117th Congress
2nd Session

SENATE

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The Constitution

of the

United States of America

ANALYSIS AND INTERPRETATION

ANALYSIS OF CASES DECIDED BY THE
SUPREME COURT OF THE UNITED STATES
TO JUNE 30, 2022

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CONGRESSIONAL AUTHORIZATION

Public Law No. 91-589, 84 Stat. 1585, 2 U.S.C. § 168

JOINT RESOLUTION

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

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

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

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

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

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

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

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

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

(3) upon the completion of the October 198C1 term of the Supreme Court, and upon the completion of each tenth October term of the Supreme Court thereafter, a hardbound decennial revised edition of the Constitution Annotated, which shall contain annotations of all decisions theretofore

rendered by the Supreme Court construing provisions of the Constitution; and

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

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

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

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

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

Approved December 24, 1970.

CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION (CONSTITUTION ANNOTATED)

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THE
CONSTITUTION OF THE UNITED STATES
OF AMERICA

LITERAL PRINT

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

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

ARTICLE. I.

SECTION. 1.

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

SECTION. 2.

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

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

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

four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

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

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

SECTION. 3.

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

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

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

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

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

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of

the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

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

SECTION. 4.

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

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

SECTION. 5.

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

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

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

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

SECTION. 6.

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

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

SECTION. 7.

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

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays

excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

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

SECTION. 8.

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

To borrow Money on the credit of the United States;

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

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

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

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

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;–And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION. 9.

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress

prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

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

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

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

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

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

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

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION. 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts,

laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

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

ARTICLE. II.

SECTION. 1.

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

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A

quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

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

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

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

SECTION. 2.

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

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

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

SECTION. 3.

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION. 4.

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE. III.

SECTION. 1.

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

SECTION. 2.

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

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

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

SECTION. 3.

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

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

ARTICLE. IV.

SECTION. 1.

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

SECTION. 2.

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

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION. 3.

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor

any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

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

SECTION. 4.

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

ARTICLE. V.

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

ARTICLE. VI.

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

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the

Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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

ARTICLE. VII.

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

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

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

Gᵒ. Washington—Presidᵗ.
and deputy from Virginia

Attest William Jackson
Secretary

Delaware	Geo: Read Gunning Bedford Jun John Dickinson Richard Bassett Jaco: Broom
Maryland	James McHenry Dan of Sᵗ Thoˢ. Jenifer Danˡ. Carroll
Virginia	John Blair— James Madison Jr.
North Carolina	Wᵐ. Blount Richᵈ. Dobbs Spaight Hu Williamson
South Carolina	J. Rutledge Charles Cotesworth Pinckney Charles Pinckney Pierce Butler
Georgia	William Few Abr Baldwin
New Hampshire	John Langdon Nicholas Gilman
Massachusetts	Nathaniel Gorham Rufus King
Connecticut	Wᵐ. Samˡ. Johnson Roger Sherman
New York . . .	Alexander Hamilton
New Jersey	Wil: Livingston David Brearley Wᵐ. Patterson Jona: Dayton
Pennsylvania	B Franklin Thomas Mifflin Robᵗ. Morris Geo. Clymer Thoˢ. FitzSimons Jared Ingersol James Wilson Gouv Morris

In Convention Monday, September 17th 1787.

Present
The States of

New Hampshire, Massachusetts, Connecticut, M^{r} Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

Resolved,

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

By the Unanimous Order of the Convention

G^{o}: Washington—Presid^{t}.

W. Jackson Secretary.

AMENDMENTS
TO THE
CONSTITUTION OF THE UNITED STATES
OF AMERICA

LITERAL PRINT

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

AMENDMENT I

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

AMENDMENT II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

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

AMENDMENT V

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

AMENDMENT VI

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

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

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

AMENDMENT IX

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

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI

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

AMENDMENT XII

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant

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

AMENDMENT XIII

SECTION 1.

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

SECTION 2.

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

AMENDMENT XIV

SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2.

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

SECTION 3.

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

SECTION 4.

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

SECTION 5.

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

AMENDMENT XV

SECTION 1.

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

SECTION 2.

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

AMENDMENT XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

AMENDMENT XVII

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

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the

executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

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

AMENDMENT XVIII

SECTION 1.

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

SECTION 2.

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

SECTION 3.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XIX

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

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

AMENDMENT XX

SECTION 1.

The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SECTION 2.

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

SECTION 3.

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

SECTION 4.

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SECTION 5.

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

SECTION 6.

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

AMENDMENT XXI

SECTION 1.

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

SECTION 2.

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XXII

SECTION 1.

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

SECTION 2.

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

AMENDMENT XXIII

SECTION 1.

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

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District

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

SECTION 2.

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

AMENDMENT XXIV

SECTION 1.

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

SECTION 2.

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

AMENDMENT XXV

SECTION 1.

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

SECTION 2.

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

SECTION 3.

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office,

and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

SECTION 4.

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

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

AMENDMENT XXVI

SECTION 1.

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

SECTION 2.

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

AMENDMENT XXVII

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

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Intro.1 The 2022 Edition

As the keystone of the United States, the Constitution informs federal and state law; delineates the distinct roles of the Executive, Legislative, and Judicial Branches of the U.S. Government; and demarcates the powers of the United States from those of the states. Supreme Court Justice Hugo Black memorably remarked that "the United States is entirely a creature of the Constitution. Its power and authority have no other source."[1] Although it shapes nearly every aspect of domestic law, the Constitution, including its twenty-seven Amendments, comprises only roughly 7,500 words. As such, it provides more of a general outline than a detailed blueprint of government. While Chief Justice John Marshall established in *Marbury v. Madison* that the Constitution implicitly accords to the Judicial Branch authority to interpret the law and deem legislative acts contrary to the Constitution void[2]—the power of judicial review—the Legislative and Executive Branches' duties necessarily require them to interpret the Constitution as well. Moreover, in matters specifically entrusted to those branches, or beyond the Judicial Branch's competency to review, Legislative and Executive Branch interpretations are dispositive.[3] Consequently, as Justice Felix Frankfurter observed: "[T]o the legislature no less than courts is committed the guardianship of deeply cherished constitutional rights."[4]

Congress passed legislation in 1797 to provide a copy of the Constitution to every Member of Congress.[5] During the nineteenth century, these copies of the Constitution were enhanced with indexes and case citations.[6] As constitutional law grew more complex, the Senate adopted a resolution in 1921 to provide for copies of the Constitution to be printed with explanations of how the Supreme Court has interpreted its provisions—the *Constitution of the United States of America, Analysis and Interpretation* (*Constitution Annotated*).[7] In 1938, the Library of Congress's Congressional Research Service (CRS) (in the form of its predecessor, the Legislative Reference Service) began to prepare and update the *Constitution Annotated*. In 1970, Congress regularized publication of the *Constitution Annotated*, providing for the Librarian of Congress to prepare a new version of the volume every ten years and to issue supplements every two years.[8] In 2019, the Library of Congress launched https://constitution.congress.gov, making the *Constitution Annotated* available online to Members of Congress, congressional staff, and the public in a digital, easily-searchable format.

Mirroring the online *Constitution Annotated*, the 2022 edition of the *Constitution Annotated* features shorter, more specific essays to allow readers to locate relevant information more quickly. Detailed information on the placement of each essay within the Constitution's

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[1] Reid v. Covert, 354 U.S. 1, 5–6 (1957) (plurality opinion).

[2] Marbury v. Madison, 5 U.S. 137, 176–80 (1803).

[3] Baker v. Carr, 369 U.S. 186, 217 (1962).

[4] Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

[5] Act of Mar. 3, 1795, ch. 50, 1 Stat. 443 (1795); S.J. Res., 4th Cong., 1 Stat. 519 (Mar. 3, 1797).

[6] *See* Constitution of the United States of America: Rules of the House of Representatives, Joint Rules of the Two Houses and Rules of the Senate with Jefferson's Manual (House of Representatives, 1837); Constitution of the United States of America with the Amendments thereto; to Which Are Added Jefferson's Manual of Parliamentary Practice, the Standing Rules and Orders for Conducting Business in the House of Representatives of the United States, the Joint Rules in Force at the Close of the 43rd Congress and a Digest (House of Representatives, 1880); Senate Manual Containing the Standing Rules and Orders of the United States Senate, The Constitution of the United States, Declaration of Independence, Articles of Confederation, The Ordinance of 1787, Jefferson's Manual, Etc. (Senate Committee on Rules, 1896).

[7] S. Res. 151, 67th Cong., 62 Cong. Rec. 95 (1921).

[8] Act of Dec. 24, 1970, Pub. L. No. 91-589, 84 Stat. 1585, 2 U.S.C. § 168.

framework is included in the headers. Each essay includes its online serial number so that readers can locate the corresponding essay in the online *Constitution Annotated*, which is regularly updated to reflect new Supreme Court developments.

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Intro.2 Congressional Authorization

Public Law No. 91-589, 84 Stat. 1585, 2 U.S.C. § 168

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

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

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

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

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

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

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

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

(2) upon the completion of each of the October 1973, October 1975, October 1977, and October 1979 terms of the Supreme Court, a cumulative pocket-part supplement to the

hardbound revised edition of the *Constitution Annotated* prepared pursuant to clause (1), which shall contain cumulative annotations of all such decisions rendered by the Supreme Court after the end of the October 1971 term;

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

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

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

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

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

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

Approved December 24, 1970.

Intro.3 Background on Amendments to the Constitution

Intro.3.1 Ratification of Amendments to the Constitution Generally

The essays that follow discuss the ratification of the amendments to the Constitution of the United States of America along with the text of the amendments (literal print).

In *Dillon v. Gloss*, 256 U.S. 368 (1921), the Supreme Court stated that it would take judicial notice of the date on which a state ratified a proposed constitutional amendment. Accordingly the Court consulted the state journals to determine the dates on which each house of the legislature of certain states ratified the Eighteenth Amendment. It, therefore, follows that the date on which the governor approved the ratification, or the date on which the secretary of state of a given state certified the ratification, or the date on which the Secretary of State of the

United States received a copy of said certificate, or the date on which he proclaimed that the amendment had been ratified are not controlling. Hence, the ratification date given in the following essays is the date on which the legislature of a given state approved the particular amendment (signature by the speaker or presiding officers of both houses being considered a part of the ratification of the "legislature"). When that date is not available, the date given is that on which it was approved by the governor or certified by the secretary of state of the particular state. In each case such fact has been noted. Except as otherwise indicated information as to ratification is based on data supplied by the Department of State.

Brackets enclosing an amendment number indicate that the number was not specifically assigned in the resolution proposing the amendment. It will be seen, accordingly, that only the Thirteenth, Fourteenth, Fifteenth, and Sixteenth Amendments were thus technically ratified by number.

Intro.3.2 Bill of Rights (First Through Tenth Amendments)

On September 12, five days before the Convention adjourned, George Mason and Elbridge Gerry raised the question of adding a bill of rights to the Constitution. Mason said: "It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours." But the motion of Gerry and Mason to appoint a committee for the purpose of drafting a bill of rights was rejected.[1] Again, on September 14, Charles Pinckney and Gerry sought to add a provision "that the liberty of the Press should be inviolably observed—." But after Roger Sherman observed that such a declaration was unnecessary, because "[t]he power of Congress does not extend to the Press," this suggestion too was rejected.[2] It cannot be known accurately why the Convention opposed these suggestions. Perhaps the lateness of the Convention, perhaps the desire not to present more opportunity for controversy when the document was forwarded to the states, perhaps the belief, asserted by the defenders of the Constitution when the absence of a bill of rights became critical, that no bill was needed because Congress was delegated none of the powers which such a declaration would deny, perhaps all these contributed to the rejection.[3]

In any event, the opponents of ratification soon made the absence of a bill of rights a major argument,[4] and some friends of the document, such as Thomas Jefferson,[5] strongly urged amendment to include a declaration of rights.[6] Several state conventions ratified while urging

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[1] 2 The Records of the Federal Convention of 1787, at 587–88 (Max Farrand ed., 1937).

[2] *Id.* at 617–18.

[3] The argument most used by proponents of the Constitution was that inasmuch as Congress was delegated no power to do those things which a bill of rights would proscribe no bill of rights was necessary and that it might be dangerous because it would contain exceptions to powers not granted and might therefore afford a basis for claiming more than was granted. The Federalist No. 84 (Alexander Hamilton).

[4] Substantial excerpts from the debate in the country and in the ratifying conventions are set out in 1 The Bill of Rights: A Documentary History 435–620 (B. Schwartz ed., 1971); 2 *id.* at 627–980. The earlier portions of volume 1 trace the origins of the various guarantees back to the Magna Carta.

[5] In a letter to Madison, Jefferson indicated what he did not like about the proposed Constitution. "First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of the fact triable by the laws of the land and not by the law of Nations. . . . Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference." 12 The Papers of Thomas Jefferson 438, 440 (J. Boyd ed., 1958). He suggested that nine States should ratify and four withhold ratification until amendments adding a bill of rights were adopted. *Id.* at 557, 570, 583. Jefferson still later endorsed the plan put forward by Massachusetts to ratify and propose amendments. 14 *id.* at 649.

[6] Thus, George Washington observed in letters that a ratified Constitution could be amended but that making such amendments conditions for ratification was ill-advised. 11 The Writings of George Washington 249 (W. Ford ed., 1891).

that the new Congress to be convened propose such amendments, 124 amendments in all being put forward by these states.[7] Although some dispute has occurred with regard to the obligation of the first Congress to propose amendments, James Madison at least had no doubts[8] and introduced a series of proposals,[9] which he had difficulty claiming the interest of the rest of Congress in considering. At length, the House of Representatives adopted seventeen proposals; the Senate rejected two and reduced the remainder to twelve, which were accepted by the House.[10]

Consequently, the first ten amendments, which are commonly referred to as the Bill of Rights, along with one that was not ratified and one that was not ratified until 1992, were proposed by Congress on September 25, 1789, when they passed the Senate, having previously passed the House on September 24.[11] They appear officially in 1 Stat. 97 (1789). Ratification of the first ten amendments was completed on December 15, 1791, when the eleventh state (Virginia) approved these amendments, there being then fourteen states in the Union.

The several state legislatures ratified the first ten amendments to the Constitution on the following dates: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; New York, February 27, 1790; Pennsylvania, March 10, 1790; Rhode Island, June 7, 1790; Vermont, November 3, 1791; Virginia, December 15, 1791. The two amendments that were not ratified prescribed the ratio of representation to population in the House, and specified that no law varying the compensation of Members of

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[7] 2 The Bill of Rights: A Documentary History 627–980 (B. Schwartz ed., 1971). *See also* H. Ames, The Proposed Amendments to the Constitution 19 (1896).

[8] Madison began as a doubter, writing Jefferson that while "[m]y own opinion has always been in favor of a bill of rights," still "I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment. . . ." 5 The Writings of James Madison 269 (G. Hunt ed., 1904). His reasons were four. (1) The Federal Government was not granted the powers to do what a bill of rights would proscribe. (2) There was reason "to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power." (3) A greater security was afforded by the jealousy of the States of the national government. (4) "[E]xperience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. . . . Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the government is the mere instrument of the major number of the Constituents. . . . Wherever there is a interest and power to do wrong, wrong will generally be done, and not less readily by a powerful & interested party than by a powerful and interested prince." *Id.* at 272–73. Jefferson's response acknowledged the potency of Madison's reservations and attempted to answer them, in the course of which he called Madison's attention to an argument in favor not considered by Madison "which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity." 14 The Papers of Thomas Jefferson 659 (J. Boyd ed., 1958). Madison was to assert this point when he introduced his proposals for a bill of rights in the House of Representatives. 1 Annals of Cong. 439 (June 8, 1789).

In any event, following ratification, Madison in his successful campaign for a seat in the House firmly endorsed the proposal of a bill of rights. "[I]t is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants & c." 5 The Writings of James Madison 319 (G. Hunt ed., 1904).

[9] 1 Annals of Cong. 424–50 (June 8, 1789). The proposals as introduced are at pp. 433–36. The Members of the House were indisposed to moving on the proposals.

[10] Debate in the House began on July 21, 1789, and final passage was had on August 24, 1789. 1 Annals of Cong. 660–779. The Senate considered the proposals from September 2 to September 9, but no journal was kept. The final version compromised between the House and Senate was adopted September 24 and 25. *See* 2 The Bill of Rights: A Documentary History 983–1167 (B. Schwartz ed., 1971).

[11] 1 Annals of Cong. 88, 913 (1789)

Congress should be effective until after an intervening election of Representatives.[12] The first was ratified by ten states (one short of the requisite number) and the second, by six states; subsequently, this second proposal was taken up by the states in the period 1980–1992 and was proclaimed as ratified as of May 7, 1992. Connecticut, Georgia, and Massachusetts ratified the first ten amendments in 1939.

Intro.3.3 Early Amendments (Eleventh and Twelfth Amendments)

Brackets enclosing an amendment number indicate that the number was not specifically assigned in the resolution proposing the amendment.

Amendment [XI.]

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

The Eleventh Amendment[1] was proposed by Congress on March 4, 1794 when it passed the House,[2] having previously passed the Senate on January 14.[3] It appears officially in 1 Stat. 402. Ratification was completed on February 7, 1795, when the twelfth state (North Carolina) approved the Amendment, there being then fifteen states in the Union. Official announcement of ratification was not made until January 8, 1798, when President John Adams in a message to Congress stated that the Eleventh Amendment had been adopted by three-fourths of the states and that it "may now be deemed to be a part of the Constitution." In the interim South Carolina had ratified, and Tennessee had been admitted into the Union as the sixteenth state.

The several state legislatures ratified the Eleventh Amendment on the following dates: New York, March 27, 1794; Rhode Island, March 31, 1794; Connecticut, May 8, 1794; New Hampshire, June 16, 1794; Massachusetts, June 26, 1794; Vermont, between October 9 and November 9, 1794; Virginia, November 18, 1794; Georgia, November 29, 1794; Kentucky, December 7, 1794; Maryland, December 26, 1794; Delaware, January 23, 1795; North Carolina, February 7, 1795; South Carolina, December 4, 1797.

Amendment [XII.]

> *The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;–The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;–The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.*

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[12] Herman V. Ames, The Proposed Amendments to the Constitution of the United States During the First Century of Its History 184, 185 (1896).

[1] Amdt11.1 Overview of Eleventh Amendment, Suits Against States.

[2] 4 Annals of Cong. 477, 478 (1794).

[3] *Id.* at 30, 31.

But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. [And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.–]The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

The Twelfth Amendment[4] was proposed by Congress on December 9, 1803, when it passed the House[5] having previously passed the Senate on December 2.[6] It was not signed by the presiding officers of the House and Senate until December 12. It appears officially in 2 Stat. 306. Ratification was probably completed on June 15, 1804, when the legislature of the thirteenth state (New Hampshire) approved the Amendment, there being then seventeen states in the Union. The Governor of New Hampshire, however, vetoed this act of the legislature on June 20, and the act failed to pass again by two-thirds vote then required by the state constitution. Inasmuch as Article V of the Federal Constitution specifies that amendments shall become effective "when ratified by legislatures of three-fourths of the several States or by conventions in three-fourths thereof," it has been generally believed that an approval or veto by a governor is without significance. If the ratification by New Hampshire be deemed ineffective, then the Amendment became operative by Tennessee's ratification on July 27, 1804. On September 25, 1804, in a circular letter to the Governors of the several states, Secretary of State Madison declared the Amendment ratified by three-fourths of the states.

The several state legislatures ratified the Twelfth Amendment on the following dates: North Carolina, December 22, 1803; Maryland, December 24, 1803; Kentucky, December 27, 1803; Ohio, between December 5 and December 30, 1803; Virginia, between December 20, 1803 and February 3, 1804; Pennsylvania, January 5, 1804; Vermont, January 30, 1804; New York, February 10, 1804; New Jersey, February 22, 1804; Rhode Island, between February 27 and March 12, 1804; South Carolina, May 15, 1804; Georgia, May 19, 1804; New Hampshire, June 15, 1804; and Tennessee, July 27, 1804. The Amendment was rejected by Delaware on January 18, 1804, and by Connecticut at its session begun May 10, 1804. Massachusetts ratified this Amendment in 1961.

Intro.3.4 Civil War Amendments (Thirteenth, Fourteenth, and Fifteenth Amendments)

Amendment XIII.

Section 1

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

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[4] Amdt12.1 Overview of Twelfth Amendment, Election of President.

[5] 13 Annals of Cong. 775, 776 (1803).

[6] *Id.* at 209.

Section 2

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

The Thirteenth Amendment[1] was proposed by Congress on January 31, 1865 when it passed the House,[2] having previously passed the Senate on April 8, 1864.[3] It appears officially in 13 Stat. 567 under the date of February 1, 1865. Ratification was completed on December 6, 1865, when the legislature of the twenty-seventh state (Georgia) approved the Amendment, there being then thirty-six states in the Union. On December 18, 1865, Secretary of State William Seward certified that the Thirteenth Amendment had become a part of the Constitution.[4]

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

Amendment XIV.

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or

[1] Amdt13.1 Overview of Thirteenth Amendment, Abolition of Slavery.

[2] Cong. Globe, 38th Cong., 2d Sess. 531 (1865).

[3] Cong. Globe, 38th Cong., 1st Sess. 1940 (1865).

[4] 13 Stat. 774.

in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

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

Section 4

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

Section 5

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

The Fourteenth Amendment[5] was proposed by Congress on June 13, 1866 when it passed the House,[6] having previously passed the Senate on June 8.[7] It appears officially in 14 Stat. 358 under date of June 16, 1866. Ratification was probably completed on July 9, 1868, when the legislature of the twenty-eighth state (South Carolina or Louisiana) approved the Amendment, there being then thirty-seven states in the Union. However, Ohio and New Jersey had prior to that date "withdrawn" their earlier assent to this Amendment. Accordingly, Secretary of State William Seward on July 20, 1868, certified that the Amendment had become a part of the Constitution if the said withdrawals were ineffective.[8] Congress on July 21, 1868, passed a joint resolution declaring the Amendment a part of the Constitution and directing the Secretary to promulgate it as such. On July 28, 1868, Secretary Seward certified without reservation that the Amendment was a part of the Constitution. In the interim, two other states, Alabama on July 13 and Georgia on July 21, 1868, had added their ratifications.

The several state legislatures ratified the Fourteenth Amendment on the following dates: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 9, 1866; New Jersey, September 11, 1866 (the New Jersey Legislature on February 20, 1868, "withdrew" its consent to the ratification; the Governor vetoed that bill on March 5, 1868; and it was repassed over his veto on March 24, 1868); Oregon, September 19, 1866 (Oregon "withdrew" its consent on October 15, 1868); Vermont, October 30, 1866; New York, January 10, 1867; Ohio, January 11,

[5] Amdt14.1 Overview of Fourteenth Amendment, Equal Protection and Rights of Citizens.

[6] Cong. Globe, 39th Cong., 1st Sess. 3148, 3149 (1866).

[7] *Id.* at 3042.

[8] 15 Stat. 706–07.

1867 (Ohio "withdrew" its consent on January 15, 1868); Illinois, January 15, 1867; West Virginia, January 16, 1867; Michigan, January 16, 1867; Kansas, January 17, 1867; Minnesota, January 17, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Indiana, January 23, 1867; Missouri, January 26, 1867 (date on which it was certified by the Missouri secretary of state); Rhode Island, February 7, 1867; Pennsylvania, February 12, 1867; Wisconsin, February 13, 1867 (actually passed February 7, but was not signed by legislative officers until February 13); Massachusetts, March 20, 1867; Nebraska, June 15, 1867; Iowa, March 9, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; North Carolina, July 2, 1868 (after having rejected the Amendment on December 13, 1866); Louisiana, July 9, 1868 (after having rejected the Amendment on February 6, 1867); South Carolina, July 8, 1868 (after having rejected the Amendment on December 20, 1866); Alabama, July 13, 1868 (date on which it was "approved" by the Governor); Georgia, July 21, 1868 (after having rejected the Amendment on November 9, 1866—Georgia ratified again on February 2, 1870); Virginia, October 8, 1869 (after having rejected the Amendment on January 9, 1867); Mississippi, January 17, 1870; Texas, February 18, 1870 (after having rejected the Amendment on October 27, 1866); Delaware, February 12, 1901 (after having rejected the Amendment February 7, 1867). The Amendment was rejected (and not subsequently ratified) by Kentucky on January 8, 1867. Maryland and California ratified this Amendment in 1959.

Amendment XV.

Section 1

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

Section 2

> *The Congress shall have the power to enforce this article by appropriate legislation.*

The Fifteenth Amendment[9] was proposed by Congress on February 26, 1869 when it passed the Senate,[10] having previously passed the House on February 25.[11] It appears officially in 15 Stat. 346 under the date of February 27, 1869. Ratification was probably completed on February 3, 1870, when the legislature of the twenty-eighth state (Iowa) approved the Amendment, there being then thirty-seven states in the Union. However, New York had prior to that date "withdrawn" its earlier assent to this Amendment. Even if this withdrawal were effective, Nebraska's ratification on February 17, 1870, authorized Secretary of State Hamilton Fish's certification of March 30, 1870, that the Fifteenth Amendment had become a part of the Constitution.[12]

The several state legislatures ratified the Fifteenth Amendment on the following dates: Nevada, March 1, 1869; West Virginia, March 3, 1869; North Carolina, March 5, 1869; Louisiana, March 5, 1869 (date on which it was "approved" by the Governor); Illinois, March 5, 1869; Michigan, March 5, 1869; Wisconsin, March 5, 1869; Maine, March 11, 1869; Massachusetts, March 12, 1869; South Carolina, March 15, 1869; Arkansas, March 15, 1869; Pennsylvania, March 25, 1869; New York, April 14, 1869 (New York "withdrew" its consent to the ratification on January 5, 1870); Indiana, March 14, 1869; Connecticut, May 19, 1869; Florida, June 14, 1869; New Hampshire, July 1, 1869; Virginia, October 8, 1869; Vermont, October 20, 1869; Alabama, November 16, 1869; Missouri, January 7, 1870 (Missouri had

[9] Amdt15.1 Overview of Fifteenth Amendment, Right of Citizens to Vote.

[10] Cong. Globe, 40th Cong., 3d Sess. 1641 (1869).

[11] *Id.* at 1563–64.

[12] 16 Stat. 1131.

ratified the first section of the Fifteenth Amendment on March 1, 1869; it failed to include in its ratification the second section of the Amendment); Minnesota, January 13, 1870; Mississippi, January 17, 1870; Rhode Island, January 18, 1870; Kansas, January 19, 1870 (Kansas had by a defectively worded resolution previously ratified this Amendment on February 27, 1869); Ohio, January 27, 1870 (after having rejected the Amendment on May 4, 1869); Georgia, February 2, 1870; Iowa, February 3, 1870; Nebraska, February 17, 1870; Texas, February 18, 1870; New Jersey, February 15, 1871 (after having rejected the Amendment on February 7, 1870); Delaware, February 12, 1901 (date on which approved by Governor; Delaware had previously rejected the Amendment on March 18, 1869). The Amendment was rejected (and was not subsequently ratified) by Kentucky, Maryland, and Tennessee. California ratified this Amendment in 1962 and Oregon in 1959.

Intro.3.5 Early Twentieth Century Amendments (Sixteenth Through Twenty-Second Amendments)

Brackets enclosing an amendment number indicate that the number was not specifically assigned in the resolution proposing the amendment.

Amendment XVI.

> *The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.*

The Sixteenth Amendment[1] was proposed by Congress on July 12, 1909 when it passed the House,[2] having previously passed the Senate on July 5.[3] It appears officially in 36 Stat. 184. Ratification was completed on February 3, 1913, when the legislature of the thirty-sixth state (Delaware, Wyoming, or New Mexico) approved the Amendment, there being then forty-eight states in the Union. On February 25, 1913, Secretary of State Henry Knox certified that this Amendment had become a part of the Constitution.[4]

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

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[1] Amdt16.1 Overview of Sixteenth Amendment, Income Tax.

[2] 44 Cong. Rec., 61st Cong., 1st Sess. 4390, 4440–41 (1909).

[3] *Id.* at 4121.

[4] 37 Stat. 1785.

Amendment [XVII.]

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

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

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

The Seventeenth Amendment[5] was proposed by Congress on May 13, 1912 when it passed the House,[6] having previously passed the Senate on June 12, 1911.[7] It appears officially in 37 Stat. 646. Ratification was completed on April 8, 1913, when the thirty-sixth state (Connecticut) approved the Amendment, there being then forty-eight states in the Union. On May 31, 1913, Secretary of State William Bryan certified that it had become a part of the Constitution.[8]

The several state legislatures ratified the Seventeenth Amendment on the following dates: Massachusetts, May 22, 1912; Arizona, June 3, 1912; Minnesota, June 10, 1912; New York, January 15, 1913; Kansas, January 17, 1913; Oregon, January 23, 1913; North Carolina, January 25, 1913; California, January 28, 1913; Michigan, January 28, 1913; Iowa, January 30, 1913; Montana, January 30, 1913; Idaho, January 31, 1913; West Virginia, February 4, 1913; Colorado, February 5, 1913; Nevada, February 6, 1913; Texas, February 7, 1913; Washington, February 7, 1913; Wyoming, February 8, 1913; Arkansas, February 11, 1913; Illinois, February 13, 1913; North Dakota, February 14, 1913; Wisconsin, February 18, 1913; Indiana, February 19, 1913; New Hampshire, February 19, 1913; Vermont, February 19, 1913; South Dakota, February 19, 1913; Maine, February 20, 1913; Oklahoma, February 24, 1913; Ohio, February 25, 1913; Missouri, March 7, 1913; New Mexico, March 13, 1913; Nebraska, March 14, 1913; New Jersey, March 17, 1913; Tennessee, April 1, 1913; Pennsylvania, April 2, 1913; Connecticut, April 8, 1913; Louisiana, June 5, 1914. The Amendment was rejected by Utah on February 26, 1913.

Amendment [XVIII.]

Section 1

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

[5] Amdt17.1 Overview of Seventeenth Amendment, Popular Election of Senators.

[6] 48 Cong. Rec., 62d Cong., 2d Sess. 6367 (1912).

[7] 47 Cong. Rec., 62d Cong., 1st Sess. 1925 (1911).

[8] 38 Stat. 2049.

Section 2

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

Section 3

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

The Eighteenth Amendment[9] was proposed by Congress on December 18, 1917 when it passed the Senate,[10] having previously passed the House on December 17.[11] It appears officially in 40 Stat. 1059. Ratification was completed on January 16, 1919, when the thirty-sixth state approved the Amendment, there being then forty-eight states in the Union. On January 29, 1919, Acting Secretary of State Frank Polk certified that this amendment had been adopted by the requisite number of states.[12] By its terms this Amendment did not become effective until one year after ratification.

The several state legislatures ratified the Eighteenth Amendment on the following dates: Mississippi, January 8, 1918; Virginia, January 11, 1918; Kentucky, January 14, 1918; North Dakota, January 28, 1918 (date on which approved by Governor); South Carolina, January 29, 1918; Maryland, February 13, 1918; Montana, February 19, 1918; Texas, March 4, 1918; Delaware, March 18, 1918; South Dakota, March 20, 1918; Massachusetts, April 2, 1918; Arizona, May 24, 1918; Georgia, June 26, 1918; Louisiana, August 9, 1918 (date on which approved by Governor); Florida, November 27, 1918; Michigan, January 2, 1919; Ohio, January 7, 1919; Oklahoma, January 7, 1919; Idaho, January 8, 1919; Maine, January 8, 1919; West Virginia, January 9, 1919; California, January 13, 1919; Tennessee, January 13, 1919; Washington, January 13, 1919; Arkansas, January 14, 1919; Kansas, January 14, 1919; Illinois, January 14, 1919; Indiana, January 14, 1919; Alabama, January 15, 1919; Colorado, January 15, 1919; Iowa, January 15, 1919; New Hampshire, January 15, 1919; Oregon, January 15, 1919; Nebraska, January 16, 1919; North Carolina, January 16, 1919; Utah, January 16, 1919; Missouri, January 16, 1919; Wyoming, January 16, 1919; Minnesota, January 17, 1919; Wisconsin, January 17, 1919; New Mexico, January 20, 1919; Nevada, January 21, 1919; Pennsylvania, February 25, 1919; New Jersey, March 9, 1922; New York, January 29, 1919; Vermont, January 29, 1919.

Amendment [XIX.]

Section 1

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

[9] Amdt18.1 Overview of Eighteenth Amendment, Prohibition of Alcohol.

[10] Cong. Rec., 65th Cong., 2d Sess. 478 (1917).

[11] *Id.* at 470.

[12] 40 Stat. 1941.

Section 2

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

The Nineteenth Amendment[13] was proposed by Congress on June 4, 1919 when it passed the Senate,[14] having previously passed the House on May 21.[15] It appears officially in 41 Stat. 362. Ratification was completed on August 18, 1920, when the thirty-sixth state (Tennessee) approved the amendment, there being then forty-eight states in the Union. On August 26, 1920, Secretary of State Bainbridge Colby certified that it had become a part of the Constitution.[16]

The several state legislatures ratified the Nineteenth Amendment on the following dates: Illinois, June 10, 1919 (readopted June 17, 1919); Michigan, June 10, 1919; Wisconsin, June 10, 1919; Kansas, June 16, 1919; New York, June 16, 1919; Ohio, June 16, 1919; Pennsylvania, June 24, 1919; Massachusetts, June 25, 1919; Texas, June 28, 1919; Iowa, July 2, 1919 (date on which approved by Governor); Missouri, July 3, 1919; Arkansas, July 28, 1919; Montana, August 2, 1919 (date on which approved by Governor); Nebraska, August 2. 1919; Minnesota, September 8, 1919; New Hampshire, September 10, 1919 (date on which approved by Governor); Utah, October 2, 1919; California, November 1, 1919; Maine, November 5, 1919; North Dakota, December 1, 1919; South Dakota, December 4, 1919 (date on which certified); Colorado, December 15, 1919 (date on which approved by Governor); Kentucky, January 6, 1920; Rhode Island, January 6, 1920; Oregon, January 13, 1920; Indiana, January 16, 1920; Wyoming, January 27, 1920; Nevada, February 7, 1920; New Jersey, February 9, 1920; Idaho, February 11, 1920; Arizona, February 12, 1920; New Mexico, February 21, 1920 (date on which approved by Governor); Oklahoma, February 28, 1920; West Virginia, March 10, 1920 (confirmed September 21, 1920); Washington, March 22, 1920; Tennessee, August 18, 1920; Vermont, February 8, 1921. The Amendment was rejected by Georgia on July 24, 1919; by Alabama, on September 22, 1919; by South Carolina on January 29, 1920; by Virginia on February 12, 1920; by Maryland on February 24, 1920; by Mississippi on March 29, 1920; by Louisiana on July 1, 1920. This Amendment was subsequently ratified by Virginia in 1952, Alabama in 1953, Florida in 1969, and Georgia and Louisiana in 1970.

Amendment [XX.]

Section 1

The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2

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

Section 3

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been

[13] Amdt19.1 Overview of Nineteenth Amendment, Women's Voting Rights.

[14] Cong. Rec., 66th Cong., 1st Sess. 635 (1919).

[15] *Id.* at 94.

[16] 41 Stat. 1823.

chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5

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

Section 6

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

The Twentieth Amendment[17] was proposed by Congress on March 2, 1932 when it passed the Senate,[18] having previously passed the House on March 1.[19] It appears officially in 47 Stat. 745. Ratification was completed on January 23, 1933, when the thirty-sixth state approved the Amendment, there being then forty-eight states in the Union. On February 6, 1933, Secretary of State Henry Stimson certified that it had become a part of the Constitution.[20]

The several state legislatures ratified the Twentieth Amendment on the following dates: Virginia, March 4, 1932; New York, March 11, 1932; Mississippi, March 16, 1932; Arkansas March 17, 1932; Kentucky, March 17, 1932; New Jersey, March 21, 1932; South Carolina, March 25, 1932; Michigan, March 31, 1932; Maine, April 1, 1932; Rhode Island, April 14, 1932; Illinois, April 21, 1932; Louisiana, June 22, 1932; West Virginia, July 30, 1932; Pennsylvania, August 11, 1932; Indiana, August 15, 1932; Texas, September 7, 1932; Alabama, September 13, 1932; California, January 3, 1933; North Carolina, January 5, 1933; North Dakota, January 9, 1933; Minnesota, January 12, 1933; Arizona, January 13, 1933; Montana, January 13, 1933; Nebraska, January 13, 1933; Oklahoma, January 13, 1933; Kansas, January 16, 1933; Oregon, January 16, 1933; Delaware, January 19, 1933; Washington, January 19, 1933; Wyoming, January 19, 1933; Iowa, January 20, 1933; South Dakota, January 20, 1933; Tennessee, January 20, 1933; Idaho, January 21, 1933; New Mexico, January 21, 1933; Georgia, January 23, 1933; Missouri, January 23, 1933; Ohio, January 23, 1933; Utah, January 23, 1933; Colorado, January 24, 1933; Massachusetts, January 24, 1933; Wisconsin, January 24, 1933; Nevada, January 26, 1933; Connecticut, January 27, 1933; New Hampshire, January 31, 1933; Vermont, February 2, 1933; Maryland, March 24, 1933; Florida, April 26, 1933.

[17] Amdt20.S1.1 Presidential and Congressional Terms.

[18] CONG. REC. (72d Cong., 1st Sess.) 5086.

[19] *Id.* at 5027.

[20] 47 Stat. 2569.

Amendment [XXI.]

Section 1

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

Section 2

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

The Twenty-First Amendment[21] was proposed by Congress on February 20, 1933 when it passed the House,[22] having previously passed the Senate on February 16.[23] It appears officially in 47 Stat. 1625. Ratification was completed on December 5, 1933, when the thirty-sixth state (Utah) approved the Amendment, there being then forty-eight states in the Union. On December 5, 1933, Acting Secretary of State William Phillips certified that it had been adopted by the requisite number of states.[24]

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

Amendment [XXII.]

Section 1

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President

[21] Amdt21.S1.1 Repeal of Prohibition.

[22] Cong. Rec. (72d Cong., 2d Sess.) 4516.

[23] *Id.* at 4231.

[24] 48 Stat. 1749.

when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2

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

The Twenty-Second Amendment[25] was proposed by Congress on March 24, 1947 having passed the House on March 21, 1947,[26] having previously passed the Senate on March 12, 1947.[27] It appears officially in 61 Stat. 959. Ratification was completed on February 27, 1951, when the thirty-sixth state (Minnesota) approved the Amendment, there being then forty-eight states in the Union. On March 1, 1951, Jess Larson, Administrator of General Services, certified that it had been adopted by the requisite number of states.[28]

A total of forty-one state legislatures ratified the Twenty-Second Amendment on the following dates: Maine, March 31, 1947; Michigan, March 31, 1947; Iowa, April 1, 1947; Kansas, April 1, 1947; New Hampshire, April 1, 1947; Delaware, April 2, 1947; Illinois, April 3, 1947; Oregon, April 3, 1947; Colorado, April 12, 1947; California, April 15, 1947; New Jersey, April 15, 1947; Vermont, April 15, 1947; Ohio, April 16, 1947; Wisconsin, April 16, 1947; Pennsylvania, April 29, 1947; Connecticut, May 21, 1947; Missouri, May 22, 1947; Nebraska, May 23, 1947; Virginia, January 28, 1948; Mississippi, February 12, 1948; New York, March 9, 1948; South Dakota, January 21, 1949; North Dakota, February 25, 1949; Louisiana, May 17, 1950; Montana, January 25, 1951; Indiana, January 29, 1951; Idaho, January 30, 1951; New Mexico, February 12, 1951; Wyoming, February 12, 1951; Arkansas, February 15, 1951; Georgia, February 17, 1915; Tennessee, February 20, 1951; Texas, February 22, 1951; Utah, February 26, 1951; Nevada, February 26, 1951; Minnesota, February 27, 1951; North Carolina, February 28, 1951; South Carolina, March 13, 1951; Maryland, March 14, 1951; Florida, April 16, 1951; and Alabama, May 4, 1951.

Intro.3.6 Post-War Amendments (Twenty-Third Through Twenty-Seventh Amendments)

Brackets enclosing an amendment number indicate that the number was not specifically assigned in the resolution proposing the amendment.

Amendment [XXIII.]

Section 1

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

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those

[25] Amdt22.1 Overview of Twenty-Second Amendment, Presidential Term Limits.

[26] Cong. Rec. (80th Cong., 1st Sess.) 2392.

[27] *Id.* at 1978.

[28] 16 Fed. Reg. 2019.

appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2

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

The Twenty-Third Amendment[1] was proposed by Congress on June 16, 1960 when it passed the Senate,[2] having previously passed the House on June 14.[3] It appears officially in 74 Stat. 1057. Ratification was completed on March 29, 1961, when the thirty-eighth state (Ohio) approved the Amendment, there being then fifty states in the Union. On April 3, 1961, John L. Moore, Administrator of General Services, certified that it had been adopted by the requisite number of states.[4]

The several state legislatures ratified the Twenty-Third Amendment on the following dates: Hawaii, June 23, 1960; Massachusetts, August 22, 1960; New Jersey, December 19, 1960; New York, January 17, 1961; California, January 19, 1961; Oregon, January 27, 1961; Maryland, January 30, 1961; Idaho, January 31, 1961; Maine, January 31, 1961; Minnesota, January 31, 1961; New Mexico, February 1, 1961; Nevada, February 2, 1961; Montana, February 6, 1961; Colorado, February 8, 1961; Washington, February 9, 1961; West Virginia, February 1961; Alaska, February 10, 1961; Wyoming, February 13, 1961; South Dakota, February 14, 1961; Delaware, February 20, 1961; Utah, February 21, 1961; Wisconsin, February 21, 1961; Pennsylvania, February 28, 1961; Indiana, March 3, 1961; North Dakota, March 3, 1961; Tennessee, March 6, 1961; Michigan, March 8, 1961; Connecticut, March 9, 1961; Arizona, March 10, 1961; Illinois, March 14, 1961; Nebraska, March 15, 1961; Vermont, March 15, 1961; Iowa, March 16, 1961; Missouri, March 20, 1961; Oklahoma, March 21, 1961; Rhode Island, March 22, 1961; Kansas, March 29, 1961; Ohio, March 29, 1961; and New Hampshire, March 30, 1961.

Amendment [XXIV.]

Section 1

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

Section 2

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

The Twenty-Fourth Amendment[5] was proposed by Congress on September 14, 1962, having passed the House on August 27, 1962.[6] and having previously passed the Senate on March 27, 1962.[7] It appears officially in 76 Stat. 1259. Ratification was completed on January 23, 1964, when the thirty-eighth state (South Dakota) approved the Amendment, there being

[1] Amdt23.1 Overview of Twenty-Third Amendment, District of Columbia Electors.

[2] Cong. Rec. (86th Cong., 2d Sess.) 12858.

[3] *Id.* at 12571.

[4] 26 Fed. Reg. 2808.

[5] Amdt24.1 Overview of Twenty-Fourth Amendment, Abolition of Poll Tax.

[6] Cong. Rec. (87th Cong., 2d Sess.) 17670.

[7] *Id.* at 5105.

then fifty states in the Union. On February 4, 1964, Bernard L. Boutin, Administrator of General Services, certified that it had been adopted by the requisite number of states.[8] President Lyndon B. Johnson signed this certificate.

Thirty-eight state legislatures ratified the Twenty-Fourth Amendment on the following dates: Illinois, November 14, 1962; New Jersey, December 3, 1962; Oregon, January 25, 1963; Montana, January 28, 1963; West Virginia, February 1, 1963; New York, February 4, 1963; Maryland, February 6, 1963; California, February 7, 1963; Alaska, February 11, 1963; Rhode Island, February 14, 1963; Indiana, February 19, 1963; Michigan, February 20, 1963; Utah, February 20, 1963; Colorado, February 21, 1963; Minnesota, February 27, 1963; Ohio, February 27, 1963; New Mexico, March 5, 1963; Hawaii, March 6, 1963; North Dakota, March 7, 1963; Idaho, March 8, 1963; Washington, March 14, 1963; Vermont, March 15, 1963; Nevada, March 19, 1963; Connecticut, March 20, 1963; Tennessee, March 21, 1963; Pennsylvania, March 25, 1963; Wisconsin, March 26, 1963; Kansas, March 28, 1963; Massachusetts, March 28, 1963; Nebraska, April 4, 1963; Florida, April 18, 1963; Iowa, April 24, 1963; Delaware, May 1, 1963; Missouri, May 13, 1963; New Hampshire, June 16, 1963; Kentucky, June 27, 1963; Maine, January 16, 1964; South Dakota, January 23, 1964.

Amendment [XXV.]

Section 1

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

Section 2

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3

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

Section 4

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

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate

[8] 25 Fed. Reg. 1717.

and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

The Twenty-Fifth Amendment[9] was proposed by the Eighty-Ninth Congress by Senate Joint Resolution No. 1, which was approved by the Senate on February 19, 1965, and by the House of Representatives, in amended form, on April 13, 1965. The House of Representatives agreed to a Conference Report on June 30, 1965, and the Senate agreed to the Conference Report on July 6, 1965. It was declared by the Administrator of General Services, on February 23, 1967, to have been ratified.

This Amendment was ratified by the following states: Nebraska, July 12, 1965; Wisconsin, July 13, 1965; Oklahoma, July 16, 1965; Massachusetts, August 9, 1965; Pennsylvania, August 18, 1965; Kentucky, September 15, 1965; Arizona, September 22, 1965; Michigan, October 5, 1965; Indiana, October 20, 1965; California, October 21, 1965; Arkansas, November 4, 1965; New Jersey, November 29, 1965; Delaware, December 7, 1965; Utah, January 17, 1966; West Virginia, January 20, 1966; Maine, January 24, 1966; Rhode Island, January 28, 1966; Colorado, February 3, 1966; New Mexico, February 3, 1966; Kansas, February 8, 1966; Vermont, February 10, 1966; Alaska, February 18, 1966; Idaho, March 2, 1966; Hawaii, March 3, 1966; Virginia, March 8, 1966; Mississippi, March 10, 1966; New York, March 14, 1966; Maryland, March 23, 1966; Missouri, March 30, 1966; New Hampshire, June 13, 1966; Louisiana, July 5, 1966; Tennessee, January 12, 1967, Wyoming, January 25, 1967; Washington, January 26, 1967; Iowa, January 26, 1967; Oregon, February 2, 1967; Minnesota, February 10, 1967; Nevada, February 10, 1967; Connecticut, February 14, 1967; Montana, February 15, 1967; South Dakota, March 6, 1967; Ohio, March 7, 1967; Alabama, March 14, 1967; North Carolina, March 22, 1967; Illinois, March 22, 1967; Texas, April 25, 1967; Florida, May 25, 1967.

Publication of the certifying statement of the Administrator of General Services that the Amendment had become valid was made on February 25, 1967.[10]

Amendment [XXVI.]

Section 1

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

Section 2

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

The Twenty-Sixth Amendment[11] was proposed by Congress on March 23, 1971, upon passage by the House of Representatives, the Senate having previously passed an identical resolution on March 10, 1971. It appears officially in 85 Stat. 825. Ratification was completed

[9] Amdt25.1 Overview of Twenty-Fifth Amendment, Presidential Vacancy.

[10] F.R. Doc 67-2208, 32 Fed. Reg. 3287.

[11] Amdt26.1 Overview of Twenty-Sixth Amendment, Reduction of Voting Age.

on July 1, 1971, when action by the legislature of the thirty-eighth state, North Carolina, was concluded, and the Administrator of the General Services Administration officially certified it to have been duly ratified on July 5, 1971.[12]

As of the publication of this volume, forty-two states had ratified this Amendment: Connecticut, March 23, 1971; Delaware, March 23, 1971; Minnesota, March 23, 1971; Tennessee, March 23, 1971; Washington, March 23, 1971; Hawaii, March 24, 1971; Massachusetts, March 24, 1971; Montana, March 29, 1971; Arkansas, March 30, 1971; Idaho, March 30, 1971; Iowa, March 30, 1971; Nebraska, April 2, 1971; New Jersey, April 3, 1971; Kansas, April 7, 1971; Michigan, April 7, 1971; Alaska, April 8, 1971; Maryland, April 8, 1971; Indiana, April 8, 1971; Maine, April 9, 1971; Vermont, April 16, 1971; Louisiana, April 17, 1971; California, April 19, 1971; Colorado, April 27, 1971; Pennsylvania, April 27, 1971; Texas, April 27, 1971; South Carolina, April 28, 1971; West Virginia, April 28, 1971; New Hampshire, May 13, 1971; Arizona, May 14, 1971; Rhode Island, May 27, 1971; New York, June 2, 1971; Oregon, June 4, 1971; Missouri, June 14, 1971; Wisconsin, June 22, 1971; Illinois, June 29, 1971; Alabama, June 30, 1971; Ohio, June 30, 1971; North Carolina, July 1, 1971; Oklahoma, July 1, 1971; Virginia, July 8, 1971; Wyoming, July 8, 1971; Georgia, October 4, 1971.

Amendment [XXVII.]

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

The Twenty-Seventh Amendment[13] was proposed by Congress on September 25, 1789 when it passed the Senate, having previously passed the House on September 24.[14] It appears officially in 1 Stat. 97. Having received in 1789–1791 only six state ratifications, the proposal then failed of ratification while ten of the twelve sent to the states by Congress were ratified and proclaimed and became the Bill of Rights. The provision was proclaimed as having been ratified and having become the Twenty-Seventh Amendment, when Michigan ratified on May 7, 1992, there being fifty states in the Union. Proclamation was by the Archivist of the United States, pursuant to 1 U.S.C. § 106b, on May 19, 1992.[15] It was also proclaimed by votes of the Senate and House of Representatives.[16]

The several state legislatures ratified the proposal on the following dates: Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; Delaware, January 28, 1790; Vermont, November 3, 1791; Virginia, December 15, 1791; Ohio, May 6, 1873; Wyoming, March 6, 1978; Maine, April 27, 1983; Colorado, April 22, 1984; South Dakota, February 1985; New Hampshire, March 7, 1985; Arizona, April 3, 1985; Tennessee, May 28, 1985; Oklahoma, July 10, 1985; New Mexico, February 14, 1986; Indiana, February 24, 1986; Utah, February 25, 1986; Arkansas, March 13, 1987; Montana, March 17, 1987; Connecticut, May 13, 1987; Wisconsin, July 15, 1987; Georgia, February 2, 1988; West Virginia, March 10, 1988; Louisiana, July 7, 1988; Iowa, February 9, 1989; Idaho, March 23, 1989; Nevada, May 25, 1989; Kansas, April 5, 1990; Florida, May 31, 1990; North Dakota, Mary 25, 1991; Alabama, May 5, 1992; Missouri, May 5, 1992; Michigan, May 7, 1992. New Jersey subsequently ratified on May 7, 1992.

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[12] 36 Fed. Reg. 12725.

[13] Amdt27.1 Overview of Twenty-Seventh Amendment, Congressional Compensation.

[14] 1 Annals of Cong. 88, 913.

[15] F.R.Doc. 92-11951, 57 Fed. Reg. 21,187.

[16] 138 Cong. Rec. S6948-49, H3505-06 (daily ed.).

Intro.3.7 Proposed Amendments Not Ratified by the States

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

Beginning with the proposed Eighteenth Amendment, Congress has customarily included a provision requiring ratification within seven years from the time of the submission to the states. The Supreme Court in *Coleman v. Miller*, declared that the question of the reasonableness of the time within which a sufficient number of states must act is a political question to be determined by Congress.[1]

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

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

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

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

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of both Houses concurring),* That the following section be submitted to the legislatures of the several states, which, when ratified by the legislatures of three fourths of the states, shall be valid and binding, as a part of the constitution of the United States.
>
> If any citizen of the United States shall accept, claim, receive or retain any title of nobility or honour, or shall, without the consent of Congress, accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them.

During the second session of the 36th Congress on March 2, 1861, the following proposed amendment to the Constitution relating to slavery was signed by the President. The President's signature is considered unnecessary because of the constitutional provision that upon the concurrence of two-thirds of both Houses of Congress the proposal shall be submitted to the states and shall be ratified by three-fourths of the states.

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following article be proposed to the Legislatures of the

[1] 307 U.S. 433 (1939).

several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said Legislatures, shall be valid, to all intents and purposes, as part of the said Constitution, viz:

ARTICLE THIRTEEN

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

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

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

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

ARTICLE

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

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

The second proposed amendment to have failed of ratification is the Equal Rights Amendment, which formally died on June 30, 1982, after a disputed congressional extension of the original seven-year period for ratification.

HOUSE JOINT RESOLUTION 208

Proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

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

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

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

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

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

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

HOUSE JOINT RESOLUTION 554

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

ARTICLE

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

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

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

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

Intro.4 *Constitution Annotated* Methodology

Intro.4.1 Overview of *Constitution Annotated* Methodology

This essay explains the methodology for the current edition of the *Constitution of the United States: Analysis and Interpretation* (commonly known as the *Constitution Annotated*)—that is, the rules and principles that dictate the organization and construction of the document. Consistent with the mission of the Library of Congress's Congressional Research Service,[1] the *Constitution Annotated* provides an objective, comprehensive, authoritative, non-partisan, and accessible treatment of one of the most—if not the most—contentious legal issues in modern American society: how to read and interpret the Constitution. As the only constitutional law treatise[2] formally authorized by federal law,[3] the *Constitution Annotated* functions as the official Constitution of record, describing how the Constitution has been construed by the Supreme Court and other authoritative constitutional actors since the drafting and ratification of the Nation's Founding document. In particular, the *Constitution Annotated* provides annotations[4] addressing the historical origins and interpretation of each article and amendment of the Constitution.

[1] 2 U.S.C. § 166 (establishing and discussing the duties of the Congressional Research Service).

[2] A "treatise" is an "extended, serious, and usually exhaustive book on a particular subject." *See* BLACK'S LAW DICTIONARY 1732 (10th ed. 2014).

[3] *See* 2 U.S.C. § 168.

[4] An annotation is a legal term of art that refers to a work that "explains" or critically analyzes a "source of law." *See* BLACK'S LAW DICTIONARY 109 (10th ed. 2014).

Producing such a treatise is a daunting task. While the Constitution and its current Amendments contain a little more than 7,500 words,[5] a seemingly endless stream of commentaries has attempted to explain the document's meaning and reach. The various sources discussing the Constitution provide a vast array of modern interpretations of the Constitution—and an immense challenge to any attempt to synthesize these sources in a single treatise. A further challenge is that expositions of the Constitution, like other legal works, can be inaccessible to many readers because they are intended for a narrow audience of attorneys specializing in "constitutional law"—that is, the body of principles and rules derived from the Constitution.[6] Also, perhaps because American constitutional law raises certain fundamental issues that define aspects of the U.S. political system,[7] discussions of constitutional law often approach the Constitution with a distinct point of view that may obfuscate, politicize, or simply ignore key issues. In addition, the *Constitution Annotated* confronts the unique challenge that it is not intended to be a static document; federal law requires that it be updated regularly by the Librarian of Congress, who has delegated this responsibility to the Congressional Research Service.[8]

With these challenges in mind, this essay seeks to provide a transparent methodology for the drafting of the *Constitution Annotated* and, in particular, for selecting sources for inclusion in the *Constitution Annotated* and organizing its content. It is anticipated that this methodology will guide future updates and revisions of the *Constitution Annotated*, ensuring a consistent approach over time. However, keeping in mind that "[a] foolish consistency is the hobgoblin of little minds,"[9] certain departures from this methodology may be made in certain cases in either the current edition or in future editions.

Intro.4.2 Information Included in the *Constitution Annotated*

One key aspect of the methodology for the *Constitution Annotated* is its criteria for determining what source materials are to be considered in drafting its annotations. Lacking such criteria, the *Constitution Annotated* would risk being inconsistent in its treatment of particular topics, thereby undermining its overall goal of providing objective, comprehensive, coherent, accessible, and authoritative information about how the Constitution has been construed. The following essays explain the overarching rules for determining when to incorporate particular types of sources within the *Constitution Annotated*.

Intro.4.3 Supreme Court Decisions

Intro.4.3.1 Treatment of Supreme Court Cases Generally

Supreme Court decisions addressing questions of constitutional law are primary sources of constitutional law, commonly used in compiling the *Constitution Annotated*. After all, the Court plays a prominent role in interpreting the Constitution, and no constitutional law treatise can credibly exist without a robust discussion of the Supreme Court's interpretations

[5] *See* Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 Mich. L. Rev. 391, 399 (2008) ("Overall, the U.S. Constitution is exceptional among written constitutions both in its age and its brevity. It is the oldest currently in effect and . . . is among the shortest at 7591 words including amendments . . . .").

[6] *See* Black's Law Dictionary 378 (10th ed. 2014) (defining "constitutional law" as the "body of law deriving from the U.S. Constitution and dealing primarily with governmental powers, civil rights, and civil liberties.").

[7] *See* Barry Friedman, *The Politics of Judicial Review*, 84 Tex. L. Rev. 257, 333 (2005) ("Judicial review can be understood as attractive precisely because it is embedded in politics, but is not quite of it. Politics and law are not separate, they are symbiotic. It would be remarkable to believe judicial review could operate entirely independent of politics or would be tolerated as such.").

[8] *See* 2 U.S.C. § 168.

[9] Ralph Waldo Emerson, *Self Reliance*, *in* Essays and English Traits 66 (Charles William Eliot ed., 1909).

of the Constitution.[1] Moreover, the statute underlying the publication of the *Constitution Annotated* requires that the Librarian of Congress[2] provide "annotations of decisions of the Supreme Court of the United States . . . construing provisions of the Constitution" through the end of the October 1971 term, with biennial updates and decennial editions thereafter.[3]

Specifically, this federal statute can be seen to impose three interrelated constraints upon the sources consulted in producing the *Constitution Annotated*. First, in keeping with the language regarding "decisions" of the Court, the *Constitution Annotated* focuses primarily (but not exclusively)[4] upon the Supreme Court's majority or plurality opinions—i.e., the ultimate determinations and dispositions on a matter by the Supreme Court.[5] Separate opinions from individual Justices found in concurrences to and dissents from majority decisions are not, as a general rule, discussed in detail in the *Constitution Annotated* unless they (1) provide insight into the majority opinion (e.g., explain something that might be opaque from the majority opinion alone); or (2) are eventually adopted by a majority of the Court or otherwise influence future Court decisions. Second, the authorizing statute requires a discussion of decisions that directly "construe[] provisions of the Constitution."[6] As such, the treatise's focus is on constitutional law. This restriction is at times challenging because constitutional law often serves as the foundation for other areas of law.[7] However, as a rule, the *Constitution Annotated* does not discuss other areas of law unless doing so is necessary to an understanding of specific constitutional issues. Third, while the statute mandates annotations of the Court's constitutional decisions through "the end of the October 1971 term," it also contemplates the *Constitution Annotated* being updated on an ongoing basis to include cases from subsequent Court terms. As a result, the *Constitution Annotated* generally differs in its treatment of cases from before the October 1971 term, and those from the October 1971 term and subsequent terms. As a rule, decisions from earlier terms are noted, if at all, only in background discussions, while decisions from later terms are noted in the text, in a footnote, or in a table appended to the *Constitution Annotated*.

Of course, the statutory mandate from Congress to annotate decisions of the Supreme Court "construing provisions of the Constitution" begs the question of what it means for the Court to interpret a constitutional provision. As one of the central actors in interpreting the

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[1] The Oxford Companion to the Supreme Court of the United States ix (Kermit L. Hall et al. eds., 1992) ("Because the Court is the highest tribunal for all cases and controversies arising under the Constitution . . . , it functions as the preeminent guardian and interpreter of the Constitution.").

[2] The Librarian of Congress has delegated this responsibility to the Congressional Research Service.

[3] 2 U.S.C. § 168.

[4] As discussed below, appropriate attention will be paid to the manner in which historical practices, such as how Congress has understood or exercised its powers over time, are pertinent to the explication of a particular clause, section, or provision of the Constitution.

[5] The term "decision" necessarily entails the controlling determinations from the Supreme Court. *See* Black's Law Dictionary 493 (10th ed. 2014) (defining the term "decision" as "a judicial . . . determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case."). The Supreme Court normally decides cases by majority rule, which in modern times would require the votes of at least five Justices to join an opinion for it to be a majority opinion for the Court. *See* 28 U.S.C. § 1 (establishing a Supreme Court consisting of a Chief Justice and eight associate justices). In a minority of cases, however, no opinion receives the full support of a majority of the participating Justices. A plurality of the Supreme Court cannot establish binding precedent. Instead, under the *Marks* rule, where a majority of the Court cannot agree on a particular opinion, the opinion reaching the majority result on the narrowest grounds controls. *See* Marks v. United States, 430 U.S. 188, 193 (1977).

[6] 2 U.S.C. § 168.

[7] *Cf.* Henry P. Monaghan, *The Supreme Court 1974 Term, Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 2 (1975) (arguing that the Constitution "establish[es] a nationwide floor below which state experimentation will not be permitted to fall").

Constitution,[8] the Supreme Court regularly issues opinions that discuss, and often provide the final word on, how particular provisions of the Constitution are to be understood.[9] Generally, the question of whether to include a Court decision in the *Constitution Annotated* is relatively easy, as when the Court asks whether particular provisions of the Constitution permit certain acts by the political branches. Other decisions can be comfortably *excluded* because they focus on questions other than constitutional interpretation (e.g., federal common law practices; questions of statutory interpretation that do not touch on matters of constitutional law).[10] There are, however, certain "gray" or unsettled areas of constitutional law where the choice of whether to include a decision, or even whether there is any Court decision to include, is not so obvious. These areas frequently involve preemption, qualified immunity, habeas corpus, statutory claims, and common law doctrines, each of which is discussed separately in the essays that follow.

Intro.4.3.2 Preemption Cases

Cases determining whether federal law displaces state law are, at bottom, constitutional law cases insofar as they at least implicitly involve the Supremacy Clause and its mandate that the laws of the United States made in pursuance of the Constitution "shall be the supreme Law of the Land."[1] However, preemption cases, by their nature, tend to focus on the meaning of particular federal and state laws and are typically resolved by focusing on a specific federal statute and the intent of the Congress that enacted the statute.[2] Many Supreme Court preemption cases do not discuss generally applicable principles of preemption or the broader meaning of the Supremacy Clause. While including preemption cases that broadly shed light on the *doctrine of preemption*, the *Constitution Annotated* generally does not include cases involving the *application of preemption* with respect to specific statutory schemes.

Intro.4.3.3 Qualified Immunity Cases

In cases where plaintiffs seek monetary damages from federal or state government officials, the Supreme Court, in a doctrine commonly referred to as "qualified immunity," has held that liability exists only when the government official's conduct violates "clearly established statutory or constitutional rights."[1] Determining whether a constitutional right is "clearly established" is related to determining what that constitutional right entails. However, these two inquiries are conceptually distinct. The Court has held that a court does not necessarily need to determine whether a constitutional right has been violated in order to

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[8] *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the [Constitution] enunciated by this Court . . . is the supreme law of the land . . . ."); *see generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[9] *See* Ryan J. Owens & Donald A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 Wm. & Mary L. Rev. 1219, 1271 (2012) (noting that while the Court in the 1940s regularly heard over 200 cases per term, now the number of cases the Court hears averages about eighty cases per term).

[10] *See The Supreme Court 2018 Term, The Statistics*, 133 Harv. L. Rev. 412, Table III (2019) (noting that during the October 2018 Supreme Court term, one third of the Court's opinions could be viewed as constitutional law cases).

[1] U.S. Const. art. VI, cl. 2.

[2] As the Supreme Court has noted, the Supremacy Clause creates a "rule of decision" for courts and does not itself provide any substantive rights. *See* Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 324–25 (2015).

[1] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

afford a government official qualified immunity.[2] Moreover, for a constitutional right to be "clearly established," "[t]he contours of th[at] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[3] As a consequence, a ruling that a government official is entitled to qualified immunity may provide little insight into the scope of the underlying constitutional right. Only qualified immunity cases that inform the general understanding of the scope of particular constitutional rights are, as a rule, included in the *Constitution Annotated*.

Intro.4.3.4 Federal Habeas Claims and State Court Convictions

Pursuant to the relevant provisions of the federal habeas statute, a federal court may not issue a writ of habeas corpus—that is, an order releasing a person from imprisonment or detention[1]—with respect to any claim that was adjudicated by a state court unless the underlying state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[2] A federal habeas petition will generally be granted as a result of a constitutional error only if the state court: (1) arrived "at a conclusion opposite to that reached by [the Supreme Court] on a question of law or . . . decide[d] a case differently than [the] Court has on a set of materially indistinguishable facts;" or (2) "identifie[d] the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case."[3] As a consequence of the governing standard in habeas cases, the Supreme Court may not opine on the scope of the underlying constitutional right, but instead merely address whether the state court erred in its assessment of the constitutional right. Such cases are, as a rule, generally not included in the *Constitution Annotated*.

Intro.4.3.5 Statutory Claims

While the Court's decisions opining on how to construe a statute[1] are generally excluded from the *Constitution Annotated*, certain cases involving statutory interpretation may be included insofar as constitutional considerations influence the Court's approach to construing legislative text. Some such cases involve the doctrine of constitutional avoidance—i.e., the long-standing interpretative rule followed by the Supreme Court that counsels that when a

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[2] *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009) (rejecting the proposition that a qualified immunity inquiry must necessarily resolve whether a constitutional right has been violated before determining whether the underlying constitutional right was clearly established).

[3] *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987).

[1] *See Habeas Corpus*, Black's Law Dictionary 825 (10th ed. 2014) (defining the writ of habeas corpus to be "[a] writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal.").

[2] *See* 28 U.S.C. § 2254(d)(1).

[3] *See* Williams v. Taylor, 529 U.S. 362, 412–13 (2000).

[1] "Statutory claims" in this essay refers to assertions of a legal right grounded in a law passed by a legislative body. Federal courts, including the Supreme Court, do not typically engage in extensive interpretations of state law. Under the doctrine announced in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), federal courts are bound to follow state law as announced by the highest state court. *Id.* at 78. Moreover, the Supreme Court will not review judgments of state courts that rest upon adequate and independent state grounds (i.e., nonfederal grounds). *See* Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1871); *see also* Michigan v. Long, 463 U.S. 1032, 1043 (1983) (holding that the Supreme Court has jurisdiction to review a state court ruling "in the absence of a plain statement that the decision below rested on an adequate and independent state ground."). At times, the Supreme Court has even certified questions to the highest court of a state for that court to provide the definitive interpretation of a statute. *See, e.g.*, Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 398 (1988). In short, it is relatively rare for the Supreme Court to attempt to gauge the meaning of a state law. Consequently, questions of federal statutory interpretation comprise the bulk of the Supreme Court's docket. *See The Supreme Court 2018 Term, The Statistics*, 133 Harv. L. Rev. 412 (2019).

particular reading of a statute would raise serious doubts about the statute's constitutionality, a court interpreting the statute must "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[2] Other cases involve the construction of statutes intended to parallel or supplement specific constitutional rights. However, as a rule, such cases are included only when the interpretation of the statute is inextricably intertwined with the interpretation of a constitutional provision. Two examples may serve to illustrate this.

The first involves the Religious Freedom Restoration Act of 1993 (RFRA),[3] which Congress enacted in the wake of the Court's 1990 decision in *Employment Division v. Smith* repudiating the methodology used in earlier cases to analyze claims asserting a violation of the Free Exercise Clause of the First Amendment.[4] These earlier cases had adopted a balancing test—often referred to as the "strict scrutiny" test—that weighed whether the challenged action imposed a "substantial burden" on the practice of religion and, if so, whether the challenged action served a "compelling government interest."[5] However, the *Smith* Court rejected that approach, allowing generally applicable laws to apply to religious practices without being subject to strict scrutiny.[6] In response, Congress enacted RFRA, which prohibits the Federal Government,[7] as a matter of federal statutory law, from substantially burdening a person's exercise of religion unless the government demonstrates that the challenged action serves a compelling government interest and is the least restrictive means of furthering that interest.[8] As a result, while the Court's modern RFRA jurisprudence touches on issues of religious liberty, the test imposed by RFRA is distinct from even the pre-*Smith* Free Exercise case law and, at bottom, does not interpret the Constitution. As a consequence, while the *Constitution Annotated* references certain RFRA cases, it does not purport to address RFRA cases in detail.

The second example involves the Electronic Communications Privacy Act of 1986 (Wiretap Act).[9] This Act authorizes a judge (after receiving an application from the government) to enter an order allowing for the interception of wire, oral, or electronic communications upon finding "probable cause" that an individual is committing, has committed, or is about to commit specified offenses.[10] The Act does not define what is meant by "probable cause." However, courts construing the probable cause requirement in the Wiretap Act have concluded that it is "co-extensive with the Constitutional requirements embodied" in the Fourth Amendment.[11] Thus, if the Court were to rule that the Wiretap Act's probable cause requirement was satisfied in a particular case, this ruling would warrant inclusion in the *Constitution Annotated* if it rests on grounds that inform our understanding of the Fourth Amendment's probable cause requirement.

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[2] *See* Crowell v. Benson, 285 U.S. 22, 62 (1932).

[3] Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb et seq.), *declared unconstitutional*, City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

[4] *See* 494 U.S. 872 (1990).

[5] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 210–11 (1972); Sherbert v. Verner, 374 U.S. 398, 408–10 (1963).

[6] *See* 494 U.S. at 888–89.

[7] As originally enacted, RFRA applied to both federal and state government actions. However, in 1997, the Court struck down the provisions of RFRA that applied to the states as being in excess of Congress's power under Section 5 of the Fourteenth Amendment. *See City of Boerne*, 521 U.S. at 511.

[8] *See* 42 U.S.C. §§ 2000bb, 2000bb-1.

[9] Pub. L. No. 99-508, 100 Stat. 1848 (codified at 18 U.S.C. § 2510 et seq.).

[10] *See* 18 U.S.C. §§ 2518(1) & (3).

[11] *See* United States v. Leisure, 844 F.2d 1347, 1354 (8th Cir. 1988).

Intro.4.3.6 Common Law Doctrines

In some cases, the Supreme Court's rulings expound upon long-established, judge-made doctrines widely referred to as the common law.[1] Some of these common law doctrines have their origins in constitutional norms, such as the rules regarding prudential standing[2] and the various doctrines requiring the suspension of federal court proceedings in favor of state court proceedings.[3] Others have little to do with the Constitution and are justified by more mundane concerns, such as the need for judicial efficiency[4] or the lack of a statute or rule to resolve an existing legal issue.[5] Cases addressing common law doctrines with constitutional underpinnings are included in the *Constitution Annotated* insofar as they help to elucidate the scope of the relevant constitutional provision.

Intro.4.4 Lower Court Decisions

Intro.4.4.1 Treatment of Lower Court Decisions Generally

Because the Supreme Court hears only a small percentage of the cases in which its review is sought (and in many cases, parties do not even seek Court review),[1] most litigation over the meaning of the Constitution does not reach the High Court. This leaves many constitutional matters to be decided by the lower federal courts and, in particular, the thirteen federal courts of appeal.[2] State courts can also play a significant role in construing the U.S. Constitution and any comparable provisions in the state's constitution.[3] While many cases come to the Supreme Court directly from state courts of last resort,[4] state courts usually have the last word on the meaning of state law.[5] Given the statutory requirement to annotate the Supreme Court's constitutional decisions, as well as considerations of space, the *Constitution Annotated* makes

[1] The Supreme Court in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), broadly announced that "[t]here is no federal general common law." *Id.* at 78. Nonetheless, the Supreme Court has recognized that federal common law still exists in two instances: where a federal rule of decision is "necessary to protect uniquely federal interests" and where "Congress has given the courts the power to develop substantive law." *See* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (internal citations omitted).

[2] *See* Gladstone, Realtors v. Bellwood, 441 U.S. 91, 100 & n.6 (1979) (discussing the "nonconstitutional limitations on standing" that derive in part from the Court's view about the proper role of federal courts in a "democratic society" (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975))).

[3] *See, e.g.*, Younger v. Harris, 401 U.S. 37, 53–54 (1971) (prohibiting federal courts from enjoining certain ongoing state court criminal, civil, or administrative proceedings); R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 498 (1941) (requiring federal courts to abstain from hearing cases that state courts can resolve by applying state law in a manner that relieves federal courts from making constitutional determinations).

[4] *See, e.g.*, New Hampshire v. Maine, 532 U.S. 742 (2001) (discussing the doctrines of claim and issue preclusion).

[5] *See generally* Larry L. Teply & Ralph U. Whitten, Civil Procedure 363–71 (1991) (discussing the gap-filling role of federal common law).

[1] *See* Ryan J. Owens & Donald A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 Wm. & Mary L. Rev. 1219, 1225 (2012) ("Since the 2005 Term, the Court has decided an average of 80 cases per Term" out of potentially thousands of petitions).

[2] As Justice Byron White once explained, "there is not just one Supreme Court in this country, there are 12 regional Supreme Courts [and the specialized Court of Appeals for the Federal Circuit] . . . . For all practical purposes, the development of the federal law is very much in the hands of the 13 circuit courts of appeals." *See* Byron R. White, *Enlarging the Capacity of the Supreme Court*, *in* The Federal Appellate Judiciary in the Twenty-First Century 145 (Cynthia Harrison & Russell R. Wheeler eds., 1989).

[3] *See* Nicole Mansker & Neal Devins, *Do Judicial Elections Facilitate Popular Constitutionalism; Can They?*, 111 Colum. L. Rev. Sidebar 27, 28 (2011) ("Moreover, state courts play a major role in interpreting and enforcing the Federal Constitution, and, perhaps more importantly, state courts are often at the cutting edge of recognizing rights that will eventually spill over into the national constitutional discourse.").

[4] *See The Supreme Court 2018 Term, The Statistics*, 133 Harv. L. Rev. 412, Table II(E) (2019) (noting that, during the October 2018 Term, fifteen of the 106 cases disposed of by the Supreme Court came from state courts).

[5] State court decisions that are based on federal constitutional law are subject to Supreme Court review. *See* Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1871); *see also* Michigan v. Long, 463 U.S. 1032, 1043 (1983).

only limited references to lower court decisions. As a general rule, such decisions are not included unless they are particularly influential or address significant issues not addressed by the High Court.

Intro.4.4.2 Lower Court Rulings

From time to time, lower court rulings on constitutional law are widely recognized by constitutional scholars to have had a lasting influence on interpretations of the Constitution, perhaps even coming to be adopted or relied upon by the Supreme Court. Examples of influential lower court rulings include Judge Learned Hand's opinion on the First Amendment and incitement in *Masses Publishing Co. v. Patten*,[1] and Judge Frank Easterbrook's opinion on the First Amendment and prohibitions on certain sexually explicit material in *American Booksellers Ass'n, Inc. v. Hudnut*.[2] Such influential lower court rulings, which may include opinions by future or retired Supreme Court Justices,[3] are included in the *Constitution Annotated*.

Intro.4.4.3 Subjects Lacking Supreme Court Coverage

In cases where the Supreme Court has not spoken on the precise issue, but a lower court has, relevant lower court decisions may be included in the *Constitution Annotated*. For example, the Supreme Court has rarely interpreted the Third Amendment. Accordingly, the *Constitution Annotated* discussion of the Constitution's prohibition on the quartering of soldiers notes a prominent lower court ruling on the issue.[1] Discussion of such "gap-filling" lower court opinions is intended to elucidate issues that the Supreme Court has not addressed, but is circumscribed and included only for purposes of noting open questions and apparent limitations in the Supreme Court's current doctrine.

Intro.4.5 Non-Judicial Sources of Constitutional Meaning

The Judiciary is not the only branch of government with a role in interpreting the Constitution. Since the Nation's Founding, the Legislative and Executive Branches, through their respective officers, have continuously participated in construing the Constitution in both formal and informal ways, providing a rich history that informs modern interpretations of the Constitution.[1] In addition, various non-governmental actors—from academic legal scholars to "ordinary" citizens—have at times played a pivotal role in interpreting the Constitution and the basic norms that underlie it.[2]

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[1] *See* 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

[2] *See* 771 F.2d 323 (7th Cir. 1985), *aff'd sub nom.*, 475 U.S. 1001 (1986).

[3] *See, e.g.*, McAuliffe v. City of New Bedford, 29 N.E. 517 (1892) (Holmes, J.) (discussing the constitutional rights of public employees); *Hayburn's Case*, 2 U.S. (Dall.) 409, 410 n.2 (1792) (discussing the circuit court rulings issued by Members of the Supreme Court).

[1] *See* Third Amendment: In General (noting Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982)).

[1] *See* Michael J. Gerhardt, *The Constitution Outside the Courts*, 51 Drake L. Rev. 775, 777 (2003) ("It is hard to overstate the range or significance of constitutional decision making that occurs outside the Court."); Mark V. Tushnet, *The Constitution Outside the Courts: A Preliminary Inquiry*, 26 Val. U. L. Rev. 437, 437–38 (1992) (arguing that "Constitutional law is obsessed with the Supreme Court," and that there is a "much richer terrain to explore" with regard to noncourt actors and their interpretations of the Constitution); Edwin Meese III, *The Law of the Constitution*, 61 Tul. L. Rev. 979, 985–86 (1987) ("The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative no less than the judicial—has a duty to interpret the Constitution in the performance of its official functions.").

[2] *See* Larry Kramer, The People Themselves 8 (2004) ("Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution. Final

Intro.4.5
Non-Judicial Sources of Constitutional Meaning

Interpretations of the Constitution outside the courts occur in three primary contexts.[3] First, non-judicial actors may opine on the meaning of the Constitution with respect to matters that could be, or have been, subject to judicial review.[4] For example, in the wake of the Court's 1989 decision in *Texas v. Johnson*, holding that a Texas law criminalizing the burning of the U.S. flag violated the First Amendment,[5] Congress enacted a similar federal law, functionally voicing its disagreement with the Court's interpretation of the First Amendment in *Johnson*.[6] Second, non-judicial constitutional interpretations may occur in contexts that are not generally subject to judicial review.[7] Court-made doctrines, like the political question doctrine and the constitutional standing doctrine, can result in entire provisions of the Constitution being interpreted solely by the political branches or non-governmental actors.[8] For example, the Court has held that the propriety of a Senate trial of impeachment is a political question that cannot be resolved by a federal court.[9] As a result, questions regarding the limits of the power to try impeachments are heavily influenced by both long-standing practices of the Senate, as well as new developments that prompt changes in such practices.[10] Third and finally, non-judicial interpretations of the Constitution may occur in areas where, while not wholly immune from judicial review, the judiciary has tended to defer to the political branches.[11] Presidential authority over foreign affairs is an example of such a field.[12]

Because nearly infinite understandings of the Constitution exist outside of formal court opinions, the use of non-judicial sources in the *Constitution Annotated* must be limited in some way, in part, to ensure that the focus of the *Constitution Annotated* remains upon the Supreme Court decisions noted in the statutory mandate.[13] In the interests of balancing these concerns, the *Constitution Annotated* generally limits its usage of non-judicial sources to situations

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interpretive authority rested with 'the people themselves,' and courts no less than elected representatives were subordinate to their judgments."); *see generally* Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 Geo. L.J. 897, 898–99 (2005) (describing a "growing body of scholarship" discussing the concept of "popular constitutionalism," the idea that "the People and their elected representatives should—and often do—play a substantial role in the creation, interpretation, evolution, and enforcement of constitutional norms.").

[3] *See* Gerhardt, *supra* note 1, at 780.

[4] *Id.*

[5] 491 U.S. 397 (1989).

[6] *See* Gerhardt, *supra* note 1, at 780.

[7] *Id.*

[8] *See* Tushnet, *supra* note 1, at 439–40.

[9] *See* Nixon v. United States, 506 U.S. 224 (1993).

[10] *See generally* Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 33–35 (1996).

[11] *See* Gerhardt, *supra* note 1, at 780.

[12] Jama v. Immigration & Customs Enf't, 543 U.S. 335, 348 (2005) (noting the Court's "customary policy of deference to the President in matters of foreign affairs").

[13] Constitutional interpretations from non-court actors can also raise concerns about sources' objectivity. Various commentators have suggested that constitutional law is more prone than other areas of law to being "manipulate[d] . . . for political purposes." *See generally* Suzanna Sherry, *Putting the Law Back in Constitutional Law*, 25 Const. Comment. 461, 464 (2009); *see also id.* at 461 ("The legal academy has erased the distinction between law and politics, used its expertise for political advantage rather than for elucidation, and mis-educated a generation of lawyers."). As a consequence, indiscriminate use of such sources in the *Constitution Annotated* could be at odds with the mission of providing objective, non-partisan, and authoritative analysis of the Constitution. Moreover, beyond considerations of objectivity, academic writing on the Constitution can, at times, be esoteric and may not warrant an extended discussion in this volume. *See, e.g.*, Video: Annual Fourth Circuit Court of Appeals Conference, C-SPAN (June 25, 2011), https://web.archive.org/web/20110713081110/http://www.c-span.org/Events/Annual-Fourth-Circuit-Court-of-Appeals-Conference/10737422476-1/ (statement of Chief Justice John Roberts, Jr. stating: "Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.").

where (1) judicial interpretation has no role, or a very limited role, in constitutional construction, or (2) non-judicial actors provide an important interstitial role in informing the general understanding of specific constitutional provisions. Examples of such topics include:

> presidents' pardon decisions, presidents' proposing national legislation, presidents' vetoing legislation, the deliberations of members of Congress over the standards for impeachment and removal, representatives' and senators' votes for and against legislation, presidents' negotiating treaties, senators' determining whether to ratify treaties, presidents' standards for nominations, senators' determinations of the standards for confirmation, presidents' standards for removing executive officials, the Congress's standards for approving international agreements made by means other than treaties, presidents' under-enforcement of federal laws and executive orders, the Congress's decisions on how to discipline its own members for their misconduct in office, and the uses of military force without declarations of war.[14]

The *Constitution Annotated* also uses non-judicial sources to supply relevant factual information that the Court may have omitted from its decision, but which is arguably key to understanding the decision. Also, on occasion, the *Constitution Annotated* notes that a debate about a particular constitutional provision or Supreme Court precedent exists, and cites secondary sources evidencing the existence of such a debate.[15]

With respect to which non-judicial sources to use, the *Constitution Annotated* concentrates upon sources that are influential to decision makers in the field, or are widely regarded as authoritative or influential within the legal profession. Some non-judicial interpretations of the Constitution can influence the actions of decision makers and, accordingly, are worth citing in the *Constitution Annotated* despite their advocacy of particular points of view, because of their effects on how particular provisions of the Constitution are implemented in practice. For example, the Department of Justice's Office of Legal Counsel's (OLC) opinions on the Recess Appointments Clause were discussed and relied on by the Supreme Court in *NLRB v. Noel Canning*, demonstrating the influence of that office's legal determination on constitutional law.[16] Examples of such "influential" sources, beyond opinions by the OLC, include legal decisions by the Government Accountability Office. In other cases, there is near consensus within the legal profession (including the Justices on the Supreme Court) that certain non-judicial sources are influential and/or authoritative on particular issues. Often these sources are ones that have long affected constitutional interpretation, such as Sir William Blackstone's *Commentaries on the Laws of England*; the *Federalist Papers*; Justice Joseph Story's *Commentaries on the Constitution*; then-Professor Louis Brandeis's early writings on the right to privacy;[17] Professor James Bradley Thayer's works on the nature of judicial review;[18] and then-private practitioner Learned Hand's writings on economic due process rights.[19]

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[14] *See* Gerhardt, *supra* note 1, at 780.

[15] For example, in the wake of the Court's 2015 ruling in *Obergefell v. Hodges*, which prohibited a state from defining marriage as exclusively between a man and a woman, there was debate about whether the logic of *Obergefell* could apply in contexts not involving same-sex marriage. *See* 576 U.S. 644 (2015). That debate is noted in the *Constitution Annotated*. *See* Amdt14.S1.8.13.1 Overview of Fundamental Rights.

[16] *See, e.g.*, 573 U.S. 513, 544 (2014).

[17] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 195 (1890).

[18] *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893).

[19] *See* Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 Harv. L. Rev. 495, 503 (1908).

Intro.5 Organization of the *Constitution Annotated*

Intro.5.1 Overview of *Constitution Annotated* Organization

Constitutional law treatises are organized in various ways. For example, some prominent treatises are organized around a limited number of general concepts, most commonly (1) the relationship between the Federal Government and the states (i.e., federalism); (2) the relationship between the different branches of the federal government (i.e., separation of powers); and (3) the relationship between the government and citizens (i.e., individual rights).[1] In many cases, these treatises focus on these general topics without addressing more context-specific issues, such as the constitutional rules undergirding modern criminal or civil procedure. Other treatises take a historical approach, moving chronologically from interpretations of the Constitution advanced at the beginning of the Nation's history to modern understandings.[2]

The *Constitution Annotated* has long been unique among treatises on constitutional law, not only for its non-partisan mission, but also because it addresses the various provisions of the Constitution in the order they appear in that document: Article by Article, Amendment by Amendment, Section by Section, Clause by Clause. This structural approach can be useful in providing information about the Constitution to a broad audience, because no prior knowledge of particular constitutional concepts or history is needed to identify where in the treatise information about a provision exists. The clause-by-clause approach of the *Constitution Annotated* also allows readers to grapple with the meaning of specific language in particular clauses or sections without being distracted by tangential discussions.

Nonetheless, this approach is not without its disadvantages. Perhaps most notably, constitutional law has often proved to be atextual in the sense that certain basic understandings of the Constitution are not tied to specific language within the Constitution. For example, the right to travel does not exist within the plain text of the Constitution, but is instead the product of several constitutional law doctrines.[3] As a result, the historic structure of the *Constitution Annotated* risks omitting critical sources—which do not focus on a specific constitutional provision—from the volume. Conversely, constitutional norms can be rooted in multiple articles or amendments. For example, the concept of "due process" is invoked in both the Fifth and Fourteenth Amendments, with often overlapping meanings. As a consequence, following the structure of the Constitution in setting forth the material in the *Constitution Annotated* can, at times, lead to the unnecessary duplication.

With these considerations in mind, the current edition of the *Constitution Annotated* primarily follows the Article-by-Article/Amendment-by-Amendment structure of prior editions—and retains the "essay" as the fundamental building block of the content[4]—with a few changes intended to avoid certain disadvantages of a purely structural approach. In particular, essays in the current edition are organized in three categories: (1) Introduction to the *Constitution Annotated*; (2) the U.S. Constitution Preamble, Articles, and Amendments, and (3) Appendix and Resources to the Constitution Annotated.

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[1] *See, e.g.*, Kathleen M. Sullivan & Noah Feldman, Constitutional Law (18th ed. 2013).

[2] *See, e.g.*, Paul Brest et. al., Processes of Constitutional Decisionmaking: Cases and Materials (5th ed. 2006).

[3] *See* Jones v. Helms, 452 U.S. 412, 418–19 (1981) ("The right to travel has been described as a privilege of national citizenship, and as an aspect of liberty that is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.").

[4] The fundamental building block of the *Constitution Annotated* is the "essay." The content may take the form of a single standalone essay or a group of essays (multiple essays grouped under a common heading).

Intro.5.2 Introductory Materials in the *Constitution Annotated*

This part of the *Constitution Annotated* includes broad introductory essays covering historical background, providing authorization information, addressing ratification and overarching constitutional issues, and more. A few key introductory essays are summarized below:

- *Historical Note on the Adoption of the Constitution*. This essay[1] provides a brief introduction to the formation of the U.S. Constitution. It discusses the general rationales for the Nation's Founding document and how the Constitution was drafted, introducing readers to historical themes discussed in various places throughout the document. More detailed background on individual clauses of the Constitution is provided within the essays on individual articles and amendments.
- *Basic Principles Underlying the Constitution*. These essays[2] introduce basic themes and concepts that commonly arise in constitutional interpretation, regardless of the particular question. Specifically, the essays discuss the threshold question of what agents of the government interpret the Constitution before addressing federalism, separation of powers, and individual rights. By providing insights into these common "issues," which recur in later essays, the *Constitution Annotated* can avoid both omitting such critical, overarching concepts from specific annotations and repeating introductory discussions of these concepts at each point where they are mentioned.
- *Ways to Interpret the Constitution*. These essays[3] describe current, widely accepted modes of constitutional interpretation. They are intended to introduce readers to the different methods that courts and other commentators may apply when construing the Constitution, such as originalism, textualism, and common-law constitutionalism. By providing readers with a basic understanding of key approaches to reading the Constitution, these essays help inform the more specific discussions of individual articles and amendments that follow.

Intro.5.3 Preamble, Articles, and Amendments

Following the introductory essays, there are three groups of essays, each addressing a separate part of the Constitution (i.e., the Preamble, Articles, and Amendments). Each group of essays generally follows the same basic structure[1] consisting of the following components:

- Text of Constitutional Provision: Generally, each essay begins with the text of the constitutional provision annotated. This is a verbatim reproduction of the text of the U.S. Constitution as recorded by the National Archives and Records Administration. Depending on how specific the essay is, the text of the constitutional provision may be excerpted to highlight particular portions and reflect the essay's more narrow focus.
- Essay: Essays in the *Constitution Annotated* consist of annotations explaining the meaning of a particular constitutional provision, as construed by the Supreme Court and other relevant authorities. While the number of essays may differ depending on the constitutional provision under discussion, the following three categories of essays generally appear:

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[1] Intro.6.1 Continental Congress and Adoption of the Articles of Confederation.

[2] Intro.7.1 Overview of Basic Principles Underlying the Constitution to Intro.7.5 Interpreters of the Constitution.

[3] Intro.8.1 Interpreting the Constitution Generally to Intro.8.9 Historical Practices and Constitutional Interpretation.

[1] Certain provisions of the Constitution may not lend themselves to full essays on each provision. In such instances, the constitutional provision may contain a single *Constitution Annotated* essay that provides an overview, historical background, and the doctrine collapsed in one.

- Overview: This essay typically summarizes the material that follows and provides a roadmap of how the material that follows is organized.
- Historical Background: This essay or group of essays focuses on the history of particular highlighted text *up to the time of ratification*. Such essays may include the common law origins of particular provisions; records of the debates that occurred among the Framers during the drafting of the provision; and any other historical materials that may provide insight into how particular provisions were understood at the time of their inclusion in the Constitution.
- Doctrine: This essay or group of essays discusses how particular provisions of the Constitution have generally been construed *following* their ratification. This often takes the form of a group of essays and follows a chronological order, tracing key developments in the evolution of the interpretation of particular constitutional provisions from early interpretations to the current doctrine. Importantly, the phrase "doctrine" is used quite broadly in the *Constitution Annotated* to encompass both judicial doctrine *and* more general understandings of what the Constitution means from non-judicial sources.[2]

Intro.5.4 Appendix and Tables in the *Constitution Annotated*

Following the essays on the Preamble, Articles, and Amendments, the *Constitution Annotated* features an Appendix and Tables containing supplemental materials that may be useful to the reader. The Appendix contains an essay explaining the methodology underlying the formation of the Tables,[1] and may include additional content in the future. Finally, four tables make up the Resources to the *Constitution Annotated*: (1) Table of Supreme Court Decisions Overruled by Subsequent Decisions; (2) Table of Laws Held Unconstitutional in Whole or in Part by the Supreme Court; (3) Table of Supreme Court Justices; and (4) Table of Cases. Additional materials prepared by the Congressional Research Service relating to the Constitution are available on the *Constitution Annotated* website, https://constitution.congress.gov/.[2]

Intro.5.5 Serial Numbers in the *Constitution Annotated*

Each essay on the *Constitution Annotated* website is associated with a unique serial number based on the essay's position in the *Constitution Annotated* hierarchy.

The serial number begins with a prefix: *Intro* for essays in the "Introduction to the *Constitution Annotated*" category, *Pre* for essays in the "Preamble to the Constitution" category, *Art* for essays in the "Articles of the Constitution" category, *Amdt* for essays in the "Amendments to the Constitution" category, and finally *Appx* for essays in the "Appendix to the *Constitution Annotated*" category. Additional prefixes that may follow are: *S* if the essay annotates a specific constitutional section and *C* if the essay annotates a specific constitutional clause.

These prefixes are followed by serial numbers that indicate the position of the essay relative to other essays or group(s) of essays in the *Constitution Annotated* hierarchy. For example:

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[2] *See* Black's Law Dictionary 585 (10th ed. 2014) (defining doctrine broadly to mean a "legal principle" that is "widely adhered to").

[1] Appx.1.1 Constitution Annotated Tables Generally.

[2] *See* Beyond the *Constitution Annotated*: Table of Additional Resources, https://constitution.congress.gov/resources/additional-resources/. For more information about the content and methodology of each Table, see Appx.1.1 Constitution Annotated Tables Generally.

- Intro.3.1 Ratification of Amendments to the Constitution Generally is an essay in the Introduction to the *Constitution Annotated* (*Intro.*3.1), is in the third group (Intro.*3*.1), and is the first essay (Intro.3.*1*) therein.
- Pre.2 Historical Background on the Preamble is the second essay in the Preamble to the Constitution (*Pre*.2).
- ArtI.S2.C5.2 Historical Background on Impeachment is an essay annotating Article I (*ArtI*.S2.C5.2), Section 2 (ArtI.*S2*.C5.2), Clause 5 (ArtI.S2.*C5*.2), and is the second essay (ArtI.S2.C5.*2*) therein.
- Amdt5.9.1 Overview of Takings Clause is an essay annotating the Fifth Amendment (*Amdt5*.8.1), is in the eighth group (Amdt5.*8*.1), and is the first essay (Amdt5.8.*1*) therein.
- Appx.1 Methodologies for the Tables is an essay in the Appendix to the *Constitution Annotated* (*Appx*.1) and is the first essay (Appx.*1*) therein.

When concepts in a particular essay are discussed in another section of the *Constitution Annotated*, the essay will include cross-references including the relevant essay's serial number.

Intro.6 Historical Note on the Adoption of the Constitution

Intro.6.1 Continental Congress and Adoption of the Articles of Confederation

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

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

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

Intro.6.1
Continental Congress and Adoption of the Articles of Confederation

While the declaration of the causes and necessities of taking up arms of July 6, 1775,[2] expressed a "wish" to see the union between Great Britain and the colonies "restored," sentiment for independence was growing. Finally, on May 15, 1776, Virginia instructed her delegates to the Continental Congress to have that body "declare the united colonies free and independent States."[3] Accordingly on June 7 a resolution was introduced in Congress declaring the union with Great Britain dissolved, proposing the formation of foreign alliances, and suggesting the drafting of a plan of confederation to be submitted to the respective colonies.[4] Some delegates argued for confederation first and declaration afterwards. This counsel did not prevail. Independence was declared on July 4, 1776; the preparation of a plan of confederation was postponed. It was not until November 17, 1777, that the Congress was able to agree on a form of government which stood some chance of being approved by the separate states. The Articles of Confederation were then submitted to the several states, and on July 9, 1778, were finally approved by a sufficient number to become operative.

Intro.6.2 Weaknesses in the Articles of Confederation

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

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

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

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

Intro.6.3 Constitutional Convention

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

[2] Tansill, *supra* note 1, at 10.

[3] Tansill, *supra* note 1, at 19.

[4] Tansill, *supra* note 1, at 21.

advantageous to the two States." Maryland in January 1785 responded to the Virginia resolution by appointing a like number of commissioners[1] "for the purpose of settling the navigation and jurisdiction over that part of the bay of Chesapeake which lies within the limits of Virginia, and over the rivers Potomac and Pocomoke" with full power on behalf of Maryland "to adjudge and settle the jurisdiction to be exercised by the said State, respectively, over the waters and navigations of the same."

At the invitation of George Washington the commissioners met at Mount Vernon, in March 1785, and drafted a compact which, in many of its details relative to the navigation and jurisdiction of the Potomac, is still in force.[2] What is more important, the commissioners submitted to their respective states a report in favor of a convention of all the states "to take into consideration the trade and commerce" of the Confederation. Virginia, in January 1786, advocated such a convention, authorizing its commissioners to meet with those of other states, at a time and place to be agreed on, "to take into consideration the trade of the United States; to examine the relative situations and trade of the said State; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States, such an act relative to this great object, as when unanimously ratified by them, will enable the United States in Congress, effectually to provide for the same."[3]

This proposal for a general trade convention seemingly met with general approval; nine states appointed commissioners. Under the leadership of the Virginia delegation, which included Edmund Randolph and James Madison, Annapolis was accepted as the place and the first Monday in September 1786 as the time for the convention. The attendance at Annapolis proved disappointing. Only five states—Virginia, Pennsylvania, Delaware, New Jersey, and New York—were represented; delegates from Massachusetts, New Hampshire, North Carolina, and Rhode Island failed to attend. Because of the small representation, the Annapolis convention did not deem "it advisable to proceed on the business of their mission." After an exchange of views, the Annapolis delegates unanimously submitted to their respective states a report in which they suggested that a convention of representatives from all the states meet at Philadelphia on the second Monday in May 1787 to examine the defects in the existing system of government and formulate "a plan for supplying such defects as may be discovered."[4]

The Virginia legislature acted promptly upon this recommendation and appointed a delegation to go to Philadelphia. Within a few weeks New Jersey, Pennsylvania, North Carolina, Delaware, and Georgia also made appointments. New York and several other states hesitated on the ground that, without the consent of the Continental Congress, the work of the convention would be extra-legal; that Congress alone could propose amendments to the Articles of Confederation. Washington was quite unwilling to attend an irregular convention. Congressional approval of the proposed convention became, therefore, highly important. After some hesitancy Congress approved the suggestion for a convention at Philadelphia "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the States render the Federal Constitution adequate to the exigencies of Government and the preservation of the Union."

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

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[1] George Mason, Edmund Randolph, James Madison, and Alexander Henderson were appointed commissioners for Virginia; Thomas Johnson, Thomas Stone, Samuel Chase, and Daniel of St. Thomas Jenifer for Maryland.

[2] Text of the resolution and details of the compact may be found in *Wheaton v. Wise,* 153 U.S. 155 (1894).

[3] Tansill, *supra* note 1, at 38.

[4] Tansill, *supra* note 1, at 39.

Intro.6.3
Constitutional Convention

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

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

On May 30 the Convention went into a committee of the whole to consider the fifteen propositions of the Virginia Plan seriatim. These discussions continued until June 13, when the Virginia resolutions in amended form were reported out of committee. They provided for proportional representation in both houses. The small states were dissatisfied. Therefore, on June 14 when the Convention was ready to consider the report on the Virginia Plan, William Paterson of New Jersey requested an adjournment to allow certain delegations more time to prepare a substitute plan. The request was granted, and on the next day Paterson submitted nine resolutions embodying important changes in the Articles of Confederation, but strictly amendatory in nature. Vigorous debate followed. On June 19 the states rejected the New Jersey Plan and voted to proceed with a discussion of the Virginia Plan. The small states became more and more discontented; there were threats of withdrawal. On July 2, the Convention was deadlocked over giving each state an equal vote in the upper house–five states in the affirmative, five in the negative, one divided.[5]

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

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

From August 6 to September 10 the report of the Committee of Detail was discussed, section by section, clause by clause. Details were attended to, further compromises were

[5] The New Hampshire delegation did not arrive until July 23, 1787.

[6] Rutledge of South Carolina, Randolph of Virginia, Gorham of Massachusetts, Ellsworth of Connecticut, and Wilson of Pennsylvania.

effected. Toward the close of these discussions, on September 8, another committee of five[7] was appointed "to revise the style of and arrange the articles which had been agreed to by the house."

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

The Convention met on Monday, September 17, for its final session. Several of the delegates were disappointed in the result. A few deemed the new Constitution a mere makeshift, a series of unfortunate compromises. The advocates of the Constitution, realizing the impending difficulty of obtaining the consent of the states to the new instrument of Government, were anxious to obtain the unanimous support of the delegations from each state. It was feared that many of the delegates would refuse to give their individual assent to the Constitution. Therefore, in order that the action of the Convention would appear to be unanimous, Gouverneur Morris devised the formula "Done in Convention, by the unanimous consent of the States present the 17th of September . . . In witness whereof we have hereunto subscribed our names." Thirty-nine of the forty-two delegates present thereupon "subscribed" to the document.[8]

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

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

Two parties soon developed, one in opposition and one in support of the Constitution, and the Constitution was debated, criticized, and expounded clause by clause. Alexander Hamilton, James Madison, and John Jay wrote a series of commentaries, now known as the *Federalist Papers*, in support of the new instrument of government.[9] The closeness and bitterness of the struggle over ratification and the conferring of additional powers on the central government can scarcely be exaggerated. In some states ratification was effected only after a bitter struggle in the state convention itself.

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

[7] William Samuel Johnson of Connecticut, Alexander Hamilton of New York, Gouverneur Morris of Pennsylvania, James Madison of Virginia, and Rufus King of Massachusetts.

[8] At least sixty-five persons had received appointments as delegates to the Convention; fifty-five actually attended at different times during the course of the proceedings; thirty-nine signed the document. It has been estimated that generally fewer than thirty delegates attended the daily sessions.

[9] These commentaries on the Constitution, written during the struggle for ratification, have been frequently cited by the Supreme Court as an authoritative contemporary interpretation of the meaning of its provisions.

355, endorsed the new Constitution, but recommended that a bill of rights be added to protect the states from federal encroachment on individual liberties. Maryland ratified on April 28, 1788; yeas 63, nays 11. South Carolina ratified on May 23, 1788; yeas 149, nays 73. On June 21, 1788, by a vote of 57-46, New Hampshire became the ninth state to ratify, but like Massachusetts she suggested a bill of rights.

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

Eleven states having thus ratified the Constitution,[10] the Continental Congress—which still functioned at irregular intervals—passed a resolution on September 13, 1788, to put the new Constitution into operation. The first Wednesday of January 1789 was fixed as the day for choosing presidential electors, the first Wednesday of February for the meeting of electors, and the first Wednesday of March (i.e., March 4, 1789) for the opening session of the new Congress. Owing to various delays, Congress was late in assembling, and it was not until April 30, 1789, that George Washington was inaugurated as the first President of the United States.

Intro.7 Basic Principles Underlying the Constitution

Intro.7.1 Overview of Basic Principles Underlying the Constitution

As compared to the constitutions of the fifty states or of other countries, the United States Constitution is a short document that, with its current amendments, contains only a little more than 7,500 words[1] and has grown very little since its initial enactment.[2] The federal Constitution consists of three central provisions: a short introductory paragraph called the "Preamble"; seven "Articles" that comprise the original Constitution that came into force in 1789; and twenty-seven "Amendments" that were subsequently added to the document.[3] The first three Articles of the Constitution establish a Federal Government consisting of the Legislative,[4] Executive,[5] and Judicial Branches.[6] It creates a tripartite system of government wherein each of the three federal branches is granted powers but given some ability to check the powers of the other two branches. Article IV generally addresses the relationship between the federal and state governments, and the remaining Articles establish, among other things, how the Constitution can be amended,[7] the supremacy of the Constitution and federal law

[10] North Carolina added her ratification on November 21, 1789; yeas 184, nays 77. Rhode Island did not ratify until May 29, 1790; yeas 34, nays 32.

[1] *See* Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 399 (2008) ("Overall, the U.S. Constitution is exceptional among written constitutions both in its age and its brevity. It is the oldest currently in effect and . . . is among the shortest at 7591 words including amendments . . . .").

[2] *See* Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 367, 369 (1994) (comparing the U.S. Constitution to the constitutions of the fifty states and over thirty countries).

[3] *See* U.S. CONST.

[4] *See id.* art. I.

[5] *See id.* art. II.

[6] *See id.* art. III.

[7] *See id.* art. V.

with respect to state law,[8] and the process for ratifying the Constitution.[9] The Amendments begin with the first ten amendments or the Bill of Rights and protect certain individual rights, such as freedom of speech[10] and the right against unreasonable searches and seizures.[11] Ratified in the period following the Civil War, the Thirteenth through Fifteenth Amendments or the Reconstruction Amendments[12] accomplish several objectives, including abolishing slavery,[13] prohibiting states from denying equal protection or due process of the law to any person,[14] and protecting certain voting rights.[15] The remaining amendments vary greatly in subject matter, addressing such diverse issues as selecting a President;[16] the income tax;[17] the manufacturing, sale, and transportation of intoxicating liquors;[18] voting rights;[19] and compensating Members of Congress.[20]

While much of the Constitution consists of a general framework for the federal government's form and functions,[21] a central, and perhaps counterintuitive, purpose of the Constitution is to *restrain* the government, by, among other things, immunizing certain values and principles from government interference.[22] Moreover, as Chief Justice John Marshall wrote in *Marbury v. Madison*, the Constitution is fundamentally "a superior, paramount law" that is "unchangeable by ordinary means."[23] In fact, changing the Constitution requires that either two-thirds of both houses of Congress or two-thirds of the states represented at a constitutional convention propose a constitutional amendment, which must then be ratified by three-fourths of the states to take effect.[24] As Justice Antonin Scalia noted in a 2013 interview, it is difficult to amend the Constitution,[25] which was a deliberate choice by the Framers to

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[8] *See id.* art. VI.

[9] *See id.* art. VII.

[10] *See id.* amend. I.

[11] *See id.* amend. IV.

[12] *See* Kathleen M. Sullivan & Noah Feldman, Constitutional Law 441 (19th ed. 2016).

[13] *See* U.S. Const. amend. XIII.

[14] *See id.* amend. XIV.

[15] *See id.* amend. XV.

[16] *See id.* amends. XII, XX, XXII, XXV.

[17] *See id.* amend. XVI.

[18] *See id.* amends. XVIII, XXI. The Twenty-First Amendment to the Constitution repealed the Eighteenth Amendment, which established a nationwide prohibition on the manufacture, sale, and transportation of alcoholic beverages.

[19] *See id.* amends. XIX, XXIV, XXVI.

[20] *See id.* amend. XXVII.

[21] *See* Jack M. Balkin, Constitutional Redemption 239 (2011) (noting that the Constitution serves a function as a "basic law" or "framework for governance that allocates powers and responsibilities").

[22] *See* Laurence H. Tribe, American Constitutional Law 10 (3d ed. 2000).

[23] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[24] *See* U.S. Const. art. V. Article V provides two means to ratify an amendment to the Constitution: approval of three-quarters of the state legislatures or three-quarters of the state ratifying conventions. The Article V convention mechanism for proposing amendments to the Constitution has never been used. *See* Michael Stokes Paulsen, *The Federalist Society National Lawyers Convention—2010: How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention*, 34 Harv. J.L. & Pub. Pol'y 837, 837–38 (2011) ("[T]he convention route [has] never successfully been employed.").

[25] Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. Mag. (Oct. 4, 2013), http://nymag.com/news/features/antonin-scalia-2013-10/index1.html ("I think if you picked the smallest number necessary for a majority in the least populous states, something like less than 2 percent of the population can prevent a constitutional amendment."). *See also* Erwin Chemerinsky, Constitutional Law: Principles and Policies 7 (4th ed. 2011) ("[A] defining characteristic of the American Constitution is that it is very difficult to alter.").

preserve certain fundamental and cherished rights from majoritarian whims.[26] In this vein, the Constitution is often described as a "higher law"[27] that enumerates the Nation's basic values.[28]

Given this underlying purpose of the Constitution, this introductory essay examines two fundamental questions, with which the Supreme Court, scholars, and other constitutional actors perennially wrestle: (1) what are the Nation's basic values that the Constitution protects; and (2) who should serve as the final interpreter of the Constitution.[29] While neither question has any firm or definite answers, debates over the Constitution, both on and off the Court, often touch on these two fundamental issues.

With regard to the first question, the *Constitution Annotated* details the unique history of each provision of the Constitution and how it has been understood.[30] A constitution, by its very nature, ideally has "an inner unity" and "reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate."[31] And, indeed, the Constitution of the United States broadly embraces three interrelated but distinct concepts that define American democracy. First, separation, or division, of power among the three branches of government[32] underlies many of the Constitution's provisions and reflects the Framers' views that the Federal Government's power should be limited and diffused among the three branches.[33] Second, the Constitution is also undergirded by the related, but distinct concept of federalism, which is the allocation of power between the national and state governments,[34] with the Federal Government having limited powers and the states retaining a general police power.[35] Third, the Constitution protects certain individual rights from government interference.[36]

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[26] Chemerinsky, *supra* note 25; *see also* Tribe, *supra* note 22, at 10.

[27] *See Marbury*, 5 U.S. (1 Cranch) at 180 ("[I]n declaring what shall be the supreme law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank. Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument."). *See also* Cooper v. Aaron, 358 U.S. 1, 16–17 (1958) ("Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.'").

[28] *See, e.g.*, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 789 (1986) (White, J., dissenting) ("The Constitution . . . is a document announcing fundamental principles in value-laden terms . . . .").

[29] A third fundamental question of constitutional law—*how* to decide what values the Constitution protects—is the subject of the introductory essay that follows. *See* Modes of Constitutional Interpretation (forthcoming on the *Constitution Annotated* online).

[30] Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570–77 (1840) (plurality opinion) ("In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added."); *Marbury*, 5 U.S. (1 Cranch) at 174 ("It cannot be presumed that any clause in the constitution is intended to be without effect . . . .").

[31] *See* Southwest State Case, [1951] BVerfGE 1, 14 (Ger.), *translated in* Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 62, 63 (2d ed. 1997).

[32] *See* Black's Law Dictionary 1572 (10th ed. 2014) (defining "separation of powers" as the "division of governmental authority into three branches of government—legislative, executive, and judicial—each with specified duties on which neither of the other branches can encroach.").

[33] *See* The Federalist No. 47 (James Madison) (explaining that "the preservation of liberty" requires that the "three great departments of power should be separate and distinct.").

[34] *See* Black's Law Dictionary 729 (10th ed. 2014) (defining "federalism" as "[t]he legal relationship and distribution of power between the national and regional governments within a federal system of government, and in the United States particularly, between the federal government and the state governments").

[35] *See* The Federalist No. 45 (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

[36] *See* Black's Law Dictionary 1517 (10th ed. 2014) (defining an "individual right" as an "absolute right" or "right that belongs to every human being, such as the right of personal liberty; a natural right").

With respect to the second question—whose interpretation of the Constitution is dispositive—the answer has been elaborated upon and debated throughout the Nation's history.[37] For instance, one view, which Thomas Jefferson, among others, espoused, is that each branch of government should interpret the Constitution with respect to itself.[38] By contrast, under the "judicial supremacy" view, which the Supreme Court has adopted at times, the Supreme Court is the exclusive and final interpreter of the Constitution.[39] Finally, the "popular constitutionalist" view holds that people and institutions outside of the Judicial Branch should play a larger role in interpreting the Constitution.[40]

How these fundamental questions of constitutional law are answered inform many of the constitutional interpretations discussed in the *Constitution Annotated*. This essay, while not attempting to provide definitive answers to the two questions, provides a brief overview of two cross-cutting issues that form the basis for modern constitutional law and introduces the discussions that follow in the *Constitution Annotated*.

Intro.7.2 Separation of Powers Under the Constitution

A well-known concept derived from the text and structure of the Constitution is the doctrine of what is commonly called separation of powers. The Framers' experience with the British monarchy informed their belief that concentrating distinct governmental powers in a single entity would subject the nation's people to arbitrary and oppressive government action.[1] Thus, in order to preserve individual liberty, the Framers sought to ensure that a separate and independent branch of the Federal Government would exercise each of government's three basic functions: legislative, executive, and judicial.[2] While the text of the Constitution does not expressly refer to "the doctrine of separation of powers," the Nation's Founding document divides governmental power among three branches by vesting the Legislative Power of the

[37] *See* Chemerinsky, *supra* note 25, at 27–29.

[38] *See, e.g.*, Letter from Thomas Jefferson to Judge Spencer Roane Poplar Forest, Univ. of Groningen: Am. History From Revolution to Reconstruction & Beyond (Sept. 6, 1819), http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl257.php ("[E]ach of the three departments has equally the right to decide for itself what is its duty under the Constitution, without any regard to what the others may have decided for themselves under a similar question.").

[39] *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 16–17 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and [this] principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").

[40] *See* Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 8 (2004) ("Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution. Final interpretive authority rested with 'the people themselves,' and courts no less than elected representatives were subordinate to their judgments."); *see generally* Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 Geo. L.J. 897, 898–99 (2005) (describing a "growing body of scholarship" discussing the concept of "popular constitutionalism," the idea that "the People and their elected representatives should—and often do—play a substantial role in the creation, interpretation, evolution, and enforcement of constitutional norms.").

[1] The Federalist No. 48 (James Madison) ("[T]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

[2] *See id.* No. 47 (James Madison) (explaining that "the preservation of liberty" requires that the "three great departments of power should be separate and distinct").

Federal Government in Congress;[3] the Executive Power in the President;[4] and the Judicial Power in the Supreme Court and any lower courts created by Congress.[5]

Although the Framers of the Constitution allocated each of these core functions to a distinct branch of government, the design of the Constitution contemplates some overlap in the branches' performance of government functions.[6] In particular, the Framers favored an approach that seeks to maintain some independence for each branch while promoting a workable government through the interdependence and sharing of power among the branches.[7] Moreover, to address concerns that one branch would aggrandize its power by attempting to exercise powers assigned to another branch, the Framers incorporated various checks that each branch could exercise against the actions of the other two branches to resist such encroachments.[8] For example, the President has the power to veto legislation passed by Congress, but Congress may overrule such vetoes by a supermajority vote of both houses.[9] And Congress has the power to impeach and remove the President, Vice President, and civil officers of the United States.[10]

Over the course of our history, the Supreme Court has elaborated on the separation-of-powers doctrine in several cases addressing the three branches of government. At times, the Court has determined that one branch's actions have infringed upon the core functions of another. For instance, the Court has held that Congress may not encroach upon the President's power by exercising an effective veto power over the President's removal of an Executive officer.[11] Furthermore, the President may not, by issuing an executive order, usurp the lawmaking powers of Congress.[12] The Supreme Court has also raised concerns about the judiciary encroaching on the legislative or executive spheres where a litigant asks the courts to recognize an implied cause of action,[13] or to vindicate the rights of the public at large rather

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[3] U.S. Const. art. I, § 1.

[4] *Id.* art. II, § 1.

[5] *Id.* art. III, § 1. *See also* Black's Law Dictionary 1572 (10th ed. 2014) (defining "separation of powers" as the "division of governmental authority into three branches of government—legislative, executive, and judicial—each with specified duties on which neither of the other branches can encroach").

[6] Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam) ("[A] hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."); Youngtown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("[W]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

[7] *See supra* note 6.

[8] The Federalist No. 51 (James Madison) ("But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition."); *id.* No. 48 (James Madison) ("The conclusion which I am warranted in drawing from these observations is, that a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."). *See generally Buckley*, 424 U.S. at 122 ("The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."); Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.").

[9] U.S. Const. art. I, § 7, cl. 3.

[10] *Id.* art. II, § 4.

[11] *Myers*, 272 U.S. at 161.

[12] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

[13] *See* Ziglar v. Abbasi, No. 15-1358, slip op. at 12 (U.S. June 19, 2017) (stating that when a party "seeks to assert an implied cause of action" under either the Constitution or a federal statute, "separation-of-powers principles are or

than those of a specific individual in a case properly before the court.[14] When ruling on whether one branch has usurped the authority of another in separation-of-powers cases, the Court has sometimes adopted a *formalist* approach to constitutional interpretation, which closely adheres to the structural divisions in the Constitution[15] and, at other times, has embraced a *functionalist* approach, which examines the core functions of each of the branches and asks whether an overlap in these functions upsets the equilibrium that the Framers sought to maintain.[16]

As discussed in the *Constitution Annotated*, the Court's decisions in separation-of-powers cases often—but not exclusively—address the relationships that the first three Articles of the Constitution establish among the branches of government. Some key constitutional provisions that have served as sources of modern separation-of-powers disputes include Article I, Section 7, which requires, among other things, that legislation passed by Congress be presented to the President for his signature or veto before it can become law;[17] Article II's Vesting Clause, which states that the "executive power shall be vested in a President of the United States of America;"[18] Article II's Appointments Clause, which addresses the respective roles of the President and Congress in the appointment of federal officials;[19] Article III's Vesting Clause, which states that "[t]he 'judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . .'";[20] and Article III, Section 2's Case or Controversy Clause, which limits the jurisdiction of the federal courts.[21]

In addition to the first three Articles, other provisions of the Constitution implicate the separation-of-powers doctrine. For example, the Supreme Court in *Marbury v. Madison*

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should be central to the analysis," and that Congress, not the courts, "most often" is the appropriate branch to decide whether to provide for a private remedy); Nestlé USA, Inc. v. Doe, Nos. 19-416, 19-453, slip op. at 7 (U.S. Jun. 17, 2021) (plurality opinion) (describing "judicial creation of a cause of action" as "an extraordinary act that places great stress on the separation of powers"). *Cf.* Tanzin v. Tanvir, No. 19-71, slip op. at 8 (U.S. Dec. 10, 2020) (stating that "separation-of-powers concerns" did not bar personal money damages against federal officials under a particular statute because "damages against government officials" have "coexisted with our constitutional system since the dawn of the Republic"). *See also* ArtIII.S2.C1.11.1 Overview of Federal Question Jurisdiction.

[14] Lujan v. Defenders of Wildlife, 504 U.S. 555, 576–77 (1992).

[15] Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 Cornell L. Rev. 488, 489 (1987) ("The Supreme Court has vacillated over the years between using a formalistic approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government (and consequently appearing to draw rather sharp boundaries), and a functional approach that stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened.").

[16] *Id.*

[17] *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 439–40 (1998) (striking down the Line Item Veto Act, which authorized the President, within five days of signing a bill into law, to make partial cancellation of certain tax and spending provisions in the law if the President determined certain criteria were met, as violating the bicameralism and presentment requirements of Article I, Section 7, Clauses 2–3 of the Constitution).

[18] *See, e.g.*, Zivotofsky v. Kerry, 576 U.S. 1, 33 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part) ("[The Constitution] vests the residual foreign affairs powers of the Federal Government—i.e., those not specifically enumerated in the Constitution—in the President by way of Article II's Vesting Clause."); Myers v. United States, 272 U.S. 52, 161 (1926) (holding that Congress cannot veto the President's removal of an Executive officer).

[19] *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 660 (1988) (holding that the Ethics in Government Act of 1978, which allowed for the appointment of an "independent counsel" by a special panel of a federal court to investigate potential violations of criminal laws by federal officials, did not violate the Appointments Clause).

[20] *See, e.g.*, Miller v. French, 530 U.S. 327, 341–50 (2000) (holding that a provision in the Prison Litigation Reform Act of 1995 providing for an "automatic stay" of court orders enjoining unlawful prison conditions did not violate the separation-of-powers doctrine by infringing upon the judiciary's Article III powers).

[21] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by [Article III, Section 2 of] the constitution . . .").

interpreted Article VI's establishment of the Constitution as being superior to other federal law to forbid Congress from exercising its legislative power in a manner inconsistent with the Nation's Founding document by enlarging the original jurisdiction of the Supreme Court beyond the boundaries established in Article III.[22] And the amendments to the Constitution also set forth some important structural features of the separation of powers. For instance, the Twelfth Amendment establishes the process for choosing the President and Vice President, specifically delineating the functions of both houses of Congress in counting and certifying the votes for President and the role of the House of Representatives in choosing a President when no candidate has attained a majority of electoral votes.[23]

Intro.7.3 Federalism and the Constitution

Another basic concept embodied in the Constitution is federalism, which refers to the division and sharing of power between the national and state governments.[1] By allocating power among state and federal governments, the Framers sought to establish a unified national government of limited powers while maintaining a distinct sphere of autonomy in which state governments could exercise a general police power.[2] Although the Framers' sought to preserve liberty by diffusing power,[3] Justices and scholars have noted that federalism has other advantages,[4] including that it allows individual states to experiment with novel government programs as "laboratories of democracy"[5] and increases the accountability of elected government officials to citizens.[6]

Although the text of the Constitution does not clearly delineate many of the boundaries between the powers of the federal and state governments, the Supreme Court has frequently

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[22] *Id.* at 180 ("[I]n declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank. Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument."). *See also* U.S. Const. art. VI.

[23] U.S. Const. amend. XII ("The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.").

[1] *See* Bond v. United States, 572 U.S. 844, 857–58 (2014) ("Among the background principles . . . that our cases have recognized are those grounded in the relationship between the Federal Government and the States under our Constitution.").

[2] The Federalist No. 45 (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."). *See also* United States v. Morrison, 529 U.S. 598, 618 (2000) ("Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.").

[3] Bond v. United States, 564 U.S. 211, 222 (2011) ("By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake."); United States v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) ("Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.").

[4] *See generally* Erwin Chemerinsky, Constitutional Law: Principles and Policies 127 (4th ed. 2011).

[5] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[6] *See* FTC v. Ticor Title Ins. Co., 504 U.S. 621, 636 (1992) ("Federalism serves to assign political responsibility, not to obscure it."); *see also* Lopez, 514 U.S. at 576 (Kennedy, J., concurring) ("The theory that two governments *accord* more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States.").

invoked certain constitutional provisions when determining that Congress has exceeded its constitutional powers and infringed upon state sovereignty.[7] One well-known provision, regarded by the Court as both a shield and sword to thwart federal encroachment, is the Tenth Amendment, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In modern times, the Court has vacillated[8] between the view that the Tenth Amendment operates to restrict Congress's power[9] and the view that the amendment is a mere "truism"[10] that cannot be used to strike down federal statutes.[11] Other notable provisions addressing Congress's power relative to the states that the Court has debated include the Supremacy Clause in Article VI, which establishes federal law as superior to state law;[12] the Commerce Clause in Article I, Section 8, Clause 3, which grants Congress the authority to legislate on matters concerning interstate commerce;[13] and Section 5 of the Fourteenth Amendment, which grants Congress the power to enforce that Amendment's guarantees against the states through the enactment of appropriate legislation.[14] More broadly, federalism principles also undergird many Supreme Court decisions interpreting individual rights and the extent to which the Court should federalize, for example, the rights afforded to

[7] *Cf.* Chemerinsky, *supra* note 4, at 115 ("A basic principle of American government is that Congress may act only if there is express or implied authority in the Constitution, whereas states may act unless the Constitution prohibits the action.").

[8] *Id.* at 3 ("Early in [the 20th] century, the Court aggressively used the Tenth Amendment as a limit on Congress's power. After 1937, the Court rejected this view and did not *see* the Tenth Amendment as a basis for declaring federal laws unconstitutional. In the 1990s, however, the Tenth Amendment was once more used by the Supreme Court to invalidate federal statutes.").

[9] *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 273–74 (1918) ("The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture. The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution."), *overruled*, United States v. Darby, 312 U.S. 100 (1941); Nat'l League of Cities v. Usery, 426 U.S. 833, 851–52 (1976) (holding that Congress's Commerce Clause power did not extend to regulation of wages, hours, and benefits of state employees because the Tenth Amendment reserves that area to the states), *overruled*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); NFIB v. Sebelius, 567 U.S. 519, 588 (2012) ("Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer.").

[10] *Darby*, 312 U.S. at 124 ("The amendment states but a truism that all is retained which has not been surrendered.").

[11] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) (upholding the National Labor Relations Act of 1935 as a proper exercise of Congress's Commerce Clause power and consistent with the Tenth Amendment); *Darby*, 312 U.S. at 123–24 ("The [Tenth Amendment] states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers."); *San Antonio Metro. Transit Auth.*, 469 U.S. at 556–57 (holding that Congress's Commerce Clause power extended to regulation of wages and hours of state and local employees and declaring that the Court's decision in *Nat'l League of Cities v. Usery* "underestimated, in [the Court's] view, the solicitude of the national political process for the continued vitality of the States").

[12] *See generally* Gregory E. Maggs & Peter J. Smith, Constitutional Law: A Contemporary Approach 246 (2d ed. 2011) (noting the doctrine of federal preemption, which is based on the Supremacy Clause, is the "most common constitutional ground upon which state laws are judicially invalidated").

[13] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 551 (1995) (holding that Congress had exceeded its Commerce Clause power when it enacted a law criminalizing possession of a firearm near a school).

[14] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997) (holding that the scope of Congress's enforcement power under Section 5 of the Fourteenth Amendment did not grant Congress the power to invade the sovereign rights of the states), *superseded on other grounds by statute as stated in* Holt v. Hobbs, 574 U.S. 352 (2015).

state criminal defendants.[15] But judges and scholars disagree on how basic principles of federalism should be realized, and a key point of controversy is whether the judiciary should enforce the interests of the states against the Federal Government or leave the resolution of such key questions about the relationship between federal and state power to the political process.[16]

Intro.7.4 Individual Rights and the Constitution

Another important area of constitutional law is individual rights that should be protected from government interference. While the Constitution limits and diffuses powers of the federal and state governments to check government power, it also expressly protects certain rights and liberties for individuals from government interference.[1] Most of these individual rights are found in the Bill of Rights, including the First Amendment's prohibition on congressional enactments that abridge the freedom of speech[2] and the Second Amendment's right to keep and bear arms.[3] Other rights, however, reside elsewhere in the Constitution, such as Article III's right to trial by jury in criminal cases[4] and the protections found in the Civil War Era Amendments, such as the Fourteenth Amendment's Due Process and Equal Protection Clauses.[5] Many of the individual rights protected by the Constitution relate to criminal procedure, such as the Fourth Amendment's prohibition against unreasonable governmental searches and seizures;[6] the Fifth Amendment's right against self-incrimination;[7] and the Sixth Amendment's right to trial by jury.[8] While the text of the Constitution specifically enumerates

[15] *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 726 (1991) ("This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus."); Spencer v. Texas, 385 U.S. 554, 563–64 (1967) ("Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial . . . But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.") (internal citations omitted).

[16] *E.g.*, Gonzales v. Raich, 545 U.S. 1, 33 (2005) (upholding Congress's regulation of intrastate cultivation and possession of marijuana for medical use as a proper exercise of its Commerce Clause power and stating that "more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress"). Scholars have also considered this question. *See generally* Jesse H. Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1557 (1977) ("[T]he federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-a-vis the states; the constitutional issue whether federal action is beyond the authority of the central government and thus violates 'states rights' should be treated as nonjusticiable, with final resolution left to the political branches.").

[1] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 10 (3d ed. 2000).

[2] U.S. CONST. amend. I.

[3] *Id.* amend. II.

[4] *Id.* art. III, § 2, cl. 3.

[5] *E.g.*, *id.* amend. XIV, § 1.

[6] *See, e.g.*, *id.* amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[7] *See, e.g.*, *id.* amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . .").

[8] *See, e.g.*, *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

many individual rights,[9] other rights are anchored in the Court's interpretations of broadly worded guarantees in the founding document.[10]

During the twentieth and twenty-first centuries, the Court's constitutional jurisprudence on individual rights focused on how the Fourteenth Amendment's Due Process Clause protects certain fundamental constitutional rights found in the Bill of Rights from state government interference.[11] Although the Civil War Era Amendments have served as the textual basis for the Court's decisions protecting these rights from state interference, the Court did not recognize that much of the Bill of Rights was applicable to the states until the mid-twentieth century.[12]

Intro.7.5 Interpreters of the Constitution

Another fundamental question of constitutional law is who should definitively interpret the meaning of the Constitution, including its basic values and the rights it protects. This key debate remains unresolved. One view, espoused by Thomas Jefferson, among others, is that each of the three branches of government may interpret the Constitution when it relates to the performance of the branch's own functions.[1] And this view appears to have been popular in Congress during the early days of the United States, as shown by the amount of time that Members of Congress devoted to "debating the constitutional limitations on" legislation during the first 100 years of the Nation.[2] Similarly, when he vetoed the reauthorization of the Bank of the United States, President Andrew Jackson argued that the President was the final interpreter of the Constitution for executive functions. Dismissing the Supreme Court's 1819 decision in *McCulloch v. Maryland*, which upheld the constitutionality of the Bank,[3] Jackson contended that "the opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of

[9] *See, e.g.*, *id.* amend. V ("[N]or shall private property be taken for public use, without just compensation."); *id.* art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

[10] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015) ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry.").

[11] *See generally* McDonald v. Chicago, 561 U.S. 742, 764–65 (2010) (noting that, during the 1960s, the Court "shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause. The Court eventually incorporated almost all of the provisions of the Bill of Rights. Only a handful of the Bill of Rights protections remain unincorporated."); *see, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 161–62 (1968) (holding that the Due Process Clause of the Fourteenth Amendment incorporates the Sixth Amendment right to trial by jury and makes it applicable to the states).

[12] *See McDonald*, 561 U.S. at 764–65.

[1] Letter from Thomas Jefferson to Judge Spencer Roane Poplar Forest, Univ. of Groningen: Am. History From Revolution to Reconstruction & Beyond (Sept. 6, 1819), http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl257.php. In a speech opposing the Supreme Court's decision in *Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857), Abraham Lincoln argued that officers of each branch of the Federal Government could disregard the Supreme Court's interpretations of the Constitution when performing their own constitutional functions. In particular, he cited President Andrew Jackson's veto of Congress's rechartering of the Second Bank of the United States following the Supreme Court's decision in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819), which upheld the constitutionality of the bank. Abraham Lincoln, *Speech on the Dred Scott Decision in Springfield, Illinois* (June 26, 1857), *in* The Life and Writings of Abraham Lincoln 418 (Philip Van Doren Stern ed., 2000).

For more on interpretations of the Constitution that occur outside of the courts, *see* Intro.4.5 Non-Judicial Sources of Constitutional Meaning.

[2] *See* Russ Feingold, *The Obligation of Members of Congress to Consider Constitutionality While Deliberating and Voting: The Deficiencies of House Rule XII and A Proposed Rule for the Senate*, 67 Vand. L. Rev. 837, 846–49 (2014); *see generally* David P. Currie, The Constitution in Congress 120 nn. 25–27 (1997) (cataloging various constitutional debates during early Congresses).

[3] 17 U.S. (4 Wheat.) 316 (1819).

both."[4] With regard to the judiciary, in *Marbury v. Madison*, the Supreme Court, early in the history of the United States, famously asserted its authority to interpret the Constitution when reviewing the constitutionality of governmental action in a case or controversy properly before the Court.[5]

The view that each branch of government has the power to interpret the Constitution when performing its own functions also has force when the Court avoids ruling on political questions or deciding cases in which litigants seek to vindicate the rights of the public at large, thereby preserving a role for the political branches in answering many important constitutional questions.[6] For example, in *Nixon v. United States*, the Court held that the Constitution gave the Senate alone the power to determine whether it had properly "tried" an impeachment.[7] And the Court may not have the last word on other issues, such as the existence of a national bank, because other constitutional actors (e.g., the President) may play a decisive role by exercising their own constitutional powers.[8] As a result, Congress and the President each interpret the Constitution independent of the Judiciary in some circumstances.[9] This is reflected in the practices of the political branches, such as the President's use of the veto power; Congress's exercise of the power to impeach and remove government officials; or the President's use of military force.[10] Accordingly, somewhere between the judicial supremacy view and popular constitutionalism view is a view that recognizes that the authoritative interpreter of the Constitution may depend on the particular provision of the Constitution at issue.

In the mid-twentieth century, however, the Supreme Court began articulating a theory of judicial supremacy, wherein the Court no longer shared its role in interpreting the Constitution with the other branches of the Federal Government, but rather characterized its role as being the preeminent arbiter of the Constitution's meaning. For example, in *Cooper v. Aaron*, the Court read *Marbury v. Madison* as "declar[ing] the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and [this] principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."[11] In other words, the *Cooper* Court concluded that the Supreme Court's interpretations of the Constitution was "the supreme law of the land,"[12] with constitutional interpretations by other actors, including Congress and the President, necessarily lacking the same force.[13] Supporters of the judicial supremacy view assert that it

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[4] *See* Andrew Jackson, Veto Message, Avalon Project, Yale L. Sch. (July 10, 1832), http://avalon.law.yale.edu/19th_century/ajveto01.asp.

[5] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

[6] *E.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring) ("A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. . . . And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.").

[7] 506 U.S. 224, 228–29 (1993).

[8] *See supra* notes 3–4 and accompanying text (recounting President Andrew Jackson's veto of Congress's reauthorization of the Second Bank of the United States).

[9] *See generally* Michael J. Gerhardt, *The Constitution Outside the Courts*, 51 Drake L. Rev. 775, 780 (2003).

[10] *See id.*

[11] Cooper v. Aaron, 358 U.S. 1, 18 (1958).

[12] *Id.*

[13] The Court has, at times, grounded this principle in the concern that if each branch were the "final judge of its own power under the Constitution," such a system would run contrary to notions of a limited and checked government. Baltimore & O R. Co. v. United States, 298 U.S. 349, 364 (1936).

promotes stability and uniformity in constitutional interpretation,[14] as well as preserves constitutional norms from majoritarian pressures.[15] Subsequent actions by the President and Congress support the notion that the political branches have, at times, acquiesced in this view,[16] resulting in the popular notion that the Judiciary is the "'ultimate expositor' of the constitutional meaning."[17]

The judicial supremacy view remains subject to debate, however. In recent decades, a number of legal scholars and government officials have criticized the judicial supremacy view,[18] arguing that entrusting the Judiciary with exclusive power over the Constitution's ultimate meaning preserves the most momentous decisions affecting the country for an unelected and unrepresentative judiciary, preventing the democratic branches from acting on behalf of their constituents.[19] Instead, a growing number of scholars have argued that people and institutions outside of the Judicial Branch should play a larger role in interpreting the Constitution.[20] Their view posits that Congress, the Executive, and even ordinary citizens maintain independent and coordinate authority to interpret the Constitution.[21] Ultimately, some scholars who do not accept judicial supremacy argue that because the Constitution expresses the fundamental values of the American people as a nation, it is essential to a

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[14] *See* Larry B. Alexander & Frederick F. Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359, 1369–81 (1997) (defending judicial supremacy because finality in constitutional interpretation provides stability and coordination in a constitutional democracy).

[15] *See* Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 Calif. L. Rev. 1013, 1018–24 (2004) (arguing for judicial supremacy because of concerns that a majoritarian Congress might interpret the Constitution in such a way as to not adequately protect minority rights).

[16] *See generally* Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 Ga. L. Rev. 57, 85 (1986) ("By the second half of the twentieth century, both the House and the Senate had abandoned the tradition of deliberating over ordinary constitutional issues."); Feingold, *supra* note 2, at 849–50 (noting the decline of constitutional interpretation by Members of Congress following Cooper v. Aaron and the "rise of judicial supremacy"); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. 217, 224 (1994) ("[T]he greater problem today is not the too-forceful exercise of presidential power to interpret law, but the too-feeble acquiescence of the executive branch in the courts' assertion of dominant interpretive power.").

[17] *See* Alon Harel & Adam Shinar, *Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review*, 10 Int'l J. Const. L. 950, 953 (2012) ("For many years, there has been basically one idea undergirding the practice of judicial review—American style judicial review, (now) also known as strong judicial review. Under that view, the judiciary is the 'ultimate expositor' of constitutional meaning, having the final say over constitutional interpretation.").

[18] *See, e.g.*, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L. J. 1346, 1349–50 (2006) (describing the claim that "legislators are incapable of addressing" the meaning of the Constitution as "nonsense"); Mark V. Tushnet, Taking the Constitution Away From the Courts 154–76 (1999) (arguing for the abolishment of judicial review in favor of popular constitutionalism); Robert H. Bork, Slouching Towards Gomorrah: Modern Liberalism and American Decline 321 (1996) (urging Americans to "*see* the judiciary for what it is, an organ of power without legitimacy either in democratic theory or in the Constitution" and advocating for passage of a constitutional amendment allowing the political branches to override judicial decisions).

[19] *See* Waldron, *supra* note 18, at 1353 ("By privileging majority voting among a small number of unelected and unaccountable judges, [judicial review] disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.").

[20] *See* Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 8 (2004) ("Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution. Final interpretive authority rested with 'the people themselves,' and courts no less than elected representatives were subordinate to their judgments."); *see generally* Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 Geo. L.J. 897, 898–99 (2005) (describing a "growing body of scholarship" discussing the concept of "popular constitutionalism," the idea that "the People and their elected representatives should—and often do—play a substantial role in the creation, interpretation, evolution, and enforcement of constitutional norms").

[21] *See* Edwin M. Meese III, *The Law of the Constitution*, 61 Tul. L. Rev. 979, 985–86 (1987) ("The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative no less than the judicial—has a duty to interpret the Constitution in the performance of its official functions."); Kramer, *supra* note 20, at 8.

democracy that the political branches and the public have a central role in exploring constitutional meanings.[22] While no member of the Court has ever embraced wholly abandoning the Judiciary's central role in constitutional interpretation, the view that the Court should play a more restrained role because of the "countermajoritarian difficulty"[23] that arises when an unelected judiciary overrides the decisions of a popularly elected Executive or legislature has been repeatedly argued by Justices on the modern Court.[24]

Related to the questions discussed above is the question of how to interpret the Constitution. That issue is the subject of the *Constitution Annotated* essays on ways to interpret the Constitution.[25]

Intro.8 Ways to Interpret the Constitution

Intro.8.1 Interpreting the Constitution Generally

Early in the history of the United States, the Supreme Court began to exercise the power that it is most closely and famously associated with—its authority of judicial review. In its 1803 decision in *Marbury v. Madison*,[1] the Supreme Court famously asserted and explained the foundations of its power to review the constitutionality of federal governmental action.[2] During the two decades following its holding in *Marbury*, the Court decided additional cases that helped to establish its power to review the constitutionality of state governmental action.[3] If a challenged governmental action is unconstitutional, the Court may strike it down, rendering it invalid.[4] When performing the function of judicial review,[5] the Court must necessarily ascertain the meaning of a given provision within the Constitution, often for the first time, before applying its interpretation of the Constitution to the particular governmental action under review.

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[22] *See* Mark V. Tushnet, *Popular Constitutionalism as Political Law*, 81 Chi.-Kent L. Rev. 991, 992–93 (2006).

[23] Professor Alexander Bickel coined the phrase "countermajoritarian difficulty" to describe the conflict that results when a court "declares unconstitutional a legislative act or the action of an elected executive" and "thwarts" the enforcement of an act that presumably reflects the will of the voters. *See* Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16–17 (1962).

[24] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) ("The majority's decision is an act of will, not legal judgment . . . [T]he Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?"); United States v. Windsor, 570 U.S. 744, 778 (2013) (Scalia, J., dissenting) ("This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former."); Citizens United v. FEC, 558 U.S. 310, 479 (2010) (Stevens, J., dissenting) ("In a democratic society, the long-standing consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules."); District of Columbia v. Heller, 554 U.S. 570, 680 n.39 (2008) (Stevens, J., dissenting) ("What impact the Court's unjustified entry into this thicket will have on that ongoing debate—or indeed on the Court itself—is a matter that future historians will no doubt discuss at length. It is, however, clear to me that adherence to a policy of judicial restraint would be far wiser than the bold decision announced today.").

[25] Intro.8.1 Interpreting the Constitution Generally to Intro.8.9 Historical Practices and Constitutional Interpretation.

[1] 5 U.S. (1 Cranch) 137 (1803).

[2] *Id.* at 180.

[3] *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 430 (1821); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 362 (1816); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810).

[4] *Id.* The Court first struck down an action of the Executive Branch of the Federal Government as unconstitutional in *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–79 (1804). The Court first struck down a state law as unconstitutional in *Fletcher v. Peck*. *See* 10 U.S. at 139.

[5] The term "judicial review" refers to "a court's power to review the actions of other branches or levels of government [, and especially] the courts' power to invalidate legislative and executive actions as being unconstitutional." Black's Law Dictionary 976 (10th ed. 2014).

The need to determine the meaning of the Constitution through the use of methods of constitutional interpretation and, perhaps, construction,[6] is apparent from the text of the document itself.[7] While several parts of the Constitution do not lend themselves to much debate about their preferred interpretation,[8] much of the Constitution is broadly worded, leaving ample room for the Court to interpret its provisions before it applies them to particular legal and factual circumstances.[9] For example, the Second Amendment reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."[10] The text of the Amendment alone does not squarely resolve whether the "right of the people to keep and bear [a]rms" extends to all citizens or merely is related to, or perhaps conditioned on, service in a militia. This ambiguity prompted a closely divided 2008 decision of the Supreme Court that ruled in favor of the former interpretation.[11]

The text of the Constitution is also silent on many fundamental questions of constitutional law, including questions that its drafters and those ratifying the document could not have foreseen or chose not to address.[12] For example, the Fourth Amendment, ratified in 1791, does not on its face resolve whether the government may perform a search of the digital contents of a cellphone seized incident to arrest without obtaining a warrant.[13] Thus, interpretation is necessary to determine the meaning of ambiguous provisions of the Constitution or to answer fundamental questions left unaddressed by the drafters. Some commentators have also noted the practical need for constitutional interpretation to provide principles, rules, or standards to govern future conduct of regulated parties, as well as political institutions, branches of government, and regulators.[14]

When deriving meaning from the text of the Constitution, the Court has relied on certain "methods" or "modes" of interpretation—that is, ways of figuring out a particular meaning of a provision within the Constitution.[15] There is significant debate over which sources and methods of construction the Court should consult when interpreting the Constitution—a controversy closely related to more general disputes about whether and how the Court should exercise the power of judicial review.

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[6] Professor Keith Whittington has distinguished between the concepts of "constitutional interpretation" and "constitutional construction." In an influential book on the subject, he wrote that both interpretation and construction of the Constitution "seek to elaborate a meaning somehow already present in the text." However, constitutional interpretation relies on traditional legal tools that look to internal aspects of the Constitution (e.g., text and structure) to ascertain meaning, whereas constitutional construction supplements the meaning derived from such traditional interpretive methods with materials outside of the text (e.g., moral principles or pragmatic considerations) "where the text is so broad or so undetermined as to be incapable of faithful but exhaustive reduction to legal rules." Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning 1, 5–7 (1999).

[7] Erwin Chemerinsky, Constitutional Law 11 (4th ed. 2013).

[8] For example, the Constitution provides a clear, bright-line rule that individuals who have not yet "attained to the Age of thirty five Years" are ineligible to be President. *See* U.S. Const. art. II, § 1, cl. 5.

[9] Chemerinsky, *supra* note 7, at 11; Cass R. Sunstein, The Partial Constitution 93–94 (1993).

[10] U.S. Const. amend. II.

[11] *See* District of Columbia v. Heller, 554 U.S. 570, 573–619, 635–36 (2008) (examining historical sources to determine the original meaning of the Second Amendment).

[12] Laurence H. Tribe, The Invisible Constitution 1–4 (Geoffrey R. Stone ed., 2008).

[13] The Court resolved this question in *Riley v. California*, holding that a warrant is needed to search the contents of a cellphone incident to an individual's arrest. *See* 573 U.S. 373, 104–03 (2014).

[14] Harry H. Wellington, Interpreting the Constitution: The Supreme Court and the Process of Adjudication 3 (1990).

[15] Professor Philip Bobbitt defines a modality for interpreting the Constitution as "the way in which we characterize a form of expression as true." Philip Bobbitt, Constitutional Interpretation 11 (1991). *See also* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. Rev. 570, 592 (2001) ("The power to say what the Constitution means or requires—recognized since Marbury v. Madison—implies a power to determine the sources of authority on which constitutional rulings properly rest.") (footnote omitted).

Intro.8.1
Interpreting the Constitution Generally

Judicial review at the Supreme Court, by its very nature, can involve unelected judges[16] overturning the will of a democratically elected branch of the Federal Government or popularly elected state officials. Some scholars have argued that in striking down laws or actions, the Court has decided cases according to the Justices' own political preferences.[17] In response to these concerns, constitutional scholars have constructed theories designed to ensure that the Justices following them would be able to reach principled judgments in constitutional adjudication. In 1987, Professor Richard Fallon of the Harvard Law School divided "interpretivists," or those purporting to prioritize the specific text and plain language of the Constitution above all else, into two basic camps: "On one side stand 'originalists,'" whom he characterized as taking "the rigid view that only the original understanding of the language and the framers' specific intent ought to count. On the other side, 'moderate interpretivists' allow contemporary understandings and the framers' general or abstract intent to enter the constitutional calculus."[18] Whether or not Professor Fallon's precise description at the time was accurate, those regarding themselves as originalists have clarified that the Court should rely on the fixed meaning of the Constitution as understood by at least the public at the time of the founding.[19] This has become known as the original public meaning of the Constitution.

On the other hand, still other commentators have questioned the legitimacy of fixating on what the Framers, ratifiers, or members of their generation might have considered the core meaning of a particular provision of the Constitution, and have instead suggested interpretive methods that ensure the Court's decisions allow government to function properly, protect minority rights, and safeguard the basic structure of government from majoritarian interference.[20] Although the debate over the proper sources of the Constitution's meaning remains unresolved, several key methods of constitutional interpretation have guided the Justices in their decision making and, more broadly, have influenced constitutional dialogue.[21]

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[16] The President appoints the Justices of the Supreme Court, who serve for life terms unless impeached and removed from office. U.S. Const. art. II, § 2, cl. 2; *id.* art. III, § 1.

[17] *See, e.g.*, Hon. Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 37–41, 44–47 (Amy Gutmann ed., 1997) [hereinafter Scalia, A Matter of Interpretation] ("The ascendant school of constitutional interpretation affirms the existence of what is called the Living Constitution, a body of law that . . . grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and 'find' that changing law.").

[18] Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189, 1211 (1987) (footnote omitted).

[19] Scalia, A Matter of Interpretation, *supra* note 17, at 44–47.

[20] *E.g.*, Paul Brest et al., Processes of Constitutional Decisionmaking: Cases and Materials 54–55 (2006) (discussing the argument that the Constitution should "be interpreted to facilitate the performance of government functions"); Hon. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433, 436 (1986) ("A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right. . . . Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaption of overarching principles to changes of social circumstance."); Hon. Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 25 (2008) ("[O]ur constitutional history has been a quest for . . . workable democratic government protective of individual personal liberty. . . . And . . . this constitutional understanding helps interpret the Constitution—in a way that helps to resolve problems related to *modern* government.").

[21] *See* 1 Laurence H. Tribe, American Constitutional Law 32 (3d ed. 2000) ("[T]he subject and substance of constitutional law in the end remains the language of the United States Constitution itself and the decisions and opinions of the United States Supreme Court. Modes of interpretation are means—however intricate—of explicating this subject and substance."). As discussed below, whether any particular source of meaning may serve as a proper basis for interpreting the Constitution is subject to debate.

It is possible to categorize the various methods that have been employed when interpreting the Constitution.[22] This essay broadly describes the most common modes of constitutional interpretation; discusses examples of Supreme Court decisions that demonstrate the application of these methods; and provides a general overview of the various arguments in support of, and in opposition to, the use of such methods by the Court. The modes discussed in detail in this essay are: (1) textualism; (2) original meaning; (3) judicial precedent; (4) pragmatism; (5) moral reasoning; (6) national identity (or "ethos"); (7) structuralism; and (8) historical practices.

In explaining these modes, this essay is merely describing the most common methods on which the Justices (and other interpreters) have relied to argue about the meaning of the Constitution.[23] Depending on the mode of interpretation, the Court may rely upon a variety of materials that include, among other things, the text of the Constitution; constitutional and ratification convention debates; prior Court decisions; pragmatic or moral considerations; and long-standing congressional or legislative practices.[24] It is important to note that the Court may use more than one source in deciding a particular case, and the Justices must exercise some discretion in choosing or coordinating the sources and materials they will consult in making sense of those sources.[25] A discussion of these modes of interpretation and the materials the Justices rely upon will aid the reader in understanding the motivating principles behind the Court's decisions, as discussed in further detail in the *Constitution Annotated*.

Intro.8.2 Textualism and Constitutional Interpretation

Textualism is a mode of legal interpretation that focuses on the plain meaning of the text of a legal document. Textualism usually emphasizes how the terms in the Constitution would be understood by people at the time they were ratified, as well as the context in which those terms appear.[1] Textualists usually believe there is an objective meaning of the text, and they do not typically inquire into questions regarding the intent of the drafters, adopters, or ratifiers of the Constitution and its amendments when deriving meaning from the text.[2] They are concerned primarily with the plain, or popular, meaning of the text of the Constitution. Nor are textualists concerned with the practical consequences of a decision; rather, they are wary of the Court acting to refine or revise constitutional texts.[3]

The Justices frequently rely on the text in conjunction with other methods of constitutional interpretation.[4] In fact, the Court will often look to the text *first* before consulting other

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[22] Philip Bobbitt, Constitutional Fate: Theory of the Constitution 6–7 (1982). This essay does not examine the potential role of politics in judicial decision making. *See, e.g.*, Lee Epstein & Thomas G. Walker, Constitutional Law for a Changing America: Rights, Liberties, and Justice 22 (8th ed. 2013).

[23] This essay does not provide an exhaustive list of the modes of interpretation. There is unlikely to be agreement on which methods such a list would include. *See* Bobbitt, *supra* note 22, at 8.

[24] *See also* Fallon, *supra* note 15, at 592; Sunstein, *supra* note 9, at 95 ("It is impossible to interpret any written text without resort to principles external to that text.").

[25] For example, in *New York v. United States*, the Court held that Congress could not directly compel states to participate in a federal regulatory program. 505 U.S. 144, 188 (1992). In so holding, the majority opinion relied upon the text of the Tenth Amendment; historical sources; the structural relationship that the Constitution establishes between the Federal Government and states; and judicial precedent, among other sources. *Id.* at 174–83.

[1] *See* Hon. Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 23–38 (Amy Gutmann ed., 1997) [hereinafter Scalia, A Matter of Interpretation].

[2] *See id.*

[3] *See id.* at 23.

[4] Lee Epstein & Thomas G. Walker, Constitutional Law for a Changing America: Rights, Liberties, and Justice 26 (8th ed. 2013). For additional examples of the Court's use of a textualist approach, see Intro.8.3 Original Meaning and Constitutional Interpretation.

potential sources of meaning to resolve ambiguities in the text or to answer fundamental questions of constitutional law not addressed in the text.[5] For example, in *Trop v. Dulles*, a plurality of the Court held that the Eighth Amendment prohibited the government from revoking the citizenship of a U.S. citizen as a punishment.[6] When determining that a punishment that did not involve physical mistreatment violated the Constitution, the Court first looked briefly to the text of the Amendment, noting that the "exact scope" of the phrase "cruel and unusual" punishment in the Eighth Amendment had not been "detailed by th[e] Court."[7] The plurality then turned to other modes of interpretation, such as moral reasoning and historical practice, in deciding the case.[8]

The *Trop* plurality's use of textualism in combination with other interpretive methods is distinguishable from a stricter textualist approach espoused most famously by Justice Hugo Black.[9] Consistent with his view that those interpreting the Constitution should look no further than the literal meaning of its words, Justice Black contended that the text of the First Amendment, which states, "Congress shall make no law . . . abridging the freedom of speech, or of the press" absolutely forbid Congress from enacting any law that would curtail these rights.[10] An example of Justice Black's use of textualism in a First Amendment case is his dissent in *Dennis v. United States*.[11] In that case, the Court held that Congress could, consistent with the First Amendment's guarantee of freedom of speech, criminalize the conspiracy to advocate the forcible overthrow of the U.S. government.[12] The Court determined that the severity of potential harm to the government from the speech in question justified Congress's restrictions on First Amendment rights.[13] In accordance with his views that the text of the Constitution should serve as the sole source of its meaning, Justice Black dissented on the grounds that the Court should not have applied a balancing test to uphold the law against First Amendment challenges.[14] He wrote, "I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress's or our own notions of mere 'reasonableness.' Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress."[15]

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[5] Erwin Chemerinsky, Constitutional Law 16 (4th ed. 2013); Laurence H. Tribe, The Invisible Constitution 2–4 (Geoffrey R. Stone ed., 2008); Sotirios A. Barber, On What the Constitution Means 9 (1984).

[6] 356 U.S. 86, 100–04 (1958) (plurality opinion). Justice William Brennan, providing the fifth and deciding vote in *Trop*, did not base his decision on the Eighth Amendment, instead concluding that denationalization exceeded Congress's war powers. *Id.* at 105–14 (Brennan, J., concurring).

[7] *Id.* at 99–101 (plurality opinion).

[8] *Id.* at 100–03 (stating that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

[9] Epstein & Walker, *supra* note 4, at 25–26.

[10] U.S. Const. amend. I. Justice Black once wrote that the First Amendment's statement that "Congress shall make no law . . . abridging the freedom of speech, or of the press" amounted to an "absolute command . . . that no law shall be passed by Congress abridging freedom of speech or the press." Hon. Hugo LaFayette Black, A Constitutional Faith 45–46 (1968). This form of textualism is sometimes referred to as *pure textualism* or *literalism*. Epstein & Walker, *supra* note 4, at 26. Justice Antonin Scalia, who was both a textualist and an originalist, criticized this sort of "strict constructionist" approach to textualism. He wrote that a "text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." Scalia, A Matter of Interpretation, *supra* note 1, at 23.

[11] 341 U.S. 494 (1951).

[12] *Id.* at 509, 513–17.

[13] *Id.*

[14] *Id.* at 580 (Black, J., dissenting) ("At least as to speech in the realm of public matters, I believe that the 'clear and present danger' test does not 'mark the furthermost constitutional boundaries of protected expression,' but does 'no more than recognize a minimum compulsion of the Bill of Rights.'") (citation omitted).

[15] *Id.*

Another classic example of a self-consciously textualist opinion is Justice Black's dissent in *Griswold v. Connecticut*.[16] In *Griswold*, the majority struck down as unconstitutional a Connecticut law that criminalized the furnishing of birth control to married couples based on a view that the Due Process Clause of the Fourteenth Amendment provides a general right to privacy.[17] Justice Black criticized the majority for straying too far from the text of the Bill of Rights and relying on "nebulous" natural law principles to find a right to privacy in "marital relations" in the Constitution that—at least in his view—did not exist.[18] Adhering to his preference for interpreting the Constitution in line with its text, Justice Black wrote, "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."[19]

Proponents of textualism point to the simplicity and transparency of an approach that focuses solely on the objectively understood meaning of language independent of ideology and politics.[20] They argue that textualism prevents judges from deciding cases in accordance with their personal policy views, leading to more predictability in judgments.[21] Proponents also argue that textualism promotes democratic values because it adheres to the words of the Constitution adopted by the "people" as opposed to what individual Justices think or believe.[22]

Opponents of a strict reliance solely on the text in interpreting the Constitution suggest that judges and other interpreters may ascribe different meanings to the Constitution's text depending on their background[23]—a problem compounded by textual provisions that are broadly worded[24] or fail to answer fundamental constitutional questions.[25] In addition, opponents argue that judges should consider values not specifically set forth in the text, such as those based on moral reasoning, practical consequences, structural relationships, or other considerations.[26] In other words, establishing textual meaning may not be straightforward, and a more flexible approach that does not bind the Court and policymakers to words written 300 years ago may, in the view of those who argue against texualism, be necessary to ensure preservation of fundamental constitutional rights or guarantees.[27]

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[16] 381 U.S. 479 (1965).

[17] *Id.* at 485–86.

[18] *Id.* at 507–27 (Black, J., dissenting).

[19] *Id.* at 510.

[20] Epstein & Walker, *supra* note 4, at 26. However, some textualist approaches may allow for consideration of contemporary values. For example, approaches based on present textual meaning may allow for consideration of these values to the extent that they have become incorporated in modern understandings of phrases in the Constitution (e.g., "cruel and unusual punishment"). *Trop*, 356 U.S. at 100–03; Philip Bobbitt, Constitutional Fate: Theory of the Constitution 36 (1982).

[21] Epstein & Walker, *supra* note 4, at 26; Scalia, A Matter of Interpretation, *supra* note 1, at 37–41, 44–47.

[22] *See* Hon. William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 695–97 (1976) ("The ultimate source of authority in this Nation, Marshall said, is not Congress, not the states, not for that matter the Supreme Court of the United States. The people are the ultimate source of authority; they have parceled out the authority that originally resided entirely with them by adopting the original Constitution and by later amending it.").

[23] Bobbitt, *supra* note 20, at 37.

[24] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind"); Epstein & Walker, *supra* note 4, at 26.

[25] Bobbitt, *supra* note 20, at 38; Tribe, *supra* note 5, at 1–4.

[26] *Cf.* Bobbitt, *supra* note 20, at 26.

[27] *Id.* at 24, 37–38.

Intro.8.3 Original Meaning and Constitutional Interpretation

Whereas textualist approaches to constitutional interpretation focus solely on the text of the document, originalist approaches consider the meaning of the Constitution as understood by at least some segment of the populace at the time of the Founding. Though this method has generally been called "originalism," constitutional scholars have not reached a consensus on what it means for a judge to adopt this methodology for construing the Constitution's text.[1] Disagreements primarily concern which sources scholars should consult when determining the fixed meaning of the Constitution.[2] Originalists, however, generally agree that the Constitution's text had an "objectively identifiable" or public meaning at the time of the Founding that has not changed over time, and the task of judges and Justices (and other responsible interpreters) is to construct this original meaning.[3]

For many years, some prominent scholars (such as Robert Bork) argued that in interpreting the Constitution, one should look to the *original intent* of the people who drafted, proposed, adopted, or ratified the Constitution to determine what those people wanted to convey through the text.[4] According to this view, original intent may be found in sources outside of the text, such as debates in the *Constitutional Convention* or the *Federalist Papers*.[5] For example, in *Myers v. United States*,[6] Chief Justice William Howard Taft, writing for the majority, held that the President did not need legislative approval to remove an Executive Branch official who was performing a purely executive function.[7] The Court sought the original meaning of the President's removal power by looking at English common law, the records of the Constitutional Convention, and the actions of the first Congress, among other sources.[8] Relying on these various sources, in his opinion for the Court, Chief Justice Taft wrote that "[t]he debates in the Constitutional Convention indicated an intention to create a strong [E]xecutive."[9] Notably, the *Myers* Court did not look at sources that would likely indicate what ordinary citizens living at the time of the Founding thought about the President's removal power.

Over the course of Justice Antonin Scalia's near thirty-year tenure on the Supreme Court, he and several prominent scholars explained that, as originalists, they were committed to seeking to understand *original public meaning* of the Constitution.[10] This method considers the plain meaning of the Constitution's text as it would have been understood by the general public, or a reasonable person, who lived at the time the Constitution was ratified.[11] This approach has much in common with textualism but is not identical. The original public meaning approach to understanding the Constitution is not based solely on the text, but, rather, draws upon the original public meaning of the text as a broader guide to interpretation.

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[1] Gregory E. Maggs & Peter J. Smith, Constitutional Law: A Contemporary Approach 39 (3d ed. 2015).

[2] *Id.*

[3] *Id.*

[4] *Id.* at 17; Robert H. Bork, Tradition and Morality in Constitutional Law (The Francis Boyer Lectures on Public Policy) 10 (1984) ("[T]he framers' intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed.").

[5] Myers v. United States, 272 U.S. 52, 136 (1926); Hon. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 852 (1989) [hereinafter Scalia, *Originalism*].

[6] 272 U.S. 52.

[7] *Id.* at 176.

[8] *Id.* at 109–21.

[9] *Id.* at 116.

[10] Hon. Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 44–45, 166 (Amy Gutmann ed., 1997) [hereinafter Scalia, A Matter of Interpretation].

[11] *Id.*

Justice Scalia's majority opinion in *District of Columbia v. Heller*[12] illustrates the use of original public meaning in constitutional interpretation. In that case, the Court held that the Second Amendment, as originally understood by ordinary citizens, protected an individual's right to possess firearms for private use unconnected with service in a militia.[13] Justice Scalia's opinion examined various historical sources to determine original public meaning, including dictionaries in existence at the time of the Founding and comparable provisions in state constitutions.[14]

Those in favor of the use of original meaning as an interpretive approach point to its long historical pedigree[15] and its adherence to the democratic will of the people who originally framed and ratified the Constitution.[16] They point as well to the basic logic that a law, in order to function as law, has to have a fixed or settled meaning until it is formally amended or discarded.[17] Proponents of originalism also argue that the approach limits judicial discretion, preventing judges from deciding cases in accordance with their own political views.[18] Some originalists argue that changes to the Constitution's meaning should be left to further action by Congress and the states to amend the Constitution in accordance with Article V.[19] Proponents also credit the approach with ensuring more certainty and predictability in judgments.[20]

Those who are skeptical of this mode of interpretation underscore the difficulty in establishing original meaning. Scholars cannot always agree on original meaning, and, perhaps, people living at the time of the Constitution's adoption may not have agreed on a particular meaning either.[21] As such, critics argue, originalists will have merely constructed a meaning that had never actually been approved by the people who drafted or ratified the

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[12] 554 U.S. 570 (2008).

[13] *Id.* at 635–36.

[14] *Id.* at 573–619.

[15] Maggs & Smith, *supra* note 1, at 18.

[16] Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 204 (1980) (discussing arguments made by supporters of originalism). Proponents of original meaning generally oppose the use of foreign law to establish the original meaning of the Constitution unless it is English common law that predates the Founding era. *See* Knight v. Florida, 528 U.S. 990 (1999) (Thomas, J., concurring); Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) ("But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."); Myers v. United States, 272 U.S. 52, 118 (1926) (discussing when English common law could be relevant to original meaning). Treaties to which the United States is party (or customary international law that is incorporated into domestic law) might be cited by a proponent of original meaning when interpreting the Constitution. *See* Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 Harv. J. L. & Pub. Pol'y 653, 689 (2009) ("In cases where the fundamental rights that a court seeks to protect are described in a treaty or convention or are a matter of customary international law, the question is merely whether those rights are incorporated by domestic law.").

[17] Maggs & Smith, *supra* note 1, at 17.

[18] Lee Epstein & Thomas G. Walker, Constitutional Law for a Changing America: Rights, Liberties, and Justice 27 (8th ed. 2013); Scalia, *Originalism*, *supra* note 5, at 852, 862–64. A textualist approach based on the original meaning may allow for consideration of contemporary values to the extent that a court finds the original meaning counsels for an application of contemporary values to modern factual circumstances. Maggs & Smith, *supra* note 1, at 36.

[19] Scalia, *Originalism*, *supra* note 5, at 852, 862–64.

[20] Maggs & Smith, *supra* note 1, at 39.

[21] Epstein & Walker, *supra* note 18, at 28; Maggs & Smith, *supra* note 1, at 40. Furthermore, opponents argue that original meaning is of little use when the provision of the Constitution to be interpreted and applied is broadly worded and open to several meanings, or when the Constitution is silent on an issue. *Id.* at 20. Arguably the "original meaning" of some provisions of the Constitution (e.g., the Ninth Amendment) contemplates constitutional rights that exist independent of the text, and thus the drafters contemplated that interpreters of the Constitution would consider sources of meaning outside of the text and historical sources from the time of the Founding. *See* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 14, 33–40 (1980).

actual text being construed.[22] Such a view may stem from the potentially wide variety of sources of such meaning; conflicting statements by these sources; conflicting understandings of statements in these sources; and gaps in historical sources.[23] Thus, because of this lack of consensus on the original meaning of the Constitution, judges may simply choose the original view that supports their political beliefs.[24] Opponents also argue that originalism requires judges to act as historians—a role for which they may not be well suited—as opposed to as decision makers.[25]

While Justice Elena Kagan, for example, has conceded that "we [the Justices] are all originalists,"[26] many critics question the extent to which originalism is a workable theory of constitutional interpretation. They argue that originalism is an inflexible, flawed method of constitutional interpretation,[27] contending that the Constitution's contemporaries could not have conceived of some of the situations that would arise in modern times.[28] They argue further that interpreting the Constitution based on original meaning may thus fail to protect minority rights because women and minorities did not have the same rights at the time of the Founding (or ratification of the Civil War Amendments) as they do today.[29] In addition, some skeptics of originalism challenge the view that Article V should be the exclusive vehicle for constitutional change,[30] as that article requires a two-thirds majority vote of the House of Representatives and Senate to propose an amendment,[31] and ratification by three-fourths of the states for the amendment to become part of the Constitution.[32] The high threshold the Constitution creates for formal amendment has prompted arguments that the Constitution's meaning should not be fixed in time, but, rather, should accommodate modern needs.[33]

Intro.8.4 Judicial Precedent and Constitutional Interpretation

The most commonly cited source of constitutional meaning is the Supreme Court's prior decisions on questions of constitutional law.[1] For most, if not all Justices, judicial precedent

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[22] *See* Maggs & Smith, *supra* note 1, at 40–41.

[23] Philip Bobbitt, Constitutional Fate: Theory of the Constitution 10–12 (1982). Justice Scalia acknowledged the limits of historical sources. Scalia, *Originalism*, *supra* note 19, at 856–57.

[24] Maggs & Smith, *supra* note 1, at 40–41.

[25] Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 Yale L.J. 852, 935 (2013) ("Judges are not historians, and so, in addition to the risk that they will not understand the materials they are charged to consult, there is the additional risk that they will not conduct a dispassionate examination of the historical evidence and will simply marshal historical anecdotes to achieve what they have already decided is the preferred outcome.").

[26] *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62, pt. 1 (2010) (statement of Elena Kagan in response to a question from Senator Patrick Leahy) ("And I think that [the Framers] laid down—sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists.").

[27] Maggs & Smith, *supra* note 1, at 21.

[28] Cass R. Sunstein, The Partial Constitution 103 (1993).

[29] J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433, 436–37 (1986); Sotirios A. Barber, The Constitution of Judicial Power 7 (1993). For example, it seems possible that many of the ratifiers of the Fourteenth Amendment would have favored segregation by race and gender. Sunstein, *supra* note 28, at 121.

[30] C. Herman Pritchett, Constitutional Law of the Federal System 37 (1984).

[31] Under Article V, two-thirds of the states' legislatures may also call a constitutional convention to propose amendments. *See* U.S. Const. art. V.

[32] *Id.*

[33] Pritchett, *supra* note 30, at 37.

[1] Michael J. Gerhardt, The Power of Precedent 147–48 (2008) ("[I]t is practically impossible to find any modern Court decision that fails to cite at least some precedents in support."). This essay's concept of "judicial precedent" is

provides possible principles, rules, or standards to govern judicial decisions in future cases with arguably similar facts.[2] Although the Court routinely purports to rely upon precedent,[3] it is difficult to say with much precision how often precedent has actually constrained the Court's decisions[4] because the Justices plainly have latitude in how broadly or narrowly they chose to construe their prior decisions.[5]

In some cases, however, a single precedent may play a particularly prominent role in the Court's decision making. An example of the heightened role that precedent can play in constitutional interpretation is the Court's decision in *Dickerson v. United States*,[6] which addressed the constitutionality of a federal statute governing the admissibility of statements made during police interrogation, a law that functionally would have overruled the 1966 case of *Miranda v. Arizona*. In striking down the statute, the majority declined to overrule *Miranda*, noting that the 1966 case had "become embedded in routine police practice to the point where the warnings have become part of our national culture."[7]

More often, the Court reasons from the logic of several precedents in rendering its decisions. An example is *Arizona State Legislature v. Arizona Independent Redistricting Commission*, which held that the voters of Arizona could remove from the state legislature the authority to redraw the boundaries for legislative districts and vest that authority in an independent commission.[8] In so holding, the Court examined the Elections Clause, which states that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."[9] The Court determined that the term "Legislature" encompassed the voters of a state making law through a referendum.[10] In reaching this determination, the Court relied on three cases from the early twentieth century to support a more expansive view of the term "Legislature,"[11] including one case from 1916, *Ohio ex rel. Davis v. Hildebrant*, which the Court described as holding that a

limited to prior decisions of the Supreme Court. However, the concept of "precedent" is arguably much broader, encompassing "norms," "historical practices," and "traditions." *Id.* at 3. For a discussion of the use of historical practice in interpreting the Constitution, see Intro.8.9 Historical Practices and Constitutional Interpretation.

[2] Philip Bobbitt, Constitutional Fate: Theory of the Constitution 7 (1982); Black's Law Dictionary 1366 (10th ed. 2014) (defining "precedent" as "a decided case that furnishes a basis for determining later cases involving similar facts or issues"). The Court may also rely on commentary on these cases by academics and judges. *Id.* This essay does not examine in any detail reliance on such commentary or the precedents of state courts or foreign tribunals in constitutional interpretation. *See* Paul Brest et al., Processes of Constitutional Decisionmaking: Cases and Materials 56 (2006).

[3] Lee Epstein & Thomas G. Walker, Constitutional Law for a Changing America: Rights, Liberties, and Justice 29 (8th ed. 2013).

[4] *See* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 Geo. Wash. L. Rev. 68, 76 (1991) ("Precedents commonly are regarded as a traditional source of constitutional decisionmaking, despite the absence of any clear evidence that they ever have forced the Court into making a decision contrary to what it would rather have decided.") (footnote omitted).

[5] Gerhardt, *supra* note 1, at 34–35.

[6] 530 U.S. 428, 431–32 (2000).

[7] *Id.* at 443; *see also id.* at 432 ("We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.").

[8] 576 U.S. 787, 793–94 (2015).

[9] U.S. Const. art. I, § 4, cl. 1.

[10] *Ariz. State Legislature*, 576 U.S. at 824.

[11] *Id.* at 805 ("Three decisions compose the relevant case law: Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916); Hawke v. Smith (No. 1), 253 U.S. 221 (1920); and Smiley v. Holm, 285 U.S. 355 (1932).").

state referendum was "part of the legislative power" and could be "exercised by the people to disapprove the legislation creating congressional districts."[12]

Proponents of the primacy of precedent as a source of constitutional meaning point to the legitimacy of decisions that adhere to principles set forth in prior, well-reasoned written opinions.[13] They contend that following the principle of stare decisis[14] and rendering decisions grounded in earlier cases supports the Court's role as a neutral, impartial, and consistent decision maker.[15] Reliance on precedent in constitutional interpretation is said to provide more predictability, consistency, and stability in the law for judges, legislators, lawyers, and political branches and institutions that rely on the Court's rulings;[16] prevent the Court from overruling all but the most misguided decisions;[17] and allow constitutional norms to evolve slowly over time.[18]

Some argue that judicial overreliance on precedent can be problematic. For one thing, certain precedents might have been wrongly decided, in which a case relying on them merely perpetuates their erroneous construction of the Constitution.[19] Indeed, critics argue that, if the Court strictly adheres to precedent, once a precedent has been established on a question of constitutional law, the only way to alter that ruling is to amend the Constitution.[20] This inflexibility is particularly problematic when those outside the Court begin to disagree about general background principles underlying a precedent; as such, disagreements arguably cause that precedent to lose its authority.[21] For example, when precedent offends basic moral principles (e.g., *Plessy v. Ferguson*[22]), the power of the Court's precedent may necessarily be weakened.[23] Other commentators argue that "consistency," "predictability," "stability," and "neutrality" are not actually benefits of reliance on precedent, as judges may choose among precedents and, to some extent, interpret precedents in accordance with their own views in order to overrule them implicitly; to expand them; or to narrow them.[24] In addition, some proponents of original meaning as a method of constitutional interpretation object to the use of judicial precedent that conflicts with original meaning, because it favors the views of the Court

[12] *Id.* at 805 (citation omitted).

[13] Bobbitt, *supra* note 2, at 42.

[14] "Stare decisis" refers to the "doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." Black's Law Dictionary 1626 (10th ed. 2014).

[15] *See* Gerhardt, *supra* note 4, at 70–71 (discussing arguments in support of the use of precedent).

[16] Epstein & Walker, *supra* note 3, at 29; Gerhardt, *supra* note 4, at 85–87.

[17] Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 749–50 (1988); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. Rev. 570, 585 (2001).

[18] Gregory E. Maggs & Peter J. Smith, Constitutional Law: A Contemporary Approach 19 (3d ed. 2015).

[19] Raoul Berger, *Original Intent and Boris Bittker*, 66 Ind. L.J. 723, 747 (1991) (citation omitted).

[20] *See, e.g.*, Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–10 (1932) (Brandeis, J., dissenting) ("[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions."); Smith v. Allwright, 321 U.S. 649, 665 (1944) ("[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.").

[21] Bobbitt, *supra* note 2, at 52.

[22] 163 U.S. 537 (1896). In *Plessy*, the Court upheld the constitutionality of a Louisiana law mandating racial segregation in railway cars, determining that "separate but equal" public accommodations did not violate Thirteenth or Fourteenth Amendment guarantees. *Id.* at 542, 550–51.

[23] Gerhardt, *supra* note 1, at 35–36.

[24] *Id.* at 34–35 ("Applying precedents requires interpreting them, interpreting them frequently entails modifying them, and modifying them often entails extending or contracting them."); Epstein & Walker, *supra* note 3, at 30.

over the views of those who ratified the Constitution, thereby allowing mistaken interpretations of the Constitution to persist.[25]

Intro.8.5 Pragmatism and Constitutional Interpretation

In contrast to textualist and some originalist approaches to constitutional interpretation, which generally focus on the words of the Constitution as understood by a certain group of people, pragmatist approaches consider the likely practical consequences of particular interpretations of the Constitution.[1] That is, pragmatist approaches often involve the Court weighing or balancing the probable practical consequences of one interpretation of the Constitution against other interpretations.[2] One flavor of pragmatism weighs the future costs and benefits of an interpretation to society or the political branches,[3] selecting the interpretation that may lead to the perceived best outcome.[4] For example, in *United States v. Leon*, the majority held that the Fourth Amendment does not necessarily require a court to exclude evidence obtained as a result of the law enforcement's good faith reliance on an improperly issued search warrant.[5] Justice Byron White's majority opinion in *Leon* took a pragmatic approach, determining that "the [exclusionary] rule's purposes will only rarely be served" by applying it in the context of a good faith violation of the Fourth Amendment.[6] Notably, the Court determined that adoption of a broader exclusionary rule would result in significant societal costs by undermining the ability of the criminal justice system to obtain convictions of guilty defendants.[7] Such costs, the Court held, outweighed the "marginal or nonexistent benefits."[8]

Another case in which the Court accorded weight to the likely practical consequences of a particular interpretation of the Constitution is *United States v. Comstock*.[9] In *Comstock*, the

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[25] *See* Monaghan, *supra* note 17, at 769–70 ("In the interpretation of this written Constitution, we may assume that the founding generation was much attached to the original, publicly shared understanding of the document. Thus, one can make a good case that, as historically understood, the written Constitution was intended to trump not only statutes but case law. This argument is reinforced if one recalls that to the founding generation it was not clear that judicial opinions would need to play such a dominant role in establishing the meaning of the Constitution.") (footnotes omitted).

[1] Hon. Richard A. Posner, The Problems of Jurisprudence 31 (1990).

[2] *See* Hon. Richard A. Posner, Cardozo: A Study in Reputation 28 (1990) (discussing Justice Benjamin Cardozo's views on pragmatism, as reflected in his jurisprudence, as contemplating a method "in which social interests behind competing legal principles are identified and (roughly speaking) weighed against each other to determine how a case lying at the intersection of those principles should be decided"); Hon. Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. Cal. L. Rev. 1653, 1670 (1990) ("All that a pragmatic jurisprudence really connotes . . . is a rejection of a concept of law as grounded in permanent principles and realized in logical manipulations of those principles, and a determination to use law as an instrument for social ends.").

[3] Justice Byron White often argued that the Court should adopt a functionalist approach in separation-of-powers cases by considering the extent to which a particular reading of the Constitution would promote a workable government. *See, e.g.*, Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 984 (White, J., dissenting) ("It is long-settled that Congress may 'exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government,' and 'avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.'") (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415–16, 420 (1819)); William J. Wagner, *Balancing as Art: Justice White and the Separation of Powers*, 52 Cath. U. L. Rev. 957, 962 (2003) ("Where he encountered silence in the constitutional text, Justice White consistently deferred to congressional judgments on the best structure and functioning of government. The judiciary's role in these cases was simply to unmask any congressional attempts to deprive another branch of its constitutional power, not to apply formulaic rules.").

[4] Paul Brest et al., Processes of Constitutional Decisionmaking: Cases and Materials 54–55 (2006).

[5] 468 U.S. 897, 926 (1984).

[6] *Id.*

[7] *Id.* at 907–08, 922.

[8] *Id.* at 922.

[9] 560 U.S. 126 (2010).

Supreme Court considered whether Congress had the power under Article I, Section 8 of the Constitution to enact a civil commitment law authorizing the Department of Justice to cause to be detained indefinitely convicted sex offenders who had already served their criminal sentences but were deemed "mentally ill" and "sexually dangerous."[10] Such a power is not among those specifically enumerated in Article I, Section 8 of the Constitution, but the Court held that Congress could enact the law under a combination of: (1) its implied constitutional powers to, among other things, legislate criminal offenses, provide for the imprisonment of offenders, and regulate prisons and prisoners; and (2) Article I, Section 8, Clause 18 of the Constitution, which provides Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States."[11] Justice Stephen Breyer, writing for the Court, listed several factors that weighed in favor of the Court's determination that Congress possessed the authority to enact the civil commitment law.[12] One of these factors rested primarily on pragmatic concerns about the potential detriment to society of releasing dangerous offenders into the community.[13] The Court held that the civil commitment law represented a rational means of implementing Congress's implied criminal justice powers "in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody."[14]

Using another type of pragmatist approach, a court might consider the extent to which the judiciary could play a constructive role in deciding a question of constitutional law.[15] According to this approach, a judge might observe the "passive virtues" by declining to rule on the constitutional issues in a case by adhering to certain doctrines, including those under which a judge will avoid ruling on political or constitutional questions.[16] This may allow the Court to avoid becoming frequently embroiled in public controversies, preserving the Court's institutional capital for key cases, and giving more space for the democratic branches to address the issue and reach accommodations on questions about the meaning of the Constitution.[17] The Supreme Court's decision in *Baker v. Carr*[18] illustrates the application of this second type of pragmatism. In that case, Justice William Brennan, writing for the majority, debated a dissenting Justice Felix Frankfurter about whether the Court was the proper actor to review the constitutionality of a state's apportionment of voters among legislative districts, or whether the plaintiffs should have sought remedies from the state legislature.[19] Justice Brennan's majority opinion in *Baker* ultimately concluded that a state's

[10] *Id.* at 129–32.

[11] *Id.* at 135–37; *see* U.S. Const. art. I, § 8, cl. 18.

[12] 560 U.S. at 149–50. The factors included: "(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope." *Id.* at 149.

[13] *Id.* at 142–43, 149–50.

[14] *Id.* at 149.

[15] Philip Bobbitt, Constitutional Fate: Theory of the Constitution 7 (1982); Brest et al., *supra* note 4, at 55.

[16] Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 199–201 (1962). Alternatively, the court could rule on the merits on narrow grounds. Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court ix–xiv (2001).

[17] Brest et al., *supra* note 4, at 55.

[18] 369 U.S. 186 (1962).

[19] *Id.* at 231–37, 266–68. The majority opinion announced a standard to determine when a case presents a political question not suitable for resolution by the courts. *See id.* at 217.

apportionment decisions are properly justiciable matters, as an alternative holding would require those harmed by malapportionment to seek redress from a political process that was skewed against such plaintiffs.[20]

Those who support pragmatism in constitutional interpretation argue that such an approach takes into account the "political and economic circumstances" surrounding the legal issue before the Court and seeks to produce the optimal outcome.[21] Such an approach may allow the Court to issue decisions reflecting contemporary values to the extent that the court considers these values relevant to the costs and benefits of a particular interpretation.[22] On this view, pragmatism posits a view of the Constitution that is adaptable to changing societal circumstances, or that at least reflects the proper role of the judiciary.[23]

Critics of pragmatism argue that consideration of costs and benefits unnecessarily injects politics into judicial decision making.[24] They argue that judges are not politicians. Rather, a judge's role is to say what the law is and not what it should be.[25] In addition, some opponents of the pragmatic approach have argued that when the Court observes the "passive virtues" by dismissing a case on jurisdictional grounds, it fails to provide guidance to parties for the future and to fulfill the Court's duty to decide important questions about constitutional rights.[26]

Intro.8.6 Moral Reasoning and Constitutional Interpretation

Another approach to constitutional interpretation is based on moral or ethical reasoning—often broadly called the "ethos of the law."[1] Under this approach, some constitutional text employs or makes reference to terms that are infused with (and informed by) certain moral concepts or ideals, such as "equal protection" or "due process of law."[2] The moral or ethical arguments based on the text often pertain to the limits of government authority over the individual (i.e., individual rights).[3] The Court has derived general moral principles from the broad language of the Fourteenth Amendment in cases involving state laws or actions affecting individual rights.[4] For example, in *Lawrence v. Texas*, the Court struck down a Texas law that banned private, consensual same-sex sexual activity, as violating the Due Process Clause of the Fourteenth Amendment.[5] That clause provides, in relevant part, that states shall not "deprive any person of . . . liberty . . . without due process of law."[6] The Court held that the concept of liberty "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[7] Notably, the text of the Fourteenth Amendment does not define "liberty," and the Court's holding in *Lawrence* is more broadly

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[20] *See id.* at 208–09.

[21] Bobbitt, *supra* note 15, at 61; Brest et al., *supra* note 1, at 54–55.

[22] Hon. Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 11–12 (2008).

[23] *Id.*

[24] *See* Hon. Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 45–47 (Amy Gutmann ed., 1997).

[25] *See id*.

[26] Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1, 15–16, 21–23 (1964).

[1] Some scholars refer to the general moral or ethical principles underlying the text of the Constitution as the "ethos of the law." Philip Bobbitt, Constitutional Fate: Theory of the Constitution 142 (1982).

[2] *Id.* at 126.

[3] *Id.* at 162.

[4] *Id.* at 142.

[5] 539 U.S. 558, 578 (2003).

[6] U.S. Const. amend. XIV, § 1.

[7] *Lawrence*, 539 U.S. at 562.

grounded in general views about the proper role of government in not punishing behavior that provides no discernible harm to the public at large.[8]

A particularly famous example of an argument based on the "ethos of the law" is contained in the Court's decision in *Bolling v. Sharpe*.[9] The Court decided *Bolling* on the same day it decided *Brown v. Board of Education*, which held that a state, in segregating its public school systems by race, violated the Fourteenth Amendment.[10] Specifically, the Court held that the practice of "separate but equal" as applied to schools violated the Equal Protection Clause, a provision that prohibits state governments from depriving their citizens of the equal protection of the law.[11] *Bolling*, however, involved the District of Columbia school system, which was not subject to the Fourteenth Amendment because the District of Columbia is not a state, but rather a federal enclave.[12] Furthermore, the Fifth Amendment, which applies to the actions of the federal government, provides that no person shall "be deprived of life, liberty, or property, without due process of law" but does not explicitly contain an Equal Protection Clause.[13] Nevertheless, the Court struck down racial segregation in D.C. public schools as a violation of the Fifth Amendment's Due Process Clause, determining that due process guarantees implicitly include a guarantee of equal protection.[14] The Court's reasoning was based on the Due Process Clause being derived "from our American ideal of fairness," ultimately holding that the Fifth Amendment prohibited the Federal Government from allowing segregation in public schools.[15]

Proponents of using moral or ethical reasoning as an approach for making sense of broad constitutional text, such as the Due Process Clause of the Fourteenth Amendment, argue that general moral principles underlie much of the text of the Constitution.[16] Thus, arguments about what the Constitution means based on moral reasoning produce "more candid opinions," as judges often rely upon moral arguments but disguise them as textual arguments or arguments based on precedent.[17] Some also argue that the Framers designed the Constitution as an instrument that would grow over time.[18] Thus, supporters of moral reasoning in constitutional interpretation contend that its use appropriately leads to more flexibility for judges to incorporate contemporary values when deriving meaning from the Constitution.[19] Ethical arguments can also fill in gaps in the text to address situations unforeseen at the time of the founding,[20] consistent with the understanding of the Bill of Rights as a starting point for individual rights.[21]

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[8] *See id.* at 578.

[9] 347 U.S. 497 (1954).

[10] *Id.* at 498–99 & n.1 (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

[11] *Id.*

[12] *Id.*; *see also* U.S. Const. art. I, § 8, cl. 17.

[13] U.S. Const. amend. V; *Bolling*, 347 U.S. at 498–500.

[14] 347 U.S. at 499.

[15] *Id.* at 499–500.

[16] Hadley Arkes, Beyond the Constitution 19 (1990).

[17] Philip Bobbitt, Constitutional Fate: Theory of the Constitution 106 (1982).

[18] Sotirios A. Barber, On What the Constitution Means 40 (1984) (discussing the view that the Constitution "marks out 'lines of growth' toward the real values of the framers and away from those of their views and attitudes that were inconsistent with their aspirations" (citing John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 Ind. L.J. 399, 410–14 (1978))).

[19] John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 1 (1980).

[20] Bobbitt, *supra* note 17, at 102.

[21] Arkes, *supra* note 16, at 60–62.

Critics of using moral reasoning in constitutional interpretation have argued that courts should not be "moral arbiters."[22] They argue that ethical arguments are based on principles that are not objectively verifiable[23] and may require a judge to choose between "competing moral conventions."[24] Courts may thus be ill-equipped to discern established moral principles. Judges using this mode of constitutional interpretation may therefore decide cases according to their own policy views, and opponents believe that overturning acts of the political branches based on such considerations is undemocratic.[25] Some opponents argue that moral considerations may be better left to the political branches.[26]

Intro.8.7 National Identity or Ethos and Constitutional Interpretation

Another approach to interpretation that is closely related to but conceptually distinct from moral reasoning is judicial reasoning that relies on the concept of a "national ethos." This national ethos is defined as the unique character of American institutions, our distinct national identity, and "the role within [our public institutions] of the American people."[1] An example of the "national ethos" approach to ethical reasoning is found in *Moore v. City of East Cleveland*, in which the Court struck down as unconstitutional a city zoning ordinance that prohibited a woman from living in a dwelling with her grandson.[2] In its decision, the Court surveyed the history of the family as an institution in American life and stated: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[3] Thus, the Court struck down the zoning ordinance, at least in part, because it interfered with the American institution of the family by preventing a grandmother from living with her grandson.[4]

Another example of the Court's reliance on national ethos as a rationale is *West Virginia State Board of Education v. Barnette*.[5] In that case, the Court held that the First Amendment prohibited a state from enacting a law compelling students to salute the American flag.[6] Writing for the majority, Justice Robert Jackson noted that, in contrast to authoritarian regimes such as the Roman Empire, Spain, and Russia, the United States' unique form of constitutional government eschews the use of government coercion as a means of achieving national unity.[7] The Court invoked the Nation's character as reflected in the Constitution, writing that, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[8]

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[22] Bobbitt, *supra* note 17, at 137.

[23] *Id.* at 138.

[24] *Id.* at 139; Ely, *supra* note 19, at 59.

[25] Ely, *supra* note 19, at 4–5.

[26] *See id.*

[1] Philip Bobbitt, Constitutional Fate: Theory of the Constitution 94 (1982).

[2] 431 U.S. 494, 506 (1977).

[3] *Id.* at 499–504 (footnote omitted).

[4] *Id.*

[5] 319 U.S. 624 (1943).

[6] *Id.* at 642.

[7] *Id.* at 640–41.

[8] *Id.* at 642.

Many of the arguments in the debate over reliance on the "national ethos" in constitutional interpretation share similarities with arguments made about the use of moral reasoning as a mode of interpretation. Some proponents of using the distinct character of the American national identity and the Nation's institutions as a method for elaborating on the Constitution's meaning argue that the "national ethos" underlies the text of the Constitution, and that the use of this method allows more flexibility for judges to incorporate contemporary American values when deriving meaning from the Constitution.[9] Moreover, unlike approaches that discern meaning from general moral or ethical principles, the "national ethos" approach arguably has added legitimacy as a mode of interpretation because it is specifically tied to the identity and values of the United States and those aspects of the Constitution that are distinctly American.[10] As noted, ethical arguments can also fill in gaps in the text to address situations unforeseen at the time of the founding.[11]

On the other hand, as with moral reasoning, critics of an approach to constitutional interpretation based on the "national ethos" have argued that such an approach involves unelected judges determining the meaning of the Constitution based on principles that are not objectively verifiable—determinations that critics argue should be made by the political branches.[12]

Intro.8.8 Structuralism and Constitutional Interpretation

One of the most common modes of constitutional interpretation is based on the structure of the Constitution. Indeed, drawing inferences from the design of the Constitution gives rise to some of the most important relationships that everyone agrees the Constitution establishes—the relationships among the three branches of the Federal Government (commonly called separation of powers or checks and balances); the relationship between the federal and state governments (known as federalism); and the relationship between the government and the people.[1] Two basic approaches seek to make sense of these relationships.

The first, known as formalism, posits that the Constitution sets forth all the ways in which federal power may be shared, allocated, or distributed.[2] An example of the use of this form of structuralism as a mode of interpretation is found in *Immigration and Naturalization Service v. Chadha*.[3] In that case, the Court held that one House of Congress could not by resolution unilaterally curtail the statutory authority of the Executive Branch to allow a deportable alien to remain in the United States.[4] The Court examined the structure of the Constitution and noted that under the Bicameralism and Presentment Clauses in Article I, Sections 1 and 7,

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[9] *Cf.* Intro.8.6 Moral Reasoning and Constitutional Interpretation, at notes 16–19.

[10] *Cf.* Thompson v. Oklahoma, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting) ("The plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries . . . is totally inappropriate as a means of establishing the fundamental beliefs of this Nation. . . . We must never forget that it is a Constitution for the United States of America that we are expounding.").

[11] *See* Intro.8.6 Moral Reasoning and Constitutional Interpretation, at notes 20–21.

[12] *Cf.* Intro.8.6 Moral Reasoning and Constitutional Interpretation, at notes 22–26.

[1] Charles L. Black, Jr., Structure and Relationship in Constitutional Law 7 (1969) [hereinafter Black, Structure and Relationship].

[2] John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 1942–44 (2011); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 Cornell L. Rev. 488, 489 (1987) ("The Supreme Court has vacillated over the years between using a formalistic approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government (and consequently appearing to draw rather sharp boundaries), and a functional approach that stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened.") (footnote omitted).

[3] Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

[4] *Id.* at 923, 946.

laws with subject matter that is "legislative in character [or effect]" require passage by a majority in both Houses and presentment to the President for his signature or veto.[5] Viewing the exercise of the one-House veto in *Chadha* to be of a legislative nature, the Court concluded that the structural relationships that the Constitution established between the Legislative and Executive Branches forbid the "one-House [legislative] veto."[6]

An example of the Court's use of formalist structural reasoning in the context of federalism is *U.S. Term Limits, Inc. v. Thornton*.[7] In that case, the Court considered whether the State of Arkansas could prohibit the names of otherwise-qualified candidates for congressional office from appearing on the state's general election ballot if the candidates had served three terms in the House of Representatives or two terms in the Senate.[8] In striking down an amendment to the Arkansas State Constitution, the Court relied heavily on its view of the formal structural relationships that the Constitution established among the people of the United States, the states, and the federal government.[9] In particular, the Court determined that the Founding Fathers established a single, national legislature representing "the people of the United States" rather than a "confederation of sovereign states."[10] Thus, allowing states to adopt a patchwork of distinct qualifications for congressional service would "erode the structure envisioned by the Framers."[11] Notably, the Court in *U.S. Term Limits* adhered closely to its view of how the Constitution allocates power between the federal and state governments, and did not employ a balancing test to examine the degree to which the states' power to set qualifications for congressional office would interfere with the federal government's constitutional prerogatives.

A second form of structural reasoning, known as functionalism, treats the Constitution's text as having firmly spelled out the relationship among the three federal branches only at their apexes, but otherwise left it to be worked out in practice how power may be distributed or shared below the apexes.[12] Whereas formalism purports to hew closely to original meaning and regards historical practices as basically irrelevant or illegitimate, functionalism uses a balancing approach that weighs competing governmental interests as one of its principal methodologies.[13] One early example of functionalism is *McCulloch v. Maryland*.[14] In that case, the Court held that Congress had the power to create the Second Bank of the United States.[15]

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[5] *Id.* at 952, 954–55, 964 n.7.

[6] *Id.*

[7] 514 U.S. 779 (1995).

[8] *Id.* at 783. The Constitution imposes qualifications regarding minimum age, citizenship, and residency of a Member of the House or Senate, but it does not contain language expressly imposing term limits on Members. U.S. Const. art. I, § 2, cl. 2 (qualifications for Members of the House of Representatives); *id.* art. I, § 3, cl. 3 (qualifications for Senators).

[9] *U.S. Term Limits*, 514 U.S. at 783.

[10] *Id.* at 783, 822, 837–38; Kathleen M. Sullivan, Comment, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 Harv. L. Rev. 78, 88 (1995) ("The majority and the dissent deduced opposite formal structural axioms from the founding. To the majority, the founding was a 'revolutionary' act that replaced a confederation of sovereign states with a 'National Government' in which the 'representatives owe primary allegiance not to the people of a State, but to the people of the Nation.'").

[11] *U.S. Term Limits*, 514 U.S. at 783, 822, 837–38. The Court also determined that the sovereign powers possessed by the states prior to the American Revolution did not include the power to establish additional qualifications for congressional service. *Id.* at 802.

[12] Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 Geo. L.J. 833, 837 (2004); Strauss, *supra* note 2, at 489.

[13] *See* Manning, *supra* note 2, at 1942–44.

[14] 17 U.S. (4 Wheat.) 316 (1819).

[15] *Id.* at 425.

While Congress's enumerated powers in Article I, Section 8 of the Constitution do not specifically include the power to create a central bank, the Court considered whether Congress had such authority under its enumerated powers when viewed in conjunction with Article I, Section 8, Clause 18, which provides Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States."[16] The Court determined that Congress had an implied power to create the bank under the Necessary and Proper Clause in order to implement its express powers to tax and spend, concluding that the terms "necessary" and "proper" should not have a restrictive meaning on Congress's power.[17] In so holding, the Court examined the structure of the Constitution's text, noting that the Constitution located the Necessary and Proper Clause in the section of the Constitution that grants powers to Congress (Article I, Section 8), instead of the section of the Constitution that restricts the powers of the Federal Government (Article I, Section 9).[18] Moreover, the *McCulloch* Court noted that a more restrictive reading of Congress's powers would impair its ability to "perform[ ] its functions," as a narrow reading of the Necessary and Proper Clause would impose "some difficulty in sustaining the authority of [C]ongress to pass other laws for the accomplishment of the same objects."[19]

As is evident, a threshold debate among structuralists is whether to use a formalist or functionalist approach when interpreting the Constitution. This debate is founded partly in concerns about which approach demonstrates greater fidelity to the Constitution, which is closest to the original meaning of the Constitution, and which best protects liberty in cases raising questions about the proper allocation of power between the branches of the Federal Government; Federal Government and states; government institutions; or citizens and government.[20]

Formalism focuses on the structural divisions in the Constitution with the idea that close adherence to these rules is required in order to achieve the preservation of liberty.[21] An example is the Court's opinion in *Chadha*, which, as noted, held that structural relationships that the Constitution established between the Legislative and Executive Branches forbid the "one-House [legislative] veto."[22] The Court rested its holding in part on a close adherence to the structural divisions established in the Constitution, stating: "It emerges clearly that the prescription for legislative action in [Article I, Sections 1 and 7 of the Constitution] represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[23] As demonstrated in *Chadha*, a formalist approach to separation-of-powers questions rejects not only looking to post-ratification historical practices as a guide for determining constitutional meaning, but also eschews balancing tests that weigh the degree of interference with one branch's powers.

By contrast, *functionalism* takes a more flexible approach, emphasizing the core functions of each of the branches, and asking whether an overlap in these functions upsets the

[16] *Id.* at 411–12; *see* U.S. Const. art. I, § 8, cl. 18.

[17] U.S. at 419–21.

[18] *Id.*

[19] *Id.* at 409.

[20] *See* Manning, *supra* note 2, at 1942–44, 1950–52, 1958–60. *See also* Myers v. United States, 272 U.S. 52, 116 (1926).

[21] Manning, *supra* note 2, at 1958–60.

[22] Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 952, 54–55 (1983).

[23] *Id.* at 951.

equilibrium that the Framers sought to maintain.[24] An example is the Court's opinion in *Zivotofsky v. Kerry*.[25] In that case, the Court held that the President has the exclusive power to recognize formally a foreign sovereign and its territorial boundaries, and that Congress could not effectively require the State Department to issue a formal statement contradicting the President's policy on recognition.[26] In so holding, the Court stated that the President should have such an exclusive power because the Nation must have a "single policy" on which governments are legitimate, and that additional pronouncements from Congress on the issue could result in confusion.[27] The Court thus adopted a functionalist approach by considering the practical consequences of allocating the power of recognition between the Legislative and Executive Branches, ultimately concluding that the President alone should exercise that power.

A further illustration of the distinction between formalism and functionalism in a separation of powers case is *Morrison v. Olson*.[28] In *Morrison v. Olson*, the Court upheld against constitutional challenge provisions in the Ethics in Government Act of 1978 that allowed for appointment of an "independent counsel to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws."[29] The Attorney General could remove the independent counsel only for "good cause,"[30] a legal standard that provided the special prosecutor with significant independence from the President and his officers.[31] In a 7-1 decision, the Court employed a functionalist approach and held that the Act did not violate constitutional separation-of-powers principles by sufficiently interfering with the President's executive authority under Article II.[32] The Court determined the limited nature of the special prosecutor's jurisdiction and authority meant that the position did not "interfere impermissibly with [the President's] constitutional obligation to ensure the faithful execution of the laws."[33] Justice Scalia, the sole dissenter, adopted a formalist approach, arguing that the majority failed to adhere to the strict allocations of power that the Constitution establishes among the branches of government.[34] Justice Scalia wrote that the independent counsel provisions deprived the President of "exclusive control" over the exercise of "purely executive powers" (e.g., investigation and prosecution of crimes) by vesting them in the independent counsel, who was not removable at will by the President.[35]

Proponents of structuralism note that it is a method of interpretation that considers the entire text of the Constitution rather than a particular part of it.[36] As a consequence, some proponents argue that structuralist methods produce clearer justifications for decisions that require interpretation of vague provisions of the Constitution and their application to particular factual circumstances than textualism alone.[37] Some argue that structuralism

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[24] Manning, *supra* note 2, at 1950–52.

[25] 576 U.S. 1 (2015).

[26] *Id.* at 31–32.

[27] *Id.* at 14.

[28] 487 U.S. 654 (1988).

[29] *Id.* at 659–60 (internal quotation marks omitted).

[30] *Id.* at 663.

[31] *Cf.* Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) ("We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers [subject to removal 'for cause'].").

[32] 487 U.S. at 689–97.

[33] *Id.* at 693.

[34] *Id.* at 699, 703–04 (Scalia, J., dissenting).

[35] *Id.* at 705–10.

[36] Philip Bobbitt, Constitutional Fate: Theory of the Constitution 74 (1982).

[37] Black, Structure and Relationship, *supra* note 1, at 13, 22.

provides a firmer basis for personal rights than other modes of interpretation like textualism or moral reasoning.[38] For example, in *Crandall v. Nevada*, the Court struck down a state law imposing a tax on people leaving or passing through the state.[39] The Court inferred an individual right to travel among the states from the structural relationship the Constitution establishes between citizens and the federal and state governments.[40] While the Constitution does not specifically provide for a right to travel among the states, because citizens of the United States might need to travel among the states to exercise other constitutional rights, the Court inferred a right to travel from the Constitution viewed in its entirety.[41] As a result, some structuralists argue that the method of interpretation provides a more firm basis to establish key constitutional rights, like the right to travel, than other modes of constitutional interpretation.[42]

Some scholars maintain, however, that structuralism does not always lead to a clear answer.[43] More specifically, critics argue that it is more difficult for judges to apply and for citizens to understand interpretations based on structuralism than arguments based on other modes of interpretation.[44] In addition, many believe that determinations about the proper structure established by the Constitution are often subjective. While the eminent Professor Charles Black argued that structure was the most important mode of constitutional interpretation, at least one other prominent commentator has argued that the approach provides "no firm basis for personal rights" because personal rights are considered to derive from the "structure of citizenship" and are therefore "vulnerable to the [government's] desire for power and its ability to manipulate the relation between citizen and state."[45]

Intro.8.9 Historical Practices and Constitutional Interpretation

Judicial precedents are not the only type of precedents that are arguably relevant to constitutional interpretation. Prior decisions of the political branches, particularly their long-established, historical practices, are an important source of constitutional meaning to many judges, academics, and lawyers.[1] Indeed, courts have viewed historical practice as a source of the Constitution's meaning in cases involving questions about the separation of powers, federalism, and individual rights, particularly when the text provides no clear answer.[2]

A recent example of judicial reliance on historical practice—sometimes described as tradition—in constitutional interpretation is the Court's decision in *National Labor Relations Board v. Canning*.[3] When determining, among other things, that the President lacked

[38] *Id.* at 46.

[39] 73 U.S. (6 Wall.) 35, 39, 49 (1868).

[40] *Id.*

[41] Black, Structure and Relationship, *supra* note 1, at 27.

[42] *Id.* at 13, 22.

[43] Bobbitt, *supra* note 36, at 84; Cass R. Sunstein, The Partial Constitution 120 (1993).

[44] Bobbitt, *supra* note 36, at 85.

[45] *Id.* at 85–86; Alexander M. Bickel, The Morality of Consent 53 (1975).

[1] Paul Brest et al., Processes of Constitutional Decisionmaking: Cases and Materials 54–55 (2006).

[2] *E.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819) ("[A] doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice."); *see also* PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 21–25 (D.C. Cir. 2016) (summarizing Supreme Court cases using historical practice as a method of constitutional interpretation in separation-of-powers cases).

[3] 573 U.S. 513 (2014).

authority to make a recess appointment during a Senate recess of fewer than ten days, the Court cited long-settled historical practice showing an absence of a settled tradition of such recess appointments as being relevant to the resolution of a separation-of-powers question not squarely addressed by the Constitution.[4] Another example of the influence of historical practice on constitutional interpretation is the Court's decision in *Zivotofsky v. Kerry*.[5] As noted, in that case, the Court held that the President had the exclusive power to recognize formally a foreign sovereign and its territorial boundaries, and that Congress could not effectively require the State Department to issue a formal statement contradicting the President's policy on recognition.[6] In deciding the case, the Court relied in part on the long-standing historical practice of the President in recognizing foreign sovereigns without congressional consent.[7]

An example of the use of historical practice as a method of constitutional interpretation in a case involving the limits of government power is *Marsh v. Chambers*.[8] In *Marsh*, the Court considered whether the First Amendment's Establishment Clause, which prohibits laws "respecting an establishment of religion," forbade the State of Nebraska from paying a chaplain with public funds to open each legislative session with a prayer in the Judeo-Christian tradition.[9] The Court held that the state's chaplaincy practice did not violate the Establishment Clause, attaching significance to the long-standing practices of Congress (including the Congress that adopted the First Amendment as part of the Bill of Rights) and some states in funding chaplains to open legislative sessions with a prayer.[10] The Court wrote: "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."[11]

The debate over historical practice as a mode of interpretation echoes many of the elements of debates over original meaning, judicial precedent, and arguments based on a "national ethos."[12] Functionalists, for example, attach considerable importance to historical practices as a source of constitutional meaning, while formalists generally regard them as irrelevant.[13] Those employing this method often argue that, when the text of the Constitution is ambiguous, the use of historical practice has legitimacy as an interpretive tool.[14] They also contend that such an approach provides an objective and neutral basis for decision making,

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[4] *Id.* at 21.

[5] 576 U.S. 1 (2015).

[6] *Id.* at 29.

[7] *Id.* at 20–21.

[8] 463 U.S. 783 (1983).

[9] *Id.* at 784.

[10] *Id.* at 788–89.

[11] *Id.* at 786.

[12] The arguments in the following three paragraphs draw heavily from the sections *supra* on Intro.8.3 Original Meaning and Constitutional Interpretation, Intro.8.4 Judicial Precedent and Constitutional Interpretation, and Intro.8.6 Moral Reasoning and Constitutional Interpretation.

[13] Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 Wis. L. Rev. 965, 969 (2013) ("[Functionalism] is a model of interpretation that invites the use of historical practice as self-affirming support for meaning.").

[14] *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them."); *see also* Turley, *supra* note 13, at 969.

leading to more predictability and stability in the law upon which parties can rely.[15] Moreover, according interpretive significance to historical practices in cases concerning the allocation of power among the branches of government may help to preserve settled expectations that have resulted from long-standing compromises among the branches regarding such allocations.[16]

Those opposing reliance on historical practices as a source of constitutional meaning argue that it may be difficult to establish definitively what the relevant historical practices are in order to interpret the Constitution properly.[17] They suggest that not all practices are authorized by the written text and that historical sources may differ and thus might not be helpful in illuminating patterns in historical practices.[18] They also warn that this methodology could allow judges to engage in a form of what is called "law office history"—simply choosing the sources that support the historical practices they wish to ratify or reject.[19] Thus, it could be argued that historical practices may not lend themselves to easy or clear interpretation. Moreover, they can lead to results inconsistent with the original meaning of the Constitution.[20] Another possible problem with reliance on historical practices in constitutional interpretation, according to its critics, is that courts could end up legitimizing long-standing historical practices, such as slavery or segregation, that offend modern moral principles. Indeed, giving historical practices special place in constitutional interpretation could lead courts to fail to protect minority rights,[21] or to preserve the basic structure of government established by the Constitution.[22] At the same time, reliance on historical practices might undermine the political branches when they are attempting to be innovative or opt for novel solutions to old problems.[23]

Deriving the Constitution's meaning from long-established, historical practices of the political branches is one of several methods of constitutional interpretation the Court has relied upon when exercising the power of judicial review. In explaining the meaning of the provisions of the Constitution, the annotations that follow this essay often refer to these modes of interpretation when discussing how courts and others have construed particular provisions

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[15] *Cf.* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 Geo. Wash. L. Rev. 68, 70–71, 86–87 (1991) (discussing similar arguments in support of the use of judicial precedent in constitutional interpretation).

[16] Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 Sup. Ct. Rev. 1, 40 ("[I]nterests in stability and related rule-of-law considerations, such as consistency, predictability, reliance, and transparency, also can be advanced by adhering to long-standing practices, regardless of whether they date to the early post-Founding period.").

[17] *Cf.* Lee Epstein & Thomas G. Walker, Constitutional Law for a Changing America: Rights, Liberties, and Justice 28 (8th ed. 2013) (reciting arguments made against original meaning as a method of constitutional interpretation).

[18] Bradley & Siegel, *supra* note 16, at 41–44; Bobbitt, *supra* note 44, at 11 (summarizing arguments made against original meaning).

[19] Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 122 & n.13 (defining "law office history" as "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered").

[20] Bradley & Siegel, *supra* note 16, at 27–29.

[21] *Cf.* J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433, 436–37 (1986); Sotirios A. Barber, The Constitution of Judicial Power 7 (1993).

[22] Nat'l Labor Relations Bd. v. Canning, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in the judgment) ("[P]olicing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of the most vital functions of this Court.'") (citation omitted); *id.* at 47–48 ("Even if the Executive could accumulate power through adverse possession by engaging in a *consistent* and *unchallenged* practice over a long period of time, the oft-disputed practices at issue here would not meet that standard. Nor have those practices created any justifiable expectations that could be disappointed by enforcing the Constitution's original meaning. There is thus no ground for the majority's deference to the unconstitutional recess-appointment practices of the Executive Branch.").

[23] *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 1943 (2011) ("[F]unctionalists believe that Congress has substantially free rein to innovate, as long as a particular scheme satisfies the functional aims of the constitutional structure, taken as a whole.").

of the Constitution. An understanding of these methods, which are not mutually exclusive, will aid the reader in understanding the development of the constitutional doctrines that guide the Justices, government officials, and other individuals when they interpret the Constitution.

THE PREAMBLE

THE PREAMBLE

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THE PREAMBLE

Pre.1 Overview of the Preamble

Preamble:

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

The Preamble introduces the American Constitution.[1] Its majestic words are the first words people see when they read the Constitution, and it is a common ritual that school children throughout the Nation memorize the Preamble when learning about the Nation's Founding document.[2] The Preamble itself imparts three central concepts to the reader: (1) the source of power to enact the Constitution (i.e., "the People of the United States"); (2) the broad ends to which the Constitution is "ordain[ed] and establish[ed]"; and (3) the authors' intent for the Constitution to be a legal instrument of lasting "Posterity."[3] Yet, as discussed in more detail below, the Preamble's origins and its continued relevance in constitutional law are unclear and, for many people, unknown.

The uncertainty surrounding the Preamble may be surprising, as the Constitution's introduction would seem central to any debate over the document's meaning. And, in fact, at least two of the Founding Fathers appeared to view the Preamble as an important feature of the document critical to the legal framework it established. James Monroe, as a delegate to the Virginia ratifying convention, referred to the Preamble as the "Key of the Constitution,"[4] and Alexander Hamilton argued in the *Federalist No. 84* that the existence of the Preamble obviated any need for a bill of rights.[5] Nonetheless, the Preamble was not the subject of any extensive debate at the Constitutional Convention in Philadelphia, having been added to the Constitution as an apparent afterthought during the final drafting process.[6]

In the years following the Constitution's enactment, the Supreme Court of the United States cited the Preamble in several important judicial decisions,[7] but the legal weight of the Preamble was largely disclaimed. As Justice Joseph Story noted in his *Commentaries*, the Preamble "never can be resorted to, to enlarge the powers confided to the general government, or any of its departments."[8] The Supreme Court subsequently endorsed Justice Story's view of the Preamble, holding in *Jacobson v. Massachusetts* that, while the Constitution's introductory paragraph "indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded by the Court as the source of any substantive power conferred on" the federal government.[9] Nonetheless, while the Court has not viewed the Preamble as having any direct, substantive legal effect, the Court has referenced the broad

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[1] *See* U.S. Const. pmbl.

[2] *See* Henry Conserva, Understanding the Constitution 7 (2011).

[3] U.S. Const. pmbl.

[4] *See* James Monroe, The Writings of James Monroe: 1778–1794, at 356 (Stanislaus Murray Hamilton ed., 1898).

[5] *See* The Federalist No. 84 (Alexander Hamilton).

[6] *See* Dennis J. Mahoney, *Preamble*, *in* 3 Encyclopedia of the American Constitution 1435 (Leonard W. Levy et al. eds., 1986) (noting "there is no record of any objection to the Preamble as it was reported by the committee").

[7] *See, e.g.*, M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403–05 (1819) ; Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 324–25 (1816); Chisholm v. Georgia, 2 U.S. (Dall.) 419, 463 (1793) (Wilson, J., concurring); *id.* at 474–75 (Jay, C.J., concurring).

[8] *See* I Joseph Story, Commentaries on the Constitution of the United States § 462 (1833).

[9] 197 U.S. 11, 22 (1905).

precepts of the Constitution's introduction to confirm and reinforce its interpretation of other provisions within the document.[10] As such, while the Preamble does not have any specific legal status, Justice Story's observation that the "true office" of the Preamble is "to expound the nature, and extent, and application of the powers actually conferred by the Constitution" appears to capture its import.[11] More broadly, while the Preamble may have little significance in a court of law, the preface to the Constitution remains an important part of the Nation's constitutional dialogue, inspiring and fostering broader understandings of the American system of government. In this vein, this essay considers the origins of the Preamble, exploring its historical roots and how it came to be a part of the Constitution, before discussing the legal and practical significance of the Constitution's opening words in the time since the ratification.

Pre.2 Historical Background on the Preamble

Preamble:

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

The Preamble's origins predate the Constitutional Convention—preambles to legal documents were relatively commonplace at the time of the Nation's Founding. In several English laws that undergird American understandings of constitutional rights, including the Petition of Rights of 1628,[1] the Habeas Corpus Act of 1679,[2] the Bill of Rights of 1689,[3] and the Act of Settlement of 1701,[4] the British Parliament included prefatory text that explained the law's objects and historical impetus. The tradition of a legal preamble continued in the New World. The Declarations and Resolves of the First Continental Congress in 1774 included a preamble noting the many grievances the thirteen colonies held against British rule.[5] Building on this document, in perhaps the only preamble that rivals the fame of the Constitution's opening lines, the Declaration of Independence of 1776 announced: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

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[10] *See, e.g.*, Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2675 (2015) (justifying the constitutional legitimacy of the modern initiative process by noting that the "fundamental instrument of government derives its authority from "We the People" "); Holder v. Humanitarian Law Project, 561 U.S. 1, 40 (2010) (upholding a law criminalizing the provision of certain forms of material support to terrorist organizations against a First and Fifth Amendment challenge, and noting that "The Preamble to the Constitution proclaims that the people of the United States ordained and established that charter of government in part to 'provide for the common defence.'"); U.S. Term Limits v. Thornton, 514 U.S. 779, 838 (1995) ("[A]llowing individual States to craft their own qualifications for Congress would thus erode the structure envisioned by the Framers, a structure that was designed, in the words of the Preamble to our Constitution, to form a 'more perfect Union.'"); *M'Culloch,* 17 U.S. (4 Wheat.) at 403 (rejecting the argument that the powers of the federal government must be exercised in subordination to the states because the federal "government proceeds directly from the people; is 'ordained and established,' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity'").

[11] *See* Story, *supra* note 8, § 462.

[1] 3 Car. 1, c. 1.

[2] 31 Car. 2, c. 2.

[3] 1 W. & M. c. 2.

[4] 12 & 13 Will. 3, c. 2.

[5] The Declarations and Resolves of the First Continental Congress (Oct. 14, 1774), *reprinted in* 1 Sources and Documents of the U.S. Constitutions: National Documents 1492–1800, at 291 (William F. Swindler ed., 1982) [hereinafter Sources & Documents].

The Declaration then listed a series of complaints against King George III, before culminating in a formal declaration of the colonies' independence from the British crown.[6] Moreover, several state constitutions at the time of the founding contained introductory text that echoed many of the themes of the 1776 Declaration.[7] The Articles of Confederation that preceded the Constitution had their own preamble—authored by "we the undersigned Delegates of the States"—declaring the "Confederation and perpetual Union" of the thirteen former colonies.[8]

While the concept of a preamble was well-known to the Constitution's Framers, little debate occurred at the Philadelphia Convention with respect to whether the Constitution required prefatory text or as to the particular text agreed upon by the delegates. For the first two months of the Convention, no proposal was made to include a preamble in the Constitution's text.[9] In late July 1787, the Convention's Committee of Detail was formed to prepare a draft of a constitution, and during those deliberations, Committee member Edmund Randolph of Virginia suggested for the first time that "[a] preamble seems proper."[10] Importantly, however, Randolph considered the Constitution to be a legal, as opposed to a philosophical document, and rejected the idea of having a lengthy "display of theory" to explain "the ends of government and human politics" akin to the Declaration of Independence's preamble or those of several state constitutions.[11] Articulating what would ultimately become the Preamble's underlying rationale, Randolph instead argued that any prefatory text to the Constitution should be limited to explaining why the government under the Articles of Confederation was insufficient and why the "establishment of a supreme legislative[,] executive[,] and judiciary" was necessary.[12]

The initial draft of the Constitution's Preamble was, however, fairly brief and did not specify the Constitution's objectives. As released by the Committee of Detail on August 6, 1787, this draft stated: "We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity."[13] While this draft was passed unanimously by the delegates,[14] the Preamble underwent significant changes after the draft Constitution was referred to the Committee of Style on September 8, 1787. Perhaps with the understanding that the inclusion of all thirteen

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[6] *See* The Declaration of Independence para. 1 (U.S. 1776), *reprinted in* Sources & Documents, *supra* note 5, at 321.

[7] *See, e.g.*, Mass. Const. of 1780, pmbl. (stating the "objects" of the Massachusetts Constitution of 1780 were "to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it, with the power of enjoying in safety and tranquillity their natural rights, and blessings of life" and, to this end, a government was created "for Ourselves and Posterity"); N.H. Const. of 1776, pmbl. (creating a government "for the preservation of peace and good order, and for the security of the lives and properties of the inhabitants of this colony"); N.Y. Const. of 1777, pmbl. (creating a government "best calculated to secure the rights and liberties of the good people of this State"); Pa. Const. of 1776, pmbl. (stating the government was created for the "protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights"); Vt. Const. of 1786, pmbl. (establishing a constitution to "best promote the general happiness of the people of this State, and their posterity"); Va. Const. of 1776, Bill of Rights, pmbl. (stating "the representatives of the good people of Virginia" created their bill of rights, which "pertain to them and their posterity").

[8] *See* Articles of Confederation of 1781, pmbl., *reprinted in* Sources & Documents, *supra* note 5, at 335.

[9] *See* Morris D. Forkosch, *Who Are the "People" in the Preamble to the Constitution?*, 19 Case W. Res. L. Rev. 644, 688–89 & n.187 (1968) (examining various records of the first two months of the Philadelphia Convention and concluding that "the Preamble was completely ignored" in the early debates).

[10] *See* 2 The Records of the Federal Convention of 1787, at 137 (Max Farrand ed., 1966) [hereinafter Farrand's Records].

[11] *Id.*

[12] *Id.*

[13] *Id.* at 177.

[14] *Id.* at 193.

of the states in the Preamble was more precatory than realistic,[15] the Committee of Style, led by Gouverneur Morris of Pennsylvania,[16] replaced the opening phrase of the Constitution with the now-familiar introduction "We, the People of the United States."[17] Moreover, the Preamble, as altered by Morris, listed six broad goals for the Constitution: "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty."[18] The record from the Philadelphia Convention is silent, however, as to why the Committee of Style altered the Preamble, and there is no evidence of any objection to the changes the Committee made to the final version of the Preamble.[19]

While the Preamble did not provoke any further discussion in the Philadelphia Convention, the first words of the Constitution factored prominently in the ratifying debates that followed.[20] For instance, Anti-Federalists, led by Patrick Henry of Virginia, criticized the opening lines of the Constitution at the Virginia ratifying convention:

> Who authorized them to speak the language of We, the people, instead of We, the States? States are the characteristics and the soul of a confederation. If the states be not the agents of this compact, it must be one great, consolidated, national government, of the people of all the states.[21]

In response, Edmund Pendleton replied: "[W]ho but the people can delegate powers? Who but the people have a right to form government?"[22] Similarly, John Marshall declared that both state and federal "governments derive [their] powers from the people, and each was to act according to the powers given it."[23] Echoing these themes at the Pennsylvania Ratification Convention, James Wilson defended the "We the People" language, arguing that "all authority is derived from the people" and that the Preamble merely announces the inoffensive principle that "people have a right to do what they please with regard to the government."[24]

The Preamble also figured into the written debates over whether to ratify the Constitution. For instance, countering criticisms that the Constitution lacked a bill of rights, Alexander Hamilton in the *Federalist No. 84* quoted the Preamble, arguing it obviated any need for an enumeration of rights.[25] An Anti-Federalist pamphlet authored under the pseudonym Brutus, noting the Preamble's references to a "more perfect union" and "establish[ment] [of] justice,"

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[15] *See* Charles Warren, The Making of the Constitution 394 (1928) (arguing it was "necessary to eliminate from the preamble the names of the specific States; for it could not be known, at the date of the signing of the Preamble and the rest of the Constitution by the delegates, just which of the thirteen States would ratify").

[16] It is generally acknowledged that the Preamble's author was Gouverneur Morris, as the language from the federal preamble echoes that of Morris's home state's Constitution. *See* Carl Van Doren, The Great Rehearsal: The Story of the Making and Ratifying of the Constitution of the United States 160 (1948); *see also* Richard Brookhiser, Gentleman Revolutionary: Gouverneur Morris, the Rake Who Wrote the Constitution 90 (2003) (claiming the "Preamble was the one part of the Constitution that Morris wrote from scratch").

[17] Farrand's Records, *supra* note 10, at 590.

[18] *Id.*

[19] *See* Dennis J. Mahoney, *Preamble*, *in* 3 Encyclopedia of the American Constitution 1435 (Leonard W. Levy et al. eds., 1986) (noting "there is no record of any objection to the Preamble as it was reported by the committee").

[20] *See* Akhil Reed Amar, America's Constitution: A Biography 7 (2005) ("In the extraordinary extended and inclusive ratification process . . . Americans regularly found themselves discussing the Preamble itself.").

[21] *See* Jonathan Elliot, 3 Elliot's Debates on the Federal Constitution 22 (2d. ed. 1996).

[22] *See id.* at 37.

[23] *Id.* at 419.

[24] *Id.* at 434–35.

[25] *See* The Federalist No. 84 (Alexander Hamilton) ("Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.").

argued that the Constitution would result in the invalidation of state laws that interfered with these objectives, resulting in the abolition of "all inferior governments" and giving "the general one complete legislative, executive, and judicial powers to every purpose."[26] While not disputing the need for national union in the wake of their experience under the Articles of Confederation,[27] supporters of the Constitution rejected the notion that their proposed government was truly a "*national* one" because "its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."[28]

In particular, those writing in support of the Constitution's ratification cited the Preamble's language. The Constitution's goals of "establish[ing] justice" and "secur[ing] the blessings of liberty"—prompted by the perception that state governments at the time of the framing were violating individual liberties, including property rights, through the tyranny of popular majorities[29]—was a central theme of the *Federalist Papers*. For instance, in the *Federalist No. 51* James Madison described justice as "the end of government . . . [and] civil society" that "has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit."[30] Similarly, the Constitution's goals of "ensur[ing] domestic tranquility" and "provid[ing] for the common defence" were noted in the *Federalist Papers* later attributed to John Jay and Alexander Hamilton, who described both the foreign threats and interstate conflicts that faced a disunited America as an argument for ratification.[31] Finally, the Preamble's references to the "common defence" and the "general welfare," which mirrored the language of the Articles of Confederation,[32] were understood by Framers like James Madison to underscore that the new federal government under the Constitution would generally provide for the national good better than the government it was replacing.[33] For example, calling the Confederation's efforts to provide for the "common defense and general welfare" an "ill-founded and illusory" experiment, Alexander Hamilton in the *Federalist No. 23* argued for

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[26] *See Brutus No. XII* (Feb. 7 & 14, 1788), *reprinted in* The Debate on the Constitution: Federalist and Anti-Federalist Speeches, Articles and Letters During the Struggle Over Ratification, Part Two: January to August 1788, at 174 (Bernard Bailyn ed., 1993).

[27] *See* The Federalist No. 5 (John Jay) ("[W]eakness and divisions at home would invite dangers from abroad; and that nothing would tend more to secure us from them than union, strength, and good government within ourselves.").

[28] *See* The Federalist No. 39 (James Madison).

[29] *See* Gordon S. Wood, The Creation of the American Republic 1776–1787, at 409–13 (1969) (noting that the Framer's experience of government under the Articles of Confederation, including the famous debtors' uprising called Shay's Rebellion, led to fear that, unless checks were imposed on majority rule, the debtor-majority might infringe the rights of the creditor-minority).

[30] *See* The Federalist No. 51 (James Madison).

[31] *See* The Federalist Nos. 2–5 (John Jay) (describing foreign dangers posed to America); *see id.* Nos. 6–8, at 21–39 (Alexander Hamilton) (describing concerns over domestic factions and insurrection in America).

[32] *See* Articles of Confederation of 1781, art. III, *reprinted in* Sources & Documents, *supra* note 5, at 335 ("The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever."); *id.* art. VIII, *reprinted in* Sources & Documents, *supra* note 5, at 338 ("All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.").

[33] *See* Letter from James Madison to Andrew Stevenson (Nov. 17, 1830), *reprinted in* 2 The Founders' Constitution 453, 456 (Philip B. Kurland & Ralph Lerner eds., 1987) (contending that the terms "common defence" and "general welfare," "copied from the Articles of Confederation, were regarded in the new as in the old instrument, . . . as general terms, explained and limited by the subjoined specifications").

a central government with the "full power to levy troops; to build and equip fleets; . . . to raise revenues" for an army and navy; and to otherwise manage the "national interest."[34]

Nonetheless, there is no historical evidence suggesting the Constitution's Framers conceived of a Preamble with any substantive legal effect, such as granting power to the new government or conferring rights to those subject to the federal government.[35] Instead, the founding generation appeared to view the Constitution's prefatory text as generally providing the foundation for the text that followed.[36] In so doing, the Preamble ultimately reflects three critical understandings that the Framers had about the Constitution. First, the Preamble specified the source of the federal government's sovereignty as being "the People."[37] Second, the Constitution's introduction articulated six broad purposes, all grounded in the historical experiences of being governed under the Articles of Confederation.[38] Finally, and perhaps most critically, the Preamble, with its conclusion that "this Constitution" was established for "ourselves and our Posterity," underscored that, unlike the constitutions in Great Britain and elsewhere at the time of the founding, the American Constitution was a written and permanent document that would serve as a stable guide for the new nation.[39]

Pre.3 Legal Effect of the Preamble

Preamble:

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

In the years following the Constitution's ratification, the Preamble has had a relatively minor role as a matter of legal doctrine, but an outsized role, particularly outside of the courtroom, in broadly embodying the American constitutional vision. With regard to the legal effect of the Constitution's preface, in the early years of the Supreme Court, it did reference the Preamble's words in some of the most important cases interpreting the Constitution. For

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[34] *See* The Federalist No. 23 (Alexander Hamilton).

[35] *See* I Joseph Story, Commentaries on the Constitution of the United States § 462 (1833).

[36] *See id.* (concluding the Preamble's "true office is to expound the nature, and extent, and application of the powers actually conferred by the constitution"); *see also* 1 Annals of Cong. 717–19 (1789) (noting several Members of the First Congress described the Preamble as comprising "no part of the Constitution"); Letter from James Madison to Robert S. Garnett (Feb. 11, 1824), *in* 9 The Writings of James Madison 176–77 (Gaillard Hunt ed., 1910) ("The general terms or phrases used in the introductory propositions . . . were never meant to be inserted in their loose form in the text of the Constitution. Like resolutions preliminary to legal enactments it was understood by all, that they were to be reduced by proper limitations and specifications . . . .").

[37] *See* Story, *supra* note 35, § 463 ("We have the strongest assurances, that this preamble was not adopted as a mere formulary; but as a solemn promulgation of a fundamental fact, vital to the character and operations of the government. The obvious object was to substitute a government of the people, for a confederacy of states; a constitution for a compact.").

[38] Farrand's Records, *supra* note 10, at 137 ("[T]he object of our preamble ought to be to briefly declare, that the present federal government is insufficient to the general happiness [and] that the conviction of this fact gave birth to this convention.").

[39] *See* Erwin Chemerinsky & Michael Stokes Paulsen, Common Interpretation: The Preamble, Interactive Constitution, Const. Ctr. (last visited Nov. 1, 2018), https://constitutioncenter.org/interactive-constitution/interpretation/preamble-ic/interps/37 ("[T]he Preamble declares that what the people have ordained and established is 'this Constitution'—referring, obviously enough, to the written document that the Preamble introduces. . . . The U.S. Constitution contrasts with the arrangement of nations like Great Britain, whose 'constitution' is a looser collection of written and unwritten traditions constituting the established practice over time. America has a written constitution, not an unwritten one."); *see also* Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 Nw. U. L. Rev. 857, 869 (2009) ("'[T]his Constitution' means, each time it is invoked, the written document.").

example, in 1793, two Members of the Court cited the Preamble in *Chisholm v. Georgia* to argue that the "people," in establishing the Constitution, necessarily subjected the State of Georgia to the jurisdiction of the federal courts in exchange for accomplishing the six broad goals listed in the Constitution's Preamble.[1] Similarly, in *Martin v. Hunter's Lessee* , the Court relied on the Preamble in concluding that the Constitution permitted the Court to exercise appellate jurisdiction over the final judgments of the highest court of a state when adjudicating questions of federal law, noting that the Constitution was established by the "people of the United States" who, in turn, "had a right to prohibit the states" from exercising any powers that were incompatible with the "objects of the general compact."[2] And in *M'Culloch v. Maryland*, Chief Justice John Marshall echoed these themes in upholding the constitutionality of a national bank, quoting the words of the Preamble when arguing for the supremacy of the law of the "people" over the laws of the states.[3]

Nonetheless, while the Court during the first century of the Nation's existence referenced the Preamble's language while interpreting the Constitution, it does not appear that the Court has ever attached any legal weight to the Preamble standing alone. Chief Justice John Jay, while serving as a circuit judge, concluded that a preamble to a legal document cannot be used to abrogate other text within it; instead, introductory language can be used to resolve two competing readings of the text.[4] Similarly, Justice Joseph Story argued in his *Commentaries* that the Preamble, while generally providing the ability to "expound the nature, and extent, and application" of the powers created by the Constitution, "never can be resorted to, to enlarge the powers confided to the general government, or any of its departments."[5]

In 1908, the Supreme Court squarely adopted Justice Story's view of the Preamble in *Jacobson v. Massachusetts*, holding that while the Constitution's introductory paragraph "indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on" the federal government.[6] Instead, "[s]uch powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted."[7] In this vein, the Court has rarely cited the Preamble in its decisions interpreting the Constitution,[8] and the Court continues to interpret prefatory text in the Constitution as announcing general purposes of the text that follows.[9]

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[1] *See* 2 U.S. (Dall.) 419, 463 (1793) (Wilson, J., concurring) ("In order, therefore, to form a more perfect union, to establish justice, to ensure domestic tranquillity, to provide for common defence, and to secure the blessings of liberty, those people, among whom were the people of Georgia, ordained and established the present Constitution. By that Constitution Legislative power is vested, Executive power is vested, Judicial power is vested."); *Id.* at 474–75 (Jay, C.J., concurring) (listing the six "objects" of the Constitution and concluding that a state could be sued by citizens of another state in federal court).

[2] 14 U.S. (1 Wheat.) 304, 324–25 (1816).

[3] 17 U.S. (1 Wheat.) 316, 403–05 (1819) ("The government proceeds directly from the people; is 'ordained and established,' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.' The assent of the States, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the people.").

[4] Jones v. Walker, 13 F. Cas. 1059, 1065 (C.C.D. Va. 1800) (Jay, C.J.) ("A preamble cannot annul enacting clauses; but when it evinces the intention of the legislature and the design of the act, it enables us, in cases of two constructions, to adopt the one most consonant to their intention and design.").

[5] *See* I Joseph Story, Commentaries on the Constitution of the United States § 462 (1833).

[6] 197 U.S. 11, 22 (1905).

[7] *Id.*

[8] One study concluded that from 1825 to 1990, the Supreme Court cited the Preamble only twenty-four times, mostly in dissenting opinions. *See* Milton Handler, Brian Leiter & Carole E. Handler, *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 Cardozo L. Rev. 117, 120–21 n.14 (1991).

Pre.3
Legal Effect of the Preamble

While the Supreme Court has not viewed the Preamble to have much direct, legal effect, the Court continues to rely on the broad precepts of the Constitution's introduction to confirm and reinforce its interpretation of other provisions within the document. For instance, in 2015 in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court held that Arizona's process for redistricting, which was created not by an act of the state legislature, but by a popular initiative, was constitutionally permissible.[10] In doing so, the Court declared that the "fundamental instrument of government derives its authority from 'We the People.'"[11] Likewise, the Court referenced the Preamble's language proclaiming that the "United States ordained and established that charter of government in part to 'provide for the common defence'" in upholding a law criminalizing certain forms of material support to terrorist organizations.[12] And in *United States Term Limits, Inc. v. Thornton*, the Court, in concluding that states could not "craft their own qualifications for Congress," reasoned that the alternative would "erode the structure envisioned by the Framers, a structure that was designed, in the words of the Preamble to our Constitution, to form a 'more perfect Union.'"[13]

The Preamble appears to have had a more significant influence outside of judicial opinions in statements from the leaders of the political branches of government, often factoring in various debates during the early history of the nation. For instance, during the debates in the First Congress over the constitutionality of the Bank of the United States, congressional leaders, like Elbridge Gerry of the Massachusetts, quoted the Preamble to note the broad "objects for which the Constitution was established" and to justify the establishment of a national bank to promote the "general welfare."[14] And the Preamble featured in early congressional debates over the role of the new government in foreign affairs. For example, during the Tenth Congress, Henry Southard of New Jersey cited the Preamble in arguing in favor of Congress arming and equipping the militia of the United States, recognizing that it was the "object of the establishment of [the federal] government" to provide for the "common defence" against "foreign enemies."[15] Perhaps one of the most famous references to the Preamble in the halls of Congress came in a speech of Senator Daniel Webster in the midst of the nullification debates of the 1830s, wherein he quoted the Preamble to argue that the Constitution was "perpetual and immortal," establishing a union "which shall last through all time."[16]

While the Preamble may have had particular relevance to a number of isolated questions before the Congress in the Nation's early years, Presidents and congressional leaders have

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For an extensive discussion of the Court's citations to the Preamble, see Dan Himmelfarb, *The Preamble in Constitutional Interpretation*, 2 Seton Hall Const. L.J. 127 (1992).

[9] *Cf.* District of Columbia v. Heller, 554 U.S. 570, 578 (2008) ("The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose."); *see also id.* at 578 n.3 ("[I]n America the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms." (internal citations and quotations marks omitted)).

[10] 135 S. Ct. 2652, 2659 (2015).

[11] *Id.* at 2675.

[12] Holder v. Humanitarian Law Project, 561 U.S. 1, 40 (2010); *see also* Wayte v. United States, 470 U.S. 598, 612 (1985) (remarking that the "Framers listed '[providing] for the common defence,' . . . as a motivating purpose for the Constitution" in noting the values promoted by the challenged policy of passively enforcing the selective service registration requirement); Greer v. Spock, 424 U.S. 828, 837 (1976) (noting "[o]ne of the very purposes for which the Constitution was ordained and established was to 'provide for the common defence,'" in upholding a law restricting political campaigning on a military base).

[13] 514 U.S. 779, 838 (1995) .

[14] *See* 2 Annals of Cong. 1947–48 (1791).

[15] *See* 17 Annals of Cong. 1047 (1807).

[16] Daniel Webster, *The Constitution Not a Compact Between Sovereign States* (Feb. 16, 1833), *reprinted in* 3 The Works of Daniel Webster 452, 471 (9th ed. 1856).

more generally relied on the Preamble's laudatory phrases in exploring the broader import of the Constitution and the general purposes of American government. For instance, President James Monroe referred to the Preamble as the "Key of the Constitution,"[17] and in his inaugural address, President John Quincy Adams described the "first words" of the Constitution as declaring the purposes for which the government "should be invariably and sacredly devoted."[18] Echoing these themes in his own first inaugural address, President Abraham Lincoln invoked the Preamble's "perfect union" language to note the importance of national unity as the country faced the brink of civil war.[19] In the midst of another constitutional crisis—that which arose in 1937 amid clashes over the constitutionality of the New Deal—President Franklin Roosevelt stated the need to "read and reread the preamble of the Constitution," as its words suggested that the document could be "used as an instrument of progress, and not as a device for prevention of action."[20] Decades later, Representative Barbara Jordan, the first African-American woman elected to the House of Representatives from the South, quoted the Preamble in a statement before the House Judiciary Committee as it considered the Articles of Impeachment for President Richard Nixon.[21] In that statement, she noted that "through the process of amendment, interpretation, and court decision" she had been included in "We, the people" and was now serving as an "inquisitor" aiming to preserve the goals of the Constitution.[22]

In more recent years, the political branches have continued to look to the Preamble, not so much for answering specific legal questions, but more so for discussing broad constitutional norms. Indeed, in a 2007 speech on the House floor discussing the modern view of the Preamble, Representative Scott Garrett of New Jersey described the preface to the Constitution as a "condensed version [of] what the Founders were intending in" the Constitution and for the Nation.[23] In this vein, President Ronald Reagan described the Preamble of the Constitution and its opening words of "We the People" as embodying "the genius, the hope, and the promise of America forever and for all mankind."[24] And President Barack Obama called the vision of the Preamble's reference to a "more perfect union" to be the vision of a "true United States of America, bound together by a recognition of the common good, [that] guided our country through its darkest hour and helped it re-emerge as a beacon of freedom and equality under law."[25] As a result, while the Preamble may have little legal weight in a court of law and may not be dispositive in resolving particular legal disputes before the political branches, the preface to the Constitution remains an important facet of the national dialogue on the country's founding document, inspiring and fostering deeper understandings of the American system of government.

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[17] *See* James Monroe, The Writings of James Monroe: 1778–1794, at 356 (Stanislaus Murray Hamilton ed., 1898).

[18] John Quincy Adams, Inaugural Address (Mar. 4, 1825), *reprinted in* The Annals of America 509 (Abiel Holmes ed., 2d ed. 1829).

[19] Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *reprinted in* 4 The Collected Works of Abraham Lincoln 265 (Roy P. Basler ed., 1953) ("In 1787, one of the declared objects for ordaining and establishing the Constitution, was 'to form a more perfect union.'").

[20] *See* 81 Cong. Rec. 84 (1937).

[21] *Debate on Articles of Impeachment: Hearings on H. Res. 803 Before the H. Comm. on the Judiciary*, 93d Cong. 111 (1974) (statement of Rep. Jordan).

[22] *Id.*

[23] 153 Cong. Rec. H2722 (daily ed. Mar. 20, 2007) (statement of Rep. Garrett).

[24] Proclamation No. 5634, 50 Fed. Reg. 13,622 (Apr. 21, 1987).

[25] Proclamation No. 8367, 74 Fed. Reg. 20,861 (May 5, 2009).

ARTICLE I
LEGISLATIVE BRANCH

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ARTICLE I—LEGISLATIVE BRANCH

ArtI.1 Overview of Article I, Legislative Branch

Article I of the U.S. Constitution establishes the Legislative Branch of the federal government. Section 1, the Legislative Vesting Clause, provides that all federal legislative powers are vested in the Congress.[1] As the Supreme Court stated in 1810, "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society."[2] One influential legal scholar in 1826 described "[t]he power of making laws" as "the supreme power in a state."[3] As discussed elsewhere, however, the Founders limited Congress's power by only vesting the legislative powers "herein granted" by the Constitution, by creating a bicameral legislature, and by creating checks in the other branches.[4]

Section 2 of Article I outlines the makeup and certain unique powers of the House of Representatives, and Section 3 does the same for the Senate. Sections 4 through 6 address procedural matters common to the two Houses, including elections, assembly and adjournment, legislative procedures, and certain privileges and limitations on Members.

As mentioned, the Constitution does not grant Congress "plenary legislative power but only certain enumerated powers."[5] Sections 7 and 8 outline the exercise of those enumerated powers. Section 7 addresses the procedures for enacting legislation, including special provisions for bills raising revenue, and the general requirements of bicameralism and presentment—the need for a bill to pass both Houses of Congress and be presented to the President for signature.[6] Section 8 enumerates Congress's specific legislative authorities, including the power to tax and spend, to borrow money, to regulate interstate commerce, to establish uniform rules on naturalization and bankruptcy, to coin money, to punish counterfeiters, to establish post offices, to regulate intellectual property, to establish courts, to punish maritime crimes, to declare war, to raise and support armies, to govern enclaves, and to make other laws "necessary and proper" for executing these enumerated powers.

Section 9 *denies* certain powers to Congress, including by restricting the slave trade; generally denying the ability to suspend the writ of habeas corpus; prohibiting bills of attainder and ex post facto laws; restricting direct taxes, export taxes, and appropriations; prohibiting ports preferences; and prohibiting titles of nobility and foreign emoluments. Section 10 denies certain powers to the *states*, including by preventing states from entering into treaties, issuing bills of credit or coining money; prohibiting bills of attainder, ex post facto laws, or laws impairing the obligations of contracts; and by restricting states' ability to impose duties on imports or exports. Section 10 also provides that states may not take certain actions without Congress's consent, including laying duties of tonnage, keeping troops or engaging in war, or entering into compacts with other states or foreign powers.

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[1] *See* ArtI.S1.1 Overview of Legislative Vesting Clause.

[2] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810).

[3] 1 James Kent, Commentaries on American Law (1826), https://press-pubs.uchicago.edu/founders/documents/a1_1s10.html.

[4] *See* ArtI.S1.2.1 Origin of Limits on Federal Power; ArtI.S1.2.2 Origin of a Bicameral Congress.

[5] Murphy v. NCAA, No. 16-476, slip op. at 15 (U.S. May 14, 2018).

[6] ArtI.S7.C2.1 Overview of Presidential Approval or Veto of Bills.

Section 1—Legislative Vesting Clause

ArtI.S1.1 Overview of Legislative Vesting Clause

Article I, Section 1:

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

The Legislative Vesting Clause of the Constitution grants specific and limited legislative powers[1] to a bicameral Congress of the United States, which is composed of a House of Representatives and Senate.[2] As such, the Legislative Vesting Clause and the coordinate Executive and Judicial Vesting Clauses delineate the powers the Framers accorded the U.S. Government's Legislative, Executive, and Judicial Branches.

Historical sources from the decades leading up to the ratification of the Constitution suggest that the Legislative Vesting Clause would have been understood to: (1) limit the powers of Congress to those expressly granted in the nation's founding document; (2) diffuse legislative power by creating a legislature with two chambers; and (3) limit the extent to which the other branches of government could exercise legislative power.[3] Although documents authored by, known to, or relied upon by the Founders support these three interrelated purposes of the Legislative Vesting Clause, scholars continue to debate whether the Framers or others alive at the time of the Founding would have understood the Clause to prohibit Congress from empowering the other branches of government or private entities to govern private conduct.[4]

ArtI.S1.2 Historical Background

ArtI.S1.2.1 Origin of Limits on Federal Power

Article I, Section 1:

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

The Legislative Vesting Clause begins by providing that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[1] The decision of the Framers of the

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[1] At least one of the Framers defined "legislative power" as the power to "prescribe rules for the regulation of society." The Federalist No. 75 (Alexander Hamilton). *See also* John Locke, Two Treatises of Government 382 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690) (defining the legislative power as "that which has a right to direct how the Force of the Commonwealth shall be imploy'd for preserving the Community and the Members of it.").

[2] U.S. Const. art. I, §§ 1, 8. In *McCulloch v. Maryland*, the Supreme Court stated that the Constitution created a government of enumerated powers. 17 U.S. (4 Wheat.) 316, (1819) ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.").

[3] *See, e.g.*, Baron Charles de Montesquieu, Spirit of Laws (1748); John Locke, Two Treatises of Government (Peter Laslett ed., Cambridge Univ. Press 1967) (1690); David Hume, Of the Original Contract (1752); Marchamont Nedham, The Excellence of a Free State (1656); William Blackstone, Commentaries on the Laws of England (1765).

[4] *Compare* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1733–34 (2002) ("[T]here's remarkably little evidence that the Framers envisioned [a nondelegation constraint] on legislative authority. . . . The Framers' principal concern was with legislative aggrandizement—the legislative seizure of powers belonging to other institutions—rather than with legislative grants of statutory authority to executive agents."), *with* Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 334 (2002) ("If one is concerned about the original meaning of the Constitution, the widespread modern obsession with the nondelegation doctrine may have some justification.").

[1] U.S. Const. art. I, § 1.

Constitution to limit Congress's powers to those "herein granted"—or, in other words, those specifically enumerated in the Constitution—reflects their experience as colonists living under the rule of the powerful British Parliament of the 1700s. The English jurist William Blackstone, writing only two decades before the American Revolution, described the British Parliament as possessing wide-ranging powers to enact legislation affecting each individual's life, liberty, and property[2] that no other governmental authority could effectively amend or repeal.[3] Although the British King could give his assent to laws, exercise some limited legislative powers in making treaties, and enforce the laws, the King could not make law without Parliament.[4] As a result, only Parliament had the power to undo or change the laws it had made, leaving the British people either to petition Parliament for changes to undesirable laws or take the extreme step of overthrowing their government.[5]

The Framers rejected this form of "parliamentary supremacy," believing that a national legislature should not exercise the "absolute despotic power"[6] of government without limitation.[7] Indeed, scholars have noted that some of the major grievances prompting the American Revolution concerned various Acts of the British Parliament that violated the colonists' rights (e.g., the right to trial by jury), which "were guaranteed specifically to the colonists by means of colonial charters."[8] Consequently, to preserve individual liberty, the Framers specifically limited the federal legislative power to those powers expressly mentioned in the Constitution and the power to "make all Laws which shall be necessary and proper" to carry out the Federal Government's limited powers.[9] As James Wilson argued during the

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[2] 1 William Blackstone, Commentaries 159–60 (Philadelphia 1893) (1768) ("[The Parliament] hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations. . . . All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal."). *But see id.* at 335–36 (suggesting that the Crown's powers, including collecting taxes and commanding a standing army, indicated that the "*real* power of the crown has not been too far weakened by any transactions in the last century").

[3] *Id.* at 160 ("True it is, that what the parliament doth, no authority upon earth can undo . . . .").

[4] The Federalist No. 47 (James Madison) ("The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which when made have, under certain limitations, the force of legislative acts . . . . [But] [t]he magistrate in whom the whole executive power resides cannot of himself make a law . . . "). The understanding that the King could not both make and enforce laws governing the rights and duties of private individuals had a lengthy pedigree in the British common law tradition, with "ancient roots in the concept of the 'rule of law'" (i.e., the notion that the King, too, was subject to the statutory and common law of the land when exercising his powers). *See* Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 66–76 (2015) (Thomas, J., concurring) (discussing the history of the separation of executive and legislative power in the British common law tradition).

[5] 1 Blackstone, *supra* note 2, at 160 ("No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation . . . ").

[6] *Id.* at 159.

[7] *See, e.g.*, The Federalist No. 83 (Alexander Hamilton) ("[T]he power of Congress . . . shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretention to a general legislative authority; because an affirmative grant of special powers would be absurd as well as useless, if a general authority was intended."); The Federalist No. 48 (James Madison) ("[I]n a representative republic, where the executive magistracy is carefully limited both in the extent and the duration of its power; and where the legislative power is exercised by an assembly . . . it is against the enterprising ambition of [the legislative] department, that the people ought to indulge all their jealousy and exhaust all their precautions."); 3 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 95 (2d ed. 1836) (James Madison) (stating that the "powers of the federal government are enumerated").

[8] Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1699 (2012).

[9] U.S. Const. art. I, §§ 1, 8.

Pennsylvania ratification convention, "to control the power and conduct of the legislature, by an overruling constitution, was an improvement in the science and practice of government reserved to the American states."[10]

The Legislative Vesting Clause and the other text of Article I thus served as an ostensible limitation on Congress's legislative power. Nonetheless in the post-Convention debates over ratification of the Constitution, Anti-Federalists raised concerns that these textual limitations would fail to prevent Congress from growing too powerful.[11] In an effort to assuage these concerns, Alexander Hamilton, who supported ratification of the Constitution, argued that the courts could enforce the Constitution's limitations on Congress's powers by declaring a legislative act in excess of such powers to be void.[12] And indeed, less than two decades after the ratification of the Constitution, the Supreme Court asserted its authority to review the constitutionality of legislative acts, and to declare void those provisions of legislation that violated the Constitution, in a case or controversy properly before the Court.[13] Thus, the Legislative Vesting Clause of the U.S. Constitution reflects a departure from the British legal tradition of "parliamentary supremacy" because it provided external limitations on the power of Congress.

ArtI.S1.2.2 Origin of a Bicameral Congress

Article I, Section 1:

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

The Framers of the Constitution aimed to limit Congress's power further by specifying in the Legislative Vesting Clause that Congress would be a bicameral institution composed of a House of Representatives and Senate. Although Congress's bicameral structure was a departure from the unicameral legislature comprised of state delegations under the Articles of Confederation,[1] the Framers had significant experience with bicameral legislatures. Under British rule, colonists were subject to law enacted by the bicameral Parliament of Great Britain, where the hereditary aristocracy was represented in the House of Lords and the freeholders of the land were represented in the House of Commons.[2] Further, many of the

[10] 2 Elliot, *supra* note 7, at 432.

[11] Brutus No. I (Oct. 18, 1787), *reprinted in* The Debate on the Constitution: Federalist and Anti-Federalist Speeches, Articles and Letters During the Struggle Over Ratification, Part One: September 1787–February 1788 (Bernard Bailyn ed., 1993) ("The powers of the general legislature extend to every case that is of the least importance—there is nothing valuable to human nature, nothing dear to freemen, but what is within its power.").

[12] The Federalist No. 78 (Alexander Hamilton) ("Limitations [on legislative power] can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.").

[13] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803) ("The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. . . . Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void."). Further checks on congressional power in the Constitution include the President's qualified veto power over legislation. *See* 2 The Records of the Federal Convention of 1787, at 52–53 (Max Farrand ed., 1966) (Madison's notes, July 19, 1787) (statement of Mr. Gouverneur Morris) (arguing that the President's veto power would permit the President to serve as the "guardian of the people" against "[l]egislative tyranny").

[1] Articles of Confederation of 1781, art. V, para. 4. For more information about the Articles of Confederation, see Intro.6.1 Continental Congress and Adoption of the Articles of Confederation.

[2] *See, e.g.*, 1 The Records of The Federal Convention of 1787, at 196, 198, 484–85 (Max Farrand ed., 1911) (discussing the House of Lords and House of Commons as a possible model for Congress).

Framers of the Constitution were governed by their bicameral state legislatures. Following the Declaration of Independence in 1776, all the states but Georgia, Pennsylvania, and Vermont established bicameral legislatures.[3]

The Constitutional Convention[4] was assembled in 1787, in part, to restructure the national unicameral legislature and to address the "defects" of the Articles of Confederation.[5] Congress, under the Articles, had no direct means to implement or compel compliance with its laws.[6] For example, Congress lacked the power to levy duties, to tax individuals directly, and to regulate interstate commerce.[7] The Articles, recognizing the states' "sovereignty, freedom, and independence," retained for the states all powers not expressly delegated to Congress.[8] As a result, Congress, among other things, was unable to stop states from adopting "discriminatory and retaliatory" trade practices among the states.[9]

However, in seeking to strengthen federal legislative power over states and individuals, the Framers were also concerned that a single legislative body with unchecked and concentrated power would threaten individual liberties.[10] James Wilson, representing Pennsylvania at the Convention, cautioned that "[i]f the Legislative authority be not restrained, there can be no liberty nor stability."[11] In supporting a bicameral Congress, he remarked that legislative power "can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check, but the inadequate one, of the virtue [and] good sense of those who compose it."[12]

In debating the new structure of Congress, the Convention considered several proposals.[13] Much of the debate focused on two proposals—the Virginia Plan and the New Jersey Plan.[14] Virginia Governor Edmund Randolph presented the Virginia Plan that proposed three separate branches of government—legislative, executive, and judicial.[15] The Legislative

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[3] James Quayle Dealey, Growth of American State Constitutions 37 (1915).

[4] For discussion of the Constitutional Convention, see Intro.6.1 Continental Congress and Adoption of the Articles of Confederation.

[5] *See* New York v. United States, 505 U.S. 144, 163 (1992) (citing The Federalist Nos. 15, 16 (Alexander Hamilton)); *see also* 1 The Records of The Federal Convention of 1787, *supra* note 2, at 18 (Edmund Randolph, in opening the Constitutional Convention, "observed that in revising the federal system we ought to inquire 1. into the properties, which such a government ought to possess, 2. the defects of the confederation, 3. the danger of our situation &. 4. the remedy.").

[6] Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1447 (1987).

[7] Articles of Confederation of 1781, art. V. *See also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1442, 1447 (1987) (discussing the lack of Federal Government power under the Articles).

[8] Articles of Confederation of 1781, art. II.

[9] For example, New York, in an effort to capitalize on its position as a port of entry, imposed duties on goods imported by nearby states. In retaliation, these states enacted taxes on commerce with New York. Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 Iowa L. Rev. 891, 896 (1990).

[10] *See e.g.*, 2 The Records of The Federal Convention of 1787, *supra* note 2, at 74 (statement of James Madison on July 21, 1787) ("Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex."); *id.* at 76 (concurring that "public liberty [was] in greater danger from Legislative usurpations than from any other source") (statement of Mr. Gouverneur Morris). *See also* The Federalist No. 48 (James Madison) (describing how the concentration of "[a]ll the powers of government, legislative, executive, and judiciary" in Virginia's legislative body "is precisely the definition of despotic government"); 4 John Adams, Thoughts on Government, *in* The Works of John Adams 195 (Charles F. Adams ed., 1851) ("A single [legislative] assembly is liable to all the vices, follies, and frailties of an individual; subject to fits of humor, starts of passion, flights of enthusiasm, partialities, or prejudice, and consequently productive of hasty results and absurd judgments."); Gordon S. Wood, Creation of the American Republic 1776–1787, at 404–13 (1969) (discussing concerns related to state governments).

[11] 1 The Records of The Federal Convention of 1787, *supra* note 2, at 254.

[12] *Id.*

[13] *See, e.g.*, *id.* at 20–22 (The Virginia Plan); *id.* at 242–45 (The New Jersey Plan); *id.* at 23 (The Pinkney Plan).

[14] New York v. United States, 505 U.S. 144, 164 (1992).

[15] 1 The Records of The Federal Convention of 1787, *supra* note 2, at 21–22.

Branch under the Virginia Plan would consist of a bicameral body in which each state would have a different number of representatives based on the state's population.[16] In addition, the Virginia Plan allowed Congress to exercise legislative authority over individuals, removing the constraint under the Articles that the state legislatures act as intermediaries to implement enacted legislation.[17] The Virginia Plan was principally favored by the larger states that embraced the notion that the view of the majority of the Nation's population should prevail in the national legislature.[18]

As an alternative to the Virginia Plan, William Paterson proposed the New Jersey Plan to the Convention.[19] In following the unicameral structure provided under the Articles of Confederation, Paterson's proposal represented an effort to revise the current Articles rather than replace them.[20] The proposed structure of Congress under the New Jersey Plan provided for a unicameral legislature with a voting system that allowed for one vote per state in the national legislature.[21] Under this proposed system, Congress would require the "consent" of the state legislatures before exercising legislative authority directly upon individuals.[22] Smaller states generally supported the New Jersey Plan because they did not favor a major departure from the Articles or proportional representation in Congress based on state size.[23]

[16] *Id.* at 20. As originally proposed by the Virginia delegates, the bicameral legislature consisted of two chambers, one that would be "elected by the people of the several states" and another that would be elected "by those of the first [chamber], out of a proper number of persons nominated by the individual [state] legislatures." *Id.* at 20. Historians have noted that the original Virginia Plan was drafted by James Madison. Max Farrand, The Framing of the Constitution of the United States 68–69 (1913). The Virginia Plan went through various revisions and amendments before it was finalized and adopted at the Convention. *Id.* The later amended version consisted of a bicameral legislature with members of one branch elected by the people, and members of the second branch elected by the individual state legislatures. 1 The Records of The Federal Convention of 1787, *supra* note 2, at 228.

[17] *See* New York v. United States, 505 U.S. 144, 164 (1992); 1 The Records of The Federal Convention of 1787, *supra* note 2, at 21, 229 (Max Farrand ed., 1911).

[18] The larger states such as Virginia, Massachusetts, and Pennsylvania supported this proposal, as it gave each state a vote in Congress based on its population size. Farrand, *supra* note 16, at 81–82 ("As the discussion proceeded it became more and more evident that Connecticut, New York, New Jersey, Delaware, and Maryland were tending to vote together, in opposition to the other states led by Virginia, Pennsylvania, and Massachusetts."); *see also* The Federalist No. 22 (Alexander Hamilton) ("Every idea of proportion and every rule of fair representation conspire to condemn a principle, which gives to Rhode Island an equal weight in the scale of power with Massachusetts, or Connecticut, or New York; and to Delaware an equal voice in the national deliberations with Pennsylvania, or Virginia, or North Carolina.").

[19] Farrand, *supra* note 16, at 84–85.

[20] In presenting the New Jersey Plan, Paterson resolved that the "[A]rticles of Confederation ought to be so revised, corrected & enlarged, as to render the federal Constitution adequate to the exigencies of Government, & the preservation of the Union." 1 The Records of The Federal Convention of 1787, *supra* note 2, at 242.

[21] *Id.* at 242; *see also* Intro.6.1 Continental Congress and Adoption of the Articles of Confederation.

[22] 1 The Records of The Federal Convention of 1787, *supra* note 2, at 243–244.

[23] Farrand, *supra* note 16, at 84–85; 1 The Records of The Federal Convention of 1787, *supra* note 2, at 242. John Dickinson, a delegate from Delaware, reportedly remarked to James Madison, a delegate from Virginia, that the smaller states "would sooner submit to a foreign power" rather than be deprived of an equal vote in both chambers of Congress. *Id.*

ArtI.S1.2.3 The Great Compromise of the Constitutional Convention

Article I, Section 1:

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

Although the states generally favored a bicameral legislature,[1] the states were heavily divided over the representation in each branch of Congress.[2] To resolve these concerns, the Convention delegates approved forming a "compromise committee" to devise a compromise among the proposed plans for Congress.[3] The committee proposed a plan that became known as the Great Compromise.[4] The plan provided for a bicameral legislature with proportional representation based on a state's population for one chamber and equal state representation in the other.[5] For the House of Representatives, the plan proposed that each state would have "one representative for every 40,000 inhabitants," elected by the people.[6] For the Senate, the committee proposed that each state would have an equal vote with members elected by the individual state legislatures.[7] After significant debate, the Convention adopted the Great Compromise on July 16, 1787.[8]

During the state ratification debates that followed the Convention, one of the central objections from the Anti-Federalists was that the consolidation of government power in a national Congress could "destroy" state legislative power.[9] The Federalists attempted to curb these fears by noting that the sovereign power of the Nation resides in the people, and the Constitution merely "distribute[s] one portion of power" to the state and "another proportion to the government of the United States."[10] To further allay Anti-Federalist concerns regarding concentrated federal power in Congress, the Federalists emphasized that bicameralism, which lodged legislative power directly in the state governments through equal representation in the Senate, would serve to restrain, separate, and check federal power.[11]

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[1] 1 The Records of The Federal Convention of 1787, at 54–55 (Max Farrand ed., 1911).

[2] *Id.* at 509; Max Farrand, The Framing of the Constitution of the United States 92 (1913).

[3] Farrand, Framing of the Constitution, *supra* note 2, at 97–98.

[4] *See generally id.* at 91–112 (discussing the process that led to the Great Compromise). Roger Sherman and other delegates from Connecticut repeatedly advanced a legislative structure early in the Convention debates that eventually was proposed as the Great Compromise. *See* 1 The Records of The Federal Convention of 1787, *supra* note 2, at 196. Historians often credit Sherman and the Connecticut delegates as the architects of the Great Compromise. Mark David Hall, Roger Sherman and the Creation of the American Republic 96–98 (2013) (discussing Sherman's proposal during the Convention debates that led to the "Connecticut Compromise"); Farrand, Framing of the Constitution, *supra* note 2, at 106. *See also* Wesberry v. Sanders, 376 U.S. 1, 12–13 (1964) (discussing Sherman's role in the Great Compromise).

[5] 1 The Records of The Federal Convention of 1787, *supra* note 1, at 524. *See* Farrand, Framing of the Constitution, *supra* note 2, at 104–07.

[6] 1 The Records of The Federal Convention of 1787, *supra* note 1, at 526. The compromise was amended to allow that state inhabitants would also include "three-fifths of the slaves" in the state. *Id.* at 603–06; Farrand, Framing of the Constitution, *supra* note 2, at 99. For discussion of the "three-fifths" clause, see Intro.6.1 Continental Congress and Adoption of the Articles of Confederation.

[7] 1 The Records of The Federal Convention of 1787, *supra* note 1, at 160. In 1913, the states ratified the Seventeenth amendment that requires members of the Senate to be elected by the people.

[8] Farrand, Framing of the Constitution, *supra* note 2, at 104–07; 1 Congressional Quarterly, Inc., Guide to Congress 358, 367–68 (5th ed. 2000) (discussing of the ratification of the Seventeenth Amendment).

[9] Gordon S. Wood, Creation of the American Republic 1776–1787, at 526–530 (1969) (discussing state ratifications concerning the jurisdiction of federal and state legislatures under the Constitution).

[10] *Id.* at 530 (quoting James Wilson from the Pennsylvania ratifying convention from Pennsylvania and the Federal Constitution 1787–1788, at 302 (John Bach McMaster & Frederick D. Stone, eds. 2011)).

[11] *See id.* at 559 (analyzing the Federalists' views of bicameralism).

ArtI.S1.2.3
The Great Compromise of the Constitutional Convention

In vesting the legislative power in a bicameral Congress, the Framers of the Constitution purposefully divided and dispersed that power between two chambers—the House of Representatives with representation based on a state's population and the Senate with equal state representation.[12] The Framers recognized that the division of legislative power between two distinct chambers of elected members was needed "to protect liberty" and address the states' fear of an imbalance of power in Congress.[13] As later explained by Chief Justice Warren Burger, "the Great Compromise, under which one House was viewed as representing the people and the other the states, allayed the fears of both the large and small states."[14]

By diffusing legislative power between two chambers of Congress in the legislative Vesting Clause, the Framers of the Constitution sought to promote the separation of powers, federalism, and individual rights.[15] They designed the bicameral Congress so that "legislative power would be exercised only after opportunity for full study and debate in separate settings."[16] While acknowledging that the bicameral legislative process often produces conflict, inefficiency, and "in some instances [can] be injurious as well as beneficial," the Framers believed that the intricate law-making process promotes open discussion and safeguards against "against improper acts of legislation."[17] As the Supreme Court later explained, the "legislative steps outlined in Art. I are not empty formalities" but serve to "make certain that there is an opportunity for deliberation and debate."[18]

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[12] U.S. Const. art. I, § 7. cl. 2. *See* The Federalist No. 39 (James Madison) ("The house of representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in the Legislature of a particular State. So far the Government is national not federal. The Senate on the other hand will derive its powers from the States, as political and co-equal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is federal, not national.").

[13] *See* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 950 (1983) ("[T]he Framers were . . . concerned, although not of one mind, over the apprehensions of the smaller states. Those states feared a commonality of interest among the larger states would work to their disadvantage; representatives of the larger states, on the other hand, were skeptical of a legislature that could pass laws favoring a minority of the people." *See also* The Federalist No. 51 (James Madison) ("In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit."); Farrand, Framing of the Constitution, *supra* note 2, at 99–112 (describing the debate among the states regarding the structure of Congress).

[14] *Chadha*, 462 U.S. at 950. *See also* Farrand, Framing of the Constitution, *supra* note 2, at 105–06 (explaining the structure of Congress as achieved under the "Great Compromise").

[15] *See* The Federalist No. 62 (James Madison) ("[A] senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient."). *See also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673, 708–09 (1997) (describing how the legislative procedures "promote caution and deliberation; by mandating that each piece of legislation clear an intricate process involving distinct constitutional actors, bicameralism and presentment reduce the incidence of hasty and ill-considered legislation").

[16] *Chadha*, 462 U.S. at 951.

[17] The Federalist No. 62 (James Madison). John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673, 709–10 (1997) (discussing the legislative process as protection against "hasty and ill-considered legislation"). Some scholars have argued that the Framers deliberately designed the lawmaking process to be slow and inefficient so that the laws that passed were sufficiently deliberative, representative, and accountable. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 524 (1989) ("The Confederation period led [the Framers] to conclude that government which moved too quickly in establishing and altering policy was, over time, less likely to make wise choices and more likely to threaten individual liberty. Therefore, they deliberately created a lawmaking process that was slow, even cumbersome.").

[18] *Chadha*, 462 U.S. at 958 n.23.

ArtI.S1.2.4 Legislative Power and the Executive and Judicial Branches

Article I, Section 1:

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

A third purpose of the Framers for the Legislative Vesting Clause was to limit the extent to which the other two branches of government could exercise legislative power. The Framers crafted the Legislative Vesting Clause against the historical backdrop of English legal tradition that viewed, in the words of William Blackstone, a "tyrannical government" as one in which "the right of both *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men."[1] For Blackstone, "wherever these two powers are united together, there can be no public liberty."[2] And James Madison, echoing Blackstone and other prominent thinkers of the time, wrote in the *Federalist Papers* of the "necessary partition of power among the several departments, as laid down in the Constitution."[3] In Madison's view, the concentration of distinct forms of government power in the same entity would lead to tyranny as when a single entity had the power to both prescribe and enforce the law.[4] To separate these powers, the Framers, in the first three Articles of the Constitution, vested the legislative powers in a Congress;[5] the executive power in a President;[6] and the judicial power of the United States "in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[7]

Although the Framers had concerns about the other two branches aggrandizing themselves at the expense of the Legislative Branch, they were unable to articulate a bright-line rule for identifying when such violations of the separation of powers principle had occurred. Indeed, Madison referred to the "separate and distinct exercise of the different powers of government" as "to a certain extent . . . admitted on all hands to be essential to the preservation of liberty."[8] But he acknowledged the difficulty in distinguishing the legislative power from the judicial or executive power in some instances.[9] Further, in contrast to some state constitutional provisions in existence at the time of the Founding,[10] the text of the Constitution does not specifically prohibit the Executive or Judicial Branches from exercising legislative power.[11]

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[1] 1 William Blackstone, Commentaries on the Laws of England 144 (J. B. Lippincott Co. ed., 1893).

[2] *Id.*

[3] The Federalist No. 51 (James Madison). The notion of separation of powers was drawn from classical political philosophy. *See generally* Baron Charles de Montesquieu, The Spirit of the Laws, at XI6, 157 (Anne M. Cohler, et. al., trans. & eds., 1989).

[4] *See also* The Federalist No. 47 (James Madison) ("No political truth is . . . stamped with the authority of more enlightened patrons of liberty [than the separation of powers because the] accumulation of all powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.").

[5] U.S. Const. art. I.

[6] *Id.* art. II.

[7] *Id.* art. III.

[8] *Id.* at 289.

[9] The Federalist No. 37 (James Madison) ("Experience has instructed us that no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive and Judiciary; or even the privileges and powers of the different Legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science."). *But see* Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 342 (2002) ("The terms 'legislative,' 'executive,' and 'judicial' meant something to Madison, even if he could not articulate precisely (or even vaguely) what they meant.").

[10] *See, e.g.*, Mass. Const. of 1780, pt. 1, art. XXX ("In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise

Indeed, while the Framers of the Constitution saw great importance in allocating the legislative power to a Congress, the design of the Constitution contemplates some overlap in the branches' performance of government functions.[12] Madison explained that even the influential French political philosopher Baron de Montesquieu, who once wrote that there could be "no liberty where the legislative and executive powers are united in the same person," would have found it permissible for the functions of government to be shared, to some extent, among the branches.[13] And Madison acknowledged that contemporaneous state constitutional provisions requiring a strict separation of powers were perhaps aspirational because, in practice, the branches of state governments sometimes shared such functions, as when a state senate served as a judicial tribunal for trying impeachments of executive or judicial officers.[14] Thus, the Framers may not have understood the Legislative Vesting Clause as prohibiting the executive and Judicial Branches from performing functions that overlapped with those performed by Congress, so long as they were not purely legislative in nature.

Although the Founders wanted to prevent the Executive Branch and judiciary from aggrandizing their power by usurping the legislative role, it is unclear whether the Legislative Vesting Clause would have been understood to prohibit Congress from giving away its power to the other two branches. The text of the Constitution is silent with respect to the extent to which Congress is prohibited from delegating its legislative power to the Executive Branch, courts, or a private entity.[15] The Framers debated the necessity of having a more express constitutional provision on separation of powers, but these debates did not lead to explicit limits on legislative delegations. For example, in the Convention debates, James Madison made a motion to give the national Executive the power to "execute such other powers ('not Legislative nor 'Judiciary' in their nature') as may from time to time be delegated by the National Legislature."[16] The motion was defeated, with Charles Pinckney arguing that the language was "unnecessary, the object of [the language] being included in the 'power to carry into effect the national laws.'"[17]

The debates over who could exercise the legislative power continued into the First Congress. Following ratification of the Constitution, James Madison also introduced an

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the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men."); Md. Const. of 1776, Declaration of Rights cl. VI ("That the legislative, executive, and judicial powers of government, ought to be forever separate and distinct from each other."). *But see* S.C. Const. of 1776, art. VII (vesting the legislative authority in "the president and commander-in-chief, the general assembly and legislative council").

[11] Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 337 (2002) ("[T]here is nothing in the Constitution that specifically states, in precise terms, that no other actor may exercise legislative power or that Congress may not authorize other actors to exercise legislative power. Such clauses were known to the founding generation.").

[12] Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam) ("[The Framers] saw that a hermetic sealing off of the three branches of government from one another would preclude establishment of a Nation capable of governing itself effectively."); Youngtown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("[W]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."). For more on the concept of "separation of powers," see Intro.7.2 Separation of Powers Under the Constitution.

[13] The Federalist No. 47 (James Madison) ("[Montesquieu] did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other.").

[14] *Id.* ("If we look into the constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which [the separation of powers doctrine] has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.").

[15] *Id.*

[16] 1 The Records of the Federal Convention of 1787, at 64, 67 (Max Farrand ed., 1911).

[17] *Id.* However, this historical episode sheds little light on whether the Founders would have understood the Constitution to permit Congress to delegate its legislative power, as Madison's language would not have specifically permitted delegations of "legislative power," and the records of the Convention debates do not fully explain the basis for Pinckney's concerns.

amendment to the Constitution in the House of Representatives of the First United States Congress that would have provided that the powers "delegated by this Constitution to the Government of the United States, shall be exercised as therein appropriated, so that the Legislative shall not exercise the powers vested in the Executive or the Judicial; nor the Executive the power vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive."[18] Although James Madison argued that the amendment would help to resolve doubts about how the Constitution should be construed, Representative Roger Sherman opposed the amendment as "unnecessary" because the Constitution already vested the legislative, executive, and judicial powers in three separate branches.[19] Although the House adopted the amendment, the Senate later rejected it without elaboration.[20] Furthermore, the founding generation during the First Congress broadly authorized the President to perform tasks that required the Executive Branch to fill ambiguities and gaps in the statutory scheme created by the legislature. One oft-cited example is a 1789 Act of the First Congress that provided pensions to wounded and disabled Revolutionary War Veterans for one year "under such regulations as the President of the United States may direct."[21] Nonetheless, the Framers did not appear to endorse wholesale delegations of the legislative power to the Executive Branch, and the import of the actions of the First Congress has been the subject of debate among legal historians.[22]

ArtI.S1.3 Legislative Power in the Constitutional Framework

ArtI.S1.3.1 Separation of Powers and Checks and Balances

Article I, Section 1:

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

The Legislative Vesting Clause, along with the coordinate Executive and Judicial Vesting Clauses, delineate the powers the Framers accorded to the National Government's Legislative, Executive, and Judicial Branches. Separating the powers to legislate, to execute, and to adjudicate into separate government departments was a familiar concept to the Framers. As noted by James Madison in the *Federalist No. 47*, political theorist Baron Charles de Montesquieu had written about the separation of powers concept almost 100 years earlier.[1] Consequently, when the colonies separated from Great Britain following the American Revolution, the framers of the new state constitutions generally embraced the principle of separation of powers in their charters.[2] The framers of the new state constitutions, however,

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[18] 1 Annals of the Congress of the United States 789 (1789).

[19] *Id.*

[20] 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1151 (1971).

[21] Act of Sept. 29, 1789, ch. 24, § 1, 1 Stat. 95, 95.

[22] *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1733–34 (2002) ("[T]here's remarkably little evidence that the Framers envisioned [a nondelegation constraint] on legislative authority. . . . The Framers' principal concern was with legislative aggrandizement—the legislative seizure of powers belonging to other institutions—rather than with legislative grants of statutory authority to executive agents."); Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 334 (2002) ("If one is concerned about the original meaning of the Constitution, the widespread modern obsession with the nondelegation doctrine may have some justification.").

[1] The Federalist No. 47 (James Madison).

[2] The Constitution of Virginia of 1776 provided: "The legislative, executive, and judiciary department shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them, at the same time[.]" *The Constitution of Virginia of 1776*, *reprinted in* 10 Sources and Documents of United States Constitutions 52 (William F. Swindler ed., 1979). *See also* 5 *id.* at 96. Similarly, the

did not necessarily incorporate systems of checks and balances. Accordingly, violations of the separation of powers doctrine by state legislatures were commonplace prior to the convening of the Constitutional Convention.[3] Theory as much as experience guided the Framers in the summer of 1787.[4]

In drafting the Constitution, the Framers considered how to order a system of government that provided sufficient power to govern while protecting the liberties of the governed.[5] The doctrine of separation of powers, which the Framers implemented in drafting the Constitution, was based on several generally held principles: the separation of government into three branches: legislative, executive, and judicial; the concept that each branch performs unique and identifiable functions that are appropriate to each branch; and the proscription against any person or group serving in more than one branch simultaneously.[6]

While the Constitution largely effectuated these principles, the Framers' separation of power was not rigid, but incorporated a system of checks and balances whereby one branch could check the powers assigned to another. For example, the Constitution allows the President to veto legislation,[7] but requires the President to gain the Senate's consent to appoint executive officers and judges or enter into treaties.[8] Some critics of the proposed Constitution objected to what they regarded as a curious mixture of government functions and powers.[9] In response to criticism that the Constitution blurred the powers accorded to the three branches of government, James Madison wrote a series of essays addressing this issue.[10]

In the *Federalist No. 47*, Madison relied on the theories of Baron de Montesquieu in addressing critics of the new Constitution.[11] According to Madison, Montesquieu and other political theorists "did not mean that these departments ought to have no *partial agency* in, or no control over, the acts of each other," but rather liberty was endangered "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department."[12] Madison further reasoned that neither sharply drawn demarcations of institutional boundaries nor appeals to the electorate were sufficient to protect liberty.[13] Instead, to secure liberty from concentrated power, Madison argued, "consists in giving to those who administer each department the necessary constitutional means and personal

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Massachusetts Constitution of 1780 provided: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men."

[3] The Federalist No. 51 (James Madison) ("In republican government the legislative authority, necessarily, predominates."). *See also id.* No. 48. This theme continues to influence the Court's evaluation of congressional initiatives. *See, e.g.,* Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 273–74, 277 (1991). *But compare id.* at 286 n.3 (White, J., dissenting).

[4] The intellectual history of the Confederation period and the Constitutional Convention is detailed in Gordon S. Wood, The Creation of the American Republic, 1776–1787 (1969).

[5] *See, e.g.*, M.J.C. Vile, Constitutionalism and the Separation of Powers (1967).

[6] The Federalist No. 47 (James Madison).

[7] U.S. Const. art. I, § 7.

[8] *Id.* art. II, § 2, cl. 2.

[9] *See, e.g.*, The Federalist No. 47 (James Madison) ("[O]ne of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct. . . . The several departments of power are distributed and blended in such a manner as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.").

[10] *Id.* Nos. 47–51 (James Madison).

[11] *Id.* No. 47 (James Madison).

[12] *Id.*

[13] *Id.* Nos. 47–49.

motives to resist encroachments of the others."[14] Thus, James Madison famously stated: "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."[15]

To achieve the principles articulated by Madison in the *Federalist No. 47*, the Constitution features many "checks and balances." For example, bicameralism reduces legislative predominance,[16] while the presidential veto gives the President a means of defending his priorities and preventing congressional overreach.[17] The Senate's role in appointments and treaties provides a check on the President.[18] The courts are assured independence from the political branches through good-behavior tenure and security of compensations,[19] and, through judicial review, the courts check the other two branches.[20] The impeachment power gives Congress authority to root out corruption and abuse of power in the other two branches.[21]

ArtI.S1.3.2 Functional and Formalist Approaches to Separation of Powers

Article I, Section 1:

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

Throughout the Nation's history, questions have arisen on how to apply the separation of powers doctrine. Since 1976, the Supreme Court has curtailed congressional discretion to structure the National Government when the Court has deemed such discretion to violate the separation of powers.[1] For example, in *Bowsher v. Synar*, the Court found unconstitutional a congressional scheme to provide for a relatively automatic deficit-reduction process pursuant to the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings Act)[2] because the Act required the critical involvement of an officer with significant legislative ties.[3] In *Immigration & Naturalization Service v. Chadha*, moreover, the Court found Congress's use of legislative vetoes unconstitutional on separation of powers grounds.[4] And in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Court held that Congress vesting broad judicial powers to handle bankruptcy cases in officers not possessing security of tenure and salary violated separation of powers principles.[5] The Court, however, sustained

[14] *Id.* No. 51.

[15] *Id.*

[16] U.S. Const. art. I, § 1.

[17] *Id.* art. I, § 7.

[18] *Id.* art. II, § 2, cl. 2.

[19] *Id.* art. III, § 1.

[20] *Id.*; Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803).

[21] U.S. Const. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6. For a more detailed discussion of the separation of powers and checks and balances, see Intro.7.2 Separation of Powers Under the Constitution and Intro.7.1 Overview of Basic Principles Underlying the Constitution.

[1] *See* Buckley v. Valeo, 424 U.S. 1, 109–43 (1976) (holding that Congress could not reserve to itself the power to appoint certain officers charged with enforcing a law).

[2] Pub. L. No. 99-177, 99 Stat. 1038.

[3] Bowsher v. Synar, 478 U.S. 714 (1986).

[4] 462 U.S. 919 (1983).

[5] 458 U.S. 50 (1982).

Congress's establishment of a process by which independent special prosecutors could investigate and prosecute cases of alleged corruption in the Executive Branch in *Morrison v. Olson*.[6]

In ruling on separation of powers questions, the Supreme Court has used two different approaches: formalist and functionalist. The Court's stricter formalist approach emphasizes the need to maintain three distinct branches of government by drawing bright lines among branches to reflect differences in legislating, executing, and adjudicating.[7] In contrast, the Court's functional approach emphasizes each branch's core functions and asks whether the challenged action threatens the essential attributes of the legislative, executive, or judicial function or functions.[8] Under this approach, the Court's rulings have provided flexibility to the branch if there is little risk that the challenged action will impair a core function. If there is a significant risk that the action will impair a branch's core function, courts will consider whether there is a compelling reason for the action.[9]

In *Immigration & Naturalization Service v. Chadha*, the Supreme Court used the formalist approach to invalidate Congress's legislative veto by which it could set aside an Attorney General determination to suspend deportation of an alien pursuant to a delegation of power from Congress.[10] Central to *Chadha* were two conceptual premises. First, the action Congress had taken was legislative because it had the purpose and effect of altering the legal rights, duties, and relations of persons outside the Legislative Branch, and thus Congress had to comply with the Constitution's bicameralism and presentment requirements.[11] Second, the Attorney General was performing an executive function in implementing the congressional delegation, and the legislative veto was an impermissible interference in the law's execution. Congress could act only by legislating to change its delegation's terms.[12]

Subsequently, in *Bowsher v. Synar*, the Court held that Congress could not vest even part of a law's execution in the Comptroller General because the Comptroller General was an officer who was subject to removal by Congress. Allowing Congress to vest execution of the laws in the Comptroller General would enable Congress to play a role in executing the laws because Congress could remove the Comptroller General if Congress was dissatisfied with how the Comptroller General was implementing its authority.[13] The Court noted that Congress could act only by passing laws.[14]

On the same day that the Court decided *Bowsher* through a seemingly formalist analysis, the Court appeared to use the less strict, functional approach in *Commodity Futures Trading Commission (CFTC) v. Schor* to resolve a challenge to a regulatory agency's power to adjudicate a state common law issue—the type of issue that the Court, in a formalist plurality

[6] 487 U.S. 654 (1988). *See also* Mistretta v. United States, 488 U.S. 361 (1989).

[7] *Chadha*, 462 U.S. at 951 ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . . must be resisted. Although not 'hermetically' sealed from one another, the powers delegated to the three Branches are functionally identifiable."). *See also N. Pipeline Constr. Co.*, 458 U.S. at 64–66 (plurality opinion); *Bowsher*, 478 U.S. at 721–27.

[8] *See, e.g.*, CFTC v. Schor, 478 U.S. 833 (1986).

[9] *Schor*, 478 U.S. 833; Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587, 589–93 (1985). The Court first formulated this analysis in cases challenging alleged infringements on presidential powers, United States v. Nixon, 418 U.S. 683, 713 (1974); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 442–42 (1977), but it subsequently turned to the stricter test. *Schor* and *Thomas* both involved provisions challenged as infringing on judicial powers.

[10] *Chadha*, 462 U.S. 919.

[11] *Id.* at 952.

[12] *Id.*

[13] Bowsher v. Synar, 478 U.S. 714, 726–27, 733–34 (1986). *But see id.* at 737 (Stevens, J., concurring) (suggesting a functionalist approach).

[14] *Id.* at 726–27, 733–34.

opinion with a more limited concurrence, had denied to a non-Article III bankruptcy court in *Northern Pipeline*.[15] Sustaining the CFTC's power, the Court emphasized "the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.'"[16] The Court held that, in evaluating such a separation of powers challenge, the Court had to consider the extent to which the "essential attributes of judicial power" were reserved to Article III courts and the extent to which the non-Article III entity exercised the jurisdiction and powers normally vested only in Article III courts; the origin and importance of the rights to be adjudicated; and the concerns that drove Congress to depart from Article III's requirements.[17] The Court distinguished *Schor* from *Bowsher* stating "[u]nlike *Bowsher*, this case [*Schor*] raises no question of the aggrandizement of congressional power at the expense of a coordinate branch."[18] The test the Court used was a balancing one—whether Congress had impermissibly undermined the role of another branch without appreciable expansion of its own power.

While the Court has exercised some flexibility in using a formalist or functionalist analysis in separation of powers cases, it has generally applied a formalist approach when the Constitution clearly commits a function or duty to a particular branch and a functionalist approach when the constitutional text is indeterminate, thereby requiring the Court to assess the likelihood that a branch's essential power would be impaired. For example, in *Morrison v. Olson*, the Court used a functionalist analysis to sustain Congress's creation of an independent counsel.[19] The independent-counsel statute, Title VI of the Ethics in Government Act,[20] the Court emphasized, did "not involve an attempt by Congress to increase its own power at the expense of the Executive Branch" nor did it constitute a "judicial usurpation" of executive power.[21] Moreover, the Court stated, the law did not "impermissibly undermine" Executive Branch powers, nor did it "disrupt the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions."[22] The Court also acknowledged that the statute undeniably reduced executive control over what the Court had previously identified as a core executive function—executing laws through criminal prosecution—through its appointment provisions and its assurance of independence by limiting removal to a "good cause" standard.[23] The Court noted the circumscribed nature of the reduction, the discretion of the Attorney General to initiate appointment, the limited jurisdiction of the counsel, and the power of the Attorney General to

[15] Although the agency in *Schor* was an independent regulatory commission and the bankruptcy court in *Northern Pipeline* was either an Article I court or an adjunct to an Article III court, the Court did not rely on the characterization of the particular entity. The issue in each case was whether the judicial power of the United States could be conferred on an entity that was not an Article III court.

[16] CFTC v. Schor, 478 U.S. 833, 848 (1986) (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587 (1985)).

[17] *Id.* at 851.

[18] *Id.* at 856.

[19] The Appointments Clause (U.S. Const. art. II, § 2) specifically provides that Congress may vest in the courts the power to appoint inferior officers (Morrison v. Olson, 487 U.S. 654, 670–77 (1988)), suggesting that, unlike *Chadha* and Bowsher, *Morrison* could be a textual commitment case. But the Court's evaluation of the separation of powers issue in *Morrison* did not appear to turn on that distinction. *Id.* at 685–96. Nevertheless, this possible distinction may work against a reading of *Morrison* as a rejection of formalism when executive powers are litigated.

[20] 28 U.S.C. § 591 *et seq*.

[21] *Morrison*, 487 U.S. at 694–95.

[22] *Id.* at 695 (quoting, respectively, *Schor*, 478 U.S. at 856 and Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977)).

[23] *Id.*

ensure that the laws are faithfully executed by the counsel.[24] This balancing, the Court concluded, left the President with sufficient control to ensure his ability to perform his constitutionally assigned functions.[25]

Similarly, in *Mistretta v. United States*, the Court used a functionalist analysis when it upheld the constitutionality of the U.S. Sentencing Commission.[26] Through the Sentencing Reform Act of 1984, Congress created the Sentencing Commission as an independent entity in the Judicial Branch to promulgate sentencing guidelines binding on federal judges when sentencing convicted offenders. Under the Act, the President appoints all seven Sentencing Commission members, three of whom have to be Article III judges, and he could remove any member for cause. Noting that the Court's separation of powers jurisprudence is always animated by concerns over encroachment and aggrandizement, the Supreme Court stated: "we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."[27] Thus, with regard to the discrete questions—the placement of the Commission, the appointment of the members, especially the service of federal judges, and the removal power—the Court carefully analyzed whether one branch had been given power it could not exercise, or had enlarged its powers impermissibly, and whether any branch would have its institutional integrity threatened by the structural arrangement.[28]

Notwithstanding *Morrison* and *Mistretta*, the Supreme Court continued to apply a formalist analysis in separation of powers cases. For instance, in its 1991 decision in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Airport Noise*,[29] the Supreme Court applied a formalistic analysis, although the case appeared to involved a factual situation that could be resolved under *Morrison* and *Mistretta*'s concern over Congress aggrandizing its powers. In *Granfinanciera, S.A. v. Nordberg*,[30] the Court reasserted the fundamental holding of *Northern Pipeline* in a bankruptcy context, although the issue was the right to a jury trial under the Seventh Amendment rather than strictly a separation of powers question. And in *Freytag v. Commissioner*,[31] the Court pursued a straightforward Appointments Clause analysis, informed by a separation of powers analysis, but not governed by it. Finally, in *Public Citizen v. U.S. Department of Justice*,[32] Justice Anthony Kennedy, in a concurring opinion, would have followed the formalist approach, but explicitly grounded his concurrence in the distinction between an express constitutional vesting of power and implicit vesting of power.

The Supreme Court has also considered the separation of powers in standing cases. For instance, in *Allen v. Wright*,[33] the Court viewed the standing requirement for access to judicial review as reflecting a separation of powers component—confining the courts to their proper

[24] *Id.* at 696.

[25] *Id.* at 697.

[26] Mistretta v. United States, 488 U.S. 361 (1989). The Court acknowledged reservations with respect to the Commission's placement as an independent entity in the Judicial Branch. *Id.* at 384, 397, 407–08. As in *Morrison*, Justice Antonin Scalia was the lone dissenter, arguing for a fairly rigorous application of separation of powers principles. *Id.* at 413, 422–27 (Scalia, J., dissenting).

[27] *Id.* at 382.

[28] *Id.*

[29] Metro. Wash. Airports Auth. v. Citizens for the Abatement of Airport Noise, 501 U.S. 252 (1991).

[30] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989).

[31] Freytag v. Commissioner, 501 U.S. 868 (1991).

[32] Public Citizen v. U.S. Dep't of Just., 491 U.S. 440, 467 (1989) (Kennedy, J., concurring).

[33] Allen v. Wright, 468 U.S. 737, 752 (1984).

sphere. In *Lujan v. Defenders of Wildlife*,[34] moreover, the Court imported the Take-Care Clause, obligating the President to see to the faithful execution of the laws, into the standing analysis, creating a substantial barrier to congressional decisions to provide for judicial review of executive actions.

ArtI.S1.3.3 Enumerated, Implied, Resulting, and Inherent Powers

Article I, Section 1:

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

The Supreme Court has recognized four general categories of powers belonging to the National Government—enumerated, implied, resulting, and inherent. Enumerated powers are those specifically identified in the Constitution.[1] In *McCulloch v. Maryland*, Chief Justice John Marshall recognized that the Constitution expressly provides the National Government with specific enumerated powers,[2] stating:

> This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.[3]

Article I, Section 8, of the Constitution lists various powers that the States ceded to the National Government. These powers include the power to tax and spend, to borrow, and to regulate commerce. Article I, Section 8, however, is not an exclusive list of powers the Constitution expressly grants to the National Government or its constituent branches. For instance, Congress also has power to regulate the electoral process under Article I, Section 4,[4] and the President has the power to veto legislation under Article I, Section 7.[5]

Implied powers are those powers necessary to effectuate powers enumerated in the Constitution.[6] In other words, the Constitution's enumeration of powers implies an additional grant of such powers that are necessary to effectuate them. In *McCulloch v. Maryland*, Chief Justice Marshall declared that the power conferred by the Necessary and Proper Clause[7] embraces all legislative "means which are appropriate" to carry out the powers provided expressly by the Constitution.[8] Chief Justice Marshall stated: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the

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[34] Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992).

[1] *Enumerated powers*, Black's Law Dictionary (6th ed. 1990) (defining enumerated or express powers to be "Powers expressly provided for in the Constitution").

[2] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819). *See* U.S. Const. art. I, § 8.

[3] *McCulloch*, 17 U.S. (4 Wheat.) at 405.

[4] U.S. Const. art. I, § 4, cl. 1.

[5] *Id.* art. I, § 7, cl. 2.

[6] *Implied powers*, Black's Law Dictionary (6th ed. 1990) (defining implied powers to be "Such as are necessary to make available and carry into effect those powers which are expressly granted or conferred, and which must therefore be presumed to have been within the intention of the constitutional or legislative grant").

[7] U.S. Const. art. I, § 8, cl.18.

[8] *McCulloch*, 17 U.S. (4 Wheat.) at 421.

constitution, are constitutional."[9] In his *Commentaries on the Constitution of the United States*, Justice Joseph Story discussed implied powers, noting that any analysis of whether a power is constitutional must first begin by determining whether the Constitution expressly provides for the power.[10] If the Constitution does not expressly state (or enumerate) the power, the question then becomes if such a power is necessary to implement a power provided expressly by the Constitution.[11]

Chief Justice Marshall identified resulting powers as those "result[ing] from the whole mass of the powers of the National Government and from the nature of political society."[12] In *American Ins. Co. v. Canter*, Chief Justice Marshall recognized that "the constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."[13] From the power to acquire territory, Chief Justice Marshall reasoned, arises the right to govern it.[14] In the *Legal Tender Cases (Knox v. Lee)*, the Supreme Court clarified that the Constitution neither expressly grants resulting powers to Congress nor are they ancillary to an unenumerated power.[15]

A fourth category of power identified by the Supreme Court—inherent powers[16]—appears to share some of the same characteristics of resulting powers. In *United States v. Curtiss-Wright Export Corp.*, Justice George Sutherland described inherent powers as those that are independent of an authorizing power but are inherent to the government in its role as sovereign.[17] Justice Sutherland emphasized that enumerated and implied powers pertain to those the States ceded to the National Government when the United States was formed,[18] while inherent powers originated in the external sovereignty that Great Britain passed to the United States at the end of the American Revolution. Justice Sutherland wrote:

> [S]ince the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but . . . were transmitted to the United States from some other source. . . . When . . . the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. . . . The powers to declare and wage war, to conclude peace, to make treaties, to

[9] *Id. See also* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816) (Story, J.) ("The government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication.").

[10] 3 Joseph Story, Commentaries on the Constitution of the United States § 1238 (1833).

[11] *Id.*

[12] Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 516 (1828); *Resulting powers*, Black's Law Dictionary (6th ed. 1990).

[13] *Am. Ins. Co.*, 26 U.S. (1 Pet.) 511.

[14] *Id.* See also 2 Story, *supra* note 10, § 1251 ("[I]f the United States should make a conquest of any of the territories of its neighbors, the [N]ational [G]overnment would possess sovereign jurisdiction over the conquered territory. This would, perhaps, rather be a result from the whole mass of the powers of the [N]ational [G]overnment, and from the nature of political society, than a consequence or incident of the powers specially enumerated.").

[15] Legal Tender Cases (Knox v. Lee), 79 U.S. 457 (1870).

[16] *Inherent powers*, Black's Law Dictionary (6th ed. 1990) (defining inherent powers as "authority possessed without it being derived from another"; a "right, ability, or faculty of doing a thing, without receiving that right, ability, or faculty from another"; "[p]owers originating from the nature of government or sovereignty, *i.e.,* powers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express grants"). *See also* Robert J. Kaczorowski, *Inherent National Sovereignty Constitutionalism: An Original Understanding of the U.S. Constitution*, 101 Minn. L. Rev. 699 (2016).

[17] United States v. Curtiss-Wright Exp., 299 U.S. 304 (1936).

[18] *Id.* at 316–18. For early versions of this concept of the national government's powers in the field of foreign relations, see Penhallow v. Doane 3 U.S. (3 Dall.) 54, 80, 81 (1795); Holmes v. Jennison, 14 U.S. (14 Pet.) 540, 575–76 (1840) (Taney, C.J.).

> maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality.[19]

Justice Sutherland emphasized the difference between domestic and foreign powers, with the former limited under the enumerated powers doctrine and the latter "virtually free of any restraint."[20]

Notwithstanding the doctrine of enumerated powers—the power to legislate by the "rights expressly given and duties expressly enjoined" by the Constitution[21]—the Court has ascribed implied, resulting, and inherent powers to the National Government. Consequently, the United States, among other things, has power to impart to paper currency the quality of legal tender to pay debts;[22] to acquire territory by discovery;[23] to legislate for Indian tribes wherever situated in the United States;[24] to exclude and deport aliens[25] and to require that those who are admitted be registered and fingerprinted;[26] and the powers of sovereignty to conduct foreign relations.[27]

ArtI.S1.3.4 Bicameralism

Article I, Section 1:

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

Although the Continental Congress consisted of a unicameral house, the Framers adopted a bicameral legislature for the U.S. Government at the Constitutional Convention. In making this decision, historical and then-recent experience informed the Framers' decision. For example, some of the ancient republics, which the Framers used as models, had two-house legislatures,[1] and the Parliament of Great Britain was based in two social orders, the hereditary aristocracy represented in the House of Lords and the freeholders of the land represented in the House of Commons.[2]

By providing a national legislature comprised of two Houses, the Framers further reinforced the separation of powers. The Great Compromise, one of the critical decisions leading to the Convention's successful completion, provided for a House of Representatives apportioned on population, and a Senate in which the states were equally represented. Bicameralism thus enabled a composite National and Federal Government, but it also provided for a further separation and diffusion of powers. The legislative power, the Framers recognized, should be predominant in a society dependent upon the suffrage of the people. However, it was important that legislative power be subject to checks unless transient

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[19] *Curtiss-Wright Exp. Corp.*, 299 U.S. at 316–18.

[20] *Id.*

[21] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 616, 618–19 (1842).

[22] Juilliard v. Greenman, 110 U.S. 421, 449–50 (1884). *See also* Knox v. Lee, 79 U.S. (12 Wall.) 457, 565 (1871) (Bradley, J., concurring).

[23] United States v. Jones, 109 U.S. 513 (1883).

[24] United States v. Kagama, 118 U.S. 375 (1886).

[25] Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[26] Hines v. Davidowitz, 312 U.S. 52 (1941).

[27] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

[1] John Adams, A Defense of the Constitutions of Government of the United States (1776).

[2] 1 William Blackstone, Commentaries on the Laws of England 149–151 (1765).

majorities abuse their powers. Hence, the Framers provided that both Houses of Congress—their Members beholden to different constituencies—deliberate on and agree to new legislation.[3]

During the North Carolina Ratifying Convention, future Supreme Court Justice James Iredell articulated the importance of a bicameral legislature for diffusing factional power, stating:

> [I]t was the general sense of all America . . . that the legislative body should be divided into two branches, in order that the people might have a double security. It will often happen that, in a single body, a bare majority will carry exceptionable and pernicious measures. The violent faction of a party may often form such a majority in a single body, and by that means the particular views or interests of a part of the community may be consulted, and those of the rest neglected or injured. . . . If a measure be right, which has been approved of by one branch, the other will probably confirm it; if it be wrong, it is fortunate that there is another branch to oppose or amend it.[4]

Events since 1787 have altered both the separation of powers and the federalism bases of bicameralism through adoption of the Seventeenth Amendment, which resulted in the popular election of the Senate. Consequently, the differences between the House of Representatives and the Senate are less pronounced than they were at the Nation's inception.

ArtI.S1.4 Delegations of Legislative Power

ArtI.S1.4.1 Overview of Delegations of Legislative Power

Article I, Section 1:

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

By vesting Congress with "[a]ll legislative Powers," the Supreme Court has viewed the Legislative Vesting Clause as limiting the authority Congress can delegate to other branches of government or private entities. In general, the Court has held that "the legislative power of Congress cannot be delegated."[1] In 1935, Chief Justice Charles Evans Hughes, on behalf of the Court, declared that "Congress is not permitted to abdicate or to transfer to others the

[3] The Federalist No. 51 (James Madison). The safeguard's assurance is built into the Presentment Clause. U.S. Const. art. I, § 7, cl. 2, 3. The structure is not often the subject of case law, but it was a foundational matter in *INS v. Chadha,* 462 U.S. 919, 944–51 (1983).

[4] 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 21 (Jonathan Elliott, ed., 1830) (James Iredell, North Carolina Ratifying Convention (July 25, 1788)). At the North Carolina Ratifying Convention on July 24, 1788, William R. Davie also spoke of the advantages of a bicameral legislature, stating: "In order to form some balance, the departments of government were separated, and as a necessary check, the legislative body was composed of *two branches*. Steadiness and wisdom are better insured when there is a second branch, to balance and check the first. The stability of the laws will be greater when the popular branch, which might be influenced by local views, or the violence of party, is checked by another, whose longer continuance in office will render them more experienced, more temperate, and more competent to decide rightly." *Id.* at 12.

[1] United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932). *See also* Gundy v. United States, No. 17-6086, slip op. at 1 (U.S. June 20, 2019) (plurality opinion) ("The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government."); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("[The] text in [Article I, Section I of the Constitution] permits no delegation of those powers."); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928) ("[I]n carrying out [the] constitutional division into three branches[,] it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial Branch, or if by law it attempts to invest itself or its members with either executive power or judicial power."); Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the

essential legislative functions with which it is thus vested."[2] This principle is the basis of the nondelegation doctrine that serves as an important, though seldom used, limit on who may exercise legislative power and the extent to which legislative power may be delegated. In its 2022 decision in *West Virginia v. Environmental Protection Agency*, the Supreme Court provided further clarity on the nondelegation doctrine, emphasizing that a decision of "magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[3]

ArtI.S1.4.2 Historical Background on Delegating Legislative Power

Article I, Section 1:

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

The extent to which Congress can delegate its legislative powers has been informed by two distinct constitutional principles: separation of powers and due process. A rigid application of separation of powers would prevent the lawmaking branch from divesting itself of any of its power and conferring it on one of the other branches. But the doctrine is not so rigidly applied as to prevent conferral of significant authority on the Executive Branch.[1] In *J. W. Hampton, Jr. & Co. v. United States*,[2] Chief Justice William Howard Taft discussed the ability of Congress to delegate power, stating:

> The Federal Constitution . . . divide[s] the governmental power into three branches. . . . [I]n carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial Branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.[3]

In *Loving v. United States*,[4] the Court distinguished between its usual separation of powers doctrine—emphasizing arrogation of power by a branch and impairment of another branch's ability to carry out its functions—and the delegation doctrine, "another branch of our separation of powers jurisdiction," which is informed not by the arrogation and impairment analyses but solely by the provision of standards.[5] This confirmed what had long been evident—that the delegation doctrine is unmoored to traditional separation of powers principles.

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system of government ordained by the Constitution."); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825) ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.").

[2] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935).

[3] No. 20-1530, slip op. at 31 (U.S. June 30, 2022).

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

[2] 276 U.S. 394 (1928).

[3] *Id.* at 406. Chief Justice Taft traced the separation of powers doctrine to the maxim, *Delegata potestas non potest delegari* (a delegated power may not be delegated), *id.* at 405, but the maxim does not help differentiate between permissible and impermissible delegations, and Court has not repeated this reference in later delegation cases.

[4] 517 U.S. 748 (1996).

[5] *Id.* at 758–59.

The second principle underlying delegation law is a due process conception that undergirds delegations to administrative agencies. The Court has contrasted the delegation of authority to a public agency, which typically is required to follow established procedures in building a public record to explain its decisions and to enable a reviewing court to determine whether the agency has stayed within its ambit and complied with the legislative mandate, with delegations to private entities, which typically are not required to adhere to such procedural safeguards.[6]

Two theories suggested themselves to the early Court to justify the results of sustaining delegations. The Chief Justice alluded to the first in *Wayman v. Southard*.[7] He distinguished between "important" subjects, "which must be entirely regulated by the legislature itself," and subjects "of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details." While his distinction may be lost, the theory of the power "to fill up the details" remains current. A second theory, formulated even earlier, is that Congress may legislate contingently, leaving to others the task of ascertaining the facts that bring its declared policy into operation.[8]

ArtI.S1.4.3 Delegating Legislative Power to Fill Up the Details

Article I, Section 1:

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

In finding a power to "fill up the details," the Court in *Wayman v. Southard*[1] rejected the contention that Congress had unconstitutionally delegated power to the federal courts to establish rules of practice.[2] Chief Justice John Marshall agreed that the rulemaking power was a legislative function and that Congress could have formulated the rules itself, but he denied that the delegation was impermissible. Since then, of course, Congress has authorized the Supreme Court to prescribe rules of procedure for the lower federal courts.[3]

Congress has long provided for the Executive and Judicial Branches to fill up the details of statutes. For example, the Court upheld a statute requiring the manufacturers of oleomargarine to have their packages "marked, stamped and branded as the Commissioner of Internal Revenue . . . shall prescribe," rejecting a contention that the prosecution was not for violation of law but for violation of a regulation.[4] "The criminal offence," said Chief Justice Melville Fuller, "is fully and completely defined by the act and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail."[5]

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[6] Carter v. Carter Coal Co., 298 U.S. 238, 310–12 (1936); Yakus v. United States, 321 U.S. 414, 424–25 (1944). Because the separation of powers doctrine is inapplicable to the states as a requirement of federal constitutional law, Dreyer v. Illinois, 187 U.S. 71, 83–84 (1902), it is the Due Process Clause to which federal courts must look for authority to review delegations by state legislatures. *See, e.g.*, Eubank v. City of Richmond, 226 U.S. 137 (1912); Embree v. Kansas City Road Dist., 240 U.S. 242 (1916).

[7] 23 U.S. (10 Wheat.) 1, 41 (1825).

[8] The Brig Aurora, 11 U.S. (7 Cr.) 382 (1813).

[1] 23 U.S. (10 Wheat.) 1 (1825).

[2] Act of May 8, 1792, § 2, 1 Stat. 275, 276.

[3] The power to promulgate rules of civil procedure was conferred by the Act of June 19, 1934, 48 Stat. 1064; the power to promulgate rules of criminal procedure was conferred by the Act of June 29, 1940, 54 Stat. 688. These authorities are now subsumed under 28 U.S.C. § 2072. In both instances Congress provided for submission of the rules to it, presumably reserving the power to change or to veto the rules. Additionally, Congress has occasionally legislated rules itself. *See, e.g.*, 82 Stat. 197 (1968), 18 U.S.C. §§ 3501–02 (admissibility of confessions in federal courts).

[4] *In re* Kollock, 165 U.S. 526 (1897).

[5] *Id.* at 533.

Kollock was not the first such case,[6] and it was followed by a multitude of delegations that the Court sustained. In one such case, for example, the Court upheld an act directing the Secretary of the Treasury to promulgate minimum standards of quality and purity for tea imported into the United States.[7]

ArtI.S1.4.4 Contingent Delegations and Nondelegation Doctrine

Article I, Section 1:

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

The Supreme Court has held that Congress may delegate authority or legislative action contigent on fact-finding or actions by the Executive Branch.[1] In the 1813 case, *Cargo of Brig Aurora v. United States*, the Court upheld the revival of a law upon the issuance of a presidential proclamation.[2] After previous restraints on British shipping had lapsed, Congress passed a new law stating that those restrictions should be renewed in the event the President found and proclaimed that France had abandoned certain practices that violated the neutral commerce of the United States.[3] To the objection that this was an invalid delegation of legislative power, the Court answered briefly that "we can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct."[4]

Similarly, in *Marshall Field & Co. v. Clark*, the Supreme Court upheld the delegation to the President to suspend the import of specific commodities under Tariff Act of 1890 as constitutional.[5] The Act directed the President to suspend the import of the commodities "for such time as he shall deem just" if he found that other countries imposed upon agricultural or other products of the United States duties or other exactions that "he may deem to be reciprocally unequal and unjust."[6] In sustaining this statute, the Court relied upon two factors: (1) legislative precedents, which demonstrated that "in the judgment of the Legislative Branch of the government, it is often desirable, if not essential, . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations,"[7] and (2) that the Act

> does not, in any real sense, invest the President with the power of legislation. . . . Congress itself prescribed, in advance, the duties to be levied, . . . while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was

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[6] United States v. Bailey, 34 U.S. (9 Pet.) 238 (1835); Caha v. United States, 152 U.S. 211 (1894).

[7] Buttfield v. Stranahan, 192 U.S. 470 (1904). *See also* United States v. Grimaud, 220 U.S. 506 (1911) (upholding act authorizing executive officials to make rules governing use of forest reservations); ICC v. Goodrich Transit Co., 224 U.S. 194 (1912) (upholding delegation to prescribe methods of accounting for carriers in interstate commerce).

[1] *See generally* Gundy v. United States, No. 17-6086, slip op. at 26 (U.S. June 20, 2019) (Gorsuch, J., dissenting) ("[Congress] may always authorize Executive Branch officials to fill in even a large number of details, to find facts that trigger the generally applicable rule of conduct specified in a statute, or to exercise non-legislative powers.").

[2] 11 U.S. (7 Cr.) 382 (1813).

[3] *Id.*

[4] *Id.* at 388.

[5] 143 U. S. 649 (1892).

[6] *Id.* at 680.

[7] *Id.* at 691.

left to the determination of the President. . . . He had no discretion in the premises except in respect to the duration of the suspension so ordered.[8]

By similar reasoning, the Supreme Court sustained the flexible provisions of the Tariff Act of 1922 whereby duties were increased or decreased to reflect differences in cost of production at home and abroad, as such differences were ascertained and proclaimed by the President.[9]

ArtI.S1.5 Nondelegation Doctrine

ArtI.S1.5.1 Overview of Nondelegation Doctrine

Article I, Section 1:

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

The nondelegation doctrine is rooted in certain separation of powers principles.[1] In limiting Congress's power to delegate, the nondelegation doctrine exists primarily to prevent Congress from ceding its legislative power to other entities not vested with legislative authority under the Constitution. As interpreted by the Court, the doctrine seeks to ensure that legislative decisions are made through a bicameral legislative process by the elected Members of Congress or governmental officials subject to constitutional accountability.[2] Reserving the legislative power for a bicameral Congress was "intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps."[3]

The nondelegation doctrine, however, does not require complete separation of the three branches of government, and its continuing strength is the question of much debate.[4] In its nondelegation jurisprudence, the Supreme Court has recognized the need and importance of coordination among the three branches of government so long as one branch does not encroach on the "constitutional field" of another branch.[5] The nondelegation doctrine seeks to distinguish the constitutional delegations of power to other branches of government that may

[8] *Id.* at 692, 693.

[9] J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

[1] *See* Loving v. United States, 517 U.S. 748, 758 (1996) ("Another strand of our separation-of-powers jurisprudence, the delegation doctrine, has developed to prevent Congress from forsaking its duties."). For discussion of the separation of powers, see Intro.7.2 Separation of Powers Under the Constitution.

[2] *See* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983) ("There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.") (citations omitted). *See also* Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 61 (2015) (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints. The Constitution's deliberative process was viewed by the Framers as a valuable feature, not something to be lamented and evaded.") (citations omitted); Indus. Union Dep't, AFL-CIO v. API, 448 U.S. 607, 687 (1980) ("It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people. When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process.").

[3] Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 957–58 (1983).

[4] Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

[5] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928).

be "necessary" for governmental coordination from unconstitutional grants of legislative power that may violate separation of powers principles.[6]

ArtI.S1.5.2 Historical Background on Nondelegation Doctrine

Article I, Section 1:

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

While the Supreme Court has declared categorically that "the legislative power of Congress cannot be delegated,"[1] and on other occasions has recognized more forthrightly, as Chief Justice John Marshall did in 1825, that, although Congress may not delegate powers that "are strictly and exclusively legislative," it may delegate "powers which [it] may rightfully exercise itself."[2] The categorical statement has never been literally true, the Court having upheld the delegation at issue in the very case in which the statement was made.[3] The Court has long recognized that administration of the law requires exercise of discretion,[4] and that, "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[5] The real issue is where to draw the line. Chief Justice Marshall recognized "that there is some difficulty in discerning the exact limits," and that "the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily."[6] Accordingly, the Court's solution has been to reject delegation challenges in all but the most extreme cases, and to accept delegations of vast powers to the President or to administrative agencies.

During the nineteenth and early twentieth centuries, the nondelegation doctrine developed slowly, partly due to the relatively few statutes that were enacted and the lack of executive agencies to exercise those delegations.[7] In early nondelegation cases, the Supreme Court upheld various delegations of authority to the President, administrative agencies, and

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[6] *Id.* at 406. *See also Chadha*, 462 U.S. at 944 ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.").

[1] United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932). *See also* Field v. Clark, 143 U.S. 649, 692 (1892).

[2] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41 (1825).

[3] The Court in *Shreveport Grain & Elevator* upheld a delegation of authority to the Food and Drug Administration to allow reasonable variations, tolerances, and exemptions from misbranding prohibitions that were backed by criminal penalties. It was "not open to reasonable dispute" that such a delegation was permissible to fill in details "impracticable for Congress to prescribe."

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

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

[6] Wayman v. Southard, 23 U.S. (10 Wheat.) at 42. For particularly useful discussions of delegations, see 1 K. Davis, Administrative Law Treatise Ch. 3 (2d ed., 1978); L. Jaffe, Judicial Control of Administrative Action ch. 2 (1965).

[7] *See* David Schoenbrod, Power without Responsibility: How Congress Abuses the People through Delegation 31–33 (1993) (discussing the history of the nondelegation doctrine and the lack of "strong, lawmaking agencies" during the nineteenth century); Jon D. Michaels, Constitutional Coup: Privatization's Threat to the American Republic 41–42 (2017) (discussing the development of federal administrative power from the "smattering of key federal agencies" that existed before the Civil War to the current modern administrative state). *See also* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379, 420–21 (2017) (analyzing the number of nondelegation cases before and after 1880s).

the judiciary.[8] For example, in *Wayman v. Southard*, the Court upheld the Process Acts of 1789, which authorized the federal courts to issue writs to execute their judgments.[9] In *Wayman*, the Court declared that "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."[10] His opinion distinguished between "important" policy issues, "which must be entirely regulated by the legislature itself," and subjects "of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details."[11] Later, in *Marshall Field & Co. v. Clark*,[12] the Court affirmed Congress's grant of power to the President to impose import tariffs only if the President determined that other nations imposed "unequal or unreasonable" tariffs on American exports.[13] The Court reasoned that Congress must "make the law, which necessarily involves a discretion as to what it shall be," and its delegations may only "confer[ ] authority and discretion as to its execution, to be exercised under and in pursuance of the law."[14]

While acknowledging the Congress may delegate some authority in these early decisions, the Supreme Court began to clarify the role of the delegee with respect to Congress and draw the boundary between permissible and impermissible delegations. In these early nondelegation cases, the Court determined that governmental entities acted as a "mere agent" to administer and effectuate the laws and "essential"[15] policy decisions Congress enacted and were not exercising legislative power.[16] To ensure the delegations were not boundless, the Court also required that the delegations of authority must stay "within the great outlines marked out by the legislature."[17]

ArtI.S1.5.3 Origin of Intelligible Principle Standard

Article I, Section 1:

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

As the primary means to enforce the nondelegation doctrine, the Supreme Court has required that Congress lays out an "intelligible principle" to govern and guide its delegee.[1] The

[8] *See* Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1, 7 (1982) (discussing early challenges to the congressional delegations).

[9] 23 U.S. (10 Wheat.) 1, 14 (1825).

[10] *Id.* at 42.

[11] *Id.* at 1, 6, 43.

[12] 143 U.S. 649 (1892).

[13] *Id.* at 699.

[14] *Id.* at 693–94 (quoting Cincinnati, Wilmington, & Zansville, R.R. v. Comm'rs of Clinton Cty., 1 Ohio St. 77, 88 (1852)).

[15] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–30 (1935).

[16] *See* United States v. Grimaud, 220 U.S. 506, 516 (1911) (upholding the constitutionality of regulations and criminal penalties promulgated by the Secretary of Agriculture regarding the use of federal grazing lands, reasoning that "Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power"); Marshall Field & Co. v. Clark, 143 U.S. 649, 693 (1892) (holding that the delegation of authority to the President to suspend import tariffs was constitutional as the President was acting as "the mere agent of the law-making department to ascertain and declare the event upon which [Congress's] expressed will was to take effect"); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 6, 43 (1825) (upholding Congress's delegation of the authority to the judiciary to establish procedures for executing judgments because the judiciary was exercising this delegated power to act pursuant to "general provisions to fill up the details").

[17] *Wayman*, 23 U.S. (10 Wheat.) at 45.

[1] 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized [ ] is directed to conform, such legislative action is not a forbidden delegation of legislative power."). *See also* Gundy v. United States, No. 17-6086, slip op. at 5 (U.S. June 20, 2019) (plurality opinion) ("The

"intelligible principle" standard requires that Congress delineate a legal framework to constrain the authority of the delegee, such as an administrative agency.[2] The principle was explicitly set forth in the 1928 case, *J. W. Hampton, Jr. & Co. v. United States*, in which the Supreme Court upheld Congress's delegation of authority to the President to set tariff rates that would equalize production costs in the United States and competing countries.[3] The Court's opinion, written by Chief Justice William Howard Taft, emphasized that Congress was restrained only according to "common sense and the inherent necessities" of governmental cooperation in seeking the assistance of another branch.[4] The Court explained that Congress could delegate discretion to other entities to "secure the exact effect" of legislation if it provides an "intelligible principle" to which the President or other entity must conform.[5] The Court further noted: "Such legislative action is not a forbidden delegation of legislative power" if "nothing involving the expediency or just operation of such legislation was left to [delegee's] determination."[6] The Court concluded that, with respect to the tariff law at issue in the case, the President acted only as "the mere agent of the law-making department" because the President was guided by an "intelligible principle" laid out by Congress.[7] Hence, the "intelligible principle" standard, as imposed by the Supreme Court, seeks to ensure that Congress has laid down the "boundaries" and limits of Congress's delegations.[8]

In 1929, the year after the *J.W. Hampton* decision, the stock market crashed, precipitating the Great Depression of the 1930s.[9] After his election in 1932,[10] President Franklin Delano Roosevelt, in conjunction with Congress, began to implement his "New Deal"[11] of economic and labor reforms that greatly expanded the power of the Federal Government during his presidency.[12] The expansion of governmental power to combat the Great Depression and spur economic recovery during the New Deal era[13] led to several judicial challenges that, among

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constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion."); Loving v. United States, 517 U.S. 748, 771 (1996) ("The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes.").

[2] *See, e.g.*, Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935) ("The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.").

[3] 276 U.S. 394 (1928).

[4] *Id.* at 406.

[5] *Id.* at 409.

[6] *Id.* at 410.

[7] *Id.* at 411.

[8] Am. Power & Light Co. v. Sec. & Exch. Comm'n, 329 U.S. 90, 105 (1946).

[9] *See generally* John K. Galbreth, The Great Crash 1929 (2009) (describing the events that led to the crash of the stock market in 1929 and subsequent impacts on the economy during the Great Depression).

[10] *See generally* William E. Leuchtenburg, The FDR Years: On Roosevelt and His Legacy 209–35 (1995) (discussing the political forces in play during the Great Depression and the election of Franklin Roosevelt).

[11] Franklin D. Roosevelt, Address Accepting the Presidential Nomination at the Democratic National Convention in Chicago (July 2, 1932) ("I pledge you, I pledge myself, to a new deal for the American people.").

[12] *See* William E. Leuchtenburg, Franklin D. Roosevelt and the New Deal 1932–1940, at 41–62 (Henry S. Commanger & Richard B. Morris eds., 1963) (describing the economic and labor reforms of Franklin Roosevelt's presidency).

[13] Historians note that the New Deal era under Franklin Delano Roosevelt began in 1933 and ended in 1938. *See generally* William E. Leuchtenburg, Franklin D. Roosevelt and the New Deal 1932–1940, at xv (Henry S. Commanger & Richard B. Morris eds., 1963) (describing the New Deal era as the "six years from 1933 to 1938 marked a greater upheaval in American institutions than in any similar period in our history"). *See also* Leuchtenburg, *supra* note 12, at 280 ("Conventionally the end of the New Deal is dated with the enactment of the Wages and Hours Act of 1938.") (quoting historian Carl Degler).

other issues, questioned the scope of Congress's authority to delegate broad power to the Executive Branch under the nondelegation doctrine.

In 1935, in the midst of the New Deal era, the Supreme Court struck down legislation that granted the President extensive and "unfettered" powers to regulate economic activity. As characterized by the Court, the delegations to the President challenged in *Panama Refining Co. v. Ryan*[14] and *A.L.A. Schechter Poultry Corp. v. United States*[15] were not only broad but unprecedented delegation of legislative power to the President. Both cases involved provisions of the National Industrial Recovery Act. At issue in *Panama Refining* was a delegation to the President of authority to prohibit interstate transportation of petroleum produced in excess of quotas set by state law.[16] The Supreme Court held that the Act provided no guidance to the President in determining whether or when to exercise this authority, requiring no finding by the President as a condition before exercising the authority.[17] As the Court noted, Congress "declared no policy, . . . established no standard, [and] laid down no rule" with respect to the so-called "hot oil" law at issue, but rather "left the matter to the President without standard or rule, to be dealt with as he pleased," resulting in the law's invalidation.[18]

Similarly, the Supreme Court in *Schechter Poultry* reviewed a delegation to the President of authority to promulgate codes of fair competition that industry groups or the President, on his own initiative, could propose and adopt.[19] The Court determined that the codes were required to implement the National Industrial Recovery Act, but the President's authority to approve, condition, or adopt codes on his own initiative was similarly devoid of meaningful standards and "virtually unfettered."[20] The Court noted that this broad delegation was "without precedent."[21] The Act supplied "no standards" for any trade or industry association for proposing codes and, unlike other broad delegations that the Court had upheld, did not set policies that an administrative agency could implement by following "appropriate administrative procedure."[22] The Court rejected the government's argument that such economic measures must take into consideration the "grave national crisis" caused by the Great Depression, stating that "[e]xtraordinary conditions do not create or enlarge constitutional power."[23]

The Supreme Court's decisions in *Panama Refining* and *Schechter Poultry* represent the "high-water mark" for the nondelegation doctrine.[24] A decline of judicial reliance on the nondelegation doctrine soon followed in the years after the Court issued its decisions in *Panama Refining* and *Schechter*.[25] This shift in the Court's approach to the nondelegation doctrine coincided with a broader "constitutional revolution" at the Supreme Court that

[14] 293 U.S. 388 (1935).

[15] 295 U.S. 495 (1935).

[16] 293 U.S. at 417–19.

[17] *Id.* at 415–18.

[18] *Id.* at 418, 430. Similarly, the Supreme Court explained that executive order exercising the authority contained no finding or other explanation by which the legality of the action could be tested. *Id.* at 431–33.

[19] *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 521–27.

[20] *Id.* at 542.

[21] *Id.* at 541. The Court was also concerned that the industrial codes were backed by criminal sanction and that the power to develop codes of fair competition was delegated to private individuals such as industry trade associations. *See generally* Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) (interpreting *Schechter* and *Panama Refining* cases).

[22] *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 541.

[23] *Id.* at 528.

[24] Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399, 1405 (2000).

[25] *Id.*

largely affirmed the Federal Government's broad powers to guide the nation's social and economic development.[26] With respect to the nondelegation doctrine, the Court's use of the "intelligible principle" standard afforded the Executive Branch "substantial discretion" over regulatory policy.[27] As noted by legal scholars, "the federal judiciary [took] a hands-off approach to assessing the congressional assignment of policy responsibility to other government officials."[28]

Under the "intelligible principle" standard, the Court has not struck down legislation as an impermissible delegation of authority to other branches of government since its *Panama Refining* and *Schechter* decisions in 1935. Since 1935, the Court has not struck down a delegation to an administrative agency.[29] Rather, the Court has approved, "without deviation, Congress's ability to delegate power under broad standards."[30] The Court has upheld, for example, delegations to administrative agencies to determine "excessive profits" during wartime,[31] to determine "unfair and inequitable distribution of voting power" among securities holders,[32] to fix "fair and equitable" commodities prices,[33] to determine "just and reasonable" rates,[34] and to regulate broadcast licensing as the "public interest, convenience, or necessity require."[35] During all this time the Court "has not seen fit . . . to enlarge in the slightest [the] relatively narrow holdings" of *Panama Refining* and *Schechter*.[36] Again and again, the Court has distinguished the two cases, sometimes by finding adequate standards in the challenged statute,[37] sometimes by contrasting the vast scope of the power delegated by the National Industrial Recovery Act (NIRA),[38] and sometimes by pointing to required administrative findings and procedures that were absent in the NIRA.[39] The Court has also relied on the

[26] *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (rejecting the view that the Fourteenth Amendment's Due Process Clause protected liberty of contract); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (adopting a broader view of the Commerce Clause). For discussion of New Deal Court, see ArtVI.C2.3.3 New Deal and Presumption Against Preemption. *See generally* Edward S. Corwin, Constitutional Revolution, LTD. 64–79, 112–14 (1941) (analyzing Supreme Court decisions during the New Deal era). *See also* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379, 420–21 (2017) (discussing the expansion of the federal government's role in regulating industry and interstate commerce).

[27] Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379, 382 (2017) (citing Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 447–48 (1987)).

[28] *Id.*

[29] A year later, the Court invalidated the Bituminous Coal Conservation Act on delegation grounds, but that delegation was to private entities. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[30] Mistretta v. United States, 488 U.S. 361, 373 (1989).

[31] Lichter v. United States, 334 U.S. 742 (1948).

[32] American Power & Light Co. v. SEC, 329 U.S. 90 (1946).

[33] Yakus v. United States, 321 U.S. 414 (1944).

[34] FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944).

[35] National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[36] Hampton v. Mow Sun Wong, 426 U.S. 88, 122 (1976) (Rehnquist, J., dissenting).

[37] Mistretta v. United States, 488 U.S. 361, 373–79 (1989).

[38] *See, e.g.*, Fahey v. Mallonee, 332 U.S. 245, 250 (1947) (contrasting the delegation to deal with "unprecedented economic problems of varied industries" with the delegation of authority to deal with problems of the banking industry, where there was "accumulated experience" derived from long regulation and close supervision); Whitman v. American Trucking Ass'ns, 531 U.S. 457, 474 (2001) (the NIRA "conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition'").

[39] *See, e.g.*, Yakus v. United States, 321 U.S. 414, 424–25 (1944) (*Schechter* involved delegation "not to a public official . . . but to private individuals"; it suffices if Congress has sufficiently marked the field within which an administrator may act "so it may be known whether he has kept within it in compliance with the legislative will.")

constitutional doubt principle of statutory construction to narrow interpretations of statutes that, interpreted broadly, might have presented delegation issues.[40]

ArtI.S1.5.4 Nature and Scope of Intelligible Principle Standard

Article I, Section 1:

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

The "intelligible principle" standard remains the Supreme Court's primary test for assessing whether Congress has unconstitutionally delegated its legislative power to the other branches of the government. Under this lenient standard, the Supreme Court has repeatedly affirmed, "without deviation, Congress's ability to delegate power under broad standards" to governmental entities.[1] As the Court has explained, "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors."[2] Under the "intelligible principle" standard, the Court has upheld, for example, delegations to administrative agencies to determine "excessive profits" during wartime;[3] "unfair and inequitable distribution of voting power" among securities holders;[4] what are "fair and equitable" commodities prices;[5] and "just and reasonable" rates that a natural gas company could charge.[6] In perhaps the broadest delegation judicially challenged, the Court in *National Broadcasting Co. v. United States*, upheld a provision in the Communications Act of 1934 that authorized the Federal Communications Commission to regulate broadcast licensing as the "public interest, convenience, or necessity require."[7]

With the rise of the modern administrative state, the Supreme Court did not impose many restrictions on Congress's ability to delegate power to governmental entities. In embracing a pragmatic view of its role, the Court has been reluctant to interfere with Congress's "practical" need and flexibility to delegate and rely on the duties and expertise of the other branches of the government.[8] The Court noted that its "jurisprudence has been driven by a practical understanding" about "our increasingly complex society, replete with ever changing and more technical problems."[9] The Court has often explained that Congress lacks the technical expertise, resources, time, foresight, and the flexibility to address every detail of its policy decisions.[10] Even when holding the delegation unconstitutional in *Panama Refining* and

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[40] *See, e.g.*, Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 645–46 (1980) (plurality opinion) (invalidating an occupational safety and health regulation, and observing that the statute should not be interpreted to authorize enforcement of a standard that is not based on an"understandable" quantification of risk); National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974) ("hurdles revealed in [*Schechter* and *J. W. Hampton, Jr. & Co. v. United States*] lead us to read the Act narrowly to avoid constitutional problems").

[1] Mistretta v. United States, 488 U.S. 361, 373 (1989).

[2] Touby v. United States, 500 U.S. 160, 165 (1991).

[3] Lichter v. United States, 334 U.S. 742, 786 (1948).

[4] Am. Power & Light Co. v. Sec. & Exch. Comm'n, 329 U.S. 90, 104 (1946).

[5] Yakus v. United States, 321 U.S. 414, 427 (1944).

[6] Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 602 (1944).

[7] Nat'l Broad. Co. v. United States, 319 U.S. 190, 226 (1943).

[8] *See* Wisconsin v. Illinois, 278 U.S. 367, 414 (1929) (reasoning that Congress may delegate to the Secretary of War authority to issue construction permits for canals because such matters were "a peculiarly expert question . . . that is naturally within the executive function").

[9] Mistretta v. United States, 488 U.S. 361, 372 (1989).

[10] *See id.* at 379 (1989) ("Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate."); Am. Power & Light Co. v. Sec. & Exch. Comm'n, 329 U.S. 90, 105 (1946) ("The legislative

Schechter, the Court affirmed that the "Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality."[11] In this vein, the Court has declared that "Congress simply cannot do its job absent an ability to delegate power under broad general directives."[12] Denying Congress the power to delegate, the Court noted, would "'stop . . . the wheels of government' and bring about confusion, if not paralysis, in the conduct of the public business."[13] As a result, the Supreme Court has often acknowledged that the practical need for coordination among the three branches of government does not violate separation of powers principles that underpin the nondelegation doctrine.[14]

The Supreme Court's application of the "intelligible principle" standard may also reflect the challenge in determining the appropriate line between permissible and impermissible delegations.[15] Since its early nondelegation decisions, the Court has recognized the difficulty in drawing the "line which separates legislative power to make laws, from administrative authority" to execute the laws enacted by Congress.[16] The "precise boundary of this [legislative] power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily."[17]

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process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."); Yakus v. United States, 321 U.S. 414, 424 (1944) ("The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate."); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–530 (1935) (recognizing "the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly"); United States v. Grimaud, 220 U.S. 506, 516 (1911) ("[I]t was impracticable for Congress to provide general regulations for these various and varying details of [forest reservation] management."); Marshall Field & Co. v. Clark, 143 U.S. 649, 694 (1892) ("The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation.").

[11] *See Schechter*, 295 U.S. at 529–30 (citing Panama Ref. Co. v. Ryan, 293 U.S. 388, 421(1935)).

[12] *Mistretta*, 488 U.S. at 372.

[13] Union Bridge Co. v. United States, 204 U.S. 364, 387 (1907).

[14] *See* Loving v. United States, 517 U.S. 748, 773 (1996) ("Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes."); Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam) ("Yet it is also clear from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of each of these three essential branches of Government."); *Yakus*, 321 U.S. at 425–26 ("Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command. . . . Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers."). The Court has noted that judicial review is available to help ensure that the administrative agencies discharge their delegated responsibilities and discretion in a reasoned manner consistent with the intelligible principles and statutory framework laid down by Congress. Am. Power & Light Co. v. Sec. & Exch. Comm'n, 329 U.S. 90, 105 (1946); *Yakus*, 321 U.S. at 423, 425–26. *See also* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 953 n.16 (1983) ("That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.").

[15] *Marshall Field & Co.*, 143 U.S. at 693; Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

[16] United States v. Grimaud, 220 U.S. 506, 517 (1911).

[17] *Wayman*, 23 U.S. (10 Wheat.) at 46. In attempts to draw the boundaries of legislative power, the Court has described Congress's "essential legislative functions" or "law-making" powers under Article I, Section 1 in various ways. *See, e.g.*, *Chadha*, 462 U.S. at 952, 954 (characterizing Congress's legislative duties as "altering the legal rights, duties, and relations of persons" and determining policy); United States v. Grimaud, 220 U.S. 506, 516 (1911)

Rather than characterize the delegated power as legislative or administrative, the Court has looked to how the intelligible principles laid out by Congress constrain delegations to governmental entities. As explained in *Yakus v. United States*,

> the only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the [delegee] is to act so that it may be known whether he has kept within it in compliance with the legislative will.[18]

In *Yakus*, the Court upheld the delegation of authority to the Price Administrator to fix commodity prices that "will be generally fair and equitable and will effectuate the purposes" of the statute.[19] The Court determined that standards in the statute were "sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards."[20] Only the absence of standards or boundaries for the delegated authority, the Court reasoned, would justify "overriding" Congress's choice to effectuate its "legislative will."[21]

This focus on statutory boundaries rather than the legislative character of the delegation is seen in the Supreme Court's review of delegations of rulemaking authority.[22] While acknowledging that regulations are "binding rules of conduct,"[23] the Court has treated such regulations as "valid only as subordinate rules when found to be within the framework of the policy which the legislature has sufficiently defined."[24]

The extent to which Congress must constrain its policy judgments or explicitly define the scope of a delegee's discretion may depend on whether the delegee possesses inherent authority related to the delegated matter. For delegated matters that are within the expertise or independent authority of the delegee, the Supreme Court has not required that Congress provide detailed guidance or direction for the delegation.[25] For example, in *Loving v. United States*, the Court reviewed a challenge to Congress's delegation to the President of the authority to prescribe aggravating factors for military capital murder cases.[26] The Court reasoned that "[o]nce delegated that power by Congress, the President, acting in his

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(describing laws as "general rules with reference to rights of persons and property" that "create or regulate obligations and liabilities"); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935) (explaining that "positive law" "bind[s] equally those who assent and those who do not assent").

[18] *Yakus*, 321 U.S. at 425.

[19] *Id.* at 457.

[20] *Id.* at 425–26.

[21] *Id.* at 426.

[22] *See e.g.*, United States v. Grimaud, 220 U.S. 506, 517 (1911) ("From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power.").

[23] Panama Ref. Co. v. Ryan, 293 U.S. 388, 428–29 (1935). *See also* Batterton v. Francis, 432 U.S. 416, 425 (1977) ("Congress . . . expressly delegated to the Secretary the power to prescribe standards for determining what constitutes "unemployment" . . . eligibility. In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect.").

[24] *Panama Ref. Co.*, 293 U.S. at 428–29. *See also* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

[25] *See, e.g.*, United States v. Mazurie, 419 U.S. 544, 556–557 (1975) ("Those limitations [on Congress's authority to delegate its legislative power] are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter.").

[26] Loving v. United States, 517 U.S. 748, 759 (1996).

constitutional office of Commander in Chief, had undoubted competency to prescribe those factors without further guidance."[27] The Court, however, cautioned that if the delegation called for "the exercise of judgment or discretion that lies beyond the traditional authority of the President," there may be a greater need to provide guiding principles to sustain the delegation.[28]

The modern application of the *J. W. Hampton* Court's intelligible principle test and the broad deference it affords congressional delegations of authority to the other branches has met with growing skepticism from some members of the Court.[29] The 2019 case of *Gundy v. United States* highlighted an emerging split on the High Court with respect its nondelegation doctrine jurisprudence.[30] In that case, a criminal defendant challenged a provision of the Sex Offender Registration and Notification Act (SORNA) allowing the Attorney General to (1) "specify the applicability" of SORNA's registration requirements to individuals convicted of a sex offense prior to the statute's enactment and (2) "prescribe rules for [their] registration" in jurisdictions where the offender resides, works, or is a student.[31] Writing for a four-Justice plurality, Justice Elena Kagan interpreted this provision as limiting the Attorney General's authority to "require pre-Act offenders to register as soon as feasible,"[32] concluding that the delegation "easily passe[d] constitutional muster."[33] For the plurality, the Attorney General's authority under SORNA, when compared to other delegations the Court had previously upheld, was "distinctly small-bore."[34]

Notably, Justice Kagan's opinion was met by a dissent, authored by Justice Neil Gorsuch and joined by Chief Justice John Roberts and Justice Clarence Thomas, which argued that the statute unconstitutionally provided the Attorney General "unfettered discretion."[35] Further, the dissenters claimed that the modern intelligible principle test has "no basis in the original meaning of the Constitution" or in historical practice.[36] In response, the plurality, noting that delegations akin to the one in SORNA are "ubiquitous in the U.S. Code," argued that as a matter of pragmatism the Court should afford deference to Congress's judgments that such broad delegations are necessary.[37] Providing the fifth vote to affirm the petitioner's conviction was Justice Samuel Alito, who, while agreeing that the plurality correctly applied the modern nondelegation case law, indicated he would "support [the] effort" of the dissenting Justices to

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[27] *Id.* at 768–69. *See also* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 324 (1936) (holding that where foreign affairs are concerned, Congress may "either leave the exercise of the power to [the President's] unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs").

[28] *Loving*, 517 U.S. at 772.

[29] *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.R., No. 13-1080, slip op. at 12 (U.S. Mar. 9, 2015) (Thomas, J., concurring) (arguing that the Court should "return to the original understanding of the federal legislative power" and reject the "boundless standard the 'intelligible principle' test has become"); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring) (noting "thoughtful" commentary questioning whether the current intelligible principle test serves "as much as a protection against the delegation of legislative authority as a license for it, undermining the separation between the legislative and executive powers that the founders thought essential").

[30] *See* No. 17-6086, slip op. (U.S. June 20, 2019). While criticisms of the intelligible principle doctrine have become more pronounced in recent years, some former members of the Court had argued for striking down legislation on nondelegation grounds. *See, e.g.*, Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring); Arizona v. California, 373 U.S. 546, 626–27 (1963) (Harlan, J., dissenting).

[31] 34 U.S.C. § 20913(d); *see also Gundy*, slip op. at 2 (plurality opinion) (discussing SORNA's "basic registration scheme").

[32] *See Gundy*, slip op. at 16 (plurality opinion).

[33] *Id.* at 1.

[34] *Id.* at 17.

[35] *Id.* at 24 (Gorsuch, J., dissenting).

[36] *Id.* at 17 (Gorsuch, J., dissenting).

[37] *Id.* at 17–18 (plurality opinion).

reconsider the intelligible principle test once a majority of the Court concurred in rethinking the doctrine.[38] Accordingly, *Gundy* witnessed the Court evenly split on how deferential the Court should be with regard to congressional delegations to the other branches, raising questions as to whether the nondelegation doctrine would remain moribund.

ArtI.S1.5.5 Agency Discretion and Chevron Deference

Article I, Section 1:

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

Challenges to delegations of legislative power often raise concerns regarding an administrative agency's discretion to interpret broad directives, ambiguities, or gaps in a statutory provision. An agency's degree of discretion that may be constitutionally "acceptable" under the nondelegation doctrine appears to be fairly broad. In *Whitman v. American Trucking Associations*, the Supreme Court rejected a challenge to the U.S. Environmental Protection Agency's (EPA's) authority to set national air quality standards at a level "'requisite' . . . to protect the public health."[1] The Court held that the "scope of discretion" given to the EPA under the Clean Air Act "fit[s] comfortably" and is "well within the outer limits of our nondelegation precedents."[2] In reviewing previous nondelegation cases, the Court reasoned that even in "sweeping regulatory schemes" that affect the entire economy, the Court has "never demanded . . . that statutes provide a 'determinate criterion' for saying 'how much [of the regulated harm] is too much.'"[3]

Congress has given considerable leeway to administrative agencies to interpret statutory ambiguities, which has been sustained by the Supreme Court under the *Chevron* doctrine. Under the *Chevron* doctrine, courts give special consideration or deference to administrative agencies to interpret statutory ambiguities within their delegated authorities.[4] Judicial review of such interpretations is governed by the framework set forth in *Chevron U.S.A. Inc., v. Natural Resources Defense Council*.[5] The *Chevron* case reviewed the EPA's definition of the term "stationary source" in a regulation promulgated under the Clean Air Act.[6] A unanimous Supreme Court upheld that regulation, determining that the EPA's definition was "a permissible construction of the statute."[7] In *Chevron*, the Court reasoned that

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[8]

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[38] *Id.* at 1 (Alito, J., concurring). Justice Brett Kavanaugh took no part in the consideration or decision in *Gundy*, as he was appointed to the Supreme Court after oral argument occurred in the case.

[1] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475–76 (2001).

[2] *Id.* at 474, 476.

[3] *Id.* at 457, 474.

[4] United States v. Mead Corp., 533 U.S. 218, 227 (2001).

[5] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[6] *Id.* at 840; 42 U.S.C. § 7502.

[7] *Chevron U.S.A., Inc.*, 467 U.S. at 866.

[8] *Id.* at 844.

The broad deference the "intelligible principle" standard affords congressional delegations of authority to the other branches has met with growing skepticism from some members of the Court.[9] The 2019 case of *Gundy v. United States* highlighted an emerging split on the High Court with respect its nondelegation doctrine jurisprudence.[10] In that case, a criminal defendant challenged a provision of the Sex Offender Registration and Notification Act (SORNA) allowing, among other things, the Attorney General to "specify the applicability" of SORNA's registration requirements to individuals convicted of a sex offense prior to the statute's enactment.[11] Writing for a four-Justice plurality, Justice Elena Kagan interpreted this provision as limiting the Attorney General's authority to "require pre-Act offenders to register as soon as feasible,"[12] concluding that the delegation "easily passe[d] constitutional muster."[13] For the plurality, the Attorney General's authority under SORNA, when compared to other delegations the Court had previously upheld, was "distinctly small-bore."[14]

Notably, Justice Kagan's opinion was met by a dissent, authored by Justice Neil Gorsuch and joined by Chief John Justice Roberts and Justice Clarence Thomas, which argued that the statute unconstitutionally provided the Attorney General "unfettered discretion."[15] Further, the dissenters claimed that the modern intelligible principle standard has "no basis in the original meaning of the Constitution" or in historical practice.[16] In response, the plurality, noting that delegations akin to the one in SORNA are "ubiquitous in the U.S. Code," argued that as a matter of pragmatism the Court should afford deference to Congress's judgments that such broad delegations are necessary.[17] Providing the fifth vote to affirm the petitioner's conviction was Justice Samuel Alito, who, while agreeing that the plurality correctly applied the modern nondelegation case law, indicated he would "support [the] effort" of the dissenting Justices to reconsider the intelligible principle test once a majority of the Court concurred in rethinking the doctrine.[18] Accordingly, the Court in *Gundy* was evenly split on how deferential the Court should be with regard to congressional delegations to the other branches, raising questions as to whether the nondelegation doctrine would remain moribund.[19]

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[9] *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 77 (2015) (Thomas, J., concurring) (arguing that the Court should "return to the original understanding of the federal legislative power" and reject the "boundless standard the 'intelligible principle' test has become"); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring) (noting "thoughtful" commentary questioning whether the current intelligible principle test serves "as much as a protection against the delegation of legislative authority as a license for it, undermining the separation between the legislative and executive powers that the founders thought essential").

[10] *See* Gundy v. United States, No. 17-6086, slip op. (2019). While criticisms of the intelligible principle doctrine have become more pronounced in the beginning of the 21st century, some former members of the Court had argued for striking down legislation on nondelegation grounds. *See, e.g.*, Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring); Arizona v. California, 373 U.S. 546, 626–27 (1963) (Harlan, J., dissenting).

[11] 34 U.S.C. § 20913(d); *see also Gundy*, slip op. at 2 (plurality opinion) (discussing SORNA's "basic registration scheme").

[12] *See Gundy*, slip op. at 16 (plurality opinion).

[13] *Id.* at 1.

[14] *Id.* at 17.

[15] *Id.* at 24 (Gorsuch, J., dissenting).

[16] *Id.* at 17 (Gorsuch, J., dissenting).

[17] *Id.* at 17–18 (plurality opinion).

[18] *Id.* at 1 (Alito, J., concurring). Justice Brett Kavanaugh took no part in the consideration or decision in *Gundy*, as he was appointed to the Supreme Court after oral argument occurred in the case.

[19] *See, e.g.*, Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 Harv. L. Rev. 1274, 1302 (2006) ("Commentators thus agree with near unanimity that the Constitution's nondelegation norm goes essentially unenforced."); Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 331 (2002) ("There is something very fundamental—indeed, almost primal—about the nondelegation doctrine that keeps resuscitating it when any rational observer would have issued a 'code blue' long ago."); Eric A. Posner & Adrian Vermeule, *Crisis*

ArtI.S1.5.6 Major Questions Doctrine and Canons of Statutory Construction

Article I, Section 1:

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

Some legal scholars have suggested that delegations to governmental entities are interpreted through other "canons" of statutory construction and principles of statutory interpretation.[1] These canons and principles have helped the Court to define the constitutionally acceptable degree of discretion, deference, or direction given by Congress to a delegee.

These complementary canons and principles have restricted the powers delegated by Congress, indirectly enforcing the separation of powers principles of the nondelegation doctrine. For example, the Supreme Court has sometimes limited the scope of an agency's delegated authority (and *Chevron* deference[2]) under the so-called "major questions" doctrine.[3] Under this doctrine, the Court has vacated administrative regulations on the ground that "Congress could not have intended to delegate a decision of such economic and political significance to an agency" without a clear statement of its intention.[4]

For matters that "affect the entire national economy" or go beyond the "traditional authority" of the delegee, Congress, in the Court's opinion, must provide "substantial guidance."[5] This additional level of guidance appears to be a more stringent version of the

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Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008, 76 U. Chi. L. Rev. 1613, 1630 (2009) ("[T]he nondelegation doctrine is largely moribund at the level of constitutional law.").

[1] *See* Nat'l Fed'n of Indep.Bus. v. Dep't. of Labor, Occupational Safety & Health Admin., Nos. 21A244 and 21A247, slip op. at 4 (2022) (per curiam) (Gorsuch, J. concurring) ("Both [the nondelegation and major question doctrines] are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands."). *See also* Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 Admin. L. Rev. 19, 22 (2010) (explaining that "Ever since the [1980] *Benzene* case, the Court has sometimes construed statutes narrowly to avoid nondelegation concerns."); Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 Yale L.J. 952, 990–91(2007) (describing as an alternative to enforcing the "intelligible principle" standard the doctrines of statutory interpretation and judicial canons); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 316, 330 (2000) (explaining that "nondelegation canons" can "forbid administrative agencies from making decisions on their own" and "impose important constraints on administrative authority, for agencies are not permitted to understand ambiguous provisions to give them authority to venture in certain directions; a clear congressional statement is necessary"); Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399, 1408 (2000) ("[The Supreme Court] has continued to identify and address delegation concerns through means other than the nondelegation doctrine.").

[2] *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 531 (2007) (invoking major questions doctrine in not affording deference to the agency's construction of the statute); Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 323–24 (2014) (same).

[3] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) (overruling administrative regulations on the ground that "Congress could not have intended to delegate a decision of such economic and political significance to an agency" without a clear statement of its intention). *See also id.* at 159, citing Hon. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.").

[4] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000). *See also* King v. Burwell, 576 U.S. 473, 485–87, 498 (2015) (holding that the Court had "reason to hesitate before concluding that Congress" implicitly delegated to the IRS the authority to "'fill in the statutory gaps'" in determining whether states participating in a federal health care exchange were eligible for tax credits under the Patient Protection and Affordable Care Act) (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159); Util. Air Regulatory Grp. v. Envtl. Prot. Agency, 573 U.S. 302, 323–24 (2014) (holding that the Environmental Protection Agency's (EPA's) regulations represented an unreasonable reading of the authority delegated in the statute because the agency's interpretation would have constituted "an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization").

[5] *See* Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'") (quoting *Brown & Williamson Tobacco*

"intelligible principle" standard that has been used by the Court for delegation challenges. In *West Virginia v. Environmental Protection Agency*, the Supreme Court expressed doubt that Congress intended to provide the Environmental Protection Agency with authority to cap carbon dioxide emissions so as to "force a nationwide transition" from fossil fuel-generated electricity.[6] The Court stated: "But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme . . . . A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[7] Similarly, in *King v. Burwell*,[8] the Court considered whether states participating in a federal health care exchange were eligible for tax credits under the Patient Protection and Affordable Care Act.[9] The Court declined to apply the *Chevron* deference to the statutory interpretation of the Internal Revenue Service (IRS), holding that this was an "'extraordinary case'" in which the Court had "'reason to hesitate before concluding that Congress'" implicitly delegated to the IRS the authority to "'fill in the statutory gaps.'"[10]

The Supreme Court has also enforced nondelegation principles through the canon of constitutional avoidance, taking a narrow view of a statutory delegation in order to avoid potential constitutional conflicts with the nondelegation doctrine.[11] In a 1974 case, *National Cable Television Association v. United States*, the Court avoided potential delegation concerns in a challenge to the Federal Communications Commission's (FCC's) authority to assess fees against regulated parties to cover their operating costs.[12] The Independent Offices Appropriations Act directed federal agencies to set fee levels by taking into consideration "direct and indirect cost[s] to the Government, value to the recipient, [and] public policy."[13] Relying on *Schechter Poultry* and *J.W. Hampton*, the Court declined to read the statute as raising a constitutional delegation question of whether the Act delegated taxing authority to the FCC, determining that "the [delegation] hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems."[14] The Court narrowly construed the

Corp., 529 U.S. at 160); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001) ("[Congress] must provide substantial guidance on setting air standards that affect the entire national economy."). *See also* Loving v. United States, 517 U.S. 748, 772 (1996) ("Had the delegations here called for the exercise of judgment or discretion that lies beyond the traditional authority of the President, Loving's last argument that Congress failed to provide guiding principles to the President might have more weight.").

[6] West Virginia v. Env't Prot. Agency, No. 20-1530, slip op. at 31 (June 30, 2022).

[7] *Id.*

[8] 576 U.S. 473 (2015).

[9] 42 U.S.C. § 18031; 26 U.S.C. §§ 36B(b)–(c).

[10] *King*, 576 U.S. at 485–86 (quoting Brown & Williamson, 529 U.S. 120, 159 (2000)).

[11] *See* Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) ("[O]ur application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."). *See also* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (acknowledging that the "sweeping delegation of legislative power [to the Secretary of Labor to set worker exposure standards] . . . might be unconstitutional" under the nondelegation doctrine and imposing a "construction of the [Occupational Safety and Health Act] that avoids this kind of open-ended grant" that required the Secretary to find a "significant risk" to employee health before adopting a standard). *See also* Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure § 4.8(b) (5th ed. 2012) ("The Supreme Court sometimes interprets grants of powers to agencies narrowly, so as to avoid constitutional issues regarding the scope of congressional power or constitutionality of the delegation to the agency."); John F. Manning, The Nondelegation Doctrine as a Canon of Avoidance, 2000 Sup. Ct. Rev. 223, 223, 242–43 (2000) ("The nondelegation doctrine . . . now operates exclusively through the interpretive canon requiring avoidance of serious constitutional questions. . . . Despite the Court's apparent refusal to enforce the nondelegation doctrine directly, cases such as *Brown & Williamson* illustrate the Court's modern strategy of using the canon of avoidance to promote nondelegation interests. Where a statute is broad enough to raise serious concerns under the nondelegation doctrine, the Court simply cuts it back to acceptable bounds.") (citing *Brown & Williamson Tobacco Corp.*, 529 U.S. 120).

[12] National Cable Television Ass'n v. United States, 415 U.S. 336, 337–41 (1974).

[13] *Id.* at 337.

[14] *Id.* at 342.

statute to limit the FCC's authority to set fees that reflect only the "value to the recipient" and not the full costs of regulating.[15] While the Supreme Court later distanced itself from the reasoning of *National Cable Television* in *Skinner v. Mid-America Pipeline Company*, explaining that "the delegation of discretionary authority under Congress's taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges,"[16] the 1974 decision illustrates that the nondelegation doctrine may not be "dead" but continues to survive through judicial canons and principles that sustain the separation of powers roots of the doctrine.[17]

ArtI.S1.6 Categories of Legislative Power Delegations

ArtI.S1.6.1 Criminal Statutes and Nondelegation Doctrine

Article I, Section 1:

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

The Supreme Court has held that only Congress has the power to declare any act or omission a criminal offense.[1] This limit derives from the due process and separation of powers principles that no one should be "subjected to a penalty unless the words of the statute plainly impose it."[2] The Supreme Court has held that Congress must "distinctly" define by statute what violations of the statute's provisions constitute a criminal offense.[3] At the same time, the Court has recognized that Congress may provide that violation of valid administrative regulations authorized by a statute shall be punished as a crime.[4]

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[15] *Id.* at 343–44.

[16] 490 U.S. 212, 221 (1989).

[17] *See* generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223 (2000).

[1] *See* Sessions v. Dimaya, No. 15-1498, slip op. at 5 (2018) (explaining that the void-for-vagueness doctrine is a "corollary of the separation of powers" that requires "Congress, rather than the executive or judiciary branch, define what conduct is [criminally] sanctionable or what is not"); Whitman v. United States, 574 U.S. 1003, 1004 (2014) ("[L]egislatures, not executive officers, define crimes."); United States v. Eaton, 144 U.S. 677, 688 (1892) ("It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offence . . . .").

[2] Tiffany v. Nat'l Bank of Missouri, 85 U.S. (18 Wall.) 409, 410 (1873). *See also* United States v. Robel, 389 U.S. 258, 272, 275 (1967) (Brennan, J., concurring) (noting that "indefinite[ ]" delegations "create the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions in an area of [constitutionally] protected freedoms" and such "vague" delegations "are far more serious when liberty and the exercise of fundamental freedoms are at stake"). The Supreme Court has recognized that the void-for-vagueness doctrine may also serve to limit delegation of authority of criminal matters to other branches of the government. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) ("A vague [criminal] law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

[3] *See Eaton*, 144 U.S. at 688 ("It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offence . . . . If Congress intended to make to an offence [to violate] regulations . . . , it would have done so distinctly, in connection with an enactment [of the statute]."); *In re* Kollock, 165 U.S. 526 (1897) ("[T]he courts of the United States, in determining what constitutes an[ ] offence against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution.").

[4] *See* United States v. Grimaud, 220 U.S. 506, 519 (1911) (explaining that the Forest Reserve Act clearly provided for punishment for violation of "rules and regulations of the Secretary"), *but see* United States v. Eaton, 144 U.S. 677 (1892) (holding the general statutory language authorizing punishment for failure to do what was "required by law" did not authorize criminal punishment for violation of a regulation because the statute did not explicitly provide for criminal sanctions for violations of regulations). Extension of the principle that penal statutes should be strictly construed requires that the prohibited acts be clearly identified in the regulation. M. Kraus & Bros. v. United States, 327 U.S. 614, 621 (1946). *See also* L. P. Steuart & Bro. v. Bowles, 322 U.S. 398, 404 (1944) ("[I]t is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute.").

Once Congress has exercised its power to declare certain acts criminal, the Supreme Court has generally upheld Congress's authority to delegate authority to further define what specific conduct is criminal pursuant to the statutory limits.[5] For example, the Supreme Court, in *Touby v. United States*, upheld a delegation of authority to the Attorney General to classify drugs as "controlled substances" under the Controlled Substances Act.[6] The Act prohibits, among other things, any person from knowingly or intentionally manufacturing, distributing a "controlled substance," and sets forth criminal penalties that vary according to the level of a drug's classification.[7] While acknowledged that its "cases are not entirely clear as to whether more specific guidance [than an 'intelligible principle'] is in fact required" for delegations that trigger statutorily prescribed criminal penalties, the Court concluded that the Act "passes muster even if greater congressional specificity is required in the criminal context."[8] The Court determined that the Act "placed multiple specific restrictions on the Attorney General's discretion to define criminal conduct," satisfying the "constitutional requirements of the nondelegation doctrine."[9]

The Supreme Court has also upheld the authority delegated to the Attorney General to apply criminal penalties retroactively. The 2019 case of *Gundy v. United States* centered on the application of registration requirements under the Sex Offender Registration and Notification Act (SORNA) to pre-act offenders.[10] Section 20913(d) of SORNA authorizes the Attorney General to "specify the applicability" of the registration requirements "to sex offenders convicted before the enactment" of the Act and to "prescribe rules for the registration of any such sex offenders" and for other offenders unable to comply with the initial registration requirements.[11] In his petition to the Supreme Court, Gundy, a convicted sex offender, argued, among other things, that SORNA's grant of "undirected discretion" to the Attorney General to decide whether to apply the statute to pre-SORNA offenders is an unconstitutional delegation of legislative power to the Executive Branch.

In a plurality opinion written on behalf of four Justices, Justice Elena Kagan concluded that SORNA's delegation "easily passes constitutional muster" and was "distinctly small-bore" when compared to the other broad delegations the Court has upheld since 1935.[12] Justice Kagan read SORNA as requiring the Attorney General to "apply SORNA's registration requirements as soon as feasible to offenders convicted before the statute's enactment."[13] Although the delegation in Section 20913(d) does not refer to a feasibility standard, Justice Kagan relied on the legislative history, definition of "sex offender," and SORNA's stated purpose (i.e., to establish a "comprehensive" registration system) as an "appropriate guide" to limit the Attorney General's discretion.[14] The plurality concluded that the Attorney General's "temporary authority" to delay the application of SORNA's registration requirements to

[5] Loving v. United States, 517 U.S. 748, 768 (1996) ("There is no absolute rule . . . against Congress's delegation of authority to define criminal punishments. We have upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal, so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, and the regulations 'confin[e] themselves within the field covered by the statute.'") (quoting *Grimaud*, 220 U.S. at 518).

[6] Touby v. United States, 500 U.S. 160, 165–69 (1991).

[7] 21 U.S.C. § 841(a)–(b).

[8] *Touby*, 500 U.S. at 166.

[9] *Id.* at 165–67.

[10] No. 17-6086, slip op. (2019).

[11] 34 U.S.C. § 20913(d).

[12] *Gundy*, No. 17-6086, slip op. at 1, 17 (plurality opinion).

[13] *Id.* at 1.

[14] *Id.* at 11–15.

pre-act offenders due to feasibility concerns "falls well within constitutional bounds."[15] Providing the fifth vote to affirm Gundy's conviction, Justice Samuel Alito concurred in the judgment only, declining to join Justice Kagan's opinion and indicating his willingness to rethink the Supreme Court's approach to the nondelegation doctrine.[16]

In his dissent joined by Chief Justice John Roberts and Justice Clarence Thomas, Justice Neil Gorsuch viewed the plain text of the delegation as providing the Attorney General limitless and "vast" discretion and "free rein" to impose (or not) selected registration requirements on pre-act offenders.[17] Justice Gorsuch concluded that SORNA's delegation was an unconstitutional breach of the separation between the legislative and Executive Branches.[18] In "a future case with a full panel," Justice Gorsuch hoped that the Court would recognize that "while Congress can enlist considerable assistance from the Executive Branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That 'is delegation running riot.'"[19]

Congress may also delegate authority to prescribe maximum and minimum penalty ranges for criminal sentences. The Court in *Mistretta v. United States* upheld Congress's conferral of "significant discretion" on the U.S. Sentencing Commission, an independent agency in the Judicial Branch, to develop and promulgate sentencing guidelines for federal judges.[20] These guidelines restricted a judge's discretion in sentencing criminal defendants by establishing a range of determinate sentences for all categories of federal offenses and defendants.[21]

The Court concluded that the statute "sets forth more than merely an 'intelligible principle' or minimal standards" by "explain[ing] what the Commission should do and how it should do it, and set[ting] out specific directives to govern particular situations."[22] Although Congress provided standards regarding the developing of the sentencing guidelines, the Court noted that the Commission has significant discretion in making policy judgments when considering the relative severity of different crimes and the weight of the characteristics of offenders, and stated that delegations may carry with them "the need to exercise judgment on matters of policy."[23] The Court also noted that the statute did not confer authority to create new crimes or to enact a federal death penalty for any offense.[24]

The Court has confessed that its "cases are not entirely clear as to whether more specific guidance is in fact required" for delegations relating to the imposition of criminal sanctions.[25] It is clear, however, that some essence of the power to define crimes and set a range of punishments is not delegable, but must be exercised by Congress. This conclusion derives in

[15] *Id.* at 17–18.

[16] *Id.* at 1 (concurring, Alito, J.).

[17] *Id.* at 3 (Gorsuch, J., dissenting).

[18] *Id.* at 27–33.

[19] *Id.* at 33 (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring)).

[20] Mistretta v. United States, 488 U.S. 361, 371–79 (1989).

[21] *Id.* The Supreme Court in *United States v. Booker* held that the mandatory nature of the sentencing guidelines violated the Sixth Amendment. 543 U.S. 220, 246–46 (2005). The Court severed the mandatory provision to make the sentencing guidelines advisory. *Id.*

[22] *Id.* at 379.

[23] *Id.* at 378.

[24] *Id.* at 377–78. "As for every other offense within the Commission's jurisdiction, the Commission could include the death penalty within the guidelines only if that punishment was authorized in the first instance by Congress and only if such inclusion comported with the substantial guidance Congress gave the Commission in fulfilling its assignments." *Id.* at 378 n.11.

[25] Touby v. United States, 500 U.S. 160, 166 (1991).

part from the time-honored principle that penal statutes are to be strictly construed, and that no one should be "subjected to a penalty unless the words of the statute plainly impose it."[26] Both *Schechter*[27] and *Panama Refining*[28]—the only two cases in which the Court has invalidated delegations—involved broad delegations of power to "make federal crimes of acts that never had been such before."[29] Thus, Congress must provide by statute that violation of the statute's terms—or of valid regulations issued pursuant thereto—shall constitute a crime, and the statute must also specify a permissible range of penalties. Punishment in addition to that authorized in the statute may not be imposed by administrative action.[30]

However, once Congress has exercised its power to declare certain acts criminal, and has set a range of punishment for violations, authority to flesh out the details may be delegated. Congress may provide that violation of valid administrative regulations shall be punished as a crime.[31] For example, the Court has upheld a delegation of authority to classify drugs as "controlled substances," and thereby to trigger imposition of criminal penalties, set by statute, that vary according to the level of a drug's classification by the Attorney General.[32]

Congress may also confer on administrators authority to prescribe criteria for ascertaining an appropriate sentence within the range between the maximum and minimum penalties that are set by statute. The Court upheld Congress's conferral of "significant discretion" on the Sentencing Commission to set binding sentencing guidelines establishing a range of determinate sentences for all categories of federal offenses and defendants.[33] Although the Commission was given significant discretionary authority "to determine the relative severity of federal crimes, . . . assess the relative weight of the offender characteristics listed by Congress, . . . to determine which crimes have been punished too leniently and which too severely, [and] which types of criminals are to be considered similar," Congress also gave the Commission extensive guidance in the Act, and did not confer authority to create new crimes or to enact a federal death penalty for any offense.[34]

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[26] Tiffany v. Nat'l Bank of Mo., 85 U.S. (18 Wall.) 409, 410 (1873).

[27] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[28] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[29] Fahey v. Mallonee, 332 U.S. 245, 249 (1947).

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

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

[32] Touby v. United States, 500 U.S. 160 (1991).

[33] Mistretta v. United States, 488 U.S. 361 (1989).

[34] *Id.* at 377–78. "As for every other offense within the Commission's jurisdiction, the Commission could include the death penalty within the guidelines only if that punishment was authorized in the first instance by Congress and only if such inclusion comported with the substantial guidance Congress gave the Commission in fulfilling its assignments." *Id.* at 378 n.11.

ArtI.S1.6.2 Delegations of Foreign and Military Affairs to the President

Article I, Section 1:

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

That the delegation of discretion in dealing with foreign relations stands upon a different footing than the transfer of authority to regulate domestic concerns was asserted in *United States v. Curtiss-Wright Corporation*.[1] There the Court upheld a joint resolution of Congress making it unlawful to sell arms to certain warring countries upon certain findings by the President, a typically contingent type of delegation. But Justice George Sutherland for the Court proclaimed that the President is largely free of the constitutional constraints imposed by the nondelegation doctrine when he acts in foreign affairs.[2] Sixty years later, the Court, relying on *Curtiss-Wright*, reinforced such a distinction in a case involving the President's authority over military justice.[3] Whether or not the President is the "sole organ of the nation" in its foreign relations, as asserted in *Curtiss-Wright*,[4] a lesser standard of delegation is applied in areas of power shared by the President and Congress.

Superintendence of the military is another area in which shared power with the President is impacted by the delegation doctrine. The Court in *Loving v. United States*[5] approved a virtually standardless delegation to the President.

Article 118 of the Uniform Code of Military Justice (UCMJ)[6] provides for the death penalty for premeditated murder and felony murder for persons subject to the Act, but the statute does not comport with the Court's capital punishment jurisdiction, which requires the death sentence to be cabined by standards so that the sentencing authority must narrow the class of convicted persons to be so sentenced and must justify the individual imposition of the sentence.[7] However, the President in 1984 had promulgated standards that purported to supply the constitutional validity the UCMJ needed.[8]

The Court in *Loving* held that Congress could delegate to the President the authority to prescribe standards for the imposition of the death penalty—Congress's power under Article I, § 8, cl. 14, is not exclusive—and that Congress had done so in the UCMJ by providing that the punishment imposed by a court-martial may not exceed "such limits as the President may prescribe."[9] Acknowledging that a delegation must contain some "intelligible principle" to guide the recipient of the delegation, the Court nonetheless held this not to be true when the delegation was made to the President in his role as Commander in Chief. "The same limitations on delegation do not apply" if the entity authorized to exercise delegated authority itself possesses independent authority over the subject matter. The President's responsibilities

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[1] 299 U.S. 304, 319–29 (1936).

[2] *Id.* at 319–22. For a particularly strong, recent assertion of the point, see *Haig v. Agee,* 453 U.S. 280, 291–92 (1981). This view also informs the Court's analysis in *Dames & Moore v. Regan,* 453 U.S. 654 (1981). *See also* United States v. Chemical Foundation, 272 U.S. 1 (1926) (Trading With Enemy Act delegation to dispose of seized enemy property).

[3] Loving v. United States, 517 U.S. 748, 772–73 (1996).

[4] 299 U.S. at 319.

[5] 517 U.S. 748.

[6] 10 U.S.C. §§ 918(1), (4).

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

[8] Rule for Courts-Martial; *see* 517 U.S. at 754.

[9] 10 U.S.C. §§ 818, 836(a), 856.

as Commander in Chief require him to superintend the military, including the courts-martial, and thus the delegated duty is interlinked with duties already assigned the President by the Constitution.[10]

ArtI.S1.6.3 States and Legislative Power Delegations

Article I, Section 1:

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

Beginning in the Nation's early years, Congress has enacted hundreds of statutes that contained provisions authorizing state officers to enforce and execute federal laws.[1] Challenges to the practice have been uniformly rejected. Although the Court early expressed its doubt that Congress could compel state officers to act, it entertained no such thoughts about the propriety of authorizing them to act if they chose.[2] When, in the *Selective Draft Law Cases*,[3] the contention was made that the 1917 statute authorizing a military draft was invalid because of its delegations of duties to state officers, the argument was rejected as "too wanting in merit to require further notice." Congress continues to empower state officers to act.[4] Presidents who have objected have done so not on delegation grounds, but rather on the basis of the Appointments Clause.[5]

ArtI.S1.6.4 Quasi-Governmental Entities and Legislative Power Delegations

Article I, Section 1:

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

To define what constitutional limits could apply if Congress delegates authority to another entity to perform specified functions and duties, the Supreme Court has said that that it must first determine whether the entity in question is a private or governmental entity. The Court applies varying levels of scrutiny to a delegation depending on whether the delegation is made to a governmental, private, or quasi-governmental entity. For governmental entities such as federal agencies, the Court applies the lenient "intelligible principle" standard.[1]

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[10] 517 U.S. at 771–74. *See also* United States v. Mazurie, 419 U.S. 544, 556–57 (1974) (limits on delegation are "less stringent" when delegation is made to an Indian tribe that can exercise independent sovereign authority over the subject matter).

[1] *See* Charles Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545 (1925); A. N. Holcombe, *The States as Agents of the Nation* (1921), *reprinted in* 3 Selected Essays on Constitutional Law 1187 (1938).

[2] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (duty to deliver fugitive slave); Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861) (holding that Congress could not compel a governor to extradite a fugitive). Doubts over Congress's power to compel extradition were not definitively removed until Puerto Rico v. Branstad, 483 U.S. 219 (1987), in which the Court overruled *Dennison*.

[3] 245 U.S. 366, 389 (1918).

[4] *E.g.*, Pub. L. No. 94-435, title III, 90 Stat. 1394, 15 U.S.C. § 15c (state attorneys general may bring antitrust parens patriae actions); Medical Waste Tracking Act, Pub. L. No. 100-582, 102 Stat. 2955, 42 U.S.C. § 6992f (states may impose civil and possibly criminal penalties against violators of the law).

[5] *See* 24 Weekly Comp. of Pres. Docs. 1418 (1988) (President Reagan). The only judicial challenge to such a practice resulted in a rebuff to the presidential argument. Seattle Master Builders Ass'n v. Pacific N.W. Elec. Power Council, 786 F.2d 1359 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987).

[1] *See* ArtI.S1.5.3 Origin of Intelligible Principle Standard.

The Court has held that a provision of a statute that states an entity is either a private or governmental entity is not dispositive for constitutional purposes.[2] While certain entities such as federal agencies can be readily characterized as governmental entities,[3] the distinction between a public and a private entity is often unclear for government-created or government-appointed entities.[4] Nondelegation challenges involving quasi-governmental entities highlight "the judiciary's unsettled approach to analyzing the constitutional status of 'boundary agencies' that sit at the public-private border."[5]

The Supreme Court has examined the following factors to determine whether government-created entities[6] with varying degrees of governmental involvement and oversight are private or governmental entities:

- ownership and corporate structure;
- day-to-day management;
- statutory goals;
- political branches' supervision over the entities' priorities and operations; and
- federal financial support.[7]

These factors arose from two Supreme Court decisions involving the status of Amtrak, a federally chartered corporation. In its 1995 decision in *Lebron v. National Railroad Passenger Corp.*, the Supreme Court held that Amtrak "is an agency or instrumentality of the United States" for purposes of a First Amendment challenge.[8] After reviewing Amtrak's history and operations, the Court concluded that when the "Government creates a corporation [such as Amtrak] by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment."[9]

Twenty years later, the Supreme Court affirmed Amtrak's status as a governmental entity in a case involving nondelegation and Appointments Clause challenges. In *Department of Transportation v. Association of American Railroads*,[10] the Court relied on its analysis in

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[2] Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 52 (2015); Lebron v. National Railroad Passenger Corp., 513 U.S. 374, 394 (1995).

[3] *See, e.g.*, 5 U.S.C. §§ 101–105 (enumerating and defining executive and military departments, executive agencies, government corporations, and independent establishments). *See also* Ass'n of Am. R.R. v. Dep't of Transp., 821 F.3d 19, 39 (D.C. Cir. 2016) ("[T]he Due Process Clause effectively guarantees the regulatory power of the federal government will be wielded by 'presumptively disinterested' and 'duly appointed' actors who, in exercising that awesome power, are beholden to no constituency but the public good.").

[4] *See* Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 Harv. J.L. & Pub. Pol'y 931, 940 (2014) ("The public-private distinction is fuzzy, and statutory labels aren't always dispositive."); Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 Notre Dame L. Rev. 975, 1030 (2005) ("[E]xpanded privatization has served to blur the distinction between the spheres of public and private.").

[5] *The Supreme Court 2014 Term: Leading Case: Federal Statutes & Regulations: Passenger Rail Investment and Improvement Act—Nondelegation—Department of Transportation v. Association of American Railroads*, 129 Harv. L. Rev. 341, 350 (2015). *See e.g.*, S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 560 (1987) (determining that the United States Olympic Committee was not a governmental actor); *Ass'n of Am. R.R*, 821 F.3d 19 (holding that Amtrak was a self-interested governmental entity subject to the due process clause of the Fifth Amendment).

[6] *See* U.S. Gov't Accountability Off., GAO-16-464SP, Principles of Federal Appropriations Law, ch. 15, at 86–87 (3d. ed. 2008) (discussing how the distinction between what is public or private is "indistinct" for "quasi-private," "quasi-governmental," "hybrid organizations," and "twilight zone corporations") (internal quotations and citations omitted).

[7] Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 54–55 (2015) (citing Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 392–99 (1995)).

[8] Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 376–78 (1995).

[9] *Id.* at 400.

[10] *Ass'n of Am. R.R.*, 575 U.S. at 45–46.

Lebron to determine whether Amtrak was a governmental or private entity. The Association of American Railroads filed suit alleging that the Passenger Rail Investment and Improvement Act of 2008 unconstitutionally delegated authority to Amtrak to set certain standards.[11] The Court concluded that Amtrak was a governmental entity because the "political branches created Amtrak, control its Board, define its mission, specify many of its day-to-day operations, have imposed substantial transparency and accountability mechanisms, and, for all practical purposes, set and supervise its annual budget."[12] The Court did not explain the relative importance of the various factors in the *Amtrak* test, concluding that the "combination of these unique features and [Amtrak's] significant ties to the Government" established that it was not a private entity but a governmental entity that "was created by the Government, is controlled by the Government, and operates for the Government's benefit."[13] The Court did not reach the issue of whether the delegation of power given to Amtrak over its competitors violates the Due Process Clause or the nondelegation doctrine.[14]

Because case law on the threshold question of whether an entity is a private or governmental entity is limited and fact-dependent, it is difficult to conclude with any certainty how the Supreme Court would apply the *Amtrak* test with respect to other government-created corporations or other entities performing government functions.[15] In addition to nondelegation concerns, the growth of quasi-governmental entities[16] could also raise due process and other constitutional concerns.[17]

[11] The U.S. Court of Appeals for the District of Columbia Circuit concluded that Amtrak was a private entity "with respect to Congress's power to delegate regulatory authority." Ass'n of Am. R.R. v. Dep't of Transp., 721 F.3d 666, 677 (D.C. Cir. 2013), *vacated by* 575 U.S. 43 (2015).

[12] *Ass'n of Am. R.R.*, 575 U.S. at 55.

[13] *Id.* at 53–54.

[14] *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 45, 55–56 (2015). *See also Ass'n of Am. R.R. v. Dep't of Transp.*, 821 F.3d 19 (2016), *reh'g denied*, 2016 U.S. App. LEXIS 16669 (D.C. Cir., Sept. 9, 2016).

[15] *Id.* at 54. In general, when applying this multi-factor test, lower courts have examined these entities in a holistic manner rather than focus on the specific challenged action of the entity. *See, e.g.*, United States v. Ackerman, 831 F.3d 1292, 1297–98 (10th Cir. 2016) (examining the factors considered in the Supreme Court's decision in *Association of American Railroads* to determine that the National Center for Missing and Exploited Children was a government entity to which the Fourth Amendment applied).

[16] Congress has established such entities in the form of for- and nonprofit corporations that are managed by boards of directors and not (as declared in the enabling legislation) "agencies" or "instrumentalities" of the Government. *See* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 386–391 (1995) (discussing examples of corporations created by Congress). For example, Congress created Amtrak in 1970 as a for-profit corporation to provide railroad passenger service, requiring by law for Amtrak to "maximize its revenues." Rail Passenger Service Act of 1970 (RPSA), Pub. L. No. 91–518, § 101, 84 Stat. 1328 (1970). Congress established Amtrak in 1970 as a for-profit corporation to take over the passenger rail service that had been operated by private railroads because "the public convenience and necessity require the continuance and improvement" of railroad passenger service. *Id. See also* 49 U.S.C. §§ 24301(a)(2), 24101(d)).

[17] The potential self-interested nature of government-created entities may also raise concerns beyond violations of the nondelegation doctrine. *See generally* Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. Pa. L. Rev. 841 (2014) (analyzing government-created corporations and organizations). These concerns include whether the self-interested nature of a government-created corporation combined with its coercive power over its competitors violate the Due Process Clause. *Id.* Also, delegation of authority to officers, members of the board of directors, or employees of government-created entities may implicate the Constitution's requirements regarding the appointment of certain federal officials under the Appointments Clause. The Appointments Clause applies to "officers" who wield "significant authority pursuant to the laws of the United States." Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam). For discussion of the Appointments Clause, see ArtII.S2.C2.3.1 Overview of Appointments Clause.

ArtI.S1.6.5 Private Entities and Legislative Power Delegations

Article I, Section 1:

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

In contrast to the relative latitude given to delegations to other branches of the government under the "intelligible principle" standard,[1] the Supreme Court has limited the types of authority and functions that Congress can delegate to a purely private entity.[2] The seminal case addressing delegations to a private entity is *Carter v. Carter Coal Co.*[3] In *Carter Coal*, the Supreme Court invalidated the Bituminous Coal Conservation Act of 1935, a law that granted a majority of coal producers and miners in a given region the authority to impose maximum hour and minimum wage standards on all other miners and producers in that region.[4] The Court reasoned that by conferring on a majority of private individuals the authority to regulate "the affairs of an unwilling minority," the law was "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[5] The Court did not apply the "intelligible principle" standard, but instead focused on the regulatory and "coercive" power given to private entities over its competitors and the due process concerns raised by such delegations.[6]

Although *Carter Coal* concerned the delegation of authority to private entities and not governmental bodies, some courts and commentators have suggested that the *Carter Coal* decision may more accurately be viewed as a due process case.[7] The Fifth Amendment's Due Process Clause prohibits the Federal Government[8] from depriving any person of "life, liberty,

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[1] *See* ArtI.S1.5.3 Origin of Intelligible Principle Standard.

[2] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935) (holding that delegation to trade and industrial associations of the power to develop codes of "fair competition" for the poultry industry "is unknown to our law and utterly inconsistent with the constitutional prerogatives and duties of Congress").

[3] 298 U.S. 238 (1936).

[4] *Id.* at 311–12.

[5] *Id.* at 311. The Court appeared to characterize the wage and hour provisions as an unlawful "delegation" to a private entity, but also held that the provision in question was "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment," *id.* at 311–12, leading some to question whether *Carter* should be considered a nondelegation case at all.

[6] *See id.* at 311 ("The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor.").

[7] At least one court has debated on whether *Carter Coal* is a nondelegation or due process decision. *See* Ass'n of Am. R.R. v. Dep't of Transp., 821 F.3d 19, 31 (D.C. Cir. 2016) (explaining that it was unclear what aspect of the "delegation [in *Carter Coal*] offended the Court. By one reading, it was the Act's delegation to 'private persons rather than official bodies. By another, it was the delegation to persons 'whose interests may be and often are adverse to the interests of others in the same business' rather than persons who are 'presumptively disinterested,' as official bodies tend to be. Of course, the Court also may have been offended on both fronts. But as the opinion continues, it becomes clear that what primarily drives the Court to strike down this provision is the self-interested character of the delegatees' . . . .").

[8] The Fifth Amendment's Due Process Clause, by its very nature, only applies to the actions of the Federal Government. *See* Farrington v. Tokushige, 273 U.S. 284, 299 (1927) ("[T]he inhibition of the Fifth Amendment—'No person shall . . . be deprived of life, liberty or property without due process of law'—applies to the federal government and agencies set up by Congress for the government of the Territory."). For discussion of the Fifth Amendment's Due Process Clause, see Amdt5.5.1 Overview of Due Process. The Fourteenth Amendment's Due Process Clause as applied to actions of the states is discussed at Fourteenth Amendment, Section 1.

or property without due process of law,"[9] which the Court has interpreted as establishing certain principles of fundamental fairness, including the notion that decision makers must be disinterested and unbiased.[10] In striking down the delegation to coal producers and miners to impose standards on other producers and miners, the Supreme Court in *Carter Coal* centered its analysis on the coercive power that the majority could exercise over the "unwilling minority."[11] The opinion articulated the due process problems involved with providing regulatory authority to private entities, stating:

> The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.[12]

The Court's reasoning in *Carter Coal* suggests that delegating authority to coal producers and miners to impose standards on its competitors is in tension with both the nondelegation doctrine and the Due Process Clause.[13]

After its *Carter Coal* decision, the Supreme Court did not comprehensively ban private involvement in regulation. In the context of private parties aiding in regulatory functions and decisions, the Court has indicated that Congress may empower a private party to play a more limited and supervised role in the regulatory process. For example, in *Currin v. Wallace*,[14] the Court upheld a law that authorized the Secretary of Agriculture to issue a regulation respecting the tobacco market, but only if two-thirds of the growers in that market voted for the Secretary to do so.[15] In distinguishing *Carter Coal*, the Court stated that "this is not a case where a group of producers may make the law and force it upon a minority."[16] Rather, it was Congress that had exercised its "legislative authority in making the regulation and in prescribing the conditions of its application."[17]

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[9] U.S. Const. amend. V. *See also* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases."); *Carter Coal*, 298 U.S. at 311; Eubank v. City of Richmond, 226 U.S. 137, 143–44 (1912) (invalidating a city ordinance on the grounds that it established "no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously. . . ."). *See* Amdt5.5.1 Overview of Due Process.

[10] *See, e.g.*, *Marshall*, 446 U.S. at 242.

[11] *Carter Coal*, 298 U.S. at 311.

[12] *Id.* at 311–12.

[13] The intersection of the Due Process Clause and the nondelegation doctrine as illustrated by the Court's decision in *Carter Coal* may arise when Congress delegates authority to government-created corporations that have both public and private aspects. For example, in *Department of Transportation v. Association of American Railroads*, the Supreme Court held that "Amtrak is a governmental entity, not a private one" for purposes of reviewing Congress's power to delegate regulatory authority to Amtrak, a for-profit entity created by Congress. Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 45, 54 (2015). The Court, however, did not reach the issue of whether the delegation of coercive power given to Amtrak over its competitors violates the Due Process Clause or the nondelegation doctrine. *Id.* at 55–56.

[14] 306 U.S. 1 (1939).

[15] *Id.* at 6.

[16] *Id.* at 15.

[17] *Id.* at 16.

Similarly, in *Sunshine Anthracite Coal Co. v. Adkins*,[18] the Supreme Court upheld a provision of the Bituminous Coal Act of 1937,[19] which authorized private coal producers to propose standards for the regulation of coal prices.[20] Those proposals were provided to a governmental entity, which was then authorized to approve, disapprove, or modify the proposal.[21] The Court approved this framework, heavily relying on the fact that the private coal producers did not have the authority to set coal prices, but rather acted "subordinately" to the governmental entity (the National Bituminous Coal Commission).[22] In particular, the *Sunshine Anthracite* Court noted that the Commission and not the private industry entity determined the final industry prices to conclude that the "statutory scheme" was "unquestionably valid."[23]

In the same vein as *Carter Coal*, the Supreme Court in *Currin* and *Sunshine Anthracite* did not evaluate whether Congress laid out an "intelligible principle" guiding the delegations to the private entities. Rather than applying the "intelligible principle" standard, the Court reviewed whether the responsibilities given to the private entities were acts of legislative or regulatory authority.[24] In these nondelegation cases involving private entities, the Court drew the "line which separates legislative power to make laws, from administrative authority" to administer laws.[25] In both *Currin* and *Adkins*, the Court reasoned that the private entities did not exercise legislative power because they did not impose or enforce binding legal requirements.[26] Because the private entity's responsibilities were primarily administrative or advisory, the Court determined that the statutes did not violate the nondelegation doctrine.[27]

ArtI.S1.6.6 Taxes and Delegations of Legislative Power Delegations

Article I, Section 1:

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

The Court has strongly implied that the same principles govern the validity of a delegation regardless of the subject matter of the delegation. "[A] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes."[1] Holding that "the delegation of discretionary authority under Congress's taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges," the Court explained in *Skinner v. Mid-America Pipeline Company*[2] that there was "nothing in the

[18] 310 U.S. 381 (1940).

[19] Pub. L. No. 75–48, 50 Stat. 72 (1937).

[20] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. at 388–89.

[21] *Id.* at 388.

[22] *Id.* at 399.

[23] *Id.*

[24] *Id.* at 388–89; Currin v. Wallace, 306 U.S. 1, 15–16 (1939).

[25] United States v. Grimaud, 220 U.S. 506, 517 (1911).

[26] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 388–89 (1940); *Currin*, 306 U.S. at 15–16.

[27] *Id.*

[1] Lichter v. United States, 334 U.S. 742, 778–79 (1948).

[2] 490 U.S. 212, 223 (1989). In *National Cable Television Ass'n v. United States,* 415 U.S. 336, 342 (1974), and *FPC v. New England Power Co.,* 415 U.S. 345 (1974), the Court had appeared to suggest that delegation of the taxing power would be fraught with constitutional difficulties. It is difficult to discern how this view could have been held after the many cases sustaining delegations to fix tariff rates, which are in fact and in law taxes. J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928); Field v. Clark, 143 U.S. 649 (1892); *see also* FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976) (delegation to President to raise license "fees" on imports when necessary to protect national security). Nor

placement of the Taxing Clause" in Article I, § 8 that would distinguish it, for purposes of delegation, from the other powers enumerated in that clause.[3] Thus, the test in the taxing area is the same as for other areas—whether the statute has provided the administrative agency with standards to guide its actions in such a way that a court can determine whether the congressional policy has been followed.

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

ArtI.S1.6.7 Individual Liberties and Delegations of Legislative Power

Article I, Section 1:

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

Some Justices have argued that delegations by Congress of power to affect the exercise of "fundamental freedoms" by citizens must be closely scrutinized to require the exercise of a congressional judgment about meaningful standards.[1] The only pronouncement in a majority opinion, however, is that, even with regard to the regulation of liberty, the standards of the delegation "must be adequate to pass scrutiny by the accepted tests."[2] The standard practice of the Court has been to interpret the delegation narrowly so as to avoid constitutional problems.[3]

Perhaps refining the delegation doctrine, at least in cases where Fifth Amendment due process interests are implicated, the Court held that a government agency charged with the efficient administration of the Executive Branch could not assert the broader interests that Congress or the President might have in barring lawfully resident aliens from government employment. The agency could assert only those interests Congress charged it with promoting, and if the action could be justified by other interests, the office with responsibility for promoting those interests must take the action.[4]

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should doubt exist respecting the appropriations power. *See* Synar v. United States, 626 F. Supp. 1374, 1385–86 (D.D.C.) (three-judge court), *aff'd on other grounds sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986).

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

[1] United States v. Robel, 389 U.S. 258, 269 (1967) (Brennan, J., concurring). The view was specifically rejected by Justices White and Harlan in dissent, *id.* at 288–89, and ignored by the majority.

[2] Kent v. Dulles, 357 U.S. 116, 129 (1958).

[3] *Kent*, 357 U.S. 116; Schneider v. Smith, 390 U.S. 17 (1968); Greene v. McElroy, 360 U.S. 474, 506–08 (1959) (Court will not follow traditional principles of congressional acquiescence in administrative interpretation to infer a delegation of authority to impose an industrial security clearance program that lacks the safeguards of due process). More recently, the Court has eschewed even this limited mode of construction. Haig v. Agee, 453 U.S. 280 (1981).

[4] Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (5-4 decision). The regulation was reissued by the President, E. O. 11935, 3 C.F.R. 146 (1976), reprinted in 5 U.S.C. § 3301 (app.), and sustained in *Vergara v. Hampton,* 581 F.2d 1281 (7th Cir. 1978).

Section 2—House of Representatives

Clause 1—Composition

ArtI.S2.C1.1 Congressional Districting

Article I, Section 2, Clause 1:

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

A major innovation in constitutional law was the development of a requirement that election districts in each state be structured so that each elected representative represents substantially equal populations. Although this requirement has generally been gleaned from the Equal Protection Clause of the Fourteenth Amendment,[1] in *Wesberry v. Sanders*,[2] the Court held that "construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[3]

Court involvement in this issue developed slowly. In America's early history, state congressional delegations were generally elected at-large instead of by districts, and even when Congress required single-member districting[4] and later added a provision for equally populated districts[5] the relief sought by voters was action by the House refusing to seat Members-elect selected under systems not in compliance with the federal laws.[6] The first series of cases did not reach the Supreme Court until the states began redistricting through the 1930 Census, and these were resolved without reaching constitutional issues and indeed without resolving the issue whether such voter complaints were justiciable at all.[7] In the late 1940s and the early 1950s, the Court used the "political question" doctrine to decline to adjudicate districting and apportionment suits, a position it changed in its 1962 decision in *Baker v. Carr*[8] and subsequently modified again in its 2019 decision in *Rucho v. Common Cause*.[9]

For the Court in *Wesberry*,[10] Justice Hugo Black argued that a reading of the debates of the Constitutional Convention conclusively demonstrated that the Framers had meant, in using the phrase "by the People," to guarantee equality of representation in the election of Members of the House of Representatives.[11] Justice John Marshall Harlan in dissent argued that the statements on which the majority relied had uniformly been in the context of the Great Compromise—Senate representation of the states with Members elected by the state legislatures, House representation according to the population of the states, qualified by the

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[1] Reynolds v. Sims, 377 U.S. 533 (1964) (legislative apportionment and districting); Hadley v. Junior College Dist., 397 U.S. 50 (1970) (local governmental units).

[2] 376 U.S. 1 (1964). *See also* Martin v. Bush, 376 U.S. 222 (1964).

[3] 376 U.S. at 7–8.

[4] Act of June 25, 1842, 5 Stat. 491.

[5] Act of February 2, 1872, 17 Stat. 28.

[6] The House uniformly refused to grant any such relief. 1 A. Hinds' Precedents of the House of Representatives 310 (1907). *See* L. Schmeckebier, Congressional Apportionment 135–138 (1941).

[7] Smiley v. Holm, 285 U.S. 355 (1932); Koenig v. Flynn, 285 U.S. 375 (1932); Carroll v. Becker, 285 U.S. 380 (1932); Wood v. Broom, 287 U.S. 1 (1932); Mahan v. Hume, 287 U.S. 575 (1932).

[8] 369 U.S. 186 (1962).

[9] No. 18-422, slip op. (U.S. June 27, 2019) (holding that political gerrymandering claims are not justiciable).

[10] Wesberry v. Sanders, 376 U.S. 1 (1964).

[11] 376 U.S. at 7–18.

guarantee of at least one Member per state and the counting of slaves as three-fifths of persons—and not at all in the context of intrastate districting. Further, he thought the Convention debates clear to the effect that Article I, § 4, had vested exclusive control over state districting practices in Congress, and that the Court action overrode a congressional decision not to require equally populated districts.[12]

The most important issue, of course, was how strict a standard of equality the Court would adhere to. At first, the Justices seemed inclined to some form of de minimis rule with a requirement that the state present a principled justification for the deviations from equality which any districting plan presented.[13] But in *Kirkpatrick v. Preisler*,[14] a sharply divided Court announced the rule that a state must make a "good-faith effort to achieve precise mathematical equality."[15] Therefore, "[u]nless population variances among congressional districts are shown to have resulted despite such [good-faith] effort [to achieve precise mathematical equality], the state must justify each variance, no matter how small."[16] The strictness of the test was revealed not only by the phrasing of the test but by the fact that the majority rejected every proffer of a justification which the state had made and which could likely be made. Thus, it was not an adequate justification that deviations resulted from (1) an effort to draw districts to maintain intact areas with distinct economic and social interests,[17] (2) the requirements of legislative compromise,[18] (3) a desire to maintain the integrity of political subdivision lines,[19] (4) the exclusion from total population figures of certain military personnel and students not residents of the areas in which they were found,[20] (5) an attempt to compensate for population shifts since the last census,[21] or (6) an effort to achieve geographical compactness.[22]

Illustrating the strictness of the standard, the Court upheld a lower court's decision to void a Texas congressional districting plan in which the population difference between the most and least populous districts was 19,275 persons and the average deviation from the ideally populated district was 3,421 persons.[23] Adhering to the principle of strict population equality, the Court in a subsequent case refused to find a plan valid because the variations were smaller than the estimated census undercount. Rejecting the plan, the difference in population

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[12] 376 U.S. at 20–49.

[13] Kirkpatrick v. Preisler, 385 U.S. 450 (1967), and Duddleston v. Grills, 385 U.S. 455 (1967), relying on the rule set out in *Swann v. Adams*, 385 U.S. 440 (1967), a state legislative case.

[14] 394 U.S. 526 (1969). *See also* Wells v. Rockefeller, 394 U.S. 542 (1969).

[15] Kirkpatrick v. Preisler, 394 U.S. 526, 530 (1969).

[16] 394 U.S. at 531.

[17] 394 U.S. at 533. People vote as individuals, Justice William Brennan said for the Court, and it is the equality of individual voters that is protected.

[18] *Id.* Political "practicality" may not interfere with a rule of "practicable" equality.

[19] 394 U.S. at 533–34. The argument is not "legally acceptable."

[20] 394 U.S. at 534–35. Justice Brennan questioned whether anything less than a total population basis was permissible but noted that the legislature in any event had made no consistent application of the rationale.

[21] 394 U.S. at 535. This justification would be acceptable if an attempt to establish shifts with reasonable accuracy had been made.

[22] 394 U.S. at 536. Justifications based upon "the unaesthetic appearance" of the map will not be accepted.

[23] White v. Weiser, 412 U.S. 783 (1973). The Court did set aside the district court's own plan for districting, instructing that court to adhere more closely to the legislature's own plan insofar as it reflected permissible goals of the legislators, reflecting an ongoing deference to legislatures in this area to the extent possible. *See also* North Carolina v. Covington, 585 U.S. ___, No. 17-1364, slip op. at 910 (2018) (per curiam) ("The District Court's decision to override the legislature's remedial map . . . was clear error. '[S]tate legislatures have primary jurisdiction over legislative reapportionment,' and a legislature's 'freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands' of federal law. A district court is 'not free . . . to disregard the political program of' a state legislature on other bases." (quoting *Weiser*, 412 U.S. at 795; Burns v. Richardson, 384 U.S. 73, 85 (1966); Upham v. Seamon, 456 U.S. 37, 43 (1982) (per curiam))).

between the most and least populous districts being 3,674 people, in a state in which the average district population was 526,059 people, the Court opined that, given rapid advances in computer technology, it is now "relatively simple to draw contiguous districts of equal population and at the same time . . . further whatever secondary goals the State has."[24]

Although the Supreme Court had suggested for a number of years that claims of unconstitutional partisan gerrymandering might be justiciable,[25] it held in *Rucho v. Common Cause* that such claims were nonjusticiable, saying that there was no "constitutional directive" nor any "legal standards to guide" the Court.[26] Quoting an earlier plurality opinion on the issue, the Court said that "neither § 2 nor § 4 of Article I 'provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting.'"[27]

ArtI.S2.C1.2 Voter Qualifications for House of Representatives Elections

Article I, Section 2, Clause 1:

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

The Framers of the Constitution vested states with authority to determine qualifications for voters—referred to in the Constitution as electors—in congressional elections,[1] subject to the express requirement that a state can prescribe no qualifications other than those the state has stipulated for voters for the more numerous branch of the state legislature.[2] In *Husted v. A. Randolph Inst.*, the Court stated: "The Constitution gives States the authority to set the qualifications for voting in congressional elections as well as the authority to set the 'Times, Places and Manner' to conduct such elections in the absence of contrary congressional direction."[3]

State discretion is circumscribed, however, by express constitutional limitations[4] and judicial decisions interpreting them.[5] In some cases, Congress has passed legislation to

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[24] Karcher v. Daggett, 462 U.S. 725, 733 (1983). Illustrating the point about computer-generated plans containing absolute population equality is *Hastert v. State Bd. of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991) (three-judge court), in which the court adopted a congressional-districting plan in which eighteen of the twenty districts had 571,530 people each and each of the other two had 571,531 people.

[25] The Court held in *Davis v. Bandemer* that partisan or political gerrymandering claims were justiciable, but a majority of Justices failed to agree on a single test for determining whether partisan gerrymanders were unconstitutional. 478 U.S. 109, 125 (1986). *See* League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006); Vieth v. Jubelirer, 541 U.S. 267 (2004).

[26] No. 18-422, slip op. at 34 (U.S. June 27, 2019).

[27] *Id.* at 29–30 (quoting Vieth v. Jubelirer, 541 U.S. 267, 305 (2004) (plurality opinion)).

[1] The Voter Qualifications Clause refers only to elections to the House of Representatives as state legislatures originally selected Senators. Adopted in 1913, the Seventeenth Amendment has identical voter qualification requirements for Senate elections. *See* Amdt17.3 Doctrine on Popular Election of Senators.

[2] Minor v. Happersett, 88 U.S. (21 Wall.) 162, 171 (1874); Breedlove v. Suttles, 302 U.S. 277, 283 (1937). *See* 2 Joseph Story, Commentaries on the Constitution of the United States 576–585 (1833).

[3] Husted v. A. Randolph Inst., No. 16-980, slip op. at (U.S. June 2018) (holding that Ohio's process of removing voters on the grounds that they have moved did not violate federal law).

[4] The Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments limited the states in the setting of qualifications in terms of race, sex, payment of poll taxes, and age.

[5] The Supreme Court's interpretation of the Equal Protection Clause has excluded certain qualifications. *E.g.*, Carrington v. Rash, 380 U.S. 89 (1965); Kramer v. Union Free School Dist., 395 U.S. 621 (1969); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970). The excluded qualifications were in regard to all elections.

address certain election requirements.[6] In the Voting Rights Act of 1965,[7] Congress legislated changes of a limited nature in the literacy laws of some of the states,[8] and in the Voting Rights Act Amendments of 1970,[9] Congress successfully lowered the minimum voting age in federal elections[10] and prescribed residency qualifications for presidential elections.[11] The Court struck down Congress's attempt to lower the minimum voting age for state and local elections.[12] These developments limited state discretion granted by the Voter Qualifications Clause of Article I, Section 2, Clause 1, and are more fully dealt with in the treatment of Section 5 of the Fourteenth Amendment.

While the Constitution grants states authority over voter qualifications, voting for Members of the House of Representatives is also governed by other provisions of the Constitution.[13] For instance, under the Elections Clause set forth at Article I, Section 4, Clause 1, Congress may preempt state laws governing the "Time, Place and Manner" of elections to protect the right to vote for Members of Congress from official[14] or private denial.[15]

Clause 2—Qualifications

ArtI.S2.C2.1 Overview of House Qualifications Clause

Article I, Section 2, Clause 2:

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

The House Qualifications Clause set forth at Article I, Section 2, Clause 2 requires a Member to be at least twenty-five years of age, a United States citizen for seven years, and an inhabitant of the state from which he or she is elected at the time of election. The Framers designed these minimal requirements to give people freedom to choose the person who would best represent their interests in Congress. Explaining the impetus behind the adoption of these requirements at the Constitutional Convention, the writer of the *Federalist No. 52* commented: "Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith."[1]

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[6] The power has been held to exist under Section 5 of the Fourteenth Amendment. Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156 (1980).

[7] § 4(e), 79 Stat. 437, 439, 42 U.S.C. § 1973b(e), as amended.

[8] Upheld in *Katzenbach v. Morgan,* 384 U.S. 641 (1966).

[9] Titles 2 and 3, 84 Stat. 314, 42 U.S.C. § 1973bb.

[10] Oregon v. Mitchell, 400 U.S. 112, 119–131, 135–144, 239–281 (1970).

[11] *Id.* at 134, 147–150, 236–239, 285–292.

[12] *Id.* at 119–131, 152–213, 293–296.

[13] In *Ex Parte Yarbrough*, the Court stated: "The right to vote for members of the Congress of the United States is not derived merely from the constitution and laws of the state in which they are chosen, but has its foundation in the Constitution of the United States." *Ex parte* Yarbrough, 110 U.S. 651, 663 (1884). *See also* Wiley v. Sinkler, 179 U.S. 58, 62 (1900); Swafford v. Templeton, 185 U.S. 487, 492 (1902); United States v. Classic, 313 U.S. 299, 315, 321 (1941).

[14] United States v. Mosley, 238 U.S. 383 (1915).

[15] United States v. Classic, 313 U.S. 299, 315 (1941).

[1] The Federalist No. 52 (Alexander Hamilton). *See also* The Federalist No. 57 (Alexander Hamilton or James Madison) ("Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.").

ArtI.S2.C2.1
Overview of House Qualifications Clause

When determining the qualification requirements, the Framers gave careful consideration to what the office required.[2] The Framers reasoned that a twenty-five year age requirement would ensure that Members had sufficient maturity to perform their duties, while a seven-year citizenship requirement would allow foreign born citizens to participate in the government while ensuring they were knowledgeable about the United States and unlikely to be influenced by loyalty to the land of their birth.[3] Finally, the Framers required Members to be inhabitants[4] of the state from which they were elected so that they would be vested in representing the interests of the state. Discussing the residency requirements in his *Commentaries on the Constitution of the United States*, Justice Joseph Story stated:

> The object of this clause, doubtless, was to secure an attachment to, and a just representation of, the interests of the state in the national councils. It was supposed, that an inhabitant would feel a deeper concern, and possess a more enlightened view of the various interests of his constituents. And, in all events, he would generally possess more entirely their sympathy and confidence.[5]

While Article I, Section 2, Clause 2 expressly requires state inhabitancy at the time of the election, Congress has interpreted the House Qualifications Clause to require only that Members meet age and citizenship qualifications at the time they take the oath of office.[6] Thus, Congress has admitted persons, who were ineligible when elected, to the House of Representatives once they met age and citizenship criteria for membership in the House.[7] Further, the Supreme Court held in *Powell v. McCormack*[8] and *U.S. Term Limits, Inc. v. Thornton*[9] that neither Congress nor the states, respectively, can add to the qualifications stipulated in the Constitution for membership in Congress.

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[2] *See, e.g.,* 2 Records of the Federal Convention of 1787 215–19, 267–72 (Max Farrand ed., 1911).

[3] *See* Joseph Story, 2 Commentaries on the Constitution of the United States §§ 616, 617 (1833). Qualifications for the Senate were more rigorous than those for the House. The Framers required that Senators be at least thirty years of age and nine years a citizen as well as a resident of the state from which they were elected at the time of the election. U.S. Const. art. I, § 3, cl. 2. The author of the *Federalist No. 62* explained the difference in requirements for Representatives and Senators as arising from the nature of the senatorial trust, which, requiring greater extent of information and ability of character, requires at the same time that the senator should have reached a period of life most likely to supply these advantages; and which, participating immediately in transactions with foreign nations, ought to be exercised by none who are not thoroughly weaned from the prepossessions and habits incident to foreign birth and education. The Federalist No. 62 (Alexander Hamilton or James Madison).

[4] The Framers adopted the term "inhabitant" in favor of "resident" because, as understood at that time, "inhabitant" would not, in the words of James Madison, "exclude persons absent occasionally for a considerable time on public or private business." 2 Records of the Federal Convention of 1787 217 (Max Farrand ed., 1911).

[5] Joseph Story, 2 Commentaries on the Constitution of the United States § 618 (1833). *See also* Edward S. Corwin, The Constitution and What it Means Today 9 (Harold W. Chase & Craig R. Ducat eds. 1973) (1958) ("An 'inhabitant' is a resident.").

[6] *See* S. Rep. No. 904, 74th Congress, 1st sess. (1935), *reprinted in* 79 Cong. Rec. 9651–9653 (1935) (discussing provision's grammatical construction provided for habitancy "when elected" and that Constitutional Convention proceedings indicated that age and citizenship qualifications related solely "to actual and not potential senatorship.").

[7] *See, e.g.,* 1 Hinds' Precedents of the House of Representatives § 418 (1907) (discussing John Young Brown of Kentucky, who waited over a year from the time of his election before taking the oath of office on account of the age qualification requirement); 79 Cong. Rec. 9841–42 (1935) (same); *cf.* 1 Hinds, *supra* note 7, at § 429 (discussing the case of James Shields of Illinois who was disqualified from his Senate seat on account of not having met the citizenship requirement at the time he took the oath of office).

[8] Powell v. McCormack, 395 U.S. 486 (1969).

[9] U.S. Term Limits, Inc., v. Thornton, 514 U.S. 779 (1995).

ArtI.S2.C2.2 Ability of Congress to Change Qualifications for Members

Article I, Section 2, Clause 2:

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

The Framers appear to have intended that the House and Senate Qualifications Clauses would establish national standards for membership in Congress.[1] During debates over qualifications for Members of Congress, delegates to the Constitutional Convention considered and rejected giving Congress discretion to set qualifications requirements on the grounds that such discretion would be susceptible to manipulation and thereby would risk excluding otherwise qualified persons from the national legislature.[2] In the *Federalist No. 60*, Alexander Hamilton addressed the exclusivity of the constitutional qualification requirements, stating: "The qualifications of the persons who may . . . be chosen . . . are defined and fixed in the constitution; and are unalterable by the legislature."[3]

Pursuant to Article I, Section 5, Clause 1, the Constitution provides for each House of Congress to determine whether Members-elect have met the qualification requirements for congressional membership. Article I, Section 5, Clause 1 states: "Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members."[4]

In determining eligibility to serve in Congress, Congress does not appear to have deviated from Hamilton's position that qualifications for Congress "are unalterable by the legislature" until the Civil War.[5] But in July of 1862, Congress passed a law requiring all persons appointed or elected to the United States Government to take an oath—known as the "Ironclad Test Oath"[6]—that they had never been, nor ever would be, disloyal to the United States Government.[7] Subsequently, both Houses refused seats to several persons because of charges of disloyalty.[8] Thereafter, Members sometimes challenged seating Members-elect on grounds such as moral turpitude and bribery with disparate and unpredictable results.[9]

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[1] The Senate Qualifications Clause is set forth at Article I, Section 3, Clause 3.

[2] 2 Records of the Federal Constitution 248–51 (Max Farrand ed., 1911).

[3] The Federalist No. 60 (Alexander Hamilton). *See also* Joseph Story, Commentaries on the Constitution of the United States §§ 623–27 (1833).

[4] U.S. Const. art. I, § 5, cl. 1.

[5] All the instances appear to have involved an additional state qualification. Other cases involve challenges under Art. I, § 3, cl. 3. *See e.g.*, R. Hupman, Senate Election, Expulsion and Censure Cases From 1789 to 1960, S. Doc. No. 71 at 1, 87th Cong., 2d sess. (1962) (discussing Albert Gallatin of Pennsylvania).

[6] https://www.senate.gov/artandhistory/history/common/generic/Civil_War_TestOath1863.htm

[7] Act of July 2, 1862, 12 Stat. 502.

[8] 1 Hinds' Precedents of the House of Representatives §§ 449, 451, 457 (1907).

[9] In 1870, the House excluded a Member-elect who was re-elected after previously resigning when the House instituted expulsion proceedings against him for selling appointments to the Military Academy. *Id.* at § 464. In 1899, the Senate did not exclude a Member-elect because he practiced polygamy (*id.* at §§ 474–80) after adopting a rule requiring a two-thirds vote to exclude a Member-elect on those grounds. *Id.* at §§ 481–483. The House twice excluded a socialist Member-elect in the wake of World War I on allegations of disloyalty. 6 Cannon's Precedents of the House of Representatives §§ 56–58 (1935). *See also* S. Rep. No. 1010, 77th Congress, 2d sess. (1942); R. Hupman, Senate Election, Expulsion and Censure Cases From 1789 to 1960, S. Doc. No. 71, at 140, 87th Cong. 2d sess. (1962) (discussing House Committee voting that Senator William Langer of North Dakota was not entitled to a seat based on alleged moral turpitude, including embracing kickbacks, converting proceeds of legal settlements, accepting a bribe, and prematurely paying on advertising contracts and the Senate upholding Senator Langer's seat); *Id.* at 140–41 (discussing effort to exclude Senator Tom Stewart of Tennessee on grounds that he contracted with the Tennessee officials to promote candidacies and secure nominations of three men, and, as part of carrying out the agreements, the candidates illegally expended more than $200,000.00 in primary and general elections. The Petition for expulsion was submitted to the Committee and dismissed by unanimous vote without explanation).

ArtI.S2.C2.2
Ability of Congress to Change Qualifications for Members

In 1969, the Supreme Court conclusively established in *Powell v. McCormack*[10] that House qualification requirements set forth at Article I, Section 2, Clause 4, and possibly any other qualification requirements set forth in the Constitution, are exclusive[11] and Congress cannot exclude Members-elect, who meet such requirements.[12] In *Powell*, Adam Clayton Powell, Jr. was re-elected to serve in the House of Representatives for the 90th Congress. The House of Representatives, however, denied him a seat based on findings by a Special Subcommittee on Contracts of the Committee on House Administration that Powell had engaged in misconduct during the 89th Congress.[13]

In determining that Powell was entitled to a declaratory judgment that he had been unlawfully excluded from Congress, the Supreme Court examined the Constitution, Constitutional Convention debates, and how Congress had applied the House qualification requirements in the past. Looking to English parliamentary and colonial legislative practice, the Court noted that these bodies had only excluded officers when they failed to meet standing qualifications.[14] The Court further noted that the Constitutional Convention considered and rejected provisions that would have allowed Congress to create property or other qualification requirements without limitation as unworkable.[15] And the Court recognized that Alexander Hamilton and James Madison in the *Federalist Papers* and Hamilton at the New York ratifying convention had stated that the Constitution stipulated exclusive qualification requirements for Members of Congress.[16]

Examining early congressional practices, the Court noted that Members of Congress, many of whom had participated in the Constitutional Convention, generally took the view that Congress could only exclude Members-elect who failed to meet qualifications expressly prescribed in the Constitution and that this position went unchallenged until the Civil War.[17] Finally, the Court reasoned that qualification requirements should be construed narrowly because, to do otherwise, would deprive voters of their choice as to who should represent them in Congress. Referencing James Madison, the Court stated: "A fundamental principle of our representative democracy is . . . 'that the people should choose whom they please to govern them.' . . . [T]his principle is undermined as much by limiting whom the people can select as by limiting the franchise itself."[18] Thus, the Court reasoned, if the House excluded Powell based on qualifications other than those stipulated in the Constitution, the House would impinge on the interests of Powell's constituents to choose their preferred candidate.[19]

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[10] Powell v. McCormack, 395 U.S. 486 (1969). The Court divided 8-1 with Justice Potter Stewart dissenting on the ground that the case was moot. *Id.* In *U.S. Term Limits, Inc. v. Thornton*, the Court affirmed *Powell*, holding that the House and Senate Qualifications Clauses are exclusive and cannot be augmented by Congress or states. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 787–98 (1995). Dissenting, Justice Clarence Thomas joined by Justices Sandra Day O'Connor and Antonin Scalia reasoned that, while Congress could not add qualifications because the Constitution had not provided it such powers, the Constitution did not preclude states from doing so. *Id.* at 875–76, 883.

[11] The Court did not address if the Constitution imposes other qualifications, such as Article I, § 3, cl. 7 (disqualifying persons impeached); Article I, § 6, cl. 2 (incompatible offices); and § 3 of the Fourteenth Amendment. Powell v. McCormack, 395 U.S. 486, 520 n.41 (1969). Courts might also consider Article VI, cl. 3, to be a qualification. *See* Bond v. Floyd, 385 U.S. 116, 129–31 (1966).

[12] Powell v. McCormack, 395 U.S. 486, 550 (1969).

[13] See H. Rep. No. 27, 90th Cong., 1st sess. (1967); Powell v. McCormack, 395 U.S. 486, 489–90 (1969).

[14] *Id.* at 522–31.

[15] *Id.* at 532–39.

[16] *Id.* at 539–41.

[17] *Id.* at 541–47.

[18] *Id.* at 547 (citations omitted).

[19] Protecting the voters' interest in choosing their representatives is consistent with voters' constitutionally secured right to cast ballots and have them counted in general elections (*Ex parte* Yarbrough, 110 U.S. 651 (1884)); and primary elections (United States v. Classic, 313 U.S. 299 (1941)); to cast a ballot undiluted in strength because of

ArtI.S2.C2.3 Ability of States to Add Qualifications for Members

Article I, Section 2, Clause 2:

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

In 1969, the Supreme Court established in *Powell v. McCormack*[1] that Congress may not consider qualifications other than those set forth in the Constitution when judging whether Members-elect qualified for Congress pursuant to Article I, Section 5, Clause 1.[2] In 1995, the Supreme Court in *U.S. Term Limits, Inc. v. Thornton* extended its findings in *Powell* to prohibit states from imposing qualification requirements on congressional membership.

The Supreme Court's *Thornton* holding was consistent with long-established congressional practice not to weigh state-added qualifications when considering whether a Member-elect qualified for a congressional seat. For instance, in 1807, the House seated a Member-elect although he was in violation of a state law requiring Members of Congress to have resided in their congressional districts for at least twelve months, the House resolving that the state requirement was unconstitutional.[3]

In *Thornton*, Arkansas, along with twenty-two other states, limited the number of terms that Members of Congress could serve.[4] Reexamining *Powell* and "its articulation of the 'basic principles of our democratic system,'" the *Thornton* Court reaffirmed that "the qualifications for service in Congress set forth in the Constitution are 'fixed,'" in that Congress may not supplement them.[5] *Powell*, the Court found, however, did not conclusively resolve the *Thornton* issue as to whether, during the framing of the Constitution, the states had retained power to add qualification requirements for membership in Congress. Recognizing that the Framers clearly intended for the Constitution to be the exclusive source of congressional qualifications,[6] the Court reasoned that even *if* states had possessed some original power in this area, they had ceded that power to the Federal Government.[7] The Court, however, held that the power to add qualifications "is not within the 'original powers' of the States, and thus not reserved to the States by the Tenth Amendment."[8]

Both the *Thornton* majority and dissent hinged their analyses on whether states had power to impose additional qualification requirements on candidates for Congress and, if so, whether they had ceded such power when they ratified the Constitution. To this end, the Court explored the Constitution's text, drafting, and ratification, as well as early congressional and

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unequally populated districts (Wesberry v. Sanders, 376 U.S. 1 (1964)); and to cast a vote for candidates of their choice unfettered by onerous restrictions on candidate qualification for the ballot. Williams v. Rhodes, 393 U.S. 23 (1968).

[1] Powell v. McCormack, 395 U.S. 486 (1969).

[2] U.S. Const. art I., § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . .").

[3] 1 Hinds' Precedents of the House of Representatives § 414 (1907). *See, e.g.,* Davis v. Adams, 400 U.S. 1203 (1970) (staying enforcement of statute requiring "incumbent of a state elective office to resign before he can become a candidate for another office" when election in which state officers were running for the House of Representatives was imminent but noting that the state could challenge the candidates as having failed to qualify in the event they won their elections).

[4] All but two of the state initiatives to impose term limits were citizen initiatives. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

[5] *Id.* at 798.

[6] *Id.*

[7] *Id.* at 801.

[8] *Id.* at 800.

state practices.[9] Observing that state powers were either (1) reserved by states from the Federal Government under the Constitution or (2) delegated to states by the Federal Government, the majority reasoned that states had no reserved powers that emanated from the Federal Government. Quoting Justice Joseph Story, the Court noted: "'[S]tates can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed.'"[10] Because states had no powers to legislate on the Federal Government prior to the Nation's Founding and the Constitution did not delegate to states power to prescribe qualifications for Members of Congress, the Court held the states did not have such power.[11]

In contrast, the dissent reasoned that the Constitution precluded states only from exercising powers delegated to the Federal Government, either expressly or implicitly,[12] or which the states had agreed not to exercise themselves.[13] Consequently, states retained all other powers.[14] The dissent stated "Where the Constitution is silent about the exercise of a particular power-that is, where the Constitution does not speak either expressly or by necessary implication-the Federal Government lacks that power and the States enjoy it."[15] Accordingly, the dissent reasoned, the Constitution's silence on whether states could impose additional qualifications meant the states retained this power.

Thornton reaffirmed that any change to qualifications for membership in Congress cannot come from state or federal law, but only through the amendment process set forth in Article V of the United States Constitution.[16] Six years later, the Court relied on *Thornton* to invalidate a Missouri law requiring that labels be placed on ballots alongside the names of congressional candidates who had "disregarded voters' instruction on term limits" or declined to pledge support for term limits.[17]

The Supreme Court has distinguished state requirements for appearing on a ballot as a third-party candidate from qualification requirements for membership in Congress. In *Storer v. Brown*, the Court noted that a California law setting criteria to be listed as a third-party candidate did not violate Article I, Section 2, Clause 2. The Court reasoned that the plaintiffs would not have been disqualified if "they had been nominated at a party primary or by an adequately supported independent petition and then elected at the general election."[18] As

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[9] *See* Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 Harv. L. Rev. 78 (1995).

[10] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 802 (1995) (quoting Joseph Story, The Commentaries on the Constitution of the United States (1833)).

[11] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 798–805 (1995). *See also id.* at 838–45 (Kennedy, J., concurring). The Court applied similar reasoning in *Cook v. Gralike*, 531 U.S. 510, 522–23 (2001), invalidating ballot labels identifying congressional candidates who had not pledged to support term limits. Because congressional offices arise from the Constitution, the Court explained, states would have had no authority to regulate these offices prior to the Constitution that they could have reserved, and the ballot labels were not valid exercise of the power granted by Article I, § 4 to regulate the "manner" of holding elections.

[12] *E.g.,* U.S. Const. art. I, § 8.

[13] *E.g.,* U.S. Const. art. I, § 10.

[14] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting) ("Nothing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress. The Constitution is simply silent on this question. And where the Constitution is silent, it raises no bar to action by the States or the people.").

[15] *Id.* at 848 (Thomas, J., dissenting). *See generally id.* at 846–65.

[16] *Id.* at 837.

[17] Cook v. Gralike, 531 U.S. 510 (2001).

[18] Storer v. Brown, 415 U.S. 724, 746 & n.16 (1974).

such, the Court recognized that state requirements for being listed on the ballot was consistent with the state's interest in ensuring that a candidate listed on a ballot is a "serious contender."[19]

Clause 3—Seats

ArtI.S2.C3.1 Enumeration Clause and Apportioning Seats in the House of Representatives

Article I, Section 2, Clause 3:

> *Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.*[1] *The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.*

Article I, Section 2, Clause 3, known as the Enumeration Clause or the Census Clause, "reflects several important constitutional determinations: that comparative state political power in the House would reflect comparative population, not comparative wealth; that comparative power would shift every 10 years to reflect population changes; that federal tax authority would rest upon the same base; and that Congress, not the states, would determine the manner of conducting the census."[2] These determinations "all suggest a strong constitutional interest in accuracy."[3]

Some contend that the language employed—"actual enumeration"—requires an actual count, but gives Congress wide discretion in determining the methodology of that count.[4] The word "enumeration" refers to a counting process without describing the count's methodological details, and the Court has held that the word "actual" refers to the enumeration that was to be used for apportioning the Third Congress, and thereby distinguishes "a deliberately taken

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[19] *Id.* at 746.

[1] The part of this clause relating to the mode of apportionment of representatives among the several States was replaced by the Fourteenth Amendment, Section 2, and the language regarding taxes on incomes without apportionment, by the Sixteenth Amendment, which allows for a federal income tax. Specifically, section 2 of the Fourteenth Amendment provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." The Thirteenth Amendment, ratified on December 6, 1865, abolished slavery, providing in Section 1, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to their jurisdiction."

[2] Utah v. Evans, 536 U.S. 452, 476 (2002).

[3] *Id. But see* Karcher v. Daggett, 462 U.S. 725, 732 (1983) (recognizing that the census data provides "the only reliable—albeit less than perfect indication of . . . population levels," and that the "census count represents the 'best population data available.'" (quoting Kirkpatrick vs. Preisler, 394 U.S. 526, 528 (1969)).

[4] *Id.* at 474 ("The final part of the sentence says that the 'actual Enumeration' shall take place 'in such Manner as' Congress itself 'shall by Law direct,' thereby suggesting the breadth of congressional methodological authority, rather than its limitation.").

count" from the conjectural approach that had been used for the First Congress.[5] Finally, the conferral of authority on Congress to "direct" the "manner" of enumeration underscores "the breadth of congressional methodological authority."[6] In *Dep't of Commerce v. U.S. House of Representatives*, the Court held that the Census Act prohibits the use of statistical sampling to determine the population for congressional apportionment purposes, but declined to reach the constitutional question of whether the Census Clause's requirement for an "actual enumeration" foreclosed the use of statistical sampling in gathering census information.[7] In *Utah v. Evans*, the Court held that the use of "hot-deck imputation," a method used to fill in missing census data, did not run afoul of the "actual enumeration" requirement.[8] The Court determined that Constitution's text "uses a general word, 'enumeration,' that refers to a counting process without describing the count's methodological details."[9] The Court distinguished imputation from statistical sampling and indicated that its holding was relatively narrow[10]—that imputation was permissible under the Constitution in this case "where all efforts have been made to reach every household, where the methods used consist not of statistical sampling but of inference, where that inference involves a tiny percent of the population, where the alternative is to make a far less accurate assessment of the population, and where consequently manipulation of the method is highly unlikely."[11] Thus, the Court held that the Framers "did not write detailed census methodology into the Constitution" and methods, such as imputation, were constitutionally valid.[12]

Although the Census Clause expressly provides for an enumeration of persons, Congress has historically collected additional demographic information—in some years asking more detailed questions regarding the personal and economic affairs of a subset of respondents.[13]

The Court confirmed this understanding of the Enumeration Clause in *Department of Commerce v. New York*.[14] In an opinion on behalf of the Court, Chief Justice John Roberts considered whether the Secretary of Commerce's decision to ask a citizenship question on the census questionnaire violated the Enumeration Clause because the question did not relate to

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[5] *Id.* at 475.

[6] *Id.* at 474.

[7] 525 U.S. 316, 343 (1999); *see id.* at 346 (Scalia, J., concurring) ("[A] strong case can be made that an apportionment census conducted with the use of 'sampling techniques' is not the 'actual Enumeration' that the Constitution requires.").

[8] *Evans*, 536 U.S. at 452. "Hot-deck imputation" refers to the concurrent use of current census information as opposed to using information from prior censuses. *Id.* at 457–58. The concept of "imputation" refers to a methodology used by U.S. Census Bureau that "imputes the relevant information by inferring that the address or unit about which it is uncertain has the same population characteristics as those of a nearby sample or donor address or unit—e.g., its geographically closest neighbor of the same type. . . that did not return a census questionnaire by mail." *Id.* at 458 (internal quotation marks omitted).

[9] *Id.* at 474.

[10] *Id.* at 477 (holding that the Court need not decide whether statistical methods are authorized by the Constitution because the Court was not dealing with "the substitution of statistical methods for efforts to reach households and enumerate each individual").

[11] *See also* Wisconsin v. City of New York, 517 U.S. 1 (1996) (holding that the decision of the Secretary of Commerce not to conduct a post-enumeration survey and statistical adjustment for an undercount in the 1990 Census was reasonable and within the bounds of discretion conferred by the Constitution and statute); Franklin v. Massachusetts, 505 U.S. 788 (1992) (upholding the practice of the Secretary of Commerce in allocating overseas federal employees and military personnel to the states of last residence. The mandate of an enumeration of "their respective numbers" was complied with, it having been the practice since the first enumeration to allocate persons to the place of their "usual residence," and to construe both this term and the word "inhabitant" broadly to include people temporarily absent).

[12] *Evans*, 536 U.S. at 479.

[13] *See* Dep't of Commerce v. New York, No. 18-966, slip op. at 2 (U.S. June 27, 2019).

[14] *See Id.*

the accomplishment of an actual enumeration.[15] The Chief Justice began his analysis by recognizing that the Clause affords virtually limitless authority to Congress in conducting the census, which Congress has, in turn, largely delegated to the Secretary.[16] The Court observed that demographic questions have been asked in every census since 1790, providing a "long and consistent historical practice" that informed the permissibility of the underlying practice.[17] Because of this understanding of the Clause's meaning, the Court held that Congress, and by extension the Secretary, has the power to use the census for broader information-gathering purposes without running afoul of the Enumeration Clause.[18]

Although taking an enlarged view of its census power, Congress has not always complied with its positive mandate to reapportion representatives among the states after the census is taken.[19] It failed to make such a reapportionment after the census of 1920, being unable to reach agreement for allotting representation without further increasing the size of the House. Ultimately, by the Act of June 18, 1929,[20] it provided that the membership of the House of Representatives should henceforth be restricted to 435 members, to be distributed among the states by the so-called "method of major fractions," which had been earlier employed in the apportionment of 1911, and which has now been replaced with the "method of equal proportions." Following the 1990 census, a state that had lost a House seat as a result of the use of this formula sued, alleging a violation of the "one person, one vote" rule derived from Article I, Section 2. Exhibiting considerable deference to Congress and a stated appreciation of the difficulties in achieving interstate equalities, the Supreme Court upheld the formula and the resultant apportionment.[21] The goal of absolute population equality among districts "is realistic and appropriate" within a single state, but the constitutional guarantee of one Representative for each state constrains application to districts in different states and makes the goal "illusory for the Nation as a whole."[22]

Although requiring the election of Representatives by districts, Congress has left it to the states to draw district boundaries. This has occasioned a number of disputes. In *Ohio ex rel. Davis v. Hildebrant*,[23] a requirement that a redistricting law be submitted to a popular referendum was challenged and sustained. After the reapportionment made pursuant to the 1930 census, deadlocks between the Governor and legislature in several states produced a

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[15] *Id.* at 11. In so doing, the Court distinguished the instant challenge against the Secretary of Commerce's decision to collect certain demographic information during the census from prior case law involving the Secretary's decisions on how to *conduct the population count* for the census. *Id.* That case law required decisions about the population count to be reasonably related to accomplishing an actual enumeration. *Id.*

[16] *Id.*

[17] *Id.* at 12–13 ("That history matters. Here, as in other areas, our interpretation of the Constitution is guided by a Government practice that 'has been open, widespread, and unchallenged since the early days of the Republic. In light of the early understanding of and long practice under the Enumeration Clause, we conclude that it permits Congress, and by extension the Secretary, to inquire about citizenship on the census questionnaire.").

[18] *Id.* at 13. In a separate part of the opinion, the Court invalidated the inclusion of the question on procedural grounds, concluding that the Secretary violated the Administrative Procedure Act by failing to disclose the actual reason for adding the citizenship question on the census questionnaire. *Id.* at 28. *See also* Trump v. New York, No. 20-366, slip op. at 2 (2020) (per curiam) (ruling that challengers to a presidential memorandum directing the Secretary of Commerce to exclude "from the apportionment base aliens who are not in lawful immigration status" lacked standing and that the case was not ripe for adjudication, observing that "[e]veryone agrees by now that the Government cannot feasibly implement the memorandum by excluding the estimated 10.5 million aliens without lawful status.").

[19] For an extensive history of the subject, *see* L. Schmeckebier, Congressional Apportionment (1941).

[20] 46 Stat. 26, 22, *as amended by* 55 Stat. 761 (1941), 2 U.S.C. § 2a.

[21] U.S. Department of Commerce v. Montana, 503 U.S. 442 (1992).

[22] *Id.* at 463 ("[T]he need to allocate a fixed number of indivisible Representatives among 50 States of varying populations makes it virtually impossible to have the same size district in any pair of States, let alone in all 50").

[23] 241 U.S. 565 (1916).

series of cases in which the right of the Governor to veto a reapportionment bill was questioned. Contrasting this function with other duties committed to state legislatures by the Constitution, the Court decided that it was legislative in character and subject to gubernatorial veto to the same extent as ordinary legislation under the terms of the state constitution.[24]

Clause 4—Vacancies

ArtI.S2.C4.1 House Vacancies Clause

Article I, Section 2, Clause 4:

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

Contemplating that vacancies would arise in the House of Representatives from time to time,[1] the Framers specified in Section 2, Clause 4, of Article I that the "Executive Authority" of an affected state fill such vacancies through elections.[2] The House Vacancy Clause, however, gives states discretion over the particulars of such elections, allowing them to tailor their procedures, including the timing of elections, to their circumstances.[3] In his *Commentaries on the Constitution of the United States*, Justice Joseph Story spoke approvingly of the flexibility the House Vacancy Clause provides states in managing their elections to fill vacancies. He commented: "The provision . . . has the strong recommendation of public convenience, and facile adaptation to the particular local circumstances of each state. Any general regulation would have worked with some inequality."[4] Perhaps because of this, adoption of the House Vacancy Clause at the Constitutional Convention appears to have been unexceptional.[5]

More controversial, however, has been whether the Framers intended for Member resignations to trigger the House Vacancy Clause.[6] While the Framers considered versions of the House Vacancy Clause that referred expressly to resignations,[7] the final language of the House Vacancy Clause did not address resignations or how vacancies might arise.[8] In 1791, the

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[24] Smiley v. Holm, 285 U.S. 355 (1932); Koenig v. Flynn, 285 U.S. 375 (1932); Carroll v. Becker, 285 U.S. 380 (1932).

[1] *See, e.g.*, 2 The Records of the Federal Convention of 1787, at 140 (Max Farrand ed., 1911).

[2] U.S. Const. art. I, § 2, cl. 4. A "writ of election" is a written order, in this case issued by the executive authority of the state, to hold a special election. Today the "executive authority" of a state is generally considered to be the state's governor. The Framers' use of the term "executive authority" reflected that early state constitutions often provided for an executive council to control or advise the state's chief executive. Charles C. Thach, Jr., The Creation of the Presidency, 1775–1789: A Study in Constitutional History 16–17 & n.7 (1923).

[3] Act of February 2, 1872, ch. 11, § 4, 17 Stat. 28, *codified at* 2 U.S.C. § 8(a), provides that state law may govern the timing of elections to fill vacancies in the House of Representatives. After September 11, 2001, Congress provided time frames for states to hold elections if House vacancies exceed 100. 2 U.S.C. § 8(b). *See* Thomas Neale, Cong. Rsch. Serv., IF11722, House of Representatives Vacancies: How Are They Filled? (2021), https://crsreports.congress.gov/product/pdf/IF/IF11722.

[4] Joseph Story, Commentaries on the Constitution of the United States § 683 (1833).

[5] *Id.* ("The propriety of adopting this clause does not seem to have furnished any matter of discussion either in, or out of the convention.").

[6] Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 Duke L.J. 177 (2008).

[7] 2 The Records of the Federal Convention of 1787, at 140 (Max Farrand ed., 1911) (considering text providing that "[v]acancies by death disability or resignation shall be supplied . . . ."); *id.* at 227 (considering text referencing "vacancies happening by refusals to accept resignations or otherwise . . . .").

[8] U.S. Const. art. I, § 2, cl. 4. By comparison, the Senate Vacancy Clause contemplated vacancies arising from resignations. U.S. Const. art. I, § 3, cl. 2 ("if Vacancies happen by Resignation, or otherwise . . . ."). One commentator has suggested that Senators were expected to resign if they refused to follow their state legislature's instructions. Chafetz, *supra* note 6, at 214. Early in U.S. history, Senators debated the the extent to which they were expected to comply with their state legislatures' instructions. David P. Currie, The Constitution in Congress: The Federalist Period

House of Representatives confronted the question of whether Member resignations triggered the Vacancy Clause when Rep. William Pinkney of Maryland resigned from Congress and the State of Maryland sought to replace him with John Francis Mercer.[9] While the House Committee on Elections supported Mercer taking Pinkney's seat, Rep. William Giles of Virginia objected because "a resignation [does] not constitute a vacancy" and the British House of Commons did not permit resignations.[10] Other Members reasoned, however, that prohibiting resignations would be inconvenient, especially "in cases of sickness or embarrassment"; there was no reason to distinguish the House from the Senate, for which the Constitution expressly contemplated resignations; and British House of Commons practice on resignations was not applicable to Congress.[11] Ultimately, the House found Mercer could replace Pinkney. Subsequent Member resignations and replacements do not appear to have faced serious challenge,[12] and resignations from the House for a wide range of reasons are routine.[13]

The Constitution treats vacancies in the House and the Senate differently. While the Seventeenth Amendment's Senate Vacancy Clause mirrors the House Vacancy Clause by requiring an affected state's Executive Authority to issue a writ of election to fill a vacancy,[14] the Seventeenth Amendment also empowers states to permit the Executive Authority to fill Senate vacancies temporarily pending an election. In contrast, the House Vacancy Clause does not contemplate state Executive Authorities filling House vacancies temporarily.[15]

1789–1801 15 & n.66 (1997). Unlike the Articles of Confederation, which provided states a right to recall delegates from Congress, the Constitution did not provide states a right to recall Senators. *Compare* Articles of Confederation art. V, § 5 *with* U.S. Const. art. I, § 3. In 1913, the Seventeenth Amendment superseded the Senate Vacancies Clause set forth at Article I, Section 3, Clause 2. Unlike Article I, Section 3, Clause 2, the Seventeenth Amendment does not refer to resignations and instead tracks the House Vacancy Clause language. It states: "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies." U.S. Const. amend. XVII.

[9] Rep. Pinkney resigned prior to taking the oath of office.

[10] 3 Annals of the House of Representatives 205–07 (Nov. 22, 1791), *reprinted in* 2 The Founder's Constitution 146–47 (Philip B. Kurland & Ralph Lerner eds., 1987).

[11] *Id.*

[12] 3 Annals of the House of Representatives 207 (Nov. 23, 1791), *reprinted in* 2 The Founder's Constitution 147 (Philip B. Kurland & Ralph Lerner eds., 1987). *See also* Chafetz, *supra* note 6. Chaftez notes that Congress passed a law that "allows states to set the time for filling House vacancies 'whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected.'" *See also* Chafetz, *supra* note 6, at 224 (citing the Apportionment Act of 1872, ch. 11, § 4, 17 Stat. 28, 29, *codified at* 2 U.S.C. § 8(a)).

[13] *See, e.g.,* Neale, *supra* note 3; Chafetz, *supra* note 6, at 179.

[14] U.S. Const. amend. XVII ("When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies"). *See also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 896 (1995) (Thomas, J., dissenting) (noting that art. I, § 2, cl. 4 and art. I, § 3, cl. 3 provide for state Executives to issue writs of election to fill vacancies).

[15] U.S. Const. amend. XVII ("Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.").

Clause 5—Impeachment

ArtI.S2.C5.1 Overview of Impeachment

Article I, Section 2, Clause 5:

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

The Constitution confers upon Congress the power to impeach and thereafter remove from office the President,[1] Vice President, and other federal officers—including judges—on account of treason, bribery, or other high crimes and misdemeanors. In exercising this power, the House and the Senate have distinct responsibilities, with the House determining whether to impeach and, if impeachment occurs, the Senate deciding whether to convict the person and remove him or her from office. The impeachment process formulated by the Constitution stems from a tool used by the British Parliament to hold accountable ministers of the Crown thought to be outside the control of the criminal courts.[2] This tool was adopted and somewhat modified by the American colonies and incorporated into state constitutions adopted before the federal Constitution was formed.[3]

When bestowing on the House of Representatives the sole power of impeachment,[4] the Framers left to that body's discretion the important question of when impeachment proceedings are appropriate for treason, bribery, or other high crimes and misdemeanors.[5] The Constitution also gives the House of Representatives general authority to structure the rules of its own proceedings, and this authority seems understood to extend to those proceedings concerning impeachment.[6]

The Constitution's grant of the impeachment power to Congress is largely unchecked by the other branches of government. Impeachment is primarily a political process, in which judgments and procedures are left to the final discretions of the authorities vested with the powers to impeach and to try impeachments.[7] Accordingly, the nature and scope of the impeachment power has been shaped not only by congressional perceptions regarding the Framers' intent in crafting the Constitution's impeachment clauses, but also by shifting institutional relationships between the three branches of the government, evolving balances of power between political parties and interest groups, and the scope of accountability exercised

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[1] The Constitution contains a number of provisions that are relevant to the impeachment of federal officials. Article I, Section 2, Clause 5 grants the sole power of impeachment to the House of Representatives; Article I, Section 3, Clause 6 assigns the Senate sole responsibility to try impeachments; Article I, Section 3, Clause 7 provides that the sanctions for an impeached and convicted individual are limited to removal from office and potentially a bar from holding future office, but an impeachment proceeding does not preclude criminal liability; Article II, Section 2, Clause 1 provides that the President enjoys the pardon power, but it does not extend to cases of impeachment; and Article II, Section 4 defines which officials are subject to impeachment and what kinds of misconduct constitute impeachable behavior. Article III does not mention impeachment expressly, but Section 1, which establishes that federal judges shall hold their seats during good behavior, is widely understood to provide the unique nature of judicial tenure. And Article III, Section 2, Clause 3 provides that trials, "except in Cases of Impeachment, shall be by jury."

[2] *See* The Federalist Nos. 65, 81 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Raoul Berger, Impeachment: The Constitutional Problems 59–66 (1973); Charles Black, Impeachment: A Handbook 5–6 (1974).

[3] *See* Peter Hoffer & N.E.H. Hull, Impeachment in America, 1635–1805, at 15–95 (1984); Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 1–24 (2000); Josh Chafetz, Congress's Constitution 96–97 (2017).

[4] U.S. Const. art. I, § 3, cl. 5.

[5] *Id.* art. II, § 4.

[6] *Id.* art. I, § 5; *see* United States v. Ballin, 144 U.S. 1, 5 (1892) ("The constitution empowers each house to determine its rules of proceedings.").

[7] *See* Nixon v. United States, 506 U.S. 224, 237–38 (1993) (ruling that a challenge to the Senate's use of a committee to take evidence for an impeachment trial posed a nonjusticiable political question).

by the people over Congress and the Executive Branch.[8] Further, examination of attempted impeachments, as well as those which sparked the resignation of an official, can sometimes inform the scope of the impeachment power.[9]

While the House alone has the power to initiate impeachment proceedings, both houses of Congress may pursue other methods to voice opposition to the conduct of government actors. The House and Senate, separately or in conjunction, have sometimes formally announced their disapproval of a particular Executive Branch official by adopting a resolution censuring, condemning, or expressing a lack of confidence in the individual, essentially noting displeasure with the official's actions short of the sanction of impeachment and removal.[10]

ArtI.S2.C5.2 Historical Background on Impeachment

Article I, Section 2, Clause 5:

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

The concept of impeachment embodied in the federal Constitution derives from English,[1] colonial, and early state practice.[2] During the struggle in England by Parliament to impose legal restraints on the Crown's powers, extending back at least to the 1600s, the House of Commons impeached and tried before the House of Lords ministers of the Crown and influential individuals—but not the Crown itself[3]—often deemed beyond the reach of the criminal courts.[4] Parliament appeared to use impeachment as a tool to punish political offenses that damaged the state, although impeachment was not limited to government ministers.[5] Impeachment applied to illegal acts, which included, among other things, significant abuses of a government office, misapplication of funds, neglect of duty, corruption, abridgement of parliamentary rights, and abuses of the public trust.[6] Punishment for impeachment was not limited to removal from office, but could include a range of penalties upon conviction by the House of Lords, including imprisonment, fines, or even death.[7]

Inheriting this tradition, the American colonies adopted their own distinctive impeachment practices. The colonies largely limited impeachment to officeholders on the basis

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[8] Gerhardt, *supra* note 3, at ix–xiii.

[9] *See* ArtI.S2.C5.3 Impeachment Doctrine; ArtII.S4.4.3 Jurisprudence on Impeachable Offenses (1789–1860) et seq.

[10] *See* ArtI.S2.C5.4 Alternatives to Impeachment.

[1] For more on the historical background of the Constitution's impeachment provisions, see ArtIII.S1.10.2.2 Historical Background on Good Behavior Clause; ArtI.S3.C6.2 Historical Background on Impeachment Trials; ArtII.S4.4.2 Historical Background on Impeachable Offenses.

[2] The Federalist No. 65 (Alexander Hamilton); H. Comm. on the Judiciary, 93d Cong., Constitutional Grounds for Presidential Impeachment 4 (Comm. Print 1974) [hereinafter Constitutional Grounds].

[3] Peter Hoffer & N.E.H. Hull, Impeachment in America, 1635–1805, at 96–106 (1984).

[4] Constitutional Grounds, *supra* note 2, at 4–7; Raoul Berger, Impeachment: The Constitutional Problems 59–66 (1973); Josh Chafetz, Congress's Constitution 49–50 (2017). *But see* Clayton Roberts, *The Law of Impeachment in Stuart England: A Reply to Raoul Berger*, 84 Yale L.J. 1419 (1975) (arguing that impeachment during the Stuart period only applied to violations of existing law).

[5] Berger, *supra* note 4, at 59–66; Constitutional Grounds, *supra* note 2, at 4–5; 15 The American and English Encyclopedia of Law 1061, 1064 (David S. Garland & Lucius P. McGehee eds., 1900).

[6] Hoffer & Hull, *supra* note 3, at 3–14; Constitutional Grounds, *supra* note 2, at 4–7; *Compare* Berger, *supra* note 4, at 67–68 (claiming that impeachment during the Stuart period was not limited to indictable conduct) *with* Clayton Roberts, *The Law of Impeachment in Stuart England: A Reply to Raoul Berger*, 84 Yale L.J. 1419 (1975) (arguing that impeachment during the Stuart period only applied to violations of existing law).

[7] Berger, *supra* note 4, at 67.

of misconduct committed in office, and the available punishment for impeachment was limited to removal from office.[8] Likewise, many state constitutions adopted after the Declaration of Independence in 1776, but before the federal Constitution was ratified, incorporated impeachment provisions.[9]

This history thus informed the Framers' consideration and adoption of impeachment procedures at the Constitutional Convention.[10] The English Parliamentary structure of a bicameral legislature dividing the power of impeachment between the "lower" house, which impeached individuals, and an "upper" house, which tried them, was replicated in the federal system with the power to impeach given to the House of Representatives and the power to try impeachments assigned to the Senate.[11] Nonetheless, the Framers, guided by the impeachment experiences in the colonies, ultimately adopted an "Americanized" impeachment practice with a republican character, distinct from English practice. The Constitution established an impeachment mechanism exclusively geared towards holding public officials, including the President, accountable.[12] This contrasted with the English practice of impeachment, which could extend to any individual save the Crown and was not limited to removal from office, but could result in a variety of punishments.[13] Likewise, the Framers adopted a requirement of a two-thirds majority vote for conviction on impeachment charges, shielding the process from naked partisan control.[14] This, too, differed with the English practice, which allowed conviction on a simple majority vote.[15] Ultimately, the Framers' choices in crafting the Constitution's impeachment provisions provide Congress with a crucial check on the other branches of the Federal Government and inform the Constitution's separation of powers.[16]

ArtI.S2.C5.3 Impeachment Doctrine

Article I, Section 2, Clause 5:

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

While legal doctrine developed from judicial opinions informs much of constitutional law, the understood meaning of the Constitution's provisions is also shaped by institutional

[8] Hoffer & Hull, *supra* note 3, at 67.

[9] *See* Hoffer & Hull, *supra* note 3, at 57–95; Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 1–11 (2000); Chafetz, *supra* note 4, at 96–97. *See, e.g.*, Penn Const. of 1776, sec. 22 (placing the power of impeachment with the commonwealth's unicameral legislature).

[10] *See* discussion The Power to Try Impeachments: Historical Background and Impeachable Offenses: Historical Background; Gerhardt, *supra* note 9, at 1–11.

[11] *See* The Federalist Nos. 65, 81 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Berger, *supra* note 4, at 59–66; U.S. Const. art. I, § 2, cl. 5 (conferring the House with the sole power of impeachment); *id.* art. I, § 3, cl. 6 (providing that the Senate has the exclusive power to try impeachments).

[12] Hoffer & Hull, *supra* note 3, at 96–106. For a more thorough discussion of how the Framers envisioned the power of impeachment, see The Power to Try Impeachments: Historical Background and Impeachable Offenses: Historical Background.

[13] Hoffer & Hull, *supra* note 3, at 97.

[14] *Id.*

[15] *Id.*

[16] *See* The Federalist No. 65 (Alexander Hamilton) (describing the power of impeachment as a "bridle in the hands of the legislative body upon the executive servants of the government"); *id.* No. 66 (noting that impeachment is an "essential check in the hands of [Congress] upon the encroachments of the executive"); *id.* No. 81 (explaining the importance of the impeachment power in checking the Judicial Branch).

practices and political norms.[1] James Madison believed that the meaning of the Constitution would be "liquidated" over time or determined through a "regular course of practice."[2] Justice Joseph Story thought this principle applied to impeachment, noting for example that the Framers understood that the meaning of "high crimes and misdemeanors" constituting impeachable offenses would develop over time, much like the common law.[3] Indeed, Justice Story believed it would be impossible to precisely define the full scope of political offenses that may constitute impeachable behavior.[4] Consequently, the historical practices of the House with regard to impeachment flesh out the meaning of the Constitution's grant of the impeachment power to that body.

Generally speaking, the impeachment process has been initiated in the House by a Member via resolution or declaration of a charge,[5] although anyone—including House Members, a grand jury, or a state legislature—may *request* that the House investigate an individual for impeachment purposes.[6] Indeed, in modern practice, a number of impeachments have been sparked by referrals from an external investigatory body.[7] Beginning in the 1980s, the Judicial Conference has referred its findings to the House recommending an impeachment investigation into a number of federal judges who were eventually impeached.[8] Similarly, in the impeachment of President Bill Clinton, an independent counsel—a temporary prosecutor given statutory independence and charged with investigating certain misconduct when approved by a judicial body[9]—first conducted an investigation into a variety of alleged

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[1] *See* Keith Whittington, Constitutional Construction 3 (1999); II Joseph Story, Commentaries on the Constitution of the United States § 762 (1833) ("The offences, to which the power of impeachment has been, and is ordinarily applied, as a remedy, are of a political character.").

[2] The Federalist No. 37 (Alexander Hamilton); Letter to Spencer Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908).

[3] Story, *supra* note 1, at § 797; ("[N]o previous statute is necessary to authorize an impeachment for any official misconduct."); *id.* at § 798 ("In examining the parliamentary history of impeachments, it will be found, that many offences, not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanours worthy of this extraordinary remedy."); *see also* Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 104–05 (2000).

[4] Story, *supra* note 1, at § 762 ("Not but that crimes of a strictly legal character fall within the scope of the power, (for, as we shall presently see, treason, bribery, and other high crimes and misdemeanours are expressly within it;) but that it has a more enlarged operation, and reaches, what are aptly termed, political offences, growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law."); *id.* at § 795 ("Again, there are many offences, purely political, which have been held to be within the reach of parliamentary impeachments, not one of which is in the slightest manner alluded to in our statute book. And, indeed, political offences are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it.").

[5] *See* 3 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States §§ 2342, 2400, 2469 (1907), https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/pdf/GPO-HPREC-HINDS-V3.pdf [hereinafter Hinds]; 116 Cong. Rec. 11,941–42 (1970); 119 Cong. Rec. 74,873 (1974); *see also* Wm. Holmes Brown et al., House Practice: A Guide to the Rules, Precedents, and Procedures of the House ch. 27 § 6 (2011), https://www.govinfo.gov/content/pkg/GPO-HPRACTICE-112/pdf/GPO-HPRACTICE-112.pdf [hereinafter House Practice].

[6] *See* Gerhardt, *supra* note 3, at 25; 3 Lewis Deschler, Precedents of the United States of the House of Representatives, H.R. Doc. No. 94-661, at Ch. 14 §§ 5, 5.10–5.11 (1974), https://www.govinfo.gov/content/pkg/GPO-HPREC-DESCHLERS-V3/pdf/GPO-HPREC-DESCHLERS-V3.pdf [hereinafter Deschler].

[7] The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 authorizes the Judicial Conference to forward a certification to the House that impeachment of a federal judge may be warranted. 28 U.S.C. § 355.

[8] *See* Gerhardt, *supra* note 3, at 176.

[9] *See* 28 U.S.C. §§ 591–99. The statute authorizing the appointment of an independent counsel expired in 1999. *Id.* § 599.

activities on the part of the President and his associates, and then delivered a report to the House detailing conduct that the independent counsel considered potentially impeachable.[10]

Regardless of the source requesting an impeachment investigation, the House has sole discretion under the Constitution to actually begin any impeachment proceedings against an individual.[11] In practice, impeachment investigations are often handled by an already existing or specially created subcommittee of the House Judiciary Committee.[12] The scope of the investigation can vary. In some instances, an entirely independent investigation may be initiated by the relevant House committee or subcommittee. In other cases, an impeachment investigation may rely on records delivered by outside entities, such as that delivered by the Judicial Conference or an independent counsel.[13] Following this investigation, the full House may vote on the relevant impeachment articles. If articles of impeachment are approved, the House chooses managers to bring the case before the Senate.[14] The managers then present the articles of impeachment to the Senate, request that the body order the appearance of the accused,[15] and typically act as prosecutors in the Senate trial.[16]

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[10] *See* Gerhardt, *supra* note 3, at 176. The impeachment investigation of President Nixon also began with the referral by special prosecutor Leon Jaworski of material relating to possible impeachable conduct to the House Judiciary Committee. Gerhardt, *supra* note 3, at 176.

[11] U.S. Const. art. I, § 2, cl. 5.

[12] *See* Gerhardt, *supra* note 3, at x--xi; *see, e.g.*, Report of the Impeachment Trial Comm. on the Articles Against Judge G. Thomas Porteous, Jr., 111th Cong., 2d Sess., S. Rep. No. 111-347, at 6 (2010) [hereinafter Porteous Impeachment] (describing the creation by the House Judiciary Committee of an Impeachment Task Force to investigate allegations against Judge Porteous). The investigations that ultimately led to the first impeachment of President Donald Trump were carried out by multiple House committees, including the Permanent Select Committee on Intelligence and the Committees on Financial Services, Foreign Affairs, Judiciary, Oversight and Reform, and Ways and Means. *See* Staff of H. Perm. Select Comm. on Intelligence, et al., 116th Cong., The Trump-Ukraine Impeachment Inquiry Report: Report for the H. Perm. Select Comm. on Intelligence Pursuant to H. Res. 660 in Consultation with the H. Comm. on Oversight and Reform and the H. Comm. on Foreign Affairs (Comm. Print 2019). The early stages of this investigation saw some controversy over whether the House must explicitly authorize the initiation of an impeachment investigation. While the House committees had previously been investigating possible misconduct by President Trump, on September 24, 2019, the Speaker of the House announced that these investigations constituted an "official impeachment inquiry." Press Release, Nancy Pelosi, Speaker of the House, Pelosi Remarks Announcing Impeachment Inquiry (Sept. 24, 2019), https://www.speaker.gov/newsroom/92419-0. The House, as an institution, did not take action to approve explicitly the impeachment investigation until October 31, 2019, when the body adopted a resolution formally authorizing the House committees "to continue their ongoing investigations as part of the existing House of Representatives inquiry into whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach Donald John Trump, President of the United States of America." H.R. Res. 660, 116th Cong. (2019). Although the Department of Justice, Office of Legal Counsel concluded that the House "must expressly authorize a committee to conduct an impeachment investigation," *see* House Committees' Authority to Investigate for Impeachment, 44 Op. O.L.C., slip op. at *53 (Jan. 19, 2020), https://www.justice.gov/olc/opinion/house-committees-authority-investigate-impeachment, it would appear that such an authorization is not strictly necessary given the existing tools and authority available to House committees to conduct more traditional legislative investigations into Executive Branch misconduct. For a more thorough discussion of this subject, see Todd Garvey, Cong. Rsch. Serv., R45983, Congressional Access to Information in an Impeachment Investigation (2019), https://crsreports.congress.gov/product/pdf/R/R45983.

[13] *See* Gerhardt, *supra* note 3, at 26. The House also did not conduct independent fact finding in the impeachments of President Bill Clinton, President Andrew Johnson, and Judge Harry E. Claiborne. *Id.* at 177. In the second impeachment of President Trump, the House conducted no formal impeachment investigation, but the staff of the Committee on the Judiciary presented the House with a report supporting the impeachment and outlining the events of January 6, 2020. *See* Staff of H. Comm. on the Judiciary, 116th Cong., Materials in Support of H. Res. 24 Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors (Comm. Print 2021).

[14] House Practice, *supra* note 5, at 616–19.

[15] Gerhardt, *supra* note 3, at 33. During the first impeachment of President Trump, the impeachment articles were adopted by the House on December 18, 2019, H.R. Res. 755, 116th Cong. (2019), but the managers were not appointed and the articles not delivered to the Senate until January 15, 2020. H. R. Res. 798, 116th Cong. (2020).

[16] 3 Hinds, *supra* note 5, at §§ 2303, 2370, 2390, 2420, 2449.

The House has impeached twenty individuals: fifteen federal judges, one Senator, one Cabinet member, and three Presidents.[17] The consensus reflected in these proceedings is that impeachment may serve as a means to address misconduct that does not necessarily give rise to criminal sanction. The types of conduct that constitute grounds for impeachment in the House appear to fall into three general categories: (1) improperly exceeding or abusing the powers of the office; (2) behavior incompatible with the function and purpose of the office; and (3) misusing the office for an improper purpose or for personal gain.[18] Consistent with scholarship on the scope of impeachable offenses,[19] congressional materials have cautioned that the grounds for impeachment "do not all fit neatly and logically into categories" because the remedy of impeachment is intended to "reach a broad variety of conduct by officers that is both serious and incompatible with the duties of the office."[20]

While successful impeachments and convictions of federal officials represent some clear guideposts as to what constitutes impeachable conduct,[21] impeachment processes that do not result in a final vote for impeachment also may influence the understanding of Congress, Executive and Judicial Branch officials, and the public regarding what constitutes an impeachable offense.[22] A prominent example involves the first noteworthy attempt at a presidential impeachment, which was aimed at John Tyler in 1842. At the time, the presidential practice had generally been to reserve vetoes for constitutional, rather than policy, disagreements with Congress.[23] Following President Tyler's veto of a tariff bill on policy grounds, the House endorsed a select committee report condemning President Tyler and suggesting that he might be an appropriate subject for impeachment proceedings.[24] The possibility apparently ended when the Whigs, who had led the movement to impeach, lost their House majority in the midterm elections.[25] In the years following the aborted effort to impeach President Tyler, presidents have routinely used their veto power for policy reasons. This practice is generally seen as an important separation of powers limitation on Congress's ability to pass laws rather than a potential ground for impeachment.[26]

Likewise, although President Richard Nixon resigned before impeachment proceedings were completed in the House, the approval of three articles of impeachment by the House

[17] *See* List of Individuals Impeached by the House of Representatives, U.S. House of Representatives, http://history.house.gov/Institution/Impeachment/Impeachment-List/ (last visited Dec. 7, 2021).

[18] House Practice, *supra* note 5, at 608–13. For examples of impeachments that fit into these categories, see Cong. Globe, 40th Cong., 2d Sess. 1400 (1868) (impeaching President Andrew Johnson for violating the Tenure of Office Act); 132 Cong. Rec. H4710–22 (daily ed. July 22, 1986) (impeaching Judge Harry E. Claiborne for providing false information on federal income tax forms); 156 Cong. Rec. 3155–57 (2010) (impeaching Judge G. Thomas Porteous for engaging in a corrupt relationship with bail bondsmen where he received things of value in return for helping bondsmen develop relationships with state judges).

[19] Gerhardt, *supra* note 3, at 48.

[20] H. Comm. on the Judiciary, 93d Cong., Constitutional Grounds for Presidential Impeachment 17 (Comm. Print 1974).

[21] *See* ArtII.S4.4.2 Historical Background on Impeachable Offenses.

[22] *See generally* ArtII.S4.4.3 Jurisprudence on Impeachable Offenses (1789–1860) et seq. In 1970, for instance, a Subcommittee of the House Judiciary Committee was authorized to conduct an impeachment investigation into the conduct of Justice William O. Douglas, but ultimately concluded that impeachment was not warranted. Associate Justice William O. Douglas, Final Report by the Special Subcomm. on H. Res. 920 of the Comm. on the Judiciary, 91st Cong., 2d Sess. (Comm. Print 1970).

[23] *See generally* Michael Gerhardt, Forgotten Presidents 41–47 (2013) [hereinafter Gerhardt, Forgotten Presidents].

[24] Oliver P. Chitwood, John Tyler: Champion of the Old South 299–300 (1939).

[25] Gerhardt, Forgotten Presidents, *supra* note 23, at 57.

[26] Randall K. Miller, *Presidential Sanctuaries After the Clinton Sex Scandals*, 22 Harv. J.L. & Pub. Pol'y 647, 706–07 (1999) ("The Senate acquittal of President Andrew Johnson and the House's failed attempt to impeach President John Tyler implies that even a deeply felt congressional disagreement with a target's policies or political philosophies alone is not enough to justify removal.").

Judiciary Committee against him may inform lawmakers' understanding of conduct that constitutes an impeachable offense.[27] The approved impeachment articles included allegations that President Nixon obstructed justice by using the office of the presidency to impede the investigation into the break-in of the Democratic National Committee headquarters at the Watergate Hotel and Office Building and authorized a cover-up of the activities that were being investigated. President Nixon was alleged to have abused the power of his office by using federal agencies to punish political enemies and refusing to cooperate with the Judiciary Committee's investigation.[28] While no impeachment vote was taken by the House, the Nixon experience nevertheless established what some would call the paradigmatic case for impeachment—a serious abuse of the office of the presidency that undermined the office's integrity.[29]

However, one must be cautious in extrapolating wide-ranging lessons from the lack of impeachment proceedings in the House. Specific behavior not believed to constitute an impeachable offense in prior contexts might be deemed impeachable in a different set of circumstances. Moreover, given the variety of contextual permutations, the full scope of impeachable behavior resists specification,[30] and historical precedent may not always serve a useful guide to whether conduct is grounds for impeachment For instance, no President has been impeached for abandoning the office and refusing to govern. The fact that this event has not occurred, however, hardly indicates that such behavior would not constitute an impeachable offense meriting removal from office.[31]

ArtI.S2.C5.4 Alternatives to Impeachment

Article I, Section 2, Clause 5:

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

As an alternative to the impeachment process, both houses of Congress have occasionally formally announced their disapproval of a particular Executive Branch official by adopting a resolution censuring, condemning, or expressing a lack of confidence in the official.[1] No constitutional provision expressly authorizes or prohibits such actions, and the propriety of using resolutions to condemn practices (which some describe as censure) has been the subject of some debate.[2] Nevertheless, both the House and the Senate have passed such resolutions throughout the Nation's history. For instance, the Senate censured President Andrew Jackson

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[27] *See* H. Comm. on the Judiciary, Impeachment of Richard M. Nixon, President of the United States, 93d Cong., 2d Sess., H.R. Rep. No. 93–1305, at 6–11 (1974) [hereinafter Nixon Impeachment]; United States v. Nixon, 418 U.S. 683, 713–14 (1974).

[28] Nixon Impeachment, *supra* note 27, at 6–11; *see* ArtII.S4.4.7 President Richard Nixon and Impeachable Offenses.

[29] *See* ArtII.S4.4.7 President Richard Nixon and Impeachable Offenses.

[30] *See* Gerhardt, *supra* note 3, at 106.

[31] *See* Charles Black, Impeachment: A Handbook 33–36 (1974).

[1] *See, e.g.*, Cong. Globe, 36th Cong., 1st Sess. 2951 (1860) ("Resolved, That the President and Secretary of the Navy, by receiving and considering the party relations of bidders for contracts with the United States, and the effect of awarding contracts upon pending elections, have set an example dangerous to the public safety, and deserving the reproof of this House."); 17 Cong. Rec., 1584–91, 2784–10 (1886) ("Resolved, That the Senate hereby expresses its condemnation of the refusal of the Attorney-General, under whatever influence, to send to the Senate copies of papers called for by its resolution of the twenty-fifth of January, and set forth in the report of the Committee on the Judiciary, is in violation of his official duty and subversive of the fundamental principles of the Government and of a good administration thereof.").

[2] *See* 2 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States § 1569 (1907); Condemning and Censuring William Jefferson Clinton, H.J. Res. 140, 105th Cong., 2d Sess. (1998). Letter from Rep.

in 1834 for refusing to turn over a document relating to his veto of an act to re-charter the United States Bank.[3] In 1860, the House adopted a resolution stating that the actions of President James Buchanan and the Secretary of the Navy Isaac Toucey, regarding the issuance of government contracts on political grounds, were deserving of reproof.[4] And the Senate in 1886 adopted a resolution condemning Attorney General A.H. Garland for refusing to provide records to the Senate concerning President Grover Cleveland's removal of a district attorney.[5] Importantly, because such resolutions are not subject to the constitutional requirements of bicameralism and presentment, they impose no formal legal penalties or consequences for any party.[6] Instead, they function primarily to express the sense of Congress on a matter and signal disagreement with the actions of the named individual.[7]

Section 3—Senate

Clause 1—Composition

ArtI.S3.C1.1 Equal Representation of States in the Senate

Article I, Section 3, Clause 1:

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

Ratified in 1913, the Seventeenth Amendment superseded Article I, Section 3, Clause 1, providing for Senators to be popularly elected rather than selected by state legislatures.[1] The Seventeenth Amendment, however, incorporated other provisions of Article I, Section 3, Clause 1: equal suffrage among states, each state accorded two Senators, each of whom would have one vote and serve a six-year term.[2]

Adopted by the Constitutional Convention and incorporated in the Seventeenth Amendment, the text set forth in Article I, Section 3, clause 1, providing that "[t]he Senate of the United States shall be composed of two Senators from each State . . . and each Senator shall have one vote"[3] is foundational to the federal nature of the U.S. Government. By providing for each state to be represented in the Senate by two Senators, each with a single vote, the Constitution ensures that all states are equal in the Senate regardless of their

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William D. Delahunt to Rep. Henry J. Hyde, Chair, House Judiciary Committee (Dec. 4, 1998); Peter Baker & Juliet Eilperin, *GOP Blocks House Censure Alternative*, Wash. Post (Dec. 13, 1998), https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/impeach121398.htm.

[3] 10 Reg. Deb. 1187 (1834); Senate Censures President, U.S. Senate, https://www.senate.gov/artandhistory/history/minute/Senate_Censures_President.htm (last visited Jan. 24, 2018). In 1850, the House passed a resolution censuring three members of President Zachary Taylor's Cabinet for involvement in a scandal regarding the payment of a claim against the United States, when much of the payment went to a Cabinet member. The House considered censuring President Taylor himself, but he died in office without any such action being taken. Michael Gerhardt, Forgotten Presidents 77 (2013).

[4] Cong. Globe, 36th Cong., 1st Sess. 2951 (1860).

[5] 17 Cong. Rec., 1584–91, 2784–2810 (1886).

[6] *See* Michael J. Gerhardt, *The Constitutionality of Censure*, 33 U. Rich. L. Rev. 33, 35 (1999).

[7] The House of Representatives also issued a report critical of President Tyler following his veto of a tariff bill. Oliver P. Chitwood, John Tyler: Champion of the Old South 299–300 (1939); Gerhardt, Forgotten Presidents, *supra* note 3, at 57.

[1] U.S. Const. amend. XVII.

[2] *Id.* ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote.").

[3] U.S. Const. art. I, § 3, cl. 1; U.S. Const. amend. XVII.

relative population, wealth, power, or size.[4] By allocating power in the Senate equally among the states, the Framers counterbalanced allocating power in the House based on a state's share of the national population.[5]

The different compositions of the House of Representatives and Senate reflect the Framers' conception of the U.S. Government as both national and federal.[6] Consistent with a National Government, the Constitution provides for the American people to be equally represented in the House.[7] Consistent with a federation of states, the Constitution provides for equal representation of states in the Senate.[8] Stressing that equal suffrage is critical to state sovereignty in his *Commentaries on the Constitution of the United States*, Justice Joseph Story stated: "The equal vote allowed in the senate is . . . at once a constitutional recognition of the sovereignty remaining in the states, and an instrument for the preservation of it. It guards them against (what they meant to resist as improper) a consolidation of the states into one simple republic."[9] By arranging for the House and Senate to exercise legislative power jointly, the Framers required U.S. law to have both national and federal approval—a majority vote in the House of Representatives demonstrates national approval while a majority vote in the Senate expresses federal approval.[10]

ArtI.S3.C1.2 Historical Background on State Voting Rights in Congress

Article I, Section 3, Clause 1:

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

The allocation of voting rights, often referred to as suffrage, in the two Houses of Congress was among the most contentious issues the Framers had to resolve at the Constitutional Convention.[1] Under the Articles of Confederation, each state had a single vote in a unicameral Congress.[2] Smaller states viewed this arrangement as essential to maintaining their

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[4] *See, e.g.*, Joseph Story, Commentaries on the Constitution of the United States § 691 (1833) ("[E]ach state in its political capacity is represented upon a footing of perfect equality, like a congress of sovereigns, or ambassadors, or like an assembly of peers.").

[5] *Compare* U.S. Const. art. I, § 3, cl. 1 *with* U.S. Const. art. I, § 2, cl. 3.

[6] Joseph Story, Commentaries on the Constitution of the United States § 696 (1833) ("[T]he very structure of the general government contemplated one partly federal, and partly national.").

[7] U.S. Const. art. I, § 2, cl. 3.

[8] U.S. Const. art. I, § 3, cl. 1.

[9] Joseph Story, Commentaries on the Constitution of the United States § 696 (1833). *See also* The Federalist No. 62 (James Madison) ("[T]he equal vote allowed to each State is at once a constitutional recognition of that portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small States; since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the States into one simple republic.").

[10] The Federalist No. 62 (James Madison) ("No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then, of a majority of the States."). The Framers also saw the division of power between the House and Senate as ensuring that they would check abuses of power by the other. *Id.* ("[A] senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient.").

[1] Joseph Story, Commentaries on the Constitution of the United States § 692 (1833). *See also* Max Farrand, The Framing of the Constitution 93 (1913) (referring to "'the most fundamental points, the rules of suffrage in the two branches.'") (quotation retained).

[2] The Articles of Confederation of 1781, art. V, *reprinted in* Max Farrand, The Framing of the Constitution app. I (1913) ("In determining questions in the united states, in Congress assembled, each state shall have one vote."). The Articles of Confederation further provided that each state legislature would determine how its delegates would be appointed; appointments would be on an annual basis; and that states could recall their delegates and replace them at

autonomy from wealthier, more populated states. The concern of small states that the Constitutional Convention would eliminate Articles of Confederation language providing for equal suffrage among states was such that Delaware, in commissioning its delegates to the Convention, prohibited them from agreeing to any deviation from the principle of state equal suffrage.[3]

More populated states, however, viewed the Articles of Confederation's provision of equal suffrage among the states to be unjust because people in less populated states had relatively more influence in the U.S. legislature than people in more populated states. Accordingly, delegates from more populated states argued that state representation in Congress should reflect the relative sizes of state populations. For example, the Virginia delegates to the Constitutional Convention proposed, among other things, a bicameral Congress in which votes in both houses would be allocated among states in accordance with "the Quotas of contribution or to the number of free inhabitants, or to both."[4] After a proposal for proportional representation in the Senate won initial approval at the Constitutional Convention by a vote of six to five,[5] New Jersey proposed to retain the Articles of Confederation provision of equal suffrage among states.[6]

After further debate on congressional representation and equal suffrage among the states, the Constitutional Convention ground to a "standstill," at which point a committee, often

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any time during the year. *Id.* Finally, the Articles provided that states could send between two to seven delegates to Congress, limited delegates to serving no more than three terms in any six-year period, and proscribed delegates from holding any office in the United States "for which he, or another for his benefit receives any salary, fees or emoluments of any kind." *Id.*

[3] Max Farrand, The Framing of the Constitution 24 (1913) (noting that the Delaware commission provided "that such Alterations or further Provisions, or any of them, do not extend to that part of the Fifth Article of the Confederation . . . which declares that 'In determining Questions in the United States Congress Assembled each State shall have one Vote'").

[4] The Virginia Plan, *reprinted in* Max Farrand, The Framing of the Constitution app. II, arts. 2 & 4 (1913). Article 2 of the Virginia Plan circulated by Edmund Randolph of Virginia on May 29, 1787, provided: "[T]he rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contributions, or to the number of free inhabitants, as the one or the other rule may seem best in different cases." *Id. See also* Max Farrand, The Framing of the Constitution 69 (1913). The "Quotas of contributions" to which the Virginia Plan referred were the shares or taxes that the states were to contribute to pay the expenses of the U.S. Government. Under the Articles of Confederation, the states' shares were determined generally "in proportion to the value of surveyed land within their borders." From the Declaration of Independence to the Constitution, the Roots of American Constitutionalism xliii (C.J. Friedrich & Robert G. McCloskey eds., 1954). Article VIII of the Articles of Confederation stated:

All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, *in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements* thereon shall be estimated according to such mode as the United States in Congress assembled from time to time direct and appoint.

The Articles of Confederation of 1781, art. VIII, *reprinted in* Max Farrand, Framing of the Federal Constitution, app. I (1913) (emphasis added).

Rufus King of Massachusetts objected to the Virginia Plan's use of "Quotas of contribution"on the grounds that the amounts for which each state would be responsible would constantly fluctuate. 1 The Records of the Federal Convention of 1787, at 36 (Max Farrand ed., 1911) ("Mr. King observed that the quotas of contribution which would alone remain as the measure of representation, would not answer; because waiving every other view of the matter, the revenue might hereafter be so collected by the general Govt. that the sums respectively drawn from the States would [not] appear; and would besides be continually varying."). In light of King's concerns, the "Quotas of contribution" language was removed. *Id.* ("Mr. Madison admitted the propriety of the observation, and that some better rule ought to be found. Col. Hamilton moved to alter the resolution so as to read 'that the rights of suffrage in the national Legislature ought to be proportioned to the number of free inhabitants.' Mr. Saight 2ded. the motion."). Notwithstanding, debate over the role that wealth should play in how states were represented in the National Government continued. *See, e.g.*, *id.* at 541–542, 567 (James Madison's notes, July 6, 1787; James Madison's notes, July 10, 1787).

[5] Max Farrand, The Framing of the Constitution 75 (1913).

[6] 1 The Records of the Federal Convention of 1787, at 242–245 (Max Farrand ed., 1911) (James Madison's notes, June 15, 1787).

referred to as the Committee of Eleven, was formed to develop a compromise.[7] The Committee of Eleven proposed that (1) representatives would be allocated in the House in proportion to the number of inhabitants and (2) each state would have an equal vote in the Senate.[8] After further debate and modification, the Great Compromise was adopted by a vote of 5-4 with Connecticut, New Jersey, Delaware, Maryland, and North Carolina in favor; Pennsylvania, Virginia, South Carolina, and Georgia against; Massachusetts divided; and New York absent, its delegation having left the Convention "because of their dissatisfaction with the way things were tending and because of their belief that they were unwarranted in supporting action taken in excess of their instructions."[9] Key to the Constitution's adoption,[10] equal suffrage among the states in the Senate ensured that the new American government would remain a federation of states.[11]

The importance of equal suffrage among the states set forth at Article I, Section 3, Clause 1 to the Constitution's adoption and ratification is further underscored by Article V of the Constitution. Article V, which provides for amending the Constitution, distinguishes equal suffrage among the states from the rest of the Constitution by making it unamendable, stating: "[N]o State, without its Consent, shall be deprived of equal suffrage in the Senate."[12] According to James Madison, Roger Sherman of Connecticut, who was one of the architects of the Great Compromise, raised this issue during debate on Article V. Madison stated:

> Mr. Sherman expressed his fears that three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate. He thought it reasonable that the proviso . . . should be extended so as to provide that no State . . . should be deprived of its equality in the Senate.[13]

After some debate, Gouverneur Morris proposed the language that the Convention ultimately adopted.[14]

ArtI.S3.C1.3 Selection of Senators by State Legislatures

Article I, Section 3, Clause 1:

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

By providing for Senators to be selected by popular vote, the Seventeenth Amendment superseded the Framers' decision—set forth in Article I, Section 3, Clause 1—that state

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[7] Max Farrand, The Framing of the Constitution 97 (1913). The Committee of Eleven was comprised of Gerry, Ellsworth, Yates, Paterson, Franklin Bedford, Martin, Mason, Davie, Rutledge, and Baldwin. 1 The Records of the Federal Convention of 1787, at 509 (Max Farrand ed., 1911) (Journal, July 2, 1787).

[8] *See* ArtI.S1.2.3 The Great Compromise of the Constitutional Convention. *See also* Max Farrand, The Framing of the Constitution 99 (1913).

[9] Max Farrand, The Framing of the Constitution 105 (1913).

[10] *See* ArtI.S1.2.3 The Great Compromise of the Constitutional Convention. The Great Compromise is also referred to as the Connecticut Compromise because of the Connecticut delegation's role in its adoption. Max Farrand, The Framing of the Constitution 106–107 (1913). *See also id.* at 146 ("The great compromise had provided that direct taxation should be proportioned to population . . . .").

[11] Max Farrand, The Framing of the Constitution 134 (1913).

[12] U.S. Const. art. V.

[13] 2 The Records of the Federal Convention of 1787, at 629 (Max Farrand ed., 1911) (James Madison's notes, Sept. 15, 1787).

[14] *Id.* at 631.

legislatures choose Senators.[1] The Seventeenth Amendment thereby harmonized selection of the Senate with that of the House, the Members of which the Framers provided to be elected by popular vote.[2]

During the Constitutional Convention, the Framers considered several methods for selecting Senators.[3] While James Wilson, James Madison, and George Mason supported direct election of Senators through popular votes,[4] other proposals provided for the House of Representatives to elect Senators directly or from a pool of nominees chosen by state legislatures.[5] Ultimately, the Framers agreed that state legislatures would select Senators.[6]

The Framers' decision to distinguish selection of the Senate from selection of the House of Representatives was consistent with established practices. Following the example of the British House of Commons, colonial charters and state constitutions generally provided for one branch of their legislatures to be selected by popular vote.[7] Popular votes were not the only method of selecting representatives of the people, however. For instance, under the Articles of Confederation, state legislatures selected delegates to Congress, while the Maryland House of Delegates appointed the Maryland Senate.[8] Thus, popular votes influenced selection of—rather than selected—Congress under the Articles of Confederation and the Maryland Senate. The Framers, moreover, appear to have viewed both direct elections of Members of the House through popular votes and selections of Senators by state legislatures, members of which had been directly elected by popular vote, as consistent with republican government. Although James Madison advocated for direct election of Senators at the Constitutional Convention, he observed in the *Federalist No. 39* that "[i]t is SUFFICIENT for such a [republican] government that the persons administering it be appointed, either directly or indirectly by the people . . . ."[9]

Although the Constitution has provided for the Senate to be popularly elected since 1913, at the time of the Nation's inception, selection of the Senate by state legislatures provided certain benefits both to states and the new U.S. Government. By selecting Senators, state legislatures could directly impact Senate decisions, which, in turn, strengthened ties and improved communication with Congress. Because Senators owed their appointments to state legislatures, they had incentives to be responsive to the needs of their states. Consequently, state legislatures had greater ability to advance their interests in Congress.[10] Describing this benefit, James Madison wrote: "It is recommended by the double advantage of favouring a

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[1] U.S. Const. amend. XVII.

[2] *Compare* U.S. Const. amend. XVII *with* U.S. Const. art. I, § 2, cl. 4.

[3] Max Farrand, The Framing of the Constitution 76 (1913).

[4] *Id.*

[5] *Id. See also* Joseph Story, Commentaries on the Constitution of the United States § 701 (1833).

[6] Joseph Story, Commentaries on the Constitution of the United States § 701 (1833).

[7] Popular votes did not mean universal suffrage. For instance, as the author of the *Federalist No. 57* notes, participation in county elections for the British House of Commons was limited to "persons having a freehold estate of the annual value of more than twenty pounds sterling, according to the present rate of money." The Federalist No. 57 (Alexander Hamilton or James Madison). *See also* The Federalist No. 63 (Alexander Hamilton or James Madison) ("But if anything could silence the jealousies on this subject, it ought to be the British example. The Senate there instead of being elected for a term of six years, and of being unconfined to particular families or fortunes, is an hereditary assembly of opulent nobles. The House of Representatives, instead of being elected for two years, and by the whole body of the people, is elected for seven years, and in very great proportion, by a very small proportion of the people.").

[8] The Federalist No. 39 (James Madison) ("The Senate, like the present Congress, and the Senate of Maryland, derives its appointment indirectly from the people.").

[9] *Id.*

[10] *See* Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 Duke L.J. 177, 214 (2008) (noting that Senators who refused to follow their state legislature's directions were expected to resign).

select appointment, and of giving to the state governments such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems."[11] Finally, by requiring no specific selection process, Article I, Section 3, Clause 1 allowed state legislatures to tailor the process of selecting Senators to the state's unique circumstances.

ArtI.S3.C1.4 Six-Year Senate Terms

Article I, Section 3, Clause 1:

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

Although the Seventeenth Amendment superseded Article I, Section 3, Clause 1, it incorporated the six-year Senate term the Framers had provided in Article I, Section 3, Clause 1.

During the Constitutional Convention, the Framers discussed extensively the appropriate term for Senators and Representatives to serve in Congress. Proposals for Senate terms ranged from life terms subject to good behavior[1] to limited terms ranging from three to nine years.[2] The Framers appear to have recognized a relationship between the length of Senate and House terms and the respective roles of the two houses. For instance, after reducing a proposed three-year House term to two years in order to compromise with advocates for one-year House terms,[3] the Framers reduced the seven-year Senate term, which had been discussed in conjunction with the three-year House term, to six years.[4] In the Federalist Papers, James Madison noted that the six-year Senate term was consistent with state senate terms.[5]

Commentators have viewed the six-year Senate term and two-year House term as striking a careful balance between institutional stability provided by a longer Senate term and legislative responsiveness provided by shorter House terms punctuated by frequent elections. Explaining the Senate's greater permanence as moderating more volatile short-term House interests, Justice Joseph Story stated in his *Commentaries on the Constitution of the United States*: "[The Senate's] value would be incalculably increased by making its term in office such, that with moderate industry, talents, and devotion to the public service, its members could scarcely fail of having the reasonable information, which would guard them against gross errors, and the reasonable firmness, which would enable them to resist visionary speculations, and popular excitement."[6]

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[11] Joseph Story, Commentaries on the Constitution of the United States § 702 (1833); The Federalist Nos. 62 (Alexander Hamilton) & 27 (Alexander Hamilton).

[1] Joseph Story, Commentaries on the Constitution of the United States § 707 & n.1 (1833).

[2] *Id.*

[3] Max Farrand, The Framing of the Constitution 76 (1913).

[4] *Id.* at 91. The *Federalist Papers* discuss state practices with respect to their "most numerous branches," stating: "In Connecticut and Rhode Island, the periods are half-yearly. In the other States, South Carolina excepted, they are annual. In South Carolina they are biennial as is proposed in the federal government." The Federalist No. 53 (Alexander Hamilton or James Madison).

[5] The Federalist No. 39 (James Madison) ("The Senate is elective, for the period of six years; which is but one year more than the period of the Senate of Maryland, and but two more than that of the Senates of New York and Virginia.").

[6] Joseph Story, Commentaries on the Constitution of the United States § 712 (1833). Justice Story continued: "If public men know, that they may safely wait for the gradual action of a sound public opinion, to decide upon the merit of their actions and measures, before they can be struck down, they will be more ready to assume responsibility, and pretermit present popularity for future solid reputation." *Id.*

Clause 2—Seats

ArtI.S3.C2.1 Staggered Senate Elections

Article I, Section 3, Clause 2:

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

The Framers provided for change in the Senate to occur gradually while ensuring that the Senate remained responsive to popular interests by providing for one-third of Senate seats to be filled every two years.[1] Consequently, the Framers adopted Article I, Section 3, Clause 2, which provided, among other things, a mechanism for staggering Senate terms. This clause provided that one-third of Senators selected to the First Congress would serve a two-year term, one-third of Senators would serve a four-year term, and one-third of Senators would serve a six-year term. After these initial terms concluded, all Senate seats would have six-year terms. In dividing the Senate seats into the three classes, Congress allocated them so "that both senators from the same state should not be in the same class, so that there never should be a vacancy, at the same time, of the seats of both senators."[2]

By staggering the filling of Senate seats so that only one-third of Senate seats may be changed at any time, Article I, Section 3, Clause 2, ensured that modifications to the Senate's membership would be gradual and occur over a series of elections.[3] Discussing the benefits of this system, Justice Story noted:

> [I]t is nevertheless true, that in affairs of government, the best measures, to be safe, must be slowly introduced; and the wisest councils are those, which proceed by steps, and reach, circuitously, their conclusion. It is, then, important in this general view, that all the public functionaries should not terminate their offices at the same period. The gradual infusion of new elements, which may mingle with the old, secures a gradual renovation, and a permanent union of the whole.[4]

Moreover, because all Members of the House of Representatives are subject to election every two years, the make-up of the House and its agenda may change significantly from election to election. As such, six-year staggered Senate terms provide Congress an institutional stability anchored by the Senate that may counterbalance rapid, fluctuating changes in the House. Discussing this balance in his *Commentaries on the Constitution of the United States*, Justice Joseph Story stated: "[The Senate] combines the period of office of the executive with that of the members of the house; while at the same time, from its own biennial changes, . . . it is silently subjected to the deliberate voice of the states."[5]

Staggering when Senate seats are filled also ensures that states have at least one Senator with previous experience in the Senate. States may realize benefits from their Senators acquiring seniority in the Senate. Committee chairmanships and other leadership roles allow

[1] *See, e.g.,* 2 The Records of the Federal Convention of 1787, at 418, 435 (Max Farrand ed., 1911).

[2] Joseph Story, Commentaries on the Constitution of the United States § 724 (1833).

[3] *Id.* at § 712.

[4] *Id.* at § 713.

[5] *Id.* at § 712.

Senators to prioritize their states' interests. Moreover, institutional knowledge of, and greater experience with, the Senate facilitates the ability of Senators to advance state interests. By providing that Senators from the same state were not assigned the same term (two, four, or six years) at the first Congress, Congress ensured that states did not have two senators who were new to the Senate at the same time.[6]

Finally, because Senate elections are staggered, the Senate is a continuing body. Consequently, while each election cycle ushers in a new House of Representatives, there has only been one Senate. As the Supreme Court observed in *McGrain v. Daugherty*, the Senate "is a continuing body whose members are elected for a term of six years and so divided into classes that the seats of one-third only become vacant at the end of each Congress, two-thirds always continuing into the next Congress, save as vacancies may occur through death or resignation."[7] Consequently, because the Senate is a continuing body, the Supreme Court has reasoned that expiration of Congress did not moot a warrant for a witness who had refused to testify before a Senate committee.[8]

ArtI.S3.C2.2 Senate Vacancies Clause

Article I, Section 3, Clause 2:

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

The Seventeenth Amendment's ratification in 1913 provided for the Senate to be elected by popular vote rather than chosen by state legislatures, thereby harmonizing the Senate selection process with that of the House.[1] Consistent with this, the Seventeenth Amendment set aside the Senate Vacancy Clause set forth at Article I, Section 3, Clause 2, which provided for state legislatures to fill Senate vacancies, mandating, instead, that a state's Executive Authority[2] fill vacant Senate seats through popular elections. Accordingly, the Seventeenth Amendment's Senate Vacancy Clause mirrors the House Vacancy Clause by providing that "the executive authority of such State shall issue writs of election to fill vacancies . . . ."[3] The Seventeenth Amendment, however, provides state legislatures greater flexibility to address Senate vacancies by allowing state legislatures to authorize state Governors to fill Senate vacancies temporarily until the election.[4]

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[6] *Id.* at § 724 ("In arranging the original classes, care was taken, that both senators from the same state should not be in the same class, so that there never should be a vacancy, at the same time, of the seats of both senators.").

[7] McGrain v. Daugherty, 273 U.S. 135, 181 (1927). *See also* Edward S. Corwin, The Constitution and What it Means Today 12 (Harold W. Chase & Craig R. Ducat eds., 1973) (1958) ("While there have been 92 Congresses to date, there has only been one Senate, and this will apparently be the case till the crack of doom.").

[8] *McGrain*, 273 U.S. 135.

[1] U.S. Const. amend. XVII. *See* U.S. Const. art. I, § 2, cl. 4.

[2] The Framers' use of the term "executive authority" reflected that early state constitutions often provided for an executive council to control or advise the state's chief executive. Charles C. Thach, Jr., The Creation of the Presidency, 1775–1789: A Study in Constitutional History 16–17 & n.7 (Johns Hopkins U. Press 1969) (1923).

[3] U.S. Const. amend. XVII.

[4] *Id.* ("Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.").

The Framers distinguished the Senate Vacancy Clause set forth at Article I, Section 3, Clause 2, from the House Vacancy Clause set forth at Article I, Section 2, Clause 4, by expressly contemplating that vacancies in the Senate might arise from resignations. By contrast, the House Vacancies Clause does not refer to resignations. Because state legislatures selected their state's Senators prior to the 1913 ratification of the Seventeenth Amendment, the express discussion of resignations in the Senate Vacancy Clause may have tacitly recognized, as one commentator has noted, that Senators who declined to follow directions of their state legislatures were expected to resign.[5]

Clause 3—Qualifications

ArtI.S3.C3.1 Overview of Senate Qualifications Clause

Article I, Section 3, Clause 3:

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

Under the Senate Qualifications Clause set forth at Article I, Section 3, Clause 3, Senators must be at least thirty years of age, a citizen for at least nine years, and an inhabitant of the state from which he or she is elected. While the Senate Qualifications Clause expressly requires inhabitancy at the time of the election, Congress has interpreted the Clause to require that Senators meet age and citizenship qualifications only at the time they take the oath of office.[1] Pursuant to Article I, Section 5, the Senate determines whether Senators-elect meet the required qualifications to be seated in the Senate.[2]

During the Constitutional Convention, the Framers adopted a minimum age requirement of thirty to ensure that Senators had sufficient maturity to perform their duties. Similarly, the Framers adopted a nine-year citizenship requirement to ensure that foreign-born Senators were loyal to, and knowledgeable about, the United States. Senate qualification requirements were more strenuous than those for the House, which required only that Members be twenty-five years of age and a citizen for at least seven years.[3] Alexander Hamilton explained the disparity in the Senate and House age requirements as due to "the nature of the senatorial trust, which requiring greater extent of information and ability of character, requires at the same time that the senator should have reached a period of life most likely to supply these advantages . . . ."[4]

Fixing the appropriate length of citizenship to be a Member of the Senate or House appears to have been the subject of significant debate at the Constitutional Convention, in part, because of the delegates' different backgrounds. Pennsylvania delegate James Wilson, an immigrant from Scotland, a signatory to the Declaration of Independence, and a future Supreme Court Justice, argued for a minimal citizenship requirement based on his personal

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[5] Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 Duke L.J. 177, 214 (2008).

[1] S. Res. 155, 79th Cong. (1935). *See also* 79 Cong. Rec. 9824–42 (June 21, 1935); 9 Cong. Rec. 9651–57 (June 19, 1935).

[2] U.S. Const. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members.").

[3] U.S. Const. art. I, § 2, cl. 2.

[4] The Federalist No. 62 (Alexander Hamilton). *See also* Joseph Story, Commentaries on the Constitution of the United States § 726 (1833) (explaining that the Roman senate had similar qualifications).

experiences of having been precluded from office earlier in his career because of citizenship requirements.[5] Other delegates proposed much lengthier terms.[6]

Having considered terms ranging from four to fourteen years, the Framers' adoption of a nine-year requirement appears to have compromised conflicting views on the subject. Explaining the adoption of a nine-year term in the *Federalist No. 62*, Alexander Hamilton wrote: "The term of nine years appears to be a prudent mediocrity between a total exclusion of adopted citizens, whose merits and talents may claim a share in the public confidence, and an indiscriminate and hasty admission of them, which might create a channel for foreign influence in the national councils."[7] Hamilton stressed the Senate's role in foreign affairs as further justifying a longer citizenship requirement, stating that "participating immediately in transactions with foreign nations, ought to be exercised by none who are not thoroughly weaned from the prepossessions and habits incident to foreign birth and education."[8]

By adopting an inhabitancy requirement, the Framers sought to ensure that Senators would represent the interests of their states.[9] In his *Commentaries on the Constitution of the United States*, Justice Joseph Story noted "[I]t is manifestly proper, that a state should be represented by one, who, besides an intimate knowledge of all its wants and wishes, and local pursuits, should have a personal and immediate interest in all measures touching its sovereignty."[10]

ArtI.S3.C3.2 When Senate Qualifications Requirements Must Be Met

Article I, Section 3, Clause 3:

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

While the Senate Qualifications Clause expressly requires a Senator-elect to reside in the state from which he is elected at the time of the election, it is less clear when a Senator-elect must meet the age and citizenship requirements. However, in 1935, the Senate established that a Senator-elect must only meet age and citizenship qualifications at the time he or she takes the oath of office.[1]

In 1935, the Senate considered when a Senator-elect must meet the qualification requirements when former Senator Henry D. Hatfield of West Virginia and various West Virginia citizens challenged the seating of Senator-elect Rush Holt of West Virginia on the

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[5] Max Farrand, The Framing of the Constitution 137 (1913). A member of the Continental Congress and a leading legal scholar, James Wilson had immigrated to the colonies in 1765. 1 Collected Works of James Wilson xvi (Kermit L. Hall & Mark David Hall eds., 2007).

[6] *See, e.g.,* 2 The Records of the Federal Convention of 1787, at 243 (1911) (Gouverneur Morris stating: "Foreigners will not learn our laws & Constitution under 14 yrs.—7 yrs must be applied to learn to be a Shoe Maker—14 at least are necessary to learn to be an Amer. Legislator—Again—that period will be requisite to eradicate the Affections of Education and native Attachments—").

[7] The Federalist No. 62 (Alexander Hamilton).

[8] *Id. See also* 2 Joseph Story, Commentaries on the Constitution of the United States § 728 (1833) (commenting that the citizenship requirement freed a naturalized Senator "from all prejudices, resentments, and partialities, in relation to the land of his nativity" and allowed him to "have acquired a thorough knowledge of the institutions and interests of a country").

[9] The Framers adopted the term "inhabitant" in favor of "resident" because, as understood at that time, "inhabitant" would not, in the words of James Madison, "exclude persons absent occasionally for a considerable time on public or private business." 2 The Records of the Federal Convention of 1787, at 217 (Max Farrand ed., 1911).

[10] 2 Joseph Story, Commentaries on the Constitution of the United States § 729 (1833).

[1] S. Res. 155, 79th Cong. (1935).

grounds that he had been elected to the Senate at the age of twenty-nine.[2] While Senator-elect Holt acknowledged that he had not been thirty at the time of the general election on November 7, 1934, or at the convening of the Seventy-Ninth Congress on January 3, 1935, he argued that he met the Senate qualification requirements because he did not seek to take the oath of office until after he turned thirty on July 19, 1935.[3] In finding that Senator-elect Holt was entitled to the seat, the Committee on Privileges and Elections considered House of Representatives practices.[4] The Committee observed that while Rep. John Young Brown of Kentucky was elected to the Thirty-Sixth Congress despite being underage, he qualified for a seat because he had waited until he was twenty-five to take the oath of office.[5] Similarly, the Committee noted that while Austrian immigrant Henry Ellenbogen of Pennsylvania was elected to the House of Representatives in 1932 and his term began on March 4, 1933, Rep. Ellenbogen had waited until January 3, 1934 to take his oath of office and be seated in order to comply with the citizenship requirement.[6]

The Committee on Privileges and Elections also noted that Senators Henry Clay of Kentucky, Armistead Mason of Virginia, and John Eaton of Tennessee had been elected and "assumed the duties of the senatorial office before they were 30 years of age," but concluded that their examples were not precedential as no one had challenged their seats in the Senate.[7] In contrast, Albert Gallatin of Pennsylvania and General James A. Shields of Illinois were elected to the Senate, but were denied their seats because they did not meet the citizenship requirement.[8] The Committee on Privileges and Elections distinguished Gallatin and Shields from Holt on the grounds that they had taken their seats despite not having met the citizenship requirement whereas Holt "'was 30 years of age at the time when he presented himself to the Senate to take the oath and to assume the duties of the office.'"[9]

Ultimately, the Senate voted 62-17 in favor of Senator-elect Holt taking the oath of office.[10] Consequently, the Senate has allowed Senators to be seated once they meet age and citizenship qualification requirements rather than requiring them to have met those requirements at the time of the election or at the beginning of the session of Congress for which they were elected.

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[2] 79 Cong. Rec. 9650 (June 19, 1935). Senator Hatfield, who was a Republican, had lost the November 7, 1934, general election to Senator-elect Holt, who was a Democrat.

[3] S. Rep. No. 904, 74th Cong., 1st Sess. (1935), *as reprinted in* 79 Cong. Rec. 9651–57 (June 19, 1935).

[4] *Id.* The Committee on Privileges and Elections considered three possible times at which a Senator-elect must have filled the requirement: (1) at the time of election, (2) at the time the congressional term commenced, or (3) at the time the Senator-elect took his oath of office. *Id.* at 9652.

[5] *Id.* at 9652 (citing Cong. Globe, 36th Cong., 1st Sess. 25, 31 and quoting from Jefferson's House Manual that "'A Member-elect not being of the required age, he was not enrolled by the Clerk and did not take the oath until he had reached the required age'").

[6] S. Rep. No. 904, 74th Cong., 1st Sess. (1935), *as reprinted in* 79 Cong. Rec. 9652 (June 19, 1935).

[7] *Id.* ("No objection was made to the seating of Henry Clay, and it appears that he himself was probably unaware of the age qualification. His case is not relied upon as precedent. Likewise, the case of Mason and Eaton are not cited as precedents because, no question having been raised, each of these cases is at most a mere physical precedent.").

[8] *Id.* at 9653. In the case of Shields, he subsequently won the special election to fill the Senate vacancy occasioned by his disqualification this time meeting the citizenship requirement.

[9] *Id.* at 9652 (quoting S. Res. 155, 79th Cong. (1935)). The minority on the Committee on Privileges and Elections argued that the standard should be commencement of the term for which the Senator was elected. *Id.* at 9653. Senator Hiram W. Johnson noted that prior Senate practice indicated that commencement of the term of office should be the date by which a Senator-elect must meet the qualification requirements. *Id.* at 9652.

[10] 79 Cong. Rec. 9842 (June 21, 1935).

ArtI.S3.C3.3 Congress's Ability to Change Qualifications Requirements for Senate

Article I, Section 3, Clause 3:

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

The Supreme Court has held that Congress cannot legislate changes to Article I, Section 3, Clause 3 qualification requirements, which require a Senator to be at least thirty years of age, a United States citizen for nine years, and an inhabitant of the state from which he or she is elected.[1]

During the Constitutional Convention, the Framers had debated whether Congress should have discretion to adopt additional qualification requirements for congressional membership but ultimately decided that such discretion would be too vulnerable to manipulation and might cause otherwise qualified persons to be excluded from Congress.[2] In particular, the Framers considered including a property requirement but the committee charged with recommending an appropriate amount could not agree and instead proposed that Congress decide.[3] Rejecting granting Congress power to determine qualifications for membership, James Madison reasoned:

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[1] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 827 (1995) ("[T]he available historical and textual evidence, read in light of the basic principles of democracy underlying the Constitution and recognized by this Court in *Powell*, reveal the Framers' intent that neither Congress nor the States should possess the power to supplement the exclusive qualifications set forth in the text of the Constitution."). *See* Powell v. McCormack, 395 U.S. 486 (1969) (holding that Article I, Section 2, Clause 2 prevented the House of Representatives from adding qualification requirements for Article 1, Section 5 judgments). In *Thornton*, the Court "reaffirm[ed]" that "*Powell*'s historical analysis and its articulation of the 'basic principles of our democratic system'" established that "the qualifications for service in Congress set forth in the text of the Constitution are 'fixed' at least in the sense that they may not be supplemented by Congress." *Thornton*, 514 U.S. at 798. See also Nixon v. United States, 506 U.S. 224, 237 (1993) ("[I]n light of the three requirements specified in the Constitution, the word 'qualifications'—of which the House was to be the Judge—was of a precise limited nature.").

Unresolved is whether the reference to "Qualifications" in Article I, Section 5 includes other constitutional stipulations. In *U.S. Term Limits, Inc. v. Thornton*, the Court identified provisions that might be disqualifying: U.S. Const. art. I, § 3, cl. 7 (impeachment judgment against); *id.* art. I, § 6, cl. 2 (U.S. Government office holder); *id.* amdt. 14, (broke oath to support the Constitution through insurrection, rebellion, or assisting enemies); *id.* art. IV (Guarantee Clause); *id.* art. VI, cl. 3 (failed to swear to support the Constitution). *Thornton*, 514 U.S. at 787, n.2 (1995). The Court noted: In *Powell*, we saw no need to resolve the question whether those additional provisions constitute 'qualifications' because 'both sides agree that Powell was not ineligible under any of these provisions.' We similarly have no need to resolve that question today: Because these additional provisions are part of the text of the Constitution, they have little bearing on whether "Congress and the states may add qualifications to those that appear in the Constitution." *Id.* (citations omitted).

[2] 2 The Records of the Federal Convention of 1787, at 248–51 (Max Farrand ed.,1911).

[3] *Id.* at 248–49. Discussing the committee report, John Rutledge of Georgia, a future Supreme Court Justice, observed that "the Committee had reported no qualifications because they could not agree on any among themselves, being embarrassed by the danger on [one] side of displeasing the people by making them [high], and on the other of rendering them nugatory by making them low." *Id.* at 249.

Oliver Ellsworth of Connecticut, another future Supreme Court Justice noted that: "The different circumstances of different parts of the U.S. and the probable difference between the present and future circumstances of the whole, render it improper to have either *uniform* or *fixed* qualifications. Make them so high as to be useful in the S. Sates, and they will be inapplicable to the E. States. Suit them to the latter, and they will serve no purpose in the former. In like manner what may be accommodated to the existing State of things among us, may be very inconvenient in some future state of them." *Id.*

Benjamin Franklin objected to a property requirement based on "his dislike of every thing that tended to debase the spirit of the common people." *Id.* He stated: "If honesty was often the companion of wealth, and if poverty was exposed to peculiar temptation, it was not less true that the possession of property increased the desire of more property—Some of the greatest rogues he was ever acquainted with, were the richest rogues. We should remember the character which the Scripture requires in Rulers, that they should be men hating covetousness—This Constitution

> The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. . . . Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans [sic] of [a weaker] faction.[4]

Similarly, in the *Federalist No. 60*, Alexander Hamilton emphasized that stipulating qualification requirements in the Constitution would preclude wealthy citizens from using their influence to add property ownership criteria to be a Member of Congress at a later date.[5]

Until the Civil War, Congress appears to have generally conformed to the position adopted by Hamilton that the Constitution fixed the qualification requirements for membership in the Senate. But in July 1862, Congress passed a law requiring all persons appointed or elected to the United States Government to take an oath—known as the "Ironclad Test Oath"—that they had never been, nor ever would be, disloyal to the United States Government.[6] Subsequently, the Senate denied seats to certain Senators-elect following the Civil War. For instance, in 1868, the Senate voted to deny a seat to Philip F. Thomas of Maryland for "having voluntarily given aid, countenance, and encouragement to persons engaged in armed hostility to the United States . . . ."[7]

In 1969, the Supreme Court held in *Powell v. McCormack* that the House of Representatives could not impose additional qualification requirements.[8] In 1995, the Supreme Court revisited *Powell* more broadly in *U.S. Term Limits, Inc. v. Thornton* where it considered whether States could impose additional qualifications for membership in the House of Representatives and Senate.[9] In holding that the States could not, the Court reaffirmed its *Powell* holding as broadly applicable to Congress. The Court stated: "[W]e reaffirm that the qualifications for service in Congress are 'fixed,' at least in the sense that they may not be supplemented by Congress."[10] Consequently, Congress cannot legislate changes to the Senate's qualification requirements.

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will be much read and attended to in Europe, and if it should betray a great partiality to the rich—will not only hurt us in esteem of the most liberal and enlightened men there, but discourage the common people from removing to this Country." *Id.*

[4] *Id.* at 250–51.

[5] The Federalist No. 60 (Alexander Hamilton) ("[There is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred on the national government. . . . The qualifications of the persons who may choose or be chosen . . . are defined and fixed in the Constitution, and are unalterable by the legislature."). *See also* The Federalist No. 52 (James Madison) (discussing the House Qualifications Clause and stating "[u]nder these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession or religious faith.").

[6] Act of July 2, 1862, 12 Stat. 502.

[7] 1 Hind's Precedents of the House of Representatives § 458 (1907). *See also id.* at § 477 (referring to "John M. Niles, Philip F. Thomas, and Benjamin Stark in the Senate, and the Kentucky cases and those of Whittemore and George Q. Cannon in the House" and noting "that the Senate and the House have taken the ground that they had the right to exclude for insanity, for disloyalty, and for crime, including polygamy, and as we believe, there is no case in either the House or the Senate, where the facts were not disputed, in which either the Senate or House has denied that it had the right to exclude a man, even though he had the three constitutional qualifications").

[8] Powell v. McCormack, 395 U.S. 486 (1969).

[9] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

[10] *Id.* at 798.

ArtI.S3.C3.4 States' Ability to Change Qualifications Requirements for Senate

Article I, Section 3, Clause 3:

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

In 1969, the Supreme Court established in *Powell v. McCormack*,[1] that the House of Representatives could not consider qualifications other than those set forth in Article I, Section 2, Clause 2 of the Constitution when judging whether Members-elect qualified for a seat in the House.[2] In 1995, the Supreme Court extended its *Powell* ruling in *U.S. Term Limits, Inc. v. Thornton* to hold that States cannot impose qualification requirements on membership in Congress.[3]

The Supreme Court's *Thornton* ruling was consistent with the established congressional practice of not weighing state-added qualification requirements when considering whether Senators-elect qualified for Senate seats. In determining the eligibility of Senators-elect, the Senate appears to have conformed to Hamilton's position in the *Federalist No. 60* that the Constitution fixed the qualification requirements for Senators. Accordingly, the Senate allowed Senators-elect who had violated state qualification requirements to be seated. For instance, in 1856, the Senate seated Lyman Trumbull of Illinois although he had violated the Illinois constitution which barred state judges, such as Trumbull, from standing for election while a judge or the following year.[4]

In *Thornton*, Arkansas, along with twenty-two other states limited the number of terms Members of Congress could serve.[5] Reexamining *Powell* and "its articulation of the 'basic principles of our democratic system,'" the *Thornton* Court reaffirmed that "the qualifications for service in Congress set forth in the Constitution are 'fixed'" in that Congress may not supplement them.[6] *Powell*, the Court found, however, did not conclusively resolve whether States had retained power to add qualification requirements for membership in Congress. Recognizing that the Framers clearly intended for the Constitution to be the exclusive source of congressional qualifications,[7] the Court reasoned that even *if* states had possessed some original power in this area, they had ceded that power to the Federal Government.[8] The Court, however, held that the power to add qualifications "is not within the 'original powers' of the states, and thus not reserved to the states by the Tenth Amendment."[9]

In reaching its decision, the *Thornton* Court explored the Constitution's text, drafting, and ratification, as well as early congressional and state practices.[10] Observing that state powers were either (1) reserved by states from the Federal Government under the Constitution or (2) delegated to states by the Federal Government, the majority reasoned that states could have no reserved powers that were derived from the federal government. Quoting Justice Joseph

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[1] Powell v. McCormack, 395 U.S. 486 (1969).

[2] U.S. Const. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . .").

[3] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

[4] Hind's Precedents of the House of Representatives § 416 (1907).

[5] All but two of the state initiatives to impose term limits were citizen initiatives. *Thornton*, 514 U.S. 779.

[6] *Id.* at 798.

[7] *Id.*

[8] *Id.* at 801.

[9] *Id.* at 800.

[10] *See* Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 Harv. L. Rev. 78 (1995).

Story, the Court noted: "'[S]tates can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed.'"[11] Because States could not have passed laws governing the National Government before the Nation's Founding and the Constitution did not delegate power to states to set qualifications for Members of Congress, the states could not have such power.[12]

Thornton clarified that changing qualification requirements for Congress must be accomplished by constitutional amendment.[13] In 2001, the Court relied on *Thornton* to invalidate a Missouri law requiring labels to be placed on ballots alongside the names of congressional candidates who had "disregarded voters' instruction on term limits" or declined to pledge support for term limits.[14]

Clause 4—President

ArtI.S3.C4.1 President of the Senate

Article I, Section 3, Clause 4:

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

During the Constitutional Convention, the Framers initially contemplated that the Senate would choose its president; however, after the Framers decided to have a Vice President, they decided by a vote of eight to two that the Vice President would be President of the Senate.[1] In his *Commentaries on the Constitution of the United States*, Justice Joseph Story notes that the Framers may have made this decision to give the Vice President a role in the government. Justice Story stated:

> It has also been coldly remarked by a learned commentator, that "the necessity of providing for the case of a vacancy in the office of president doubtless gave rise to the creation of that officer; and for want of something else for him to do, whilst there is a president in office, he seems to have been placed, with no very great propriety, in the chair of the senate."[2]

Justice Story further reasoned, however, that by making the Vice President, President of the Senate, the Framers saved the Senate from the difficulties of selecting a President of the

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[11] *Thornton*, 514 U.S. at 802 (quoting Joseph Story, The Commentaries on the Constitution of the United States (1833)).

[12] *Id.* at 798–805. *See also id.* at 838–45 (Kennedy, J., concurring). The Court applied similar reasoning in Cook v. Gralike, 531 U.S. 510, 522–23 (2001), invalidating ballot labels identifying congressional candidates who had not pledged to support term limits. Because congressional offices arise from the Constitution, the Court explained, states would have had no authority to regulate these offices prior to the Constitution that they could have reserved, and the ballot labels were not a valid exercise of the power granted by Article I, § 4 to regulate the "manner" of holding elections.

[13] *Id.* at 837.

[14] Cook v. Gralike, 531 U.S. 510 (2001).

[1] Joseph Story, Commentaries on the Constitution of the United States § 732 (1833). During the Constitutional Convention, several delegates expressed concern that having the Vice President serve as President of the Senate would excessively involve the Executive Branch in the Legislative Branch's activities. *See also* 2 Records of the Federal Convention of 1787 536 (Max Farrand ed., 1911) (Elbridge Gerry of Massachusetts commenting that "We might as well put the President himself at the head of the Legislature. The close intimacy that must subsist between the President & vice-president makes it absolute improper;" George Mason of Virginia described as thinking that "the office of vice-President an encroachment on the rights of the Senate; and that it mixed too much the Legislative & Executive, which as well as the Judiciary departments, ought to be kept as separate as possible.").

[2] Joseph Story, Commentaries on the Constitution of the United States § 733 (1833).

Senate from among themselves, which would have given the state from which the president was selected either more or less influence than the other states. If the President of the Senate retained his right to vote as a Senator, the state he represented would have three votes in the event a vote was tied. If the President of the Senate was only allowed to cast a vote when there was a tie, then his state would have one less vote than other states absent a tie.[3] Justice Story, moreover, notes that the states would likely have a high regard for the Vice President of the United States as they would have selected him for the office of Vice President.[4]

In addition to casting the tie-breaking vote when the Senate is divided equally, the President of the Senate also, among other things, conducts the electoral count[5] and attests that an enrolled bill has been passed by the Senate.[6] By affixing his or her signatures to an enrolled bill the President of the Senate along with the Speaker of the House indicates that the bill has passed Congress and is ready for presentment to the President. Describing this process in *Marshall Field & Co. v. Clark*, Justice John Marshall Harlan stated:

> The signing by the speaker of the house of representatives, and by the president of the senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed congress. It is a declaration by the two houses through their presiding officers, to the president, that a bill, thus attested, has received, in due form, the sanction of the Legislative Branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed congress should be deemed complete and unimpeachable.[7]

The signing by the President of the Senate and Speaker of the House of an enrolled bill is not mandated by the Constitution, but instead is a legislative practice.[8] The Court in *Marshall Field*, however, found that a bill with the official attestations of the President of the Senate, Speaker of the House, and President was "sufficient evidence of itself . . . that it passed Congress."[9] More important, even if a discrepancy arose between an officially attested bill and

[3] *Id.* at § 736.

[4] *Id.* at § 735 ("A citizen who was deemed worthy of being one of the competitors for the presidency, could scarcely fail of being distinguished by private virtues, by comprehensive acquirements, and by eminent services. In all questions before the senate he might safely be appealed to, as a fit arbiter upon an equal division, in which case alone he is entrusted with a vote.").

[5] U.S. CONST. amend. XII ("The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;-The person having the greatest number of votes for President, shall be the President . . . .").

[6] *See, e.g.,* Marshall Field & Co. v. Clark, 143 U.S. 649 (1892). In the event the Vice President is unable to fulfill his duties as President of the Senate, Article I, Section 3, Clause 5, provides for the Senate to choose a "President pro tempore, in the Absence of the Vice President or when he shall exercise the Office of the President of the United States." U.S. CONST. art. I, § 3, cl.4.

[7] *Id.* at 672. The Court continued: "As the president has no authority to approve a bill not passed by congress, an enrolled act in the custody of the secretary of state, and having the official attestations of the speaker of the house of representatives, of the president of the senate, and of the president of the United States, carries on its face a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by congress." *Id.*

The Court noted, however, that "[t]here is no authority in the presiding officers of the house of representatives and the senate to attest by their signatures, not in the president to approve, nor in the secretary of state to receive and cause to be published, as a legislative act, any bill not passed by Congress." *Id. See also* Harwood v. Wentworth, 162 U.S. 547 (1896).

[8] *Marshall Field & Co.*, 143 U.S. at 671.

[9] *Id.* at 672.

House or Senate journals of proceedings mandated by Article I, Section 5,[10] the Court could not resolve such a dispute as "[j]udicial action, based upon such a suggestion [that "the presiding officers, committees on enrolled bills, and the clerks of the two houses" conspired to thwart a law intended by Congress], is forbidden by the respect due to a co-ordinate branch of the government."[11]

Clause 5—Officers

ArtI.S3.C5.1 Senate Officers

Article I, Section 3, Clause 5:

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

Article I, Section 3, Clause 5, provides for the Senate to choose officers[1] and a President pro tempore, who would serve as the President of the Senate when the Vice President of the United States is unable to fill that role.[2] Unlike the President of the Senate, who may only vote in the Senate when there is a tie, the President pro tempore may "vote upon all questions before the Senate."[3] The importance of the President pro tempore in the constitutional framework was underscored in 1792 when Congress provided for the President pro tempore to serve as President of the United States if neither the President nor the Vice President were able to do so.[4] Pursuant to the Succession Act of 1947, the President pro tempore is now third in the chain of succession to the presidency of the United States after the Vice President and Speaker of the House.[5]

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[10] U.S. Const. art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment requie Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.").

[11] *Id.* at 673. *See also* Baker v. Carr, 369 U.S. 186 (1962) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.").

[1] Senate officers include the Secretary of the Senate, Sergeant at Arms and Doorkeeper, chaplain, and majority and minority party secretaries. Ida Brudnick, Cong. Rsch. Serv., R43532, Offices and Officials in the Senate: Roles and Duties (2015), https://crsreports.congress.gov/product/pdf/R/R43532. *See also* Valerie Heitshusen, Cong. Rsch. Serv., RS20722, The First Day of a New Congress: A Guide to Proceedings on the Senate Floor (2020), https://crsreports.congress.gov/product/pdf/RS/RS20722.

[2] For additional discussion on the role of the President pro tempore, see Christopher Davis, Cong. Rsch. Serv., RL30960, The President Pro Tempore of the Senate: History and Authority of the Office (2015), https://crsreports.congress.gov/product/pdf/RL/RL30960.

[3] Roger Foster, Commentaries on the Constitution of the United States, Historical and Juridical, with Observations upon the Ordinary Provisions of State Constitutions and a Comparison with the Constitutions of Other Countries § 84 (1895). *See also* U.S. Const. art. I, § 3, cl. 4.

[4] Act of Mar. 1, 1792, ch. VIII, § 9, 1 Stat. 240 (providing that "in case of removal, death, or inability of both the President and the Vice President of the United States, the President of the Senate pro tempore, and in the case there shall be no President of the Senate, then the Speaker of the House of Representatives shall act as President of the United States until the disability be removed or a President shall be elected.").

[5] Christopher Davis, Cong. Rsch. Serv., RL30960, The President Pro Tempore of the Senate: History and Authority of the Office (2015), https://crsreports.congress.gov/product/pdf/RL/RL30960. The Succession Act of 1886 replaced the President pro tempore and Speaker of the House of Representatives with members of the President's cabinet in the order in which their respective departments had been established. Act of Jan. 19, 1886, ch. 4, § 1, 24 Stat. 1.

ArtI.S3.C5.1
Senate Officers

Pursuant to Article I, Section 3, Clause 5, the Senate has discretion to choose and remove its officers.[6] In his *Commentaries on the Constitution of the United States*, Justice Joseph Story noted that the benefits of allowing the Senate to choose its officers and a President pro tempore were "so obvious, that it is wholly unnecessary to vindicate it."[7] He further stated: "Confidence between the senate and its officers, and the power to make a suitable choice, and to secure a suitable responsibility for the faithful discharge of the duties of office, are so indispensable for the public good, that the provision will command universal assent, as soon as it is mentioned."[8]

Clause 6—Impeachment Trials

ArtI.S3.C6.1 Overview of Impeachment Trials

Article I, Section 3, Clause 6:

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

Just as the Constitution vests the House with "sole"[1] authority to impeach government officials,[2] it entrusts the Senate with the "sole" power to try impeachments.[3] And just as the Constitution authorizes the House to establish its own procedures, including for impeachments, it empowers the Senate to determine its own rules for impeachment trial proceedings.[4] The Senate's impeachment rules have remained largely the same since their adoption during the trial of President Andrew Johnson.[5] However, while most impeachment trials were historically conducted on the Senate floor with the entire Senate participating, the Senate adopted Rule XI in 1935, which permits a committee to take evidence during impeachment trials.[6] This rule was first implemented in the trial of Judge Claiborne in 1986; and the contemporary practice, at least with respect to the more common impeachment of federal judges, is for the Senate to appoint a special trial committee to receive and report

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[6] Roger Foster, Commentaries on the Constitution of the United States, Historical and Juridical, with Observations upon the Ordinary Provisions of State Constitutions and a Comparison with the Constitutions of Other Countries § 85 (1895).

[7] Joseph Story, Commentaries on the Constitution of the United States § 739 (1833).

[8] *Id.*

[1] The Constitution contains a number of provisions that are relevant to the impeachment of federal officials. Article I, Section 2, Clause 5 grants the sole power of impeachment to the House of Representatives; Article I, Section 3, Clause 6 assigns the Senate sole responsibility to try impeachments; Article I, Section 3, Clause 7 provides that the sanctions for an impeached and convicted individual are limited to removal from office and potentially a bar from holding future office, but an impeachment proceeding does not preclude criminal liability; Article II, Section 2, Clause 1 provides that the President enjoys the pardon power, but it does not extend to cases of impeachment; and Article II, Section 4 defines which officials are subject to impeachment and what kinds of misconduct constitute impeachable behavior. Article III does not mention impeachment expressly, but Section 1, which establishes that federal judges shall hold their seats during good behavior, is widely understood to provide the unique nature of judicial tenure. And Article III, Section 2, Clause 3 provides that trials, "except in Cases of Impeachment, shall be by jury."

[2] *See* ArtI.S2.C5.1 Overview of Impeachment.

[3] U.S. Const. art. I, § 3, cl. 6.

[4] *Id.* § 5, cl. 2.

[5] *See* Procedure and Guidelines for Impeachment Trials in the Senate, S. Doc. No. 93-33, 99th Cong., 2d Sess. (1986); Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 33 (2000).

[6] Impeachment: Senate Impeachment Trials, U.S. Senate, https://www.senate.gov/artandhistory/history/common/briefing/Senate_Impeachment_Role.htm (last visited Jan. 24, 2018) (citing S. Res. 242, 73d Cong. (1934)).

evidence.[7] After issuance of a report, the full Senate then convenes to consider the report and, after a closed deliberative session, publicly votes on the impeachment articles. The immediate effect of conviction upon an article of impeachment is removal from office,[8] although the Senate may subsequently vote on whether the official shall be disqualified from again holding an office of public trust under the United States.[9] If future disqualification from office is pursued, a simple majority vote by the Senate is required.[10]

Because impeachment is a political process largely unchecked by the judiciary, the role of the Senate in impeachment proceedings is primarily determined by historical practice rather than judicial interpretation.[11] Examination of the Senate's practices is thus central to understanding the Constitution's provision granting that body power to conduct impeachment trials.

ArtI.S3.C6.2 Historical Background on Impeachment Trials

Article I, Section 3, Clause 6:

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

The federal impeachment process stems originally from English practice,[1] where the House of Commons could impeach individuals and the House of Lords would convict or acquit.[2] Most of the American colonies and early state constitutions adopted their own impeachment procedures before the establishment of the federal constitution, with the power to try impeachments located in various bodies.[3] At the Constitutional Convention, the proper body to try impeachment posed a difficult question.[4] A number of proposals were considered that would have assigned responsibility for trying impeachments to different bodies, including the Supreme Court, a panel of state court judges, or a combination of these bodies.[5] One objection to granting the Supreme Court authority to try impeachments was that Justices were to be appointed by the President, calling into question their ability to be independent in an

[7] *See* ArtI.S3.C6.3 Impeachment Trial Practices. This practice has not been extended to presidential impeachments. *See* ArtII.S4.4.8 President Bill Clinton and Impeachable Offenses and ArtII.S4.4.9 President Donald Trump and Impeachable Offenses.

[8] U.S. Const. art. II, § 4.

[9] *See* 3 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States § 2397 (1907), https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/pdf/GPO-HPREC-HINDS-V3.pdf; 6 Clarence Cannon, Cannon's Precedents of the House of Representatives of the United States § 512 (1936), https://www.govinfo.gov/content/pkg/GPO-HPREC-CANNONS-V6/pdf/GPO-HPREC-CANNONS-V6.pdf [hereinafter Cannon].

[10] *See* 6 Cannon, *supra* note 9, § 512. *See, e.g.*, 49 Cong. Rec. 1447–48 (1913) (vote to disqualify Judge Robert W. Archbald, thirty-nine yeas, thirty-five nays).

[11] *See* Nixon v. United States, 506 U.S. 224, 226 (1993); *see* ArtII.S4.4.1 Overview of Impeachable Offenses.

[1] For more on the historical background of the Constitution's impeachment provisions, see ArtIII.S1.10.2.2 Historical Background on Good Behavior Clause; ArtI.S2.C5.2 Historical Background on Impeachment; ArtI.S3.C6.2 Historical Background on Impeachment Trials.

[2] *See* ArtII.S4.4.2 Historical Background on Impeachable Offenses. Charles Black, Impeachment 5–14 (1974).

[3] *See* Gordon S. Wood, The Creation of the American Republic 141 (1969); *see, e.g.*, N.Y. Const. of 1777 arts. XXXII–XXXIII (providing that impeachments be tried before a court composed of state senators, judges of the New York Supreme Court, and the state chancellor).

[4] *See Nixon*, 506 U.S. at 233.

[5] *See id.* at 243–44 (White, J., joined by Blackmun, J., concurring); Peter Hoffer & N.E.H. Hull, Impeachment in America, 1635–1805 at 96–100 (1984); Black, *supra* note 2, at 10.

impeachment trial of the President or another executive official.[6] Further, a crucial legislative check in the Constitution's structure against the Judicial Branch is impeachment, as Article III judges cannot be removed by other means.[7] To permit the judiciary to have the ultimate say in one of the most significant checks on its power would subvert the purpose of that important constitutional limitation.[8] Rather than allowing a coordinate branch to play a role in the impeachment process, the Framers decided that Congress alone would determine who is subject to impeachment. This framework guards against, in the words of Alexander Hamilton, "a series of deliberate usurpations on the authority of the legislature" by the judiciary as Congress enjoys the power to remove federal judges.[9] Likewise, the Framers' choice to place both the accusatory and adjudicatory aspects of impeachment in the legislature renders impeachment "a bridle in the hands of the legislative body upon the executive" branch.[10]

The Framers' choice also imposed institutional constraints on the process.[11] Dividing the power to impeach from the authority to try and convict guards against "the danger of persecution from the prevalency of a fractious spirit in either" body.[12] Likewise, the requirement of a two-thirds majority in the Senate to convict and remove an official ensures (at least in the absence of one political faction gaining a supermajority) that impeachment and removal is not a strictly partisan affair and is limited to situations where consensus is possible.[13]

Finally, the Framers made one exception to the legislature's exclusive role in the impeachment process that promotes integrity in the proceedings. While the Presiding Officer of the Senate (typically the Vice President of the United States) usually presides at impeachment trials, the Chief Justice of the Supreme Court presides in the event that the President of the United States is tried.[14] This provision ensures that a Vice President shall not preside over proceedings that could result in his own elevation to the presidency, a particularly important concern at the time of the founding, when Presidents and Vice Presidents were not elected on the same ticket and could belong to rival parties.[15]

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[6] 2 Records of the Federal Convention of 1787, at 511 (Max Farrand ed., 1911).

[7] While Congress enjoys the power of the purse, U.S. Const. art. I, § 9, cl. 7, this authority is less pronounced relative to the Judiciary than the Executive Branch as the Constitution provides that the salary of federal judges cannot be reduced "during their continuance in office." *Id.* art. III, § 1.

[8] *See Nixon*, 506 U.S. at 235; The Federalist No. 81 (Alexander Hamilton).

[9] *See* The Federalist No. 81 (Alexander Hamilton).

[10] *See Id.* No. 65; *id.* No. 66 (noting that impeachment is an "essential check in the hands of [Congress] upon the encroachments of the executive"); *see Nixon*, 506 U.S. at 242–43 (White, J., joined by Blackmun, J., concurring) ("[T]here can be little doubt that the Framers came to the view at the Convention that . . . the impeachment power must reside in the Legislative Branch to provide a check on the largely unaccountable Judiciary.").

[11] Black, *supra* note 2, at 5–14.

[12] The Federalist No. 66 (Alexander Hamilton).

[13] *See id.*

[14] U.S. Const. art. I, § 3, cls. 6, 7. While it is clear that the Chief Justice must preside over the impeachment trial of a sitting President, the Chief Justice did not preside over the second impeachment trial of *former* President Trump. 167 Cong. Rec. S142 (daily ed. Jan. 26, 2021) (swearing in Patrick Leahy (D-VT), President pro tempore of the United States Senate, as presiding officer).

[15] *Compare id.* § 1, cl. 3, *with id.* amend. XII. *See* Wood, *supra* note 3, at 212.

ArtI.S3.C6.3 Impeachment Trial Practices

Article I, Section 3, Clause 6:

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

The Senate enjoys broad discretion in establishing procedures to be undertaken in an impeachment trial. For instance, in a lawsuit challenging the Senate's use of a trial committee to take and report evidence, the Supreme Court in *Nixon v. United States* unanimously ruled that the suit posed a nonjusticiable political question and was not subject to judicial resolution.[1] The Court explained that the term "try" in the Constitution's provisions regarding impeachment was textually committed to the Senate for interpretation and lacked sufficient precision to enable a judicially manageable standard of review.[2] In reaching this conclusion, the Court noted that the Constitution imposes three precise requirements for impeachment trials in the Senate: (1) Members must be under oath during the proceedings; (2) conviction requires a two-thirds vote; and (3) the Chief Justice must preside if the President is tried.[3] Given these three clear requirements, the Court reasoned that the Framers "did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word 'try.'"[4] Accordingly, subject to these three clear requirements of the Constitution, the Senate enjoys substantial discretion in establishing its own procedures during impeachment trials.

The Senate's discretion to establish procedures for an impeachment trial extends to how the body will receive evidence. In addition to relying on the evidentiary record prepared by the House, Senate impeachment trials have generally involved the presentation of additional evidence by witnesses appearing before either the Senate or a trial committee. The different approaches adopted in past presidential impeachment trials, however, display the scope of the Senate's discretion in this regard. In the trial of Andrew Johnson, the Senate took live testimony from more than forty witnesses.[5] In the trial of Bill Clinton the Senate chose to hear from three witnesses through videotaped depositions rather than through live questioning.[6] In contrast, the Senate chose not to obtain witness testimony in either of the two trials of Donald Trump.[7] While the Senate determines for itself how to conduct impeachment proceedings, the nature and frequency of Senate impeachments trial are largely dependent on the impeachment charges brought by the House. The House has impeached thirteen federal district judges, a judge on the Commerce Court, a Senator, a Supreme Court Justice, the

[1] 506 U.S. 224, 238 (1993).

[2] *Id.* at 229–30.

[3] *Id.* at 230.

[4] *Id.*

[5] *See* Impeachment Trial of President Andrew Johnson, 1868, U.S. Senate, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-johnson.htm (last visited Dec. 14, 2021).

[6] *See* Proceedings of the United States Senate in the Impeachment Trial of President William Jefferson Clinton, Vol. III: Depositions and Affidavits, 106th Cong., 1st Sess., S. Doc. No. 106-4 (1999). The Senate also received three affidavits. *Id.* at 2534–36.

[7] *See* Proceedings of the United States Senate in the Impeachment Trial of President Donald John Trump, Vol. II: Floor and Trial Proceedings, 116th Cong., S. Doc. No. 116-18, at 1498–99 (2020). In the second impeachment trial, the House Managers sought to obtain a Senate subpoena for testimony from Congresswoman Jaime Herrera Beutler (D-WA). The Senate approved a motion making it in order to debate such a subpoena, but the Senate instead agreed to a stipulation allowing introduction of Rep. Herrera Beutler's existing public statement. 167 Cong. Rec. S717–19 (daily ed. Feb. 13, 2021).

secretary of an executive department, and three Presidents.[8] But the Senate ultimately has only convicted and removed from office seven federal district judges and a Commerce Court judge.[9] While this pattern obviously does not mean that Presidents or other civil officers are immune from removal based on impeachment,[10] the Senate's acquittals may be deemed to have precedential value when assessing whether particular conduct constitutes a removable offense. For instance, the first subject of an impeachment by the House involved a sitting U.S. Senator for allegedly conspiring to aid Great Britain's attempt to seize Spanish-controlled territory.[11] The Senate voted to dismiss the charges,[12] and no Member of Congress has been impeached since. The House also impeached Supreme Court Justice Samuel Chase, who was widely viewed by Jeffersonian Republicans as openly partisan for, among other things, misapplying the law.[13] The Senate acquitted Justice Chase, establishing a general principle that impeachment is not an appropriate remedy for disagreement with a judge's judicial philosophy or decisions.[14]

ArtI.S3.C6.4 Oath or Affirmation Requirement in Impeachment Trials

Article I, Section 3, Clause 6:

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

The Constitution requires Senators sitting as an impeachment tribunal to take a special oath distinct from the oath of office that all Members of Congress must take.[1] This requirement underscores the unique nature of the role the Senate plays in impeachment trials, at least in comparison to its normal deliberative functions.[2] The Senate practice has been to require each Senator to swear or affirm that he will "do impartial justice according to the Constitution and laws."[3] The oath was originally adopted by the Senate before proceedings in the impeachment of Senator Blount in 1798 and has remained largely unchanged since.[4]

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[8] *See* List of Individuals Impeached by the House of Representatives, U.S. House of Representatives, http://history.house.gov/Institution/Impeachment/Impeachment-List/ (last visited Jan. 24, 2018).

[9] *See* Impeachment, Complete List of Senate Impeachment Trials, U.S. Senate, https://www.senate.gov/artandhistory/history/common/briefing/Senate_Impeachment_Role.htm#4 (last visited Jan. 24, 2018).

[10] U.S. Const. art. II, § 4.

[11] *See* ArtII.S4.4.3 Jurisprudence on Impeachable Offenses (1789–1860); David Currie, The Constitution in Congress: The Federalist Period 1789–1801, at 275–81 (1997).

[12] 8 Annals of Cong. 2318 (1799).

[13] *See* ArtII.S4.4.3 Jurisprudence on Impeachable Offenses (1789–1860).

[14] *See* Keith E. Whittington, *Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution*, 9 Stud. Am. Pol. Dev. 55 (1986); William H. Rehnquist, Grand Inquests: The Historic Impeachments 134 (1992).

[1] U.S. Const. art. I, § 3, cl. 6.

[2] *See* Charles Black, Impeachment 9–10 (1974).

[3] *See* Procedure and Guidelines for Impeachment Trials in the Senate, S. Doc. No. 93-33, 99th Cong., 2d Sess., at 61 (1986).

[4] *See* Senate Adopts First Impeachment Rules, U.S. Senate, https://www.senate.gov/artandhistory/history/minute/Senate_Adopts_First_Impeachment_Rules.htm (last visited Jan. 24, 2018).

ArtI.S3.C6.5 Impeaching the President

Article I, Section 3, Clause 6:

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

The Senate has held impeachment trials for three Presidents. The first was the trial of President Andrew Johnson,[1] who was impeached in the shadow of the Civil War and significant disputes with Congress over the policy of Reconstruction.[2] In the first major impeachment trial of a President, the Senate formed a committee to adopt procedures for use at trial. The procedures adopted during the Johnson impeachment are largely unchanged today.[3] Chief Justice Salmon Chase administered the oath to the Senate sitting as an impeachment trial and presided over the proceedings.

The primary issue at the trial was whether President Johnson's violation of the Tenure of Office Act was an impeachable offense. The statute barred the removal of federal officeholders absent Senate approval; Johnson violated it by removing Secretary of War Edwin Stanton without the Senate's consent.[4] The Johnson Administration thought the law unconstitutional,[5] and there was disagreement about the applicability of the Act to Stanton because he had been appointed by President Lincoln, rather than Johnson.[6] Counsel for Johnson at the Senate trial argued that impeachment was inappropriate for violating a statute whose meaning was unclear and that the law itself was unconstitutional.[7] The Senate voted to acquit President Johnson by one vote.[8] The failure to convict Johnson seems to have established a precedent that impeachment is not appropriate for political or policy disagreements with the President; instead, impeachment is reserved for serious abuses of the office.[9]

The impeachment trial of President Bill Clinton was the second Senate trial of a president.[10] The impeachment of President Clinton stemmed from the investigation by an independent counsel into a wide range of alleged scandals in the Clinton Administration. Independent Counsel Kenneth Starr's investigation eventually expanded into whether President Clinton committed perjury in his response to a civil suit regarding the existence of a

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[1] For a more thorough examination of the Johnson impeachment, see ArtII.S4.4.4 President Andrew Johnson and Impeachable Offenses.

[2] *See* Michael J. Gerhardt, Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson; William H. Rehnquist, 16 Const. Comment. 433, 435 (1999); Eric Foner, A Short History of Reconstruction (2015).

[3] *See* Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 33 (2000); Procedure and Guidelines for Impeachment Trials in the Senate, S. Doc. No. 93-33, 99th Cong., 2d Sess., at 61 (1986).

[4] Tenure of Office Act, ch. 154, 14 Stat. 430 (1867) (amended by Act of Apr. 5, 1869, ch. 10, 16 Stat. 6, repealed by Act of Mar. 3, 1887, ch. 353, 24 Stat. 500); *see* ArtII.S4.4.4 President Andrew Johnson and Impeachable Offenses.

[5] Such tenure protections were later invalidated as unconstitutional by the Supreme Court. *See* Myers v. United States, 272 U.S. 52 (1926).

[6] William H. Rehnquist, Grand Inquests: The Historic impeachments 228–29 (1992).

[7] *Id.* at 228–30.

[8] *Id.* at 234.

[9] Peter Hoffer & N.E.H. Hull, Impeachment in America, 1635–1805, at 101 (1984); Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 St. Louis U. L.J. 905, 921–22 (1999).

[10] For a more thorough examination of the Clinton impeachment, see ArtII.S4.4.4 President Andrew Johnson and Impeachable Offenses.

sexual relationship he had with a White House staffer and obstructed justice by encouraging others to lie about his relationship with the staffer.[11]

Starr referred a report to the House of Representatives on September 9, 1998, noting that under the Independent Counsel Act in effect at the time, his office was required to notify Congress about potentially impeachable behavior discovered during the course of the independent counsel investigation.[12] The House eventually impeached President Clinton for perjury to a grand jury and obstruction of justice.[13] In a departure from past impeachment trials of judges and Executive Branch officials, the Senate voted to require separate votes to approve each individual witness offered by the House managers.[14] Due to the infrequency of presidential impeachments, the relevance of the Senate's decisions concerning the procedures employed in the Clinton trial for future impeachments is uncertain.

The constitutional significance of the Clinton impeachment experience is still a matter of dispute. To the extent the impeachment of President Clinton stemmed from behavior arguably unconnected to the office, some might view the ultimate acquittal of President Clinton by the Senate as evidence that impeachment only applies to behavior distinctly public in nature.[15] However, the majority report of the House Judiciary Committee argued that just as perjury, for example, was an impeachable offense for a federal judge, so it was also an impeachable offense for a President because it was "just as devastating to our system of government."[16] In addition, the charge of obstruction of justice brought by the House alleged that President Clinton used the powers of his office to impede and conceal the existence of evidence in both a civil lawsuit brought against him and during the investigation of the independent counsel.[17] Complicating matters further, the acquittal might not represent any particular view of the standards for impeachable behavior, but simply either that the House managers did not prove their case, or that other considerations drove the votes of certain Senators.[18]

The third President to face a Senate impeachment trial was Donald Trump—the only President to be impeached, tried, and acquitted twice. The first impeachment trial stemmed primarily from a telephone conversation President Trump had with President Volodymyr Zelenskyy of Ukraine in which President Trump asked the Ukrainian President to announce two investigations: one involving President Trump's potential opponent in the upcoming 2020 presidential election and a second into unsubstantiated allegations that entities within Ukraine had interfered in the 2016 presidential election.[19] At the time of the phone call, the Office of Management and Budget had frozen $400 million in military aid to Ukraine at the

[11] The Starr Report, Wash. Post (1998), http://www.washingtonpost.com/wp-srv/politics/special/clinton/icreport/icreport.htm.

[12] The Starr Report, Introduction, Wash. Post (1998), http://www.washingtonpost.com/wp-srv/politics/special/clinton/icreport/5intro.htm; *see* 28 U.S.C. § 595(c) (1994). The independent counsel statute expired in 1999. 28 U.S.C. § 599.

[13] H.R. Rep. No. 105–830, at 28 (1998).

[14] 5 Cong. Rec. S50 (daily ed. Jan. 8, 1999).

[15] *See* Michael J. Gerhardt, *The Perils of Presidential Impeachment*, 67 U. Chi. L. Rev. 293, 300–01 (2000) ("[M]ost senators who voted to acquit President Clinton explained that they did not perceive his misconduct as having a sufficiently public dimension or injury to warrant his removal from office. The former decision, coupled with Clinton's acquittal, likely signals that there is a zone of a president's private life that will be treated as largely off limits in the federal impeachment process.").

[16] H. Comm. on the Judiciary, Impeachment of William Jefferson Clinton, President of the United States, 105th Cong., 2d Sess., H.R. Rep. No. 105-830, at 110–18 (1998).

[17] *Id.* at 63–64.

[18] *See generally* Gerhardt, *supra* note 3, at 175–85.

[19] H.R. Rep. No. 116-346, at 81–83 (2019).

direction of the President.[20] Revelations about the phone call, first brought to light by a whistleblower, prompted the initiation of a number of House investigations that eventually evolved into an impeachment investigation.

The House ultimately approved two articles of impeachment against the President. The first charged the President with abuse of power, alleging that he had used the powers of his office to solicit Ukraine's interference in the 2020 election and had conditioned official acts, including the release of military aid to Ukraine and a White House meeting, on President Zelenskyy agreeing to announce the investigations.[21] "President Trump," the article alleged, "engaged in this scheme or course of conduct for corrupt purposes in pursuit of personal political benefit."[22] The second article charged the President with obstruction of the House impeachment investigation by directing the "unprecedented, categorical, and indiscriminate defiance of subpoenas issued by the House of Representatives."[23]

The second Trump impeachment occurred a year later following the events on January 6, 2021, at the U.S. Capitol in which some supporters of President Trump attempted to disrupt the congressional certification of the 2020 presidential election as having been won by Joseph Biden.[24] One week after that event, the House introduced and approved a single article of impeachment charging the President with "incitement to insurrection."[25] Specifically, the article alleged that in the months running up to January 6 the President had consistently "issued false statements asserting that the Presidential election results were the product of widespread fraud and should not be accepted by the American people."[26] He then repeated those claims when addressing a crowd on January 6, and "willfully made statements that, in context, encouraged—and foreseeably resulted in—lawless action at the Capitol . . . ."[27] Notably, although the House ultimately impeached President Trump prior to the expiration of his term of office, the Senate did not commence a trial until after President Trump had left office and become a private citizen.[28]

In both impeachments, the Senate tried and acquitted President Trump on all charges.[29] Both trials, however, saw at least one member of the President's own party vote to convict, and the second trial saw a majority of Senators vote to convict,[30] though the fifty-seven votes was short of the two-thirds required for conviction under the Constitution.[31] Like most acquittals, the constitutional implications and precedential impact of the Trump trials is difficult to assess.

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[20] *Id.* at 82.

[21] H.R. Res. 755, 116th Cong. (2019).

[22] *Id.*

[23] *Id.*

[24] H.R. Rep. No. 117-2, at 4–21 (2021).

[25] H.R. Res. 24, 117th Cong. (2021).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] 166 Cong. Rec. S937 (daily ed. Feb. 5, 2020) (acquitting President Trump on Article I by a vote of 48-52); *id.* at S938 (acquitting President Trump on Article II by a vote of 47-53); 167 Cong. Rec. S733 (daily ed. Feb. 13, 2021) (acquitting former President Trump by a vote of 57-43). Although the second Trump impeachment saw a majority of Senators vote to convict the former President, the Constitution requires the "Concurrence of two thirds" of the Senate to convict an impeached official. U.S. Const. art. I, § 3 cl. 6.

[30] In the first trial, one member of the President's party voted to convict, while in the second trial seven members of the President's party voted to convict. *See* 166 Cong. Rec. S937–38 (daily ed. Feb. 5, 2020); 167 Cong. Rec. S733 (daily ed. Feb. 13, 2021).

[31] 167 Cong. Rec. S733 (daily ed. Feb. 13, 2021) (acquitting former President Trump by a vote of 57-43); U.S. Const. art. I, § 3 cl. 6.

The first impeachment trial was characterized by deep partisan divides and complicated disagreements over questions of fact, law, and presidential motive. But one clear constitutional conflict that arose during the trial involved the proper relationship between impeachment and the criminal law. Trial briefs and debate made clear that the House managers and President Trump's attorneys reached different conclusions on the question of whether "high crimes and misdemeanors" require evidence of a criminal act.[32] The House, consistent with past impeachment practice, asserted that for purposes of Article II "high Crimes and Misdemeanors" "need not be indictable criminal offenses."[33] In response, however, the President's attorneys asserted that an "impeachable offense must be a violation of established law," and that the articles "fail[ed] to allege any crime or violation of law whatsoever, let alone 'high Crimes and Misdemeanors,' as required by the Constitution."[34] The acquittal provided no clear resolution to these conflicting positions, but the debate over a link between illegal acts and impeachable acts appears to have had some impact on individual Senators. Indeed, the House's managers' failure to allege a criminal act appears, along with what has been criticized as shortcomings in the House investigation and failure of the House to prove its case, to have been among the primary reasons given by Senators who favored acquittal.[35]

The second trial displayed the legal and practical import of impeaching a former official. After briefing and debate on the question of whether the Senate had the constitutional authority to try a former President for acts that occurred during his tenure in office, the Senate explicitly determined by a vote of fifty-six to forty-four that it had jurisdiction and authority to do so.[36] Thus a majority of Senators, as they have on previous occasions, determined that former officials may be tried by the Senate and remain—as provided in Article I, Section 3—subject to disqualification from holding future office if convicted.[37] However, the majority of the forty-three Senators who voted to acquit the President did so at least partly on the basis that they disagreed with that decision and instead viewed the trial of a former President as

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[32] U.S. Const. art. II, § 4.

[33] Proceedings of the United States Senate in the Impeachment Trial of President Donald John Trump, Vol. I: Preliminary Proceedings, 116th Cong., S. Doc. No. 116-18, at 416 (2020).

[34] *Id.* at 471.

[35] *See, e.g.*, Proceedings of the United States Senate in the Impeachment Trial of President Donald John Trump, Vol. IV: Statements of Senators, 116th Cong., S. Doc. No. 116-18, at 1915 (2020) (statement of Senator James M. Inhofe) ("Each of the past impeachment cases in the House of Representatives accused Presidents Johnson, Nixon, and Clinton of committing a crime. This President didn't commit a crime."); *id.* at 1984 (statement of Senator Ted Cruz) ("Indeed, in the Articles of Impeachment they sent over here, they don't allege any crime whatsoever. They don't even allege a single Federal law that the President violated."); *id.* at 1990 (statement of Senator David Perdue) ("President Trump is the first President ever to face impeachment who was never accused of any crime in these proceedings, whatsoever. These two Articles of Impeachment simply do not qualify as reasons to impeach any President"); *id.* at 2034 (statement of Senator John Cornyn) ("But they failed to bring forward compelling and unassailable evidence of any crime—again, the Constitution talks about treason, bribery, or other high crimes and misdemeanors; clearly, a criminal standard . . . ."). Other Senators identified the non-existence of a crime as an important factor in their vote, but nevertheless made clear their belief that a crime is not constitutionally required. *See, e.g.*, *id.* at 1937 (statement of Senator Mitch McConnell) ("Now, I do not subscribe to the legal theory that impeachment requires a violation of a criminal statute, but there are powerful reasons why, for 230 years, every Presidential impeachment did in fact allege a criminal violation."); *id.* at 2016 (statement of Senator Rob Portman) ("In this case, no crime is alleged. Let me repeat. In the two Articles of Impeachment that came over to us from the House, there is no criminal law violation alleged. Although I don't think that that is always necessary—there could be circumstances where a crime isn't necessary in an impeachment . . . .").

[36] 167 Cong. Rec. S609 (daily ed. Feb. 9, 2021) (determining that "Donald John Trump is subject to the jurisdiction of a Court of Impeachment for acts committed while President of the United States, notwithstanding the expiration of his term in that office").

[37] *See* Jared P. Cole & Todd Garvey, Cong. Rsch. Serv., R46013, Impeachment and the Constitution 47–48 (2019), https://crsreports.congress.gov/product/pdf/R/R46013.

"unconstitutional."[38] As a result, it appears that while the Senate may have legal authority to try a former official, current disagreement on the matter may be widespread enough to create a practical obstacle to obtaining the supermajority necessary to convict a former official.

Clause 7—Impeachment Judgments

ArtI.S3.C7.1 Overview of Impeachment Judgments

Article I, Section 3, Clause 7:

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

The immediate effect of conviction upon an article of impeachment is removal from office,[1] although the Senate may subsequently vote on whether the official shall be disqualified from again holding an office of public trust under the United States.[2] If this latter option is pursued, a simple majority vote by the Senate is required.[3] If not, an individual who has been impeached and removed may remain eligible to serve in an office in the future, including as a Member of Congress.[4]

By design,[5] impeachment is separate and distinct from a criminal proceeding. Impeachment and conviction by Congress operates to remove an individual from office; it does not, however, preclude criminal consequences for an individual's actions.[6] Those who have been impeached and removed from office are still subject to criminal prosecutions for the same underlying factual matters, and individuals who have already been convicted of crimes may be

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[38] *See, e.g.*, Proceedings of the United States Senate in the Impeachment Trial of Donald John Trump, Vol. II: Visual Aids from the Trial and Statements of Senators, 117th Cong., S. Doc. No. 117-3, at 879 (2021) (statement of Senator Roger Marshall) (stating that "the lone Article passed out of the House as well as the subsequent trial in the Senate, was unconstitutional . . . Donald J. Trump is no longer the President of the United States and therefore can no longer be removed from office. He is a private citizen."). One survey has found that thirty-eight of the forty-three Senators who voted to acquit did so in part because of concerns that the Senate lacked jurisdiction over the former President. *See* Ryan Goodman & Josh Asabor, *In Their Own Words: The 43 Republicans' Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, Just Security (Feb. 15, 2021), https://www.justsecurity.org/74725/in-their-own-words-the-43-republicans-explanations-of-their-votes-not-to-convict-trump-in-impeachment-trial/.

[1] U.S. Const. art. II, § 4; 3 Lewis Deschler, Precedents of the United States of the House of Representatives, H.R. Doc. No. 94–661, at Ch. 14 § 3.8 (1974), https://www.govinfo.gov/content/pkg/GPO-HPREC-DESCHLERS-V3/pdf/GPO-HPREC-DESCHLERS-V3.pdf.

[2] *See* 3 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States § 2397 (1907), https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/pdf/GPO-HPREC-HINDS-V3.pdf; 6 Clarence Cannon, Cannon's Precedents of the House of Representatives of the United States § 512 (1936), https://www.govinfo.gov/content/pkg/GPO-HPREC-CANNONS-V6/pdf/GPO-HPREC-CANNONS-V6.pdf [hereinafter Cannon].

[3] *See* 6 Cannon, *supra* note 2, at § 512. *See, e.g.*, 49 Cong. Rec. 1447–48 (1913) (vote to disqualify Judge Robert W. Archbald, thirty-nine yeas, thirty-five nays).

[4] *See* Waggoner v. Hastings, 816 F. Supp. 716 (S.D. Fla. 1993).

[5] The Constitution contains a number of provisions that are relevant to the impeachment of federal officials. Article I, Section 2, Clause 5 grants the sole power of impeachment to the House of Representatives; Article I, Section 3, Clause 6 assigns the Senate sole responsibility to try impeachments; Article I, Section 3, Clause 7 provides that the sanctions for an impeached and convicted individual are limited to removal from office and potentially a bar from holding future office, but an impeachment proceeding does not preclude criminal liability; Article II, Section 2, Clause 1 provides that the President enjoys the pardon power, but it does not extend to cases of impeachment; and Article II, Section 4 defines which officials are subject to impeachment and what kinds of misconduct constitute impeachable behavior. Article III does not mention impeachment expressly, but Section 1, which establishes that federal judges shall hold their seats during good behavior, is widely understood to provide the unique nature of judicial tenure. And Article III, Section 2, Clause 3 provides that trials, "except in Cases of Impeachment, shall be by jury."

[6] U.S. Const. art. II, § 4.

impeached for the same underlying behavior later.[7] A number of federal judges, in fact, have been indicted and convicted for conduct which has formed the basis for a subsequent impeachment proceeding.[8]

The text of the Constitution does not address the sequencing of impeachment and other legal proceedings. Generally speaking, historical practice has been to impeach individuals after the conclusion of any related criminal proceedings, although this might simply reflect practical convenience as such proceedings can alert Congress of improper behavior that may warrant impeachment. Nonetheless, nothing in the Constitution demands this order of events.

The Constitution bars the President from using the pardon power to shield individuals from impeachment or removal from office.[9] A President could pardon impeached officials suspected of criminal behavior, thus protecting them from federal criminal prosecution; such a move would not, however, shield those officials from removal from office via the impeachment process.

ArtI.S3.C7.2 Doctrine on Impeachment Judgments

Article I, Section 3, Clause 7:

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

While the Constitution authorizes the Senate,[1] following an individual's conviction in an impeachment trial, to bar an individual from holding office in the future, the text of the Constitution does not clearly indicate that a vote for disqualification from future office must be taken separately from the initial vote for conviction.[2] Instead, the potential for a separate vote for disqualification has arisen through the historical practice of the Senate.[3] The Senate did not choose to disqualify an impeached individual from holding future office until the Civil War era. Federal district judge West H. Humphreys took a position as a judge in the Confederate government but did not resign his seat in the United States government.[4] The House impeached Humphreys in 1862. The Senate then voted unanimously to convict Judge Humphreys and voted separately to disqualify the Humphreys from holding office in the future.[5] Senate practice since the Humphreys case has been to require a simple majority vote

[7] *See* discussion ArtII.S4.4.10 Judicial Impeachments.

[8] *See id.*

[9] U.S. Const. art. II, § 2, cl. 1.

[1] For more on the background of the Constitution's impeachment provisions, see ArtIII.S1.10.2.2 Historical Background on Good Behavior Clause; ArtI.S3.C6.2 Historical Background on Impeachment Trials; ArtII.S4.4.2 Historical Background on Impeachable Offenses.

[2] U.S. Const. art. I, § 3, cl. 7.

[3] *See* 6 Clarence Cannon, Cannon's Precedents of the House of Representatives of the United States § 512 (1936), https://www.govinfo.gov/content/pkg/GPO-HPREC-CANNONS-V6/pdf/GPO-HPREC-CANNONS-V6.pdf. *See, e.g.*, 49 Cong. Rec. 1447–48 (1913) (vote to disqualify Judge Robert W. Archbald, thirty-nine yeas, thirty-five nays).

[4] Emily F.V. Tassel & Paul Finkelman, Impeachable Offenses: A Documentary History from 1787 to the Present 87–88, 114–16 (1999).

[5] Eleanore Bushnell, Crimes, Follies, and Misfortunes: The Federal Impeachment Trials 123 (1992); *see* U.S. Const. art. I, § 3, cl. 7 ("Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States.").

to disqualify an individual from holding future office, rather than the supermajority required by the Constitution's text for removal, but it is unclear what justifies this result beyond historical practice.[6]

The second impeachment trial of Donald Trump saw the President's attorneys argue that the dual punishments of removal and disqualification are linked. They asserted that removal and disqualification are not "separate or alternative punishment[s]" but instead that removal was a "condition precedent" to the "further penalty" of disqualification.[7] As such, the President's attorneys argued that as a textual matter, there can be no impeachment of former officials because the necessary punishment of removal is not available when the official has already left office. The House managers rejected this interpretation during the impeachment trial, arguing that the punishments are indeed separate and have been historically treated as such. Linking the two punishments "defies logic" the managers argued, for "[i]f a law sets out two possible penalties and one of them becomes unavailable, that does not mean that the offender is exempt from the penalty that remains."[8] Ultimately, the Senate's decision to exercise jurisdiction over the second Trump impeachment appears to be an implicit rejection of the President's position.[9]

The Senate's power to convict and remove individuals from office, as well as to bar them from holding office in the future, does not overlap with criminal remedies for misconduct. Indeed, the unique nature of impeachment as a political remedy distinct from criminal proceedings ensures that "the most powerful magistrates should be amenable to the law."[10] Rather than serving to police violations of strictly criminal activity, impeachment is a "method of national inquest into the conduct of public men" for "the abuse or violation of some public trust."[11] Impeachable offenses are those that "relate chiefly to injuries done immediately to the society itself."[12] Put another way, the purpose of impeachment is to protect the public interest, rather than impose a punitive measure on an individual.[13] This distinction was highlighted in the impeachment trial of federal district judge Alcee Hastings. Judge Hastings had been indicted for a criminal offense, but was acquitted.[14] In 1988, the House impeached Hastings for much of the same conduct for which he had been indicted. Judge Hastings argued that the impeachment proceedings constituted "double jeopardy" because of his previous acquittal in a criminal proceeding.[15] The Senate rejected his motion to dismiss the articles against him.[16]

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[6] U.S. Const. art. I, § 3, cl. 7.

[7] Proceedings of the United States Senate in the Impeachment Trial of Donald John Trump, Part II, 117th Cong., S. Doc. No. 117-2, at 141 (2021).

[8] Proceedings of the United States Senate in the Impeachment Trial of Donald John Trump, Part III, 117th Cong., S. Doc. No. 117-2, at 200–01 (2021).

[9] 167 Cong. Rec. S609 (daily ed. Feb. 9, 2021).

[10] James Wilson, *Lectures on Law*, *reprinted in*, 1 The Works of James Wilson 425–26 (1791).

[11] *See* The Federalist No. 65 (Alexander Hamilton).

[12] *See Id.*

[13] 8 Annals of Cong. 2251 (1798).

[14] H.R. Res. 499 (Aug. 9, 1988); H. Comm. on the Judiciary, Impeachment of Judge Alcee L. Hastings, Report of the Comm. on the Judiciary to Accompany H. Res. 499, 100th Cong., 2d Sess., H.R. Rep. No. 100–810, at 1–5 (1988).

[15] Impeachment of Judge Alcee L. Hastings, Motions of Judge Alcee L. Hastings to Dismiss Articles I--XV and XVII of the Articles of Impeachment Against Him and Supporting and Opposing Memoranda, 101st Cong., 1st Sess., S. Doc. No. 101–4, at 48–65 (1989).

[16] The Impeachment Trial of Alcee L. Hastings (1989) U.S. District Judge, Florida, U.S. Senate, https://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Hastings.htm (last visited Jan. 24, 2018).

The Senate voted to convict and remove Judge Hastings on eight articles, but it did not disqualify him from holding office in the future.[17] Judge Hastings was subsequently elected to the House of Representatives.[18]

Section 4—Congress

Clause 1—Elections Clause

ArtI.S4.C1.1 Historical Background on Elections Clause

Article I, Section 4, Clause 1:

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

The Elections Clause gives state legislatures authority over Senate and House elections but allows Congress to regulate such elections and thereby override state election laws.[1] The only exception to Congress's authority over state elections—"the Places of chusing Senators"—became a nullity when the Seventeenth Amendment superseded Article I, Section 3, Clause 1, by providing for Senators to be elected by popular votes rather than selected by state legislatures.[2] How state and federal regulation of Senate and House elections interplay has been a topic of significant interest throughout the nation's history.

During the Constitution's ratification, the proposal to allow Congress to set aside state laws for electing Senators and Representatives was controversial.[3] In his *Commentaries on the Constitution of the United States*, Justice Joseph Story summarized state concerns that were raised during the ratification process. He stated:

> Congress might prescribe the times of election so unreasonably, as to prevent the attendance of the electors; or the place at so inconvenient a distance from the body of the electors, as to prevent a due exercise of the right of choice. And congress might contrive the *manner* of holding elections, so as to exclude all but their own favourites from office. They might modify the right of election as they please; they might regulate the number of votes by the quantity of property, without involving any repugnancy to the constitution.[4]

In contrast to state concern over the ability of Congress to legislate how states would hold congressional elections, Alexander Hamilton, in the *Federalist No. 59*, reasoned that unless

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[17] 135 Cong. Rec. S13,783–87 (daily ed. Oct. 20, 1989).

[18] *See* Waggoner v. Hastings, 816 F. Supp. 716 (S.D. Fla. 1993).

[1] In 1842, Congress passed its first legislation to regulate House and Senate elections by establishing the district system for House elections. Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491. Later legislation provided that Representatives "be elected by districts composed of a compact and contiguous territory and containing as nearly as practicable an equal number of inhabitants." *See, e.g.,* Act of Aug. 8, 1911, ch. 5, 37 Stat. 13.

[2] U.S. Const. amend. XVII. Congress's authority to regulate elections did not extend to where state legislatures would choose the Senators, because, at that time, the choice of senators belonged solely to the state legislatures. *See also* Joseph Story, Commentaries on the Constitution of the United States § 826 (1833) ("The choice is to be made by the state legislature; and it would not be either necessary, or becoming in congress to prescribe the place, where it should sit.").

[3] The Federalist No. 59 (Alexander Hamilton) ("This provision has not only been declaimed against by those who condemn the Constitution in the gross, but it has been censured by those who have objected with less latitude and greater moderation; and, in one instance it has been thought exceptionable by a gentleman who has declared himself the advocate of every other part of the system.").

[4] Joseph Story, Commentaries on the Constitution of the United States § 814 (1833).

Congress had authority to regulate Senate and House elections, state legislatures might "at any moment annihilate [the U.S. Government], by neglecting to provide for the choice of persons to administer its affairs."[5] Noting that the Elections Clause gave state legislatures primary power over Senate and House elections, Hamilton took the position that Congress would likely involve itself in congressional elections only if "extraordinary circumstances might render that interposition necessary to [the U.S. Government's] safety."[6] Echoing Hamilton's expectation that only "extraordinary circumstances" would involve Congress in regulating House and Senate elections, Justice Story reasoned that, as representatives of states and their people, Members of Congress would be reluctant to impose election laws on objecting states.[7]

ArtI.S4.C1.2 States and Elections Clause

Article I, Section 4, Clause 1:

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

By its terms, Article I, Section 4, Clause 1, referred to as the Elections Clause, contemplates that state legislatures will establish the times, places, and manner of holding elections for the House of Representatives and the Senate, subject to Congress making or altering such state regulations (except as to the place of choosing Senators).[1] The Supreme Court has interpreted the Elections Clause expansively, enabling states "to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."[2] The Court has further recognized the states' ability to establish sanctions for violating election laws[3] as well as authority over recounts[4] and primaries.[5] The Elections Clause, however, does not govern voter qualifications, which under Article I, Section 2, Clause 1, and the Seventeenth Amendment must be the same as the "Qualifications requisite for Electors of the most numerous Branch of the State Legislatures."[6] Similarly, the authority of states to establish the "Times, Places and Manner of holding Elections for Senators and Representatives" does not include authority to impose additional qualification requirements to be a Member of the House of Representatives or a Senator, which are governed by the

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[5] The Federalist No. 59 (Alexander Hamilton).

[6] *Id.*

[7] *See* Joseph Story, Commentaries on the Constitution of the United States § 818 (1833) ("Who are to pass the laws for regulating elections? The congress of the United States, composed of a senate chosen by the state legislatures, and of representatives chosen by the people of the states. Can it be imagined, that these persons will combine to defraud their constituents of their rights, or to overthrow the state authorities, or the state influence?").

[1] U.S. Const. art. I, § 4, cl. 1. *See* Foster v. Love, 522 U.S. 67, 69 (1997) ("[I]t is well settled that the Elections Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections binding on the States.'" (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832–33 (1995))).

[2] Smiley v. Holm, 285 U.S. 355, 366 (1932)

[3] *Id.* at 369.

[4] Roudebush v. Hartke, 405 U.S. 15, 24, 25 (1972).

[5] United States v. Classic, 313 U.S. 299, 320 (1941).

[6] U.S. Const. art. I, § 2, cl. 1; U.S. Const. amend. XVII. *See also* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 17 (2013) ("Prescribing voting qualifications, therefore, 'forms no part of the power to be conferred upon the national government' by the Elections Clause, which is 'expressly restricted to the regulation of the *times,* the *places,* and the *manner* of elections.'" (quoting The Federalist No. 60 (Alexander Hamilton))).

Constitution's Qualification Clauses at Article I, Section 2, Clause 2 for Members of the House and at Article I, Section 3, Clause 3 for the Senate.[7]

State authority to regulate the times, places, and manner of holding congressional elections has been described by the Court as the ability "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental rights involved."[8] The Court has upheld a variety of state laws designed to ensure that elections are fair and honest and orderly.[9] But the Court distinguished state laws that go beyond "protection of the integrity and regularity of the election process," and instead operate to disadvantage a particular class of candidates[10] or negate the need for a general election.[11] The Court noted that the Elections Clause does not allow states to set term limits, which the Court viewed as "disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clause,"[12] or ballot labels identifying candidates who disregarded voters' instructions on term limits or declined to pledge support for them.[13] In its 1995 decision in *U.S. Term Limits v. Thornton*, the Court explained: "[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."[14]

The Supreme Court has held that Article I, Section 4, Clause 1, provides for Congress, not the courts, to regulate how states exercise their authority over Senate and House elections,[15] although courts may hear cases concerning claims of one-person, one-vote violations and racial

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[7] U.S. Const. art. I, § 2, cl. 2; U.S. Const. art. I, § 3, cl. 3. *See* United States Term Limits v. Thornton, 514 U.S. 779 (1995)

[8] Smiley v. Holm, 285 U.S. 355, 366 (1932).

[9] *See, e.g.*, Storer v. Brown, 415 U.S. 724 (1974) (restrictions on independent candidacies requiring early commitment prior to party primaries); Roudebush v. Hartke, 405 U.S. 15, 25 (1972) (recount for Senatorial election); Munro v. Socialist Workers Party, 479 U.S. 189 (1986) (requirement that minor party candidate demonstrate substantial support—1% of votes cast in the primary election—before being placed on ballot for general election). The Court, however, has held that courts should not modify election rules if the election is imminent and "'[n]o bright line separates permissible election-related regulation from unconstitutional infringements.'" Purcell v. Gonzalez, 549 U.S. 1, 5 (2006) (per curiam) (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 359 (1997)). In *Purcell v. Gonzalez*, the Court observed that "the imminence of the election and the inadequate time to resolve the factual disputes" required the Court to "of necessity allow the election to proceed without an injunction suspending the voter identification rules." *Purcell*, 549 U.S. at 5–6. *See also* Republican Nat'l Comm. v. Democratic Nat'l Comm., No. 19A1016, slip op. (U.S. Apr. 2020) (per curiam) (noting that "lower federal courts should ordinarily not alter the election rules on the eve of the election") (citing Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam); Frank v. Walker, 574 U.S. 929 (2014); Veasey v. Perry, 574 U.S. 951 (2014)).

[10] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 835 (1995)

[11] Foster v. Love, 522 U.S. 67, 69 (1997) (explaining that the Elections Clause "is a default provision; it invests the State with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices"); *see id.* at 74 (holding that a Louisiana statute that deemed the winner of the primary to be the winner of the general election void and preempted by federal law which set the date of the election for federal offices).

[12] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832 (1995) ("Petitioners make the related argument that Amendment 73 merely regulates the "Manner" of elections and that the amendment is therefore a permissible exercise of state power under Article I, Section 4, Clause 1 (the Elections Clause) to regulate the "Times, Places and Manner" of elections. We cannot agree.").

[13] Cook v. Gralike, 531 U.S. 510 (2001).

[14] *Thornton*, 514 U.S. at 833–34. *See also* Burdick v. Takushi, 504 U.S. 428, 433 (1992) (states have an interest in "seeking to assure that elections are operated equitably and efficiently"); Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986) ("the power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights."); Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983) (states may adopt "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.").

[15] Rucho v. Common Cause, No. 18-422, slip op. (U.S. June 2019). *See also* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1 (2013); *Ex parte* Siebold, 100 U.S. 371, 392 (1880) ("The power of Congress . . . is paramount, and may be exercised at any time, and to any extent which it deems expedient.").

gerrymandering.[16] For example, in its 2019 *Rucho v. Common Cause* decision, the Court held that partisan gerrymandering claims—claims that one political party has gerrymandered congressional districts to the disadvantage of the other party—are not justiciable by courts because "the only provision in the Constitution [Article I, Section 4, Clause 1] that specifically addresses the matter assigns it to the political branches"[17] and such claims present political questions—"outside the courts' competence and therefore beyond the courts' jurisdiction"—that are not for courts to decide.[18] Although noting that the "districting plans at issue here are highly partisan, by any measure,"[19] the *Rucho* Court observed that partisan gerrymandering claims raise particular problems for courts to adjudicate. First, the Court noted that the Framers had expected partisan interests to inform how states drew district lines.[20] Consequently, the Court reasoned that the problem is not whether partisan gerrymandering has occurred but when it has "gone too far."[21] Second, the Court observed that there is no obvious standard by which to assess whether a partisan gerrymander has gone too far.[22] The Court stated: "The initial difficulty in settling on a 'clear manageable and politically neutral' test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of 'unfairness' in any winner-take-all system."[23] The Court in *Rucho* further emphasized that it did not condone partisan gerrymanders but that Congress is constitutionally authorized to address the issue.[24] Likewise, in *Husted v. A. Philip Randolph Institute*, the Court upheld a state law providing for removing voters from voting roles based on indicators that they had moved, noting, among other things, that the state law was consistent with federal law and that the Court had "no authority to dismiss the considered judgment of Congress and the Ohio Legislature regarding the probative value of a registrant's failure to send back a return card."[25]

The Court addressed what constitutes regulation by a state "Legislature" for purposes of the Elections Clause in its 2015 decision in *Arizona State Legislature v. Arizona Independent*

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[16] Shaw v. Reno, 509 U.S. 630 (1993); *see also* Wesberry v. Sanders, 376 U.S. 1 (1964); Wright v. Rockefeller, 376 U.S. 52 (1964); Baker v. Carr, 369 U.S. 186 (1962); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Colegrove v. Green, 328 U.S. 549 (1946); Wood v. Broom, 287 U.S. 1 (1932).

[17] Rucho v. Common Cause, No. 18-422, slip op. at 29 (U.S. June 2019).

[18] *Id.* at 7. The Court observed that "[a]mong the political question cases the Court has identified are those that lack 'judicially discoverable and manageable standards for resolving [them].'" *Id.* (quoting Baker v. Carr, 369 U.S. 186 (1962)); *see also id.* ("This Court's authority to act . . . 'is grounded in and limited by the necessity of resolving according to legal principles, a plaintiff's particular claim of legal right.' The question here is whether there is an 'appropriate role for the Federal Judiciary' in remedying the problem of partisan gerrymandering—whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere." (quoting Gill v. Whitford, No. 16-1161, slip op. at 8, 13 (U.S. June 2018))).

[19] *Id.* at 2.

[20] *Id.* at 12.

[21] *Id.* at 13 (citing Vieth v. Jubelirer, 541 U.S 267, 296 (2004) (plurality opinion)). *See also* Hunt v. Cromartie, 526 U.S. 541, 555 (1999) ("Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering . . . .").

[22] *Id. see also* Vieth v. Jubelirer, 541 U.S. 267 (2004); Davis v. Bandemer, 478 U.S. 109 (1986);Gaffney v. Cummings, 412 U.S. 735 (1973)). In *Gill v. Whitford*, the Court observed that "this Court is not responsible for vindicating generalized partisan preferences. The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it." Gill v. Whitford, No. 16-1161, slip op. at 21 (U.S. June 2018).

[23] *Rucho*, slip op. at 17; *see also Vieth*, 541 U.S. at 291 ("'Fairness' does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than [fairness] seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking.").

[24] *Rucho*, slip op. at 9 ("Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering.").

[25] Husted v. A. Philip Randolph Inst., No. 16-960, slip op. at 25, 26 (U.S. June 11, 2018).

Redistricting Commission.[26] There, the Court rejected the Arizona legislature's challenge to the validity of the Arizona Independent Redistricting Commission (AIRC) and AIRC's 2012 map of congressional districts.[27] The Commission had been established by a 2000 ballot initiative, which removed redistricting authority from the legislature and vested it in the AIRC.[28] The legislature asserted that this arrangement violated the Elections Clause because the Clause contemplates regulation by a state "Legislature" and "Legislature" means the state's representative assembly.[29]

The Court disagreed and held that Arizona's use of an independent commission to establish congressional districts is permissible because the Elections Clause uses the word "Legislature" to describe "the power that makes laws," a term that is broad enough to encompass the power provided by the Arizona constitution for the people to make laws through ballot initiatives.[30] In so finding, the Court noted that the word "Legislature" has been construed in various ways depending upon the constitutional provision in which it is used, and its meaning depends upon the function that the entity denominated as the "Legislature" is called upon to exercise in a specific context.[31] Here, in the context of the Elections Clause, the Court found that the function of the "Legislature" was lawmaking and that this function could be performed by the people of Arizona via an initiative consistent with state law.[32] The Court also pointed to dictionary definitions from the time of the Framers;[33] the Framers' intent in adopting the Elections Clause;[34] the "harmony" between the initiative process and the Constitution's "conception of the people as the font of governmental power;"[35] and the practical consequences of invalidating the Arizona initiative.[36]

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[26] No. 13-1314 (2015).

[27] *Id.* at 2–3.

[28] *Id.*

[29] *Id.* at 2.

[30] *Id.* at 18. The Court also found that the use of the commission was permissible under 2 U.S.C. § 2a (c), a statutory provision that the Court construed as safeguarding to "each state full authority to employ in the creation of congressional districts its own laws and regulations." *Id.* at 19.

[31] *Id.* at 18.

[32] *Id. See also* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 568 (1916) (holding that a state's referendum system to override redistricting legislation "was contained within the legislative power," rejecting the argument that the referendum was not part of the "Legislature").

[33] *Arizona*, No. 13-1314, slip op. at 24 (noting that "dictionaries, even those in circulation during the founding era, capaciously define the word 'legislature'" to include as "[t]he power that makes laws" and "the Authority of making laws").

[34] *Id.* at 25 ("The dominant purpose of the Elections Clause . . . was to empower Congress to override state election rules, not to restrict the way States enact legislation. . . . [T]he Clause 'was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.'").

[35] *Id.* at 30 ("The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power.").

[36] *Id.* at 31, 33 (noting that it would be "perverse" to interpret the term "Legislature" to exclude the initiative, because the initiative is intended to check legislators' ability to determine the boundaries of the districts in which they run, and that a contrary ruling would invalidate a number of other state provisions regarding initiatives and referendums).

ArtI.S4.C1.3 Congress and Elections Clause

Article I, Section 4, Clause 1:

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

Known as the Elections Clause, Article I, Section 4, Clause 1 provides for Congress and state legislatures to regulate the "Times, Places and Manner of holding elections for Senators and Representatives."[1] Under the Elections Clause, each state establishes how it will hold congressional elections, subject to Congress adopting or altering the state requirements (except as to the place of choosing Senators).[2] The Elections Clause's "Times, Places and Manner" encompasses "a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."[3] States and Congress may also establish sanctions for violating election laws[4] and procedures for recounts[5] and primaries.[6] The Elections Clause however, does not permit states or Congress to set voter qualifications for congressional elections, which, under the Constitution, must be the same qualifications necessary to vote for the most numerous branch of the state legislature.[7] Likewise, the Elections Clause does not allow states or Congress to change the qualifications to be a Member of the House of Representatives or the Senate, which are stipulated at Article I, Section 2, Clause 2 for the House and Article I, Section 3, Clause 3 for the Senate.[8]

By providing Congress power to preempt state election procedures, the Framers sought to prevent states from thwarting the Federal Government's operation by using state law to manipulate or preclude elections for the House of Representatives.[9] For example, during the Constitutional Convention Gouverneur Morris of Pennsylvania expressed concern that "the States might make false returns and then make no provision for new elections,"[10] while Alexander Hamilton observed in the *Federalist Papers* that "Nothing can be more evident than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy."[11] Despite the Elections Clause providing Congress power to preempt state law governing elections,

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[1] U.S. Const. art. I, § 4, cl. 1.

[2] *Id. See* Foster v. Love, 522 U.S. 67, 69 (1997) ("[I]t is well settled that the Elections Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections binding on the States.'" (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832–33 (1995))).

[3] Smiley v. Holm, 285 U.S. 355, 366 (1932).

[4] *Id.* at 369.

[5] Roudebush v. Hartke, 405 U.S. 15, 24–25 (1972).

[6] United States v. Classic, 313 U.S. 299, 320 (1941).

[7] U.S. Const. art. I, § 2, cl. 1; U.S. Const. amend. XVII. *See* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 17 (2013) ("Prescribing voting qualifications, therefore, 'forms no part of the power to be conferred upon the national government' by the Elections Clause, which is 'expressly restricted to the regulation of the *times,* the *places,* and the *manner* of elections.'" (quoting The Federalist No. 60 (Alexander Hamilton))). See also Oregon v. Mitchell, 400 U.S. 112 (1970).

[8] U.S. Const. art. I, § 2, cl. 2; U.S. Const. art. I, § 3, cl. 3. *See* United States Term Limits v. Thornton, 514 U.S. 779 (1995)

[9] United States Term Limits v. Thornton, 514 U.S. 779, 808 (1995).

[10] 2 The Records of the Federal Convention 241 (Max Farrand ed., 1901).

[11] The Federalist No. 59 (Alexander Hamilton). *See also* Rucho v. Common Cause, No. 18–422, slip op. at 9 (U.S. June 2019) (discussing Congress's authority under the Commerce Clause).

Congress did not exercise this power until 1842 when it passed a law requiring that Representatives be elected on a district basis.[12] Congress subsequently added contiguity, compactness, and substantial equality of population to districting requirements.[13]

In the Court's 1997 decision, *Foster v. Love*, the Supreme Court affirmed a lower court decision that, under the Elections Clause, federal law preempted a Louisiana statute governing congressional elections.[14] The *Foster* Court noted that while states can prescribe regulations governing the "Times, Places and Manner" of holding elections, "Congress may at any time by Law make or alter such Regulations."[15] The Court stated:

> The [Elections] Clause is a default provision; it invests the States with responsibility for the mechanics of congressional elections but only so far as Congress declines to pre-empt state legislative choices. Thus, it is well settled that the Elections Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States. 'The regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter so far as the conflict extends, ceases to be operative.'[16]

Under its Elections Clause authority, Congress has passed laws that govern how state election systems may operate.[17] For example, in *Arizona v. Inter Tribal Council of Arizona*, the Court held that the National Voter Registration Act of 1993, which required states to use a specific federal form to register voters for federal elections, preempted an Arizona law that imposed an additional evidence-of-citizenship requirement.[18] The *Arizona* Court further noted that state authority to regulate congressional elections is less than its general police powers because the Constitution provides expressly for state law governing elections to be preempted by federal law. The Court stated: "Unlike the States' 'historic police powers,' the States' role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that 'it terminates according to federal law.'"[19]

The Court has also held that where a primary election is an integral part of choosing a Member of Congress, the right to vote in that primary election is subject to congressional protection[20] and includes the opportunity to cast a ballot and to have it counted honestly.[21] Congress may secure elections from personal violence and intimidation as well as from failures to count ballots lawfully cast[22] or the stuffing of ballot boxes with fraudulent ballots.[23] Congress may also enforce election laws by imposing sanctions[24] or punish state election

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[12] Act of June 25, 1842, ch. 47, 5 Stat. 491. In 1870, Congress passed the first comprehensive federal statute to enforce the Fifteenth Amendment's guarantee against racial discrimination in voting. The Enforcement Act of 1870, ch. 114, 16 Stat. 140.

[13] Under the 1872 Act (17 Stat. 28), Congress provided for congressional districts to contain "as nearly as practicable" equal numbers of inhabitants. In 1901 (31 Stat. 733), Congress required districts to comprise "compact territory."

[14] Foster v. Love, 522 U.S. 67 (1997).

[15] *Id.* at 69.

[16] *Id.*

[17] Rucho v. Common Clause, No. 18–422, slip op. at 30–34 (U.S. June 2019).

[18] 570 U.S. 1 (2013). Unlike the Arizona law, which required documentary evidence of citizenship, the federal form required only that an applicant wishing to vote in federal elections to swear under penalty of perjury that he or she was a citizen. *Id.* at 5.

[19] *Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347 (2001)).

[20] United States v. Classic, 313 U.S. 299, 315–321 (1941). The authority of Newberry v. United States, 256 U.S. 232 (1921), to the contrary has been vitiated. *Cf.* United States v. Wurzbach, 280 U.S. 396 (1930).

[21] United States v. Mosley, 238 U.S. 383 (1915); United States v. Saylor, 322 U.S. 385, 387 (1944).

[22] *Ex parte* Yarbrough, 110 U.S. 651 (1884); United States v. Mosley, 238 U.S. 383 (1915)

officers for violating legal duties relating to congressional elections.[25] But the Court has held that bribing voters, although within Congress's power under other clauses of the Constitution, does not implicate the Elections Clause.[26] Finally, the Court has recognized that because the Elections Clause specifically vests Congress and the states with authority over the "Time, Places and Manner" of congressional elections, the Court's authority over such matters is limited.[27]

Clause 2—Assembly

ArtI.S4.C2.1 When Congress Shall Assemble

Article I, Section 4, Clause 2:

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

Ratified in 1933, Section 2 of the Twentieth Amendment superseded Article I, Section 4, Clause 2, by changing the date when Congress shall assemble from "the first Monday in December" to "noon on the 3d day of January . . . ."[1]

In requiring Congress to assemble at least once a year, the Framers ensured that Congress would meet regularly, thereby placing such sessions "equally beyond the power of faction, and of party of power, and of corruption."[2] During the Constitutional Convention, the Framers considered both May and December as possible periods for convening. In making this decision, they weighed the difficulties of traveling in December against the inconvenience to Members engaged in agricultural pursuits in May.[3] The interest in commercial pursuits proving greater than the interest in convenience, the Framers selected the first Monday in December to assemble.

The Framers' choice of December rather than May meant that more than a year would pass from the election of Congress in November until Congress convened in December of the following year. In its 1932 *Report on Fixing the Commencement of the Terms of the President and Vice President and Members of Congress*, the Senate Committee on the Judiciary explained the need for the lengthy delay, stating: "When our Constitution was adopted there was some reason for such a long intervention of time between the election and the actual

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[23] United States v. Saylor, 322 U.S. 385 (1944)

[24] *Ex parte* Siebold, 100 U.S. 371, 392 (1880) (holding that Congress's power under the Elections Clause "is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith."); *Ex parte* Clarke, 100 U.S. 399 (1880); United States v. Gale, 109 U.S. 65 (1883); *In re* Coy, 127 U.S. 731 (1888).

[25] *Ex parte* Siebold, 100 U.S. 371, 396–97 (1880).

[26] United States v. Bathgate, 246 U.S. 220, 225–26 (1918); United States v. Gradwell, 243 U.S. 476, 485 (1917) ("[T]he policy of Congress for [a] great . . . part of our constitutional life has been . . . to leave the conduct of the election of its members to state laws, administered by state officers, and that whenever it has assumed to regulate such elections it has done so by positive and clear statutes.").

[27] *See, e.g.,* Husted v. A. Philip Randolph Inst., No. 16-960, slip op. at 25–26 (U.S. June 2018) ("We have no authority to dismiss the considered judgment of Congress and the Ohio Legislature regarding the probative value of a registrant's failure to send back a [voter verification] return card.").

[1] U.S. Const. amend. XX.

[2] Joseph Story, Commentaries on the Constitution of the United States § 827 (1833). Justice Story further opined: "[I]t was obvious, that from the nature of their duties, and the distance of their abodes, the members of congress ought not to be brought together at shorter periods, unless upon the most pressing exigencies. A provision, so universally acceptable, requires no vindication or commentary." *Id.*

[3] Max Farrand, The Framing of the Constitution 136 (1913) (noting that James Madison advocated for Congress to convene in May because it was easier to travel then, but the Framers chose December for its convenience for Members involved in agriculture.)

commencement of work by the new Congress. We had neither railroads nor telegraphic communication connecting the various States and communities of the country."[4] The Senate Committee on the Judiciary also noted that, prior to the 1913 adoption of the Seventeenth Amendment, time was required between the election and convening of Congress so that state legislatures could convene and select Senators.[5] With popular election of Senators and improved communication and transportation technologies, the lengthy delay between the election and convening of Congress was no longer necessary.[6]

Section 5—Proceedings

Clause 1—Authority

ArtI.S5.C1.1 Congressional Authority over Elections, Returns, and Qualifications

Article I, Section 5, Clause 1:

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

Each House, in judging of elections under this clause, acts as a judicial tribunal, with like power to compel attendance of witnesses. In the exercise of its discretion, it may issue a warrant for the arrest of a witness to procure his testimony, without previous subpoena, if there is good reason to believe that otherwise such witness would not be forthcoming.[1] It may punish perjury committed in testifying before a notary public upon a contested election.[2] The power to judge elections extends to an investigation of expenditures made to influence nominations at a primary election.[3] Refusal to permit a person presenting credentials in due form to take the oath of office does not oust the jurisdiction of the Senate to inquire into the legality of the election.[4] Nor does such refusal unlawfully deprive the state that elected such person of its equal suffrage in the Senate.[5]

ArtI.S5.C1.2 Quorums in Congress

Article I, Section 5, Clause 1:

> *Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller*

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[4] Fixing the Commencement of the Terms of the President and Vice President and Members of Congress, S. Rep. No. 26, 72nd Cong., 1st Sess. (1932), *as reprinted in* 75 Cong. Rec. 1372, 1372 (Jan. 6, 1932).

[5] *Id.* ("Originally, Senators were elected by the legislatures, and as a rule the legislatures of the various States did not convene until after the beginning of the new year, and it was difficult and sometimes impossible for Senators to be elected until February or March.").

[6] *Id.* ("Under present conditions the result of elections is known all over the country within a few hours after the polls close, and the Capital City is within a few days' travel of the remotest portions of the country.").

[1] Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 616 (1929).

[2] *In re* Loney, 134 U.S. 372 (1890).

[3] 6 Cannon's Precedents of the House of Representatives §§ 72–74, 180 (1936). *Cf.* Newberry v. United States, 256 U.S. 232, 258 (1921).

[4] Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 614 (1929).

[5] 279 U.S. at 615. The existence of this power in both houses of Congress does not prevent a state from conducting a recount of ballots cast in such an election any more than it prevents the initial counting by a state. Roudebush v. Hartke, 405 U.S. 15 (1972).

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

The quorum principle—that a certain number of members of a governing body be present at a given meeting for the body to exercise its powers—was well established in parliamentary practice by the time of the Constitutional Convention.[1] The debate then was not over whether to have a quorum requirement, but instead where to set it.[2] Some felt a majority requirement was too high and would result in "great delay" and "great inconvenience" if either house consistently struggled to obtain a quorum.[3] But others, including George Mason, believed that setting the quorum requirement any lower would be "dangerous to the distant parts to allow a small number of members of the two Houses to make laws," as the "Central States could always take care to be on the Spot and by meeting earlier than the distant ones . . . ."[4] The Framers, apparently recognizing that too high a quorum requirement could debilitate Congress, but that too low a requirement would risk undue influence by the states in close proximity to the capital, set the quorum requirements at a majority of Members. In the *Federalist Papers*, James Madison explained the Framers' choice of a majority as balancing the risk of either requiring too many or too few Members of Congress to establish a quorum.[5] He noted:

> It has been said that more than a majority ought to have been required for a quorum; and in particular cases, if not in all, more than a majority of a quorum for a decision. That some advantages might have resulted from such a precaution, cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures. But these considerations are outweighed by the inconveniences in the opposite scale.[6]

For many years the view prevailed in the House of Representatives that it was necessary for a majority of the members to vote on any proposition submitted to the House in order to satisfy the constitutional requirement for a quorum. It was a common practice for the opposition to break a quorum by refusing to vote. This was changed in 1890, by a ruling made by Speaker Thomas Brackett Reed of Maine and later embodied in Rule XV of the House, that Members present in the chamber but not voting would be counted in determining the presence of a quorum.[7]

After an 1890 law was adopted with a majority of Members present in the chamber, but not a majority voting, Speaker Reed's rule was challenged. The case, *United States v. Ballin*, provided the Supreme Court with an opportunity to construe not just the Constitution's quorum requirement, but also the breadth of the House's authority to determine how the presence of a quorum is determined.[8] After establishing that it had authority to consider the rule's "validity," the Court examined the quorum requirement, holding that "[a]ll that the Constitution requires is the presence of a majority, and when that majority are present the

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[1] 2 Joseph Story, Commentaries on the Constitution of the United States § 832 (1833)

[2] 2 Records of the Federal Convention of 1787, at 251–52 (Max Farrand ed., 1911).

[3] *Id.* at 251 (statement of Nathaniel Gorham of Massachusetts). *See also id.* at 251 (statement of John Mercer of Maryland).

[4] *Id.* at 251–52 (statement of George Mason). *See also id.* at 253 (statement of Oliver Ellsworth of Connecticut).

[5] The Federalist No. 58 (James Madison).

[6] *Id.*

[7] Hinds' Precedents of the House of Representatives §§ 2895–2905 (1907).

[8] 144 U.S. 1 (1892).

power of the house arises."[9] The Court then granted significant deference to the House in deciding how to determine the presence of a majority, concluding that because "[t]he Constitution has prescribed no method of making this determination," it is "within the competency of the house to prescribe any method which shall be reasonably certain to ascertain . . . the presence of a majority, and thus establishing the fact that the house is in a condition to transact business."[10] Thus, under *Ballin*, each chamber may determine a method for counting a quorum provided that method is "reasonably certain to ascertain" the "presence of a majority" such that the chamber is, constitutionally speaking, "in a condition to transact business."[11]

While *Ballin* established that the Court should generally defer to House and Senate rules on when a quorum exists, the Court's 1949 case *Christoffel v. United States*[12] suggest that such deference is not proper when the existence of a quorum is made an element of a cirminal offense.[13] In *Christoffel*, a witness who denied under oath before the House Committee on Education and Labor that he was a Communist was subsequently convicted of perjury in federal court. The Court reversed his conviction because the Committee did not have a quorum at the time the witness made the perjurious statements, and consequently, the witness's testimony had not been before a "competent tribunal," as required by the District of Columbia Code.[14] Although the Committee had a quorum when the hearing commenced, some of the Members had stepped away during the hearing so that the number of Members in attendance at the time the witness testified was below the number required to establish a quorum.[15] Under House practice, a quorum once established is presumed to continue until a Member raises "a point of no quorum and a count [reveals] the presence of less than a majority."[16] No such point of order had been raised during the hearing. Nevertheless, the Court held that in order "to convict, the jury had to be satisfied beyond a reasonable doubt that there were 'actually physically present' a majority of the committee."[17] To hold that the quorum requirement was satisfied "by a finding that there was a majority present two or three hours before the defendant offered his testimony, in the face of evidence indicating the contrary, is to rule as a matter of law that a quorum need not be present when the offense is committed."[18] "This," the Court concluded, "not only seems to us contrary to the rules and practice of the Congress, but denies petitioner a fundamental right. That right is that he be convicted of crime only on proof of all the elements of the crime charged against him."[19]

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[9] *Id.* at 6.

[10] *Id.* (emphasis added).

[11] *Id.*

[12] 338 U.S. 84 (1949).

[13] ArtI.S5.C2.1 Congressional Proceedings and the Rulemaking Clause.

[14] *Christoffel*, 338 U.S. at 87–90.

[15] *Id.* at 89–90 ("An element of the crime charged in the instant indictment is the presence of a competent tribunal . . . . [T]o charge, however, that such a requirement is satisfied by a finding that there was a majority present two or three hours before the defendant offered his testimony, in the face of evidence indicating the contrary, is to rule as a matter of law that a quorum need not be present when the offense is committed. . . . A tribunal that is not competent is no tribunal, and it is unthinkable that such a body can be the instrument of criminal conviction.").

[16] *Id.* at 88.

[17] *Id.* at 89.

[18] *Id.* at 90.

[19] *Id.*

Clause 2—Rules

ArtI.S5.C2.1 Congressional Proceedings and the Rulemaking Clause

Article I, Section 5, Clause 2:

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

The Constitution's Rulemaking Clause authorizes the House of Representatives and Senate to establish rules by which each will conduct its own business. Describing the Senate's authority under the Rulemaking Clause "to determine how and when to conduct its business" as broad, the Court noted in *National Labor Relations Board v. Canning*:

> The Constitution explicitly empowers the Senate to 'determine the Rules of its Proceedings.' And we have held that 'all matters of method are open to the determination' of the Senate, as long as there is 'a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained' and the rule does not 'ignore constitutional restraints or violate fundamental rights.'[1]

The House and Senate's authority to establish rules is ongoing. As the Supreme Court observed in *United States v. Ballin*: "The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."[2]

Under *Ballin*, the House and Senate may exercise their rulemaking authorities at their discretion provided there is (1) "a reasonable relation" between the rule's method and the desired result, and (2) the rule does not "ignore constitutional restraints or violate fundamental rights."[3] Case law on when a House or Senate rule transgresses this standard is limited. In the 1932 case *United States v. Smith*,[4] the Court held that the Senate's rules did not allow the Senate to deprive an appointee of his title to federal office after he had been confirmed and taken the oath of office. In reaching this decision, the Court construed the Senate's rules and held against the Senate, stating: "In deciding the issue, the Court must give great weight to the Senate's present construction of its own rules; but so far, at least as that construction was arrived at subsequent to the events in controversy, we are not concluded by it."[5]

In the 1949 case *Christoffel v. United States*,[6] a sharply divided Court upset a perjury conviction in federal court of a witness who had denied under oath before a House committee that he was affiliated with Communist programs. Although the committee had a quoroum when the hearing commenced, at the time the witness allegedly perjured himself, some of the Members had stepped away from the hearing with the result that the number of Members in attendance was less than the number necessary to establish a quorum. Consequently, the

[1] NLRB v. Canning, 573 U.S. 513, 564–64 (2014) (quoting United States v. Ballin, 144 U.S. 1, 5 (1892).

[2] United States v. Ballin, 144 U.S. 1, 5 (1892). In *McGrain v. Daugherty*, the Court observed that the Senate is "a continuing body." McGrain v. Daugherty, 273 U.S. 135, 181–82 (1927). Hence its rules remain in force from Congress to Congress except as they are changed from time to time, whereas those of the House are readopted at the outset of each new Congress. *Id. See also* Marshall Field & Co. v. Clark, 143 U.S. 649, 672 (1892).

[3] *Ballin*, 144 U.S. at 5.

[4] 286 U.S. 6 (1932).

[5] *Id.* at 6.

[6] 338 U.S. 84 (1949).

Court reversed the lower court decision on the grounds that the witness's testimony had not been before a "competent tribunal" under the District of Columbia Code.[7] Writing for the Court, Justice Frank Murphy stated:

> An element of the crime charged in the instant indictment is the presence of a competent tribunal, and the trial court properly so instructed the jury. . . . [T]o charge, however, that such a requirement is satisfied by a finding that there was a majority present two or three hours before the defendant offered his testimony, in the face of evidence indicating the contrary, is to rule as a matter of law that a quorum need not be present when the offense is committed. . . . A tribunal that is not competent is no tribunal, and it is unthinkable that such a body can be the instrument of criminal conviction.[8]

In a dissent joined by three other Justices, Justice Robert H. Jackson argued that the Court's ruling had invalidated the House's rules and practices when it should have deferred to them and upheld the lower court decision. He stated: "The House has adopted the rule and practice that a quorum once established is presumed to continue unless and until a point of no quorum is raised. By this decision, the Court, in effect, invalidates that rule despite the limitations consistently imposed upon courts where such an issue is tendered."[9] By questioning the legitimacy of the House's rule and practice that "a quorum once established is presumed to continue" unless challenged, the Court, Justice Jackson suggested, risked undermining other actions taken by the House consistent with its rules.[10] Justice Jackson noted: "Since the constitutional provision governing the House itself also requires a quorum before that body can do business, this raises the question whether the decision now announced will also apply to itself. If it does, it could have the effect of invalidating any action taken or legislation passed without a record vote, which represents a large proportion of the business done by both House and Senate."[11]

ArtI.S5.C2.2 Punishments and Expulsions from Congress

ArtI.S5.C2.2.1 Overview of Expulsion Clause

Article I, Section 5, Clause 2:

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

Article I, Section 5, Clause 2, expressly grants each house of Congress the power to discipline its own Members for misconduct, including through expulsion. Expulsion is the process[1] by which a house of Congress may remove one of its Members, after the Member has

[7] *Id.* at 87–90.

[8] *Id.* at 89–90.

[9] 338 U.S. at 95. In her concurrence denying certiorari in *Schock v. United States,* No. 18-406, slip op. at 1 (U.S. Feb. 19, 2019), Justice Sonia Sotomayor noted that the Court has not resolved whether the separation of powers doctrine is violated by a federal court interpreting "internal rules adopted by the House of Representatives to govern its own Members." She stated: "Although this question does not arise frequently—presumably because criminal charges against Members of Congress are rare—the sensitive separation-of-powers questions that such prosecutions raise ought to be handled uniformly." *Id.*

[10] *Id.*

[11] *Id.* at 93.

[1] Expulsions generally begin with an investigation by the body's ethics committee, which may follow the introduction of a resolution proposing expulsion. *See* William Brown, House Practice: A Guide to the Rules, Precedents, and Procedures of the House, ch. 25, § 21 (2011). The ethics committees have jurisdiction to investigate the conduct of

been duly elected and seated.[2] Expulsion, which is expressly provided for in the Expulsion Clause, is often confused with exclusion, which is an implied power of Congress that stems from the Qualifications Clauses for the House and Senate.[3] Exclusion occurs when a body of Congress refuses to seat a Member-elect.[4] Unlike the two-thirds majority requirement of the expulsion power, a body of Congress may exclude a Member-elect with a simple majority.[5]

While exclusion and expulsion both bar an individual from holding a seat in Congress, the two actions exist for different purposes and occur at different times. For example, in *Powell v. McCormack*, the Court explored the constitutionality of Representative Adam Clayton Powell's exclusion from the House of Representatives.[6] The impetus for the case was an investigation of expenditures authorized by Powell during the 89th Congress, which concluded that, as chairman of a House committee, the Member had engaged in improper activities, including deceiving House authorities with regard to travel expenses and directing illegal payments to his wife.[7] The House took no formal action with regard to those findings during that Congress but refused to administer the oath of office to Powell at the start of the 90th Congress the following year.[8] Subsequently, a Select Committee, which was appointed at the outset of the 90th Congress to determine Powell's eligibility to be seated as a Member, recommended that Powell be sworn into office as a Member and subsequently disciplined.[9] However, the House rejected that recommendation and instead adopted a resolution that would exclude Powell, which it approved by a vote of 307 to 116.[10]

Powell sued to be reinstated, and on appeal the Supreme Court held that Powell's exclusion was unconstitutional, explaining that "exclusion and expulsion are not fungible proceedings."[11] While the Court recognized that the Constitution grants broad authority to

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Members who may be deemed to reflect upon the body of Congress in which they serve. *See* Senate Select Comm. on Ethics, 115th Cong., 1st Sess., Rules of Procedure 24 (Comm. Print 2015), https://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=551b39fc-30ed-4b14-b0d3-1706608a6fcb.

[2] Expulsion, as a form of legislative discipline, exists separate from any individual criminal or civil liability of Members for particular actions. *See* United States v. Traficant, 368 F.3d 646, 649–652 (6th Cir. 2004) ("Because it would thwart the constitutional separation of powers if Congress could shield its members from criminal prosecution by the Executive Branch, we cannot read the Double Jeopardy Clause to include Congress's disciplining its own members." (emphasis omitted)), *cert. denied*, 543 U.S. 1055 (2005); United States v. Rose, 28 F.3d 181, 189–90 (D.C. Cir. 1994) (holding that separation of powers doctrine does not preclude a Member of Congress from being subject to investigation by both legislative and executive authorities). *See also* Punishment by the House of Representatives No Bar to an Indictment to the President of the United States, 2 Op. Att'y Gen. 655, 655–56 (1834). That is, Members of Congress are subject to both legislative discipline by their respective body as well as potential criminal or civil prosecution of any misconduct that constitutes a violation of federal, state, or local law.

[3] U.S. Const. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); *id.* art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.").

[4] Powell v. McCormack, 395 U.S. 486, 492–32 (1969).

[5] *Id.*

[6] *Id.* at 506. Prior to the Court's decision in *Powell*, there are some examples in which Members-elect were expelled, although commentators have observed that such classification may have been used because "no one [had] raised the point that he had not been sworn in." 3 Lewis Deschler, Deschler's Precedents of the United States House of Representatives ch. 12, § 13 (1979) (hereinafter Deschler's Precedents) (citing 2 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States § 1262 (1907) (hereinafter Hinds' Precedents) and 1 Hinds' Precedents § 476).

[7] *Powell*, 395 U.S. at 489–90.

[8] *Id.* at 490.

[9] *Id.* at 492.

[10] *Id.* at 492–93.

[11] *Id.* at 512.

each of the houses of Congress regarding expulsion and other discipline,[12] it explained that Congress's authority regarding *exclusion* was limited to the enumerated qualifications requirements.[13] Because of the distinct nature of each action, the Court emphasized that the vote to exclude Powell, despite exceeding a two-thirds majority, could not substitute for his expulsion.[14]

ArtI.S5.C2.2.2 Historical Background on Expulsion Clause

Article I, Section 5, Clause 2:

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

The Expulsion Clause states that "[e]ach House may [. . .] punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[1] Thus, the Constitution requires that expulsion of a Member of Congress may only be enforced "with the Concurrence of two-thirds."[2] While the Expulsion Clause does not specify the measure of the two-thirds majority, the standard is generally understood to be assessed relative to the number of Members of that body who are present and voting.[3] The two-thirds majority requirement mirrors the standard by which Congress may likewise remove officials in the Executive and Judicial Branches of government through the impeachment process.[4]

Like other constitutional provisions relating to the powers and privileges of the Congress,[5] the origins of the Expulsion Clause lay with the practices of the British Parliament.[6] The English House of Commons historically exercised an inherent authority to expel members by a simple majority vote.[7] That power was viewed as one to be wielded at the body's "absolute discretion" with few recognized limitations, and as a result, it was historically used more liberally in England than it has been in the United States.[8] Moreover, the House of Commons expulsion power was used in a relatively ad hoc manner with, for example, no established standards governing the type of conduct warranting expulsion.[9] As a result, hundreds of members were expelled from Parliament before the turn of the nineteenth century on grounds

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[12] *See* United States v. Brewster, 408 U.S. 501, 519 (1972).

[13] *Powell*, 395 U.S. at 522 ("[T]he Constitution leaves the House without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.").

[14] *Id.* at 510.

[1] U.S. Const. art. I, § 5, cl. 2.

[2] *Id.*

[3] 14 Lewis Deschler, Deschler's Precedents of the United States House of Representatives ch. 30, § 5.2; William Brown, House Practice: A Guide to the Rules, Precedents, and Procedures of the House, ch. 58, § 28 (2011).

[4] *See* Gerald T. McLaughlin, *Congressional Self-Discipline: The Power to Expel, To Exclude and To Punish*, 41 Fordham L. Rev. 43, 48 fn. 37 (1972) (citing Special Committee on Congressional Ethics, Association of the Bar of the City of New York, Congress and the Public Trust 204 (1970)).

[5] *See, e.g.,* U.S. Const. art. I, § 5, cl. 2 (authorizing each house to "determine the Rules of its Proceedings . . . "); *Id.* (authorizing each house to "punish its Members"); *Id.* art. I, § 6, cl.1 (providing that "for any speech or Debate" Members "shall not be questioned in any other Place").

[6] For a discussion of the exercise of the expulsion power by the House of Commons, see Dorian Bowman & Judith Farris Bowman, *Article 1, Section 5: Congress's Power to Expel-An Exercise in Self-Restraint*, 29 Syracuse L. Rev. 1071, 1073–83 (1978).

[7] *See* 1 Joseph Story, Commentaries on the Constitution of the United States § 837 (1833) (hereinafter Story); Benjamin Cassady, *"You've Got Your Crook, I've Got Mine": Why the Disqualification Clause Doesn't (Always) Disqualify*, 32 Quinnipiac L. Rev. 209, 243 (2014).

[8] Bowman & Bowman, *supra* note 6, at 1083.

[9] *Id.*

ranging from publishing slanderous writings to treason.[10] Early parliamentary expulsions were motivated not only by a desire to preserve the integrity of the legislative process, but also to expel unpopular or dissenting legislators for political or religious reasons.[11]

One contemporary English expulsion case that influenced the members of the Constitutional Convention was that of John Wilkes.[12] Wilkes was a Member of Parliament who in 1763 criticized the King's peace treaty with France.[13] Wilkes was arrested, expelled from the House of Commons, and fled into exile. He later returned to England and was reelected to Parliament in 1768, only to be convicted of seditious libel and again expelled from the House.[14] Wilkes was repeatedly reelected, but each time Parliament excluded him, prevented him from taking his seat, and ultimately declared him ineligible for reelection.[15] Wilkes was finally permitted to serve following his election in 1774, after which the House of Commons expunged his expulsions and exclusions, acknowledging that it had acted in a manner "subversive of the rights of the whole body of electors of this kingdom."[16]

English precedents and traditions concerning expulsion were incorporated into the proceedings of the colonial legislatures, where legislators were expelled for an equally wide array of reasons.[17] But the Wilkes case had a "significant impact in the American colonies," and after the Revolution, "few expulsions occurred in the new state legislatures."[18] The House of Commons's use of the expulsion power in the Wilkes case likely led to two constitutional restrictions on each house's authority to judge its membership and discipline its members: constitutionally fixed qualifications for service in the House and Senate and a two-thirds supermajority requirement to expel a Member.[19]

Early draft versions of the Expulsion Clause from the Convention's Committee of Detail[20] distinguished the power to expel from the power to punish members for "disorderly behavior"[21] and may have contributed to the lack of significant debate on the Expulsion Clause at the Constitutional Convention.[22] In early drafts, the "disorderly behavior" language appears to have been entirely separate from, and therefore inapplicable to, the power to expel.[23] It was not until late in the Convention's consideration of the provision that the body approved the two-thirds requirement for expulsion. James Madison recommended the addition, noting that "the right of expulsion was too important to be exercised by a bare majority . . . . "[24] No

[10] *Id.* at 1074.

[11] *Id.* at 1073–78.

[12] Cassady, *supra* note 7, at 222–49.

[13] *See* Powell v. McCormack, 395 U.S. 486, 527 (1969).

[14] *Id.*

[15] *Id.* at 528.

[16] *Id.* (citing 22 Parl. Hist. Eng. 1411 (1782)).

[17] Bowman & Bowman, *supra* note 6, at 1083–85.

[18] *See Powell*, 395 U.S. at 531 (characterizing Wilkes' struggles as a "*cause celebre*" for the colonists); Bowman & Bowman, *supra* note 6, at 1086.

[19] U.S. Const. art. I, § 5, cl. 1; *Id.* at art. I, § 5, cl. 2; Cassady, *supra* note 7, at 242–43.

[20] The Committee of Detail was appointed to draft the Constitution based on previously adopted resolutions.

[21] *See* Bowman & Bowman, *supra* note 6, at 1087–90.

[22] Josh Chafetz, Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions 207 (2007).

[23] A draft presented to that committee distinguished between the power to punish and the power to expel: "Each House shall have authority . . . to punish its own Members for disorderly Behavior. Each House may expel a Member, but not a second time for the same Offence." 2 Records of the Federal Convention of 1787 156 (Max Farrand ed., 1911).

[24] *Id.* at 254 (remarks of James Madison). Madison's view won out over that of Gouverneur Morris, who was concerned that by imposing a supermajority requirement "a few men from factious motives may keep in a member who ought to be expelled." *Id.*

mention was made at the Convention in regards to the type of misconduct that would warrant expulsion.[25] Accordingly, it appears that the Founders viewed the chief barrier to the expulsion power's abuse as the procedural requirement of the approval of a supermajority of a house of Congress, as opposed to any substantive requirement that defines what sort of conduct warrants expulsion.[26]

ArtI.S5.C2.2.3 Judicial Interpretations of Expulsion Clause

Article I, Section 5, Clause 2:

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

The Supreme Court has not decided a case directly bearing on the expulsion of a Member of Congress, although judicial discussions of the expulsion power have developed in dicta.[1] The Court has stated, for example, that Congress's expulsion power "extends to all cases where the offence is such as in the judgment of the Senate is inconsistent with the trust and duty of a member."[2] The Court highlighted that a Member's conduct could be subject to legislative discipline even if "[i]t was not a statutable offence nor was it committed in his official character, nor was it committed during the session of Congress, nor at the seat of government."[3] The Court has also emphasized that the House and Senate may exercise the expulsion power exclusively, such that any prosecution by the Executive of related offenses by the Member does not interfere with Congress's power to expel.[4] These relatively few statements suggest the Court has a broad view of the expulsion power.

The lack of judicial precedent directly addressing the Expulsion Clause may be due to the political question doctrine, a principle stemming from the Constitution's separation of powers.[5] Under the doctrine, courts have declined to decide cases involving "political questions," which are controversies where there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it."[6] In this vein, courts have been cognizant that the expulsion power,

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[25] *See* Bowman & Bowman, *supra* note 6, at 1072.

[26] *See* 1 Joseph Story, Commentaries on the Constitution of the United States § 835 (1833) (noting that the expulsion power "might be exerted for mere purposes of faction or party, to remove a patriot, or to aid a corrupt measure; and it has therefore been wisely guarded by the restriction, that there shall be a concurrence of two thirds of the members, to justify an expulsion"). The Expulsion Clause does not, for example, contain explicit substantive limiting language similar to that found in the Constitution's impeachment and removal provisions, which restrict the exercise of that authority to only that conduct which amounts to "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. II, § 4.

[1] *See In re* Chapman, 166 U.S. 661, 669–671 (1897) (discussing expulsion authority of Congress in the context of a petitioner convicted of criminal contempt for refusing to answer questions during a congressional investigation); Powell v. McCormack, 395 U.S. 486, 506–11 (1969) (discussing the distinction between the exclusion of Members-elect based on qualifications for office and the expulsion of seated Members based on misconduct).

[2] *In re Chapman*, 166 U.S. at 669–70 (citations omitted). One scholar has examined the relationship between the removal authority conferred by the Constitution for purposes of impeachment to the removal authority conferred by the Expulsion Clause, discussing arguments for and against holding the separate branches of government accountable to similar standards of conduct. *See* Gerald T. McLaughlin, *Congressional Self-Discipline: The Power to Expel, To Exclude and To Punish*, 41 Fordham L. Rev. 43, 50 (1972).

[3] *In re Chapman*, 166 U.S. at 670.

[4] Burton v. United States, 202 U.S. 344, 368–70 (1906).

[5] *See* Baker v. Carr, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

[6] *Id.* at 217.*See generally* CRS Report R43834, *The Political Question Doctrine: Justiciability and the Separation of Powers*, by Jared P. Cole.

as a form of legislative discipline, exists separately from civil or criminal liability and empowers the respective houses of Congress to maintain the integrity and dignity of the legislature and its proceedings.[7]

The Supreme Court has reflected this reasoning in some of its cases touching on the Expulsion Clause. For example, in 1897, the Court discussed the Expulsion Power in a case of a petitioner convicted of criminal contempt for refusing to answer questions during a congressional investigation of potential misconduct of Members of Congress.[8] Acknowledging that the houses of Congress had broad power to discipline Members and discretion in exercising that power, the Court declined to "encroach upon the province of that body."[9] In a criminal case against a Senator involving congressional privileges, the Court recognized that Congress has "almost unbridled discretion" over the standards for expulsion.[10] The Court observed that Members who are subject to legislative discipline are "judged by no specifically articulated standards," but by a body "from whose decision there is no established right of review."[11] The Court also discussed justiciability in *Powell v. McCormack* after determining that the House's attempt to bar a Member's service constituted an exclusion rather than expulsion.[12] In *Powell*, the Court generally recognized that the *exclusion* at issue was justiciable because "the Constitution leaves the House without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."[13] In a concurring opinion, however, Justice William O. Douglas noted that, "if this were an expulsion case I would think that no justiciable controversy would be presented."[14]

Members of Congress who were expelled do not appear to have challenged the expulsion decision itself in court. Some Members who have faced disciplinary proceedings under the Expulsion Clause have attempted to challenge the disciplinary measures through judicial review, but lower courts have consistently declined to consider the claims, citing separation of powers concerns.[15] For example, in *United States v. Traficant*, a Member of the House of Representatives was convicted by a jury of criminal charges related to his service in Congress and then found by the House Ethics Committee to have violated the House's internal rules of conduct, resulting in his eventual expulsion.[16] The U.S. Court of Appeals for the Sixth Circuit rejected the Member's claim that he could not be punished through both a criminal trial and

[7] *See In re Chapman*, 166 U.S. at 668 (noting that the power of houses of Congress to discipline their Members through expulsion or other means constitutes an exercise of their "inherent power of self-protection" that may be used to prevent Members' behavior from "destroy[ing] public confidence in the body").

[8] *Id.* at 664.

[9] *Id.* at 670.

[10] United States v. Brewster, 408 U.S. 501, 519 (1972).

[11] *Id.*

[12] *Powell*, 395 U.S. at 516.

[13] *Id.* at 522.

[14] *Id.* at 553 (Douglas, J., concurring) (noting the difference in justiciability of a case of exclusion of a Member-elect compared to a case of expulsion of a Member for misconduct).

[15] *See* United States v. Traficant, 368 F.3d 646, 652 (6th Cir. 2004); Rangel v. Boehner, 20 F. Supp. 3d 148, 167–68 (D.D.C. 2013), aff'd on other grounds by 785 F.3d 19 (2015) (noting that the district court dismissed the complaint on numerous jurisdictional grounds and recognizing that it needed only to affirm one of those grounds, relying upon the Speech and Debate Clause as "the simplest ground" upon which to affirm).

[16] *Traficant*, 368 F.3d at 648–49.

legislative discipline because of the Fifth Amendment's Double Jeopardy prohibition,[17] concluding that both branches have distinct authority to punish behavior of Members that can be exercised independent of the other.[18]

ArtI.S5.C2.2.4 Misconduct That Occurred in Office

Article I, Section 5, Clause 2:

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

Expulsion cases have been rare.[1] As of 2017, a total twenty Members of Congress have been expelled from their respective bodies—five in the House[2] and fifteen in the Senate.[3] While the grounds for expulsions may illustrate potential bases upon which the House or Senate may decide to expel a Member, they are not necessarily the exclusive grounds for expulsion as this is left to the discretion of the respective bodies of Congress.[4] Accordingly, expulsion is "'in its very nature discretionary, that is, it is impossible to specify beforehand all the causes for which a member ought to be expelled; and, therefore, in the exercise of this power, in each particular case, a legislative body should be governed by the strictest justice.'"[5] Expulsion does not appear to apply automatically to any particular conduct.[6]

Disloyalty to the United States appears to be the predominant basis upon which both the House and Senate have exercised their power to expel Members. Eighteen of the twenty expulsions in congressional history were based on the Members' disloyalty to the United States.[7] The earliest expulsion case in 1797 involved a Senator who "concocted a scheme for Indians and frontiersmen to attack Spanish Florida and Louisiana, in order to transfer those territories to Great Britain" for his own financial gain.[8] The Senate special committee that was appointed to investigate the matter recommended expulsion, describing the Senator's conduct as "entirely inconsistent with his public trust," and the full Senate subsequently voted to expel the Member by a vote of 25-1.[9]

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[17] *Id.* at 649 (The Member argued that "he was twice placed in jeopardy: first, when the House of Representatives initiated hearings that included the possibility of his imprisonment [. . .] and second, after Congress had already expelled him, when the district court ordered his imprisonment." (citation omitted)).

[18] *Id.* at 650–52 (noting Supreme Court precedent recognizing that the Expulsion Clause grants Congress exclusive authority to discipline its members) (citing Burton v. United States 202 U.S. 344, 369 (1906)).

[1] *See In re* Chapman, 166 U.S. 661, 670 (1897).

[2] U.S. House of Representatives, Historical Summary of Conduct Cases in the House of Representatives 1798–2004 (2004), https://ethics.house.gov/sites/ethics.house.gov/files/Historical_Chart_Final_Version%20in%20Word_0.pdf.

[3] Senate Historical Office, Expulsion and Censure https://www.cop.senate.gov/artandhistory/history/common/briefing/Expulsion_Censure.htm (last accessed Dec. 26, 2017).

[4] *See* 3 Lewis Deschler, Deschler's Precedents of the United States House of Representatives ch. 12, § 13 (hereinafter Deschler's Precedents).

[5] *Id.* (quoting Luther Cushing, Elements of the Law and Practice of Legislative Assemblies in the United States of America, § 625 (1866)).

[6] Legislative discipline for Members who have been convicted of a crime requires the House or Senate to affirmatively act in response to that Member's behavior. *See* 3 Deschler's Precedents, *supra* note 4, ch. 12, § 13 (noting that Congress normally will wait "to consider expulsion until the judicial processes have been exhausted"). *See also* Burton v. United States, 202 U.S. 344, 369–370 (1906).

[7] U.S. House of Representatives, Historical Summary of Conduct Cases in the House of Representatives 1798–2004 (2004), https://ethics.house.gov/sites/ethics.house.gov/files/Historical_Chart_Final_Version%20in%20Word_0.pdf; Senate Historical Office, Expulsion and Censure, https://www.cop.senate.gov/artandhistory/history/common/briefing/Expulsion_Censure.htm (last accessed Dec. 26, 2017).

[8] United States Senate: Election, Expulsion, and Censure Cases 1793–1990, S. Doc. No. 103-33, at 13 (1995).

[9] *Id.* at 13–14.

The majority of expulsion cases based on disloyalty to the United States—seventeen of the eighteen—arose in the context of the secession of the Confederate states at the beginning of the Civil War.[10] In early 1861, the Senate considered the status of Members representing states that were contemplating secession, ultimately expelling ten Members in a single vote after the war had begun.[11] In those cases, the Members represented Southern states that had seceded from the Union, and the Members had not formally resigned from the Senate. The expulsion resolution cited the Members' failure to appear in the Senate and alleged that the Members "are engaged in said conspiracy for the destruction of the Union and Government, or, with full knowledge of such conspiracy, have failed to advise the Government of its progress or aid in its suppression."[12] Other examples of Civil War expulsions involved Members who had supported secessionists despite representing states that had not seceded.[13]

After the Civil War expulsions, neither the House nor Senate expelled a Member for more than a century. In 1980, a Member was expelled following a criminal conviction on charges relating to receiving a payment in return for promising to use official influence on legislation in the so-called ABSCAM[14] investigation.[15] In 2002, the House expelled a Member who had been convicted of various criminal charges relating to his official actions in Congress, including bribery, illegal gratuities, obstruction of justice, defrauding the government, filing false tax returns, and racketeering.[16]

In some cases, Members' behavior has drawn public calls for expulsion or preliminary proceedings by the respective house toward potential expulsion, but the Member ultimately resigned prior to a formal decision to expel.[17] Members have resigned facing formal expulsion inquiries or even recommendations for expulsion for conduct during their time in office.[18] In the Senate, one such example occurred in 1995 when the Select Committee on Ethics recommended expelling a Member following its investigation of allegations of sexual misconduct, misuse of official staff, and attempts to interfere with the Committee's inquiry.[19] In the House, for example, the Committee on Standards of Official Conduct recommended expelling a Member for conduct violations related to activities that also resulted in the Member's criminal conviction for accepting illegal gratuities, illegal trafficking, and obstruction of justice.[20]

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[10] *See generally* Senate Historical Office, The Civil War Senate Reacts to Secession, https://www.cop.senate.gov/artandhistory/history/common/expulsion_cases/CivilWar_Expulsion.htm (last accessed Dec. 26, 2017).

[11] S. Doc. No. 103-33, at 95–98. Prior to the beginning of the Civil War in April 1861, the Senate considered expelling a number of Members representing Southern states, but instead only declared those seats to be vacant. *See id*. at 89–90.

[12] *Id.*

[13] *See, e.g.*, *Id.* at 102–107.

[14] *See* History: Famous Cases & Criminals, https://www.fbi.gov/history/famous-cases/abscam (last visited Dec. 13, 2017).

[15] *See* H.R. Rep. No. 96-1387, at 1–5 (1980); H.R. 794, 96th Cong. (1980).

[16] *See* H.R. Rep. No. 107-594, at 1–2 (2002); H.R. 495, 107th Cong. (2002); *see also* United States v. Traficant, 368 F.3d 646, 648 (6th Cir. 2004).

[17] The House Rules note an example in which the Speaker of the House advised a Member who was facing disciplinary proceedings that he should resign, but also note that "this is not usual." H.R. Doc. No. 114-192, at 28 (2017). The House did not identify which case it was relying upon in this example.

[18] *See, e.g.*, S. Rep. No. 104–137 (1995); H.R. Rep. No. 100-506 (1988); H.R. Rep. No. 97-110 (1981).

[19] S. Rep. No. 104-137, at 1–2 (1995).

[20] H.R. Rep. No. 100-506, at 1–2 (1988).

ArtI.S5.C2.2.5 Misconduct Occurring Prior to Election or Reelection

Article I, Section 5, Clause 2:

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

Whether the House and Senate may expel a Member for conduct that solely occurred prior to an intervening election appears unresolved. House and Senate practice (drawn primarily from committee reports relating to expulsion resolutions that were either not approved or not acted upon by the full body) concerning expulsions for prior misconduct are relatively inconsistent and do not appear to establish a clear and constant interpretation of whether prior conduct (i.e., conduct occurring before an intervening election)[1] may form the basis for an expulsion.[2] While the reasoning underlying the House and Senate approach to expulsions for prior misconduct does not appear to be uniform, and thus may have limited value in understanding the constitutional power,[3] some evidence suggests that both the House and the Senate have, on occasion, "distrusted their power" to expel for such conduct.[4] Manifestations of

[1] Both bodies have, at times, distinguished between (1) conduct occurring during a Member's previous term of office and (2) conduct (either private or public) that occurred prior to the Member's first election to Congress. *See e.g.,* S. Rep. No. 77-1010, at 6 (1942); H.R. Rep. No. 42-81, at 13 (1872). However, to the extent that the justification for nor expelling a Member for conduct that occurred prior to his last election rests on a reluctance to overturn the decision of the voters, this report treats the two groups of prior conduct similarly.

[2] *See* Memorandum to Hon. Louis Stokes, Chairman, Committee on Standards of Official Conduct *in* H.R. Rep. No. 97-110, at 156 (1981); 2 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States § 1283–89 (1907) (discussing precedents dealing with the question of expulsion for conduct "committed before election.").

[3] *See* United States v. Nixon, 418 U.S. 683, 703 (1974); Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 11 (D.D.C. 2013) (interpreting Nixon as holding that "each branch of government is empowered to interpret the Constitution in the first instance when defining and performing its own constitutional duties, and that one branch's interpretation of its own powers is due deference from the others."). *See also* The Pocket Veto Case, 279 U.S. 655, 689 (1929); 1 Joseph Story, Commentaries on the Constitution of the United States § 838 (1833) (noting that questions regarding what conduct may be punished and what punishment may be applied "do not appear to have been settled by any authoritative adjudication of either house of [C]ongress"); Timothy Zick, *The Consent of the Governed: Recall of United States Senators*, 103 Dick. L. Rev. 567, 596 (1999) ("There continues to be much confusion concerning the proper boundaries of the power to expel."). *But see* NLRB v. Canning, 573 U.S. 513, 525 (2014) (noting that "this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute").

[4] *See* Rules of the House of Representatives, H.R. Doc. No. 96-398, at 27 (1981). The House Manual no longer contains this statement. *See* Rules of the House of Representatives, H.R. Doc. No. 114-192, at 28–9 (2017). *See also* H.R. Rep. No. 56–85, at 4 (1900) ("Both Houses have many times refused to expel where the guilt of the Member was apparent; where the refusal to expel was put upon the ground that the House or Senate, as the case might be, had no right to expel for an act unrelated to the Member as such, or because it was committed prior to his election.") Yet, it appears that neither the House or the Senate has previously expelled a Member for conduct that solely occurred prior to the Member's election to Congress. It can, however, be difficult to identify the specific date that misconduct giving rise to an expulsion occurred. For example, there is some ambiguity with regard to the timing of the conduct giving rise to the expulsion of Senator William Blount. However, a subsequent Senate report determined the offending conduct to have occurred after his first election, and also noted that "we have not been able to find a single case of expulsion where the crime or gross impropriety occurred outside of the time of membership." S. Rep. No. 77-1010, at 6 (1942). Similarly, the report recommending the expulsion of Senator Waldo Johnson, which was ultimately approved by the Senate, made reference to that fact that "[p]revious to his election to the Senate Mr. Johnson was known in Missouri, as entertaining secession proclivities," but it does not appear that that statement represented the sole grounds for the expulsion. S. Rep. No. 37-5 (1862). In the case of Senator Robert Packwood, a Senate Committee recommended expulsion on grounds that included prior misconduct, but the Senator resigned before the full Senate took action on those recommendations. *See* S. Rep. No. 104-137, at 9–11 (1995). Similarly, in the House, Raymond Lederer resigned after a committee recommended his expulsion for conduct that occurred prior to his last election. H.R. Rep. No. 97-110, at 17 (1981).

this "distrust" through more restrictive interpretations of the expulsion power appear to be driven more by considerations of policy than of constitutional authority.[5]

Reticience by the House or Senate to expel a Member for conduct that occurred prior to election may be justified by reluctance to supplant the judgment of the duly elected Member's constituency with that of a supermajority of the body. That justification is strongest when the Member's constituency is fully aware of the prior misconduct, but nevertheless elects the Member to represent them.[6] In short, the body must balance its interest in "assur[ing] the integrity of its legislative performance and its institutional acceptability to the people at large as a serious and responsible instrument of government,"[7] with respect for the voting public's electoral decisions and deference to the popular will and choice of the people.[8] This view is consistent with James Madison's statements in the *Federalist Papers* that "frequent elections" would be the chief means of ensuring "virtuous" legislators[9] and Justice Joseph Story's view that, although the expulsion power was both necessary and critical to the integrity of each house, exercise of the power was "at the same time so subversive of the rights of the people," as to require that it be used sparingly and to be "wisely guarded" by the required approval of a two-thirds majority.[10]

Congress's attempt to balance House and Senate integrity with deference to the people's will does not appear to be based on a clear constitutional prescription. As a 1914 House Judiciary Report noted:

> In the judgment of your committee, the power of the House to expel or punish by censure a Member for misconduct occurring before his election or in a preceding or former Congress is sustained by the practice of the House, sanctioned by reason and sound policy and in extreme cases is absolutely essential to enable the House to exclude from its deliberations and councils notoriously corrupt men, who have unexpectedly and suddenly dishonored themselves and betrayed the public by acts and conduct rendering them unworthy of the high position of honor and trust reposed in them . . . .
>
> But in considering this question and in arriving at the conclusions we have reached, we would not have you unmindful of the fact that we have been dealing with the question merely as one of *power*, and it should not be confused with the question of *policy* also involved. As a matter of sound policy, this extraordinary prerogative of the House, in

[5] *See, e.g.,* H.R. Rep. No. 63-570, at 4–5 (1914) (noting the distinction between questions of "power" and questions of "policy" and concluding that "[a]s a matter of sound policy, this extraordinary prerogative of the House, in our judgment, should be exercised only in extreme cases . . . ."); H.R. Rep No. 96-351, at 4–5 (1981) (noting that "power is not to be confused with policy or discretion"); S. Rep. No. 104-137, at 7–8 (1995) (noting that "[t]here have been indications that the Senate, in an expulsion case, might not exercise its disciplinary discretion with regard to conduct in which an individual had engaged before the time he or she had been a member.").

[6] *See* Memorandum to Hon. Louis Stokes, Chairman, Committee on Standards of Official Conduct *in* H.R. Rep. No. 97-110, at 156–57 (1981) (noting that with regard to expulsion for prior conduct "the issue ultimately is one of Congressional policy, and not Constitutional power"). "Indeed, the House precedents against punishment for prior misconduct have sometimes been characterized as constituting a doctrine of 'forgiveness,' resting on the assumption that the electorate, knowing full well of the Member's misconduct, has consciously chosen to forgive those acts and return him to the House." *Id.* at 157.

[7] Powell v. McCormack, 395 F.2d 577, 607 (D.C. Cir. 1968) (McGowan, J., concurring).

[8] *See* 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 257 (statement of Alexander Hamilton) ("After all, sir, we must submit to this idea, that the true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed.").

[9] The Federalist No. 57 (James Madison).

[10] 1 Joseph Story, Commentaries on the Constitution of the United States § 837 (1833).

> our judgment, should be exercised only in extreme cases and always with great caution and after due circumspection, and should be invoked with greatest caution where the acts of misconduct complained of had become public previous to and were generally known at the time of the Member's election.[11]

To exercise the power of expulsion in a case in which the misconduct was generally known at the time of the Member's election, the report further noted, the House "might abuse its high prerogative, and in our opinion might *exceed the just limitations of its constitutional authority* by seeking to substitute its standards and ideals for the standards and ideals of the constituency of the Member who had deliberately chosen him to be their Representative."[12]

ArtI.S5.C2.2.6 House of Representatives Treatment of Prior Misconduct

Article I, Section 5, Clause 2:

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

Whether the Expulsion Clause extends to misconduct that occurred prior to a Member's election (or reelection) has been explored more thoroughly in the House than in the Senate.[1] As early as 1884, Speaker John G. Carlisle responded to a proposed House investigation of alleged misconduct that occurred prior to a Member's election by stating that "this House has no right to punish a Member for any offense alleged to have been committed previous to the time when he was elected as a member of the House. That has been so frequently decided in the House that it is no longer a matter of dispute."[2] Nevertheless, disagreement exists on whether a Member can be expelled for prior misconduct.[3]

In 1872, two House committees investigating Members Oakes Ames and James Brooks for their role in the Credit Mobilier scandal reached different conclusions.[4] The alleged misconduct had occurred "four or five years" prior to being brought to the attention of the House and before the Members had been elected to Congress.[5] A special committee found that the House had authority to expel a Member for conduct occurring in a prior Congress, and before an intervening election, and recommended that the House exercise that power with respect to Ames and Brooks.[6] The report concluded that the Constitution placed "no qualification [on] the [expulsion] power" and assigned no restriction as to when an offense that

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[11] H.R. Rep. No. 63-570, at 4–5 (1914) (emphasis added).

[12] *Id.* at 5 (emphasis added).

[1] In addition to the examples discussed below, *Hinds* lists a number of precedents relating to the House's power to expel a Member for prior conduct. 2 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States § 1283–89 (1907). For example, in 1799, the House declined to expel Matthew Lyon for an offense which had been committed while he was a Member of the House but before his last election. *Id.* § 1284. In 1858, the House laid on the table a committee report concluding that it was "inexpedient" for the House to take action against O.B. Matteson for known misconduct prior to an election. *Id.* § 1285. In 1876, the House declined to take action against Members William S. King and John G. Schumaker for violations of law committed in a preceding Congress. *Id.* § 1283.

[2] H.R. Rep. No. 69–30, at 1–2 (1925).

[3] The House and Senate power to discipline their members generally includes the authority to censure, reprimand, fine, or expel. *See* Josh Chafetz, Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions 2010 (2007).

[4] *Compare* H.R. Rep. No. 42–77 (1872), *with* H.R. Rep. No. 42–81 (1872). The Credit Mobilier scandal involved the sale of shares of stock to Members at below market rates. *See* Chafetz, *supra* note 3, at 221.

[5] H.R. Rep. No. 63–570, at 3 (1914).

[6] H.R. Rep. No. 42–77, at XIX (1872).

warranted expulsion had to occur.[7] The committee interpreted the expulsion power to have no apparent limit, reasoning that although inappropriate, "[i]f two-thirds of the House shall see fit to expel a man . . . without any reason at all . . . they have the power, and there is no remedy except by appeal to the people."[8] The committee also addressed whether the expulsion power authorized the House to override the will of a Member's constituency, who, with full knowledge of the questionable conduct, chose to elect him as their representative:

> The committee have no occasion in this report to discuss the question as to the power or duty of the House in a case where a constituency, with a full knowledge of the objectionable character of a man, have selected him to be to their representative. It is hardly a case to be supposed that any constituency, with a full knowledge that a man had been guilty of an offense involving moral turpitude, would elect him. The majority of the committee are not prepared to concede such a man could be forced upon the House, and would not consider the expulsion of such a man any violation of the rights of the electors, for while the electors have rights that should be respected, the House as a body has rights also that should be protected and preserved.[9]

The House Judiciary Committee reached a different conclusion with respect to Ames and Oakes, however, adopting a much narrower view of the expulsion power.[10] According to the Committee, so long as a Member "does nothing which is disorderly or renders him unfit to be in the House while a member thereof . . . the House has no right or legal constitutional jurisdiction or power to expel the member."[11] In support of this conclusion, the Committee also addressed the right of the Member's constituency, noting: "This is a Government of the people, which assumes that they are the best judges of the social, intellectual, and moral qualifications of their Representatives whom they are to choose, not anybody else to choose for them . . . ."[12] Ultimately, the House chose to censure, rather than expel, Ames and Brooks.[13] However, in adopting the censure resolution, the House specifically *refused* to agree to a preamble that asserted that "grave doubts exist as to the rightful exercise by this House of its power to expel a Member for offenses committed by such Member long before his election thereto and not connected with such election."[14]

Other House examples, however, suggest that the House has viewed itself, at times, as lacking the power to expel a Member for misconduct occurring prior to the individual's last election.[15] The House Rules Manual, for example, reflects different interpretations: while previously providing that "both Houses have distrusted their power to punish in such cases," it no longer makes such a statement.[16] Similarly, a House select committee investigating the possible expulsion of John W. Langley stated in 1925 that "with practical uniformity the

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[7] *Id.* at XIV.

[8] *Id.* at XVII.

[9] *Id.* at XVI–XVII.

[10] H.R. Rep. No. 42-81, at 7–13 (1873).

[11] *Id.* at 13.

[12] *Id.* at 8.

[13] H.R. Rep. No. 63-570, at 4–5 (1914).

[14] *Id.* at 4 ("The House ignored the recommendations of the Judiciary Committee and punished two of its Members by censure and declined to express doubt as to its power and jurisdiction by refusing to adopt the preamble.").

[15] *See, e.g.,* H.R. Rep. No. 56-85, at 4 (1900) ("Both houses have many times refused to expel where . . . [the misconduct] was committed prior to his election."); H.R. Rep. No. 94–1477, at 2 (1976) (recommending that a Member not be expelled because a prior conviction did "not relate to his official conduct while a Member of Congress.").

[16] *Compare* Rules of the House of Representatives, H.R. Doc. No. 96-398, at 27 (1981), *with* Rules of the House of Representatives, H.R. Doc. No. 114-192, at 28–9 (2017).

precedents in such cases are to the effect that the House will not expel a Member for reprehensible action prior to his election as a Member . . . . "[17] A 1972 House report similarly noted that "[p]recedents, without known exception, hold that the House will not act in any way against a Member for any actions of which his electorate had full knowledge at the time of his election. The committee feels that these precedents are proper and should in no way be altered."[18]

The Supreme Court relied upon these and other House precedents in *Powell v. McCormack*.[19] Although urged by the House to view Powell's exclusion as an expulsion, the Court would not assume that the House would have voted to exclude Powell given that Members had "expressed a belief that such strictures [on expelling a Member for prior conduct] apply to its own power."[20] The Court specifically stated, however, it was not ruling on the House's authority to expel for past misconduct.[21]

Two additional examples provide additional insight into the ambiguity of the House's various positions on the reach of the expulsion power. In 1979, a House committee recommended censure of Charles C. Diggs, Jr., when he was reelected to the House after being convicted of a criminal kickback scheme involving his congressional employees.[22] In discussing the House's authority to punish a Member for known conduct that occurred prior to an election, the Committee noted that "the House has jurisdiction under Article I, Section 5 to inquire into the misconduct of a Member occurring prior to his last election, and under appropriate circumstances, to impose *at least* those disciplinary sanctions that *fall short of expulsion*."[23] Although perhaps questioning whether expulsion can reach prior misconduct, the committee did not conclude that it lacked the power to expel in such a case, instead deeming it "unwise" to "express an opinion on the Constitutional issue of whether the House has the power to expel" for prior misconduct.[24] The report added that "the House cannot overlook entirely the reelection of Rep. Diggs following his conviction and due respect for that decision by his constituents is a proper element in the consideration of this case."[25]

In 1981, a House committee recommended expulsion of Raymond F. Lederer for misconduct occurring while he was a Member, but prior to his reelection to Congress.[26] A grand jury indicted Lederer in connection with the ABSCAM inquiry before his reelection, but he was not convicted until after the voters of his district had returned him to Congress.[27] As a result of this timing, the Special Counsel to the House Committee on Standards of Official Conduct concluded that "the voters did not have full knowledge of the offenses he committed at the time they reelected him, and there appears to be no constitutional impediment to the Congressional expulsion power under such circumstances."[28]

[17] H.R. Rep. No. 69-30, at 1–2 (1925).
[18] H.R. Rep. No. 92-1039, at 4 (1972).
[19] *Powell*, 395 U.S. at 508–10.
[20] *Id.* at 510.
[21] *Id.* at 507, n. 27.
[22] H.R. Rep. No. 96–351, at 3–5 (1979).
[23] *Id.* at 3.
[24] *Id.* at 5.
[25] *Id.*
[26] H.R. Rep. No. 97–110, at 16 (1981).
[27] *Id.* at 157.
[28] *Id.* at 145. Lederer resigned before the House took action on the expulsion recommendation.

ArtI.S5.C2.2.7 Senate Treatment of Prior Misconduct

Article I, Section 5, Clause 2:

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

The Senate's use of expulsion for prior misconduct[1] suggests that the Senate does not have a clearly established view on whether a Member may be expelled for conduct that occurred prior to the Member's election to the Senate.[2] In 1807, John Quincy Adams provided an early, broad conception of the Senate's expulsion power, writing in a committee report that "[b]y the letter of the Constitution the power of expelling a Member is given to each of the two Houses of congress, without any limitation other than that which requires a concurrence of two-thirds."[3] The two-thirds requirement was, in the opinion of the committee, "a wise and sufficient guard against the possible abuse of this legislative discretion."[4] Yet, the report also suggested that whether the public was aware of the misconduct was significant in asserting that expulsion was the appropriate remedy when misconduct was "suddenly and unexpectedly revealed to the world."[5]

Other Senate precedents suggest that when misconduct occurred is a factor in determining whether expulsion is appropriate. For example, as Senator-elect Arthur R. Gould prepared to take the oath of office after being elected in 1926, allegations were made that he engaged in bribery in connection with a Canadian railroad contract that occurred in 1911.[6] A Senate committee investigated and recommended that the Senate disregard all charges.[7] In the committee report, a question was raised as to whether, under the circumstances, the Senate had the authority to expel.[8] Although the committee expressed no opinion on the "important constitutional questions touching the power of the Senate," the report nevertheless stated that "expulsion of a Member of the Senate for an offense alleged to have been committed prior to his election must depend upon the peculiar facts and circumstances of the particular case."[9] The full Senate later adopted the committee's recommendation to disregard all charges.

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[1] This lack of precedent may be due to the fact that Senators face elections less frequently (thereby reducing the possibility of misconduct occurring prior to an intervening election) and, prior to adoption of the Seventeenth Amendment, were not directly elected by the people. U.S. Const. amend. XVII. *But see* 41 Cong. Rec. 936 (Jan. 11, 1907) (statement of Sen. Hopkins) (asserting that the William N. Roach case "settled forever the question that the Senate will not undertake to revise the judgment of a State in determining the character of a man whom the State shall select as a United States Senator. The Senate will content itself with what occurs while such Senator is a member of this body.").

[2] One commentator has described the Senate's power in this area as existing in a "twilight zone of the Senate's jurisdiction." George H. Haynes, The Senate of the United States: Its History and Practice 1892 (2d ed. 1960). For a Senate floor debate on the topic, see Cong. Globe, 37th Cong., 2d Sess. 968 (1862). In addition to the examples discussed below, *Hinds* lists two precedents relating to the Senate's power to expel a Member for prior conduct. 2 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States §§ 1288–89 (1907) (hereinafter Hinds' Precedents). In 1796, the Senate declined to pursue action against Humphrey Marshall for alleged criminal conduct that occurred prior to his election. 2 Hinds' Precedents § 1288. In 1893, the Senate "discussed" its power to take action against William N. Roach who was "charged with a crime alleged to have been committed before his election," but ultimately concluded to take no action. 2 Hinds' Precedents § 1289.

[3] *See* 2 Hinds' Precedents § 1264.

[4] *Id.*

[5] *Id.*

[6] United States Senate: Election, Expulsion, and Censure Cases 1793–1990, S. Doc. No. 103-33, at 334–35 (1995).

[7] S. Rep. No. 69-1715, at 12 (1927).

[8] *Id.*

[9] *Id.*

ArtI.S5.C2.2.7
Senate Treatment of Prior Misconduct

A Senate committee took a highly restrictive view of the Senate's expulsion power in the exclusion case of Senator William Langer.[10] Shortly after his election to the Senate in 1941, the Senate received allegations of the Senator's participation in a wide variety of misconduct, including a bribery and kickback scheme during his time as a state official.[11] A Senate committee investigated the matter and in its report recommended that Langer be excluded on the grounds that he lacked the required "moral fitness" to be a Senator.[12] The report also discussed the absence of any authority to expel Langer from the Senate. "This committee finds," the report concluded, "that expulsion cannot occur unless the offender is a member, at the time when the injury to the Senate insides."[13] The Committee did qualify that blanket conclusion, however, by reserving the Senate's right to expel a Member for *unknown* prior misconduct, ultimately concluding that the Constitution "does not contemplate expulsion for any crime or violation of rules, or Infraction of law, except such as occurred either during membership or was first disclosed during membership to the impairment of the honor of the Senate."[14]

The recommended expulsion of Senator Robert Packwood in 1995 supports the conclusion that the Senate has authority to expel a Member for conduct prior to election, at least when the conduct was not previously known and occurred during the Member's previous term in office. In that case, the Senate Ethics Committee voted unanimously to recommend that the Senate expel Senator Packwood for various allegations, including acts of sexual misconduct stretching back to 1969.[15] Much of the Senator's conduct, however, was not uncovered until after his 1992 reelection.[16]

The Committee report began by articulating a broad expulsion power, acknowledging that the Supreme Court had "implied an unqualified authority of each House of Congress to discipline a Member for misconduct, regardless of the specific timing of the offense."[17] The report also made a distinction between the power of censure and the power to expel, similar to that which was made by the House in the 1979 case of Charles C. Diggs, Jr., noting that "[h]istorically, neither House of congress has abdicated its ability to punish a Member in the form of censure" for prior misconduct.[18] With regard to expulsion, the report noted only that "[t]here have been indications that the Senate, in an expulsion case, might not exercise its disciplinary discretion with regard to conduct in which an individual had engaged before the time he or she had been a member."[19] For this proposition, the Senate report cited a single past expulsion case in which the Senate did not act on a specific charge "since it was to have been taken previously to the election" of the Senator.[20]

House and Senate examples appear to support the conclusion that both bodies have been "less than consistent" in their views on the expulsion power's application to conduct occurring

[10] S. Rep. No. 77-1010, at 9–13 (1942).

[11] United States Senate: Election, Expulsion, and Censure Cases 1793–1990, S. Doc. No. 103-33, at 368–70 (1995).

[12] *Id.* at 369.

[13] S. Rep. No. 77-1010, at 6 (1942).

[14] *Id.* at 13, n.4. (emphasis added). Senate votes to both exclude and expel Langer each failed. S. Doc. No. 103-33, at 370 (1995).

[15] S. Rep. No. 104-137, at 7–8 (1995).

[16] *Id.* at 1–2.

[17] *Id.* at 39–40.

[18] *Id.* at 40.

[19] *Id.*

[20] *Id.* at n. 65.

prior to a Member's last election.[21] However, in either house, the key factors for consideration include whether the Member's constituency had knowledge of the misconduct and whether the misconduct, though taking place before an intervening election, nonetheless occurred during one of the Member's previous terms in office.[22] However, exercising restraint in expelling a Member generally does not appear to be due to a constitutional restriction; rather, it is a policy choice based on respect for the democratic system.[23]

Clause 3—Records

ArtI.S5.C3.1 Requirement that Congress Keep a Journal

Article I, Section 5, Clause 3:

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

Justice Joseph Story explained that the object of the requirement in Article I, Section 5, Clause 3, that the House of Representatives and Senate each keep of "a Journal of its Proceedings" is "to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents."[1] In his *Commentaries on the Constitution of the United States*, Justice Story noted that the Journal requirement prevents secrecy and the "intrigue and cabal" that secrecy facilitates.[2] Justice Story also noted that the Journal requirement aids civic understanding and confidence in the government.[3] Finally, he noted that public interest in and knowledge of Congress's proceedings serves as a bellwether of the Republic's health. He stated:

> So long as known and open responsibility is valuable as a check, or an incentive among the representatives of a free people, so long a journal of their proceedings, and their votes, published in the face of the world, will continue to enjoy public favour, and be demanded by public opinion. When the people become indifferent to the acts of their representatives, they will have ceased to take much interest in the preservation of their liberties. When the journals shall excite no public interest, it will not be a matter of surprise, if the constitution itself is silently forgotten, or deliberately violated.[4]

When the Journal of either House is put in evidence for the purpose of determining whether the yeas and nays were ordered, and what the vote was on any particular question, the Journal must be presumed to show the truth, and a statement therein that a quorum was

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[21] *See* Memorandum to Hon. Louis Stokes, Chairman, Committee on Standards of Official Conduct *in* H.R. Rep. No. 97-110, at 156 (1981).

[22] *See, e.g.,* H.R. Rep. No. 42-81, at 7–13 (1872); S. Rep. No. 77-1010, at 6–13 (1942).

[23] *Id.*

[1] 2 Joseph Story, Commentaries on the Constitution of the United States § 838 (1833). *See also* Field v. Clark, 143 U.S. 649, 670 (1892).

[2] 2 Joseph Story, Commentaries on the Constitution of the United States § 839 (1833) ("Intrigue and combination are more commonly found connected with secret sessions than with public debates, with the workings of the ballot box, than with the manliness of viva voce voting.").

[3] *Id.* § 838 ("The public mind is enlightened by an attentive examination of the public measures; patriotism, and integrity, and wisdom obtain their due reward; and votes are ascertained, not by vague conjecture, but by positive facts.").

[4] *Id.* § 839.

present, though not disclosed by the yeas and nays, is final.[5] But when an enrolled bill, which has been signed by the Speaker of the House and by the President of the Senate, in open session receives the approval of the President and is deposited in the Department of State, its authentication as a bill that has passed Congress is complete and unimpeachable, and it is not competent to show from the Journals of either House that an act so authenticated, approved, and deposited, in fact omitted one section actually passed by both Houses of Congress.[6]

Clause 4—Sessions

ArtI.S5.C4.1 Adjournment of Congress

Article I, Section 5, Clause 4:

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

In Article I, Section 4, Clause 2, the Framers stipulated when Congress would assemble and begin conducting its official business.[1] In Article I, Section 5, Clause 4, the Framers gave the two chambers of Congress—the House of Representatives and the Senate—authority to adjourn.[2] The House and Senate can use this power independent of each other subject to the requirement that if one Chamber wants to adjourn for more than three days, it requires the other's consent.[3] If the two houses cannot agree to adjourn, the Constitution gives the President power to adjourn them.[4] Article II, Section 3, provides in part "in Case of

[5] United States v. Ballin, 144 U.S. 1, 4 (1892). *See also* NLRB v. Canning, 573 U.S. 513, 551–52 (2014) ("[W]hen the Journal of the Senate indicates that a quorum was present, under a valid Senate rule, at the time the Senate passed a bill, we will not consider an argument that a quorum was not, in fact, present. The Constitution requires the Senate to keep its Journal . . . and 'if reference may be had to' it, 'it must be assumed to speak the truth.'") (quoting *Ballin*, 144 U.S. at 4).

[6] Field v. Clark, 143 U.S. 649 (1892); Flint v. Stone Tracy Co., 220 U.S. 107, 143 (1911). *See* the dispute in the Court with regard to the application of *Field* in an origination clause dispute. United States v. Munoz-Flores, 495 U.S. 385, 391 n.4 (1990), and *id.* at 408 (Scalia, J., concurring). A parallel rule holds in the case of a duly authenticated official notice to the Secretary of State that a state legislature has ratified a proposed amendment to the Constitution. Leser v. Garnett, 258 U.S. 130, 137 (1922); *see also* Coleman v. Miller, 307 U.S. 433 (1939).

[1] U.S. Const. art. I, § 4, cl. 2 ("The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day."). Article I, Section 4, Clause 2 was superseded by ratification of the Twentieth Amendment in 1933. U.S. Const. amend. XX ("The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.").

[2] U.S. Const. art. I, § 5, cl. 4. For additional information on adjournments, see Richard S. Beth & Valerie Heitshusen, Cong. Rsch. Serv., R42977, Sessions, Adjournments, and Recesses of Congress (2016), https://crsreports.congress.gov/product/pdf/R/R42977. Beth and Heitshusen state: "In either a daily or an annual context, generally speaking, a *session* is a period when a chamber is formally assembled as a body and can, in principle, engage in business. *A session* begins when a chamber *convenes*, or assembles, and ends when it *adjourns*. In the period between convening and adjournment, the chamber is said to be 'in session.' Once a chamber adjourns, it may be said to 'stand adjourned,' and until it reconvenes, it may be said to be 'out of session,' or 'in adjournment.' The period from a chamber's adjournment until its next convening is also often called an adjournment. The term *recess*, by contrast, is generally used to refer to a temporary suspension of a session, or a break within a session. For a break within the daily session, this term is a formal designation; for a break within an annual session, the term is only colloquial, but is in general use. In either context, a recess begins when the chamber recesses, or 'goes into recess.' For most purposes, it can be said that a recess, like an adjournment, ends when the chamber reconvenes. During the period between recessing and reconvening, the chamber is said to be 'in recess' or to 'stand in recess.' When a chamber reconvenes from a recess, the suspended session resumes." *Id.*

[3] U.S. Const. art. I, § 5, cl. 4.

[4] U.S. Const. art. II, § 3. See Joseph Story, Commentaries on the Constitution of the United States § 1557 (1833) ("The power to adjourn congress in cases of disagreement is equally indispensable; since it is the only peaceable way of

Disagreement between [the House of Representatives and the Senate], with Respect to the Time of Adjournment, [the President] may adjourn them, to such Time as he shall think proper."[5]

In his *Commentaries on the Constitution of the United States*, Justice Joseph Story reasoned that by empowering Congress to determine when to adjourn, the Framers prevented the President from using the royal governor tactic of squelching dissent by adjourning colonial legislatures.[6] Consequently, Article I, Section 5, Clause 4 checked the President's power over Congress.[7] Likewise, by requiring the two chambers of Congress to agree to any adjournment longer than three days, Clause 4 prevented either house from frustrating the legislative process by adjourning. In addition, by authorizing the President to resolve disagreements between the two chambers on when they would adjourn, the Framers created an incentive for the chambers to cooperate.

Section 6—Rights and Disabilities

Clause 1—Pay, Privileges, and Immunities

ArtI.S6.C1.1 Compensation of Members of Congress

Article I, Section 6, Clause 1:

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

The Compensation Clause of Article I, Section 6, Clause 1 provides for the national government to compensate Members of Congress for their services in amounts set by congressional legislation. With the ratification of the Twenty-Seventh Amendment on May 7, 1992,[1] congressional legislation "varying"—decreasing or increasing—the level of Members' compensation may not take effect until an intervening election has occurred.

The Framers' decision that Members of Congress should be paid from the Treasury of the United States reflected their view that Members of Congress worked for the nation as a whole and should be compensated accordingly. In his *Commentaries on the Constitution of the United States*, Justice Joseph Story reasoned, "If it be proper to allow a compensation for services to the members of congress, there seems the utmost propriety in its being paid out of the public

terminating a controversy, which can lead to nothing but distraction in the public councils."). For discussion on the President's ability to conduct business when the Senate is in recess, see ArtII.S2.C3.1 Overview of Recess Appointments Clause.

[5] U.S. Const. art. II, § 3.

[6] Joseph Story, Commentaries on the Constitution of the United States § 842 (1833).

[7] *Id.* at § 841. Justice Story further noted that "[v]ery different is the situation of parliament under the British constitution; for the king may, at any time, put an end to a session by a prorogation of parliament, or terminate the existence of parliament by a dissolution, and a call of a new parliament." *Id.*

[1] U.S. Const. amend. XXVII ("No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."). *See* Twenty-Seventh Amendment discussion at Amdt27.1 Overview of Twenty-Seventh Amendment, Congressional Compensation. On September 25, 1789, James Madison proposed text that would become the Twenty-Seventh Amendment to Congress as one of twelve amendments, ten of which the states quickly ratified and comprise the Bill of Rights. The states would ultimately ratify the Twenty-Seventh Amendment on May 7, 1992. *See* 2 Mark Grossman, Constitutional Amendments 1029, 1031 (2012).

treasury of the United States. The labor is for the benefit of the nation, and it should properly be remunerated by the nation."[2] Conversely, if states or constituents compensated their specific Members of Congress, the Members might be more loyal to those interests than to the good of the nation as a whole. Justice Story observed: "[I]f the compensation were to be allowed by the states, or by the constituents of the members, if left to their discretion, it might keep the latter in a state of slavish dependence, and might introduce great inequalities in the allowance."[3] Concern that state frugality in compensating Members of Congress would reduce the pool of candidates to serve in Congress also drove the Framers' decision to have the Federal Government compensate Members of Congress. As George Mason of Virginia commented during the Constitutional Convention: "[T]he parsimony of the States might reduce the provision so low that . . . the question would be not who were most fit to be chosen, but who were most willing to serve."[4]

From the Founding to 1967, Congress passed legislation setting its rates of pay. In 1967, Congress passed a law that created a quadrennial commission to propose to the President salary levels for top officials of the Government, including Members of Congress.[5] In 1975, Congress legislated to bring Members of Congress within a separate commission system authorizing the President to recommend annual increases for civil servants to maintain pay comparability with private-sector employees.[6] Dissenting Members of Congress attacked the use of commissions to set congressional compensation as violating the Compensation Clause mandate that compensation be "ascertained by Law." Courts, however, rejected these challenges.[7] In the Ethics Reform Act of 1989,[8] Congress provided for a formula to make adjustments to its compensation on an annual basis. Congress, however, has declined to accept the annual adjustment more often than it has accepted the adjustment.[9] Following ratification of the Twenty-Seventh Amendment in 1992, which made pay increases effective only after an intervening election, a federal court of appeals panel ruled that Congress's cost-of-living mechanism did not violate the Twenty-Seventh Amendment, and that a challenge to the quadrennial pay raise provision was not ripe.[10]

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[2] 2 Joseph Story, Commentaries on the Constitution of the United States § 854 (1833).

[3] *Id.*

[4] 1 The Records of the Federal Constitution 216 (Max Farrand ed., 1911) (statement of George Mason). *See also id.* at 372 (with respect to states compensating Members of Congress, Nathanial Gorham stated that he "wished not to refer the matter to the State Legislatures who were always paring down salaries in such a manner as to keep out of offices men most capable of executing the functions of them."); *id.* at 373 ("those who pay are the masters of those who are paid") (statement of Alexander Hamilton).

[5] Pub. L. No. 90-206, § 225, 81 Stat. 642 (1967), *as amended*, Pub. L. No. 95-19, § 401, 91 Stat. 45 (1977), *as amended*, Pub. L. No. 99-190, § 135(e), 99 Stat. 1322 (1985).

[6] Pub. L. No. 94-82, § 204(a), 89 Stat. 421.

[7] Pressler v. Simon, 428 F. Supp. 302 (D.D.C. 1976) (three-judge court), *aff'd summarily*, 434 U.S. 1028 (1978); Humphrey v. Baker, 848 F.2d 211 (D.C. Cir.), *cert. denied*, 488 U.S. 966 (1988).

[8] Pub. L. No. 101-194, § 704(a)(1), 103 Stat. 1769, 2 U.S.C. § 4501.

[9] Ida A. Brudnick, Cong. Rsch. Serv., No. 97-615, Salaries of Members of Congress: Congressional Votes, 1990–2022 (2022), https://crsreports.congress.gov/product/pdf/RS/97-1011/86.

[10] Boehner v. Anderson, 30 F.3d 156, 163 (D.C. Cir. 1994). For additional information on how Members of Congress are compensated, see Ida A. Brudnick, Cong. Rsch. Serv., No. 97-1011, Salaries of Members of Congress: Recent Actions and Historical Tables (2022), https://crsreports.congress.gov/product/pdf/RS/97-1011/86; Ida A. Brudnick, Cong. Rsch. Serv., No. 97-615, Salaries of Members of Congress: Congressional Votes, 1990–2022 (2022), https://crsreports.congress.gov/product/pdf/RL/97-615.

ArtI.S6.C1.2 Privilege from Arrest

Article I, Section 6, Clause 1:

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

In Article I, Section 6, Clause 1, the Framers provided for Members of Congress to be free from arrest when attending or traveling to and from Congress except in cases of treason, felony, or breaches of the peace.[1] In interpreting this provision, the Supreme Court has held that the phrase "treason, felony, and breach of the peace" encompasses all criminal offenses.[2] Consequently, Members are only privileged from arrests arising from civil suits, which were common in America at the time the Constitution was ratified.[3]

In providing for Members to "be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same,"[4] the Framers followed English parliamentary and colonial practices as well as precedent established by the Articles of Confederation. The Articles provided that "the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on, Congress, except for treason, felony or breach of the peace."[5] In his *Commentaries on the Constitution of the United States*, Justice Joseph Story discussed the practice of privileging members of Parliament and colonial legislatures from arrest,[6] reasoning that privilege from arrest reflected the "superior duties" of members of legislative bodies to the legislative process and the representation of their constituents.[7] Justice Story stated:

> When a representative is withdrawn from his seat by a summons, the people whom he represents, lose their voice in debate and vote, as they do in his voluntary absence. When a senator is withdrawn by summons, his state loses half its voice in debate and vote, as it does in his voluntary absence. The enormous disparity of the evil admits of

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[1] U.S. Const. art. I, § 6, cl. 1.

[2] Williamson v. United States, 207 U.S. 425, 446 (1908).

[3] Long v. Ansell, 293 U.S. 76, 82 (1934) (citing *Williamson*, 207 U.S. 425).

[4] U.S. Const. art. I, § 6, cl. 1.

[5] Articles of Confederation of 1781, art. V. *See Williamson*, 207 U.S. 425. *See also* Bolton v. Martin, 1 U.S. (1 Dall.) 296, 316 (1788) (recognizing the privilege as covering members of the Pennsylvania Convention on ratifying the Constitution and noting that members "ought not to be diverted from the public business by law-suits, brought against them during the sitting of the House; which, though not attended with the arrest of their persons, might yet oblige them to attend to those law-suits, and to bring witnesses from a distant county, to a place whither they came, perhaps solely, on account of that public business."); Geyer's Lessee v. Irwin, 4 U.S. (4 Dall.) 92, 92 (1790) ("A member of the general assembly is, undoubtedly, privileged from arrest, summons, citation, or other civil process, during his attendance on the public business confided to him. And we think, that upon principle, his suits cannot be forced to a trial and decision, while session of the legislature continues."); Joseph Story, Commentaries on the Constitution of the United States § 856 (1833); 1 William Blackstone, Commentaries on the Laws of England 160–61 (1765) ("Neither can any member of either house be arrested and taken into custody, nor served with any process of the courts of law . . . . These privileges however, which derogate from the common law, being only indulged to prevent the member's being diverted from the public business, endure no longer than the session of parliament, save only as to the freedom of his person: which in a peer is for ever sacred and inviolable, and in a commoner for forty days after every prorogation, and forty days before the next appointed meeting . . . . But this privilege of person does not hold in crimes of such public malignity as treason, felony, or breach of the peace; or rather perhaps in such crimes for which surety of the peace may be required.").

[6] Joseph Story, Commentaries on the Constitution of the United States § 856 (1833).

[7] *Id.* at § 857.

> no comparison. The privilege, indeed, is deemed not merely the privilege of the member, or his constituents, but the privilege of the house also.[8]

Whether the provision in Article I, Section 6, excluding "Treason, Felony, and Breach of the Peace" offenses from the privilege from arrest applied to all criminal offenses or only criminal offenses involving violence and public disturbance has been subject to debate. After examining the historical meaning of the provision, the Supreme Court in *Williamson v. United States*, concluded that the qualifying language encompassed all criminal offenses. The *Williamson* Court adopted the government's position, which was summarized by the Court as follows:

> [T]he words "breach of the peace" should not be narrowly construed, but should be held to embrace substantially all crimes, and therefore as in effect confining the parliamentary privilege exclusively to arrests in civil cases. And this is based not merely upon the ordinary acceptation of the meaning of the words, but upon the contention that the words "treason, felony, and breach of the peace," as applied to parliamentary privilege, were commonly used in England prior to the Revolution, and were there well understood as excluding from the parliamentary privilege all arrests and prosecutions for criminal offenses; in other words, as confining the privilege alone to arrests in civil cases, the deduction being that when the framers of the Constitution adopted the phrase in question they necessarily must be held to have intended that it should receive its well-understood and accepted meaning.[9]

Consequently, under Supreme Court precedent, the privilege from arrest applies only to civil cases.[10] As one commentator has noted: "In practice, since the abolition of imprisonment for debt, this particular clause has lost most of its importance."[11]

While the privilege prevents Members from being arrested in civil suits, it does not prevent them from being served with subpoenas. In *United States v. Cooper*, Thomas Cooper, a newspaper publisher, was indicted under the Sedition Act of 1798 for libeling President John Adams. Cooper sought to compel several members of Congress to testify as witnesses at his trial. In allowing Cooper to subpoena Members of Congress, Justice Samuel Chase, in a Circuit Court decision, stated: "I do not know of any privilege to exempt members of congress from the service, or the obligations of a *subpoena* . . . ."[12] Over a hundred years later, Justice Louis Brandeis reached a similar conclusion in *Long v. Ansell*, holding that the privilege from arrest was limited to arrests in civil cases and did not encompass service of process. Writing for the Court, Justice Brandeis stated: "History confirms the conclusion that the immunity is limited to arrest."[13]

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[8] *Id.*

[9] Williamson v. United States, 207 U.S. 425, 436 (1908). *See also* Coxe v. M'Clenachan & Houston, Special Bail, 3 U.S. (3 Dall.) 478, 478 (1798) (noting the privilege applies when Congress is in session).

[10] *Williamson*, 207 U.S 425. *See also* Gravel v. United States, 408 U.S. 606, 614–15 (1972) (noting that the privilege only applies to arrests in civil cases).

[11] Edward S. Corwin, The Constitution and What It Means Today 23 (Harold W. Chase & Craig R. Ducat eds., 1973) (1958).

[12] United States v. Cooper, 4 U.S. (4 Dall.) 341, 341 (Chase, Cir. J., Dist. Pa. 1800),

[13] Long v. Ansell, 293 U.S. 76, 80 (1934) (holding that Senator Huey P. Long was not exempt from service of civil process). Justice Brandeis further clarified that: "The constitutional privilege here asserted must not be confused with the common-law rule that witnesses, suitors, and their attorneys while in attendance in connection with the conduct of one suit, are immune from service in another. That rule of practice is founded upon the needs of the court, not upon the convenience or preference of the individuals concerned. And the immunity conferred by the court is extended or withheld as judicial necessities require." *Id.* (citing Lamb v. Schmitt, 285 U.S. 222 (1932)).

ArtI.S6.C1.3 Speech or Debate

ArtI.S6.C1.3.1 Overview of Speech or Debate Clause

Article I, Section 6, Clause 1:

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

The Supreme Court has described the Speech or Debate Clause as a provision that cannot be interpreted literally,[1] but instead must be construed "broadly" in order to effectuate the Clause's vital role in the constitutional separation of powers.[2] "Deceptively simple"[3] phrases—such as "shall not be questioned," "Speech or Debate," and even "Senators and Representatives"—have therefore been accorded meanings that extend well beyond their literal constructions.[4] Arguably, this purpose-driven interpretive approach has given rise to some ambiguity in the precise scope of the protections afforded by the Clause. Despite uncertainty at the margins, it is well established that the Clause serves to secure the independence of the federal legislature by providing Members of Congress and their aides with immunity from criminal prosecutions or civil suits that stem from acts taken within the legislative sphere.[5] As succinctly described by the Court, the Clause's immunity from liability applies "even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes."[6] This general immunity principle forms the core of the protections afforded by the Clause.

Once it is determined that the Clause applies to a given action, the resulting protections from liability are "absolute,"[7] and the action "may not be made the basis for a civil or criminal judgment against a Member."[8] In such a situation, the Clause acts as a jurisdictional bar to the legal claim.[9] But this immunity is also complemented by two component privileges (an evidentiary privilege and a testimonial privilege) that emanate from the Clause and can be

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[1] Hutchinson v. Proxmire, 443 U.S. 111, 124 (1979) (noting that the "Court has given the Clause a practical, rather than a strictly literal, reading . . .").

[2] Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 501 (1975) ("Without exception, our cases have read the Speech or Debate Clause broadly to effectuate its purposes.").

[3] Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 415 (D.C. Cir. 1995).

[4] Kilbourn v. Thompson, 103 U.S. 168, 204 (1881).

[5] *Eastland*, 421 U.S. at 510–11 (noting that the Clause should be "construed to provide the independence which is its central purpose"); United States v. Johnson, 383 U.S. 169, 182 (1966) ("There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause.").

[6] Doe v. McMillan, 412 U.S. 306, 312–13 (1973).

[7] *Eastland*, 421 U.S. at 503 ("[O]nce it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference."); *McMillan*, 412 U.S. at 324 ("The business of Congress is to legislate; Congressmen and aides are absolutely immune when they are legislating.").The Court has gone so far as to say that legislative acts may not even be the subject of "inquiry" by either the executive or Judicial Branches. United States v. Brewster, 408 U.S. 501, 509 (1972) ("The privilege protect[s] Members from inquiry into legislative acts or the motivation for actual performance of legislative acts.").

[8] *McMillan*, 412 U.S. at 312.

[9] *See McMillan*, 412 U.S. at 318; *see also* Fields v. Off. of Johnson, 459 F.3d 1, 13 (D.C. Cir. 2006) (quoting *McMillan* and explaining that "[t]he Speech or Debate Clause operates as a jurisdictional bar when 'the actions upon which [a party seeks] to predicate liability [are] 'legislative acts.'").

asserted to prevent certain compelled disclosures. Even if absolute immunity is inappropriate, the evidentiary component of the Clause prohibits the introduction of evidence of legislative acts for use against a Member,[10] while the testimonial privilege protects Members from compelled testimony on protected acts.[11] The Supreme Court has not explicitly framed the protections of the Clause by reference to these two independent component privileges, but has instead implicitly recognized their existence.[12] As a result, these privileges are neither clearly established nor described, and may further contribute to the unsettled aspects of the Clause.

ArtI.S6.C1.3.2 Historical Background on Speech or Debate Clause

Article I, Section 6, Clause 1:

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

The text and purpose of the Speech or Debate Clause can be traced to Parliament's historic struggles for supremacy with the English monarch.[1] Prior to 1689, the English Crown had repeatedly used both the power of prosecution, and its control over the courts, to punish, suppress, or intimidate Members of Parliament who had made statements critical of the Crown during parliamentary debates.[2] The common law of seditious libel "was interpreted with the utmost harshness against those whose political or religious tenets were distasteful to the government," and used to imprison "disfavored" Members of the House of Commons.[3] Following the Glorious Revolution and the new ascension of parliamentary power, the English Bill of Rights of 1689 sought to combat these past abuses by ensuring parliamentary independence through the establishment of a legislative privilege. That seminal document provided that "the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament."[4]

Although English history and practice is essential to a complete understanding of the Clause, the Court has noted that the Clause must nevertheless be "interpreted in light of the American experience, and in the context of the American constitutional scheme of government

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[10] United States v. Helstoski, 442 U.S. 477, 487 (1979) (noting that the Court's previous holdings "leave no doubt that evidence of a legislative act of a Member may not be introduced by the Government"); *Brewster*, 408 U.S. at 527 (holding that "evidence of acts protected by the Clause is inadmissible").

[11] Gravel v. United States, 408 U.S. 606, 616 (1972) ("We have no doubt that Senator Gravel may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for the events that occurred at the subcommittee meeting.").

[12] Indeed, the Supreme Court has never used the phrase "testimonial privilege" or "evidentiary privilege" in discussing the Speech or Debate Clause. In *United States v. Gillock*, the Court referenced an evidentiary privilege for state legislators "similar in scope" to the Clause. 445 U.S. 360, 366 (1980).

[1] United States v. Johnson, 383 U.S. 169, 178–79 (1966) (describing the Clause as "the culmination of a long struggle for parliamentary supremacy" in which "successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators."). For a thorough discussion of the historical evolution of the legislative privilege associated with the Clause *see* Josh Chafetz, Congress's Constitution: Legislative Authority and the Separation of Powers 201–10 (2017).

[2] *Johnson*, 383 U.S. at 177–79.

[3] VI Holdsworth, A History of English Law 214 (1927).

[4] 1 W. & M., Sess. 2, c.2.

. . . ."[5] The early American "experience" began with colonial charters and early state constitutions, many of which included some form of legislative privilege that generally tracked the language of the English Bill of Rights.[6] Following the American Revolution, the Articles of Confederation adopted language explicitly enshrining legislative privilege into the Federal Government structure, providing that "[f]reedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress. . . ."[7]

The current text, which draws its key terms "[s]peech," "[d]ebate," and "questioned" directly from the English Bill of Rights, was adopted at the Constitutional Convention without significant discussion or debate.[8] In light of the absence of any contrary intent, and despite the fact that early American history did not "reflect" the same "catalogue of abuses at the hands of the Executive that gave rise to the privilege in England,"[9] it may nonetheless be "reasonably inferred that the framers of the Constitution meant" to incorporate the principles underlying the legislative privilege established in England through the English Bill of Rights "by the use of language borrowed from that source."[10] James Wilson, one of the few Members of the Constitutional Convention to comment on the Clause, called the provision "indispensably necessary" to the "discharge" of the "publick [sic] trust."[11] His view was that Members of Congress must be clothed with the "fullest liberty of speech" so as to "be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense."[12] The Clause, therefore, appears to have been adopted for the same basic purpose that undergirded its English and early American ancestors: to preserve the independence and integrity of individual Members of the legislative body by "prevent[ing] intimidation by the executive and accountability before a possibly hostile judiciary."[13] As such, it represents a key pillar of the American separation of powers.

Preventing such intimidation is not "the sole function of the Clause."[14] The Clause also serves a good governance role, effectively barring judicial or executive processes that may "disrupt" or "distract[ ]" from a Member's representative or legislative obligations.[15] Consistent with this anti-distraction rationale, the Clause's broad proscription that Members

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[5] United States v. Brewster, 408 U.S. 501, 508 (1972).

[6] Kilbourn v. Thompson, 103 U.S. 168, 201–02 (1881); Tenney v. Brandhove, 341 U.S. 367, 372–73 (1951).

[7] Articles of Confederation of 1781, art. V; *Johnson*, 383 U.S. at 177.

[8] *Johnson*, 383 U.S. at 177 (citing V Elliot's Debates 406 (1836 ed.)).

[9] *Brewster*, 408 U.S. at 508.

[10] *Kilbourn*, 103 U.S. at 202.

[11] 1 The Works of James Wilson 421 (R. McCloskey ed., 1967); *see also* 1 Joseph Story, Commentaries on the Constitution of the United States § 866 (1833) ("The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual.").

[12] 1 The Works of James Wilson 421 (R. McCloskey ed., 1967).

[13] *See Johnson*, 383 U.S. at 180–81 (noting that "it is apparent from the history of the clause that the privilege was [ ] born primarily of a desire . . . to prevent intimidation by the executive and accountability before a possibly hostile judiciary.").

[14] Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 502 (1975).

[15] *Id.* at 503 ("Just as a criminal prosecution infringes upon the independence which the Clause is designed to preserve, a private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation. Private civil actions also may be used to delay and disrupt the legislative function."); *Brewster*, 408 U.S. at 507 (noting that the Clause exists to "protect the integrity of the legislative process by insuring the independence of individual legislators"); Powell v. McCormack, 395 U.S. 486, 505 (1969) (stating that "[t]he purpose of the protection afforded legislators is . . . to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions"); Tenney v. Brandhove, 341 U.S. 367, 377 (1951) ("Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good . . . The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial. . . .").

not be "questioned in *any* other place" has been interpreted as limiting not only actions initiated by the Executive Branch—which clearly implicate the separation of powers—but also private civil suits initiated by members of the public—which generally implicate the separation of powers only to a lesser degree.[16]

ArtI.S6.C1.3.3 Activities to Which Speech or Debate Clause Applies

Article I, Section 6, Clause 1:

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

A series of decisions from the Supreme Court address the general scope of the Speech or Debate Clause. These cases elucidate the distinction between legislative acts, such as voting or debating, which are accorded protection under the Clause and are not subject to "inquiry,"[1] and political or other nonlegislative acts, which are not protected by the Clause and therefore may serve as the basis for a legal action.[2] The cases suggest at least three noteworthy themes. First, despite the text, the protections afforded by the Clause extend well beyond "speeches" or "debates" undertaken by "Senators and Representatives."[3] Second, otherwise legitimate political interactions external to the legislative sphere—for example, disseminating information outside of Congress—are generally not considered protected legislative acts.[4] Third, the Clause does not immunize criminal conduct that is clearly not part of the "due functioning" of the legislative process.[5]

The Supreme Court adopted a broad interpretation of "Speech or Debate" from its first assessment of the Clause in the 1881 case *Kilbourn v. Thompson*.[6] In *Kilbourn*, the Court considered whether a civil action could be maintained against Members who were responsible for initiating and approving a contempt resolution ordering an arrest.[7] The Members defended themselves on the ground that their acts were protected by the Clause. The Court agreed, determining that the Members were not subject to suit for their actions.[8]

The Court adopted a constitutional construction of the Clause that extended its protections beyond mere legislative deliberation and argument, holding that "it would be a

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[16] *Eastland*, 421 U.S. at 503 (emphasis added). Even civil suits implicate the separation of powers principles that underlie the Clause as any court order directed at a Member could be viewed as a clash between the judicial and legislative powers. *See id.* ("[W]hether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled.").

[1] Gravel v. United States, 408 U.S. 606, 616 (1972).

[2] *See, e.g., id.* at 613–29; United States v. Brewster, 408 U.S. 501, 507–29 (1972); United States v. Johnson, 383 U.S. 169, 174–85 (1966); Kilbourn v. Thompson, 103 U.S. 168, 201–05 (1881).

[3] *Kilbourn*, 103 U.S. at 204 (extending the protections of the Clause beyond speeches and debates); *Gravel*, 408 U.S at 616–17 (extending the protections of the Clause to acts of aides).

[4] *See Gravel*, 408 U.S. at 625–26.

[5] *See Johnson*, 383 U.S. at 172.

[6] *Kilbourn*, 103 U.S. at 200–05.

[7] *Id.* at 200.

[8] *Id.* at 201. In reaching its holding, the Court noted that if the Members had ordered the unlawful arrest "in any ordinary tribunal" they would have been liable for the act. *Id.* The Court concluded, however, that the Constitution and the Clause make clear that Congress "is not an ordinary tribunal." *Id.*

narrow view of the constitutional provision to limit it to words spoken in debate."[9] Instead, the Court determined that the Clause applied to "things generally done in a session of the House by one of its members in relation to the business before it," including the presentation of reports, the offering of resolutions, and the act of voting.[10] Accordingly, the Court concluded that although the arrest itself may have been unlawful, the Members were immune from suit and could not be "brought in question" for their role in approving the resolution "in a court of justice or in any other place," as that act was protected by the Clause.[11]

The Court only rarely addressed the Clause after *Kilbourn*.[12] It was not until the 1966 case *United States v. Johnson* that the Court embarked on an attempt to define the protections afforded by the Clause in the context of a criminal prosecution of a Member.[13] In *Johnson*, a former Member challenged his conviction for conspiracy to defraud the United States that arose from allegations he had agreed to give a speech defending certain banking interests in exchange for payment.[14] In prosecuting the case, the government relied heavily on the former Member's motive for giving the speech, introducing evidence that the speech had been made solely to serve private, rather than public, interests.[15] Focusing on the admission of this protected evidence, the Court overturned the conviction. "However reprehensible such conduct may be," the Court concluded that a criminal prosecution, the "essence" of which requires proof that "the Congressman's conduct was improperly motivated," was "precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry."[16] The opinion noted that the Clause must be "read broadly to effectuate its purposes," ultimately concluding that it prohibits a prosecution that is "dependent" upon the introduction of evidence of "the legislative acts" of a Member *or* "his motives for performing them."[17] Although it overturned the conviction, the Court remanded the case to the district court for further proceedings, holding that the government should not be precluded from bringing a prosecution "purged of elements offensive to the Speech or Debate clause" through the elimination of all references to the making of the speech.[18]

The *Johnson* case stands for at least two important propositions. First, the opinion demonstrated that the government is not prohibited from prosecuting conduct that merely relates to legislative duties, but is not itself a legislative act.[19] When a legislative act is not an element of the offense, the government may proceed with its case by effectively "purg[ing]" the introduction of evidence offensive to the Clause.[20] Second, though not explicitly articulating

[9] *Id.* at 204.

[10] *Id.*

[11] *Id.* at 201.

[12] *See* Philip Mayer, *An Uncertain Privilege: Reexamining the Scope and Protections of the Speech or Debate Clause*, 50 Colum. J.L. & Soc. Probs. 229, 233 (2017) ("After *Kilbourn*, the Supreme Court did not substantively address the Clause until almost a century later.").

[13] *Johnson*, 383 U.S. at 170–85.

[14] *Id.* at 170–73. The Member also allegedly agreed to "exert influence" over Department of Justice enforcement decisions. *Id.* at 171. With regard to that aspect of the claim, the Court suggested that an "attempt to influence the Department of Justice" was not legislative. *Id.* at 172.

[15] *Id.* at 177.

[16] *Id.* at 180.

[17] *Id.* at 185.

[18] *Johnson*, 383 U.S. at 185.

[19] *Id.* at 185.

[20] *Id.*

such a privilege, the opinion impliedly introduced the evidentiary component of the Clause by holding that even though a case may go forward, a Member may invoke the Clause to bar admission of specific protected evidence.[21]

The evidentiary privilege component of the Clause was reaffirmed in *United States v. Helstoski*.[22] There, the Court expressly held that any "references to past legislative acts of a Member cannot be admitted [into evidence] without undermining the values protected by the Clause."[23] The Court acknowledged that "without doubt the exclusion of such evidence will make prosecutions more difficult," but reasoned that such a limitation was consistent with a constitutional provision that was "designed to preclude prosecution of Members" entirely when legislative acts form the basis of the claim.[24]

In the 1972 decision of *United States v. Brewster*, which involved a Member's challenge to his indictment on a bribery charge, the Court reaffirmed *Johnson* and clarified that "a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts."[25] The Court made clear that the Clause does not prohibit inquiry into illegal conduct simply because it is "related" to the legislative process or has a "nexus to legislative functions," but rather, the Clause protects only the legislative acts themselves.[26] By adhering to such a limitation, the Court reasoned that the result would be a Clause that was "broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members."[27]

Brewster also drew an important distinction between legislative and political acts. The opinion labeled a wide array of constituent services,[28] though "entirely legitimate," as "political

[21] *Id.* at 173 ("The language of the Speech or Debate Clause clearly proscribes at least some of the evidence taken during trial.").

[22] 442 U.S. 477, 487 (1979).

[23] *Id.* at 489. The *Helstoski* opinion interpreted Johnson as "leav[ing] no doubt that evidence of a legislative act of a Member may not be introduced by the Government in a prosecution . . ." *Id.* at 487.

[24] *Id.* The *Helstoski* opinion also evidenced the Court's unwillingness to address the important question of the proper means by which the protections of the Clause may be waived. *Id.* at 490–94. The waiver question hinges on whether the protections of the Clause inhere to Members as individuals, or to the House and Senate as institutions. If the Clause creates an individual privilege, waiver would need to be made by the individual Member and arguably could not be made by the institution without the Member's consent. If, however, the privilege is institutional, waiver would need to be made by the institution, and arguably could not be made by the individual member without the institution's consent. With regard to individual waiver, the Court saw no need to determine whether an individual Member can waive the Clause's protections, but "assuming that is possible, we hold that waiver can be found only after explicit and unequivocal renunciation of the protection." *Id.* at 490–91. With regard to institutional waiver, the opinion noted that "[t]his Court has twice declined to decide" whether Congress could waive a Member's privilege through a "narrowly drawn statute." *Id.* at 492. The Court again, however, saw "no occasion to resolve" the question. *Id.* The opinion nonetheless "recognize[d] that an argument can be made from precedent and history that Congress, as a body, should not be free to strip individual Members of the protection guaranteed by the Clause from being 'questioned' by the Executive in the courts," but ultimately reiterated that "[w]e perceive no reason to undertake, in this case, consideration of the Clause in terms of separating the Members' rights from the rights of the body." *Id.* at 492–93.

[25] United States v. Brewster, 408 U.S. at 512.

[26] *Id.* at 513, 528.

[27] *Id.* at 525.

[28] These unprotected activities include "a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress." *Id.* at 512. Similarly, in *Hutchinson v. Proxmire*, the Court held that informing the public of legislative activities is not protected by the Clause. 443 U.S. 111, 133 (1979) ("Valuable and desirable as it may be in broad terms, the transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process. As a result, transmittal of such information by press releases and newsletters is not protected by the Speech or Debate Clause.").

in nature" rather than legislative.[29] As a result, the Court suggested that "it has never been seriously contended that these political matters . . . have the protection afforded by the Speech or Debate Clause."[30]

Turning to the terms of the bribery indictment, the Court framed the fundamental threshold question for any prosecution of a Member of Congress as "whether it is necessary to inquire into how [the Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute."[31] With regard to bribery, the Court reasoned that because acceptance of the bribe is enough to prove a violation of the statute, there was no need for the government to present evidence that the Member had later *voted* in accordance with the illegal promise, "[f]or it is *taking* the bribe, not performance of the illicit compact, that is a criminal act."[32] Because "taking the bribe is, obviously, no part of the legislative function" and was therefore "not a legislative act," the government would not be required to present any protected legislative evidence in order to "make out a prima facie case."[33] In that sense, the Court distinguished the case before it from *Johnson*. Whereas the prosecution in *Johnson* relied heavily on showing the motive for Johnson's floor speech, the prosecution in *Brewster* need not prove any legislative act, but only that money was accepted in return for a promise.

ArtI.S6.C1.3.4 Distraction Rationale and Speech or Debate Clause

Article I, Section 6, Clause 1:

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

Two cases from the late 1960s reveal the Court's view that the Clause embodies a desire to prevent the "distractions" associated with compelling a Member to participate in a legal proceeding. In *Dombrowski v. Eastland*, the Court affirmed the dismissal of a civil action against a Senator for allegedly conspiring with Louisiana state officials to violate the petitioner's Fourth Amendment rights.[1] In doing so, the Court noted broadly, and without additional discussion, that a Member "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves."[2]

Similarly, in *Powell v. McCormack*, the Court suggested that "the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending themselves."[3] The Court further described its underlying reasoning, noting that "[t]he purpose of the protection afforded legislators is not to forestall judicial review of legislative action but

[29] *Brewster*, 408 U.S. at 512.

[30] *Id.*

[31] *Id.* at 526.

[32] *Id.*

[33] *Id.* at 525.

[1] Dombrowski v. Eastland, 387 U.S. 82, 83 (1967). The petitioners were civil rights lawyers alleging that the Chairman and counsel of the Internal Security Subcommittee of the Senate Judiciary Committee conspired with Louisiana State officials to "seize property and records of petitioners by unlawful means." *Id.*

[2] *Id.* at 85.

[3] Powell v. McCormack, 395 U.S. 486, 505 (1969).

to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions."[4] The Court's brief and indefinite articulation of the anti-distraction rationale in these and subsequent cases has given rise to a significant debate among the lower courts regarding whether the principle justifies prohibitions on the disclosure of protected documents, even when not for evidentiary use.[5]

ArtI.S6.C1.3.5 Communications Outside the Legislative Process

Article I, Section 6, Clause 1:

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

The Supreme Court's opinion in *Gravel v. United States* establishes that communications outside of the legislative process are generally not protected by the Clause.[1] *Gravel* involved a Speech or Debate challenge to a grand jury investigation into the disclosure of classified documents by a Senator and his aides.[2] After coming into possession of the "Pentagon Papers"—a classified Defense Department study addressing U.S. involvement in the Vietnam War—Senator Mike Gravel disclosed portions of the document at a subcommittee hearing and submitted the entire study into the record.[3] The Senator and his staff had also allegedly arranged for the study to be published by a private publisher.[4] A grand jury subsequently issued a subpoena for testimony from one of Senator Gravel's aides and the private publisher.[5] Senator Gravel intervened to quash the subpoenas.[6]

The Supreme Court rejected Senator Gravel's effort to shield his aide and the publisher from testifying. The *Gravel* opinion began by reasoning that "[b]ecause the claim is that a Member's aide shares the Member's constitutional privilege, we consider first whether and to what extent Senator Gravel himself is exempt from process or inquiry by a grand jury investigating the commission of a crime."[7] In addressing the scope of the Senator's protections, the Court implied the existence of the testimonial component of the Clause, noting that the

[4] *Id.*

[5] Disagreement among the lower federal courts over whether the Clause prohibits any compelled disclosure of legislative act documents, regardless of purpose, or instead prevents only the evidentiary use of such documents, represents perhaps the chief ongoing dispute over the scope of the Clause's protections. *Compare* United States v. Rayburn House Off. Bldg., 497 F.3d 654, 655 (D.C. Cir. 2007) (holding that the testimonial component of the Clause includes a documentary nondisclosure privilege) *with* United States v. Renzi, 651 F.3d 1012, 1034 (9th Cir. 2011) (holding that the testimonial component of the Clause does not create the documentary nondisclosure privilege outlined in *Rayburn*) and *In re* Fattah, 802 F.3d 516, 529 (3rd Cir. 2015) ("The Speech or Debate Clause does not prohibit the disclosure of privileged documents. Rather, it forbids the evidentiary use of such documents.").

[1] Gravel v. United States, 408 U.S. 606, 622–27 (1972). *Gravel* also exemplifies that the Speech or Debate protections can extend to a Member's personal aides. *Id.* at 616–22.

[2] *Id.* at 608–10.

[3] *Id.* at 608.

[4] *Id.* at 610.

[5] *Id.* at 608.

[6] *Id.* at 609.

[7] *Gravel*, 408 U.S. at 613.

protections of the Clause protect a Member from compelled questioning.[8] The Court did so by stating, without further discussion, that it had "no doubt" that "Senator Gravel may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for the events that occurred at the subcommittee meeting."[9]

The *Gravel* opinion also drew a clear line of demarcation between protected legislative acts and other unprotected acts not "essential to the deliberations" of Congress.[10] Although the Senator was protected for his actions at the hearing, the Senator's alleged arrangement for private publication of the Pentagon Papers was not "part and parcel of the legislative process" and was therefore not protected by the Clause.[11] In reaching this determination, the Court established a working definition of "legislative act" that remains applicable today, holding that a legislative act is an

> integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.[12]

Private publication, as opposed to publication in the record, was "in no way essential to the deliberations of the Senate."[13] Thus, the Clause provided no immunity from testifying before the grand jury relating to that arrangement.[14]

The Court reaffirmed its views on internal and external distribution of legislative materials in its subsequent decisions in *Doe v. McMillan* and *Hutchinson v. Proxmire*.[15] *McMillan* involved a civil suit brought by parents and students in which it was alleged that the disclosure and publication of "somewhat derogatory" personal information in a congressional committee report on the District of Columbia public school system violated the petitioner's right to privacy.[16] The report was distributed within Congress and ordered printed and distributed by the Government Publishing Office (GPO).[17] The complaint named a variety of defendants, including committee Members, congressional staff, the head of the GPO, and a number of non-congressional parties.[18] The Court began by holding that the claims against the committee Members and their staffs for their activities, such as preparing and approving the report, were "plain[ly] . . . barred" by the Clause.[19] However, the Court found that the public printer enjoyed no Speech or Debate Clause protections for the republication of the report to the public, even though that action was directed by Congress.[20] Public republication of an otherwise protected legislative report, the Court reasoned, was not "an essential part" of the

[8] *Id.* at 626; Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 418 (D.C. Cir. 1995) (holding that "the Supreme Court recognized the testimonial privilege in *Gravel v. United States*"). *Gravel* involved questioning before a grand jury. 408 U.S. at 613. The D.C. Circuit has suggested, however, that the prohibition extends to questions asked "in a deposition, on the witness stand, and so forth . . ." Fields v. Off. of Johnson, 459 F.3d 1, 14 (D.C. Cir. 2006).

[9] *Gravel*, 408 U.S. at 616.

[10] *Id.* at 625.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 626.

[15] 412 U.S. 306, 308–17 (1973); 443 U.S. 111, 114–133 (1979).

[16] *McMillan*, 412 U.S. at 308 n.1.

[17] *Id.* at 308–09.

[18] *Id.* at 309.

[19] *Id.* at 312.

[20] *Id.* at 313–18.

legislative or deliberative process.[21] In reaching that conclusion, the Court rejected claims that Congress's public "informing function" should fall within the Clause's protections.[22]

Similarly, in *Hutchinson*, the Court held that the Clause did not provide a Senator and his aide with immunity in a defamation suit arising from the Senator's public dissemination of his "Golden Fleece Award," a prize intended to draw attention to wasteful government spending.[23] The suit alleged damages arising from the Senator publicizing the award nationwide through press releases and newsletters.[24] In holding that the Clause did not provide the Member and his aide with immunity, the Court saw no reason "for departing from the long-established rule" that a Member may face liability for republication of legislative statements or reports.[25] Whereas the Senator would be "wholly immune" for his efforts to publicize the award through a speech in the Senate, "neither the newsletters nor the press release was 'essential to the deliberations of the Senate'" and therefore they were not protected.[26] The Court rejected arguments put forward by the Senator that public dissemination of the award came within the protections of the Clause either by advancing the "the duty of Members to tell the public about their activities," an argument previously rejected in *McMillan*, or as a means to influence other Senators.[27] Neither activity, the Court concluded, was "part of the legislative function or the deliberations that make up the legislative process."[28]

ArtI.S6.C1.3.6 Subpoena Power and Congress

Article I, Section 6, Clause 1:

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

In *Eastland v. U.S. Servicemen's Fund*, the Supreme Court concluded that the Clause acts as a significant barrier to judicial interference in Congress's exercise of its subpoena power.[1] The case involved a suit filed by a private non-profit organization against the Chairman of a Senate subcommittee seeking the Court to enjoin a congressional subpoena issued to a bank for the non-profit's account information.[2] The subpoena was issued as part of an investigation into alleged "subversive" activities harmful to the U.S. military conducted by the organization.[3] The Court held that because the "power to investigate and to do so through compulsory process plainly" constitutes an "indispensable ingredient of lawmaking," the Clause made the

[21] *Id.* at 314–15

[22] *Id.* at 317.

[23] Hutchinson v. Proxmire, 443 U.S. 111, 114 (1979). Senator Proxmire had given the award to federal agencies that funded the petitioner's research. *Id.*

[24] *Id.* at 115–16.

[25] *Id.* at 128.

[26] *Id.* at 130 (quoting Gravel v. United States, 408 U.S. 606, 625 (1972)).

[27] *Id.* at 131–33. The opinion drew a clear distinction between the legislative act of a Member informing himself, and the generally non-legislative act of informing the public. *Id.* at 132.

[28] *Id.* at 133.

[1] 421 U.S. 491, 501 (1975).

[2] *Id.* at 494–96.

[3] *Id.* at 493.

subpoena "immune from judicial interference."[4] *Eastland* is generally cited for the proposition that the Clause prohibits courts from entertaining pre-enforcement challenges to congressional subpoenas.[5] As a result, the lawfulness of a subpoena usually may not be challenged until Congress seeks to enforce the subpoena through either a civil action or contempt of Congress.[6]

ArtI.S6.C1.3.7 Persons Who Can Claim the Speech or Debate Privilege

Article I, Section 6, Clause 1:

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

Although the text of the Speech or Debate Clause refers only to "Senators and Representatives," and therefore clearly applies to actions by any Member of Congress,[1] it is now well established that protections of the Clause apply equally to certain congressional staff.[2] Initially, however, the Court seemed apprehensive about such an extension. For example, in early cases the Court held that while Members enjoyed immunity for their actions, the congressional staffers who were also named as defendants, and who were responsible for implementing the Member's directives, did not.[3] Indeed, in *Dombrowski v. Eastland*, the Court relied on language in *Tenney v. Brandhove* in reasoning that the protection of the Clause "'deserves greater respect'" when a legislator is sued "'than where an official acting on behalf of the legislature is sued.'"[4]

However, the Court later shifted course. In *Gravel*, the Court held that the Clause protects an aide's action when the Clause would have protected the same action if it were done by a

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[4] *Id.* at 501.

[5] *See In re* Grand Jury, 821 F.2d 946, 957 (3d Cir. 1987) ("The Supreme Court has held analogously that the Speech or Debate Clause shields Congressmen from suit to block a Congressional subpoena because making the legislators defendants 'creates a distraction and forces Members [of Congress] to divert their time, energy, and attention from their legislative tasks to defend the litigation.'") (citing *Eastland*, 421 U.S. at 503).

[6] United States v. Ryan, 402 U.S. 530, 532 (1971) (noting that in the judicial context that "one who seeks to resist the production of desired information [has a] choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal"); *Eastland*, 421 U.S. at 515–16 (Marshall, J., concurring). While it is generally true that courts will not interfere in valid congressional attempts to obtain information, especially through the exercise of the subpoena power, Justice Thurgood Marshall's concurrence in *Eastland* suggests that the restraint exercised by the courts in deference to the separation of powers is not absolute. *Id.* at 513–18 (Marshall, J., concurring) (clarifying that the Clause "does not entirely immunize a congressional subpoena from challenge," but instead requires only that a Member "may not be called upon to defend a subpoena against constitutional objection"). Justice Marshall thus implied that a challenge to the legitimacy of a subpoena may proceed if it is not directed at Congress or its Members. *Id.* at 517. He did not speculate as to what such a case may look like or "who might be the proper parties defendant." *Id.*

[1] The Clause may be asserted not only by a current Member but also by a former Member in an action implicating his conduct while in Congress. *See* United States v. Brewster, 408 U.S. 501, 502 (1972).

[2] Gravel v. United States, 408 U.S. 606, 616–17 (1972).

[3] *See* Kilbourn v. Thompson, 103 U.S. 168, 200 (1881) (distinguishing between a claim against the Sergeant-at-Arms and a claim against a Member); Dombrowski v. Eastland, 387 U.S. 82, 84–85 (1967) (permitting a claim against an aide, but not the Member); Powell v. McCormack, 395 U.S. 486, 504 (1969) (noting that "although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts").

[4] *Dombrowski*, 387 U.S. at 85 (quoting Tenney v. Brandhove, 341 U.S. at 367, 378 (1951).

Member.[5] An aide, the Court reasoned, should be viewed as the "alter ego" of the Member he or she serves.[6] The *Gravel* Court recognized that the Member and his or her aide must be "treated as one,"[7] noting:

> [I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary—will inevitably be diminished and frustrated.[8]

The opinion distinguished its earlier decisions on the ground that in those cases, the aides did not themselves engage in legislative acts.[9] Whereas, in *Gravel*, and a number of subsequent cases, the Court was willing to extend the protections of the Clause so long as the act of the aide was itself a legislative act, and therefore would have been protected had it been performed by the Member.[10]

At issue in *Gravel* were the actions of a Member's personal staff, but the Clause applies to others as well. Decisions of the Court have extended the protections of the Clause to committee staff, including those in the position of chief counsel, clerk, consultant, staff director, and investigator.[11]

However, it should be noted that any protections under the Clause that are enjoyed by congressional or legislative staff flow from the Member.[12] They do not inhere personally to the individual. As a result, an "aide's claim of privilege can be repudiated and thus waived by the [Member]."[13] Moreover, the fact that a legislative aide is carrying out a directive from the Member, or even has specific authorization from the House or Senate to take the act in question, "is not sufficient to insulate the act from judicial scrutiny."[14] This principle was underscored in *Kilbourn*, in which the Court denied Speech or Debate Clause immunity for the Sergeant at Arms for carrying out an arrest pursuant to a House resolution,[15] and *Powell v. McCormack*, in which the Court similarly held that a suit could be maintained against the House Sergeant at Arms, Doorkeeper, and Clerk for implementing the House's exclusion of Representative Adam Clayton Powell.[16]

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[5] *Gravel*, 408 U.S. at 628 (holding that an aide's "immunity, testimonial or otherwise, extends only to legislative acts as to which the Senator himself would be immune").

[6] *Id.* at 617.

[7] *Id.* at 616 (quoting United States v. Doe, 455 F.2d 753, 761 (1972)).

[8] *Id.* at 616–17 (internal citations omitted).

[9] *Id.* at 618–21.

[10] *Id.* at 620 (noting that in *Kilbourn*, *Dombrowski*, and *Powell* "immunity was unavailable because [the aide] engaged in illegal conduct that was not entitled to Speech or Debate Clause protection").

[11] *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 507 (1975); Doe v. McMillan, 412 U.S. 306, 309 (1973).

[12] *Gravel*, 408 U.S. at 621–22 (noting that the "privilege applicable to the aide is viewed, as it must be, as the privilege of the Senator, and invocable only by the Senator or by the aide on the Senator's behalf . . . .").

[13] *Id.* at 622 n.13.

[14] *McMillan*, 412 U.S. at 315 n.10.

[15] Kilbourn v. Thompson, 103 U.S. at 199–200.

[16] Powell v. McCormack, 395 U.S. at 504.

Clause 2—Bar on Holding Federal Office

ArtI.S6.C2.1 Overview of Federal Office Prohibition

Article 1, Section 6, Clause 2

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

The second clause of Article I, Section 6 contains two provisions disqualifying Members of Congress from holding other federal offices, such as those in the Executive or Judicial Branches of government. The first provision is generally known as the Ineligibility Clause,[1] and precludes Members from being appointed to federal civil offices that were created (or had their compensation increased) during their congressional term for the length of their elected term. The second provision, often called the Incompatibility Clause,[2] forbids a Member from simultaneously holding "any Office under the United States."

The essential distinction between the Ineligibility and Incompatibility Clauses is one of timing.[3] The Incompatibility Clause forbids only concurrent officeholding, so incompatibility violations can generally be prevented by resigning either the other federal office or one's seat in Congress.[4] In contrast, the Ineligibility Clause forbids appointment to a federal office that was created or had its compensation increased during a Member's elected term for the length of that term; it thus may apply even if the Member is willing to resign his or her seat in Congress to take the other office.[5]

Both Clauses seek to prevent corruption and ensure the separation of powers between the federal executive and Legislative Branches of government.[6] As Justice Antonin Scalia explained:

> The Framers' experience with post revolutionary self-government had taught them that combining the power to create offices with the power to appoint officers was a recipe for legislative corruption. The foremost danger was that legislators would create offices with the expectancy of occupying them themselves. This was guarded against by the Incompatibility and Ineligibility Clauses.[7]

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[1] *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 210 (1974) (using "Ineligibility Clause" to refer to the first half of U.S. Const. art. I, § 6, cl. 2). Other names for this provision include the Emoluments Clause and the Sinecure Clause. *See* Seth Barrett Tillman, *Originalism and the Scope of the Constitution's Disqualification Clause*, 33 Quinnipiac L. Rev. 59, 64 n.12 (2014).

[2] *See, e.g.*, *Schlesinger*, 418 U.S. at 210 (using "Incompatibility Clause" to refer to the second half of U.S. Const. art. I, § 6, cl. 2).

[3] *See* Buckley v. Valeo, 424 U.S. 1, 272–73 (1976) (White, J., dissenting) (explaining the distinction between the Clauses), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, 116 Stat. 81.

[4] *See* ArtI.S6.C2.3 Incompatibility Clause and Congress.

[5] *See* ArtI.S6.C2.2 Ineligibility Clause (Emoluments or Sinecure Clause) and Congress.

[6] *See* The Federalist No. 76 (Alexander Hamilton) (describing the Ineligibility and Incompatibility Clauses as "important guards against the danger of executive influence upon the legislative body"); *Buckley*, 424 U.S. at 124 ("The further concern of the Framers of the Constitution with maintenance of the separation of powers is found in the so-called 'Ineligibility' and 'Incompatibility' Clauses contained in Art. I, § 6. . . ."); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 869 n.11 (1995) (Thomas, J., dissenting) ("The Ineligibility Clause was intended to guard against corruption.").

[7] Freytag v. Comm'r, 501 U.S. 868, 904 (1991) (Scalia, J., dissenting) (citations omitted).

ArtI.S6.C2.1
Overview of Federal Office Prohibition

Edmond Randolph introduced what became the Ineligibility and Incompatibility Clauses at the Constitutional Convention as part of the resolutions of the Virginia Plan.[8] The original proposed language would have prohibited Members of Congress from holding any state or federal office during their elected term and for a period of time thereafter,[9] later set at one year.[10] The scope of Members' eligibility for other offices was debated during the Convention.[11] Some delegates favored stricter ineligibility rules to prevent corruption,[12] while others wished to limit the provision to forbid only concurrent officeholding (i.e., incompatibility) so as not to render worthy Members ineligible for Executive office.[13]

Early in the Convention, Nathaniel Gorham moved to strike the Ineligibility Clause, which—after a debate that revealed the Framers' divergent views on this issue—failed by an equally divided vote.[14] James Madison then proposed a "middle ground" provision, which would limit ineligibility of Members only to federal offices that were created, or had their emoluments increased, during the Members' term.[15] Madison's compromise failed to be approved by the Convention when first proposed.[16] Charles Pinckney, who had earlier successfully moved to limit the Ineligibility and Incompatibility Clauses to only federal (and not state) offices,[17] moved to limit the provision to forbid only concurrent officeholding, but failed in that effort.[18]

Late in the Convention, after another failed motion by Pinckney to remove the ineligibility provision,[19] the substance of Madison's compromise was re-introduced and was narrowly passed by the Convention.[20] With some stylistic changes, the Ineligibility and Incompatibility Clauses were incorporated into the Constitution.[21]

ArtI.S6.C2.2 Ineligibility Clause (Emoluments or Sinecure Clause) and Congress

Article 1, Section 6, Clause 2

> *No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or*

[8] 1 The Records of the Federal Convention of 1787, at 20–21 (Max Farrand ed., 1911) [hereinafter Farrand's Records].

[9] *Id.*

[10] *Id.* at 217, 235.

[11] For historical perspectives on the framing of the Ineligibility and Incompatibility Clauses, see, for example, John F. O'Connor, *The Emoluments Clause: An Anti-Federalist Intruder in A Federalist Constitution*, 24 Hofstra L. Rev. 89, 91 (1995); Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 Cornell L. Rev. 1045 (1994); Daniel H. Pollitt, *Senator/Attorney-General Saxbe and the "Ineligibility Clause" of the Constitution: An Encroachment upon Separation of Powers*, 53 N.C. L. Rev. 111 (1974).

[12] *See, e.g.,* 1 Farrand's Records, *supra* note 8, at 387 (comments of George Mason), 387–88 (comments of Roger Sherman).

[13] *See, e.g.*, 1 Farrand's Records, *supra* note 8, at 381–82 (comments of Alexander Hamilton); 2 Farrand's Records, *supra* note 8, at 490 (comments of Charles Pinckney).

[14] 1 Farrand's Records, *supra* note 8, at 379–82.

[15] *See* 1 Farrand's Records, *supra* note 8, at 386–88.

[16] 1 Farrand's Records, *supra* note 8, at 390.

[17] *Id.* at 386.

[18] 2 Farrand's Records, *supra* note 8, at 283–84, 289. Pinckney's proposal, which lost by an evenly divided vote, would have made Members incapable of holding any federal office for which they "receive any salary, fees or emoluments of any kind—and the acceptance of such office shall vacate their seats respectively." 2 Farrand's Records, *supra* note 8, at 284.

[19] 2 Farrand's Records, *supra* note 8, at 489–90.

[20] 2 Farrand's Records, *supra* note 8, at 491–92.

[21] 2 Farrand's Records, *supra* note 8, at 568 (Committee of Style draft), 654 (final language).

the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

The Ineligibility Clause prohibits a Member of Congress from being appointed to a federal civil office that was created, or had its compensation increased, during the Member's elected term. The main intent of this provision is to prevent "legislative corruption" whereby Members vote to create or increase the remuneration of an office that they expect to occupy themselves.[1] Appointments to such offices are restricted only "during the Time for which [the Member] was elected."[2] A former Member may, for example, be appointed to a federal judgeship created during his term, so long as appointment is not made until after the expiration of that term.[3] For this reason, as Justice Joseph Story observed, the Clause "does not go to the extent of [its anti-corruption] principle" because a Member may still be influenced by the possibility of holding another office "if the period of his election is short, or the duration of it is approaching its natural termination."[4]

Because of standing and other justiciability requirements, courts have only rarely addressed the Ineligibility Clause.[5] In *Ex parte Levitt*, the Supreme Court ruled on a motion challenging the appointment of Justice Hugo Black, who was a U.S. Senator immediately prior to his appointment and confirmation to the Court in 1937.[6] Justice Black was alleged to be constitutionally ineligible for that office because Congress had, during Black's current Senate term, created a new option that allowed Supreme Court Justices to retire and receive a pension.[7] Finding that the movant lacked any direct injury from Justice Black's appointment beyond "a general interest common to all members of the public," the Court summarily dismissed the case on standing grounds.[8] In another notable decision, the U.S. District Court for the District of Columbia dismissed, for lack of standing, an Ineligibility Clause challenge to then-Senator Hillary Clinton's appointment as Secretary of State because the salary of that office was increased (but then subsequently decreased) during her Senate term.[9]

As the courts have largely declined to rule on Ineligibility Clause disputes, Presidents have sought legal opinions from the Department of Justice—through the Attorney General or the Office of Legal Counsel (OLC)—to determine whether particular appointments would accord with the Ineligibility Clause. For example, OLC has opined that when a statute provides for the "possibility of a future salary increase" (such as an annual adjustment) during a Member's

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[1] Freytag v. Comm'r, 501 U.S. 868, 904 (1991) (Scalia, J., dissenting) (citations omitted).

[2] U.S. Const. art. I, § 6, cl. 2. As the Clause forbids appointment during the time for which the Member was elected—even if that person is no longer a Member—resignation of one's congressional seat to take the other office does not cure the Ineligibility Clause violation. *See* Appointment to Civil Office, 17 Op. Att'ys Gen. 365, 366 (1882).

[3] Judges—Members of Cong.—Const. Restriction on Appointment (Article I, § 6, cl. 2) Omnibus Judgeship Bill, 2 Op. O.L.C. 431 (1978).

[4] Joseph Story, Commentaries on the Constitution of the United States § 864 (1833).

[5] Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 219 (1974) (noting that *Ex parte Levitt* was "the only other occasion" where the Supreme Court faced a question under the Ineligibility and Incompatibility Clauses).

[6] *Ex parte* Levitt, 302 U.S. 633 (1937) (per curiam).

[7] Act of Mar. 1, 1937, ch. 21, 50 Stat. 24. The constitutionality of Justice Black's appointment was defended on a number of grounds, including that providing for retirement did not actually increase the emoluments of the office because Justices were already allowed to resign and continue receiving their full salary. For a discussion of these arguments, see William Baude, *The Unconstitutionality of Justice Black*, 98 Tex. L. Rev. 327, 333–38 (2019) and Daniel H. Pollitt, *Senator/Attorney General Saxbe and the "Ineligibility Clause" of the Constitution: An Encroachment upon Separation of Powers*, 53 N.C. L. Rev. 111, 123–24 (1974).

[8] *Ex parte Levitt*, 302 U.S. at 633; *see also* McClure v. Carter, 513 F. Supp. 265, 270 (D. Idaho 1981) (holding that Senator lacked standing to challenge the appointment of Judge Abner Mikva based on the Ineligibility Clause), *aff'd sub nom.* McClure v. Reagan, 454 U.S. 1025 (1981).

[9] Rodearmel v. Clinton, 666 F. Supp. 2d 123, 128–29 (D.D.C. 2009), *appeal dismissed*, 560 U.S. 950 (2010).

term—but no increase has yet occurred—the Ineligibility Clause does not bar the Member's appointment to that office.[10] Other OLC opinions have found no Ineligibility Clause violation when the President is free to set a salary after the appointment is made[11] or when an office is created by the President after the expiration of a Member's term (even if the nomination occurred prior to the end of that term).[12]

One area of conflicting opinions on the scope of the Ineligibility Clause concerns the so-called "Saxbe fix."[13] Under this procedure, Congress reduces (or "rolls back") the salary of a particular office to the level it was at the beginning of a Member of Congress's term, seeking to avoid an Ineligibility Clause violation and enable the appointment of the Member to that office.[14] For example, in 1973, President Richard Nixon wished to appoint Senator William Saxbe to be his Attorney General.[15] However, during Saxbe's current Senate term, Congress voted to increase the Attorney General's salary from $35,000 to $60,000.[16] Seeking to comply with the Ineligibility Clause, Congress voted to roll back the Attorney General's salary to $35,000 before the Senate confirmed Saxbe as Attorney General.[17] Although there have been conflicting views within the Executive Branch as to whether such rollbacks actually cure the constitutional problem, recent OLC opinions have concluded that the Saxbe fix complies with the Ineligibility Clause.[18]

ArtI.S6.C2.3 Incompatibility Clause and Congress

Article 1, Section 6, Clause 2.

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

The Incompatibility Clause forbids Members of Congress from simultaneously holding another federal office.[1] The Clause is thus broader than the Ineligibility Clause in some ways, but narrower in others. It is broader in that its prohibition applies to "*any* Office under the United States," and not just civil offices that were created or had their compensation increased

[10] Const. Law—Article I, Section 6, Clause 2—Appointment of Member of Cong. to a Civ. Office, 3 Op. O.L.C. 298, 298 (1979); *see also* Const. Law—Article I, Section 6, Clause 2—Appointment of Member of Cong. to a Civil Office, 3 Op. O.L.C. 286 (1979).

[11] Applicability of Ineligibility Clause to Appointment of Congressman Tony P. Hall, 26 Op. O.L.C. 40, 41 (2002).

[12] Nomination of Sitting Member of Cong. to be Ambassador to Vietnam, 20 Op. O.L.C. 284, 284 (1996).

[13] Statutory Rollback of Salary to Permit Appointment of Member of Cong. to Exec. Office, 33 Op. O.L.C. 201, 202 (2009) (noting that Executive Branch "has not yet come to rest on a conclusion" as to whether the Saxbe fix complies with the Ineligibility Clause). Although the "fix" is named for its use in 1973 when President Nixon appointed Senator William Saxbe as his Attorney General, the first prominent usage was in 1903, when Congress reduced the compensation of the Secretary of State to allow President Taft to appoint Senator Philander Knox to that office. *See generally* John F. O'Connor, *The Emoluments Clause: An Anti-Federalist Intrude in a Federalist Constitution*, 24 Hofstra L. Rev. 89, 122–35 (1995) (reviewing the history of the Saxbe fix).

[14] *See* Statutory Rollback, 33 Op. O.L.C. at 201 (explaining this procedure); O'Connor, *supra* note 13, at 93 (same).

[15] *See* Pollitt, *supra* note 7, at 111–12.

[16] Pollitt, *supra* note 7, at 112.

[17] Pollitt, *supra* note 7, at 112

[18] Statutory Rollback, 33 Op. O.L.C. at 220. For contrary views, see Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 Stan. L. Rev. 907, 907–11 (1994); O'Connor, *supra* note 13, at 135–46; and Memorandum for the Counselor to the Attorney General, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: Ineligibility of Sitting Congressman to Assume a Vacancy on the Supreme Court* (Aug. 24, 1987).

[1] *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 210 (1974).

during the Member's term.[2] But the Clause is narrower in that it only prohibits *concurrent* office-holding: a Member may generally avoid an Incompatibility Clause violation by resigning his or her seat in Congress to accept appointment to the other federal office (or vice versa).[3] As Justice Byron White explained:

> [U]nder the [Ineligibility and Incompatibility Clauses], Congressmen were disqualified from being appointed only to those offices which were created, or for which the emoluments were increased, during their term of office. Offices not in this category could be filled by Representatives or Senators, but only upon resignation.[4]

Like the Ineligibility Clause, courts have largely declined to adjudicate Ineligibility Clause suits based on standing and other justiciability issues. In *Schlesinger v. Reservists Committee to Stop the War*, the Supreme Court rejected, on standing grounds, an Incompatibility Clause challenge to certain Members of Congress's holding of commissions in reserve components of the U.S. Armed Forces.[5] The Court, relying on *Ex parte Levitt*, held that the plaintiffs lacked a concrete injury as either citizens or taxpayers to sue for the alleged Incompatibility Clause violation.[6] The Supreme Court therefore did not reach the merits of dispute, which included arguments over whether a commission in the Reserves was an "office" within the meaning of the Clause and whether such Incompatibility Clause determinations rest exclusively with Congress.[7]

Although *Schlesinger* held that citizens do not generally have standing to enforce the Incompatibility Clause, lower courts have occasionally heard Incompatibility Clause disputes in particular circumstances. In *United States v. Lane*, a service member convicted of wrongful use of cocaine had his conviction affirmed by a panel of the Air Force Court of Criminal Appeals that included Senator Lindsay Graham (who was also an officer in the United States Air Force Standby Reserve).[8] The lower court denied the service member's motion to disqualify the Senator from the panel based on the Incompatibility Clause.[9] On subsequent appeal, the U.S. Court of Appeals for the Armed Forces held this to be in error, finding that the service member had standing and that the Incompatibility Clause prevented a Senator from serving as an appellate judge on a military court of criminal appeal.[10]

Relying on its constitutional power to determine the qualifications of its own Members,[11] Congress—rather than the courts—has been the primary enforcer of the Incompatibility Clause. Thus, Congress has voted to deny seats to putative Members, or declared Members'

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[2] U.S. Const. art. I, § 6, cl. 2 (emphasis added).

[3] *See, e.g.*, 2 Deschler's Precedents § 13 (1976) (Member-elect may hold incompatible office if that office is resigned prior to the convening of Congress); *accord* 1 Hinds' Precedents §§ 497–98 (1907).

[4] Buckley v. Valeo, 424 U.S. 1, 272–73 (1976) (White, J. dissenting), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

[5] 418 U.S. at 209.

[6] *Id.* at 217–28.

[7] *Id.* at 212–14. The President's Office of Legal Counsel has adopted the latter view, opining that "exclusive responsibility for interpreting and enforcing the Incompatibility Clause rests with Congress." Members of Cong. Holding Rsrv. Comm'ns, 1 Op. O.L.C. 242, 242 (1977). The Supreme Court has noted this as an open question but has not resolved it. Powell v. McCormack, 395 U.S. 486, 521 n.41 (1969) ("It has been argued that [the Incompatibility Clause and other provisions] is no less a 'qualification' within the meaning of Art. I, § 5, than those set forth in Art. I, § 2. We need not reach this question, however . . . .") (citations omitted).

[8] 64 M.J. 1, 2 (C.A.A.F. 2006).

[9] *Id.*

[10] *See id.* at 3–4, 6–7.

[11] *See supra* ArtI.S5.C1.1 Congressional Authority over Elections, Returns, and Qualifications.

seats to be vacant, based on their holding or acceptance of incompatible offices.[12] An early example of this practice occurred in the Seventh Congress, which relied on the Incompatibility Clause to declare the seat of then-Representative John P. Van Ness vacant based on his acceptance of the office of major in the District of Columbia militia.[13]

A recurring and unsettled issue relates to whether Members of Congress may simultaneously serve in the U.S. Armed Forces reserve despite the Incompatibility Clause.[14] Early congressional practice held that accepting a commission as an officer in the Army forfeited a Member's seat in Congress.[15] In 1916, during the First World War, the House Judiciary Committee issued a report finding that acceptance of a commission in the National Guard would vacate that Member's seat.[16] However, Congress did not act on the report.[17] During World War II, an opinion of the Attorney General concluded that Members would forfeit their seat if they entered the armed forces by enlistment or commission, should Congress "choose to act."[18] The opinion therefore urged the President to refrain from commissioning Members.[19] In recent decades, Congress has declined to take any action against Members holding Reserve or National Guard commissions, which may suggest acceptance of the practice.[20]

Section 7—Legislation

Clause 1—Revenue

ArtI.S7.C1.1 Origination Clause and Revenue Bills

Article I, Section 7, Clause 1:

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

Until ratification of the Seventeenth Amendment in 1913,[1] only members of the House of Representatives were elected by the people directly.[2] To ensure that persons elected directly by the people would have initial responsibility over tax decisions,[3] the Constitution's Origination Clause directs that all "Bills for raising Revenue shall originate in the House of

[12] *See, e.g.*, 6 Cannon's Precedents §§ 60, 65 (1935); 1 Hinds' Precedents §§ 486, 487, 488, 492, 501, 504 (1907).

[13] *See* 1 Hinds' Precedents § 486 (1907).

[14] 2 Deschler's Precedents § 14 (1976) ("An unresolved issue relating to incompatible offices and military service is the status of Members of Congress who hold reserve commissions in branches of the armed forces. Congress has declined on several occasions to finally determine whether active service with the reserves is an incompatible office under the United States.").

[15] *See, e.g.*, 1 Hinds' Precedents §§ 487–92, 494 (1907).

[16] *See* 6 Cannon's Precedents § 60 (1935).

[17] Although the Members kept their seats, the Speaker of House initially declined to pay the salaries of Members who had accepted commissions. *See* David J. Shaw, *An Officer and a Congressman: The Unconstitutionality of Congressmen in the Armed Forces Reserve*, 97 Geo. L.J. 1739, 1750 (2009). A few years later, Congress voted to pay salaries to such Members, less the compensation received from the Army. *Id.*; 6 Cannon's Precedents § 61 (1935).

[18] Members of Cong. Serving in the Armed Forces, 40 Op. Att'ys Gen. 301, 303 (1949).

[19] *Id.*

[20] 2 Deschler's Precedents §§ 14, 14.1, 14.4 (1976). For a review of arguments as to whether the Incompatibility Clause permits or forbids dual service in Congress and the armed forces reserve, see Shaw, *supra* note 17, at 1755–66.

[1] *See* William Jennings Bryan, Certification of Adoption of Seventeenth Amendment as Part of Constitution, *reprinted in* 38 Stat. 2049–50 (1915).

[2] *See* Amdt17.2 Historical Background on Popular Election of Senators.

[3] Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 221 (1989).

Representatives."[4] The Clause permits Senate amendments to such bills.[5] By implication, though, the Senate may not originate bills for raising revenue.[6]

The Origination Clause is part of the procedures that Congress and the President must follow to enact a law.[7] The Clause is a prerogative of the House—it alone is allowed to originate such bills. However, in all Origination Clause challenges, the House has passed a bill containing matter alleged to have improperly originated in the Senate. House passage has not prevented the Court from addressing an Origination Clause challenge.[8]

The typical Origination Clause challenge involves a federal law that requires a person to pay a particular sum. These sums have gone by various names in statute,[9] including a "tax."[10] The person challenging the payment requirement focuses on Congress's consideration of the bill that became law with the payment requirement. The challenger alleges that this bill was one for raising revenue within the meaning of the Origination Clause and that action of the Senate is what first gave the bill its revenue-raising character.[11]

Origination Clause cases potentially pose a factual question and a legal question. The potential factual question is whether the bill that became law containing the challenged payment requirement first took on a revenue-raising character as a result of action by the Senate. The Court has never resolved competing factual claims about origination by, for example, considering evidence of a bill's content at different stages in its congressional consideration. In a related context, the Court has limited its factual inquiry into the process by which a bill became law, citing the "respect due to" Congress.[12] Similar concerns have impacted the Court's approach to Origination Clause cases, which has been to resolve only the primary legal question posed by such cases and not competing factual claims about where bill matter actually originated.[13]

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[4] U.S. Const. art. I, § 7, cl. 1.

[5] *Id.*

[6] *See id.*

[7] United States v. Munoz-Flores, 495 U.S. 385, 396–97 (1990) (rejecting the contention of a dissenting justice that improperly originated bills for raising revenue may nonetheless become law if passed according to the other legislative process requirements of Article I, Section 7).

[8] *Id.* at 395 (rejecting the argument that an Origination Clause claim poses a nonjusticiable political question to be decided solely by the House when it decides whether to pass legislation).

[9] *Id.* at 388 (special assessment).

[10] Millard v. Roberts, 202 U.S. 429, 435 (1906); Twin City Nat'l Bank of New Brighton v. Nebecker, 167 U.S. 196, 197 (1897).

[11] Most commonly, one of two types of Senate action has been alleged: either the bill that became law with revenue-raising features was originally introduced in the Senate, *see Millard*, 202 U.S. at 435 (apparently describing relevant bills as having been introduced in the Senate), or the bill first passed the House without any revenue-raising features, which the Senate then added through amendment, *see Nebecker*, 167 U.S. at 197 (challenge to a "tax on the circulating notes of national banks" that was alleged to have "originated in the Senate, by way of amendment to the House bill," which bill originally passed the House with no provisions for raising revenue). *But see infra* note 16.

[12] *See* Marshall Field & Co. v. Clark, 143 U.S. 649, 672–73, 679 (1892) (declining to examine the journals of the houses, committee reports, or "other documents printed by authority of Congress" to determine whether, as required by Article I, Section 7, Clause 2, a bill passed both chambers in identical form and was presented to the President in the same form); *see also* ArtI.S5.C3.1 Requirement that Congress Keep a Journal.

[13] *See Nebecker*, 167 U.S. at 203 (stating that because the Court held that the bill in question was not a "Bill[ ] for raising Revenue," the Court did not need to "consider whether, for the decision of the question before us, the journals of the two houses of congress can be referred to for the purpose of determining" whether an act "originated in the one body or the other"); *see also* Rainey v. United States, 232 U.S. 310, 317 (1914) (similar); Flint v. Stone Tracy Co., 220 U.S. 107, 143 (1911) (similar).

This legal question is whether the bill that became law was a "Bill[ ] for raising Revenue." The House-origination requirement applies only to bills that levy taxes "in the strict sense."[14] A statute that raises revenue to support the general functions of the Government fits this category.[15] If a bill with a revenue-raising provision originates in the House, the Origination Clause does not prevent the Senate from removing that revenue-raising provision and substituting another in its place.[16] A statute does not levy taxes in the strict sense—and thus is not subject to House origination—if it establishes a program and raises money for the support of that program in particular.[17] The fact that such a statute might refer to a monetary exaction as a "tax" does not make the bill subject to the Origination Clause.[18]

Clause 2—Role of President

ArtI.S7.C2.1 Overview of Presidential Approval or Veto of Bills

Article I, Section 7, Clause 2:

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

Article I, Section 7, Clause 2 provides that once a bill passes both houses of Congress it must be presented to the President for approval or veto.[1] This provision, together with Article I, Section 7, Clause 3, is sometimes called the "Presentment Clause."[2]

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[14] United States v. Norton, 91 U.S. 566, 569 (1875) (internal quotation marks omitted) (interpreting provisions of criminal law by reference to the Origination Clause's use of the term "revenue").

[15] United States v. Munoz-Flores, 495 U.S. 385, 397–98 (1990).

[16] In *Flint v. Stone Tracy Co.*, a bill allegedly originated in the House containing an inheritance tax, but after House passage of the measure the Senate amended the bill to substitute a corporate tax for the inheritance tax. The Court found no constitutional impediment to this process, because the bill had "properly originated in the House" and the Senate amendment was germane to the bill's subject matter and not beyond the Senate's power to propose. 220 U.S. at 143.

[17] *Munoz-Flores*, 495 U.S. at 397–98 (concluding that a "special assessment provision was passed as part of a particular program" to compensate and assist crime victims "to provide money for that program"). Earlier cases employed an equivalent framing, asking whether the money-raising aspects of a bill were a means of achieving the central, non-revenue-raising object of the bill. *See* Millard v. Roberts, 202 U.S. 429, 435–36 (1906) (ruling that taxes imposed on property in the District of Columbia merely financed a bill's central object of infrastructure improvements); *Nebecker*, 167 U.S. at 202–03 (holding that a tax on certain notes was a means of accomplishing a bill's main purpose of providing a national currency and further explaining that the act did not "raise revenue to be applied in meeting the expenses or obligations of the government" more generally).

[18] *See Munoz-Flores*, 495 U.S. at 398.

[1] The following essays discuss the veto power, including Supreme Court cases limiting the availability of line item vetoes and legislative vetoes. *See* ArtI.S7.C2.2 Veto Power; ArtI.S7.C2.3 Line Item Veto; ArtI.S7.C2.4 Legislative Veto.

[2] Because the presentment requirement is contained in two separate constitutional provisions, some sources refer to them collectively as the "Presentment Clauses," *e.g.*, INS v. Chadha, 462 U.S. 919, 946 (1983). Article I, Section 7,

The Supreme Court has held that if the President wishes to approve a bill, the Presentment Clause only requires him to sign it. He need not write on the bill the word "approved" nor the date of approval.[3] The text of Article I requires that the President sign a bill, if at all, "within ten Days (Sundays excepted)" after presentment. Failure to sign has different consequences depending on whether the legislature is in session, since the President cannot return a vetoed bill to Congress when the legislature is adjourned.[4] If the President does not sign a bill within ten days of presentment while Congress is in session, the bill automatically becomes law. If Congress adjourns while the bill is awaiting signature and the President does not sign the bill within ten days of presentment, the bill does not become law. This is sometimes called a "pocket veto." However, a President wishing to approve a bill is not required to sign it on a day when Congress is in session.[5] He may sign within ten days (other than Sundays) after the bill is presented to him, even if that period extends beyond the date of Congress's adjournment.[6]

The Court has held that a bill becomes a law on the date of its approval by the President.[7] When an act does not specify an effective date, it also takes effect on the date of its approval.[8] The Court has further held that a new law generally takes effect from the first moment of the day, fractions of a day being disregarded.[9] If no date appears on the face of the roll, the Court may ascertain the fact by resort to any source of information capable of furnishing a satisfactory answer.[10]

ArtI.S7.C2.2 Veto Power

Article I, Section 7, Clause 2:

> *Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days*

Clause 3 requires presentment to the President of orders, resolutions, and votes approved by both houses of Congress. *See* ArtI.S7.C3.1 Presentation of Senate or House Resolutions.

[3] Gardner v. The Collector, 73 U.S. (6 Wall.) 499, 503 (1868).

[4] For discussion of cases concerning the return of vetoed legislation to Congress, see ArtI.S7.C2.2 Veto Power.

[5] La Abra Silver Mining Co. v. United States, 175 U.S. 423, 453 (1899).

[6] Edwards v. United States, 286 U.S. 482 (1932). On one occasion in 1936, delay in presentation of a bill enabled the President to sign it twenty-three days after the adjournment of Congress. L. F. Schmeckebier, *Approval of Bills After Adjournment of Congress*, 33 Am. Pol. Sci. Rev. 52–53 (1939).

[7] *Gardner*, 73 U.S. at 504. *See also* Burgess v. Salmon, 97 U.S. 381, 383 (1878).

[8] Matthews v. Zane, 20 U.S. (7 Wheat.) 164, 211 (1822). Subject to applicable constitutional limitations, Congress may specify that a bill takes effect before or after the date of enactment. *See* "Effective Dates" section of CRS Report R46484, *Understanding Federal Legislation: A Section-by-Section Guide to Key Legal Considerations*, by Victoria L. Killion.

[9] Lapeyre v. United States, 84 U.S. (17 Wall.) 191, 198 (1873).

[10] *Gardner*, 73 U.S. at 511.

(Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

The Presentment Clause allows the President to veto legislation, preventing it from taking effect unless two thirds of both the House and Senate vote to override the veto. The Supreme Court has held that the two-thirds vote of each Chamber required to pass a bill over a veto refers to two-thirds of a quorum.[1] While the President may exercise the veto power to prevent a bill from becoming law, the Court has held that, once a bill becomes law, the President has no authority to repeal it.[2] The Court has also issued decisions limiting vetoes in certain contexts, including the line item veto and the legislative veto.[3]

When Congress is in session, a President who wishes to veto a bill must return the bill to the Chamber in which it originated within ten days (excepting Sundays) of when the bill is presented to him.[4] If Congress approves a bill and sends it to the President, then adjourns before the ten days elapse, the President cannot return the bill to the originating Chamber after adjournment. In those circumstances, the President can prevent the bill from becoming law simply by declining to sign it, sometimes called a "pocket veto." If the President blocks legislation by pocket veto, Congress cannot later override the veto—instead, the legislature must reintroduce the bill and enact it again.

The Supreme Court has explained that the Constitution's veto provisions serve two functions. On the one hand, they ensure that "the President shall have suitable opportunity to consider the bills presented to him. . . . It is to safeguard the President's opportunity that Paragraph 2 of § 7 of Article I provides that bills which he does not approve shall not become law if the adjournment of the Congress prevents their return."[5] At the same time, the sections ensure "that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes."[6] The Court asserted that it "should not adopt a construction which would frustrate either of these purposes."[7]

The Supreme Court has considered two cases concerning the return of vetoed legislation to Congress. In 1929, in *The Pocket Veto Case*, the Court held that the President could not return a bill to the Senate, where it originated, when Congress adjourned its first session *sine die* fewer than ten days after presenting the bill to the President.[8] The Court declined to limit the word "adjournment" to final adjournments, instead reading it as referring to any occasion on which a house of Congress is not in session. The Court held that "the determinative question in reference to an 'adjournment' is not whether it is a final adjournment of Congress or an interim adjournment, such as an adjournment of the first session, but whether it is one that 'prevents' the President from returning the bill to the House in which it originated within the time allowed."[9] Because neither House was in session to receive the bill, the President was prevented from returning it. One of the parties had argued that the President could return the

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[1] Missouri Pacific Ry. v. Kansas, 248 U.S. 276 (1919).

[2] The Confiscation Cases, 87 U.S. (20 Wall.) 92 (1874).

[3] *See* ArtI.S7.C2.3 Line Item Veto; ArtI.S7.C2.4 Legislative Veto.

[4] If the President fails to sign a bill within ten days of enactment (excepting Sundays) while Congress is in session, the bill becomes law automatically.

[5] Wright v. United States, 302 U.S. 583 (1938).

[6] *Id.* at 596.

[7] *Id.*

[8] 279 U.S. 655 (1929).

[9] *Id.* at 680.

bill to a proper agent of the House of origin for consideration when that body convened. After noting that Congress had never authorized an agent to receive bills during adjournment, the Court further opined that "delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate."[10]

By contrast, in the 1938 case *Wright v. United States*, the Court held that the President's return of a bill to the Secretary of the Senate on the tenth day after presentment, during a three-day adjournment by the originating Chamber only, was an effective return.[11] In the first place, the Court reasoned, the pocket veto clause referred to an adjournment of "the Congress," and here only the Senate, the originating body, had adjourned. The President could return the bill to the originating Chamber while it was in an intrasession adjournment because there was no "practical difficulty" in making the return. The Court observed: "The organization of the Senate continued and was intact. The Secretary of the Senate was functioning and was able to receive, and did receive the bill."[12] The Court held that such a procedure complied with the constitutional provisions because "[t]he Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return."[13] The Court determined that the concerns that motivated the decision in *The Pocket Veto Case* were not present. There was no indefinite period in which a bill was in a state of suspended animation with public uncertainty over the outcome. Thus, the Court concluded, "When there is nothing but such a temporary recess the organization of the House and its appropriate officers continue to function without interruption, the bill is properly safeguarded for a very limited time and is promptly reported and may be reconsidered immediately after the short recess is over."[14]

ArtI.S7.C2.3 Line Item Veto

Article I, Section 7, Clause 2:

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

The veto power grants the President a significant role in the legislative process; but, as with many aspects of the Constitution's three-branch system of government, the Presentment Clause sometimes requires the President to compromise. At times, often in the appropriations context, Congress enacts far-reaching bills containing provisions the President believes to be beneficial or even necessary along with other provisions that he would not approve standing

[10] *Id.* at 684.

[11] 302 U.S. 583 (1938).

[12] *Id.* at 589–90.

[13] *Id.* at 589.

[14] *Id.* at 595.

alone. Under the Presentment Clause, the President must sign or veto an entire bill. For more than a century, Presidents sought authority to veto certain line items in an appropriations bill while otherwise approving the legislation. Numerous Presidents from Ulysses Grant on unsuccessfully sought a constitutional amendment that would allow a line-item veto by which individual items in an appropriations bill or a substantive bill could be extracted and vetoed. Beginning in the Franklin Delano Roosevelt Administration, Congress debated whether it could enact a statute authorizing a line-item veto.[1]

In 1996, Congress approved and the President Bill Clinton signed the Line Item Veto Act.[2] The law empowered the President, within five days of signing a bill, to cancel certain spending items and targeted, defined tax benefits. In exercising this authority, the President was to determine that the cancellation of each item would (1) reduce the Federal budget deficit; (2) not impair any essential Government functions; and (3) not harm the national interest.[3]

In *Clinton v. City of New York*, the Supreme Court held the Act unconstitutional because it did not comply with the Presentment Clause.[4] Although Congress in passing the Act considered itself to have been delegating power to the President,[5] the Court instead analyzed the statute under the Presentment Clause. In the Court's view, two bills from which the President subsequently struck items became law the moment the President signed them. His cancellations thus amended and, in part, repealed the two federal laws. The Court explained, however, that statutory repeals must conform to the Presentment Clause's "single, finely wrought and exhaustively considered, procedure" for enacting or repealing a law.[6] The Court held that the procedures in the Act did not, and could not, comply with that clause. The Act purported to allow the President to act in a legislative capacity, altering a law. But nothing in the Constitution authorized the President to amend or repeal a statute unilaterally, and the Court construed both constitutional silence and the historical practice over 200 years as "an express prohibition" of the President's action.[7]

ArtI.S7.C2.4 Legislative Veto

Article I, Section 7, Clause 2:

> *Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days*

[1] *See* Line Item Veto: Hearing Before the Senate Committee on Rules and Administration, 99th Cong., 1st Sess. (1985), esp. 10–20 (CRS memoranda detailing the issues).

[2] Pub. L. No. 104-130, 110 Stat. 1200 (codified in part at 2 U.S.C. §§ 691–692).

[3] *Id.* § 691(a)(A).

[4] 524 U.S. 417 (1998).

[5] *E.g.*, H.R. Conf. Rep. No. 104-491, 104th Cong., 2d Sess. 15 (1996) (stating that the proposed law delegates limited authority to the President).

[6] 524 U.S. at 438–39 (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).

[7] *Id.* at 439.

(Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Beginning in the 1930s, Congress embraced a new use for concurrent resolutions (resolutions by both Houses of Congress) and simple resolutions (resolutions by a single Chamber), invoking them to terminate powers delegated to the President or to disapprove particular exercises of power by the President or the President's agents. The "legislative veto" or "congressional veto" first developed in the context of the delegation to the Executive of power to reorganize governmental agencies,[1] and expanded in response to national security and foreign affairs considerations immediately prior to and during World War II.[2] At first, Congress applied veto provisions to certain actions taken by the President or another Executive officer—such as the reorganization of an agency, changes to tariff rates, or the disposal of federal property. However, Congress later expanded the device to give itself power to negate regulations issued by Executive Branch agencies, and proposals were made to allow Congress to negate all regulations of Executive Branch independent agencies.[3] The proliferation of congressional veto provisions raised a series of interrelated constitutional questions.[4]

In the 1983 case *INS v. Chadha*, the Court held a one-House congressional veto to be unconstitutional as violating both the bicameralism principles reflected in Article I, Sections 1 and 7, and the presentment provisions of Section 7, Clauses 2 and 3.[5] The veto provision in question, Section 244(c)(2) of the Immigration and Nationality Act, authorized either house of Congress by resolution to veto the decision of the Attorney General to allow a particular deportable alien to remain in the country.

In determining that veto of the Attorney General's decision on suspension of deportation was a legislative action requiring presentment to the President for approval or veto, the Court set forth the general standard. The Court explained that whether actions taken by either House are "an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'"[6] The Court concluded that the action before it "was essentially legislative" because "it had the

[1] Act of June 30, 1932, § 407, 47 Stat. 414.

[2] *See, e.g.*, Lend Lease Act of March 11, 1941, 55 Stat. 31; First War Powers Act of December 18, 1941, 55 Stat. 838; Emergency Price Control Act of January 30, 1942, 56 Stat. 23; Stabilization Act of October 2, 1942, 56 Stat. 765; War Labor Disputes Act of June 25, 1943, 57 Stat. 163, all providing that the powers granted to the President should come to an end upon adoption of concurrent resolutions to that effect.

[3] A bill providing for this failed to receive the two-thirds vote required to pass under suspension of the rules by only three votes in the 94th Congress. H.R. 12048, 94th Congress, 2d Sess. *See* H. Rep. No. 94-1014, 94th Congress, 2d Sess. (1976), and 122 Cong. Rec. 31615–641, 31668. Considered extensively in the 95th and 96th Congresses, similar bills were not adopted. See Regulatory Reform and Congressional Review of Agency Rules: Hearings Before the Subcommittee on Rules of the House of the House Rules Committee, 96th Congress, 1st Sess. (1979); Regulatory Reform Legislation: Hearings Before the Senate Committee on Governmental Affairs, 96th Congress, 1st Sess. (1979).

[4] From 1932 to 1983, by one count, nearly 300 separate provisions giving Congress power to halt or overturn Executive action had been passed in nearly 200 acts; substantially more than half of these had been enacted since 1970. A partial listing was included in The Constitution, Jefferson's Manual and Rules of the House of Representatives, H. Doc. No. 96-398, 96th Congress, 2d Sess. (1981), 731–922. A subsequent listing, in light of the Supreme Court's ruling, is contained in H. Doc. No. 101-256, 101st Cong., 2d sess. (1991), 907–1054. Justice Byron White's dissent in INS v. Chadha, 462 U.S. 919, 968–974, 1003–1013 (1983), describes and lists many kinds of such vetoes. The types of provisions varied widely. Many required congressional approval before an executive action took effect, but more commonly they provided for a negative upon Executive action, by concurrent resolution of both Houses, by resolution of only one House, or even by a committee of one House.

[5] 462 U.S. 919 (1983).

[6] *Id.* at 952.

purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch."[7]

The other major component of the Court's reasoning in *Chadha* stemmed from its reading of the Constitution as making only "explicit and unambiguous" exceptions to the bicameralism and presentment requirements. Thus the House alone was given power of impeachment, and the Senate alone was given power to convict upon impeachment and to provide advice and consent to Executive appointments and treaties; similarly, the Congress may propose a constitutional amendment without the President's approval, and each House is given autonomy over certain "internal matters" such as judging the qualifications of its members. By implication then, exercises of legislative power not falling within any of these "narrow, explicit, and separately justified" exceptions must conform to the prescribed procedures: "passage by a majority of both Houses and presentment to the President."[8]

While *Chadha* involved a single-House veto, the Court's analysis of the presentment issue made clear that two-House veto provisions and committee veto provisions suffer the same constitutional infirmity as the law at issue in that case.[9] Justice Byron White, dissenting in *Chadha*, asserted that the Court had "sound[ed] the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.'"[10] The breadth of the Court's ruling in *Chadha* was evidenced in its 1986 decision in *Bowsher v. Synar*.[11] Among that case's rationales for holding the Deficit Control Act unconstitutional was that Congress had, in effect, retained control over Executive action in a manner resembling a congressional veto. The Court explained that "*Chadha* makes clear" that "once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation."[12]

Since 1983, Congress has employed various devices other than the legislative veto, such as "report and wait" provisions and requirements for certain consultative steps before action may be undertaken.[13] *Chada* has, however, restricted efforts in Congress to confine the discretion it delegates to the Executive Branch.

Clause 3—Process

ArtI.S7.C3.1 Presentation of Senate or House Resolutions

Article I, Section 7, Clause 3:

> *Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented*

[7] *Id.*

[8] *Id.* at 955–56.

[9] Shortly after deciding *Chadha*, the Court removed any doubts on this score with summary affirmance of an appeals court's invalidation of a two-House veto in Consumers Union v. FTC, 691 F.2d 575 (D.C. Cir. 1982), *aff'd sub nom.* Process Gas Consumers Group v. Consumer Energy Council, 463 U.S. 1216 (1983).

[10] *Chadha*, 462 U.S. at 967 (White, J., dissenting).

[11] 478 U.S. 714 (1986). *See also* Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991).

[12] *Id.* at 733. This position was developed at greater length in the concurring opinion of Justice John Paul Stevens. *Id.* at 736.

[13] A "report and wait" provision requires that new rule-making be reported to Congress before it takes effect. It does not allow Congress to veto a rule unilaterally, but instead gives Congress the opportunity to enact new legislation through the ordinary legislative process to block or alter the rule. The Court has upheld a "report and wait" provision that allowed for congressional rule of new court procedural rules. Sibbach v. Wilson, 312 U.S. 1 (1941); *see also Chadha*, 462 U.S. at 935 n.9 (citing *Sibbach*).

to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Article I, Section 7, Clause 3 requires presentation to the President of all orders, resolutions, or votes in which both Houses of Congress must concur. This provision is sometimes called the Orders, Resolutions, and Votes Clause (ORV Clause) and, together with Article I, Section 7, Clause 2, forms part of the Presentment Clause.[1] Some sources from the Founding and the early years of the Republic suggest that the Framers included the ORV Clause to prevent Congress from evading the veto clause by designating as something other than a bill measures intended to take effect as laws.[2]

If construed literally, the ORV Clause could have significantly slowed the legislative process by requiring presentment to the President of various intermediate matters. However, Congress has interpreted the Clause to limit its practical burden. At the request of the Senate, the Judiciary Committee in 1897 published a comprehensive report detailing how the Clause had been interpreted over the years. The report showed that the word "necessary" in the Clause had come to refer to necessity for law-making—that is, an order, resolution, or vote must be approved by both Chambers and presented to the President if it is to have the force of law. By contrast, "votes" taken in either House preliminary to the final passage of legislation need not be submitted to the other House or to the President, nor must concurrent resolutions merely expressing the views or "sense" of the Congress.[3]

The ORV Clause expressly excepts only adjournment resolutions and makes no explicit reference to resolutions proposing constitutional amendments. However, beginning with the Bill of Rights, congressional practice has been that resolutions proposing constitutional amendments need not be presented to the President for veto or approval. In *Hollingsworth v. Virginia*, the Court rejected a challenge to the validity of the Eleventh Amendment based on the assertion that it had not been presented to the President.[4] Subsequent cases cite *Hollingsworth* for the proposition that presentation of constitutional amendment resolutions is not required.[5]

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[1] Article I, Section 7, Clause 2 requires presentment to the President of bills approved by both houses of Congress. *See* ArtI.S7.C2.1 Overview of Presidential Approval or Veto of Bills. One Supreme Court case discusses both provisions of the Presentment Clause together. INS v. Chadha, 462 U.S. 919 (1983). For additional discussion of *Chadha*, see ArtI.S7.C2.4 Legislative Veto.

[2] *See* 2 Records of the Federal Convention of 1787, at 301–02, 304–05 (Max Farrand ed., 1937); 2 Joseph Story, Commentaries on the Constitution of the United States § 889, at 335 (1833). Recent scholarship presents a different possible explanation for the ORV Clause—that it was designed to authorize delegation of lawmaking power to a single House, subject to presentment, veto, and possible two-House veto override. Seth Barrett Tillman, *A Textualist Defense of Art. I, Section 7, Clause 3: Why Hollingsworth v. Virginia was Rightly Decided, and Why INS v. Chadha was Wrongly Reasoned*, 83 Tex. L. Rev. 1265 (2005).

[3] S. Rep. No. 1335, 54th Congress, 2d Sess.; 4 Hinds' Precedents of the House of Representatives § 3483 (1907).

[4] 3 U.S. (3 Dall.) 378 (1798).

[5] Although *Hollingsworth* did not necessarily so hold, *see* Seth Barrett Tillman, *A Textualist Defense of Art. I, Section 7, Clause 3: Why Hollingsworth v. Virginia was Rightly Decided, and Why INS v. Chadha was Wrongly Reasoned*, 83 Tex. L. Rev. 1265 (2005), the Court has reaffirmed this interpretation. *See* Hawke v. Smith, 253 U.S. 221, 229 (1920) (In *Hollingsworth* "this court settled that the submission of a constitutional amendment did not require the action of the President."); INS v. Chadha, 462 U.S. 919, 955 n.21 (1983) (In *Hollingsworth* the Court "held Presidential approval was unnecessary for a proposed constitutional amendment.").

Section 8—Enumerated Powers

ArtI.S8.1 Overview of Congress's Enumerated Powers

As discussed in more detail in earlier essays, the Framers sought to limit the legislative power only to those powers granted by the Constitution.[1] Section 8 of Article 1 sets out the bulk of Congress's enumerated legislative authorities. Congress's most significant powers, in terms of the breadth of authority, may be its "power of the purse,"[2] referring to its authority to tax and spend[3] and its power to regulate interstate and foreign commerce.[4] Section 8 also defines a number of more specific powers. For example, it gives Congress authority to establish uniform laws on naturalization and bankruptcy,[5] establish post offices[6] and courts,[7] regulate intellectual property,[8] and punish maritime crimes.[9] Further, although the President is the Commander in Chief,[10] Section 8 also grants Congress certain war powers, including the power to declare war,[11] to raise and maintain armies and a navy,[12] and to call forth the militia for certain purposes.[13] Apart from these specific powers, Section 8 also provides that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" and other express constitutional powers.[14] This Necessary and Proper Clause gives Congress discretion over the means it chooses to execute its enumerated powers, so long as the goal is "legitimate" and the means "appropriate."[15]

Clause 1—General Welfare

ArtI.S8.C1.1 Taxing Power

ArtI.S8.C1.1.1 Overview of Taxing Clause

Article I, Section 8, Clause 1:

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

Article I, Section 8, Clause 1 of the Constitution provides Congress with broad authority to lay and collect taxes for federal debts, the common defense, and the general welfare.[1] By the Constitution's terms, the power of Congress to levy taxes is subject to but "one exception and

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[1] ArtI.S1.2.1 Origin of Limits on Federal Power; ArtI.S1.3.3 Enumerated, Implied, Resulting, and Inherent Powers.

[2] *See, e.g.*, United States v. Richardson, 418 U.S. 166, 178 n.11 (1974) (discussing Congress's power of the purse).

[3] U.S. Const. art. I, § 8, cl. 1.

[4] *Id.* cl. 3.

[5] *Id.* cl. 4.

[6] *Id.* cl. 7.

[7] *Id.* cl. 9.

[8] *Id.* cl. 8.

[9] *Id.* cl. 10.

[10] U.S. Const. art. II, § 2, cl. 1.

[11] U.S. Const. art. I, § 8, cl. 11.

[12] *Id.* cls. 12–13.

[13] *Id.* cl. 15.

[14] *Id.* cl. 18.

[15] United States v. Kebodeaux, 570 U.S. 387, 394 (2013); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

[1] *See* Nicol v. Ames, 173 U.S. 509, 514–16 (1899); 3 Joseph Story, Commentaries on the Constitution of the United States 368–69 (1833); The Federalist No. 41 (James Madison).

only two qualifications."[2] Articles exported from any state may not be taxed at all,[3] direct taxes must be levied by the rule of apportionment,[4] and indirect taxes by the rule of uniformity.[5] The Supreme Court has emphasized the sweeping character of this power by saying from time to time that it "reaches every subject,"[6] that it is "exhaustive"[7] or that it "embraces every conceivable power of taxation."[8] Despite few express limitations on the taxing power, the scope of Congress's taxing power has been at times substantially curtailed by judicial decisions with respect to the manner in which taxes are imposed,[9] the objects for which they may be levied,[10] and the subject matter of taxation.[11]

ArtI.S8.C1.1.2 Historical Background on Taxing Power

Article I, Section 8, Clause 1:

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

The Framers' principal motivation for granting Congress the power to tax in the Constitution was to provide the National Government with a mechanism to raise a "regular and adequate supply"[1] of revenue and pay its debts.[2] Under the predecessor Articles of Confederation, the National Government had no power to tax and could not compel states to raise revenue for national expenditures.[3] The National Government could requisition funds from states to place in the common treasury, but, under the Articles of Confederation, state requisitions were "mandatory in theory" only.[4] State governments resisted these calls for

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[2] License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1866).

[3] U.S. Const. art. I, § 9, cl. 5.

[4] *Id.* art. I, § 9, cl. 4.

[5] *Id.* art. I, § 8, cl. 1.

[6] *License Tax Cases*, 72 U.S. (5 Wall.) at 471.

[7] Brushaber v. Union Pac. R.R., 240 U.S. 1, 12 (1916).

[8] *Id.*

[9] *See, e.g.,* Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20, 36–37 (1922).

[10] *See*, *e.g.*, United States v. Constantine, 296 U.S. 287, 293–94 (1935).

[11] *See*, *e.g.*, Collector v. Day, 78 U.S. (11 Wall.) 113, 120–21 (1871), *overruled by* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939).

[1] The Federalist No. 30 (Alexander Hamilton).

[2] Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 Harv. L. Rev. 83, 89 (2012); *see* Veazie Bank v. Fenno, 75 U.S. 533, 540 (1869) ("The [National Government] had been reduced to the verge of impotency by the necessity of relying for revenue upon requisitions on the States, and it was a leading object in the adoption of the Constitution to relieve the government, to be organized under it, from this necessity, and confer upon it ample power to provide revenue by the taxation of persons and property."); Bruce Ackerman, *Taxation and the Constitution*, Colum. L. Rev. 1, 6 (1999) ("The [Federalists] would never have launched their campaign against America's first Constitution, the Articles of Confederation, had it not been for its failure to provide adequate fiscal powers for the national government."); *see generally* The Federalist No. 30 (Alexander Hamilton) (advocating for a "General Power of Taxation").

[3] *See* Articles of Confederation of 1781, arts. II, VIII; The Federalist No. 30 (Alexander Hamilton); Ackerman, *supra* note 2 at 6 ("The Articles of Confederation stated that the 'common treasury . . . shall be supplied by the several States, in proportion to the value of all land within each State,' Articles of Confederation art. VIII (1781), but did not explicitly authorize the Continental Congress to impose any sanctions when a state failed to comply. This silence was especially eloquent in light of the second Article's pronouncement: 'Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by the confederation expressly delegated to the United States, in Congress assembled.'").

[4] Calvin H. Johnson, Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution 15 (Cambridge University Press) (2005); *see* Articles of Confederation of 1781, art. VIII.

funds.[5] As a result, the National Government raised "very little" revenue through state requisitions,[6] inhibiting its ability to resolve immediate fiscal problems, such as repaying its Revolutionary War debts.[7]

In the first draft of the Constitution, the taxing clause stated, "The legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises," "without any qualification whatsoever.'"[8] After discussions about the first draft's unlimited terms and several rewrites, the Framers limited the objects of the taxing power—for United States debts, defense, and the general welfare.[9] The Framers also discussed whether the clause should include language to limit expressly the subjects of the taxing power.[10] One of the arguments against a general taxing power was the potential danger to state governments.[11] A general taxing power ultimately prevailed as the Framers believed the Constitution's federal system would prevent the oppression of one government by the other through its taxing power, a general taxing power would circumvent the need to overtax certain subjects, and a general taxing power would allow the government to efficiently raise funds in times of war.[12]

ArtI.S8.C1.1.3 Uniformity Clause and Indirect Taxes

Article I, Section 8, Clause 1:

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

Article I, Section 8, Clause 1 of the Constitution authorizes Congress to lay and collect duties, imposts, or excise taxes—collectively referred to as *indirect* taxes—and requires that they be "uniform throughout the United States."[1] The Supreme Court has held that an indirect tax satisfies the Uniformity Clause "only when the tax 'operates with the same force and effect

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[5] Johnson, *supra* note 4, at 16 ("Some states simply ignored the requisitions. Some sent them back to Congress for amendment, more to the states' liking. New Jersey said it had paid enough tax by paying the tariffs or 'imposts' on goods imported through New York or Philadelphia and it repudiated the requisition in full.").

[6] Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 Va. L. Rev. 1195, 1202 (2012); *see*, *e.g.*, Johnson, *supra* note 4, at 15 ("In the requisition of 1786—the last before the Constitution—Congress mandated that states pay $3,800,000, but it collected only $663."); *see* Metzger, *supra* note 2, at 89 ("Under the Articles of Confederation, states had failed to meet congressional requisitions on a massive scale and Congress was bankrupt.").

[7] Johnson, *supra* note 4, at 16–17 ("Congress's Board of Treasury had concluded in June 1786 that there was 'no reasonable hope' that the requisitions would yield enough to allow Congress to make payments on the foreign debts, even assuming that nothing would be paid on the domestic war debt. . . . Almost all of the money called for by the 1786 requisition would have gone to payments on the Revolutionary War debt. French and Dutch creditors were due payments of $1.7 million, including interest and some payment on the principal. Domestic creditors were due to be paid $1.6 million for interest only. Express advocacy of repudiation of the federal debt was rare, but with the failure of requisitions, payment was not possible. . . . Beyond the repayment of war debts, the federal goals were quite modest. The operating budget was only about $450,000 . . . . Without money, however, the handful of troops on the frontier would have to be disbanded and the Congress's offices shut."); *see* Cooter & Siegel, *supra* note 6, at 1204.

[8] 3 Joseph Story, Commentaries on the Constitution of the United States § 925 (1833).

[9] *Id.* at § 926.

[10] *Id.* at §§ 930–931; The Federalist No. 31 (Alexander Hamilton): *see* The Federalist No. 41 (James Madison); The Federalist No. 34 (Alexander Hamilton).

[11] 3 Joseph Story, Commentaries on the Constitution of the United States § 936 (1833); *see* The Federalist No. 31 (Alexander Hamilton); The Federalist No. 30 (Alexander Hamilton).

[12] 3 Joseph Story, Commentaries on the Constitution of the United States §§ 930–945 (1833); The Federalist No. 31 (Alexander Hamilton); *see* The Federalist No. 34 (Alexander Hamilton); The Federalist No. 30 (Alexander Hamilton).

[1] U.S. Const. art. I, § 8, cl. 1; *see* Flint v. Stone Tracy Co., 220 U.S. 107, 151 (1911) ("[T]he terms duties, imposts and excises are generally treated as embracing the indirect forms of taxation contemplated by the Constitution.").

in every place where the subject of it is found."[2] In general, an indirect tax does not violate the Uniformity Clause where the subject of the indirect tax is described in non-geographical terms.[3] If Congress uses geographical terms to describe the subject of the indirect tax, then the Supreme Court "will examine the classification closely to see if there is actual geographic discrimination."[4]

In *Knowlton v. Moore*,[5] the Supreme Court examined how the rule of uniformity applied to indirect taxes. In *Knowlton*, the Court adopted a less restrictive reading of the Uniformity Clause,[6] holding that, in selecting the subject of an indirect tax, Congress could define the class of objects subject to the tax and make distinctions between similar classes.[7] The *Knowlton* Court ruled that an inheritance tax that exempted legacies and distributive shares of personal property under $10,000 imposed a primary tax rate that varied based on the beneficiary's degree of relationship to the decedent, and progressively raised tax rates on legacies and distributive shares as they increased in size, did not violate the Uniformity Clause.[8] The Court held that the Uniformity Clause merely requires "geographical uniformity," meaning indirect taxes must operate in the same manner throughout the United States.[9]

The Court further clarified the meaning of the Uniformity Clause in *United States v. Ptasynski*.[10] In *Ptasynski*, the Court ruled that the Crude Oil Windfall Profit Tax Act of 1980,[11] which made the windfall profit tax inapplicable to "exempt Alaskan oil,"[12] did not violate the Uniformity Clause despite the Act's inclusion of favorable treatment for a geographically defined classification.[13] The Court explained, "Where Congress defines the subject of a tax in nongeographic terms, the Uniformity Clause is satisfied. . . . But where Congress does choose to frame a tax in geographic terms, we will examine the classification closely to see if there is actual geographic discrimination."[14] The Court held that the geographically defined classification was constitutional because Congress used "neutral factors" relating to the ecology, environment, and the remoteness of the location to conclude the exempt Alaskan oil

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[2] United States v. Ptasynski, 462 U.S. 74, 82 (1983) (quoting Head Money Cases, 112 U.S. 580, 594 (1884)).

[3] *Ptasynski*, 462 U.S. at 84; *see, e.g.,* Knowlton v. Moore, 178 U.S. 41, 106 (1900).

[4] *Ptasynski*, 462 U.S. at 85.

[5] 178 U.S. at 46.

[6] *Id.* at 84–106; *see id.* at 96 ("The proceedings of the Continental Congress also make it clear that the words 'uniform throughout the United States,' which were afterwards inserted in the Constitution of the United States, had, prior to its adoption, been frequently used, and always with reference purely to a geographical uniformity and as synonymous with the expression, 'to operate generally throughout the United States.' The foregoing situation so thoroughly permeated all the proceedings of the Continental Congress that we might well rest content with their mere statement. . . . The view that intrinsic uniformity was not then conceived is well shown.").

[7] *Id.* at 83–110; *see also Ptasynski*, 462 U.S. at 82.

[8] *Knowlton*, 178 U.S. at 110; *see id.* at 83–84.

[9] *Id.* at 87.

[10] 462 U.S. 74.

[11] Pub. L. No. 96–223, 94 Stat. 229 (1980).

[12] *Ptasynski*, 462 U.S. at 77; *see id.* at 77–78 ("[Exempt Alaskan oil] is defined as: 'any crude oil (other than Sadlerochit oil) which is produced (1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or (2) from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System.' § 4994(e). Although the Act refers to this class of oil as 'exempt Alaskan oil,' the reference is not entirely accurate. The Act exempts only certain oil produced in Alaska from the windfall profit tax. Indeed, less than 20% of current Alaskan production is exempt. Nor is the exemption limited to the State of Alaska. Oil produced in certain offshore territorial waters—beyond the limits of any State—is included within the exemption.").

[13] *Id.* at 85.

[14] *Id.* at 84–85.

classification merited favorable treatment.[15] Moreover, the Court found nothing in the legislative history that suggests Congress intended to grant Alaska "an undue preference at the expense of other oil producing states."[16]

ArtI.S8.C1.1.4 Taxes to Regulate Conduct

Article I, Section 8, Clause 1:

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

Congress has broad discretion in selecting the "measure and objects" of taxation, and may use its taxing power to regulate private conduct.[1] For instance, the Supreme Court has sustained regulations on the contents of taxed packaged goods[2] and the packaging of taxed oleomargarine,[3] which were ostensibly designed to prevent fraud in the collection of the tax. It has also upheld measures taxing drugs[4] and firearms,[5] which prescribed rigorous restrictions under which such articles could be sold or transferred, and imposed heavy penalties upon persons dealing with them in any other way.

The Court has not invalidated a tax with a clear regulatory effect solely because Congress was motivated by a regulatory purpose.[6] Even where a tax is coupled with regulations that have no relation to the efficient collection of the tax, and no other purpose appears on the face of the statute, the Court has refused to inquire into the motives of the lawmakers and has sustained the tax despite its prohibitive proportions.[7] The Court has stated:

> It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. . . . The principle applies even though the revenue obtained is obviously negligible . . . or the revenue purpose of the tax may be secondary.[8]

In some cases, however, the structure of a taxation scheme is such as to suggest that Congress actually intends to regulate under a separate constitutional authority.[9] As long as such separate authority is available to Congress, the imposition of a tax as a penalty for such regulation is valid.[10] In *National Federation of Independent Business v. Sebelius (NFIB)*,[11] the

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[15] *Id.* at 85.

[16] *Id.* at 85–86.

[1] Flint v. Stone Tracy Co., 220 U.S. 107, 167 (1911).

[2] Felsenheld v. United States, 186 U.S. 126 (1902).

[3] *In re* Kollock, 165 U.S. 526 (1897).

[4] United States v. Doremus, 249 U.S. 86 (1919); *cf.* Nigro v. United States, 276 U.S. 332 (1928).

[5] Sonzinsky v. United States, 300 U.S. 506 (1937).

[6] Without casting doubt on the ability of Congress to regulate or punish through its taxing power, the Court has overruled *United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955), to the extent that the opinions precluded individuals from asserting their Fifth Amendment privilege from self-incrimination as a defense to prosecution for violations of tax statutory schemes requiring registration and information reporting. Marchetti v. United States, 390 U.S. 39 (1968); *see* Leary v. United States, 395 U.S. 6 (1969); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968).

[7] McCray v. United States, 195 U.S. 27 (1904); *see* United States v. Doremus, 249 U.S. 86 (1919); Patton v. Brady, 184 U.S. 608 (1902).

[8] United States v. Sanchez, 340 U.S. at 44 (1950).

[9] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 393 (1940).

[10] *Id.*; *see also* Edye v. Robertson (Head Money Cases), 112 U.S. 580 (1884).

Court reaffirmed that it construes the Constitution to prohibit Congress from using the taxing power to enact taxes that are functionally regulatory penalties as a means of regulating in areas that Congress cannot regulate directly through a separate constitutional authority.[12] The Court has invalidated a few federal taxes on this basis.[13]

Discerning whether Congress, in passing a regulation that purports to be under the taxing authority, intends to exercise a separate constitutional authority, requires evaluation of a number of factors.[14] Under *Bailey v. Drexel Furniture Co.*,[15] decided in 1922, the Court, which had previously rejected a federal law regulating child labor as being outside of the Commerce Clause,[16] also rejected a 10% tax on the net profits of companies who knowingly employed child labor. The Court invalidated the child labor tax as a penalty exceeding Congress's constitutional authority and aiming to achieve a regulatory purpose "plainly within" the exclusive powers reserved to the states under the Tenth Amendment.[17] Four characteristics of the tax led the Court to conclude the tax was a penalty. First, the Court noted that the law in question set forth a specific and detailed regulatory scheme—including the ages, industry, and number of hours allowed—establishing when employment of underage youth would incur taxation.[18] Second, the tax was not commensurate with the degree of the infraction—i.e., a small departure from the prescribed course of conduct could feasibly lead to the 10% tax on net profits.[19] Third, the tax had a scienter requirement, so that the employer had to know that the child was below a specified age in order to incur taxation.[20] Fourth, the statute made the businesses subject to inspection by officers of the Secretary of Labor, positions not traditionally charged with the enforcement and collection of taxes.[21] The Court distinguished the child labor tax from acceptable regulatory taxes by emphasizing that in those cases Congress had authority outside the taxing power to regulate those activities.[22]

In the first half of the twentieth century, the Court continued to strike down federal taxes on the ground that they infringed on regulatory powers reserved to the states under the Tenth Amendment because Congress did not have separate constitutional authority to regulate the subject matter at issue. In 1935, in *United States v. Constantine*,[23] the Court struck down a federal excise tax on liquor dealers operating in violation of state law. The Court construed the Constitution to prohibit Congress from imposing the excise tax when the purpose of the tax was to punish rather than raise revenue.[24] The majority concluded that Congress exceeded its authority by penalizing liquor dealers for violating state law, because such regulation was reserved, under the Tenth Amendment, to the states.[25] Congress lacked authority to impose a penalty on liquor dealers following the repeal of the Eighteenth Amendment, which had

[11] 567 U.S. 519 (2012).

[12] *Id.* at 572–73.

[13] *See*, *e.g.*, United States v. Butler (Child Labor Tax Case), 297 U.S. 1, 68–69 (1936); United States v. Constantine, 296 U.S. 287, 293–94 (1935); Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20, 37 (1922).

[14] Hill v. Wallace, 259 U.S. 44 (1922); *see also* Helwig v. United States, 188 U.S. 605 (1903).

[15] 259 U.S. 20.

[16] Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

[17] *Drexel Furniture Co.*, 259 U.S. at 37.

[18] *Id.* at 36.

[19] *Id.*

[20] *Id.* at 36–37.

[21] *Id.* at 37.

[22] *Id.* at 40–44.

[23] 296 U.S. 287 (1935).

[24] *Id.* at 294.

[25] *Id.* at 296.

established the national prohibition on alcohol.[26] The next year, in *United States v. Butler*,[27] the Court struck down a tax on agricultural producers that Congress had enacted to raise funds to subsidize specific crops and control agricultural commodity prices. The Court held that Congress did not hold the power to regulate the "purely local activity"[28] of controlling agricultural production, because the power to regulate local activity was reserved to the states under the Tenth Amendment.[29] The Court has since limited the applicability of these decisions.[30]

In subsequent cases, the Court upheld regulatory taxes without specifying whether Congress had authority to regulate the activity subject to tax under its other enumerated powers. For example, in *Sonzinsky v. United States*,[31] the Court rejected a challenge to a federal license tax on dealers, importers, and manufacturers of certain firearms. Similarly, in *United States v. Sanchez*,[32] the Court upheld a tax on unregistered transfers of marijuana that was challenged based on its penal nature.

In 2012, in *NFIB v. Sebelius*, the Court confirmed that the taxing power provides Congress with the authority to use taxes to carry out regulatory measures that might be impermissible if Congress enacted them under its other enumerated powers.[33] In *NFIB*, the Court upheld the constitutionality of a provision in the Patient Protection and Affordable Care Act (ACA) requiring individuals to either purchase minimum health insurance (commonly referred to as the "individual mandate") or pay a "penalty" in lieu of purchasing minimum health insurance.[34] Despite being labeled a penalty in the statute, the Court held the payment due in lieu of purchasing minimum health insurance (the exaction) was a constitutionally permissible use of Congress's authority under the taxing power.[35] More precisely, the Court ruled the exaction was a tax not a penalty for constitutional purposes, and thus the exaction was not impermissibly regulatory under the taxing power.[36]

Chief Justice John Roberts, in a majority holding,[37] distinguished the exaction in *NFIB* from its past precedent in which it held Congress lacked authority under the taxing power to use penalties disguised as taxes to regulate activities that it could not regulate directly through its other enumerated powers.[38] Specifically, the Court found that three of the four characteristics that it had used in *Drexel Furniture Co.* to conclude the child labor tax was a penalty for constitutional purposes were not present with respect to the individual mandate provision at issue in *NFIB*.[39] Unlike *Drexel Furniture Co.*, the Court found: (1) the exaction was not "prohibitory" because the exaction was "far less" than the cost of insurance; (2) there was no scienter requirement—the exaction was not levied based on a taxpayer's knowledge of

[26] *Id.* at 293–94.

[27] 297 U.S. 1, 63 (1936).

[28] *Id.* at 63–64.

[29] *Id.* at 68–69.

[30] *See* NFIB v. Sebelius, 567 U.S. 519, 572–73 (2012).

[31] 300 U.S. 506, 513–14 (1937).

[32] 340 U.S. 42, 44 (1950).

[33] *NFIB*, 567 U.S. 519.

[34] *Id.* at 574 (majority opinion).

[35] *Id.*

[36] *Id.* at 572–74.

[37] Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan joined this portion of Justice Roberts' opinion.

[38] *Id.* at 564–68.

[39] *Id.* at 565–66.

wrongdoing; and (3) the Internal Revenue Service (IRS) collected the exaction and the IRS was prohibited from using "those means most suggestive of a punitive sanction, such as criminal prosecution."[40]

The majority did not expressly address the first factor used by the Court in *Drexel Furniture Co.* to conclude the child labor tax was a penalty for constitutional purposes—whether the ACA set forth a specific and detailed course of conduct and imposed an exaction on those who transgress its standard. However, the majority did apply a functional approach that looked at the exaction's "substance and application" to conclude the exaction was a tax not a penalty for constitutional purposes.[41] The Court found that the exaction "look[ed] like a tax in many respects."[42] The Court observed that the exaction is located in the Internal Revenue Code (IRC); the requirement to pay the exaction is located in the IRC; the IRS enforces the exaction; the IRS assesses and collects the exaction "in the same manner as taxes"; the exaction does not apply to individuals who do not owe federal income taxes because their income is less than the filing threshold; taxpayers pay the exaction to the Treasury's general fund when they file their tax returns; the exaction is based on "such familiar factors" as taxable income, filing status, and the number of dependents; and the exaction "yields the essential factor of any tax: it produces at least some revenue for the government."[43] Additionally, in distinguishing penalties from taxes for constitutional purposes, the Court explained that, "if the concept of penalty means anything, it means punishment for an unlawful act or omission."[44] The Court emphasized that, besides the exaction itself, there were no additional "negative legal consequences" for failure to purchase health insurance.[45] The majority's discussion suggests that, for constitutional purposes, the prominence of regulatory motivations for tax provisions may become less important than the nature of the exactions imposed and the manner in which they are administered.

In those areas where activities are subject to both taxation and regulation, Congress's taxing authority is not limited from reaching illegal activities. For instance, Congress may tax an activity, such as the business of accepting wagers,[46] regardless of whether it is permitted or prohibited by the laws of the United States[47] or by those of a state.[48] However, Congress's authority to regulate using the taxing power "reaches only existing subjects."[49] For example, "Congress cannot authorize a trade or business within a state in order to tax it," because it would be "repugnant to the exclusive power of the State over the same subject."[50] Thus, so-called federal "licenses," so far as they relate to topics outside Congress's constitutional authority, merely express "the purpose of the [federal] government not to interfere . . . with the trade nominally licensed, if the required taxes are paid."[51] In those instances, whether a federally "licensed" trade shall be permitted at all is a question to be decided by a state.

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[40] *Id.* at 566.

[41] *Id.* at 565 (quoting United States v. Constantine, 296 U.S. 287, 294 (1935)).

[42] *Id.* at 563.

[43] *NFIB*, 567 U.S. at 563–64.

[44] *Id.* at 567 (quoting United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996)).

[45] *Id.* at 568.

[46] United States v. Kahriger, 345 U.S. 22 (1953).

[47] United States v. Stafoff, 260 U.S. 477, 480 (1923); United States v. Yuginovich, 256 U.S. 450, 462 (1921).

[48] United States v. Constantine, 296 U.S. 287, 293 (1935).

[49] License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1867).

[50] *Id.*

[51] *Id.*

ArtI.S8.C1.1.5 Intergovernmental Tax Immunity Doctrine

Article I, Section 8, Clause 1:

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

There is no provision in the Constitution that expressly provides that the federal government is immune from state taxation,[1] just as there is no provision in the Constitution that expressly provides that states are immune from federal taxation.[2] However, the Supreme Court has applied the intergovernmental tax immunity doctrine to invalidate taxes that impair the sovereignty of the Federal Government or state governments. The intergovernmental tax immunity doctrine is a limitation on federal and state taxing powers by implication.[3] The Court has explained that the origins of the intergovernmental tax immunity doctrine lie in the Supremacy Clause,[4] the Tenth Amendment, and the preservation of the Constitution's system of dual federalism.[5]

The Court first articulated the principles underlying the intergovernmental tax immunity doctrine in 1819 in *McCulloch v. Maryland*.[6] In *McCulloch*, the Court ruled that the Supremacy Clause barred Maryland from imposing taxes on notes issued by the Second Bank of the United States and related penalties.[7] The Court reasoned that if a state had the power to tax the means of the Federal Government, the Supremacy Clause would be empty and without meaning.[8] Thus, the Court held states had "no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[9]

Initially, following *McCulloch*, there were few limitations on federal immunity from state taxation and state immunity from federal taxation.[10] The Court applied the intergovernmental tax immunity doctrine to prohibit federal and state governments from imposing a nondiscriminatory tax on the income or the assets an individual or business received from a contract with the other sovereign. In 1842, in *Dobbins v. Commissioners of Erie County*,[11] the Supreme Court held that the compensation of a federal officer was immune from state taxes.[12]

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[1] Collector v. Day, 78 U.S. (11 Wall.) 113, 127 (1871), *overruled by* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 486 (1939).

[2] *Day*, 78 U.S. (11 Wall.) at 127.

[3] *Graves*, 306 U.S. at 477–78 (1939).

[4] U.S. Const. art. VI, cl. 2.

[5] *See*, *e.g.*, South Carolina v. Baker, 485 U.S. 505, 523, 523 n.14 (1988); United States v. New Mexico, 455 U.S. 720, 735–36 (1982); New York v. United States, 326 U.S. 572, 586–87 (1946); *Day*, 78 U.S. (11 Wall.) at 123–27; McCulloch, v. Maryland, 17 U.S. (4 Wheat.) 316, 427–37 (1819).

[6] 17 U.S. (4 Wheat.) at 427–37.

[7] *Id.* at 436.

[8] *Id.* at 433.

[9] *Id.* at 436.

[10] Jefferson Cnty. v. Acker, 527 U.S. 423, 436 (1999), *superseded on other grounds by statute*, Removal Clarification Act of 2011, Pub. L. No. 112–51, 125 Stat. 545 (broadening grounds for removal of certain litigation to federal courts); *see also* Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218 (1928) (holding a state tax on the privilege of distributing gasoline measured by gallons of gasoline sold was unconstitutional as applied to sales a distributor made to the United States), *abrogated by* Alabama v. King & Boozer, 314 U.S. 1 (1941).

[11] 41 U.S. (16 Pet.) 435, 450 (1842), *superseded by statute,* Public Salary Act of 1939, Pub. L. No. 76–32, tit. 1, ch. 59, § 4, 53 Stat. 574, 575 (codified as amended at 4 U.S.C. § 111).

[12] *Id.* at 450.

In 1870, in *Collector v. Day*,[13] the Court relied on the dual federalism principles laid out in *McCulloch* to hold that the salary of a state officer was immune from federal taxes.[14] In 1895, building upon *Day*, the Court held in *Pollock v. Farmers' Loan & Trust*[15] that the interest earned from municipal bonds was immune from a nondiscriminatory federal tax because it was a tax on the power of states and their instrumentalities to borrow money, which was repugnant to the Constitution.[16]

By the beginning of the twentieth century, the Supreme Court began to outline the limits of *Day* and the scope of state immunity from nondiscriminatory federal taxation. In 1903, the Court upheld a federal succession tax upon a bequest to a municipality for public purposes on the ground that the tax was payable by the executor of an estate before distribution to the legatee, the municipality.[17] A closely divided Court declined to "regard it as a tax upon the municipality though it might operate incidentally to reduce the bequest by the amount of the tax."[18] The Court noted "many, if not all, forms of taxation—indeed it may be said generally that few taxes are wholly paid by the person upon whom they are directly and primarily imposed."[19] When South Carolina embarked upon the business of dispensing "intoxicating liquors," its agents were held to be subject to the federal license tax on dealers in intoxicating liquors, the ground of the holding being that agents were not carrying out the ordinary functions of government, but carrying on an ordinary private business.[20]

Another decision marking a clear departure from the logic of *Collector v. Day* was *Flint v. Stone Tracy Co.*,[21] in which the Court sustained an act of Congress taxing the privilege of doing business as a corporation, the tax being measured by the income.[22] The argument that the tax imposed an unconstitutional burden on the exercise by a state of its reserved power to create corporate franchises was rejected, partly because of the principle of national supremacy and partly on the ground that state immunity did not extend to private businesses.[23] This case also qualified *Pollock v. Farmers' Loan & Trust Co.* to the extent that it allowed Congress to impose a privilege tax on the income of corporations from all sources, including state bond interest.[24]

Subsequent cases have sustained an estate tax on a decedent's estate that included state bonds,[25] a federal transportation tax on the transportation of merchandise in performance of a contract to sell and deliver it to a county,[26] custom duties on the importation of scientific

[13] 78 U.S. (11 Wall.) 113 (1871), *overruled by* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939).

[14] *Id.* at 120–21.

[15] Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429 (1895), *overruled by* South Carolina v. Baker, 485 U.S. 505 (1988).

[16] *Id.* at 586 (citing Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449, 468 (1829) (holding federal bond interest was immune from state taxation)).

[17] Snyder v. Bettman, 190 U.S. 249 (1903).

[18] *Id.* at 254.

[19] *Id.*

[20] South Carolina v. United States, 199 U.S. 437 (1905); *see also* Ohio v. Helvering, 292 U.S. 360 (1394); *but see* New York v. United States, 326 U.S. 572 (1946) (abandoning the governmental/proprietary distinction in determining state immunity from federal taxation).

[21] 220 U.S. 107 (1911).

[22] *Id.* at 146, 177.

[23] *Id.* at 152–58.

[24] *See id.* at 162–65.

[25] Greiner v. Lewellyn, 258 U.S. 384, 387 (1922).

[26] Wheeler Lumber Bridge & Supply Co. of Des Moines v. United States, 281 U.S. 572, 579 (1930).

apparatus by a state university,[27] a federal admissions tax on admissions to athletic contests sponsored by a state institution when the state institution used the net proceeds from admissions to support a system of public education,[28] and a federal admissions tax on admissions to a municipal corporation's recreational facilities when the municipal corporation used the admissions charges to cover the recreational facilities' costs.[29] The income derived by independent contractors who were consulting engineers advising states on water supply and sewage disposal systems,[30] the compensation of trustees appointed to manage a street railway system temporarily taken over and operated by a state,[31] the net profits derived from the sale of state bonds,[32] and the net proceeds derived by a trust from the sale of oil produced under a lease of state lands[33] have all been held to be subject to federal taxation despite a possible economic burden on the states.

In *South Carolina v. Baker*,[34] the Court finally explicitly confirmed that it had overruled its holding in *Pollock* that state bond interest was immune from a nondiscriminatory federal tax.[35] The Court observed that "the more general rule that neither the federal nor the state governments could tax income an individual directly derived from any contract with another government"[36] had already been rejected in numerous decisions involving immunity under the intergovernmental tax immunity doctrine.[37] Thus, the Court concluded,

> We see no constitutional reason for treating persons who receive interest on government bonds differently than persons who receive income from other types of contracts with the government, and no tenable rationale for distinguishing the costs imposed on states by a tax on state bond interest from the costs imposed by a tax on the income from any other state contract.[38]

The specific ruling of *Day* that the Federal Government was prohibited from taxing the salaries of state government officers has been overruled.[39] But the principles underlying that

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[27] Bd. of Trs. v. United States, 289 U.S. 48, 59–60 (1933) ("explaining Congress has the exclusive power to regulate foreign commerce under Article I, Section 8, clause 3 of the U.S. Constitution and that the principles underlying state immunity from federal taxation do not provide a basis for state control over importation.").

[28] Allen v. Regents, 304 U.S. 439, 451–453 (1938) (citing South Carolina v. United States, 199 U.S. 437 (1905)).

[29] Wilmette Park Dist. v. Campbell, 338 U.S. 411, 413–14, 420 (1949).

[30] Metcalf & Eddy v. Mitchell, 269 U.S. 514, 518, 524–26 (1926).

[31] Helvering v. Powers, 293 U.S. 214, 225–27 (1934) (citing South Carolina v. United States, 199 U.S. 437 (1905)) and Ohio v. Helvering, 292 U.S. 360 (1394)).

[32] Willcuts v. Bunn, 282 U.S. 216, 223, 230–34 (1931).

[33] Helvering v. Mountain Producers Corp., 303 U.S. 376, 385–87 (1938) *overruling in part* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 52 S. Ct. 443, 76 L. Ed. 815 (1932) *and* Gillespie v. Oklahoma, 257 U.S. 501 (1922).

[34] 485 U.S. 505 (1988).

[35] *Id.* at 524.

[36] *Id.* at 517.

[37] *Id.* at 518–525 (citing Washington v. United States, 460 U.S. 536 (1983); United States v. New Mexico, 455 U.S. 720 (1982); United States v. Cnty. of Fresno, 429 U.S. 452 (1977); United States v. City of Detroit, 355 U.S. 466 (1958); Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949); Alabama v. King & Boozer, 314 U.S. 1 (1941); Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939); Helvering v. Gerhardt, 304 U.S. 405 (1938); *Mountain Producers Corp.*, 303 U.S. 376 (1938); James v. Dravo Contracting Co., 302 U.S. 134 (1937)).

[38] *Id.* at 524–25.

[39] Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 486 (1939). *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871), was decided in 1871 while the country was still in the throes of Reconstruction. As noted by Chief Justice Stone in a footnote to his opinion in *Helvering v. Gerhardt*, 304 U.S. 405, 414 n.4 (1938), the Court had not determined how far the Civil War Amendments had broadened the federal power at the expense of the states, but the fact that the taxing power had recently been used with destructive effect upon notes issued by state banks for circulation in *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869), suggested the possibility of similar attacks upon the existence of the states themselves. Two years later, the Court took the logical step of holding that a federal tax on railroad bond interest could

decision—that Congress may not lay a tax that would impair the sovereignty of the states—is still recognized as retaining some vitality.[40] The Court in *South Carolina v. Baker* summarized the modern intergovernmental tax immunity doctrine,[41] stating:

> States can never tax the United States directly but can tax any private parties with whom it does business, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals [and] the rule with respect to state tax immunity is essentially the same.[42]

The Court reasoned that under the modern doctrine there were "at least some" nondiscriminatory taxes that the Federal Government could impose directly on states that states could not impose directly on the Federal Government, but it did not address the extent to which states were immune from direct federal taxation.[43] In a footnote, the Court reaffirmed the principal from *New York v. United States*[44] that the issue of whether a federal tax violates state tax immunity under the intergovernmental tax immunity does not arise unless the tax is collected directly from a state.[45]

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not be imposed on the interest received by a municipal corporation that issued bonds to provide a loan to a railroad company because the federal tax was a tax on the municipal corporation. United States v. R.R., 84 U.S. (17 Wall.) 322 (1873). Then, the far-reaching extension of state immunity from federal taxation was granted in *Pollock v. Farmers' Loan & Tr. Co.*, 157 U.S. 429 (1895), when interest received by a private investor on state or municipal bonds was held to be exempt from federal taxation. Though relegated to virtual desuetude, *Pollock* was not expressly overruled until *South Carolina v. Baker*, 485 U.S. 505 (1988). As the apprehension of this era subsided, the doctrine of these cases that extended the reach of state immunity from federal taxation was pushed into the background. It never received the same wide application as did *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in curbing the power of the states to tax operations or instrumentalities of the Federal Government. The Supreme Court has not issued an opinion significantly narrowing the national taxing power in the name of dual federalism since the early twentieth century. In 1931, the Court held that a federal excise tax on articles sold by manufacturers was inapplicable to the sale of a motorcycle to a municipal corporation for use by the corporation in its police service. Indian Motorcycle Co. v. United States, 283 U.S. 570, 579 (1931). Justices Stone and Brandeis dissented from this decision, and it is doubtful whether it would be followed today. *Cf.* Massachusetts v. United States, 435 U.S. 444 (1978) (upholding the application of a nondiscriminatory federal user fee on all civil aircraft that fly in U.S. navigable airspace to state-owned aircraft used exclusively for police functions when the user fees defrayed the costs of federal aviation programs). The Court in *Indian Motorcycle Co.* relied on its decision in *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218 (1928), in which it invalidated the application of a state privilege tax to sales of gasoline a distributor made to the United States. The Court later rejected this reasoning from *Panhandle Oil Co.* in *Alabama v. King & Boozer*, 314 U.S. 1 (1941). In *King & Boozer*, the Court stated, "The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity." *King & Boozer*, 314 U.S. at 9.

[40] At least, if the various opinions in *New York v. United States*, 326 U.S. 572 (1946), retain force, and they may in view of (a later) *New York v. United States*, 505 U.S. 144 (1992), a Commerce Clause case rather than a tax case. *See also* South Carolina v. Baker, 485 U.S. 505, 523 n. 14 (1988).

[41] *South Carolina v. Baker*, 485 U.S. at 523.

[42] *Id.*

[43] *Id.*; *see id.* at 523 n.14. The Supreme Court's decision in *South Carolina v. Baker* came just three years after *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), where the Court held that the Tenth Amendment's limit on Congress's authority to regulate state activities was structural as opposed to substantive and that States must find their protection through the national political process (e.g., elections). The Court in *South Carolina v. Baker* observed that even in *Garcia* it "left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment." *Id.* In both *Garcia* and *South Carolina v. Baker*, the Court declined to identify and define the defects that would lead to invalidation of legislation. *Id.*; *see id.* at 520 n.11 ("To some, Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), may suggest further limitations on state tax immunity. We need not, however, decide here the extent to which the scope of the federal and state immunities differ or the extent, if any, to which States are currently immune from direct nondiscriminatory federal taxation."); *cf.* New York v. United States, 326 U.S. 572, 586 (1946) ("Concededly a federal tax discriminating against a State would be an unconstitutional exertion of power over a coexisting sovereignty within the same framework of government.").

[44] New York v. United States, 326 U.S. 572 (1946) (upholding the application of a nondiscriminatory federal excise tax to state sales of bottled mineral water taken from state-owned springs).

[45] *South Carolina v. Baker*, 485 U.S at 523 n.14.

ArtI.S8.C1.2 Spending Power

ArtI.S8.C1.2.1 Overview of Spending Clause

Article I, Section 8, Clause 1:

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

In its modern understanding, the Spending Clause of the U.S. Constitution ranks among Congress's most important powers. The Clause appears first in Article I, Section 8's list of enumerated legislative powers. It states in relevant part that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[1] The Court has construed the Spending Clause as legislative authority for federal programs as varied and consequential as Social Security,[2] Medicaid,[3] and federal education programs.[4] The spending power also underlies laws regulating local land-use decisions and the treatment of persons institutionalized by states,[5] as well as statutes prohibiting discrimination on certain protected grounds.[6]

The Spending Clause has not always been understood to confer such broad authority. The scope of Congress's spending power divided key members of the founding generation, and these disputes persisted throughout the nineteenth century.[7] The Supreme Court did not squarely address the substantive power of Congress's spending power until the 1930s, when it embraced a relatively broad view of Congress's discretion to identify the expenditures that further the general welfare.[8] Congress has used that power to pursue broad policy objectives, including objectives that it could not achieve legislating under its other enumerated powers. Under the usual framework, Congress offers federal funds in exchange for a recipient agreeing to honor conditions that accompany the funds. This offer and acceptance, the Court has said, is what lends Spending Clause legislation its legitimacy.

In its modern case law, the Court has reaffirmed the central holdings of its 1930s cases. However, the Court has also articulated and developed restrictions or limitations on the spending power. Chief among these are factors that ensure the knowing[9] and voluntary[10] acceptance of funding conditions. Other factors affect the Court's review of Spending Clause legislation as well.[11]

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[1] U.S. Const. art. I, § 8, cl. 1.

[2] Helvering v. Davis, 301 U.S. 619, 641 (1937).

[3] Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 332 (2015).

[4] Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) (observing that "Congress enacted the" Individuals with Disabilities Education Act "pursuant to the Spending Clause"); Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 665 (1985) (examining funds received by states under Title I of the of the Elementary and Secondary Education Act).

[5] Sossamon v. Texas, 563 U.S. 277, 281 (2011) (explaining that Congress enacted the Religious Land Use and Institutionalized Persons Act under its Spending and Commerce Clause powers).

[6] Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1569 (2022).

[7] *See* ArtI.S8.C1.2.2 Historical Background on Spending Clause.

[8] *See* ArtI.S8.C1.2.3 Early Spending Clause Jurisprudence.

[9] *See* ArtI.S8.C1.2.5 Clear Notice Requirement and Spending Clause.

[10] *See* ArtI.S8.C1.2.6 Anti-Coercion Requirement and Spending Clause.

[11] *See* ArtI.S8.C1.2.7 General Welfare, Relatedness, and Independent Constitutional Bars.

ArtI.S8.C1.2.2 Historical Background on Spending Clause

Article I, Section 8, Clause 1:

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

Under the Articles of Confederation, the Confederation Congress had authority to "ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses."[1] "All charges of war, and all other expenses" that were "incurred for the common defense or general welfare" were paid "out of a common treasury."[2]

For many of the Founding generation, though, this power to determine necessary expenses had limited utility.[3] The common treasury depended entirely on taxes levied by states under state law.[4] If a state failed to supply its quota for national expenses, the Confederation Congress had few effective alternatives. For example, in 1782 New Jersey urged the Confederation Congress to put a stop to the practice of other states paying the wages of troops of their own line rather than contributing those sums to the common treasury to support the Continental Army as a whole.[5] The Confederation Congress's response was that it had already done all it could to ensure that the "whole army" would be "regularly and duly paid" by setting revenue quotas for states, but given the lack of a national taxing power only states could take the actions necessary to meet those quotas.[6]

The Constitution ratified by the states plainly addressed the prior lack of a national taxing power. Congress had the "Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[7] What was far from plain, both before and after ratification, was the authority that the Spending Clause conferred on Congress to authorize expenditures.[8]

One collection of views, commonly associated with James Madison, argued that the Constitution was structured so that the general language of the Spending Clause was followed by a "specification of the objects alluded to by these general terms."[9] The Madisonian view judged the validity of a particular spending measure by asking whether the spending

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[1] Articles of Confederation of 1781, art. IX, para. 5.

[2] *Id.*, art. VIII, para. 1.

[3] *See, e.g.*, The Federalist No. 21 (Alexander Hamilton) ("The principle of regulating the contributions of the States to the common treasury by QUOTAS is another fundamental error in the Confederation.").

[4] Articles of Confederation of 1781, art. VIII, paras. 1–2 (specifying that the common treasury would be "supplied by the several States" according to land values and that "taxes for paying" each state's share of necessary sums "shall be laid and leveied by the authority and direction of the legislatures of the several States").

[5] 23 J. of the Cont'l Cong. 629 (Oct. 1, 1782). The Continental Congress provided for the raising of the Continental Army by establishing regimental quotas for each state to furnish. *See, e.g.*, 18 J. of the Cont'l Cong. 894 (Oct. 3, 1780). Troops furnished by a state were considered part of the state's "line." *See* Robert K. Wright, Jr., The Continental Army 438 (1983) (explaining that a "line" was that "portion of the Continental Army under the auspices of a specific state").

[6] *See* 23 J. of the Cont'l Cong. 629–31 (Oct. 1, 1782) (asserting that if "individual states undertake, without the previous warrant of Congress, to disperse any part of moneys required for and appropriated to the payment of the army, . . . the federal constitution must be so far infringed").

[7] U.S. Const. art. I, § 8, cl. 1.

[8] These disputes persisted long after the Founding generation. *See, e.g.*, Theodore Sky, To Provide for the General Welfare 245–46 (2003) (discussing then-Rep. Abraham Lincoln's Hamiltonian rejoinder to President James K. Polk's 1848 veto of a river-and-harbors bill).

[9] *See* The Federalist No. 41 (James Madison).

addressed a subject within one of Congress's other enumerated powers.[10] Another set of viewpoints, commonly associated with Alexander Hamilton, took a broader view.[11] Hamilton argued that the phrase "the general welfare" was as "comprehensive as any that could have been used."[12] The phrase embraced subject matter of such wide variety that it defied further specification or definition.[13]

ArtI.S8.C1.2.3 Early Spending Clause Jurisprudence

Article I, Section 8, Clause 1:

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

Some Supreme Court opinions issued prior to 1936 featured arguments from parties that a particular appropriation exceeded Congress's authority under the Spending Clause. Despite these arguments occasionally arising, the Court in the nineteenth and early twentieth centuries generally declined to address them. In 1892, the Court avoided the question of whether the Spending Clause permitted Congress to direct payments to the producers of domestic sugar, because if the appropriation exceeded Congress's spending powers, that conclusion would not yield the relief sought by those seeking to invalidate the producer payment.[1] Perhaps more important, in 1923, the Court relied on justiciability doctrines to dismiss separate challenges, brought by a state and an individual taxpayer, to a federal program offering grants to states to reduce maternal and infant mortality.[2] Until the New Deal, disputes about the scope of Congress's spending power were generally fought between and within the political branches, not in the courts.[3] However, the Court had held by the 1930s that the Spending Clause's use of the term "debts" allows Congress to pay claims that rest on moral considerations, in addition to those claims that rest on legally enforceable obligations of the United States.[4]

By 1937, the state of the case law had changed following three groundbreaking decisions. In 1936, the Court decided *United States v. Butler*, a challenge to the Agricultural Adjustment Act of 1933.[5] To boost agricultural commodities prices, the Act authorized the Secretary of Agriculture to levy fees on agricultural commodity processors and pay farmers of the same commodities who agreed to reduce their acreage under cultivation.[6] Processors challenged the

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[10] The Virginia Report of 1799–1800, at 201 (J.W. Randolph ed., 1850) ("Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises whether the particular measure be within the enumerated authorities vested in Congress.").

[11] Having endorsed the Hamiltonian view in his influential treatise on the Constitution, Justice Joseph Story is often listed alongside Hamilton as one of its chief proponents. *See, e.g.*, United States v. Butler, 297 U.S. 1, 66 (1936); *see also* 2 Joseph Story, Commentaries on the Constitution of the United States § 922 (1833).

[12] Alexander Hamilton, Report on the Subject of Manufactures 54 (1791).

[13] *Id.*

[1] *See* Marshall Field & Co. v. Clark, 143 U.S. 649, 695–96 (1892).

[2] *See* Massachusetts v. Mellon, 262 U.S. 447, 483, 488 (1923) (dismissing challenge by state and taxpayer on political question and standing grounds, respectively).

[3] *See, e.g.*, David E. Engdahl, *The Spending Power*, 44 Duke L.J. 1, 26–35 (1994).

[4] *See* United States v. Realty Co., 163 U.S. 427, 440 (1896). The Court reaffirmed this understanding in its New Deal-era cases. *See* Cincinnati Soap Co. v. United States, 301 U.S. 308, 317 (1937).

[5] 297 U.S. 1, 53 (1936).

[6] *See id.* at 58–59.

program as exceeding Congress's legislative authority. The Federal Government pointed to the Spending Clause as constitutional authority for the Act.[7]

For the first time in its history, the Court considered three perspectives of the authority granted by the Clause.[8] The Court first noted that though it had "never been authoritatively accepted," one could argue that the Spending Clause granted Congress authority to provide for the general welfare by regulating agriculture, whether or not taxation or expenditure figured in the regulation.[9] The Court rejected this view. The grant of such a "general and unlimited" regulatory power in the first clause of Article I, Section 8 could not be squared with the later enumeration of Congress's legislative powers.[10] The "only thing" that the Clause granted was "the power to tax for the purpose of providing funds for payment" of debts and supporting the general welfare.[11]

Having rejected the conception of the Spending Clause as general regulatory authority, the *Butler* Court then considered two long-standing views on the types of taxes and expenditures authorized by the Clause's reference to the "general welfare."[12] The Madisonian view held that "the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress."[13] The Hamiltonian view cast the power as "separate and distinct from those later enumerated" and "not restricted" by them.[14] Recognizing that support existed among the Founders for both perspectives, the Court adopted the Hamiltonian view, stating that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[15]

Even under this "broader construction" of the Clause, however, the Court held that the Act exceeded Congress's authority.[16] The producer fee and the farmer payments were part of a plan to regulate agriculture, which the Court held invaded the reserved powers of states.[17] If Congress could not directly regulate agriculture, it could not "purchase compliance" with such federal policies by offering funds to farmers that they could not afford to refuse.[18]

One year later, in 1937, the Court reaffirmed *Butler*'s embrace of the Hamiltonian perspective and offered further guidance on Congress's authority to identify expenditures that serve the general welfare.[19] In resolving a challenge to the Social Security Act's system of old-age benefits, the Court in *Helvering v. Davis* characterized Spending Clause analysis as requiring a fact-intensive distinction between "one welfare and another," that is, "between particular and general."[20] Congress had discretion to decide that expenditures aided the general welfare, unless that choice was "clearly wrong, a display of arbitrary power," or "not an

[7] *Id.* at 64.

[8] *See* United States v. Gerlach Live Stock Co., 339 U.S. 725, 738 (1950) (characterizing *Butler* as the Supreme Court's "first" declaration on the "substantive power" to tax and spend).

[9] *Butler*, 297 U.S. at 64.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 65.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 66.

[16] *Id.* at 66, 77–78.

[17] *Id.* at 68 (stating that the regulation of agriculture involved a power not delegated to the Federal Government).

[18] *Id.* at 70–71, 74.

[19] Helvering v. Davis, 301 U.S. 619, 640 (1937) (stating that, so far as the federal courts are concerned, differences between the Madisonian and Hamiltonian views had been "settled by decision" in *Butler*).

[20] *Id.*

exercise of judgment."[21] What qualified as the general welfare could change with the times.[22] Congress could thus conclude that legislation to support the destitute elderly, a "national" problem, would advance the general welfare.[23]

Whereas *Helvering* reaffirmed and expanded upon aspects of *Butler*, a companion case, *Charles C. Steward Machine Co. v. Davis*,[24] eroded *Butler*'s coercion conclusions. *Steward Machine Co.* involved a challenge to a federal payroll tax.[25] Employers who made contributions to an unemployment fund established under state law could credit the contribution against the federal tax, but only if the state's unemployment-fund law met standards set forth in federal law.[26] The Court held that this framework did not coerce states to enact unemployment-fund laws; the prospect of a tax credit was merely an "inducement."[27] States had the freedom of will to participate (or not) in the provision of unemployment relief, and if a state decided to participate it could rescind that decision at any time by repealing its unemployment-fund law.[28]

As the Court's first forays into debates about the Spending Clause drew to a close, a few points were clear. The Spending Clause did not bestow general regulatory powers on Congress. Instead, the power conferred was the power to tax and spend in aid of the general welfare. These fiscal powers were not limited by the Constitution's other grants of enumerated legislative powers. Congress instead had broad discretion to determine the types of expenditures that would further the general welfare, and the federal courts would not second-guess that choice. Where Congress's offer of federal funds came with conditions attached, the federal courts would view the funds as a mere inducement to accept the condition unless compulsion was apparent.

ArtI.S8.C1.2.4 Modern Spending Clause Jurisprudence Generally

Article I, Section 8, Clause 1:

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

The Supreme Court's early Spending Clause case law culminated, in 1937, with an embrace of a relatively expansive view of Congress's power to tax and spend in aid of the general welfare. That same expansive view permeates the Court's modern Spending Clause case law. The Court has repeatedly stated that, by allocating federal funds and attaching conditions to those funds,[1] Congress may pursue broad policy objectives.[2] Congress may even achieve policy outcomes that it could not directly legislate using its other enumerated powers.[3]

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[21] *Id.*

[22] *Id.* at 641.

[23] *Id.* at 644.

[24] 301 U.S. 548 (1937).

[25] *Id.* at 573–74.

[26] *Id.* at 574–75.

[27] *Id.* at 590.

[28] *Id.* at 590, 592–93.

[1] The Court has stated that Congress's authority to attach conditions to federal funds derives, in part, from the Necessary and Proper Clause. *See* Sabri v. United States, 541 U.S. 600, 605 (2004); *see also* ArtI.S8.C18.1 Overview of Necessary and Proper Clause.

Much of the Court's modern Spending Clause jurisprudence has focused on what the Court has termed "restrictions"[4] or "limits"[5] on the spending power. The Court today judges the constitutional validity of federal spending using five factors. First, Congress must unambiguously identify conditions attached to federal funds. Second, Congress must refrain from offers of funds that coerce acceptance of funding conditions. Third, spending must be in pursuit of the general welfare. Fourth, conditions on federal funds must relate to the federal interest in a program. Finally, a funding condition may not induce conduct on the part of the funds recipient that is itself unconstitutional.

ArtI.S8.C1.2.5 Clear Notice Requirement and Spending Clause

Article I, Section 8, Clause 1:

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

The Court evaluates Spending Clause legislation by requiring Congress to state conditions attached to federal funds in unambiguous terms. This requirement derives from a distinction between legislation enacted pursuant to Congress's other enumerated powers and legislation enacted under the Spending Clause. When Congress legislates under its power to enforce the Fourteenth Amendment, for example, it can command action or proscribe conduct.[1] Spending Clause legislation, on the other hand, is akin to a contract.[2] Congress makes federal funds available, subject to stated conditions, and a recipient knowingly and voluntarily accepts the funds and the conditions.[3] Knowing and voluntary acceptance is what lends Spending Clause legislation its legitimacy.[4]

Much of the Court's modern Spending Clause case law involves states as recipients, and that context has shaped the Court's clear-notice doctrine.[5] In view of limits on Congress's ability to command action by states,[6] the Justices have stressed that knowing and voluntary acceptance is "critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system."[7] In particular, the

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[2] Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1568 (2022); Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 213 (2013); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006); South Dakota v. Dole, 483 U.S. 203, 206–07 (1987); Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.).

[3] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999); Oklahoma v. U.S. Civ. Serv. Comm'n, 330 U.S. 127, 143 (1947).

[4] *Dole*, 483 U.S. at 207.

[5] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 n.13 (1981).

[1] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); *see also* Amdt14.S5.4 Modern Doctrine on Enforcement Clause.

[2] However, the Court has stated that its contract analogy does not necessarily result in offers of federal funds made pursuant to Spending Clause legislation being viewed in all respects as a bilateral contract. *See, e.g.*, Barnes v. Gorman, 536 U.S. 181, 188 n.2 (2002); Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 669 (1985).

[3] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

[4] *Barnes*, 536 U.S. at 186.

[5] *But see* Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1569 (2022) (applying clear-notice requirements to ascertain the scope of damages available against a private rehabilitation facility made subject to certain federal requirements by virtue of its participation in Medicare and Medicaid).

[6] *See* Amdt10.4.2 Anti-Commandeering Doctrine.

[7] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577 (2012) (plurality opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.).

clear-notice requirement—along with the anti-coercion principle discussed below—ensure that state officials bear political accountability for only those funding conditions that the officials had a legitimate chance of rejecting.[8]

A funds recipient cannot knowingly accept a condition if the recipient is either not aware of the condition or unable to determine the recipient's obligations under the condition.[9] To gauge whether Congress stated a condition with requisite clarity, the Court views Congress's offer from the perspective of a state official who is deciding whether to accept conditioned funds.[10] The Court asks whether the statute that makes the funds available provided the state official with clear notice of a particular obligation imposed by the condition.[11]

Questions of enforcement of funding conditions have implicated the clear-notice requirement. The Court has stated that, typically, the remedy for noncompliance with a funding condition is for the Federal Government to take action against a grantee.[12] Unless a statute provides otherwise, a state will not usually have clear notice that noncompliance with a funding condition would result in a suit brought by someone other than the Federal Government, such as an end beneficiary of the program supported with conditioned funds.[13] However, the Court has found funding conditions enforceable by private parties when a statute conferred a specific monetary entitlement on a person bringing suit who lacked sufficient administrative procedures to challenge denial of that entitlement.[14]

The Court has applied clear-notice principles to determine whether a funds recipient plainly knew it could be held liable for the particular conduct at issue in the suit.[15] Congress must also speak with a clear voice regarding the scope of remedies authorized by statute.[16] If a private suit is authorized but statute does not specify remedies, the Court has stated that the funds recipient is on notice that it may be subject to the usual remedies for a breach of contract action.[17]

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[8] *See id.* at 578–79 (discussing New York v. United States, 505 U.S. 144, 169 (1992)).

[9] *Id.*; *see also* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 25 (1981) ("Though Congress's power to legislate under the spending power is broad, it does not include surprising participating States with post acceptance or 'retroactive' conditions.").

[10] Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006).

[11] *See id.*

[12] *Pennhurst State Sch. & Hosp.*, 451 U.S. at 28; *see also* Bell v. New Jersey, 461 U.S. 773, 791 (1983) (explaining, in the context of an enforcement action by the Federal Government, a state has "no sovereign right to retain funds without complying with" valid conditions).

[13] *See Pennhurst State Sch. & Hosp.*, 451 U.S. at 28.

[14] *See* Gonzaga University v. Doe, 536 U.S. 273, 280–83 (2002) (discussing Wright v. Roanoke Redevelopment and Hous. Auth., 479 U.S. 418 (1987), and Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990)); *see also* Suter v. Artist M., 503 U.S. 347, 363 (1992). The Court has also implied a private right of action to enforce certain statutes barring discrimination in federally financed programs. *See, e.g.*, Barnes v. Gorman, 536 U.S. 181, 185 (2002).

[15] Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287–88 (1998).

[16] *See* Sossamon v. Texas, 563 U.S. 277, 286 (2011) (statutory authorization of "appropriate relief" did not unambiguously include a damages award against a state because states are usually immune from such suits); *Arlington Cent. Sch. Dist. Bd. of Educ.*, 548 U.S. at 300 (statutory reference to an "award of reasonable attorneys' fees as part of the costs" of a suit did not clearly allow recovery of expert fees).

[17] *See* Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1576 (2022) (holding that a request for emotional distress damages failed clear-notice requirement because it was not a remedy usually available in breach of contract actions between private parties); Barnes v. Gorman, 536 U.S. 181, 187–88 (2002) (same conclusion with respect to punitive damages).

ArtI.S8.C1.2.6 Anti-Coercion Requirement and Spending Clause

Article I, Section 8, Clause 1:

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

As discussed above, Spending Clause legislation derives its legitimacy from a funds recipient's knowing *and* voluntary acceptance of the conditions attached to federal funds.[1] While the clear-notice requirement is directed at ensuring a funds recipient's acceptance of Congress's conditions is knowing, the anti-coercion principle aims at acceptance that is voluntary.

Spending Clause legislation often advances policy objectives by using the prospect of federal funds as pressure or incentive to accept the conditions that go along with the funds.[2] States can either accept the incentive or assert their prerogative of not agreeing to federal stipulations.[3] There is a limit, however, to Congress's ability to exert influence on states through offers of conditioned funds.[4] Depending on how a conditional offer of funds is presented, permissible inducement can turn into impermissible compulsion.[5]

The Court's modern case law includes two applications of the anti-coercion principle.[6] In its first case, the 1987 decision in *South Dakota v. Dole*, the Court held that the threat of withholding 5% of highway funding from states that refused to adopt a minimum drinking age of twenty-one was only "relatively mild encouragement" to accept Congress's policy condition.[7] As Chief Justice John Roberts would later explain, this sum was less than one-half of one percent of South Dakota's budget at the time.[8]

In the second case, the 2012 decision in *National Federation of Independent Business (NFIB) v. Sebelius*, seven of nine Justices concluded that Congress presented states with a coercive funding condition by requiring them to expand Medicaid coverage to new populations or lose all Medicaid funds.[9] However, the seven Justices joined two different opinions: a plurality opinion authored by Chief Justice Roberts on behalf of himself and Justices Stephen Breyer and Elena Kagan, and a joint dissent by Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito. The fractured nature of this most recent application of the anti-coercion principle leaves its precise contours unclear.

Chief Justice Roberts explained that the condition confronting the Court was not a condition on the use of funds, but rather a threat to terminate "other significant independent

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[1] *See* ArtI.S8.C1.2.5 Clear Notice Requirement and Spending Clause.

[2] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577 (2012) (plurality opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.) (stating that Congress may use its spending power to create "incentives for States to act in accordance with federal policies" (internal quotation marks omitted)); South Dakota v. Dole, 483 U.S. 203, 211 (1987) (stating that every "rebate from a tax when conditioned upon conduct is in some measure a temptation" (quoting Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 589 (1937)).

[3] Oklahoma v. U.S. Civ. Serv. Comm'n, 330 U.S. 127, 143–44 (1947); *see also* Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 271 (1991).

[4] See *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 577 (plurality opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.) (relating anti-commandeering rules to the anti-coercion principle).

[5] *See Dole*, 483 U.S. at 211.

[6] Coercion figures in the Court's early Spending Clause jurisprudence as well. *See* ArtI.S8.C1.2.3 Early Spending Clause Jurisprudence (discussing United States v. Butler, 297 U.S. 1 (1936) and Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937)).

[7] *Dole*, 483 U.S. at 211–12.

[8] *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 581 (plurality opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.).

[9] *See id.* at 577.

grants" of funds.[10] Conditions that govern the use of funds ensure that grantees spend federal funds for only authorized purposes, while conditions of the Medicaid-expansion variety could properly be viewed as Congress's attempt to pressure states to accept policy changes.[11] Moreover, this instance of Medicaid expansion was not a mere modification of an existing program, as with past changes to Medicaid; it was the creation of a "new health care program."[12] States could not have anticipated the contours of this new program when they first agreed to participate in Medicaid, yet were required to participate in the new program to keep federal funding for pre-expansion Medicaid populations.[13]

Faced with such a policy condition, Chief Justice Roberts focused on the "financial inducement offered by Congress," or in other words, the amount of funding a state could lose if it declined to expand Medicaid coverage.[14] The threatened loss of federal funds equal to 10% of a state's overall budget—twenty times the portion of the state budget at issue in *Dole*—left states with no choice but to accept Medicaid expansion.[15]

The joint dissent, on the other hand, framed the coercion inquiry as whether "states really have no choice other than to accept the package."[16] This formulation appeared to place particular emphasis on the practical effects of a state declining Medicaid expansion.[17] For example, the joint dissent reasoned that though states possess separate taxing powers, as a practical matter those state powers could not be used to create alternate health care coverage under state law on the pre-expansion model of Medicaid.[18]

ArtI.S8.C1.2.7 General Welfare, Relatedness, and Independent Constitutional Bars

Article I, Section 8, Clause 1:

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

Beyond the clear-notice requirement and the anti-coercion rule, the Court evaluates Spending Clause legislation using three additional factors. First, spending must be in pursuit of the general welfare.[1] This determination is largely for Congress to make.[2] The Court substantially defers to Congress's decision that a particular expenditure advances the general

[10] *Id.* at 580.

[11] *Id.*

[12] *Id.* at 582–84 (stressing differences in patient population, federal-state cost sharing, and benefits packages, as between pre- and post-expansion Medicaid programs).

[13] *See id.*

[14] *Id.* at 580.

[15] *Id.* at 581.

[16] *Id.* at 679 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

[17] *See id.* (stating that "theoretical voluntariness is not enough").

[18] *See id.* at 683–84.

[1] South Dakota v. Dole, 483 U.S. 203, 207 (1987).

[2] Buckley v. Valeo, 424 U.S. 1, 90 (1976) ("It is for Congress to decide which expenditures will promote the general welfare."), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81; *cf.* Lyng v. Int'l Union, 485 U.S. 360, 373 (1988) (explaining that "the discretion about how best to spend money to improve the general welfare is lodged in Congress rather than the courts"); Mathews v. De Castro, 429 U.S. 181, 185 (1976) (similar).

welfare.[3] The Court has not invalidated Spending Clause legislation on the ground that it did not satisfy the general welfare requirement.[4] It has even questioned whether the general-welfare requirement is judicially enforceable.[5]

Second, a funding condition must reasonably relate to the federal interest in a program.[6] The Court has not held that a funding condition was unrelated to a federal interest. It has instead sustained a condition requiring states to set a minimum drinking age of twenty-one, because that condition promoted the federal interest in safe interstate travel.[7] The Court has also concluded that Congress could require a state to not employ in its federally supported programs a person who plays an active role in the affairs of a political party.[8] This condition advanced the federal interest in sound management of federal funds.[9]

Third, a funding condition may not induce states to act in a way that is itself unconstitutional.[10] This factor asks whether provisions of the Constitution, other than the Spending Clause, prohibit the conduct that the funding condition would prompt.[11] The constraining effect of other constitutional provisions is explored in other essays.[12] However, under the Court's modern case law, it appears that one provision of the Constitution in particular, the Tenth Amendment, is not properly understood as a capable of standing as an independent constitutional bar to a conditional offer of federal funds that otherwise satisfies the Court's five-factor analysis.[13]

Clause 2—Borrowing

ArtI.S8.C2.1 Borrowing Power of Congress

Article I, Section 8, Clause 2:

> *[The Congress shall have Power . . .] To borrow Money on the credit of the United States;* . . .

The original draft of the Constitution reported to the convention by its Committee of Detail empowered Congress "To borrow money and emit bills on the credit of the United States."[1]

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[3] *Dole*, 483 U.S. at 208; *see also Buckley*, 424 U.S. at 91 (stating that whether spending is wasteful, excessive, or unwise is irrelevant to judicial review of the general-welfare requirement).

[4] *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 674 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

[5] *Dole*, 483 U.S. at 208 n.2 ("The level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all." (citing *Buckley*, 424 U.S. at 90–91)).

[6] *Id.* at 207–08; *cf.* Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958).

[7] *Dole*, 483 U.S. at 207–08.

[8] Oklahoma v. U.S. Civ. Serv. Comm'n, 330 U.S. 127, 143 (1947).

[9] *See id.*

[10] *Dole*, 483 U.S. at 210–11; King v. Smith, 392 U.S. 309, 333 n. 34 (1968).

[11] *See* United States v. Am. Libr. Ass'n, Inc., 539 U.S. 194, 214 (2003) (plurality op.) ("Because public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights," a federal statute requiring such filtering as a condition of federal funds "does not induce libraries to violate the Constitution, and is a valid exercise of Congress's spending power.").

[12] In addition, the Court has developed its unconstitutional conditions doctrine, in part, by examining Spending Clause legislation. *See* Amdt1.7.13.1 Overview of Unconstitutional Conditions Doctrine (summarizing the doctrine as resting on the principle "that the government normally may not require a person, as a condition of receiving a public benefit, to relinquish a constitutional right").

[13] *Cf. Dole*, 483 U.S. at 210 (characterizing Oklahoma v. U.S. Civ. Serv. Comm'n, 330 U.S. 127 (1947), as having held that "a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants").

[1] 2 Records of the Federal Convention of 1787, at 144, 308–09 (Max Farrand ed., 1937).

ArtI.S8.C2.1
Borrowing Power of Congress

When this section was reached in the debates, Gouverneur Morris moved to strike out the clause "and emit bills on the credit of the United States." James Madison suggested that it might be sufficient "to prohibit the making them a tender." After a spirited exchange of views on the subject of paper money, the convention voted, nine states to two, to delete the words "and emit bills."[2] Nevertheless, in 1870, the Court relied in part upon this clause in holding that Congress had authority to issue treasury notes and to make them legal tender in satisfaction of antecedent debts.[3]

When it borrows money "on the credit of the United States," Congress creates a binding obligation to pay the debt as stipulated and cannot thereafter vary the terms of its agreement. A law purporting to abrogate a clause in government bonds calling for payment in gold coin was held to contravene this clause, although the creditor was denied a remedy in the absence of a showing of actual damage.[4]

Clause 3—Commerce

ArtI.S8.C3.1 Overview of Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

The Commerce Clause gives Congress broad power to regulate interstate commerce and restricts states from impairing interstate commerce. Early Supreme Court cases primarily viewed the Commerce Clause as limiting state power rather than as a source of federal power. Of the approximately 1,400 Commerce Clause cases that the Supreme Court heard before 1900, most stemmed from state legislation.[1] As a consequence, the Supreme Court's early interpretations of the Commerce Clause focused on the meaning of "commerce" while paying less attention to the meaning of "regulate." During the 1930s, however, the Supreme Court increasingly heard cases on Congress's power to regulate commerce, with the result that its interstate Commerce Clause jurisprudence evolved markedly during the twentieth century.

ArtI.S8.C3.2 Meaning of Commerce

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

While the etymology of the word "commerce" suggests that "merchandise," or goods for sale, was integral to its original meaning,[1] Chief Justice John Marshall in *Gibbons v. Ogden* interpreted the Commerce Clause broadly.[2] *Gibbons* concerned whether the New York legislature could grant a monopoly to Aaron Ogden to operate steamships on New York waters and thereby prevent Thomas Gibbons from operating a steamship between New York and New

[2] *Id.* at 310.

[3] Knox v. Lee (Legal Tender Cases), 79 U.S. (12 Wall.) 457 (1871), overruling Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870).

[4] Perry v. United States, 294 U.S. 330, 351 (1935). *See also* Lynch v. United States, 292 U.S. 571 (1934).

[1] E. Prentice & J. Egan, The Commerce Clause of the Federal Constitution 14 (1898).

[1] The Oxford English Dictionary: "com- together, with, + merx, merci- merchandise, ware."

[2] 22 U.S. (9 Wheat.) 1 (1824).

Jersey pursuant to a license granted by Congress.[3] In defending his New York-granted steamship monopoly, Ogden argued that transporting passengers did not constitute "commerce" under the Commerce Clause. Finding New York's grant of a steamship monopoly violated the Commerce Clause, Chief Justice Marshall reasoned that commerce encompassed not only buying and selling but also, more generally, intercourse and consequently navigation. The Chief Justice wrote:

> The subject to be regulated is commerce. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse.[4]

Marshall further noted the general understanding of the meaning of commerce, the Article I, Section 9 prohibition against Congress granting any preference "by any regulation of commerce or revenue, to the ports of one State over those of another," and Congress's power to impose embargoes.[5]

In *Gibbons*, Marshall qualified the word "intercourse" with the word "commercial," thus retaining the element of monetary transactions.[6] Initially, the Court viewed activities covered by Congress's interstate commerce clause power narrowly. Thus, the Court held the Commerce Clause did not reach mining or manufacturing regardless of whether the product moved in interstate commerce;[7] insurance transactions crossing state lines;[8] and baseball exhibitions between professional teams traveling from state to state.[9] Similarly, the Court held that the Commerce Clause did not apply to contracts to insert advertisements in periodicals in another state[10] or to render personal services in another state.[11]

Later decisions treated the Commerce Clause more expansively. In 1945, the Court held in *Associated Press v. United States* that a press association gathering and transmitting news to client newspapers to be interstate commerce.[12] Likewise, in 1943, the Court held in *American Medical Association v. United States* that activities of Group Health Association, Inc., which

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[3] Act of February 18, 1793, 1 Stat. 305, entitled "An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same."

[4] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824).

[5] *Id.* at 190–94.

[6] *Id.* at 193.

[7] Kidd v. Pearson, 128 U.S. 1 (1888); Oliver Iron Co. v. Lord, 262 U.S. 172 (1923); United States v. E. C. Knight Co., 156 U.S. 1 (1895); *see also* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[8] Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869); see also the cases to this effect cited in United States v. Se. Underwriters Ass'n, 322 U.S. 533, 543–545, 567–568, 578 (1944).

[9] Fed. Baseball League v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200 (1922). When pressed to reconsider its decision, the Court declined, noting that Congress had not seen fit to bring the business under the antitrust laws by legislation having prospective effect; that the business had developed under the understanding that it was not subject to these laws; and that reversal would have retroactive effect. Toolson v. N.Y. Yankees, 346 U.S. 356 (1953). In *Flood v. Kuhn*, 407 U.S. 258 (1972), the Court recognized these decisions as aberrations, but thought the doctrine was entitled to the benefits of *stare decisis*, as Congress was free to change it at any time. The same considerations not being present, the Court has held that businesses conducted on a multistate basis, but built around local exhibitions, are in commerce and subject to, *inter alia*, the antitrust laws, in the instance of professional football, Radovich v. Nat'l Football League, 352 U.S. 445 (1957), professional boxing, United States v. Int'l Boxing Club, 348 U.S. 236 (1955), and legitimate theatrical productions, United States v. Shubert, 348 U.S. 222 (1955).

[10] Blumenstock Bros. v. Curtis Publ'g Co., 252 U.S. 436 (1920).

[11] Williams v. Fears, 179 U.S. 270 (1900). *See also* Diamond Glue Co. v. U.S. Glue Co., 187 U.S. 611 (1903); Browning v. City of Waycross, 233 U.S. 16 (1914); General Ry. Signal Co. v. Virginia, 246 U.S. 500 (1918). *But see* York Mfg. Co. v. Colley, 247 U.S. 21 (1918).

[12] Associated Press v. United States, 326 U.S. 1 (1945).

serve only its own members, are "trade" and capable of becoming interstate commerce.[13] The Court also held insurance transactions between an insurer and insured in different states to be interstate commerce.[14] Most importantly, the Court held that manufacturing,[15] mining,[16] business transactions,[17] and the like, which occur antecedent or subsequent to a move across state lines, are part of an integrated commercial whole and covered by the Commerce Clause. As such, Supreme Court case law on the meaning of "commerce" in "interstate commerce" covers movements of persons and things, whether for profit or not, across state lines;[18] communications; transmissions of intelligence, whether for commercial purposes or otherwise;[19] and commercial negotiations that involve transportation of persons or things, or flows of services or power, across state lines.[20]

ArtI.S8.C3.3 Meaning of Among the Several States in the Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

The Supreme Court has interpreted the phrase "among the several states" to exclude transactions that occur wholly within a state. In *Gibbons v. Ogden*, Chief Justice John Marshall observed that the phrase "among the several States" was "not one which would probably have been selected to indicate the completely interior traffic of a state."[1] He noted that although the phrase "may very properly be restricted to that commerce which concerns more states than one,"[2] "[c]ommerce among the states, cannot stop at the external boundary line of each state, but may be introduced into the interior."[3] Identifying transactions covered by the Commerce Clause, he stated:

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.[4]

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[13] Am. Med. Ass'n v. United States, 317 U.S. 519 (1943). *Cf.* United States v. Or. Med. Society, 343 U.S. 326 (1952).

[14] United States v. Se. Underwriters Ass'n, 322 U.S. 533 (1944).

[15] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[16] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940). *See also* Hodel v. Va. Surface Mining and Reclamation Ass'n, 452 U.S. 264, 275–283 (1981); Mulford v. Smith, 307 U.S. 38 (1939) (agricultural production).

[17] Swift & Co. v. United States, 196 U.S. 375 (1905); Stafford v. Wallace, 258 U.S. 495 (1922); Chi. Bd. of Trade v. Olsen, 262 U.S. 1 (1923).

[18] In many later formulations, crossing of state lines is no longer the *sine qua non*; wholly intrastate transactions with substantial effects on interstate commerce may suffice.

[19] *E.g.*, United States v. Simpson, 252 U.S. 465 (1920); Caminetti v. United States, 242 U.S. 470 (1917).

[20] The Court stated: "Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information." United States v. Se. Underwriters Ass'n, 322 U.S. 533, 549–50 (1944).

[1] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824).

[2] *Id.* at 194.

[3] *Id.*

[4] 22 U.S. (9 Wheat.) 1, 194–195 (1824).

Subsequent to *Gibbons*, the Court held in a number of cases that Congress's Commerce Clause power did not extend to commerce that was "exclusively internal" to a state.[5] In these nineteenth and early twentieth century cases, the Court seemingly tied Congress's interstate commerce power to cross-border transactions notwithstanding Marshall's *Gibbons* reasoning that Congress's Commerce Clause power could extend to intrastate commerce that affects other states or implicates congressional power.[6] In its 1905 *Swift & Co. v. United States* decision, the Court revisited Marshall's expansive reading of the Commerce Clause to reason that, in a current of commerce, each element was within Congress's Commerce Clause power.[7] Looking at the interrelationship of industrial production to interstate commerce,[8] the Court noted that the cumulative impact[9] of minor transactions can impact interstate commerce.[10]

ArtI.S8.C3.4 Meaning of Regulate in the Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

The Court has interpreted "regulate" in the Commerce Clause as Congress's power to prescribe conditions and rules for commercial transactions, keep channels of commerce open, and regulate prices and terms of sale. In *Gibbons v. Ogden*, Chief Justice John Marshall discussed Congress's authority to "regulate," stating:

> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution . . . If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in

[5] New York v. Miln, 36 U.S. (11 Pet.) 102 (1837); License Cases, 46 U.S. (5 How.) 504 (1847); Passenger Cases, 48 U.S. (7 How.) 283 (1849); Patterson v. Kentucky, 97 U.S. 501 (1879); Trade-Mark Cases, 100 U.S. 82 (1879); Kidd v. Pearson, 128 U.S. 1 (1888); Ill. Cent. R.R. v. McKendree, 203 U.S. 514 (1906); Keller v. United States, 213 U.S. 138 (1909); Hammer v. Dagenhart, 247 U.S. 251 (1918); Oliver Iron Co. v. Lord, 262 U.S. 172 (1923).

[6] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194–195 (1824). Marshall stated: "Commerce among the states must, of necessity, be commerce with[in] the states. The power of congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states." *Id.* at 196. Commerce "among the several States," however, does not comprise commerce of the District of Columbia or the territories of the United States. Congress's power over their commerce is an incident of its general power over them. Stoutenburgh v. Hennick, 129 U.S. 141 (1889); Atl. Cleaners & Dyers v. United States, 286 U.S. 427 (1932); *In re* Bryant, 4 F. Cas. 514 (No. 2067) (D. Oreg. 1865). The Court has held transportation between two points in the same state to be interstate commerce when a part of the route is a loop outside the state. Hanley v. Kan. City S. Ry., 187 U.S. 617 (1903); W. Union Tel. Co. v. Speight, 254 U.S. 17 (1920). But such a deviation cannot be solely for the purpose of evading a tax or regulation in order to be exempt from the state's reach. Greyhound Lines v. Mealey, 334 U.S. 653, 660 (1948); Eichholz v. Pub. Serv. Comm'n, 306 U.S. 268, 274 (1939). Red cap services performed at a transfer point within the state of departure but in conjunction with an interstate trip are reachable. New York, N.H. & H. R.R. v. Nothnagle, 346 U.S. 128 (1953).

[7] Swift & Co. v. United States, 196 U.S. 375 (1905); Stafford v. Wallace, 258 U.S. 495 (1922); Chi. Bd. of Trade v. Olsen, 262 U.S. 1 (1923).

[8] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[9] United States v. Darby, 312 U.S. 100 (1941); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Maryland v. Wirtz, 392 U.S. 183 (1968); Perez v. United States, 402 U.S. 146 (1971); Russell v. United States, 471 U.S. 858 (1985); Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991).

[10] NLRB v. Fainblatt, 306 U.S. 601 (1939); Kirschbaum v. Walling, 316 U.S. 517 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Reliance Fuel Oil Co., 371 U.S. 224 (1963); Katzenbach v. McClung, 379 U.S. 294 (1964); Maryland v. Wirtz, 392 U.S. 183 (1968); McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 241–243 (1980); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

> Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.[1]

Similarly, in *Brooks v. United States*, the Court explained "regulate," observing:

> Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin. In doing this, it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce.[2]

In upholding a federal statute prohibiting shipping goods made with child labor in interstate commerce in order to extirpate child labor rather than bar intrinsically harmful goods, the Court said: "It is no objection to the assertion of the power to regulate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states."[3] Congress has also used its Commerce Clause power to enforce moral codes,[4] to ban racial discrimination in public accommodations,[5] and to protect the public from danger.[6] Consequently, Congress's power to regulate interstate commerce is among its most potent Article I, Section 8 powers.

ArtI.S8.C3.5 Historical Background

ArtI.S8.C3.5.1 Sherman Antitrust Act of 1890 and Sugar Trust Case

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

To curb the growth of industrial combinations, Congress passed the Sherman Antitrust Act (Sherman Act) in 1890. Under the Sherman Act, Congress sought to regulate commerce as "traffic." The Sherman Act prohibited "every contract, combination in the form of trust or otherwise," or "conspiracy in restraint of trade and commerce among the several States, or with foreign nations"[1] and made it a misdemeanor to "monopolize or attempt to monopolize any part of such commerce."[2]

In 1895, the Court considered the Sherman Act in *United States v. E. C. Knight Co. (Sugar Trust C)*[3] in which the government asked the Court to cancel certain agreements whereby the American Sugar Refining Company had acquired "nearly complete control of the manufacture

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[1] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196–97 (1824).

[2] Brooks v. United States, 267 U.S. 432, 436–37 (1925).

[3] United States v. Darby, 312 U.S. 100, 114 (1941).

[4] *E.g.*, Caminetti v. United States, 242 U.S. 470 (1917) (transportation of female across state line for noncommercial sexual purposes); Cleveland v. United States, 329 U.S. 14 (1946) (transportation of plural wives across state lines); United States v. Simpson, 252 U.S. 465 (1920) (transportation of five quarts of whiskey across state line for personal consumption).

[5] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Daniel v. Paul, 395 U.S. 298 (1969).

[6] *E.g.*, Reid v. Colorado, 187 U.S. 137 (1902) (transportation of diseased livestock across state line); Perez v. United States, 402 U.S. 146 (1971) (prohibition of all loan-sharking).

[1] 26 Stat. 209 (1890); 15 U.S.C. §§ 1–7.

[2] *Id.*

[3] 156 U.S. 1 (1895).

of refined sugar in the United States."[4] The Court rejected the government's claim on the grounds that the activities of the Sugar Trust had only an indirect effect on commerce, which Congress's Commerce Clause powers did not reach. Although the Court did not directly rule on the Sherman Act's constitutional validity, it analyzed the scope of Congress's commerce power when considering what activities the Sherman Act barred. Explaining the federal government's role in mitigating commercial power, Chief Justice Melville Fuller stated:

> [T]he independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.[5]

The *E. C. Knight* Court reasoned that a hard and fast line should exist between commercial and police powers based on (1) production being local and subject to state oversight; (2) commerce among the states does not begin until goods "commence their final movement from their State of origin to their destination;" (3) a product's sale is merely an incident of its production and, while capable of "bringing the operation of commerce into play," affects it only incidentally; (4) such restraint as would reach commerce, as just defined, in consequence of combinations to control production "in all its forms," would be "indirect, however inevitable and whatever its extent," and as such beyond the purview of the Act.[6] Applying this reasoning, the *E. C. Knight* Court stated:

> The object [of the combination] was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function.[7]
>
> . . . [I]t does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree.[8]

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[4] *Id.* at 9.

[5] *Id.* at 13.

[6] *Id.* at 13–16.

[7] *Id.* at 17.

[8] *Id.* at 17. The doctrine of the case boiled down to the proposition that commerce was transportation only, a doctrine Justice John Marshall Harlan undertook to refute in his dissenting opinion. Justice Harlan stated: "Interstate commerce does not, therefore, consist in transportation simply. It includes the purchase and sale of articles that are intended to be transported from one State to another—every species of commercial intercourse among the States and with foreign nations." 156 U.S. at 22. Justice Harlan further stated:

> Any combination, therefore, that disturbs or unreasonably obstructs freedom in buying and selling articles manufactured to be sold to persons in other States or to be carried to other States—a freedom that cannot exist if the right to buy and sell is fettered by unlawful restraints that crush out competition—affects, not

Four years later, in *Addyston Pipe and Steel Co. v. United States*,[9] the Court applied the Sherman Act to hold an industrial combination unlawful. The defendants in *Addyston* were manufacturing concerns that had effected a division of territory among them, which the Court held to be a "direct" restraint on the distribution and transportation of the products of the contracting firms. In reaching its holding, however, the Court did not question *E. C. Knight*, which remained substantially undisturbed until the Court's 1905 *Swift* decision.[10]

ArtI.S8.C3.5.2 Current of Commerce Concept and 1905 Swift Case

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In *Swift & Co. v. United States*, Justice Oliver Wendell Holmes referred to a "current of commerce" in providing a more expansive interpretation of the Commerce Clause. *Swift* concerned some thirty firms that bought livestock at stockyards, processed it into fresh meat, and then sold and shipped the fresh meat to purchasers in other states. The government alleged that the defendants had agreed, among other things, not to bid against each other in local markets, to fix prices, and to restrict meat shipments. On appeal to the Supreme Court, the defendants contended that some of the acts they were charged with were not acts in interstate commerce and consequently not covered by the Sherman Act. The Court ruled in favor of the government on the ground that the Sherman Act covered the "scheme as a whole" and that the local activities alleged were part of this general scheme.[1] Explaining why Congress's Commerce Clause power extended to acts that occurred within a single state, Justice Oliver Wendell Holmes reasoned:

> Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.[2]

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incidentally, but directly, the people of all the States; and the remedy for such an evil is found only in the exercise of powers confided to a government which, this court has said, was the government of all, exercising powers delegated by all, representing all, acting for all.
156 U.S. at 33 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819)).

[9] 175 U.S. 211 (1899).

[10] 196 U.S. 375 (1905). The Court applied the Sherman Act to break up combinations of interstate carriers in *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290 (1897); *United States v. Joint-Traffic Ass'n*, 171 U.S. 505 (1898); and *N. Sec. Co. v. United States*, 193 U.S. 197 (1904).

In *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 229–39 (1948), Justice Wiley Rutledge, for the Court, critically reviewed the jurisprudence of the limitations on the Act and the deconstruction of the judicial constraints. In recent years, the Court's decisions have permitted the reach of the Sherman Act to expand along with the expanding notions of congressional power. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974); Hosp. Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738 (1976); McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232 (1980); Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991). The Court, however, does insist that plaintiffs alleging that an intrastate activity violates the Act prove the relationship to interstate commerce set forth in the Act. *Gulf Oil Corp*, 419 U.S. at 194–99.

[1] Swift & Co. v. United States, 196 U.S. 375, 396 (1905).

[2] *Id.* at 398–99.

Likewise, the Court held that, even if title passed at the slaughterhouses, the sales were to persons in other states and shipments to such states were part of the transaction.[3] Thus, in *Swift*, the Court deemed sales to be part of the stream of interstate commerce if they enabled the manufacturer "to fulfill its function" although ten years earlier the Court had held in *United States v. E. C. Knight Co (Sugar Trust Case)*[4] that such sales were immaterial.

Thus, in *Swift*, the Court appeared to return to Chief Justice John Marshall's concept of commerce as traffic, which he had explored in *Gibbons v. Ogden*. As a result, activities that indirectly affected interstate trade could be deemed interstate commerce. The *Swift* Court stated: "But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States."[5] The Court also held that combinations of employees who engaged in intrastate activities such as manufacturing, mining, building, construction, and distributing poultry could be subject to the Sherman Act because of the effect, or intended effect, of these activities on interstate commerce.[6]

ArtI.S8.C3.5.3 Packers and Stockyards Act of 1921 and Grain Futures Act of 1922

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In 1921, Congress passed the Packers and Stockyards Act,[1] which brought the livestock industry in the country's chief stockyards under federal supervision. In 1922, Congress passed the Grain Futures Act[2] to regulate grain futures exchanges. In sustaining these laws, the Court relied on *Swift & Co. v. United States*. For example, in *Stafford v. Wallace*,[3] which involved the Packers and Stockyards Act, Chief Justice William Taft stated:

> The object to be secured by the act is the free and unburdened flow of livestock from the ranges and farms of the West and Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still as livestock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.[4]

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[3] *Id.* at 399–401.

[4] 156 U.S. 1 (1895).

[5] *Swift*, 196 U.S. at 400. *See also* Houston & Tex. Ry. v. United States (The Shreveport Rate Case), 234 U.S. 342 (1914).

[6] Loewe v. Lawlor (The Danbury Hatters Case), 208 U.S. 274 (1908); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Coronado Co. v. United Mine Workers, 268 U.S. 295 (1925); United States v. Bruins, 272 U.S. 549 (1926); Bedford Co. v. Stone Cutters Ass'n, 274 U.S. 37 (1927); Local 167 v. United States, 291 U.S. 293 (1934); Allen Bradley Co. v. Union, 325 U.S. 797 (1945); United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954); United States v. Green, 350 U.S. 415 (1956); Callanan v. United States, 364 U.S. 587 (1961).

[1] 42 Stat. 159, 7 U.S.C. §§ 171–183, 191–195, 201–203.

[2] 42 Stat. 998 (1922), 7 U.S.C. §§ 1–9, 10a-17.

[3] 258 U.S. 495 (1922).

[4] *Id.* at 514.

The *Stafford* Court reasoned the stockyards were "not a place of rest or final destination."[5] Instead, they were "but a throat through which the current flows," and the sales there were not "merely local transactions. [T]hey do not stop the flow . . . but, on the contrary, [are] indispensable to its continuity."[6]

In *Chicago Board of Trade v. Olsen*,[7] involving the Grain Futures Act, the Court followed the reasoning in *Stafford*. Discussing *Swift*, Chief Justice Taft remarked:

> [*Swift*] was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. It refused to permit local incidents of a great interstate movement, which taken alone are intrastate, to characterize the movement as such.[8]

In *Olsen*, the Court examined how futures sales relate to cash sales and impact the interstate grain trade. Writing for the Court, Chief Justice Taft stated: "The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it."[9] Thus, a practice that demonstrably affects prices would affect interstate trade "directly" and, even though local in itself, would be subject to Congress's regulatory power under the Commerce Clause. In *Olsen*, Chief Justice Taft also stressed the importance of congressional deference. He stated:

> Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger to meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.[10]

ArtI.S8.C3.5.4 New Deal Legislation Generally

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Several days after President Franklin D. Roosevelt's first inauguration, Chief Justice Charles Evans Hughes described a problem the new Administration faced, stating: "When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry."[1] Congress's legislative response to the Great Depression marked a significant expansion of federal economic regulation. Congress did not limit itself to regulating traffic among the states and the instrumentalities thereof. It also attempted to govern production and industrial relations in the field of production, areas over which states had historically exercised

[5] *Id.*

[6] *Id.* at 515–16. *See also* Lemke v. Farmers Grain Co., 258 U.S. 50 (1922); Minnesota v. Blasius, 290 U.S. 1 (1933).

[7] 262 U.S. 1 (1923).

[8] *Id.* at 35.

[9] *Id.* at 40.

[10] *Id.* at 37, quoting Stafford v. Wallace, 258 U.S. 495, 521 (1922).

[1] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 372 (1933).

legislative power. Confronted with this expansive exercise of congressional power, the Court reexamined Congress's interstate commerce power.

ArtI.S8.C3.5.5 National Industrial Recovery and Agricultural Adjustment Acts of 1933

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Passed on June 16, 1933, the National Industrial Recovery Act (NIRA) marked Congress's initial effort to address the Great Depression.[1] NIRA recognized the existence of "a national emergency productive of widespread unemployment and disorganization of industry" that burdened "interstate and foreign commerce," affected "the public welfare," and undermined "the standards of living of the American people." To alleviate these conditions, NIRA authorized the President to approve "codes of fair competition" if industrial or trade groups applied for such codes, or to prescribe such codes if there were no applications. Among other things, NIRA required the codes to provide certain guarantees respecting hours, wages, and collective bargaining.[2]

In *A. L. A. Schechter Poultry Corp. v. United States*,[3] the Supreme Court held the Live Poultry Code to be unconstitutional. Although practically all poultry Schechter handled came from outside the state, and hence via interstate commerce, the Court held that once the chickens arrived in Schechter's wholesale market, interstate commerce in them ceased. Although NIRA purported to govern business activities that "affected" interstate commerce, Chief Justice Charles Hughes interpreted "affected" to mean "directly" affect commerce. He stated:

> [T]he distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, . . . there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government.[4]

In short, the Court appeared to have returned in *Schechter* to the rationale of the *Sugar Trust* case.[5]

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[1] 48 Stat. 195.

[2] *Id.*

[3] 295 U.S. 495 (1935).

[4] *Id.* at 548. *See also id.* at 546.

[5] In *United States v. Sullivan*, 332 U.S. 689 (1948), the Court interpreted the Federal Food, Drug, and Cosmetic Act of 1938 to apply to a retailer's sale of drugs purchased from his wholesaler nine months after their interstate shipment had been completed. In an opinion written by Justice Hugo Black, the Court cited *United States v. Walsh*, 331 U.S. 432 (1947); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *United States v. Darby*, 312 U.S. 100 (1941). Justice Felix Frankfurter dissented on the basis of *FTC v. Bunte Bros.*, 312 U.S. 349 (1941). Subsequently, the Court repudiated the *Schechter* distinction between "direct" and "indirect" effects. *Cf.* Perez v. United States, 402 U.S. 146 (1971). *See also* McDermott v. Wisconsin, 228 U.S. 115 (1913), which preceded *Schechter* by more than two decades.

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

ArtI.S8.C3.5.5
National Industrial Recovery and Agricultural Adjustment Acts of 1933

Congress next attempted to address the Depression through the Agricultural Adjustment Act of 1933 (AAA).[6] The Court, however, set the AAA aside in *United States v. Butler* on the grounds that Congress had attempted to regulate production in violation of the Tenth Amendment.[7]

ArtI.S8.C3.5.6 Railroad Retirement and Securities Exchange Acts of 1934

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

To assist commerce and labor, Congress passed the Railroad Retirement Act (RRA) in 1934,[1] which ordered compulsory retirement for superannuated employees of interstate carriers and provided they receive pensions from a fund comprised of the compulsory contributions from the carriers and the carriers' present and future employees. In *Railroad Retirement Board v. Alton Railroad*,[2] however, a closely divided Court held the RRA to exceed Congress's Commerce Clause power and to violate the Due Process Clause of the Fifth Amendment. Writing for the majority, Justice Owen Roberts stated:

> We feel bound to hold that a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat noncontractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the States, but as a means of assuring a particular class of employees against old age dependency. This is neither a necessary nor an appropriate rule or regulation affecting the due fulfillment of the railroads' duty to serve the public in interstate transportation.[3]

In dissent, Chief Justice Charles Hughes contended that "the morale of the employees [had] an important bearing upon the efficiency of the transportation service."[4] He added:

> The fundamental consideration which supports this type of legislation is that industry should take care of its human wastage, whether that is due to accident or age. That view cannot be dismissed as arbitrary or capricious. It is a reasoned conviction based upon abundant experience. The expression of that conviction in law is regulation. When expressed in the government of interstate carriers, with respect to their employees likewise engaged in interstate commerce, it is a regulation of that commerce. As such, so far as the subject matter is concerned, the commerce clause should be held applicable.[5]

In subsequent legislation, Congress levied an excise on interstate carriers and their employees, while by separate but parallel legislation, it created a fund in the Treasury from

[6] 48 Stat. 31.

[7] United States v. Butler, 297 U.S. 1, 63–64, 68 (1936).

[1] 48 Stat. 1283.

[2] 295 U.S. 330 (1935).

[3] *Id.* at 374.

[4] *Id.* at 379.

[5] *Id.* at 384.

which pensions would be paid along the lines of the original plan. The Court did not appear to question the constitutionality of this scheme in *Railroad Retirement Board v. Duquesne Warehouse Co*.[6]

New Deal legislation did not necessarily require expansive interpretations of congressional power. The Securities Exchange Act of 1934[7] created the Securities and Exchange Commission (SEC), authorized the Commission to promulgate regulations to keep dealings in securities honest, and closed the channels of interstate commerce and the mails to dealers refusing to register under the Act.

ArtI.S8.C3.5.7 Public Utility Holding Company and Bituminous Coal Conservation Acts of 1935

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In 1935, Congress passed the Public Utility Holding Company Act ("Wheeler-Rayburn Act")[1] and the Bituminous Coal Conservation Act.[2] The Wheeler-Rayburn Act required covered companies to register with the Securities and Exchange Commission and report on their business, organization, and financial structure or be prohibited from using mails and other interstate commerce facilities. Under Section 11, the so-called "death sentence" clause, the Wheeler-Rayburn Act closed channels of interstate communication after a certain date to certain types of public utility holding companies whose operations, Congress found, were calculated chiefly to exploit the investing and consuming public. In a series of decisions, the Court sustained these provisions,[3] relying principally on *Gibbons v. Ogden*.

The Court, however, disallowed the Guffey-Snyder Bituminous Coal Conservation Act (BCCA) of 1935,[4] which regulated the price of soft coal that was sold both in interstate commerce and "locally," and the hours of labor and wages in the mines. The BCCA declared these provisions to be separable, so that the invalidity of one set would not affect the validity of the other. However, a majority of the Court, in an opinion written by Justice George Sutherland, held that (1) these provisions were not separable because the BCCA constituted one connected scheme of regulation, and (2) the BCCA was unconstitutional because it invaded the reserved powers of the states over conditions of employment in productive industry.[5] Taking Chief Justice Charles Hughes' assertion in *A. L. A. Schechter Poultry Corp. v. United States* of the "fundamental" distinction between "direct" and "indirect" effects, which, in turn, drew upon the *Sugar Trust*, Justice Sutherland stated:

> Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective

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[6] 326 U.S. 446 (1946). Indeed, in a case decided in June 1948, Justice Rutledge, speaking for a majority of the Court, listed the *Alton* case as one "foredoomed to reversal," though the formal reversal has never taken place. *See* Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, 230 (1948). *Cf.* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 19 (1976).

[7] 48 Stat. 881, 15 U.S.C. §§ 77b *et seq*.

[1] 49 Stat. 803, 15 U.S.C. §§ 79–79z-6.

[2] 49 Stat. 991.

[3] Elec. Bond Co. v. SEC, 303 U.S. 419 (1938); N. Am. Co. v. SEC, 327 U.S. 686 (1946); Am. Power & Light Co. v. SEC, 329 U.S. 90 (1946).

[4] 49 Stat. 991.

[5] Carter v. Carter Coal Co., 298 U.S. 238 (1936).

bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is greatly affected thereby. But . . . the conclusive answer is that the evils are all local evils over which the Federal Government has no legislative control. . . . Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.[6]

ArtI.S8.C3.5.8 National Labor Relations Act of 1935

Article I, Section 8, Clause 3:

[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

In *NLRB v. Jones & Laughlin Steel Corporation*, the Court reduced the distinction between "direct" and "indirect" effects, thereby enabling Congress to regulate productive industry and labor relations.[1] The National Labor Relations Act (NLRA) of 1935[2] granted workers a right to organize, forbade unlawful employer interference with this right, established procedures for workers to select representatives with whom employers were required to bargain, and created a board to oversee these processes.[3]

In an opinion by Chief Justice Charles Hughes, the Court upheld the NLRA, stating: "The close and intimate effect, which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local."[4] Considering defendant's "far-flung activities,"[5] the Court expressed concern about strife between the industry and its employees, stating:

We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. When industries

[6] *Id.* at 308–09.

[1] 301 U.S. 1 (1937). Prior to this decision, President Roosevelt, frustrated by the Court's invalidation of much of his New Deal program, proposed a "reorganization" of the Court that would have allowed him to name one new Justice for each Justice on the Court who was more than seventy years old, in the name of "judicial efficiency." The Senate defeated the plan, which some have attributed to the Court having begun to uphold New Deal legislation in cases such as *Jones & Laughlin*. *See* William E. Leuchtenberg, *The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan*, 1966 Sup. Ct. Rev. 347 (P. Kurland ed.); Alpheus Thomas Mason, *Harlan Fiske Stone and FDR's Court Plan*, 61 Yale L. J. 791 (1952); 2 Merlo J. Pusey, Charles Evans Hughes 759–765 (1951).

[2] 49 Stat. 449, as amended, 29 U.S.C. §§ 151 *et seq*.

[3] While Congress passed the NLRA during the Great Depression, the 1898 Erdman Act, 30 Stat. 424, concerning unionization of railroad workers and facilitating negotiations with employers through mediation provided some precedent. The Erdman Act, however, fell largely into disuse because the railroads refused to mediate. Additionally, in *Adair v. United States*, 208 U.S. 161 (1908), the Court struck down a provision of the Erdman Act outlawing "yellow-dog contracts" by which employers exacted promises from workers to quit or not join unions as a condition of employment. The Court held the provision did not regulate commerce on the grounds that an employee's membership in a union was not related to conducting interstate commerce. *Cf.* Coppage v. Kansas, 236 U.S. 1 (1915).

In *Wilson v. New*, 243 U.S. 332 (1917), the Court upheld Congress's passage of an act to establish an eight-hour day and time-and-a-half overtime for all interstate railway employees to settle a threatened rail strike. While the Court cited the national emergency in its decision, the case implied that the power existed generally, suggesting that Congress's powers were not as limited as some judicial decisions had indicated.

The Court sustained Congress's passage of the Railway Labor Act (RLA) of 1926, 44 Stat. 577, as amended, 45 U.S.C. §§ 151 et seq., recognizing a substantial connection between interstate commerce and union membership. Tex. & New Orleans R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548 (1930). In a subsequent decision, the Court sustained applying the RLA to "back shop" employees of an interstate carrier who made repairs to locomotives and cars withdrawn from service for long periods on the grounds that these employees' activities related to interstate commerce. Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937).

[4] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 38 (1937).

[5] *Id.* at 41.

> organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.[6]

The Court held the NLRA to be within Congress's constitutional powers because a strike that interrupted business "might be catastrophic."[7] The Court also held that the NLRA applied to (1) two minor concerns,[8] (2) a local retail auto dealer on the ground that he was an integral part of a manufacturer's national distribution system,[9] (3) a labor dispute arising during alteration of a county courthouse because one-half of the cost was attributable to materials shipped from out-of-state,[10] and (4) a dispute involving a local retail distributor of fuel oil that it obtained from a wholesaler who imported it from another state.[11] The Court stated: "This Court has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause."[12] Thus, the Court implicitly approved the National Labor Relations Board's jurisdictional standards, which assumed a prescribed dollar volume of business had a requisite effect on interstate commerce.[13]

ArtI.S8.C3.5.9 Agricultural Marketing Agreement Act of 1937

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

By passing the Agricultural Marketing Agreement Act (AMAA) on June 3, 1937,[1] Congress sought to bolster agriculture by authorizing the Secretary of Agriculture to fix the minimum prices of certain agricultural products, when the handling of such products occurs "in the current of interstate or foreign commerce or . . . directly burdens, obstructs or affects interstate or foreign commerce in such commodity or product thereof." In *United States v. Wrightwood Dairy Co.*,[2] the Court sustained an order of the Secretary of Agriculture that fixed the minimum prices to be paid to producers of milk in the Chicago "marketing area." The dairy company demurred to the regulation on the ground it applied to milk produced and sold intrastate. Sustaining the order, the Court said:

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[6] *Id.* at 41–42.

[7] *Id.* at 41.

[8] NLRB v. Fruehauf Trailer Co., 301 U.S. 49 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937). In a later case, the Court noted that the amount of affected commerce was not material. NLRB v. Fainblatt, 306 U.S. 601, 606 (1939).

[9] Howell Chevrolet Co. v. NLRB, 346 U.S. 482 (1953).

[10] Journeymen Plumbers' Union v. Cnty. of Door, 359 U.S. 354 (1959).

[11] NLRB v. Reliance Fuel Oil Co., 371 U.S. 224 (1963).

[12] *Id.* at 226. *See also* Guss v. Utah Labor Bd., 353 U.S. 1, 3 (1957); *Fainblatt*, 306 U.S. at 607.

[13] *Reliance Fuel*, 371 U.S. at 225 n.2; Liner v. Jafco, 375 U.S. 301, 303 n.2 (1964).

[1] 50 Stat. 246, 7 U.S.C. §§ 601 *et seq*.

[2] 315 U.S. 110 (1942). The Court had previously upheld other legislation that regulated agricultural production through limitations on sales in or affecting interstate commerce. Currin v. Wallace, 306 U.S. 1 (1939); Mulford v. Smith, 307 U.S. 38 (1939).

> Congress plainly has power to regulate the price of milk distributed through the medium of interstate commerce . . . and it possesses every power needed to make that regulation effective. The commerce power is not confined in its exercise to the regulation of commerce among the States. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. It follows that no form of State activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.[3]

In *Wickard v. Filburn*,[4] the Court sustained even greater Congressional regulation over production. The Agricultural Adjustment Act (AAA) of 1938, as amended in 1941,[5] regulated production even when it was not intended for commerce but wholly for consumption on the producer's farm. Sustaining the AAA amendment, the Court noted that it supported the market, stating:

> It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. . . . But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.[6]

The Court also stated:

> [Q]uestions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce. The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause . . . has made the mechanical application of legal formulas no longer feasible.[7]

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[3] 315 U.S. at 118–19.

[4] 317 U.S. 111 (1942).

[5] 42 Stat. 31, 7 U.S.C. §§ 612c, 1281–82 *et seq*.

[6] 317 U.S. at 128–29.

[7] *Id.* at 120, 123–24. In United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 (1939), the Court sustained an order under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, regulating the price of milk in certain instances. Writing for the Court, Justice Stanley Reed stated:

> The challenge is to the regulation 'of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant.' It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements of that incident violates the Tenth Amendment. But where commodities are bought for use beyond state lines, the sale is a part of interstate commerce. We have likewise held that where sales for interstate transportation were commingled with intrastate transactions, the existence of the local activity did not interfere with the federal power to regulate inspection of the whole. Activities conducted within state lines do not by this fact alone escape the sweep of the Commerce Clause. Interstate commerce may be dependent

ArtI.S8.C3.5.10 Fair Labor Standards Act of 1938

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In 1938, Congress enacted the Fair Labor Standards Act (FLSA), which prohibited shipping goods in interstate commerce that were manufactured by workmen whose employment did not comply with prescribed wages and hours.[1] The FLSA defined interstate commerce to mean "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." The FLSA further provided that "for the purposes of this act an employee shall be deemed to have been engaged in the production of goods [for interstate commerce] if such employee was employed . . . in any process or occupation directly essential to the production thereof in any State."[2] Sustaining an indictment under the FLSA, Chief Justice Harlan Stone, writing for a unanimous Court, stated:

> The motive and purpose of the present regulation are plainly to make effective the congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the States from and to which the commerce flows.[3]

In support of the decision, the Court invoked Chief Justice John Marshall's interpretations of the Necessary and Proper Clause in *McCulloch v. Maryland* and the Commerce Clause in *Gibbons v. Ogden*.[4] The Court rejected objections purporting to be based on the Tenth Amendment, stating:

> Our conclusion is unaffected by the Tenth Amendment which provides: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and State governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears

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upon them. Power to establish quotas for interstate marketing gives power to name quotas for that which is to be left within the state of production. Where local and foreign milk alike are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens and obstructions, arising from excessive surplus and the social and sanitary evils of low values, the power of the Congress extends also to the local sales. *Id.* at 568–69.

[1] The Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 *et seq*.

[2] 52 Stat. 1060, as amended, 63 Stat. 910 (1949). The 1949 amendment substituted the phrase "in any process or occupation directly essential to the production thereof in any State" for the original phrase "in any process or occupation necessary to the production thereof in any State." In Mitchell v. H.B. Zachry Co., 362 U.S. 310, 317 (1960), the Court noted that the change "manifests the view of Congress that on occasion courts . . . had found activities to be covered, which . . . [Congress now] deemed too remote from commerce or too incidental to it." The 1961 amendments to the Act, 75 Stat. 65, departed from previous practices of extending coverage to employees individually connected to interstate commerce to cover all employees of any "enterprise" engaged in commerce or production of commerce; thus, there was an expansion of employees covered but not, of course, of employers, 29 U.S.C. §§ 201 et seq. *See* 29 U.S.C. §§ 203(r), 203(s), 206(a), 207(a).

[3] United States v. Darby, 312 U.S. 100, 115 (1941).

[4] *Id.* at 113, 114, 118.

that the new National Government might seek to exercise powers not granted, and that the States might not be able to exercise fully their reserved powers.[5]

Subsequent decisions of the Court took a broad view of which employees should be covered by the FSLA,[6] and in 1949, Congress narrowed the permissible range of coverage and disapproved some of the Court's decisions.[7] But, in 1961,[8] with extensions in 1966,[9] Congress expanded the FSLA's coverage by several million persons, introducing the "enterprise" concept by which all employees in a business producing anything in commerce or affecting commerce were covered by the minimum wage-maximum hours standards.[10] Sustaining the "enterprise concept" in *Maryland v. Wirtz*,[11] Justice John Harlan, writing for a unanimous Court, held the FSLA's expanded coverage legal based on two theories: (1) all of a business's significant labor costs, not just those costs attributable to employees engaged in production in interstate commerce, contribute to the business's competitive position in commerce; and (2) ending substandard labor conditions that affect all employees, not just those actually engaged in interstate commerce, facilitates labor peace, and smooth functioning of interstate commerce.[12]

ArtI.S8.C3.5.11 Dual Federalism and Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Prior to the 1930s, the Court had effectively followed a doctrine of "dual federalism," under which Congress's power to regulate activity largely depended on whether the activity had a "direct" rather than an "indirect" effect on interstate commerce.[1] When the Court adopted a less restrictive interpretation of the Commerce Clause during and after the New Deal, the question of how concerns over federalism might impact congressional regulation of private activities became moot. However, in a number of instances, the states themselves engaged in commercial activities, which would have been subject to federal legislation if a privately owned enterprise had engaged in the activity. Consequently, the Court sustained applying federal law

[5] *Id.* at 123–24.

[6] *E.g.*, Kirschbaum v. Walling, 316 U.S. 517 (1942) (operating and maintenance employees of building, part of which was rented to business producing goods for interstate commerce); Walton v. S. Package Corp., 320 U.S. 540 (1944) (night watchman in a plant the substantial portion of the production of which was shipped in interstate commerce); Armour & Co. v. Wantock, 323 U.S. 126 (1944) (employees on stand-by auxiliary fire-fighting service of an employer engaged in interstate commerce); Borden Co. v. Borella, 325 U.S. 679 (1945) (maintenance employees in building housing company's central offices where management was located though the production of interstate commerce was elsewhere); Martino v. Mich. Window Cleaning Co., 327 U.S. 173 (1946) (employees of a window-cleaning company the principal business of which was performed on windows of industrial plants producing goods for interstate commerce); Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207 (1959) (nonprofessional employees of architectural firm working on plans for construction of air bases, bus terminals, and radio facilities).

[7] *Cf.* Mitchell v. H.B. Zachry Co., 362 U.S. 310, 316–18 (1960).

[8] 75 Stat. 65.

[9] 80 Stat. 830.

[10] 29 U.S.C. §§ 203(r), 203(s).

[11] 392 U.S. 183 (1968).

[12] The Court overruled another aspect of this case in Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), which the Court also overruled in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[1] *E.g.*, United States v. E. C. Knight Co., 156 U.S. 1 (1895); Hammer v. Dagenhart, 247 U.S. 251 (1918). Of course, for much of this time there existed a parallel doctrine under which federal power was not so limited. *E.g.*, Houston & Tex. Ry. v. United States (The Shreveport Rate Case), 234 U.S. 342 (1914).

to these state proprietary activities.[2] As Congress began to extend regulation to state governmental activities, the judicial response was inconsistent.[3] Although the Court may revisit constraining federal power on federalism grounds, Congress lacks authority under the Commerce Clause to regulate states when federal statutory provisions would "commandeer" a state's legislative or executive authority to implement a federal regulatory program.[4]

ArtI.S8.C3.6 Modern Doctrine

ArtI.S8.C3.6.1 United States v. Lopez and Interstate Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Construing modern interstate Commerce Clause doctrine in its 1995 decision of *United States v. Lopez*, the Court identified three general categories of commerce that were subject to Congress's Commerce Clause powers. These are (1) "channels of interstate commerce"; (2) "instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "activities having a substantial relation to interstate commerce."[1] In general, Congress's authority under the interstate Commerce Clause has expanded since the 1930s because of the volume of interstate commerce and Congress's ability to regulate intrastate activities that sufficiently affect interstate commerce. In *New York v. United States*, the Court noted:

> [T]he volume of interstate commerce and the range of commonly accepted objects of government regulation have expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them. As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress's commerce power.[2]

In addition, the Court has from time-to-time expressly noted that Congress's exercise of power under the Commerce Clause is akin to the police power exercised by the states.[3]

ArtI.S8.C3.6.2 Channels of Interstate Commerce

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In *United States v. Lopez*, the Court identified "channels of interstate commerce" as being subject to Congress's Commerce Clause power.[1] Channels of interstate commerce encompasses physical conduits of interstate commerce such as highways, waterways, railroads, airspace,

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[2] *E.g.*, California v. United States, 320 U.S. 577 (1944); California v. Taylor, 353 U.S. 553 (1957).

[3] For example, federal regulation of the wages and hours of certain state and local governmental employees has alternatively been upheld and invalidated. *See* Maryland v. Wirtz, 392 U.S. 183 (1968), *overruled in* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled in* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[4] New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997). For elaboration, see the discussions under the Supremacy Clause and under the Tenth Amendment.

[1] United States v. Lopez, 514 U.S. 549, 558–59 (1995) (citations omitted).

[2] New York v. United States, 505 U.S. 144, 158 (1992).

[3] *E.g.,* Brooks v. United States, 267 U.S. 432, 436–437 (1925); United States v. Darby, 312 U.S. 100, 114 (1941).

[1] United States v. Lopez, 514 U.S. 549, 558–59 (1995) (citations omitted).

and telecommunication networks, as well as the use of such interstate channels for ends Congress wishes to prohibit. As early as 1849, the Court had noted that whether "the transportation of passengers is a part of commerce is not now an open question."[2] In *Hoke v. United States*, the Court expanded its description of interstate commerce to include "the transportation of persons and property."[3] When the Court decided *Caminetti v. United States* in 1917, the Court observed that it was long settled that not only "the transportation of passengers in interstate commerce" but also the use of such authority to keep those channels "free from immoral and injurious uses" falls within Congress's regulatory power under the Commerce Clause.[4]

Courts have upheld various acts of Congress as falling within its authority to regulate channels of interstate commerce. For example, in *United States v. Morrison*, the Court noted that federal courts have uniformly upheld a federal prohibition on traveling across state lines to commit intimate-partner abuse, reasoning that the prohibition regulates "the use of channels of interstate commerce—i.e., the use of the interstate transportation routes through which persons and goods move."[5]

In *Pierce County v. Guillen*, the Court considered the constitutionality of a law that prohibited using certain highway data identifying hazardous highway locations, which the Highway Safety Act (HSA) of 1966 required states to collect, in discovery or as evidence in state or federal court proceedings.[6] The Court observed that the provision had been adopted in response to states being reluctant to comply with the HSA's requirements due to concerns about potential liability for accidents that occurred in those hazardous locations before they could be addressed.[7] The Court concluded that the data collection requirement was adopted to help state and local governments "in reducing hazardous conditions in the Nation's channels of commerce," and that "Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement . . . would result in more diligent efforts [by states] to collect the relevant information."[8] Accordingly, the Court held that the provision preventing use of the data in state and federal court proceedings—not just the data collection itself—was within the scope of Congress's Commerce Clause power.[9]

ArtI.S8.C3.6.3 Persons or Things in and Instrumentalities of Interstate Commerce

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In *United States v. Lopez*, the Court identified "instrumentalities of interstate commerce, or persons or things in interstate commerce" as being subject to Congress's Commerce Clause power.[1] Consequently, Congress has authority to regulate persons or objects in interstate

[2] Smith v. Turner, 48 U.S. (7 How.) 283, 401 (1849).

[3] 227 U.S. 308, 320 (1913).

[4] 242 U.S. 470, 491 (1917).

[5] 529 U.S. 598, 613 n.5 (2000).

[6] 537 U.S. 129, 133–34, 146–48 (2003).

[7] *Id.* at 133–34, 147.

[8] *Id.* at 129, 147.

[9] *Id.* at 147–48.

[1] United States v. Lopez, 514 U.S. 549, 558–59 (1995) (citations omitted).

commerce and the instrumentalities[2] of interstate commerce. Regulation under this category is not limited to persons or objects crossing state lines but may extend to objects or persons that have or will cross state lines. Thus, for example, the Court has upheld federal laws that penalized convicted felons for possessing or receiving firearms that had been previously transported in interstate commerce, independent of any activity by the felons, with no other connection between the felons' conduct and interstate commerce.[3]

In *United States v. Sullivan*, the Court sustained a conviction for misbranding under the Federal Food, Drug and Cosmetic Act.[4] Sullivan, a pharmacist in Columbus, Georgia, had bought a properly labeled 1,000-tablet bottle of sulfathiazole from an Atlanta wholesaler. The bottle had been shipped to the Atlanta wholesaler by a Chicago supplier six months earlier. Three months after Sullivan received the bottle, he made two retail sales of 12 tablets each, placing the tablets in boxes not labeled in strict accordance with the law. Upholding the conviction, the Court concluded that there was no question of "the constitutional power of Congress under the Commerce Clause to regulate the branding of articles that have completed an interstate shipment and are being held for future sales in purely local or intrastate commerce."[5]

ArtI.S8.C3.6.4 Intrastate Activities Having a Substantial Relation to Interstate Commerce

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In *United States v. Lopez*, the Court identified "activities having a substantial relation to interstate commerce" as being subject to Congress's Commerce Clause power.[1] Consequently, Congress's power extends beyond transactions or actions that involve crossing state or national boundaries to activities that, though local in nature, sufficiently "affect" commerce. The Court has stated that, "even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations."[2] This power derives from the Commerce Clause supplemented by the Necessary and Proper Clause.

The seminal case on Congress's authority to regulate certain intrastate commerce is *Wickard v. Filburn*, which sustained federal regulation of a wheat crop that was grown on a

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[2] Black's Law Dictionary defines instrumentality to mean "a thing used to achieve an end or purpose." For example, the Supreme Court used the example of a law prohibiting the destruction of an aircraft as a regulation of instrumentalities of interstate commerce. Perez v. United States, 402 U.S. 146, 150 (1971) (citing 18 U.S.C. § 32).

[3] Scarborough v. United States, 431 U.S. 563 (1977); Barrett v. United States, 423 U.S. 212 (1976). However, because such laws reach far into the traditional police powers of the states, the Court insists Congress clearly speak to its intent to cover such local activities. United States v. Bass, 404 U.S. 336 (1971). *See also* Rewis v. United States, 401 U.S. 808 (1971); United States v. Enmons, 410 U.S. 396 (1973). A similar tenet of construction has appeared in the Court's recent treatment of federal prosecutions of state officers for official corruption under criminal laws of general applicability. *E.g.*, McDonnell v. United States, 579 U.S. 550, 576–77 (2016) (narrowly interpreting the term "official act" to avoid a construction of the Hobbs Act and federal honest-services fraud statute that would "raise[ ] significant federalism concerns" by intruding on a state's "prerogative to regulate the permissible scope of interactions between state officials and their constituents."); McCormick v. United States, 500 U.S. 257 (1991); McNally v. United States, 483 U.S. 350 (1987).

[4] 332 U.S. 689 (1948).

[5] *Id.* at 698–99.

[1] United States v. Lopez, 514 U.S. 549, 558–59 (1995) (citations omitted).

[2] Fry v. United States, 421 U.S. 542, 547 (1975).

family farm and intended solely for home consumption.[3] The Court reasoned that even if the locally-grown and consumed wheat were never marketed, it supplied a need for the family that otherwise would have been satisfied through the market and therefore competes with wheat in commerce.[4] The Court also posited that if prices rose, the family might be induced to introduce the wheat onto the market.[5] Accordingly, the Court concluded, wheat grown on a farm for personal consumption could "have a substantial effect in defeating and obstructing [Congress's] purpose" in enacting the legislation if omitted from the regulatory scheme.[6]

Subsequent cases have applied a rational basis test to determine whether Congress may reasonably conclude that an activity affects interstate commerce, resulting in a broad application of the "affects" standard. In *Hodel v. Indiana*, the Court addressed provisions of the Surface Mining and Reclamation Control Act of 1977 designed to preserve "prime farmland." The trial court had relied on an interagency report that determined that the amount of such land disturbed annually by surface mining amounted to 0.006% of the total prime farmland acreage nationwide, concluding that the impact on commerce was "infinitesimal" or "trivial." Disagreeing, the Court said: "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends."[7] Moreover, "[t]he pertinent inquiry therefore is not how much commerce is involved but whether Congress could rationally conclude that the regulated activity affects interstate commerce."[8]

In a companion case, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, the Court reiterated that "[t]he denomination of an activity as a 'local' or 'intrastate' activity does not resolve the question whether Congress may regulate it under the Commerce Clause."[9] Rather, the Court stated, "the commerce power 'extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.'"[10] Judicial review is narrow. A court must defer to Congress's determination of an "effect" if it is rational, and Congress must have acted reasonably in choosing the means.[11]

The expansion of the class-of-activities standard in the "affecting" cases has been a potent engine of regulation. In *Perez v. United States*,[12] the Court sustained the application of a federal "loan-sharking" law to a local culprit. The Court held that, although individual loan-sharking activities might be intrastate in nature, Congress possessed the power to determine that the activity was within a class of activities that affected interstate commerce, thus affording Congress an opportunity to regulate the entire class. Although the Court and

[3] 317 U.S. 111 (1942).

[4] *Id.* at 128.

[5] *Id.*

[6] *Id.* at 128–29.

[7] Hodel v. Indiana, 452 U.S. 314, 323–24 (1981).

[8] *Id.* at 324.

[9] 452 U.S. 264, 281 (1981).

[10] *Id.* at 281 (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)).

[11] *Id.* at 276, 277. The scope of review is restated in Preseault v. ICC, 494 U.S. 1, 17 (1990). Then-Justice William Rehnquist, concurring in the two *Hodel* cases, objected that the Court was making it appear that no constitutional limits existed under the Commerce Clause, whereas in fact it was necessary that a regulated activity must have a substantial effect on interstate commerce, not just some effect. He thought it a close case that the statutory provisions here met those tests. *Id.* at 307–13.

[12] 402 U.S. 146 (1971).

the congressional findings emphasized that loan-sharking was generally part of organized crime operating on a national scale and that loan-sharking was commonly used to finance organized crime's national operations, subsequent cases do not depend upon a defensible assumption of relatedness in the class.

The Court applied the federal arson statute to the attempted "torching" of a defendant's two-unit apartment building. The Court merely pointed to the fact that the rental of real estate "unquestionably" affects interstate commerce and that "the local rental of an apartment unit is merely an element of a much broader commercial market in real estate."[13] The apparent test of whether aggregation of local activity can be said to affect commerce was made clear next in an antitrust context.[14]

In a case allowing continuation of an antitrust suit challenging a hospital's exclusion of a surgeon from practice in the hospital, the Court observed that in order to establish the required jurisdictional nexus with commerce, the appropriate focus is not on the actual effects of the conspiracy but instead on the possible consequences for the affected market if the conspiracy is successful. The required nexus in this case was sufficient because competitive significance is measured by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which the surgeon was excluded.[15]

ArtI.S8.C3.6.5 Limits on Federal Regulation of Intrastate Activity

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In *United States v. Lopez*[1] the Court, for the first time in almost sixty years,[2] invalidated a federal law as exceeding Congress's authority under the Commerce Clause. The statute made it a federal offense to possess a firearm within 1,000 feet of a school.[3] The Court reviewed the doctrinal development of the Commerce Clause, especially the effects and aggregation tests, and reaffirmed that it is the Court's responsibility to decide whether a rational basis exists for concluding that a regulated activity sufficiently affects interstate commerce when a law is challenged.[4] As noted previously, the Court's evaluation started with a consideration of whether the legislation fell within the three broad categories of activity that Congress may

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[13] Russell v. United States, 471 U.S. 858, 862 (1985). In a later case the Court avoided the constitutional issue by holding the statute inapplicable to the arson of an owner-occupied private residence. Jones v. United States, 529 U.S. 848 (2000).

[14] Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991).

[15] *Id.* at 330–32. The decision was 5-4, with the dissenters of the view that, although Congress could reach the activity, it had not done so.

[1] 514 U.S. 549 (1995). The Court was divided 5-4, with Chief Justice William Rehnquist writing the opinion of the Court, joined by Justices Sandra O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas, with dissents by Justices John Paul Stevens, David Souter, Stephen Breyer, and Ruth Bader Ginsburg.

[2] Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down regulation of mining industry as outside of Commerce Clause).

[3] 18 U.S.C. § 922(q)(1)(A). Congress subsequently amended the section to make the offense jurisdictionally turn on possession of "a firearm that has moved in or that otherwise affects interstate or foreign commerce." Pub. L. No. 104–208, 110 Stat. 3009–370.

[4] 514 U.S. at 556–57, 559.

regulate or protect under its commerce power: (1) the use of the channels of interstate commerce; (2) the use of instrumentalities of interstate commerce; or (3) activities that substantially affect interstate commerce.[5]

The Court reasoned that the criminalized activity did not implicate the first two categories.[6] As for the third, the Court found an insufficient connection. First, a wide variety of regulations of "intrastate economic activity" has been sustained where an activity substantially affects interstate commerce. But the statute being challenged, the Court continued, was a criminal law that had nothing to do with "commerce" or with "any sort of economic enterprise." Therefore, it could not be sustained under precedents "upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."[7] The provision did not contain a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[8] The existence of such a section, the Court implied, would have saved the constitutionality of the provision by requiring a showing of some connection to commerce in each particular case.

Finally, the Court rejected arguments of the government and dissent that there was a sufficient connection between the offense and interstate commerce.[9] At base, the Court's concern was that accepting the attenuated connection arguments presented would eviscerate federalism. The Court stated:

> Under the theories that the government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.[10]

Whether *Lopez* indicated a determination by the Court to police more closely Congress's exercise of its commerce power, so that it would be a noteworthy case,[11] or whether it was rather a "warning shot" across the bow of Congress, urging more restraint in the exercise of power or more care in the drafting of laws, was not immediately clear. The Court's decision five years later in *United States v. Morrison*,[12] however, suggests that stricter scrutiny of Congress's exercise of its commerce power is the chosen path, at least for legislation that falls outside the realm of economic regulation.[13] The Court will no longer defer, via rational basis review, to every congressional finding of substantial effects on interstate commerce, but instead will examine the nature of the asserted nexus to commerce, and will also consider

[5] *Id.* at 558–59. For an example of regulation of persons or things in interstate commerce, see Reno v. Condon, 528 U.S. 141 (2000) (information about motor vehicles and owners, regulated pursuant to the Driver's Privacy Protection Act, and sold by states and others, is an article of commerce).

[6] 514 U.S. at 559.

[7] *Id.* at 559–61.

[8] *Id.* at 561.

[9] *Id.* at 563–68.

[10] *Id.* at 564.

[11] "Not every epochal case has come in epochal trappings." *Id.* at 615 (Souter, J., dissenting) (wondering whether the case is only a misapplication of established standards or is a veering in a new direction).

[12] 529 U.S. 598 (2000). Once again, the Justices split 5-4, with Chief Justice Rehnquist's opinion for the Court being joined by Justices O'Connor, Scalia, Kennedy, and Thomas, and with Justices Souter, Stevens, Ginsburg, and Breyer dissenting.

[13] For an expansive interpretation in the area of economic regulation, decided during the same Term as Lopez, see Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995). *Lopez* did not "purport to announce a new rule governing Congress's Commerce Clause power over concededly economic activity." Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 58 (2003).

whether a holding of constitutionality is consistent with its view of the commerce power as being a limited power that cannot be allowed to displace all exercise of state police powers.

In *Morrison* the Court applied *Lopez* principles to invalidate a provision of the Violence Against Women Act (VAWA) that created a federal cause of action for victims of gender-motivated violence. Gender-motivated crimes of violence "are not, in any sense of the phrase, economic activity,"[14] the Court explained, and there was allegedly no precedent for upholding commerce-power regulation of intrastate activity that was not economic in nature. The provision, like the invalidated provision of the Gun-Free School Zones Act, contained no jurisdictional element tying the regulated violence to interstate commerce. Unlike the Gun-Free School Zones Act, the VAWA did contain "numerous" congressional findings about the serious effects of gender-motivated crimes,[15] but the Court rejected reliance on these findings. "The existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. [The issue of constitutionality] is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."[16]

The problem with the VAWA findings was that they "relied heavily" on the reasoning rejected in *Lopez*—the "but-for causal chain from the initial occurrence of crime . . . to every attenuated effect upon interstate commerce." As the Court had explained in *Lopez*, acceptance of this reasoning would eliminate the distinction between what is truly national and what is truly local, and would allow Congress to regulate virtually any activity and basically any crime.[17] Accordingly, the Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." Resurrecting the dual federalism dichotomy, the Court could find "no better example of the police power, which the Founders denied the national government and reposed in the States, than the suppression of violent crime and vindication of its victims."[18]

Yet, the ultimate impact of these cases on Congress's power over commerce may be limited. In *Gonzales v. Raich*,[19] the Court reaffirmed an expansive application of *Wickard v. Filburn*, and signaled that its jurisprudence is unlikely to threaten the enforcement of broad regulatory schemes based on the Commerce Clause. In *Raich*, the Court considered whether the cultivation, distribution, or possession of marijuana for personal medical purposes pursuant to the California Compassionate Use Act of 1996 could be prosecuted under the federal Controlled Substances Act (CSA).[20] The respondents argued that this class of activities should be considered as separate and distinct from the drug-trafficking that was the focus of the CSA, and that regulation of this limited non-commercial use of marijuana should be evaluated separately.

In *Raich*, the Court declined the invitation to apply *Lopez* and *Morrison* to select applications of a statute, holding that the Court would defer to Congress if there was a rational

[14] *Morrison*, 529 U.S. at 613.

[15] Dissenting Justice Souter pointed to a "mountain of data" assembled by Congress to show the effects of domestic violence on interstate commerce. 529 U.S. at 628–30. The Court has evidenced a similar willingness to look behind congressional findings purporting to justify exercise of enforcement power under Section 5 of the Fourteenth Amendment. *See* discussion under "enforcement," Amdt14.S5.1 Overview of Enforcement Clause. In *Morrison* itself, the Court determined that congressional findings were insufficient to justify the VAWA as an exercise of Fourteenth Amendment power. 529 U.S. at 619–20.

[16] *Morrison*, 529 U.S. at 614.

[17] *Id.* at 615–16. Applying the principle of constitutional doubt, the Court in Jones v. United States, 529 U.S. 848 (2000), interpreted the federal arson statute as inapplicable to the arson of a private, owner-occupied residence. Were the statute interpreted to apply to such residences, the Court noted, "hardly a building in the land would fall outside [its] domain," and the statute's validity under *Lopez* would be squarely raised. 529 U.S. at 857.

[18] *Morrison*, 529 U.S. at 618.

[19] 545 U.S. 1 (2005).

[20] 84 Stat. 1242, 21 U.S.C. §§ 801 *et seq*.

basis to believe that regulation of home-consumed marijuana would affect the market for marijuana generally. The Court found that there was a "rational basis" to believe that diversion of medicinal marijuana into the illegal market would depress the price on the latter market.[21] The Court also had little trouble finding that, even in application to medicinal marijuana, the CSA was an economic regulation. Noting that the definition of "economics" includes "the production, distribution, and consumption of commodities,"[22] the Court found that prohibiting the intrastate possession or manufacture of an article of commerce is a rational and commonly used means of regulating commerce in that product.[23]

The Court's decision also contained an intertwined but potentially separate argument that Congress had ample authority under the Necessary and Proper Clause to regulate the intrastate manufacture and possession of controlled substances, because failure to regulate these activities would undercut the ability of the government to enforce the CSA generally.[24] The Court quoted language from *Lopez* that appears to authorize the regulation of such activities on the basis that they are an essential part of a regulatory scheme.[25] Justice Antonin Scalia, in concurrence, suggested that this latter category of activities could be regulated under the Necessary and Proper Clause regardless of whether the activity in question was economic or whether it substantially affected interstate commerce.[26]

ArtI.S8.C3.6.6 Regulation of Activity Versus Inactivity

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

While the Supreme Court has interpreted Congress's Commerce Clause authority to reach a wide range of activity, it has concluded that the Commerce Clause does not authorize Congress to regulate inactivity. In *National Federation of Independent Business (NFIB) v. Sebelius*,[1] the Court held that Congress does not have the authority under the Commerce Clause to impose a requirement compelling certain individuals to maintain a minimum level of health insurance. The "individual mandate" provisions of the Affordable Care Act generally subject individuals who failed to purchase health insurance to a monetary penalty, administered through the tax code.[2]

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[21] 545 U.S. at 19.

[22] *Id.* at 25, quoting Webster's Third New International Dictionary 720 (1966).

[23] *See also* Taylor v. United States, 579 U.S. 301, 307 (2016) (rejecting the argument that the government, in prosecuting a defendant under the Hobbs Act for robbing drug dealers, must prove the interstate nature of the drug activity). The *Taylor* Court viewed this result as following necessarily from the Court's earlier decision in *Raich*, because the Hobbs Act imposes criminal penalties on robberies that affect "all . . . commerce over which the United States has jurisdiction," 18 U.S.C. § 1951(b)(3) (2012), and *Raich* established the precedent that the market for marijuana, "including its intrastate aspects," is "commerce over which the United States has jurisdiction." *Taylor*, 579 U.S. at 307. *Taylor* was, however, expressly "limited to cases in which a defendant targets drug dealers for the purpose of stealing drugs or drug proceeds." *Id.* at 310. The Court did not purport to resolve what federal prosecutors must prove in Hobbs Act robbery cases "where some other type of business or victim is targeted." *Id.*

[24] 545 U.S. at 18, 22.

[25] *Id.* at 23–25.

[26] *Id.* at 34–35 (Scalia, J., concurring).

[1] 567 U.S. 519 (2012).

[2] Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111–148, as amended. The Act's "guaranteed-issue" and "community-rating" provisions necessitated the mandate because they prohibited insurance companies from denying coverage to those with pre-existing conditions or charging unhealthy individuals higher premiums than healthy individuals. *Id.* at §§ 300gg, 300gg-1, 300gg-3, 300gg-4. As these requirements provide an

Chief Justice John Roberts's controlling opinion[3] suggested that Congress's authority to regulate interstate commerce presupposes the existence of a commercial activity to regulate. Further, his opinion noted that the commerce power had been uniformly described in previous cases as involving the regulation of an "activity."[4] The individual mandate, on the other hand, compels an individual to become active in commerce on the theory that the individual's inactivity affects interstate commerce. Justice Roberts suggested that regulation of individuals because they are doing nothing would result in an unprecedented expansion of congressional authority with few discernable limitations. While recognizing that most people are likely to seek health care at some point in their lives, Justice Roberts noted that there was no precedent for the argument that individuals who might engage in a commercial activity in the future could, on that basis, be regulated today.[5]

ArtI.S8.C3.6.7 Regulation of Interstate Commerce to Achieve Policy Goals

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Congress has, at times, used its interstate Commerce Clause authority to pursue policy goals tangential or unrelated to the commercial nature of the activity being regulated. The Court has several times expressly noted that Congress's exercise of power under the Commerce Clause is akin to the police power exercised by the states.[1] Many of the 1964 public accommodations law applications have been premised on the point that large and small establishments alike may serve interstate travelers, making it permissible for Congress to regulate them under the Commerce Clause so as to prevent or deter racial discrimination.[2] For example, in *Heart of Atlanta Motel, Inc. v. United States*, the Court upheld a provision of Title II of the Civil Rights Act of 1964 that prohibited certain categories of business establishments that served interstate travelers from discriminating or segregating on the basis of race, color, religion, or national origin.[3] In that same case, the Court observed that Congress had used its authority over and interest in protecting interstate commerce to regulate gambling, criminal enterprises, deceptive sales practices, fraudulent security transactions, misbranding drugs, labor practices such as wages and hours, labor union membership, crop control, discrimination against shippers, injurious price cutting that affected small businesses, resale price maintenance, professional football, and racial discrimination in bus terminal restaurants.[4]

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incentive for individuals to delay purchasing health insurance until they become sick, this would impose new costs on insurers, leading them to significantly increase premiums on everyone.

[3] Although no other Justice joined Chief Justice Robert's opinion, four dissenting Justices reached similar conclusions regarding the Commerce Clause and the Necessary and Proper Clause. *NFIB*, 567 U.S. at 646–707 (joint opinion of Scalia, Kennedy, Thomas and Alito, JJ., dissenting).

[4] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 573 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained").

[5] *NFIB*, 567 U.S. at 557.

[1] *E.g.*, Brooks v. United States, 267 U.S. 432, 436–437 (1925); United States v. Darby, 312 U.S. 100, 114 (1941). *See* Robert Eugene Cushman, The National Police Power Under the Commerce Clause, 3 Selected Essays on Constitutional Law 62 (1938).

[2] Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Daniel v. Paul, 395 U.S. 298 (1969).

[3] 379 U.S. 241, 245–47, 261–62 (1964).

[4] 379 U.S. 241, 256–57 (1964) (citing Champion v. Ames, 188 U.S. 321 (1903); Brooks v. United States, 267 U.S. 432 (1925); FTC v. Mandel Bros., Inc., 359 U.S. 385 (1959); SEC v. Ralston Purina Co., 346 U.S. 119 (1953); Weeks v. United States, 245 U.S. 618 (1918); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301

ArtI.S8.C3.6.8 Civil Rights and Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

It has been generally established that Congress has power under the Commerce Clause to prohibit racial discrimination in the use of channels of commerce.[1] The Court firmly and unanimously sustained the power under the clause to forbid discrimination within the states when Congress in 1964 enacted a comprehensive measure outlawing discrimination because of race or color in access to public accommodations with a requisite connection to interstate commerce.[2] Hotels and motels were declared covered—that is, declared to "affect commerce"—if they provided lodging to transient guests; restaurants, cafeterias, and the like, were covered only if they served or offered to serve interstate travelers or if a substantial portion of the food which they served had moved in commerce.[3] The Court sustained the Act as applied to a downtown Atlanta motel that did serve interstate travelers,[4] to an out-of-the-way restaurant in Birmingham that catered to a local clientele but that had spent 46 percent of its previous year's out-go on meat from a local supplier who had procured it from out-of-state,[5] and to a rural amusement area operating a snack bar and other facilities, which advertised in a manner likely to attract an interstate clientele and that served food a substantial portion of which came from outside the state.[6]

Writing for the Court in *Heart of Atlanta Motel* and *McClung*, Justice Tom Clark denied that Congress was disabled from regulating the operations of motels or restaurants because those operations may be, or may appear to be, "local" in character. He wrote: "[T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce."[7]

Although Congress was regulating on the basis of moral judgments and not to facilitate commercial intercourse, the Court still considered Congress's actions to be covered by the Commerce Clause. The *Heart of Atlanta* Court stated:

> That Congress [may legislate] . . . against moral wrongs . . . rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not

U.S. 1 (1937); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Baltimore & Ohio R. Co., 333 U.S. 169 (1948); Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954); Hudson Distrib., Inc. v. Eli Lilly & Co., 377 U.S. 386 (1964); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); Radovich v. Nat'l Football League, 352 U.S. 445 (1957); Boynton v. Virginia, 364 U.S. 454 (1960)).

[1] Boynton v. Virginia, 364 U.S. 454 (1960); Henderson v. United States, 339 U.S. 816 (1950); Mitchell v. United States, 313 U.S. 80 (1941); Morgan v. Virginia, 328 U.S. 373 (1946).

[2] Civil Rights Act of 1964, tit. II, 78 Stat. 241, 243, 42 U.S.C. §§ 2000a et seq.

[3] 42 U.S.C. § 2000a(b).

[4] Heart of Atlanta Motel, Inc. v. United States. 379 U.S. 241 (1964).

[5] Katzenbach v. McClung, 379 U.S. 294 (1964).

[6] Daniel v. Paul, 395 U.S. 298 (1969).

[7] *Heart of Atlanta Motel, Inc.*, 379 U.S. at 258; *Katzenbach*, 379 U.S. at 301–04.

restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.[8]

The Court held that evidence supported Congress's conclusion that racial discrimination impeded interstate travel by more than 20 million Black citizens, which was an impairment Congress could legislate to remove.[9]

The Commerce Clause basis for civil rights legislation prohibiting private discrimination was important because early cases had interpreted Congress's power under the Fourteenth and Fifteenth Amendments as limited to official discrimination.[10] The Court's subsequent determination that Congress has broader powers under the Fourteenth and Fifteenth Amendments reduced the importance of the Commerce Clause in this area.[11]

ArtI.S8.C3.6.9 Criminal Law and Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Federal criminal jurisdiction based on the commerce or postal power has historically been an auxiliary criminal jurisdiction. That is, Congress has made federal crimes of acts that would usually constitute state crimes but for some contact, however tangential, with a matter subject to congressional regulation even though the federal interest in the acts may be minimal.[1] Early examples of this type of federal criminal statute include the Mann Act of 1910, which outlawed transporting a woman or girl across state lines for purposes of prostitution, debauchery, or other immoral acts,[2] the Dyer Act of 1919, which criminalized interstate transportation of stolen automobiles,[3] and the Lindbergh Law of 1932, which made transporting a kidnapped person across state lines a federal crime.[4] Congress subsequently expanded federal criminal law beyond prohibiting use of interstate facilities in the commission of a crime. Typical of this expansion is a statute making it a federal offense to "in any way or degree obstruct . . . delay . . . or affect . . . commerce . . . by robbery or extortion."[5] But Congress's authority to make crimes federal offenses is not unlimited. In its 1821 *Cohens v. Virginia* decision, the Court held that "Congress cannot punish felonies generally" and may enact only those criminal laws that are connected to one of its constitutionally enumerated

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[8] *Heart of Atlanta Motel, Inc.*, 379 U.S. at 257.

[9] 379 U.S. at 252–53; *Katzenbach*, 379 U.S. at 299–301.

[10] The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Reese, 92 U.S. 214 (1876); Collins v. Hardyman, 341 U.S. 651 (1951).

[11] The Fair Housing Act (Title VIII of the Civil Rights Act of 1968), 82 Stat. 73, 81, 42 U.S.C. §§ 3601 *et seq*., was based on the Commerce Clause, but, in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Court held that legislation that prohibited discrimination in housing could be based on the Thirteenth Amendment and made operative against private parties. Similarly, the Court has concluded that, although section 1 of the Fourteenth Amendment is judicially enforceable only against "state action," Congress is not so limited under its enforcement authorization of section 5. United States v. Guest, 383 U.S. 745, 761, 774 (1966) (concurring opinions); Griffin v. Breckenridge, 403 U.S. 88 (1971).

[1] *E.g.*, Barrett v. United States, 423 U.S. 212 (1976); Scarborough v. United States, 431 U.S. 563 (1977); Lewis v. United States, 445 U.S. 55 (1980); McElroy v. United States, 455 U.S. 642 (1982).

[2] 18 U.S.C. § 2421.

[3] 18 U.S.C. § 2312.

[4] 18 U.S.C. § 1201.

[5] 18 U.S.C. § 1951. *See also id.* § 1952.

powers, such as the commerce power.[6] As a consequence, most federal offenses include a jurisdictional element that ties the underlying offense to one of Congress's constitutional powers.[7]

ArtI.S8.C3.7 Dormant Commerce Clause

ArtI.S8.C3.7.1 Overview of Dormant Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Even as the Commerce Clause empowers Congress to pass federal laws, it has also come to limit state authority to regulate commerce. In contrast to the doctrine of preemption, which generally applies in areas where Congress has acted,[1] the so-called "Dormant" Commerce Clause may bar state or local regulations even where there is no relevant congressional legislation. Although the Commerce Clause "is framed as a positive grant of power to Congress" and not an explicit limit on states' authority,[2] the Supreme Court has also interpreted the Clause to prohibit state laws that unduly restrict interstate commerce even in the absence of congressional legislation—i.e., where Congress is "dormant." This "negative" or "dormant" interpretation of the Commerce Clause "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services."[3]

The Supreme Court has identified two principles that animate its modern Dormant Commerce Clause analysis. First, subject to certain exceptions, states may not discriminate against interstate commerce.[4] Second, states may not take actions that are facially neutral but unduly burden interstate commerce.[5]

ArtI.S8.C3.7.2 Historical Background on Dormant Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

The Supreme Court has long rooted its Dormant Commerce Clause jurisprudence in historical circumstances, characterizing the doctrine as a response to the state barriers to trade that served as an impetus for developing a new Constitution.[1] Under the Articles of

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[6] *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 428 (1821).

[7] *See* Luna Torres v. Lynch, 578 U.S. 452, 457 (2016).

[1] *See* ArtVI.C2.3.3 New Deal and Presumption Against Preemption.

[2] Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542, 548–549 (2015).

[3] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459 (2019); *see also* H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537–38 (1949) ("This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units."); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935), ("What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.").

[4] *E.g.*, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090–2091 (2018).

[5] *Id.*

[1] *See* Tenn. Wine & Spirits Retailers Ass'n, 139 S. Ct. 2449, 2460–2461 (2019); *see also* Hughes v. Oklahoma, 441 U.S. 322, 325–326 (1979) (highlighting as the "central concern of the Framers . . . the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation"). In Guy v. Baltimore, 100 U.S. 434, 440 (1880), the Court cautioned that state protectionist measures "would ultimately bring our commerce to that

Confederation, Congress lacked the authority to regulate interstate and foreign commerce.[2] The Annapolis Convention of 1786 was convened out of a desire to remove the protectionist barriers to trade that some states had imposed.[3] At the Philadelphia Convention in 1787, the Framers discussed Congress's authority to regulate interstate commerce in the context of that goal.[4]

In the *Federalist Papers*, Alexander Hamilton and James Madison discussed the benefits of a free national market, such as improving the circulation of commodities for export to foreign markets, increasing the diversity and scope of production, facilitating aid between the states, and providing for more advantageous terms of foreign trade.[5] They also warned that protectionism could lead to interstate conflicts.[6]

Despite these concerns, the Framers did not adopt a constitutional provision expressly addressing state and local regulations affecting interstate commerce. The Import-Export Clause provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws."[7] That clause has not been held to apply to trade among the states, however.[8] Similarly, in the *Federalist No. 32*, Hamilton asserted that the states' taxing authority "remains undiminished" save for imposts or duties on imports or exports.[9] He did not specify, however, whether Congress and the states also enjoyed concurrent power over interstate and foreign commerce. Instead, the Supreme Court has developed its Dormant Commerce Clause jurisprudence to serve as a limitation on some state regulations and taxes, and has linked that jurisprudence with the concerns and goals expressed by the various Framers.

'oppressed and degraded state,' existing at the adoption of the present Constitution, when the helpless, inadequate Confederation was abandoned and a National Government instituted, with full power over the entire subject of commerce, except that wholly internal to the States composing the Union."

[2] The Federalist No. 42 (James Madison) (discussing "[t]he defect of power in the existing Confederacy to regulate the commerce between its several members").

[3] Max Farrand, The Framing of the Constitution of the United States 7–10 (1913); Brandon P. Denning, *Confederation-Era Discrimination Aginst Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 Ky. L.J. 37, 49–59 (2005).

[4] James Madison, Notes of Debates in the Federal Convention of 1787, at 14 (Ohio University Press 1966) (1840) ("The same want of a general power over Commerce, led to an exercise of the power separately, by the States, which not only proved abortive, but engendered rival, conflicting and angry regulations."); *see also* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 470–471 (1941). Later in life, James Madison stated that the power had been granted to Congress mainly as "a negative and preventive provision against injustice among the states." 4 Letters and Other Writings of James Madison 14–15 (1865).

[5] For example, in the *Federalist No. 11*, Hamilton argued: "An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope, from the diversity in the productions of different States."

[6] Madison wrote in the *Federalist No. 42* that, if the states regulated interstate trade, "it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisiction, with duties which would fall on the makers of the latter and the consumers of the former."

[7] U.S. Const. art. I, § 10, cl. 2.

[8] Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869). *But see* Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449 (1827) (noting that "the principles laid down in this case [regarding the Import-Export Clause] . . . apply equally to importations from a sister state"); Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542, 570 (2015) (noting "the close relationship between" the Export-Import Clause and the Dormant Commerce Clause).

[9] The Federalist No. 32 (Alexander Hamilton).

ArtI.S8.C3.7.3 Early Dormant Commerce Clause Jurisprudence

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

The Supreme Court first described the principles that would become the dormant Commerce Clause doctrine in 1824. In *Gibbons v. Ogden*, the Court struck down New York's grant of a monopoly on steamboat traffic in New York waters.[1] The Court decided the case on Supremacy Clause grounds, ruling that the Federal Coastal Act of 1793 preempted the state law. Accordingly, the Court did not decide whether the Commerce Clause barred states from regulating interstate commerce. Chief Justice John Marshall recognized, however, the "great force" of Daniel Webster's argument that the state law violated the Commerce Clause because that clause conferred upon Congress an exclusive power to regulate national commerce.[2] In dicta, Chief Justice Marshall suggested that the power to regulate commerce between the states might be exclusively federal.[3] At the same time, he also recognized that any national power to regulate commerce coexisted with state regulatory authority over matters that could affect commerce, such as laws governing inspection, quarantine, and health, as well as "laws for regulating the internal commerce of a State."[4]

Chief Justice Marshall again addressed the nascent Dormant Commerce Clause doctrine in *Willson v. Black-Bird Creek Marsh Co.*[5] In that case, a sloop owner whose vessel ran into a dam across a navigable creek challenged a state law authorizing the construction of the dam, arguing that the law conflicted with the federal power to regulate interstate commerce. The Supreme Court rejected this argument, concluding that the state law could not "be considered as repugnant to the [federal] power to regulate commerce in its dormant state . . . ."[6] The Court did not explain the basis for its holding, however, or attempt to square it with the ruling in *Gibbons*.

Over time, the Court came to add more nuance than was present in its earliest dicta. In *Cooley v. Board of Wardens*,[7] the Court enunciated a doctrine of *partial* federal exclusivity that inquired into the subject of a regulation. The Court distinguished between subjects of interstate commerce that "imperatively demand a single uniform rule" nationwide, and subjects of commerce that do not demand such uniformity and which may require "that diversity, which alone can meet the local necessities."[8] While the Court held that Congress's power over the former category was exclusive, it also held that Congress and the states could concurrently regulate the latter category. Concluding that the regulation of pilotage was "incapable of uniformity throughout all the states," the Court upheld a Pennsylvania state law that required ships to hire a local pilot when entering or leaving the Port of Philadelphia.[9]

The Court first struck down a state law solely on Commerce Clause grounds more than two decades later. In the *State Freight Tax Case*, the Court held unconstitutional a statute that required every company transporting freight within the state, with certain exceptions, to pay a

[1] 22 U.S. 1 (1824).

[2] *Id.* at 209.

[3] *Id.* at 17–18.

[4] *Id.* at 2.

[5] 27 U.S. 245, 251 (1829).

[6] *Id.* at 252.

[7] 53 U.S. 299 (1851).

[8] *Id.* at 319.

[9] *Id.* at 306.

tax at specified rates on each ton of freight carried.[10] Two years later, in *Welton v. Missouri*,[11] the Court held unconstitutional a state law that required a peddler's license for merchants selling goods that came from other states. In doing so, it identified two separate goals that the dormant Commerce Clause might serve. First, it adopted *Cooley*'s consideration of the goal of uniformity of commercial regulation. It then provided the additional justification that Congress had not enacted specific legislation governing interstate commerce, which was "equivalent to a declaration that inter-State commerce shall be free and untrammelled." In other words, Congress's silence on the subject was an indication that states could not regulate it.[12]

Prior to 1945, the Court considered whether state regulations imposed unreasonable or undue burdens on interstate commerce, but did not generally weigh a regulation's burdens against its benefits. Instead, the Court distinguished between instances where a state regulated interstate commerce and thus imposed a "direct" and impermissible burden on interstate commerce, and those where it imposed an "indirect" burden or merely "affected" interstate commerce, such as in the course of exercising its police powers.[13] The Court indicated that "a state enactment [that] imposes a *direct burden* upon interstate commerce . . . must fall regardless of federal legislation," indicating that such laws would be invalid even if they were not actually discriminatory.[14]

The distinction between direct and indirect burdens was not always clear, however.[15] Then-Justice (and later Chief Justice) Harlan Stone criticized the direct-or-indirect framework "too mechanical, too uncertain in its application, and too remote from actualities, to be of value," and argued that the Court was "doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached."[16] The same Justice later articulated the modern balancing test for review of state regulations of or affecting interstate commerce.[17]

Many early Dormant Commerce Clause cases addressed regulation of interstate transportation, including trains and motor vehicles. For example, in the *Minnesota Rate Cases*, the Supreme Court applied the direct/indirect burden test to invalidate Minnesota's adoption of maximum charges for freight and passenger transportation.[18] Other transportation-related cases did not yield a uniform application of the doctrine. In one case, the Court held that states could not set charges for the transportation of persons and freight because such regulation

[10] Case of the State Freight Tax, 82 U.S. 232 (1873).

[11] 91 U.S. 275 (1875).

[12] *Id.* at 282.

[13] *E.g.*, The Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 400 (1913) ("The principle which determines this classification underlies the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which, from its nature, should be under the control of the one authority, and be free from restriction, save as it is governed in the manner that the national legislature constitutionally ordains."); Hall v. DeCuir, 95 U.S. 485, 488 (1877).

[14] *The Minnesota Rate Cases*, 230 U.S. at 396; *see also* W. Union Tel. Co. v. Kansas *ex rel.* Coleman, 216 U.S. 1, 37 (1910) (invalidating a Kansas state fee on Western Union for the benefit of in-state schools).

[15] *See* James M. McGoldrick, Jr., *The Dormant Commerce Clause: The Origin Story and the "Considerable Uncertainties"—1824 to 1945*, 52 Creighton L. Rev. 243, 276–284 (2019) (surveying the Court's varying approaches to the direct/indirect test).

[16] Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927) (Stone, J., dissenting).

[17] S. Pac. Co. v. Arizona, 325 U.S. 761 (1945); ArtI.S8.C3.7.8 Facially Neutral Laws and Dormant Commerce Clause.

[18] 230 U.S. at 396–97.

must be uniform.[19] In another case, the Court struck down a Louisiana law requiring that all businesses engaged in interstate transportation of passengers provide equal treatment to all passengers regardless of race or color when transiting through Louisiana.[20] In other cases, the Court upheld a variety of state regulations of trains that had been justified on public safety grounds.[21]

Similarly, the Court recognized that states may enact and enforce comprehensive schemes for licensing and regulation of motor vehicles,[22] though it did not uphold all such schemes.[23] As with regulation of trains, the Court was particularly deferential towards laws that were rooted in safety concerns.[24] The Court also upheld state regulations related to navigation on the basis that the activities were local and did not require nationally uniform rules.[25] By contrast, the Court tended to invalidate facially neutral laws that had an impermissibly protectionist purpose or effect, such as the protection of local producers or industries.[26] For example, in *Minnesota v. Barber*, the Court invalidated a law requiring fresh meat sold in Minnesota to

[19] Wabash, St. Louis & Pac. Ry. v. Illinois, 118 U.S. 557 (1886). After *Wabash*, the Court still upheld states' authority to set rates for passengers and freight taken up and put down within their borders. R.R. Comm'n of Wis. v. Chi., Burlington & Quincy R.R., 257 U.S. 563 (1922).

[20] Hall v. DeCuir, 95 U.S. 485 (1877). Some scholars have drawn a connection between *Hall v. DeCuir* and the Court's decision in *Plessy v. Ferguson*, 163 U.S. 537, to uphold the segregation of railroad accommodations under the Equal Protection Clause of the Fourteenth Amendment. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1396 (1996). The Court later distinguished *DeCuir* from *Plessy* by explaining that, in the latter case, the state laws requiring segregated railway cars "applied only between places in the same state." The Roanoke, 189 U.S. 185, 198 (1903).

[21] *E.g.*, Smith v. Alabama, 124 U.S. 465 (1888) (upholding Alabama law requiring locomotive engineers to be examined and licensed by the state); N.Y., New Haven & Hartford R.R. v. New York, 165 U.S. 628 (1897) (upholding New York law forbidding heating of passenger cars by stoves). In some very fact-specific rulings, the Court considered regulations that imposed requirements that trains stop at designated cities and towns. *Compare* Gladson v. Minnesota, 166 U.S. 427 (1897), and Lake Shore & Mich. S. Ry. v. Ohio, 173 U.S. 285 (1899) (upholding such regulations), *with* Ill. Cent. R.R. v. Illinois, 163 U.S. 142 (1896) (invalidating such a law as an unconstitutional burden on interstate commerce). Many other challenged regulations were "full-crew laws" that regulated the number of employees required to operate a train. *E.g.*, Chi., Rock Island & Pac. Ry. v. Arkansas, 219 U.S. 453 (1911); St. Louis, Iron Mtn. & S. Ry. v. Arkansas, 240 U.S. 518 (1916); Mo. Pac. R.R. v. Norwood, 283 U.S. 249 (1931). The connection of state train regulations to public safety was not always apparent. *E.g.*, Terminal R.R. Ass'n of St. Louis v. Brotherhood of R.R. Trainmen, 318 U.S. 1 (1943) (upholding law requiring railroad to provide caboose cars for its employees); Hennington v. Georgia, 163 U.S. 299 (1896) (upholding law forbidding freight trains to run on Sundays). *But see* Seaboard Air Line Ry. v. Blackwell, 244 U.S. 310 (1917) (voiding as too onerous a law requiring trains to come to almost a complete stop at all grade crossings, which would have doubled trains' running time over a 123-mile stretch of track that contained 124 highway crossings at grade).

[22] *E.g.*, Hendrick v. Maryland, 235 U.S. 610 (1915) (upholding state vehicle registration requirement); Kane v. New Jersey, 242 U.S. 160 (1916) (upholding law requiring imposition of various fees and requirements on nonresident drivers); Bradley v. Pub. Util. Comm'n, 289 U.S. 92 (1933) (holding that a state could deny an interstate firm a necessary certificate of convenience to operate as a common carrier on the basis that the route was overcrowded); H. P. Welch Co. v. New Hampshire, 306 U.S. 79 (1939) (upholding maximum hours for drivers of motor vehicles); Eichholz v. Pub. Serv. Comm'n of Mo., 306 U.S. 268 (1939) (allowing reasonable regulations of traffic).

[23] *E.g.*, Mich. Pub. Util. Comm'n v. Duke, 266 U.S. 570 (1925) (holding that a state could not impose common-carrier responsibilities on a business operating between states that did not hold itself out as a carrier for the public); Buck v. Kuykendall, 267 U.S. 307 (1925) (holding that a requirement that common carriers for hire obtain a certificate of public convenience and necessity was an unconstitutional ban on competition).

[24] *E.g.*, Maurer v. Hamilton, 309 U.S. 598 (1940) (upholding ban on the operation of any motor vehicle carrying any other vehicle above the operator's head); S.C. Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938) (upholding truck weight restrictions and width restrictions even though such restrictions were not in effect in most other states).

[25] Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888); Kelly v. Washington, 302 U.S. 1 (1937).

[26] Best & Co. v. Maxwell, 311 U.S. 454, 457 (1940) ("The freedom of commerce . . . is not to be fettered by legislation, the actual effect of which is to discriminate in favor of interstate businesses, whatever may be the ostensible reach of the language.") (footnote omitted).

have been inspected in the state within 24 hours of slaughter, effectively excluding meat slaughtered in other states from the Minnesota market.[27]

Finally, the Supreme Court's early Dormant Commerce Clause jurisprudence also shows an effort to grapple with what constituted "commerce." In some cases, the Court found that a state action had not violated the Dormant Commerce Clause because interstate commerce had not yet begun. For example, the Court upheld a municipal tax that covered cut logs that floated in a river until the spring thaw permitted them to be floated to another state, reasoning that interstate commerce did not begin until the logs were committed to a common carrier for transportation or transport actually began.[28] In a case regarding limitations on the manufacture and sale of "intoxicating liquors," the Court distinguished between the purchase, sale, and incidental transportation of manufactured goods including alcohol, which constituted commerce; and the manufacture of alcohol, which was "the fashioning of raw materials into a change of form for use" and did not constitute commerce.[29]

ArtI.S8.C3.7.4 Modern Dormant Commerce Clause Jurisprudence Generally

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In its modern Dormant Commerce Clause jurisprudence, the Supreme Court has applied two primary principles. First, subject to certain exceptions, state and local laws that "discriminate[ ] against out-of-state goods or nonresident economic actors" are considered *per se* invalid and are generally struck down absent a showing that they are narrowly tailored to advance a legitimate local purpose.[1] Second, for laws that regulate "evenhandedly" and are not facially discriminatory, the Court applies a balancing test and upholds laws that serve a "legitimate local purpose" unless the burden on interstate commerce clearly exceeds the local benefits.[2] While the Court has acknowledged Congress's primacy in regulating interstate commerce, it has also asserted its own role in interpreting the scope of that authority.[3]

The application of these two principles in modern Dormant Commerce Clause jurisprudence has been highly fact-specific. While the Court has articulated a basic framework for reviewing state regulations, it has not successfully defined clear rules that can be consistently applied, resulting in holdings that sometimes appear unpredictable. In particular,

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[27] Minnesota v. Barber, 136 U.S. 313 (1890). *See also Buck*, 267 U.S. at 315; *see also* Baldwin v. G.A.F. Seelig, 294 U.S. 511 (1935) (striking down a regulation on the price of interstate milk purchases that kept the price of milk artificially high within the state).

[28] Coe v. Errol, 116 U.S. 517, 525 (1886). In general, the Court did not permit states to regulate a purely interstate activity or prescribe prices of purely interstate transactions. *E.g.*, W. Union Tel. Co. v. Foster, 247 U.S. 105 (1918); Lemke v. Farmers Grain Co., 258 U.S. 50 (1922); State Corp. Comm'n of Kan. v. Wichita Gas Co., 290 U.S. 561 (1934). But the Court sustained price and other regulations imposed prior to or subsequent to the travel in interstate commerce of goods produced for such commerce or received from such commerce. For example, decisions late in the early period of the Court's jurisprudence upheld state price-fixing schemes applied to goods intended for interstate commerce. Milk Control Bd. v. Eisenberg Co., 306 U.S. 346; Parker v. Brown, 317 U.S. 341 (1943).

[29] Kidd v. Pearson, 128 U.S. 1, 20 (1888).

[1] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2461 (2019); Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338–339 (2008); Granholm v. Heald, 544 U.S. 460, 487 (2005).

[2] *E.g.*, Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)); *Davis*, 553 U.S. at 338–339.

[3] S. Pac. Co. v. Arizona, 325 U.S. 761, 769, 770 (1945) ("[T]his Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests. . . . [I]n general Congress has left it to the courts to formulate the rules thus interpreting the commerce clause in its application . . . .").

some Justices have criticized the balancing test, arguing that facially nondiscriminatory laws should be upheld without the need for balancing.[4]

ArtI.S8.C3.7.5 General Prohibition on Facial Discrimination

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Subject to limited exceptions, the Supreme Court has struck down state laws that discriminate against out-of-state goods or nonresident economic actors, allowing such laws only when the regulatory entity meets the burden of showing that it is "narrowly tailored to advance a legitimate local purpose" and that there is no reasonable, nondiscriminatory regulatory alternative.[1] A law that "clearly discriminates against interstate commerce [ ] will be struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism."[2] Put another way, the Court applies a "virtually *per se* rule of invalidity" to state laws that evince economic protectionism.[3]

Applying this rule, the Court has struck down as discriminatory some regulations that expressly treat out-of-state or interstate interests less favorably, or that expressly grant advantages to in-state businesses. For example, the Court invalidated an Oklahoma law that required coal-fired electric utilities in the state, producing power for sale in the state, to burn a mixture containing at least 10% Oklahoma-mined coal.[4] Similarly, the Court invalidated a state law that permitted a state public utility commission to restrict the export of hydroelectric power to neighboring states when the commission determined that the energy was required for use within the state.[5]

Since the advent of the modern framework for evaluating Dormant Commerce Clause challenges, the Court has also continued to strike down state laws that purport to be facially neutral, but which have either the purpose or the effect of depriving out-of-state businesses of a competitive advantage. In *Hunt v. Washington State Apple Advertising Commission*, the Court invalidated a North Carolina regulation requiring apples shipped in closed containers to display no grade other than the applicable federal grade.[6] Washington State mandated that all

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[4] *See* Bendix Autlolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 896 (1988) (Scalia, J., concurring) ("[Weighing] the governmental interests of a State against the needs of interstate commerce is [a] task squarely within the responsibility of Congress."); *see also* Camps Newfound/Owatonna v. Harrison, 520 U.S. 564, 620, 636–637 (1997) (Thomas, J., dissenting) (describing the Court's Dormant Commerce Clause jurisprudence as "unworkable," and arguing that it should be abandoned in favor of considering state taxation laws under the Import-Export Clause); South Dakota v. Wayfair, 138 S. Ct. 2080, 2100 (2018) (Thomas, J., concurring) (arguing that the Court's Dormant Commerce Clause precent "can no longer be rationally justified"); Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2477 (2019) (Gorsuch, J., dissenting) (describing the Court's dormant Commerce Clause doctrine as "peculiar").

[1] Tenn. Wine & Spirits Retailers Ass'n, 139 S. Ct. at 2461 (internal quotations omitted); Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008); Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 353 (1977).

[2] Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992)

[3] Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

[4] *Wyoming*, 502 U.S. 437.

[5] New England Power Co. v. New Hampshire, 455 U.S. 331 (1982); *see also* Hughes v. Oklahoma, 441 U.S. 322 (1979) (striking down a ban on transporting minnows caught in the state for sale outside the state); Sporhase v. Nebraska, 458 U.S. 941 (1982) (invalidating a ban on the withdrawal of groundwater from any well in the state intended for use in another state); Camps Newfound/Owatonna, Inc. v. Harrison, 520 U.S. 564 (1997) (striking down a state tax law that disfavored businesses that primarily served nonresidents).

[6] 432 U.S. 333 (1977).

apples produced and shipped in interstate commerce pass a much more rigorous inspection than that mandated by the United States. The Court held that the inability to display the recognized state grade in North Carolina had the practical effect of discriminating against interstate commerce, could not be defended as a consumer protection measure, and therefore was unconstitutional.[7]

In some cases, the Supreme Court has emphasized the availability of less discriminatory alternatives for achieving a regulatory goal. In *Dean Milk Co. v. Madison*, an Illinois-based dairy processor challenged a local ordinance in Madison, Wisconsin that required all milk sold in the city to be pasteurized at an approved plant within five miles of the city.[8] The Court concluded that the ordinance "plainly discriminates against interstate commerce," and noted that it was "immaterial" that the ordinance discriminated against Wisconsin milk from outside the Madison area as well as out-of-state milk.[9] The Court also reasoned that "reasonable nondiscriminatory alternatives" were available for the inspection of milk or implementation of safety standards, and that the ordinance could not "be justified in view of the character of the local interests and the available methods of protecting them."[10]

The Court has rejected some claims that state regulations are facially discriminatory. In *Minnesota v. Clover Leaf Creamery Co.*, the Court upheld a state law banning the retail sale of milk products in plastic, nonreturnable containers but permitting sales in other nonreturnable, nonrefillable containers, such as paperboard cartons.[11] The Court found no discrimination against interstate commerce, despite a state-court finding that the measure was intended to benefit the local pulpwood industry, because both in-state and out-of-state interests could not use plastic containers. In *Exxon Corp. v. Governor of Maryland*, the Court upheld a statute that prohibited producers or refiners of petroleum products from operating retail service stations in Maryland.[12] The statute did not on its face discriminate against out-of-state companies, but as there were no producers or refiners in Maryland, "the burden of the divestiture requirements" fell solely on such companies. The Court held, however, that "this fact does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce at the retail level," as the statute does not "distinguish between in-state and out-of-state companies in the retail market."[13]

ArtI.S8.C3.7.6 State Proprietary Activity (Market Participant) Exception

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

The Supreme Court has recognized limited exceptions to the *per se* invalidity of discriminatory state laws under the Dormant Commerce Clause. Under the market participant exception, states that "themselves 'participat[e] in the market'" may "'exercis[e]

[7] *Id.* at 351–353; *see also* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 194–195 (1994); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 580 (1986).

[8] 340 U.S. 349 (1951).

[9] *Id.* at 354.

[10] *Id.* at 354–356; *see also Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S at 354.

[11] 449 U.S. 456, 470–474 (1981).

[12] 437 U.S. 117 (1978).

[13] *Id.* at 125–126.

the right to favor [their] own citizens over others.'"[1] For example, a state does not unconstitutionally discriminate against out-of-state businesses when it chooses to buy or sell goods or services with its own residents or businesses

In *Hughes v. Alexandria Scrap Corp.*, the Court upheld a Maryland bounty scheme by which the state paid scrap processors for each "hulk" automobile destroyed, and which substantially disadvantaged out-of-state processors.[2] Reasoning that the scheme was a means of participating in the market to bid up the price of hulks rather than a regulation of the market, the Court held that "entry by the State itself into the market itself as a purchaser, in effect, of a potential article of interstate commerce [does not] create[ ] a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State."[3] In *Reeves, Inc. v. Stake*, the Court held that South Dakota could limit the sale of cement from a government-operated plant to in-state residents in times of shortage.[4] The Court noted that "[t]here is no indication of a constitutional plan to limit the ability of States themselves to operate freely in the free market."[5]

Despite these decisions, the scope of the market participant exception has not been carefully defined, particularly with respect to whether a state acts as a market participant in "downstream regulation."[6]

ArtI.S8.C3.7.7 Congressional Authorization of Otherwise Impermissible State Action

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In general, the Court has recognized that Congress's plenary authority over interstate commerce enables Congress to "keep the way open, confine it broadly or closely, or close it entirely, subject only to the restrictions placed upon its authority by other constitutional provisions and the requirement that it shall not invade the domains of action reserved exclusively for the states."[1] Because the Dormant Commerce Clause protects this legislative domain, Congress may authorize state laws that otherwise would be considered

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[1] Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 339 (2008) (quoting Hughes v. Alexandria Scrap Co., 426 U.S. 794, 810 (1976)).

[2] 426 U.S. 794.

[3] *Id.* at 808; *see also* McBurney v. Young, 569 U.S. 221, 236 (2013) (to the extent that the Virginia Freedom of Information Act created a market for public documents in Virginia, the Commonwealth was the sole manufacturer of the product, and therefore did not violate the Dormant Commerce Clause when it limited access to those documents under the Act to citizens of the Commonwealth).

[4] 447 U.S. 429 (1980).

[5] *Id.* at 437; *see also* White v. Mass. Council of Constr. Emps., 460 U.S. 204 (1983) (holding that a city may favor its own residents in construction projects paid for with city funds). The Court reached a different result in *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984), in which it held unconstitutional a requirement that timber taken from state lands in Alaska be processed within the state. The Court distinguished Alaska's requirement from the laws at issue in other market-participant doctrine cases based on the fact that the Alaska law restricted resale, affected foreign commerce, and involved a natural resource).

[6] *See S.-Cent. Timber Dev., Inc.*, 467 U.S. at 97–98 (cautioning that "[u]nless the 'market' is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry").

[1] Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434 (1946).

discriminatory.[2] For example, in 1852, the Supreme Court held that the Wheeling Bridge unlawfully obstructed the free navigation of the Ohio River.[3] Soon thereafter, Congress enacted legislation declaring the bridge to be a "lawful structure[ ]."[4] In a subsequent opinion, the Court acknowledged that the act of Congress superseded its earlier ruling.[5] Some Justices, however, have questioned whether Congress may in fact override the dormant Commerce Clause.[6]

Congress's intent to permit otherwise impermissible state actions must "be unmistakably clear," however.[7] The Court has struck down various state regulations where it held that there was no federal law expressing a sufficiently clear intent to authorize a particular burden on interstate commerce.[8]

One line of cases has addressed states' authority to regulate and tax the insurance business. In *United States v. South-Eastern Underwriters Association*, the Court held that insurance transactions across state lines constituted interstate commerce and thus could not be subjected to discriminatory state taxation.[9] Less than a year later, Congress passed the McCarran-Ferguson Act, which provided that "the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."[10] Following the enactment of that law, the Court upheld a South Carolina statute that taxed the premiums of business done in that state by foreign insurance companies.[11]

In a series of cases relating to state prohibition laws enacted in the 1890s, the Court emphasized that states could prohibit the manufacture and sale of alcohol within their boundaries, but could not prevent the importation or sale of alcohol in its original package from

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[2] Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 472 U.S. 159, 174 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.")

[3] Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518 (1852).

[4] Ch. 111, 10 Stat. 112, § 6.

[5] Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1856).

[6] *E.g.*, Comptroller of Treasury v. Wynne, 575 U.S. 542, 572 (2015) (Scalia, J., dissenting) ("The clearest sign that the negative Commerce Clause is a judicial fraud is the utterly illogical holding that congressional consent enables States to enact laws that would otherwise constitute impermissible burdens upon interstate commerce. . . . How could congressional consent lift a constitutional prohibition?"); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 426 (1946) ("[I]f the commerce clause 'by its own force' forbids discriminatory state taxation, or other measures, how is it that Congress by expressly consenting can give that action validity?").

[7] S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 90, 92 (1984) (explaining that this rule ensures that there is a "collective decision" to impose a burden on interstate commerce and reduces the risk that unrepresented, out-of-state interests will be adversely affected by a state's unilateral regulations). Likewise, Congress must specify when it intends to reduce the degree of scrutiny to be applied to a state action. *See* Maine v. Taylor, 477 U.S. 131, 139 (1986) (holding that the Lacey Act's reinforcement of state bans on importation of fish and wildlife neither authorizes state law that otherwise would be unconstitutional, nor shifts analysis from the presumption of invalidity for discriminatory laws to the balancing test for state laws that burden commerce only incidentally).

[8] *E.g.*, Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 66 (2003) (holding that the Federal Agriculture Improvement and Reform Act of 1996 addressed laws regulating the composition and labeling of fluid milk products, but did not mention pricing laws, and thus did not authorize a California program to regulate the minimum prices paid by California dairy processors to producers); *S.-Cent. Timber Dev.*, 467 U.S. at 92 (holding that consistency between federal and state policy was "insufficient indicium" that Congress intended to authorize the state to apply a similar policy for timber harvested from state lands).

[9] 322 U.S. 533 (1944).

[10] Act of Mar. 9, 1945, ch. 20, § 1, 59 Stat. 33, 15 U.S.C. § 1011.

[11] Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429 (1946) (explaining that Congress "[o]bviously [intended] to give support to the existing and future state systems for regulating and taxing the business of insurance").

another state so long as Congress remained silent on the issue.[12] Congress then enacted the Wilson Act, which empowered states to regulate imported liquor on the same terms as domestic liquor.[13] But the Court interpreted the Wilson Act narrowly to authorize states to regulate the resale of imported liquor, and not direct shipment to consumers for personal use.[14] Congress then responded in 1913 by enacting the Webb-Kenyon Act, which authorized states to limit direct shipments of liquor for personal use.[15]

Following the repeal of Prohibition, the Supreme Court has repeatedly considered the relationship between the Twenty-First Amendment and the Dormant Commerce Clause as they govern state alcohol laws.[16] Section 2 of the Amendment prohibited the "transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof."[17] In its recent case law, the Court has emphasized that "the aim of § 2 was not to give States a free hand to restrict the importation of alcohol for purely protectionist purposes."[18] The Court has thus invalidated various state alcohol laws that discriminated in favor of in-state businesses where it has determined that a challenged requirement "[cannot] be justified as a public health or safety measure or on some other legitimate nonprotectionist ground."[19]

ArtI.S8.C3.7.8 Facially Neutral Laws and Dormant Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

For laws that are neither facially discriminatory nor protectionist in purpose or effect, the Supreme Court now applies a balancing approach to determine if they impermissibly burden interstate commerce. The Court first articulated the modern balancing test in 1945, in *Southern Pacific Co. v. Arizona*.[1] In that case, the Court held that an Arizona train-length law

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[12] Bowman v. Chi. & Nw. Ry., 125 U.S. 465 (1888); Leisy v. Hardin, 135 U.S. 100 (1890). Relying on the distinction between manufacture and commerce, the Court applied *Mugler* to authorize states to prohibit the manufacture of liquor for an out-of-state market. Kidd v. Pearson, 128 U.S. 1 (1888). For a lengthier discussion of the Court's temperance-law jurisprudence, see Granholm v. Heald, 544 U.S. 460, 476–482 (2005); and Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2464–2467 (2019).

[13] Ch. 728, 26 Stat. 313 (codified at 27 U.S.C. § 121).

[14] Rhodes v. Iowa, 170 U.S. 412 (1898); *see also* Scott v. Donald, 165 U.S. 58, 100 (1897) (holding that the Wilson Act did not authorize a South Carolina law requiring all liquor sales to be channeled through the state liquor commissioner); Vance v. W. A. Vandercook Co., 170 U.S. 438 (1898).

[15] 37 Stat. 699 (codified at 27 U.S.C. § 122). The Supreme Court upheld the constitutionality of the Webb-Kenyon Act in Clark Distilling Co. v. W. Md. Ry., 242 U.S. 311 (1917).

[16] *See* Amdt21.S2.1 Discrimination Against Interstate Commerce.

[17] U.S. Const. amend. XXI, § 2.

[18] *Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2469 (citing *Granholm*, 544 U.S. at 486–487, and Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 276 (1984)).

[19] *E.g.*, *id.* at 2474–2476 (holding that a Tennessee two-year residency requirement for retail liquor license applicants was not justified on public health and safety grounds and violated the Commerce Clause); *Bacchus*, 468 U.S. at 273–276 (invalidating tax exemption favoring certain in-state alcohol producers); Healy v. Beer Inst., 491 U.S. 324, 340–341 (1989) (holding unconstitutional a Connecticut law requiring out-of-state shippers of beer to affirm that their wholesale price for products sold in the state was no higher than the prices they charged to wholesalers in bordering states); *Granholm*, 544 U.S. at 492–493 (holding that discriminatory direct-shipment law that favored in-state wineries was not reasonably necessary to protect states' asserted interests in policing underage drinking and facilitating tax collection).

[1] 325 U.S. 761 (1945). Prior to 1945, Chief Justice Stone authored a series of opinions presaging this standard. See DiSanto v. Pennsylvania, 273 U.S. 34, 44 (1927) (Stone, J., dissenting) (advocating "consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual

imposed an unconstitutional burden on interstate commerce. Writing for the majority, Justice Harlan Stone explained that courts would generally uphold regulations as within state authority "[w]hen the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight."[2]

According to the Court, determining whether a state or local regulation was valid required a "reconciliation of the conflicting claims of state and national power," which "is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved."[3] To weigh those conflicting claims, the Court would consider "the nature and extent of the burden which the state regulation . . . imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference."[4] Applying that balancing test to the Arizona law under review, the Court concluded that it was "obstructive to interstate train operation," would have "a seriously adverse effect on transportation efficiency and economy," and "passes beyond what is plainly essential for safety."[5]

A more commonly cited articulation of the modern balancing test comes from *Pike v. Bruce Church, Inc*.[6] In that case, the Court explained:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[7]

Since the adoption of the balancing test for evaluating facially neutral laws under the Dormant Commerce Clause, the Court has issued divergent rulings on state regulations.[8] It has not expressly identified what constitutes an intolerable burden on interstate commerce, though it has held that a state law does not necessarily impose an undue burden on interstate commerce merely because it increases compliance costs or causes some entities to stop doing

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effect on the flow of commerce"); California v. Thompson, 313 U.S. 109 (1941) (overruling *DiSanto*); Parker v. Brown, 317 U.S. 341, 362–368 (1943). A notable exception to this approach was *South Carolina Highway Department v. Barnwell Bros.*, in which Justice Stone authored an opinion upholding truck weight and width restrictions that were more limiting than almost all other states, based on a review of whether "the legislative choice is without rational basis." 303 U.S. 177, 192 (1938). Although the Court has not reversed *Barnwell Bros.*, its application of the rational basis test to subsequent Dormant Commerce Clause challenges has been limited. *See* Clark v. Paul Gray, Inc., 306 U.S. 583, 594 (1939).

[2] *S. Pac. Co.*, 325 U.S. at 767.

[3] *Id.* at 768–69.

[4] *Id.* at 770–71.

[5] *Id.* at 781–782.

[6] 397 U.S. 137 (1970).

[7] *Id.* at 142 (citation omitted).

[8] Several cases applying the balancing approach—both before and after *Pike v. Bruce Church*—have addressed regulation of the transportation industry. *E.g.*, Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959) (invalidating Illinois law requiring a particular kind of mudguards on trucks and trailers because of the burden on interstate commerce that would result from truckers shifting cargo to differently designed vehicles); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 447 (1978) (holding that Wisconsin truck-length limitations placed no more than "the most speculative contribution to highway safety"); Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) (invalidating Iowa truck-length limitations on similar grounds).

business in that state.[9] Likewise, the Court has not articulated a definition of "legitimate local purpose," though it has identified categories of interests that could be considered legitimate or illegitimate. In *Pike*, for example, the Court indicated that states had a legitimate interest in addressing safety (particularly in the context of long-standing local regulation), protecting in-state consumers, protecting or promoting in-state businesses, and maxmimizing the financial return to in-state industries.[10] Under the Court's balancing approach, however, the existence of a legitimate local interest is not alone a sufficient basis to uphold a law that burdens interstate commerce. The Court has also explained that "[s]hielding in-state industries from out-of-state competition is almost never a legitimate local purpose."[11]

Cases that have arisen in the context of financial regulation illustrate the fact-specific nature of the balancing test. In *Lewis v. BT Investment Managers, Inc.*, the Court struck down a state law prohibiting ownership of local advisory businesses by out-of-state banks, holding companies, and trust companies. It acknowledged that "banking and related financial activities are of profound local concern" and that "[d]iscouraging economic concentration and protecting the citizenry against fraud are undoubtedly legitimate state interests."[12] The Court nevertheless held that "disparate treatment of out-of-state bank holding companies cannot be justified as an incidental burden necessitated by legitimate local concerns," in part because "some intermediate form of regulation" could accomplish the same goals.[13] Likewise, in *CTS Corp. v. Dynamics Corp. of America*, the Court recognized the state's legitimate interest in regulating its corporations and resident shareholders. In that case, it upheld the state law, finding that the state's interest outweighed any burden on interstate commerce from the effects of the law.[14] By contrast, in *Edgar v. MITE Corp.*, the Court reasoned that states did *not* have a legitimate interest in protecting *nonresident* shareholders.[15]

At times, the Court has applied an extraterritoriality principle in its Dormant Commerce Clause analysis, holding that certain facially neutral state laws are unconstitutional because they attempt to regulate beyond a state's borders.[16] The Court has recognized that this principle "protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State" and "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not

[9] Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127 (1978) (holding that a Maryland law prohibiting oil producers oil refiners from operating gas stations within the state did not impermissibly burden interstate commerce even where the law would cause some refiners to stop selling in Maryland, because those refiners could "be promptly replaced by other interstate refiners").

[10] 397 U.S. at 143.

[11] Maine v. Taylor, 477 U.S. 131, 148 (1986).

[12] 447 U.S. 27, 38, 43–44 (1980).

[13] *Id.* at 43–44.

[14] 481 U.S. 69, 88, 93 (1987).

[15] 457 U.S. 624, 644 (1982).

[16] Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 524 (1935) (striking down a law requiring milk sellers in New York to pay an out-of-state milk producer the minimum price set by New York law in order to equalize the price of milk from in-state and out-of-state producers, and explaining that "commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another"); Edgar v. MITE Corp., 457 U.S. 624, 642–643 (1982) (emphasizing the extraterritorial effect of an Illinois regulation of take-over attempts of companies that had specified business contacts with the state); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 580 (1986) (striking down a New York law requiring liquor distillers and producers selling to wholesalers within the state to affirm that the prices they charged were no higher than the lowest price at which the same product would be sold in any other state in the month covered by the affirmation); Healy v. Beer Inst., 491 U.S. 324, 332 (1989) (striking down a Connecticut price-affirmation statute for out-of-state beer shippers, and confirming that "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause").

the commerce has effects within the [regulating] State."[17] The Court has not articulated a general rule for when it will consider a state's law to have the practical effect of regulating extraterritorial commerce.[18]

For both discriminatory and facially neutral laws, the Court's "critical consideration" is a law's "overall effect . . . on both local and interstate activity."[19] Yet determining whether a law is discriminatory and *per se* invalid, or facially netural and subject to the balancing test, is not straightforward. While the Court has cautioned that "no clear line" separates these two categories of regulations,[20] it has identified some categories of laws that are generally discriminatory: laws that aim to create "barriers to allegedly ruinous outside competition," "to create jobs by keeping industry within the State," "to preserve the State's financial resources from depletion by fencing out indigent immigrants," and to "accord [a state's] own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders" would all be invalidated.[21]

ArtI.S8.C3.7.9 Local Laws and Traditional Government Functions

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

At times, the Supreme Court has taken a more lenient approach under the Dormant Commerce Clause toward local laws that relate to government actions it identifies as traditional government functions, and which "may be directed toward any number of legitimate goals unrelated to protectionism."[1] In such cases, the Court has held that "a government function is not susceptible to standard Dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors."[2]

The Court has not identified an exhaustive list of traditional government functions or a test for identifying them, but one paradigmatic example is the govenrment's role in waste collection. In *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, the Court upheld a law requiring trash haulers to bring waste to a processing plant owned by a state-created public benefit corporation. The Court explained that it would be "particularly hesitant to interfere . . . under the guise of the Commerce Clause" where a local government engaged in a traditional government function.[3] *United Haulers* contrasted with earlier rulings that addressed garbarge transport and disposal laws without discussing whether those laws related to a traditional government function.[4] For example, in *C & A*

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[17] *Healy*, 491 U.S. at 336–337; *Edgar*, 457 U.S. at 642.

[18] *See* Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003) (holding that the rule applied in *Baldwin* and *Healy* "is not applicable to this case" because the challenged statute was not a price control or price affirmation statute and did not regulate the price of any out-of-state transaction).

[19] *Brown-Forman*, 476 U.S. at 579 (1986).

[20] *Id.*

[21] Philadelphia v. New Jersey, 437 U.S. 617, 626–627 (1978) (citing cases).

[1] United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343 (2007).

[2] Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 341 (2008).

[3] 550 U.S. at 344.

[4] In *Philadelphia v. New Jersey*, the Supreme Court struck down a New Jersey statute that banned the importation of most solid or liquid wastes that originated outside the state. 437 U.S. at 629. Then, in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992), the Court applied

Carbone, Inc. v. Clarkstown,[5] the Court invalidated a local "flow control" ordinance requiring that all solid waste within the town be processed at a designated transfer station before leaving the town. Underlying the restriction was the town's desire to guarantee a minimum waste flow to the private contractor that constructed a solid waste transfer station. The Court declined to apply *Carbone* in *United Haulers* because the ordinance at issue in the latter case required haulers to bring waste to facilities owned and operated by a state-created public benefit corporation, as opposed to a private processing facility.[6] The Court found this difference constitutionally significant because "[d]isposing of trash has been a traditional government activity for years, and laws that favor the government in such areas—but treat every private business, whether in-state or out-of-state, exactly the same—do not discriminate against interstate commerce for purposes of the Commerce Clause."[7]

The Court has applied a traditional governmental function lens in other contexts. In *Department of Revenue of Kentucky v. Davis*, the Court upheld Kentucky's exemption of interest on its municipal bonds from state income taxes while imposing income taxes on bond interest from other states, after concluding that the issuance of debt securities to pay for public projects is a "quintessentially public function."[8] Curiously, the Court declined to apply the *Pike v. Bruce Church, Inc.* balancing analysis, holding that "the current record and scholarly material convince us that the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary . . . to satisfy a *Pike* burden in this particular case."[9]

ArtI.S8.C3.7.10 Foreign Commerce and State Powers

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

State taxation and regulation of commerce from abroad are also subject to negative commerce clause constraints. In the seminal case of *Brown v. Maryland*,[1] in the course of striking down a state statute requiring "all importers of foreign articles or commodities," preparatory to selling the goods, to take out a license, Chief Justice John Marshall developed a lengthy exegesis explaining why the law was void under both the Import-Export Clause[2] and the Commerce Clause. According to the Chief Justice, an inseparable part of the right to import was the right to sell, and a tax on the sale of an article is a tax on the article itself. Thus, the

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Philadelphia to hold unconstitutional a Michigan law prohibiting private landfill operators from accepting solid waste that originates outside the county where their facilities are located.

[5] 511 U.S. 383 (1994).

[6] *United Haulers*, 550 U.S. at 334.

[7] *Id.* The Court has applied *United Haulers* in other contexts. In *Department of Revenue of Kentucky v. Davis*, the Court upheld Kentucky's exemption of interest on its municipal bonds from state income taxes while imposing income taxes on bond interest from other states, after concluding that the issuance of debt securities to pay for public projects is a "quintessentially public function." 553 U.S. at 342. The Court declined to apply the *Pike* balancing analysis, however, holding that "the current record and scholarly material convince us that the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary . . . to satisfy a *Pike* burden in this particular case."

[8] 553 U.S. at 342.

[9] *Id.* at 353.

[1] 25 U.S. (12 Wheat.) 419 (1827).

[2] Article I, § 10, cl. 2. This aspect of the doctrine of the case was considerably expanded in *Low v. Austin,* 80 U.S. (13 Wall.) 29 (1872), and subsequent cases, to bar states from levying nondiscriminatory, ad valorem property taxes upon goods that are no longer in import transit. This line of cases was overruled in Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976).

taxing power of the states did not extend in any form to imports from abroad so long as they remain "the property of the importer, in his warehouse, in the original form or package" in which they were imported. This is the famous "original package" doctrine. Only when the importer parts with his importations, mixes them into his general property by breaking up the packages, may the state treat them as taxable property.

Obviously, to the extent that the Import-Export Clause was construed to impose a complete ban on taxation of imports so long as they were in their original packages, there was little occasion to develop a Commerce Clause analysis that would have reached only discriminatory taxes or taxes upon goods in transit.[3] In other respects, however, the Court has applied the foreign commerce aspect of the clause more stringently against state taxation.

Thus, in *Japan Line, Ltd. v. County of Los Angeles,*[4] the Court held that, in addition to satisfying the four requirements that govern the permissibility of state taxation of interstate commerce,[5] "When a State seeks to tax the instrumentalities of foreign commerce, two additional considerations . . . come into play. The first is the enhanced risk of multiple taxation. . . . Second, a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential."[6] Multiple taxation is to be avoided with respect to interstate commerce by apportionment so that no jurisdiction may tax all the property of a multistate business, and the rule of apportionment is enforced by the Supreme Court with jurisdiction over all the states. However, the Court is unable to enforce such a rule against another country, and the country of the domicile of the business may impose a tax on full value. Uniformity could be frustrated by disputes over multiple taxation, and trade disputes could result.

Applying both these concerns, the Court invalidated a state tax, a nondiscriminatory, ad valorem property tax, on foreign-owned instrumentalities, i.e., cargo containers, of international commerce. The containers were used exclusively in international commerce and were based in Japan, which did in fact tax them on full value. Thus, there was the actuality, not only the risk, of multiple taxation. National uniformity was endangered, because, although California taxed the Japanese containers, Japan did not tax American containers, and disputes resulted.[7]

On the other hand, the Court has upheld a state tax on all aviation fuel sold within the state as applied to a foreign airline operating charters to and from the United States. The Court found the *Complete Auto* standards met, and it similarly decided that the two standards specifically raised in foreign commerce cases were not violated. First, there was no danger of double taxation because the tax was imposed upon a discrete transaction—the sale of fuel—that occurred within only one jurisdiction. Second, the one-voice standard was satisfied, because the United States had never entered into any compact with a foreign nation

[3] *See, e.g.*, Halliburton Oil Well Co. v. Reily, 373 U.S. 64 (1963); Minnesota v. Blasius, 290 U.S. 1 (1933). After the holding in *Michelin Tire*, the two clauses are now congruent. The Court has observed that the two clauses are animated by the same policies. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449–50 n.14 (1979).

[4] 441 U.S. 434 (1979).

[5] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). A state tax failed to pass the nondiscrimination standard in *Kraft General Foods, Inc. v. Iowa Dept. of Revenue and Finance,* 505 U.S. 71 (1992). Iowa imposed an income tax on a unitary business operating throughout the United States and in several foreign countries. It taxed the dividends that a corporation received from its foreign subsidiaries, but not the dividends it received from its domestic subsidiaries. Therefore, there was a facial distinction between foreign and domestic commerce.

[6] 441 U.S. at 446, 448. *See also* Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60 (1993) (sustaining state sales tax as applied to lease of containers delivered within the state and used in foreign commerce).

[7] 441 U.S. at 451–57. For income taxes, the test is more lenient, accepting not only the risk but the actuality of some double taxation as something simply inherent in accounting devices. Container Corp. of America v. Franchise Tax Board, 463 U.S. 159, 187–192 (1983).

precluding such state taxation, having only signed agreements with others, which had no force of law, aspiring to eliminate taxation that constituted impediments to air travel.[8] Also, a state unitary-tax scheme that used a worldwide-combined reporting formula was upheld as applied to the taxing of the income of a domestic-based corporate group with extensive foreign operations.[9]

Extending *Container Corp.*, the Court in *Barclays Bank v. Franchise Tax Bd. of California*[10] upheld the state's worldwide-combined reporting method of determining the corporate franchise tax owed by unitary multinational corporations, as applied to a foreign corporation. The Court determined that the tax easily satisfied three of the four-part *Complete Auto* test—nexus, apportionment, and relation to state's services—and concluded that the nondiscrimination principle—perhaps violated by the letter of the law—could be met by the discretion accorded state officials. As for the two additional factors, as outlined in *Japan Lines*, the Court pronounced itself satisfied. Multiple taxation was not the inevitable result of the tax, and that risk would not be avoided by the use of any reasonable alternative. The tax, it was found, did not impair federal uniformity or prevent the Federal Government from speaking with one voice in international trade, in view of the fact that Congress had rejected proposals that would have preempted California's practice.[11] The result of the case, perhaps intended, is that foreign corporations have less protection under the negative Commerce Clause.[12]

The power to regulate foreign commerce was always broader than the states' power to tax it, an exercise of the "police power" recognized by Chief Justice John Marshall in *Brown v. Maryland*.[13] That this power was constrained by notions of the national interest and preemption principles was evidenced in the cases striking down state efforts to curb and regulate the actions of shippers bringing persons into their ports.[14] On the other hand, quarantine legislation to protect the states' residents from disease and other hazards was commonly upheld though it regulated international commerce.[15] A state game-season law applied to criminalize the possession of a dead grouse imported from Russia was upheld because of the practical necessities of enforcement of domestic law.[16]

Nowadays, state regulation of foreign commerce is likely to be judged by the extra factors set out in *Japan Line*.[17] Thus, the application of a state civil rights law to a corporation

[8] Wardair Canada v. Florida Dep't of Revenue, 477 U.S. 1, 10 (1986).

[9] Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983). The validity of the formula as applied to domestic corporations with foreign parents or to foreign corporations with foreign parents or foreign subsidiaries, so that some of the income earned abroad would be taxed within the taxing state, is a question of some considerable dispute.

[10] 512 U.S. 298 (1994).

[11] Reliance could not be placed on Executive statements, the Court explained, because "the Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'" 512 U.S. at 329. "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting." *Id.* at 330. Dissenting Justice Scalia noted that, although the Court's ruling correctly restored preemptive power to Congress, "it permits the authority to be exercised by silence. *Id.* at 332."

[12] *The Supreme Court, Leading Cases, 1993 Term*, 108 Harv. L. Rev. 139, 139–49 (1993).

[13] 25 U.S. (12 Wheat.) 419, 443–44 (1827).

[14] New York City v. Miln, 36 U.S. (11 Pet.) 102 (1837) (upholding reporting requirements imposed on ships' masters), *overruled by* Henderson v. Mayor of New York, 92 U.S. 259 (1876); Passenger Cases, 48 U.S. (7 How.) 283 (1849); Chy Lung v. Freeman, 92 U.S. 275 (1876).

[15] Campagnie Francaise De Navigation a Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380 (1902); Louisiana v. Texas, 176 U.S. 1 (1900); Morgan v. Louisiana, 118 U.S. 455 (1886).

[16] New York *ex rel.* Silz v. Hesterberg, 211 U.S. 31 (1908).

[17] Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 456 n.20 (1979) (construing Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948)).

transporting passengers outside the state to an island in a foreign province was sustained in an opinion emphasizing that, because of the particularistic geographic situation the foreign commerce involved was more conceptual than actual, there was only a remote hazard of conflict between state law and the law of the other country and little if any prospect of burdening foreign commerce.

ArtI.S8.C3.7.11 State Taxation

ArtI.S8.C3.7.11.1 Overview of State Taxation and Dormant Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In 1959, the Supreme Court acknowledged that, with respect to the taxing power of the states in light of the negative (or "dormant") Commerce Clause, "some three hundred full-dress opinions" as of that year had not resulted in "consistent or reconcilable" doctrine but rather in something more resembling a "quagmire."[1] Although many of the principles still applicable in constitutional law may be found in the older cases, the Court has worked to drain that quagmire, though at different times for taxation and for regulation.

The task of drawing the line between state power and the commercial interest has proved a comparatively simple one in the field of foreign commerce, the two things being in great part territorially distinct.[2] With "commerce among the States," affairs are very different. Interstate commerce is conducted by persons and corporations that are ordinarily engaged also in local business, often through activities that comprise the most ordinary subject matter of state power. In this field, the Court consequently has been unable to rely upon sweeping solutions. To the contrary, its judgments have often been fact-bound and difficult to reconcile, and this is particularly the case with respect to the infringement of interstate commerce by the state taxing power.[3]

ArtI.S8.C3.7.11.2 Early Dormant Commerce Clause Jurisprudence and State Taxation

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

The Supreme Court's Dormant Commerce Clause jurisprudence dealing with how state taxing power relates to interstate commerce developed gradually with the Court first striking down a state tax as violating the Commerce Clause in 1873 in the *State Freight Tax Case*.[1] In the *State Freight Tax Case*, the Court considered the validity of a Pennsylvania statute that

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[1] Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457–58 (1959) (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344 (1954)). Justice Felix Frankfurter was similarly skeptical of definitive statements. "To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts." Freeman v. Hewit, 329 U.S. 249, 251–52 (1946).

[2] *See* J. Hellerstein & W. Hellerstein, State and Local Taxation: Cases and Materials ch. 5 (8th ed. 2005).

[3] In addition to the sources previously cited, see J. Hellerstein & W. Hellerstein, *supra* note 2. For a succinct description of the history, see W. Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 Tax Law. 37 (1987).

[1] Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1873).

required every company transporting freight within the state, with certain exceptions, to pay a tax at specified rates on each ton of freight carried by it. The Court's reasoning was forthright: Transportation of freight constitutes commerce.[2] A tax upon freight transported from one state to another effects a regulation of interstate commerce.[3] Hence, a state law imposing a tax upon freight, taken up within the state and transported out of it or taken up outside the state and transported into it, violates the Commerce Clause.[4]

Relying on the doctrine established in *Cooley v. Board of Wardens*,[5] the Supreme Court stated:

> [W]henever the subjects over which a power to regulate commerce is asserted are in their nature national or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. Surely transportation of passengers or merchandise through a State, or from one state to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed. . . . It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the States was conferred upon the Federal government.[6]

The principle thus established in the *State Freight Tax Case*—that a state may not tax interstate commerce—confronted the principle that a state may tax all purely domestic business within its borders and all property "within its jurisdiction." The task before the Court was to determine where to draw the line between the immunity claimed by interstate business, on the one hand, and the prerogatives claimed by local power on the other. In the *State Tax on Railway Gross Receipts Case*, decided the same day as the *State Freight Tax Case*, the Supreme Court considered the constitutionality of a state tax upon gross receipts of all railroads chartered by the state, when part of the receipts had been derived from interstate transportation of the same freight that had been held immune from tax *pursuant* to the *State Freight Tax Case*.[7] If the latter tax—the state tax upon gross receipts of all railroads chartered by the state—was regarded as a tax on interstate commerce, it too would violate the Constitution. But to the Court, the tax on gross receipts of an interstate transportation company was not a tax on commerce. The Court stated: "[I]t is not everything that affects

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[2] *Id.* at 275.

[3] *Id.* at 275–76, 279.

[4] *Id.* at 281–82.

[5] 53 U.S. (12 How.) 299 (1851). While the issue of exclusive federal power and the separate issue of the Dormant Commerce Clause was present in the *License Cases*, 46 U.S. (5 How.) 504 (1847) and the *Passenger Cases*, 48 U.S. (7 How.) 283 (1849), the Court did not establish a definitive rule. Chief Justice Roger Taney viewed the Commerce Clause only as a grant of power to Congress, containing no constraint upon the states, and the Court's role was to void state laws in contravention of federal legislation. *License Cases*, 46 U.S. (5 How.) 504, 573 (1847); *Passenger Cases*, 48 U.S. (7 How.) 283, 464 (1849).

In *Cooley*, the Court, upholding a state law that required ships to engage a local pilot when entering or leaving the port of Philadelphia, enunciated a doctrine of *partial* federal exclusivity. According to Justice Benjamin Curtis's opinion, the state act was valid on the basis of a distinction between those subjects of commerce that "imperatively demand a single uniform rule" operating throughout the country and those that "as imperatively" demand "that diversity which alone can meet the local necessities of navigation," that is to say, of commerce. As to the former, the Court held Congress's power to be "exclusive"; as to the latter, it held that the states enjoyed a power of "concurrent legislation." 48 U.S. at 317–20. The Philadelphia pilotage requirement was of the latter kind. *Id.*

[6] *Case of the State Freight Tax*, 82 U.S. at 279–80.

[7] State Tax on Railway Gross Receipts, 82 U.S. (15 Wall.) 284 (1872).

commerce that amounts to a regulation of it, within the meaning of the Constitution."[8] The Court reasoned that a gross receipts tax upon a railroad company, which concededly affected commerce, did not directly regulate commerce. The Court explained: "Very manifestly it is a tax upon the railroad company. . . . That its ultimate effect may be to increase the cost of transportation must be admitted. . . . Still it is not a tax upon transportation, or upon commerce. . . ."[9]

The Court differentiated these two cases in part on the basis of *Cooley*, reasoning that some subjects embraced within the meaning of commerce demand uniform, national regulation, whereas other similar subjects permit of diversity of treatment, until Congress acts; and in part on the basis of a concept of a "direct" tax on interstate commerce, which was impermissible, and an "indirect" tax, which was permissible until Congress acted.[10] Those two concepts were sometimes conflated and sometimes treated separately. In any event, the Court itself was clear that interstate commerce could not be taxed at all, even if the tax was a nondiscriminatory levy applied alike to local commerce.[11] In the *Minnesota Rate Cases*, the Court stated: "Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it . . . ; or upon persons or property in transit in interstate commerce."[12] However, the Court sustained taxes that imposed only an "indirect" burden on interstate commerce. For instance, the Court sustained property taxes and taxes in lieu of property taxes applied to all businesses, including instrumentalities of interstate commerce.[13] Generally, courts sustained taxes that were imposed on some local, rather than interstate, activity or if the tax was exacted before interstate movement had begun or after it had ended.

An independent basis for invalidation was that the tax was discriminatory—that its impact was intentionally or unintentionally felt by interstate commerce and not by local commerce—perhaps in pursuit of parochial interests. Many early cases actually involving discriminatory taxation were decided on the basis of the impermissibility of taxing interstate commerce at all, but the category was soon clearly delineated as a separate ground for invalidation.[14]

Following the Great Depression and under the leadership of Justice, and later Chief Justice, Harlan Stone, the Court attempted to move away from the principle that interstate commerce may not be taxed and the use of the direct-indirect distinction. Instead, a state or local tax would be voided only if, in the opinion of the Court, it created a risk of multiple taxation for interstate commerce not felt by local commerce.[15] It became much more important to the validity of a tax that it be apportioned to an interstate company's activities within the

[8] *Id.* at 293.

[9] *Id.* at 294. This case was overruled 14 years later, when the Court voided substantially the same tax in *Philadelphia Steamship Co. v. Pennsylvania,* 122 U.S. 326 (1887).

[10] *See* The Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 398–412 (1913) (reviewing and summarizing at length both taxation and regulation cases). *See also* Missouri *ex rel.* Barrett v. Kan. Nat. Gas Co., 265 U.S. 298, 307 (1924).

[11] Robbins v. Shelby Cnty. Taxing Dist., 120 U.S. 489, 497 (1887); Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888).

[12] *The Minnesota Rate Cases*, 230 U.S. at 400–401.

[13] The Del. R.R. Tax, 85 U.S. (18 Wall.) 206, 232 (1873). *See* Cleveland, Cincinnati, Chi. & St. Louis Ry. v. Backus, 154 U.S. 439 (1894); Postal Tel. Cable Co. v. Adams, 155 U.S. 688 (1895). *See* cases cited in J. Hellerstein & W. Hellerstein, State and Local Taxation: Cases and Materials 195 *et seq* (8th ed.).

[14] *E.g.*, Welton v. Missouri, 91 U.S. 275 (1876); Robbins v. Shelby Cnty. Taxing Dist., 120 U.S. 489 (1887); Darnell & Son Co. v. City of Memphis, 208 U.S. 113 (1908); Bethlehem Motors Co. v. Flynt, 256 U.S. 421 (1921).

[15] W. Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940); Int'l Harvester Co. v. Dep't of Treasury, 322 U.S. 340 (1944); Int'l Harvester Co. v. Evatt, 329 U.S. 416 (1947).

taxing state, so as to reduce the risk of multiple taxation.[16] But in some cases, the Court continued to suggest that interstate commerce may not be taxed at all, even by a properly apportioned levy, and reasserted the direct-indirect tax distinction.[17] Following a series of cases that suggested difficulty in applying the Court's precedents,[18] the Court adopted the modern standard which is discussed in the essay Modern Dormant Commerce Clause Jurisprudence on State Taxation Generally.[19]

ArtI.S8.C3.7.11.3 Modern Dormant Commerce Clause Jurisprudence and State Taxation

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In the area of taxation, the transition from the earliest formulations to the modern standard was gradual.[1] Both taxation and regulation now, however, are evaluated under a judicial balancing formula comparing the burden on interstate commerce with the importance of the state interest, save for discriminatory state action that cannot be justified at all.

During the 1940s and 1950s, there was conflict within the Court between the view that interstate commerce could not be taxed at all, at least "directly," and the view that the Dormant Commerce Clause protected against the risk of double taxation.[2] In *Northwestern States Portland Cement Co. v. Minnesota*,[3] the Court reasserted the principle expressed in *Western Live Stock*—that the Framers did not intend to immunize interstate commerce from its just share of the state tax burden even though it increased the cost of doing business.[4] In *Northwestern States*, the Court held that a state could constitutionally impose a nondiscriminatory, fairly apportioned net income tax on an out-of-state corporation engaged exclusively in interstate commerce in the taxing state. The Court stated: "For the first time outside the context of property taxation, the Court explicitly recognized that an exclusively interstate business could be subjected to the states' taxing powers."[5] Thus, in *Northwestern States*, foreign corporations that maintained a sales office and employed sales staff in the taxing state for solicitation of orders for their merchandise that, upon acceptance of the orders

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[16] *E.g.*, Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939); Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947); Cent. Greyhound Lines v. Mealey, 334 U.S. 653 (1948). Notice the Court's distinguishing of *Cent. Greyhound* in *Okla. Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 188–91 (1995).

[17] Freeman v. Hewit, 329 U.S. 249 (1946); Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951).

[18] For example, the states carefully phrased tax laws so as to impose on interstate companies not a license tax for doing business in the state, which was not permitted, Ry. Express Agency v. Virginia, 347 U.S. 359 (1954), but as a franchise tax on intangible property or the privilege of doing business in a corporate form, which was permissible. Ry. Express Agency v. Virginia, 358 U.S. 434 (1959); Colonial Pipeline Co. v. Traigle, 421 U.S. 100 (1975). Also, the Court increasingly found the tax to be imposed on a local activity in instances it would previously have seen to be an interstate activity. *E.g.*, Memphis Nat. Gas Co. v. Stone, 335 U.S. 80 (1948); Gen. Motors Corp. v. Washington, 377 U.S. 436 (1964); Standard Pressed Steel Co. v. Dep't of Revenue, 419 U.S. 560 (1975).

[19] ArtI.S8.C3.7.4 Modern Dormant Commerce Clause Jurisprudence Generally.

[1] Scholars dispute just when the modern standard was firmly adopted. The conventional view is that it was articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), but there also seems little doubt that the foundation of the present law was laid in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

[2] *Compare* Freeman v. Hewit, 329 U.S. 249, 252–256 (1946), *with* W. Live Stock v. Bureau of Revenue, 303 U.S. 250, 258, 260 (1938).

[3] 358 U.S. 450 (1959).

[4] *Id.* at 461–62. *See W. Live Stock*, 303 U.S. at 254.

[5] W. Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 Tax Law. 37, 54 (1987).

at their home office in another jurisdiction, were shipped to customers in the taxing state, were held liable to pay the latter's income tax on that portion of the net income of their interstate business as was attributable to such solicitation.

Subsequent years, however, saw inconsistent rulings that turned almost completely upon the use of or failure to use "magic words" by legislative drafters. That is, it was constitutional for states to tax a corporation's net income, properly apportioned to the taxing state, as in *Northwestern States*, but no state could levy a tax on a foreign corporation for the privilege of doing business in the state, notwithstanding the similarity of the taxes.[6]

In *Complete Auto Transit, Inc. v. Brady*,[7] the Court overruled the cases embodying the distinction and articulated a standard that has governed subsequent cases. A tax on interstate commerce will be sustained "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[8]

ArtI.S8.C3.7.11.4 Nexus Prong of Complete Auto Test for Taxes on Interstate Commerce

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In *Complete Auto Transit, Inc. v. Brady*,[1] the Court held that a state tax on interstate commerce will be sustained "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[2] The first prong of the *Complete Auto* test, which this essay concerns,[3] asks whether the tax applies to an activity with a "substantial nexus" with the taxing state, which requires the taxpayer to "avail[ ] itself of the substantial privilege of carrying on business in that jurisdiction."[4] This requirement runs parallel to the "minimum contacts" requirement under the Due Process Clause that a state must meet to exercise control over a person, that person's property, or a transaction involving the person.[5] Specifically, under the due process requirement, there must be "some definite link, some minimum connection between a state and the person, property, or transaction it seeks to

[6] Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951). The attenuated nature of the purported distinction was evidenced in *Colonial Pipeline Co. v. Traigle,* 421 U.S. 100 (1975), in which the Court sustained a nondiscriminatory, fairly apportioned franchise tax that was measured by the taxpayer's capital stock, imposed on a pipeline company doing an exclusively interstate business in the taxing state, on the basis that it was a tax imposed on the privilege of conducting business in the corporate form.

[7] 430 U.S. 274 (1977).

[8] *Id.* at 279. "In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.'" Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615 (1981) (quoting Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 443 (1980)).

[1] 430 U.S. 274 (1977).

[2] *Id.* at 279. "In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.'" Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615 (1981) (quoting Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 443 (1980)).

[3] ArtI.S8.C3.7.11.5 Apportionment Prong of Complete Auto Test for Taxes on Interstate Commerce; ArtI.S8.C3.7.11.6 Discrimination Prong of Complete Auto Test for Taxes on Interstate Commerce; ArtI.S8.C3.7.11.7 Benefit Prong of Complete Auto Test for Taxes on Interstate Commerce.

[4] *See* Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 11 (2009) (internal citations and quotations omitted).

[5] *See* MeadWestvaco Corp. v. Ill. Dep't of Revenue, 553 U.S. 16, 24 (2008).

tax."[6] The "broad inquiry" under "both constitutional requirements"[7] is "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state—" i.e., "whether the state has given anything for which it can ask return."[8]

Until the Court's 2018 decision in *South Dakota v. Wayfair*,[9] the Court imposed a relatively narrow interpretation of the minimum contacts test in two cases, which involved a state's ability to require an out-of-state seller to collect and remit tax from a sale to a consumer within that state. First, in the 1967 case of *National Bellas Hess, Inc. v. Department of Revenue*, the Court held that unless a retailer maintained a physical presence with the state, the state lacked the power to require that retailer to collect a local use tax.[10] A quarter of a century later, the Court reaffirmed *Bellas Hess*'s physical presence rule under the Commerce Clause in *Quill v. North Dakota*.[11]

In *South Dakota v. Wayfair*, however, the Court overruled both cases, rejecting the rule that a retailer must have a physical presence within a state before the state may require the retailer to collect a local use tax.[12] Several reasons undergirded the *Wayfair* Court's rejection of the physical presence rule. First, the Court noted that the rule did not comport with modern Dormant Commerce Clause jurisprudence, which viewed the substantial nexus test as "closely related" to and having "significant parallels" with the due process minimum contacts analysis.[13] Second, Justice Anthony Kennedy viewed the *Quill* rule as unmoored from the underlying purpose of the Commerce Clause: to prevent states from engaging in economic discrimination.[14] Contrary to this purpose, the *Quill* rule created artificial market distortions that placed businesses with a physical presence in a state at a competitive disadvantage relative to remote sellers.[15] Third, the *Wayfair* Court viewed the physical presence rule, in contrast with modern Commerce Clause jurisprudence, as overly formalistic.[16] More broadly, the majority opinion criticized the *Quill* rule as ignoring the realities of modern e-commerce wherein a retailer may have "substantial virtual connections" to a state without having a physical presence.[17]

As the Court in *Wayfair* noted, the substantial nexus inquiry has tended to reject formal rules in favor of a more flexible inquiry.[18] Thus, maintenance of one full-time employee within the state (plus occasional visits by non-resident engineers) to make possible the realization and continuance of contractual relations seemed to the Court to make almost frivolous a claim of lack of sufficient nexus.[19] The application of a state business-and-occupation tax on the gross

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[6] *See* Miller Bros. Co. v. Maryland, 347 U.S. 340, 344–45 (1954).

[7] *See MeadWestvaco Corp.* 553 U.S. at 24 .

[8] *See* Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940).

[9] South Dakota v. Wayfair, No. 17-494, slip op. at 22 (U.S. June 21, 2018).

[10] 386 U.S. 753, 758 (1967).

[11] *See* 504 U.S. 298 (1992).

[12] *See Wayfair*, slip op at 22.

[13] *Id.* at 10–12. The Court, citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985), concluded that it is "settled law that a business need not have a physical presence in a State to satisfy the demands of due process." *See Wayfair*, slip op. at 11.

[14] *See Wayfair*, slip op. at 12 (noting that the purpose of the Commerce Clause was to prevent states from engaging in economic discrimination and not to "permit the Judiciary to create market distortions.") *Id.*

[15] *Id.* at 12–13.

[16] *Id.* at 14–15.

[17] *Id.* at 15.

[18] *Id.* at 14.

[19] Standard Pressed Steel Co. v. Dep't of Revenue, 419 U.S. 560 (1975). *See also* Gen. Motors Corp. v. Washington, 377 U.S. 436 (1964).

receipts from a large wholesale volume of pipe and drainage products in the state was sustained, even though the company maintained no office, owned no property, and had no employees in the state, its marketing activities being carried out by an in-state independent contractor.[20] The Court also upheld a state's application of a use tax to aviation fuel stored temporarily in the state prior to loading on aircraft for consumption in interstate flights.[21]

Providing guidance on *what* states may tax, the Court's unitary business principle looks at whether the taxpayer's intrastate and extra-state activities form a "single unitary business" or if the extra-state activities are unrelated to the instrastate activities and instead form a discrete business.[22] In *MeadWestvaco Corp. v. Illinois Department of Revenue*, the Supreme Court stated:

> When there is no dispute that the taxpayer has done some business in the taxing State, the inquiry shifts from whether the State may tax to what it may tax. To answer that question, [the Court has] developed the unitary business principle. Under that principle, a State need not isolate the intrastate income-producing activities from the rest of the business but may tax an apportioned sum of the corporation's multistate business if the business is unitary. The court must determine whether intrastate and extrastate activities formed part of a single unitary business, or whether the out-of-state values that the State seeks to tax derive[d] from unrelated business activity which constitutes a discrete business enterprise. . . . If the value the State wishe[s] to tax derive[s] from a 'unitary business' operated within and without the State, the State [may] tax an apportioned share of the value of that business instead of isolating the value attributable to the operation of the business within the State. Conversely, if the value the State wished to tax derived from a discrete business enterprise, then the State could not tax even an apportioned share of that value.[23]

However, notwithstanding the existence of a unitary business, a "minimal connection" or "nexus" must still exist between the state and the taxpayer's interstate activities to meet constitutional standards as well as a "rational relationship" between the amount taxed and the taxpayer's intrastate activities.[24] As the Court explained in *Container Corp. v. Franchise Tax Board*:

> The Due Process and Commerce Clauses of the Constitution do not allow a State to tax income arising out of interstate activities—even on a proportional basis—unless there

[20] Tyler Pipe Indus. v. Dep't of Revenue, 483 U.S. 232, 249–51 (1987). The Court agreed with the state court's holding that "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." *Id.* at 250.

[21] United Air Lines v. Mahin, 410 U.S. 623 (1973).

[22] MeadWestvaco Corp. v. Ill. Dep't of Revenue, 128 S. Ct. 1498, 1505–06 (2008).

[23] *Id.* (citations and internal quotation marks omitted). The holding of this case was that the concept of "operational function," which the Court had introduced in prior cases, was "not intended to modify the unitary business principle by adding a new ground for apportionment." *Id.* at 1507–08. In other words, the Court declined to adopt a basis upon which a state could tax a non-unitary business.

[24] Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 165–66 (1983) .

is a 'minimal connection' or 'nexus' between the interstate activities and the taxing State and 'a rational relationship between the income attributed to the State and the intrastate values of the enterprise.'[25]

ArtI.S8.C3.7.11.5 Apportionment Prong of Complete Auto Test for Taxes on Interstate Commerce

Article I, Section 8, Clause 3:

[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

In *Complete Auto Transit, Inc. v. Brady*,[1] the Court held that a state tax on interstate commerce will be sustained "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[2] The second prong of the *Complete Auto* test, which this essay concerns, is the apportionment of the tax.[3] This requirement is of long standing,[4] but its importance has broadened as the scope of the states' taxing powers has enlarged. When a business carries on a single integrated enterprise both within and without the state, the state may not exact from interstate commerce more than the state's fair share. Avoidance of multiple taxation, or the risk of multiple taxation, is the test of an apportionment formula. Generally speaking, this factor has been seen as both a Commerce Clause and a due process requisite,[5] although, as one recent Court decision notes, some tax measures that are permissible under the Due Process Clause nonetheless could run afoul of the Commerce Clause.[6] The Court has declined to impose any particular formula on the states, reasoning that to do so would be to require the Court to engage in"extensive judicial lawmaking," for which it was ill-suited and for which Congress had ample power and ability to legislate.[7]

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[25] *Id.* (internal quotation marks omitted). *See also* ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 316–17 (1982); Hunt-Wesson, Inc. v. Franchise Tax Bd., 528 U.S. 458 (2000) (interest deduction not properly apportioned between unitary and non-unitary business).

[1] 430 U.S. 274 (1977).

[2] *Id.* at 279. "In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.'" Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615 (1981) (quoting Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 443 (1980)).

[3] ArtI.S8.C3.7.11.4 Nexus Prong of Complete Auto Test for Taxes on Interstate Commerce; ArtI.S8.C3.7.11.6 Discrimination Prong of Complete Auto Test for Taxes on Interstate Commerce; ArtI.S8.C3.7.11.7 Benefit Prong of Complete Auto Test for Taxes on Interstate Commerce.

[4] *E.g.*, Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 26 (1891); Maine v. Grand Trunk Ry., 142 U.S. 217, 278 (1891).

[5] *See* Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768 (1992); Tyler Pipe Indus. v. Dep't of Revenue, 483 U.S. 232, 251 (1987); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983); F. W. Woolworth Co. v. N.M. Tax. & Revenue Dep't, 458 U.S. 354 (1982); ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 (1982); Exxon Corp. v. Wis. Dep't of Revenue, 447 U.S. 207 (1980); Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425 (1980); Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978). *Cf.* Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987).

[6] Comptroller of the Treasury of Md. v. Wynne, No. 13-485, slip op. at 13 (U.S. May 18, 2015) ("The Due Process Clause allows a State to tax '*all* the income of its residents, even income earned outside the taxing jurisdiction.' But 'while a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause.") (internal citations omitted). The challenge in *Wynne* was brought by Maryland residents, whose worldwide income three dissenting Justices would have seen as subject to Maryland taxation based on their domicile in the state, even though it resulted in the double taxation of income earned in other states. *Id.* at 2 (Ginsburg, J., dissenting) ("For at least a century, 'domicile' has been recognized as a secure ground for taxation of residents' worldwide income."). However, the majority took a different view, holding that Maryland's taxing scheme was unconstitutional under the Dormant Commerce Clause because it did not provide a full credit for taxes paid to other states on income earned from interstate activities. *Id.* at 21–25 (majority opinion).

[7] Moorman Mfg. Co. v. Bair, 437 U.S. 267, 278–80 (1978).

In *Goldberg v. Sweet*, the Court articulated an "internally consistent test" and an "externally consistent test" when it upheld as properly apportioned a state tax on the gross charge of any telephone call originated or terminated in the state and charged to an in-state service address, regardless of where the telephone call was billed or paid.[8] Explaining its "internally consistent test" and its "externally consistent test" for determining whether a tax has been fairly apportioned, the *Goldberg* Court wrote:

> We determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent. To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute. The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.[9]

In *American Trucking Ass'ns v. Scheiner*, the Supreme Court held that a state registration tax met the internal consistency test because every state honored every other states', and a motor fuel tax similarly was sustained because it was apportioned to mileage traveled in the state, whereas lump-sum annual taxes, an axle tax and an identification marker fee, being unapportioned flat taxes imposed for the use of the state's roads, were voided under the internal consistency test, because if every state imposed them, then the burden on interstate commerce would be great.[10] Similarly, in *Comptroller of the Treasury of Maryland v. Wynne*, the Court held that Maryland's personal income tax scheme—which taxed Maryland residents on their worldwide income and nonresidents on income earned in the state and did not offer Maryland residents a full credit for income taxes they paid to other states—"fails the internal consistency test."[11] The Court did so because if every state adopted the same approach, taxpayers who "earn[ ] income interstate" would be taxed twice on a portion of that income, while those who earned income solely within their state of residence would be taxed only once.[12]

Deference to state taxing authority was evident in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, in which the Court sustained a state sales tax on the price of a bus ticket for travel that originated in the state but terminated in another state.[13] The tax was unapportioned to reflect the intrastate travel and the interstate travel.[14] The tax in *Oklahoma* was different from the tax upheld in *Central Greyhound*, the Court held, because the tax in *Central Greyhound* constituted a levy on gross receipts, payable by the seller, whereas the tax in

[8] Goldberg v. Sweet, 488 U.S. 252 (1989). The tax law provided a credit for any taxpayer who was taxed by another state on the same call. Actual multiple taxation could thus be avoided, the risks of other multiple taxation was small, and it was impracticable to keep track of the taxable transactions.

[9] *Id.* at 261, 262 (citations omitted).

[10] Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987).

[11] Comptroller of the Treasury of Md. v. Wynne, No. 13-485, slip op. at 22 (U.S. May 18, 2015). The Court in *Wynne* expressly declined to distinguish between taxes on gross receipts and taxes on net income or between taxes on individuals and taxes on corporations. *Id.* at 7, 9. The Court also noted that Maryland could "cure the problem with its current system" by granting a full credit for taxes paid to other states, but the Court did "not foreclose the possibility" that Maryland could comply with the Commerce Clause in some other way. *Id.* at 25.

[12] *Id.* at 22–23.

[13] Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

[14] *Id.* The Court distinguished *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.* from *Central Greyhound Lines v. Mealey*, 334 U.S. 653 (1948), in which the Court struck down a state statute that failed to apportion its taxation of interstate bus ticket sales to reflect the distance traveled within the state.

Oklahoma was a sales tax, also assessed on gross receipts, but payable by the buyer.[15] The *Oklahoma* tax, the Court continued, was internally consistent, because if every state imposed a tax on ticket sales within the state for travel originating there, no sale would be subject to more than one tax.[16] The tax was also externally consistent, the Court held, because it was a tax on the sale of a service that took place in the state, not a tax on the travel.[17]

In *Fulton Corp. v. Faulkner*, the Court, however, found discriminatory and thus invalid a state intangibles tax on a fraction of the value of corporate stock owned by state residents inversely proportional to the state's exposure to the state income tax.[18]

ArtI.S8.C3.7.11.6 Discrimination Prong of Complete Auto Test for Taxes on Interstate Commerce

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In *Complete Auto Transit, Inc. v. Brady*,[1] the Court held that a state tax on interstate commerce will be sustained "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[2] The third prong of the *Complete Auto* test, which this essay concerns, goes to whether the tax discriminates against interstate commerce.[3]

The "fundamental principle" governing the discrimination factor is simple and fully consonant with the broader application of the Dormant Commerce Clause. As the Supreme Court recognized in *Boston Stock Exchange v. State Tax Commission*: "'No State may, consistent with the Commerce Clause, impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'"[4] That is, a tax that by its terms or operation imposes greater burdens on out-of-state goods or activities than on competing in-state goods or activities will be struck down as discriminatory under the Commerce Clause.[5] In *Armco, Inc. v. Hardesty*,[6] the Court voided as discriminatory the imposition on an out-of-state wholesaler of a state tax that was levied on manufacturing and wholesaling but that relieved manufacturers subject to the manufacturing tax of liability for

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[15] Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

[16] *Id.*

[17] *Id.* Indeed, the Court analogized the tax to that in *Goldberg v. Sweet,* 488 U.S. 252 (1989), a tax on interstate telephone services that originated in or terminated in the state and that were billed to an in-state address.

[18] Fulton Corp. v. Faulkner, 516 U.S. 325 (1996). The state had defended on the basis that the tax was a "compensatory" one designed to make interstate commerce bear a burden already borne by intrastate commerce. The Court recognized the legitimacy of the defense, but it found the tax to meet none of the three criteria for classification as a valid compensatory tax. *Id.* at 333–44. *See also* S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999) (tax not justified as compensatory).

[1] 430 U.S. 274 (1977).

[2] *Id.* at 279. "In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.'" Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615 (1981) (quoting Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 443 (1980)).

[3] ArtI.S8.C3.7.11.4 Nexus Prong of Complete Auto Test for Taxes on Interstate Commerce; ArtI.S8.C3.7.11.5 Apportionment Prong of Complete Auto Test for Taxes on Interstate Commerce; ArtI.S8.C3.7.11.7 Benefit Prong of Complete Auto Test for Taxes on Interstate Commerce.

[4] Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (quoting Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959)). The principle, as we have observed above, is a long-standing one under the Commerce Clause. *E.g.*, Welton v. Missouri, 91 U.S. 275 (1876).

[5] Maryland v. Louisiana, 451 U.S. 725, 753–760 (1981). *But see* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617–619 (1981). *See also* Or. Waste Sys., Inc. v. Dep't of Env't Quality, 511 U.S. 93 (1994) (surcharge on in-state disposal of solid wastes that discriminates against companies disposing of waste generated in other states invalid).

paying the wholesaling tax. Even though the former tax was higher than the latter, the Court found that the imposition discriminated against the interstate wholesaler.[7] Similarly, in *Bacchus Imports, Ltd. v. Dias*, the Court held a state excise tax on wholesale liquor sales, which exempted sales of specified local products, to violate the Commerce Clause.[8] The Court also held that a state statute that granted a tax credit for ethanol fuel if the ethanol was produced in the state, or if it was produced in another state that granted a similar credit to the state's ethanol fuel, to be discriminatory and in violation of the Commerce Clause in *New Energy Co. of Indiana v. Limbach*.[9] The Court reached the same conclusion as to Maryland's personal income tax scheme in *Comptroller of the Treasury of Maryland v. Wynne*, which taxed Maryland residents on their worldwide income and nonresidents on income earned in the state and did not offer Maryland residents a full credit for income taxes they paid to other states, finding the scheme "inherently discriminatory."[10]

Expanding, although neither unexpectedly nor exceptionally, its dormant commerce jurisprudence, the Court in *Camps Newfound / Owatonna, Inc. v. Town of Harrison*[11] applied its nondiscrimination element of the doctrine to invalidate the state's charitable property tax exemption statute, which applied to nonprofit firms performing benevolent and charitable functions, but which excluded entities serving primarily out-of-state residents. As such, the tax scheme was designed to encourage entities to care for local populations and to discourage attention to out-of-state individuals and groups. Camps Newfound/Owatonna Inc., however, operated a church camp for children, most of whom resided out-of-state. In holding the tax to violate the Commerce Clause, the Court underscored that there was no reason to distinguish nonprofits from for-profit companies for Commerce Clause purposes.

> For purposes of Commerce Clause analysis, any categorical distinction between the activities of profit-making enterprises and not-for-profit entities is therefore wholly illusory. Entities in both categories are major participants in interstate markets. And, although the summer camp involved in this case may have a relatively insignificant

[6] 467 U.S. 638 (1984).

[7] The Court applied the "internal consistency" test here too, in order to determine the existence of discrimination. 467 U.S. at 644–45. Thus, the wholesaler did not have to demonstrate it had paid a like tax to another state, only that if other states imposed like taxes it would be subject to discriminatory taxation. *See also* Tyler Pipe Indus. v. Wash. Dept. of Revenue, 483 U.S. 232 (1987); Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987); Amerada Hess Corp. v. Dir., N.J. Tax'n Div., 490 U.S. 66 (1989); Kraft Gen. Foods v. Iowa Dep't of Revenue, 505 U.S. 71 (1992).

[8] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

[9] New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988). *Compare* Fulton Corp. v. Faulkner, 516 U.S. 325 (1996) (state intangibles tax on a fraction of the value of corporate stock owned by in-state residents inversely proportional to the corporation's exposure to the state income tax violated Dormant Commerce Clause), *with* Gen. Motors Corp. v. Tracy, 519 U.S. 278 (1997) (state imposition of sales and use tax on all sales of natural gas except sales by regulated public utilities, all of which were in-state companies, but covering all other sellers that were out-of-state companies did not violate Dormant Commerce Clause because regulated and unregulated companies were not similarly situated).

[10] Comptroller of the Treasury of Md. v. Wynne, No. 13-485, slip op. at 23 (U.S. May 18, 2015) ("[T]he internal consistency test reveals what the undisputed economic analysis shows: Maryland's tax scheme is inherently discriminatory and operates as a tariff."). In so doing, the Court noted that Maryland could "cure the problem with its current system" by granting a full credit for taxes paid to other states, but it did "not foreclose the possibility" that Maryland could comply with the Commerce Clause in some other way. *Id.* at 25.

[11] 520 U.S. 564 (1997). The decision was 5-4 with a strong dissent by Justice Antonin Scalia, *id.* at 595, and a philosophical departure by Justice Clarence Thomas. *Id.* at 609.

impact on the commerce of the entire Nation, the interstate commercial activities of nonprofit entities as a class are unquestionably significant.[12]

ArtI.S8.C3.7.11.7 Benefit Prong of Complete Auto Test for Taxes on Interstate Commerce

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In *Complete Auto Transit, Inc. v. Brady*,[1] the Court held that a state tax on interstate commerce will be sustained "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[2] The fourth prong of the *Complete Auto* test, which this essay concerns, goes to whether the tax is fairly related to the services that the State provides.[3]

Although, in all the modern cases, the Court has stated that a necessary factor to sustain state taxes having an interstate impact is that the tax be fairly related to benefits provided by the taxing state, the Court has not addressed how to weigh the amount of the tax or the value of the benefits bestowed. The test rather is whether, as a matter of the nexus factor, the business has the requisite nexus with the state; if it does, then the tax meets the fourth factor simply because the business has enjoyed the opportunities and protections that the state has afforded it.[4]

ArtI.S8.C3.8 Foreign

ArtI.S8.C3.8.1 Overview of Foreign Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

There are certain dicta urging or suggesting that Congress's power to regulate interstate commerce restrictively is less than its analogous power over foreign commerce, the argument being that whereas the latter is a branch of the Nation's unlimited power over foreign relations, the former was conferred upon the National Government primarily in order to

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[12] 520 U.S. at 586.

[1] 430 U.S. 274 (1977).

[2] *Id.* at 279. "In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.'" Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615 (1981) (quoting Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 443 (1980)).

[3] ArtI.S8.C3.7.11.4 Nexus Prong of Complete Auto Test for Taxes on Interstate Commerce; ArtI.S8.C3.7.11.5 Apportionment Prong of Complete Auto Test for Taxes on Interstate Commerce; ArtI.S8.C3.7.11.6 Discrimination Prong of Complete Auto Test for Taxes on Interstate Commerce.

[4] Commonwealth Edison Co. v. Montana, 453 U.S. 609, 620–29 (1981). Two state taxes imposing flat rates on truckers, because they did not vary directly with miles traveled or with some other proxy for value obtained from the state, were found to violate this standard in *American Trucking Ass'ns, Inc. v. Scheiner,* 483 U.S. 266, 291 (1987). *But see* American Trucking Ass'ns v. Michigan Pub. Serv. Comm'n, 545 U.S. 429 (2005), upholding imposition of a flat annual fee on all trucks engaged in intrastate hauling (including trucks engaged in interstate hauling that "top off" loads with intrastate pickups and deliveries) and concluding that levying the fee on a per-truck rather than per-mile basis was permissible in view of the objectives of defraying costs of administering various size, weight, safety, and insurance requirements.

protect freedom of commerce from state interference. The four dissenting Justices in the 1903 *Lottery Case* endorsed this view in the following words: "[T]he power to regulate commerce with foreign nations and the power to regulate interstate commerce, are to be taken *diverso intuitu*, for the latter was intended to secure equality and freedom in commercial intercourse as between the States, not to permit the creation of impediments to such intercourse; while the former clothed Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the States. The laws which would be necessary and proper in the one case, would not be necessary or proper in the other."[1]

Twelve years later, Chief Justice Byron White, speaking for the Court, expressed the same view: "In the argument reference is made to decisions of this court dealing with the subject of the power of Congress to regulate interstate commerce, but the very postulate upon which the authority of Congress to absolutely prohibit foreign importations as expounded by the decisions of this court rests is the broad distinction which exists between the two powers and therefore the cases cited and many more which might be cited announcing the principles which they uphold have obviously no relation to the question in hand."[2]

But dicta to the contrary are much more numerous and span a far longer period of time. Thus Chief Justice Roger Taney wrote in 1847: "The power to regulate commerce among the several States is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it."[3] And nearly fifty years later, Justice Stephen Field, speaking for the Court, said: "The power to regulate commerce among the several States was granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations."[4] Today it is firmly established that the power to regulate commerce, whether with foreign nations or among the several states, comprises the power to restrain or prohibit it at all times for the welfare of the public, provided only that the specific limitations imposed upon Congress's powers, as by the Due Process Clause of the Fifth Amendment, are not transgressed.[5]

ArtI.S8.C3.8.2 Instruments of Commerce

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

The applicability of Congress's power to the agents and instruments of commerce is implied in Chief Justice John Marshall's opinion in *Gibbons v. Ogden*,[1] where the waters of the State of New York in their quality as highways of interstate and foreign transportation were held to be governed by the overriding power of Congress. Likewise, the same opinion recognizes that in "the progress of things," new and other instruments of commerce will make their appearance. When the Licensing Act of 1793 was passed, the only craft to which it could apply

[1] Lottery Case (Champion v. Ames), 188 U.S. 321, 373 (1903).

[2] Brolan v. United States, 236 U.S. 216, 222 (1915). The most recent dicta to this effect appears in *Japan Line v. County of Los Angeles,* 441 U.S. 434, 448–51 (1979), a "dormant" commerce clause case involving state taxation with an impact on foreign commerce. In context, the distinction seems unexceptionable, but the language extends beyond context.

[3] License Cases, 46 U.S. (5 How.) 504, 578 (1847).

[4] Pittsburg & Southern Coal Co. v. Bates, 156 U.S. 577, 587 (1895).

[5] United States v. Carolene Products Co., 304 U.S. 144, 147–148 (1938).

[1] 22 U.S. (9 Wheat.) 1, 217, 221 (1824).

were sailing vessels, but it and the power by which it was enacted were, Marshall asserted, indifferent to the "principle" by which vessels were moved. Its provisions therefore reached steam vessels as well. A little over half a century later the principle embodied in this holding was given its classic expression in the opinion of Chief Justice Morrison Waite in the case of the *Pensacola Telegraph Co. v. Western Union Telegraph Co.*,[2] a case closely paralleling *Gibbons v. Ogden* in other respects also. "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of times and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation."[3]

The Radio Act of 1927[4] whereby "all forms of interstate and foreign radio transmissions within the United States, its Territories and possessions" were brought under national control, affords another illustration. Because of the doctrine thus stated, the measure met no serious constitutional challenge either on the floors of Congress or in the Courts.[5]

ArtI.S8.C3.9 Indian Tribes

ArtI.S8.C3.9.1 Scope of Commerce Clause Authority and Indian Tribes

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Jurisdiction over matters in "Indian Country"[1] "is governed by a complex patchwork of federal, state, and tribal law."[2] Since *Worcester v. Georgia* in 1832,[3] the Supreme Court has recognized that Native American "tribes are unique aggregations possessing attributes of

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[2] 96 U.S. 1 (1878). *See also* Western Union Telegraph Co. v. Texas, 105 U.S. 460 (1882).

[3] 96 U.S. at 9. "Commerce embraces appliances necessarily employed in carrying on transportation by land and water." Railroad v. Fuller, 84 U.S. (17 Wall.) 560, 568 (1873).

[4] Act of March 28, 1927, 45 Stat. 373, superseded by the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. §§ 151 *et seq*.

[5] "No question is presented as to the power of the Congress, in its regulation of interstate commerce, to regulate radio communication." Chief Justice Charles Evans Hughes speaking for the Court in *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 266, 279 (1933). *See also* Fisher's Blend Station v. Tax Comm'n, 297 U.S. 650, 654–55 (1936).

[1] "Indian Country" is statutorily defined in 18 U.S.C. § 1151 as: (a) "all land within the limits of any Indian reservation under the jurisdiction of the United States Government"; (b) "all dependent Indian communities within the borders of the United States"; and (c) "all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

[2] Duro v. Reina, 495 U.S. 676, 680 (1990) (citing United States v. John, 437 U.S. 634, 648–49 (1978)), *superseded by statute as recognized in* United States v. Lara, 541 U.S. 1931 (2004).

[3] 31 U.S. (6 Pet.) 515 (1832). *See also* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). Under this doctrine, tribes possess sovereign immunity from suit in the same way as the United States and the states. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 512–13 (1940). The Supreme Court has repeatedly rejected arguments to abolish or curtail tribal sovereign immunity. *See, e.g.*, Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 510 (1991).

sovereignty over both their members and their territories."[4] They are no longer "possessed of the full attributes of sovereignty,"[5] however, having relinquished some part of it by "[t]heir incorporation within the territory of the United States and their acceptance of its protection."[6] Accordingly, "[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance."[7]

While previously "the subject of some confusion," the source of federal authority over tribal matters is generally recognized to "derive[ ] from federal responsibility for regulating commerce with Indian tribes and for treaty making."[8] The Constitution's so-called "Indian Commerce Clause" explicitly authorizes Congress to regulate commerce with the tribes.[9] Congress's authority to regulate commercial activity in "Indian Country" is plenary,[10] exclusive,[11] and broad,[12] and persists even though such activity may occur within a state's territorial boundaries.[13]

Using its Indian Commerce Clause authority, Congress may determine with whom and in what manner the tribes engage in commercial activity.[14] Major areas where Congress has exercised its power to regulate include: tribal land; tribal gaming; hunting, fishing, and wildlife; and natural resources, such as minerals, oil and gas, and timber. Congress has also

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[4] United States v. Wheeler, 435 U.S. 313, 323 (1978) (internal quotation marks and citation omitted), *superseded by statute as recognized in Lara*, 541 U.S. 1931.

[5] United States v. Kagama, 118 U.S. 375, 381 (1886) ("[T]he Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the States, Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian.").

[6] *Wheeler*, 435 U.S. at 323.

[7] *Id. See also* South Dakota v. Bourland, 508 U.S. 679 (1993) (discussing abrogation of tribal treaty rights and reduction of sovereignty). Congress may also remove restrictions on tribal sovereignty. The Supreme Court has held, however, that absent authority from federal statute or treaty, tribes possess no criminal authority over non-Natives (with some limited exceptions). Montana v. United States, 450 U.S. 544 (1981); *see also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). In United States v. Cooley, No. 19-1414, slip op. at 1 (U.S. June 1, 2021), the Court applied the *Montana* Doctrine to hold that a "tribal officer possesses the authority . . . to detain temporarily and to search a non-Indian on a public right-of-way that runs through an Indian reservation." As to members of other tribes, the Court held in *Duro v. Reina*, that a tribe has no criminal jurisdiction over members of other tribes who commit crimes on the reservation. Congress, however, later enacted a statute recognizing the inherent authority of tribal governments to exercise criminal jurisdiction over non-member Natives; the Court subsequently upheld congressional authority to do so in *United States v. Lara*.

[8] McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 n.7 (1973) (citing U.S. Const. art. I, § 8, cl. 3; art. II, § 2, cl. 2; Williams v. Lee, 358 U.S. 217, 219 (1959); Perrin v. United States, 232 U.S. 478 (1914). Article II, Section 2, Clause 2 of the Constitution gives the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ." For more on the treaty-making power, see ArtII.S2.C2.1.1 Overview of President's Treaty-Making Power.

[9] U.S. Const. art. I, § 8, cl. 3. *See also* Williams v. Lee, 358 U.S. 217, 220 n.4 (1959) ("The Federal Government's power over Indians is derived from Art. I, s. 8, cl. 3, of the United States Constitution, and from the necessity of giving uniform protection to a dependent people." (citing Perrin v. United States, 232 U.S. 478 (1914))).

[10] Michigan v. Bay Mills Indian Cmty., 572 U.S. 782 (2014); United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011).

[11] Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985); Oneida Cnty. v. Oneida Indian Nation of New York State, 470 U.S. 226 (1985); Howard v. Ingersoll, 54 U.S. 381, 410 (1851) ("Constitutionally [the United States] could alone regulate commerce with the Indian tribes.").

[12] United States v. Lara, 541 U.S. 193 (2004); Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

[13] United States v. Jackson, 280 U.S. 183 (1930).

[14] Perrin v. United States, 232 U.S. 478 (1914); Tinker v. Midland Valley Mercantile Co., 231 U.S. 681 (1914).

attempted to promote tribal political and economic development[15] through legislation such as the Indian Reorganization Act of 1934[16] and the Native American Business Development, Trade Promotion, and Tourism Act.[17]

The Supreme Court has increasingly recognized Congress's power under the Indian Commerce Clause as a source of authority to regulate tribal rights and obligations beyond matters of mere commerce.[18] Although the power of Congress over tribal affairs is broad, it is not limitless.[19] While "the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to constitutional limitations."[20] The Court has articulated a standard of review that defers to legislative judgment "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians."[21] A more searching review is warranted when it is alleged that the Federal Government's behavior toward a tribe contravenes its obligations, or when the government has taken property which it guaranteed to the tribe without compensating the tribe for the land's full value.[22]

[15] 25 U.S.C. §§ 1451 et seq.

[16] *Id.* §§ 461 et seq.

[17] *Id.* §§ 4301 et seq. Other examples include the Indian Revolving Loan Fund, *id.* §§ 1461 et seq.; 25 C.F.R. §§ 101.1 et seq., Indian Loan Guaranties and Insurance, 25 U.S.C. §§ 1481 et seq.; 25 C.F.R. §§ 103.1 et seq., and Indian Business Grants, 25 U.S.C. §§ 1521 et seq.

[18] In an early case, the Supreme Court rejected the Commerce Clause as a basis for congressional enactment of a system of criminal laws for Native Americans living on reservations. United States v. Kagama, 118 U.S. 375 (1886). Nonetheless, the Court sustained the laws on the grounds that the Federal Government had the obligation and thus the power to protect a "weak and diminished" people. *Id.* at 384. *Cf.* United States v. Holliday, 70 U.S. (3 Wall.) 407 (1866); United States v. Sandoval, 231 U.S. 28 (1913). A special fiduciary responsibility between the Federal Government and tribes can also be created by statute. *See, e.g.*, United States v. Mitchell, 463 U.S. 206 (1983) ("[T[he statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.").

[19] "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946) (plurality opinion) (quoted with approval in Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84 (1977)).

[20] United States v. Klamath & Moadoc Tribes, 304 U.S. 119, 123 (1938).

[21] Morton v. Mancari, 417 U.S. 535, 555 (1974). The Court applied this standard to uphold a statutory classification that favored employment of "qualified Indians" at the Bureau of Indian Affairs. In *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977), the same standard was used to sustain a classification that favored, although inadvertently, one tribe over other tribes. While tribes are unconstrained by federal or state constitutional provisions, Congress has legislated a "bill of rights" statute covering them. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[22] United States v. Sioux Nation, 448 U.S. 371 (1980). *See also* Solem v. Bartlett, 465 U.S. 463, 472 (1984) (stating there must be "substantial and compelling evidence of congressional intention to diminish Indian lands" before the Court will hold that a statute removed land from a reservation); Nebraska v. Parker, 577 U.S. 481, 494 (2016) (noting that "only Congress can divest a reservation of its land and diminish its boundaries," but finding the statute in question did not clearly indicate Congress's intent to effect such a diminishment of the Omaha Reservation); McGirt v. Oklahoma, No. 18-9526, slip. op. at 8 (U.S. July 9, 2020) (stating that to disestablish a reservation, Congress must "clearly express its intent to do so"). In *McGirt*, the Court held that Congress had not expressed a sufficiently clear intent to disestablish the Creek Reservation, concluding the reservation survived allotment and other intrusions "on the Creek's promised right to self-governance." *Id.* at 13.

ArtI.S8.C3.9.2 Restrictions on State Powers, Indian Tribes, and Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Although in 1871, Congress forbade making further treaties with the tribes,[1] cases disputing the application of old treaties, and especially their effects upon attempted *state* regulation of on-reservation activities, continue to appear on the Supreme Court's docket.[2] Given the broad federal power to legislate on tribal affairs, the Court has generally used a preemption-like doctrine as the analytical framework with which to judge the permissibility of assertions of state jurisdiction over tribes:

> [T]he traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis that governs this inquiry. As a result, ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity.[3]

Accordingly, state regulation of tribal activities is preempted by federal law if the state scheme is incompatible with federal and tribal interests, unless the state's interests are substantial enough to justify the assertion of its authority.[4] If a detailed, federal regulatory framework exists and would be compromised by incompatible state regulation, the state action may be preempted by federal law.[5] Tribal gaming, for instance, is subject to a detailed federal regulatory scheme that preempts state law for certain types of gaming on tribal land, but preserves state regulation of tribal gaming on non-tribal land.[6] Notably, just as federal statutes are generally construed to the benefit of Native Americans, the preemption doctrine will *not* be applied strictly to prevent states from aiding tribes.[7]

The Supreme Court has also clarified that "States have no authority to reduce federal reservations lying within their borders."[8] In a leading case involving settlement of Native land claims, the Court ruled in *County of Oneida v. Oneida Indian Nation*[9] that a tribe could obtain damages for wrongful possession of land conveyed in 1795 without federal approval, as

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[1] Act of March 3, 1871, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71).

[2] *E.g.*, Puyallup Tribe v. Wash. Game Dep't, 433 U.S. 165 (1977); Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); McGirt v. Oklahoma, No. 18-9526 (U.S. July 9, 2020). With regard to tribal regulation of on-reservation activities of non-Indians, see generally Montana v. United States, 450 U.S. 544 (1981) (articulating the so-called "*Montana* Doctrine").

[3] Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 838 (1982). *See also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

[4] California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

[5] Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g, 476 U.S. 877 (1986).

[6] Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701–2721; 18 U.S.C. §§ 1166–1168).

[7] Three Affiliated Tribes of the Fort Berthold Rsrv., v. Wold Eng'g, P.C., 467 U.S. 138 (1984) (upholding state-court jurisdiction to hear claims of Native Americans against non-Natives involving transactions that occurred in Indian Country). Attempts by states to retrocede jurisdiction favorable to tribes, however, may be held to be preempted. *Three Affiliated Tribes of the Fort Berthold Rsrv.*, 476 U.S. at 877.

[8] McGirt v. Oklahoma, No. 18-9526, slip. op. at 7 (July 9, 2020) (emphasis added).

[9] Oneida Cnty. v. Oneida Indian Nation of New York State, 470 U.S. 226 (1985).

required by the Nonintercourse Act.[10] The Act reflected the accepted principle that extinguishment of title to Native American land requires the United States' consent. The Court reiterated the rule that enactments are construed liberally in favor of Native Americans; Congress may abrogate Native treaty rights or extinguish aboriginal land title only if it does so clearly and unambiguously. Consequently, federal approval of land-conveyance treaties containing references to earlier conveyances that violated the Nonintercourse Act do not constitute ratification of the invalid conveyances.[11]

In addition to federal preemption, the impact on tribal sovereignty is a determinant of relative state and tribal regulatory authority.[12] A tribe has the power to regulate its members and, unless so provided by Congress, a state may not regulate in a manner that would infringe upon this tribal authority.[13] In other words, the "semi-autonomous status" of tribes is an "independent but related" barrier to the exercise of state authority over commercial activity on a reservation.[14] If state regulation of activities on tribal lands would interfere with the tribe's sovereignty and self-governance, the state is generally divested of jurisdiction under federal law.[15] Substantial tribal interests in on-reservation activities could outweigh the state's interests in the off-reservation effects of on-reservation activities.[16] However,a tribe may not offer on-reservation activities to avoid state off-reservation law.[17]

In sum, there are two independent barriers to *state* regulation of tribal reservations and members, either of which can independently bar the application of a state law: (1) preemption by federal law and (2) tribal sovereignty.[18] Accordingly, the Court's preemption inquiry in this context requires an examination of applicable federal law as well as the nature of state, federal, and tribal interests to determine whether the exercise of state authority is permissible.[19] The preemption inquiry considers traditional notions of tribal sovereignty and the federal goal of tribal self-governance, including tribal self-sufficiency and economic development.[20]

Generally, however, Native Americans on reservations are not subject to state law unless Congress has expressly legislated otherwise,[21] because the federal interest in encouraging tribal self-government is strongest on the reservation, while the state's regulatory interest is

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[10] Act of Mar. 1, 1793, Pub. L. No. 2-19, § 8, 1 Stat. 329, 330.

[11] *Oneida Indian Nation of New York State*, 470 U.S. at 246–48.

[12] *E.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

[13] *Three Affiliated Tribes of Fort Berthold Rsrv.*, 476 U.S. at 877.

[14] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142–43 (1980); Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 837–38 (1982). The *Ramah* Court stated: "The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." *Id.* at 837 (quoting *White Mountain Apache Tribe*, 448 U.S. at 143).

[15] Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987). Notably, this protective rule is inapplicable to state regulation of liquor because there is no tradition of tribal sovereignty with respect to that subject. Rice v. Rehner, 463 U.S. 713 (1983). Similarly, the Supreme Court has repeatedly held that the Indian Commerce Clause "affords Congress the power to prohibit or regulate the sale of alcoholic beverages to tribal Indians, wherever situated, and to prohibit or regulate the introduction of alcoholic beverages into Indian country." United States v. Mazurie, 419 U.S. 544, 554 (1975) (citing United States v. Holliday, 3 Wall. 407, 417–18 (1866); United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 194–95 (1876); *Ex parte* Webb, 225 U.S. 663, 683–84 (1912); Perrin v. United States, 232 U.S. 478, 482 (1914); Johnson v. Gearlds, 234 U.S. 422, 438–39 (1914); United States v. Nice, 241 U.S. 591, 597 (1916)).

[16] California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

[17] Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134 (1980).

[18] *Cabazon Band of Mission Indians*, 480 U.S. at 202; New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); *White Mountain Apache Tribe*, 448 U.S. at 136.

[19] Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g, 476 U.S. 877 (1986).

[20] *Cabazon Band of Mission Indians*, 480 U.S. at 202.

[21] *Id.*

likely to be low.[22] On the other hand, beyond reservation boundaries, Native Americans are subject to generally applicable state laws as long as they are not discriminatory or preempted by federal law.[23] And when state interests outside the reservation are implicated on the reservation, such as in the context of a state's police powers, states may regulate the activities of tribe members on tribal land under certain circumstances.[24]

With regard to regulation of on-reservation activities of non-Natives, in *Montana v. United States*,[25] the Supreme Court articulated the so-called *Montana* Doctrine under which a tribe may not "exercise criminal jurisdiction over non-Indians" with two notable exceptions.[26] First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[27] Second, a tribe may address "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[28] Applying the *Montana* Doctrine's second exception, in *United States v. Cooley*, the Court held that a "tribal officer possesses the authority . . . to detain temporarily and to search a non-Indian on a public right-of-way that runs through an Indian reservation."[29]

As suggested by the first exception to the *Montana* Doctrine, among the fundamental attributes of sovereignty a tribe possesses, unless divested by federal law, is the power to tax non-Natives entering the reservation to engage in economic activities.[30] Over time, the Court has recognized additional inherent tribal sovereign powers.[31]

The scope of *state* taxing powers—the conflict of "the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations"[32]—has been frequently litigated. Absent cession of jurisdiction or other congressional consent, states possess no power to tax reservation lands or tribal income from activities carried on within a reservation's boundaries.[33] Off-reservation Native activities

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[22] *White Mountain Apache Tribe*, 448 U.S. at 136.

[23] Michigan v. Bay Mills Indian Cmty., 572 U.S. 782 (2014); *White Mountain Apache Tribe*, 448 U.S. at 136; Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

[24] Nevada v. Hicks, 533 U.S. 353 (2001).

[25] 450 U.S. 544 (1981).

[26] *Id.* at 565. *See also* United States v. Bryant, 579 U.S. 140 (2016), *as revised* (July 7, 2016) ("Most States lack jurisdiction over crimes committed in Indian country against Indian victims." (citing United States v. John, 437 U.S. 634, 651 (1978))).

[27] *Montana*, 450 U.S. at 565.

[28] *Id.* at 566.

[29] No. 19-1414, slip op. at 1 (U.S. June 1, 2021).

[30] *Montana*, 450 U.S at 565; *see also* Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980); United States v. Jicarilla Apache Nation, 455 U.S. 130 (2011).

[31] *See, e.g.*, United States v. Wheeler, 435 U.S. 313 (1978) (recognizing Tribe's inherent sovereign power to punish tribal offenders); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (finding state regulation of on-reservation bingo "would impermissibly infringe on tribal government"). *But see* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (holding extensive ownership of land within "open areas" of reservation by non-members of tribe precludes application of tribal zoning within such areas); Hagen v. Utah, 510 U.S. 399 (1994).

[32] McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164, 165 (1973).

[33] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); *McClanahan*, 411 U.S. at 164; Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Bryan v. Itasca Cnty., 426 U.S. 373 (1976); *Confederated Colville Tribes*, 447 U.S. at 134; Montana v. Blackfeet Tribe, 471 U.S. 759 (1985). *See also* Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991). An easing of the Court's apparent reluctance to find congressional cession is reflected in more recent cases. *See* Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992).

require an express federal exemption to deny state taxing power.[34] State taxation of non-Natives doing business with Natives on the reservation involves a close analysis of the federal statutory framework, although the operating premise was for many years to deny state taxation power because of its burdens upon the development of tribal self-sufficiency and interference with the tribes' ability to exercise their sovereign functions.[35]

The Supreme Court appears to have moved away from this operating premise to some extent. For example, in *Cotton Petroleum Corp. v. New Mexico*,[36] the Court upheld a state oil and gas severance tax applied to on-reservation operations by non-Natives, which were already taxed by the Tribe,[37] finding the impairment of tribal sovereignty was "too indirect and too insubstantial" to warrant preemption. The Court found the fact that the state provided significant services to the oil and gas lessees justified state taxation, while distinguishing earlier cases in which the state "asserted no legitimate regulatory interest that might justify the tax."[38] In a later case where the Court confronted arguments that the imposition of particular state taxes on reservation property was inconsistent with self-determination and self-governance, the Court denominated these as "policy" arguments properly presented to Congress rather than to the Court.[39]

Clause 4—Uniform Laws

ArtI.S8.C4.1 Naturalization

ArtI.S8.C4.1.1 Overview of Naturalization Clause

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Article I, Section 8, Clause 4 of the Constitution provides Congress with the "power . . . To establish an uniform Rule of Naturalization . . .throughout the United States."[1] The Supreme Court has described naturalization as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen."[2] Pursuant to this authority, Congress may legislate terms and conditions by which a foreign-born national (alien) may become a U.S. citizen.[3] Moreover,

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[34] *Mescalero Apache Tribe*, 411 U.S. at 148–49. *Cf.* Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 115 (2005) (holding that a Kansas motor fuel tax imposed on non-Indian fuel distributors who subsequently deliver the fuel to a gas station owned by and located on a reservation is "a nondiscriminatory tax imposed on an off-reservation transaction between non-Indians" and therefore "the tax is valid and poses no affront to the Nation's sovereignty").

[35] White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160 (1980); Ramah Navajo School Board v. Bureau of Revenue of N.M., 458 U.S. 832 (1982).

[36] Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

[37] Held permissible in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

[38] Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 185 (1989) (distinguishing *White Mountain Apache Tribe*, 448 U.S. at 136, and *Ramah Navajo Sch. Bd., Inc.*, 458 U.S. at 832).

[39] Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 265 (1992). For other tax controversies, see Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993); Dep't of Tax'n & Fin. v. Milhelm Attea & Bros., 512 U.S. 61 (1994); Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995).

[1] U.S. Const. art. I, § 8, cl. 4.

[2] Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135, 162 (1892); *see also* Osborn v. President of Bank of U.S., 22 U.S. (9 Wheat.) 738, 827 (1824) (a naturalized citizen "becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the [C]onstitution, on the footing of a native"), *superseded by statute*, 28 U.S.C. § 1349.

[3] *See* Schneider v. Rusk, 377 U.S. 163, 165 (1964) (noting that the rights of a naturalized citizen derive from the requirements set by Congress); Takahashi v. Fish & Game Comm., 334 U.S. 410, 419 (1948) ("The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they

Congress's power over naturalization is exclusive; states may not impose their own terms and conditions by which aliens may become U.S. citizens.[4] Based on this broad power, Congress has enacted a series of laws governing the naturalization of aliens in the United States since the end of the eighteenth century.[5] These naturalization laws have generally applied to three main categories of aliens: (1) those who have resided in the United States for certain periods of time and applied for naturalization; (2) those born abroad to U.S. citizen parents; and (3) those who derived citizenship after their parents naturalized in the United States.[6]

Congress's power under the Naturalization Clause is not limited to conferring citizenship. The Supreme Court has recognized the power as also giving Congress the ability to revoke citizenship improperly obtained through fraud or other unlawful means.[7] Additionally, the Court has recognized that Congress has the power to expatriate an individual who, through some voluntary act, has relinquished his or her U.S. citizenship.[8]

In addition to conferring Congress with power to determine when foreign nationals may obtain U.S. citizenship, the Naturalization Clause is sometimes viewed as contributing to Congress's power over immigration, including its power to set rules for when aliens may enter or remain in the United States.[9]

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may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization."). *See also* Scott v. Sandford, 60 U.S. (19 How.) 393, 417 (1857) (recognizing that the naturalization power strictly applies to "persons born in a foreign country, under a foreign government"), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

[4] *See Takahashi*, 334 U.S. at 419 ("Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states."); United States v. Wong Kim Ark, 169 U.S. 649, 701 (1898) ("The power, granted to [C]ongress by the [C]onstitution, 'to establish an uniform rule of naturalization,' was long ago adjudged by this court to be vested exclusively in [C]ongress."); Chirac v. Lessee of Chirac, 15 U.S. (2 Wheat.) 259, 269 (1817) ("That the power of naturalization is exclusively in [C]ongress does not seem to be, and certainly ought not to be, controverted").

[5] *See e.g.,* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103–04 (repealed 1795) (providing that "free white person[s]" who resided in the United States for at least two years could be granted citizenship if they showed good moral character and swore allegiance to the Constitution); Naturalization Act of 1795, ch. 20, § 1, 1 Stat. 414, 414 (repealed 1802) (requiring a declaration of intent to become a citizen at least three years in advance of naturalization, and extending the minimum residence requirement to five years); Naturalization Law of 1802, ch. 28, 2 Stat. 153 (requiring applicants to maintain five years of residence in the United States, and to submit a declaration of intent to become citizens at least three years in advance of naturalization); Naturalization Act of 1855, ch. 71, 10 Stat. 604 (extending citizenship to foreign-born children of U.S. citizens and wives of U.S. citizens); Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256 (extending citizenship to "aliens of African nativity and to persons of African descent"); Naturalization Act of 1906, ch. 3592, 34 Stat. 596 (providing for "a uniform rule for the naturalization of aliens throughout the United States"); Cable Act, ch. 411, § 2, 42 Stat. 1021, 1022 (1922) (requiring women married to U.S. citizens to fulfill naturalization requirements independently); Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 334, 66 Stat. 163, 254–55 (setting forth comprehensive requirements for naturalization of aliens).

[6] *Wong Kim Ark*, 169 U.S. at 672. *See also* Constitutionality of Legis. to Confer Citizenship Upon Albert Einstein, 1 Op. O.L.C. 417 (1934) (describing different ways in which Congress has conferred citizenship).

[7] *See e.g.,* Fedorenko v. United States, 449 U.S. 490, 506 (1981); Knauer v. United States, 328 U.S. 654, 672 (1946); Johannessen v. United States, 225 U.S. 227, 241 (1912).

[8] *See e.g.,* Vance v. Terrazas, 444 U.S. 252, 261, 270 (1980); Afroyim v. Rusk, 387 U.S. 253, 262, 267–68 (1967).

[9] For example, in *Arizona v. United States*, the Court declared that the Federal Government's "broad, undoubted power" over immigration was partially based "on the national government's constitutional power to 'establish an uniform Rule of Naturalization,' and its inherent power as sovereign to control and conduct relations with foreign nations." 567 U.S. 387, 394–95 (2012) (quoting U.S. Const. art. I, § 8, cl. 4); *but see id.* at 422 (Scalia, J., concurring in part and dissenting in part) ("I accept [immigration regulation] as a valid exercise of federal power—not because of the Naturalization Clause (it has no necessary connection to citizenship) but because it is an inherent attribute of sovereignty no less for the United States than for the States."). Similarly, in *Harisiades v. Shaughnessy*, the Court observed that "[t]he power of Congress to exclude, admit, or deport aliens flows from sovereignty itself and from the power 'To establish an uniform Rule of Naturalization.'" 342 U.S. 580, 599 (1952) (quoting U.S. Const. art. I, § 8, cl. 4); *see also* INS v. Chadha, 462 U.S. 919, 940 (1983) ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question"); Toll v. Moreno, 458 U.S. 1, 10 (1982) ("Federal authority to regulate the status of aliens derives from various sources, including the Federal Government's power '[t]o establish [a] uniform Rule of Naturalization'

ArtI.S8.C4.1.1
Overview of Naturalization Clause

Congress's implied power over immigration is explained in the discussion of the Necessary and Proper Clause (Article I, Section 8, Clause 18 of the Constitution).[10]

ArtI.S8.C4.1.2 Historical Background

ArtI.S8.C4.1.2.1 British and American Colonial Naturalization

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

The American conception of citizenship is informed by the English common law doctrine of *jus soli* ("right of soil"), in which a person's nationality at birth is determined by the territory where that person is born.[1] Under English common law, any person born in England or any territory within "the realm of England," including its American colonies, was considered a subject of the Crown and entitled to certain benefits of "subjecthood" unavailable to others.[2] A foreign national born outside England and its dominions could only become a subject through private legislation conferring that status.[3] Typically, this was an expensive process for the intended beneficiary of the bill, and in practice, private bills, which were subject to fees, were

. . . .") (quoting U.S. Const. art. I, § 8, cl. 4); Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."). Apart from the Naturalization Clause, the Supreme Court has cited Congress's foreign commerce power as a basis for its immigration power. *See Toll*, 458 U.S. at 10 (observing that Congress's immigration power also derives from "its power '[t]o regulate Commerce with foreign Nations,' and its broad authority over foreign affairs") (citing U.S. Const. art. I, § 8, cl. 3); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 290 (1904) (recognizing that an immigration statute was based in part "on the power to regulate commerce with foreign nations, which includes the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States"); Edye v. Robertson, 112 U.S. 580, 600 (1884) ("It is enough to say that, Congress having the power to pass a law regulating immigration as a part of the commerce of this country with foreign nations, we see nothing in the statute by which it has here exercised that power forbidden by any other part of the Constitution.").

[10] *See* ArtI.S8.C18.8.1 Overview of Congress's Immigration Powers.

[1] *See* Rogers v. Bellei, 401 U.S. 815, 828 (1971) ("We thus have an acknowledgment that our law in this area follows English concepts with an acceptance of the jus soli, that is, that the place of birth governs citizenship status except as modified by statute."); Schneider v. Rusk, 377 U.S. 163, 170 (1964) (Clark, J., dissenting) ("Our concept of citizenship was inherited from England and, accordingly, was based on the principle that rights conferred by naturalization were subject to the conditions reserved in the grant."); United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898) ("The Constitution nowhere defines the meaning of. . .[the word "citizen"], either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.' In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution."); Fitisemanu v. United States, 1 F.4th 862, 867 (10th Cir. 2021) ("Early American attitudes toward what we now call citizenship developed in the context of English law regarding the relationship between monarch and subject.").

[2] *See* Calvin's Case (1608) 77 Eng. Rep. 377, 407, 7 Co. Rep. 1 b; *Wong Kim Ark*, 169 U.S. at 655 ("The fundamental principle of the common law with regard to English nationality was birth within the allegiance—also called 'ligealty,' 'obedience,' 'faith,' or 'power'—of the king. The principle embraced all persons born within the king's allegiance, and subject to his protection. Such allegiance and protection were mutual,—as expressed in the maxim, 'Protectio trahit subjectionem, et subjectio protectionem,'—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects."); Taunya Lovell Banks, *Dangerous Woman: Elizabeth Key's Freedom Suit—Subjecthood and Racialized Identity in Seventeenth Century Colonial Virginia*, 41 Akron L. Rev. 799, 806 (2008) ("The rule in Calvin's Case, anyone born within the territory of the sovereign is a subject of the English monarch, became the common law rule").

[3] *See* James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 Va. L. Rev. 359, 379–80 (2010) (observing that, "[f]or much of [the] seventeenth century, private acts of Parliament offered the principal means by which aliens sought naturalization."). However, children born of English parents outside the country were considered English subjects. *See* Banks, *supra* note 2, at 806.

only available to those with substantial wealth.[4] Otherwise, English law afforded no mechanism by which a foreign national could naturalize and become a subject.[5] Even so, some of the American colonies developed their own naturalization policies that enabled foreign nationals to enjoy some of the rights and protections traditionally afforded to English subjects.[6]

During the eighteenth century and prior to American independence, the British Parliament passed laws that allowed certain foreign nationals to naturalize and become subjects if they met specific requirements under those laws.[7] For instance, a 1709 law allowed the naturalization of foreign Protestants who took an oath of allegiance and paid a small fee.[8] More significantly for the American colonies, in 1740, the British Parliament passed a law that uniformly provided for the naturalization of any foreign national residing in a British colony for at least seven years, effectively superseding the naturalization policies of the individual colonies.[9] In 1773, a law was passed that allowed foreign-born Protestants who had served two years "in any of the royal American regiments" to be naturalized subject to limitations on office-holding in England.[10] During that same year, England, in an effort to maintain control over naturalization policy, directed governors in the American colonies not to authorize naturalization bills passed by the legislatures in those colonies.[11] Thus, by the time of the American Revolution, England had established a uniform naturalization policy that foreshadowed the naturalization laws of the United States in the years to come.

[4] *See* Pfander & Wardon, *supra* note 3, at 379 ("The private bill process had a number of serious problems, especially for those of modest means who were hoping to acquire land in the new world.").

[5] But in some cases, an alien could become a "denizen," a status conferred solely by the Crown which provided certain rights akin to those enjoyed by British subjects, including the right to purchase and own lands (but not necessarily the right to transfer ownership of the land). *See* Pfander & Wardon, *supra* note 3, at 378–79; Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 Yale J.L. & Human. 73, 86–87 (1997). Denizen status, which was conferred entirely at the monarch's discretion, could be withdrawn at any time. *See* A.H. Carpenter, *Naturalization in England and the American Colonies*, 9 Am. Hist. Rev. 288, 290 (1904) (describing a "denizen" as a class between natural-born subjects and foreign nationals).

[6] *See* Carpenter, *supra* note 5, at 296–97 (describing colonial naturalization laws that afforded certain rights, such as the right to acquire lands and vote in elections, which did not extend beyond a particular province's borders). For example, South Carolina's naturalization law provided that all aliens residing in South Carolina had the same rights and privileges as any person born to English parents. Carpenter, *supra* note 5, at 298. Other provinces, like Pennsylvania, Delaware, and New Jersey, provided for naturalization by private acts of the legislatures. Carpenter, *supra* note 5, at 300–01. In addition, New York allowed foreign nationals residing there who were Christians to naturalize upon taking an oath of allegiance, and the colony also provided for naturalization through private bills. Carpenter, *supra* note 5, at 301–02.

[7] *See* Pfander & Wardon, *supra* note 3, at 380–82.

[8] *See* Carpenter, *supra* note 5, at 292–93.

[9] Carpenter, *supra* note 5, at 293. While this law conferred subjecthood on foreign nationals, "[l]imitations were placed upon office-holding in England, and no person under this act could be admitted to the Privy Council or either house of Parliament, nor could such a one hold any office, civil or military, within the kingdom of Great Britain or Ireland. Otherwise, English rights and privileges were freely and fully given." Carpenter, *supra* note 5, at 293–94.

[10] Carpenter, *supra* note 5, at 294.

[11] Carpenter, *supra* note 5, at 294.

ArtI.S8.C4.1.2.2 Constitutional Convention and Naturalization

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Following the American Revolution, individual states established their own policies on the naturalization of foreign-born nationals.[1] While some like Pennsylvania had fairly liberal naturalization requirements,[2] others like Virginia had more restrictive laws that limited naturalization to aliens who resided in the state for longer periods, who were "free white persons," or who were not otherwise subject to caps on citizenship admissions.[3] Other states, including South Carolina, only conferred citizenship through private legislation rather than through any naturalization law.[4]

Despite these differences, the Articles of Confederation, ratified in 1781, provided that "the free inhabitants" of each state had the right to travel freely to any other state, and were "entitled to all privileges and immunities of free citizens in the several states."[5] Thus, a foreign national who became a citizen in one state could obtain citizenship rights in another state simply by relocating and establishing residence in that state.[6] In essence, the combination of interstate travel and competing state citizenship laws established a form of national citizenship that signaled the future establishment of a constitutional standard for obtaining U.S. citizenship.[7]

The lack of consistency between state citizenship laws led some delegates to the Constitutional Convention to propose a uniform naturalization policy during the debates over the United States Constitution. Charles Pinckney, who served as a delegate from South Carolina, noted that the states had widely divergent citizenship laws, and argued that, "[t]o render this power generally useful it must be placed in the Union, where alone it can be equally exercised."[8] Alexander Hamilton, who served as a delegate from New York, wrote in the *Federalist No. 32* that naturalization policy should be an exclusive federal power "because if each State had power to prescribe a distinct rule there could not be [a] uniform rule."[9]

In addition, Virginia delegate James Madison commented in the *Federalist No. 42* that "[t]he dissimilarity in the rules [of] naturalization, has long been remarked as a fault in our

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[1] *See* James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 Va. L. Rev. 359, 383 (2010) (noting that "naturalization policy fell to the states and they responded with a profusion of approaches meant to attract new immigrants from Europe"); Smith v. Turner, 48 U.S. (7 How.) 283, 440 (1849) (Grier, J., concurring) ("During the Confederation, the States passed naturalization laws for themselves, respectively, in which there was great want of uniformity . . . .").

[2] For example, under Pennsylvania law, foreign nationals of "good character" could acquire the rights of citizenship within two years of their arrival in the state. *See* Pfander & Wardon, *supra* note 1, at 383.

[3] Pfander & Wardon, *supra* note 1, at 383 (describing naturalization laws of southern states).

[4] Pfander & Wardon, *supra* note 1, at 383 (describing the policies of South Carolina and the New England states).

[5] Articles of Confederation of 1781, art. IV, para. 1.

[6] Arizona v. United States, 567 U.S. 387, 418 (2012) (Scalia, J., concurring in part and dissenting in part) ("This meant that an unwelcome alien could obtain all the rights of a citizen of one State simply by first becoming an *inhabitant* of another."); *see also* Pfander & Wardon, *supra* note 1, at 384 ("It effectively permitted an alien to seek naturalization in a state with permissive naturalization practices and then move to a state with tighter restrictions, and still be entitled to all the incumbent rights of naturalized citizens in the second state."); Charles Pinckney, Observations on the Plan of Government Submitted to The Federal Convention, in Philadelphia, on the 28th of May, 1787, *reprinted in* 2 The Records of the Federal Convention of 1787, at 120 (Max Farrand ed., 1911) ("At present the citizens of one State, are entitled to the privileges of citizens in every State. Hence it follows, that a foreigner, as soon as he is admitted to the rights of citizenship in one, becomes entitled to them in all.").

[7] *See* Pfander & Wardon, *supra* note 1, at 385.

[8] *See* Pinckney, *supra* note 6.

[9] The Federalist No. 32 (Alexander Hamilton).

system, and as laying a foundation for intricate and delicate questions."[10] He noted, for example, that an alien who acquired citizenship in a state with lenient naturalization requirements (such as a short period of residence) could obtain citizenship rights in another state even if he did not meet the more restrictive naturalization policies of that state, given the "privileges and immunities of free citizens" conferred by the Articles of Confederation.[11] Consequently, Madison warned, "the law of one State [would be] preposterously rendered paramount to the law of another, within the jurisdiction of the other."[12]

Ultimately, there was a consensus at the Convention that there should be a federal naturalization power in the Constitution.[13] Originally, the proposed language of the text relating to naturalization simply authorized Congress "to regulate naturalization."[14] Then, a revised draft appeared in the New Jersey Plan, which had been introduced by delegate William Paterson, and declared that "the rule for naturalization ought to be the same in every State."[15] Following some further modification, the Convention adopted the final draft of the Naturalization Clause, which authorized Congress "[t]o establish an uniform rule of naturalization. . . throughout the United States."[16]

ArtI.S8.C4.1.2.3 Early U.S. Naturalization Laws

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Congress established its first uniform rule of naturalization through the Naturalization Act of 1790. The Act provided that any "free white person" who resided "within the limits and under the jurisdiction of the United States" for at least two years could be granted citizenship if he or she showed "good character" and swore allegiance to the Constitution.[1] The law also provided that the children of naturalized citizens under the age of twenty-one at the time of their parents' naturalization and who were residing in the United States would be considered U.S. citizens.[2] The children of U.S. citizens who were born outside the United States were deemed U.S. citizens unless their fathers had never resided in the United States.[3] Additionally, Congress delegated to the courts the power to administer the naturalization process.[4]

In 1795 Congress amended the naturalization law by requiring an applicant to submit a declaration of intent to become a citizen at least three years before naturalization, and

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[10] The Federalist No. 42 (James Madison).

[11] *Id.*

[12] *Id.*

[13] *See* Pfander & Wardon, *supra* note 1, at 385 ("Widespread acceptance of the argument for a national standard made the transfer of naturalization power to the new federal government one of the least controversial features of the new Constitution.").

[14] *See* Pfander & Wardon, *supra* note 1, at 389.

[15] James Madison, Notes of the Constitutional Federal Convention, *reprinted in* 1 The Records of the Federal Convention of 1787, at 245 (Max Farrand ed., 1911).

[16] *See* U.S. Const. art. I, § 8, cl. 4; Pfander & Wardon, *supra* note 1 at 386, 389 (describing process by which language of naturalization clause was adopted).

[1] *See* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103–04 (repealed 1795).

[2] *Id.*

[3] *Id.*

[4] *Id. See also* Frederick Van Dyne, A Treatise on the Law of Naturalization of the United States 9 (1907) ("In the United States naturalization is a judicial function, having been committed by Congress to the courts.").

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extending the minimum residence requirement to five years.[5] Then, in 1798, Congress passed the Alien and Sedition Acts, which, among other things, lengthened the period in which to declare an intent to become a citizen to five years, lengthened the minimum residence requirement to fourteen years, and barred the naturalization of any alien from a country at war with the United States.[6] In 1802, Congress repealed the previous laws and restored both the five-year residence requirement and the three-year declaration of intent period.[7]

In the ensuing years, Congress continued to establish naturalization policies with varying conditions and restrictions.[8] Despite these differences, naturalization laws uniformly required that an applicant prove residence in the United States for a specific time period before acquiring citizenship.[9]

[5] Naturalization Act of 1795, ch. 20, § 1, 1 Stat. 414, 414 (repealed 1802).

[6] Naturalization Act of 1798, ch. 54, § 1, 1 Stat. 566, 566–67 (repealed 1802); *see also* Alien Friends Act, ch. 58, § 1, 1 Stat. 570, 570–71 (1798) (authorizing the President to deport aliens who are "dangerous to the peace and safety of the United States," or who are reasonably suspected of being "concerned in any treasonable or secret machinations against the government"); Alien Enemy Act, ch. 66, § 1, 1 Stat. 577, 577 (1798) (providing that "all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies").

[7] *See* Naturalization Law of 1802, ch. 28, § 1, 2 Stat. 153, 153–54. In the 1802 law, Congress continued to limit eligibility for naturalization to "free white persons" who had good moral character. *Id.* The law also extended citizenship to children of naturalized citizens who were under twenty-one at the time of their parents' naturalization and who were residing in the United States, as well as children of U.S. citizens who were born outside the United States (unless their fathers had never resided in the United States). *Id.* § 4. Congress eventually extended naturalization eligibility to "aliens of African nativity and to persons of African descent" in 1870. Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256.

[8] *See e.g.*, Naturalization Act of 1804, ch. 47, 2 Stat. 292 (providing that any alien who was a "free white person" residing in the United States between June 18, 1798, and April 14, 1802, and who continued to reside in the United States, could become a citizen without timely filing a declaration of intent; and that the widow and children of any alien who filed a declaration of intent and subsequently passed away prior to naturalization would be considered U.S. citizens); Act of Mar. 22, 1816, ch. 32, § 1, 3 Stat. 258, 258–59 (requiring every applicant for naturalization who arrived in the United States since June 18, 1812, to produce a "certificate of report and registry" as evidence of the time of his arrival in the United States, as well as a certificate of his duly filed declaration of intention); Naturalization Act of 1824, ch. 186, § 1, 4 Stat. 69, 69 (providing that any alien minor who was a "free white person" and who lived in the United States for the three years before turning twenty-one, and who continued to reside in the United States, could become a citizen without timely filing a declaration of intent if he had reached the age of twenty-one and had resided in the United States for five years at the time of filing his naturalization application); Act of May 24, 1828, ch. 116, § 2, 4 Stat. 310, 310–11 (providing that any alien who was a "free white person" residing in the United States between April 14, 1802 and June 18, 1812, and who continued to reside in the United States, could naturalize without timely filing a declaration of intent, provided that he could show that he was residing in the United States before June 18, 1812, and that he maintained continuous residence in the United States since then; and requiring applicant to prove residence in the United States for at least five years immediately preceding application through "the oath or affirmation of citizens of the United States"); Naturalization Act of 1855, ch. 71, 10 Stat. 604 (extending naturalization to wives of U.S. citizens); Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256 (extending naturalization eligibility to "aliens of African nativity and to persons of African descent").

[9] *See* United States v. Wong Kim Ark, 169 U.S. 649, 686–87 (1898) ("From the first organization of the national government under the [C]onstitution, the naturalization acts of the United States, in providing for the admission of aliens to citizenship by judicial proceedings, uniformly required every applicant to have resided for a certain time 'within the limits and under the jurisdiction of the United States,' and thus applied the words 'under the jurisdiction of the United States' to aliens residing here before they had taken an oath to support the [C]onstitution of the United States, or had renounced allegiance to a foreign government.").

ArtI.S8.C4.1.2.4 Naturalization as an Exclusive Power of Congress

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

While the first Congress enacted federal laws governing naturalization, the Supreme Court initially appeared to recognize that states retained naturalization powers. For instance, in one early case, *Collet v. Collet*, the Court in 1792 declared that the states continued to have "concurrent authority" over naturalization, but could not exercise that authority in a manner that conflicted with federal naturalization laws.[1] In *United States v. Villato*, the Court in 1797 ruled that a Spanish national, Francis Villato, was not a U.S. citizen even though he had taken an oath of citizenship under Pennsylvania law.[2] Without deciding whether states maintained naturalization powers, the Court simply determined that the Pennsylvania law under which Villato sought to naturalize had been effectively repealed by an amendment to the state's constitution.[3] Accordingly, the Court held, Villato never became a U.S. citizen and could not be criminally charged with treason.[4]

Despite the Supreme Court's early recognition of state power over naturalization, the Court ultimately determined that the naturalization power rested solely within Congress. For example, in *Chirac v. Lessee of Chirac*, Chief Justice John Marshall in 1817 declared "[t]hat the power of naturalization is exclusively in [C]ongress does not seem to be, and certainly ought not to be, controverted."[5] Therefore, in that case, a French national did not have the ability to own land (a privilege generally extended only to U.S. citizens at the time) based on the fact that he had taken an oath of citizenship under Maryland law because "[C]ongress alone has the power of prescribing uniform rules of naturalization."[6] Nonetheless, the Court held that a 1778 treaty between the United States and France permitted French nationals to purchase and own lands in the United States.[7]

ArtI.S8.C4.1.2.5 Collective Naturalization (1800–1900)

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

While Congress, by the early nineteenth century, had established the general framework for a foreign subject who came to the United States to acquire citizenship, the expansion of the United States into new areas prompted the Federal Government, through statute or treaty, to provide for collective naturalization of the inhabitants of those newly acquired territories.[1] The

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[1] 2 U.S. (2 Dall.) 294, 296 (1792) (quoting U.S. Const. art. I, § 8, cl. 4).

[2] 2 U.S. (2 Dall.) 370, 373 (1797).

[3] *Id.*

[4] *Id.*

[5] Chirac v. Lessee of Chirac, 15 U.S. (2 Wheat.) 259, 269 (1817).

[6] *Id.* at 269. According to Chief Justice John Marshall, the Maryland naturalization law was "virtually repealed by the [C]onstitution of the United States, and the act of naturalization enacted by [C]ongress." *Id.*

[7] *Id.* at 270–71. *See also* Matthew's Lessee v. Rae, 16 F. Cas. (3 Cranch) 1112 (C.C.D.D.C. 1829) (No. 9,284) (ruling that an alien who complied with state naturalization laws after Congress had passed a naturalization law was not a U.S. citizen because "the state naturalization laws [were] superseded, and annulled by the act of [C]ongress, whose jurisdiction upon that subject is, under the [C]onstitution of the United States, exclusive. . . .").

[1] For example, a 1794 treaty with Great Britain provided that British subjects who remained in the United States and did not declare their intention to remain British subjects were deemed to be U.S. citizens. Treaty of Amity,

ArtI.S8.C4.1.2.5
Collective Naturalization (1800–1900)

United States' acquisition of the Louisiana territory and Florida in the early 1800s raised the question of whether the Federal Government could collectively naturalize designated groups of persons through statute or treaty.[2]

In *American Insurance Co. v. 356 Bales of Cotton*, an 1828 case involving a challenge to the legality of admiralty proceedings in a Florida territorial court, the Supreme Court recognized the collective naturalization of Florida inhabitants under an 1819 treaty between the United States and Spain that ceded the territory of Florida to the United States.[3] The Court explained that "the ceded territory becomes a part of the nation to which it is annexed," and that, upon such transfer, the inhabitants of the territory sever ties with their former country and establish a political allegiance with the government that has acquired their territory.[4] The Court declared that "[t]his treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities, of the citizens of the United States."[5]

The notion of collective naturalization through federal statute or treaty continued to play a role throughout the nineteenth century, particularly as the United States engaged in its westward expansion. For example, in 1845, Congress passed a resolution admitting the Republic of Texas into the union "on an equal footing with the original States,"[6] and all the citizens of the former republic became citizens of the United States.[7] In 1848, the United States signed a treaty with Mexico that officially ended the Mexican-American War, and, under

Commerce and Navigation, Between His Britannic Majesty and the United States of America, by their President, with the Advice and Consent of their Senate, Gr. Brit.-U.S., art. 2, Nov. 19, 1794, 8 Stat. 116. Under the 1803 Treaty of Paris, the United States acquired the Louisiana territory from France, and the treaty provided that "[t]he inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States." Treaty Between the United States of America and the French Republic, Fr.-U.S., art. 3, Apr. 30, 1803, 8 Stat. 200. An 1819 treaty with Spain that allowed the United States to acquire Florida similarly stated that the inhabitants of Florida were to be "admitted to the enjoyment of all the privileges, rights, and immunities, of the citizens of the United States." Treaty of Amity, Settlement, and Limits, Between the United States of America and his Catholic Majesty, Spain-U.S., art. 6, Feb. 22, 1819, 8 Stat. 252.

[2] *See* Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 525 (1828) ("In what relation then do, the inhabitants of an acquired territory, stand to the United States? Are they citizens, or subjects? This is a grave question, and merits the serious consideration of the Court.").

[3] *Id.* at 542.

[4] *Id.*

[5] *Id.*; *see also* Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135, 162 (1892) ("Congress, in the exercise of the power to establish a uniform rule of naturalization, has enacted general laws under which individuals may be naturalized, but the instances of collective naturalization, by treaty or by statute, are numerous."). Additionally, during the War of 1812 and shortly after the admission of Louisiana into the Union, a federal district court considered whether individuals who were born in Great Britain and had resided in the territory of Orleans when it became the state of Louisiana could be detained as "alien enemies" or whether they were instead citizens of the United States. United States v. Laverty, 26 F. Cas. (3 Mart.) 875, 875–76 (D. La. 1812) (No. 15,569a). The U.S. Government argued that the only way to become a U.S. citizen was by fulfilling the uniform requirements for naturalization as Congress provided. *Id.* at 875–77 ("It is contended by the attorney of the United States that congress alone have power to pass laws on the subject of the naturalization of foreigners, and that, by the constitution, if is declared that the rule for their admission must be uniform."). The court disagreed, ruling that all "bona fide inhabitants" of the territory of Orleans became U.S. citizens upon the admission of Louisiana as a state. *Id.* at 877. The court reasoned that, although Congress has the power to establish a uniform rule of naturalization for individuals seeking citizenship, Congress's power to admit new states into the union enabled the government "to admit at once great bodies of men, or new states, into the federal Union." *Id.* at 876–77. *See also* Desbois' Case, 2 Mart. (La.) 185 (1812) (holding that French national who had resided in the territory of Orleans since 1806 could be considered a U.S. citizen upon the admission of Louisiana into the union); U.S. Const. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union . . . ."); U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .").

[6] J. Res. 1, 29th Cong., 9 Stat. 108 (1845).

[7] *Boyd*, 143 U.S. at 169; *see also* Contzen v. United States, 179 U.S. 191, 193 (1900) ("It is not disputed that citizenship may spring from collective naturalization by treaty or statute, nor that by the annexation of Texas and its admission into the Union all the citizens of the former Republic became, without any express declaration, citizens of the United States.").

that treaty, Mexican nationals who remained in the territory ceded to the United States (e.g., modern-day Arizona, New Mexico, and California) could become citizens of the United States.[8] Additionally, in 1900, Congress established the territory of Hawai'i and conferred citizenship on its residents.[9]

Through legislation, Congress also provided for the collective naturalization of specific groups of people who were present in the United States or its territories. For instance, in 1887, Congress passed the Dawes Act, which authorized the President to allot tribal land to individual American Indians, and conferred citizenship on American Indians who accepted individual land grants.[10] A few decades later, in 1924, Congress passed the Indian Citizenship Act, which declared that all American Indians born within the territorial limits of the United States were U.S. citizens.[11] Additionally, in 1917, Congress passed the Jones Act, which provided that all citizens of Puerto Rico, which had become a United States territory in 1898, would become U.S. citizens.[12]

In short, naturalization is not strictly limited to conferring citizenship on individual foreign nationals. Congress also has the power to grant citizenship collectively to designated groups of persons through legislation, such as the naturalization of all residents of an acquired territory or state, or through a treaty provision.[13]

ArtI.S8.C4.1.3 Post-1900 Naturalization Doctrine Generally

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

The Supreme Court repeatedly affirmed Congress's broad and exclusive power over naturalization into the twentieth century and the modern era. In *United States v. Ginsberg*, the Court in 1917 declared that "[a]n alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress," and that "[c]ourts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare."[1] Similarly, in *Schneiderman v. United States*, the Court in 1943 recognized that "[t]he Constitution authorizes Congress 'to establish an uniform Rule of Naturalization,' and we may assume that naturalization is a privilege, to be given or withheld on such conditions as Congress sees fit."[2] Decades later, in *Fedorenko v. United States*, the Court in 1981 maintained that "[t]his judicial

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[8] Treaty of Guadalupe Hidalgo, Mex.-U.S., art. 8, Feb. 2, 1848, 9 Stat. 922; *see Boyd*, 143 U.S at 162 ("Manifestly the nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal, or otherwise, as may be provided.").

[9] Hawaiian Organic Act, ch. 339, § 4, 31 Stat. 141, 141 (1900).

[10] Dawes Act of 1887, ch. 119, § 6, 24 Stat. 388, 390.

[11] Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924).

[12] Jones Act, ch. 145, § 5, 39 Stat. 951, 953 (1917).

[13] *Boyd*, 143 U.S. at 170; Contzen v. United States, 179 U.S. 191, 193 (1900); U.S. Const. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union . . . ."); U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."). *See also Boyd*, 143 U.S. at 170 ("Congress having the power to deal with the people of the territories in view of the future states to be formed from them, there can be no doubt that in the admission of a state a collective naturalization may be effected in accordance with the intention of congress and the people applying for admission.").

[1] 243 U.S. 472, 474 (1917).

[2] 320 U.S. 118, 131 (1943).

insistence on strict compliance with the statutory conditions precedent to naturalization is simply an acknowledgment of the fact that Congress alone has the constitutional authority to prescribe rules for naturalization."[3] In its 2001 decision in *Nguyen v. INS*, the Court acknowledged "the wide deference afforded to Congress in the exercise of its immigration and naturalization power."[4]

Exercising this broad power, Congress continued to enact legislation governing the naturalization of aliens. Like early U.S. naturalization laws, these laws similarly required naturalization applicants to establish continuous residence in the United States and good moral character during specified periods, among other requirements.[5] The Immigration and Nationality Act (INA) of 1952, as amended, establishes the modern framework governing the naturalization of aliens in the United States.[6]

ArtI.S8.C4.1.4 Children

ArtI.S8.C4.1.4.1 Citizenship and Children Born Abroad

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Apart from the general requirements for the naturalization of aliens in the United States, and the collective naturalization of certain classes of aliens, Congress has also addressed the naturalization of children born abroad to U.S. citizen parents. The concept of naturalization of foreign-born children may be traced to early English laws that allowed children born abroad to English subjects to inherit the rights of their parents.[1] The Supreme Court has recognized that this concept of "nationality by descent" is rooted in statute rather than common law.[2] According to the Court, "[p]ersons not born in the United States acquire citizenship by birth only as provided by Acts of Congress."[3]

From the outset, Congress has conferred citizenship on children born outside the United States to U.S. citizen parents. Under the original Naturalization Act of 1790, children of U.S. citizens born outside the United States were considered U.S. citizens unless their fathers had never resided in the United States.[4] For the next two centuries, Congress continued to pass legislation providing for the naturalization of children born abroad to U.S. citizens if specified

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[3] 449 U.S. 490, 506–07 (1981) (quoting Johnson v. Eisentrager, 339 U.S. 763, 791 (1950) (Black, J., dissenting)).

[4] 533 U.S. 53, 72–73 (2001); *see also* Miller v. Albright, 523 U.S. 420, 455 (1998) ("Judicial power over immigration and naturalization is extremely limited.").

[5] *See e.g.,* Naturalization Act of 1906, ch. 3592, § 4, 34 Stat. 596, 596–98; Immigration and Nationality Act of 1952, Pub. L. No. 82-414, §§ 316–319, 66 Stat. 163, 242–45 (codified at 8 U.S.C. §§ 1427–30); Immigration Act of 1990, Pub. L. No. 101-649, § 402, 104 Stat. 4978, 5038.

[6] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, §§ 316–319, 66 Stat. 163, 244 (codified at 8 U.S.C. §§ 1427–30, 1439–40). The INA also codified a number of provisions that allowed for the collective naturalization of certain classes of aliens in U.S. territories or outlying possessions if they met specified requirements. *See id.* §§ 302 (persons born in Puerto Rico) (codified at 8 U.S.C. § 1402), 303 (persons born in the Canal Zone or the Republic of Panama) (codified at 8 U.S.C. § 1403), 304 (persons born in Alaska) (codified at 8 U.S.C. § 1404), 305 (persons born in Hawai'i) (codified at 8 U.S.C. § 1405), 306 (persons born and living in the U.S. Virgin Islands) (codified at 8 U.S.C. § 1406), 307 (persons born and living in Guam) (8 U.S.C. § 1407).

[1] *See* United States v. Wong Kim Ark, 169 U.S. 649, 658, 668–72 (1898) (examining early English statutes).

[2] *Id.* at 670–71.

[3] Miller v. Albright, 523 U.S. 420, 424 (1998) (citing *Wong Kim Ark*, 169 U.S. at 703).

[4] *See* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103–04 (repealed 1795).

requirements were met.[5] These requirements included, among others, establishing a parent's residence in the United States before the child's birth; and, with respect to some earlier laws, proving the child's continuous residence in the United States for specified periods if one of the parents was not a U.S. citizen.[6]

ArtI.S8.C4.1.4.2 Naturalization and Rogers v. Bellei

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

In the 1971 case of *Rogers v. Bellei*, the Supreme Court considered a constitutional challenge to a requirement under the Immigration and Nationality Act (INA) that a child born abroad to a U.S. citizen parent and an alien parent maintain citizenship by residing in the United States continuously for five years between the ages of fourteen and twenty-eight.[1] The plaintiff, Aldo Mario Bellei, was born in Italy to an Italian father and a U.S. citizen mother in 1939.[2] Despite his birth abroad, Bellei acquired his U.S. citizenship under the Equal Nationality Act of 1934 (the law in effect at the time of his birth) because his U.S. citizen mother had established her residence in the United States before Bellei's birth.[3] Bellei, who lived most of his life in Italy and periodically visited the United States, eventually lost his U.S. citizenship in 1962 because he failed to satisfy the INA's continuous residence requirement.[4]

Bellei argued that the INA's residency condition violated his constitutional rights.[5] A federal district court agreed, ruling that the requirement was unconstitutional in light of the Supreme Court's decisions in *Schneider v. Rusk* and *Afroyim v. Rusk*.[6] In *Schneider*, the Supreme Court had held that a separate INA provision revoking the citizenship of a naturalized U.S. citizen who subsequently resided in her former country of nationality for three years violated due process under the Fifth Amendment because there was no similar restriction against foreign residence for native-born U.S. citizens.[7] In *Afroyim*, the Court invalidated an INA provision that terminated the citizenship of a naturalized U.S. citizen who voted in a foreign election, holding that, under the Fourteenth Amendment, a U.S. citizen has a constitutional right to remain a citizen unless he voluntarily relinquishes citizenship.[8]

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[5] *See e.g.,* Naturalization Act of 1795, ch. 20, § 3, 1 Stat. 414, 415 (repealed 1802); Naturalization Law of 1802, ch. 28, § 4, 2 Stat. 153, 155; Naturalization Act of 1855, ch 71, 10 Stat. 604; Act of Mar. 2, 1907, ch. 2534, § 6, 34 Stat. 1228, 1229; Equal Nationality Act, ch. 344, sec. 1, § 1993, 48 Stat. 797, 797 (1934); Nationality Act of 1940, ch. 876, § 201, 54 Stat. 1137, 1138–39; Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 301, 66 Stat. 163, 235–36 (codified at 8 U.S.C. § 1401); Act of Nov. 6, 1966, Pub. L. No. 89-770, 80 Stat. 1322; Act of Oct. 27, 1972, Pub. L. No. 92-584, §§ 1, 3, 86 Stat. 1289, 1289; Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 12, 100 Stat. 3655, 3657; Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, sec. 102, § 322, 108 Stat. 4305, 4306–07. *See also Wong Kim Ark*, 169 U.S. at 672 (discussing early laws that conferred citizenship upon foreign-born children of U.S. citizens).

[6] *See e.g.,* Equal Nationality Act, sec. 1, § 1993; Nationality Act of 1940, § 201(c), (g); Immigration and Nationality Act § 301(a)(3), (a)(7), (b) (codified at 8 U.S.C. § 1401(c), (g)). The INA, as amended, contains the current governing provisions for the naturalization of children born abroad to U.S. citizens.

[1] 401 U.S. 815, 816 (1971).

[2] *Id.* at 817.

[3] *Id.* at 818, 826.

[4] *Id.* at 818–20.

[5] *Id.* at 820.

[6] *Id.*

[7] Schneider v. Rusk, 377 U.S. 163, 168–69 (1964).

[8] Afroyim v. Rusk, 387 U.S. 253, 267–68 (1967).

The Supreme Court held that applying the INA's residency condition to Bellei did not violate the Fourteenth Amendment's Citizenship Clause, which provides that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[9] The Court determined that the protections against involuntary expatriation under the Fourteenth Amendment applied only to those who were "born or naturalized in the United States."[10] The Court noted that Bellei, who had lived in Italy most of his life, was not born or naturalized in the United States, and had not been subject to the jurisdiction of the United States.[11] The Court distinguished these facts from *Schneider* and *Afroyim*, where the plaintiffs had naturalized and resided in the United States.[12] The Court declared that the Fourteenth Amendment "obviously did not apply to any acquisition of citizenship by being born abroad of an American parent."[13] Thus, the Court explained, it was "necessarily left" to Congress, under its power "to establish an uniform rule of naturalization," to determine when a person born abroad to U.S. citizen parents may become a citizen.[14]

Given "[t]he reach of congressional power in this area," and the Court's prior recognition of that power, the Supreme Court held that imposing the INA's residency condition on Bellei was not "irrational, arbitrary, or unfair."[15] The Court stated that "Congress has an appropriate concern with problems attendant on dual nationality," particularly when a child's non-U.S. citizen father chooses to raise his family in his home country rather than the United States.[16] In those circumstances, the Court noted, "[t]he child is reared, at best, in an atmosphere of divided loyalty."[17] In light of these concerns, the Court determined that Congress may require a person born abroad to establish a sufficient connection to the United States to enjoy the benefits of citizenship.[18] The Court concluded that it was reasonable for Congress to impose a conditional period of residence for aliens born abroad to U.S. citizen parents, and that the INA provision containing this requirement was constitutional.[19]

The Supreme Court's decision in *Bellei* underscores that Congress has broad power over naturalization, and that it may set forth the terms and conditions in which an alien may become a U.S. citizen as long as those terms are not "unreasonable, arbitrary, or unlawful."[20]

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[9] *Bellei*, 401 U.S. at 827; *see also* U.S. Const. amend. XIV, § 1.

[10] *Bellei*, 401 U.S. at 827.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 830; *see also* United States v. Wong Kim Ark, 169 U.S. 649, 688 (1898) ("This sentence of the Fourteenth Amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed,—'born in the United States,' and 'subject to the jurisdiction thereof'; in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the constitution to establish a uniform rule of naturalization.").

[14] *Bellei*, 401 U.S. at 829–30.

[15] *Id.* at 828, 833.

[16] *Id.* at 831–32.

[17] *Id.* at 832.

[18] *Id.* at 832–33.

[19] *Id.* at 833–34, 836. Furthermore, observing that Congress already imposes a "condition precedent" requiring the U.S. citizen parent to have been in the United States for at least ten years prior to the birth of the child, the Court determined that "it does not make good constitutional sense, or comport with logic, to say, on the one hand, that Congress may impose a condition precedent, with no constitutional complication, and yet be powerless to impose precisely the same condition subsequent" on the child seeking citizenship. *Id.* at 834.

[20] *Id.* at 831; *see also* United States v. Wong Kim Ark, 169 U.S. 649, 702 (1898) ("Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law."). Ultimately, with respect to children

ArtI.S8.C4.1.4.3 Naturalization and Sessions v. Morales-Santana

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

More recently, in *Sessions v. Morales-Santana*, the Supreme Court in 2017 considered a legal challenge to Immigration and Nationality Act (INA) provisions that set forth the manner in which a child born abroad to a U.S. citizen parent and an alien parent could acquire citizenship.[1] These provisions generally required the U.S. citizen parent to have accrued at least five years of physical presence in the United States prior to the child's birth.[2] The INA extended this rule to children born out of wedlock to a U.S. citizen parent and an alien parent.[3] If a child was born abroad to an unwed U.S. citizen father and an alien mother, the father could transmit citizenship to the child if he had accrued five years of physical presence in the United States before the child's birth.[4] The INA, however, created an exception for unwed U.S. citizen mothers, who could transmit citizenship to the child so long as they had accrued just one year of physical presence in the United States.[5]

Luis Ramon Morales-Santana was born in the Dominican Republic to an unwed U.S. citizen father and an alien mother, but he could not acquire citizenship from his father because his father had not yet accrued five years of physical presence in the United States at the time of Morales-Santana's birth.[6] Noting that the INA allowed unwed U.S. citizen mothers to transmit citizenship so long as the mother had accrued one year of physical presence, Morales-Santana argued that the gender-based distinction between unwed U.S. citizen fathers and mothers violated his U.S. citizen father's right to equal protection.[7]

The Supreme Court agreed, ruling that the government failed to show an "exceedingly persuasive justification" for the gender-based distinction between unwed mothers and fathers.[8] According to the Court, the distinction was based on "overbroad generalizations" about the respective roles of husbands and wives.[9] Specifically, the Court observed, the statute rested on the long-held notion that, for unmarried parents, the mother is considered to be the child's natural and sole guardian because she is more qualified than the father to take responsibility for the child.[10] The Court rejected the government's contentions that the gender-based distinction ensured that children born abroad have sufficiently strong connections to the United States and reduced the risk of statelessness (i.e., lacking a country of citizenship) for foreign-born children.[11]

The Supreme Court thus held that the one-year physical presence provision for unwed U.S. citizen mothers was unconstitutional, and invited Congress to "settle on a uniform prescription

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born abroad to a U.S. citizen parent and an alien parent, Congress in 1978 removed the residence requirement for children that had been challenged in *Bellei*. Act of Oct. 10, 1978, Pub. L. No. 95-432, § 1, 92 Stat. 1046.

[1] No. 15-1191, slip op. at 1 (U.S. June 12, 2017).

[2] 8 U.S.C. § 1401(g).

[3] *Id.* § 1409(a).

[4] *Id.* §§ 1401(g), 1409(a).

[5] *Id.* § 1409(c).

[6] *Morales-Santana*, slip op. at 5–6.

[7] *Id.* at 6.

[8] *Id.* at 9, 22–23.

[9] *Id.* at 7, 11–12.

[10] *Id.* at 10–12.

[11] *Id.* at 15–23.

that neither favors nor disadvantages any person on the basis of gender."[12] In the meantime, the Court determined, the standard five-year physical presence requirement should apply to both unwed U.S. citizen mothers and fathers of children born abroad.[13]

The Supreme Court's *Morales-Santana* decision shows that, while Congress has broad power over naturalization, the terms and conditions that Congress sets forth for obtaining citizenship may be subject to constraints imposed elsewhere in the Constitution.

ArtI.S8.C4.1.5 Denaturalization

ArtI.S8.C4.1.5.1 Denaturalization (Revoking Citizenship) Generally

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

The concept of naturalization typically concerns the grant of citizenship to a person who has lived in the United States for a specified time period and meets certain other requirements; to groups of people in newly-acquired territories who acquire citizenship by statute or treaty; and to children born outside the United States who become U.S. citizens upon birth to a U.S. citizen parent, or who derive their citizenship upon their parents' naturalization in the United States. Congress has also addressed the concept of *denaturalization*, which refers to the revocation of citizenship from a naturalized U.S. citizen.

Congress's power over denaturalization derives from its power "[t]o establish an uniform rule of naturalization," and from its power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof."[1] In describing the theory of denaturalization, the Supreme Court has stated that "[a]n alien has no moral nor constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practiced upon the court, without which the certificate of

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[12] *Id.* at 27–28.

[13] *Id.* at 28. By contrast, in *Nguyen v. INS*, the Court in 2001 rejected an equal protection challenge to a separate INA provision that requires unwed U.S. citizen fathers of children born abroad to establish paternity in order to transmit their U.S citizenship to those children, without imposing similar requirements on unwed U.S. citizen mothers. *Nguyen v. INS*, 533 U.S. 53, 58–59 (2001). Unlike in *Morales-Santana*, the Court determined that the gender distinction served two important governmental objectives: (1) assuring that a biological parent-child relationship exists (a fact, the Court observed, that is already verifiable from the birth itself in the case of a mother), and (2) ensuring that the child and the U.S. citizen parent have an opportunity to develop a real, meaningful relationship (which, in the Court's view, "inheres in the very event of birth" in the case of a U.S. citizen mother). *Id.* at 62, 64–65. In *Morales-Santana*, the Court distinguished *Nguyen*, noting that, unlike the paternity requirement at issue in that case, "the physical-presence requirements now before us relate solely to the duration of the parent's prebirth residency in the United States, not the parent's filial tie to the child. As the Court of Appeals observed in this case, a man needs no more time in the United States than a woman 'in order to have assimilated citizenship-related values to transmit to [his] child.' And unlike *Nguyen*'s parental-acknowledgement requirement, § 1409(a)'s age-calibrated physical-presence requirements cannot fairly be described as 'minimal.'" *Morales-Santana*, slip op. at 16 (quoting *Nguyen*, 533 U.S. at 70; Morales-Santana v. Lynch, 804 F.3d 521, 531 (2d Cir. 2015), *rev'd in part sub. nom.* Sessions v. Morales-Santana, No. 15-1191 (U.S. June 12, 2017). The Supreme Court had also considered the constitutionality of the gender-based distinction at issue in *Nguyen* in Miller v. Albright. 523 U.S. 420 (1998). There, however, a majority of the Court did not decide that question. Although four justices rejected the challenge to the gender-based distinction, only two reached the merits, ruling that there was no equal protection violation. *Id.* at 445. In a separate opinion, two other justices concluded that the Court could not confer citizenship as a remedy even if the statute violated equal protection. *Id.* at 459. In another opinion, three justices argued there was an equal protection violation. *Id.* at 481–82. Additionally, in another separate opinion, two justices determined that the petitioner in the case lacked standing to raise the equal protection rights of his father. *Id.* at 452.

[1] Knauer v. United States, 328 U.S. 654, 673 (1946); *see also* U.S. Const. art. I, § 8, cl. 18 ("Necessary and Proper Clause").

citizenship could not and would not have been issued."[2] Thus, "there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship. Failure to comply with any of these conditions renders the certificate of citizenship 'illegally procured,' and naturalization that is unlawfully procured can be set aside."[3]

The Naturalization Act of 1906 was the first law to provide for denaturalization.[4] It authorized judicial proceedings against a naturalized U.S. citizen "for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured."[5] The Act provided that if a naturalized U.S. citizen returned to his native country or went to another foreign country and established a permanent residence there within five years of being admitted as a U.S. citizen, such facts were "*prima facie* evidence" that he or she lacked the intention to become a permanent citizen of the United States at the time of filing the naturalization application.[6] Absent "countervailing evidence," the naturalized citizen's permanent residence in the foreign country would "be sufficient in the proper proceeding to authorize the cancelation of his certificate of citizenship as fraudulent, . . ."[7]

ArtI.S8.C4.1.5.2 Early Denaturalization Jurisprudence

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

In a 1913 case, *Luria v. United States*, a naturalized U.S. citizen, George Luria, challenged a court order setting aside, as fraudulently and illegally procured, his certificate of citizenship under the denaturalization provisions of the 1906 Act.[1] The U.S. Government claimed that Luria, who was born in Russia, had established permanent residence in South Africa shortly after obtaining his certificate of citizenship in the United States and thus lacked the intention of becoming a permanent U.S. citizen when he naturalized.[2] Luria argued that, although the Naturalization Act of 1906 authorized the denaturalization of someone who established a permanent residence in a foreign country, this restriction should not have applied to him because he had naturalized under a prior law that did not require applicants to produce a declaration of their intention to reside in the United States.[3]

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[2] Johannessen v. United States, 225 U.S. 227, 241 (1912). *See also* United States v. Spohrer, 175 F. 440, 446 (D.N.J. 1910) ("That the government, especially when thereunto authorized by Congress, has the right to recall whatever of property has been taken from it by fraud, is, in my judgment, well settled, and, if that be true of property, then by analogy and with greater reason it would seem to be true where it has conferred a privilege in answer to the prayer of an ex parte petitioner. A recall of this character injures no one but the fraud doer, and his discomfiture is entitled to but slight consideration.").

[3] Fedorenko v. United States, 449 U.S. 490, 506 (1981).

[4] *See* Aram A. Gavoor & Daniel Miktus, *Snap: How the Moral Elasticity of the Denaturalization Statute Goes too Far*, 23 Wm. & Mary Bill Rts. J. 637, 648 (2015) ("As early as 1844, members of the United States Senate inquired into how they could legislate a legal method for revoking citizenship. Over time, the President and others directed Congress's attention to the need for a legislative effort to create formalized denaturalization proceedings. The effort was intended to create a uniform system of naturalization and provide 'uniform fairness' to individuals seeking to naturalize.").

[5] Naturalization Act of 1906, ch. 3592, § 15, 34 Stat. 596, 601.

[6] *Id.*

[7] *Id.*

[1] 231 U.S. 9, 17 (1913).

[2] *Id.* at 17–18.

[3] *Id.* at 21–22.

The Supreme Court disagreed, explaining that, before 1906, naturalization laws still imposed certain duties and obligations on the applicant, such as a declaration of intention to become a U.S. citizen and renounce any allegiance to a foreign government, and proof that the applicant had resided in the United States for at least five years at the time of the application.[4] The Court determined that these prior laws "clearly implied" that they were not intended to apply to someone "whose purpose was to reside permanently in a foreign country, and to use his naturalization as a shield against the imposition of duties there, while by his absence he was avoiding his duties here."[5]

Luria also challenged the 1906 Act's denaturalization provision itself, arguing that it violated his right to due process by characterizing his permanent residence in a foreign country within five years of becoming a U.S. citizen as "*prima facie* evidence" of a lack of intention to become a permanent U.S. citizen.[6] The Court rejected Luria's argument, reasoning that the 1906 Act "goes no farther than to establish a rebuttable presumption which the possessor of the certificate is free to overcome" with evidence of his intention to reside permanently in the United States.[7] Recognizing a legislature's power to craft rules of evidence in civil and criminal cases, the Court determined that the rebuttable presumption created by the 1906 Act was reasonable and did not violate Luria's right to due process.[8]

The Court also rejected Luria's contention that the 1906 Act violated his right to equal protection by discriminating between the rights of naturalized U.S. citizens, who were subject to the foreign residence restriction, and native-born U.S. citizens, who were not subject to such restriction.[9] The Court explained that the Act "does not in anywise affect or disturb rights acquired through lawful naturalization, but only provides for the orderly cancellation, after full notice and hearing, of certificates of naturalization which have been procured fraudulently or illegally. It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors never were lawfully entitled."[10] The Court thus upheld Luria's order of denaturalization.[11]

In the following decades, federal immigration laws concerning denaturalization remained largely unchanged from the 1906 Act.[12] In 1952, however, the INA established a new framework governing denaturalization. The INA authorized the "revoking and setting aside"

[4] *Id.*

[5] *Id.* at 23–24.

[6] *Id.* at 25.

[7] *Id.*

[8] *Id.* at 24–27.

[9] *Id.*

[10] *Id.* at 24 (citing Johannessen v. United States, 225 U.S. 227 (1912)).

[11] *See also Johannessen*, 225 U.S. at 241–43 (upholding denaturalization of U.S. citizen who provided perjured testimony from witnesses that he had resided in the United States for at least five years); United States v. Ginsberg, 243 U.S. 472, 475 (1917) (upholding denaturalization of U.S. citizen who obtained citizenship based on "a manifest mistake by the judge" who adjudicated his petition); United States v. Ness, 245 U.S. 319, 327 (1917) (reversing dismissal of action to set aside U.S. citizen's certificate of naturalization on the grounds that he "illegally procured" naturalization without providing certificate of arrival in the United States).

[12] *See e.g.,* Nationality Act of 1940, ch. 876, § 338(a), (b), 54 Stat. 1137, 1158–60 (authorizing proceedings against a naturalized citizen for "revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured," and creating presumption that naturalized citizen's permanent residence in foreign country within five years after naturalization established "a lack of intention on the part of such person to become a permanent citizen of the United States at the time of filing such person's petition"). The Nationality Act of 1940, however, also provided that the revocation of a person's citizenship would not result in the loss of citizenship to his wife or minor child unless "the revocation and setting aside of the order [admitting the person to citizenship] was the result of actual fraud." *Id.* § 338(d).

of a naturalization certificate that had been "procured by concealment of a material fact or by willful misrepresentation."[13] The INA also listed certain categories of naturalized citizens who would be considered to have obtained citizenship through "concealment of a material fact or by willful misrepresentation," including a person who returned to his or her native country or any other foreign country within five years of naturalization, and established permanent residence in that country.[14] The INA further provided that any person who claimed U.S. citizenship through the naturalization of a parent or spouse would be deemed to lose citizenship if there was a revocation of the parent's or spouse's citizenship because "the order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation."[15]

ArtI.S8.C4.1.5.3 Limits to Congress's Denaturalization Power

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Despite Congress's broad power over denaturalization, the Supreme Court has recognized certain limitations to this power, particularly with respect to the evidentiary requirements to sustain a person's denaturalization such as the burden of proving that citizenship was unlawfully obtained, and the standard that governs whether a person seeking citizenship concealed a material fact relating to his or her eligibility for citizenship.[1] In imposing these limitations, the Court has recognized the "value and importance" of citizenship, and declared that the consequences of denaturalization are "more serious than a taking of one's property, or the imposition of a fine or other penalty."[2] Thus, according to the Court, "such a right once conferred should not be taken away without the clearest sort of justification and proof."[3]

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[13] *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 340(a), 66 Stat. 163, 260 (codified at 8 U.S.C. § 1451(a)). This provision was later amended to allow denaturalization proceedings where the order admitting the person to citizenship and the naturalization certificate "were *illegally procured or* were procured by concealment of a material fact or by willful misrepresentation." Act of Sept. 26, 1961, Pub. L. No. 87-301, § 18(a), 75 Stat. 650, 656 (emphasis added).

[14] Immigration and Nationality Act § 340(a) (persons who within ten years following naturalization refused to testify as witnesses in any proceeding before a congressional committee concerning "subversive activities," and had been convicted of contempt for such refusal), 340(c) (persons who within five years following naturalization became members of or affiliated with an organization, and such membership or affiliation would have barred them from naturalization), 340(d) (persons establishing a permanent residence in a foreign country) (codified at 8 U.S.C. § 1451(a), (c)). Congress eventually repealed the permanent foreign residence provision. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 104(b), 108 Stat. 4305, 4308.

[15] Immigration and Nationality Act § 340(f) (codified at 8 U.S.C. § 1451(d)). The INA provided, however, that the revocation of a person's citizenship under the Nationality Act of 1940 would not result in the loss of citizenship to that person's wife or minor child unless "the revocation and setting aside of the order [admitting the person to citizenship] was the result of actual fraud." *Id.* § 340(e).

[1] Kungys v. United States, 485 U.S. 759, 772 (1988); Chaunt v. United States, 364 U.S. 350, 355 (1960); Schneiderman v. United States, 320 U.S. 118, 122–25 (1943). For more discussion about the Supreme Court's jurisprudence concerning the evidentiary requirements and standard for proving unlawful procurement of citizenship, see ArtI.S8.C4.1.5.4 Unlawful Procurement of Citizenship and ArtI.S8.C4.1.5.5 Concealing Material Facts When Procuring Citizenship.

[2] *Schneiderman*, 320 U.S. at 122; *see also Chaunt*, 364 U.S. at 353 ("[I]n view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside . . . ."); Klapprott v. United States, 335 U.S. 601, 611 (1949) ("Denaturalization consequences may be more grave than consequences that flow from conviction for crimes."); Knauer v. United States, 328 U.S. 654, 659 (1946) ("For denaturalization, like deportation, may result in the loss 'of all that makes life worth living.'") (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).

[3] *Schneiderman*, 320 U.S. at 122.

ArtI.S8.C4.1.5.4 Unlawful Procurement of Citizenship

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

In *Schneiderman v. United States*, the Supreme Court in 1943 considered a legal challenge by a U.S. citizen, William Schneiderman, to his denaturalization under the 1906 Act based on the charge that he had "illegally procured" his citizenship by failing to disclose his membership in the Communist Party.[1] The government had argued that Schneiderman's membership in the Communist Party disqualified him from naturalization because he was not "attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."[2]

The Supreme Court held that, in a denaturalization proceeding, "the facts and the law should be construed as far as is reasonably possible in favor of the citizen," and that the government bears the burden of presenting "'clear, unequivocal, and convincing'" evidence that citizenship was unlawfully procured, rather than "'a bare preponderance of evidence which leaves the issue in doubt.'"[3] Applying this standard, the Court determined that Congress, in creating the "attachment to the Constitution" requirement for naturalization, had intended to deny naturalization to those who advocated the use of force or violence against the government, but not to those who simply subscribed to certain principles or beliefs, however unpopular or "distasteful."[4] The Court ruled that Schneiderman's membership in the Communist Party failed to clearly establish that he was not "attached to the principles of the Constitution" because there was no evidence that he advocated the use of violence against the government.[5]

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[1] 320 U.S. 118, 121–22 (1943).

[2] *Id.* at 129; *see* Naturalization Act of 1906, ch. 3592, § 4, 34 Stat. 596, 598 (requiring naturalization applicant to show that "he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same.").

[3] *Schneiderman*, 320 U.S. at 122–23, 125 (quoting United States v. Maxwell Land-Grant Co., 121 U.S. 325, 381 (1887)); *see also* Fedorenko v. United States, 449 U.S. 490, 505–06 (1981) ("Any less exacting standard would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding.").

[4] *Schneiderman*, 320 U.S. at 136, 157–59. While recognizing that "naturalization is a privilege, to be given or withheld on such conditions as Congress sees fit," the Court warned that "we certainly will not presume in construing the naturalization and denaturalization acts that Congress meant to circumscribe liberty of political thought by general phrases in those statutes." *Id.* at 131–32. In particular, the Court explained that "[t]here is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public discord or other substantive evil, and mere doctrineal justification or prediction of the use of force under hypothetical conditions at some indefinite future time-prediction that is not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason." *Id.* at 157–58.

[5] *Id.* at 134–36, 142, 146, 160–61. The Court held, moreover, that where there are two possible interpretations of a political organization's platform, one of which may preclude naturalization, a court may not simply impute the "reprehensible interpretation" to a member of the organization without further evidence. *Id.* at 158–59. *See also* Baumgartner v. United States, 322 U.S. 665, 677 (1944) (ruling that statements made by a naturalized U.S. citizen showing admiration for Nazi government did not clearly show that he lacked allegiance to the United States and had thus procured his citizenship through fraud, because such statements were made after he had naturalized and were nothing more than "the expression of silly or even sinister-sounding views which native-born citizens utter with impunity").

ArtI.S8.C4.1.5.5 Concealing Material Facts When Procuring Citizenship

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Apart from considering the government's burden of proof in denaturalization cases, the Supreme Court has also considered, under the Immigration and Nationality Act's (INA) denaturalization provision, the standard for assessing whether facts concealed by a naturalization applicant are "material."[1] In a 1960 case, *Chaunt v. United States*, a Hungarian national, Peter Chaunt, challenged the government's claim that he had fraudulently procured his naturalization by concealing and misrepresenting his record of arrests in the United States, and that his arrest record was a "material" fact under the denaturalization statute.[2] The Court suggested that, to meet the materiality threshold, the government had to show that either (1) the omitted facts "would have warranted the denial of citizenship," or (2) their disclosure "might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship."[3]

The Court determined that Chaunt's arrests, which related to minor offenses (e.g., distributing handbills in violation of a city ordinance) occurring more than five years before his naturalization application, did not affect his qualifications for citizenship.[4] The Court also rejected the government's contention that the disclosure of the arrests would have led to an investigation revealing Chaunt's communist affiliations, warranting the denial of citizenship on the ground that he lacked the requisite attachment to the Constitution.[5] The Court noted that Chaunt had disclosed in his naturalization application that he was a member of the International Worker's Order (reportedly linked to the Communist Party), and that it was thus questionable whether the disclosure of his arrest record would have led to an investigation of any communist affiliations.[6] The Court thus ruled that the government failed to prove by "clear, unequivocal, and convincing" evidence that Chaunt procured his citizenship by "concealment of a material fact."[7]

However, in *Fedorenko v. United States*, the Court in 1981 held that the failure of a Ukrainian national, Feodor Fedorenko, to disclose in his naturalization application that he had served as a concentration camp guard following his capture by German forces during World War II warranted his denaturalization.[8] The Court reasoned that Fedorenko's misrepresentations about his wartime activities were material because, had those facts been known to immigration officials, he would have been ineligible for initial admission into the United States.[9] Consequently, the Court determined, because Fedorenko obtained his

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[1] *See* 8 U.S.C. § 1451(a) (authorizing denaturalization if "order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation").

[2] 364 U.S. 350, 351 (1960).

[3] *Id.* at 355.

[4] *Id.* at 353–54.

[5] *Id.* at 354–55.

[6] *Id.*

[7] *Id.* at 350, 355.

[8] 449 U.S. 490, 518 (1981).

[9] *Id.* at 512–14.

immigration visa through fraud, he could not establish that he was *lawfully* admitted to the United States for permanent residence, as required for naturalization under the INA, and thus, his citizenship was "illegally procured."[10]

Further, the Court rejected Fedorenko's claim that a district court could, as an exercise of discretion, decline to enter a judgment of denaturalization against a person who procured his citizenship unlawfully.[11] The Court stated that "once a district court determines that the Government has met its burden of proving that a naturalized citizen obtained citizenship illegally or by willful misrepresentation, it has no discretion to excuse the conduct."[12]

Eventually, in its 1988 decision in *Kungys v. United States*, the Supreme Court clarified the test for determining whether a concealment or misrepresentation is "material" under the INA's denaturalization provision.[13] In that case, the Court considered whether willful misrepresentations by a naturalized German national, Juozas Kungys, about the date and place of his birth were material for purposes of his denaturalization proceeding.[14] The Court rejected the notion that a misrepresentation or concealment is material if it would more likely than not have produced an erroneous decision, or would more likely than not have triggered an investigation, as the Court had suggested in *Chaunt*.[15] Instead, the Court held that materiality is established if the government presents "clear, unequivocal, and convincing" evidence that the misrepresentation or concealment "had a natural tendency to produce the conclusion that the applicant was qualified" for citizenship.[16]

Applying this standard, the Court held that Kungys's misrepresentation of the date and place of his birth was not material for purposes of his denaturalization proceeding because there was no indication that it had the natural tendency to influence the immigration official's decision whether to confer citizenship.[17] The Court determined there was no suggestion that Kungys's date and place of birth were "themselves relevant to his qualifications for citizenship," or that knowledge of his true date and place of birth would "predictably have disclosed other facts relevant to his qualifications."[18]

The Court also noted that, apart from showing a material misrepresentation or concealment, the government in a denaturalization proceeding must show that the naturalized citizen *procured* citizenship as a result of the misrepresentation or concealment.[19] The Court held that proof of a misrepresentation's materiality established a presumption that the naturalized citizen procured citizenship based on the misrepresentation, but that the

[10] *Id.* at 514–15, 518; *see* 8 U.S.C. § 1427(a) (requiring applicant to show five years of continuous residence in the United States after being lawfully admitted for permanent residence).

[11] *Fedorenko*, 449 U.S. at 516–17.

[12] *Id.* at 517.

[13] 485 U.S. 759 (1988).

[14] *Id.* at 766–67.

[15] *Id.* at 771. In *Kungys*, the Court explained that *Chaunt* had not provided "a conclusive judicial test" for determining whether a misrepresentation or concealment was "material," and noted that subsequent judicial rulings have struggled to uniformly interpret the materiality standard under *Chaunt*. *Id.* at 768–69.

[16] *Id.* at 772. The Court based this standard on the "uniform understanding" of "materiality" that had been adopted by courts in construing federal statutes criminalizing false statements to public officials. *Id.* at 770.

[17] *Id.* at 775–76.

[18] *Id.* at 774.

[19] *Id.* at 767; *see* 8 U.S.C. § 1451(a) (authorizing government to institute proceedings against a naturalized citizen on the ground that his order of citizenship and certificate of naturalization "were illegally procured or were procured by concealment of a material fact or by willful misrepresentation").

presumption could be rebutted "by showing, through a preponderance of the evidence, that the statutory requirement as to which the misrepresentation *had a natural tendency* to produce a favorable decision was in fact met."[20]

ArtI.S8.C4.1.6 Expatriation

ArtI.S8.C4.1.6.1 Expatriation (Termination of Citizenship) Generally

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Besides revoking citizenship fraudulently or unlawfully obtained through denaturalization, Congress may have the power to terminate citizenship as a result of an individual's voluntary actions abroad that evince an intent to relinquish citizenship.[1] Unlike its power over denaturalization, Congress's power over expatriation does not derive from any specific enumerated power in the Constitution.[2] But informed by the notion that an individual has the inherent right of expatriation, Congress has established a statutory framework that provides for the expatriation of U.S. citizens in certain specified circumstances.[3]

ArtI.S8.C4.1.6.2 Development of Expatriation Doctrine

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Under British common law, the "doctrine of perpetual allegiance" prescribed that an individual retained allegiance to his country of nationality, and could not lose that "bond of allegiance" through his own actions or the acts of a foreign nation.[1] But during the early years of the United States, there was some disagreement over whether a U.S. citizen had the right to

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[20] *Kungys*, 485 U.S. at 777. The Court also considered whether false testimony has a materiality requirement for purposes of establishing a lack of good moral character for naturalization. *Id.* at 779; *see* 8 U.S.C. §§ 1101(f)(6) (providing that one who has given false testimony for the purpose of obtaining immigration benefits does not have good moral character); 1427(a) (requiring naturalization applicant to show that he "has been and still is a person of good moral character" during the requisite periods of continuous residence). Citing the INA provision that enumerates the types of conduct that show a lack of good moral character, the Court observed that, with respect to false testimony, the statutory language "does not distinguish between material and immaterial misrepresentations," and concluded that there was no materiality requirement for false testimony. *Kungys*, 485 U.S. at 779–80.

[1] *See* Perez v. Brownell, 356 U.S. 44, 61 (1958), *overruled on other grounds by* Afroyim v. Rusk, 387 U.S. 253 (1967) (describing Congress's power "to enact legislation depriving individuals of their American citizenship").

[2] *See Afroyim*, 387 U.S. at 257 ("The Constitution of course, grants Congress no express power to strip people of their citizenship, whether in the exercise of the implied power to regulate foreign affairs or in the exercise of any specifically granted power."); *Perez*, 356 U.S. at 66 (Warren, C.J., dissenting) ("The Constitution also provides that citizenship can be bestowed under a 'uniform Rule of Naturalization, but there is no corresponding provision authorizing divestment. Of course, naturalization unlawfully procured can be set aside. But apart from this circumstance, the status of the naturalized citizen is secure.").

[3] *Afroyim*, 387 U.S. at 258 ("By 1818, however, almost no one doubted the existence of the right of voluntary expatriation, but several judicial decisions had indicated that the right could not be exercised by the citizen without the consent of the Federal Government in the form of enabling legislation."); *Perez*, 356 U.S. at 66 (Warren, C.J., dissenting) ("There is no question that citizenship may be voluntarily relinquished.").

[1] *See* Jonathan David Shaub, *Expatriation Restored*, 55 Harv. J. on Legis. 363, 370–71 (2018) ("Under British law at the time of the Declaration of Independence, the bond of allegiance between a sovereign and its subject was an immutable, permanent bond established by the law of nature.").

renounce citizenship.[2] Some argued that the doctrine of perpetual allegiance restricted an individual's ability to relinquish citizenship, while others contended that there was an inherent right of expatriation.[3] In one early case, *Talbot v. Jansen*, the Supreme Court in 1795 determined that a U.S. citizen's temporary absence from the United States could not be construed as an expatriation.[4] The U.S. citizen had captured a Dutch vessel in violation of piracy laws, and, when arrested upon returning to the United States, he claimed that he had expatriated himself by swearing allegiance to France.[5] While concluding that the individual "was, and still is, a citizen of the United States," the Court noted that "[a] statute of the United States, relative to expatriation is much wanted."[6]

Eventually Congress in 1868 passed a law declaring that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness."[7] The law prohibited government action that denied or restricted the right of expatriation, and provided protections to foreign nationals who had relinquished their native citizenship to become U.S. citizens, and who were detained by their former governments.[8] While the 1868 Act recognized an "inherent right" of expatriation, the law did not specify the circumstances in which an individual would be considered to have expatriated himself, or address the government's authority to remove citizenship on the grounds of expatriation.[9]

After the 1868 expatriation act, the United States entered into treaties with other countries that sought to resolve certain disagreements about citizenship.[10] While these treaties generally clarified that persons naturalized in a country would be considered citizens of that country, they also contemplated circumstances in which citizenship could be lost based on the commission of certain acts.[11] Based on these treaties, the State Department began issuing ad hoc rulings that determined, in individual cases, whether U.S. citizens had lost their citizenship following the commission of certain acts abroad.[12] These administrative rulings

[2] *Id.* at 372 ("The question of expatriation was of fundamental importance during the early days of the United States, and the debate largely fell along the familiar divide between the Federalists and Republicans, exemplified by the distinctly different views of Thomas Jefferson and Alexander Hamilton."); *see also* Afroyim v. Rusk, 387 U.S. 253, 257 (1967) ("And even before the adoption of the Fourteenth Amendment, views were expressed in Congress and by this Court that under the Constitution the Government was granted no power, even under its express power to pass a uniform rule of naturalization, to determine what conduct should and should not result in the loss of citizenship.").

[3] *See* Alan G. James, *Expatriation in the United States: Precept and Practice Today and Yesterday*, 27 San Diego L. Rev. 853, 862 (1990) ("Secretaries of State Jefferson, Marshall, Madison, and Monroe vigorously defended the view that expatriation is a natural right."); Shaub, *supra* note 1, at 372 ("The Federalists, by contrast, continued to espouse a vestige of the doctrine of perpetual allegiance, in which the sovereign retained authority over the relinquishment of citizenship.").

[4] 3 U.S. (3 Dall.) 133, 153–54 (1795).

[5] *Id.* at 152–54.

[6] *Id.* at 153–54; *see also* Shanks v. Dupont, 28 U.S. 242, 246 (1830) ("The general doctrine is, that no persons can by any act of their own, without the consent of the government, put off their allegiance, and become aliens."), *superseded by statute*, Act of July 27, 1868, ch. 249, 15 Stat. 223.

[7] Act of July 27, 1868, ch. 249, 15 Stat. 223.

[8] *Id.*

[9] *Id.*; *see also* Afroyim v. Rusk, 387 U.S. 253, 265–66 (1967) ("The Act, as finally passed, merely recognized the 'right of expatriation' as an inherent right of all people.").

[10] *See* James, *supra* note 3, at 866 ("Typically, these treaties provided that each of the signatories would acknowledge as a citizen of the other such of its citizens who became naturalized by the other. The treaties thus removed a serious irritant from the relations of the United States with the states with which they were concluded.").

[11] *See* Perez v. Brownell, 356 U.S. 44, 48 (1958) ("This series of treaties initiated this country's policy of automatic divestment of citizenship for specified conduct affecting our foreign relations."), *overruled by* Afroyim v. Rusk, 387 U.S. 253 (1967) .

[12] *See id.* at 49 ("On the basis, presumably, of the Act of 1868 and such treaties as were in force, it was the practice of the Department of State during the last third of the nineteenth century to make rulings as to forfeiture of United

laid the groundwork for legislation that would authorize the government to strip citizenship from U.S. citizens who were considered to have expatriated themselves abroad.[13]

ArtI.S8.C4.1.6.3 Expatriation Legislation

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

In 1907, Congress passed a law on the expatriation of U.S. citizens.[1] The legislation provided that a U.S. citizen was "deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state."[2] The law also provided that, if a naturalized U.S citizen resided for two years in his or her native country, or for five years in any other foreign country, there was a rebuttable presumption that the U.S. citizen "ceased to be an American citizen."[3] Further, the law provided that "any American woman who marries a foreigner shall take the nationality of her husband," but allowed the woman to resume her U.S. citizenship upon the termination of the marriage if certain requirements were met.[4]

In 1940, Congress passed a more comprehensive nationality law that enumerated various circumstances in which a U.S. citizen (whether by birth or naturalization) would lose citizenship.[5] These circumstances (subject to certain exceptions) included obtaining citizenship in a foreign country; taking an oath of allegiance to a foreign country; serving in the armed forces of a foreign country; accepting certain foreign employment; voting in a political election in a foreign country; making a formal renunciation of nationality in a foreign country; conviction by military court martial of desertion during a time of war; and committing an act of treason against (or seeking to overthrow) the United States.[6] The statute also clarified when a naturalized U.S. citizen would lose citizenship by residing in his or her native country or another foreign country.[7]

States citizenship by individuals who performed various acts abroad."); Shaub, *supra* note 1, at 384 ("Recognizing that the United States had no authority to determine whether a foreign nation, under its law, considered a particular individual its citizen or subject, the United States entered into a series of international treaties and began to formulate a body of Executive Branch common law to implement them. The State Department was responsible for receiving and responding to requests for assistance from U.S. citizens abroad, and, in administering this responsibility, it applied the Executive Branch common law.").

[13] *See Perez*, 356 U.S. at 49 ("[I]t was recognized in the Executive Branch that the [State] Department had no specific legislative authority for nullifying citizenship, and several of the Presidents urged Congress to define the acts by which citizens should be held to have expatriated themselves."); Shaub, *supra* note 1, at 384 ("Ultimately, the rules and procedures of the Executive Branch common law were codified.").

[1] *See* Act of Mar. 2, 1907, ch. 2534, § 2, 34 Stat. 1228, 1228.

[2] *Id.* However, no U.S. citizen could expatriate himself when the United States was in a state of war. *Id.*

[3] *Id.* The presumption could be "overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States." *Id.*

[4] *Id.* § 3. Conversely, a foreign-born woman who obtained U.S. citizenship through marriage to a U.S. citizen was deemed to have retained her citizenship after termination of that marriage if she continued to reside in the United States (unless she formally renounced her U.S. citizenship). *Id.* § 4. If the woman resided abroad, she could retain her U.S. citizenship by registering abroad with a U.S. consul within one year after termination of the marriage. *Id.*

[5] *See* Nationality Act of 1940, ch. 876, § 401, 54 Stat. 1137, 1168–69.

[6] *Id.* § 401.

[7] *Id.* §§ 404, 405, 406. The law did not provide for the expatriation of U.S. citizen women who married non-U.S. citizens, as the 1907 law had required.

ArtI.S8.C4.1.6.3
Expatriation Legislation

Through enactment of the INA in 1952, Congress expanded the range of conduct that would trigger a loss of U.S. citizenship.[8] The INA added, as grounds for expatriation, the acts of making a formal renunciation of nationality in the United States during a time of war, and leaving or remaining outside the United States during a time of war or national emergency to avoid military service.[9] The INA also provided that a naturalized U.S. citizen would lose nationality by "having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated," or by "having a continuous residence for five years in any other foreign state or states."[10] The INA did not contain a similar foreign residence restriction for native-born U.S. citizens.

ArtI.S8.C4.1.6.4 Judicial Recognition of Congress's Expatriation Power

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

In a number of cases, the Supreme Court considered Congress's authority to remove citizenship based on the performance of specified acts. Initially, the Court determined that Congress had broad authority to remove citizenship that was rooted in its power to regulate foreign affairs. But the Court later imposed limitations on Congress's authority, concluding that Congress can only remove citizenship from those who voluntarily commit specified acts with the intention of relinquishing their citizenship.

For example, in *Mackenzie v. Hare*, the Court in 1915 considered a challenge to the 1907 Act's provision that terminated citizenship of U.S. citizen women who married foreign nationals.[1] The Court rejected the plaintiff's contention that expatriation can be shown only by an act demonstrating a voluntary renunciation of citizenship.[2] Instead, the Court upheld the statute as a lawful exercise of Congress's authority to regulate foreign affairs and determine the conditions of nationality.[3]

Several decades later, in *Perez v. Brownell*, the Court in 1958 addressed a constitutional challenge to the INA provision that removed citizenship from a U.S. citizen who voted in a foreign political election.[4] The Court declared that "[a]lthough there is in the Constitution no

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[8] *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 349(a), 66 Stat. 163, 267 (codified as amended at 8 U.S.C. § 1481(a)). The INA stated that that anyone who committed or performed one of the enumerated acts was "conclusively presumed" to have done the act voluntarily if that person was "a national of the state in which the act was performed and had been physically present in such state for a period or periods totaling ten years or more immediately prior to such act." *Id.* § 349(b).

[9] *Id.* § 349(a) (codified as amended at 8 U.S.C. § 1481(a)). The INA provided that no U.S. citizen could expatriate himself while *in the United States* (except if he or she made a formal renunciation of nationality in the United States during a time of war, was convicted by military court martial of desertion during a time of war, or committed an act of treason against the United States), but that expatriation would occur as a result of the performance of one of the enumerated acts within the United States when the individual subsequently resided outside the United States. *Id.* § 351(a) (codified at 8 U.S.C. § 1483(a)).

[10] *Id.* § 352(a), *repealed by* Act of Oct. 10, 1978, Pub. L. No. 95-432, § 2, 92 Stat. 1046. The INA provided for some exceptions to this restriction, such as for those who maintained their residence abroad in the employment of the U.S. Government, those whose residence abroad occurred at least twenty-five years after their naturalization and after they reached the age of sixty, those who were prevented from returning to the United States for health reasons, those who resided abroad for educational purposes, and certain war veterans and their immediate families. *Id.* §§ 353, 354, *repealed by* Act of Oct. 10, 1978, Pub. L. No. 95-432, § 2, 92 Stat. 1046.

[1] 239 U.S. 299, 306–07 (1915).

[2] *Id.* at 310–12.

[3] *Id.* at 311–12.

[4] 356 U.S. 44, 47 (1958), *overruled by* Afroyim v. Rusk, 387 U.S. 253 (1967).

specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation."[5] The Court determined that Congress's power to regulate foreign affairs authorized it to make voting in foreign elections an act of expatriation.[6] Additionally, while the Court recognized that "Congress can attach loss of citizenship only as a consequence of conduct engaged in voluntarily," the Court rejected the notion that an individual must *intend* to relinquish citizenship.[7]

ArtI.S8.C4.1.6.5 Judicial Limits on Congress's Expatriation Power

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

In a series of cases decided in the 1950s and 1960s, the Supreme Court established some constraints upon Congress's expatriation power.[1] As for the standard of proof to establish expatriation, the Supreme Court in the 1958 case of *Nishikawa v. Dulles* held that the standard adopted in *Schneiderman v. United States* for denaturalization applied to expatriation cases.[2] Under this standard, the government has the burden of proving by "clear, convincing and unequivocal evidence" that a U.S. citizen voluntarily performed one of the statutorily enumerated acts that results in loss of citizenship.[3] Applying this standard, the Court held that the government failed to prove that a dual U.S.-Japanese citizen, Nishikawa, lost his U.S. citizenship by serving in the Japanese military during World War II because, according to his testimony, he had been drafted into the Japanese military under the country's penal conscription law while visiting Japan.[4]

Apart from setting the standard of proof for expatriation, the Supreme Court has struck down certain expatriation provisions as unconstitutional. In *Trop v. Dulles*, decided the same day as *Nishikawa*, the Court held that the statutory provision revoking citizenship of U.S. citizens convicted by general court martial of desertion was unconstitutional because it exceeded Congress's war power.[5] The Court reasoned that "[d]esertion in wartime, though it

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[5] *Perez*, 356 U.S. at 57.

[6] *Id.* at 59–62. The Court reasoned that "Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship." *Id.* at 61.

[7] *Id.* at 61–62. The Court also briefly considered the Citizenship Clause of Fourteenth Amendment, which instructs that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." *Id.* at 58 n. 3; *see also* U.S. CONST. amend. XIV, § 1, cl. 1. The Court determined that "there is nothing in the terms, the context, the history or the manifest purpose of the Fourteenth Amendment to warrant drawing from it a restriction upon the power otherwise possessed by Congress to withdraw citizenship." *Perez*, 356 U.S. at 58 n.3. For more information about the Citizenship Clause, see Amdt14.S1.1.2 Citizenship Clause Doctrine.

[1] *See* Afroyim v. Rusk, 387 U.S. 253, 255 (1967) ("[I]n the other cases decided with and since *Perez*, this Court has consistently invalidated on a case-by-case basis various statutory sections providing for involuntary expatriation.").

[2] Nishikawa v. Dulles, 356 U.S. 129, 134–35 (1958), *superseded by statute*, 8 U.S.C. § 1481(b).

[3] *Id.* at 135–37, 137; *see also* Schneiderman v. United States, 320 U.S. 118, 122 (1943) (declaring that the right of citizenship "should not be taken away without the clearest sort of justification and proof"). The Court reasoned that, given the "drastic" consequences of depriving someone of his or her citizenship, the government should have the burden of proving voluntariness, which the Court described as "the essential ingredient of expatriation." *Nishikawa*, 356 U.S. at 134–35, 137. However, if voluntariness is not at issue, "the Government makes its case simply by proving the objective expatriating act." *Id.* at 136.

[4] *Nishikawa*, 356 U.S. at 136–37.

[5] 356 U.S. 86, 92–93 (1958).

may merit the ultimate penalty, does not necessarily signify allegiance to a foreign state."[6] The Court declared that "[c]itizenship is not a license that expires upon misbehavior," and concluded that "[a]s long as a person does not voluntarily renounce or abandon his citizenship, . . . his fundamental right of citizenship is secure."[7]

In the alternative, the Court held that revoking citizenship as punishment for a crime violates the Eighth Amendment's prohibition against "cruel and unusual" punishment because it causes "the total destruction of the individual's status in organized society."[8] For instance, the Court explained, the individual would become stateless, "a condition deplored in the international community of democracies," and subject only to the limited and potentially temporary protections available in the country where he happens to reside.[9] Furthermore, although the crime of desertion was punishable by death under criminal statutes, "the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination."[10]

In the 1963 case of *Kennedy v. Mendoza-Martinez*, the Supreme Court struck down the statutory provision that divested citizenship for leaving or remaining outside the United States at a time of war or national emergency to evade military service.[11] As in *Trop*, the Court construed the Immigration and Nationality Act (INA) provision as punitive because it strictly imposed penalties on those who engaged in specified conduct.[12] The Court held that the provision violated the Fifth and Sixth Amendments because it exacted a punishment (loss of citizenship) without providing any procedural safeguards, such as notice, the right to trial, the right to counsel, and the right to present witnesses.[13]

The term after it decided *Mendoza-Martinez*, the Supreme Court in *Schneider v. Rusk* considered the constitutionality of the INA's expatriation provision for naturalized U.S. citizens who maintained a continuous residence in their native country for three years.[14] The case involved a German national, Angelika Schneider, who had derived U.S. citizenship through her mother when she was a child, but later resided in Germany following her marriage to a German national.[15] Eventually, the State Department denied Schneider a passport on the ground that she lost her citizenship by maintaining a continuous residence in Germany, her native country, for at least three years.[16]

Because "the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive," the Supreme Court held that the INA's expatriation provision violated due process by unjustifiably discriminating between naturalized U.S. citizens and native-born U.S. citizens, who were not subject to the INA's foreign residence

[6] *Id.* at 92.

[7] *Id.* at 92–93; *see also id.* at 92 ("The right may be voluntarily relinquished or abandoned either by express language or by language and conduct that show a renunciation of citizenship.").

[8] *Id.* at 99, 101–02. The Court rejected the government's contention that the statute authorizing expatriation based on military desertion was regulatory, rather than penal, in nature, concluding that "[t]he purpose of taking away citizenship from a convicted deserter is simply to punish him. There is no other legitimate purpose that the statute could serve." *Id.* at 97.

[9] *Id.* at 101–02.

[10] *Id.* at 99.

[11] 372 U.S. 144, 165–66 (1963).

[12] *Id.* at 180–84.

[13] *Id.* at 166–67.

[14] 377 U.S. 163 (1964).

[15] *Id.* at 164.

[16] *Id.*

restriction.[17] The Court reasoned that, although Congress has the power to set forth the various requirements for naturalization, "[t]he constitution does not authorize Congress to enlarge or abridge those rights" that are equally conferred upon both naturalized and native-born U.S. citizens.[18]

During this period, the Supreme Court also considered the constitutionality of removing citizenship from those who voted in a foreign political election. In its 1958 decision in *Perez v. Brownell*, the Supreme Court had initially ruled that Congress's inherent authority to regulate foreign affairs enabled it to make voting in foreign elections an act of expatriation resulting in loss of U.S. citizenship.[19] A few years later in *Afroyim v. Rusk*, however, the Supreme Court in 1967 reexamined this issue and reached a different conclusion.[20] *Afroyim* involved a naturalized U.S. citizen, Beys Afroyim, who voted in an Israeli election and was denied the opportunity to renew his U.S. passport on the ground that he had lost his U.S. citizenship.[21] Afroyim argued that the government's termination of his citizenship without his voluntary renunciation of it violated his right to due process under the Fifth Amendment, as well as the Fourteenth Amendment's command that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."[22]

In striking down the relevant statute, the Court turned away from the view expressed in *Perez* that Congress "has any general power, express or implied, to take away an American citizen's citizenship without his assent."[23] The Court rejected the theory that Congress derived the power to forcefully remove citizenship from its power to regulate foreign affairs, or "as an implied attribute of sovereignty possessed by all nations."[24] Further, the Court observed that the Fourteenth Amendment declares that all persons born or naturalized in the United States are U.S. citizens, and that "[t]here is no indication in these words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time."[25] Instead, the Court held, a U.S. citizen has a constitutional right under the Fourteenth Amendment to remain a citizen unless he *voluntarily relinquishes* his citizenship, and the Federal Government has no power to terminate citizenship without the individual's consent.[26] This conclusion, the Court determined, "comports more nearly than *Perez* with the principles of liberty and equal justice to all that the entire Fourteenth Amendment was adopted to guarantee."[27]

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[17] *Id.* at 165, 168–69.

[18] *Id.* at 166. The Court rejected the government's contention that the expatriation provision reasonably advanced concerns that a naturalized citizen's prolonged residence in his or her native country would call into question allegiance to the United States and reliability as a U.S. citizen. *Id.* at 165, 168. Noting that native-born citizens may reside abroad indefinitely without losing their citizenship, the Court determined that "[l]iving abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance." *Id.* at 168–69. In fact, the Court observed, residing abroad "may indeed be compelled by family, business, or other legitimate reasons." *Id.* at 169. Accordingly, the Court held that the foreign residence restriction significantly impeded a naturalized U.S. citizen's ability "to live and work abroad in a way that other citizens may," and essentially created "a second-class citizenship." *Id.* at 168–69.

[19] 356 U.S. 44, 59–62 (1958), *overruled by* Afroyim v. Rusk, 387 U.S. 253 (1967).

[20] 387 U.S. 253 (1967).

[21] *Id.* at 254.

[22] *Id.* at 254–55; *see also* U.S. Const. amend. XIV, § 1, cl. 1.

[23] *Afroyim*, 387 U.S. at 257.

[24] *Id.* at 257, 263.

[25] *Id.* at 262.

[26] *Id.* at 262, 267–68.

[27] *Id.* at 267.

ArtI.S8.C4.1.6.5
Judicial Limits on Congress's Expatriation Power

The Supreme Court most recently addressed expatriation in the 1980 case of *Vance v. Terrazas*.[28] In that case, a native-born U.S. citizen of Mexican descent, Laurence Terrazas, applied for and obtained a certificate of Mexican nationality while he was in Mexico, and renounced his allegiance to the United States in his application.[29] The Department of State determined that, based on these actions, Terrazas voluntarily relinquished his U.S. citizenship.[30] The Supreme Court disagreed, holding that, under *Afroyim*, evidence must show that "the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship."[31] Because the evidence failed to show that Terrazas specifically intended to relinquish his U.S. citizenship when he applied for Mexican nationality, the Court held that he did not expatriate himself.[32]

The Supreme Court's post-*Perez* jurisprudence signals that the government may not remove an individual's citizenship unless that person voluntarily commits a specified act with intent to renounce citizenship.[33] In response, Congress amended the INA to clarify that the government has the burden of proving by "a preponderance of the evidence" that an individual committed an expatriating act "with the intention of relinquishing nationality."[34] The amendments clarified that, when an individual commits one of the enumerated acts, there is a presumption that the individual acted voluntarily, but this presumption may be rebutted by a preponderance of evidence that the act was involuntary.[35] Congress also repealed INA provisions that removed citizenship based on voting abroad, military desertion, departure from the United States during a time of war, and maintaining a foreign residence—provisions ruled unconstitutional by the Supreme Court.[36]

[28] 444 U.S. 252 (1980).

[29] *Id.* at 255.

[30] *Id.* at 256.

[31] *Id.* at 261.

[32] *Id.* at 263.

[33] *See Afroyim*, 387 U.S. at 255 (observing that, since *Perez*, the Court "has refused to hold that citizens can be expatriated without their voluntary renunciation of citizenship").

[34] Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, §§ 18, 19, 100 Stat. 3655, 3658; Act of Sept. 26, 1961, Pub. L. No. 87-301, § 19, 75 Stat. 650, 656. In *Terrazas*, the Supreme Court rejected the argument that the standard of proof in expatriation cases should be a "clear and convincing evidence" standard rather than the "preponderance of the evidence" standard established by Congress. *Terrazas*, 444 U.S. at 264–65. The Court recognized that, in *Nishikawa*, it had required (in the absence of legislative guidance) the government to prove a voluntary expatriating act by clear and convincing evidence, but determined that Congress had constitutional authority to prescribe the evidentiary standards in repatriation cases. *Id.* at 265–66.

[35] Act of Sept. 26, 1961, § 19. Congress later removed the INA provision that "conclusively presumed" that a person voluntarily committed one of the enumerated acts if he or she was a national of the state in which the act was performed and had been physically present there for at least ten years. Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 19, 100 Stat. 3655, 3658. In *Terrazas*, the Supreme Court held that it was constitutional for Congress to create a presumption that the commission of an expatriating act is committed voluntarily. *Terrazas*, 444 U.S. at 270. But there is no presumption that the act was performed with the intent to relinquish citizenship. *Id.* at 268. The government still has the burden of proving that intent by a preponderance of the evidence. *Id.*

[36] Act of Oct. 10, 1978, Pub. L. No. 95-432, § 2, 92 Stat. 1046, 1046; Act of Sept. 14, 1976, Pub. L. No. 94-412, § 501(a), 90 Stat. 1255, 1258.

ArtI.S8.C4.2 Bankruptcy

ArtI.S8.C4.2.1 Overview of Bankruptcy Clause

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

The Bankruptcy Clause grants Congress power to enact uniform, national laws governing bankruptcies in the United States.[1] In the colonial period, domestic bankruptcy and insolvency matters were governed by each colony's individual laws. After ratification of the Constitution, state law continued to govern bankruptcy and insolvency matters until Congress passed the first federal bankruptcy law in 1800.[2] States retained the ability to enforce their own bankruptcy laws in subsequent periods when there was no national law.[3]

While early English bankruptcy law at the time of American independence existed merely as a collective remedy for creditors and applied to a narrow category of debtors, neither Congress nor the Supreme Court has ever accepted the view that, under the Bankruptcy Clause, Congress may only enact laws of the type that governed England in the eighteenth century. Over the years, Congress has expanded the coverage of bankruptcy laws, increasingly enlarging the scope of relief afforded debtors and the rights of creditors and other parties.[4] However, in exercising its bankruptcy power, Congress is subject to certain constitutional limitations, including the requirement that it enact "uniform" bankruptcy laws.[5]

When no national bankruptcy law exists, the states may enact and enforce their own bankruptcy and insolvency laws. During the country's first eighty-nine years under the Constitution, a national bankruptcy law existed for only sixteen years in total.[6] Congress's enactment of a national bankruptcy law does not invalidate conflicting state laws, but only suspends them.[7] Upon repeal of a national bankruptcy statute, conflicting state bankruptcy laws again come into operation without the need for re-enactment.[8]

The following essays examine the history and meaning of the Bankruptcy Clause. They first review the historical background of the Clause. They then consider how the Supreme Court has interpreted the scope of the Clause and constitutional limitations on Congress's exercise of its bankruptcy power. Finally, they review general restrictions on state bankruptcy power.

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[1] U.S. Const. art. I, § 8, cl. 4.

[2] Act of April 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803); *see* ArtI.S8.C4.2.6 Restrictions on State Bankruptcy Power.

[3] *See* ArtI.S8.C4.2.6 Restrictions on State Bankruptcy Power.

[4] *See* ArtI.S8.C4.2.3 Scope of Federal Bankruptcy Clause.

[5] U.S. Const. art. I, § 8, cl. 4; *see* ArtI.S8.C4.2.3 Scope of Federal Bankruptcy Clause.

[6] *See* ArtI.S8.C4.2.6 Restrictions on State Bankruptcy Power.

[7] *See* ArtI.S8.C4.2.6 Restrictions on State Bankruptcy Power.

[8] *See* Tua v. Carriere, 117 U.S. 201, 210 (1886); *see* ArtI.S8.C4.2.6 Restrictions on State Bankruptcy Power.

ArtI.S8.C4.2.2 Historical Background on Bankruptcy Clause

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Colonial American bankruptcy and insolvency laws were inspired by the English bankruptcy experience.[1] Under English law, creditors were authorized to institute involuntary bankruptcy proceedings against debtors who committed certain unauthorized "acts of bankruptcy."[2] The debtor's property was liquidated and the proceeds from liquidation were distributed to his or her creditors.[3] Only a trader or merchant qualified as a debtor for purposes of bankruptcy.[4] Debtors could not institute voluntary bankruptcy proceedings—instead, the early English bankruptcy system was by design a collective remedy for creditors.[5] Debtors could be punished by, among other measures, imprisonment and, by 1705, death.[6] English law did not allow for the discharge of a debtor's debts until 1705; however, by 1706, a discharge was only available upon the consent of one's creditors.[7]

In the American colonies, domestic bankruptcy and insolvency matters were governed by each colony's laws.[8] Early statutes typically were modeled on English laws, but later colonial laws began to differ from English practice in various ways.[9] As opposed to English law, colonial American laws "broadly centered on the plight of imprisoned debtors, with somewhat lesser emphasis on the issue of insolvent traders (to the exclusion of other debtors)."[10] Colonial

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[1] *See* Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause*, 64 Case W. Rsrv. L. Rev. 319, 337 (2013) (explaining that the early American approach to bankruptcy and insolvency "was heavily influenced by English practice," although noting that "it was never the case that English practice applied directly in the colonies"). Regarding the distinction between bankruptcy and insolvency laws, the Supreme Court has explained that "[w]hile attempts have been made to formulate a distinction between bankruptcy and insolvency, it long has been settled that, within the meaning of the constitutional provision, the terms are convertible." Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & P. R. Co., 294 U.S. 648, 667–68 (1938); *accord* Sturges v. Crowninshield, 17 U.S. 122, 194 (1819) ("[T]he subject is divisible in its nature into bankrupt and insolvent laws; though the line of partition between them is not so distinctly marked as to enable any person to say, with positive precision, what belongs exclusively to the one, and not to the other class of laws.").

[2] Lubben, *supra* note 1, at 329–30; Israel Treiman, *Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law*, 52 Harv. L. Rev. 189, 192 (1938). In 1542, during the reign of Henry VIII, Parliament passed what scholars generally consider England's first bankruptcy law. 34 & 35 Hen. 8, ch. 4 (1542); *see* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 329 n.21 (1991) [herinafter Tabb, *Discharge*]. England's second bankruptcy law arose in 1570 during Elizabeth I's reign. 13 Eliz., ch. 7 (1570). Parliament enacted several subseqent bankruptcy acts in the following years, although, as one scholar has noted, the 1570 act "filled out the basic parameters of the English bankruptcy system, lacking only the discharge provisions added in the early eighteenth century, and remained in effect until the time of the American Revolution." Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 8 (1995) [hereinafter Tabb, *History*].

[3] Tabb, *History*, *supra* note 2, at 8.

[4] Tabb, *History*, *supra* note 2, at 9, 12; Lubben, *supra* note 1, at 330.

[5] Tabb, *History*, *supra* note 2, at 8; Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 Tenn. L. Rev. 487, 500 (1996).

[6] Plank, *supra* note 5, at 506 (citing 4 Anne, ch. 17, §§ 1, 18 (1705)).

[7] Plank, *supra* note 5, at 506 (explaining that in 1706, "Parliament provided that the debtor could not receive a discharge unless 80% of the creditors, by number and by the value of the outstanding debts, consented") (citing 5 Anne, ch. 22, § 1 (1706); 4 Anne, ch. 17, § 7 (1705)); Tabb, *Discharge*, *supra* note 2, at 342 & n.112 (explaining that the English bankruptcy law in existence at the time of American independence retained the consent requirement, although it excluded creditors who held claims of less than £ 20) (citing 5 Geo. 2, c. 30, § 10 (1732)). A discharge refers to relief from some or all of one's debts. CRS Report R45137, Bankruptcy Basiscs: A Primer, by Kevin M. Lewis, at 28.

[8] *See* Lubben, *supra* note 1, at 337 ("Through a hodgepodge of general bankruptcy laws, often not titled as such, and private bills, the American colonies managed to provide a system of bankruptcy relief.").

[9] *See* Lubben, *supra* note 1, at 337–39.

[10] Lubben, *supra* note 1, at 337; *see* Plank, *supra* note 5, at 518–19.

legislatures often passed private bills that discharged individual debtors.[11] While English bankruptcy law did not directly govern creditor-debtor relations in the American colonies, colonial bankruptcy laws were subject to invalidation by the Privy Council.[12]

Following independence, bankruptcy and insolvency laws remained within the purview of the newly independent states. The Articles of Confederation did not empower Congress to establish federal bankruptcy laws.[13]

During the Constitutional Convention in Philadelphia, the Framers did not appear to spend a considerable amount of time debating what would become the Bankruptcy Clause.[14] Charles Pinckney of South Carolina proposed that the Convention add to what would become the Full Faith and Credit Clause[15] a provision granting Congress authority "[t]o establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange."[16] The Committee of Detail proposed adding slightly modified language—"to establish uniform laws on the subject of Bankruptcies"—to what would become the clause housing Congress's naturalization power.[17] The Convention ultimately approved the bankruptcy provision on September 3, 1787, with only Connecticut voting against the measure.[18] Roger Sherman of Connecticut objected to granting Congress authority to establish bankruptcy laws, remarking that in England, "[b]ankrutptcies were in some cases punishable with death."[19] In response, Gouverneur Morris of New York acknowledged that it "was an extensive & delicate subject," but agreed with the bankruptcy proposal because he did not see any "danger of abuse of the power by the Legislature of the U.S."[20]

Once the Constitution was submitted to the states for ratification, scant attention was paid to the Bankruptcy Clause in the ensuing public debate. In the *Federalist Papers*, James Madison remarked that the bankruptcy power "is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question."[21] However, some expressed opposition to the Bankruptcy Clause. For example, the Anti-Federalist "Federal Farmer" wrote in one letter that the bankruptcy power "will

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[11] Lubben, *supra* note 1, at 339.

[12] Lubben, *supra* note 1, at 339 ("A common problem throughout most of the colonies was the requirement that any commercial legislation, including bankruptcy statutes, obtain the approval of the Privy Counsel and its Lords of Trade. Quite often, colonies enacted statutes only to have them revoked by officials in London.").

[13] Lubben, *supra* note 1, at 340.

[14] *See* Plank, *supra* note 5, at 527 (explaining that the Constitutional Convention "adopted [the Bankruptcy Clause] with little debate").

[15] *See* U.S. Const. art. IV, § 1. For information on the Full Faith and Credit Clause, see ArtIV.S1.1 Overview of Full Faith and Credit Clause.

[16] Debates in the Federal Convention of 1787 as Reported by James Madison [hereinafter Debates in the Federal Convention of 1787], *in* Documents Illustrative of the Formation of the Union of the American States, H.R. Doc. No. 398, at 632 (1927); *see* Plank, *supra* note 5, at 527; Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. Rev. 22, 35 (1983).

[17] Debates in the Federal Convention of 1787, *supra* note 16, at 655; Plank, *supra* note 5, at 527; *see* U.S. Const. art. I, § 8, cl. 4. For an overview of Congress's naturalization power, see ArtI.S8.C4.1.1 Overview of Naturalization Clause.

[18] Debates in the Federal Convention of 1787, *supra* note 16, at 657.

[19] Debates in the Federal Convention of 1787, *supra* note 16, at 657.

[20] Debates in the Federal Convention of 1787, *supra* note 16, at 657.

[21] The Federalist No. 42 (James Madison). Madison wrote that the bankruptcy power was one of the powers contained in the Constitution that "provide for the harmony and proper intercourse among the States." *Id.*

immediately and extensively interfere with the internal police of the separate states" and aggrandize the new federal judiciary.[22] Ultimately, however, the Clause was not a focal point for extensive debate during this period.

ArtI.S8.C4.2.3 Scope of Federal Bankruptcy Clause

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

In an 1817 opinion issued while riding circuit, Justice Henry Livingston suggested that because the English statutes on the subject of bankruptcy from the time of Henry VIII down had applied only to traders, it might "well be doubted, whether an act of Congress subjecting to such a law every description of persons within the United States, would comport with the spirit of the powers vested in them in relation to this subject."[1] Neither Congress nor the Supreme Court has ever accepted this limited view. The first bankruptcy law, passed in 1800, departed from the English practice by including bankers, brokers, factors, and underwriters as well as traders.[2] Justice Joseph Story argued that the narrow scope of the English bankruptcy statutes merely reflected Parliament's policy judgment about how far bankruptcy relief should extend, but that this policy judgment was not an immutable part of the nature of bankruptcy laws.[3] Justice Story defined bankruptcy legislation, in a constitutional sense, as lawmaking provisions for persons who failed to pay their debts.[4]

This interpretation has been ratified by the Supreme Court. In *Hanover National Bank v. Moyses*,[5] the Court upheld the Bankruptcy Act of 1898,[6] which provided that persons other than traders might become bankrupts and that this might be done on voluntary petition.[7] Over the years, the Court has given tacit approval to extending bankruptcy laws to cover a variety of classes of persons and corporations,[8] including municipal corporations[9] and wage-earning individuals.[10] In its 1935 decision in *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry.*,[11] the Court wrote that "as far reaching" as the federal bankruptcy laws up to that point had been, they "have not gone beyond the limit of Congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed."[12]

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[22] Letter XVIII of the Federal Farmer (Jan. 25, 1788), *in* 2 The Complete Anti-Federalist 344 (Herbert J. Storing ed., 1981). While not seeking the Clause's elimination, the New York ratifying convention recommended that the scope of Congress's bankruptcy power be limited "to merchants and other traders," and that the states be permitted to "pass laws for the relief of other insolvent debtors." NY Ratification Convention Debates and Proceedings (July 25, 1788), https://www.consource.org/document/ny-ratification-convention-debates-and-proceedings-1788-7-25/.

[1] Adams v. Storey, 1 F. Cas. 141, 142 (C.C.D.N.Y. 1817).

[2] Act of April 4, 1800, ch. 19, 2 Stat. 19 (1800) (repealed 1803).

[3] 2 Joseph Story, Commentaries on the Constitution of the United States § 1113 (1833).

[4] *Id.*

[5] 186 U.S. 181 (1902).

[6] Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978).

[7] Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 187 (1902).

[8] Continental Bank v. Rock Island Ry., 294 U.S. 648, 670 (1935)

[9] United States v. Bekins, 304 U.S. 27 (1938).

[10] *See* Perry v. Commerce Loan Co., 383 U.S. 392, 394–95 (1966).

[11] 294 U.S. 648 (1935).

[12] *Id.* at 671. The Court has emphasized the breadth of Congress's bankruptcy power by acknowledging that the Constitution's framers "understood that laws 'on the subject of Bankruptcies' included laws providing, in certain

Congress repealed and replaced the 1898 act with the Bankruptcy Reform Act of 1978.[13] The 1978 act, as amended, is the current national bankruptcy law. It is commonly referred to as the Bankruptcy Code.

ArtI.S8.C4.2.4 Expansion of the Scope of Bankruptcy Power

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Through the years, Congress has expanded the coverage of the bankruptcy laws. As a result, the scope of statutory relief afforded debtors and the rights of creditors have been correspondingly adjusted. The act of 1800,[1] like its English antecedents, was designed primarily to benefit creditors.[2] Beginning with the act of 1841,[3] which first permitted voluntary petitions, debtor rehabilitation has become an object of increasing importance in American bankruptcy law.[4] Under the act of 1867,[5] as amended in 1874,[6] the debtor was permitted, either before or after adjudication of his or her bankruptcy, to propose terms of composition that would become binding if accepted by a designated majority of his or her creditors and confirmed by a bankruptcy court.[7] In a decision by the United States District Court for the Southern District of New York that the Supreme Court would later cite with approval, future-Justice Samuel Blatchford held that this measure was constitutional.[8] The Supreme Court has upheld the constitutionality of laws that provided for the reorganization of corporations that were insolvent or unable to meet their debts as they matured,[9] limitation of landlords' claims for indemnification for rent,[10] and composition and extension of debts in proceedings for the relief of individual farmer debtors.[11] The Court also has concluded that a bankruptcy court is permitted under the Constitution to authorize sales of property free from

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limited respects, for more than simple adjudications of rights in the res," such as those granting courts "the power to issue ancillary orders enforcing their *in rem* adjudications." Cent. Va. Cmty. College v. Katz, 546 U.S. 356, 370 (2006); *cf.* Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 Tenn. L. Rev. 487, 499 (1996) (writing that the development of federal bankruptcy laws led "courts and scholars [to conclude] that the boundaries of the Bankruptcy Clause are constantly expanding to meet the new demands and forms of commercial and business development").

[13] Pub. L. 95-598, 92 Stat. 2549 (Nov. 6, 1978) (codified at 11 U.S.C. §§ 101 et seq.).

[1] Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803).

[2] *See* Continental Bank v. Rock Island Ry., 294 U.S. 648, 670 (1935).

[3] Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (repealed 1843).

[4] *See* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 588 (1935) ("The discharge of the debtor has come to be an object of no less concern than the distribution of his property.").

[5] Act of March 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878).

[6] Act of June 22, 1874, ch. 390, 18 Stat. 178 (repealed 1878).

[7] *Id.* § 17, 18 Stat. at 182–84. Under the composition procedure of the 1874 amendments, a debtor could offer a plan to retain its property and repay its creditors a portion of its obligations over a period of time. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 21 (1995) (discussing Section 17 of the 1874 amendments). If a creditor did not agree to the composition agreement, the 1874 amendments provided that the creditor must obtain the same amount of value it would have obtained in liquidation proceedings. *Id.* at 21 (citing Act of June 22, 1874, Ch. 390, § 17, 18 Stat. at 183).

[8] In re Reiman, 20 F. Cas. 490 (D.C.S.D.N.Y. 1874) (Blatchford, J.), cited with approval in *Continental Bank*, 294 U.S. at 672.

[9] *Rock Island Ry.*, 294 U.S. 648, 671–75 (1935).

[10] Kuehner v. Irving Trust Co., 299 U.S. 445, 450–51 (1937).

[11] Wright v. Vinton Branch, 300 U.S. 440, 466–70 (1937); Adair v. Bank of America Ass'n, 303 U.S. 350, 355–56 (1938).

encumbrance by state tax liens,[12] and that, because Congress "possesses supreme power in respect of bankruptcies," a state that desires to recover assets in a bankruptcy must comply with bankruptcy court requirements regarding filing claims by a designated date.[13]

Congress's bankruptcy power is not limited to adjusting creditor rights. The Supreme Court has ruled that Congress's bankruptcy power extends to a purchaser's rights at a judicial sale of a debtor's property, and Congress may modify such rights by reasonably extending the period for redemption from such sale.[14] The Court has also held that a federal law permitting reorganization courts to stay pending bankruptcy court proceedings "was within the power of Congress,"[15] and that a statute enacted under Congress's bankruptcy power deprived a state court of power to proceed with pending foreclosure proceedings after a farmer-debtor filed a petition in federal bankruptcy court for a composition or extension of time to pay his debts.[16] All of these developments demonstrate the Supreme Court's broad view of "the subject of Bankruptcies."[17] In *Wright v. Union Central Life Insurance Co.*,[18] the Court explained that, while "incapable of final definition," "[t]he subject of bankruptcies is nothing less than the subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief."[19]

The Court considered the relationship between the Bankruptcy Clause and the Eleventh Amendment[20] in *Central Virginia Community College v. Katz*.[21] In *Katz*, the Court determined that the Eleventh Amendment poses no obstacle to proceedings by bankruptcy trustees to

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[12] Van Huffel v. Harkelrode, 284 U.S. 225, 228 (1931); *see* Gardner v. New Jersey, 329 U.S. 565, 578 (1947) (stating, citing *Van Huffel*, that "[t]he constitutional authority of Congress to grant the bankruptcy court power to deal with the lien of a State has been settled," and holding that a "reorganization court [had] jurisdiction over" property "on which [the State of] New Jersey assert[ed] a lien, and that the power of the court to deal with liens extend[ed] to the lien which New Jersey claim[ed]").

[13] New York v. Irving Trust Co., 288 U.S. 329, 333 (1933).

[14] Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 514–15 (1938). A right of redemption is "the right of the borrower to redeem the property by paying off the entire balance of the mortgage" and a "redemption period is a period during which the borrower has redemption rights." Andra Ghent, *How Do Case Law and Statute Differ? Lessons from the Evolution of Mortgage Law*, 57 J. Law & Econ. 1085, 1090 (2014).

[15] Duggan v. Sansberry, 327 U.S. 499, 510 (1946).

[16] Kalb v. Feuerstein, 308 U.S. 433, 439–40 (1940). The Court has upheld or opined on other statutory provisions as within the scope of Congress's bankruptcy power. *See* Reconstruction Fin. Corp. v. Denver & R. G. W. R. Co., 328 U.S. 495, 509 (1946) (holding that Congress's delegation of "authority to the [Interstate Commerce] Commission to eliminate valueless claims from participation in reorganization is a valid exercise of the federal bankruptcy power," and stating that this conclusion is a restatement of the Court's decisions in Group of Institutional Investors v. Chicago, M., S. P. & P. R. Co., 318 U.S. 523 (1943), and Ecker v. Western P. R. Corp., 318 U.S. 448 (1943)); *see also* BFP v. Resolution Trust Corp., 511 U.S. 531, 543 (1994) ("Surely Congress has the power pursuant to its constitutional grant of authority over bankruptcy . . . to disrupt the ancient harmony that foreclosure law and fraudulent conveyance law, those two pillars of debtor-creditor jurisprudence, have heretofore enjoyed. But absent clearer textual guidance . . . we will not presume such a radical departure."); Butner v. United States, 440 U.S. 48, 54 (1979) (opining that, although Congress had not elected to do so, "[t]he constitutional authority of Congress to establish 'uniform Laws on the subject of Bankruptcies throughout the United States' would clearly encompass a federal statute defining the mortgagee's interest in the rents and profits earned by property in a bankrupt estate") (quoting U.S. Const. art. I, § 8, cl. 4); Schumacher v. Beeler, 293 U.S. 367, 374 (1934) (explaining that "Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain . . . suits" by the bankruptcy trustee against an adverse claimant "and could prescribe the conditions upon which the federal courts should have jurisdiction."); United States v. Fox, 95 U.S. 670, 672 (1877) (explaining that statutory provisions designed to prevent fraud concerning the distribution of proceeds to creditors or the debtor's discharge "would seem to be within the competency of Congress").

[17] U.S. Const. art. I, § 8, cl. 4 (Congress is empowered "[t]o establish . . . uniform Laws on *the subject of Bankruptcies* throughout the United States" (emphasis added)).

[18] 304 U.S. 502 (1938).

[19] *Id.* at 513–14 (citation and internal quotation marks omitted).

[20] U.S. Const. amend. XI. For more information about the Eleventh Amendment, see Amdt11.1 Overview of Eleventh Amendment, Suits Against States to Amdt11.6.4 Tort Actions Against State Officials.

[21] 546 U.S. 356 (2006).

avoid preferential transfers of property to state agencies and to recover such property. The Court held that, when they ratified the Bankruptcy Clause, states relinquished their ability to assert sovereign immunity as a defense in proceedings that implicate a bankruptcy court's authority over the debtor's property and the bankruptcy estate.[22] The Court determined that given this relinquishment, Congress's effort to abrogate sovereign immunity in Section 106 of the Bankruptcy Code[23] was unnecessary.[24]

ArtI.S8.C4.2.5 Constitutional Limits on Bankruptcy Power

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

In exercising its bankruptcy powers, Congress is subject to certain constitutional limitations.[1] Congress may not circumscribe the creditor's right in property to such an unreasonable extent as to deny him due process of law or effect an unconstitutional taking.[2] Congress *may* impair the obligation of a contract or extend a federal bankruptcy law to contracts already entered into at the time Congress passed the law.[3] In 1935, the Court held that, under the Tenth Amendment,[4] Congress was unable to subject the fiscal affairs of a political subdivision of a state to a federal bankruptcy court's control.[5] A year later, however, the Court held that Congress may empower federal bankruptcy courts to entertain petitions by taxing agencies or instrumentalities for a composition of their indebtedness when the state has consented to the proceeding and the federal court is not authorized to interfere with the fiscal or governmental affairs of such petitioners.[6]

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[22] *Id.* at 378.

[23] 11 U.S.C. § 106. Section 106 states that "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to" a number of sections of the Bankruptcy Code. *Id.* § 106(a). A "governmental unit" includes a state. *Id.* § 101(27). The Court had held, in two prior decisions, that an earlier version of Section 106 had not successfully abrogated state or federal sovereign immunity regarding suits seeking monetary recoveries. United States v. Nordic Village, Inc., 503 U.S. 30, 39 (1992); Hoffman v. Conn. Dep't of Income Maintenance, 492 U.S. 96, 104 (1989) (plurality); *id.* at 105 (O'Connor, J., concurring); *id.* (Scalia, J., concurring in the judgment). In their concurring opinions in *Hoffman*, Justices O'Connor and Scalia, respectively, opined that the Bankruptcy Clause did *not* permit Congress to abrogate states' sovereign immunity. *Id.* at 105 (O'Connor, J., concurring); *id.* (Scalia, J., concurring in the judgment).

[24] *Katz*, 546 U.S. at 361–62. A year earlier, the Court held that a debtor's adversary proceeding against a state to establish the dischargeability of student loan debt was "not a suit against a State for purposes of the Eleventh Amendment." Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 451 (2005).

[1] *See, e.g.*, Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589 (1935) ("The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment."); *see also* Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 72–73 (1982) (plurality) (explaining that when the requirements of Article III of the Constitution are applicable, Congress's Article I legislative powers—including the Bankruptcy Clause—are controlled by Article III).

[2] Louisville Bank v. Radford, 295 U.S. 555, 589, 602 (1935) ; *see* Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 518 (1938).

[3] *In re* Klein, 42 U.S. (1 How.) 277 (1843); Hanover National Bank v. Moyses, 186 U.S. 181, 188 (1902). For information on the Contract Clause, U.S. Const. art. I, § 10, cl. 1, see ArtI.S10.C1.6.1 Overview of Contract Clause.

[4] U.S. Const. amend. X. For information on the Tenth Amendment, see Amdt10.1 Overview of Tenth Amendment, Rights Reserved to the States and the People to Amdt10.4.4 Commerce Clause and Tenth Amendment.

[5] Ashton v. Cameron Cnty. Dist., 298 U.S. 513, 532 (1936).

[6] United States v. Bekins, 304 U.S. 27, 51–53 (1938) ; *see* Puerto Rico v. Franklin Cal. Tax-Free Trust, 579 U.S. 115, 122 (2016) ("Critical to the Court's constitutional analysis [in *Bekins*] was that the State had first authorized its instrumentality to seek relief under the federal bankruptcy laws.").

ArtI.S8.C4.2.5
Constitutional Limits on Bankruptcy Power

The Bankruptcy Clause provides that Congress may enact "uniform" bankruptcy laws.[7] However, the Court has explained that the uniformity required is geographic, not personal.[8] Thus, Congress may recognize state laws relating to dower, exemptions, the validity of mortgages, priorities of payment, and similar matters, even though such recognition leads to different results from state to state.[9] And the Court has declared that the uniformity requirement "does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems."[10] Thus, in the *Regional Rail Reorganization Act Cases*, the Court denied a uniformity challenge to a railroad reorganization law that applied to railroads in one particular geographic region, because no other railroads were under reorganization at the time.[11] However, in *Railway Labor Executives' Association v. Gibbons*,[12] the Court held that a railroad reorganization law that applied to only one railroad was unconstitutional where there were other railroads engaged in reorganizations that were not subject to the law.[13]

Article III of the U.S. Constitution contains relevant limits on Congress's exercise of the bankruptcy power.[14] The Supreme Court has considered Congress's power to vest the adjudication of claims in non-Article III bankruptcy courts in several decisions.[15] In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[16] the Court invalidated portions of the Bankruptcy Reform Act of 1978 that impermissibly empowered non-Article III bankruptcy courts with "jurisdiction over all 'civil proceedings arising under [the Bankruptcy Code] or arising in or related to cases under [the Bankruptcy Code],'" such as state law breach of contract claims and other claims unrelated to "the restructuring of debtor-creditor relations."[17] Later, in *Stern v. Marshall*,[18] the Court held a provision of the Bankruptcy Amendments and Federal Judgeship Act of 1984[19] unconstitutional for authorizing bankruptcy courts to enter final judgments on certain actions whose existence are not attributable to bankruptcy proceedings—such as tortious interference counterclaims against creditors—but which are

[7] U.S. Const. art. I, § 8, cl. 4 (Congress is empowered "[t]o establish . . . *uniform* Laws on the subject of Bankruptcies throughout the United States") (emphasis added); *see* Perez v. Campbell, 402 U.S. 637, 656 (1971) (explaining that "to legislate in such a way that a discharge in bankruptcy means one thing in the District of Columbia and something else in the States—depending on state law—[would be to reach] a result explicitly prohibited by the uniformity requirement in the constitutional authorization to Congress to enact bankruptcy legislation").

[8] Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 189 (1902). "Personal uniformity" is the principle—rejected by the Supreme Court—"that the bankruptcy laws should apply identically to individual debtors, regardless of the state or locality in which the debtor resides." Schultz v. United States, 529 F.3d 343, 350–51 (6th Cir. 2008).

[9] Stellwagon v. Clum, 245 U.S. 605, 613 (1918) ; *Hanover National Bank*, 186 U.S. at 190 ; *see* Wright v. Vinton Branch of Mountain Trust Bank of Roanoke, Va., 300 U.S. 440, 463 n.7 (1937) ("The problem dealt with may present significant variations in different parts of the country.").

[10] Blanchette v. Connecticut General Ins. Corporations (Railroad Reorganization Act Cases), 419 U.S. 102, 159 (1974).

[11] *Id.* at 159–61.

[12] 455 U.S. 457.

[13] *Id.* at 470; *cf.* Warren v. Palmer, 310 U.S. 132, 137 (1940) ("Railroad reorganization in bankruptcy is a field completely within the ambit of the bankruptcy powers of Congress.")

[14] *See* U.S. Const. art. III.

[15] For information on Congress's power to establish non-Article III courts, see ArtIII.S1.9.1 Overview of Congressional Power to Establish Non-Article III Courts.

[16] 458 U.S. 50 (1982).

[17] *Id.* at 59, 71, 87 (plurality) (quoting 28 U.S.C. § 1471(b) (repealed) (emphasis omitted)); *see id.* at 91–92 (Rehnquist, J. concurring in the judgment). The plurality referred to the alteration of debtor-creditor relationships as "the core of the federal bankruptcy power." *Id.* at 71 (plurality).

[18] 564 U.S. 462 (2011).

[19] Pub. L. 98-353, 98 Stat. 333 (July 10, 1984).

merely intended to "augment the bankruptcy estate."[20] The Court subsequently held that a bankruptcy court may issue proposed findings and conclusions of law, subject to de novo review by the district court, on claims statutorily denominated as within the bounds of bankruptcy courts' "core" powers but which may only be constitutionally committed to an Article III adjudicator.[21] And in 2015, the Court held that a bankruptcy court may resolve such claims if a party consents to the bankruptcy court's jurisdiction.[22]

ArtI.S8.C4.2.6 Restrictions on State Bankruptcy Power

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Prior to 1898, Congress exercised its authority "[t]o establish . . . uniform Laws on the subject of Bankruptcies" only intermittently.[1] It did not enact the first national bankruptcy law until 1800, twelve years after the Constitution's ratification. This first national bankruptcy law was soon after repealed in 1803.[2] Congress then passed the second national bankruptcy law in 1841, only to repeal it two years later.[3] And Congress enacted the third federal bankruptcy law in 1867, which it subsequently rescinded in 1878.[4] Thus, during the country's first eighty-nine years under the Constitution, a national bankruptcy law was in existence for only sixteen years altogether.[5] Consequently, a key issue of interpretation that arose during that period concerned the effect of the Bankruptcy Clause on state bankruptcy and insolvency laws.

The Supreme Court ruled at an early date that, in the absence of congressional action, states may enact bankruptcy and insolvency laws because it is not the mere existence of the federal bankruptcy power, but rather the power's actual exercise by Congress that is incompatible with states exercising bankruptcy power.[6] Thus, the Court has held that a state statute regulating the distribution of an insolvent's property was suspended by the then-governing national bankruptcy law.[7] Further, the Court held that a state law governing

[20] 564 U.S. at 495, 503.

[21] Exec. Bens. Insurance Agency v. Arkison, 573 U.S. 25, 39–40 (2014); *see* 28 U.S.C. § 157(b), (c) (distinguishing between "core" and non-core proceedings in relation to the jurisdiction of bankruptcy courts).

[22] Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 686 (2015). The Court held that the required consent need not be expressed, but must be "knowing and voluntary." *Id.* at 683, 685. *See also* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) (concerning the Seventh Amendment right to jury trial in fraudulent conveyance action by bankruptcy trustee). (For other decisions concerning the Seventh Amendment and bankruptcy, see Langenkamp v. Culp, 498 U.S. 42 (1990) (per curiam); Katchen v. Landy, 382 U.S. 323 (1966). To read about the right to trial by jury in civil cases guaranteed by the Seventh Amendment, U.S. Const. amend. VII, see Amdt7.2.1 Historical Background of Jury Trials in Civil Cases to Amdt7.2.5 Composition and Functions of a Jury in Civil Cases.

[1] U.S. Const. art. I, § 8, cl. 4.

[2] *See* Act of April 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803).

[3] *See* Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (repealed 1843).

[4] *See* Act of March 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878); Hanover National Bank v. Moyses, 186 U.S. 181, 184 (1902).

[5] Congress did not establish a new federal bankruptcy law again until 1898. *See* Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978). Congress replaced the 1898 Act with the current Bankruptcy Code in 1978. *See* Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549 (Nov. 6, 1978) (codified, as amended, at 11 U.S.C. §§ 101 et seq.).

[6] Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 199 (1819); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 368 (1827).

[7] Int'l Shoe Co. v. Pinkus, 278 U.S. 261, 265 (1929).

fraudulent transfers was compatible with federal law.[8] But while a state insolvency or bankruptcy law is inoperative to the extent it conflicts with a national bankruptcy law in effect,[9] the Court has held that Congress's enactment of a national bankruptcy law does not *invalidate* conflicting state laws; it merely suspends them. Upon repeal of the national statute, the conflicting state laws again come into operation without the need for re-enactment.[10]

Clause 5—Standards

ArtI.S8.C5.1 Congress's Coinage Power

Article I, Section 8, Clause 5:

> *[The Congress shall have Power . . .] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures; . . .*

Because Article I, Section 10, Clause 1 of the Constitution prohibits the states from coining money,[1] the Supreme Court has recognized Congress's coinage power to be exclusive.[2] The Supreme Court has also construed Congress's power "to coin money" and "regulate the value thereof" to authorize Congress to regulate every phase of currency. Congress may charter banks and endow them with the right to issue circulating notes,[3] and it may restrain the circulation of notes not issued under its own authority.[4] To this end, it may impose a prohibitive tax upon the circulation of notes of state banks[5] or municipal corporations.[6]

Inasmuch as "every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power,"[7] the Supreme Court sustained the power of Congress to make Treasury notes legal tender in satisfaction of antecedent debts.[8]

The Supreme Court has also held that the power to coin money imports authority to maintain such coinage as a medium of exchange at home, and to forbid its diversion to other uses by defacement, melting, or exportation.[9] Consistent with this power, Congress may require holders of gold coin or gold certificates to surrender them in exchange for other currency not redeemable in gold. The Supreme Court denied recovery to a plaintiff who sought payment for gold coin and certificates thus surrendered in an amount measured by the higher

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[8] Stellwagon v. Clum, 245 U.S. 605, 615 (1918).

[9] Butner v. United States, 440 U.S. 48, 54 n.9 (1979); *see Pinkus*, 278 U.S. at 264; Stellwagon v. Clum, 245 U.S. 605, 613 (1918); *In re* Watts and Sachs, 190 U.S. 1, 27 (1903); Boese v. King, 108 U.S. 379, 385–87 (1883).
A state's bankruptcy law also may not extend to persons or property outside its jurisdiction, *see Ogden*, 25 U.S. at 368; Denny v. Bennett, 128 U.S. 489, 498 (1888); Brown v. Smart, 145 U.S. 454 (1892), or impair the obligation of contracts, *see Crowninshield*, 17 U.S. at 199. For information on the Contract Clause, U.S. Const. art. I, § 10, cl. 1, see ArtI.S10.C1.6.1 Overview of Contract Clause.

[10] Tua v. Carriere, 117 U.S. 201, 210 (1886) ; Butler v. Goreley, 146 U.S. 303, 314 (1892).

[1] U.S. Const. art. I, § 10, cl. 1.

[2] Houston v. Moore, 18 U.S. 1, 49 (1820); Sturges v. Crowninshield, 17 U.S. 122, 125 (1819).

[3] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[4] Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).

[5] *Id.* at 548.

[6] National Bank v. United States, 101 U.S. 1 (1880).

[7] Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457, 549 (1871); Juilliard v. Greenman, 110 U.S. 421, 449 (1884).

[8] Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457 (1871).

[9] Ling Su Fan v. United States, 218 U.S. 302 (1910).

market value of gold on the ground that the plaintiff had not proved that he would suffer any actual loss by being compelled to accept an equivalent amount of other currency.[10]

The Supreme Court also upheld Congress's authority to abrogate clauses in pre-existing private contracts calling for payment in gold coin.[11] However, as to obligations of the United States (as opposed to those of private parties), the Supreme Court has held that such an abrogation was an unconstitutional use of the coinage power. The Court reasoned that such abrogation would render obligations of the United States, entered into by earlier Congresses pursuant to their authority to borrow money on the credit of the United States, mere illusory pledges.[12]

Clause 6—Counterfeiters

ArtI.S8.C6.1 Congress's Power to Punish Counterfeiting

Article I, Section 8, Clause 6:

> *[The Congress shall have Power . . .] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States; . . .*

The Supreme Court has interpreted the Counterfeiting Clause narrowly. The Court has held that the language of the Clause covers only the specific offense of counterfeiting, understood as the creation of forged coin, and not the separate offense of fraudulently using forged coins in transactions.[1] At the same time, the Supreme Court has rebuffed attempts to read into this provision a limitation upon either the power of the states or upon the powers of Congress under the Coinage Clause and other provisions.[2] The Court has ruled that a state may punish the use of forged coins.[3] The Court also has sustained federal statutes penalizing the importation or circulation of counterfeit coin,[4] or the willing and conscious possession of dies in the likeness of those used for making coins of the United States,[5] on the ground that the power of Congress to coin money includes "the correspondent and necessary power and obligation to protect and to preserve in its purity this constitutional currency for the benefit of the nation."[6]

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[10] Nortz v. United States, 249 U.S. 317 (1935).

[11] Norman v. Baltimore & Ohio R.R., 294 U.S. 240 (1935). Similarly, the Supreme Court also upheld Congress's abrogation of clauses in pre-existing private contracts allowing bondholders to elect to be paid in foreign currencies. Guaranty Trust Co. of N.Y. v. Henwood, 307 U.S. 247 (1939).

[12] Perry v. United States, 294 U.S. 330 (1935).

[1] Fox v. Ohio, 46 U.S. (5 How.) 410, 433 (1847); United States v. Marigold, 50 U.S. (9 How.) 560, 568 (1850).

[2] Some commentators have therefore argued that the Counterfeiting Clause is superfluous or unnecessary as Congress would have the power to punish counterfeiters under the Necessary and Proper Clause. *See, e.g.*, Edward S. Corwin, The Constitution and What It Means Today 74 (Harold W. Chase & Craig R. Ducat, eds., 13th ed., 1973).

[3] *Fox*, 46 U.S. (5 How.) at 433.

[4] *Marigold*, 50 U.S. (9 How.) at 568.

[5] Baender v. Barnett, 255 U.S. 224 (1921).

[6] *Marigold*, 50 U.S. (9 How.) at 568. In a 1984 decision, the Supreme Court observed that Congress had relied on its counterfeiting authority to pass certain statutes that restricted the use of photographic depictions of currency, but did not directly consider the scope of the Counterfeiting Clause. Regan v. Time, Inc., 468 U.S. 641, 643 (1984). The Court held that aspects of the laws at issue were unconstitutional on First Amendment grounds. *Id.* at 658.

Clause 7—Post Offices

ArtI.S8.C7.1 Historical Background on Postal Power

Article I, Section 8, Clause 7:

[The Congress shall have Power . . .] To establish Post Offices and post Roads; . . .

The Articles of Confederation provided Congress with the "sole and exclusive . . . power of . . . establishing post offices."[1] During the Constitutional Convention, the Committee on Detail proposed similar language providing that "[t]he Legislature of the United States shall have the power . . . To establish Post-offices."[2] The Convention then adopted an amendment adding the phrase "and post roads"[3] to the Committee's draft.

The primary question raised in the early days of the Nation regarding the postal clause concerned the meaning of the word "establish" and whether it conferred upon Congress the power to construct new postal facilities and roads or only the power to designate existing buildings and routes to serve as post offices and post roads.[4] In 1845, the Court held that Congress, being "charged . . . with the transportation of the mails," could enter a valid compact with the State of Pennsylvania regarding the use and upkeep of the portion of the Cumberland Road lying in the state, but the Court did not pass upon the validity of Congress's authorization of the original construction of the road.[5] In 1855, however, Justice John McLean stated that the power to establish post roads "has generally been considered as exhausted in the designation of roads on which the mails are to be transported," and concluded that neither Congress's commerce power nor its power to establish post roads empowered Congress to construct a bridge over a navigable waterway.[6] The Court's 1876 decision in *Kohl v. United States*[7] ended the debate on the extent of Congress's power to establish post roads when the Court sustained a proceeding by the United States to appropriate a parcel of land in Cincinnati as a site for a post office and courthouse.

[1] Articles of Confederation of 1781, art. IX ("The United States in Congress assembled shall also have the sole and exclusive right and power of . . . establishing or regulating post offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office . . .").

[2] *Id.*

[3] 2 The Records of the Federal Convention 308 (Max Farrand ed., 1911) (August 16, 1787). According to James Madison: "The power of establishing post-roads, must in every view be a harmless power; and may perhaps, by judicious management, become productive of great public conveniency. Nothing which tends to facilitate the intercourse between the States, can be deemed unworthy of the public care." The Federalist No. 42 (James Madison).

[4] *See* Letter from Thomas Jefferson to James Madison (Mar. 6, 1796) ("Does the power to establish post roads, given you by Congress, mean that you shall make the roads, or only select from those already made, those on which there shall be a post?") *in* 3 The Works of Thomas Jefferson 223, 226 (Philip B. Kurland & Ralph Lerner eds., 1904). *See also* Robert G. Natelson, *Founding-Era Socialism: The Original Meaning of the Constitution's Postal Clause*, 7 Brit. J. Am. Legal Studies 1, 57 (2018) ("The suggestion was perhaps whimsical or mischievous, for there is no support for such an interpretation other than Jefferson's prestige. . . . founding-era sources show that 'establishing' a road included whatever was necessary for bringing it into existence: planning, laying out, clearing, surfacing, and so forth.").

[5] Searight v. Stokes, 44 U.S. (3 How.) 151, 166 (1845). In 1806, 2 Stat. 357, 358–359, without referring to the mails or the postal clause, Congress authorized the President to construct a road from Cumberland, Maryland, to Ohio, and "to obtain consent . . . of the state or states, through which . . . [it was] laid out."

[6] United States v. Railroad Bridge Co., 27 F. Cas. 686 (No. 16114) (C.C.N.D. Ill. 1855).

[7] 91 U.S. 367 (1875).

ArtI.S8.C7.2 Power to Protect the Mails

Article I, Section 8, Clause 7:

[The Congress shall have Power . . .] To establish Post Offices and post Roads; . . .

The postal powers of Congress embrace all measures necessary to insure the safe and speedy transit and prompt delivery of the mails.[1] And not only are the mails under the protection of the National Government, they are, in contemplation of the law, its property. This principle was recognized by the Supreme Court in 1845 in holding that wagons carrying United States mail were not subject to a state toll tax imposed for use of the Cumberland Road pursuant to a compact with the United States.[2] Half a century later it was availed of as one of the grounds on which the National Executive was conceded the right to enter the national courts and demand an injunction against the authors of any widespread disorder interfering with interstate commerce and the transmission of the mails.[3]

Prompted by the efforts of Northern anti-slavery elements to disseminate their propaganda in the Southern states through the mails, President Andrew Jackson, in his annual message to Congress in 1835, suggested "the propriety of passing such a law as will prohibit, under severe penalties, the circulation in the Southern States, through the mail, of incendiary publications intended to instigate the slaves to insurrection."[4] In the Senate, John C. Calhoun resisted this recommendation, taking the position that it belonged to the States and not to Congress to determine what is and what is not calculated to disturb their security. He expressed the fear that if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary and enforce their circulation.[5] On this point his reasoning would appear to be vindicated by Supreme Court decisions denying states the right to bar shipments of alcoholic beverages from other states.[6]

ArtI.S8.C7.3 Power to Prevent Harmful Use of Postal Facilities

Article I, Section 8, Clause 7:

[The Congress shall have Power . . .] To establish Post Offices and post Roads; . . .

In 1872, Congress passed the first of a series of acts to exclude from the mails publications designed to defraud the public or corrupt its morals. In the pioneer case of *Ex parte Jackson*,[1] the Court sustained the exclusion of circulars relating to lotteries on the general ground that "the right to designate what shall be carried necessarily involves the right to determine what shall be excluded."[2] The leading fraud order case, decided in 1904, held to the same effect.[3]

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[1] *Ex parte* Jackson, 96 U.S. 727, 732 (1878). *See In re* Rapier, 143 U.S. 110, 134 (1892) ("It is not necessary that congress should have the power to deal with crime or immorality within the states in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality."); U.S. Postal Serv. v. Council of Greenburgh Civic Assn's, 453 U.S. 114 (1981) (sustaining the constitutionality of a law making it unlawful for persons to use, without payment of a fee (postage), a letterbox which has been designated an "authorized depository" of the mail by the Postal Service).

[2] Searight v. Stokes, 44 U.S. (3 How.) 151, 169 (1845).

[3] *In re* Debs, 158 U.S. 564, 599 (1895).

[4] Jackson, Andrew, *Seventh Annual Message to Congress* (Dec. 8, 1835), available at https://www.presidency.ucsb.edu/documents/seventh-annual-message-2.

[5] Cong. Globe, 24th Cong., 1st Sess., 3, 10, 298 (1835).

[6] Bowman v. Chicago & Nw. Ry., 125 U.S. 465 (1888); Leisy v. Hardin, 135 U.S. 100 (1890).

[1] 96 U.S. 727 (1878).

[2] *Id.* at 732.

Noting that supplying postal facilities "is by no means an indispensable adjunct to a civil government," the Court held that the "legislative body in thus establishing a postal service may annex such conditions . . . as it chooses."[4]

Later cases first qualified these sweeping assertions and then overturned them, holding government operation of the mails to be subject to constitutional limitations. In upholding requirements that publishers of newspapers and periodicals seeking second-class mailing privileges file complete information regarding ownership, indebtedness, and circulation and that all paid advertisements in the publications be marked as such, the Court emphasized that these provisions were reasonably designed to safeguard the second-class privilege from exploitation by mere advertising publications.[5] Chief Justice Byron White warned that the Court by no means intended to imply that it endorsed the Government's "broad contentions concerning . . . the classification of the mails, or by the way of condition . . . ."[6] Again, when the Court sustained an order of the Postmaster General excluding from the second-class privilege a newspaper he had found to have published material in contravention of the Espionage Act of 1917, the claim of absolute power in Congress to withhold the privilege was sedulously avoided.[7]

A unanimous Court transformed these reservations into a holding in *Lamont v. Postmaster General*,[8] in which it struck down a statute authorizing the Post Office to detain mail it determined to be "communist political propaganda" and to forward it to the addressee only if he notified the Post Office he wanted to see it. Noting that Congress was not bound to operate a postal service, the Court observed that while it did, it was bound to observe constitutional guarantees.[9] The statute violated the First Amendment because it inhibited the right of persons to receive any information that they wished to receive.[10]

On the other hand, a statute authorizing persons to place their names on a list in order to reject receipt of obscene or sexually suggestive materials is constitutional, because no sender has a right to foist his material on any unwilling receiver.[11] But, as in other areas, postal

[3] Pub. Clearing House v. Coyne, 194 U.S. 497 (1904), *followed in* Donaldson v. Read Magazine, 333 U.S. 178 (1948).

[4] *Pub. Clearing House*, 194 U.S. at 506. *See also* United States v. Bromley, 53 U.S. 88 (1851) (upholding statute imposing fines on commercial carriers of mail for carrying non-mail letters not related to their cargo).

[5] Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913).

[6] *Id.* at 316.

[7] United States *ex rel.* Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407 (1921). *See also* Hannegan v. Esquire, 327 U.S. 146 (1946) (denying the Post Office the right to exclude Esquire Magazine from the mails on grounds of the poor taste and vulgarity of its contents).

[8] 381 U.S. 301 (1965).

[9] *Id.* at 305 ("'The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues.'") (quoting Justice Holmes in *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson,* 255 U.S. 407, 437 (1921)) (dissenting opinion). *See also* Blount v. Rizzi, 400 U.S. 410, 416 (1971) (quoting same language). For a different perspective on the meaning and application of Holmes' language, see United States Postal Service v. Council of Greenburgh Civic Assn's, 453 U.S. 114, 127 n.5 (1981), although there, too, the Court observed that the postal power may not be used in a manner that abridges freedom of speech or press. *Id.* at 126. Additionally, first-class mail is protected against opening and inspection, except in accordance with the Fourth Amendment. *Ex parte* Jackson, 96 U.S. 727, 733 (1878); United States v. van Leeuwen, 397 U.S. 249 (1970). *But see* United States v. Ramsey, 431 U.S. 606 (1977) (border search).

[10] Lamont v. Postmaster General, 381 U.S. 301, 306–07 (1965). *See also id.* at 308 (concurring opinion). This was the first federal statute ever voided for being in conflict with the First Amendment. *See also* Bolger v. Youngs Drugs Products Corp., 463 U.S. 60 (1983) (holding unconstitutional a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives); Roth v. United States, 354 U.S. 476, 493 (1957); United States v. Reidel, 402 U.S. 351, 356–357 (1971); Smith v. United States, 431 U.S. 291, 305 (1977) (upholding congressional authority under the postal clause to exclude obscene materials from the mail).

[11] Rowan v. Post Office Dep't, 397 U.S. 728 (1970).

censorship systems must contain procedural guarantees sufficient to ensure prompt resolution of disputes about the character of allegedly objectionable material consistently with the First Amendment.[12]

ArtI.S8.C7.4 Exclusive Power Over Post Offices as an Adjunct to Other Powers

Article I, Section 8, Clause 7:

[The Congress shall have Power . . .] To establish Post Offices and post Roads; . . .

Cases such as *Lamont v. Postmaster General*,[1] involved attempts to close the mails to communications that were deemed to be harmful. A much broader power of exclusion was asserted in the Public Utility Holding Company Act of 1935.[2] To induce compliance with the regulatory requirements of that act, Congress denied the privilege of using the mails for any purpose to holding companies that failed to obey that law, irrespective of the character of the material to be carried. Viewing the matter realistically, the Supreme Court treated this provision as a penalty. Although it held this statute constitutional because the regulations whose infractions were thus penalized were themselves valid,[3] it declared that "Congress may not exercise its control over the mails to enforce a requirement which lies outside its constitutional province. . . ."[4]

ArtI.S8.C7.5 Restrictions on State Power Over Post Offices

Article I, Section 8, Clause 7:

[The Congress shall have Power . . .] To establish Post Offices and post Roads; . . .

In determining the extent to which state laws may impinge upon persons or corporations whose services are used by Congress in executing its postal powers, the task of the Supreme Court has been to determine whether particular measures are consistent with the general policies indicated by Congress. Broadly speaking, the Court has approved regulations having a trivial or remote relation to the operation of the postal service, while disallowing those constituting a serious impediment to it. Thus, the Court held a state statute granting one company an exclusive right to operate a telegraph business in the state to be incompatible with a federal law that granted any telegraph company the right to construct its lines upon post roads.[1] The Court interpreted the federal statute to prohibit state monopolies in a field Congress was entitled to regulate in exercising its combined power over commerce and post roads.[2]

The Court also held an Illinois statute that, as construed by the state courts, required an interstate mail train to make a detour of seven miles in order to stop at a designated station to be an unconstitutional interference with Congress's postal power.[3] However, the Court held

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[12] Blount v. Rizzi, 400 U.S. 410 (1971).

[1] 381 U.S. 301 (1965)) (striking down statute authorizing the Post Office to detain mail that it determined to be "communist political propaganda" and to forward it to the addressee only if he notified the Post Office that he wanted it).

[2] 49 Stat. 803, 812, 813, 15 U.S.C. §§ 79d, 79e.

[3] Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938).

[4] *Id.* at 442.

[1] Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1 (1878).

[2] *Id.* at 11.

[3] Illinois Cent. R.R. v. Illinois, 163 U.S. 142 (1896) (characterizing it as "a statute . . . which unnecessarily interferes with the speedy and uninterrupted carriage of the mails of the United States," and contrasting it with "a reasonable police regulation of the State"). *Id.* at 154.

that a Minnesota statute requiring any intrastate train to stop at county seats "directly on its course, for a few minutes," was "a reasonable exercise of police power" and not "an unconstitutional interference with . . . the transportation of the mails of the United States."[4]

Local laws classifying postal workers with railroad employees for the purpose of determining a railroad's liability for personal injuries,[5] or subjecting a union of railway mail clerks to a general law forbidding any "labor organization" to deny any person membership because of his race, color or creed,[6] have been held not to conflict with national legislation or policy in this field. A state also may arrest a postal employee charged with murder while he is engaged in carrying out his official duties,[7] despite the interference *pro tanto* with the performance of a federal function, but it cannot punish a person for operating a mail truck over its highways without a valid state driver's license.[8]

Clause 8—Intellectual Property

ArtI.S8.C8.1 Overview of Congress's Power Over Intellectual Property

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

The Intellectual Property Clause[1] (IP Clause) empowers Congress to grant authors and inventors exclusive rights in their writings and discoveries for limited times. This clause provides the foundation for the federal copyright[2] and patent[3] systems, with a parallel

[4] Gladson v. Minnesota, 166 U.S. 427 (1897).

[5] Price v. Pennsylvania R.R., 113 U.S. 218 (1895); Martin v. Pittsburgh & Lake Erie R.R., 203 U.S. 284 (1906).

[6] Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945).

[7] United States v. Kirby, 74 U.S. (7 Wall.) 482 (1869) ("the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder."). *Id.* at 484.

[8] Johnson v. Maryland, 254 U.S. 51, 57 (1920) ("the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on.").

[1] This provision is also known as the "Patent Clause," the "Copyright Clause," the "Patent and Copyright Clause," and the "Progress Clause." *See generally* Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. Intell. Prop. L. 1, 56 (1994) ("[Article I, section 8, clause 8] is frequently referred to as either the Patent Clause, the Copyright Clause, or the Intellectual Property Clause, depending on the context in which it is being discussed."); Malla Pollack, *What Is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 Neb. L. Rev. 754, 810 n.1 (2001) (noting usage of "Copyright and Patent Clause," "Intellectual Property Clause," "Exclusive Rights Clause," and "Progress Clause"). *See, e.g.*, Allen v. Cooper, No. 18-877, slip op. at 6 (U.S. Mar. 23, 2020) (using the term "Intellectual Property Clause"); *Eldred v. Ashcroft,* 537 U.S. 186, 194 (2003) (using the term "Copyright and Patent Clause"); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank,* 527 U.S. 627, 635 (1999) (using the term "Patent Clause"); Goldstein v. California, 412 U.S. 546, 555 (1973) (using the term "Copyright Clause"). Although this essay uses the term "Intellectual Property Clause," the terminology is somewhat imprecise because the Clause does not encompass all of the legal areas that may be considered intellectual property, such as trademarks and trade secrets. *See* Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 Geo. L.J. 1771, 1845 n.1 (2006).

[2] A copyright gives authors (or their assignees) the exclusive right to reproduce, adapt, display, and/or perform an original work of authorship, such as a literary, musical, artistic, photographic, or audiovisual work, for a specified time period. *See* 17 U.S.C. §§ 102, 106.

[3] A patent gives inventors (or their assignees) the exclusive right to make, use, sell, or import an invention that is new, nonobvious, and useful, for a specified time period. 35 U.S.C. §§ 101–103, 271(a).

construction that divides into two parts, one for each form of intellectual property.[4] As to copyrights, Congress may grant "Authors" exclusive rights to their "Writings" in order to "promote the Progress of Science." (The "Progress of Science," at the time of the Framing, referred to "the creation and spread of knowledge and learning."[5]) As to patents, Congress may grant "Inventors" exclusive rights to their "Discoveries" in order to "promote the Progress of . . . useful Arts"—that is, to encourage technological "innovation, advancement, or social benefit."[6] Relying on the IP Clause, Congress has protected copyrights and patents in some form under federal law since 1790.[7]

Under the IP Clause, copyrights and patents are based on a utilitarian rationale that exclusive rights are necessary to provide incentives to create new artistic works and technological inventions.[8] Without legal protection, competitors could freely copy such creations, denying the original creators the ability to recoup their investments in time and effort, reducing the incentive to create in the first place.[9] The IP Clause thus reflects an "economic philosophy" that the "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors."[10]

The Framers included the IP Clause in the Constitution to facilitate a uniform, national law governing patent and copyrights.[11] In the Framers' view, the states could not effectively protect copyrights or patents separately.[12] Under the patchwork state-law system that prevailed in the Articles of Confederation period, creators had to obtain copyrights and patents in multiple states under different standards, a difficult and expensive process that undermined the purpose and effectiveness of the legal regime.[13]

The IP Clause is "both a grant of power and a limitation."[14] Two such limitations apply to both copyrights and patents. First, the Clause's plain language requires that the exclusive rights can only persist for "limited Times." Thus, although the term of protection may be long,

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[4] *See generally* Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA J.L. & Tech. 1 (2002) ("[The IP Clause] exhibits a remarkably parallel or balanced structure . . . much favored in the eighteenth century . . . ."); Karl B. Lutz, *Patents and Science: A Clarification of the Patent Clause of the U.S. Constitution*, 32 J. Pat. Off. Soc'y 83, 84 (1952) (explaining the parallel structure of the IP Clause); *accord* Golan v. Holder, 565 U.S. 302, 319 (2012); Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 5 n.1 (1966).

[5] *Golan*, 565 U.S. at 324.

[6] *Graham*, 383 U.S. at 6.

[7] *See* Act of Apr. 10, 1790, ch. 7, 1 Stat. 109 (patents); Act of May 31, 1790, ch. 15, 1 Stat. 124 (copyrights).

[8] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("[Copyrights and patents are] intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").

[9] *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480 (1974) ("The patent laws promote [the progress of the useful arts] by offering a right of exclusion for a limited period as an incentive to inventors to risk the often enormous costs in terms of time, research, and development.").

[10] Mazer v. Stein, 347 U.S. 201, 219 (1954). Although economic incentives provide the dominant justification for copyright and patents, the IP Clause also empowers Congress to protect the so-called "moral rights" of creators, such as the right of attribution, in order to promote the progress of science and useful arts. *See, e.g.*, Visual Artist Rights Act of 1990, Pub. L. No. 101-650, tit. VI, 104 Stat. 5128 (1990).

[11] Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 162 (1989) ("One of the fundamental purposes behind the [IP Clause] was to promote national uniformity in the realm of intellectual property.").

[12] The Federalist No. 43 (James Madison).

[13] *See* Goldstein v. California, 412 U.S. 546, 556 (1973).

[14] Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 5 (1966).

Congress cannot provide for a perpetual copyright or patent term.[15] Second, the exclusive rights must promote the progress of science or useful arts. Courts are broadly deferential to Congress, however, as to the means that it uses to achieve this goal.[16]

Other constitutional limitations of the IP Clause are specific to either copyright or patent law. For example, only works that are original are copyrightable, because copyright extends only to the "Authors" of "Writings."[17] In the context of patent law, only inventions that are novel and nonobvious are patentable "Discoveries" of "Inventors";[18] furthermore, patentable inventions must have some substantial utility to promote the progress of the "useful Arts."[19]

ArtI.S8.C8.2 Historical Background

ArtI.S8.C8.2.1 English Origins of Intellectual Property Law

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

The Intellectual Property Clause was written against the "backdrop" of English law and practice.[1] Patent law traces its origins to the English Parliament's 1623 Statute of Monopolies.[2] Prior to this law, many patents were "little more than feudal favors,"[3] a royal privilege granted by the Crown "to court favorites in goods or businesses which had long before been enjoyed by the public."[4] Parliament curtailed this practice in the Statute of Monopolies, which declared that "all monopolies and all commissions, grants, licences, charters and letters patents . . . are altogether contrary to the laws of the realm . . . and shall be utterly void and of none effect."[5] The statute contained an exception, however, that is the ancestor of modern patent law. Section 6 provided that the general prohibition on monopolies "shall not extend to

[15] *See* Eldred v. Ashcroft, 537 U.S. 186, 199–204 (2003).

[16] *See id.* at 212 ("[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."); *Graham*, 383 U.S. at 6 ("Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose [of the IP Clause] by selecting the policy which in its judgment best effectuates the constitutional aim.").

[17] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58–59 (1884).

[18] *See Graham*, 383 U.S. at 6 ("Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain."); Hotchkiss v. Greenwood, 52 U.S. (11 How.) 248, 267 (1851) (concluding that the "essential elements of every [patentable] invention" require "more ingenuity and skill [than] possessed by an ordinary mechanic acquainted with the business").

[19] Brenner v. Manson, 383 U.S. 519, 534 (1966) ("The basic quid pro quo contemplated by the Constitution and the Congress for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility."); *Graham*, 383 U.S. at 6 ("Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of . . . useful Arts.'").

[1] Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 5 (1966).

[2] *See* United States v. Line Material Co., 333 U.S. 287, 331–32 (1948) ("[The Statute of Monopolies] has become the foundation of the patent law securing exclusive rights to inventors . . . throughout the world.").

[3] Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, No. 16-712, slip op. at 5 (U.S. Apr. 24, 2018) (Gorsuch, J., dissenting).

[4] *Graham*, 383 U.S. at 5.

[5] 21 Jac. c. 3 § 1.

any letters patents . . . for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm to the true and first inventor . . . of such manufactures."[6]

Copyright, too, has its origins in English law.[7] The 1710 Statute of Anne, which was styled "[a]n act for the encouragement of learning,"[8] was also enacted against a background of monopolistic privileges granted by the Crown—in particular, the Stationers' Company's exclusive control over book printing.[9] To encourage the creation of new books, the Statute of Anne granted authors the exclusive right to copy their works for an initial term of fourteen years, renewable for another term of fourteen years if the author was still living.[10] For already published books, the Statute of Anne replaced the perpetual rights claimed by booksellers with a single twenty-one-year term.[11]

ArtI.S8.C8.2.2 Framing and Ratification of Intellectual Property Clause

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

Under the Articles of Confederation, the Federal Government lacked power to grant copyrights or patents.[1] Recognizing the limits on its authority, the Continental Congress passed a resolution in May 1783 calling upon the state legislatures to enact copyright legislation.[2] All of the then-existing states except Delaware adopted such laws, with varying scope and terms of protection.[3] Similarly, to the extent patent rights existed at all during this period, such rights derived from varying state laws.[4]

This patchwork of state-by-state protection created difficulties for authors and inventors: obtaining multiple state copyrights or patents was "time consuming, expensive, and frequently frustrating."[5] In April 1787, James Madison deplored the "want of uniformity in the laws concerning . . . literary property," though he conceded that the issue was of "inferior moment"

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[6] *Id.* § 6.

[7] Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 647 (1943) ("Anglo-American copyright legislation begins . . . with the Statute of 8 Anne, c. 19.").

[8] 8 Anne c. 19.

[9] *See* Eldred v. Ashcroft, 537 U.S. 186, 201 n.5 (2003).

[10] *Fred Fisher Music Co.*, 318 U.S. at 648–49.

[11] *Eldred*, 537 U.S. at 232 (Stevens, J. dissenting).

[1] *See* Articles of Confederation of 1781, art. II ("Each state retains . . . every Power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."). The articles did not expressly mention patents or copyrights. *See* Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. Intell. Prop. L. 1, 7 (1994).

[2] 24 Journals of the Continental Congress 1774–1989, at 326–27 (1922); *see also* Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 648–49 (1943).

[3] *Fred Fisher Music Co.*, 318 U.S. at 649–50.

[4] *See generally* Bruce W. Bugbee, The Genesis of American Patent and Copyright Law 84–103 (1967) (surveying early state patent systems).

[5] Walterscheid, *supra* note 1, at 22; *see also* Goldstein v. California, 412 U.S. 546, 556 & n.12 (1973) (describing difficulties in the country's "early history" faced by an "author or inventor who wishes to achieve protection in all States when no federal system of protection is available"); *see generally* Bugbee, *supra* note 4, at 128–29.

compared to other concerns facing the early Republic.[6] Perhaps for this reason, neither the early plans of government presented at the Constitutional Convention nor the first draft of the Constitution mentioned intellectual property.[7]

On August 18, 1787, Madison and Charles Pinckney of South Carolina each proposed additions to the draft Constitution that would grant Congress power over intellectual property.[8] These proposals would have granted Congress the power to, among other things: (i) "secure to literary authors their copy rights for a limited time"; (ii) "encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries"; and (iii) "grant patents for useful inventions."[9] The matter was referred to the Committee of Eleven, who combined elements of these proposals to produce the language that would become the Intellectual Property (IP) Clause on September 5, 1787.[10] The Convention approved the IP Clause without objection or any recorded debate.[11]

In the *Federalist No. 43*, Madison explained the IP Clause's purpose:

> The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.[12]

Madison's view of the IP Clause's utility was not universally held. Thomas Jefferson, learning of the IP Clause in Paris, wrote to Madison on July 31, 1788, suggesting that the proposed Bill of Rights include a provision "to abolish . . . Monopolies, in all cases."[13] Acknowledging this "may lessen[ ] the incitements to ingenuity," Jefferson argued "the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression."[14] Jefferson later tempered his views, proposing a constitutional amendment that "Monopolies may be allowed to persons for their own productions in literature, & their own inventions in the arts, for a term not exceeding—years, but for no longer term & no other purpose."[15] Congress did not act on Jefferson's proposal, but his views on intellectual property have influenced the Supreme Court.[16]

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[6] 4 Documentary History of the Constitution of the United States of America 1786–1870, at 128 (1905) [hereinafter Documentary History].

[7] *See* Walterscheid, *supra* note 1, at 25; Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 Geo. L.J. 1771, 1788–89 (2006).

[8] *See* Oliar, *supra* note 7, at 1789.

[9] 1 Documentary History, *supra* note 6, at 130–31 (journal of James Madison).

[10] Oliar, *supra* note 7, at 1790; 2 The Records of the Federal Convention of 1787, at 505–10 (Max Farrand ed., 1911) [hereinafter Farrand's Records].

[11] 2 Farrand's Records, *supra* note 10, at 509–10; Bilski v. Kappos, 561 U.S. 593, 631 (2010) (Stevens, J., concurring in the judgment).

[12] The Federalist No. 43 (James Madison). It should be noted that, contrary to Madison's statement in the *Federalist No. 43*, the House of Lords held, in *Donaldson v. Beckett* (1774), 1 Eng. Rep. 837, that copyright in England was not a common law right.

[13] 13 The Papers of Thomas Jefferson 442–43 (1956).

[14] *Id.*; *see also* Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 7–8 (1966).

[15] *Graham*, 383 U.S. at 8.

[16] *See id.* at 7–10 (discussing Jefferson's "philosophy on the nature and purpose of the patent monopoly").

Following the ratification of the Constitution, the first Congress invoked its power under the IP Clause to enact national copyright and patent laws in 1790.[17] Protections for patents and copyrights have been a part of federal law ever since.[18]

ArtI.S8.C8.3 Copyrights

ArtI.S8.C8.3.1 Authorship, Writings, and Originality

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

In 1834, the Supreme Court established in its first copyright case, *Wheaton v. Peters*, that federal copyright is purely a creation of statutory law—not federal common law.[1] *Wheaton* arose out of the reporting of the decisions of the Supreme Court itself; Wheaton, who published the annotated decisions of the Court from 1816 to 1827, sued a competing reporter.[2] Because it appeared that Wheaton had not complied with all of the statutory requirements for a copyright, he alternatively asserted a common law right in his publications.[3]

The Supreme Court held that although common law rights may exist in an unpublished manuscript under state law, after publication, federal protection for the work was available "if at all, under the acts of Congress."[4] The Court rejected the argument that the word "secure" in the Intellectual Property (IP) Clause was intended not "to originate a right, but to protect one already in existence."[5] Thus, copyright did not vest in the author unless he substantially complied with the statutory requirements imposed by Congress.[6]

The IP Clause empowers Congress to grant copyright to the "Authors" of "Writings." The term "Writings" has long been interpreted more broadly than merely "script or printed material."[7] In 1884, the Supreme Court held in *Burrow-Giles Lithographic Co. v. Sarony* that Congress could constitutionally provide for copyright in photography.[8] The Court defined an "Author" as "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature."[9] "Writings," in turn, encompassed "all forms of writing, printing, engravings, etchings, etc., by which the ideas in the mind of the author are given . . . expression."[10] Applying these definitions, the Court had "no doubt" that the IP Clause was

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[17] Act of Apr. 10, 1790, ch. 7, 1 Stat. 109 (patent); Act of May 31, 1790, ch. 15, 1 Stat. 124 (copyright).

[18] Of course, the scope of copyright and patent protection has changed substantially over time. For example, the subject matter of copyright under the 1790 Copyright Act was limited to maps, books, and charts, with an initial term of fourteen years (plus an optional fourteen-year renewal term). *See* 1 Stat. 124, 124 (1790). Today, copyright protects (among other things) computer programs, musical works, sound recordings, motion pictures, and architectural works, and generally persists for a term of the life of the author plus seventy years. *See* 17 U.S.C. §§ 102(a), 302(a).

[1] Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

[2] *Id.* at 593–95.

[3] *Id.* at 654.

[4] *Id.* at 661, 663. Similarly, in the patent context, the Court has understood the Intellectual Property (IP) Clause to be "permissive," such that the scope of patent rights is determined by the statutory language enacted pursuant to the IP Clause, not the Clause itself. Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 530 (1972).

[5] *Wheaton*, 33 U.S. at 661.

[6] *Id.* at 661, 665.

[7] Goldstein v. California, 412 U.S. 546, 561 (1973).

[8] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884).

[9] *Id.* at 58 (quoting Joseph E. Worcester's Dictionary of the English Language).

[10] *Id.* at 58.

broad enough to authorize copyright in photographs.[11] Indeed, under current law, copyright generally covers any original work of authorship, including literary works; musical works; dramatic works; choreography; audiovisual works; pictorial, graphic, and sculptural works; sound recordings; and architectural works.[12]

Having established that photography was copyrightable in general, *Burrow-Giles* turned to whether the photograph at issue possessed the requisite level of originality. The subject of the lawsuit was a portrait of Oscar Wilde taken by the photographer Napoleon Sarony.[13] The Court noted that Sarony conceived the portrait, posed Wilde in front of the camera, and arranged the subject and the lighting, all to evoke a desired expression.[14] On these facts, the Court concluded the photograph was more than a "mechanical reproduction," but "an original work" that could be copyrighted.[15] Indeed, so long as a work is original—and meets all statutory requirements—copyright is available irrespective of the aesthetic or social value of the work.[16]

A century later, in *Feist Publications v. Rural Telephone Service Co.*, the Supreme Court confirmed that originality is a constitutional requirement and more precisely defined what originality requires.[17] The issue in *Feist* was whether a telephone directory listing the names, addresses, and telephone numbers of people in a particular geographic area was copyrightable.[18] The Supreme Court held that originality, the "*sine qua non* of copyright,"[19] requires "that the work was independently created by the author" and "that it possesses at least some minimal degree of creativity."[20] On this standard, facts—such as names and telephone numbers arranged alphabetically—are neither original nor copyrightable because facts "do not owe their origin to an act of authorship."[21] That said, a *compilation* of facts may be copyrightable, but only if the selection and arrangement of facts is independently created and minimally creative.[22] Because the telephone directory in *Feist* simply listed names and telephone numbers alphabetically by surname, it lacked the minimal creativity necessary for copyright.[23]

Along with being original, a copyrightable work must be recorded or embodied in some physical form to be a copyrightable "Writing." Current law requires that the work be "fixed in any tangible medium of expression, now known or later developed, from which [it] can be perceived, reproduced, or otherwise communicated."[24] Although the Supreme Court has never squarely held that fixation is a constitutional requirement, it appears to be implicit in the Court's definition of "Writings" as "any *physical rendering* of the fruits of creative [activity]."[25]

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[11] *Id.*

[12] 17 U.S.C. § 102(a).

[13] *Burrow-Giles*, 111 U.S. at 54–55.

[14] *Id.* at 60.

[15] *Id.* at 59–60.

[16] *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250–52 (1903) (Holmes, J.); *see also* Mitchell Bros. Film Grp. v. Cinema Adult Theater, 604 F.2d 852, 858–60 (5th Cir. 1979) (obscene material may be copyrighted).

[17] *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

[18] *Id.* at 343–44.

[19] *Sine qua non* is Latin for "without which not," meaning "[a]n indispensable condition or thing." Sine qua non, Black's Law Dictionary (11th ed. 2019).

[20] *Feist*, 499 U.S. at 345.

[21] *Id.* at 347.

[22] *Id.* at 348.

[23] *Id.* at 362–63.

[24] 17 U.S.C. § 102(a).

[25] *See* Goldstein v. California, 412 U.S. 546, 561 (1973) (emphasis added).

Courts have thus generally assumed that, under the IP Clause, copyright cannot protect unfixed works, such as unrecorded live musical performances.[26]

ArtI.S8.C8.3.2 Limited Times for Copyrights and the Progress of Science

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

Even if a work is copyrightable, Congress may only grant copyright for limited times. Throughout American history, Congress has repeatedly lengthened copyright terms, with those extensions usually applying both prospectively and retroactively to works still under copyright.[1] In Congress's first Copyright Act of 1790, as under the Statute of Anne, copyright persisted for fourteen years, with the possibility of a fourteen-year renewal term.[2] Under current law, copyright in a work created by an individual author lasts for the life of that author, plus an additional seventy years.[3]

In *Eldred v. Ashcroft*, the Court addressed whether the 1998 Copyright Term Extension Act (CTEA), which retroactively extended existing copyright terms by twenty years, violated the Intellectual Property (IP) Clause's "limited Times" requirement.[4] *Eldred* held that a term of life of the author plus seventy years was a "limited" time, which required only that the term be "confine[d] within certain bounds," and not that the term must be fixed once granted.[5] On this point, the Court relied heavily on the historical practice of retroactive copyright extensions to inform its interpretation of the IP Clause.[6]

Satisfied that the CTEA complied with the "limited Times" requirement, the Court held that further judicial review was limited to whether the CTEA was "a rational exercise of the legislative authority conferred by the Copyright Clause."[7] In this determination, the Court "defer[red] substantially" to "congressional determinations and policy judgments."[8] Applying that standard, the Court found Congress's desire to conform American copyright terms to international norms sufficed as a rational basis.[9] *Eldred* further rejected arguments that the CTEA "effectively" amounted to a perpetual copyright, protected non-original works, or failed

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[26] *See, e.g.*, United States v. Martignon, 492 F.3d 140, 144 (2d Cir. 2007) ("[T]he government concedes [that] Congress could not have enacted [protection for live musical performances] pursuant to the Copyright Clause."); United States v. Moghadam, 175 F.3d 1269, 1277 (11th Cir. 1999) (assuming that "the Copyright Clause could not sustain [anti-bootlegging statute] because live performances, being unfixed, are not encompassed by the term 'Writings'"). Both *Martignon* and *Moghadam* ultimately upheld the anti-bootlegging laws at issue under Congress's Commerce Clause authority. *Martignon*, 492 U.S. F.3d at 152–53; *Moghadam*, 175 F.3d at 1282.

[1] *See generally* Eldred v. Ashcroft, 537 U.S. 186, 194–96 (2003) (reviewing history of congressional extensions of copyright term).

[2] *See* Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (1790); 8 Anne c. 19 (1710).

[3] 17 U.S.C. § 302(a). Anonymous works, pseudonymous works, and works made for hire have a copyright term of 95 years from the date of publication or 120 years from the date of creation, whichever is less. *Id.* § 302(c). Works published before 1978, if still covered by copyright, have a term lasting for 95 years from the date of publication. *See Eldred*, 537 U.S. at 196; 17 U.S.C. § 304(a), (b).

[4] *Eldred*, 537 U.S. at 199.

[5] *Id.* at 199.

[6] *Id.* at 200–04.

[7] *Id.* at 204.

[8] *Id.* at 205, 207

[9] *Id.* at 205–08.

to promote the progress of science,[10] reiterating "it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."[11]

In 2012, *Golan v. Holder* extended *Eldred*'s deferential approach to the IP Clause's limitations.[12] *Golan* addressed whether Congress could, consistent with the IP Clause, grant copyright to works already in the U.S. public domain.[13] Motivated by compliance with international copyright treaties, Congress passed the Uruguay Round Agreements Act (URAA)[14] in 1994 to "restore" copyright to certain foreign works that had never been protected by copyright in the United States.[15]

The Supreme Court rejected the argument that the URAA failed to "promote the Progress of Science" because it did not encourage the creation of new works.[16] The Court held that providing incentives for new works was "not the sole means" Congress may use to advance the spread of knowledge, and Congress could rationally conclude that a "well-functioning international copyright system" would encourage the dissemination of existing works.[17] Ultimately, *Golan* held that it is for Congress to "determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the [IP] Clause."[18]

ArtI.S8.C8.3.3 Copyright and the First Amendment

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

Copyright, by its nature, may restrict speech—it operates to prevent others from, among other things, reproducing and distributing creative expression without the copyright holder's permission.[1] The Supreme Court has thus recognized that "some restriction on expression is the inherent and intended effect of every grant of copyright."[2] Even so, the restrictions on speech effected by copyright are not ordinarily subject to heightened scrutiny.[3]

The Supreme Court has reasoned that, because the Intellectual Property (IP) Clause and the First Amendment were adopted close in time, the Framers believed that "copyright's limited monopolies are compatible with free speech principles."[4] The Framers intended copyright to be "the engine of free expression" by providing "the economic incentive to create

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[10] *Id.* at 208–15.

[11] *Id.* at 212–13.

[12] Golan v. Holder, 565 U.S. 302 (2012).

[13] *Id.* at 308.

[14] The URAA implemented the Marrakesh Agreement of 1994, which transformed the General Agreement on Tariffs and Trade (GATT) into the World Trade Organization (WTO), into U.S. law. *See* Pub. L. No. 103-465, § 101, 108 Stat. 4809, 4814–15 (1994).

[15] *Golan*, 565 U.S. at 314.

[16] *Id.* at 324–27.

[17] *Id.* at 326–27.

[18] *Id.* at 325 (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003)).

[1] *See* 17 U.S.C. § 106.

[2] Golan v. Holder, 565 U.S. 302, 327–28 (2012).

[3] *See* Eldred v. Ashcroft, 537 U.S. 186, 218–19 (2003); Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 560 (1985).

[4] *Eldred*, 537 U.S. at 219.

and disseminate ideas."[5] As a result, so long as Congress maintains the "traditional contours" of copyright protection, copyright laws are not subject to heightened First Amendment scrutiny.[6]

The traditional contours of copyright law include two important "built-in First Amendment accommodations."[7] The first is the idea-expression distinction, which provides that copyright does not "extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[8] For example, copyright in a nonfiction essay extends only to the particular creative expression used to describe its ideas; others remain free to communicate the same ideas in their own words.[9] Because of this distinction, copyright's impact on free expression is reduced because "every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication."[10]

Copyright law's other First Amendment accommodation is the fair use doctrine. Fair use is a privilege that permits certain uses of a copyrighted work, for purposes such as "criticism, comment, news reporting, teaching[,] scholarship, or research," without the copyright holder's permission.[11] Courts assess whether a particular use is fair using a multifactor balancing test that looks to, among other considerations, the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used; and the economic impact of the use on the market for the original work.[12] Fair use also considers whether a use is "transformative"—that is, whether it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[13] Fair use serves First Amendment purposes because it "allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances."[14]

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[5] *Harper & Row*, 471 U.S. at 558.

[6] *Golan*, 565 U.S. at 890–91.

[7] *Eldred*, 537 U.S. at 219.

[8] 17 U.S.C. § 102(b).

[9] *Id.* The Supreme Court famously articulated the idea-expression distinction in *Baker v. Selden*, which concerned the scope of the copyright in a book describing an accounting system. 101 U.S. 99, 100 (1880).

[10] *Eldred*, 537 U.S. at 219 (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991)).

[11] 17 U.S.C. § 107.

[12] *Id.* For applications of the fair use factors, see, e.g., Google LLC v. Oracle Am., Inc., No. 18-956 (U.S. Apr. 5, 2021); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575–94 (1994); Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 560–69 (1985); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448–56 (1984); Folsom v. Marsh, 9 F. Cas. 342, 347–49 (C.C.D. Mass. 1841) (Story, J.).

[13] *Campbell*, 510 U.S. at 579.

[14] *Eldred*, 537 U.S. at 219.

ArtI.S8.C8.4 Patents

ArtI.S8.C8.4.1 Inventorship and Utility

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

To be patentable, an invention must be new, nonobvious, useful, and directed at patent-eligible subject matter.[1] Each of these four requirements are long-standing features of patent law, rooted in the Intellectual Property (IP) Clause.[2]

First, because only "Inventors" may secure patent rights under the IP Clause, a patent application cannot claim exclusive rights to an alleged discovery that is not *novel*. "Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available" to the public.[3] In other words, if every element of the claimed invention is already disclosed in the "prior art"—that is, information known or available to the public—then the alleged inventor "has added nothing to the total stock of knowledge," and no valid patent may issue to the individual.[4]

Second, a patentable invention, even if novel in the narrowest sense, cannot be *obvious* in light of the prior art. In 1851, *Hotchkiss v. Greenwood* articulated a standard of "invention" that required more than just novelty.[5] The patent in *Hotchkiss* claimed an improvement in making door knobs, where the only new element was "the substitution of a knob of a different material" over the material previously employed in making the knob.[6] The Supreme Court held this improvement too minor to be patentable; unless the discovery required "more ingenuity and skill" than that "possessed by an ordinary mechanic," it was not the work of an inventor.[7]

In *Graham v. John Deere Co. of Kansas City*, the Court concluded that Congress had codified the holding of *Hotchkiss* and its progeny in the 1952 Patent Act's "nonobviousness" requirement for patentability.[8] Under this test, "the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined."[9] When an invention does

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[1] 35 U.S.C. §§ 101–103. This essay focuses on utility patents, but protection for plants and ornamental design are also available under federal law with generally similar requirements. *See* 35 U.S.C. §§ 161–164, 171–173.

[2] *See* Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 5–6 (1966) (novelty and nonobviousness requirement); Brenner v. Manson, 383 U.S. 519, 534–35 (1966) (utility requirement); Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127 (1948) (patent-eligible subject matter); Hotchkiss v. Greenwood, 52 U.S. (11 How.) 248, 267 (1851) (nonobviousness requirement); *see also* Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp., 340 U.S. 147, 155 (1950) (Douglas, J., concurring) ("The standard of patentability is a constitutional standard . . . ."). Because these requirements (with the exception of nonobviousness) have been continuously part of patent law since 1790, it is difficult in some cases to determine the extent to which patentability standards articulated by the Supreme Court are required by the IP Clause, or are merely a construction of the patent statute.

[3] *Graham*, 383 U.S. at 6.

[4] Great Atl. & Pac. Tea Co., 340 U.S. at 153; *see also* 35 U.S.C. § 102.

[5] *Hotchkiss*, 52 U.S. (11 How.) at 265–67.

[6] *Id.* at 266.

[7] *Id.* at 266–67.

[8] *Graham*, 383 U.S. at 17.

[9] *Id.* In addition, such "secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to

no more than combine "familiar elements according to known methods," yielding only "predictable results," it is likely to be obvious.[10]

In addition to being novel and nonobvious, an invention must be *useful* to be patentable—that is, it must have a specific and substantial utility.[11] The utility requirement derives from the IP Clause's command that patent law serve to "promote the Progress of . . . *useful* Arts."[12] Justice Joseph Story, in an oft-quoted 1817 decision, interpreted the utility requirement narrowly, stating that to be "useful" an invention need only "not be frivolous or injurious to the well-being, good policy, or sound morals of society."[13] In 1966, the Supreme Court moved away from this standard in *Brenner v. Manson*, holding that the constitutional purpose of patent law requires a "benefit derived by the public from an invention with substantial utility," where the "specific benefit exists in currently available form."[14] Thus, in *Brenner* itself, a novel chemical process yielding a compound with no known use other than as "an object of scientific research" was not patentable because it lacked the requisite utility.[15]

ArtI.S8.C8.4.2 Patent-Eligible Subject Matter

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

In addition to the novelty, nonobviousness, and utility requirements, the claimed invention must be directed at *patent-eligible subject matter*.[1] By statute, an inventor may patent "any new and useful process, machine, manufacture, or composition of matter."[2] The Supreme Court has observed that Congress intended "anything under the sun that is made by man" to be patentable.[3] Nonetheless, despite the broad statutory language, the Court has held that three types of discoveries are categorically nonpatentable: "laws of nature, natural phenomena, and

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be patented." *Id.* at 17–18. The obviousness determination is an "expansive and flexible" approach that cannot be reduced to narrow, rigid tests. *See* KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 415–19 (2007).

[10] *KSR*, 550 U.S. at 416.

[11] Brenner v. Manson, 383 U.S. 519, 534–35 (1966); *In re* Fisher, 421 F.3d 1365, 1371 (Fed. Cir. 2005).

[12] Stiftung v. Renishaw PLC, 945 F.2d 1173, 1180 (Fed. Cir. 1991) (citing *Brenner*, 383 U.S. at 528–29); *see also Graham*, 383 U.S. at 5–6.

[13] Lowell v. Lewis, 15 F. Cas. 1018, 1019 (C.C.D. Mass. 1817) (Story, J.). Whether the utility requirement prohibits patents on inventions that serve "immoral or illegal purposes" in modern times is an open question. *See* Juicy Whip, Inc. v. Orange Bang, Inc., 185 F.3d 1364, 1366–67 (Fed. Cir. 1999) ("[T]he principle that inventions are invalid if they are principally designed to serve immoral or illegal purposes has not been applied broadly in recent years.").

[14] *Brenner*, 383 U.S. at 534–35.

[15] *Id.* at 535–36. *Brenner* did not define the terms "specific" and "substantial." Subsequent lower court decisions have equated "substantial" with "practical utility," that is, the invention must have some "significant and presently available benefit to the public." *In re* Fisher, 421 F.3d at 1371. "Specific" utility requires only that the asserted use "is not so vague as to be meaningless." *Id.* at 1372.

[1] Because the statutory standard for patent-eligible subject matter has remained essentially unchanged for over two centuries, *see generally* Kevin J. Hickey, Cong. Rsch. Serv., R45918, Patent-Eligible Subject Matter Reform in the 116th Congress (2019), https://crsreports.congress.gov/product/pdf/R/R45918, it can be difficult to discern the extent to which the Supreme Court's patent-eligible subject matter cases are motivated or required by the IP Clause, or are merely a construction of the patent statute. *See* Bilski v. Kappos, 561 U.S. 593, 649 (2010) ("The Court has kept this 'constitutional standard' [of the IP Clause] in mind when deciding what is patentable subject matter under § 101. For example, we have held that no one can patent 'laws of nature, natural phenomena, and abstract ideas.'" (quoting Diamond v. Diehr, 450 U.S. 175, 185 (1981)) (Stevens, J., concurring in the judgment).

[2] 35 U.S.C. § 101.

[3] Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980) (quoting S. Rep. No. 82-1979 (1952); H.R. Rep. No. 82-1923 (1952)).

abstract ideas."[4] The Court has reasoned that to permit a patent monopoly on the "'basic tools of scientific and technological work' . . . might tend to impede innovation more than it would tend to promote it."[5]

For example, a person who discovers a previously unknown product of nature (say, a plant with medicinal properties) cannot obtain a patent on this discovery.[6] On the other hand, a genetically engineered bacterium with "markedly different characteristics than any found in nature" may be patented.[7] Similarly, laws of nature—basic physical principles, like Einstein's mass-energy equivalence (E=mc2) or the law of gravity—are not patentable, even if newly discovered and useful.[8] However, a new and useful *application* of a law of nature, such as the use of a physical law in a novel process for molding uncured rubber, may be patentable,[9] so long as the application is not "conventional or obvious."[10] Lastly, abstract ideas are not patentable. For example, the Supreme Court has held that patents on a method for converting binary-coded decimal numerals into pure binary numerals[11] and a business method for hedging risk against price fluctuations[12] claimed nonpatentable abstract ideas.

In the 2010s, the Supreme Court decided a trio of cases that set forth the modern standards for patentable subject matter. These cases established a two-step test. The court first "determine[s] whether the claims at issue are directed to" ineligible subject matter such as a law of nature, natural phenomenon, or abstract idea.[13] If so, the claimed invention is nonpatentable unless the patent claims have an "inventive concept" that transforms the nature of the claim to a patent-eligible application, with elements "sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself."[14]

In *Mayo Collaborative Services v. Prometheus Laboratories*, the Court addressed the scope of the "law of nature" exception.[15] The patent in *Mayo* claimed a method for measuring metabolites in the blood to calibrate the dosage of thiopurine drugs in the treatment of autoimmune disorders.[16] The Court found the patent claims were directed to a law of nature: "namely, relationships between concentrations of certain metabolites in the blood and the likelihood that a dosage of a thiopurine drug will prove ineffective or cause harm."[17] Because the claims were little "more than an instruction to doctors to apply the applicable laws when treating their patients," the patent lacked any inventive concept and the Court held it to be patent ineligible.[18]

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[4] *Diehr*, 450 U.S. at 185.

[5] Mayo Collaborative Servs. v. Prometheus Labs., Inc., 566 U.S. 66, 71 (2012) (quoting Gottschalk v. Benson, 409 U.S. 63, 67 (1972)).

[6] *Chakrabarty*, 447 U.S. at 309; Fred Funk Seed Bros. Co. v. Kalo Inoculant Co., 333 U.S. 127, 130 (1948).

[7] *Chakrabarty*, 447 U.S. at 310.

[8] *Id.* at 309.

[9] *Diehr*, 450 U.S. at 190–91.

[10] Parker v. Flook, 437 U.S. 584, 590 (1978).

[11] Gottschalk v. Benson, 409 U.S. 63, 67 (1972).

[12] Bilski v. Kappos, 561 U.S. 593, 609–12 (2010). However, the Court declined to hold that business methods are categorically nonpatentable. *See id.* at 606–09.

[13] Alice Corp. Pty. v. CLS Bank Int'l, 573 U.S. 208, 217 (2014).

[14] *Id.* at 217–18 (quoting Mayo Collaborative Servs. v. Prometheus Labs., Inc., 566 U.S. 66, 72–73 (2012)).

[15] *Mayo*, 566 U.S. at 77.

[16] *Id.* at 73–75.

[17] *Id.* at 77.

[18] *Id.* at 79.

The second decision in the trilogy, *Association for Molecular Pathology v. Myriad Genetics, Inc.*, concerned the applicability of the "natural phenomena" exception to the patentability of DNA.[19] The inventor in *Myriad* discovered the precise location and genetic sequence of two human genes associated with an increased risk of breast cancer.[20] Based on this discovery, the patentee claimed two molecules associated with the genes: (1) an isolated DNA segment; and (2) a complementary DNA (cDNA) segment, in which the nucleotide sequences that do not code for amino acids were removed.[21]

Myriad held that isolated DNA segments were nonpatentable products of nature because the patent claimed naturally-occurring genetic information.[22] The Court held, however, that cDNA, as a synthetic molecule distinct from naturally-occurring DNA, was patentable even though the underlying nucleotide sequence was dictated by nature.[23]

Lastly, *Alice Corp. v. CLS Bank International* examined the scope of the "abstract idea" category of nonpatentable subject matter.[24] *Alice* concerned a patent on a system for mitigating settlement risk (i.e., the risk that only one party will pay) using a computer.[25] The Court first held that the invention was directed at "the abstract idea of intermediated settlement."[26] Although the invention in *Alice* was implemented on a computer (which is, of course, a physical machine), the patent lacked an inventive concept because the claims merely "implement[ed] the abstract idea of intermediated settlement on a generic computer."[27]

ArtI.S8.C8.4.3 Constitutional Constraints on Congress's Power Over Granted Patents

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

Early Supreme Court cases suggest that Congress has "plenary" power to enlarge patent rights retrospectively.[1] The extent to which patent rights can be *limited* retrospectively, consistent with the Intellectual Property (IP) Clause and constitutional protections for property, is an unsettled area of law.

The Supreme Court has presumed that patents, once granted, are property rights subject to the Due Process Clause of the Fifth and Fourteenth Amendments.[2] The Court has repeatedly suggested that patents are "private property" the government cannot take without

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[19] Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 569 U.S. 576, 580 (2013).

[20] *Id.* at 579.

[21] *Id.* at 580–85.

[22] *Id.* at 591–94.

[23] *Id.* at 594–95.

[24] Alice Corp. Pty. v. CLS Bank Int'l, 573 U.S. 208, 212 (2014).

[25] *Id.*

[26] *Id.* at 218.

[27] *Id.* at 225.

[1] McClurg v. Kingsland, 42 U.S. (1 How.) 202, 206 (1843) ("[T]he powers of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution. . . . [T]here can be no limitation of their right to modify them at their pleasure, so that they do not take away the rights of property in existing patents."); *see also* Eldred v. Ashcroft, 537 U.S. 186, 202 (2003) ("[T]he Court has found no constitutional barrier to the legislative expansion of existing patents." (citing *McClurg*, 42 U.S. at 206)).

[2] Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 642 (1999) ("Patents, however, have long been considered a species of property. . . . As such, they are surely included within the 'property' of which no

just compensation under the Fifth Amendment's Takings Clause.[3] The Court has not had occasion to decide the applicability of the Takings Clause to patents, however, because Congress has long provided by statute that a patent holder may sue for "reasonable and entire compensation" if the Federal Government uses or manufactures a patented invention without a license.[4]

In *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*,[5] the Court distinguished these precedents regarding the nature of a patent as private property. *Oil States* held that because the grant of a patent was a "public right" (not a private right) under Article III of the Constitution, determinations of patent validity can be made by an administrative agency and need not be decided by an Article III court.[6] Although this holding is in some tension with the Court's earlier characterizations of patents as private property, *Oil States* emphasized "the narrowness of [its] holding"; the Court specifically noted that "our decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause."[7]

ArtI.S8.C8.5 Federal Power Over Trademarks

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

Congress's power over trademarks, another form of intellectual property, does not derive from the Intellectual Property (IP) Clause. In *The Trade-Mark Cases*,[1] decided in 1879, the Supreme Court held that Congress lacked power under the IP Clause to provide for trademark protection because trademarks need not be original, creative, novel, nor inventive.[2] As a result, the Court was "unable to see any such power [to protect trademarks] in the constitutional provision concerning authors and inventors, and their writings and discoveries."[3] In the

person may be deprived by a State without due process of law [under the Fourteenth Amendment.]" (citations omitted)). For background on the Due Process Clause, see Amdt14.S1.3 Due Process Generally.

[3] *See, e.g.*, Horne v. Dep't of Agric., 576 U.S. 351, 359–60 (2015) ("'[A patent] confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser.'" (quoting James v. Campbell, 104 U.S. 356, 358 (1882))); *see also* McCormick Harvesting Mach. Co. v. C. Aultman & Co., 169 U.S. 606, 609 (1898) (concluding that a granted patent "become[s] the property of the patentee, and as such is entitled to the same legal protection as other property"); Brown v. Duchesne, 60 U.S. (19 How.) 183, 197 (1857) ("[B]y the laws of the United States, the rights of a party under a patent are his private property . . . ."). For more on the Takings Clause as applied to tangible property, see Amdt5.9.1 Overview of Takings Clause.

[4] *See* 28 U.S.C. § 1498(a). An analogous right to sue is afforded to copyright holders. *Id.* § 1498(b).

[5] Oil States Energy Servs., LLC v. Greene's Energy Grp., No. 16-712, slip op. at 10–11 (U.S. Apr. 24, 2018).

[6] *Id.* at 5–10. For a discussion of *Oil States* in the context of the limits on congressional power to establish non-Article III courts, see ArtIII.S1.9.1 Overview of Congressional Power to Establish Non-Article III Courts.

[7] *Oil States*, slip op. at 16–17. *Oil States* also specified that it did not decide "whether other patent matters, such as infringement actions, can be heard in a non-Article III forum," or whether the retroactive application of the inter partes review administrative procedure effected a due process violation. *Id.* at 17.

[1] The Trade-Mark Cases, 100 U.S. 82 (1879).

[2] *Id.* at 94 ("The ordinary trade-mark has no relation to invention or discovery . . . neither originality, invention, discovery, science, nor art is in any way essential to the [trademark] right . . . .").

[3] *Id.*

twentieth century, however, courts have sustained federal trademark legislation as an exercise of Congress's power under the Commerce Clause.[4]

As with other forms of intellectual property, Congress's power over trademarks cannot be used in ways that infringe the constitutional rights of individuals. For example, because trademarks are considered private speech under the First Amendment, the government generally cannot engage in viewpoint discrimination in trademark registration decisions.[5]

ArtI.S8.C8.6 State Regulation of Intellectual Property

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

In the absence of preemptive federal legislation to the contrary, nondiscriminatory exercises of state police and taxing powers are not invalid just because such state laws affect federal copyrights and patents.[1] Thus, state safety regulations are not void because they limit or preclude the practice of an invention protected by a federal patent.[2] Similarly, a state may prescribe reasonable regulations on the transfer of intellectual property rights to protect its citizens from fraud.[3] States may tax royalties received from patent or copyright licenses as income.[4]

Furthermore, states may provide IP-like protections to material that Congress could regulate under the IP Clause, so long as these provisions are neither (i) expressly preempted by a valid act of Congress, nor (ii) in conflict with the purposes of, or the policy balance struck by, federal IP law.[5] For example, before the Copyright Act of 1976, federal copyright law only applied to published works, and many states protected unpublished creative works under "common law" copyright.[6] Similarly, in *Goldstein v. California*, the Supreme Court ruled that states may use criminal law to penalize the unauthorized pirating of sound recordings that (although they are the writings of authors) were not protected by federal copyright law.[7] States may also provide trade secret protections for economically valuable information that is kept secret, even if that information constitutes patentable subject matter.[8]

However, states may not regulate in the field of copyrights and patents in a way that "conflict[s] with the operation of the laws in this area passed by Congress" or "clashes with the

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[4] Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358, 365 (2d Cir. 1959) (holding that Congress has power under the Commerce Clause to regulate trademarks used in commerce, even if the use is purely intrastate). For an overview of the scope of the Commerce Clause, see ArtI.S8.C3.1 Overview of Commerce Clause.

[5] Iancu v. Brunetti, No. 18-302, slip op. at 1 (U.S. June 24, 2019); *Matal v. Tam,* slip op. at 18, 25–26 (U.S. June 19, 2017); *see generally* Amdt1.7.6.1 Commercial Speech Early Doctrine.

[1] Aronson v. Quick Point Pencil Co., 440 U.S. 257, 262 (1979) ("[S]tates are free to regulate the use of such intellectual property in any manner not inconsistent with federal law.").

[2] Patterson v. Kentucky, 97 U.S. 501, 505–07 (1879).

[3] Allen v. Riley, 203 U.S. 347, 356 (1906); *see also Aronson*, 440 U.S. at 262 ("State [contract] law is not displaced merely because the contract relates to intellectual property which may or may not be patentable . . . .").

[4] Fox Film Corp. v. Doyal, 286 U.S. 123, 128, 131 (1932).

[5] *See* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 152, 165 (1989).

[6] *See* Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 550–51 (1985); Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657 (1834).

[7] 412 U.S. 546, 560–62 (1973). Congress later created federal protection for the pre-1972 sound recordings at issue in *Goldstein*. *See* Hatch-Goodlatte Music Modernization Act, Pub. L. No. 115-264, tit. II, 132 Stat. 3676, 3728–37 (2018).

[8] Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 491 (1974).

balance struck by Congress" in its IP laws.[9] Indeed, a core purpose of the IP Clause's inclusion in the Constitution was to provide national uniformity in intellectual property law.[10] Thus, states cannot offer patent-like protection to the subject matter of an expired patent or to "intellectual creations which would otherwise remain unprotected as a matter of federal law."[11] For example, states may not use unfair competition law to prevent the copying of items that are not patentable for a lack of novelty or nonobviousness,[12] or create a patent-like regime that prohibits the copying of certain unpatented industrial designs.[13] Such state laws impermissibly interfere with the federal patent policy that "ideas once placed before the public without the protection of a valid patent are subject to appropriation [by the public] without significant restraint."[14]

Clause 9—Courts

ArtI.S8.C9.1 Inferior Federal Courts

Article I, Section 8, Clause 9:

[The Congress shall have Power . . .] To constitute Tribunals inferior to the supreme Court.

Congress's ninth enumerated power is to "constitute Tribunals inferior to the supreme Court"—that is, to establish lower federal courts subordinate to the Supreme Court of the United States.[1] This grant of power to Congress accords with Article III's Vesting Clause, which places the judicial power of the United States in the Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish."[2]

As explained elsewhere in the *Constitution Annotated*,[3] the Constitutional Convention's delegates generally agreed that a national judiciary should be established with a supreme tribunal,[4] but disagreed as to whether there should be inferior federal tribunals.[5] James Wilson (who later served as an Associate Justice on the Supreme Court) and James Madison proposed a compromise in which Congress would be empowered to appoint inferior tribunals if necessary, which the Convention approved.[6]

The Constitution thus leaves the federal judiciary's structure—and, indeed, whether any federal courts besides the Supreme Court should exist at all—to congressional determination.

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[9] *Id.* at 479; *Bonito Boats*, 489 U.S. at 152.

[10] *Bonito Boats*, 489 U.S. at 162.

[11] *Id.* at 152, 156.

[12] Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); *see also* Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964).

[13] *Bonito Boats*, 489 U.S. at 157.

[14] *Id.* at 156.

[1] *See* ArtIII.S1.8.4 Establishment of Inferior Federal Courts.

[2] *See* U.S. Const. art. III, § 1; *see* 3 Joseph Story, Commentaries on the Constitution of the United States § 1573 (1833) (noting that the inferior courts power "properly belongs to the third article of the Constitution").

[3] *See* ArtIII.S1.8.2 Historical Background on Establishment of Article III Courts; *see also* 3 Story's Commentaries, *supra* note 2, § 1574 (reviewing the debate at the Convention over inferior federal tribunals).

[4] *See* 1 Max Farrand, The Records of the Federal Convention of 1787, at 104 (1911).

[5] *See id.* at 124–25. John Rutledge, for example, argued that the existing state courts—and not inferior federal courts—ought to decide all cases in the first instance with a right of appeal to the supreme national tribunal. *Id.* at 124.

[6] *Id.* at 125, 127. Madison argued that the Supreme Court's appellate workload would become "oppressive" without inferior federal tribunals. *Id.* at 124; *see also* The Federalist No. 81 (Alexander Hamilton) ("The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance.").

Through the Judiciary Act of 1789 and subsequent enactments,[7] Congress organized the federal judiciary into district courts with original jurisdiction over most federal cases, intermediate circuit courts of appeal, and the Supreme Court.

Congress's Article I power to establish inferior federal courts, and to distribute federal jurisdiction among them, should be read alongside Article III's provisions, which set forth the reach of federal judicial power.[8] Article III also identifies certain cases in which the Supreme Court has original jurisdiction.[9]

Clause 10—Maritime Crimes

ArtI.S8.C10.1 Historical Background on Maritime Crimes

Article I, Section 8, Clause 10:

> *[The Congress shall have Power . . .] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; . . .*

"When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among civilized nations of Europe, as their public law. . . . The faithful observance of this law is essential to national character. . . ."[1] These words of the Chancellor Kent expressed the view of the binding character of international law that was generally accepted at the time the Constitution was adopted. During the Revolutionary War, Congress took cognizance of all matters arising under the law of nations and professed obedience to that law.[2] Under the Articles of Confederation, it was given exclusive power to appoint courts for the trial of piracies and felonies committed on the high seas, but no provision was made for dealing with offenses against the law of nations.[3] The draft of the Constitution submitted to the Convention of 1787 by its Committee of Detail empowered Congress "to declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations."[4] In the debate on the floor of the Convention, the discussion turned on the question as to whether the terms, "felonies" and the "law of nations," were sufficiently precise to be generally understood. The view that these terms were often so vague and indefinite as to require definition eventually prevailed and Congress was authorized to define as well as punish piracies, felonies, and offenses against the law of nations.[5]

ArtI.S8.C10.2 Definition of Maritime Crimes and Offenses

Article I, Section 8, Clause 10:

> *[The Congress shall have Power . . .] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; . . .*

The fact that the Constitutional Convention considered it necessary to give Congress authority to define offenses against the law of nations does not mean that in every case

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[7] *See* An Act to Establish the Judicial Courts of the United States, 1 Stat. 73 (1789).

[8] U.S. Const. art. III, § 2, cl. 1; *see* ArtIII.S2.C1.1 Overview of Cases or Controversies.

[9] U.S. Const. art. III, § 2, cl. 2; *see* ArtIII.S2.C2.2 Supreme Court Original Jurisdiction.

[1] 1 J. Kent, Commentaries on American Law 1 (1826).

[2] 19 Journals of the Continental Congress 315, 361 (1912); 20 *id.* at 762; 21 *id.* at 1136–37, 1158.

[3] Article IX.

[4] 2 Records of the Federal Convention of 1787, at 168, 182 (Max Farrand ed., 1937).

[5] *Id.* at 316.

Congress must undertake to codify that law or mark its precise boundaries before prescribing punishments for infractions thereof. An act punishing "the crime of piracy, as defined by the law of nations[,]" was held to be an appropriate exercise of the constitutional authority to "define and punish" the offense, since it adopted by reference the sufficiently precise definition of International Law.[1] Similarly, in *Ex parte Quirin*,[2] the Court found that by the reference in the Fifteenth Article of War to "offenders or offenses that . . . by the law of war may be triable by such military commissions . . .," Congress had "exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals."[3] Where, conversely, Congress defines with particularity a crime which is "an offense against the law of nations," the law is valid, even if it contains no recital disclosing that it was enacted pursuant to this clause. Thus, the duty which the law of nations casts upon every government to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof, was found to furnish a sufficient justification for the punishment of the counterfeiting within the United States, of notes, bonds, and other securities of foreign governments.[4]

ArtI.S8.C10.3 Extraterritorial Reach

Article I, Section 8, Clause 10:

> *[The Congress shall have Power . . .] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; . . .*

Since this clause contains the only specific grant of power to be found in the Constitution for the punishment of offenses outside the territorial limits of the United States, a lower federal court held in 1932[1] that the general grant of admiralty and maritime jurisdiction by Article III, Section 2, could not be construed as extending either the legislative or judicial power of the United States to cover offenses committed on vessels outside the United States but not on the high seas. Reversing that decision, the Supreme Court held that this provision "cannot be deemed to be a limitation on the powers, either legislative or judicial, conferred on the National Government by Article III, § 2. The two clauses are the result of separate steps independently taken in the Convention, by which the jurisdiction in admiralty, previously divided between the Confederation and the states, was transferred to the National Government. It would be a surprising result, and one plainly not anticipated by the framers or justified by principles which ought to govern the interpretation of a constitution devoted to the redistribution of governmental powers, if part of them were lost in the process of transfer. To construe the one clause as limiting rather than supplementing the other would be to ignore their history, and without effecting any discernible purpose of their enactment, to deny to both the states and the National Government powers which were common attributes of sovereignty before the adoption of the Constitution. The result would be to deny to both the power to define and punish crimes of less gravity than felonies committed on vessels of the United States while on the high seas, and crimes of every grade committed on them while in foreign territorial

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[1] United States v. Smith, 18 U.S. (5 Wheat.) 153, 160, 162 (1820). *See also* The Marianna Flora, 24 U.S. (11 Wheat.) 1, 40–41 (1826); United States v. Brig Malek Abhel, 43 U.S. (2 How.) 210, 232 (1844).

[2] 317 U.S. 1 (1942).

[3] 317 U.S. at 28.

[4] United States v. Arjona, 120 U.S. 479, 487, 488 (1887).

[1] United States v. Flores, 3 F. Supp. 134 (E.D. Pa. 1932).

waters."[2] Within the meaning of this Section, an offense is committed on the high seas even when the vessel on which it occurs is lying at anchor on the road in the territorial waters of another country.[3]

Clause 11—War Powers

ArtI.S8.C11.1 Source of Congress's War Powers

Article I, Section 8, Clause 11:

> *[The Congress shall have Power . . .] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; . . .*

Three different views regarding the source of "war powers" were expressed in the early years of the Constitution and continued to vie for supremacy for nearly a century and a half. In the *Federalist Papers*,[1] Alexander Hamilton elaborated on the theory that the war power is an aggregate of the particular powers granted to a National Government. In 1795, the argument was advanced that the National Government's war power is an attribute of sovereignty and hence not dependent upon the affirmative grants of the written Constitution.[2] In *McCulloch v. Maryland*, Chief Justice John Marshall appears to have taken a still different view, namely that the power to wage war is implied from the power to declare it.[3] During the Civil War era, the two latter theories emerged from the Supreme Court. Speaking for four Justices in *Ex parte Milligan*, Chief Justice Salmon P. Chase described the power to declare war as "necessarily" extending "to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and conduct of campaigns."[4] In another case, adopting the terminology used by President Abraham Lincoln in his Message to Congress on July 4, 1861,[5] the Court referred to "the war power" as a single unified power.[6]

In 1936, the Court explained the logical basis for imputing such an inherent power to the Federal Government. In *United States v. Curtiss-Wright Corp.*,[7] Justice George Sutherland stated the reasons for this conclusion:

> As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised

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[2] United States v. Flores, 289 U.S. 137, 149–50 (1933).

[3] United States v. Furlong, 18 U.S. (5 Wheat.) 184, 200 (1820).

[1] The Federalist No. 23 (Alexander Hamilton). Hamilton argued that the power to regulate the Armed Forces, like other powers related to the common defense, "ought to exist without limitation." *Id.*

[2] Penhallow v. Doane, 3 U.S. (3 Dall.) 54, 80 (1795) ("In [the Continental] Congress were vested, because by Congress were exercised with the approbation of the people, the rights and powers of war and peace. In every government, whether it consists of many states, or of a few, or whether it be of a federal or consolidated nature, there must be a supreme power or will; the rights of war and peace are component parts of this supremacy . . . ").

[3] McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 373 (1819) ("[T]he power to declare war involves, by necessary implication, if anything was to be implied, the powers of raising and supporting armies, and providing and maintaining a navy, to prosecute the war then declared.").

[4] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (dissenting opinion); *see also* Miller v. United States, 78 U.S. (11 Wall.) 268, 305 (1871).

[5] Cong. Globe, 37th Congress, 1st Sess., App. 1 (1861).

[6] Hamilton v. Dillin, 88 U.S. (21 Wall.) 73, 87 (1875).

[7] 299 U.S. 304 (1936).

an army, created a navy, and finally adopted the Declaration of Independence. It results that the investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality.[8]

ArtI.S8.C11.2 Scope of Congress's War Powers

Article I, Section 8, Clause 11:

[The Congress shall have Power . . .] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; . . .

The Supreme Court has suggested the breadth of Congress's "war powers" covers matters beyond the authorization of military and naval operations to support economic measures with impact on private citizens.[1] For example, in *McCulloch v. Maryland*,[2] Chief Justice John Marshall listed the power "to declare and conduct a war" as one of the "enumerated powers" from which the authority to charter the Bank of the United States was deduced.[3]

In *Lichter v. United States*,[4] upholding the Renegotiation Act,[5] which permitted the government to recoup excessive profits from defense contractors, the Court declared that:

In view of this power 'To raise and support Armies,' and the power granted in the same Article of the Constitution 'to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers', the only question remaining is whether the Renegotiation Act was a law 'necessary and proper for carrying into Execution' the war powers of Congress and especially its power to support armies.[6]

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[8] *Id.* at 318; *but see* Torres v. Texas Dep't of Public Safety, No. 20-603, slip op. at 7 (U.S. June 29, 2022) ("For one thing, the Constitution's text, across several Articles, strongly suggests a complete delegation of authority to the Federal Government to provide for the common defense. Unlike most of the powers given to the national government, the Constitution spells out the war powers not in a single, simple phrase, but in many broad, interrelated provisions.").

[1] See. *e.g.*, United States v. Macintosh, 283 U.S. 605, 622 (1931), ("From its very nature the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law.") overruled on other grounds by Girouard v. United States, 328 U.S. 61, 66 (1946); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934) ("[The] war power of the federal government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation."); Jacob Ruppert, Inc. v. Caffey, 251 U.S. 264, 299–300 (1920) (upholding the Volstead Act prohibition on the manufacture and sale of non-intoxicating beer on the basis that "the implied war power over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors but will effectually prevent their sale"); Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 507 (1870) ("[T]he [war] power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.").

[2] 17 U.S. (4 Wheat.) 316 (1819).

[3] *Id.* at 407–08 ("Although, among the enumerated powers of government, we do not find the word 'bank' or 'incorporation,' we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. . . . [I]t may with great reason be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution.").

[4] 334 U.S. 742 (1948).

[5] Sixth Supplemental National Defense Appropriation Act § 403, 56 Stat. 226, 245–246 (1942) (as amended).

[6] 334 U.S. at 757–58.

In a footnote, the Court in *Lichter* listed the Preamble, the Necessary and Proper Clause, the provisions authorizing Congress to lay taxes and provide for the common defense, to declare war, and to provide and maintain a navy, together with the clause designating the President as Commander in Chief of the Army and Navy, as being "among the many other provisions implementing the Congress and the President with powers to meet the varied demands of war . . . ."[7] The Court in *Lichter* also compared the Renegotiation Act to the Selective Service Act, explaining that "[t]he authority of Congress to authorize each of them sprang from its war powers. Each was part of a national policy adopted in time of crisis in the conduct of total global warfare by a nation dedicated to the preservation, practice and development of the maximum measure of individual freedom consistent with the unity of effort essential to success."[8] The Court asserted that "[b]oth Acts were a form of mobilization" and that "[t]he language of the Constitution authorizing such measures is broad rather than restrictive."[9]

The Court has stated that "[the war power] is not limited to victories in the field . . . [as] [i]t carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."[10] After World War II hostilities ended, Congress enacted the Housing and Rent Act to continue the controls begun in 1942,[11] and continued the military draft.[12] With the outbreak of the Korean War, legislation was enacted establishing general presidential control over the economy again,[13] and by executive order the President created agencies to exercise the power.[14] The Court continued to assume the existence of a state of wartime emergency prior to Korea, but with misgivings. In *Woods v. Cloyd W. Miller Co.*,[15] the Court held that the new rent control law were constitutional on the ground that cessation of hostilities did not end the government's war power, but that the power continued to remedy the evil arising out of the emergency. Yet as Justice William Douglas noted for the Court:

> "We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well. There are no such implications in today's decision."[16]

Justice Robert Jackson, concurring, explained that he found the war power "the most dangerous one to free government in the whole catalogue of powers" and cautioned that its exercise "be scrutinized with care."[17] In *Ludecke v. Watkins*,[18] four dissenting Justices were prepared to hold that the presumption in the statute under review of continued war with

[7] *Id.* at 755 n.3.

[8] *Id.* at 754–55.

[9] *Id.* at 755.

[10] Stewart v. Kahn, 78 U.S. 493, 507 (1870); *see also* Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146 (1919).

[11] 61 Stat. 193 (1947).

[12] 62 Stat. 604 (1948).

[13] Defense Production Act of 1950, 64 Stat. 798.

[14] E.O. 10161, 15 Fed. Reg. 6105 (1950).

[15] 333 U.S. 138 (1948).

[16] *Id.* at 143–44.

[17] *Id.* at 146–47; *but see* Chastelton Corp. v. Sinclair, 265 U.S. 543, 547–48 (1924) ("[A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed. . . . [The Court] is open to inquire whether the exigency still existed upon which the continued operation of the law depended.").

Germany was "a pure fiction" and not to be used. The majority in *Ludecke* held, however, that the delegated power of the President to remove enemy aliens during World War II continued after hostilities ended, determining that the termiation of "'[t]he state of war' . . . is a political act."[19]

ArtI.S8.C11.3 Declarations of War

Article I, Section 8, Clause 11:

> *[The Congress shall have Power . . .] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; . . .*

In the early draft of the Constitution presented to the Convention by its Committee of Detail, Congress was empowered "to make war."[1] Although there were solitary suggestions that the power should be vested in the President alone,[2] in the Senate alone,[3] or in the President and the Senate,[4] the limited notes of the proceedings indicate that the Convention's sentiment was that the potentially momentous consequences of initiating armed hostilities should require involvement by the President and both Houses of Congress.[5] In contrast to the English system, the Framers did not want the wealth and blood of the Nation committed by the decision of a single individual;[6] in contrast to the Articles of Confederation, they did not wish to forego entirely the advantages of Executive efficiency nor to entrust the matter solely to a branch so close to popular passions.[7]

The result of these conflicting considerations was that the Convention amended the clause so as to give Congress the power to "declare war."[8] Although this change could be read to give Congress the mere formal function of recognizing a state of hostilities, in the context of the Convention proceedings it appears more likely the change was intended to ensure that the

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[18] 335 U.S. 160, 175 (1948).

[19] *Id.* at 168–69 (explaining that "'[t]he state of war' may be terminated by treaty or legislation or Presidential proclamation").

[1] 2 Records of the Federal Convention of 1787, at 313 (Max Farrand ed., 1937).

[2] Mr. Pierce Butler favored "vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it." *Id.* at 318.

[3] Mr. Charles Pinkney thought the House was too numerous for such deliberations but that the Senate would be more capable of a proper resolution and more acquainted with foreign affairs. Additionally, with the states equally represented in the Senate, the interests of all would be safeguarded. *Id.*

[4] Alexander Hamilton's plan provided that the President was "to make war or peace, with the advice of the senate." 1 *id.* at 300.

[5] 2 *id.* at 318–319. In the *Federalist No. 69* (Alexander Hamilton), Hamilton notes: "[T]he President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the Constitution under consideration, would appertain to the legislature." *See also id.* at No. 26, 164–171. *Cf.* C. Berdahl, War Powers of the Executive in the United States ch. V (1921).

[6] The Federalist No. 69 (Alexander Hamilton). During the Convention, Elbridge Gerry remarked that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." 2 Records of the Federal Convention of 1787, at 318 (Max Farrand ed., 1937).

[7] The Articles of Confederation vested powers with regard to foreign relations in the Congress.

[8] 2 Records of the Federal Convention of 1787, at 318–19 (Max Farrand ed., 1937).

President was empowered to repel sudden attacks[9] without awaiting congressional action and to make clear that the conduct of war was vested exclusively in the President.[10]

An early controversy revolved about the issue of the President's powers and the necessity of congressional action when hostilities are initiated against the United States rather than the Nation instituting armed conflict. The Bey of Tripoli, in the course of attempting to extort payment for not molesting United States shipping, declared war upon the United States, and a debate began whether Congress had to enact a formal declaration of war to create a legal status of war. President Thomas Jefferson sent a squadron of frigates to the Mediterranean to protect American ships but limited its mission to defense in the narrowest sense of the term. Attacked by a Tripolitan cruiser, one of the frigates subdued it, disarmed it, and, pursuant to instructions, released it. Jefferson in a message to Congress announced his actions as in compliance with constitutional limitations on his authority in the absence of a declaration of war.[11] Alexander Hamilton espoused a different interpretation, contending that the Constitution vested in Congress the power to initiate war, but that when another nation made war upon the United States, the United States was already in a state of war and no declaration by Congress was needed.[12] Congress thereafter enacted a statute authorizing the President to instruct the commanders of armed vessels of the United States to seize all vessels and goods of the Bey of Tripoli "and also to cause to be done all such other acts of precaution or hostility as the state of war will justify."[13] But Congress, apparently accepting Hamilton's view, did not pass a formal declaration of war.[14]

Sixty years later, the Supreme Court sustained the blockade of the Southern ports that Lincoln instituted in April 1861 at a time when Congress was not in session.[15] Congress subsequently ratified Lincoln's action,[16] so that it was unnecessary for the Court to consider the constitutional basis of the President's action in the absence of congressional authorization, but the Court in its 1863 decision *The Prizes Cases* nonetheless approved, 5-4, the blockade order as an exercise of Presidential power alone, on the ground that a state of war was a fact.[17] The Court reasoned: "The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact."[18] The minority challenged this doctrine on the ground that while the President could unquestionably adopt such measures as the laws permitted for the

[9] Jointly introducing the amendment to substitute "declare" for "make," Madison and Gerry noted the change would "leav[e] to the Executive the power to repel sudden attacks." *Id.* at 318.

[10] Connecticut originally voted against the amendment to substitute "declare" for "make" but "on the remark by Mr. King that 'make' war might be understood to 'conduct' it which was an Executive function, Mr. Ellsworth gave up his opposition, and the vote of Connecticut was changed." *Id.* at 319. The contemporary and subsequent judicial interpretation was to the understanding set out in the text. *Cf.* Talbot v. Seeman, 5 U.S. (1 Cr.) 1, 28 (1801) (Chief Justice John Marshall stated: "The whole powers of war being, by the Constitution of the United States, vested in congress, the acts of that body alone can be resorted to as our guides in this inquiry."); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866).

[11] Messages and Papers of the Presidents 326, 327 (J. Richardson ed., 1896).

[12] 7 Works of Alexander Hamilton 746–747 (J. Hamilton ed., 1851).

[13] 2 Stat. 129, 130 (1802).

[14] Congress need not declare war in the all-out sense; it may provide for a limited war which, it may be, the 1802 statute recognized. *Cf.* Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).

[15] Prize Cases, 67 U.S. (2 Bl.) 635 (1863).

[16] 12 Stat. 326 (1861).

[17] Prize Cases, 67 U.S. (2 Bl.) 635 (1863).

[18] *Id.* at 669.

enforcement of order against insurgency, Congress alone could stamp an insurrection with the character of war and thereby authorize the legal consequences ensuing from a state of war.[19]

A unanimous Court adopted the position of the majority in the *Prizes Case* a few years later in *The Protector* when it became necessary to ascertain the exact dates on which the war began and ended. In *The Protector*, Chief Justice Salmon P. Chase reasoned that the Court must "refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken. The proclamation of intended blockade by the President may therefore be assumed as marking the first of these dates, and the proclamation that the war had closed, as marking the second."[20]

These cases settled whether a state of war could exist without a formal declaration by Congress. When hostile action is taken against the Nation or against its citizens or commerce, the President may resort to force in response. But whether the Constitution empowers the President to commit troops abroad to further national interests absent a declaration of war or specific congressional authorization short of such a declaration has been controversial.[21] The Supreme Court has not addressed this issue[22] and lower courts have generally not adjudicated the matter on "political question" grounds.[23] Absent judicial guidance, Congress and the President have had to reach accommodations with each other.[24]

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[19] *Id.* at 682.

[20] The Protector, 79 U.S. (12 Wall.) 700, 702 (1872).

[21] The controversy, not susceptible of definitive resolution in any event, was stilled for the moment, when in 1973 Congress set a cut-off date for United States military activities in Indochina, Pub. L. No. 93–52, 108, 87 Stat. 134, and subsequently, over the President's veto, Congress enacted the War Powers Resolution, providing a framework for the assertion of congressional and presidential powers in the use of military force. Pub. L. No. 93–148, 87 Stat. 555 (1973), 50 U.S.C. §§ 1541–1548. *See* ArtII.S2.C1.10 1.10 Use of Troops Overseas and Congressional Authorization.

[22] In Atlee v. Richardson, 411 U.S. 911 (1973), *aff'g* 347 F. Supp. 689 (E.D. Pa., 1982), the Court summarily affirmed a three-judge court's dismissal of a suit challenging the constitutionality of United States activities in Vietnam on political question grounds. The action constituted approval on the merits of the dismissal, but it did not necessarily approve the lower court's grounds. *See also* Massachusetts v. Laird, 400 U.S. 886 (1970) (denying leave to file complaint); Holtzman v. Schlesinger, 414 U.S. 1304, 1316, 1321 (1973) (actions of individual justices on motions for stays). The Court has consistently denied certiorari in cases on its discretionary docket concerning this issue.

[23] *E.g.,* Velvel v. Johnson, 287 F. Supp. 846 (D. Kan. 1968), *aff'd sub nom.* Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970); Luftig v. McNamara, 252 F. Supp. 819 (D.D.C. 1966), aff'd 373 F.2d 664 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 945 (1968); Mora v. McNamara, 387 F.2d 862 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 934 (1968); Orlando v. Laird, 317 F. Supp. 1013 (E.D.N.Y. 1970), and Berk v. Laird, 317 F. Supp. 715 (E.D.N.Y. 1970), *consolidated and aff'd*, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973).

During the 1980s, based on the political question doctrine and certain other discretionary doctrines, courts were not receptive to suits, many by Members of Congress, seeking a declaration of the President's powers. *See, e.g.*, Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982) (military aid to El Salvador), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); Conyers v. Reagan, 578 F. Supp. 324 (D.D.C. 1984) (invasion of Grenada), *dismissed as moot*, 765 F.2d 1124 (D.C. Cir. 1985); Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987) (reflagging and military escort operation in Persian Gulf), *aff'd.* No. 87-5426 (D.C. Cir. 1988); Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) (U.S. Saudia Arabia/Persian Gulf deployment).

[24] For further discussion, see ArtII.S2.C1.1.1 Historical Background on Commander in Chief Clause to ArtII.S2.C1.1.19 Military Commissions.

ArtI.S8.C11.4 Enemy Property and Congress's War Powers

Article I, Section 8, Clause 11:

> *[The Congress shall have Power . . .] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; . . .*

In *Brown v. United States*,[1] Chief Justice John Marshall addressed the legal position of enemy property during wartime. He held that the mere declaration of war by Congress does not effect a confiscation of enemy property situated within the territorial jurisdiction of the United States, but that Congress could subject such property to confiscation by further action.[2] As an exercise of the war power, such confiscation is not subject to the restrictions of the Fifth and Sixth Amendments.[3] Since such confiscation is unrelated to the personal guilt of the property owner, it is immaterial whether the property belongs to an alien, a neutral, or even to a citizen.[4] Confiscation operates as an instrument of coercion, which, by depriving an enemy of his or her property, impairs the ability of such enemy to oppose the confiscating government while providing the confiscating government the means for conducting the war.[5]

ArtI.S8.C11.5 Prizes of War and Congress's War Powers

Article I, Section 8, Clause 11:

> *[The Congress shall have Power . . .] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; . . .*

The power of Congress with respect to prizes is plenary; no one can have any interest in prizes captured except by permission of Congress.[1] Nevertheless, since international law informs United States law, the Court will apply international law norms so long as such international law norms have not been modified by treaty or by legislative or executive action.[2]

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[1] 12 U.S. (8 Cr.) 110, 126 (1814). *See also* Conrad v. Waples, 96 U.S. 279, 284 (1878) ("[U]ntil some provision was made by law, the courts of the United States could not decree a confiscation of his property, and direct its sale.").

[2] *Brown*, 12 U.S. at 125 ("The constitution of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity, was received throughout the civilized world. In expounding that constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property, which may enable the government to apply to the enemy the rule that he applies to us."). *See also* Cent. Union Tr. Co. of New York v. Garvan, 254 U.S. 554, 566 (1921) ("There can be no doubt that Congress has power to provide for an immediate seizure in war times of property supposed to belong to the enemy . . . ."); United States v. Chem. Found., 272 U.S. 1, 11 (1926) ("Congress was untrammeled and free to authorize the seizure, use or appropriation of such properties without any compensation to the owners."); Silesian Am. Corp. v. Clark, 332 U.S. 469, 475 (1947) ("There is no doubt but that under the war power, as heretofore interpreted by this Court, the United States, acting under a statute, may vest in itself the property of a national of an enemy nation. Unquestionably to wage war successfully, the United States may confiscate enemy property.").

[3] Miller v. United States, 78 U.S. (11 Wall.) 268, 304–305 (1871); Stoehr v. Wallace, 255 U.S. 239, 245 (1921) ("That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy-owned, if adequate provision be made for a return in case of mistake, is not debatable."). *But see* Cities Serv. Co. v. McGrath, 342 U.S. 330, 335 (1952) (holding that confiscation of an instrument of debt could, in the event of a foreign court judgment effecting effecting a double recovery against them, give rise to a claim against the United States for a 'taking' of their property within the meaning of the Fifth Amendment).

[4] *Miller*, 78 U.S. at 305 (citing The Venus, 12 U.S. (8 Cranch) 253 (1814)); Juragua Iron Co. v. United States, 212 U.S. 297, 306–07 (1909) ("A neutral owning property within the enemy's lines holds it as enemy property, subject to the laws of war; and, if it is hostile property, subject to capture.") (quoting Young v. United States, 97 U.S. 39, 60 (1877)).

[5] *Miller*, 78 U.S. at 306; Kirk v. Lynd, 106 U.S. (16 Otto) 315, 316, (1882) ("All private property used, or intended to be used, in aid of an insurrection, with the knowledge or consent of the owner, is made the lawful subject of capture and judicial condemnation; and this, not to punish the owner for any crime, but to weaken the insurrection.").

[1] The Siren, 80 U.S. (13 Wall.) 389, 393 (1871).

[2] The Paquete Habana, 175 U.S. 677, 700, 711 (1900).

Thus, during the Civil War, the Court found that the Confiscation Act of 1861[3] and the Supplementary Act of 1863,[4] which, in authorizing the condemnation of vessels, made provision for the protection of interests of loyal citizens, merely created a municipal forfeiture and did not override or displace the law of prize.[5] The Court decided, therefore, that when a vessel was liable to condemnation under either law, the government was at liberty to proceed under the most stringent rules of international law, with the result that the citizen would be deprived of the benefit of the protective provisions of the statute.[6] Similarly, when Cuban ports were blockaded during the Spanish-American War, the Court held that the rule of international law exempting unarmed fishing vessels from capture applied in the absence of any treaty provision, or other public act of the government in relation to the subject.[7]

Clause 12—Army

ArtI.S8.C12.1 Historical Background on Congress's Authority to Raise and Support Armies

Article I, Section 8, Clause 12:

> *[The Congress shall have Power . . .] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; . . .*

The Framers did not insert the constitutional clauses that grant Congress authority to raise and support armies, as well as other related authorities, to endow the National Government rather than the states with these powers, but to designate the department of the Federal Government that would exercise the powers. The English King was endowed with the power not only to initiate war but the power to raise and maintain armies and navies.[1] Because these powers had been used historically to the detriment of the liberties and well-being of Englishmen and the English Declaration of Rights of 1688 provided that the King could not maintain standing armies without the consent of Parliament, the Framers vested these basic powers in Congress.[2]

ArtI.S8.C12.2 Time Limits on Appropriations for Army

Article I, Section 8, Clause 12:

> *[The Congress shall have Power . . .] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; . . .*

Prompted by the fear of standing armies to which Justice Joseph Story alluded, the Framers inserted the limitation that "no appropriation of money to that use shall be for a longer term than two years." In 1904, the question arose whether this provision would be violated if the government contracted to pay a royalty for use of a patent in constructing guns and other equipment where the payments are likely to continue for more than two years.

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[3] Act of Aug. 6, 1861, ch. 60, 12 Stat. 319.

[4] Act of Mar. 3, 1863, ch. 90, 12 Stat. 762.

[5] The Hampton, 72 U.S. (5 Wall.) 372, 376 (1867).

[6] *Id.*

[7] *The Paquete Habana*, 175 U.S. at 711.

[1] W. Blackstone, Commentaries 263 (St. G. Tucker ed., 1803).

[2] 3 Joseph Story, Commentaries on the Constitution of the United States 1187 (1833). While these clauses do not completely divest states of authority in this area, the Supreme Court has held that the states renounced their right to interfere with national policy in this area in the plan of the Convention. Torres v. Tex. Dep't of Pub. Safety, No. 20-603, slip op. 6 (U.S. 2022). Thus, Congress "may legislate at the expense of traditional state sovereignty to raise and support the Armed Forces." *Id.* at 9.

Solicitor-General Henry Hoyt ruled that such a contract would be lawful; that the appropriations limited by the Constitution "are those only which are to raise and support armies in the strict sense of the word 'support,' and that the inhibition of that clause does not extend to appropriations for the various means which an army may use in military operations, or which are deemed necessary for the common defense. . . ."[1] Relying on this earlier opinion, Attorney General Thomas Clark ruled in 1948 that there was "no legal objection to a request to the Congress to appropriate funds to the Air Force for the procurement of aircraft and aeronautical equipment to remain available until expended."[2]

ArtI.S8.C12.3 Conscription

Article I, Section 8, Clause 12:

> *[The Congress shall have Power . . .] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; . . .*

The constitutions adopted during the Revolutionary War by at least nine of the states sanctioned compulsory military service.[1] Towards the end of the War of 1812, conscription of men for the army was proposed by James Monroe, then Secretary of War, but opposition developed and peace came before the bill could be enacted.[2] In 1863, a compulsory draft law was adopted and put into operation without being challenged in the federal courts.[3] Yet this was not so with the Selective Service Act of 1917.[4] This measure was attacked on the grounds that it tended to deprive the States of the right to "a well-regulated militia," that the only power of Congress to exact compulsory service was the power to provide for calling forth the militia for the three purposes specified in the Constitution, which did not comprehend service abroad, and finally that the compulsory draft imposed involuntary servitude in violation of the Thirteenth Amendment. The Supreme Court rejected all of these contentions. It held that the powers of the States with respect to the militia were exercised in subordination to the paramount power of the National Government to raise and support armies, and that the power of Congress to mobilize an army was distinct from its authority to provide for calling the militia and was not qualified or in any wise limited thereby.[5]

Before the United States entered World War I, the Court had anticipated the objection that compulsory military service would violate the Thirteenth Amendment and had answered it in the following words: "It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers."[6] Accordingly, in the *Selective Draft Law Cases*,[7] it dismissed the objection under that Amendment as a contention that was "refuted by its mere statement."[8]

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[1] 25 Ops. Atty. Gen. 105, 108 (1904).

[2] 40 Ops. Atty. Gen. 555 (1948).

[1] Selective Draft Law Cases, 245 U.S. 366, 380 (1918); Cox v. Wood, 247 U.S. 3 (1918).

[2] 245 U.S. at 385.

[3] 245 U.S. at 386–88. The measure was upheld by a state court. Kneedler v. Lane, 45 Pa. St. 238 (1863).

[4] Act of May 18, 1917, 40 Stat. 76.

[5] Selective Draft Law Cases, 245 U.S. 366, 381, 382 (1918).

[6] Butler v. Perry, 240 U.S. 328, 333 (1916) (upholding state law requiring able-bodied men to work on the roads).

[7] 245 U.S. 366 (1918).

[8] 245 U.S. at 390.

Although the Supreme Court has so far formally declined to pass on the question of the "peacetime" draft,[9] its opinions leave no doubt of the constitutional validity of the act. In *United States v. O'Brien*,[10] upholding a statute prohibiting the destruction of selective service registration certificates, the Court, speaking through Chief Justice Earl Warren, thought "[t]he power of Congress to classify and conscript manpower for military service is 'beyond question.'"[11] In noting Congress's "broad constitutional power" to raise and regulate armies and navies,[12] the Court has specifically observed that the conscription act was passed "pursuant to" the grant of authority to Congress in clauses 12–14.[13]

Clause 13—Navy

ArtI.S8.C13.1 Congress's Naval Powers

Article I, Section 8, Clause 13:

[The Congress shall have Power . . .] To provide and maintain a Navy; . . .

Among the powers the states granted the U.S. Government pursuant to the Constitution was the power set forth at Article I, Section 8, Clause 13, to provide and maintain a navy. The Framers saw a navy as essential to the ability of the United States "to dictate the terms of the connection between the old and new world."[1] Among other things, the Framers viewed a navy as critical to whether the United States would be commercially independent of foreign naval powers, which might otherwise use their control of the seas to dictate terms under which the United States could trade.[2] Likewise, the Framers were concerned that, absent a navy, foreign nations could impede American citizens' access to the nation's fisheries or prevent them from navigating the Great Lakes and the Mississippi unimpaired.[3]

Not only was a navy essential to the nascent United States's viability but the Framers perceived that the vulnerabilities of individual states to the predations of foreign powers could only be addressed effectively and economically by the combined resources of the states—in

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[9] Universal Military Training and Service Act of 1948, 62 Stat. 604, as amended, 50 U.S.C. App. §§ 451–473. Actual conscription was precluded as of July 1, 1973, Pub. L. No. 92-129, 85 Stat. 353, 50 U.S.C. App. § 467(c), and registration was discontinued on March 29, 1975. Pres. Proc. No. 4360, 3 C.F.R. 462 (1971–1975 Compilation), 50 U.S.C. App. § 453 note. Registration, but not conscription, was reactivated in the wake of the invasion of Afghanistan. Pub. L. No. 96-282, 94 Stat. 552 (1980).

[10] 391 U.S. 367 (1968).

[11] 391 U.S. at 377, quoting Lichter v. United States, 334 U.S. 742, 756 (1948).

[12] Schlesinger v. Ballard, 419 U.S. 498, 510 (1975).

[13] Rostker v. Goldberg, 453 U.S. 57, 59 (1981). *See id.* at 64–65. *See also* Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984) (upholding denial of federal financial assistance under Title IV of the Higher Education Act to young men who fail to register for the draft).

[1] The Federalist No. 11 (Alexander Hamilton). *See also* The Federalist No. 4 (John Jay) ("The extension of our own commerce in our own vessels cannot give pleasure to any nations who possess territories on or near this Continent, because of the cheapness and excellence of our productions, added to the circumstance of vicinity, and the enterprize [sic] and address of our merchants and navigators, will give us a greater share in the advantages which thos territories afford, than consists with the wishes or policy of their respective Sovereigns.").

[2] The Federalist No. 11 (Alexander Hamilton) ("It would be in the power of the maritime nations, availing themselves of our universal impotence, to prescribe the conditions of our political existence; and as they have a common interest in being our carriers, and still more in preventing our becoming theirs, they would in all probability combine to embarrass our navigation in such a manner as would in effect destroy it, and confine us to a PASSIVE COMMERCE. We should then be compelled to content ourselves with the first price of our commodities, and to see the profits of our trade snatched from us to enrich our enemies and persecutors.") (capitalization retained). *See also* The Federalist No. 24 (Alexander Hamilton) ("If we mean to be a commercial people, or even secure on our Atlantic side, we must endeavor, as soon as possible, to have a navy.").

[3] The Federalist No. 11 (Alexander Hamilton). *See also* The Federalist No. 15 (Alexander Hamilton) ("Are we entitled by nature and compact to a free participation in the navigation of the Mississippi? Spain excludes us from it.").

short, by the United States. Recognizing this, John Jay asked during the Constitution's ratification: "Leave America divided into thirteen, or if you please into three or four independent Governments, what armies could they raise and pay, what fleets could they ever hope to have?"[4] Similarly, Alexander Hamilton noted the inadequacy of any individual state to support a navy, commenting: "A navy of the United States, as it would embrace the resources of all, is an object far less remote than a navy of any single State or partial confederacy, which would only embrace the resources of a single part."[5]

The Articles of Confederation and initial drafts of the Constitution provided for Congress "to build and equip" fleets.[6] The Framers, however, ultimately settled on the language "to provide and maintain a Navy." While this change appears to have elicited little debate at the Constitutional Convention, delegates at state ratification conventions expressed concern that a standing navy would provoke Great Britain and other European naval powers, possibly leading to wars.[7] Delegates to state conventions also argued that the cost of maintaining a navy would be excessive,[8] while others responded that a navy would be necessary to encourage national objectives such as commerce and navigation.[9] Supporters of a navy also reasoned that it would allow the Federal Government to maintain its rights to fisheries and protect the Atlantic seaboard in the event of attack.[10]

The Supreme Court has recognized that the Constitution's grant of authority to Congress over the Navy under Article I, Section 8, Clause 13 in conjunction with its grant of authority "[t]o raise and support Armies"[11] and "to make Rules for the Government and Regulation of the land and naval Forces"[12] requires the Court to provide great deference to Congress's decisions regarding the military and national defense.[13] For instance, in *Rostker v. Goldberg*, the Court observed: "The case arises in the context of Congress's authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."[14] Likewise, in *Torres v. Texas Department of Public Safety*, the Supreme Court found that Congress's authority "[t]o provide and maintain a Navy" and "[t]o raise and support Armies" gives it broad authority to achieve these objectives, including power to provide "returning veterans the right to reclaim their prior jobs with state employers" and the right to sue if state "employers refuse to accommodate them" notwithstanding the State sovereign immunity doctrine.[15] In another example of the breadth of power the Constitution grants Congress pursuant to its powers "[t]o provide and maintain a Navy" and "to raise and support

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[4] The Federalist No. 4 (John Jay).

[5] The Federalist No. 11 (Alexander Hamilton).

[6] Max Farrand, The Framing of the Constitution 141 (1913).

[7] Joseph Story, Commentaries on the Constitution of the United States § 1189 (1833).

[8] *Id.* Justice Story stated: "But the attempt on our part to provide a navy would provoke these powers who would not suffer us to become a naval power. Thus, we should be immediately involved in wars with them. The expense, too, of maintaining a suitable navy would be enormous; and wholly disproportionate to our resources. If a navy should be provided at all, it ought to be limited to the mere protection of our trade. It was further urged, that the Southern states would share a large portion of the burthens [sic] of maintaining a navy, without any corresponding advantages." *Id.*

[9] *Id.* at § 1190.

[10] *Id.*

[11] U.S. Const. art. I, § 8, cl. 12.

[12] U.S. Const. art. I, § 8, cl. 14.

[13] For additional discussion on Congress's powers with regard to the military and national defense, see ArtI.S8.C14.1 Care of Armed Forces.

[14] 453 U.S. 57, 64–65 (1981). See also Schlesinger v. Ballard, 419 U.S. 498, 510 (1975); United States v. O'Brien, 391 U.S. 367, 377 (1968); Smith v. Whitney, 116 U.S. 167 (1886).

[15] Torres v. Tex. Dep't of Pub. Safety, No. 20–603, slip op. at 8 (U.S. June 29, 2022). In making this finding, the Court reasoned that "States may be sued if they agreed their sovereignty would yield as part of the 'plan of the convention,'—that is, if 'the structure of the original Constitution itself' reflects a waiver of States' sovereign

Armies," the Court found in *United States v. Bethlehem Steel Corporation* that the Government could recoup excess profits from a shipbuilder.[16] The Court stated:

> The Constitution art. 1, s 8 grants to Congress power 'to raise and support Armies', 'to provide and maintain a Navy', and to make all laws necessary and proper to carry these powers into execution. Under this authority Congress can draft men for battle service. Its power to draft business organizations to support the fighting men who risk their lives can be no less.[17]

Clause 14—Land and Naval Forces Rules

ArtI.S8.C14.1 Care of Armed Forces

Article I, Section 8, Clause 14:

> *[The Congress shall have Power . . .] To make Rules for the Government and Regulation of the land and naval Forces; . . .*

Scope of the congressional and executive authority to prescribe the rules for the governance of the military is broad and subject to great deference by the Judiciary. The Supreme Court recognizes "that the military is, by necessity, a specialized society separate from civilian society," that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian," and that "Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [military society] shall be governed than it is when prescribing rules for [civilian society]."[1] Denying that Congress or military authorities are free to disregard the Constitution when acting in this area,[2] the Court nonetheless operates with "a healthy deference to legislative and executive judgments" about military affairs,[3] so that, while constitutional guarantees apply, "the different character of the military community and of the military mission requires a different application of those protections."[4]

In reliance upon this deference to congressional judgment about the roles of the sexes in combat and the necessities of military mobilization, coupled with express congressional consideration of the precise questions, the Court sustained as constitutional the legislative judgment to provide for registration of males only for possible future conscription.[5] Emphasizing the unique, separate status of the military, the necessity to indoctrinate men in obedience and discipline, the tradition of military neutrality in political affairs, and the need to protect troop morale, the Court upheld the validity of military post regulations, backed by congressional enactments, banning speeches and demonstrations of a partisan political nature

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immunity. '[A]ctions do not offend state sovereignty' if 'the States consented' to them 'at the founding.'") (quoting PennEast Pipeline Co. v. New Jersey, No. 19-1039, (U.S. June 29, 2021); Alden v. Maine, 527 U.S. 706, 728 (1999)).

[16] United States v. Bethlehem Steel Corp., 315 U.S. 289, 305 (1942).

[17] *Id.* The Court cited *Selective Draft Law Cases (Arver v. United States),* 245 U.S. 366 (1918) for Congress's authority to draft men into military service. *Id.*

[1] Parker v. Levy, 417 U.S. 733, 743–52 (1974). *See also* Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953); Schlesinger v. Councilman, 420 U.S. 738, 746–48 (1975); Greer v. Spock, 424 U.S. 828, 837–38 (1976); Middendorf v. Henry, 425 U.S. 25, 45–46 (1976); Brown v. Glines, 444 U.S. 348, 353–58 (1980); Rostker v. Goldberg, 453 U.S. 57, 64–68 (1981).

[2] Rostker v. Goldberg, 453 U.S. 57, 67 (1981).

[3] 453 U.S. at 66. "[P]erhaps in no other area has the Court accorded Congress greater deference." *Id.* at 64–65. *See also* Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

[4] Parker v. Levy, 417 U.S. 733, 758 (1974). "[T]he tests and limitations [of the Constitution] to be applied may differ because of the military context." Rostker v. Goldberg, 453 U.S. 57, 67 (1981).

[5] Rostker v. Goldberg, 453 U.S. 57 (1981). *Compare* Frontiero v. Richardson, 411 U.S. 677 (1973), *with* Schlesinger v. Ballard, 419 U.S. 498 (1975).

and the distribution of literature without prior approval of post headquarters, with the commander authorized to keep out only those materials that would clearly endanger the loyalty, discipline, or morale of troops on the base.[6] On the same basis, the Court rejected challenges on constitutional and statutory grounds to military regulations requiring servicemen to obtain approval from their commanders before circulating petitions on base, in the context of circulations of petitions for presentation to Congress.[7] And the statements of a military officer urging disobedience to certain orders could be punished under provisions that would have been of questionable validity in a civilian context.[8] Reciting the considerations previously detailed, the Court has refused to allow enlisted men and officers to sue to challenge or set aside military decisions and actions.[9]

Congress has a plenary and exclusive power to determine the age at which a soldier or seaman shall serve, the compensation he shall be allowed, and the service to which he shall be assigned. This power may be exerted to supersede parents' control of minor sons who are needed for military service. Where the statute requiring the consent of parents for enlistment of a minor son did not permit such consent to be qualified, their attempt to impose a condition that the son carry war risk insurance for the benefit of his mother was not binding on the government.[10] Because the possession of government insurance payable to the person of his choice is calculated to enhance the morale of the serviceman, Congress may permit him to designate any beneficiary he desires, irrespective of state law, and may exempt the proceeds from the claims of creditors.[11] Likewise, Congress may bar a state from taxing the tangible, personal property of a soldier, assigned for duty in the state, but domiciled elsewhere.[12] To safeguard the health and welfare of the armed forces, Congress may authorize the suppression of bordellos in the vicinity of the places where forces are stationed.[13]

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[6] Greer v. Spock, 424 U.S. 828 (1976), limiting Flower v. United States, 407 U.S. 197 (1972).

[7] Brown v. Glines, 444 U.S. 348 (1980); Secretary of the Navy v. Huff, 444 U.S. 453 (1980). The statutory challenge was based on 10 U.S.C. § 1034, which protects the right of members of the armed forces to communicate with a Member of Congress, but which the Court interpreted narrowly.

[8] Parker v. Levy, 417 U.S. 733 (1974).

[9] Chappell v. Wallace, 462 U.S. 296 (1983) (enlisted men charging racial discrimination by their superiors in duty assignments and performance evaluations could not bring constitutional tort suits); United States v. Stanley, 483 U.S. 669 (1987) (officer who had been an unwitting, unconsenting subject of an Army experiment to test the effects of LSD on human subjects could not bring a constitutional tort action for damages). These considerations are also the basis of the Court's construction of the Federal Tort Claims Act as not reaching injuries arising incident to military service. Feres v. United States, 340 U.S. 135 (1950). In *United States v. Johnson,* 481 U.S. 681 (1987), four Justices urged reconsideration of *Feres*, but that has not occurred.

[10] United States v. Williams, 302 U.S. 46 (1937). *See also In re* Grimley, 137 U.S. 147, 153 (1890); *In re* Morrissey, 137 U.S. 157 (1890).

[11] Wissner v. Wissner, 338 U.S. 655 (1950); Ridgway v. Ridgway, 454 U.S. 46 (1981). In the absence of express congressional language, like that found in *Wissner*, the Court nonetheless held that a state court division under its community property system of an officer's military retirement benefits conflicted with the federal program and could not stand. McCarty v. McCarty, 453 U.S. 210 (1981). *See also* Porter v. Aetna Casualty Co., 370 U.S. 159 (1962) (exemption from creditors' claims of disability benefits deposited by a veteran's guardian in a savings and loan association).

[12] Dameron v. Brodhead, 345 U.S. 322 (1953). *See also* California v. Buzard, 382 U.S. 386 (1966); Sullivan v. United States, 395 U.S. 169 (1969).

[13] McKinley v. United States, 249 U.S. 397 (1919).

ArtI.S8.C14.2 Trial and Punishment of Servicemen (Courts-Martial)

Article I, Section 8, Clause 14:

> *[The Congress shall have Power . . .] To make Rules for the Government and Regulation of the land and naval Forces; . . .*

Under its power to make rules for the government and regulation of the armed forces, Congress has set up a system of criminal law binding on all servicemen, with its own substantive laws, its own courts and procedures, and its own appeals procedure.[1]

Although courts have disagreed about using courts-martial to try servicemen for nonmilitary offenses,[2] the matter became important during the Cold War period when the United States found it essential to maintain, both at home and abroad, a large standing army in which great numbers of servicemen were draftees. In *O'Callahan v. Parker*,[3] the Supreme Court held that courts-martial did not have jurisdiction to try servicemen charged with a crime that was not "service connected." While the Court did not define "service connection," it noted that the serviceman committed the crime off-base when he was lawfully off duty against a civilian in peacetime in the United States.[4] In *Solorio v. United States*,[5] the Court discussed *O'Callahan*, holding that "the requirements of the Constitution are not violated where . . . a court-martial is convened to try a serviceman who was a member of the armed services at the time of the offense charged."[6] Chief Justice William Rehnquist's opinion for the Court stated that *O'Callahan* had been based on erroneous readings of English and American history, and that "the service connection approach . . . has proved confusing and difficult for military courts to apply."[7]

How the Bill of Rights and other constitutional guarantees apply to court-martial trials is not clear. The Fifth Amendment expressly excepts "[c]ases arising in the land and naval forces" from its grand jury provision, and there cases may also be excepted from the Sixth Amendment.[8] The double jeopardy provision of the Fifth Amendment appears to apply, however.[9] The Court of Military Appeals now holds that servicemen are entitled to all constitutional rights except those that expressly or by implication do not apply to the

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[1] The Uniform Code of Military Justice of 1950, 64 Stat. 107, *as amended by* the Military Justice Act of 1968, 82 Stat. 1335, 10 U.S.C. §§ 801 *et seq*. For prior acts, see 12 Stat. 736 (1863); 39 Stat. 650 (1916). *See also* Loving v. United States, 517 U.S. 748 (1996) (in context of the death penalty under the UCMJ). The same power that authorized Congress to promulgate the Uniform Code of Military Justice—granted by this Clause and the Necessary and Proper Clause—also authorized Congress to make a civil registration requirement a consequence of certain military crime convictions. *See* United States v. Kebodeaux, 570 U.S. 387, 395 (2013) (holding that the Military Regulation and Necessary and Proper Clauses authorized Congress to make civil registration a consequence of a servicemember's federal sex offence conviction).

[2] *Compare* Solorio v. United States, 483 U.S. 435, 441–47 (1987) (majority opinion), *with id.* at 456–61 (dissenting opinion), and O'Callahan v. Parker, 395 U.S. 258, 268–72 (1969) (majority opinion), with *id.* at 276–80 (Harlan, J., dissenting). *See* Robert Duke & Howard Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 Vand. L. Rev. 435 (1960).

[3] 395 U.S. 258 (1969).

[4] 395 U.S. at 273–74. *See also* Relford v. Commandant, 401 U.S. 355 (1971); Gosa v. Mayden, 413 U.S. 665 (1973).

[5] 483 U.S. 435 (1987).

[6] 483 U.S. at 450–51.

[7] 483 U.S. at 448. Although the Court of Military Appeals had affirmed Solorio's military-court conviction on the basis that the service-connection test had been met, the Court elected to reconsider and overrule O'Callahan altogether.

[8] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123, 138–39 (1866); *Ex parte* Quirin, 317 U.S. 1, 40 (1942). The matter was raised but left unresolved in *Middendorf v. Henry*, 425 U.S. 25 (1976).

[9] *See* Wade v. Hunter, 336 U.S. 684 (1949). *Cf.* Grafton v. United States, 206 U.S. 333 (1907).

military.[10] The Uniform Code of Military Justice, supplemented by the *Manual for Courts-Martial*, affirmatively grants due process rights roughly comparable to civilian procedures.[11] However, the Code leaves intact much of the traditional structure of courts-martial, including the possibility of command influence,[12] and the Court of Military Appeals scope of review is limited,[13] thus creating areas of potential constitutional challenges.

Upholding Articles 133 and 134 of the Uniform Code of Military Justice (UCMJ), the Court in *Parker v. Levy* stressed the special status of military society.[14] This difference has resulted in a military code that regulates aspects of military members' conduct that civilian governments do not regulate. In addition, the military code imposes penalties ranging from severe to below those possible in civilian life. Because of these factors, the Court, while agreeing that constitutional limitations apply to military justice, reasoned that the standards of constitutional guarantees were significantly different in the military. Thus, the Court held the vagueness challenge to UCMJ Articles 133 and 134 to be governed by the standard applied to criminal statutes regulating economic affairs—the most lenient of vagueness standards.[15] Applying USMJ Articles 133 and 134 to conduct essentially composed of speech did not require voiding the conviction, as the speech was unprotected, and, even if the Articles might reach protected speech, the officer in the instant case was unable to raise that issue.[16]

The Court has recognized that military courts are not Article III courts, but are agencies established pursuant to Article I.[17] In the nineteenth century, the Court established that the civil courts have no power to interfere with courts-martial and that court-martial decisions are not subject to civil court review.[18] The Supreme Court had no jurisdiction to review by writ of certiorari military commission proceedings until August 1, 1984, when Congress conferred appellate jurisdiction to the Court of Military Appeals.[19] Prior to that time, civil court review of court-martial decisions was possible through habeas corpus jurisdiction,[20] an avenue that continues to exist, but the Court severely limited the scope of such review, restricting it to

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[10] United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). This conclusion by the Court of Military Appeals is at least questioned and perhaps disapproved in *Middendorf v. Henry*, 425 U.S. 25, 43–48 (1976), in the course of overturning a CMA rule that counsel was required in summary court-martial. For the CMA's response to the holding, *see* United States v. Booker, 5 M. J. 238 (C.M.A. 1977), *rev'd in part on reh.*, 5 M. J. 246 (C.M.A. 1978).

[11] The UCMJ guarantees counsel, protection from self-incrimination and double jeopardy, and warnings of rights prior to interrogation, to name a few.

[12] *Cf.* O'Callahan v. Parker, 395 U.S. 258, 263–64 (1969).

[13] 10 U.S.C. § 867.

[14] 417 U.S. 733 (1974). Article 133 punishes a commissioned officer for "conduct unbecoming an officer and gentleman," and Article 134 punishes any person subject to the Code for "all disorders and neglects to the prejudice of good order and discipline in the armed forces."

[15] 417 U.S. at 756.

[16] 417 U.S. at 757–61.

[17] Kurtz v. Moffitt, 115 U.S. 487 (1885); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858). Judges of Article I courts do not have the independence conferred by security of tenure and of compensation.

[18] Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

[19] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, 28 U.S.C. § 1259 . *See also* Ortiz v. United States, No. 16-1423, slip op. 5–19 (U.S. 2018) (affirming the Supreme Court's appellate jurisdiction to review decisions of the Court of Appeals for the Armed Forces).

[20] *Cf. Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1869); *Ex parte* Reed, 100 U.S. 13 (1879). While federal courts have jurisdiction to intervene in military court proceedings prior to judgment, as a matter of equity, following the standards applicable to federal court intervention in state criminal proceedings, they should act when the petitioner has not exhausted his military remedies only in extraordinary circumstances. Schlesinger v. Councilman, 420 U.S. 738 (1975).

whether the court-martial has jurisdiction over the person tried and the offense charged.[21] In *Burns v. Wilson*,[22] however, several Justices appeared to suggest that civil courts on habeas corpus could review claims of due process violations by military courts. Since *Burns*, the Court has thrown little light on the range of issues cognizable by a federal court in such litigation[23] and the lower federal courts have divided several possible ways.[24]

ArtI.S8.C14.3 Trial and Punishment of Civilians and Dependents (Courts-Martial)

Article I, Section 8, Clause 14:

> *[The Congress shall have Power . . .] To make Rules for the Government and Regulation of the land and naval Forces; . . .*

Over the years, the Supreme Court has narrowed the scope of persons Congress may constitutionally subject to the Uniform Code of Military Justice under its Clause 14 powers. In *United States ex rel. Toth v. Quarles*, the Court held that an honorably discharged former soldier, charged with having committed murder during military service in Korea, could not be tried by court-martial but, under the Constitution, could be charged in federal court.[1] In *Reid v. Covert*, the Court, after initially upholding the constitutionality of court-martial jurisdiction,[2] reached the opposite conclusion on rehearing, holding that court-martial jurisdiction was lacking, at least in peacetime, to try civilian dependents of service personnel for capital crimes committed outside the United States.[3] Subsequently, the Court extended its ruling to civilian dependents overseas charged with noncapital crimes[4] and to civilian employees of the military charged with either capital or noncapital crimes.[5]

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[21] *Ex parte* Reed, 100 U.S. 13 (1879); Swaim v. United States, 165 U.S. 553 (1897); Carter v. Roberts, 177 U.S. 496 (1900); Hiatt v. Brown, 339 U.S. 103 (1950).

[22] 346 U.S. 137 (1953).

[23] *Cf.* Fowler v. Wilkinson, 353 U.S. 583 (1957); United States v. Augenblick, 393 U.S. 348, 350 n.3, 351 (1969); Parker v. Levy, 417 U.S. 733 (1974); Secretary of the Navy v. Avrech, 418 U.S. 676 (1974).

[24] *E.g.*, Calley v. Callaway, 519 F.2d 184 (5th Cir., 1975) (en banc), *cert. denied*, 425 U.S. 911 (1976).

[1] 350 U.S. 11 (1955) (stating that it is within Congress's power to make former soldiers who are no longer subject to the military code subject to federal jurisdiction). Explaining the rationale for courts-martial, the Court noted: "Court-martial jurisdiction sprang from the belief that within the military ranks there is need for prompt, ready-at-hand means of compelling obedience and order. But Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades." *Id.* at 22. *See also* Lee v. Madigan, 358 U.S. 228 (1959).

[2] *See* Kinsella v. Krueger, 351 U.S. 470 (1956); Reid v. Covert, 351 U.S. 487 (1956).

[3] Reid v. Covert, 354 U.S. 1 (1957) (voiding court-martial convictions of two women for murdering their soldier husbands stationed in Japan). No majority of Justices in *Reid* agreed on the extent to which Congress's power under Clause 14 could reach civilians. Chief Justice Earl Warren and Justices Hugo Black, William Douglas, and William Brennan were of the opinion Congress's power under Clause 14 could not reach civilians at all. Justices Felix Frankfurter and John Harlan concurred as to the result, but expressed the more limited view that Clause 14 cannot justify the exercise of court-martial jurisdiction over civilian dependents in capital cases in peacetime.

[4] Kinsella v. United States, 361 U.S. 234 (1960) (voiding court-martial conviction for noncapital crime committed overseas by civilian wife of soldier). The majority could see no reason for distinguishing between capital and noncapital crimes. Justices Harlan and Frankfurter dissented on the ground that in capital cases greater constitutional protection, available in civil courts, was required.

[5] Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960).

Clause 15—Calling Militias

ArtI.S8.C15.1 Congress's Power to Call Militias

Article I, Section 8, Clause 15:

> *[The Congress shall have Power . . .] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; . . .*

The states as well as Congress may prescribe penalties for failure to obey the President's call of the militia. They also have a concurrent power to aid the National Government by calls under their own authority, and in emergencies may use the militia to put down armed insurrection.[1] The Federal Government may call out the militia in case of civil war; its authority to suppress rebellion is found in the power to suppress insurrection and to carry on war.[2] The act of February 28, 1795,[3] which delegated to the President the power to call out the militia, was held constitutional.[4] A militiaman who refused to obey such a call was not "employed in the service of the United States so as to be subject to the article of war," but was liable to be tried for disobedience of the act of 1795.[5]

Clause 16—Organizing Militias

ArtI.S8.C16.1 Congress's Power to Organize Militias

Article I, Section 8, Clause 16:

> *[The Congress shall have Power . . .] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; . . .*

The Supreme Court has characterized Congress's power over the militia as "being unlimited, except in the two particulars of officering and training them" under the Militia Clauses,[1] such that the power "may be exercised to any extent that may be deemed necessary by Congress."[2] At the same time, the Court acknowledged "[t]he power of the state government to legislate on the same subjects, having existed prior to the formation of the Constitution" remained with the states.[3] However, this power, the Court continued, is nevertheless subordinate "to the paramount law of the General Government."[4]

Under the National Defense Act of 1916,[5] the militia, which had been an almost purely state institution, was brought under the control of the federal government. The act divided

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[1] Moore v. Houston, 3 S. & R. (Pa.) 169 (1817), *aff'd*, Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820).

[2] Texas v. White, 74 U.S. (7 Wall.) 700 (1869); Tyler v. Defrees, 78 U.S. (11 Wall.) 331 (1871).

[3] 1 Stat. 424 (1795), 10 U.S.C. § 332.

[4] Martin v. Mott, 25 U.S. (12 Wheat.) 19, 32 (1827).

[5] Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

[1] U.S. Const. art. I, § 8, cl. 15; U.S. Const. art. I, § 8, cl. 16. For discussion of Congress's power to call militias, see ArtI.S8.C15.1 Congress's Power to Call Militias.

[2] Houston v. Moore, 18 U.S. (5 Wheat.) 1, 16 (1820).

[3] *Id.*

[4] *Id.* Because the Constitution commits organizing and providing for the militia to Congress and Congress has statutorily shared this authority with the Executive, the Judiciary is precluded from exercising oversight over the process, Gilligan v. Morgan, 413 U.S. 1 (1973), although wrongs committed by troops are subject to judicial relief in damages. Scheuer v. Rhodes, 416 U.S. 232 (1974).

[5] 39 Stat. 166, 197 (1916), codified in sections of Titles 10 & 32. *See* Frederick Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940).

"militia of the United States"—defined to include "all able-bodied male citizens of the United States and all other able-bodied males who have . . . declared their intention to become citizens of the United States" between the ages of eighteen and forty-five—into several classes of organized militias, including the National Guard. Among its measures, the act reorganized the National Guard, determined its size in proportion to the population of the several States, required that all enlistments be for "three years in service and three years in reserve," and limited the appointment of officers to those who "shall have successfully passed such tests as to . . . physical, moral and professional fitness as the President shall prescribe."[6] The act also authorized the President in certain emergencies to "draft into the military service of the United States to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and National Guard Reserve," who thereupon should "stand discharged from the militia."[7]

The Militia Clauses do not constrain Congress in raising and supporting a national army. The Supreme Court has approved the system of dual enlistment, under which persons enlisted in state militia (National Guard) units simultaneously enlist in the National Guard of the United States, and, when called to active duty in the federal service, are relieved of their status in the state militia.[8] Consequently, the restrictions in the first militia clause that limit the militia to be called forth for three specified purposes do not apply to the federalized National Guard.[9] Nor is there a constitutional requirement that state governors hold a veto power over federal duty training conducted outside the United States or that a national emergency be declared before such training may take place.[10]

Clause 17—Enclave Clause

ArtI.S8.C17.1 The Capitol

ArtI.S8.C17.1.1 Historical Background on Seat of Government Clause

Article I, Section 8, Clause 17:

> *[The Congress shall have Power . . .] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;–And . . .*

The Convention was moved to provide for the creation of a site in which to locate the Capital of the Nation, completely removed from the control of any state, because of the humiliation suffered by the Continental Congress on June 21, 1783. Some eighty soldiers, unpaid and weary, marched on the Congress sitting in Philadelphia, physically threatened and verbally abused the members, and caused the Congress to flee the City when neither

[6] 39 Stat. 166 at 198, 200, 202.

[7] *Id.* at 211. Military and civilian personnel of the National Guard are state, rather than federal, employees and the Federal Government is thus not liable under the Federal Tort Claims Act for their negligence. Maryland v. United States, 381 U.S. 41 (1965).

[8] *See* Perpich v. Dep't of Defense, 496 U.S. 334, 345–47 (1990). *Cf.* King v. St. Vincent's Hosp., 502 U.S. 215, 217 (1991) (holding that a provision of the Veterans' Reemployment Rights Act protected the reemployment rights of a National Guard member during his three-year full-time appointment with the Guard).

[9] *Id.* at 347–355.

[10] *Id.*

municipal nor state authorities would take action to protect the members.[1] Thus, Madison noted that "[t]he indispensable necessity of complete authority at the seat of government, carries its own evidence with it. . . . Without it, not only the public authority might be insulted and its proceedings interrupted with impunity, but a dependence of the members of the general government on the State comprehending the seat of government, for protection in the exercise of their duty, might bring on the national council an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the confederacy."[2]

The actual site was selected by compromise, Northerners accepting the Southern-favored site on the Potomac in return for Southern support for a Northern aspiration, assumption of Revolutionary War debts by the National Government.[3] Maryland and Virginia both authorized the cession of territory[4] and Congress accepted.[5] Congress divided the District into two counties, Washington and Alexandria, and provided that the local laws of the two states should continue in effect.[6] It also established a circuit court and provided for the appointment of judicial and law enforcement officials.[7]

ArtI.S8.C17.1.2 Seat of Government Doctrine

Article I, Section 8, Clause 17:

> *[The Congress shall have Power . . .] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;–And . . .*

There seems to have been no consideration, at least none recorded, given at the Convention or in the ratifying conventions to the question of the governance of the citizens of the District.[1] James Madison in the *Federalist Papers* did assume that the inhabitants "will have had their voice in the election of the government which is to exercise authority over them, as a municipal legislature for all local purposes, derived from their own suffrages, will of course be allowed

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[1] J. Fiske, The Critical Period of American History, 1783–1789 112–113 (1888); W. Tindall, The Origin and Government of the District of Columbia 31–36 (1903).

[2] The Federalist No. 43 (James Madison). *See also* 3 Joseph Story, Commentaries on the Constitution of the United States 1213, 1214 (1833).

[3] W. Tindall, The Origin and Government of the District of Columbia 5–30 (1903).

[4] Maryland Laws 1798, ch. 2, p. 46; 13 Laws of Virginia 43 (Hening 1789).

[5] Act of July 16, 1790, 1 Stat. 130. In 1846, Congress authorized a referendum in Alexandria County on the question of retroceding that portion to Virginia. The voters approved and the area again became part of Virginia. Laws of Virginia 1845–46, ch. 64, p. 50; Act of July 9, 1846, 9 Stat. 35; Proclamation of September 7, 1846; 9 Stat. 1000. Constitutional questions were raised about the retrocession but suit did not reach the Supreme Court until some forty years later and the Court held that the passage of time precluded the raising of the question. Phillips v. Payne, 92 U.S. 130 (1875).

[6] Act of February 27, 1801, 2 Stat. 103. The declaration of the continuing effect of state law meant that law in the District was frozen as of the date of cession, unless Congress should change it, which it seldom did. For some of the problems, *see* Tayloe v. Thompson, 30 U.S. (5 Pet.) 358 (1831); *Ex parte* Watkins, 32 U.S. (7 Pet.) 568 (1833); Stelle v. Carroll, 37 U.S. (12 Pet.) 201 (1838); Van Ness v. United States Bank, 38 U.S. (13 Pet.) 17 (1839); United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842).

[7] Act of March 3, 1801, 2 Stat. 115.

[1] The objections raised in the ratifying conventions and elsewhere seemed to have consisted of prediction of the perils to the Nation of setting up the National Government in such a place. 3 Joseph Story, Commentaries on the Constitution of the United States 1215, 1216 (1833).

them. . . .”[2] Although there was some dispute about the constitutional propriety of permitting local residents a measure of “home rule,” to use the recent term,[3] almost from the first there were local elections provided for. In 1802, the District was divided into five divisions, in some of which the governing officials were elected; an elected mayor was provided in 1820. District residents elected some of those who governed them until this form of government was swept away in the aftermath of financial scandals in 1874[4] and replaced with a presidentially appointed Commission in 1878.[5] The Commission lasted until 1967 when it was replaced by an appointed Mayor-Commissioner and an appointed city council.[6] In recent years, Congress provided for a limited form of self-government in the District, with the major offices filled by election.[7] District residents vote for President and Vice President[8] and elect a nonvoting delegate to Congress.[9] An effort by constitutional amendment to confer voting representation in the House and Senate failed of ratification.[10]

Constitutionally, it appears that Congress is neither required to provide for a locally elected government[11] nor precluded from delegating its powers over the District to an elective local government.[12] The Court has indicated that the “exclusive” jurisdiction granted was meant to exclude any question of state power over the area and was not intended to require Congress to exercise all powers itself.[13]

Chief Justice John Marshall for the Court held in *Hepburn v. Ellzey*[14] that the District of Columbia was not a state within the meaning of the Diversity Jurisdiction Clause of Article III. This view, adhered to for nearly a century and a half,[15] was overturned in 1949, the Court upholding the constitutionality of a 1940 statute authorizing federal courts to take jurisdiction of nonfederal controversies between residents of the District of Columbia and the citizens of a state.[16] The decision was by a 5-4 division, but the five in the majority disagreed among themselves on the reasons. Three thought the statute to be an appropriate exercise of the power of Congress to legislate for the District of Columbia pursuant to this clause without

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[2] The Federalist No. 43 (James Madison).

[3] Such a contention was cited and rebutted in 3 Joseph Story, Commentaries on the Constitution of the United States 1218 (1833).

[4] Act of May 3, 1802, 2 Stat. 195; Act of May 15, 1820, 3 Stat. 583; Act of February 21, 1871, 16 Stat. 419; Act of June 20, 1874, 18 Stat. 116. The engrossing story of the postwar changes in the government is related in W. Whyte, The Uncivil War: Washington During the Reconstruction (1958).

[5] Act of June 11, 1878, 20 Stat. 103.

[6] Reorganization Plan No. 3 of 1967, 32 Fed. Reg. 11699, reprinted as appendix to District of Columbia Code, Title I.

[7] District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774.

[8] Twenty-third Amendment.

[9] Pub. L. No. 91-405, 84 Stat. 848, D.C. Code, § 1-291.

[10] H.J. Res. 554, 95th Congress, passed the House on March 2, 1978, and the Senate on August 22, 1978, but only 16 states had ratified before the expiration of the proposal after seven years.

[11] Loughborough v. Blake, 18 U.S. (5 Wheat.) 317 (1820); Heald v. District of Columbia, 259 U.S. 114 (1922).

[12] District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953). The case upheld the validity of ordinances enacted by the District governing bodies in 1872 and 1873 prohibiting racial discrimination in places of public accommodations.

[13] 346 U.S. at 109–10. *See also* Thompson v. Lessee of Carroll, 63 U.S. (22 How.) 422 (1860); Stoutenburgh v. Hennick, 129 U.S. 141 (1889).

[14] 6 U.S. (2 Cr.) 445 (1805); *see also* Sere v. Pitot, 10 U.S. (6 Cr.) 332 (1810); New Orleans v. Winter, 14 U.S. (1 Wheat.) 91 (1816). The District was held to be a state within the terms of a treaty. Geofroy v. Riggs, 133 U.S. 258 (1890).

[15] Barney v. City of Baltimore, 73 U.S. (6 Wall.) 280 (1868); Hooe v. Jamieson, 166 U.S. 395 (1897); Hooe v. Werner, 166 U.S. 399 (1897).

[16] National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949).

regard to Article III.[17] Two others thought that *Hepburn v. Ellzey* had been erroneously decided and would have overruled it.[18] But six Justices rejected the former rationale and seven Justices rejected the latter one; since five Justices agreed, however, that the statute was constitutional, it was sustained.

It is not disputed that the District is a part of the United States and that its residents are entitled to all the guarantees of the United States Constitution including the privilege of trial by jury[19] and of presentment by a grand jury.[20] Legislation restrictive of liberty and property in the District must find justification in facts adequate to support like legislation by a state in the exercise of its police power.[21]

Congress possesses over the District of Columbia the blended powers of a local and national legislature.[22] This fact means that in some respects ordinary constitutional restrictions do not operate; thus, for example, in creating local courts of local jurisdiction in the District, Congress acts pursuant to its legislative powers under Clause 17 and need not create courts that comply with Article III court requirements.[23] And when legislating for the District Congress remains the legislature of the Union, so that it may give its enactments nationwide operation to the extent necessary to make them locally effective.[24]

ArtI.S8.C17.2 Places Purchased

ArtI.S8.C17.2.1 Overview of Places Purchased Clause

Article I, Section 8, Clause 17:

> *[The Congress shall have Power . . .] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;–And . . .*

This Clause has been broadly construed to cover all structures necessary for carrying on the business of the National Government.[1] It includes post offices,[2] a hospital and a hotel

[17] 337 U.S. at 588–600 (Justices Jackson, Black, and Burton).

[18] 337 U.S. at 604 (Justices Rutledge and Murphy). The dissents were by Chief Justice Vinson, *id.* at 626, joined by Justice Douglas and by Justice Frankfurter, *id.* at 646, joined by Justice Reed.

[19] Callan v. Wilson, 127 U.S. 540 (1888); Capital Traction Co. v. Hof, 174 U.S. 1 (1899).

[20] United States v. Moreland, 258 U.S. 433 (1922).

[21] Wright v. Davidson, 181 U.S. 371, 384 (1901); *cf.* Adkins v. Children's Hospital, 261 U.S. 525 (1923), overruled in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[22] Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 619 (1838); Shoemaker v. United States, 147 U.S. 282, 300 (1893); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 435 (1932); O'Donoghue v. United States, 289 U.S. 516, 518 (1933).

[23] In the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 111, 84 Stat. 475, D.C. Code, § 11-101, Congress specifically declared it was acting pursuant to Article I in creating the Superior Court and the District of Columbia Court of Appeals and pursuant to Article III in continuing the United States District Court and the United States Court of Appeals for the District of Columbia. The Article I courts were sustained in *Palmore v. United States,* 411 U.S. 389 (1973). *See also* Swain v. Pressley, 430 U.S. 372 (1977). The latter, federal courts, while Article III courts, traditionally have had some non-Article III functions imposed on them, under the "hybrid" theory announced in *O'Donoghue v. United States,* 289 U.S. 516 (1933). *E.g.*, Hobson v. Hansen, 265 F. Supp. 902 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968) (power then vested in District Court to appoint school board members). *See also* Keller v. Potomac Elec. Co., 261 U.S. 428 (1923); Embry v. Palmer, 107 U.S. 3 (1883).

[24] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 428 (1821).

[1] James v. Dravo Contracting Co., 302 U.S. 134, 143 (1937).

located in a national park,[3] and locks and dams for the improvement of navigation.[4] But it does not cover lands acquired for forests, parks, ranges, wild life sanctuaries or flood control.[5] Nevertheless, the Supreme Court has held that a state may convey, and the Congress may accept, either exclusive or qualified jurisdiction over property acquired within the geographical limits of a state, for purposes other than those enumerated in Clause 17.[6]

After exclusive jurisdiction over lands within a state has been ceded to the United States, Congress alone has the power to punish crimes committed within the ceded territory.[7] Private property located thereon is not subject to taxation by the state,[8] nor can state statutes enacted subsequent to the transfer have any operation therein.[9] But the local laws in force at the date of cession that are protective of private rights continue in force until abrogated by Congress.[10] Moreover, as long as there is no interference with the exclusive jurisdiction of the United States, an area subject to such jurisdiction may be annexed by a municipality.[11]

ArtI.S8.C17.2.2 Federal Jurisdiction Over Places Purchased

Article I, Section 8, Clause 17:

> *[The Congress shall have Power . . .] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;–And . . .*

A state may qualify its cession of territory by a condition that jurisdiction shall be retained by the United States only so long as the place is used for specified purposes.[1] Such a provision operates prospectively and does not except from the grant that portion of a described tract which is then used as a railroad right of way.[2] In 1892, the Court upheld the jurisdiction of the United States to try a person charged with murder on a military reservation, over the objection that the state had ceded jurisdiction only over such portions of the area as were used for military purposes and that the particular place on which the murder was committed was used solely for farming. The Court held that the character and purpose of the occupation having been officially established by the political department of the government, it was not open to the

[2] Battle v. United States, 209 U.S. 36 (1908).

[3] Arlington Hotel v. Fant, 278 U.S. 439 (1929).

[4] James v. Dravo Contracting Co., 302 U.S. 134, 143 (1937).

[5] Collins v. Yosemite Park Co., 304 U.S. 518, 530 (1938).

[6] 304 U.S. at 528.

[7] Battle v. United States, 209 U.S. 36 (1908); Johnson v. Yellow Cab Co., 321 U.S. 383 (1944); Bowen v. Johnston, 306 U.S. 19 (1939).

[8] Surplus Trading Co. v. Cook, 281 U.S. 647 (1930).

[9] Western Union Tel. Co. v. Chiles, 214 U.S. 274 (1909); Arlington Hotel v. Fant, 278 U.S. 439 (1929); Pacific Coast Dairy v. Department of Agriculture, 318 U.S. 285 (1943). The Assimilative Crimes Act of 1948, 18 U.S.C. § 13, making applicable to a federal enclave a subsequently enacted criminal law of the state in which the enclave is situated entails no invalid delegation of legislative power to the state. United States v. Sharpnack, 355 U.S. 286, 294, 296–97 (1958).

[10] Chicago, R.I. & P. Ry. v. McGlinn, 114 U.S. 542, 545 (1885); Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940).

[11] Howard v. Commissioners, 344 U.S. 624 (1953). As *Howard* recognized, such areas of federal property do not cease to be part of the state in which they are located and the residents of the areas are for most purposes residents of the state. Thus, a state may not constitutionally exclude such residents from the privileges of suffrage if they are otherwise qualified. Evans v. Cornman, 398 U.S. 419 (1970).

[1] Palmer v. Barrett, 162 U.S. 399 (1896).

[2] United States v. Unzeuta, 281 U.S. 138 (1930).

Court to inquire into the actual uses to which any portion of the area was temporarily put.[3] A few years later, however, it ruled that the lease to a city, for use as a market, of a portion of an area which had been ceded to the United States for a particular purpose, suspended the exclusive jurisdiction of the United States.[4]

The question arose whether the United States retains jurisdiction over a place that was ceded to it unconditionally, after it has abandoned the use of the property for governmental purposes and entered into a contract for sale to private persons. Minnesota asserted the right to tax the equitable interest of the purchaser in such land, and the Supreme Court upheld its right to do so. The majority assumed that "the Government's unrestricted transfer of property to nonfederal hands is a relinquishment of the exclusive legislative power."[5] In separate concurring opinions, Chief Justice Harlan Fiske Stone and Justice Felix Frankfurter reserved judgment on the question of territorial jurisdiction.[6]

ArtI.S8.C17.2.3 State Jurisdiction Over Places Purchased

Article I, Section 8, Clause 17:

> *[The Congress shall have Power . . .] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;–And . . .*

For more than a century the Supreme Court kept alive, by repeated dicta,[1] the doubt expressed by Justice Joseph Story "whether Congress are by the terms of the Constitution, at liberty to purchase lands for forts, dockyards, etc., with the consent of a State legislature, where such consent is so qualified that it will not justify the 'exclusive legislation' of Congress there. It may well be doubted if such consent be not utterly void."[2] But when the issue was squarely presented in 1937, the Court ruled that, when the United States purchases property within a state with the consent of the latter, it is valid for the state to convey, and for the United States to accept, "concurrent jurisdiction" over such land, the state reserving to itself the right to execute process "and such other jurisdiction and authority over the same as is not inconsistent with the jurisdiction ceded to the United States."[3] The holding logically renders the second half of Clause 17 superfluous. In a companion case, the Court ruled further that even if a general state statute purports to cede exclusive jurisdiction, such jurisdiction does not pass unless the United States accepts it.[4]

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[3] Benson v. United States, 146 U.S. 325, 331 (1892).

[4] Palmer v. Barrett, 162 U.S. 399 (1896).

[5] S.R.A., Inc. v. Minnesota, 327 U.S. 558, 564 (1946).

[6] 327 U.S. at 570, 571.

[1] Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 532 (1885); United States v. Unzeuta, 281 U.S. 138, 142 (1930); Surplus Trading Co. v. Cook, 281 U.S. 647, 652 (1930).

[2] United States v. Cornell, 25 F. Cas. 646, 649 (No. 14867) (C.C.D.R.I. 1819).

[3] James v. Dravo Contracting Co., 302 U.S. 134, 145 (1937).

[4] Mason Co. v. Tax Comm'n, 302 U.S. 186 (1937). *See also* Atkinson v. Tax Comm'n, 303 U.S. 20 (1938).

Clause 18—Necessary and Proper Clause

ArtI.S8.C18.1 Overview of Necessary and Proper Clause

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

The Necessary and Proper Clause[1] concludes Article I's list of Congress's enumerated powers with a general statement that Congress's powers include not only those expressly listed, but also the authority to use all means "necessary and proper" for executing those express powers. Under the Necessary and Proper Clause, congressional power encompasses all implied and incidental powers that are "conducive" to the "beneficial exercise" of an enumerated power.[2] The Clause does not require that legislation be *absolutely* necessary to the exercise of federal power.[3] Rather, so long as Congress's end is within the scope of federal power under the Constitution, the Necessary and Proper Clause authorizes Congress to employ any means that are "appropriate and plainly adapted to the permitted end."[4]

The Necessary and Proper Clause was included in the Constitution in response to the shortcomings of the Articles of Confederation, which had limited federal power to only those powers "expressly delegated to the United States."[5] While the Framers chose to follow the Articles in enumerating a list of specific federal powers—as opposed to some general statement of federal power[6]—they included the Necessary and Proper Clause to make clear that Congress's power encompassed the implied power to use all appropriate means required to execute those express powers.[7] The Necessary and Proper Clause was not a primary focus of debate at the Constitutional Convention itself, but its meaning quickly became a major issue in the debates over the ratification of the Constitution,[8] and in the early Republic.[9]

The Supreme Court has interpreted the Necessary and Proper Clause as an extension of the other powers vested in the Federal Government, most notably Congress's enumerated

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[1] Although "Necessary and Proper Clause" is the modern term for the constitutional provision, historically it was often called the "Sweeping Clause." *See, e.g.*, The Federalist No. 33 (Alexander Hamilton) ("[T]he sweeping clause, as it has been affectedly called, authori[z]es the national legislature to pass all *necessary* and *proper* laws."); *see generally* John Mikhail, *The Necessary and Proper Clauses*, 102 Geo. L.J. 1045, 1059 & n.47 (2014) ("[The Framers] referred to the last clause of Article I, Section 8 as the 'Sweeping Clause.'"). The terms "Elastic Clause," "Basket Clause," and "Coefficient Clause" are also occasionally used to refer to this provision. *See* Devotion Garner & Cheryl Nyberg, *Popular Names of Constitutional Provisions*, Univ. of Wash. Sch. of Law, https://lib.law.uw.edu/ref/consticlauses.html#oth (listing these terms as "popular name[s]" for the provision).

[2] *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 418 (1819).

[3] *See id.* ("[T]his limited construction of the word 'necessary' [as meaning indispensably necessary] must be abandoned.").

[4] United States v. Darby, 312 U.S. 100, 124 (1941).

[5] Articles of Confederation of 1781, art. II ("Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.").

[6] *See* ArtI.S8.C18.2 Historical Background on Necessary and Proper Clause notes 2–8 and accompanying text (discussing alternative formulations of federal power considered at the Constitutional Convention).

[7] *See* The Federalist No. 44 (James Madison).

[8] *See* ArtI.S8.C18.2 Historical Background on Necessary and Proper Clause notes 17–24 and accompanying text (reviewing the role of the Clause in the ratification debates).

[9] *See* ArtI.S8.C18.2 Historical Background on Necessary and Proper Clause notes 25–28 and accompanying text (reviewing the debate over the constitutionality of the First Bank of the United States).

Article I powers.[10] Thus, whenever the Supreme Court addresses the outer limits of Congress's enumerated powers, it necessarily invokes the Necessary and Proper Clause as well, either explicitly or implicitly.[11] However, the Necessary and Proper Clause is not, in itself, an independent grant of congressional power.[12] Although the Necessary and Proper Clause is therefore implicated in many cases examining the extent of Congress's power under, for example, the Commerce Clause, those decisions are primarily addressed elsewhere in the *Constitution Annotated*, under the particular enumerated federal power at issue.[13]

In a few cases, however, the Supreme Court has analyzed Congress's power under the Necessary and Proper Clause separately from any specific enumerated power. Typically, these cases involve either multiple enumerated powers[14] or congressional actions that are many steps removed from the exercise of the underlying enumerated federal power.[15] Because the extent of the Necessary and Proper Clause defines the outer reaches of Congress's Article I legislative powers, these cases, in effect, delineate the boundary between the authority of the Federal Government and those areas reserved to the states.[16]

This section first reviews the history of the Necessary and Proper Clause's inclusion in the Constitution and its role in the ratification debates. Next, the section turns to the early judicial interpretation of the Clause, culminating in the Chief Justice John Marshall's landmark 1819 opinion in *McCulloch v. Maryland*. After briefly reviewing the major nineteenth century Supreme Court decisions on the Necessary and Proper Clause following *McCulloch*, the section concludes with a review of the modern Supreme Court cases on the scope of Congress's power under the Clause.

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[10] *See generally* United States v. Comstock, 560 U.S. 126, 133–34 (2010).

[11] *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 5 (2005) (addressing whether the prohibition of intrastate use and cultivation of marijuana was necessary and proper to Congress's power to regulate interstate commerce); United States v. Kahriger, 345 U.S. 22, 29–32 (1953) (addressing whether registration requirement for tax on illegal gambling activities was a necessary and proper exercise of Congress's power to tax), *overruled in part by* Marchetti v. United States, 390 U.S. 39 (1968); United States v. Darby, 312 U.S. 100, 121–25 (1941) (addressing whether wage and hour regulations, as applied to intrastate activities, were necessary and proper to Congress's power to regulate interstate commerce).

[12] *See* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 247 (1960) ("The [Necessary and Proper Clause] is not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of [Article I, Section 8] 'and all other Powers vested by this Constitution.'").

[13] *See e.g.*, ArtI.S8.C1.1.1 Overview of Taxing Clause; ArtI.S8.C1.2.1 Overview of Spending Clause; and ArtI.S8.C3.6.1 United States v. Lopez and Interstate Commerce Clause.

[14] *See, e.g.*, *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 407 (1819) (considering whether Congress's powers "to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies" implied the power to establish a national bank under the Necessary and Proper Clause); Juilliard v. Greenman, 110 U.S. 421, 439–40 (1884) (considering whether Congress's powers to borrow money, coin money, lay and collect taxes, and regulate interstate and foreign commerce implied the power to make paper notes legal tender for public and private debts under the Necessary and Proper Clause).

[15] *See, e.g.*, United States v. Comstock, 560 U.S. 126, 148 (2010) (considering whether "the same enumerated power that justifies the creation of a federal criminal statute" further justifies indefinite civil commitment of federal prisoners after the expiration of their criminal sentences).

[16] *See* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution . . . are reserved to the states respectively, or to the people.").

ArtI.S8.C18.2 Historical Background on Necessary and Proper Clause

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

Under the Articles of Confederation, the Federal Government's powers were limited to those "expressly delegated to the United States."[1] Whether to maintain this limitation or to provide broader or implied powers to the National Government was a matter of debate at the Constitutional Convention. Under the South Carolina Plan of government presented by Charles Pinckney, the states would have retained all powers "not expressly delegated."[2] Similarly, the New Jersey Plan would have slightly expanded federal power by amending the Articles of Confederation to add new enumerated federal powers.[3] At the other extreme, Alexander Hamilton's plan would have empowered the national legislature to pass "all laws whatsoever," subject only to the veto of the executive.[4]

The Virginia Plan of government, which ultimately became the blueprint for the Constitution, took a different approach. As presented to the Convention by Edmund Randolph, Resolution VI of the Virginia Plan would have granted Congress power to "legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation."[5] Several delegates, including Pinckney and John Rutledge, objected to the vagueness of the word "incompetent,"[6] but a motion to replace this general statement with a specific enumeration of powers failed by an equally divided vote.[7] On July 17, 1787, the Convention approved Resolution VI following an amendment by Gunning Bedford, resolving that Congress should have power to legislate "in all cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation."[8]

On July 26, 1787, the Convention referred the amended Resolution VI (along with the other resolutions approved by the Convention) to the Committee of Detail, which developed the

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[1] Articles of Confederation of 1781, art. II ("Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."). For more information on the history, origins, and original meaning of the Necessary and Proper Clause, see generally Gary Lawson et al., The Origins of the Necessary and Proper Clause 35–119 (2010); John Mikhail, *The Necessary and Proper Clauses*, 102 Geo. L.J. 1045, 1086–1106 (2014); Kurt T. Lash, *"Resolution VI": The Virginia Plan and Authority to Resolve Collective Action Problems Under Article I, Section 8*, 87 Notre Dame L. Rev. 2123, 2134–41 (2012); Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 Case W. Res. L. Rev. 243, 267–73 (2004); Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 188–220 (2003); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 297–326 (1993).

[2] 2 The Records of the Federal Convention of 1787, at 135 (Max Farrand ed., 1911) [hereinafter Farrand's Records]. Pinckney's plan was presented to the Convention on May 29, 1787, but it was neither debated nor voted on. *See* 1 Farrand's Records, *supra* note 2, at 16.

[3] 2 *Id.* at 242–43.

[4] *Id.* at 291.

[5] 1 *Id.* at 21.

[6] *Id.* at 53; 2 *id.* at 17.

[7] *See* 2 *id.* at 17 (motion by John Rutledge for a "specification of . . . powers" failed 5-5). The Convention also rejected an alternative formulation of Resolution VI that would have empowered Congress to legislate "in all cases [which may concern the common interest of the Union]." *Id.* at 25–26 (brackets in original).

[8] *Id.* at 26–27 (Bedford amendment); *id.* at 131–32 (final form as referred to the Committee of Detail).

first draft of the Constitution.[9] Ultimately, the Committee replaced Resolution VI's general statement of national legislative power with a list of enumerated powers (essentially those in the Articles of Confederation, plus a number of additional powers), followed by the Necessary and Proper Clause.[10] Because the Committee of Detail did not keep any record of its deliberations, it is a matter of speculation why it made this change.[11]

Although there is no record of the Committee's motivations, it is possible to trace the drafting history of the Necessary and Proper Clause based on the Committee's papers. In his markup of Randolph's draft Constitution, Rutledge added, at the end of the list of enumerated powers, that Congress shall have a "right to make all Laws necessary to carry the foregoing Powers into Execut[ion]."[12] In a subsequent draft, James Wilson expanded Rutledge's language to grant Congress power "to make all Laws that shall be necessary and proper for carrying into (full and complete) Execution (the foregoing Powers, and) all other powers vested, by this Constitution, in the Government of the United States, or in any Department or Officer thereof."[13]

On August 6, 1787, the Committee of Detail reported its draft Constitution to the Convention, which contained the Necessary and Proper Clause in its final form.[14] The Convention unanimously approved the Necessary and Proper Clause on August 20, 1787.[15] There was no further substantial debate on the Clause during the Convention itself, although the three members of the Convention who declined to sign the Constitution—Randolph, George Mason, and Elbridge Gerry—all cited the breadth of the Necessary and Proper Clause among their objections to the document.[16]

Following the signing of the Constitution on September 17, 1787,[17] the Constitution was submitted to the states for ratification pursuant to Article VII.[18] During the ratification debates, opponents of the Constitution, such as Patrick Henry, strongly criticized the

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[9] *Id.* at 128.

[10] *Compare* Articles of Confederation of 1781, art. IX *with* 2 Farrand's Records, *supra* note 2, at 181–82 (August 6, 1787 draft of the Constitution); *see also* Mikhail, *supra* note 1, at 1104–05 (highlighting the enumerated powers derived from the Articles of Confederation, versus those added by the Committee of Detail).

[11] One view is that the Committee of Detail effectively rejected Resolution VI by adopting an enumeration of powers and the Necessary and Proper Clause. *See* Carter v. Carter Coal Co., 298 U.S. 238, 292 (1936) ("The convention, however, declined to confer upon Congress power in such general terms [as Resolution VI]."); Barnett, *supra* note 1, at 185 (characterizing the enumeration of powers as a "reject[ion]" of Resolution VI). Other scholars see the enumeration and the Necessary and Proper Clause as the Committee of Detail's attempt to "*enact*" Resolution VI. *See* Jack M. Balkin, Commerce, 109 Mich. L. Rev. 1, 11 (2010). Another view is that Resolution VI was merely a "placeholder" provision: the Committee of Detail's enumeration served to *identify* the specific areas where the states were separately incompetent or where the general interests of the Union required federal authority. *See* Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 177–78 (1997); *accord* Clinton Rossiter, 1787: The Grand Convention 208–09 (1966) (describing the Committee of Detail's enumeration of powers as a "conver[sion]" of "the general resolution of law-making authority" approved by the Convention into a specific list of powers).

[12] 2 Farrand's Records, *supra* note 2, at 144. At the same time, Rutledge suggested that the Committee "Insert the II Article," apparently referencing the Articles of Confederation's statement that all powers not "expressly delegated" are retained by the states. 2 Farrand's Records, *supra* note 2, at 144.

[13] 2 Farrand's Records, *supra* note 2, at 168. The language in parentheses is crossed out in the original document. 2 Farrand's Records, *supra* note 2, at 163 n.17.

[14] 2 Farrand's Records, *supra* note 2, at 182. There are only stylistic differences (e.g., differences in capitalization) between the August 6, 1787 version and the version in the ratified Constitution. *Compare* 2 Farrand's Records, *supra* note 2, at 182 *with* U.S. Const. art. I, § 8, cl. 18.

[15] 2 Farrand's Records, *supra* note 2, at 345.

[16] 2 Farrand's Records, *supra* note 2, at 563 (Randolph); 2 Farrand's Records, *supra* note 2, at 633 (Gerry); 2 Farrand's Records, *supra* note 2, at 640 (Mason).

[17] 2 Farrand's Records, *supra* note 2, at 648–49.

[18] *See* ArtVII.1 Historical Background on Ratification Clause.

Necessary and Proper Clause.[19] Antifederalists argued that the Clause would empower Congress to enact any law that it deemed to be necessary and proper, amounting to an open-ended, general grant of power for Congress to legislate on virtually any subject.[20]

Federalist proponents of ratification maintained that the Necessary and Proper Clause had a more limited meaning. In the *Federalist No. 33*, Alexander Hamilton maintained that the Clause was merely "declaratory": the "unavoidable implication" of "constituting a [f]ederal [g]overnment, and vesting it with certain specified powers."[21] The worst that could be said of the Clause, in Hamilton's view, is that it was "chargeable with tautology or redundancy."[22] In the *Federalist No. 44*, James Madison agreed that even if the Constitution had been "silent" on this point, "there can be no doubt that all the particular powers, requisite as means of executing the general powers would, have resulted to the government . . . . No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authori[z]ed."[23] If, as the Antifederalists feared, Congress should "misconstrue" the Clause and "exercise powers not warranted by its true meaning," then "the executive and [the] judiciary" would act to stop the usurpation.[24]

Following the ratification of the Constitution, debate over the meaning of the Necessary and Proper Clause resumed almost immediately when the First Congress moved to create a national bank.[25] Opposing the bank, Madison and Thomas Jefferson maintained that the Necessary and Proper Clause only empowered Congress to use "necessary" means, not means that were merely "convenien[t]" or "conducive" to the exercise of an enumerated power (such as the power to tax or borrow money).[26] Alexander Hamilton, supporting the constitutionality of the bank, argued that "necessary" in this context means no more than "needful, requisite, incidental, useful, or conducive to," and that Jefferson had misconstrued "necessary" as if "the

[19] *See* 3 The Debates in Several State Conventions on the Adoption of the Federal Constitution 436–37 (Jonathan Elliot ed., 1891) (statement of Patrick Henry) (arguing that the "sweeping clause" would give Congress "unlimited power").

[20] *See, e.g.*, The Antifederalist No. 32 (*Brutus V*), *in* The Antifederalist Papers 82–86 (Morton Borden ed., 1965) (arguing that it is "utterly impossible to fully define" Congress's powers under the Necessary and Proper Clause, which would give Congress power to "pass any law which they may think proper"); The Antifederalist No. 46 (*An Old Whig II*) *in* The Antifederalist Papers, *supra* note 20, at 131–32 (arguing that the Necessary and Proper Clause granted Congress "*undefined*, *unbounded* and *immense* power"). These objections largely traced the views of George Mason, a dissenter at the Constitution Convention, who argued that the Necessary and Proper Clause would empower Congress to "extend their powers as far as they shall think proper." 2 Farrand's Records, *supra* note 2, at 640.

[21] The Federalist No. 33 (Alexander Hamilton).

[22] *Id.*

[23] The Federalist No. 44 (James Madison).

[24] *Id.*

[25] The practice of the First Congress has been treated by the Supreme Court as probative of the original meaning of constitutional provisions. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 787–90 (1983) ("An act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning.'" (ellipses in original) (quoting Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888), *overruled in part by* Milwaukee Cty. v. M.E. White Co., 296 U.S. 268 (1935))).

[26] 2 Annals of Cong. 1946–50 (1791) (speech of James Madison); Thomas Jefferson, Opinion on the Constitutionality of the Bill to Establish the Bank of the United States (Feb. 15, 1791), *reprinted in* Legislative and Documentary History of the Bank of the United States 93–94 (M. St. Clair Clarke & D.A. Hall eds., 1832) [hereinafter History of the Bank]; *see also* Edmund Randolph, Opinion on the Constitutionality of the Bill to Establish the Bank of the United States (Feb. 12, 1791), *reprinted in* History of the Bank, *supra*, at 86–91.

word absolutely, or indispensably, had been prefixed to it."[27] President Washington, apparently persuaded by Hamilton's view, signed into law the bill chartering the First Bank of the United States in 1791.[28]

ArtI.S8.C18.3 Necessary and Proper Clause Early Doctrine and McCulloch v. Maryland

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

The Supreme Court was first called upon to construe the Necessary and Proper Clause in an 1805 case, *United States v. Fisher*, which concerned a law giving the United States priority over other creditors in the collection of debts.[1] Chief Justice Marshall held that this law was a necessary and proper means of executing Congress's power to raise revenue and pay the debts of the United States.[2] Marshall rejected the argument that acts of Congress must be "indispensably necessary to give effect to a specified power," reasoning that such a requirement would produce "endless difficulties."[3] Rather, under the Necessary and Proper Clause, "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the [C]onstitution."[4]

Marshall's 1819 opinion in *McCulloch v. Maryland*[5] expanded on *Fisher* to provide the canonical interpretation of the Necessary and Proper Clause.[6] *McCulloch* resolved the long-simmering debate over whether Congress had the power to incorporate a national bank.[7] Because the enumerated powers of Article I do not explicitly include the power to establish a bank, the issue in *McCulloch* was whether creating a national bank was a necessary and

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[27] Alexander Hamilton, Opinion of the Bill to Establish the Bank of the United States (Feb. 23, 1791), *reprinted in* History of the Bank, *supra* note 26, at 95–96 (emphasis omitted).

[28] History of the Bank, *supra* note 26, at 85–86. The First Bank of the United States remained in operation during Jefferson's presidency, despite his earlier opposition. *See* History of the Bank, *supra* note 26, at 115. However, The First Bank of the United States ceased operations after a vote in Congress to renew its charter failed by a single vote in 1811. History of the Bank, *supra* note 26, at 446. In 1816, President Madison, again despite his earlier view, signed into law a bill chartering the Second Bank of the United States. History of the Bank, *supra* note 26, at 713.

[1] 6 U.S. (2 Cranch.) 358, 385 (1805).

[2] *Id.* at 396–97.

[3] *Id.*

[4] *Id.* at 396.

[5] 17 U.S. (4 Wheat.) 316 (1819). The nine days of oral argument in *McCulloch* brought together an extraordinary constellation of legal talent, with Daniel Webster, then U.S. Attorney General William Wirt, and former U.S. Attorney General William Pinkney arguing for McCulloch. *See* Edward S. Corwin, John Marshall and the Constitution 128–29 (1921) (describing the arguments); Daniel A. Farber, *The Story of McCulloch: Banking on National Power*, 20 Const. Comment. 679, 690–98 (2004) (same). Luther Martin, a member of the Constitutional Convention and prominent Antifederalist, argued for Maryland, notably citing the assertions made in the *Federalist Papers* that, he argued, disclaimed that broad interpretations of the Necessary and Proper Clause now offered to support the Bank. *See McCulloch*, 17 U.S. at 372–73.

[6] Alison L. LaCroix, *The Shadow Powers of Article I*, 123 Yale L.J. 2044, 2061 (2014) (describing *McCulloch* as "the lodestar for understanding the [Necessary and Proper] clause"); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 Tex. L. Rev. 795, 814 (1996) ("Analysis of the Necessary and Proper Clause has historically begun and ended with *McCulloch*.").

[7] 17 U.S. (4 Wheat.) at 401.

proper means of effectuating Congress's powers "to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies."[8]

The decision hinged on the interpretation of the Necessary and Proper Clause. In *McCulloch*, the Court empathically rejected a narrow interpretation of "necessary" as limiting Congress's powers to those that are "indispensably" or "absolutely" necessary to the exercise of a enumerated federal power.[9] Adopting this strict reading, Marshall argued, would effectively hobble the operations of the Federal Government, "rendering [it] incompetent to its great objects" and "depriv[ing] the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."[10] In Marshall's view, such a narrow construction was particularly inappropriate for "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[11] The Court instead held that, in context, "necessary" was better understood to mean merely "conducive to" or "needful."[12] As the unanimous opinion famously concluded: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[13]

ArtI.S8.C18.4 Nineteenth Century Evolution of Necessary and Proper Clause Jurisprudence

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

Following *McCulloch*, the Necessary and Proper Clause received relatively little attention on its own through the nineteenth and twentieth centuries,[1] although it served as an important component in many Commerce Clause cases.[2] For example, in its 1824 opinion in *Gibbons v. Ogden*,[3] the Supreme Court addressed the scope of Congress's power to regulate

[8] *Id.* at 406–07.

[9] *Id.* at 414–17.

[10] *Id.* at 415–16, 418.

[11] *Id.* (emphasis omitted).

[12] *Id.* at 418.

[13] *Id.* at 421. Five years later, the Court extended *McCulloch* to hold that Congress may not only incorporate banks but further confer upon them any powers or privileges that are essential to their effective operation. Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 862 (1824). For later development of this doctrine, see, e.g., Pittman v. Home Owners' Loan Corp., 308 U.S. 21, 32–33 (1939) ("Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized [by granting immunity from state taxation.]"); Watters v. Wachovia Bank, N.A., 550 U.S. 1, 15 (2007) (holding that Congress may exempt national banks from state licensing, registration, and inspection requirements).

[1] *See* Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2060 (2014) ("Before 2005, one would have been hard pressed to identify a body of doctrine on the necessary and proper power. . . . [T]he necessary and proper power has tended to ride along as a quieter, sometimes overlooked presence in the case law—the perpetual bridesmaid to the commerce power's bride."); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 814 (1996) ("Analysis of the Necessary and Proper Clause has historically begun and ended with *McCulloch*[.]").

[2] *See, e.g.*, United States v. Wrightwood Dairy Co., 315 U.S. 110, 119–21 (1942); United States v. Darby, 312 U.S. 100, 118 (1941); Houston, E. & W. Tex. Ry. v. United States, 234 U.S. 342, 353 (1914).

[3] 22 U.S. (9 Wheat.) 1 (1824).

interstate commerce[4] as supplemented by the Necessary and Proper Clause. Chief Justice Marshall concluded that the Commerce Clause empowers Congress "to prescribe the rule by which commerce is to be governed," including "every species of commercial intercourse" among the states.[5] *Gibbons* relied on the Necessary and Proper Clause as supporting a broad construction of commerce power,[6] while at same time noting that the power did not reach purely intrastate commerce that "does not extend to or affect other States," because such power "would be inconvenient, and is certainly unnecessary."[7]

In a series of late nineteenth century opinions known as the *Legal Tender Cases*,[8] the Supreme Court relied on *McCulloch*'s reading of the Necessary and Proper Clause to establish Congress's power to issue paper money and make it legal tender for all debts, public and private.[9] Although the Constitution expressly grants Congress the power "to coin Money,"[10] this had been previously understood as limited to actual coinage (i.e., metal tokens).[11] Nonetheless, the *Legal Tender Cases* upheld the issuance of paper money and its status as legal tender as necessary and proper to Congress's powers to tax, borrow money, coin money, and regulate interstate and foreign commerce.[12] These powers, taken together with the Necessary and Proper Clause, authorized Congress to "establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes."[13]

ArtI.S8.C18.5 Modern Necessary and Proper Clause Doctrine

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

Building on the foundation established by *McCulloch*, modern Necessary and Proper Clause doctrine holds that the Clause permits any federal legislation that is "convenient" or "useful" to the exercise of federal power—that is, any "means that is rationally related to the implementation of a constitutionally enumerated power."[1] The significance of this broad

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[4] U.S. Const. art. I, § 8, cl. 3; *see* ArtI.S8.C3.8.1 Overview of Foreign Commerce Clause through ArtI.S8.C3.7.11.1 Overview of State Taxation and Dormant Commerce Clause.

[5] 22 U.S. (9 Wheat.) at 196.

[6] *Id.* at 187.

[7] *Id.* at 193–94.

[8] Juilliard v. Greenman, 110 U.S. 421 (1884); Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870). These cases overturned *Hepburn v. Griswold*, which held that a law making United States notes legal tender for the payment of debts exceeded the powers of Congress. *See* 75 U.S. (8 Wall.) 603, 616–22 (1869). For further discussion of these cases, see ArtI.S8.C5.1 Congress's Coinage Power.

[9] *See Juilliard*, 110 U.S. at 449–50.

[10] U.S. Const. art. I, § 8, cl. 5.

[11] *Hepburn*, 75 U.S. (8 Wall.) at 616 ("[The power to make paper notes] is certainly not the same power as the power to coin money."); *Juilliard*, 110 U.S. at 462 (Field, J., dissenting) ("The meaning of the terms 'to coin money' is not at all doubtful. It is to mould metallic substances into forms convenient for circulation and to stamp them with the impress of the government authority indicating their value with reference to the unit of value established by law. Coins are pieces of metal of definite weight and value, stamped such by the authority of the government.").

[12] *Juilliard*, 110 U.S. at 439–40, 448.

[13] *Id.* at 448. As a corollary to its power over the currency, the Supreme Court later upheld Congress's power to abrogate clauses in private contracts that required payment in gold. *See* Norman v. Baltimore & Ohio R.R., 294 U.S. 240, 316 (1935).

[1] United States v. Comstock, 560 U.S. 126, 134 (2010).

understanding of *McCulloch* on the powers of the Federal Government is difficult to overstate.[2] Much federal law rests on the foundation established by *McCulloch*, and practically every power of the Federal Government has been expanded in some degree by the Necessary and Proper Clause.[3] Under the authority granted it by the Clause, Congress has adopted measures required to comply with treaty obligations,[4] organized the federal judicial system,[5] regulated intrastate matters that substantially affect interstate commerce,[6] seized property pursuant to its taxing powers,[7] and exercised the power of eminent domain to acquire private property for public use.[8]

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[2] *See, e.g.*, David S. Schwartz, *Misreading McCulloch v. Maryland*, 18 U. Pa. J. Const. L. 1, 3 (2015) (describing universal view of *McCulloch* as "a decision of the highest importance in American constitutional law"); Daniel A. Farber, *The Story of McCulloch: Banking on National Power*, 20 Const. Comment. 679 (2004) ("Many scholars consider [*McCulloch*] the single most important opinion in the Court's history."); Jack M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963, 987 (1998) ("At least within the field of constitutional law, almost everyone seems to agree that *McCulloch* is canonical.").

[3] *See, e.g.*, Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and "Expressly" Delegated Power*, 83 Notre Dame L. Rev. 1889, 1942 (2008) ("[In *McCulloch*, Chief Justice Marshall] articulated a vision of federal power not only expansive for its day, but expansive enough to become the foundational theory of the modern administrative state."); Felix Frankfurter, *John Marshall and the Judicial Function*, 69 Harv. L. Rev. 217, 219 (1955) ("One can, I believe, say with assurance that a failure to conceive the Constitution as Marshall conceived it in [*McCulloch*], to draw from it the national powers which have since been exercised and to exact deference to such powers from the states, would have been reflected by a very different United States than history knows."); *see also supra* note 2 (sources discussing the influence and importance of *McCulloch*).

Moreover, later amendments to the Constitution, including the Civil War Amendments, drew on *McCulloch*'s language to empower Congress to enforce their provisions by "by appropriate legislation." U.S. Const. amends. XIII, § 2; XIV, § 5; XV, § 2; XIX, § 2; XXIII, § 2; XXIV, § 2; XXVI, § 2. For the connection between *McCulloch* and the term "appropriate legislation," see, for example, Cong. Globe, 39th Cong., 1st Sess. 1118 (1866) (statement of Rep. Wilson) (equating "appropriate" as used in section two of the Thirteenth Amendment with "necessary and proper" and citing *McCulloch*); Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) ("[T]he *McCulloch v. Maryland* standard is the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment."); The Civil Rights Cases, 109 U.S. 3, 51 (1883) (Harlan, J., dissenting) ("The word appropriate was undoubtedly used with reference to its meaning, as established by repeated decisions of th[e] [C]ourt." (citing *McCulloch*)); *Ex parte* Virginia, 100 U.S. 339, 346 (1879) (defining "appropriate legislation" by paraphrasing the *McCulloch* standard).

[4] Missouri v. Holland, 252 U.S. 416, 432 (1920) (holding that congressional statutes to implement a treaty are valid under the Necessary and Proper Clause so long as the treaty is valid); Neely v. Henkel, 180 U.S. 109, 121 (1901) (observing that the Necessary and Proper Clause empowers Congress to "enact such legislation as is appropriate to give efficacy" to a treaty with a foreign power).

[5] Jinks v. Richland Cty., 538 U.S. 456, 461–64 (2003) (holding that federal courts may exercise supplemental jurisdiction, including tolling of state statutes of limitation, pursuant to Article III and the Necessary and Proper Clause); Willy v. Coastal Corp., 503 U.S. 131, 136–37 (1992) (holding that federal courts may impose sanctions on litigants pursuant to Article III and the Necessary and Proper Clause, even if it is later determined that the court lacked subject matter jurisdiction); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 32 (1988) (holding that the federal transfer statute is "comfortably with Congress'[s] powers under Article III as augmented by the Necessary and Proper Clause"); Burlington N. R.R. v. Woods, 480 U.S. 1, 5 n.3 (1987) ("Article III of the Constitution, augmented by the Necessary and Proper Clause of Article I, § 8, cl. 18, empowers Congress to establish a system of federal district and appellate courts and, impliedly, to establish procedural Rules governing litigation in these courts."); *see also* Artis v. District of Columbia, No. 16-460, slip op. at 16–18 (2018) (reaffirming *Jinks*).

[6] *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 17–22 (2005) (holding that Congress had authority to criminalize intrastate possession of marijuana under the Commerce and Necessary and Proper Clauses); *see generally* ArtI.S8.C3.8.1 Overview of Foreign Commerce Clause through ArtI.S8.C3.7.11.1 Overview of State Taxation and Dormant Commerce Clause.

[7] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 281 (1856) ("The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the constitution.").

[8] Kohl v. United States, 91 U.S. 367, 372–73 (1876) ("[T]he right of eminent domain exists in the Federal government . . . so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.").

Perhaps most notably, nearly all federal criminal law that applies outside of federal enclaves[9] relies on the Necessary and Proper Clause.[10] The Constitution expressly empowers Congress to punish only four crimes: counterfeiting, piracies, offenses against the law of nations, and treason.[11] The remainder of the federal criminal code—prohibitions on, for example, tax evasion, racketeering, mail fraud, and drug possession[12]—rests on a determination that criminalization is necessary to effectuate congressional power to regulate interstate commerce, collect taxes, establish post offices, spend for the general welfare, or some other enumerated federal power.[13] For example, as necessary and proper to Congress's authority under the Spending Clause, Congress may criminalize bribery of state and local officials receiving federal funds.[14] Or, as necessary and proper to its power to regulate interstate commerce, Congress may prohibit intrastate cultivation and use of controlled substances such as illegal drugs.[15]

In *United States v. Comstock*, the Roberts Court addressed whether the Necessary and Proper Clause could support a federal law that provided for indefinite civil commitment of certain persons in federal custody who were shown to be "sexually dangerous," authorizing detention of such prisoners even after they had served their sentences.[16] The difficulty with the law, as a matter of congressional power, was that sexual dangerousness was defined broadly, without an explicit tie to any enumerated federal power,[17] such as an impact on commerce. Moreover, the Court's 2000 decision in *United States v. Morrison* foreclosed the argument that Congress could regulate general sexual violence pursuant to the Commerce Clause.[18]

The Court in *Comstock* upheld the civil commitment provision under the Necessary and Proper Clause. Writing for a five-Justice majority, Justice Stephen Breyer held that whatever enumerated power justified the prisoner's crime of conviction[19] permitted Congress "to provide

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[9] *See* ArtI.S8.C17.1.1 Historical Background on Seat of Government Clause, ArtI.S8.C17.1.2 Seat of Government Doctrine, and ArtI.S8.C17.2.1 Overview of Places Purchased Clause.

[10] *See* United States v. Comstock, 560 U.S. 126, 135–36 (2010).

[11] *See* U.S. Const. art. I, § 8, cls. 6, 10; *id.* art. III, § 3, cl. 2.

[12] *See, e.g.*, 18 U.S.C. §§ 1341–51 (mail fraud and wire fraud); *id.* §§ 1951–68 (racketeering); 21 U.S.C. § 844 (drug possession); 27 U.S.C. § 7201 (tax evasion).

[13] For example, the Supreme Court has upheld federal laws criminalizing the alteration of registered bonds, *Ex parte* Carll, 106 U.S. 521 (1883), the bringing of counterfeit bonds into the country, United States v. Marigold, 50 U.S. (9 How.) 560, 567 (1850), conspiracy to injure prisoners in custody of a United States Marshal, Logan v. United States, 144 U.S. 263, 282–84 (1892), impersonation of a federal officer with intent to defraud, United States v. Barnow, 239 U.S. 74, 77–80 (1915), conspiracy to injure a citizen in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States, *Ex parte* Yarbrough, 110 U.S. 651, 657–59 (1884), and the receipt by government officials of contributions from government employees for political purposes, *Ex parte* Curtis, 106 U.S. 371, 373–75 (1882).

[14] Sabri v. United States, 541 U.S. 600, 606 (2004).

[15] Gonzales v. Raich, 545 U.S. 1, 5, 22 (2005).

[16] 560 U.S. 126, 130–31 (2010).

[17] *See* 18 U.S.C. § 4247(a)(6) (defining a "sexually dangerous person" as one who "suffers from a serious mental illness . . . as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released").

[18] 529 U.S. 598, 617 (2000) (holding that Congress may not regulate "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"); *see* Amdt14.S5.2 Who Congress May Regulate (discussing *Morrison*).

[19] Notably, the civil commitment provisions applied to any person in federal custody, regardless of whether his conviction was for a sex-related crime or not. *See* 18 U.S.C. §§ 4247(a)(5), 4248(a). In practice, however, many of the individuals committed under the statute were in federal custody for a sex crime that fell within federal jurisdiction, such as possession of child pornography that "has been shipped or transported in or affecting interstate or foreign commerce . . . by any means including by computer." *See id.* § 2252(a)(2); *Comstock*, 560 U.S. at 131 ("Three of the five [petitioners] had previously pleaded guilty in federal court to possession of child pornography.").

appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others," including through post-sentence civil commitment.[20] This conclusion was justified by five factors:

> (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope.[21]

In 2013, the Supreme Court reaffirmed *Comstock*'s reasoning in *United States v. Kebodeaux*.[22] Like *Comstock*, *Kebodeaux* concerned a federal regulation of sex offenders: the registration requirements of the 2006 Sex Offender Registration and Notification Act (SORNA).[23] Anthony Kebodeaux, a member of the U.S. Air Force, was convicted by a court martial of a sex crime in 1999; he served a three-month sentence and received a bad conduct discharge.[24] In 2007, Kebodeaux was convicted of violating SORNA when he moved from El Paso to San Antonio but failed to update his registration.[25]

Although Congress did not enact SORNA until after Kebodeaux's court martial and discharge, the Supreme Court upheld its application to Kebodeaux as necessary and proper to Congress's power to "make Rules for the . . . Regulation of the land and naval Forces."[26] Key to that conclusion was the Court's finding that Kebodeaux's release from federal custody was not "unconditional" because, as part of his original punishment by the court martial he was subject to an earlier federal statute, the Wetterling Act, which imposed "very similar" registration requirements to those of SORNA.[27] The Court thus framed the case as presenting a narrow question of whether Congress could later "modify" the Wetterling Act's registration requirements through SORNA.[28] Applying the five *Comstock* factors, the Court concluded that the breadth of the Necessary and Proper Clause and the reasonableness of Congress's registration requirements justified SORNA's application to Kebodeaux.[29]

Although *Comstock* and *Kebodeaux* embrace a broad, relatively deferential understanding of the Necessary and Proper Clause, the Supreme Court has at times taken a narrower view, especially in cases involving independent federalism concerns.[30] In the Commerce Clause context, for example, the Rehnquist Court found the Necessary and Proper Clause insufficient

[20] *Comstock*, 560 U.S. at 149.

[21] *Id.*

[22] 570 U.S. 387 (2013).

[23] *See* 34 U.S.C. §§ 20911–932; 18 U.S.C. § 2250(a).

[24] *Kebodeaux*, 570 U.S. at 389–90.

[25] *Id.* at 390.

[26] U.S. Const. art. I, § 8, cl. 14; *Kebodeaux*, 570 U.S. at 399.

[27] *Kebodeaux*, 570 U.S. at 391.

[28] *Id.* at 393–94.

[29] *See id.* at 395–99.

[30] *See, e.g.*, Alden v. Maine, 527 U.S. 706, 732 (1999) (holding that the Congress could not subject states to suit for federal claims in state courts because "the specific Article I powers delegated to Congress necessarily [do not] include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers"); Printz v. United States, 521 U.S. 898, 923–24 (1997) (holding that Congress cannot compel state officials to enforce federal law and characterizing the Necessary and Proper Clause as "the last, best hope of those who defend ultra vires congressional action").

to support laws prohibiting possession of guns near schools[31] and prohibiting gender-motivated violence,[32] despite arguments that these activities have an aggregate impact on interstate commerce.

Similarly, just two years after *Comstock*, five Justices separately concluded that the "individual mandate" provision of the Affordable Care Act (ACA), which required individuals to purchase insurance or pay a tax penalty, exceeded Congress's power under the Commerce and Necessary and Proper Clauses.[33] In *National Federation of Independent Business v. Sebelius (NFIB)*, Chief Justice Roberts's opinion reasoned that the individual mandate was not an "essential component" of the ACA's health insurance reforms because it operated to "vest[ ] Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power" by compelling individuals to engage in commerce.[34] Therefore, unlike the law in *Comstock*, the authority Congress attempted to exercise in *NFIB* was neither "narrow in scope" nor "incidental" to the exercise of Commerce Clause power.[35] However, a majority of the Court ultimately held that the individual mandate was authorized under Congress's power to lay and collect taxes.[36]

ArtI.S8.C18.6 Meaning of Proper

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

In general, Supreme Court doctrine has afforded relatively little attention to whether the word "proper" as used in the Necessary and Proper Clause independently limits Congress's authority.[1] Indeed, it is not clear that "proper" imparts any limitation on Congress's power beyond the *McCulloch* test itself, which requires a law to both be "appropriate" and "consist[ent] with the letter and spirit of the constitution."[2] At the least, to be "proper," an act of Congress must not violate another express or implied constitutional provision, including the system of dual state-federal sovereignty established by the Constitution.[3] For example, the

[31] United States v. Lopez, 514 U.S. 549, 566–68 (1995).

[32] United States v. Morrison, 529 U.S. 598, 617 (2000).

[33] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB), 567 U.S. 519, 558–61 (2012) (opinion of Roberts, C.J.). Although there were five votes for this holding, no single rationale was adopted by the Court. *Compare id.* at 558–61 (opinion of Roberts, C.J.) *with id.* at 649–55 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

[34] *Id.* at 560 (opinion of Roberts, C.J.).

[35] *Id.*

[36] *Id.* at 574.

[1] *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 285 (1993) ("Historically, discussion of the [Necessary and Proper] Clause has been dominated by discussion of the meaning of the word 'necessary.' . . . The word 'proper' has generally been treated as a constitutional nullity or, at best, as a redundancy.").

[2] *See* United States v. Comstock, 560 U.S. 126, 160–61 (2010) (Thomas, J., dissenting) (brackets in original) "The means Congress selects will be . . . 'proper' if they are not otherwise 'prohibited' by the Constitution and not '[in]consistent' with its 'letter and spirit.'" (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

[3] *See* Buckley v. Valeo, 424 U.S. 1, 135 (1976) ("Congress could not, merely because it concluded that such a measure was 'necessary and proper' to the discharge of its substantive legislative authority, pass a bill of attainder or ex post facto law contrary to the prohibitions contained in § 9 of Art[icle] I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so."); New York v. United States, 505 U.S. 144, 166 (1992) ("We have always understood that

Court has held that the Tenth Amendment operates to restrain the scope of the Necessary and Proper Clause, holding that an otherwise valid law that violates principles of state sovereignty is not a "*proper*" exercise of federal power.[4]

ArtI.S8.C18.7 Investigations and Oversight

ArtI.S8.C18.7.1 Overview of Congress's Investigation and Oversight Powers

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

Congress's power to conduct investigations stands on equal footing with its authority to legislate and appropriate.[1] Although the "power of inquiry" was not expressly provided for in the Constitution, it has nonetheless been acknowledged as "an essential and appropriate auxiliary to the legislative function" derived implicitly from Article I's vesting of "legislative Powers" in the Congress.[2] This implied constitutional prerogative to gather information related to legislative activity is both critical in purpose, as Congress "cannot legislate wisely or effectively in the absence of information," and extensive in scope, as Congress is empowered to obtain pertinent testimony and documents through investigations into nearly any matter.[3] Included within the scope of the power is the authority to initiate investigations, hold hearings, gather testimony or documents from witnesses, and, in situations where either a government or private party is not forthcoming, compel compliance with congressional requests through the issuance and enforcement of subpoenas.

While Congress's investigative tools can be used to achieve a number of different purposes, congressional practice suggests that legislative inquiries primarily serve to either gather information valuable for considering and producing legislation (what may be called the self-informing or legislative-informing function)[4] or to ensure that existing laws are being

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even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.").

[4] *See, e.g.*, Printz v. United States, 521 U.S. 898, 924 (1997) ("When a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in [the Tenth Amendment and other constitutional provisions] it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause.'").

[1] Barenblatt v. United States, 360 U.S. 109, 111 (1959); Woodrow Wilson, Congressional Government 303 (15th ed. 1913) (asserting that the "informing function of Congress should be preferred even to its legislative function"). *See also* J. William Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. Chi. L. Rev. 440, 441 (1951) (describing the power of investigation as "perhaps the most necessary of all the powers underlying the legislative function").

[2] *See* McGrain v. Daugherty, 273 U.S. 135, 174 (1927) ("We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

[3] *Id.* at 175 ("A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it."). Congress's oversight function is subject to a variety of legal limitations. *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 n.15 (1975) ("Although the power to investigate is necessarily broad it is not unlimited . . . . We have made it clear [ ] that Congress is not invested with a "general' power to inquire into private affairs.' The subject of any inquiry always must be one 'on which legislation could be had.'") (citations omitted). For a discussion of other constitutional limitations on congressional investigations see CRS Report RL30240, Congressional Oversight Manual, by Christopher M. Davis et al.

[4] Congressional investigations have previously served to either inform Congress itself (for purposes of a legislative function) or to inform the public. *See* Hutchinson v. Proxmire, 443 U.S. 111, 132 (1979) ("Advocates of a broad reading of the "informing function" sometimes tend to confuse two uses of the term 'informing.' In one sense, Congress informs itself collectively by way of hearings of its committees . . . . The other sense of the term . . .

properly administered (what may be referred to as the oversight function.)[5] Although functionally distinguishable, the self-informing and oversight functions often merge during the conduct of significant investigations.

In the absence of explicit constitutional text, the scope of the investigatory power has been molded and defined primarily by congressional practice, negotiations between the political branches, and opinions of the Supreme Court. The Supreme Court has only rarely engaged in any significant discussion of Congress's investigatory power, and in fact has only once issued an opinion directly addressing an investigative oversight conflict between Congress and the Executive Branch.[6] A variety of factors contribute to the reduced judicial role in this area, including legal principles of judicial restraint and the separation of powers. But at least historically, the chief constraint appears to be the infrequency in which cases involving the investigatory power have been adjudicated.[7] As a general matter, the Judicial Branch generally has become involved in subpoena disputes in only three classes of cases: (1) when a party is subject to a contempt proceeding for failure to comply with congressional demands;[8] (2) when the House or Senate itself initiates a lawsuit in an attempt to enforce a subpoena—though the Supreme Court has never heard such a case;[9] or (3) when a subpoena seeks an individual's documents from a third party, and the individual brings suit to block the third party from complying with the subpoena.[10] The majority of cases have historically come from the first category, arising either in the context of a criminal prosecution for contempt of Congress, or a habeas proceeding stemming from a detention carried out pursuant to an exercise of Congress's inherent contempt power.[11] The relative dearth of jurisprudence means that historical practice, especially Congress's views of the reach of its own authority established through hundreds of years of investigations, plays a substantial role in establishing the outer bounds of the investigatory power.

Although Supreme Court decisions in this area are limited, they illuminate the basic constitutional foundation of Congress's investigatory power and establish key legal limitations

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perceives it to be the duty of Members to tell the public about their activities."). While the self-informing function is clearly a valid justification for exercise of the investigative power, the public-informing function sits on less certain ground. *Id.* ("Valuable and desirable as it may be in broad terms, the transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process.") *But see* Watkins v. United States, 354 U.S. 178, 200 n.33 (1957) (noting that "[f]rom the earliest times in its history, the Congress has assiduously performed an 'informing function'" the purpose of which is to "inquire into *and publicize* corruption, maladministration or inefficiency in agencies of the Government") (emphasis added).

[5] Watkins v. United States, 354 U.S. 178, 187 (1957) (holding that the investigatory power "encompasses inquiries concerning the administration of existing laws").

[6] Prior to *Trump v. Mazars*, 140 S. Ct. 2019 (2020), the Court's last significant discussion of the scope of the investigatory power was in 1975. *Eastland*, 421 U.S. at 505–11.

[7] *See Rumely*, 345 U.S. at 46–48 ("Experience admonishes us to tread warily in this domain . . . . Grave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication. Until then it is our duty to abstain from marking the boundaries of congressional power . . . . Only by such self-restraint will we avoid the mischief which has followed occasional departures from the principles which we profess."). The Court has limited a witness's options for challenging a subpoena. For example, in *Eastland*, the Court held that the Speech or Debate Clause severely limits a court's ability to quash a congressional subpoena in a civil case. *See Eastland*, 421 U.S. at 511 (forbidding "invocation of judicial power to challenge the wisdom of Congress's use of its investigative authority").

[8] *See, e.g.*, *Watkins*, 354 U.S. at 181–82.

[9] *See, e.g.*, Comm. on the Judiciary of the United States House of Representatives v. McGahn, 968 F.3d 755, 762 (D.C. Cir. 2020) (House lawsuit to enforce a committee subpoena).

[10] *See, e.g.*, *Mazars*, 140 S. Ct. at 2028.

[11] *Trump v. Mazars* and *Eastland v. United States Serviceman's Fund* represent two opinions that come from outside the contempt context. *Mazars*, 140 S. Ct. at 2028–29 (involving a lawsuit filed by President Donald Trump to block his accounting firm from complying with a congressional subpoena); *Eastland*, 421 U.S. at 493–501 (involving application of the Speech or Debate Clause in a challenge to a congressional subpoena).

on its exercise. The Court's early jurisprudence began with a focus on establishing the source of the investigatory power before considering the power's scope.[12] In that vein, the Court established that the authority to conduct investigations was implied from the "legislative power" vested in Congress by Article I of the Constitution, but only to the extent that an inquiry actually served a "legislative purpose."[13] By the mid-twentieth century, judicial recognition of the investigatory power had been well established, and the Court's focus shifted to legal limitations on congressional inquiries, generally in the context of the tension between congressional investigations and the individual rights of private citizens.[14] These judicially identified limitations on Congress's power of inquiry emanated principally from the Bill of Rights, including the First and Fifth Amendments, as well as from the internal rules of the House and Senate, which can act as self-imposed constraints on the investigatory power. Intervention by the Supreme Court into investigative disputes has generally been confined to scenarios in which Congress is seeking information from a private citizen, rather than a government official. *Trump v. Mazars*, decided in 2020, was the first time the Supreme Court directly addressed an interbranch investigatory conflict. Even then, the case was technically brought by President Donald Trump in his private rather than official capacity, though the Court chose to treat the conflict as one between the branches.[15] Instead, the historical reality has generally been that inter-branch investigative conflicts are resolved through an informal tug-of-war between the political branches rather than through adjudication by the courts.[16]

ArtI.S8.C18.7.2 Historical Background on Congress's Investigation and Oversight Powers

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

The power to conduct investigations and oversight has long been considered an essential attribute of legislative bodies. In England, Parliament's protean investigatory powers first emerged in connection to its authority to protect the sanctity of the legislative body by punishing for contempt, a practice that can be traced back to at least 1548.[1] Through a contempt proceeding, the legislative body can detain, imprison, and fine those that either obstruct Parliament's operation, refuse to comply with its lawful orders, or threaten its

[12] *See Watkins*, 354 U.S. at 195 ("Prior cases . . . had defined the scope of investigative power in terms of the inherent limitations of the sources of that power. In the more recent cases, the emphasis shifted to problems of accommodating the interest of the Government with the rights and privileges of individuals.").

[13] Kilbourn v. Thompson, 103 U.S. 168, 204 (1880) (holding that exercise of Congress's implied power of inquiry must be made "in aid of the legislative function").

[14] *See e.g.*, *Watkins*, 354 U.S. at 215 (Fifth Amendment Due Process); Quinn v. United States, 349 U.S. 155, 161–65 (1955) (Fifth Amendment privilege against self-incrimination); *Barenblatt*, 360 U.S. at 125–34 (First Amendment).

[15] *Mazars*, 140 S. Ct. at 2028, 2034 ("The interbranch conflict here does not vanish simply because the subpoenas seek personal papers or because the President sued in his personal capacity.").

[16] Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight,* 98 Marq. L. Rev. 881, 889–90 (2014) (arguing that "the constitutional scheme places a premium on good faith negotiation between Congress and the Executive backstopped by rare instances of judicial resolution . . . . In cases of impasse, Congress primarily enforces its requests through political self-help remedies rather than outsourcing enforcement to the courts. When Congress does seek judicial enforcement, restraint is generally the hallmark of Article III tribunals presented with bickering political branches.").

[1] James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 157 n. 15 (1926).

prerogatives.[2] These roots remain apparent today, as legal discussions of legislative investigatory powers in the United States are consistently and intimately intertwined with the contempt power.[3]

By the early seventeenth century, Parliament unmistakably recognized its power to investigate as the House of Commons began requiring, on a case by case basis, the attendance of witnesses or the production of documents in furtherance of the body's "duty to inquire into every Step of publick management . . . ."[4] Eventually, as gathering information relating to both the passage of new laws and the administration of existing laws became an apparent and essential ingredient of the legislative process, compulsory investigatory powers were provided on a more general and permanent basis to established parliamentary committees of inquiry.[5] This overarching historical notion of the power of inquiry as a necessary component part of the legislative power was transported to America, and incorporated into the practice of colonial governments, and, after independence, state governments.[6]

It is important to note that while the antecedent history of the English Parliament may be relevant to understanding the powers that the Framers of the U.S. Constitution understood the new national legislature to have, it is clear that there are limits to the usefulness of parliamentary precedents in defining Congress's investigatory powers due to significant distinctions between the two legislative bodies. As the Supreme Court has repeatedly reaffirmed, Parliament's investigatory and contempt powers were derived from the bodies' authority to exercise a "blend[ ]" of both legislative and judicial powers.[7] Congress, under the American system's separation of powers among three branches of government, exercises no judicial power.[8] Thus, unlike Parliament, any authority to investigate and subsequently enforce its orders must rest solely on legislative authority provided to the body by the Constitution.

The Constitutional Convention saw almost no discussion of Congress's power to conduct oversight and investigations, although individual delegates to the Convention appear to have understood Congress to possess "inquisitorial" powers.[9] A proposal to provide Congress explicitly with the power to punish for contempts—a power often used, and at times "abused," by Parliament as a means to effectuate its investigatory powers—was made, but not acted upon.[10] Nevertheless, it is likely that the general view of Convention delegates was that an express enumeration of the power of inquiry or the power to punish for contempt was unnecessary. The Framers' conception of legislative power, based on centuries of consistent

[2] For a broader discussion of the congressional contempt power see CRS Report RL 34097, Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure, by Todd Garvey.

[3] *See* Watkins v. United States, 354 U.S. 178, 181–82 (1957); *See, e.g.*, Comm. on the Judiciary of the United States House of Representatives v. McGahn, 968 F.3d 755, 762 (D.C. Cir. 2020) (House lawsuit to enforce a committee subpoena).

[4] 13 R. Chandler, History & Proceedings of the House of Commons 172 (1743). Ernest J. Eberling, Congressional Investigations: A Study of the Origin and Development of the Power of Congress to Investigate and Punish for Contempt 34 (1928) (noting that Parliament viewed the subpoena power as "too serious a matter for general delegation").

[5] Landis, *supra* note 1, at 161.

[6] *Id.* at 165.

[7] Marshall v. Gordon, 243 U.S. 521, 533, (1917) (concluding that the English contempt power "rested upon an assumed blending of legislative and judicial authority possessed by the Parliament").

[8] *Kilbourn*, 103 U.S. at 192 (1880) (suggesting that "no judicial power is vested in the Congress").

[9] *See e.g.,* 2 Max Farrand, The Records of the Federal Convention of 1787 206 (1937) (remarks of George Mason) (Members of Congress "are not only Legislators but they possess inquisitorial powers. They must meet frequently to inspect the Conduct of the public offices"); James Wilson, 3 The Works of the Honourable James Wilson 219 (1804) (noting the traditional power of legislators to act as "grand inquisitors of the realm").

[10] *See* 2 Farrand, *supra* note 9, at 340; Josh Chafetz, Congress's Constitution: Legislative Authority and the Separation of Powers 171 (2017).

practice by both Parliament and colonial legislatures, included the ability to gather information relevant to the conduct of the House and Senate's legislative functions.[11] Congressional practice, executive acquiescence and acknowledgement, and judicial precedent all confirm the view that the power to investigate is implicit in the legislative power.

ArtI.S8.C18.7.3 Congress's Investigation and Oversight Powers (1787–1864)

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

Congress exhibited a robust view of its own investigatory powers from the very outset, especially in regard to the legislature's obligation to oversee the Executive Branch.[1] The first session of the First Congress saw the House establish a special committee to investigate Robert Morris's conduct as Superintendent of Finance under the Articles of Confederation.[2] The House then established an important special investigating committee in 1792 for the purpose of inquiring into Major General Arthur St. Clair's disastrous military excursion into the Northwest Territory in which nearly 700 federal troops were killed by the Western Confederacy of American Indians.[3] The mere act of authorizing such a committee set an important precedent, in that adoption of the resolution was preceded by a debate over whether it was appropriate, and indeed constitutional, for the House to investigate the matter, or whether it was preferable to urge the President to carry out the inquiry.[4] Although it was asserted by some that the House lacked authority to inquire into Executive operations, that position was defeated and Congress established an investigating committee with clear authority to "call for such persons, papers and records as may be necessary to assist their inquiries."[5] The investigation itself also established important precedents for Congress's authority to gather information from the Executive Branch, including in relation to sensitive military matters. After some discussion within Washington's cabinet of the President's authority to withhold requested information from Congress, the special committee obtained documents from both the War Department and the Treasury Department as well as testimony from cabinet officials Henry Knox and Alexander Hamilton.[6]

Congress also acted swiftly to use federal law and internal rules to strengthen its investigatory powers. In 1798, Congress enacted a statute recognizing its powers not only to obtain evidence through testimony, but also to do so from witnesses under oath.[7] The statute specifically authorized the President of the Senate, the Speaker of the House, and a chairman

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[11] As one scholar has put it, the contemporary understanding of legislative power, at the time of the adoption of the Constitution, "possessed a content sufficiently broad to include the use of committees of inquiry with powers to send for persons and paper." Landis, *supra* note 1, at 169.

[1] Ernest J. Eberling, Congressional Investigations: A Study of the Origin and Development of the Power of Congress to Investigate and Punish for Contempt 33 (1928).

[2] 2 Annals of Cong. 1514 (1822).

[3] Telford Taylor, Grand Inquest: The Story of Congressional Investigations 17–19 (1974).

[4] *See* 3 Annals of Cong. 490–94 (1792).

[5] Taylor, *supra* note 3, at 22.

[6] *Id.* at 23–4

[7] Act of May 3, 1798, ch. 36, 1 stat. 554.

of a select committee to administer oaths to witnesses testifying before Congress.[8] In addition, both the House and Senate delegated to ad hoc select committees the authority to call for papers or persons beginning as early as the late eighteenth century.[9] However, those early years saw Congress use compulsory process sparingly, especially for purposes of informing itself when considering legislation.[10]

Congress's relatively broad understanding of its own investigatory powers continued into the nineteenth century as both the House and Senate engaged in ongoing oversight of the Executive Branch. A variety of inquiries set important precedents establishing Congress's authority to inquire into the expenditure of appropriated funds, activities of state officials, and operations of the military and post office.[11]

It was not until 1821 that the Supreme Court issued its first notable opinion in this area. That opinion, *Anderson v. Dunn*, dealt not with Congress's power to conduct the type of oversight with which it had been engaged, but instead with the related question of whether the House possessed the power to punish a private citizen for attempting to bribe a Member.[12] The *Anderson* opinion recognized the House's authority to defend its own powers and prerogatives by punishing certain contemptuous acts committed against the body, despite the absence of a constitutional provision granting the body such power.[13] The contempt power was "derived from implication" in Article I as essential to the self-preservation of all legislative bodies.[14] The Court said nothing about Congress's general investigatory or oversight powers, but *Anderson* marks the Court's first clear acknowledgment of implied legislative powers. That Congress holds certain implied powers necessary to the functioning of a deliberative legislative body is a principle that would later lead to the judicial affirmation of the wider investigatory and oversight powers that Congress had already asserted in practice.[15]

In the meantime, the House and Senate continued to engage in major investigations of the Executive Branch without intervention or interference from the courts. In 1832, the House established a select committee to investigate the operations of the federally chartered, but privately owned Second Bank of the United States.[16] The investigation, which inquired into both the operation of the Bank and whether the Bank's soon-to-expire charter should be renewed, represents an example of an investigation that blended both the oversight and

[8] *Id.* The power to administer oaths was expanded to all standing committee chairman in 1817. Act of Feb. 8, 1817, ch. 10, 3 stat. 345. *See also*, *McGrain*, 273 U.S. at 167.

[9] Eberling, *supra* note 1, at 34–5.

[10] Watkins v. United States, 354 U.S. 178, 193 (1957) ("There was very little use of the power of compulsory process in early years to enable Congress to obtain facts pertinent to the enactment of new statutes or the administration of existing laws."); Eberling, *supra* note 1, at 34.

[11] *See* James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 172–76 (1926).

[12] Anderson v. Dunn, 19 U.S. 204, 224–25 (1821).

[13] *Id.* at 229.

[14] *Id.* at 225. The Supreme Court acknowledged fundamental structural concerns associated with finding the existence of implied powers in a Constitution of enumerated powers, noting that the "[g]enius and spirit of our institutions are hostile to the exercise of implied powers." *Id.* But, the Court reasoned, to find no such power would "lead to the total annihilation of the Power of the House of Representatives." *Id.* at 228.

[15] *See* Barenblatt v. United States, 360 U.S. 109, 111 (1959) ("The congressional power in question concerns the internal process of Congress in moving within its legislative domain; it involves the utilization of its committees to secure 'testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.'[ ] The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and farreaching as the potential power to enact and appropriate under the Constitution.").

[16] 1 Congress Investigates: A Critical and Documentary History 71 [hereinafter Congress Investigates].

informing functions.[17] The majority report, after taking testimony from a variety of former and current bank officers and employees and reviewing the Bank's accounting books, found that the Bank had violated its charter on a number of occasions and specifically recommended that the Bank not be reauthorized.[18]

The House's investigation was not undertaken without dissent. Former President and then-Representative John Quincy Adams disagreed with both the committee majority's conclusion and the way in which it carried out its investigation. In his own minority report, Adams criticized the committee's focus on the actions of specific officers and employees of the Bank rather than the Bank's general operation—calling the investigation a "trial" that invaded both the "sanctuary of private life" and the judicial power.[19]

Adams' concerns over Congress's ability to inquire into personal conduct of private citizens were reflected in a Senate investigation into John Brown's raid on Harpers Ferry. Brown, an ardent and at times violent abolitionist, had led an attack on a federal arsenal in an effort to stimulate an armed slave uprising.[20] Following the failed attack, the Senate adopted a resolution establishing a select committee to investigate the facts of the raid, including whether Brown received financial support from other conspirators and whether legislation was necessary to prevent similar acts from occurring in the future.[21] The committee attempted to compel testimony from a number of individuals who were suspected of criminal involvement in the raid, but was unable to acquire testimony in a number of instances. One witness, Thaddeeus Hyatt, refused to testify, asserting that he had no constitutional obligation to do so because the "inquisitorial" investigation represented an exercise of judicial rather than legislative power.[22] Hyatt's refusals sparked a debate in the Senate, with a vocal minority of members arguing that the committee's assumption of judicial functions violated the separation of powers.[23] Ultimately, it appears that concerns expressed in the Senate over congressional inquiry into private conduct gave shelter to witnesses who refused to comply with committee investigative demands, resulting in what has been characterized as a failed and highly partisan investigation.[24]

ArtI.S8.C18.7.4 Congress's Investigation and Oversight Powers (1865–1940)

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

The end of the nineteenth and first half of the twentieth centuries saw the Supreme Court consider the question of Congress's power to investigate private conduct that the Adams report and Harpers Ferry investigation had placed into public view. In considering that question,

[17] *Id.*

[18] H. R. Rep. No. 22-460, at 1–2 (1832).

[19] *Id.* at 370.

[20] Congress Investigates, *supra* note 16, at 124–137.

[21] *Id.* at 130.

[22] *Id.* at 133–34

[23] Cong. Globe, 36th Cong., 1st Sess. 1100–09 (1861).

[24] McGrain v. Daugherty, 273 U.S. 135, 161–65 (1927).

seminal cases such as *Kilbourn v. Thompson*,[1] *In re Chapman*,[2] and *Marshall v. Gordon*[3] developed an enduring and essential limit on Congress's investigatory authorities: the principle that Congress's implied powers of investigation, being derived from the express delegation of legislative power to Congress, extend only to those inquiries that can be said to "aid the legislative function" or that serve a "legislative purpose."[4]

The 1880 case of *Kilbourn v. Thompson* represents the Court's first and arguably most restrictive assessment of Congress's general investigatory powers. *Kilbourn* involved a contempt action arising from a private citizen's refusal to testify before a special House committee established to investigate the bankruptcy of a company to which the government was a creditor.[5] In addition to placing certain limits on Congress's exercise of its contempt power,[6] the opinion also contained the Court's first discussion of Congress's authority to compel the attendance of witnesses during an investigation.[7] The opinion connected that power to the exercise of other constitutional powers. The Court noted that the House and Senate had an "undoubted right to examine witnesses and inspect papers" and "the right to compel the attendance of witnesses, and their answer to proper questions," either when exercising the powers of impeachment and removal or to judge the election and qualification of their own members.[8]

Outside those areas, however, the *Kilbourn* Court held that Congress could only compel production of testimony or documents when "required in a matter into which that House has jurisdiction to inquire."[9] With regard to the bankruptcy investigation at issue, the Court ruled that the House lacked jurisdiction, as neither house "possesses the general power of making inquiry into the private affairs of the citizen."[10] The Court viewed the committee's inquiry as a "fruitless investigation into the personal affairs of individuals" that could "result in no valid legislation on the subject to which the inquiry referred" and thus was not in aid of the legislative function.[11] Further evidence that the investigation was not legislative in nature, the Court reasoned, lay in the fact that any congressional investigation into purely private affairs with implications for private rights "assumed a power" that was "in its nature clearly judicial."[12]

Similarly, in *Marshall v. Gordon*, the Supreme Court held that a House committee had no legislative purpose in punishing, through contempt, a federal district attorney for writing and publishing a "defamatory and insulting" letter criticizing Congress.[13] The Court held that the contempt power extends only as far as is "necessary to preserve and carry out the legislative

[1] Kilbourn v. Thompson, 103 U.S. 168, 199 (1880) (delineating Congress's investigative powers as those that are "necessarily implied" from the Congress's "constitutional functions and duties").

[2] *In re* Chapman, 166 U.S. 661, 671 (1897).

[3] Marshall v. Gordon, 243 U.S. 521, 541 (1917) (describing Congress's implied power as that which is "necessary to preserve and carry out the legislative authority given").

[4] *See* McGrain v. Daugherty, 273 U.S. 135, 172, 175, 177 (1927).

[5] *Kilbourn*, 103 U.S. at 193–94.

[6] The Court held that the contempt power can "derive no support from the precedents and practices" of Parliament and any detention cannot extend beyond the end of the Congress. *Id.* at 189.

[7] *Id.* at 190.

[8] *Id.*

[9] *Id.* The Court left open the question of whether the House did, in fact, have that power. *Id.* at 189 (holding the proposition that the investigative power "exists as one necessary to enable either House of Congress to exercise successfully their function of legislation . . . is one which we do not propose to decide in the present case . . .)".

[10] *Id.*

[11] *Id.* at 195.

[12] *Kilbourn*, 103 U.S. at 192.

[13] Marshall v. Gordon, 243 U.S. 521, 532 (1917).

authority given."[14] This includes, the Court reasoned, responding to acts that "in and of themselves inherently obstruct or prevent the discharge of legislative duty" such as "refusing to obey orders to produce documents or give testimony which there was a right to compel."[15] An ill-tempered letter, on the other hand, did not sufficiently obstruct Congress's ability to exercise its powers to trigger contempt.[16]

The contempt actions that gave rise to *Anderson*, *Kilbourn,* and *Marshall* were undertaken pursuant to the House and Senate's implied authority to unilaterally punish contemptuous conduct.[17] These contempt proceedings took place before the House or Senate.[18] However, in order to enforce congressional investigatory powers "more effectually[,]" Congress had enacted a criminal provision in 1857 that made it a misdemeanor to willfully fail to comply with a congressional subpoena for testimony or documents.[19] Violations were certified to the Executive Branch for prosecution, rather than proceeded against within the Legislative Branch.

The Supreme Court upheld the contempt statute against a constitutional challenge in *In re Chapman* as "necessary and proper for carrying into execution the powers vested in Congress and in each House thereof."[20] The *Chapman* decision also contributed to development of the "legislative purpose" concept by clarifying that though some connection to the legislative function is necessary to justify exercising compulsory investigative powers, Congress is not required to specifically "declare in advance" the purpose of an inquiry at the outset.[21]

The inquiry into the Teapot Dome scandal that arose during the Administration of Warren G. Harding was one of Congress's most significant and wide ranging investigations.[22] The investigation involved both private and governmental conduct and allowed Congress to display the full panoply of its investigative tools. The inquiry began as a result of accusations that the Secretary of the Interior, in return for some pecuniary benefits, had made a secret arrangement to lease the Teapot Dome oil reserves in Wyoming to personal friends who led major private oil companies, without required competitive bidding.[23] The subsequent Senate investigation—running from 1922 to 1923—uncovered pervasive corruption throughout the highest levels of the Executive Branch, ultimately leading to the downfall of a variety of government officials and oil executives.[24] The Senate not only held hearings, issued subpoenas to compel the production of testimony and documents, and published reports, but also approved resolutions calling for the President to remove certain officials; confirmed the

[14] *Id.* at 541

[15] *Id.* at 543.

[16] *Id.* at 546 (concluding that the contempt was "not intrinsic to the right of the House to preserve the means of discharging its legislative duties, but was extrinsic to the discharge of such duties and related only to the presumed operation which the letter might have upon the public mind and the indignation naturally felt by members of the committee on the subject.").

[17] For a discussion of the differences between the implied or inherent contempt power and criminal contempt of Congress under 2 U.S.C. § 192, 194, see CRS Report RL34097, Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure, by Todd Garvey.

[18] *Id.* at 10.

[19] Act of January 24, 1857, ch. 19, 11 stat. 155 (codified as amended at 2 U.S.C. §§ 192, 194).

[20] *In re* Chapman, 166 U.S. 661, 671 (1897).

[21] *Id* at 670 (concluding that it is "not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation concluded").

[22] 1 Congress Investigates: A Critical and Documentary History 460–499.

[23] *Id.* at 462–63.

[24] *Id.* at 463–72.

appointment of a special counsel to investigate criminal wrongdoing independently; and referred matters to the Executive Branch for criminal prosecution.[25]

The Teapot Dome investigation also gave rise to the important decisions of *McGrain v. Daugherty* and *Sinclair v. United States*.[26] *McGrain* represents one of the Supreme Court's most significant and detailed discussions of the scope of Congress's investigatory powers and is likely the historical high-water mark of the judicial vision of Congress's power.[27] The decision was also the first time that the Court explicitly recognized each house's ability to compel testimony.[28] The case arose from a Senate investigation into the alleged failure of the Attorney General to prosecute certain federal violations uncovered by the preceding Teapot Dome investigation.[29] After Mallie Daugherty, the brother of the Attorney General and president of an Ohio bank, refused to comply with a subpoena for testimony, the Senate ordered him detained pursuant to its own contempt power. Daugherty's challenge to his detention ultimately was rejected by the Supreme Court, which upheld the chamber's authority to arrest and detain a witness in order to obtain information for legislative purposes. The *McGrain* opinion found "[t]he power of inquiry—with process to enforce it is an essential and appropriate auxiliary to the legislative function."[30] In support of its conclusion, the Court noted that such a power had been recognized by legislative bodies consistently through American history, from colonial and state legislatures before adoption of the Constitution to both the House and Senate after.[31] In an oft quoted passage, the Court reasoned that the practicalities of investigative inquiries sometimes require compulsion:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.[32]

The *McGrain* opinion also clearly established that Congress's oversight and informing functions are employed in aid of its legislative function, and thus represent legitimate justification for the exercise of compulsory investigative powers.[33] With regard to the informing function, the Court suggested there existed a "presumption" that an investigation is undertaken to aid the Congress in legislating, and also reaffirmed that an "express avowal" of the legislative goal "was not indispensable."[34] With regard to the oversight function, the Court gave its imprimatur to the general purpose of the committee investigation, that of overseeing "the administration of the Department of Justice," because the activities of Executive Branch

[25] *Id.* at 473–74.

[26] 273 U.S. 135 (1927); 279 U.S. 263 (1929).

[27] *See McGrain*, 273 U.S. at 177–78 (articulating the scope of Congress's investigatory power as extending to any "subject . . . on which legislation could be had . . . .").

[28] *Id.* at 160–75

[29] *Id.* at 152–53.

[30] *Id.* at 174.

[31] *Id.* at 160–68.

[32] *Id.* at 175.

[33] *McGrain*, 273 U.S. at 177–78.

[34] *Id.* at 178 ("The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object.").

agencies "are all subject to regulation by congressional legislation."[35] *McGrain* firmly and explicitly entrenched the investigatory powers that had been recognized and employed by the House and Senate since at least 1792.

The second opinion arising from the Teapot Dome investigation was *Sinclair v. United States*.[36] That case involved a prosecution for criminal contempt of Congress against an oil executive, who had received an illegal lease from the government, for his refusal to comply with a committee subpoena for testimony.[37] Like previous decisions, the case again centered on whether an investigation into private conduct could be "in aid of legislation."[38] Although the Court reaffirmed that neither house "possesses the general power of making inquiry into the private affairs of the citizen," it nevertheless upheld the contempt conviction and the Senate's exercise of its investigatory powers, holding that the authority to investigate extends to "matters affecting the United States . . . as well as to those having relation to the legislative function."[39] It was clear, the Court reasoned, that Congress had power to investigate how and to whom the Executive Branch leased oil reserves. The opinion distinguished *Kilbourn*, observing that Congress's inability to inquire into private conduct applies only when an investigation is not a matter of federal concern, but rather relates "merely or principally [a] personal or private affair."[40]

The Supreme Court's subsequent opinions further refined the legislative purpose requirement, generally in the direction of expanding Congress's realm of interest. For example, in *Barenblatt v. United States*, the Court observed that the legislative role requires attention to a "whole range of national interests," reflecting a corresponding power of inquiry that "is as penetrating and as far reaching as the potential power to enact and appropriate under the Constitution."[41] The Court has also generally deferred to Congress's articulated purpose, effectively creating a presumption in favor of congressional authority when an investigation is related to a constitutional purpose.[42] The Court, for example, will not inquire into "the motives which spurred the exercise of" the investigative power.[43] Even the existence of bad intent will not "vitiate" an otherwise valid investigation.[44] But, the Court has warned that because the exercise of investigative powers by a committee is based upon authority delegated to it by the parent body, the parent body should clarify those committee powers by articulating the committee's jurisdiction and purpose "with sufficient particularity."[45] As the Court has noted

[35] *Id.*

[36] 279 U.S. 263 (1929).

[37] *Id.* at 284–85.

[38] *Id.* at 291, 295.

[39] *Id.* at 294, 297 (noting that the "transaction purporting to lease to it the lands within the reserve cannot be said to be merely or principally the personal or private affair of appellant. It was a matter of concern to the United States").

[40] *Id.* at 294.

[41] Barenblatt v. United States, 360 U.S. 109, 111 (1959).

[42] *See McGrain*, 273 U.S. at 178.

[43] *Id.* at 132 ("So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power."); *Watkins*, 354 U.S. at 200 ("Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served."); Wilkinson v. United States, 365 U.S. 399, 412 (1961) ("[I]t is not for us to speculate as to the motivations that may have prompted the decision of individual members of the subcommittee to summon the [witness].").

[44] Watkins v. United States, 354 U.S. 178, 200 (1957)

[45] *Id.* at 201 (noting that "instructions" to an investigating committee should "spell out that group's jurisdiction and purpose with sufficient particularity").

"the more vague the committee's charter, the greater becomes the possibility" that the committee will act outside the confines of a legislative purpose.[46]

ArtI.S8.C18.7.5 Congress's Investigation and Oversight Powers (1940–1970)

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

Whereas the Supreme Court's early cases on Congress's investigatory powers almost exclusively focused on the source and scope of Congress's implied authorities by requiring that a legislative purpose exist in any congressional inquiry, the 1950s and 1960s saw the Court develop two additional categories of limits on Congress's investigative powers. First, the Court began to enforce Congress's own self-imposed internal constraints, for example by requiring committees to stay within their delegated jurisdiction and comply with their own committee rules.[1] And second, the Court enforced constraints emanating from the personal rights of private citizens secured by the Bill of Rights.[2]

Many of the disputes that were ultimately heard by the Supreme Court during this time period stemmed from House and Senate investigations into "the threat of subversion of the United States Government," especially from communist infiltration and influence.[3] These investigations, and subsequent contempt actions, were generally initiated by the House Un-American Activities Committee (HUAC) or other committees targeting communist activity. Although the Court has characterized this period as a "new phase of legislative inquiry" involving "broad-scale intrusion into the lives and affairs of private citizens," it is clear that congressional inquiry into private conduct was not in and of itself a new development.[4] Nevertheless, perhaps because actions taken by Congress and its committees in this period clearly implicated individual constitutional rights such as the privilege against self-incrimination and free speech, the Court more heavily scrutinized Congress's use of its investigatory powers.[5]

The uptick in Supreme Court review of congressional inquiries from earlier periods may also have been partly due to an overall increase in investigative activity following enactment of the Legislative Reorganization Act of 1946.[6] The 1946 Act was the result of a report by the Joint Committee on the Reorganization of Congress that recommended that Congress abandon

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[46] *Id.* at 206 ("It is impossible in such a situation to ascertain whether any legislative purpose justifies the disclosures sought and, if so, the importance of that information to the Congress in furtherance of its legislative function.").

[1] *See, e.g.,* Yellin v. United States, 374 U.S. 109, 114 (1963); Gojack v. United States, 384 U.S. 702, 712 (1966); United States v. Rumely, 345 U.S. 41, 47 (1953).

[2] *See, e.g.*, Watkins v. United States, 354 U.S. 178, 195 (1957); Barenblatt v. United States, 360 U.S. 109, 112 (1959); Quinn v. United States, 349 U.S. 155, 161 (1955); Hutcheson v. United States, 369 U.S. 599, 607–13 (1962).

[3] *Watkins*, 354 U.S. at 195.

[4] *Id.*

[5] It must also be noted that a party subject to a congressional subpoena for testimony or evidence bears the risk of any refusal to comply with congressional demands on the ground the committee had violated either rules based, or constitutional limitations. The risk is especially acute for a witness called to provide testimony who "must decide at the time the questions are propounded whether or not to answer." *Id.* at 208. As the Court warned in *Watkins*, "an erroneous determination on his part, even if made in the utmost good faith, does not exculpate him if the court should later rule" that the claim was unfounded. *Id.*

[6] Legislative Reorganization Act of 1946, Pub. Law No. 79-601, 60 Stat. 812, 823–831(1946).

its long-standing practice of establishing special committees to carry out investigations and instead that all House and Senate standing committees "be directed and empowered to carry on continuing review and oversight of legislation and agencies within their jurisdiction" and be given subpoena power.[7] The Act ultimately veered slightly from the Joint Committee's recommendation, delegating subpoena power to all standing committees of the Senate, but only the Un-American Activities Committee in the House. The Act further mandated that each standing committee in both chambers "exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee."[8]

ArtI.S8.C18.7.6 Rules-Based Limits of Congress's Investigation and Oversight Powers

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

In exercising its investigatory powers, Congress is subject to its own rules and, in particular, rules defining committee jurisdictions. The Supreme Court has enforced House and Senate internal rules to limit the exercise of investigatory authority as shown by cases such as *Yellin v. United States*, *Gojack v. United States*, and *United States v. Rumely*.[1] These cases stand for the proposition that a congressional committee lacks authority to compel compliance with investigative demands when it acts outside its jurisdiction or fails to comply with its own rules.

In *Yellin*, the Supreme Court overturned a contempt conviction stemming from a witness's refusal to answer questions in a public hearing.[2] The witness had argued that the conviction was improper because the committee had failed to comply with its own rules regarding the availability of closed sessions.[3] Those rules expressly required that in considering whether to close a hearing, the committee consider the possible injury to the witness's reputation that may result from a public hearing.[4] The Court held that in exercising investigative powers, a committee may be "held to observance of its rules." Finding that the committee had not given due consideration to the witness's requests for a private hearing, the Court overturned the contempt conviction.[5] The Court reached a similar conclusion in *Gojack*.[6] There a HUAC rule required that all "major investigations" be initiated only with the majority approval of the

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[7] S. Rep. No. 79-1011, at 5 (1946). Ernest J. Eberling, Congressional Investigations: A Study of the Origin and Development of the Power of Congress to Investigate and Punish for Contempt 34 (1928) (noting that during its early history the House "sparingly . . . delegate[d] to its committees the right to send for persons and papers.").

[8] 60 Stat. at 830–31.

[1] Yellin v. United States, 374 U.S. 109, 114 (1963); Gojack v. United States, 384 U.S. 702, 712 (1966); United States v. Rumely, 345 U.S. 41, 47 (1953).

[2] *Yellin*, 374 U.S. at 111–12.

[3] *Id.* at 113–14.

[4] *Id.* at 114. The committee rule provided: "If a majority of the Committee or Subcommittee . . . believes that the interrogation of a witness in a public hearing might endanger national security or unjustly injure his reputation, or the reputation of other individuals, the Committee shall interrogate such witness in an Executive Session for the purpose of determining the necessity or advisability of conducting such interrogation thereafter in a public hearing." *Id.* at 114–15.

[5] *Id.* at 114.

[6] *Gojack*, 384 U.S. at 703–04.

Committee.[7] The underlying investigation that gave rise to the contempt prosecution had not been authorized, and thus, the Court reversed the conviction.[8]

Nor may a committee exercise compulsory investigative powers in connection to matters outside its jurisdiction.[9] Committee jurisdiction acts as a fundamental limit on investigative activity as it is directly tied to the "source" of the committee's authority: the delegation from the parent body.[10] A congressional committee, the Supreme Court has declared "is restricted to the missions delegated to it by the parent body, and" "no witness can be compelled to make disclosures on matters outside that area."[11]

In *Rumely*, the Court affirmed a reversal of a contempt conviction of a defendant who had failed to comply with a House select committee's subpoena on the basis that the committee was operating outside the jurisdiction delegated to it by the House.[12] The defendant in *Rumely*, the secretary of an organization that published and sold books of "particular political tendentiousness," had refused to comply with a committee subpoena for the names of those persons or groups who made bulk purchases from the organizations.[13] The resolution establishing the select committee, which the Court viewed as "the controlling charter of the committee's powers," had authorized the committee to investigate "lobbying activities intended to influence . . . legislation."[14] The Court interpreted "lobbying activities" to extend only to "representation made directly to the Congress" and thus concluded that the committee had no authority to investigate or enforce a subpoena against a witness who had sought only to influence public opinion.[15] In adopting this interpretation of "lobbying activities," the Court expressly stated that it gave the committee's jurisdiction a "more restricted scope" in part so as to avoid the possibility that enforcement of the subpoena would violate the witness's First Amendment right to engage in political speech.[16] The Court has followed a similar approach in subsequent cases. At times, it has adopted a narrow interpretation of a committee's jurisdiction or the scope of a committee investigation to avoid the possibility of a constitutional conflict on the grounds that "[p]rotected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a particular legislative need."[17]

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[7] *Id.* at 706.

[8] *Id.* at 712. The Court rejected claims that it should infer authorization for the investigations, holding instead that "the usual standards of the criminal law must be observed, including proper allegation and proof of all the essential elements of the offense." *Id.* at 707.

[9] See Watkins v. United States, 354 U.S. 178, 206 (1957) ("Plainly these committees are restricted to the missions delegated to them, *i.e.,* to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere. No witness can be compelled to make disclosures on matters outside that area."). The Court referred to this principle as "a jurisdictional concept of pertinency drawn from the nature of a congressional committee's source of authority" and distinguished it from the "element of pertinency embodied in the" criminal contempt statute. *Id.*

[10] *Id.*

[11] *Id.*

[12] *Rumely*, 345 U.S. at 48.

[13] *Id.* at 42.

[14] *Id.* at 44.

[15] *Id.* at 47.

[16] *Id.* ("Certainly it does no violence to the phrase 'lobbying activities' to give it a more restricted scope. To give such meaning is not barred by intellectual honesty. So to interpret is in the candid service of avoiding a serious constitutional doubt.").

[17] *See Watkins*, 345 U.S. at 224. *But see* Barenblatt v. United States, 360 U.S. 109, 121 (1959) (rejecting the avoidance approach adopted in *Rumely* on the grounds that Congress had placed a clarifying "legislative gloss" on the meaning of the applicable committee rule).

ArtI.S8.C18.7.7 Constitutional Limits of Congress's Investigation and Oversight Powers

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

Congress's investigatory powers are limited by the constitutional protections accorded to individuals under the Bill of Rights. In *Watkins v. United States*, the Supreme Court observed that:

> It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation. This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. The Bill of Rights is applicable to investigations as to all forms of governmental action.[1]

Because a congressional inquiry is part of "lawmaking," a congressional committee engaged in an investigation generally must observe applicable constitutional restrictions and respect validly asserted constitutionally-based privileges.[2] Although not all provisions of the Bill of Rights are directly relevant to a congressional investigation, it is apparent that many are, with the First and Fifth Amendments providing the principle limitations on Congress's exercise of it powers.[3]

The Court has clearly established that First Amendment protections apply to congressional investigations.[4] Compelling a witness to testify "against his will, about his beliefs, expressions, or associations is a measure of governmental interference" with the witness's free speech rights.[5] However, the actual application of these protections in a congressional investigation is an "arduous and delicate task" that involves balancing Congress's interest in obtaining information with the witnesses' interest in personal privacy.[6] In *Watkins*, the Court made clear that in considering a First Amendment challenge in a congressional inquiry "[t]he critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness."[7] In short,

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[1] Watkins v. United States, 345 U.S. 178, 187–88 (1957) ("Congress, must exercises its own powers, including the power to investigate, subject to the limitations placed by the Constitution on governmental action.").

[2] *Id.* at 197 ("While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process.").

[3] Due in part to the unique nature of congressional proceedings, not all provisions of the Bill of Rights have been judicially determined to be applicable in the committee investigation context. For example, the D.C. Circuit has held that because of the "investigative" rather than "criminal" nature of committee hearings, the Sixth Amendment's individual criminal procedural guarantees; including a party's right to "present evidence on one's own behalf and to confront and cross examine one's accusers," do not apply in the congressional investigation setting. United States v. Fort, 443 F.2d 670, 678–81 (D.C Cir. 1970).

[4] *Watkins*, 345 U.S. at 197 ("Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly.").

[5] *Id.*

[6] *Id.* at 198.

[7] *Id.*

the extent to which the First Amendment can be used as a shield against a congressional inquiry depends on the strength of the committee's legislative purpose.[8]

This balancing test was put to use in *Barenblatt v. United States*.[9] The opinion, along with subsequent consistent decisions, suggests that a First Amendment defense to compulsory congressional process has generally had little success.[10] In *Barenblatt*, a college professor had been convicted of criminal contempt of Congress for his refusal to answer, on First Amendment grounds, questions before a HUAC subcommittee relating to his Communist Party involvement.[11] The Court disagreed with the professor's position, reasoning that the First Amendment does "not afford a witness the right to resist inquiry in all circumstances."[12] Instead, the Court reasoned, "[w]here First Amendment rights are asserted to bar government interrogation resolution of the issue always involved a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." After determining that Congress has "wide power to legislate in the field of Communist activity in this Country," the Court characterized the government interest at play as one of "self-preservation" as one of the central tenets of the Communist Party was the violent overthrow of the American government.[13] In contrast, the opinion made little mention of the witnesses' First Amendment rights, but in weighing the competing interests, the *Barenblatt* opinion concluded that the balance "must be struck in favor of the government."[14]

Witnesses also have a right to invoke the Fifth Amendment privilege against self-incrimination during a congressional investigation.[15] The privilege's applicability was explicitly established in a group of cases released on the same day in 1955.[16] Each involved a witness who had refused to answer questions before the HUAC by relying on their Fifth Amendment privilege.[17] In each case, the privilege was rejected by the HUAC and the witness later prosecuted for criminal contempt of Congress. The Court overturned all three convictions, simultaneously establishing important foundational principles for the scope of the privilege in a congressional proceeding as well as standards for invocation and waiver of the privilege.[18]

In pertinent part, the Fifth Amendment establishes that "no person . . . shall be compelled in any criminal case to be a witness against himself . . . "[19] Although the Amendment's protection expressly refers to "criminal cases[s]," the Court has nevertheless found the

[8] *See Barenblatt*, 360 U.S. at 127 ("The first question is whether this investigation was related to a valid legislative purpose, for Congress may not constitutionally require an individual to disclose his political relationships or other private affairs except in relation to such a purpose.").

[9] *Id.* at 126–27.

[10] *Id.* at 134; Wilkinson v. United States, 365 U.S. 399, 414–15 (1961) (following *Barenblatt* and concluding that the subcommittee had an "overbalancing interest" because it "had reasonable ground to suppose that the petitioner was an active Communist Party member, and that as such he possessed information that would substantially aid it in its legislative investigation").

[11] *Barenblatt*, 360 U.S. at 113–14.

[12] *Id.* at 126.

[13] *Id.* at 144.

[14] *Id.* at 134 "(We conclude that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended.").

[15] *See Quinn*, 349 U.S. at 160–62 ("Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights, such as the Fifth Amendment's privilege against self-incrimination which is in issue here.").

[16] Quinn v. United States, 349 U.S. 155 (1955); Emspak v. United States, 349 U.S. 190 (1955); Bart v. United States, 349 U.S. 219 (1955).

[17] *Quinn*, 349 U.S. at 157–58; *Emspak*, 349 U.S. at 192; *Bart*, 349 U.S. at 219.

[18] *Quinn*, 349 U.S. at 170; *Emspak*, 349 U.S. at 202; *Bart*, 349 U.S. at 223.

[19] U.S. Const. amend. V.

privilege against self-incrimination to be available to a witness appearing before a congressional committee.[20] Once properly invoked, the privilege protects a witness from being compelled to provide Congress with statements that may directly or indirectly furnish evidence which could be used against the witness in a subsequent criminal prosecution or from being punished for their refusal to respond to committee inquiries.[21] The Court has recognized the potential consequences of such a broad protection, but has repeatedly confirmed that the Fifth Amendment must be regarded as "a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions."[22]

In *Quinn v. United States*, the Court adopted a relatively lenient standard for determining whether the Fifth Amendment protection against self-incrimination was properly invoked during a congressional proceeding.[23] That opinion held that invocation "does not require any special combination of words."[24] Nor is any "ritualistic formula or talismanic phrase" essential to invoke the privilege.[25] Rather, "[i]f an objection to a question is made in any language that a committee may reasonably be expected to understand as an attempt to invoke the privilege, it must be respected [ ] by the committee . . . ."[26] So long as the witness's statement places the committee "on notice" of a potential claim of privilege, the invocation has been considered adequate.[27]

The Court's approach to invocation of the privilege in an investigative proceeding stems largely from the strong presumption against waiver of the privilege. This presumption was apparent in *Emspak v. United States* where after invoking the Fifth Amendment in response to questions from a committee relating to his alleged communist associations and affiliations, the witness was directly asked: "Is it your feeling that to reveal your knowledge . . . would subject you to criminal prosecution?"[28] The witness responded "No. I don't think this committee has a right to pry into my associations."[29] The government argued that the witness's assertion that he did not believe his response would lead to potential criminal liability constituted a waiver of the Fifth Amendment privilege, but the Court disagreed, noting that the witness's statement was not "sufficiently unambiguous to warrant finding a waiver . . . "[30] To hold otherwise, the Court concluded, would contravene "oft repeated admonition that the courts must 'indulge every reasonable presumption against waiver of fundamental constitutional rights."[31]

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[20] *See Quinn*, 349 U.S. at 160–62.

[21] The Court articulated the breadth of the protection in *Emspak*, holding:

> The protection of the Self-Incrimination Clause is not limited to admissions that 'would subject [a witness] to criminal prosecution'; for this Court has repeatedly held that 'Whether such admissions by themselves would support a conviction under a criminal statute is immaterial' and that the privilege also extends to admissions that may only tend to incriminate . . . ." To sustain the privilege,' this Court has recently held, 'it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

Emspak, 349 U.S. at 197–98.

[22] *Quinn*, 349 U.S. at 162 (citing Twining v. New Jersey, 211 U. S. 78, 91 (1908).

[23] *Id.* at 162–65.

[24] *Id.* at 162.

[25] *Emspak*, 349 U.S. at 194.

[26] *Quinn*, 349 U.S. at 163.

[27] Moreover, the Court has stated that where a congressional committee is uncertain whether the witness is in fact invoking the privilege against self-incrimination or instead claiming some other basis for declining to answer, the committee should direct the witness to specify the objection. *Id.* at 167–70.

[28] Emspak, 349 U.S. at 195.

[29] *Id.* at 196.

[30] *Id.* at 198.

[31] *Id.* (citing Johnson v. Zerbst, 304 U. S. 458, 464 (1938)).

Finally, the requirements of the Due Process Clause of the Fifth Amendment,[32] in conjunction with the required elements of the criminal contempt statute,[33] limit Congress's ability to enforce compliance with subpoenas through contempt. Perhaps the leading case on what is known as the "pertinence" requirement is *Watkins v. United States*.[34] The *Watkins* opinion recognized the extraordinary breadth of the investigatory power, but also made clear that the power must accommodate the constitutionally guaranteed rights and privileges of witnesses, including those stemming from the Due Process Clause. In *Watkins*, the witness had been convicted of criminal contempt of Congress after refusing to answer questions before the HUAC on the grounds that the questions asked related to matters "outside the proper scope of [the] committee's activities."[35] In overturning the conviction, the Court noted that criminal defendants must be accorded the right, stemming from the Due Process Clause, to have adequate knowledge and notice—"through a sufficiently precise statute"—of the "standard of criminality" for any offense.[36] Under the criminal contempt statute, that standard of criminality includes the determination that the witness has refused to give an answer "pertinent to the question under inquiry."[37] Therefore, the witness must have knowledge of what subjects are pertinent to the committee inquiry with the degree of "explicitness and clarity that the Due Process Clause requires."[38] The Court found the HUAC authorizing resolution, the statements for the record made by the Chair and other HUAC members, and the "nature of the proceedings" all failed to establish with adequate clarity the scope of the matter under inquiry and the pertinence of the questions propounded thereto.[39] In such a scenario, the Court found that "fundamental fairness demands that no witness be compelled to make such a determination with so little guidance."[40]

ArtI.S8.C18.7.8 Watergate, Church, and Pike Investigations of Congress

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

The beginning of the modern era of congressional oversight is arguably marked by a pair of historically significant investigations into core components of Executive power. In 1973 the Senate approved a resolution establishing the Senate Select Committee on Presidential Campaign Activities to investigate various aspects of the 1972 presidential campaign

[32] U.S. CONST. amend. V.

[33] The Court has alluded to two separate pertinence requirements. Jurisdictional pertinence, which relates to whether the subject under inquiry is pertinent to the committee's jurisdiction, *see* Barry v. United States, 279 U.S. 597, 613 (1929) ("When evidence is taken by a committee, the pertinency of questions propounded must be determined by reference to the scope of the authority vested in the committee by the Senate.") "and statutory pertinence, embodied" in the terms of the criminal contempt of Congress statute. *See Watkins*, 354 U.S. at 206. The Court has suggested that the two principles are "not wholly different . . . nor unrelated . . . ." *Id.*

[34] *Id.* at 208–16 (discussing the "vice of vagueness" and the principle that a witness "is entitled to have knowledge of the subject to which the interrogation is deemed pertinent.").

[35] *Id.* at 185.

[36] *Id.* at 208.

[37] 2 U.S.C. § 192 (making the refusal to "answer any question pertinent to the question under inquiry" a misdemeanor offense).

[38] *Watkins*, 345 U.S. at 209.

[39] *Id.* at 209–15.

[40] *Id.* at 214.

including the break in of the Democratic National Committee headquarters at the Watergate Office Building.[1] The Senate Committee engaged in a series of hearings and received testimony from a number of President Richard Nixon's closest advisers.[2] These hearings uncovered the existence of a taping mechanism installed in the White House, which led to a major confrontation between the President, Congress, and the courts over appropriate access to confidential presidential communications.[3] The Senate investigation, in conjunction with an investigation spearheaded by the Watergate Special Prosecutor eventually led to an impeachment investigation in the House and, ultimately, President Nixon's resignation from office.[4]

The Watergate investigation was followed up by the 1975 House and Senate investigations into potential abuses by the U.S. intelligence community. The Senate Select Committee to Study Government Operations with Respect to Intelligence Activities (known as the Church Committee after its Chairman, Senator Frank Church)[5] and the House Select Intelligence Committee (known as the Pike Committee after its chairman, Congressman Otis Pike)[6] held both private and public hearings inquiring into a variety of secret programs, including some related to the potential assassination of foreign leaders, run by the Central Intelligence Agency, National Security Agency, and Federal Bureau of Investigation. The Committees' work had a significant influence on the Executive Branch, ultimately resulting in President Gerald Ford taking actions to reform and reorganize the Intelligence Community.

The Watergate, Church, and Pike investigations not only uncovered Executive Branch abuses, but also helped Congress inform itself for legislative enactments to correct problems that had been uncovered by the Committees. The experience of the Watergate investigation, for example, arguably led to campaign finance reform and the Ethics in Government Act, while the findings of the Church and Pike Committees led to enactment of Foreign Intelligence Surveillance Act.[7] Congress also made internal changes to increase legislative oversight of intelligence activities by establishing select committees on intelligence in both the House and Senate.[8]

ArtI.S8.C18.7.9 Congress's Investigatory Powers Generally

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

In 1975, the Supreme Court issued the first of only two opinions on Congress's investigatory powers in the modern era. In *Eastland v. United States Serviceman's Fund*, a

[1] S. Res. 60, 93rd Cong. (1973).

[2] *See* S. Rep. No. 93-981, at 1–95 (1974); 1 Congress Investigates: A Critical and Documentary History 886–904.

[3] *See* 1 Congress Investigates: A Critical and Documentary History 900–904; Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 729–33 (D.C. Cir. 1974).

[4] H. Rep. No. 93-1305 (1974).

[5] S. Res. 21, 94th Cong. (1974).

[6] H. Res. 591, 94th Cong. (1975).

[7] S. Rep. No. 93-981, at 1071 (making legislative recommendations); Ethics in Government Act, Pub. Law No. 95-521, 92 stat. 1824 (1978); Foreign Intelligence Surveillance Act, Pub. Law No. 95-511, 92 stat. 1783 (1978).

[8] S. Res. 400, 94th Cong. (1976) (establishing the Senate Select Committee on Intelligence); H. Res. 658, 95th Cong. (1977) (establishing the house Permanent Select Committee on Intelligence).

private nonprofit organization filed suit against the Chairman of a Senate subcommittee. The Court was asked to review an appellate court order enjoining a subpoena issued to a bank for the nonprofit's account information.[1] In reversing the appellate court, the Court reaffirmed the importance of the subpoena power and further concluded that the Speech or Debate Clause acts as a significant barrier to judicial interference in Congress's exercise of that power.[2] The Court began by noting that the "power to investigate and to do so through compulsory process" has "long been held to be a legitimate" and "indispensable ingredient of lawmaking," at least when an investigation "is related to and in furtherance of a legitimate task of Congress."[3]

The opinion went further, however, interpreting the Speech or Debate Clause, which provides that no Member of Congress may be "questioned in any other Place" for "any Speech or Debate in either House," to limit significantly the Court's ability to review a committee's exercise of its subpoena power.[4] The Court determined that because the issuance of a subpoena is a protected legislative act under the Clause, the act was "immune from judicial interference."[5] *Eastland* is generally cited for the proposition that the Speech or Debate Clause prohibits courts from entertaining direct pre-enforcement challenges to congressional subpoenas.[6] Instead, the recipient of a subpoena may refuse to comply, risk being cited for criminal contempt or becoming the subject of a civil enforcement lawsuit, and then present his or her defense in that subsequent action.[7]

While it is generally true that courts will not interfere in valid congressional attempts to obtain information, especially through the exercise of the subpoena power, the concurrence in *Eastland* clarified that judicial restraint is not absolute.[8] The Speech or Debate Clause does not, for example, bar indirect challenges to a subpoena brought against a third-party rather than against Congress itself.[9] These lawsuits generally arise when a committee issues a subpoena for documents not to the target of the investigation but rather to a third-party custodian of records. In such a scenario the party with a personal interest in the records is "not in a position to assert its claim of constitutional right by refusing to comply with a subpoena" and may instead bring suit against the neutral third party to block compliance with the subpoena.[10]

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[1] Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 493–97 (1975).

[2] *Id.* at 511 ("The Clause was written to prevent the need to be confronted by such 'questioning' and to forbid invocation of judicial power to challenge the wisdom of Congress's use of its investigative authority.").

[3] *Id.* at 504–06.

[4] U.S. Const. art. I, § 6, cl. 1.

[5] *Eastland*, 421 U.S. at 501.

[6] *In re* Grand Jury, 821 F.2d 946, 957 (3d Cir. 1987) ("The Supreme Court has held analogously that the Speech or Debate Clause shields Congressmen from suit to block a Congressional subpoena because making the legislators defendants 'creates a distraction and forces Members [of Congress] to divert their time, energy, and attention from their legislative tasks to defend the litigation.'") (citing *Eastland*, 421 U.S. at 503.).

[7] *See* United States v. Ryan, 402 U.S. 530, 532 (1971) (noting that in the judicial context that "one who seeks to resist the production of desired information [has a] choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal").

[8] *Eastland*, 421 U.S. at. 513 (Marshall, J., concurring).

[9] *See, e.g.*, Trump v. Mazars, 140 S. Ct. 2019 (2020) (third party subpoena suit brought against bank and accounting firm); United States v. AT&T, 567 F.2d 121, (D.C. Cir. 1977) (third party subpoena suit brought against telecommunications company).

[10] United States v. AT&T, 567 F.2d 121, 129 (D.C. Cir. 1977).

ArtI.S8.C18.7.10 Congress's Investigatory Powers and the President

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

The Supreme Court appears to be less deferential to Congress when Congress uses its investigatory powers to examine activities of the President. In *Trump v. Mazars*,[1] President Donald Trump brought suit in his personal capacity to block his banks and accounting firm from complying with various committee subpoenas for his personal financial records primarily on the ground that the committees had no valid legislative purpose to seek his personal financial information.[2] Applying the deferential legislative purpose standard used by the Court in cases like *McGrain* and *Barenblatt*, the opinions below upheld the committee subpoenas.[3] On appeal to the Supreme Court, *Mazars* presented the Court with its first opportunity to directly consider the authority of Congress to investigate the President.[4]

The Court's opinion in *Mazars* established that the Constitution does not make Presidents immune from investigation,[5] but it also clarified that, in the context of congressional investigations, the separation of powers requires that the President be treated somewhat differently from others.[6] The opinion described the courts below as having mistakenly "treated [this case] much like any other," applying standards and principles established in "precedents that do not involve the President's papers."[7] Subpoenas for the President's personal records, the Court determined, involve significant separation of powers concerns that trigger a different, more scrutinizing approach to the scope of Congress's power. But the Court also rejected as inappropriate invitations to import the heightened "demonstrated, specific need" or "demonstrably critical" standards that had been used in prior cases involving Executive privilege—a privilege not at issue in *Mazars* due to the personal nature of the documents sought.[8] Instead, Chief Justice John Roberts's opinion for the Court charted a middle course by identifying at least four "special considerations" to help lower courts to appropriately balance the "legislative interests of Congress" with "the 'unique position' of the President."[9]

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[1] 140 S. Ct. 2019 (2020).

[2] The challenged subpoenas were issued as part of different ongoing committee investigations. *See generally*, Todd Garvey, Cong. Rsch. Serv., LSB10517, Trump v. Mazars: Implications for Congressional Oversight (2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10517.

[3] *Mazars*, 140 S. Ct. at 2028–29.

[4] Although the case was technically brought by President Trump in his private rather than official capacity, the Court chose to treat the conflict as one between the branches. *Mazars*, 140 S. Ct. at 2028, 2034 ("The interbranch conflict here does not vanish simply because the subpoenas seek personal papers or because the President sued in his personal capacity.").

[5] *Id.* at 2033 ("Legislative inquiries might involve the President in appropriate cases; as noted, Congress's responsibilities extend to 'every affair of government.'").

[6] *Id.* at 2026. *See also*, United States v. Burr, 25 F. Cas. 30, 192 (CC Va. 1807) (No. 14,692d) (noting that the court would not "proceed against the president as against an ordinary individual"). The *Mazars* opinion also treated a congressional investigation as "different" from a "judicial proceeding." *Mazars*, 140 S. Ct. at 2026.

[7] *Mazars*, 140 S. Ct. at 2033.

[8] *Id.* at 2032. ("We disagree that these demanding standards apply here. . . . We decline to transplant that protection root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations."). The Court also rejected the House's proposed approach, which it characterized as failing to "take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President's information." *Id.* at 2033.

[9] *Id.* at 2035.

First, a reviewing court should "carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers."[10] Second, courts "should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective."[11] Third, "courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose."[12] Fourth, "courts should be careful to assess the burdens imposed on the President by a subpoena."[13]

Mazars' "special considerations" were tailored to Presidential records. To view the case otherwise—for example, to apply the "special considerations" to congressional subpoenas issued as part of a more typical oversight investigation into agency activity—would put the opinion in tension with previous precedent, including the principles established in *McGrain*.[14] Nothing in the *Mazars* opinion appears to signal that the majority intended to alter previously established principles in congressional investigations not involving the President.

Conspicuously absent from the Court's oversight jurisprudence is any evaluation of Executive privilege. Despite the sometimes prevalent role played by executive privilege in congressional investigations of the Executive Branch, the Court has never issued an opinion addressing such a dispute.[15] Even the lower federal courts have only rarely taken on interbranch oversight disputes involving Executive privilege.[16] Recent changes in Congress's approach to the enforcement of its own investigatory powers, however, suggest that the traditionally limited judicial role in interbranch oversight disputes—including those involving Executive privilege—may be evolving. In recent years, the House has increasingly relied on the courts as a means to enforce committee subpoenas issued to members of the Executive Branch.[17] In these instances, committees have obtained authorization from the House to file a civil claim in federal court, seeking a court order directing compliance with a committee subpoena.[18] Although these subpoena enforcement cases have not reached the Supreme Court, lower federal courts, including the U.S. Court of Appeals for the D.C. Circuit have generally

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[10] The Court elaborated that Congress's "interests are not sufficiently powerful to justify access to the President's personal papers when other sources could provide Congress the information it needs." *Id. at 2036.*

[11] Specific demands, the High Court reasoned, are less likely to "intrude" on the operation of the Presidency. *Id.*

[12] To this end, Congress's position is strengthened when a congressional committee can provide "detailed and substantial evidence" of its legislative purpose. *Id.*

[13] Here the Court reasoned that in comparison to the burdens imposed by judicial subpoenas, the burdens imposed on the President by congressional subpoenas "should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage." *Id.*

[14] *McGrain*, 273 U.S. at 178 ("The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object.").

[15] *United States v. Nixon*, the Court's most significant decision on Executive privilege, involved a criminal trial subpoena. 418 U.S. 683, 687–88 (1974). The Court explicitly disclaimed any attempt to assess the application of Executive privilege in a congressional investigation, noting that "we are not here concerned with the balance between the President's generalized interest in confidentiality . . . and congressional demands for information." *Id.* at 712 n. 19.

[16] *See, e.g.,* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F. 2d 725, 729–33 (D.C. Cir. 1974) (evaluating President Nixon's Executive privilege claims in the face of a congressional subpoena) and United States v. AT&T, 567 F. 2d 121, 130–133 (D.C. Cir. 1977) (entertaining an action by the Justice Department to enjoin AT&T from complying with a congressional subpoena to provide telephone records that might compromise national security matters); Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 112–14 (D.D.C. 2016) (finding that a congressional Committees need for deliberative materials outweighed the Executive Branch's interest in confidentiality).

[17] See Civil Enforcement of Congressional Authorities: Hearing before the H. Comm. on the Judiciary, Subcomm. on Courts, Intellectual Property, and the Internet, 117th Cong., (2021) (statement of Todd Garvey) (describing House subpoena enforcement lawsuits).

[18] *Id.*

found these claims to be justiciable.[19] As a result, the Judiciary's role in resolving information access disputes between Congress and the Executive Branch may become more significant.

ArtI.S8.C18.8 Immigration

ArtI.S8.C18.8.1 Overview of Congress's Immigration Powers

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

Long-standing Supreme Court precedent recognizes Congress as having "plenary" power over immigration, giving it almost complete authority to decide whether foreign nationals ("aliens," under governing statutes and case law) may enter or remain in the United States.[1] But while Congress's power over immigration is well established, defining its constitutional underpinnings is more difficult. The Constitution does not mention immigration, but parts of the Constitution address related subjects. The Supreme Court has sometimes relied upon Congress's powers over naturalization (the term and conditions in which an alien becomes a U.S. citizen),[2] foreign commerce,[3] and, to a lesser extent, upon the Executive Branch's implied Article II foreign affairs power,[4] as sources of federal immigration power.[5] While these powers continue to be cited as supporting the immigration power, since the late nineteenth century, the Supreme Court has described the power as flowing from the Constitution's establishment of a federal government.[6] The United States government possesses all the powers incident to a

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[19] *See, e.g.,* Comm. on the Judiciary v. McGahn, 968 F.3d 755, 760–61 (D.C. Cir. 2020); Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 3 (D.D.C. 2013) ("The fact that this case arises out of a dispute between two branches of government does not make it non-justiciable . . . ."); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 56, 65–99 (D.D.C. 2008).

[1] Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) ("The Court without exception has sustained Congress's 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'") (quoting Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118, 123 (1967)); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 343 (1909) (noting the "plenary power of Congress as to the admission of aliens" and "the complete and absolute power of Congress over the subject" of immigration); *see also* Galvan v. Press, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.").

[2] *See* U.S. Const. art. I, § 8, cl. 4 (Naturalization Clause); Arizona v. United States, 567 U.S. 387, 394–95 (2012); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 940 (1983); *but see Arizona*, 567 U.S. at 422 (Scalia, J., concurring in part and dissenting in part) ("I accept [federal immigration law] as a valid exercise of federal power—not because of the Naturalization Clause (it has no necessary connection to citizenship)").

[3] *See* U.S. Const. art. I, § 8, cl. 3 (Foreign Commerce Clause); Toll v. Moreno, 458 U.S. 1, 10 (1982); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 290 (1904) (citing Foreign Commerce Clause as a source of immigration power).

[4] *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (relying on foreign affairs power as source of executive power to exclude aliens).

[5] Discussions of the source of congressional immigration power sometimes also mention the power to declare war, U.S. Const. art. I, § 8, cl. 11, and the Migration and Importation Clause, *id.* § 9, cl. 1; which barred Congress from outlawing the slave trade before 1808. *See* Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 Iowa L. Rev. 707, 726 n.95 (1996).

[6] Ping v. United States, 130 U.S. 581, 609 (1889) (upholding law that prohibited the return to the United States of Chinese laborers who had been issued, before their departure from the United States and under a prior law, certificates entitling them to return, and recognizing "[t]he power of exclusion of foreigners" as "an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution").

sovereign, including unqualified authority over the Nation's borders and the ability to determine whether foreign nationals may come within its territory.[7] The Supreme Court has generally assigned the constitutional power to regulate immigration to Congress, with executive authority mainly derived from congressional delegations of authority.[8]

In exercising its power over immigration, Congress can make laws concerning aliens that would be unconstitutional if applied to citizens.[9] The Supreme Court has interpreted that power to apply with most force to the admission and exclusion of nonresident aliens abroad seeking to enter the United States.[10] The Court has further upheld laws excluding aliens from entry on the basis of ethnicity,[11] gender and legitimacy,[12] and political belief.[13] It has also upheld an Executive Branch exclusion policy, premised on a broad statutory delegation of authority, that some evidence suggested was motivated by religious animus.[14] But the immigration power has proven less than absolute when directed at aliens already physically present within the United States.[15] Even so, the Supreme Court's jurisprudence reflects that Congress retains broad power to regulate immigration and that the Court will accord substantial deference to the government's immigration policies, particularly those that implicate matters of national security.

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[7] *See* Trump v. Hawaii, No. 17-965, slip op. at 30 (U.S. June 26, 2018) ("For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments.'") (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)); Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[T]he power to admit or exclude aliens is a sovereign prerogative."); *Mandel*, 408 U.S. at 765 (relying upon "ancient principles of the international law of nation-states"); Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952) (the "traditional power of the Nation over the alien" is "a power inherent in every sovereign state"); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."); *see also Arizona*, 567 U.S. at 394–95 (relying upon the Naturalization Clause and the "inherent power as sovereign to control and conduct relations with foreign nations"); *Ex rel. Turner*, 194 U.S. at 290 (relying on "the accepted principle of international law, that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions," and upon the foreign commerce power).

[8] *See* Galvan v. Press, 347 U.S. 522, 530 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.") (internal citations omitted).

[9] Demore v. Kim, 538 U.S. 510, 522 (2003) ("[T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.").

[10] *See* Zadvydas v. Davis, 533 U.S. 678, 693, 695–96 (2001) (noting that the "distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law" and equating "the political branches' authority to control entry" with "the Nation's armor"); *Fiallo*, 430 U.S. at 792; Jean v. Nelson, 472 U.S. 846, 875 (1985) (Marshall, J., dissenting) (declaring that it is "in the narrow area of entry decisions" that "the Government's interest in protecting our sovereignty is at its strongest and that individual claims to constitutional entitlement are the least compelling").

[11] Ping v. United States, 130 U.S. 581, 609 (1889) (upholding law that excluded "Chinese laborer[s]").

[12] *Fiallo*, 430 U.S. at 798–99 (upholding law that excluded individuals linked by an illegitimate child-to-natural father relationship from eligibility for certain immigration preferences).

[13] *See Mandel*, 408 U.S. at 767 (suggesting that law rendering communists ineligible for visas did not exceed Congress's immigration powers).

[14] Trump v. Hawaii, No. 17-965, slip op. at 22–23, 39 (U.S. June 26, 2018).

[15] *See Zadvydas*, 533 U.S. at 690 (observing that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem").

ArtI.S8.C18.8.2 English Common Law on Immigration

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

Before the Constitution was ratified, the English common law recognized that the monarchy had authority to bar aliens from entering the country and expel those who had entered, although the expulsion power may have been subject to limitations.[1] William Blackstone, writing in 1765, reviewed the law of nations and summarized the basis of the monarch's exclusion and expulsion powers as follows:

> [I]t is left in the power of all states, to take such measures about the admission of strangers, as they think convenient; those being ever excepted who are driven on the coasts by necessity, or by any cause that deserves pity or compassion. . . . [S]o long as their nation continues at peace with ours, and they themselves behave peaceably, [foreigners] are under the king's protection; though liable to be sent home whenever the king sees occasion.[2]

Blackstone was an authority "most familiar to the Framers,"[3] and his endorsement of the principle that sovereigns possessed power to exclude or expel aliens from their territories was widely shared by scholars of the law of nations in the eighteenth and nineteenth centuries.[4] Many of these scholars, however, concluded that the proper exercise of the exclusion power required the sovereign to state good reasons for the decision to deny entry to an alien.[5] Scholars also debated the extent of the expulsion power, with some arguing that expulsion of resident aliens required special justification.[6]

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[1] *See* Peter L. Markowitz, *Deportation Is Different*, 13 U. Pa. J. Const. L. 1299, 1309 (2011) ("Legal historians agree that the . . . power[ ] to exclude or prevent entry[ ] could be exercised by the king alone without any criminal process. In regard to the power to expel noncitizens from within England, there is some disagreement, as a theoretical matter, as to whether the power could be exercised through civil administrative fiat or solely through the criminal process.As a practical matter, however, the historical record demonstrates that expulsion was exercised exclusively as a common form of criminal punishment in England (imposed on both citizens and noncitizens) as early as the thirteenth century."); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893) ("In England, the only question that has ever been made in regard to the power to expel aliens has been whether it could be exercised by the king without the consent of parliament."); *id.* at 757 (Field, J., dissenting) (arguing that "deportation from the realm has not been exercised in England since Magna Charta, except in punishment for crime, or as a measure in view of existing or anticipated hostilities").

[2] 1 William Blackstone, Commentaries on the Laws of England 251–52 (1765).

[3] Sessions v. Dimaya, No. 15-1498, slip op. at 14 (U.S. Apr. 17, 2018) (Thomas, J., dissenting) (quoting Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 Yale L.J. 231, 253 (2001)).

[4] *See* 1 Emer de Vattel, The Law of Nations ch. XIX, § 230, at 107 (Joseph Chitty ed., T. & J.W. Johnson & Co. 1844) (1758) ("[T]he sovereign may forbid the entrance of his territory either to foreigners in general or in particular cases, or to certain persons or for certain particular purposes, according as he may think it advantageous to the state. There is nothing in all this that does not flow from the rights of domain and sovereignty."); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 15, 83 (2002) ("International law commentators generally viewed authority over foreign nationals as deriving from international rules regarding commerce or the state's right to self-preservation. With respect to exclusion, principles of sovereignty and territoriality provided that states had authority to protect themselves from undesirable aliens seeking entry, but this power was not absolute.") (footnotes omitted).

[5] Cleveland, *supra* note 4, at 83–85.

[6] *Id.* at 86–87.

ArtI.S8.C18.8.3 Colonial Period, Constitutional Convention, and Immigration

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

At the Constitutional Convention, James Madison, in a debate on a length of citizenship requirement for the House of Representatives, described immigration as essential to the new country's prospects: "He [Madison] wished to invite foreigners of merit and republican principles among us. America was indebted to emigration for her settlement and prosperity. That part of America which had encouraged them most had advanced most rapidly in population, agriculture, and the arts."[1] Madison's open attitude towards immigration has been taken as representative of the Framers' "general feeling at the time."[2] But the Constitution that they produced did not contain any provision explicitly addressing the Federal Government's power to admit, exclude, or expel aliens (unless one counts the compromise over delayed prohibition of the slave trade reflected in the Migration or Importation Clause contained in Article I, Section 9).[3]

During the colonial period, the laws of some colonies had restricted the entry of particular categories of immigrants, including paupers and criminals.[4] England had power to override these restrictions, however, and engaged in a consistent practice of transporting convicts to the American colonies over colonial protest.[5] That practice resulted in the transportation of 50,000 convicts from England to the United States between 1718 and 1775, accounting for one quarter of all British immigrants during that period.[6] In 1788, after the Constitutional Convention but before ratification, the Congress of the Confederation recommended by resolution that the individual states enact laws to prohibit the transportation of convicts from foreign countries into the United States.[7]

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[1] James Madison, Debates on the Adoption of the Federal Constitution 411 (Elliot ed., 1845).

[2] S. Doc. No. 61-758, pt. 21, at 5 (1911); *see also* Madison, *supra* note 1, at 233 (statement of Charles Pinckney) ("[I]n a new country, possessing immense tracts of uncultivated lands, where every temptation is offered to emigration, and where industry must be rewarded with competency there will be few poor"); *id.* at 389 ("Col. [George] MASON was for opening a wide door for emigrants; but did not choose to let foreigners and adventurers make laws for us and govern us. Citizenship for three years was not enough for ensuring that local knowledge which ought to be possessed by the representative."); *but see id.* at 310 (statement of Elbridge Gerry) ("There was a rage for emigration from the Eastern States to the western country, and [Gerry] did not wish those remaining behind to be at the mercy of the emigrants. Besides, foreigners are resorting to that country, and it is uncertain what turn things may take there.").

[3] *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 15, 81–82 (2002); *see also* Arizona v. United States, 567 U.S. 387, 422 (2012) (Scalia, J., concurring in part and dissenting in part) (arguing that because of the acceptance of exclusion power as an incidence of sovereignty at the time of the framing, "there was no need to set forth control of immigration as one of the enumerated powers of Congress, although an acknowledgment of that power (as well as of the States' similar power, subject to federal abridgment) was contained in" the Migration or Importation Clause).

[4] Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 Colum. L. Rev. 1833, 1841 (1993); Edward P. Hutchinson, Legislative History of American Immigration Policy 1798–1965, at 396–404 (1981).

[5] *See* Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 Harv. C.R. - C.L. L. Rev. 289, 323–25 (2008); Neuman, *supra* note 4, at 1841–43.

[6] Markowitz, *supra* note 5, at 323–24.

[7] Neuman, *supra* note 4, at 1842.

ArtI.S8.C18.8.4 Early Federal Laws on Immigration

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

From ratification of the Constitution until 1875, Congress took little action with respect to immigration.[1] However, one major outlier to Congress's inactivity during this period—contained in the group of laws enacted in 1798 commonly known as the as the Alien and Sedition Acts—generated intense debate over whether the Constitution gave Congress power to regulate immigration.[2] The Alien Friends Act empowered the President "to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States . . . to depart out of the territory of the United States."[3] The Naturalization Act of 1798 imposed registration requirements on "all white aliens residing or arriving" in the United States.[4] Federalist proponents of these laws defended their constitutionality by drawing from the law of nations literature to argue that inherent principles of sovereignty gave Congress power to regulate immigration, including by providing for the expulsion of aliens.[5] The party of John Adams and Alexander Hamilton, the Federalists, pointed to various constitutional provisions, including the Article I provision giving Congress power to declare war, that they argued incorporated the sovereignty principles into the constitutional system.[6] Opponents of the laws, Thomas Jefferson and James Madison among them, argued that the power to expel aliens did not fit within any of Congress's enumerated powers, that Congress did not possess any unenumerated or inherent powers, and that the law of nations (to the extent it was relevant) only permitted the expulsion of enemy aliens.[7] The federal judiciary never resolved the

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[1] Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 15, 99 (2002) ("Federal legislation was adopted [in 1799, 1816, and the 1840s] to ensure the health and safety of passengers and to grant duty-free admission to their personal and professional possessions. No meaningful federal restrictions on immigration were imposed [during the pre-Civil War period].") (footnotes omitted); Edward P. Hutchinson, Legislative History of American Immigration Policy 1798–1965, at 45–46 (1981) (reviewing all immigration-related federal legislation in the pre-Civil War era, including naturalization and steerage laws, and explaining that "Congress was not yet ready to take action" on "complaints about the coming of foreign paupers, criminals, and other undesirables"); *cf.* Steerage Act of 1819, ch. 46, 3 Stat. 488 (restricting the number of passengers an owner of a vessel could carry on board without being subjected to fines and other penalties). On naturalization—in contrast to immigration—Congress established a federal system from the outset. *See* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (providing that "free white persons" who resided in the United States for at least two years could be granted citizenship if they showed good moral character and swore allegiance to the Constitution). Decades later, in 1870, Congress extended naturalization eligibility to "aliens of African nativity and to persons of African descent." Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254.

[2] *See* Cleveland, *supra* note 1, at 15, 87–98; Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 Colum. L. Rev. 1833, 1880–82 (1993).

[3] *Compare* Alien Friends Act ("An Act Concerning Aliens"), ch. 58, § 1, 1 Stat. 571 (1798) *with* Alien Enemy Act ("An Act respecting Alien Enemies"), ch. 66, § 1, 1 Stat. 577 (1798) (applicable only in wartime and providing that "all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies"). The Alien Friends Act was modeled after a 1793 English law that "similarly gave the King unfettered discretion to expel aliens as he 'shall think necessary for the publick Security.'" Sessions v. Dimaya, No. 15-1498, slip op. at 7 (U.S. Apr. 17, 2018) (Thomas, J., dissenting) (citing 33 Geo. III, ch. 4, § 18, *in* 39 Eng. Stat. at Large 16).

[4] Act of June 18, 1798, ch. 54, § 1,1 Stat. 566. The Act also extended the minimum residence requirement for naturalization from five to fourteen years. *Id.*

[5] Cleveland, *supra* note 1, at 89–92.

[6] *Id.*

[7] *Id.* at 93–97.

constitutionality of the laws.[8] The Alien Friends Act expired on its own terms in 1800; its registration requirements, which appear not to have been enforced, were repealed in the Naturalization Act in 1802.[9]

Aside from the short-lived deportation and registration provisions in the Alien and Sedition Acts, few federal statutes pertained to immigration before 1875.[10] During this period, however, some state laws following in the colonial tradition provided for the exclusion or expulsion of convicts, paupers, and people with contagious diseases.[11] Some states, primarily but not exclusively in the South, also provided for the exclusion and in some cases expulsion of free Blacks, regardless of their national origin.[12] A subset of these laws required that Black seamen be detained or quarantined while their vessels were in port.[13] Yet state immigration restrictions during this period did not impose numerical limits on immigration and, as such, did not resemble the regime of limited immigration that has existed under federal law since 1921.[14]

ArtI.S8.C18.8.5 Immigration Jurisprudence (1837–1889)

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

While there was little federal immigration regulation before 1875, the Supreme Court initially recognized state immigration powers before building tepidly to the conclusion that the Foreign Commerce Clause of Article I bestowed exclusive authority to regulate immigration on Congress. In the 1837 case *Mayor, Aldermen & Commonalty of City of New York v. Miln*, the Court upheld a New York statute requiring masters of vessels arriving from foreign or out-of-state ports to provide passenger manifests.[1] The Court reasoned that power over alien entry fell within the states' general police powers.[2] The opinion did not express a view as to whether the Federal Government also had power to exclude aliens.[3]

The 1849 *Passenger Cases*, however, chipped away at the state power recognized in *Miln* when the Court voted 5-4 to strike down as unconstitutional New York and Massachusetts

[8] *Id.* at 98.

[9] *Id.*; Neuman, *supra* note 2, at 1881–83.

[10] Hutchinson, *supra* note 1, at 45–46.

[11] *See generally* Neuman, *supra* note 2, at 1841–65; Hutchinson, *supra* note 1, at 397–401 ("[T]he dominant concern of the [state] legislators was that immigrants would add to the burden of poor relief, and there was strong suspicion at the time that Europe was deliberately exporting its human liabilities."); *see also Sessions*, No. 15-1498, slip op. at 10 (Thomas, J., dissenting) (noting that "[t]he States enacted their own removal statutes" during the 1800s).

[12] *See* Neuman, *supra* note 2, at 1866–73; Cleveland, *supra* note 1, at 98–99.

[13] *See* Neuman, *supra* note 2, at 1873–74.

[14] *See id.* at 1834 ("Neither Congress nor the states attempted to impose quantitative limits on immigration [before the 1870s and 1880s].").

[1] 36 U.S. (11 Pet.) 102 (1837).

[2] *Id.* at 161 ("On the same principle by which a state may prevent the introduction of infected persons or goods, and articles dangerous to the persons or property of its citizens, it may exclude paupers who will add to the burdens of taxation, or convicts who will corrupt the morals of the people, threatening them with more evils than gunpowder or disease. The whole subject is necessarily connected with the internal police of a state.").

[3] *Id.*

statutes that imposed head taxes on foreign passengers arriving by sea.[4] The *Passenger Cases* did not produce a majority opinion.[5] The five Justices in the majority, each writing separately, agreed that the state head tax statutes encroached impermissibly on federal policy to encourage immigration. But the Justices did not agree as to the source of the federal immigration power—the separate opinions pointed variously to the Commerce, Taxation, and Naturalization powers, the Importation and Migration Clause, and inherent principles of sovereignty—or about whether that power was exclusive.[6]

Finally, in the 1875 case *Henderson v. New York*, the Court overcame these earlier disagreements and embraced unanimously the Foreign Commerce Clause as the source of an exclusive federal immigration power.[7] "[T]he transportation of passengers from European ports to those of the United States," the Court reasoned, "has become a part of our commerce with foreign nations, of vast interest to this country, as well as to the immigrants who come among us to find a welcome and a home within our borders."[8] Accordingly, "[a] law or a rule emanating from any lawful authority, which prescribes terms or conditions on which alone [a] vessel can discharge its passengers, is a regulation of commerce; and, in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations."[9] *Henderson* and its companion case *Chy Lung v. Freeman* struck down New York, Louisiana, and California statutes that required vessel masters to post bond for some foreign passengers.[10]

Thereafter, the Court reaffirmed the principle that the Foreign Commerce Clause gives Congress, not the states, power to regulate immigration in the 1883 case of *New York v. Compagnie Generale Transatlantique*.[11] There, the Court struck down a New York statute that imposed taxes on ship owners for the inspection of foreign passengers.[12] And in the 1884 *Head Money Cases*,[13] the Court upheld a federal statute that did much the same thing as the state statute invalidated in *Transatlantique*.[14] The *Transatlantique* and the *Head Money Cases* appeared to cement the Supreme Court's commerce-based immigration doctrine, but five years after the *Head Money Cases* the Court would alter course and hold in the *Chinese Exclusion Case* that the power was based instead on inherent principles of sovereignty.[15]

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[4] Smith v. Turner, 48 U.S. (7 How.) 283, 283 (1849).

[5] *Id.*

[6] *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 15, 103–04 (2002).

[7] 92 U.S. 259, 270 (1875); *see generally* Jennifer Gordon, *Immigration as Commerce: A New Look at the Federal Immigration Power and the Constitution*, 93 Ind. L.J. 653, 671 (2018).

[8] *Henderson*, 92 U.S. at 270.

[9] *Id.* at 271.

[10] *Id.*; Chy Lung v. Freeman, 92 U.S. 275, 276 (1875) (describing the statutes at issue in the two cases as follows: "[t]he statute of California, unlike those of New York and Louisiana, does not require a bond for all passengers landing from a foreign country, but only for classes of passengers specifically described, among which are 'lewd and debauched women'").

[11] 107 U.S. 59 (1883).

[12] *Id.* at 60 ("[S]uch a tax as this is a regulation of commerce with foreign nations, confided by the constitution to the exclusive control of congress.").

[13] 112 U.S. 580 (1884).

[14] *Id.* at 596 ("We are clearly of opinion that, in the exercise of its power to regulate immigration, and in the very act of exercising that power, it was competent for congress to impose this contribution on the ship-owner engaged in that business.").

[15] *See* Ping v. United States, 130 U.S. 581, 589, 609 (1889).

ArtI.S8.C18.8.6 Immigration Jurisprudence (1889–1900)

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

Federal regulation of immigration began just as the Supreme Court was solidifying its short-lived doctrine that the Foreign Commerce Clause supplied the basis for exclusive federal power over the subject. In 1875, Congress passed the Page Act, which, among other things, barred the entry of aliens with criminal convictions and women "imported for the purposes of prostitution."[1] Then, in 1882, Congress restricted the entry of "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge."[2] In that same year, Congress passed the Chinese Exclusion Act, which generally barred the entry of "Chinese laborers" into the United States.[3] And in 1891, Congress expanded the categories of excludable aliens to include "[a]ll idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any persons whose ticket or passage is paid for with the money of another or who is assisted by others to come."[4] Thus, by the late 1800s, Congress had established a statutory regime governing the admission of aliens.

The Supreme Court set the foundation for its doctrine that inherent principles of sovereignty give Congress plenary power to regulate immigration in the *Chinese Exclusion Case* of 1889. In this historic case, the Court upheld a federal law that expanded upon the Chinese Exclusion Act by prohibiting Chinese laborers from returning to the United States even if they had received, before their departures from the United States, certificates allowing their return issued under the earlier Chinese Exclusion Act.[5] In a break from earlier cases relying on the Foreign Commerce Clause as the basis for the federal immigration power, the Court reasoned that the power to exclude aliens was "an incident of sovereignty belonging to the government of the United States," and that—without exception—this sovereign power could be "exercise[d] at any time when, in the judgment of the government, the interests of the country require it."[6]

Three years later, in 1892, the Supreme Court held that Congress's inherent immigration power, as recognized in the *Chinese Exclusion Case*, foreclosed an alien's challenge to his exclusion from the United States pursuant to the Immigration Act of 1891. In *Nishimura Ekiu v. United States*, the Court determined that "[i]t is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and Executive Branches of the National Government."[7] Instead, the Court declared, "the

[1] Page Act of 1875, ch. 141, § 5, 18 Stat. 477.

[2] Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214.

[3] Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882).

[4] Immigration Act of 1891, ch. 551, 26 Stat. 1084.

[5] Ping v. United States, 130 U.S. 581, 609 (1889).

[6] *Id.*

[7] 142 U.S. 651, 660 (1892).

decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law" for aliens who seek to enter the United States.[8]

By the end of the nineteenth century, the Supreme Court construed Congress's broad immigration power as covering not only the exclusion of foreign nationals seeking entry into the United States, but also the expulsion of aliens already within the territorial boundaries of this country.[9] For example, in 1896 in *Fong Yue Ting v. United States*, the Court upheld the deportation of Chinese nationals residing in the United States following their failure to obtain "certificates of residence" under the Chinese Exclusion Act.[10] The Court determined that "[t]he right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."[11] Thus, based on the Supreme Court's early jurisprudence, Congress, and by extension, the Executive Branch, had virtually unlimited authority to exclude and deport aliens from the United States with little judicial intervention.

ArtI.S8.C18.8.7 Plenary Power

ArtI.S8.C18.8.7.1 Overview of Immigration Plenary Power Doctrine

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

Upon the advent of the twentieth century, the Supreme Court began to establish some outer limits on Congress's seemingly unfettered power over immigration, particularly with respect to aliens physically present within the United States. But the Court's jurisprudence repeatedly recognized that Congress retains broader power with respect to aliens seeking to enter this country.

ArtI.S8.C18.8.7.2 Aliens in the United States

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

In 1903, the Court in the *Japanese Immigrant Case* reviewed the legality of deporting an alien who had lawfully entered the United States, clarifying that "an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population" could not be deported without an "opportunity to be heard upon the questions involving his

[8] *Id.*; *see also* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) ("[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.").

[9] *See* Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893); Wong Wing v. United States, 163 U.S. 228, 236–38 (1896).

[10] *Fong Yue Ting*, 149 U.S. at 732.

[11] *Id.* at 707; *but see Wong Wing*, 163 U.S. at 237 (holding that, while the government could summarily expel aliens already residing within the country, it could not subject such aliens to criminal punishment on account of their unlawful presence without due process).

right to be and remain in the United States."[1] In the decades that followed, the Supreme Court maintained the notion that "once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders."[2]

Eventually, the Supreme Court extended these constitutional protections to *all aliens* within the United States, including those who entered unlawfully, declaring that "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."[3] The Court reasoned that aliens physically present in the United States, regardless of their legal status, are recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments.[4] Thus, the Court determined, "[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."[5] Accordingly, notwithstanding Congress's indisputably broad power to regulate immigration, fundamental due process requirements notably constrained that power with respect to aliens within the territorial jurisdiction of the United States.[6]

Yet the Supreme Court has also suggested that the extent of due process protection "may vary depending upon [the alien's] status and circumstance."[7] In various opinions, the Court has suggested that at least some of the constitutional protections to which an alien is entitled may turn upon whether the alien has been admitted into the United States or developed substantial ties to this country.[8] Thus, while the Court has recognized that due process

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[1] Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903); *see also* Low Wah Suey v. Backus, 225 U.S. 460, 468 (1912) (observing requirement of "fairly conducted" hearings in cases involving the expulsion of aliens from the United States); United States *ex rel.* Tisi v. Tod, 264 U.S. 131, 132 (1924) (recognizing admitted alien's right to notice and opportunity to be heard); United States *ex rel.* Vajtauer v. Comm'r of Immigration at Port of N.Y., 273 U.S. 103, 106 (1927) ("Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on habeas corpus.").

[2] Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) (quoting Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)); *see also* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."); Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.").

[3] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); *see also* Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law."); Plyler v. Doe, 457 U.S. 202, 215 (1982) (holding that unlawfully present aliens were entitled to both due process and equal protection under the Fourteenth Amendment).

[4] *Plyler*, 457 U.S. at 210 (citing *Mezei*, 345 U.S. at 212; Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

[5] *Mathews*, 426 U.S. at 77; *see also* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (explaining that the Due Process Clause applies "to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent").

[6] *See Kwong Hai Chew*, 344 U.S. at 596–97 (explaining that a lawful permanent resident "may not be deprived of his life, liberty or property without due process of law," and thus cannot be deported without "notice of the nature of the charge and a hearing at least before an executive or administrative tribunal").

[7] *See Zadvydas*, 533 U.S. at 694.

[8] *See* Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161, slip op. at 2 (U.S. June 25, 2020) (stating that "aliens who have established connections in this country have due process rights in deportation proceedings"); United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) ("These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."); *Landon*, 459 U.S. at 32 ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."); *Kwong Hai Chew*, 344 U.S. at 596 n.5 ("But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by

considerations may constrain the Federal Government's exercise of its immigration power, there is some uncertainty regarding the extent to which these constraints apply with regard to aliens within the United States.

ArtI.S8.C18.8.7.3 Aliens Seeking to Enter the United States

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

While the Supreme Court has generally recognized that due process considerations provide some constraint on the procedures employed to remove aliens from the United States, the Court has repeatedly affirmed the plenary nature of the immigration power with respect to aliens seeking *to enter* the country. In particular, the Court has reasoned that, while aliens who have entered the United States—even unlawfully—may not be deported without due process, an alien "on the threshold of initial entry stands on a different footing" because he or she is theoretically outside the United States and typically beyond the veil of constitutional protection.[1]

For example, in *United States ex rel. Knauff v. Shaughnessy*, the German wife of a U.S. citizen challenged her exclusion without a hearing under the War Brides Act.[2] The German national was detained at Ellis Island during her proceedings, and, therefore, technically within United States territory.[3] Nevertheless, the Supreme Court held that the government had the "inherent executive power" to deny her admission, and that, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[4]

Similarly, in *Shaughnessy v. United States ex rel. Mezei*, an alien detained on Ellis Island argued that the government's decision to deny admission without a hearing violated due process.[5] Citing "the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments," the Court determined that the Executive was authorized to deny entry without a hearing, and that the decision was not subject to judicial review.[6] Further, the Court held, although the alien had "temporary

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the Constitution to all people within our borders."); Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."); Yamataya v. Fisher, 189 U.S. 86, 101 (1903) ("[I]t is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States.").

[1] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); *see also* Kaplan v. Tod, 267 U.S. 228, 230 (1925) (construing an alien seeking admission at the border as a person who "was still in theory of law at the boundary line and had gained no foothold in the United States") (citing Nishimura Ekiu v. United States, 142 U.S. 651, 661 (1892)). This distinction is known as the "entry fiction doctrine." Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. . . . It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.").

[2] 338 U.S. 537, 539–40 (1950).

[3] *Id.* at 539.

[4] *Id.* at 544.

[5] *Mezei*, 345 U.S. at 207–09.

[6] *Id.* at 210–12.

harborage" inside the United States pending his exclusion proceedings, he had not effected an "entry" for purposes of immigration law, and could be indefinitely detained and "treated as if stopped at the border."[7]

The Supreme Court, however, has held that Congress's largely unencumbered power over the entry of aliens does not extend to lawful permanent residents (LPRs) who return from trips abroad.[8] In *Kwong Hai Chew v. Colding*, the Court ruled that an LPR returning from a five-month voyage as a crewman on a U.S. merchant ship was entitled to a hearing upon being detained by immigration officers because he retained the same constitutional rights that he had enjoyed prior to leaving the United States.[9] Subsequently, in *Rosenberg v. Fleuti*, the Court reaffirmed that an LPR "is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him, a holding which supports the general proposition that a resident alien who leaves this country is to be regarded as retaining certain basic rights."[10] Thus, unlike aliens seeking initial admission into the United States, aliens who have resided in the United States as LPRs are fully vested with constitutional protections upon their return from trips abroad.[11]

ArtI.S8.C18.8.8 Modern Era

ArtI.S8.C18.8.8.1 Overview of Modern Immigration Jurisprudence

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

Since the latter part of the twentieth century, the Supreme Court has distinguished between aliens who have entered the United States and aliens who have gained no legal foothold into this country in shaping the scope of Congress's immigration power.[1] Generally,

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[7] *Id.* at 212–15 (citations omitted).

[8] *See* Landon v. Plasencia, 459 U.S. 21, 33 (1982); Rosenberg v. Fleuti, 374 U.S. 449, 460 (1969)); Kwong Hai Chew v. Colding, 344 U.S. 590, 600–02 (1953).

[9] *Kwong Hai Chew*, 344 U.S. at 596, 600–01. Specifically, the Court stated that "[f]or purposes of the constitutional right to due process, we assimilate [a returning LPR's] status to that of an alien continuously residing and physically present in the United States." *Id.* at 596.

[10] *Fleuti*, 374 U.S. at 460; *see also Landon*, 459 U.S. at 33 ("Any doubts that Chew recognized constitutional rights in the resident alien returning from a brief trip abroad were dispelled by *Rosenberg v. Fleuti*."). Moreover, the Court in *Fleuti* held that an LPR cannot be construed as making an "entry" into the United States for immigration purposes following "an innocent, casual, and brief excursion" outside the country. *Fleuti*, 374 U.S. at 462. Eventually, Congress in 1996 amended the Immigration and Nationality Act (INA) to provide that a returning LPR is not considered an "applicant for admission" except in certain enumerated circumstances. 8 U.S.C. § 1101(a)(13)(C); Vartelas v. Holder, 566 U.S. 257, 261 (2012). But even in those circumstances, an LPR is entitled to a hearing with respect to his admissibility before he can be excluded from the United States. *See* 8 U.S.C. §§ 1225(b)(1)(C), 1252(e)(2)(C); 8 C.F.R. § 235.3(b)(5).

[11] *See Landon*, 459 U.S. at 32 (recognizing that LPR had the right to due process upon returning to the United States).

[1] *See* Trump v. Hawaii, No. 17-965, slip op. at 30 (U.S. June 26, 2018) ("[T]he admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'") (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)); Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422, 443 (3d Cir. 2016) (noting that "*Knauff* and *Mezei* essentially restored the political branches' plenary power over aliens at the border seeking initial admission. And since these decisions, the Court has continued to signal its commitment to the full breadth of the plenary power doctrine, at least as to aliens at the border seeking initial admission to the country").

the Court's jurisprudence has been based on the notion that nonresident aliens outside the United States have no constitutional or statutory rights with respect to entry and therefore no legal basis to challenge their exclusion.[2]

Supreme Court precedent establishes that inherent principles of sovereignty give Congress "plenary power" to regulate immigration. Notwithstanding the implicit nature of this authority, the Court has described the immigration power as perhaps the most complete that Congress possesses.[3] The core of this power—the part that has proven most impervious to judicial review—is the authority to determine which aliens may enter the United States and under what conditions. The Court has also established that the Executive Branch, when enforcing the laws concerning alien entry, has broad authority to do so mostly free from judicial oversight. While the Court has recognized that aliens present within the United States generally have more robust constitutional protections than aliens seeking entry into the country, the Court has upheld federal statutes impacting the rights of aliens within the United States in light of Congress's unique immigration power, though the degree to which the immigration power is constrained by these constitutional protections remains a matter of continuing uncertainty.

ArtI.S8.C18.8.8.2 Exclusion of Aliens

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

In *Boutilier v. Immigration & Naturalization Service*, the Court rejected an alien's constitutional vagueness challenge to a statute that barred the admission of homosexuals (who had been interpreted by immigration authorities to fall under the prohibition on the admission of "persons afflicted with psychopathic personality"), observing that "[i]t has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden."[1]

In a similar vein, in 1972, the Supreme Court in *Kleindienst v. Mandel* rejected a First Amendment challenge to the application of a statute that barred the admission of aliens who advocated communism.[2] Notably, in *Mandel*, the Court considered a constitutional challenge to the exclusion of an alien that was not brought by the alien himself, but by a group of professors who had invited the alien to speak at their universities.[3] Recognizing that "plenary

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[2] *See* Kerry v. Din, 576 U.S. 86 (2015) (Scalia, J.) ("[A]n unadmitted and nonresident alien . . . has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission."); Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.").

[3] Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens.") (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners . . . is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.").

[1] Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118, 123 (1967).

[2] Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972).

[3] *Id.* at 762. Indeed, the Court observed that "Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise." (citing United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); Galvan v. Press, 347 U.S. 522, 530–32 (1954).

congressional power to make policies and rules for exclusion of aliens has long been firmly established," the Court held that it would uphold, in the face of a constitutional challenge, an alien's exclusion as long as there is "a facially legitimate and bona fide reason" for the decision.[4] Thus, even when reviewing constitutional challenges brought by U.S. citizens, the Court has adopted a highly deferential standard for reviewing the decision to exclude an alien.

The Supreme Court in 1977 maintained this deferential posture in *Fiallo v. Bell*, a case in which a group of U.S. citizens and lawful permanent residents (LPRs) brought an equal protection challenge to a statute that granted special immigration preferences to the children and parents of U.S. citizens and LPRs, unless the parent-child relationship was that of a father and an illegitimate child.[5] Noting at the outset "the limited scope of judicial inquiry into immigration legislation," the Court upheld the statute in view of Congress's "exceptionally broad power to determine which classes of aliens may lawfully enter the country."[6] Importantly, the Court explained that "it is not the judicial role in cases of this sort to probe and test the justifications" for Congress's legislative policy distinctions between classes of aliens.[7]

ArtI.S8.C18.8.8.3 Kerry v. Din and Trump v. Hawaii

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

The Supreme Court's recognition of Congress's broad power to exclude aliens was further illustrated in its 2015 decision in *Kerry v. Din*. In that case, a U.S. citizen (Fauzia Din) challenged the State Department's denial of her husband's visa application, claiming that the agency failed to adequately explain the basis for the denial.[1] The Supreme Court rejected Din's challenge in a 5-4 decision, but without a majority opinion.[2] Justice Antonin Scalia, writing for a plurality of three Justices, determined that Din did not have a protected liberty interest under the Due Process Clause in her husband's ability to come to the United States, and did not decide whether the government had established a facially legitimate and bona fide reason for excluding her husband.[3]

However, in a concurring opinion joined by Justice Samuel Alito, Justice Anthony Kennedy determined that the government had shown a facially legitimate and bona fide reason for Din's exclusion by citing the Immigration and Nationality Act's provision barring the issuance of

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[4] *Mandel*, 408 U.S. at 769–70. Applying this test, the Court upheld the alien's exclusion based on the government's explanation that the alien had abused visas in the past, and refused to "look behind" the government's justification to determine whether it was supported by any evidence. *Id.*

[5] Fiallo v. Bell, 430 U.S. 787, 788–89, 791 (1977); *see* 8 U.S.C. § 1101(b)(1)(D), (b)(2) (1977).

[6] *Fiallo*, 430 U.S. at 792–94, 798–800.

[7] *Id.* at 798–99. Although the *Fiallo* Court relied on Mandel in reaching its decision, it did not identify a "facially legitimate or bona fide reason" for the challenged statute. *Id.* at 794–95. Instead, the Court determined that Congress may have excluded illegitimate children and their natural fathers from preferential immigration status "because of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations." *Id.* at 799; *see also* Miller v. Albright, 523 U.S. 420, 444–45 (1998) (upholding statutory requirement that children born abroad and out of wedlock to U.S. citizen fathers, but not to U.S. citizen mothers, obtain formal proof of paternity by age 18 in order to establish citizenship).

[1] Kerry v. Din, 576 U.S. 86, 88 (2015).

[2] *Id.*

[3] *Id.* at 100.

visas to aliens who engage in terrorist activities.[4] Justice Kennedy reasoned that, even if Din's rights were burdened by the denial of her husband's visa, the government's reference to the statutory provision provided ample justification even if the denial did not disclose the facts underlying that decision.[5] At the same time, Justice Kennedy suggested that there may be circumstances where a court could "look behind" the government's stated reason for a visa denial if the plaintiff makes "an affirmative showing of bad faith" on the part of the government.[6] Nevertheless, because Din had not "plausibly alleged with sufficient particularity" that the government acted in bad faith, Justice Kenney declined to look beyond the government's stated reason for the visa denial.[7]

The Supreme Court reaffirmed that *Mandel* and its progeny permit courts to conduct only a limited review of Executive decisions to exclude aliens abroad in the 2018 case *Trump v. Hawaii*.[8] The case concerned a presidential proclamation that provided for the indefinite exclusion of specified categories of nonresident aliens from seven countries, subject to some waivers and exemptions.[9] Five of the seven countries covered by the proclamation were Muslim-majority countries.[10] The proclamation, like two earlier executive orders that imposed entry restrictions of a similar nature, became known colloquially as the "Travel Ban" or "Muslim Ban."[11] The stated purpose of the proclamation was to protect national security by excluding aliens who could not be properly vetted due to the deficient information-sharing practices of their governments or the conditions in their countries.[12] U.S. citizens and other challengers argued that the actual purpose of the proclamation was to exclude Muslims from the United States and that it therefore violated the Establishment Clause of the First Amendment.[13] They based this argument primarily upon extrinsic evidence—that is, evidence outside of the four corners of the proclamation—including statements that the President had made as a candidate calling for a "total and complete shutdown of Muslims entering the United States."[14]

A five-Justice majority of the Supreme Court rejected the Establishment Clause challenge and upheld the proclamation.[15] Writing for the majority, Chief Justice Roberts reiterated the holdings from *Mandel* and *Fiallo* that matters concerning the admission or exclusion of aliens are "largely immune from judicial control" and are subject only to "highly constrained" judicial

[4] *Id.* at 101–02 (Kennedy, J., concurring in the judgment); *see also* 8 U.S.C. § 1182(a)(3)(B) (providing that aliens who engage in terrorist activities are inadmissible to the United States).

[5] *Din*, 576 U.S. at 103–04 (Kennedy, J., concurring in the judgment).

[6] *Id.* at 105. Justice Kennedy, however, did not explain what an "affirmative showing" would require to allow a court to probe beyond the government's stated rationale for a visa denial.

[7] *Id.*

[8] No. 17-965, slip op. at 32 (U.S. June 26, 2018).

[9] *Id.* at 2–6 (describing Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats).

[10] Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,165–67 (Sept. 24, 2017). The proclamation originally applied to nationals of eight countries: Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia. *Id.* The President terminated the restrictions on nationals of Chad, however, after determining that their government "had made sufficient improvements to its identity-management protocols." *Hawaii*, No. 17-965, slip op. at 14.

[11] *See Hawaii*, No. 17-965, slip op. at 12; *id.* at 78 (Sotomayor, J., dissenting); *id.* at 2 (Breyer, J., dissenting).

[12] Proclamation No. 9645, 82 Fed. Reg. at 45,161–62; *see Hawaii*, No. 17-965, slip op. at 34 ("The Proclamation is expressly premised on . . . preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices.").

[13] *Hawaii*, No. 17-965, slip op. at 6–7.

[14] *Id.* at 27 (quoting record).

[15] *Id.* at 38. The Court also rejected statutory challenges to the proclamation. *Id.* at 22–24.

inquiry when exclusion "allegedly burdens the constitutional rights of a U.S. citizen."[16] But the Court did not decide whether the narrow scope of this inquiry barred consideration of extrinsic evidence of the proclamation's purpose.[17] Much of the litigation in the lower courts had turned on this issue. A majority of judges on the U.S. Court of Appeals for the Fourth Circuit, citing Justice Kennedy's concurrence in *Din*, deemed it appropriate to consider the campaign statements and other extrinsic evidence of anti-Muslim animus and relied on that evidence to hold that the proclamation likely violated the First Amendment.[18] Dissenting Fourth Circuit judges, by contrast, reasoned that *Mandel* and the other exclusion cases prohibited consideration of the extrinsic evidence.[19] Instead of resolving this disagreement, the Supreme Court assumed without deciding that it could consider the extrinsic evidence when reviewing the proclamation under a "rational basis" standard to determine "whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes."[20] The Court explained that the government "hardly ever" loses cases under the rational basis standard unless the laws at issue lack any purpose other than a "bare . . . desire to harm a politically unpopular group."[21] Applying this standard, the Court held that the proclamation satisfied it mainly because agency findings about deficient information-sharing by the governments of the seven covered countries established a "legitimate grounding in national security concerns, quite apart from any religious hostility."[22]

ArtI.S8.C18.8.8.4 Federal Laws Relating to Aliens

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

The line of exclusion cases from *Kleindienst v. Mandel* to *Trump v. Hawaii* makes clear that claims brought by U.S. citizens against the exclusion of aliens abroad are governed by a narrow standard of review under which the government has never lost before the Supreme Court, not even when extrinsic evidence has suggested that the Executive may have acted for an unconstitutional purpose.[1] Yet even with respect to aliens *within* the United States—a group that, as noted above, enjoys more constitutional protections than aliens seeking entry—the

[16] *Id.* at 28–32 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

[17] *Id.* at 32–33.

[18] Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 264 (4th Cir. 2018) (en banc) ("Justice Kennedy's concurrence in *Din* elaborated on [*Mandel*'s] 'bona fide' requirement. An action is not considered 'bona fide' if Plaintiffs make an 'affirmative showing of bad faith,' which they must 'plausibly allege[ ] with sufficient particularity.' Upon such a showing, a court may 'look behind' the Government's proffered justification for its action.") (quoting Kerry v. Din, No. 13-1402, slip op. at 57 (U.S. June 15, 2015) (Kennedy, J., concurring in the judgment).

[19] *Id.* at 364 (Niemeyer, J., dissenting) ("[J]ust as the Court in *Mandel* rejected the plaintiffs' challenge because, even assuming a constitutional violation lurked beneath the surface of the Executive's implementation of its statutory authority, the reasons the Executive had provided were 'facially legitimate and bona fide,' so must we reject this similar challenge today."); Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 648 (4th Cir. 2017) (Niemeyer, J., dissenting) ("*Mandel*, *Fiallo*, and *Din* have for decades been entirely clear that courts are not free to look behind these sorts of exercises of executive discretion [to exclude aliens] in search of circumstantial evidence of alleged bad faith.").

[20] *Trump v. Hawaii*, No. 17-965, slip op. at 32–33.

[21] *Id.* (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (ellipses in original).

[22] *Id.* at 34 ("The Proclamation . . . reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review. . . . But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country.").

[1] *See* Trump v. Hawaii, No. 17-965, slip op. at 3234 (U.S. June 26, 2018).

Court has deferred to Congress's policy judgments. For example, in *Mathews v. Diaz*, the Supreme Court in 1976 upheld a federal statute that restricted eligibility for participation in a federal medical insurance program to U.S. citizens or lawful permanent residents (LPRs) who had continuous residence in the United States for five years.[2] In *Mathews*, a group of aliens who had been lawfully admitted to the United States, but failed to meet the federal statute's eligibility requirements, challenged the statute on equal protection grounds.[3] The Court observed that, "in the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens," and that, based on that power, Congress could, as a matter of policy, decide which classes of aliens would be entitled to the benefits that are available to U.S. citizens.[4] Therefore, the Court determined, "it is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence."[5]

On the other hand, in *Zadvydas v. Davis*, the Supreme Court in 2001 ruled that the indefinite detention of lawfully admitted aliens who had been ordered removed from the United States following formal removal proceedings "would raise a serious constitutional problem."[6] The Court reasoned that, although Congress has broad authority over immigration, "that power is subject to important constitutional limitations."[7] Noting that "[f]reedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects," the Court determined that the government failed to show a "sufficiently strong special justification" for the indefinite detention of aliens that outweighed their constitutionally protected liberty interest.[8] In addition, the Court emphasized the "critical distinction" between aliens who have entered the United States and those who have not entered the country, observing that "certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."[9] Accordingly, the Court held that the federal statute that authorized the detention of aliens in the United States pending their removal had to be construed as limiting the detention to "a period reasonably necessary to secure removal."[10]

But more recently, in *Department of Homeland Security v. Thuraissigiam*, the Supreme Court in 2020 held that an alien apprehended after entering the United States unlawfully, who was subject to an "expedited removal" process applicable to aliens apprehended at or near the border, could not raise a due process challenge to a federal statute limiting judicial review of those proceedings.[11] Although the alien was twenty-five yards inside the United States when

[2] Mathews v. Diaz, 426 U.S. 67, 77–84 (1976); *see* 42 U.S.C. § 1395o(2).

[3] *Mathews*, 426 U.S. at 69–71.

[4] *Id.* at 79–80.

[5] *Id.* at 82–83.

[6] Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

[7] *Id.* at 695.

[8] *Id.* at 690–92.

[9] *Id.* at 693–94.

[10] *Id.* at 699. But a few years later, in *Demore v. Kim*, the Supreme Court in 2003 considered a due process challenge to a federal statute that required the detention of criminal aliens during the pendency of their removal proceedings, and the Court held that "[d]etention during removal proceedings is a constitutionally permissible part of that process" because such detention is generally shorter in duration, and serves the purpose of preventing criminal aliens from absconding during their proceedings. 538 U.S. 510, 527–28, 531 (2003); *see also* Jennings v. Rodriguez, No. 15-1204, slip op. at 12–14, 19–24, 28 (U.S. Feb. 27, 2018) (holding that the Department of Homeland Security has statutory authority to indefinitely detain aliens during the pendency of their formal removal proceedings, but not deciding whether such prolonged detention is constitutional); Reno v. Flores, 507 U.S. 292, 315 (1993) (upholding regulation generally providing for the release of detained alien juveniles only to parents, close relatives, or legal guardians during pendency of deportation proceedings).

[11] Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161, slip op. at 34–36 (U.S. June 25, 2020).

apprehended, the Court reasoned that its "century-old" precedent holding that aliens seeking initial entry to the United States have no constitutional rights regarding their applications for admission "would be meaningless if it became inoperative as soon as an arriving alien set foot on U.S. soil."[12] The Court determined that the alien essentially remained "'on the threshold'" of entry and could be "'treated' for due process purposes 'as if stopped at the border.'"[13] To conclude otherwise, the Court declared, "would undermine the 'sovereign prerogative' of governing admission to this country and create a perverse incentive to enter at an unlawful rather than a lawful location."[14]

ArtI.S8.C18.8.8.5 Immigration-Related State Laws

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

While the Supreme Court has generally shown deference to Congress's authority over aliens, the Court has shown less deference to state government regulation of aliens. In *Graham v. Richardson*, the Supreme Court in 1971 held that state laws denying welfare benefits to noncitizens, or conditioning such benefits on a long period of residence, violated equal protection.[1] Recognizing that both U.S. citizens and aliens were entitled to the equal protection of the laws of their state of residence, the Court determined that a state's desire to preserve limited welfare benefits for its citizens was not a sufficient justification for denying benefits to aliens.[2] The Court, moreover, observed that only Congress had the power to formulate policies with respect to the admission of aliens and the conditions of their residence in the United States, and concluded that by denying welfare benefits to aliens, the state laws "conflict[ed] with these overriding national policies in an area constitutionally entrusted to the Federal Government."[3]

Similarly, in *Plyler v. Doe*, the Supreme Court in 1982 struck down a Texas statute that withheld funds for the education of children who were not "legally admitted" into the United

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[12] *Id.* at 34–35 (citing Landon v. Plasencia, 459 U.S. 21, 32 (1982); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950); Nishimura Ekiu v. United States, 142 U.S. 651, 659–60 (1892)).

[13] *Thuraissigiam*, slip op. at 34–36 (quoting *Mezei*, 345 U.S. at 212, 215).

[14] *Id.* at 35–36 (quoting *Plasencia*, 459 U.S. at 32). The Court indicated that aliens who "established connections" to the United States would have greater due process protections in the event that the government sought to remove them, but the Court did not go further to assess the nature of those "established connections." *Id.* at 2–4. Nevertheless, in describing the limited constitutional protections for aliens seeking entry into the United States, the Court cited its statement in *Nishimura Ekiu* that it is not within the province of the judiciary to order that "foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law," shall be permitted to enter, in opposition to the constitutional and lawful measures of the Legislative and Executive Branches of the National Government. *Id.* at 34–36; *see also Nishimura Ekiu*, 142 U.S. at 660. The Court's reference to this language suggests that the extent to which an alien establishes connections may turn, at least in part, on whether the alien has been lawfully admitted to the country. On the other hand, the language could suggest that an alien who entered the country unlawfully, but had "acquired . . . domicile or residence" within the country, could establish connections to be accorded due process protections in removal proceedings.

[1] Graham v. Richardson, 403 U.S. 365, 374–80 (1971).

[2] *Id.* at 374–75.

[3] *Id.* at 376–78; *see also* Sugarman v. Dougall, 413 U.S. 634, 646 (1973) (holding that New York statute excluding aliens from permanent positions in the competitive class of the state civil service violated equal protection).

States, and a school district policy that denied enrollment to such children.[4] The Court noted that aliens present within the United States, even unlawfully, "have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."[5] Thus, the Court held, the plaintiffs challenging the state law and school district policy that denied them a basic education were entitled to equal protection.[6] The Court concluded that, because the state failed to show that its school enrollment policies advanced a substantial state interest, those policies could not survive constitutional scrutiny.[7] Further, the Court observed that Congress uniquely had the power to create "a complex scheme governing admission to our Nation and status within our borders," and that the state's policy of restricting access to education for aliens "d[id] not operate harmoniously within the federal program."[8] But the Court suggested that the state's policy would have been permissible if it had advanced an "identifiable congressional policy" to limit access to education for unlawfully present aliens.[9]

Although the Federal Government has the exclusive power to regulate immigration, not every state law that pertains to aliens is necessarily a regulation of immigration that is "per se preempted" by that federal power.[10] But state laws that conflict with or pose an obstacle to the federal regulatory scheme are preempted.[11] For example, in *Arizona v. United States*, the Supreme Court in 2012 held that Arizona laws that made it a misdemeanor to fail to comply with federal alien-registration requirements, that made it a misdemeanor for an unlawfully present alien to seek or engage in employment in the state, and that authorized police officers to arrest aliens on the grounds that they were potentially removable were preempted by federal law.[12] Citing the Federal Government's "broad, undoubted power over the subject of immigration and the status of aliens," the Court determined that the Arizona provisions intruded into areas that Congress already regulated, and conflicted with Congress's existing statutory framework governing aliens.[13]

The Supreme Court's greater scrutiny of state laws reveals an important "distinction between the constitutional limits on state power and the constitutional grant of power to the Federal Government" with respect to immigration.[14] The Court's jurisprudence suggests that the Court is willing to give more deference to Congress's policy choices in the immigration context because "it is the business of the political branches of the Federal Government, rather

[4] Plyler v. Doe, 457 U.S. 202, 226–30 (1982).

[5] *Id.* at 210 (citing Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

[6] *Id.* at 215.

[7] *Id.* at 227–30.

[8] *Id.* at 225–26.

[9] *Id.* at 225.

[10] DeCanas v. Bica, 424 U.S. 351, 355 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, *as recognized in* Arizona v. United States, 567 U.S. 387, 404–05 (2012).

[11] *See Arizona*, 567 U.S. at 399 (recognizing that "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance," and that, additionally, "state laws are preempted when they conflict with federal law"); Hines v. Davidowitz, 312 U.S. 52, 66–67 (1941) ("And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.").

[12] *Arizona*, 567 U.S. at 404–07.

[13] *Id.* at 394, 400–10; *but see* Kansas v. Garcia, No. 17-834, slip op. 14–19 (U.S. Mar. 3, 2020) (holding that federal laws setting forth the terms and conditions in which aliens may work in the United States did not preempt state laws that allowed criminal prosecutions against aliens who provided false Social Security numbers on their tax withholding forms when they obtained employment, because the state laws only regulated the fraudulent use of tax forms and did not purport to regulate the employment of aliens in the United States).

[14] Mathews v. Diaz, 426 U.S. 67, 85 (1976).

than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens."[15] Conversely, the Court is willing to exercise less judicial restraint when the constitutional challenge in question involves the relationship between aliens and states rather than aliens and the Federal Government, especially if the state's policy encroaches upon the Federal Government's authority.[16]

Section 9—Powers Denied Congress

Clause 1—Migration or Importation

ArtI.S9.C1.1 Restrictions on the Slave Trade

Article I, Section 9, Clause 1:

> *The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.*

This sanction for the importation of slaves by the states for twenty years after the adoption of the Constitution, when considered with the section requiring escaped slaves to be returned to their masters, Article IV, Section 1, Clause 3, was held by Chief Justice Roger Taney in *Scott v. Sandford*[1] to show conclusively that such persons and their descendants were not embraced within the term "citizen" as used in the Constitution. Today this ruling is interesting only as a historical curiosity.

Clause 2—Habeas Corpus

ArtI.S9.C2.1 Suspension Clause and Writ of Habeas Corpus

Article I, Section 9, Clause 2:

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

This Clause is the only place in the Constitution in which the Great Writ is mentioned, a strange fact in the context of the regard with which the right was held at the time the Constitution was written[1] and stranger in the context of the role the right has come to play in the Supreme Court's efforts to constitutionalize federal and state criminal procedure.[2]

Only the Federal Government and not the states, it has been held obliquely, is limited by the Clause.[3] The issue that has always excited critical attention is the authority in which the Clause places the power to determine whether the circumstances warrant suspension of the

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[15] *Id.* at 84. In *Mathews*, the Supreme Court explained that the Federal Government is uniquely entrusted with the responsibility of "regulating the relationship between the United States and our alien visitors," and that because the Federal Government's role in that respect implicates foreign relations and "changing political and economic circumstances," the Federal Government's immigration decisions are "frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary." *Id.* at 81.

[16] *Id.* at 84–85.

[1] 60 U.S. (19 How.) 393, 411 (1857).

[1] R. Walker, The American Reception of the Writ of Liberty (1961).

[2] *See* ArtIII.S1.6.9 Habeas Review.

[3] Gasquet v. Lapeyre, 242 U.S. 367, 369 (1917).

privilege of the Writ.[4] The Clause itself does not specify, and although most of the clauses of Section 9 are directed at Congress not all of them are.[5] At the Convention, the first proposal of a suspending authority expressly vested "in the legislature" the suspending power,[6] but the author of this proposal did not retain this language when the matter was taken up,[7] the present language then being adopted.[8] Nevertheless, Congress's power to suspend was assumed in early commentary[9] and stated in dictum by the Court.[10] President Abraham Lincoln suspended the privilege on his own motion in the early Civil War period,[11] but this met with such opposition[12] that he sought and received congressional authorization.[13] Three other suspensions were subsequently ordered on the basis of more or less express authorizations from Congress.[14]

When suspension operates, what is suspended? In *Ex parte Milligan*,[15] the Court asserted that the Writ is not suspended but only the privilege, so that the Writ would issue and the issuing court on its return would determine whether the person applying can proceed, thereby passing on the constitutionality of the suspension and whether the petitioner is within the terms of the suspension.

Restrictions on habeas corpus placed in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) have provided occasion for further analysis of the scope of the Suspension Clause. AEDPA's restrictions on successive petitions from state prisoners are "well within the compass" of an evolving body of principles restraining "abuse of the writ," and hence do not amount to a suspension of the Writ within the meaning of the Clause.[16] Interpreting IIRIRA so as to avoid what it viewed as a serious constitutional problem, the Court in another case held that Congress had not evidenced clear intent to eliminate federal court habeas corpus jurisdiction to determine whether the Attorney General retained discretionary authority to

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[4] In form, of course, Clause 2 is a limitation of power, not a grant of power, and is in addition placed in a section of limitations. It might be argued, therefore, that the power to suspend lies elsewhere and that this Clause limits that authority. This argument is opposed by the little authority there is on the subject. 3 The Records of the Federal Convention of 1787, at 213 (Max Farrand ed., 1937); *Ex parte* Merryman, 17 F. Cas. 144, 148 (No. 9487) (C.C.D. Md. 1861); *but cf.* 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 464 (Edmund Randolph, 2d ed. 1836). At the Convention, Gouverneur Morris proposed the language of the present Clause: the first section of the Clause, down to "unless" was adopted unanimously, but the second part, qualifying the prohibition on suspension was adopted over the opposition of three states. 2 Farrand, *supra*, at 438. It would hardly have been meaningful for those states opposing any power to suspend to vote against this language if the power to suspend were conferred elsewhere.

[5] *Cf.* Clauses 7, 8.

[6] 2 Records of the Federal Convention of 1787, at 341 (Max Farrand ed., 1937).

[7] *Id.* at 438.

[8] *Id.*

[9] 3 Joseph Story, Commentaries on the Constitution of the United States 1336 (1833).

[10] *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 101 (1807).

[11] *Cf.* J. Randall, Constitutional Problems Under Lincoln 118–39 (rev. ed. 1951).

[12] Including a finding by Chief Justice Roger Taney on circuit that the President's action was invalid. *Ex parte* Merryman, 17 F. Cas. 144 (No. 9487) (C.C.D. Md. 1861).

[13] Act of March 3, 1863, 1, 12 Stat. 755. *See* George Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress*, 1 U. Wis. History Bull. 213 (1907).

[14] The privilege of the Writ was suspended in nine counties in South Carolina in order to combat the Ku Klux Klan, pursuant to Act of April 20, 1871, 4, 17 Stat. 14. It was suspended in the Philippines in 1905, pursuant to the Act of July 1, 1902, 5, 32 Stat. 692. *Cf.* Fisher v. Baker, 203 U.S. 174 (1906). Finally, it was suspended in Hawaii during World War II, pursuant to a section of the Hawaiian Organic Act, 67, 31 Stat. 153 (1900). *Cf.* Duncan v. Kahanamoku, 327 U.S. 304 (1946). For the problem of de facto suspension through manipulation of the jurisdiction of the federal courts, *see* discussion under Article III, ArtIII.S1.5.1 Overview of Congressional Control Over Judicial Power.

[15] 71 U.S. (4 Wall.) 2, 130–131 (1866).

[16] Felker v. Turpin, 518 U.S. 651 (1996).

waive deportation for a limited category of resident aliens who had entered guilty pleas before IIRIRA repealed the waiver authority.[17] "[At] the absolute minimum," the Court wrote, "the Suspension Clause protects the writ as it existed in 1789. At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."[18]

Building on its statement concerning the "minimum" reach of the Suspension Clause, the Court, in *Department of Homeland Security v. Thuraissigiam*, explored what the habeas writ protected, as it existed in 1789.[19] *Thuraissigiam* involved a Suspension Clause challenge to a provision in IIRIRA limiting when an asylum seeker could seek habeas review to challenge a removal decision and stay in the United States.[20] Proceeding on the assumption that the Suspension Clause only prohibited limitations on the common-law habeas writ,[21] the Court concluded that the Writ at the time of the Founding "simply provided a means of contesting the lawfulness of restraint and securing release."[22] The asylum seeker in *Thuraissigiam* did not ask to be released from United States custody, but instead sought vacatur of his removal order and a new opportunity to apply for asylum, which if granted would enable him to remain in the United States.[23] The Court concluded that such relief fell outside the scope of the common-law habeas writ.[24] As a consequence, the Court held that, at least with respect to the relief sought by the respondent, Congress did not violate the Suspension Clause by limiting habeas relief for asylum seekers in IIRIRA.[25]

The question remains as to what aspects of habeas are aspects of this broader habeas are protected against suspension. Noting that the statutory writ of habeas corpus has been expanded dramatically since the First Congress, the Court has written that it "assume[s] . . . that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than

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[17] INS v. St. Cyr, 533 U.S. 289 (2001).

[18] 533 U.S. at 301 (internal quotation marks and citation omitted).

[19] 140 S. Ct. 1959, 1968–69 (2020).

[20] In relevant part, IIRIRA limited the review that an alien in expedited removal proceedings could obtain through a habeas petition by allowing habeas review of three matters: (1) whether the petitioner was an alien; (2) whether the petitioner was "ordered removed"; and (3) whether the petitioner had already been granted entry as a lawful permanent resident, refugee, or asylee. *See* 8 U.S.C. § 1252(e)(2)(A)–(C). The asylum seeker in *Thuraissigiam* challenged these jurisdictional limits, arguing they precluded review of a determination that he lacked a credible fear of persecution in his home country, of which an affirmative finding would enable him to enter the United States. *Thuraissigiam*, 140 S. Ct. at 1966–68.

[21] The respondent in *Thuraissigiam* stated "there is no reason" for the Court to consider anything beyond whether the writ of habeas corpus, as it existed in 1789, encompassed the relief sought. *Thuraissigiam*, 140 S. Ct. at 1969 & n.12.

[22] *Id.* at 1969 (discussing the views of William Blackstone and Justice Joseph Story, among others).

[23] *Id.* at 1969–71.

[24] In so concluding, the Court rejected the argument that three bodies of case law—(1) "British and American cases decided prior to or around the time of the adoption of the Constitution;" (2) decisions from the Court during the so-called "finality era" from the late nineteenth to the mid-twentieth century; and (3) two more recent cases—suggested that the Suspension Clause "guarantees a broader habeas right" than the right to contest the lawfulness of restraint and seek release. *Id.* at 1971–82. With regard to the early British and American cases, the *Thuraissigiam* Court viewed those cases to suggest that the habeas writ could only be used to secure a "simple release" from government custody. *Id.* at 1971–76. With respect to the finality-era case law, the Court viewed those cases, including *Nishimura Ekiu v. United States,* 142 U.S. 651 (1892), as simply interpreting the scope of the then-existing habeas statute and not what limitations the Suspension Clause imposes on Congress. *Thuraissigiam*, 140 S. Ct. at 1976–81. Finally, the Court distinguished two more recent cases, *Boumediene v. Bush,* 553 U.S. 723 (2008) and *INS v. St. Cyr,* 533 U.S. 289 (2001), holding that the former case did not pertain to immigration and that the latter case involved using habeas as a vehicle to seek the release of aliens who were in custody pending deportation proceedings. *Thuraissigiam*, 140 S. Ct. at 1981–82.

[25] *Thuraissigiam*, 140 S. Ct. at 1963–64.

as it existed in 1789."[26] This statement, however, appears to be in tension with the theory of congressionally defined habeas found in *Bollman*, unless one assumes that a habeas right, once created, cannot be diminished. The Court, however, in reviewing provisions of the Antiterrorism and Effective Death Penalty Act[27] that limited habeas, passed up an opportunity to delineate Congress's permissive authority over habeas, finding that none of the limitations to the writ in that statute raised questions of constitutional import.[28]

In *Boumediene v. Bush*,[29] in which the Court held that Congress's attempt to eliminate all federal habeas jurisdiction over "enemy combatant" detainees held at Guantanamo Bay[30] violated the Suspension Clause. Although the Court did not explicitly identify whether the underlying right to habeas that was at issue arose from statute, common law, or the Constitution itself, it did decline to infer "too much" from the lack of historical examples of habeas being extended to enemy aliens held overseas.[31] In *Boumediene*, the Court instead emphasized a "functional" approach that considered the citizenship and status of the detainee, the adequacy of the process through which the status determination was made, the nature of the sites where apprehension and detention took place, and any practical obstacles inherent in resolving the prisoner's entitlement to the writ.[32]

In further determining that the procedures afforded to the detainees to challenge their detention in court were not adequate substitutes for habeas, the Court noted the heightened due process concerns when a detention is based principally on Executive Branch proceedings—here, Combatant Status Review Tribunals (CSRTs)—rather than proceedings before a court of law.[33] The Court also expressed concern that the detentions had, in some cases, lasted as long as six years without significant judicial oversight.[34] The Court further noted the limitations at the CSRT stage on a detainee's ability to find and present evidence to challenge the government's case, the unavailability of assistance of counsel, the inability of a detainee to access certain classified government records which could contain critical allegations against him, and the admission of hearsay evidence. While reserving judgment as to whether the CSRT process itself comports with due process, the Court found that the

[26] Felker v. Turpin, 518 U.S. 651, 663–64 (1996). *See* INS v. St. Cyr, 533 U.S. 289, 300–01 (2001) (leaving open the question of whether post-1789 legal developments are protected); Swain v. Pressley, 430 U.S. 372 (1977) (finding "no occasion" to define the contours of constitutional limits on congressional modification of the writ).

[27] Pub. L. No. 104-132, §§ 101–08, 110 Stat. 1214, 1217–26, amending, *inter alia*, 28 U.S.C. §§ 2244, 2253, 2254, 2255, and Fed. R. App. P. 22.

[28] Felker v. Turpin, 518 U.S. 651 (1996).

[29] 128 S. Ct. 2229 (2008).

[30] In *Rasul v. Bush*, 542 U.S. 466 (2004), the Court found that 28 U.S.C. § 2241, the federal habeas statute, applied to these detainees. Congress then removed all court jurisdiction over these detainees under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1) (providing that "no court . . . shall have jurisdiction to hear or consider . . . an application for . . . habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay)." After the Court decided in *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006), that the Detainee Treatment Act did not apply to detainees whose cases were pending at the time of enactment, it was amended by the Military Commissions Act of 2006, Pub. L. No. 109-366, to also apply to pending cases where a detainee had been determined to be an enemy combatant.

[31] 128 S. Ct. at 2251.

[32] 128 S. Ct. at 2258, 2259.

[33] Under the Detainee Treatment Act, Pub. L. No. 109-148, Title X, Congress granted only a limited appeal right to determination made by the Executive Branch as to "(I) whether the status determination of [a] Combatant Status Review Tribunal . . . was consistent with the standards and procedures specified by the Secretary of Defense . . . and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." § 1005(e)(2)(C).

[34] 128 S. Ct. at 2263, 2275.

appeals process for these decisions, assigned to the United States Court of Appeals for the District of Columbia, did not contain the means necessary to correct errors occurring in the CSRT process.[35]

Clause 3—Nullification

ArtI.S9.C3.1 Historical Background on Bills of Attainder

Article 1, Section 9, Clause 3

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

A bill of attainder is legislation that imposes punishment on a specific person or group of people without a judicial trial.[1] The term has its roots in English law before the Founding. As the Supreme Court has explained:

> The bill of attainder, a parliamentary act sentencing to death one or more specific persons, was a device often resorted to in sixteenth, seventeenth and eighteenth century England for dealing with persons who had attempted, or threatened to attempt, to overthrow the government.[2]

A related sanction, known as a "bill of pains and penalties," historically referred to legislation imposing extrajudicial punishments less severe than death, such as banishment or deprivation of political rights.[3] Bills of attainder and bills of pains and penalties were legal in England at the time of the Founding, and state legislatures in the United States also enacted bills of attainder and bills of pains and penalties during the Revolution.[4] However, two separate clauses of the Constitution, Article I, Sections 9 and 10, respectively banned enactment of bills of attainder by the Federal Government and the states.[5]

The Framers adopted the constitutional prohibitions on bills of attainder unanimously and without debate.[6] However, sources from around the time of the Founding outline key concerns underlying the Bill of Attainder Clauses. In the *Federalist No. 44*, James Madison noted that

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[35] The Court focused in particular on the inability of the reviewing court to admit and consider relevant exculpatory evidence that was not introduced in the prior proceeding. The Court also listed other potential constitutional infirmities in the review process, including the absence of provisions empowering the D.C. Circuit to order release from detention, and not permitting petitioners to challenge the President's authority to detain them indefinitely.

[1] *See, e.g.*, Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977). In construing an analogous constitutional provision prohibiting the States from enacting bills of attainder, U.S. Const. art. I § 10 cl. 1, the Supreme Court has held that the clause "is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts." Frank v. Magnum, 237 U.S. 309, 344 (1915). *Accord* Ross v. Oregon, 227 U.S. 150, 161 (1913).

[2] United States v. Brown, 381 U.S. 437, 441 (1965). A bill of attainder also resulted in forfeiture of the target's property, including the right of the person's heirs to inherit it. *Id.* ("In addition to the death sentence, attainder generally carried with it a 'corruption of blood,' which meant that the attainted party's heirs could not inherit his property.").

[3] *Id.* at 441–42.

[4] *Id.* at 442. As one notable example, in 1778, Thomas Jefferson drafted, and the Virginia House of Delegates enacted, a bill of attainder targeting a man accused of offenses including treason, murder, and arson. 2 The Papers of Thomas Jefferson 189 (J. Boyd ed., 2018).

[5] For the prohibition on state bills of attainder, see U.S. Const. art. I, § 10, cl. 1. *See also* ArtI.S10.C1.4 State Bills of Attainder. The Supreme Court appears to have interpreted the federal and state prohibitions as having the same scope. *See, e.g.*, *Ex parte* Garland, 71 U.S. 333, 377–78 (1866) ("In [Cummings v. Missouri, 71 U.S. 277 (1866)] we have had occasion to consider [the state Bill of Attainder Clause] . . . A like prohibition is contained in the Constitution against enactments of this kind by Congress; and the argument presented in that case against certain clauses of the constitution of Missouri is equally applicable to the act of Congress under consideration in this case."); *Nixon*, 433 U.S. at 468–76 (citing *Cummings* in case applying federal Bill of Attainder Clause).

[6] *Brown*, 381 U.S. at 441.

many states had enacted constitutional provisions banning bills of attainder.[7] Observing that bills of attainder "are contrary to the first principles of the social compact, and to every principle of sound legislation," he opined that it was appropriate for the Framers also to ban the practice in the federal constitution, "add[ing] this constitutional bulwark in favor of personal security and private rights."[8] Joseph Story's *Commentaries* explained that bills of attainder undermine both separation of powers and the individual right to a judicial trial.[9]

ArtI.S9.C3.2 Bills of Attainder Doctrine

Article 1, Section 9, Clause 3

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

Supreme Court cases have given "broad and generous meaning to the constitutional protection against bills of attainder" by interpreting it to ban not only legislation imposing a death sentence, as the term was used at English common law, but also legislation that imposes other forms of punishment on specific persons without trial.[1] However, the Court has emphasized that legislation does not violate the Bill of Attainder Clause simply because it places legal burdens on a specific individual or group.[2] Rather, as discussed in more detail below, a bill of attainder must also inflict *punishment*.[3] Another key feature of a bill of attainder is that it applies retroactively: the Supreme Court has held that the Bill of Attainder Clause does not apply to legislation that "is intended to prevent future action rather than to punish past action."[4] The Court has also held that the prohibition on bills of attainder does not safeguard the states against allegedly punitive federal legislation[5] and does not protect U.S. citizens who commit crimes abroad and face trial in other jurisdictions.[6] Overall, the Supreme Court's decisions suggest that the Court has applied the Bill of Attainder Clause to prevent legislatures from circumventing the courts by punishing people without due process of law.

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[7] The Federalist No. 44 (James Madison).

[8] *Id.*

[9] 3 Joseph Story, Commentaries on the Constitution of the United States § 1338 (1833) (In bill of attainder cases, "the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence, or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears, or unfounded suspicions.").

[1] *Nixon*, 433 U.S. at 469; *see also* Fletcher v. Peck, 10 U.S. 87, 138 (1810) ("A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.").

[2] *Id.* at 470–71.

[3] *Id.* at 472–73; *see also* Trop v. Dulles, 356 U.S. 86, 95–96 (1958) ("Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and ex post facto laws, it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties." (footnotes omitted)).

[4] American Communications Ass'n, C.I.O., v. Douds, 339 U.S. 382, 414 (1950). The Bill of Attainder Clause is one of several constitutional provisions that limit the ability of the Federal Government and the states to legislate retroactively. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994).

[5] South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) ("[C]ourts have consistently regarded the Bill of Attainder Clause of Article I and the principle of the separation of powers only as protections for individual persons and private groups, those who are peculiarly vulnerable to non-judicial determinations of guilt. . . . Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate parens patriae of every American citizen." (internal citations omitted)).

[6] Neely v. Henkel, 180 U.S. 109, 122 (1901) (holding that constitutional provisions including the Bill of Attainder Clause "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country").

The Supreme Court applied the constitutional prohibitions on bills of attainder in a pair of Reconstruction-era cases, *Ex parte Garland*[7] and *Cummings v. Missouri*.[8] *Garland* concerned a federal statute, while *Cummings* involved a post-Civil War amendment to the Missouri constitution, but both of the challenged provisions required persons engaged in certain professions to swear an oath that they had never been disloyal to the United States.[9] In both cases, the Court held that the effect of the challenged provisions was to punish a group of individuals who had been disloyal to the United States, and the punishment they faced was effective exclusion from the covered professions.[10]

Based on that holding, the Supreme Court invalidated the provisions as unconstitutional bills of attainder.[11] In *Cummings*, the Court noted that the challenged state constitutional provisions did not expressly "define any crimes, or declare that any punishment shall be inflicted, but they produce[d] the same result upon the parties, against whom they are directed, as though the crimes were defined and the punishment was declared."[12] The provisions "aimed at past acts, and not future acts," and were "intended to operate by depriving such persons of the right to hold certain offices and trusts, and to pursue their ordinary and regular avoications."[13] The Court held that this deprivation constituted a punishment, and that the purported option to avoid the restriction by swearing a loyalty oath did not make it less so:

> The framers of the constitution of Missouri knew at the time that whole classes of individuals would be unable to take the oath prescribed. To them . . . the deprivation was intended to be, and is, absolute and perpetual. To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act.[14]

In *Garland*, the Court applied its reasoning in *Cummings* to strike down the similar federal law.[15]

In the 1946 case *United States v. Lovett*, the Supreme Court struck down as a bill of attainder an appropriations bill cutting off the pay of certain named federal employees accused of being "subversives."[16] The Court explained that the challenged legislation effectively declared specific persons guilty of the crime of subversive activities "without the safeguards of

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[7] 71 U.S. 333 (1866).

[8] 71 U.S. 277 (1866).

[9] *See Garland*, 71 U.S. at 334–35 (federal statute required attorneys practicing in federal court to swear an oath that they had never voluntarily borne arms against the United States or "given . . . aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto"); *Cummings*, 71 U.S. at 280 (state constitutional provision required members of the clergy and others to swear, "I have always been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic").

[10] *See Garland*, 71 U.S. at 377 ("The statute is directed against parties who have offended in any of the particulars embraced by these clauses [related to past disloyalty]. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States."); *Cummings*, 71 U.S. at 320 (The oath requirement "was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen.").

[11] *Cummings*, 71 U.S. at 325–29; *Garland*, 71 U.S. at 380.

[12] *Cummings*, 71 U.S. at 327.

[13] *Id.*

[14] *Id.*

[15] *Garland*, 71 U.S. at 377–78.

[16] 328 U.S. 303, 315 (1946).

a judicial trial."[17] The legislation further permanently barred those persons from government service, which qualified as "punishment . . . of a most severe type."[18] Similarly, in the 1965 case *United States v. Brown*, the Court held that a federal statute making it a crime for a member of the Communist Party to serve as an officer of a labor union was a bill of attainder.[19] The *Brown* Court eschewed a rigid historical view of the Bill of Attainder Clause, explaining that the clause

> was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply-trial by legislature.[20]

The Court concluded that Congress had "exceeded the authority granted it by the Constitution" in enacting the challenged statute because, rather than creating generally applicable rules for courts to apply, the statute "designate[d] in no uncertain terms the persons who possess . . . feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party."[21] By contrast, in roughly contemporaneous cases, the Supreme Court rejected bill of attainder challenges to a decision of the Secretary of Health, Education and Welfare terminating old-age insurance benefits of an individual who had been deported[22] and an order of the Subversive Activities Control Board requiring the Communist Party of the United States to register as a "Communist-action organization."[23]

The Supreme Court articulated the current test for whether a law is a bill of attainder in the 1977 case *Nixon v. Administrator of General Services*.[24] In that case, former President Richard M. Nixon challenged provisions of a federal statute that directed the Administrator of General Services to take custody of and preserve his presidential papers and tape recordings.[25] The Court held that a statute constitutes a bill of attainder only if it both applies with specificity and imposes punishment without trial.[26] With respect to the legislation before it, the Supreme Court acknowledged "the Act's specificity—the fact that it refer[red] to [President Nixon] by name."[27] However, the Court rejected the proposition that an individual or defined group is subject to a bill of attainder "whenever he or it is compelled to bear burdens which the individual or group dislikes."[28] Instead, the Court explained, Congress may in some

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[17] *Id.* at 317. *See also* Bigelow v. Forrest, 76 U.S. 339, 345 (1869) ("[The] limitation upon *bills of attainder* does not apply to proceedings in courts, in individual cases, where there are regular trials and formal proceedings in which the individual has full opportunity to defend.").

[18] *Id.* at 313, 316.

[19] 381 U.S. 437, 440 (1965).

[20] *Id.* at 442.

[21] *Id.* at 450.

[22] Flemming v. Nestor, 363 U.S. 603, 617 (1960) (holding that "the mere denial of a noncontractual governmental benefit" was not sufficently punitive to constitute a bill of attainder).

[23] Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 86 (1961) (registration requirement was not a bill of attainder because "[i]t attache[d] not to specified organizations but to described activities in which an organization may or may not engage," the registration requirement applied only "after full administrative hearing, subject to judicial review," and the law was not retroactive since parties subject to it could "escape regulation merely by altering the course of their own present activities").

[24] 433 U.S. 425 (1977).

[25] *Id.* at 429.

[26] *Id.* at 471–73.

[27] *Id.* at 471–72.

[28] *Id.* at 470.

circumstances regulate "a legitimate class of one."[29] If such a law applies with specificity but does not impose punishment, it will not be struck down as a bill of attainder.[30]

The *Nixon* Court then proceeded to lay out three tests for assessing whether a law imposes punishment: (1) historical, (2) functional, and (3) motivational. The historical test looks to "[t]he infamous history of bills of attainder" to determine whether the law was one of a limited set of legislative actions that were deemed to be bills of attainder before the Founding and in prior Supreme Court cases.[31] Those historical punishments included pre-Founding legislation imposing death sentences, imprisonment, and banishment, as well as the employment bans that were struck down in *Cummings*, *Lovett*, and *Brown*.[32] The functional test considers "whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes."[33] The motivational test looks to legislative history to determine "whether the legislative record evinces a congressional intent to punish."[34] Finding that none of the three tests were satisfied in *Nixon*, the Supreme Court concluded that the law requiring the transfer and preservation of the presidential records did not qualify as a punishment under any of these three tests.[35]

The Court has continued to apply the *Nixon* framework in its rare Bill of Attainder cases since 1977. In *Selective Service System v. Minnesota Public Interest Research Group*, the Supreme Court rejected a bill of attainder challenge to a federal statute that denied student financial assistance to male students who failed to register for the draft.[36] After holding that the statute did not single out a specific group based on past actions because "those failing to register timely can qualify for aid by registering late," the Court concluded that none of the *Nixon* tests suggested that the law was punitive.[37]

ArtI.S9.C3.3 Ex Post Facto Laws

ArtI.S9.C3.3.1 Overview of Ex Post Facto Laws

Article I, Section 9, Clause 3:

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

Separate provisions of the Constitution ban enactment of ex post facto laws by the Federal Government and the states, respectively.[1] The Supreme Court has cited cases interpreting the

[29] *Id.* at 472.

[30] *Id.*

[31] *Id.* at 473.

[32] *Id.* at 474–75.

[33] *Id.* at 475–76. *See also* Trop v. Dulles, 356 U.S. 86, 96 (1958) ("If [a] statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.").

[34] *Id.* at 478. "[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute" based on punitive intent. Flemming v. Nestor, 363 U.S. 603, 617 (1960).

[35] *Id.* at 484. In *Local 28 of Sheet Metal Workers' Int'l Ass'n v. Equal Employment Opportunity Com'n*, the Supreme Court rejected as without merit the argument that a construction of Title VII of the Civil Rights Act of 1964 allowing a court to impose an affirmative action plan on an entity that violated Title VII had "the effect of making the Civil Rights Act an unconstitutional bill of attainder, visiting upon white persons the sins of past discrimination by others." 478 U.S. 421, 481 n.50 (1986).

[36] 468 U.S. 841, 856 (1984).

[37] *Id.* at 850–56.

[1] U.S. Const. art. I, § 9, cl. 3; art. I, § 10, cl. 1. While there are two Ex Post Facto Clauses, only one of the two can apply to any given piece of legislation. Courts and commentators at times distinguish between the federal Ex Post

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federal Ex Post Facto Clause in challenges under the state clause, and vice versa, implying that the two clauses have the same scope.[2] The Court has construed both clauses to ban legislatures from enacting laws that impose criminal liability or increase criminal punishment retroactively.[3] The constitutional prohibitions of ex post facto laws are closely related to the prohibitions of bills of attainder—legislative actions that determine guilt or impose criminal punishment on specific persons or groups without a judicial trial.[4] In some cases, the Court has held that a single legislative action may violate both the ex post facto and bill of attainder prohibitions.[5]

Some ex post facto cases involve facial challenges—claims that the challenged laws are invalid in all circumstances.[6] Many, however, involve claims that the Ex Post Facto Clauses bar applying laws to specific offenses that were committed before the laws' enactment.[7] The Supreme Court has denied ex post facto claims when it has found that a law is not ex post facto as applied to the challenger, even when the law might be ex post facto as applied to others not before the Court.[8]

The Supreme Court has held that the constitutional prohibitions on ex post facto laws do not apply to crimes committed outside the jurisdiction of the United States against the laws of a foreign country.[9]

ArtI.S9.C3.3.2 Historical Background on Ex Post Facto Laws

Article I, Section 9, Clause 3:

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

An ex post facto law, named using the Latin phrase for "after the fact," is a law that imposes criminal liability or increases criminal punishment retroactively.[1] Two separate clauses of the Constitution, Article I, Sections 9 and 10, respectively ban enactment of ex post facto laws by the Federal Government and the states.[2]

Facto Clause and the state Ex Post Facto Clause, but also sometimes use the singular "Ex Post Facto Clause" without explicitly distinguishing between the two. *E.g.*, Dorsey v. United. States 567 U.S. 260, 275 (2012) ("Although the Constitution's Ex Post Facto Clause, Art. I, § 9, cl. 3, prohibits applying a new Act's higher penalties to pre-Act conduct, it does not prohibit applying lower penalties.").

[2] *See, e.g.*, Peugh v. United States, 569 U.S. 530, 532–33 (2013) (case construing federal clause citing case construing state clause); Reetz v. Michigan, 188 U.S. 505, 510 (1903) (case construing state clause citing case construing federal clause).

[3] *See*, *e.g.*, *Calder*, 3 U.S. at 389; *Peugh*, 569 U.S. at 532–33; Baltimore and Susquehanna R.R. v. Nesbit, 51 U.S. 395, 401 (1850) (a state can enact a retroactive law that is not punitive and does not impair the obligation of contracts). *See also* Fletcher v. Peck, 10 U.S. 87, 138 (1810) ("An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed."); Locke v. New Orleans, 71 U.S. 172, 173 (1867); Orr v. Gilman, 183 U.S. 278, 285 (1902).

[4] *E.g.*, Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 537–38 (1977).

[5] *E.g.*, Cummings v. Missouri, 71 U.S. 277 (1866); *Ex parte* Garland, 71 U.S. 333 (1866).

[6] *See, e.g.*, *Garland*, 71 U.S. at 382; *cf.* Jaehne v. New York, 128 U.S. 189, 194 (1888) (challenger argued that a law was facially invalid because it could be ex post facto in some cases).

[7] *See, e.g.*, Lindsey v. Washington, 301 U.S. 397, 398 (1937); Weaver v. Graham, 450 U.S. 24, 28–33 (1981).

[8] *Jaehne*, 128 U.S. at 194 (law that might be void as applied to pre-enactment offenses was not void as applied to post-enactment offenses); Bugajewitz v. Adams, 228 U.S. 585, 608–09 (1913).

[9] Neely v. Henkel, 180 U.S. 109, 123 (1901).

[1] *E.g.*, Locke v. New Orleans, 71 U.S. 172, 173 (1867).

[2] For the prohibition on state ex post facto laws, see U.S. Const. art. I, § 10, cl. 1. *See also* ArtI.S10.C1.5 State Ex Post Facto Laws.

In the *Federalist No. 44*, James Madison asserted that ex post facto laws "are contrary to the first principles of the social compact, and to every principle of sound legislation."[3] In the *Federalist No. 84*, Alexander Hamilton further justified prohibitions on ex post facto laws by arguing:

> The creation of crimes after the commission of the fact, or . . . punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.[4]

The prohibition on ex post facto laws seeks "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed" and "restricts governmental power by restraining arbitrary and potentially vindictive legislation."[5] The Supreme Court has further stated that the prohibition is based on

> the notion that laws . . . which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act . . . should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.[6]

At the Constitutional Convention, multiple delegates expressed disapproval of ex post facto laws. However, some believed that an explicit constitutional prohibition of ex post facto laws was unnecessary because such laws were clearly invalid. One delegate "contended that there was no lawyer, no civilian who would not say that ex post facto laws were void of themselves."[7] Others asserted that including the prohibition could do harm by "proclaim[ing] that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so" or "implying an improper suspicion of the National Legislature."[8] Other delegates responded that an express prohibition was necessary because some state legislatures had previously passed ex post facto laws, and state constitutional bans of such laws had been invoked to oppose them.[9]

There was also discussion at the Convention as to whether the prohibition on ex post facto laws applied only to retroactive criminal laws or also forbade retroactive civil laws.[10] The delegates rejected a suggestion that would have altered the federal Ex Post Facto Clause to state expressly that it applied to civil laws, but they did not clearly resolve the question.[11] Soon after ratification, in the 1798 case *Calder v. Bull*, the Supreme Court construed the constitutional prohibition on ex post facto laws to prohibit only retroactive criminal laws.[12]

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[3] The Federalist No. 44, at 278–79 (James Madison). Madison further noted that several state constitutions expressly banned ex post facto laws and that in any case such laws were "prohibited by the spirit and scope of these fundamental charters." *Id.*

[4] The Federalist No. 84, at 511 (Alexander Hamilton).

[5] Weaver v. Graham, 450 U.S. 24, 28–29 (1981).

[6] Beazell v. Ohio, 269 U.S. 167, 170 (1925). By contrast, the Supreme Court has held that retroactive criminal statutes that do not disadvantage criminal defendants are not ex post facto laws. *See* ArtI.S9.C3.3.5 Increasing Punishment and Ex Post Facto Laws.

[7] 2 The Records of the Federal Convention of 1787, at 376 (Max Farrand ed., 1911).

[8] *Id.*

[9] *Id.*

[10] *Id.* at 448–49, 617.

[11] *Id.* at 617. *See also id.* at 440 (considering amendment to the state Ex Post Facto Clause that would instead have prohibited enactment of "retrospective laws").

[12] 3 U.S. 386, 389 (1798). *See also* 3 Joseph Story, Commentaries on the Constitution of the United States § 1339 (1833).

ArtI.S9.C3.3.3 Retroactivity of Ex Post Facto Laws

Article I, Section 9, Clause 3:

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

As the phrase "ex post facto" ("after the fact") suggests, the Ex Post Facto Clauses apply only to legislation that imposes or increases a punishment *retroactively*.[1] The Ex Post Facto Clauses are related to other constitutional provisions that limit retroactive government action, including the federal and state Bill of Attainder Clauses, the Contract Clause, and the Due Process Clauses.[2]

In ex post facto cases, the relevant point in time for determining whether a law applies retroactively is the time the offense was committed: the Supreme Court has explained that people must have notice of the possible criminal penalties for their actions at the time they act.[3]

A key consideration in ex post facto cases is whether the specific individuals challenging the law had notice of all the legal consequences of their actions at the time they committed their offenses. The Supreme Court has rejected ex post facto challenges to laws that might apply retroactively in some circumstances but applied only prospectively to the challengers before the Court.[4] The Court has also held that statutes are not retroactive if they apply to past conduct that was also prohibited under a prior statute. For instance, in *Harisiades v. Shaughnessy*, the Court considered ex post facto claims from several resident aliens who had been ordered deported under a 1940 statute based on their pre-1940 membership in the Communist Party.[5] The Court stated that "[a]n impression of retroactivity results from reading as a new and isolated enactment what is actually a continuation of prior legislation."[6] However, the Court noted that membership in organizations such as the Communist Party had been grounds for deportation since 1920. Thus, the challengers "were not caught unawares by a change of law. There can be no contention that they were not adequately forewarned both that their conduct was prohibited and of its consequences."[7]

The Supreme Court has denied ex post facto challenges to laws that impose legal consequences based not solely on past conduct but rather on an ongoing condition that began in the past. In a late nineteenth century case, *Murphy v. Ramsey*, the Court rejected an ex post facto challenge to a law that disenfranchised bigamists and polygamists, holding that the law did not retroactively impose a penalty for a crime.[8] Although bigamy and polygamy were criminal offenses, the Court observed that the criminal offense was the unlawful marriage itself and was subject to a three-year statute of limitations following the marriage, so that a person subject to disenfranchisement might be "a bigamist or a polygamist, and yet guilty of no criminal offense."[9]

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[1] *See, e.g.*, Calder v. Bull, 3 U.S. 386, 391 (1798).

[2] *See, e.g.*, Fletcher v. Peck, 10 U.S. 87, 138–39 (1810).

[3] *See, e.g.*, Weaver v. Graham, 450 U.S. 24, 30 (1981) ("Critical to relief under the Ex Post Facto Clause is . . . the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.").

[4] Jaehne v. New York, 128 U.S. 189, 194 (1888) (law that might be void as applied to pre-enactment offenses was not void as applied to post-enactment offenses); Bugajewitz v. Adams, 228 U.S. 585, 608–09 (1913).

[5] 342 U.S. 580, 581–82 (1952).

[6] *Id.* at 593.

[7] *Id.*

[8] 114 U.S. 15, 36 (1885).

[9] *Id.* at 43.

In *United States v. Trans-Missouri Freight Association*, the Court rejected an ex post facto challenge to the application of an 1890 antitrust law to an agreement begun in 1889.[10] The Court explained that the law did not apply to past conduct but rather to an ongoing violation: even if the agreement was lawful when entered into, "the continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act. . . . There is nothing of an ex post facto character about the act."[11] Similarly, in *Samuels v. McCurdy*, the Court rejected an ex post facto challenge to a law that prohibited the possession of liquor that was legal when purchased.[12] The Court held that the law did not "provide a punishment for a past offense" by penalizing the owner "for having become possessed of the liquor," but instead imposed a penalty for "continuing to possess the liquor after the enactment of the law."[13]

The Supreme Court has rejected multiple ex post facto challenges to repeat offender statutes on the ground that such statutes do not penalize past conduct.[14] In *McDonald v. Massachusetts*, the Court rejected an ex post facto challenge to a "habitual criminal" statute that imposed an increased penalty for post-enactment offenses based on the defendant's previous, pre-enactment criminal convictions.[15] While the defendant argued that the law amounted to an additional punishment for his prior offenses, the Court concluded that the "statute, imposing a punishment on none but future crimes, is not ex post facto."[16] The Court likewise approved the consideration of pre-enactment offenses under a repeat offender statute in *Gryger v. Burke*.[17] The Court explained that the sentence for a habitual criminal "is not to be viewed as . . . additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."[18]

In *Johnson v. United States*, the Court denied an ex post facto challenge to a statute authorizing courts to impose an additional term of supervised release following the reimprisonment of persons who violate the conditions of an initial term of supervised release.[19] The Court declined to construe the statute to apply retroactively and therefore concluded that "the ex post facto question does not arise."[20]

In *Kansas v. Hendricks*, the Court rejected an ex post facto challenge to a statute allowing for civil commitment of "sexually violent predators," in part because the statue was not retroactive.[21] The Court held that the law allowed for involuntary confinement "based upon a determination that the person currently both suffers from a 'mental abnormality' or

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[10] 166 U.S. 290, 342 (1897).

[11] *Id. See also* Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67, 73 (1915) ("[P]laintiff in error is subjected to a penalty not because of the manner in which it originally constructed its railroad embankment, nor for anything else done or omitted before the passage of the act . . ., but because after that time it maintained the embankment in a manner prohibited by that act.").

[12] 267 U.S. 188, 191 (1925).

[13] *Id.* at 193.

[14] *Cf.* Graham v. West Virginia, 224 U.S. 616, 623 (1912) (upholding repeat offender law against non-ex post facto challenges, holding: "The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted.").

[15] 180 U.S. 311, 311 (1901).

[16] *Id.* at 313.

[17] 334 U.S. 728, 729 (1948).

[18] *Id.* at 732.

[19] 529 U.S. 694, 696 (2000).

[20] *Id.* at 702.

[21] 521 U.S. 346, 371 (1997). The Court also held that the statute was not punitive. *See* ArtI.S9.C3.3.5 Increasing Punishment and Ex Post Facto Laws.

'personality disorder' and is likely to pose a future danger to the public."[22] The Court explained that, under the statute, past behavior was permissably used "solely for evidentiary purposes."[23]

ArtI.S9.C3.3.4 Ex Post Facto Law Prohibition Limited to Penal Laws

Article I, Section 9, Clause 3:

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

Since the 1798 case *Calder v. Bull*, the Supreme Court has interpreted the Ex Post Facto Clauses to apply only to laws that are criminal or penal in nature, not to civil laws.[1] The Court has explained, however, that "the ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal."[2] In *Calder*, the Court enumerated four ways in which a legislature may violate the Ex Post Facto Clauses' prohibition on imposing retroactive criminal liability: (1) making criminal an action taken before enactment of the law that was lawful when it was done; (2) increasing the severity of an offense after it was committed; (3) increasing the punishment for a crime after it was committed; and (4) altering the rules of evidence after an offense was committed so that it is easier to convict an offender.[3]

Supreme Court decisions from the nineteenth century suggested that a legislature might violate the Ex Post Facto Clauses in ways that do not fit within any of the four categories recognized in *Calder*.[4] However, in the 1990 case *Collins v. Youngblood*, the Court rejected that reasoning and held that the scope of the prohibition on ex post facto laws is "defined by the *Calder* categories."[5]

[22] *Id.*

[23] *Id.*

[1] Calder v. Bull, 3 U.S. 386, 389 (1798); *see also, e.g.*, Watson v. Mercer, 33 U.S. 88, 110 (1834) ("The constitution of the United States does not prohibit the states from passing retrospective laws generally; but only ex post facto laws. Now it has been solemnly settled by this court, that the phrase, ex post facto laws, is not applicable to civil laws, but to penal and criminal laws."). For additional discussion of certain categories of laws that have generally been held to be non-penal in nature, see ArtI.S9.C3.3.10 Retroactive Taxes and Ex Post Facto Laws and ArtI.S9.C3.3.12 Ex Post Facto Laws, Deportation, and Related Issues. For discussion of other constitutional provisions that apply exclusively to penal laws, see ArtI.S9.C3.1 Historical Background on Bills of Attainder, ArtI.S10.C1.4 State Bills of Attainder, and Amdt5.3.1 Overview of Double Jeopardy Clause.

[2] Burgess v. Salmon, 97 U.S. 381, 385 (1878); *see also* Cummings v. Missouri, 71 U.S. 277, 278 (1866).

[3] *Calder*, 3 U.S. at 390. *Cf.* Trop v. Dulles 356 U.S. 86, 95 (1958) ("In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect.") (footnotes omitted).

[4] Kring v. Missouri, 107 U.S. 221, 228 (1883), *overruled by* Collins v. Youngblood, 497 U.S. 37 (1990); *cf.* Thompson v. Utah, 170 U.S. 343, 352 (1898) (same).

[5] 497 U.S. 37, 47 (1990).

ArtI.S9.C3.3.5 Increasing Punishment and Ex Post Facto Laws

Article I, Section 9, Clause 3:

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

The Supreme Court has denied ex post facto challenges to changes to trial procedures and sentences that do not disadvantage criminal defendants.[1] For instance, in *Dobbert v. Florida*, the Court rejected an ex post facto challenge to a state law that changed the role of the jury in capital cases.[2] The sentencing regime in place at the time the challenger committed his offenses provided for a death sentence upon conviction of a capital felony, unless a majority of the jury chose to depart from the presumption and instead recommended a life sentence. The revised procedure allowed the jury to render a non-binding advisory opinion on whether a death sentence was warranted; the judge then considered aggravating and mitigating circumstances and determined whether to impose a death sentence. A death sentence had to be supported by written findings by the judge and was subject to expedited appellate review.[3] The Supreme Court held that the new regime was not ex post facto, in part because it was "on the whole ameliorative," providing increased procedural protections for defendants.[4]

In *Malloy v. South Carolina*, the Court rejected an ex post facto challenge to a statute that changed the method of execution from hanging to electrocution for persons previously sentenced to death.[5] The change was based on a determination that electrocution was more humane.[6] The Court explained that the law did not change the applicable death sentence, "but only the mode of producing this, together with certain nonessential details in respect of surroundings. The punishment was not increased, and some of the odious features incident to the old method were abated."[7] Similarly, in *Holden v. Minnesota*, the Court held that a statute changing the time of executions and limiting who could attend executions was not ex post facto.[8]

By contrast, the Supreme Court has held that statues that retroactively increase the severity of a criminal sentence are ex post facto laws. Another provision of the statute at issue in *Holden* mandated solitary confinement pending execution.[9] The Court held that such a provision "may be deemed ex post facto, if applied to offenses committed before its passage."[10]

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[1] *See, e.g.*, Dobbert v. Florida, 432 U.S. 282, 294 (1977) ("It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law.").

[2] *Id.* at 284.

[3] *Id.* at 290.

[4] *Id.* at 292. The Court explained, "The Florida Legislature enacted the new procedure specifically to provide the constitutional procedural protections required by [Furman v. Georgia, 408 U.S. 238 (1972)], thus providing capital defendants with more, rather than less, judicial protection." *Id.* at 294–95. Other aspects of the *Dobbert* decision are discussed later in this section and in the section *Procedural Changes*.

[5] 237 U.S. 180, 183 (1915).

[6] *Id.* at 185.

[7] *Id. See also* Rooney v. North Dakota, 196 U.S. 319, 326–27 (1905) (statute increasing the term of imprisonment prior to execution "did not alter the situation to the material disadvantage of the criminal, and, therefore, was not ex post facto when applied to his case in the particulars mentioned"); Dorsey v. United States, 567 U.S. 260, 275 (2012) ("Although the Constitution's Ex Post Facto Clause . . . prohibits applying a new Act's higher penalties to pre-Act conduct, it does not prohibit applying lower penalties.").

[8] 137 U.S. 483, 491 (1890).

[9] *Id.* at 491.

[10] *Id.* The Court ultimately denied the ex post facto claim because it concluded there was no evidence that the prisoner challenging the law was actually being held in solitary confinement. *Id.* at 491–92.

In *In re Medley*, the Court held that a statute that required a previously convicted death row inmate to be held in solitary confinement until execution and not informed of his execution date was ex post facto.[11]

In considering ex post facto challenges to the length of prison sentences, the Court has held that a law may be impermissible if it increases the sentencing range for a past offense, even if it is not certain that the defendant received a higher sentence than he would have under the previous regime. In *Lindsey v. Washington*, criminal defendants challenged as ex post facto a statute that imposed a mandatory *minimum* sentence equal to what had been the *maximum* sentence at the time they committed their offense.[12] The Supreme Court held that the law was ex post facto as applied to pre-enactment offenses. The Court observed that "[t]he effect of the new statute is to make mandatory what was before only the maximum sentence."[13] While acknowledging that the challengers might have received the new mandatory minimum sentence under the prior regime, the Court emphasized that "the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed."[14] Thus, in *Miller v. Florida*, the Court held that new state sentencing guidelines could not be applied retroactively to offenses that had been commited when a lower presumptive sentencing range was in place.[15] Similarly, in *Peugh v. United States*, the Court held that it violated the federal Ex Post Facto Clause when a defendant was sentenced under a new version of the U.S. Sentencing Guidelines promulgated after he committed his offense that provided a higher sentencing range—even though the Guidelines were only advisory and courts were free to impose sentences outside the range.[16]

The Supreme Court has held that statutes that canceled or reduced release credits earned by prisoners were ex post facto laws. In *Weaver v. Graham*, the Court held that a statute reducing credits for good behavior that counted towards early release was ex post facto as applied to a prisoner whose offense occurred before the statue was enacted.[17] In another case, *Lynce v. Mathis*, the Court heard an ex post facto challenge from a prisoner whose early release credits were canceled after he had been released, causing him to be rearrested and returned to prison.[18] The Court held that the retroactive cancellation of credits increased punishment because "it made ineligible for early release a class of prisoners who were previously eligible—including some, like petitioner, who had actually been released."[19]

On the other hand, statutes decreasing the frequency of parole hearings do not necessarily violate the Ex Post Facto Clauses. In *California Department of Corrections v. Morales*, the Supreme Court held that a state law that changed the frequency of parole hearings for certain offenders from annual to every three years did not violate the state Ex Post Facto Clause as applied to prisoners who committed their offenses before its enactment.[20] In *Garner v. Jones*, the Court considered a state parole board rule that increased the time between parole hearings

[11] 134 U.S. 160, 167–73 (1890).

[12] 301 U.S. 397, 398 (1937).

[13] *Id.* at 400.

[14] *Id.* at 401.

[15] 482 U.S. 423, 435–36 (1987). The *Miller* Court explained that "one is not barred from challenging a change in the penal code on ex post facto grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old." *Id.* at 432 (quoting Dobbert v. Florida, 432 U.S. 282, 300 (1977)).

[16] 569 U.S. 530, 533 (2013).

[17] 450 U.S. 24, 28–33 (1981).

[18] 519 U.S. 433, 446–47 (1997).

[19] *Id.* at 447.

[20] 514 U.S. 499, 501–02 (1995).

from three years to as much as eight years.[21] The Court emphasized that the parole board had broad discretion over whether a prisoner was released, and opined that procedural changes within a system that had always allowed such discretion might not undermine the interest in "actual or constructive notice to the criminal before commission of the offense of the penalty for the transgression."[22] The Court explained that the key question in its ex post facto analysis was whether the amended rule "creates a significant risk of prolonging [the challenger's] incarceration."[23] On the record before it, the Court could not conclude the change lengthened his actual time of imprisonment.[24]

ArtI.S9.C3.3.6 Imposing Criminal Liability and Ex Post Facto Laws

Article I, Section 9, Clause 3:

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

Congress and state legislatures sometimes enact temporary statutes that apply until a fixed expiration date. In *United States v. Powers*, the Supreme Court held that a legislature may extend a temporary criminal statute before it expires, and that, following the extension, the government may prosecute pre-extension conduct—that is, conduct that occurred while the temporary law was in effect and expected to expire as initially planned—without violating the Ex Post Facto Clause.[1] The Court explained that, due to the extension at issue in that case, "the Act has never ceased to be in effect. No new law was created; no old one was repealed. Without hiatus of any kind, the original Act was given extended life."[2]

In *Dobbert v. Florida*, a prisoner sentenced to death raised a claim that "there was no 'valid' death penalty in effect in Florida as of the date of his actions" because the state had made subsequent changes to sentencing procedures to satisfy newly articulated constitutional requirements.[3] The prisoner committed two murders between December 1971 and April 1972. In July 1972, the Florida Supreme Court found that the state's death penalty statute was inconsistent with the requirements laid out *Furman v. Georgia*.[4] Florida enacted new death penalty procedures in late 1972, and the challenger was convicted and sentenced under the new regime. The prisoner argued that the death penalty statute in effect at the time of his crimes had been struck down, and that applying the new statute to his conduct was ex post facto. The Supreme Court rejected that claim, holding that despite its procedural flaws, the old statute had "clearly indicated Florida's view of the severity of murder and of the degree of punishment" appropriate to that crime.[5]

By contrast, the Supreme Court has held that a legislature may not retroactively reimpose criminal liability after it has lapsed. Many criminal laws contain statutes of limitations that bar prosecution once a certain amount of time passes after an offense is committed. In *Stogner v. California*, the Court held that "a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously

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[21] 529 U.S. 244, 247 (2000).

[22] *Id.* at 253.

[23] *Id.* at 251.

[24] *Id.* at 256. The Court remanded the case to the lower federal courts for further consideration of that question. *Id.* at 257.

[1] 307 U.S. 214, 216 (1939).

[2] *Id.* at 217.

[3] 432 U.S. 282, 297 (1977).

[4] 408 U.S. 238 (1972).

[5] *Dobbert*, 432 U.S. at 297.

time-barred prosecution."[6] The Court explained that a law extending a statute of limitations after it had lapsed falls within the second category of ex post facto laws laid out in *Calder*, a "law that aggravates a crime, or makes it greater than it was, when committed," because it "inflict[s] punishments, where the party was not, by law, liable to any punishment."[7]

ArtI.S9.C3.3.7 Civil Commitment, Sex Offender Registration, and Ex Post Facto Laws

Article I, Section 9, Clause 3:

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

The Supreme Court has rejected ex post facto challenges to sex offender registration laws and laws imposing civil commitment for "sexually violent predators," holding that such laws are not penal in nature. For instance, in *Kansas v. Hendricks*, the Court rejected an ex post facto challenge to a statute allowing for civil commitment of "sexually violent predators," in part because the statue was not punitive.[1] The Court held that the civil commitment statute did "not implicate either of the two primary objectives of criminal punishment: retribution or deterrence." On the contrary, the Court stated, "measures to restrict the freedom of the dangerously mentally ill" constituted "a legitimate nonpunitive governmental objective" and a "classic example of nonpunitive detention."[2] In *Seling v. Young*, the Court rejected a claim that a civil commitment statute was punitive and thus ex post facto as applied to a particular individual.[3] In *Smith v. Doe*, the Court denied an ex post facto challenge to the Alaska Sex Offender Registration Act.[4] The Court relied in part on *Hendricks* to analyze whether the challenged law was punitive, concluding that the registration statute was civil and non-punitive in both purpose and effect.[5]

ArtI.S9.C3.3.8 Procedural Changes and Ex Post Facto Laws

Article I, Section 9, Clause 3:

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

The Supreme Court has often, but not universally, denied ex post facto challenges to laws changing procedures in criminal trials. At times, the Court has suggested that the application of the Ex Post Facto Clauses depends on whether a challenged law is substantive or procedural, and that a procedural change cannot be ex post facto.[1] More recently, however, the Court has rejected a rigid distinction between substance and procedure and instead focused on whether a law falls within the four categories identified in *Calder v. Bull*.[2] Thus, in *Collins v.*

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[6] 539 U.S. 607, 632–33 (2003).

[7] *Id.* at 614–615.

[1] 521 U.S. 346, 360–61 (1997). The Court also held that the statute was not retroactive. *See* ArtI.S9.C3.3.3 Retroactivity of Ex Post Facto Laws.

[2] *Id.* at 361–63.

[3] 531 U.S. 250, 263 (2001).

[4] 538 U.S. 84, 95–106 (2003).

[5] *Id.*

[1] *See, e.g.*, Dobbert v. Florida, 432 U.S. 282, 293 (1977) ("Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto."); *cf.* Thompson v. Missouri, 171 U.S. 380, 388 (1898) ("[T]he statute is to be regarded as one merely regulating procedure, and may be applied to crimes committed prior to its passage without impairing the substantial guaranties of life and liberty that are secured to an accused by the supreme law of the land.").

[2] 3 U.S. 386, 390 (1798).

Youngblood, the Court held that "by simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause."[3]

The Supreme Court has explained, "[t]he inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed."[4] Rather, the legislature retains full authority to establish trial procedures, "subject only to the condition that [it] may not, under the guise of establishing modes of procedure and prescribing remedies, violate the accepted principles that protect an accused person against ex post facto enactments."[5] Thus, several Supreme Court cases have allowed the application of laws enacted after an offense that changed the place or mode of trial for that offense. For instance, in *Gut v. Minnesota*, the Court held that "[a]n ex post facto law does not involve, in any of its definitions, a change of the place of trial of an alleged offence after its commission."[6] In *Beazell v. Ohio*, the Court rejected an ex post facto challenge to a statute providing for criminal defendants jointly indicted for a felony to be tried jointly rather than separately.[7] In *Gibson v. Mississippi*, the Court rejected a challenge to a post-offense statute implementing new jury selection procedures.[8] In *Mallett v. North Carolina*, the Court denied an ex post facto challenge to a post-offense statute providing the state a right of appeal when a criminal defendant was granted a new trial.[9]

Under the fourth category identified in *Calder v. Bull*, a statute that alters the rules of evidence after an offense was committed so it is easier to convict an offender is ex post facto.[10] However, not every change to evidentiary procedures in criminal cases violates the Ex Post Facto Clauses. In *Thompson v. Missouri*, the Supreme Court rejected an ex post facto challenge to a post-offense statute that allowed prosecutors to introduce certain evidence related to the authenticity of a disputed letter in a murder trial.[11] The *Thompson* Court held that the statute did not fit within any of the *Calder* categories and was not "so unreasonable as materially to affect the substantial rights of one put on trial for crime."[12] In *Splawn v. California*, the Court rejected an ex post facto challenge to a post-offense statute that altered jury instructions related to the consideration of evidence in an obscenity trial.[13] The Court emphasized that the substantive criminal law governing the challenger's conduct "was in full force and effect at all times relevant to [the] conduct."[14] By contrast, the newly enacted statute did "not create any new substantive offense, but merely declare[d] what type of evidence may be received and

[3] 497 U.S. 37, 46 (1990).

[4] Gibson v. Mississippi, 162 U.S. 565, 590 (1896).

[5] *Id.*

[6] 76 U.S. 35, 38 (1870). *See also* Cook v. United States, 138 U.S. 157, 183 (1891); *cf.* Duncan v. Missouri, 152 U.S. 377, 382–83 (1894) (rejecting ex post facto challenge to state constitutional amendment separating the state supreme court into divisions and assigning certain cases to one division of the court).

[7] 269 U.S. 167, 169–70 (1925).

[8] 162 U.S. at 588–89.

[9] 181 U.S. 589, 593 (1901).

[10] 3 U.S. 386, 390 (1798).

[11] 171 U.S. 380, 381 (1898).

[12] *Id.* at 387. *See also id.* at 388 ("We cannot adjudge that the accused had any vested right in the rule of evidence which obtained prior to the passage of the Missouri statute, nor that the . . . statute entrenched upon any of the essential rights belonging to one put on trial for a public offense.").

[13] 431 U.S. 595, 599–600 (1977).

[14] *Id.* at 600.

considered."[15] Accepting a state court's conclusion that the new statute did not allow admission of previously inadmissible evidence, the Court held that the law was not ex post facto.[16]

Two cases about witness testimony illustrate the difference between laws that merely change trial procedures and those that alter the legal standards for conviction. In *Hopt v. Utah*, the Supreme Court denied an ex post facto challenge to a post-offense statute that allowed convicted felons to testify as witnesses in murder trials.[17] The Court held that the amendment did not fall within any of the *Calder* categories and that changes in the law that "only remove[ ] existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right."[18] The Court later distinguished *Hopt* in the 2000 case *Carmell v. Texas*.[19] In *Carmell*, the Court accepted an ex post facto challenge to a post-offense law that removed a requirement for corroborating evidence and authorized conviction of certain sexual offenses based on the victim's testimony alone.[20] Unlike in *Hopt*, the *Carmell* Court held that the challenged statute did not simply determine who was competent to testify but was instead "a sufficiency of the evidence rule" that lowered the burden to convict and thus fell within the fourth category of prohibited laws identified in *Calder*.[21]

ArtI.S9.C3.3.9 Employment Qualifications and Ex Post Facto Laws

Article I, Section 9, Clause 3:

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

The Supreme Court has heard multiple ex post facto challenges to laws that limit the ability of the challengers to engage in certain professions. The Court has struck down laws it deemed to impose employment bans as punishment for past conduct. For instance, in *Cummings v. Missouri*, the Court considered a challenge to a post-Civil War amendment to the Missouri Constitution that required persons engaged in certain professions to swear an oath that they had never been disloyal to the United States.[1] The Court held that the purpose and effect of the challenged amendment was to punish a group of individuals who had been disloyal to the United States, and the punishment they faced was effective exclusion from the covered professions.[2] The Court noted that some of the covered acts of disloyalty were crimes when they were committed, while some were not. The amendment violated the Ex Post Facto Clause in either case, whether by retroactively increasing the punishment for an existing offense or by imposing punishment for acts that were not offenses at the time they were committed.[3] The Court also held that the challenged provisions improperly "subvert[ed] the presumptions of innocence, and alter[ed] the rules of evidence" by "assum[ing] that the parties are guilty" and

[15] *Id.*

[16] *Id.* at 601.

[17] 110 U.S. 574, 589 (1884).

[18] *Id.* at 590.

[19] 529 U.S. 513, 531–53 (2000).

[20] *Id.* at 516.

[21] *Id.* at 545.

[1] 71 U.S. 277, 280–81 (1866).

[2] *Id.* at 320 (determining that the oath requirement "was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen").

[3] *Id.* at 327–28.

requiring them to "establish their innocence."[4] In *Ex parte Garland*, the Court relied on its reasoning in *Cummings* to strike down a similar federal law.[5]

By contrast, the Court has rejected ex post facto challenges to laws that it found imposed legitimate, non-punitive employment qualifications. In *Hawker v. New York*, the Court denied a challenge to a state statute that barred any person convicted of a felony from practicing medicine.[6] The Court concluded that the prohibition "is not to be regarded as a mere imposition of additional penalty, but as prescribing the qualifications for the duties to be discharged and the position to be filled."[7] The Court further explained that a state "may require both qualifications of learning and of good character" of those engaged in the practice of medicine, may determine "that one who has violated the criminal laws of the state is not possessed of sufficient good character," and "may make the record of a conviction conclusive evidence of the fact of the violation of the criminal law, and of the absence of the requisite good character."[8] For similar reasons, the Court in *Reetz v. Michigan* rejected an ex post facto challenge to a state law that imposed new professional registration requirements for doctors and prohibited the practice of medicine by unregistered persons.[9]

In *Garner v. Board of Public Works*, the Supreme Court considered ex post facto challenges to a provision of the Charter of the City of Los Angeles barring from public employment any person who within the last five years had been affiliated with a group that advocated the forceful overthrow of the government, and a city ordinance requiring public employees to state whether they had ever been members of the Communist Party.[10] The Court construed the challenged provisions to apply only after adoption of the Charter to "bar[ ] from the city's public service persons who . . . advise, advocate, or teach the violent overthrow of the Government or who are or become affiliated with any group doing so."[11] The Court held that "[t]he provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States."[12] It further held that the provisions were not ex post facto because, assuming that being fired for failure to satisfy the requirements constituted punishment, the conduct covered by the oath had been unlawful for years prior to imposition of the oath requirement, so the provisions did not operate to "impose[ ] punishment for past conduct lawful at the time it was engaged in."[13]

[4] *Id.* at 328.

[5] 71 U.S. 333, 377–78 (1867). *Cf.* Pierce v. Carskadon, 83 U.S. 234, 237–39 (1873) (striking down a law making access to certain court proceedings contingent on an affidavit that, among other things, "such defendant never voluntarily bore arms against the United States, the reorganized government of Virginia, or the State of West Virginia").

[6] 170 U.S. 189, 190–193 (1898). *See also* De Veau v. Braisted, 363 U.S. 144, 160 (1960) (plurality opinion) (rejecting an ex post facto challenge to a state law that prevented any person who had been convicted of a felony and had not been pardoned from serving as an officer or agent for certain labor organizations).

[7] *Hawker*, 170 U.S. at 200.

[8] *Id.* at 191.

[9] 188 U.S. 505, 510 (1903).

[10] 341 U.S. 716, 718–19 (1951).

[11] *Id.* at 720.

[12] *Id.* at 720–21.

[13] *Id.* at 721.

ArtI.S9.C3.3.10 Retroactive Taxes and Ex Post Facto Laws

Article I, Section 9, Clause 3:

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

The Supreme Court has generally rejected ex post facto challenges to laws imposing retroactive tax liability.[1] In *Kentucky Union Co. v. Kentucky*, the Court emphasized that not all retroactive laws are ex post facto, as the prohibition on ex post facto laws applies only to retroactive criminal laws.[2] The majority further opined: "Laws of a retroactive nature, imposing taxes or providing remedies for their assessment and collection, and not impairing vested rights, are not forbidden by the Federal Constitution."[3]

The Court has made clear, however, that the question of whether a law is a non-penal tax, and thus outside the scope of the Ex Post Facto Clauses, depends on how the statute functions rather than its formal classification by the legislature. In *Burgess v. Salmon*, the Court held that the retroactive application of a tax law that was enforceable through a fine and imprisonment was invalid on ex post facto grounds.[4] The Court cautioned that "the ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal."[5]

ArtI.S9.C3.3.11 Ex Post Facto Prohibition and Judicial Decisions

Article I, Section 9, Clause 3:

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

Multiple Supreme Court decisions have held that the Ex Post Facto Clauses apply only to federal and state legislation (including state constitutional amendments), not to judicial decisions.[1] In *Ross v. Oregon*, the Court declined to apply the prohibition on ex post facto laws to a court decision that interpreted a statute that had been in place at the time of the offense to the disadvantage of the defendant.[2] In *Frank v. Mangum*, the Court rejected an ex post facto challenge to a judicial decision that allegedly departed from precedent.[3] The Court explained that the state Ex Post Facto Clause "is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts."[4] Similarly, in *Marks v. United States*, the Court held that the federal Ex Post Facto Clause "is a limitation upon the powers of the Legislature . . . and does not of its own force apply to the Judicial Branch of government."[5]

Although the Judicial Branch is not bound by the Ex Post Facto Clauses, the Court has held that the Due Process Clause might similarly prevent a defendant from being convicted for

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[1] *See, e.g.*, Carpenter v. Pennsylvania, 58 U.S. 456, 463 (1855) (law retroactively imposing a tax on certain devises in a will was not ex post facto); Bankers Trust Co. v. Blodgett, 260 U.S. 647, 652 (1923) (upholding a state statute retroactively imposing an estate tax and imposing a 2% penalty for non-payment, holding that the penalty "was not in punishment of a crime, and it is only to such that the constitutional prohibition applies"). In *Locke v. City of New Orleans*, the Supreme Court denied an ex post facto challenge to a tax law, holding both that the law was not retroactive and that the Ex Post Facto Clause did not apply to the non-penal tax at issue. 71 U.S. 172, 173 (1866).

[2] 219 U.S. 140, 152 (1911).

[3] *Id.* at 152–53.

[4] 97 U.S. 381, 381, 385 (1878).

[5] *Id.*

[1] *See generally* Cummings v. Missouri, 71 U.S. 277 (1866).

[2] 227 U.S. 150, 161 (1913).

[3] 237 U.S. 309, 344–45 (1914).

[4] *Id.* at 344.

[5] 430 U.S. 188, 191 (1977) (citation omitted).

conduct that would not have been criminal but for an intervening court decision.[6] In *Bouie v. City of Columbia*, the Supreme Court held that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law" and "[i]f a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."[7] In *Rogers v. Tennessee*, the Court reiterated that while the Ex Post Facto Clause does not apply to the judiciary, "limitations on ex post facto judicial decisionmaking are inherent in the notion of due process."[8] However, the *Rogers* Court also held that the due process limitation on courts is not identical to the ex post facto prohibition that applies to legislation. The Court explained:

> The Ex Post Facto Clause, by its own terms, does not apply to courts. Extending the Clause to courts through the rubric of due process thus would circumvent the clear constitutional text. It also would evince too little regard for the important institutional and contextual differences between legislating, on the one hand, and common law decisionmaking, on the other.[9]

ArtI.S9.C3.3.12 Ex Post Facto Laws, Deportation, and Related Issues

Article I, Section 9, Clause 3:

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

Multiple Supreme Court cases have held that deportation proceedings are civil, not penal, in nature, and therefore are not subject to the federal Ex Post Facto Clause.[1] As one example, in *Harisiades v. Shaughnessy*, the Court considered ex post facto claims from several resident aliens who had been ordered deported based on their past membership in the Communist Party. The Court rejected the claims, holding in part:

> Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure. . . . 'Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want.'[2]

In *Galvan v. Press*, the Court considered another ex post facto claim by a former Communist Party member challenging his deportation.[3] The Court acknowledged the severe

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[6] *See, e.g.*, United States v. Marcus, 560 U.S. 258, 263 (2010) (holding that if a criminal defendant was erroneously convicted based on noncriminal conduct that preceded enactment of the relevant law, he would have a due process claim rather than an ex post facto claim).

[7] 378 U.S. 347, 353–354, (1964). *See also* Marks v. United States, 430 U.S. 188, 195–96 (1977) (applying *Bouie*); *but see* Splawn v. California, 431 U.S. 595 (1977) (rejecting application of *Bouie* where there was no "change in the interpretation of the elements of the substantive offense").

[8] 532 U.S. 451, 456 (2000).

[9] *Id.* at 460.

[1] Bugajewitz v. Adams, 228 U.S. 585, 609 (1913); Mahler v. Eby, 264 U.S. 32, 39 (1924); Marcello v. Bonds, 349 U.S. 302, 314 (1955).

[2] 342 U.S. 580, 594 (1952) (quoting *Bugajewitz*, 228 U.S. at 591). The Court also held that the challenged statute did not apply retroactively. *See id.* at 593; *see* ArtI.S9.C3.3.3 Retroactivity of Ex Post Facto Laws.

[3] 347 U.S. 522, 523 (1954).

consequences of deportation—even likening its "intrinsic consequences" to punishment for a crime—but ultimately chose to follow "the unbroken rule of this Court that [the Ex Post Facto Clause] has no application to deportation."[4]

In *Flemming v. Nestor*, the Supreme Court rejected an ex post facto challenge to a statute terminating federal old-age, survivor, and disability insurance benefits for individuals deported on certain grounds.[5] The Court deemed the challenged sanction to be "the mere denial of a noncontractual governmental benefit" and held that Congress could have reasonable, non-punitive reasons for "the disqualification of certain deportees from receipt of Social Security benefits while they are not lawfully in this country."[6] While the challenger argued that Congress was actually motivated by a punitive purpose, the Court stated that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground," and found no such proof with respect to the challenged statute.[7]

In *Johannessen v. United States*, the Supreme Court held that a statute providing for cancellation of United States citizenship obtained by fraud was not an ex post facto law.[8] The Court held that the "act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges."[9]

Clause 4—Direct Taxes

ArtI.S9.C4.1 Overview of Direct Taxes

Article I, Section 9, Clause 4:

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

Under Article I, Section 9, Clause 4 and Article I, Section 2, Clause 3[1] of the Constitution, direct taxes are subject to the rule of apportionment.[2] Though the Supreme Court has not clearly distinguished direct taxes from indirect taxes,[3] the Court has identified capitation taxes—a tax "paid by every person, 'without regard to property, profession, or any other

[4] *Id.* at 531.

[5] 363 U.S. 603, 604–05 (1960).

[6] *Id.* at 617.

[7] *Id.*

[8] 225 U.S. 227, 242–43 (1912).

[9] *Id.* at 242.

[1] U.S. Const. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."). The Fourteenth Amendment subsequently modified apportionment of Representatives. U.S. Const. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.").

[2] U.S. Const. art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken."); *Id.* art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .").

[3] Article I, Section 8, Clause 1 of the U.S. Constitution subjects duties, imposts, and excise taxes—collectively referred to as indirect taxes—to the rule of uniformity. U.S. Const. art. I, § 8, cl. 1. The rule of uniformity requires an indirect tax to operate in the same manner throughout the United States.

circumstance'"[4]—and taxes on real and personal property as direct taxes.[5] Under the rule of apportionment, Congress sets the total amount to be raised by a direct tax, then divides that amount among the states according to each state's population.[6] Thus, a state with one-twentieth of the Nation's population would be responsible for one-twentieth of the total amount of direct tax, without regard to that state's income or wealth levels.[7]

An 1861 federal tax on real property illustrates how the rule of apportionment operates.[8] Congress enacted a direct tax of $20 million.[9] After apportioning the direct tax among the states, territories, and the District of Columbia, the State of New York was liable for the largest portion of the tax, $2,603,918.67,[10] and the Territory of Dakota was liable for the least, $3,241.33.[11] The act called for the President to assign collection districts to states, territories, and the District of Columbia to apportion "to each county and State district its proper quota of direct tax"[12] and determine the amounts taxpayers in each collection district would be required to pay.[13]

The lack of clarity surrounding the meaning of a direct tax[14] and the Federal Government's desire for additional revenues ultimately contributed to the adoption in 1913 of the Sixteenth Amendment, which authorizes Congress to impose taxes on income without regard to the rule of apportionment.[15]

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[4] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 571 (2012) [hereinafter NFIB] (emphasis omitted) (citing Hylton v. United States, 3 U.S. 171, 175 (1796) (opinion of Chase, J.)).

[5] Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); Hylton v. United States, 3 U.S. 171 (1796); *see also NFIB*, 567 U.S. at 571 (holding that the individual mandate provision in the Patient Protection and Affordable Care Act was not a direct tax because it did "not fall within" any of the "recognized categor[ies]" of direct taxes, capitation taxes and taxes on real or personal property).

[6] *See*, *e.g.*, Act of Aug. 5, 1861, ch. 45, 12 Stat. 292; Act of Jan. 9, 1815, ch. 21, 3 Stat. 164.

[7] Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 Ariz. St. L.J. 1057, 1067 (2001). *See also Hylton*, 3 U.S. at 174.

[8] Act of Aug. 5, 1861, ch. 45, 12 Stat. 292, 294; *see also* Act of Jan. 9, 1815, ch. 21, 3 Stat. 164.

[9] Act of Aug. 5, 1861, ch. 45, 12 Stat. 292, 294.

[10] *Id.* at 295 ("To the State of New York, two million six hundred and three thousand nine hundred and eighteen and two-third dollars.").

[11] *Id.* at 296 ("To the Territory of Dakota, three thousand two hundred and forty-one and one-third dollars.").

[12] *Id.* at 301.

[13] *Id.* at 296 ("That, for the purpose of assessing the above tax and collecting the same, the President of the United States be, and he is hereby authorized, to divide, respectively, the States and Territories of the United States and the District of Columbia into convenient collection districts, and to nominate and, by and with the advice of the Senate, to appoint an assessor and a collector for each such district, who shall be freeholders and resident within the same."); *id.* at 302 ("[T]he said assessors, respectively, shall make out lists containing the sums payable according to the provisions of this act upon every object of taxation in and for each collection district; which lists shall contain the name of each person residing within the said district, owning or having the care or superintendence of property lying within the said district which is liable to the said tax.").

[14] In *National Federation of Independent Business v. Sebelius*, the Court noted that "[e]ven when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a "head tax" or a "poll tax"), might be a direct tax." Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012). *See also* 2 Records of the Federal Convention 350 (Max Farrand ed., 1911) ("Mr. King asked what was the precise meaning of *direct* taxation? No one answered.")

[15] U.S. Const. amend. XIV. *See* Amdt14.1 Overview of Fourteenth Amendment, Equal Protection and Rights of Citizens.

ArtI.S9.C4.2 Historical Background on Direct Taxes

Article I, Section 9, Clause 4:

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

The Framers' principal motivation for granting Congress the power to tax in the Constitution was to provide the National Government with a mechanism to raise a "regular and adequate supply"[1] of revenue and pay its debts.[2] Under the predecessor Articles of Confederation, the National Government had no power to tax and could not compel states to raise revenue for national expenditures.[3] The National Government could requisition funds from states to place in the common treasury, but, under the Articles of Confederation, state requisitions were "mandatory in theory" only.[4] State governments resisted these calls for funds.[5] As a result, the National Government raised "very little" revenue through state requisitions,[6] inhibiting its ability to resolve immediate fiscal problems, such as repaying its Revolutionary War debts.[7]

By contrast, the Constitution provides Congress with broad authority to lay and collect taxes. Article I, Section 8, Clause 1 of the Constitution—commonly known as the Taxing and Spending Clause[8]—empowers Congress "To lay and collect Taxes, Duties, Impost and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States;

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[1] The Federalist No. 30 (Alexander Hamilton).

[2] Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 Harv. L. Rev. 83, 89 (2012); *see* Veazie Bank v. Fenno, 75 U.S. 533, 540 (1869) ("The [National Government] had been reduced to the verge of impotency by the necessity of relying for revenue upon requisitions on the States, and it was a leading object in the adoption of the Constitution to relieve the government, to be organized under it, from this necessity, and confer upon it ample power to provide revenue by the taxation of persons and property."); Bruce Ackerman, *Taxation and the Constitution*, 99 Colum. L. Rev. 1, 6 (1999) ("The [Federalists] would never have launched their campaign against America's first Constitution, the Articles of Confederation, had it not been for its failure to provide adequate fiscal powers for the national government."); *see generally* The Federalist No. 30 (Alexander Hamilton) (advocating for a "General Power of Taxation").

[3] *See* Articles of Confederation of 1777, arts. II, VIII; Ackerman, *supra* 2, at 6 ("The Articles of Confederation stated that the 'common treasury . . . shall be supplied by the several States, in proportion to the value of all land within each State,' Articles of Confederation art. VIII (1781), but did not explicitly authorize the Continental Congress to impose any sanctions when a state failed to comply. This silence was especially eloquent in light of the second Article's pronouncement: 'Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by the confederation expressly delegated to the United States, in Congress assembled.'").

[4] Calvin H. Johnson, Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution, 15 (2005); *see* Articles of Confederation of 1777, art. VIII.

[5] Johnson, *supra* note 4, at 16 ("Some states simply ignored the requisitions. Some sent them back to Congress for amendment, more to the states' liking. New Jersey said it had paid enough tax by paying the tariffs or 'imposts' on goods imported through New York or Philadelphia and it repudiated the requisition in full.").

[6] Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195, 1202 (2012); *see*, *e.g.*, Johnson, *supra* note 4, at 15 ("In the requisition of 1786—the last before the Constitution—Congress mandated that states pay $3,800,000, but it collected only $663."); *see* Metzger, *supra* note 2, at 89 ("Under the Articles of Confederation, states had failed to meet congressional requisitions on a massive scale and Congress was bankrupt.").

[7] Johnson, *supra* note 4, at 16–17 ("Congress's Board of Treasury had concluded in June 1786 that there was 'no reasonable hope' that the requisitions would yield enough to allow Congress to make payments on the foreign debts, even assuming that nothing would be paid on the domestic war debt. . . . Almost all of the money called for by the 1786 requisition would have gone to payments on the Revolutionary War debt. French and Dutch creditors were due payments of $1.7 million, including interest and some payment on the principal. Domestic creditors were due to be paid $1.6 million for interest only. Express advocacy of repudiation of the federal debt was rare, but with the failure of requisitions, payment was not possible. . . . Beyond the repayment of war debts, the federal goals were quite modest. The operating budget was only about $450,000 . . . . Without money, however, the handful of troops on the frontier would have to be disbanded and the Congress's offices shut."); *see* Cooter & Siegel, *supra* note 6, at 1204.

[8] *See, e.g.*, United States v. Richardson, 418 U.S. 166, 169–70 (1974).

but all Duties, Imposts and Excises shall be uniform throughout the United States."[9] The U.S. Supreme Court has described Congress's power to tax as "very extensive."[10] Supreme Court Chief Justice Salmon P. Chase famously described the taxing power in the *License Tax Cases*:

> It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion.[11]

By proscribing direct taxes "unless in Proportion to the Census or enumeration herein" under Article I, Section 9, Clause 4, the Framers apportioned direct taxes consistent with how they apportioned representation in the House.[12] As James Madison noted in the *Federalist Papers*, linking tax liability to representation ensured that any advantage a state may have in enhancing its reported population size to increase its representation would be offset by its increased tax liability. Madison stated:

> As the accuracy of the census to be obtained by the Congress will necessarily depend, in a considerable degree on the disposition, if not the co-operation of the States, it is of great importance that the States should feel as little bias as possible, to swell or to reduce the amount of their numbers. Were their share of representation alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the States will have opposite interests, which will control and balance each other, and produce the requisite impartiality.[13]

ArtI.S9.C4.3 Early Jurisprudence on Direct Taxes

Article I, Section 9, Clause 4:

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

The Supreme Court first interpreted the Constitution's "direct tax" language shortly after the Nation's founding in *Hylton v. United States*.[1] *Hylton* presented the question of whether an

[9] U.S. Const. art. I, § 8, cl. 1; *see also id.* art. I, § 8, cl. 18 ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[10] License Tax Cases, 72 U.S. 462, 471 (1866); *see also* United States v. Kahriger, 345 U.S. 22, 28 (1953) ("It is axiomatic that the power of Congress to tax is extensive and sometimes falls with crushing effect . . . . As is well known, the constitutional restraints on taxing are few."); Brushaber v. Union Pac. R. Co., 240 U.S. 1, 12 (1916) ("That the authority conferred upon Congress by § 8 of article 1 'to lay and collect taxes, duties, imposts and excises' is exhaustive and embraces every conceivable power of taxation has never been questioned or, if it has, has been so often authoritatively declared as to render it necessary only to state the doctrine."); Austin v. Aldermen, 74 U.S. (7 Wall.) 694, 699 (1869) ("The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy."); *see generally* Veazie Bank v. Fenno, 75 U.S. 533, 540 (1869) (explaining "[N]othing is clearer, from the discussions in the [Constitutional] Convention and the discussions which preceded final ratification [of the Constitution] by the necessary number of States, than the purpose to give this power to Congress, as to the taxation of everything except exports, in its fullest extent.").

[11] *License Tax Cases*, 72 U.S. at 471.

[12] U.S. Const. art. I, § 2, Cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .").

[13] The Federalist No. 54 (James Madison).

[1] *Hylton*, 3 U.S. 171.

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unapportioned tax on carriages was a "direct tax," and therefore unconstitutional.[2] In three separate opinions, the deciding justices[3] each held that the tax was not "direct" within the meaning of the Constitution and suggested that the term "direct taxes" applied only to a narrow class of taxes that includes (1) capitation taxes[4] and (2) taxes on "land."[5]

In *Hylton*, the Supreme Court adopted a functional approach to determine whether a tax is direct, focusing on whether the tax at issue can be apportioned and, if so, whether apportionment would produce significant inequities among taxpayers.[6] As Justice Samuel Chase stated in his opinion, "If [a tax] is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say, that the Constitution intended such tax should be laid by that rule."[7] As the Court recently explained its holding in *Hylton*, the "Court upheld the tax, in part reasoning that apportioning such a tax would make little sense, because it would have required taxing carriage owners at dramatically different rates depending on how many carriages were in their home State."[8] The Court in *Hylton* did not, however, offer a comprehensive definition of the types of taxes that are "direct."[9]

The result of *Hylton* was not challenged until after the Civil War. A number of taxes imposed to meet the demands of that war were challenged as direct taxes. The Supreme Court, however, sustained successively as "excises" or "duties," a tax on an insurance company's receipts for premiums and assessments,[10] a tax on the circulating notes of state banks,[11] an inheritance tax on real estate,[12] and a general tax on incomes.[13] In the last case, *Springer v. United States,* the Court noted that it regarded the term "direct taxes" as meaning capitation taxes and taxes on land.[14] The Court stated: "Our conclusions are, that *direct taxes,* within the

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[2] *Id.* at 172. The tax at issue in *Hylton* imposed a specific yearly sum on carriages. Act of June 5, 1794, ch. 45, 1 Stat. 373, 374 (1794). The amount varied between one and ten dollars, depending on the type of carriage. *Id.* The tax exempted carriages used in husbandry or for the transportation of goods, wares, merchandise, produce, or commodities. *Id.*

[3] Only four of the six Justices who comprised the Supreme Court at the time participated in the *Hylton* argument—Associate Justices Samuel Chase, William Paterson, James Iredell, and James Wilson. Consistent with the Court's practice during that period, Justices Chase, Paterson, and Iredell each wrote a separate, or "seriatim," opinion holding the tax to be constitutional. *See Hylton*, 3 U.S. at 172–83; M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 Sup. Ct. Rev. 283, 303–11 (2007). Justice Wilson abstained from voting on the case because he had previously expressed an opinion on the issue while serving as a circuit court judge and because the unanimity of the remaining three participating Justices made his opinion unnecessary. *See Hylton*, 3 U.S. at 183–84.

[4] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 571 (2012) [hereinafter *NFIB*] (citing *Hylton*, 3 U.S. at 175 (opinion of Chase, J.)).

[5] *Hylton*, 3 U.S. at 174–75 (opinion of Chase, J.); *Id.* at 176–77 (opinion of Paterson, J.); *Id.* at 183 (opinion of Iredell, J.).

[6] *Id.* at 174 (opinion of Chase, J.); *Id.* at 179–80 (opinion of Paterson, J.); *Id.* at 181–83 (opinion of Iredell, J.).

[7] *Id.*

[8] *NFIB*, 567 U.S. at 570; *see Hylton*, 3 U.S. at 179 (opinion of Paterson, J.) ("A tax on carriages, if apportioned, would be oppressive and pernicious. How would it work? In some states there are many carriages, and in others but few. Shall the whole sum fall on one or two individuals in a state, who may happen to own and possess carriages? The thing would be absurd, and inequitable.").

[9] *Contra* Springer v. United States, 102 U.S. 586, 602 (1880) ("Our conclusions are, that *direct taxes, within the meaning of the Constitution, are only* capitation taxes, as expressed in that instrument, and taxes on real estate." (emphasis added)); *but see* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) (holding taxes on personal property are also direct taxes).

[10] Pacific Ins. Co. v. Soule, 74 U.S. (7 Wall.) 433 (1869).

[11] Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).

[12] Scholey v. Rew, 90 U.S. (23 Wall.) 331 (1875).

[13] Springer v. United States, 102 U.S. 586 (1881).

[14] *Id.* at 602.

meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate, and that the tax of which the plaintiff in error complains is within the category of an excise or duty."[15]

ArtI.S9.C4.4 Direct Taxes and the Sixteenth Amendment

Article I, Section 9, Clause 4:

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

In 1895, the Supreme Court expanded its interpretation of the meaning of direct taxes in its two decisions in *Pollock v. Farmers' Loan & Trust Co.*,[1] holding that taxes on real *and* personal property, and income derived from them, were direct taxes.[2] These decisions significantly altered the Court's direct tax jurisprudence. Considering whether an 1894 act that imposed unapportioned taxes on income derived from both real and personal property were direct taxes,[3] the Court adopted two primary holdings on the scope of the Constitution's "direct tax" clause. First, the Court held that taxes on real estate and personal property are direct taxes.[4] Second, the Court held that a tax on income *derived from* real or personal property—as opposed to income derived from employment or some other source[5]—is, in effect, a tax imposed directly on the property itself and is also a direct tax.[6] Applying these holdings, the Court held that the provisions before it were unconstitutional because they were unapportioned taxes on income derived from real and personal property.[7]

The *Pollock* Court concluded that its holding did not conflict with the Court's prior decisions interpreting the direct tax language.[8] The Court reasoned that each of those decisions had sustained unapportioned taxes as either "excises" or "duties" imposed on a particular use of, or privilege associated with, the property in question, not as a tax on the property itself.[9] As to *Hylton* specifically, the Court determined that it had upheld the unapportioned carriage tax as an "excise" on the "expense" or "consumption" of carriages, rather than as a tax on carriage ownership.[10]

After the *Pollock* decision, taxpayers challenged numerous taxes that Congress had treated as excises subject to the rule of uniformity as unconstitutional direct taxes. The Court,

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[15] *Id.* (emphasis retained).

[1] 158 U.S. 601 (1895) [hereinafter Pollock II]; 157 U.S. 429 [hereinafter Pollock I]. *Pollock* came to the Court twice. In *Pollock I*, the Court invalidated the tax at issue insofar as it was a tax upon income derived from real property, but the Court was equally divided on whether income derived from personal property was a direct tax. 157 U.S. at 583, 586. In *Pollock II*, on petitions for rehearing, the Court held that a tax on income derived from personal property was also a direct tax. 158 U.S. at 637. For simplicity, this essay refers to the two decisions collectively as the "*Pollock*" decision.

[2] *Pollock II*, 158 U.S. 601; *Pollock I*, 157 U.S. 429.

[3] *Pollock II*, 158 U.S. at 618; *Pollock I*, 157 U.S. at 558; *see* Act of Aug. 27, 1894, ch. 349, 28 Stat. 509.

[4] *Pollock II*, 158 U.S. at 628; *Pollock I*, 157 U.S. at 580–81.

[5] The Court stated that its holding did not extend to income or other gains derived from "business, privileges, or employments." *Pollock II*, 158 U.S. at 635.

[6] *Pollock I*, 157 U.S. at 581 ("An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income."); *Pollock II*, 158 U.S. at 628 (applying "the same reasoning . . . to capital in personalty held for the purpose of income, or ordinarily yielding income, and to the income therefrom").

[7] *Pollock II*, 158 U.S. at 637; *Pollock I*, 157 U.S. at 583.

[8] *Pollock II*, 158 U.S. at 626–27; *Pollock I*, 157 U.S. at 574–80.

[9] *Pollock II*, 158 U.S. at 626–27; *Pollock I*, 157 U.S. at 574–80.

[10] *Pollock II*, 158 U.S. at 627 ("What was decided in the *Hylton* Case was, then, that a tax on carriages was an excise, and therefore an indirect tax.").

however, distinguished taxes levied "because of ownership" or "upon property as such" from those laid upon "privileges."[11] The Court sustained as "excises" a tax on sales of business exchanges,[12] a succession tax construed to fall on the recipients of the property transmitted rather than on the estate of the decedent,[13] and a tax on manufactured tobacco in the hands of a dealer, after an excise tax had been paid by the manufacturer.[14] In *Thomas v. United States*,[15] the Court sustained a stamp tax on sales of stock certificates based on the definition of "duties, imposts and excises."[16] The Court explained that these terms "were used comprehensively to cover customers and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."[17] On the same day, the Court ruled in *Spreckels Sugar Refining Co. v. McClain*[18] that an exaction on the business of refining sugar and measured by gross receipts was an excise and properly levied under the rule of uniformity. Likewise, in *Flint v. Stone Tracy Co.,*[19] the Court held a tax on a corporation that was measured by income, including investment income, to be a tax on the privilege of doing business as a corporation rather than an income tax. Similarly, in *Stanton v. Baltic Mining Co.*[20], the Court held a tax on the annual production of mines "is not a tax upon property as such because of its ownership, but a true excise levied on the results of the business of carrying on mining operations."[21]

Pollock's holding and rationale were further limited in several respects.[22] Most prominently, Congress passed and the states ratified the Sixteenth Amendment in 1913 in direct response to *Pollock*'s prohibition on the unapportioned taxation of income derived from real or personal property.[23] The Sixteenth Amendment authorized Congress "to lay and collect taxes on incomes, *from whatever source derived*, without apportionment among the several states."[24] Further, while the Court in *Pollock* held that a tax on income derived from property was indistinguishable from a tax on the property itself, the Court later rejected that reasoning in *Stanton v. Baltic Mining Company*, upholding an unapportioned tax on a mine's income as being "not a tax upon property as such . . . , but a true excise levied on the results of the business of carrying on mining operations."[25] The Court opined:

> [T]he Sixteenth Amendment conferred no new power of taxation but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived,

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[11] Stanton v. Baltic Mining Co., 240 U.S. 103 (1916); Knowlton v. Moore, 178 U.S. 41, 80 (1900).

[12] Nicol v. Ames, 173 U.S. 509 (1899).

[13] *Knowlton*, 178 U.S. at 41.

[14] Patton v. Brady, 184 U.S. 608 (1902).

[15] 192 U.S. 363 (1904).

[16] *Id.* at 369.

[17] *Id.* at 370.

[18] 192 U.S. 397 (1904)

[19] 220 U.S. 107 (1911).

[20] 240 U.S. 103 (1916).

[21] *Stanton*, 240 U.S. at 114 (citing Stratton's Independence v. Howbert, 231 U.S. 399 (1913)).

[22] Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 Ariz. St. L.J. 1057, 1073 (2001).

[23] *Id.*; Boris I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government*, 41 Tax Law. 3 (1987).

[24] U.S. Const. amend. XVI (emphasis added).

[25] 240 U.S. 103, 112–14 (1916).

> that is by testing the tax not by what it was—a tax on income, but by a mistaken theory deduced from the origin or source of the income taxed.[26]

Despite these developments, the Supreme Court has not expressly overruled *Pollock*'s central holding that a tax on real or personal property solely because of its ownership is a direct tax.[27] In 1920, the Court relied on *Pollock* in *Eisner v. Macomber* to hold an unapportioned tax on shares issued as stock dividends unconstitutional.[28] There, the Court addressed whether a corporation's issuance of additional shares to a stockholder as stock dividends was "income" under the Sixteenth Amendment and, if not, whether a tax on those unrealized gains was a direct tax.[29] After concluding that the stock dividends were not "income,"[30] the Court relied on *Pollock* to conclude that the tax was a direct tax.[31]

The *Eisner* Court determined that the limitation on Congress's taxing power identified in *Pollock* "still has an appropriate and important function . . . not to be overridden by Congress or disregarded by the courts."[32] The Court observed that the Sixteenth Amendment must be "construed in connection with the taxing clauses of the original Constitution and the effect attributed to them," including *Pollock*'s holding that "taxes upon property, real and personal," are direct taxes.[33] Applying that limitation, the Court held that the tax before it was unconstitutional because it was an unapportioned tax on personal property.[34]

In the Supreme Court's 2012 decision, *National Federation of Independent Business v. Sebelius,* the Supreme Court upheld the Affordable Care Act individual mandate, known as a "shared responsibility payment," as a tax under Article I, Section 8, Clause 1 of the Constitution.[35] In its ruling, the Court explained that the individual mandate was not a direct tax subject to the rule of apportionment. The Court stated:

> A tax on going without health insurance does not fall within any recognized category of direct tax. It is not a capitation. Capitations are taxes paid by every person "without regard to property, profession or *any other circumstance.*" The whole point of the shared responsibility payment is that it is triggered by specific circumstances—earning a certain amount of income but not obtaining health insurance. The payment is also

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[26] *Id.* at 112–13 (citing Brushaber v. Union Pac. R.R., 240 U.S. 1 (1916)).

[27] *See* Union Elec. Co. v. United States, 363 F.3d 1292, 1299 (Fed. Cir. 2004) ("We agree that *Pollock* has never been overruled, though its reasoning appears to have been discredited."); *see also NFIB*, 567 U.S. at 571 ("In 1895, [in *Pollock II*,] we expanded our interpretation [of direct taxes] to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax. That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes" (citations omitted)).

[28] Eisner v. Macomber, 252 U.S. 189, 219 (1920).

[29] *Id.* at 201–19.

[30] *Id.* at 201–17. *Eisner* defined "income" as "the gain derived from capital, labor, or from both combined." *Id.* at 207 (internal quotation marks omitted).

[31] 252 U.S. at 218–19.

[32] *Id.* at 206.

[33] *Id.* at 205–06; *id.* at 218–19.

[34] *Id.* at 219. In 1921, the Court sustained an estate tax as an excise in *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). The Court further held that including certain property in computing an estate tax does not constitute a direct tax on the following such property: (1) property held as joint tenants or as tenants by the entirety; or (2) the entire value of community property owned by a husband and wife; or (3) life insurance proceeds. Philips v. Dime Trust & S.D. Co., 284 U.S. 345, 349 (1921) (joint tenants); Tyler v. United States, 281 U.S. 497 (1930) (tenants by the entirety); Fernandez v. Wiener, 326 U.S. 340 (1945) (community property); Chase Nat'l Bank v. United States, 278 U.S. 327 (1929) (insurance proceeds); United States v. Manufacturers Nat'l Bank, 363 U.S. 194, 198–201 (1960) (insurance proceeds). Similarly, the Court upheld a graduated tax on gifts as an excise, saying that it was "a tax laid only upon the exercise of a single one of those powers incident to ownership, the power to give the property owned to another." Bromley v. McCaughn, 280 U.S. 124, 136 (1929). *See also* Helvering v. Bullard, 303 U.S. 297 (1938).

[35] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

plainly not a tax on the ownership of land or personal property. The shared responsibility payment is thus not a direct tax that must be apportioned among the several States.[36]

The Supreme Court further explained that direct taxes are capitation taxes, real estate taxes, and personal property taxes.[37] While income taxes are also direct taxes under *Pollock*, adoption of the Sixteenth Amendment,[38] as discussed above, amended the Constitution to permit the federal government to tax income.

Clause 5—Exports

ArtI.S9.C5.1 Export Clause and Taxes

Article I, Section 9, Clause 5:

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

Article 1, Section 9, Clause 5 of the U.S. Constitution prohibits Congress from laying taxes and duties on articles exported from any state.[1] Known as the Export Clause,[2] it applies to taxes and duties, not user fees.[3] The Supreme Court has interpreted the Export Clause to address shipments only to foreign countries, not shipments to unincorporated territories, such as Puerto Rico and the Commonwealth of the Northern Mariana Islands.[4] The Court has also

[36] *Id.* at 571.

[37] *Id.*

[38] *See* Amdt16.1 Overview of Sixteenth Amendment, Income Tax.

[1] U.S. Const. art. I, § 8, cl. 1; *see, e.g.*, United States v. U.S. Shoe Corp., 523 U.S. 360 (1998) (holding an ad valorem tax directly imposed on the value of cargo loaded at U.S. ports for export violated the Export Clause).

[2] *See, e.g., U.S. Shoe*, 523 U.S. at 362.

[3] *Id.* at 363 ("The [Export] Clause, however, does not rule out a 'user fee,' provided that the fee lacks the attributes of a generally applicable tax or duty and is, instead, a charge designed as compensation for government-supplied services, facilities, or benefits." (citing Pace v. Burgess, 92 U.S. 372 (1876))). In general, a user fee is a charge imposed on the user of a government service with the primary purpose of offsetting the costs of that government service. *See, e.g.*, Pace v. Burgess, 92 U.S. 372, 375–76 (1876) ("The stamp [tax] was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and secure the faithful carrying out of the declared intent with regard to the tobacco so marked. The payment of twenty-five cents or of ten cents for the stamp used was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo. It bore no proportion whatever to the quantity or value of the package on which it was affixed. These were unlimited, except by the discretion of the exporter or the convenience of handling. . . . We know how next to impossible it is to prevent fraudulent practices wherever the internal revenue is concerned . . . . The proper fees accruing in the due administration of the laws and regulations necessary to be observed to protect the government from imposition and fraud likely to be committed under pretence of exportation are in no sense a duty on exportation. They are simply the compensation given for services properly rendered. . . . [W]e cannot say that the charge imposed is excessive, or that it amounts to an infringement of the [Export Clause]. We cannot say that it is a tax or duty instead of what it purports to be, a fee or charge, for the employment of that instrumentality which the circumstances of the case render necessary for the protection of the government.").

[4] Dooley v. United States, 183 U.S. 151, 153–54 (1901); *see also* Swan & Finch Co. v. United States, 190 U.S. 143, 144–45 (1903) (explaining "'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country"); *see generally* Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797, 800 (2005) (explaining the U.S. Supreme Court's doctrine of territorial incorporation "divided domestic territory . . . into two categories: those places 'incorporated' into the United States and forming an integral part thereof (including the states, the District of Columbia, and the 'incorporated territories'); and those places not incorporated into the United States, but merely 'belonging' to it (which came to be known as the 'unincorporated territories')").

construed the Export Clause as requiring "not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens" the process of exporting.[5]

For example, in *United States v. IBM*, the Supreme Court held that an excise tax[6] on insurance premiums paid to foreign insurers for policies insuring exported goods was unconstitutional under the Export Clause.[7] In *IBM*, the parties agreed that the facts and issue before the Court were largely indistinguishable from an earlier case, *Thames & Mersey Marine Insurance Co. v United States*,[8] in which the Court held that a tax on insuring exports was "functionally the same" as a tax on exports.[9] Applying stare decisis principles, the Court declined to overrule *Thames & Mersey Marine Insurance* absent additional briefing from the parties on whether the insurance policies subject to the excise tax were "so closely connected to the goods that the tax is, in essence, a tax on exports."[10]

The Supreme Court has ruled that the Export Clause's restriction on Congress's taxing power does not extend to several taxes, such as a tax on all property alike, including property intended for export but not in the "course of exportation"[11]; a nondiscriminatory tax on an exporter's income;[12] and a stamp tax to identify goods intended for export.[13] The Court,

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[5] Fairbank v. United States, 181 U.S. 283, 293 (1901). *See* William E. Peck & Co. v. Lowe, 247 U.S. 165, 173 (1918) ("And the court has indicated that where the tax is not laid on the articles themselves while in course of exportation the true test of its validity is whether it 'so directly and closely' bears on the 'process of exporting' as to be in substance a tax on the exportation." (quoting Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19, 25 (1915))). *See also* A.G. Spaulding & Bros. v. Edwards, 262 U.S. 66, 69–70 (1923).

[6] Fernandez v. Wiener, 326 U.S. 340, 352 (1945) (an excise tax is a tax laid "upon particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property").

[7] United States v. IBM, 517 U.S. 843, 854–56 (1996).

[8] 237 U.S. 19, 27 (1915) (holding "proper insurance during the voyage is one of the necessities of exportation" and that "the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves").

[9] *IBM*, 517 U.S. at 850, 854. *See also id.* at 846 ("We have had few occasions to interpret the language of the Export Clause, but our cases have broadly exempted from federal taxation not only export goods, but also services and activities closely related to the export process. At the same time, we have attempted to limit the term 'Articles exported' to permit federal taxation of pre-export goods and services.").

[10] *Id.* at 855–56; *see id.* at 855 ("[T]he marine insurance policies in *Thames & Mersey* arguably 'had a value apart from the value of the goods.' Nevertheless, the Government apparently has chosen not to challenge that aspect of Thames & Mersey in this case. When questioned on that implicit concession at oral argument, the Government admitted that it 'chose not to' argue that [the excise tax] does not impose a tax on the goods themselves.") (citations omitted).

[11] Turpin v. Burgess, 117 U.S. 504, 507 (1886) ("But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition. . . . In the present case, the tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation; they might never be exported; whether they would be or not would depend altogether on the will of the manufacturer."). *See also* Cornell v. Coyne, 192 U.S. 418, 427 (1904) ("The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated.").

[12] William E. Peck & Co. v. Lowe, 247 U.S. 165, 174–75 (1918) (holding the Export Clause did not shield an exporter from an income tax laid generally on net incomes because the tax was laid on the exporter's income from exportation).

[13] Pace v. Burgess, 92 U.S. 372, 376 (1876) (finding the "stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected" and that "[a] stamp may be used, and, in the case before us, we think it is used, for quite a different purpose from that of imposing a tax or duty: indeed, it is used for the very contrary purpose,—that of securing exemption from a tax or duty"). *See also* Turpin v. Burgess, 117 U.S. 504, 505 (1886) ("[T]he tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation, they might never be exported, whether they would be or not would depend altogether on the will of the manufacturer. Had the same excise which was laid upon all other tobacco manufactured by the plaintiffs been laid on the tobacco in question, they could not have complained. But it was not. A special indulgence was granted to them (in common with the others), in reference to the particular tobacco which they declared it to be their intention to export. With regard to

however, has held that stamp taxes imposed on foreign bills of lading;[14] charter parties, which "were exclusively for the carriage of cargo from state ports to foreign ports";[15] or marine insurance policies[16] were in effect taxes or duties upon exports, and so void.

The Supreme Court has also held that refunds for taxes collected in violation of the Export Clause are subject to the the general tax refund scheme adopted by Congress.[17] The Court stated: "We therefore hold that the plain language of 26 U.S.C. §§ 7422(a) and 6511 requires a taxpayer seeking a refund for a tax assessed in violation of the Export Clause, just as for any other unlawfully assessed tax, to file a timely administrative refund claim before bringing suit against the Government."[18] The Court reasoned that this was necessary so that "allegations of taxes unlawfully assessed—whether the asserted illegality is based upon the Export Clause or any other provision of law—are processed in an orderly and timely manner, and that costly litigation is avoided when possible."[19]

Clause 6—Ports

ArtI.S9.C6.1 No-Preference Clause for Ports

Article I, Section 9, Clause 6:

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

The No-Preference Clause was designed to prevent preferences between ports because of their location in different states. Discriminations between individual ports are not prohibited. Acting under the Commerce Clause, Congress may do many things that benefit particular ports and that incidentally result to the disadvantage of other ports in the same or neighboring states. It may establish ports of entry, erect and operate lighthouses, improve rivers and harbors, and provide structures for the convenient and economical handling of traffic.[1] A rate order of the Interstate Commerce Commission that allowed an additional charge to be made for ferrying traffic across the Mississippi to cities on the east bank of the river was sustained over the objection that it gave an unconstitutional preference to ports in Texas.[2] Although there were a few early intimations that this Clause was applicable to the states as well as to Congress,[3] the Supreme Court declared emphatically in 1886 that state legislation was

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that, in order to identify it, and to protect the government from fraudulent practices, all that was required of the plaintiffs was to affix a 25 cent stamp of a peculiar design to each package, no matter how much it might contain, and enter into bond either to export it according to the declared intention, or to pay the regular tax, if it should not be exported.").

[14] Fairbank v. United States, 181 U.S. 283 (1901).

[15] United States v. Hvoslef, 237 U.S. 1, 13 (1915). The Court stated that "[a] tax on these charter parties was in substance a tax on the exportation; and a tax on the exportation is a tax on the exports." *Id.* at 17.

[16] Thames & Mersey Inc. v. United States, 237 U.S. 19 (1915).

[17] United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1 (2008).

[18] *Id.* at 23.

[19] *Id.* at 19.

[1] Louisiana PSC v. Texas & N.O. R.R., 284 U.S. 125, 131 (1931); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 433 (1856); South Carolina v. Georgia, 93 U.S. 4 (1876). In *Williams v. United States,* 255 U.S. 336 (1921), the argument that an act of Congress which prohibited interstate transportation of liquor into states whose laws prohibited manufacture or sale of liquor for beverage purposes was repugnant to this Clause was rejected.

[2] Louisiana PSC v. Texas & N.O. R.R., 284 U.S. 125, 132 (1931).

[3] Passenger Cases (Smith v. Turner), 48 U.S. (7 How.) 283, 414 (1849) (opinion of Justice Wayne); *cf.* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 314 (1851).

unaffected by it.[4] After more than a century, the Court confirmed, over the objection that this Clause was offended, the power that the First Congress had exercised[5] in sanctioning the continued supervision and regulation of pilots by the states.[6]

Clause 7—Appropriations

ArtI.S9.C7.1 Overview of Appropriations Clause

Article I, Section 9, Clause 7:

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

The Appropriations Clause establishes a rule of law to govern money contained in "the Treasury," which is a term that describes a place where public revenue is deposited and kept and from which payments are made to cover public expenses.[1] As the Supreme Court has explained, that rule of law directs "that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."[2] The Clause has roots in the practice of English parliaments, dating from at least the 1690s, of legislating both the means of raising public revenue and also dedicating, or appropriating, newly raised sums to particular purposes. State constitutions adopted after Independence continued this practice, in most instances expressly identifying an appropriation as a necessity for drawing funds from a state treasury. The proposition that a legislature should control the disbursement of public funds appears to have become so firmly rooted by the late 1780s that the Appropriations Clause itself attracted relatively little debate either in the Constitutional Convention where it was drafted or in the state conventions where it was ratified.[3]

Strictly speaking, the Appropriations Clause does not confer a distinct legislative power upon Congress, on the order of those powers enumerated in Article I, Section 8. Instead, the Clause is phrased as a limitation on government action.[4] Thus, the Supreme Court's cases explain that any exercise of a power granted by the Constitution to the Judiciary or to the Executive is "limited by a valid reservation of congressional control over funds in the Treasury."[5] For instance, the Court has held federal courts may not enter, and Executive Branch officials may not pay, money judgments against the United States for which there is no appropriation. However, the Court's cases also explain that Congress may not dictate that

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[4] Morgan v. Louisiana, 118 U.S. 455, 467 (1886). *See also* Munn v. Illinois, 94 U.S. 113, 135 (1877); Johnson v. Chicago & Pacific Elevator Co., 119 U.S. 388, 400 (1886).

[5] 1 Stat. 53, 54, § 4 (1789).

[6] Thompson v. Darden, 198 U.S. 310 (1905).

[1] *See Treasury*, Black's Law Dictionary (11th ed. 2019); *see also* Samuel Johnson, *Treasury*, A Dictionary of the English Language (10th ed. 1792) ("A place in which riches are accumulated."); *see also* United States v. Bank of Metropolis, 40 U.S. 377, 403 (1841) (describing the "Treasury of the United States" as the place "where its money is directed by law to be kept").

[2] Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937).

[3] *See* ArtI.S9.C7.2 Historical Background on Appropriations Clause.

[4] *Compare, e.g.*, U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."), *with id* art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

[5] Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 425 (1990).

funds are available subject to a limitation that is itself unconstitutional. The Court has thus disregarded a funding limitation enacted by Congress because the limitation constituted, for example, a Bill of Attainder.[6]

ArtI.S9.C7.2 Historical Background on Appropriations Clause

Article I, Section 9, Clause 7:

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

The Appropriations Clause makes part of American constitutional law a regular practice of British Parliaments dating from at least the Glorious Revolution of the late seventeenth century. Parliament's function of granting its consent to raise revenue as a supplement to the Monarch's ordinary revenue sources had by then been an established and powerful tool.[1] However, prior to the Glorious Revolution, Parliament does not seem to have regularly directed its attention to decisions of how voted sums would be used.[2] The view of King Charles II's chief ministers in the decades prior to the Glorious Revolution, for example, was that the Monarch was the "master of his own money" and that his ministers had discretion to apply voted sums "to defray any casual expenses, of any nature" whatsoever.[3] The ministers viewed a 1665 supply bill passed by the House of Commons, for example, as "not fit for [a] monarchy" because it included a clause of appropriation, that is, legislative language stating that sums the bill raised could be used only for the costs of war against the Dutch Republic.[4] However, when King William III and Queen Mary II jointly assumed the throne in 1689, they recognized Parliament's power to legislate supply and expenditure.[5] Thereafter, clauses of appropriations became common features of parliamentary legislation.[6]

When the American states framed new systems of government after Independence, most state constitutions made legislative authorization a prerequisite for drawing any funds from a

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[6] *See* ArtI.S9.C7.3 Appropriations Clause Generally.

[1] *See* 1 William Blackstone, Commentaries *271, *296–97 (distinguishing between the Monarch's ordinary revenue, meaning revenue sources that belonged to the Monarch by long-standing custom, and extraordinary revenues, defined as the "aids, subsidies, and supplies" periodically granted by Parliament to supplement ordinary revenues).

[2] *See, e.g.*, 3 John Hatsell, Precedents of Proceedings in the House of Commons 203 (1818) (dating regular use of clauses of appropriation to 1688). However, members of Parliament maintained that they had the authority to legislate expenditure decisions even before the practice became more common. *See* 3 Anchitell Grey, Debates of the House of Commons 446–47 (1763) (statement of William Sacheverell, M.P.) (asserting, during 1675 debate in the Grand Committee of Supply, precedent for clauses of appropriation in supply bills dating from the 13th century).

[3] 3 Edward Hyde,The Life of Edward Earl of Clarendon 17 (1827).

[4] *Id.* at 10–11, 13. The clause passed the House of Commons, on Lord High Chancellor Clarendon's telling, because to that point King Charles II had lent it his support, relying on the faulty advice of its proponents. *Id.* at 11. After the House of Lords received the bill, near when Parliament was to be prorogued, the King heard debate over its merits. *Id.* at 14–22. The King left the debate "unsatisfied" but gave the bill his assent because there was not enough time left in the session to correct the allegedly troublesome clause. *See id.* at 22; *see also* 17 Car. II, c. 1 (1665), *reprinted in* 5 Statutes of the Realm 573 (John Raithby ed., 1819) (reciting that "noe moneyes leavyable by this Act be issued out of the Exchequer dureing this Warr but by such Order or Warrant mentioning that the moneyes payable by such Order or Warrant are for the service of Your Majestie in the said Warr respectively").

[5] *See* Bill of Rights of 1689, 1 W. & M., 2d sess., c.2 (1688) (dated under the Old Style calendar), *reprinted in* 6 Statutes of the Realm 143 (John Raithby ed., 1819) (listing among Parliament's ancient rights and liberties the rule that "levying Money for or to the Use of the Crowne" by pretense "of Prerogative without Grant of Parlyament for longer time or in other manner then the same is or shall be granted is Illegall").

[6] *See* 3 Hatsell, *supra note* note 2 at 202–05 (stating that between 1689 and the early 1800s Parliament's general practice was to specify "the particular sums which they thought necessary to be applied to the different services they had voted in the course of the session").

state treasury.[7] No state constitution in effect in 1787 expressly allowed a person to draw money from the state treasury without legislative authorization.[8] The states framed the Articles of Confederation to include a similar appropriating function for the Confederation Congress,[9] albeit one that drew from a common treasury supplied by taxes laid and levied by states rather than by the Confederation Congress itself.[10]

Perhaps owing to the pedigree then enjoyed by the view that a legislature should be solely endowed with the authority to identify the purposes for which public money may be spent, the Appropriations Clause itself attracted little debate at the Constitutional Convention of 1787. The Framers debated only whether the Senate—then conceived as a body whose members the states would elect—would have the power to originate or amend, among others, appropriations bills.[11] The first proposal in the Convention that mentioned Congress's appropriations function stated that "all Bills for raising or appropriating money" shall "originate in the first Branch of the Legislature, and shall not be altered or amended by the second Branch. . . ."[12] This first proposal continued: "and that no money shall be drawn from the public Treasury but in pursuance of appropriations to be originated in the first Branch."[13] The delegates ultimately removed limitations on Senate origination and amendment of appropriations bills in the Constitution before submitting the Constitution to the states for ratification.[14]

The Appropriations Clause occasionally figured in arguments advanced on either side of ratification. Those favoring ratification cited the Clause as a way to ensure that expenditure decisions would be made by legislators, the officials who under the new Constitution would be most accountable to the people.[15] Proponents also argued that the Clause would check

[7] *See* Del. Const. of 1776, art. VII (providing for the appointment of a "chief magistrate" empowered to "draw for such sums of money as shall be appropriated by the general assembly, and be held accountable to them for the same"); Md. Const. or Form of Gov't of 1776, at X – XI (specifying that the House of Delegates would originate all "money bills," a term defined to include all bills "appropriating money in the treasury" or otherwise providing supplies "for the support of the government"); Mass. Const. of 1780, ch. 2, § 1, art. XI ("No moneys shall be issued out of the treasury of this Commonwealth, and disposed of . . . but by warrant, under the hand of the Governour for the time being, with the advice and consent of the council, for the necessary defence and support of the Commonwealth; and for the protection and preservation the inhabitants thereof, agreeably to the act and resolves of the general court."); N.H. Const. of 1783, pt. 2, *reprinted in* The Perpetual Laws of the State of New-Hampshire 16 (John Melcher ed., 1789) (substantially similar language to that of Massachusetts Constitution of 1780); N.C. Const. of 1776, § 19 ("That the governor for the time being, shall have the power to draw for and apply such sums of money as shall be voted by the general assembly for the contingencies of government, and be accountable to them for the same"); Pa. Const. of 1776, § 20 (providing that the president and the president's council "may draw upon the treasury for such sums as shall be appropriated by the house"); S.C. Const. of 1778, art. XVI (directing that no "money be drawn out of the public treasury but by the legislative authority of the state").

[8] The constitutions of Georgia, New Jersey, New York, and Virginia, in effect in 1787, did not expressly refer to the making of appropriations. *See* Ga. Const. of 1777; NJ. Const. of 1776; N.Y. Const. of 1777; Va. Const. of 1776. Rhode Island and Connecticut "retained their colonial charters with only minor modifications as their fundamental law into the nineteenth century." G. Alan Tarr, Understanding States Constitutions 60 (1998).

[9] Articles of Confederation of 1781, art. IX, para. 5 (granting the Confederation Congress the power to "ascertain the necessary sums of Money to be raised for the service of the united states, and to appropriate and apply the same for defraying the public expenses").

[10] *Id.* art. VIII.

[11] 1 The Records of the Federal Convention of 1787, at 544–45 (Max Farrand ed. 1911).

[12] *Id.* at 524.

[13] *Id.*

[14] 2 The Records of the Federal Convention of 1787, at 545, 552 (Max Farrand ed. 1911).

[15] *See, e.g.*, 2 The Documentary History of the Ratification of the Constitution: Pennsylvania 417 (Merrill Jensen ed., 1976) (Nov. 28, 1787 convention statement of Thomas McKean) (contending that because the Appropriations Clause would settle responsibility for disbursements on Congress and the Statements and Accounts Clause would require disclosure of disbursements, the people could "judge of the conduct of their rulers and, if they see cause to object to the use or the excess of the sums raised, they may express their wishes or disapprobation to the legislature in petitions or remonstrances"); 6 The Documentary History of the Ratification of the Constitution: Massachusetts 1322 (John P. Kaminski et al. eds., 2000) (similar argument in January 23, 1788 convention statement of James Bowdoin); *see also*

Executive power[16] and guard against waste of public funds.[17] Those opposing ratification of the Constitution as proposed drew unfavorable comparisons between the original text of the Appropriations Clause, which would have barred the Senate from amending or originating bills making appropriations, and the version submitted to the states for ratification, which made the Senate an equal partner to the House of Representatives in authorizing expenditures.[18]

ArtI.S9.C7.3 Appropriations Clause Generally

Article I, Section 9, Clause 7:

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

The Supreme Court has construed the Appropriations Clause in relatively few cases, concluding that the requirement for an "appropriation made by law" to prohibit conduct that would result in disbursements of public funds for which an appropriation was lacking. The Court has explained in cases involving the claims of private parties, for example, that a judgment requiring payment to a person asserting a claim against the United States could not be entered in that person's favor without an appropriation to pay the judgment.[1] In *Knote v. United States*, the Court decided that an appropriation would likewise be needed for a court to order the return of the proceeds of seized property that had been paid into the Treasury.[2] Prior to entry of judgment, the Appropriations Clause also shapes the legal doctrines that courts

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Brutus, Virginia J. (Dec. 6, 1787), *reprinted in* 8 The Documentary History of the Ratification of the Constitution: Virginia 215 (John P. Kaminski et al. eds., 1988) (excerpted response to George Mason's objections to the Constitution) (pointing to the Appropriations Clause as requiring that "any evils which may arise from an improper application of the public money must either originate with, or have the assent of the immediate Representatives of the people").

[16] *See* An Impartial Citizen, in Petersburg Virginia Gazette (Jan. 10, 1788), *reprinted in* 8 The Documentary History of the Ratification of the Constitution: Virginia 295 (John P. Kaminski et al. eds., 1988) (arguing that because, among other things, the President could not "appropriate the public money to any use, but what is expressly provided by law," the President's constitutional powers would leave "dignity enough for the execution" of the office "without the possibility of making a bad use of it").

[17] *See* A Native of Virginia, Observations upon the Proposed Plan of Federal Government (Apr. 2, 1788), *reprinted in* 9 The Documentary History of the Ratification of the Constitution: Virginia 676 (John P. Kaminski et al. eds., 1990) ("As all appropriations of money are to be made by law, and regular statements thereof published, no money can be applied but to the use of the United States.").

[18] *See, e.g.*, George Mason, Objections to the Proposed Federal Constitution (1787), *reprinted in* Pamphlets on the Constitution of the United States Published During Its Discussion by the People, 1787–1788, at 329 (Paul Leicester Ford ed., 1888) [hereinafter Pamphlets on the Constitution] (pointing to the Senate's composition powers, including its ability to alter money bills and originate appropriations, to argue that the Senate would "destroy any balance in the government"); *but see* James Iredell, Answers to Mr. Mason's Objections to the New Constitution, Recommended by the Late Convention (1788), *reprinted in* Pamphlets on the Constitution, at 340–41 (arguing that the Senate should have a role in offering and amending appropriations because the House of Representatives might overlook a needed appropriation and the House would be able to check the Senate's power by withholding its assent to appropriations proposed in the upper chamber).

[1] Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1851) ("[N]o mandamus or other remedy lies against any officer of the Treasury Department, in a case situated like this, where no appropriation to pay it has been made.").

[2] *See* 95 U.S. 149, 154 (1877) (explaining that "if the proceeds" of condemned and sold property "have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress"); *see also* Republic Nat. Bank v. United States, 506 U.S. 80, 94–96 (1992) (Rehnquist, C.J., opinion of the Court) (reading *Knote* as standing for "the principle that once funds are deposited into the Treasury, they become public money," and "thus may only be paid out pursuant to a statutory appropriation," even if the Government's ownership of the funds is disputed, but concluding that there was an appropriation that authorized payment of the funds sought by the petitioner).

may apply to adjudicate money claims against the United States.[3] Congress may even direct that no funds are available to pay what might otherwise be a valid debt.[4] If there is no appropriation to pay an alleged debt, either because no such appropriation had been made or Congress has validly prohibited the use of otherwise available funds, the only way that the purported creditor may seek relief is by petitioning Congress.[5]

The Appropriations Clause's limitation on drawing funds from the Treasury is not confined to the types of relief available in judicial proceedings against the United States.[6] As the Court explained in 1850 in *Reeside v. Walker*, if there is no appropriation available, the President and Executive Branch officers and employees lack the authority to pay the "debts of the United States generally, when presented to them"[7] or to incur obligations on behalf of the United States in anticipation of Congress later making an appropriation to support the obligation.[8] Even the President's constitutionally vested powers may not, on their own, authorize or require disbursements from the Treasury.[9] For example, though a presidential pardon removes all disabilities resulting from a pardoned offense, a pardon cannot require return of property seized, sold, and paid into the Treasury as a consequence of the offense.[10]

However, the Court has also identified circumstances in which the Appropriations Clause is not a relevant limitation on government action. The Clause governs the conduct of federal officers or employees, but it does not constrain Congress in its ability to incur obligations—binding commitments to pay federal funds—by statute[11] or to otherwise dispose of public funds.[12] Similarly, the Clause is not implicated where there is an appropriation

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[3] *See* Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 426 (1990) ("[J]udicial use of the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized.").

[4] *See* Hart v. United States, 118 U.S. 62, 65, 67 (1886) ("It was entirely within the competency of congress to declare" that no debt that accrued prior to the outbreak of the Civil War could be paid in favor of a claimant who had "promoted, encouraged, or in any manner sustained" rebellion "till the further order of congress.").

[5] *See* Bradley v. United States, 98 U.S. 104, 117 (1878) (stating that where the Federal Government contracted to lease real property owned by a third party, subject to Congress making appropriations in the future to pay the agreed annual rental amounts, the lessor had to "rely upon the justice of Congress" to recover the difference between the agreed rental value for the third year of the lease, $4,200, and the lesser amount actually appropriated for that year's rental payments, $1,800); *Reeside*, 52 U.S. (11 How.) at 291 ("Hence, the petitioner should have presented her claim on the United States to Congress, and prayed for an appropriation to pay it."); *cf.* R.R. v. Alabama, 101 U.S. 832, 835 (1879) (drawing an analogy between the Appropriations Clause and a similar provision in the Alabama Constitution to explain that in the absence of an appropriation "the party who gets a judgment must wait until Congress makes an appropriation before his money can be had").

[6] *Richmond*, 496 U.S. at 425.

[7] *Reeside*, 52 U.S. at 291 ("No officer, however high, not even the President, much less a Secretary of the Treasury or Treasurer, is empowered to pay debts of the United States generally, when presented to them . . . . However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned.").

[8] *See Bradley*, 98 U.S. at 114 ("Argument to show that money cannot be drawn from the treasury before it is appropriated is unnecessary, as the Constitution provides that 'no money shall be drawn from the treasury but in consequence of an appropriation made by law. . . .'" (quoting U.S. CONST. art. I, § 9, cl. 7)).

[9] *See Richmond*, 496 U.S. at 425 ("Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury.").

[10] Knote v. United States, 95 U.S. 149, 154 (1877) (holding that however large the President's pardon power may be, that power, like "all" of the President's powers, "cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress").

[11] *See* Me. Cmty. Health Options v. United States, No. 18-1023, slip op. at 10, 13 (U.S. Apr. 27, 2020) (explaining that the Appropriations Clause constrains "how federal employees and officers may make or authorize payments without appropriations" but does not address "whether Congress itself can create or incur an obligation directly by statute").

[12] *See* Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 – 22 (1937) (concluding that the Appropriations Clause was "intended as a restriction upon the disbursing authority of the Executive department" and thus was "without significance" in a case challenging Congress's decision to pay the proceeds of a tax on coconut oil to the treasury of the Philippine Islands and further rejecting the argument that the terms of the appropriation were so

available to make a payment, because in that event payments made pursuant to the appropriation would comply with the Clause.[13]

While the Appropriations Clause does not itself constrain Congress's ability to dictate the terms upon which it makes funds available, other provisions of the Constitution may. The Court held in *United States v. Lovett* that a limitation in an appropriations act that barred payment of compensation to three named federal employees was an unconstitutional bill of attainder because it inflicted punishment without judicial trial.[14] The Court also disregarded a limitation placed on an appropriation for the payment of Court of Claims judgments in *United States v. Klein*, explaining that the limitation impermissibly sought to change the legal effect of a presidential pardon.[15]

In short, the Court's case law has considered the Appropriations Clause and its effects in roughly three contexts. The Court has articulated how, from Congress's perspective, the Clause it not a relevant limitation on congressional action. The Clause requires an appropriation "made by law" before funds may leave the Treasury, and Congress is the branch empowered to authorize such disbursements. From the perspective of the other branches, the Clause conditions any exercise of a constitutional or statutory power, so that such powers cannot result in disbursements of Treasury funds absent an appropriation. Finally, the Court has considered appropriations made by Congress for their consistency with provisions or features of the Constitution other than the Appropriations Clause. If Congress imposes a limitation on funds that is itself unconstitutional, the limitation cannot be enforced.

Clause 8—Titles of Nobility and Foreign Emoluments

ArtI.S9.C8.1 Overview of Titles of Nobility and Foreign Emoluments Clauses

Article I, Section 9, Clause 8:

> *No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.*

This provision encompasses two distinct commands. The first half, sometimes called the federal "Title of Nobility Clause,"[1] limits the power of the United States by prohibiting it from

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general that it constituted an impermissible delegation of legislative power to the Executive Branch); *cf.* United States v. Realty Co., 163 U.S. 427, 444 (1896) (stating that Congress's decision to recognize a claim "founded upon equitable and moral considerations, and grounded upon principles of right and justice" and "appropriating money for its payment, can rarely, if ever, be the subject of review by the Judicial Branch of the government").

[13] *See* Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 198 n.9 (2012) (reading *Richmond* as having "indicated that the Appropriations Clause is no bar to recovery in a case like this one, in which 'the express terms of a specific statute' establish 'a substantive right to compensation' from" an appropriation (quoting *Richmond*, 496 U.S. at 432)). Congress may appropriate funds in terms that leave disbursing officials no discretion to deny a claimant the funds owed. *See* United States v. Price, 116 U.S. 43, 44 (1885) ("fully" concurring with the conclusion of the Court of Claims that "congress undertook, as it had the right to do, to determine, not only what particular citizens of Tennessee, by name, should have relief, but also the exact amount which should be paid to each of them" (internal quotation marks omitted)); United States v. Jordan, 113 U.S. 418, 422 (1885) (same).

[14] *See* 328 U.S. 303, 313, 316–18 (1946) (holding that though Congress phrased the limitation as compensation prohibition it served as a permanent bar on federal employment, a consequence that case law held to be punishment within the meaning of the Bill of Attainder Clause).

[15] *See* United States v. Klein, 80 U.S. 128, 147 – 48 (1871) (explaining that the "legislature cannot change the effect of" a "pardon any more than the executive can change a law").

[1] *See, e.g.*, Mark R. Killenbeck, *The Physics of Federalism*, 51 U. Kan. L. Rev. 1, 7 (2002) (using the term "Title of Nobility Clause" to refer to this provision). More often, the collective terms "Title of Nobility Clauses" or "Nobility Clauses" are used to refer to both this provision and the parallel prohibition on state-granted titles of nobility in the following section. *See* U.S. Const. art. I, § 10, cl. 1 ("No state shall . . . grant any Title of Nobility."); *see, e.g.,* Akhil Reed

granting any "title of Nobility." The second half, often referred to as the "Foreign Emoluments Clause,"[2] limits the actions of certain federal officers by prohibiting them from accepting "any present, Emolument, Office, or Title, of any kind whatever" from a foreign state, without the consent of Congress.

For most of their history, neither the Title of Nobility Clause nor the Foreign Emoluments Clause have been much discussed or substantively examined by the courts.[3] The meaning and scope of the Foreign Emoluments Clause have been examined in opinions from the Department of Justice's Office of Legal Counsel and the Comptroller General of the United States concerning the obligations of federal officers with respect to gifts, salaries, awards, and other potential emoluments from foreign sources.[4] During the administration of President Donald Trump, the lower federal courts for the first time issued substantive—but often conflicting—decisions interpreting the Foreign Emoluments Clause.[5]

ArtI.S9.C8.2 Historical Background on Foreign Emoluments Clause

Article I, Section 9, Clause 8:

> *No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.*

The Foreign Emoluments Clause's basic purpose is to prevent corruption and limit foreign influence on federal officers. At the Constitutional Convention, Charles Pinckney of South Carolina introduced the language that became the Foreign Emoluments Clause based on "the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence."[1] The Convention approved the Clause unanimously without noted debate.[2] During the ratification debates, Edmund Randolph of Virginia, a key figure at the Convention,

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Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 131 (2000) (using the term "Title of Nobility Clauses" to refer to these two prohibitions); J.M. Balkin, *The Constitution of Status*, 106 Yale L.J. 2313, 2349 (1997) (same).

[2] *See, e.g.*, Deborah Samuel Sills, *The Foreign Emoluments Clause: Protecting Our National Security Interests*, 26 J.L. & Pol'y 63 (2018); Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 Minn. L. Rev. 639 (2017); Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 Nw. U.L. Rev. Colloquy 180 (2013). The usage "Foreign Emoluments Clause" distinguishes Article I, Section 9, Clause 8 from another clause governing the emoluments that the President in particular may receive, sometimes called the "Domestic Emoluments Clause." *See* ArtII.S1.C7.1 Emoluments Clause and Presidential Compensation.

[3] *See generally* Michael A. Foster & Kevin J. Hickey, Cong. Rsch. Serv., R45992, The Emoluments Clauses and the Presidency: Background and Recent Developments 1 (2019), https://crsreports.congress.gov/product/pdf/R/R45992 ("For most of their history, the Foreign and Domestic Emoluments Clauses . . . were little discussed and largely unexamined by the courts."); Manley W. Roberts, *The Nobility Clauses: Rediscovering the Cornerstone*, 1 J. Attenuated Subtleties 20, 21 (1982), *reprinted in* 9 J.L.: Periodical Lab'y of Leg. Scholarship 102, 103 (2019) ("For two centuries the courts . . . said nothing about the [Title of] Nobility Clauses.").

[4] *See, e.g.*, Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize, 33 Op. O.L.C. 1 (2009); Proposal that the President Accept Honorary Irish Citizenship, 1 Op. O.L.C. Supp. 278 (1963); *In re* Retired Uniformed Service Members Receiving Compensation from Foreign Governments, 58 Comp. Gen. 487 (1979).

[5] *See* ArtI.S9.C8.3 Foreign Emoluments Clause Generally.

[1] 2 The Records of the Federal Convention of 1787, at 389 (Max Farrand ed., 1911) [hereinafter Farrand's Records] (Madison's notes).

[2] *Id.*

explained that the Foreign Emoluments Clause was intended to "prevent corruption" by "prohibit[ing] any one in office from receiving or holding any emoluments from foreign states."[3]

The Foreign Emoluments Clause reflected the Framers' experience with the then-customary European practice of giving gifts to foreign diplomats.[4] Following the example of the Dutch Republic, which prohibited its ministers from receiving foreign gifts in 1651,[5] the Articles of Confederation provided: "any person holding any office of profit or trust under the United States, or any of them" shall not "accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state."[6] The Foreign Emoluments Clause largely tracks this language from the Articles, although there are some differences.[7]

During the Articles period, American diplomats struggled with how to balance their legal obligations and desire to avoid the appearance of corruption, against prevailing European norms and the diplomats' wish to not offend their host country.[8] A well-known example from this period, which appears to have influenced the Framers of the Emoluments Clause,[9] involved the King of France's gift of an opulent snuff box to Benjamin Franklin.[10] Concerned that receipt of this gift would be perceived as corrupting and violate the Articles of Confederation, Franklin sought (and received) congressional approval to keep the gift.[11] Following this precedent, the Foreign Emoluments Clause prohibits federal officers from accepting foreign presents, offices, titles, or emoluments, unless Congress consents.[12]

The Foreign Emoluments Clause thus provides a role for Congress in determining the propriety of foreign emoluments. Under this authority, Congress has in the past provided consent to the receipt of particular presents, emoluments, and decorations through public or

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[3] *See* 3 Farrand's Records, *supra* note 1, at 327; *accord* Joseph Story, 3 Commentaries on the Constitution of the United States 215–16 (1st ed. 1833) ("[The Foreign Emoluments Clause] is founded in a just jealousy of foreign influence of every sort.").

[4] *See generally* Deborah Samuel Sills, *The Foreign Emoluments Clause: Protecting Our National Security Interests*, 26 J.L. & Pol'y 63, 69–72 (2018); Robert G. Natelson, *The Original Meaning of "Emoluments" in the Constitution*, 52 Ga. L. Rev. 1, 37, 43–45 (2017); Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 Nw. U.L. Rev. Colloquy 30, 33–35 (2012).

[5] *See* Zephyr Teachout, Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United 20–21 (2014) (citing 4 John Bassett Moore, A Digest of International Law 579 (1906)).

[6] Articles of Confederation of 1781, art. VI, ¶ 1.

[7] Two differences are notable. First, unlike the corresponding provision in the Articles, the Foreign Emoluments Clause expressly provides that Congress may consent to a federal official's receipt of emoluments. *See* U.S. Const. art. I, § 9, cl. 8. Second, the Articles expressly reached *state* officeholders as well as federal ones, while the Foreign Emoluments Clause does not. Articles of Confederation of 1781, art. VI, ¶ 1; *see also* Natelson, *supra* note 4, at 37–38 (discussing these differences); Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 Nw. U. L. Rev. Colloquy 1, 5 (2012) (same).

[8] *See generally* Teachout, *supra* note 5, at 20–26; Natelson, *supra* note 4, at 43–45.

[9] As Edmund Randolph recounted to the Virginia ratifying convention:

> An accident which actually happened, operated in producing the [Foreign Emoluments Clause]. A box was presented to our ambassador by the king of [France]. It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states. . . . [I]f at that moment, when we were in harmony with the king of France, we had supposed that he was corrupting our ambassador, it might have disturbed that confidence . . . .

3 Farrand's Records, *supra* note 1, at 327. It is unclear whether Randolph was referring to the snuff box gifted to Franklin, or a similar gift made to Arthur Lee, an American envoy to France during this same period. *See* Teachout, *supra* note 5, at 35.

[10] *See* Teachout, *supra* note 5, at 25–26.

[11] *See id.*; Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, 18 Op. O.L.C. 13, 16 n.4 (1994).

[12] U.S. Const. art. I, § 9, cl. 8.

private bills,[13] or by enacting general rules governing the receipt of gifts by federal officers from foreign governments.[14] For example, in 1966, Congress enacted the Foreign Gifts and Decorations Act, which provided general congressional consent for foreign gifts of minimal value, as well as conditional authorization for acceptance of gifts on behalf of the United States in some cases.[15]

Several Presidents in the nineteenth century—such as Andrew Jackson,[16] Martin Van Buren,[17] John Tyler,[18] and Benjamin Harrison[19]—notified Congress of foreign presents they received, and either placed the gifts at Congress's disposal or obtained consent for their acceptance. Other nineteenth century Presidents treated presents they received as "gifts to the United States, rather than as personal gifts."[20] Thus, in one instance, President Lincoln accepted a foreign gift on behalf of the United States and then deposited it with the Department of State.[21] In the twentieth century, some Presidents sought the advice of the Department of Justice's Office of Legal Counsel on whether acceptance of particular honors or benefits would violate the Emoluments Clauses.[22]

[13] *See generally* S. Rep. No. 89-1160, at 1–2 (1966) ("In the past, the approval of Congress, as required by [the Foreign Emoluments Clause], has taken the form of public or private bills, authorizing an individual or group of individuals to accept decorations or gifts.").

[14] *See, e.g.*, Act of Jan. 31, 1881, ch. 32, § 3, 21 Stat. 603, 603–04 (1881) (authorizing certain named persons to accept presents from foreign governments, and requiring that "hereafter, any presents, decoration, or other thing, which shall be conferred or presented by any foreign government to any officer of the United States . . . shall be tendered through the Department of State").

[15] *See* Pub. L. No. 89-673, 80 Stat. 952 (1966) (codified as amended at 5 U.S.C. § 7342).

[16] A Compilation of the Messages and Papers of the Presidents 1789–1902, at 466–67 (James Richardson, ed., 1907) (January 19, 1830 letter from President Jackson to the Senate and House of Representatives stating that the Constitution prohibited his acceptance of a medal from Simon Bolivar, and therefore placing the medal "at disposal of Congress").

[17] S.J. Res. 4, 26th Cong., 5 Stat. 409 (1840) (joint resolution of Congress authorizing President Van Buren to dispose of presents given to him by the Imam of Muscat and deposit the proceeds in the Treasury).

[18] S. Journal, 28th Cong., 2d Session 254 (1844) (authorizing sale of two horses presented to the United States by the Imam of Muscat); *see also* Teachout, *supra* note 5, at 42 (discussing the Van Buren and Tyler precedents); Seth Barrett Tillman, The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout, 107 Nw. L. Rev. Colloquy 180, 190 (2013) (same).

[19] Pub. Res. 54-39, 29 Stat. 759 (1896) (congressional resolution authorizing delivery of Brazilian and Spanish medals to former President Benjamin Harrison).

[20] *See* Proposal that the President Accept Honorary Irish Citizenship, 1 Op. O.L.C. Supp. 278, 281 (1963).

[21] *Id.*

[22] *See* Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize, 33 Op. O.L.C. 1, 4, 7–9 (2009) (concluding that acceptance of the Nobel Peace Prize does not violate the Foreign Emoluments Clause because it is awarded by a private organization, not a foreign government); President Reagan's Ability to Receive Retirement Benefits from the State of California, Op. O.L.C. 187, 189–92 (1981) (concluding that retirement benefits are not "emoluments" under the Domestic Emoluments Clause because they "are neither gifts nor compensation for services" and would not subject the President to improper influence); Honorary Irish Citizenship, 1 Op. O.L.C. Supp. at 278 (concluding that President's acceptance of even "honorary" Irish citizenship would violate "the spirit, if not the letter" of the Foreign Emoluments Clause).

ArtI.S9.C8.3 Foreign Emoluments Clause Generally

Article I, Section 9, Clause 8:

> *No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.*

For most of its history, courts have rarely substantively analyzed or interpreted the Foreign Emoluments Clause.[1] During the administration of President Donald Trump, however, a number of private parties, state attorneys general, and Members of Congress sued the President based on alleged violations of both the Foreign Emoluments Clause and the Domestic Emoluments Clause[2] (collectively, the Emoluments Clauses). Three major federal lawsuits concerning the Emoluments Clauses were filed against President Trump.[3] Over nearly four years, these cases progressed through the lower federal courts, resulting in the first significant judicial decisions on the Emoluments Clauses.

In late 2020, the Supreme Court denied review in one of these cases,[4] and—after the end of President Trump's term in January 2021—instructed two federal appellate courts to vacate their judgments and dismiss the other two cases as moot.[5] As a result, most of the lower court decisions on the Emoluments Clauses have been vacated.[6] In the absence of definitive precedent from the Supreme Court, this section reviews these lower court holdings regarding the meaning and scope of the Emoluments Clauses, although they generally retain at most persuasive, and not precedential, value.[7]

In the three cases, plaintiffs alleged that President Trump's retention of certain business and financial interests during his Presidency violated the Emoluments Clauses. For example, because President Trump retained an ownership interest in the Trump International Hotel, plaintiffs alleged he received constitutionally forbidden "emoluments" when foreign or state governments paid for their officials to stay at the Hotel.[8] In a series of rulings, the lower courts addressed three main issues: (1) who has standing to assert Emoluments Clause violations; (2)

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[1] *See* Michael A. Foster & Kevin J. Hickey, Cong. Rsch. Serv., R45992, The Emoluments Clauses and the Presidency: Background and Recent Developments 1 (2019), https://crsreports.congress.gov/product/pdf/R/R45992. Like the Title of Nobility Clause, the Foreign Emoluments Clause is occasionally cited by the Supreme Court in passing to make a rhetorical point. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 424 n.51 (2010) (Stevens, J., concurring in part and dissenting in part) (citing Foreign Emoluments Clause to argue that the "notion that Congress might lack the authority to distinguish foreigners from citizens in the regulation of electioneering would certainly have surprised the Framers"); Roe v. Wade, 410 U.S. 113, 157 (1973) (noting that the Emoluments Clause, along with a number of other constitutional provisions, uses the term "Person" without "pre-natal application").

[2] *See* ArtII.S1.C7.1 Emoluments Clause and Presidential Compensation.

[3] *See* Complaint, Citizens for Resp. & Ethics in Washington (CREW) v. Trump, No. 1:17-cv-00458-RA (S.D.N.Y. Jan. 23, 2017); Complaint, Blumenthal v. Trump, No. 1:17-cv-01154-EGS (D.D.C. June 14, 2017); Complaint, District of Columbia v. Trump, No. 8:17-cv-01596-PJM (D. Md. June 12, 2017).

[4] Blumenthal v. Trump, 949 F.3d 14 (D.C. Cir. 2020), *cert. denied*, 141 S. Ct. 553 (U.S. 2020).

[5] *See* CREW v. Trump, 953 F.3d 178 (2d Cir. 2019), *cert. granted, judgment vacated*, No. 20-330, 2021 WL 231541 (U.S. Jan. 25, 2021); *In re* Trump, 958 F.3d 274 (4th Cir. 2020) (en banc), *cert. granted, judgment vacated sub nom.*, Trump v. District of Columbia, No. 20-331, 2021 WL 231542 (U.S. Jan. 25, 2021).

[6] An exception is the District of Columbia Circuit's opinion on legislative standing, which remains good law. *See Blumenthal*, 949 F.3d 14.

[7] *See Persuasive Authority*, Black's Law Dictionary (11th ed. 2019) ("Authority that carries some weight but is not binding on a court . . . .").

[8] *See, e.g.*, CREW v. Trump, 276 F. Supp. 3d 174, 182 (S.D.N.Y. 2017) (reviewing plaintiffs' allegations), *vacated and remanded*, 953 F.3d 178 (2d Cir. 2019), *judgment vacated*, No. 20-330, 2021 WL 231541 (U.S. Jan. 25, 2021).

whether the President and other elected officials are subject to the Foreign Emoluments Clause; and (3) the meaning and scope of the term "emolument."[9]

On the standing-to-sue issue, the U.S. Court of Appeals for the District of Columbia Circuit held that individual Members of Congress lacked standing to sue based on alleged injuries to the legislature as a whole (namely, the deprivation of an opportunity to vote on whether to consent to the acceptance of foreign emoluments).[10] As to the standing of private individuals, the U.S. Court of Appeals for the Second Circuit held that hospitality-industry plaintiffs had standing based on a theory of competitive harm resulting from the allegedly unlawful acceptance of emoluments.[11] However, a number of judges on the Second Circuit dissented from this holding[12] and the Supreme Court subsequently vacated the decision as moot.[13]

On the second issue, commentators have debated whether federal elected officials hold an "Office of Profit or Trust" under the United States are thus subject to the Foreign Emoluments Clause.[14] The Department of Justice's Office of Legal Counsel (OLC), which has developed a body of opinions on the Emoluments Clauses, has opined that the President "surely" holds an office of profit and trust under the Constitution.[15] In litigation, President Trump conceded that he was subject to the Foreign Emoluments Clause,[16] and the only lower court to directly reach the issue agreed with the OLC's view.[17] However, that holding was subsequently vacated.[18]

The final litigated issue was the meaning and scope of the term "emolument" as used in the Emoluments Clauses—particularly, whether it includes private, arm's-length market transactions. In the litigation, President Trump argued that "emoluments" included only benefits received by an officeholder in return for official action or through his office or employment.[19] Plaintiffs urged that "emoluments" be defined more broadly to apply to any "profit, gain, or advantage" received by the President from a foreign or domestic government.[20] The two district courts that reached the issue adopted the plaintiffs' broader definition of "emolument,"[21] although the appellate courts subsequently vacated those decisions.[22]

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[9] For a fuller examination of these decisions, see Foster & Hickey, *supra* note 1, at 5–18.

[10] *Blumenthal*, 949 F.3d at 19–20.

[11] CREW v. Trump, 953 F.3d 178, 189–200 (2d Cir. 2019), *cert. granted, judgment vacated*, No. 20-330, 2021 WL 231541 (U.S. Jan. 25, 2021). A district court in Maryland adopted a similar view of competitor standing with respect to state-government plaintiffs. *See* District of Columbia v. Trump, 291 F. Supp. 3d 725, 740–49 (D. Md. 2018), *vacated,* 838 F. App'x 789, 790 (4th Cir. 2021).

[12] *See* CREW v. Trump, 971 F.3d 102, 102 (2d Cir. 2020) (noted dissents from five judges from the denial of rehearing en banc).

[13] CREW v. Trump, No. 20-330, 2021 WL 231541 (U.S. Jan. 25, 2021).

[14] *Compare* Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 Nw. L. Rev. Colloquy 180, 185–95 (arguing that the Foreign Emoluments Clause does not apply to elected federal officials), *with* Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 Nw. L. Rev. Colloquy 30, 39–48 (2012) (disputing this view).

[15] Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize, 33 Op. O.L.C. 1, 4 (2009); *see also* Proposal that the President Accept Honorary Irish Citizenship, 1 Op. O.L.C. Supp. 278, 278 (1963) (assuming that the Foreign Emoluments Clause applies to the President).

[16] *See, e.g.*, Blumenthal v. Trump, 373 F. Supp. 3d 191, 196 n.3 (D.D.C. 2019) ("The parties do not dispute that the [Foreign Emoluments] Clause applies to the President."), *rev'd on other grounds*, Blumenthal v. Trump, 949 F.3d 14 (D.C. Cir. 2020).

[17] *See* District of Columbia v. Trump, 315 F. Supp. 3d 875, 882–86 (D. Md. 2018), *vacated,* 838 F. App'x 789, 790 (4th Cir. 2021).

[18] District of Columbia v. Trump. 838 F. App'x 789, 790 (4th Cir. 2021).

[19] *See, e.g.*, *Blumenthal*, 373 F. Supp. 3d at 196–98.

[20] *See, e.g.*, *id.* at 197–98.

[21] *See id.* at 199–208; *D.C. v. Trump*, 315 F. Supp. 3d at 886–904.

ArtI.S9.C8.4 Titles of Nobility and the Constitution

Article I, Section 9, Clause 8:

> *No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.*

The Constitution's prohibition on titles of nobility reflects both "the American aversion to aristocracy"[1] and the republican character of the government established by the Constitution.[2] The Clause thus complements other constitutional provisions—most notably the Thirteenth, Fourteenth, and Fifteenth Amendments—that prohibit invidious governmental distinctions between classes of American citizens.[3]

The Articles of Confederation[4] and many Revolutionary-era state constitutions contained prohibitions of titles of nobility and other systems of hereditary privilege.[5] The federal Title of Nobility Clause substantially follows the Articles' prohibition and was not a subject of significant debate at the Constitutional Convention.[6] As James Madison observed in the *Federalist No. 44*: "The prohibition with respect to titles of nobility is copied from the articles of Confederation and needs no comment."[7] Alexander Hamilton, in the *Federalist No. 84*, was only slightly more loquacious:

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[22] District of Columbia v. Trump, 838 F. App'x 789, 790 (4th Cir. 2021); Blumenthal v. Trump, 949 F.3d 14, 21 (D.C. Cir. 2020), *cert. denied*, 141 S. Ct. 553 (2020).

[1] Zobel v. Williams, 457 U.S. 55, 70 n.3 (1982) (Brennan, J., concurring); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (characterizing Title of Nobility Clauses as reflecting the Constitution's "rejection of dispositions . . . based on blood").

[2] *See* The Federalist No. 39 (James Madison); The Federalist No. 84 (Alexander Hamilton).

[3] *See* Fullilove v. Klutznick, 448 U.S. 448, 533–55 (1980) (Stevens, J., dissenting) (discussing Title of Nobility Clauses as "one aspect of our commitment to the proposition that the sovereign has a fundamental duty to govern impartially"); J. M. Balkin, *The Constitution of Status*, 106 Yale L.J. 2313, 2349–52 (1997) (characterizing the Title of Nobility Clauses as among "status-dismantling" constitutional provisions intended "to ensure that nothing like a hereditary monarchy or a hereditary nobility would ever rise up in the United States").

[4] Articles of Confederation of 1781, art. VI, ¶ 1 ("[N]or shall the United States in Congress assembled, or any of them, grant any title of nobility.").

[5] *See, e.g.*, Md. Const. of 1776, art. XL ("[N]o title of nobility, or hereditary honours, ought to be granted in this State."); N.C. Const. of 1776, art. XXII ("[N]o hereditary emoluments, privileges or honors ought to be granted or conferred in this State."); Ga. Const. of 1777, art. XI ("[N]or shall any person who holds any title of nobility be entitled to a vote, or be capable of serving as a representative, or hold any post of honor, profit, or trust in this State, whilst such person claims his title of nobility."); Mass. Const. of 1780, art. VI ("No man, or corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public . . . ."); Pa. Const. of 1790, art. IX, § 24 ("[T]he legislature shall not grant any title of nobility or hereditary distinction . . . .").

[6] *See* Carlton F.W. Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 84 Wash. U.L. Rev. 1375, 1401–02 (2006) ("The Nobility Clauses occasioned little debate in the Constitutional Convention itself; indeed, as carry-overs from the Articles of Confederation they were unlikely to be the subject of much comment."); *Eugenic Artificial Insemination: A Cure for Mediocrity?*, 94 Harv. L. Rev. 1850, 1859 (1981) ("Taken from the Articles of Confederation, the titles of nobility clause was enacted virtually without debate in the Constitutional Convention.").

[7] The Federalist No. 34 (James Madison).

> Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the corner-stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people.[8]

Very few courts have had occasion to interpret the meaning of the federal Title of Nobility Clause.[9] The Supreme Court has only discussed the Title of Nobility Clause in passing, as when Justices cite the Clause to make a rhetorical point in a concurring or dissenting opinion.[10]

How broadly to understand the Title of Nobility Clause's prohibition thus remains an open, if perhaps academic, question. On a narrow reading, the Clause merely prohibits a federal system of hereditary privilege along the lines of the British aristocratic system.[11] More broadly understood, the Clause could preclude other governmental grants of enduring favor or disfavor to particular classes based on birth or other non-merit-based criteria.[12] Some commentators

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[8] The Federalist No. 84 (Alexander Hamilton); *accord* The Federalist No. 39 (James Madison) ("Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility . . . ").

[9] There are only a handful of lower court decisions that can be characterized as substantive interpretations of the Clause. *See, e.g.*, State v. Larson, 419 N.W.2d 897, 898 (N.D. 1988) (holding that state issuance of driver's licenses did not confer a title of nobility); United States v. Thomason, 444 F.2d 1094, 1095 (9th Cir. 1971) (holding that military rank system does not constitute a title of nobility); *In re* Jama, 272 N.Y.S.2d 677, 678 (N.Y. Civ. Ct. 1966) (rejecting application for surname change to "von Jama" based on "spirit and intent" of federal Title of Nobility Clause); *see generally* Jol A. Silversmith, *The "Missing Thirteenth Amendment": Constitutional Nonsense and Titles of Nobility*, 8 S. Cal. Interdisc. L.J. 577, 606 n.178 (1999) (collecting cases). A substantial number of these lower-court cases raise the oft-rejected claim that attorneys' or public officials' use of the term "Esquire" violates the Title of Nobility Clause. *See, e.g.*, State v. Casteel, 634 N.W.2d 338, 343 n.6 (Wis. Ct. App. 2001); Williams v. Florida., No. 218CV389FTM29UAM, 2019 WL 858024, at *2 (M.D. Fla. Feb. 22, 2019); Bassoff v. Treanor, Pope & Hughes P.A., No. CV RDB-14-3753, 2015 WL 8757651, at *4 (D. Md. Dec. 15, 2015); *see generally* Silversmith, *supra* note 9, at 602–07 (addressing this argument).

[10] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (observing that the Title of Nobility Clause reflects the Constitution's "rejection of dispositions . . . based on blood"); Zobel v. Williams, 457 U.S. 55, 70 n.3 (1982) (Brennan, J., concurring) (noting that both the Title of Nobility Clause and the Fourteenth Amendment forbid "degrees of citizenship"); Fullilove v. Klutznick, 448 U.S. 448, 533–55 (1980) (Stevens, J., dissenting) (discussing the Title of Nobility Clauses as "one aspect of our commitment to the proposition that the sovereign has a fundamental duty to govern impartially"); Mathews v. Lucas, 427 U.S. 495, 521 n.3 (1976) (Stevens, J., dissenting) (arguing that the Title of Nobility Clause "would prohibit the United States from attaching any badge of ignobility to a citizen at birth").

As in the *Federalist Papers*, early mentions of the Clause in Supreme Court opinions treat its meaning as self-explanatory. *See, e.g.*, Briscoe v. Bank of Commonwealth of Kentucky, 36 U.S. 257, 350 (1837) (noting that "title of nobility" is "a term which defines itself"); Sturges v. Crowninshield, 17 U.S. 122, 153 (1819) (characterizing the state Title of Nobility Clause as a "plain prohibition" that is "clearly understood"); *accord* 3 Joseph Story, Commentaries on the Constitution of the United States 215 (1833) ("[The Title of Nobility] clause seems scarcely to require even a passing notice. As a perfect equality is the basis of all our institutions, state and national, the prohibition against the creation of any titles of nobility seems proper, if not indispensable . . . .").

[11] *See, e.g.*, *Nobility*, Black's Law Dictionary (11th ed. 2019) (defining "nobility" with respect to the English peerage system of "dukes, marquises, earls, viscounts, and barons, and their female counterparts," usually associated with land grants and hereditary descent of title and privilege); *but see* Larson, *supra* note 6, at 1380–82 (arguing the Title of Nobility Clauses' scope extends "beyond the narrow meaning of nobility under English law").

[12] *See Mathews*, 427 U.S. at 521 n.3 (Stevens, J., dissenting) (arguing the Title of Nobility Clause would prohibit "any badge of ignobility" imposed by the government to "a citizen at birth"); Richard Delgado, *Inequality "From the Top": Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 UCLA L. Rev. 100, 115–17 (1984) (arguing the Title of Nobility Clauses prohibit state action that confers the "indices of nobility," such an enduring grant of advantage or wealth to a closed class of individuals).

This broader reading of the Title of Nobility Clause is in tension, as a matter of original meaning, with the system of chattel slavery prevailing in the American South when the Constitution was ratified. *See* Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 62 (2000) ("In the antebellum South, there were indeed lords and serfs notwithstanding the Nobility Clauses."). This discord between the Constitution's literal textual guarantees and the reality of American slavery at the Founding is not unique to the Title of Nobility Clause. *See* Amar, *supra* note 12, at 60–63 (examining this issue and noting "[s]lavery seemed to contradict a huge part of the Constitution if read

have suggested, for example, that the Title of Nobility Clause might forbid admission preferences for legacy students at state universities or certain benefits that accompany receipt of the Medal of Honor.[13] After the adoption of the Fourteenth Amendment, challenges to governmental favoritism based on class, race, or other bases have usually relied on the Equal Protection Clause.[14]

Section 10—Powers Denied States

Clause 1—Proscribed Powers

ArtI.S10.C1.1 Foreign Policy by States

Article I, Section 10, Clause 1:

> *No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.*

At the time of the Civil War, the Court relied on the prohibition on treaties, alliances, or confederations in holding that the Confederation formed by the seceding states could not be recognized as having any legal existence.[1] Today, the prohibition's practical significance lies in the limitations that it implies upon the power of the states to deal with matters having a bearing upon international relations.

In the early case of *Holmes v. Jennison*,[2] Chief Justice Roger Taney invoked it as a reason for holding that a state had no power to deliver up a fugitive from justice to a foreign state. More recently, the kindred idea that the responsibility for the conduct of foreign relations rests exclusively with the Federal Government prompted the Court to hold that, because the oil under the three-mile marginal belt along the California coast might well become the subject of international dispute, and because the ocean, including this three-mile belt, is of vital consequence to the Nation in its desire to engage in commerce and to live in peace with the world, the Federal Government has paramount rights in and power over that belt, including full dominion over the resources of the soil under the water area.[3] In *Skiriotes v. Florida*,[4] the Court, on the other hand, ruled that this clause did not disable Florida from regulating the manner in which its own citizens may engage in sponge fishing outside its territorial waters. Speaking for a unanimous Court, Chief Justice Charles Evans Hughes declared, "When its action does not conflict with federal legislation, the sovereign authority of the State over the

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blithely"); Frederick Douglass, *The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?* (1860), *in* Frederick Douglass: Selected Speeches and Writings 338 (Philip S. Foner & Yuval Taylor eds., 2000) ("The Constitution forbids the passing of a bill of attainder . . . a law entailing upon the child the disabilities and hardships imposed upon the parent. Every slave law in America might be repealed on this very ground. The slave is made a slave because his mother is a slave.").

[13] *See, e.g.*, Larson, *supra* note 6, at 1375, 1425; Manley W. Roberts, *The Nobility Clauses: Rediscovering the Cornerstone*, 1 J. Attenuated Subtleties 20, 22–23 (1982), *reprinted in* 9 J.L.: Periodical Lab'y of Leg. Scholarship 102, 104–05 (2019).

[14] *See* Amdt14.S1.8.1.1 Overview of Race-Based Classifications; Amdt14.S1.8.7.1 Overview of Non-Race Based Classifications.

[1] Williams v. Bruffy, 96 U.S. 176, 183 (1878).

[2] 39 U.S. (14 Pet.) 540 (1840).

[3] United States v. California, 332 U.S. 19 (1947).

[4] 313 U.S. 69 (1941).

conduct of its citizens upon the high seas is analogous to the sovereign authority of the United States over its citizens in like circumstances."[5]

ArtI.S10.C1.2 Coining Money by States

Article I, Section 10, Clause 1:

> *No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.*

Within the sense of the Constitution, bills of credit signify a paper medium of exchange, intended to circulate between individuals, and between the government and individuals, for the ordinary purposes of society. It is immaterial whether the quality of legal tender is imparted to such paper. Interest-bearing certificates, in denominations not exceeding ten dollars, that were issued by loan offices established by the state of Missouri and made receivable in payment of taxes or other moneys due to the state, and in payment of the fees and salaries of state officers, were held to be bills of credit whose issuance was banned by this section.[1] The states are not forbidden, however, to issue coupons receivable for taxes,[2] nor to execute instruments binding themselves to pay money at a future day for services rendered or money borrowed.[3] Bills issued by state banks are not bills of credit;[4] it is immaterial that the state is the sole stockholder of the bank,[5] that the officers of the bank were elected by the state legislature,[6] or that the capital of the bank was raised by the sale of state bonds.[7]

ArtI.S10.C1.3 Legal Tender Issued by States

Article I, Section 10, Clause 1:

> *No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.*

Relying on this clause, which applies only to the states and not to the Federal Government[1], the Supreme Court has held that, where the marshal of a state court received state bank notes in payment and discharge of an execution, the creditor was entitled to demand payment in gold or silver.[2] Because, however, there is nothing in the Constitution prohibiting a bank depositor from consenting when he draws a check that payment may be

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[5] 313 U.S. at 78–79.

[1] Craig v. Missouri, 29 U.S. (4 Pet.) 410, 425 (1830); Byrne v. Missouri, 33 U.S. (8 Pet.) 40 (1834).

[2] Virginia Coupon Cases (Poindexter v. Greenhow), 114 U.S. 270 (1885); Chaffin v. Taylor, 116 U.S. 567 (1886).

[3] Houston & Texas Central R.R. v. Texas, 177 U.S. 66 (1900).

[4] Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1837).

[5] Darrington v. Bank of Alabama, 54 U.S. (13 How.) 12, 15 (1851); Curran v. Arkansas, 56 U.S. (15 How.) 304, 317 (1853).

[6] Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1837).

[7] Woodruff v. Trapnall, 51 U.S. (10 How.) 190, 205 (1851).

[1] Juilliard v. Greenman, 110 U.S. 421, 446 (1884).

[2] Gwin v. Breedlove, 43 U.S. (2 How.) 29, 38 (1844). *See also* Griffin v. Thompson, 43 U.S. (2 How.) 244 (1844).

made by draft, a state law providing that checks drawn on local banks should, at the option of the bank, be payable in exchange drafts, was held valid.[3]

ArtI.S10.C1.4 State Bills of Attainder

Article I, Section 10, Clause 1:

> *No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.*

A bill of attainder is legislation that imposes punishment on a specific person or group of people without a judicial trial.[1] The Constitution includes two separate clauses respectively banning enactment of bills of attainder by the federal government and the states.[2] The Supreme Court has interpreted the federal and state bill of attainder prohibitions as having the same scope.[3]

The Supreme Court applied the constitutional prohibition on state bills of attainder in a Reconstruction-era case, *Cummings v. Missouri*.[4] That case involved a post-Civil War amendment to the Missouri constitution that required persons engaged in certain professions to swear an oath that they had never been disloyal to the United States.[5] The Court held that the purpose and effect of the challenged provision was to punish a group of individuals who had been disloyal to the United States by effectively permanently excluding them from the covered professions.[6] Based on that holding, the Supreme Court invalidated the provision as an unconstitutional bill of attainder.[7]

In *Drehman v. Stifle*, the Supreme Court rejected a bill of attainder challenge to another provision of the Missouri constitution that barred civil suits against individuals for actions

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[3] Farmers & Merchants Bank v. Federal Reserve Bank, 262 U.S. 649, 659 (1923).

[1] *See, e.g.*, Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977).

[2] For the prohibition on federal bills of attainder, see U.S. Const. art. I, § 9, cl. 3. For discussion of the prohibition on federal bills of attainder and further information on the historical roots of the federal and state Bill of Attainder Clauses, see ArtI.S9.C3.1 Historical Background on Bills of Attainder.

[3] *See, e.g.*, *Nixon*, 433 U.S. at 468–76. In *Nixon*, the Court cited *Cummings v. Missouri*, 71 U.S. 277 (1866), a case involving the state Bill of Attainder Clause, to support its application of the federal Bill of Attainder Clause.

[4] 71 U.S. 277 (1866). In an earlier case, the Supreme Court considered a challenge to a Georgia statute enacted before the federal Constitution was ratified that punished treason through banishment and confiscation of property without a judicial trial. Cooper v. Telfair, 4 U.S. 14, 14–15 (1800). A former resident of Georgia living abroad who had allegedly supported the British during the Revolutionary War argued that the statute violated the Georgia state constitution, which did not expressly bar enactment of bills of attainder. *Id.* at 16–17. The Court declined to strike down the law. *Id.* at 19. Justice William Paterson opined, "the power of confiscation and banishment does not belong to the judicial authority, whose process could not reach the offenders: and yet, it is a power, that grows out of the very nature of the social compact, which must reside somewhere, and which is so inherent in the legislature, that it cannot be divested, or transferred, without an express provision of the constitution." *Id.* (opinion of Paterson, J.).

[5] *Id.* at 280.

[6] *See id.* at 320 (The oath requirement "was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen.").

[7] *Id.* at 325–29. In a related case, *Ex parte Garland*, the Court applied its reasoning in *Cummings* to strike down a similar federal law. 71 U.S. 333, 377–78 (1866). For additional discussion of *Cummings* and *Garland*, see ArtI.S9.C3.1 Historical Background on Bills of Attainder. *See also* Pierce v. Carskadon, 83 U.S. 234, 239 (1873); *cf.* Klinger v. Missouri, 80 U.S. 257, 262 (1872) (holding, in a challenge to a loyalty oath for jurors, that it would have raised constitutional concerns if a juror was excluded solely for past conduct, "simply because he had sympathized with or aided the rebellion during the war," but that it was permissible to exclude a juror who "also refused to take [the oath] because he was still a more bitter rebel than ever, [because] the avowal of such a feeling was inconsistent with the upright and loyal discharge of his duties").

taken under federal or state military authority during the Civil War.[8] The Court concluded that the law did not impose punishment on those who might want to file such suits: "If not the opposite of penal, there is certainly nothing punitive in its character. It simply exempts from suits . . . those who might otherwise be harassed by litigation and made liable in damages."[9]

The Supreme Court has also rejected bill of attainder challenges to state and local rules imposing employment qualifications, as long as those employment qualifications were not punitive. For instance, in *Garner v. Board of Public Works*, the Supreme Court considered bill of attainder challenges to a provision of the Charter of the City of Los Angeles barring from public employment any person who within the last five years had been affiliated with a group that advocated the forceful overthrow of the government, and a city ordinance requiring public employees to state whether they had ever been members of the Communist Party.[10] The Court upheld both provisions, holding that a bill of attainder must inflict punishment, and the Court was "unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment."[11] Similarly, in *De Veau v. Braisted*, the Supreme Court rejected a bill of attainder challenge to a state law that prevented any person who had been convicted of a felony and had not been pardoned from serving as an officer or agent for certain labor organizations.[12] A plurality of the Court held that the law "embodies no further implications of appellant's guilt than are contained in his . . . judicial conviction; and so it manifestly is not a bill of attainder."[13]

The state Bill of Attainder Clause is part of a single sentence of the Constitution that provides, "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts."[14] In *Fletcher v. Peck*, Chief Justice John Marshall stated that those restrictions on state legislative power "may be deemed a bill of rights for the people of each state."[15] The Supreme Court has held that the state Ex Post Facto Clause[16] and the Contract Clause,[17] also located in Article I, Section 10, Clause 1, apply only to legislative action and do not apply to judicial decisions.[18] The Court has not expressly considered whether the state Bill

[8] 75 U.S. 595, 598 (1869).

[9] *Id.* at 601.

[10] 341 U.S. 716, 718–19 (1951).

[11] *Id.* at 722. *See also* Hawker v. People of New York 170 U.S. 189, 198–200 (1898); Konigsberg v. State Bar of California, 366 U.S. 36, 47 n.9 (1961). Loyalty oaths in public employment, particularly those premised on political affiliation, have sometimes also been challenged under the First Amendment. *See Garner*, 341 U.S. at 719–21 (noting that "Congress may reasonably restrict the political activity of federal civil service employees" to protect the integrity and competency of the service, and holding that "a State is not without power to do as much"); *see also, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 606 (1967) (holding that university professors could not be dismissed based on their refusal to swear that they had never been members of the Communist party, as mere "membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions").

[12] 363 U.S. 144, 160 (1960) (plurality opinion). Justice William Brennan concurred, stating in part that the challenged provision "does not deny due process or otherwise violate the Federal Constitution." *Id.* at 161 (Brennan, J., concurring).

[13] *Id.* at 160 (plurality opinion).

[14] U.S. Const. art. I, § 10, cl. 1.

[15] 10 U.S. 87, 138 (1810).

[16] *See* ArtI.S10.C1.5 State Ex Post Facto Laws.

[17] *See* ArtI.S10.C1.5 State Ex Post Facto Laws.

[18] *E.g.*, Frank v. Mangum, 237 U.S. 309, 344 (1914) ("the constitutional prohibition: "No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts" . . . is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts"); *see also* Ross v. Oregon 227 U.S. 150, 161 (1913); Moore-Mansfield Constr. Co. v. Elec. Installation Co., 234 U.S. 619, 624 (1914).

of Attainder Clause similarly excludes judicial action, but because it is located in the same provision barring states from "pass[ing]" prohibited laws, it is likely the Court would interpret this clause in the same way.

ArtI.S10.C1.5 State Ex Post Facto Laws

Article I, Section 10, Clause 1:

> *No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.*

An ex post facto law is a law that imposes criminal liability or increases criminal punishment retroactively.[1] Two separate clauses of the Constitution, Article I, Sections 9 and 10, ban enactment of ex post facto laws by the Federal Government and the states, respectively.[2] The Supreme Court has cited cases interpreting the federal Ex Post Facto Clause in challenges under the state clause, and vice versa, treating the two clauses as having the same scope.[3] The Court's decisions interpreting both clauses are therefore discussed collectively in greater detail in the Article I, Section 9 essays on the federal Ex Post Facto Clause.[4] In particular, those essays on federal and state ex post facto laws discuss Supreme Court jurisprudence addressing imposing or increasing punishments, procedural changes, employment qualifications, retroactive taxes, inapplicability to judicial decisions, and deportation and related issues.

The Supreme Court has interpreted the Ex Post Facto Clauses to limit only legislation that is criminal or penal in nature,[5] though the Court has also made clear that "the ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal."[6] In addition, the Court has uniformly applied the prohibition on ex post facto legislation only to laws that operate retroactively.[7] In the 1798 case *Calder v. Bull*, the Court enumerated four ways in which a legislature may violate the Ex Post Facto Clauses' prohibition on imposing retroactive criminal liability: (1) making criminal an action taken before enactment of the law that was lawful when it was done; (2) increasing the severity of an offense after it was committed; (3) increasing the punishment for a crime after it was committed; and (4) altering the rules of evidence after an offense was committed so that it is easier to convict an offender.[8] The Ex Post Facto Clauses are related to other constitutional provisions that limit retroactive government action, including the federal and state Bill of Attainder Clauses, the Contract Clause, and the Due Process Clauses.[9]

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[1] *See, e.g.*, Calder v. Bull, 3 U.S. 386, 391 (1798); Locke v. New Orleans, 71 U.S. 172, 173 (1867).

[2] For the prohibition on federal ex post facto laws, see U.S. CONST. art. I, § 10, cl. 1; *see also* ArtI.S9.C3.3.1 Overview of Ex Post Facto Laws.

[3] *See, e.g.*, Peugh v. United States, 569 U.S. 530, 532–33 (2013) (case construing federal clause citing case construing state clause); Reetz v. Michigan, 188 U.S. 505, 510 (1903) (case construing state clause citing case construing federal clause).

[4] *See* ArtI.S9.C3.3.1 Overview of Ex Post Facto Laws.

[5] *E.g.*, *Calder*, 3 U.S. at 389; Watson v. Mercer, 33 U.S. 88, 110 (1834); *see also* ArtI.S9.C3.3.4 Ex Post Facto Law Prohibition Limited to Penal Laws.

[6] Burgess v. Salmon, 97 U.S. 381, 385 (1878).

[7] *E.g.*, *Calder*, 3 U.S. at 389; *see also* ArtI.S9.C3.3.3 Retroactivity of Ex Post Facto Laws.

[8] *Calder*, 3 U.S. at 390.

[9] *See, e.g.*, Fletcher v. Peck, 10 U.S. 87, 138–39 (1810); *cf.* Landgraf v. USI Film Prods., 511 U.S. 244, 267 (1994) (the restrictions that the Constitution places on retroactive legislation "are of limited scope" and "[a]bsent a violation of one

Multiple Supreme Court decisions have held that the Ex Post Facto Clauses apply only to federal and state legislation, not to judicial decisions.[10] The state Ex Post Facto Clause also applies to state constitutional amendments. In *Cummings v. Missouri*, the Court considered a challenge to a post-Civil War amendment to the Missouri Constitution that required persons engaged in certain professions to swear an oath that they had never been disloyal to the United States.[11] In holding that the amendment violated the state Ex Post Facto Clause, the Court looked to the Clause's language providing that "'no State'—not *no legislature of a State*, but that '*no State*'—should pass any ex post facto law," and concluded that "[i]t can make no difference, therefore, whether such legislation is found in a constitution or in a law of a State; if it be within the prohibition it is void."[12]

ArtI.S10.C1.6 Contracts

ArtI.S10.C1.6.1 Overview of Contract Clause

Article I, Section 10, Clause 1:

> *No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.*

In addition to prohibiting states from enacting bills of attainder and ex post facto laws, the Constitution seeks to protect private rights from state interference by limiting the states' power to enact legislation that alters existing contract rights.[1] The Constitution's Contract Clause provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[2] Although this language could be read as completely prohibiting a state's

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of those specific provisions," when a new law makes clear that it is retroactive, the arguable "unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give [that law] its intended scope").

[10] *E.g.*, Frank v. Magnum, 237 U.S. 309, 344–45 (1914); *cf.* Rogers v. Tennessee, 532 U.S. 451, 456–60 (2000) (holding that "limitations on ex post facto judicial decisionmaking are inherent in the notion of due process," but the due process limitation on courts is not identical to the ex post facto prohibition that applies to legislation); *see also* ArtI.S9.C3.3.11 Ex Post Facto Prohibition and Judicial Decisions.

[11] 71 U.S. 277, 280–81 (1866).

[12] *Id.* at 307–08. For additional discussion of *Cummings*, see ArtI.S9.C3.3.9 Employment Qualifications and Ex Post Facto Laws.

[1] *See* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 266–67 (1827) ("If it were proper to prohibit a State legislature to pass a retrospective law, which should take from the pocket of one of its own citizens a single dollar, as a punishment for an act which was innocent at the time it was committed; how much more proper was it to prohibit laws of the same character precisely, which might deprive the citizens of other States, and foreigners, as well as citizens of the same State, of thousands, to which, by their contracts, they were justly entitled, and which they might possibly have realized but for such State interference?"); *see also* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 431 (1934) ("The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them[,] and impairment, as above noted, has been predicated on laws which without destroying contracts derogate from substantial contractual rights.") (citations omitted).

[2] U.S. Const. art. I, § 10, cl. 1. The Supreme Court has long considered contractual "obligations" to encompass both the express terms of an agreement and the underlying state law regarding interpreting and enforcing contracts upon which the parties relied when they made the contract. *See* U.S. Trust Co. v. New Jersey, 431 U.S. 1, 19–20 & n.17 (1977) ("The obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement."). Such underlying state law may include the law of the place in which the contract was made and the place where it will be performed. *Id.* Thus, the "obligation" of a contract refers to laws that affect its "validity, construction, discharge and enforcement." *Blaisdell*, 290 U.S. at 429–30 (quoting Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535, 550 (1866)). States have long regulated the formation, interpretation, enforcement, and performance of contracts. *Ogden*, 25 U.S. (12 Wheat.) at 286 ("But to assign to contracts, universally, a literal purport, and to exact for them a rigid literal fulfilment, could not have been the intent of the constitution. It is repelled by a hundred examples. Societies exercise a positive control as well over the inception, construction, and fulfilment of contracts, as over the form and measure of the remedy to enforce them.").

legislative impairment of contracts, the Supreme Court has interpreted the clause to *limit* a state's power to enact legislation that: (1) breaches or modifies its own contracts; or (2) regulates contracts between private parties.[3]

The Supreme Court has held that the Contract Clause does not generally prevent states from enacting laws to protect the welfare of their citizens.[4] Thus, states retain some authority to enact laws with retroactive effect that alter contractual or other legal relations among individuals and entities.[5] However, a state's regulation of contracts, whether involving public or private parties, must generally be reasonably designed and appropriately tailored to achieve a legitimate public purpose.[6]

Prior to the ratification of the Fourteenth Amendment and the subsequent development of the Supreme Court's Due Process jurisprudence in the late nineteenth and early twentieth centuries, the Contract Clause was one of the few constitutional clauses that expressly limited the power of the states.[7] As Chief Justice John Marshall explained in an early opinion

[3] *U.S. Trust Co.*, 431 U.S. at 17. Notably, the Clause does not apply to acts of the Federal Government. Sinking-Funds Cases, 99 U.S. 700, 718–19 (1878) (acknowledging that the Federal Government is "prohibited from depriving persons or corporations of property without due process of law" but is "not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts"); *see also* Samuel R. Olken, *Charles Evans Hughes and the Blaisdell Decision: A Historical Study of the Contract Clause*, 72 Or. L. Rev. 513, 519 (1993) (discussing how the Contract Clause "differed from the Northwest Ordinance in that it barred only state impairment of contract obligations").

[4] *Blaisdell*, 290 U.S. at 434–35 (observing that a state "continues to possess authority to safeguard the vital interests of its people[;] . . . [t]his principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court"); *see also* W.B. Worthen Co. v. Thomas, 292 U.S. 426, 433 (1934) ("[L]iteralism in the construction of the contract clause . . . would make it destructive of the public interest by depriving the State of its prerogative of self-protection.").

[5] *See Blaisdell*, 290 U.S. at 428 ("[T]he prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula."); *U.S. Trust Co.*, 431 U.S. at 17 ("[T]he Contract Clause does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effects."); El Paso v. Simmons, 379 U.S. 497, 506–09 (1965) ("[I]t is not every modification of a contractual promise that impairs the obligation of contract under federal law . . . . The State has the 'sovereign right . . . to protect the . . . general welfare of its people . . . . Once we are in this domain of the reserve power of a State we must respect the wide discretion on the part of the legislature in determining what is and what is not necessary.'") (quoting E. N.Y. Sav. Bank v. Hahn, 326 U.S. 230, 232–33 (1945)); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 628–30 (1819) ("Taken in its broad unlimited sense, the [Contract Clause] would be an unprofitable and vexatious interference with the internal concerns of a State . . . . [T]he framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit."). Notably, other constitutional provisions may limit a state's power to enact retroactive legislation that, for example, imposes a punishment (e.g., a bill of attainder or ex post facto law). *See U.S. Trust Co.*, 431 U.S. at 17 n.13. For example, the Contract Clause generally does not prevent a state from altering laws governing state offices or civil institutions, or from enacting laws on the subject of divorce. *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 627–30 ("That the framers of the constitution did not intend to retrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us, is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts, than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces."). The Court has cautioned, however, that the clause should not be interpreted to imply that parties may contract to obtain immunity from state regulation. *U.S. Trust Co.*, 431 U.S. at 22 ("The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from state regulation by making private contractual arrangements."); *see also* Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349, 357 (1908) ("One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.").

[6] *U.S. Trust Co.*, 431 U.S. at 22 ("Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."). A court's evaluation of the reasonableness of state legislation that affects private contract rights may include consideration of the background circumstances that motivated the state law's adoption and the measure's duration, among other factors. *See Blaisdell*, 290 U.S. at 444–47. Courts accord legislatures some deference in determining necessity and reasonableness of such legislation. *U.S. Trust Co.*, 431 U.S. at 22–23.

[7] *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978) (characterizing the Contract Clause as "perhaps the strongest single constitutional check on state legislation during our early years as a Nation"); *U.S. Trust*

interpreting the Contract Clause, the Framers' intent in including such language in the Constitution was to prohibit states from enacting legislation intended to assist debtors by abrogating or modifying the terms of existing contracts, as many colonies and states had done during the Colonial Era and under the Articles of Confederation.[8] Many of the Framers believed that such laws discouraged commerce and the extension of credit, undermining the stability of contractual relations and damaging the national economy.[9] Although limited evidence exists to clarify the Contract Clause's original meaning, James Madison argued during debates over ratification of the Constitution that the Clause would prevent shifting state legislative majorities from retroactively impairing private rights.[10] And Alexander Hamilton suggested that the Contract Clause would avoid a breakdown in commercial relations among the states, noting that state laws abrogating private contract rights could serve as a source of hostility among them.[11]

The Supreme Court's views on the level of protection that the Contract Clause provides for contract rights have shifted over time. During the 1800s, and in particular prior to the ratification of the Fourteenth Amendment in 1868, the Supreme Court often relied on the Contract Clause to strike down state legislation as unconstitutional when it interfered with existing contract rights.[12] The Court interpreted the Clause to protect a variety of property interests, such as an executed grant of land[13] and the state-granted charter of a private

Co., 431 U.S. at 15 ("Over the last century, however, the Fourteenth Amendment has assumed a far larger place in constitutional adjudication concerning the States [than the Contract Clause]."). As noted in *McDonald v. Chicago,* 561 U.S. 742 (2010), during the 1960s, the Court "shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause. The Court eventually incorporated almost all of the provisions of the Bill of Rights. Only a handful of the Bill of Rights protections remain unincorporated." *Id.* at 764–65; *see e.g.*, Duncan v. Louisiana, 391 U.S. 145, 161–62 (1968) (holding that the Fourteenth Amendment's Due Process Clause incorporates the Sixth Amendment right to trial by jury and makes it applicable to the states). For a discussion of the limitations that the Due Process Clause imposes on states with respect to retroactive deprivations of a life, liberty, or property interest, see Amdt14.S1.5.1 Overview of Procedural Due Process. In addition, the Dormant Commerce Clause doctrine, although not specifically directed at protecting contract rights, limits state power by restraining state authority to regulate interstate commerce. For more, see ArtI.S8.C3.7.1 Overview of Dormant Commerce Clause.

[8] *Cf. Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 628–30 ("That anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements."); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 199, 203 (1819) ("[T]he prevailing evil of the times, which produced this clause in the constitution, was the practice of emitting paper money, of making property which was useless to the creditor a discharge of his debt, and of changing the time of payment by authorizing distant instalments.").

[9] *Blaisdell*, 290 U.S. at 427–28.

[10] The Federalist No. 44 (James Madison).

[11] The Federalist No. 7 (Alexander Hamilton) ("Laws in violation of private contracts, as they amount to aggressions on the rights of those States whose citizens are injured by them, may be considered as another probable source of hostility [among the states].").

[12] *See, e.g.*, *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 627, 654 (striking down as unconstitutional a state law that interfered with a private corporate charter established under state law); *Sturges*, 17 U.S. (4 Wheat.) at 208 (holding a bankruptcy law that allowed insolvent debtors to obtain the discharge of their debts by surrendering their property violated the Contract Clause); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 127, 135–39 (1810) (interpreting the Contract Clause to prohibit a state from breaching its own contracts by rescinding a land grant); *see also* James W. Ely, Jr., The Contract Clause: A Constitutional History 1 (2016) ("Under the leadership of John Marshall, the Supreme Court construed the provision expansively, and it rapidly became the primary vehicle for federal judicial review of state legislation before the adoption of the Fourteenth Amendment. Indeed, the contract clause was one of the most litigated provisions of the Constitution throughout the nineteenth century . . . .").

[13] *Fletcher*, 10 U.S. (6 Cranch) at 137.

corporation.[14] But even during the early years of the Republic, the Court recognized that the states retained some power to regulate contracts in order to further the public interest.[15]

During the late nineteenth and early twentieth centuries, the Supreme Court decided cases that gradually weakened the Contract Clause's protections.[16] The Court's view of the Contract Clause underwent a major change during the New Deal Era when the Court decided *Home Building & Loan Ass'n v. Blaisdell*.[17] In that case, the Court declined to enforce strictly the Contract Clause's prohibition on state legislation that alters *private* contracts.[18] During the depths of the Great Depression, the Court upheld the Minnesota Mortgage Moratorium Law, which allowed courts to extend temporarily the period of time during which a mortgagor (e.g., a homeowner) could redeem a home after the bank foreclosed on the property.[19] The Supreme Court's decision in *Blaisdell* marked a turning point in its Contract Clause jurisprudence, signaling that the Court would thereafter be more solicitous of states' use of their police powers to regulate contracts to "protect the lives, health, morals, comfort and general welfare of the people," even when the exercise of such powers would substantially impact contract rights.[20]

Since *Blaisdell*, the Court has permitted state legislatures to modify contract rights to serve the public interest in several cases.[21] Nonetheless, since the 1970s, the Court has decided a few cases indicating that the Contract Clause still provides some protection for contracts, at least when the state lacks a legitimate public purpose for substantially interfering with contract rights and has not regulated such rights in a reasonable or necessary way.[22] For example, the Contract Clause continues to prohibit states from unreasonably and unnecessarily breaching certain legislative covenants with private bondholders,[23] and from

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[14] *See Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 644, 652–54. As the Court noted in *Blaisdell*, the Clause has been held not to encompass a marriage contract as it pertains to divorce laws, a judgment rendered upon a contract, or a state's waiver of sovereign immunity in general legislation. *Blaisdell*, 290 U.S. at 429 n.8.

[15] *See, e.g.*, W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 535–36 (1848) (upholding a state's authority to use the power of eminent domain to take a company's toll bridge franchise in order to construct a public highway as not violative of the Contract Clause).

[16] Ely, *supra* note 12, at 1 ("Over time . . . courts carved out several malleable exceptions to the constitutional protection of contracts . . . thereby weakening the protection of the contract clause and enhancing state regulatory authority.").

[17] 290 U.S. 398 (1934).

[18] *Id.* at 444–48.

[19] *Id.* at 415–16, 424. The law prevented the mortgagee from obtaining possession during that time. *Id.* This right ran contrary to existing contracts, which granted the lender the right to foreclose. *Id.* at 424–25.

[20] Allied Structural Steel Co v. Spannaus, 438 U.S. 234, 241 (1978) (quoting Manigault v. Springs, 199 U.S. 473, 480 (1905)).

[21] *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 474–78, 502, 506 (1987) (upholding a Pennsylvania safety and environmental law—which prohibited mining that would damage existing structures, such as public buildings and homes, by eliminating underground support—against a Contract Clause challenge where the challengers argued the law nullified the surface owner's contractual waiver of liability for damage to the surface estate from coal mining); Exxon Corp. v. Eagerton, 462 U.S. 176, 178–79, 196 (1983) (upholding an Alabama law that increased the severance tax on oil and gas extracted from wells located in the state—which the state imposed on producers at the time of severance and which exempted the owners of royalty interests but forbid producers from passing the tax increase on to purchasers or consumers—against a Contract Clause challenge alleging the law impaired the obligations of oil and gas producers' contracts with royalty owners and consumers).

[22] *Spannaus*, 438 U.S. at 242, 250 ("If the Contract Clause is to retain any meaning at all, . . . it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.").

[23] U.S. Trust Co. v. New Jersey, 431 U.S. 1, 26, 32 (1977) ("If a State could reduce its financial obligations [by breaching a legislative covenant to protect private bondholders] whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.").

enacting legislation that regulates private pension contracts by imposing a substantial new and retroactive payment obligation on a narrow class of companies.[24]

ArtI.S10.C1.6.2 Historical Background on Contract Clause

Article I, Section 10, Clause 1:

> *No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.*

After the American Revolution, many citizens of the newly created United States had difficulty repaying their debts, motivating state legislatures to enact a number of laws to relieve them of their financial obligations.[1] During the peak of this financial crisis, and under the Articles of Confederation, states enacted laws that assisted debtors by, for example, (1) permitting a debtor to tender worthless property or nearly valueless commodities in payment of debts; (2) extending the time for repaying a debt beyond the time period provided for in a contract; and (3) permitting the payment of overdue obligations in installments rather than a lump sum.[2]

Historical sources from the time of the Founding do not shed much light on the Contract Clause's original meaning.[3] Certainly, the Framers knew the states had enacted various laws that disrupted private contracts, and they wanted to protect private property rights.[4] At least some of the delegates who attended the Constitutional Convention of 1787 in Philadelphia were aware that the Confederation Congress, the country's governing body under the Articles of Confederation, had recently passed an ordinance governing the Northwest Territory that specifically protected private contract rights from legislative interference.[5] Article 2 of the Northwest Ordinance provided that "in the just preservation of rights and property it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, bona fide and without fraud previously formed."[6]

During deliberations over the Constitution, delegate Rufus King of Massachusetts proposed to insert the Northwest Ordinance's broad language into the Constitution.[7] Delegates Gouverneur Morris and George Mason opposed the addition of this language,

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[24] *Spannaus*, 438 U.S. at 247–50.

[1] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427 (1934) ("The widespread distress following the revolutionary period, and the plight of debtors, had called forth in the States an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations."); *see also* Sveen v. Melin, No. 16-1432, slip op. at 6 (U.S. June 11, 2018) ("The origins of the Clause lie in legislation enacted after the Revolutionary War to relieve debtors of their obligations to creditors.").

[2] *See* Sturges v. Crowninshield, 17 U.S. 122, 199, 204–05 (1819).

[3] *See Blaisdell*, 290 U.S. at 427.

[4] *See* James W. Ely Jr., The Contracts Clause: A Constitutional History 11 (2016) ("Historians generally agree that the establishment of safeguards for private property was one of the principal objectives of the constitutional convention of 1787."); *see also Blaisdell*, 290 U.S. at 459–60 (Sutherland, J., dissenting) (indicating that at least some of the Framers were aware of state laws that disrupted private contracts).

[5] *See* Ely, *supra* note 4, at 11 ("Passed by the Confederation Congress while the constitutional convention was meeting in Philadelphia, the Northwest Ordinance established a framework for territorial governance in the Old Northwest.").

[6] *An ordinance for the government of the territory of the United States, North-west of the river Ohio*, Library of Congress, https://www.loc.gov/resource/bdsdcc.22501/?st=gallery.

[7] *See* 2 The Records of the Federal Convention of 1787, at 439–40 (Max Farrand ed., rev. ed. 1966).

arguing that state legislatures would occasionally need to modify contract rights in order to protect their citizens.[8] On the other hand, James Madison "admitted that inconvenience might arise from such a prohibition but thought on the whole it would be overbalanced by the utility of it."[9] However, Madison suggested that the Constitution's prohibition on ex post facto laws would prevent states from impairing the obligation of contracts retroactively, and the delegates approved language in Article I, Section 10 of the draft Constitution without the proposed Contract Clause.[10]

The next day, however, delegate John Dickinson of Delaware stated that, after further research, he had determined the term ex post facto "related to criminal cases only; that [the language prohibiting such laws] would not, consequently, restrain the states from retrospective laws in civil cases; and that some further provision for this purpose would be requisite."[11] Nonetheless, the delegates did not approve the Contract Clause's addition to the Constitution during these deliberations; rather, the Committee of Style and Arrangement, which produced the final version of the Constitution, added a modified version of the Contract Clause to the document without significant comment.[12]

The debates over the Constitution's ratification briefly addressed the Contract Clause. Federalists, who generally supported a strong central government, argued the clause would (1) protect private contract rights from state debtor relief legislation; and (2) improve commercial relations among the states. Writing in the *Federalist No. 44*, James Madison briefly discussed the importance of the Contract Clause along with the Ex Post Facto Clause and the Constitution's prohibition on bills of attainder.[13] Madison argued these clauses would prevent shifting state legislative majorities from retroactively impairing private rights.[14] The Framers may also have added the Contract Clause to prevent a breakdown in commercial relations among the states. In the *Federalist No. 7*, Alexander Hamilton noted that state laws abrogating private contract rights could serve as a source of hostility among the states.[15] And several other speakers at state ratifying conventions argued that the Contract Clause would protect interstate contracts from impairment.[16] Perhaps surprisingly, the Anti-Federalists, who

[8] *See id.*

[9] *Id.* at 440.

[10] *See id.*

[11] Jonathan Elliot, 5 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 488 (2d ed. 1836) (statement of John Dickinson).

[12] *See* 2 The Records of the Federal Convention of 1787, at 596–97, 610 (Max Farrand ed., rev. ed. 1966) (McHenry's notes, September 10–12, 1787) (Report of Committee of Style); Ely, *supra* note 4, at 13 (noting the Committee of Style "placed a differently worded contract clause into Article I, section 10, that contained various restrictions on state power"). An attempt to apply the Contract Clause to the Federal Government failed. Elliot, *supra* note 11, at 546 (motion of Elbridge Gerry).

[13] The Federalist No. 44 (James Madison).

[14] *See id.*; *see also* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137–38 (1810) ("[I]t is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment.").

[15] *See* The Federalist No. 7 (Alexander Hamilton) ("Laws in violation of private contracts, as they amount to aggressions on the rights of those States whose citizens are injured by them, may be considered as another probable source of hostility [among the States].").

[16] Ely, *supra* note 4, at 15 (collecting statements).

generally opposed a strong central government, supported the Contract Clause.[17] However, they believed that state courts rather than federal courts should enforce it.[18]

Although most commentators involved in debates over the proposed Constitution agreed that the document should include the Contract Clause, one delegate to the Federal Convention, Maryland Attorney General Luther Martin, opposed the Clause.[19] In a letter to the Maryland House of Delegates that foreshadowed the development of the Supreme Court's jurisprudence, Martin argued that the Contract Clause would tie states' hands and prevent them from modifying contracts to address national crises.[20]

As Justice John Marshall explained in an early opinion interpreting the Contract Clause, the Framers' intent in including such language in the Constitution was to prohibit states from enacting legislation intended to assist debtors by abrogating or modifying the terms of existing contracts,[21] as many colonies and states had done during the Colonial Era and under the Articles of Confederation.[22] The Founders believed these laws injured creditors and undermined contractual relationships.[23] The Constitution's Framers therefore sought to preserve faith in contractual relationships—and facilitate interstate and foreign commerce—by adding a constitutional restraint on state power to impair contractual obligations.[24] This restraint reflected the Framers' preference for private ordering; that is, the notion that private parties could enter into and rely upon binding contracts to "order their personal and business affairs."[25]

ArtI.S10.C1.6.3 Evolution of Contract Clause's Use

Article I, Section 10, Clause 1:

> *No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a*

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[17] Ely, *supra* note 4, at 16–17.

[18] Ely, *supra* note 4, at 16–17 ("Anti-Federalists rarely focused on the clause in urging rejection of the proposed new government. . . . [Instead, at least one writer] insisted that state, not federal, courts should be trusted with deciding cases arising under [the Contract Clause].").

[19] Elliot, *supra* note 11, at 376–77 (letter of Luther Martin to the Maryland House of Delegates) ("I considered, sir, that there might be times of such great public calamities and distress, and of such extreme scarcity of specie, as should render it the duty of a government, for the preservation of even the most valuable part of its citizens, in some measure to interfere in their favor, by passing laws totally or partially stopping courts of justice; or authorizing the debtor to pay by instalments, or by delivering up his property to his creditors at a reasonable and honest valuation.").

[20] *See* Elliot, *supra* note 11, at 376–77.

[21] *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 628–30 (1819) ("That anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements."); *see also* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 199 (1819) ("[T]he prevailing evil of the times, which produced this clause in the constitution, was the practice of emitting paper money, of making property which was useless to the creditor a discharge of his debt, and of changing the time of payment by authorizing distant instalments.").

[22] *Sturges*, 17 U.S. (4 Wheat.) at 203.

[23] *See id.* at 204; *see also* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427 (1934) ("Legislative interferences had been so numerous and extreme that the confidence essential to prosperous trade had been undermined and the utter destruction of credit was threatened.").

[24] *See Blaisdell*, 290 U.S. at 427–28; *see also* Sveen v. Melin, No. 16-1432, slip op. at 2 (U.S. June 11, 2018) (Gorsuch, J., dissenting) ("[The Framers] took the view that treating existing contracts as 'inviolable' would benefit society by ensuring that all persons could count on the ability to enforce promises lawfully made to them—even if they or their agreements later prove unpopular with some passing majority." (quoting *Sturges*, 17 U.S. (4 Wheat.) at 206).

[25] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978) ("Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.").

Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

During the 1800s, the Supreme Court often relied on the Contract Clause to strike down as unconstitutional state legislation that interfered with existing contract rights. In fact, the Court relied on the Contract Clause in one of the earliest cases in which it determined that a state law violated the Constitution: its 1810 decision in *Fletcher v. Peck*.[1] In that case, the Court interpreted the Contract Clause to protect public contracts (i.e., those involving a state as a party to an agreement with one or more private entities) in addition to private agreements.[2] The Court determined that a state could not breach its own contracts with private parties by revoking a grant of real estate.[3] Almost a decade later, the Court held in *Trustees of Dartmouth College v. Woodward* that the Contract Clause barred a state from enacting legislation that substantially interfered with a private corporate charter established under state law.[4] And with respect to contracts between private parties, in the 1819 decision, *Sturges v. Crowninshield*, the Court held that a bankruptcy law allowing insolvent debtors to obtain the discharge of their debts by surrendering their property violated the Contract Clause.[5] But even during the early years of the Republic, the Court recognized that states retained some power to regulate contracts in order to further the public interest.[6]

The Supreme Court's view of the Contract Clause changed significantly during the New Deal Era when the Court decided *Home Building & Loan Ass'n v. Blaisdell*, a case in which the Court declined to enforce strictly the Contract Clause's prohibition on state legislation that altered *private* contracts.[7] During the depths of the Great Depression, the Court upheld the constitutionality of the Minnesota Mortgage Moratorium Law, which allowed courts to extend temporarily the period of time during which a mortgagor (e.g., a homeowner) could redeem a home after the bank foreclosed on the property.[8] Although the Minnesota law prevented the mortgagee from obtaining actual possession, the Court upheld the law as necessary and reasonable to address the economic crisis because it was appropriately tailored to address the

[1] 10 U.S. (6 Cranch) 87, 127 (1810).

[2] *Id.* at 139.

[3] *Id.*

[4] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 627, 644–45 (1819).

[5] Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 197, 208, 212 (1819). The Supreme Court's early interpretations of the Contract Clause often drew a distinction between permissible state legislation that retroactively altered private contractual *remedies* and often forbidden state legislation that modified contractual *obligations*. *See* U.S. Trust Co. v. New Jersey, 431 U.S. 1, 19 n.17 (1977) (discussing early cases). For example, a state law that prohibited the imprisonment of debtors did not contravene the Contract Clause because it removed a *remedy* rather than modifying a contract's terms. *Id.*; *see also Sturges*, 17 U.S. (4 Wheat.) at 200 ("Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."). However, the Court later rejected this distinction between contractual remedies and obligations, determining that even altering a contract's obligations retroactively may not contravene the Contract Clause in some circumstances. *See* Bronson v. Kinzie, 42 U.S. 311, 317 (1843) ("It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing."); *see also U.S. Trust Co.*, 431 U.S. at 19 n.17 ("More recent decisions have not relied on the remedy/obligation distinction, primarily because it is now recognized that obligations as well as remedies may be modified without necessarily violating the Contract Clause.").

[6] *See* W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 535 (1848) (discussing a state's exercise of its eminent domain power).

[7] *See* 290 U.S. 398, 442–43, 444–48 (1934).

[8] *See id.* at 415–18, 447. This right ran contrary to existing contracts, which granted the lender the right to foreclose. *See id.* at 424–25.

emergency and was limited in duration.[9] The Court determined that a state had the power to regulate existing contracts to "safeguard the vital interests of its people"[10] as an exercise of its sovereignty.[11]

The Supreme Court's decision in *Blaisdell* marked a turning point in its Contract Clause jurisprudence, signaling that the Court would thereafter be more solicitous of states' use of their police powers to regulate contracts to "protect the lives, health, morals, comfort and general welfare of the people,"[12] even when the exercise of such powers would substantially impact contract rights. Since *Blaisdell*, the Court has permitted states to alter contract rights legislatively to serve a legitimate public interest.[13] But the Court has indicated that the Contract Clause still provides some protection for contracts.[14] For example, in a 1978 case, the Court closely scrutinized state legislation affecting *public* contracts and held that the Contract Clause prohibited a state from breaching a legislative covenant it made with private bondholders.[15] In the context of private contracts, although the Court continues to defer to the judgment of a state's legislature when weighing the impairment of private contracts against the public purposes that allegedly motivated the challenged legislation's enactment, the Court has held that the Clause prohibits a state from enacting legislation that regulates private contracts by imposing a substantial new and retroactive payment obligation on a narrow class of companies.[16]

ArtI.S10.C1.6.4 State Contracts

ArtI.S10.C1.6.4.1 Early Cases on State Modifications to State Contracts

Article I, Section 10, Clause 1:

> *No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.*

Early in the nation's history, the Supreme Court established that, in addition to barring a state from substantially interfering with contracts of private individuals, the Constitution's Contract Clause may prohibit a state from breaching or modifying its own contracts. In fact, one of the first cases in which the Supreme Court struck down a state law as unconstitutional arose under the Contract Clause, and involved contracts between the State of Georgia and private parties.[1] In *Fletcher v. Peck*, Robert Fletcher sued John Peck, arguing, among other

[9] *See id.* at 424–25, 444–48.

[10] *Id.* at 434–35.

[11] *See id.* ("Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order.").

[12] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978) (quoting Manigault v. Springs, 199 U.S. 473, 480 (1905)).

[13] *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 474–78, 506 (1987); Exxon Corp. v. Eagerton, 462 U.S. 176, 178–79, 196 (1983).

[14] *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. at 242 (1978) ("If the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.").

[15] *See U.S. Trust Co.*, 431 U.S. at 23–28, 32 ("If a State could reduce its financial obligations [by breaching a legislative covenant to protect private bondholders] whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.").

[16] *See Spannaus*, 438 U.S. at 247–50.

[1] *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 127 (1810).

things, that Peck lacked clear title to a tract of land he had conveyed to Fletcher.[2] The State of Georgia sold the tract to private parties in 1795 by an act of its legislature.[3] However, a subsequent legislature, determining that corruption tainted the sale, passed a law purporting to rescind the earlier grant.[4] This raised the question of whether Peck had title to the land he purported to convey to Fletcher.

Chief Justice John Marshall, writing for the Court, characterized Georgia's original sale of land as a contract between Georgia and private parties that fell within the scope of the Contract Clause.[5] Although the contract had already been executed, the grant of real estate continued to impose obligations on Georgia not to reassert title to the land.[6] The Court interpreted the Contract Clause to prohibit a state from breaching *its own* contracts as well as impairing those between private individuals.[7] Drawing a comparison between the act rescinding the land grant and an unconstitutional ex post facto state law that punished an individual for an act that was not a crime at the time it was committed, the Court determined that the Contract Clause prohibited the Georgia legislature from nullifying its earlier grant of land.[8] The Court stated that subsequent purchasers of the land bought it without notice of the corrupt intent of the legislature that initially conveyed it, and, therefore, "the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void."[9] The Court's decision in *Fletcher* was an early indication that the Justices would closely scrutinize a state's breach of its own contracts with private parties, and that grants of real estate could constitute contract rights protected by the Contract Clause.

Nine years later, in a seminal corporate law decision, the Supreme Court further extended its interpretation of the types of contracts and property interests protected by the Contract Clause, determining the Clause may prohibit states from revoking or substantially interfering with private corporate charters established under state law. In *Trustees of Dartmouth College v. Woodward*, the New Hampshire state legislature enacted a law amending the corporate charter of Dartmouth College, which King George III of Great Britain established in a 1769 grant.[10] New Hampshire altered the charter to vest control of the College in the state's governor and other state officials.[11] The majority of the college's trustees objected to this

[2] *See id.* at 127–28.

[3] *Id.* at 127.

[4] *Id.* at 130–32. For more on the history of the so-called "Yazoo Land Fraud," see Allen Pusey, *The Yazoo Land Fraud Becomes Law*, 104 A.B.A. J. 72 (2018).

[5] *See Fletcher*, 10 U.S. (6 Cranch) at 135, 137 ("A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.").

[6] *See id.* at 136–37; *cf.* Texaco, Inc. v. Short, 454 U.S. 516, 518, 531 (1982) (upholding, against a Contract Clause challenge, an Indiana law that automatically extinguished severed mineral interests if they were not used for twenty years unless the mineral owner filed a statement of claim with the local county recorder because the mineral owners in the case had not executed mineral leases until after their mineral rights had lapsed, and thus there was no existing contract to be impaired).

[7] *See Fletcher*, 10 U.S. (6 Cranch) at 137.

[8] *Id.* at 136–39.

[9] *Id.* at 139.

[10] *See* 17 U.S. (4 Wheat.) 518, 624–26 (1819). After the Revolution, the State of New Hampshire succeeded to the duties and powers of government previously held by the Crown, including obligations to Dartmouth College created by the charter. *See id.* at 651.

[11] *Id.* at 626.

transfer of control of the College to the state and sued the secretary of the new board of trustees to recover corporate property transferred to the new secretary.[12]

The Court determined that Dartmouth's corporate charter was a contract subject to the Contract Clause even though the Constitution's Framers may not have contemplated the Clause would protect rights granted under a corporate charter.[13] In support of this view, the Court focused on the law's effects on the corporation's property, noting the charter had been made for the "security and disposition of property" and that "real and personal estate ha[d] been conveyed to the corporation" to accomplish its mission of education.[14] Donors gifted the College with money and property upon the expectation that its mission would be fulfilled by the trustees without interference by the state legislature.[15]

Having determined the trustees' rights under the corporate charter were protected by the Contract Clause, the Court further decided that the New Hampshire law impaired these rights because, contrary to the will of the College's donors, the legislation transferred the power of governing the College from the trustees appointed in the founder's will to the New Hampshire governor and placed donor funds under the state government's control.[16] The College's founders donated funds with the expectation that the charter would protect the objectives and governance structure of Dartmouth College for posterity.[17] Furthermore, Dartmouth College was a private institution that held property for nongovernmental purposes; its professors and trustees were not public officers; and it was funded by private donors.[18]

Thus, even though the College was formed under state law, the Court determined it was not a civil institution, and thus the government had no right to change its governance structure and mission substantially without its consent.[19] Moreover, the legislature had not reserved a right to amend the charter.[20] *Dartmouth College* was a key decision with ramifications beyond the higher education context. The decision established constitutional limits on a state's power to alter a corporation's charter without its consent, at least when the state had not reserved a right to amend the charter.

ArtI.S10.C1.6.4.2 State Sovereign Powers and Contracts

Article I, Section 10, Clause 1:

> *No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a*

[12] *Id.* at 626–27.

[13] *Id.* at 627, 644–45.

[14] *Id.* at 643–44.

[15] *See Id.* at 647 ("It is probable, that no man ever was, and that no man ever will be, the founder of a college, believing at the time, that an act of incorporation constitutes no security for the institution; believing, that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature.").

[16] *Id.* at 652.

[17] *Id.* at 652–54 ("They contracted for a system, which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves.").

[18] *See id.* at 629–36.

[19] *See id.* at 637–38 ("There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations.").

[20] *See id.* at 674–75, 680 (Story, J., concurring).

ArtI.S10.C1.6.4.2
State Sovereign Powers and Contracts

Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

During the 1800s, the Supreme Court often interpreted the Contract Clause as providing robust protection for public and private contracts. However, the Court decided some cases that were more solicitous of the states' power to regulate contracts in the public interest. Under Chief Justice Roger B. Taney, the Court held that states could not contract away their sovereign powers, including their powers of eminent domain and police powers.[1]

An early example of a case in which the Supreme Court recognized the Contract Clause allows states some leeway to adopt legislation that would interfere with existing contracts in order to protect the public interest involved the Vermont legislature's exercise of the power of eminent domain to "take" contractual rights of private parties.[2] In *West River Bridge Co. v. Dix*, the Vermont legislature enacted a law granting an exclusive 100-year franchise to operate a toll bridge over the West River to the West River Bridge Company.[3] However, several decades later, the legislature passed a statute that permitted certain public officials to "take" such franchises using the power of eminent domain to construct public highways—a power the state sought to use against the West River Bridge Company's toll bridge franchise.[4] In an attempt to avoid the taking of its franchise, the company sued, arguing the state's eminent domain law impaired the obligation of the franchise contract between Vermont and itself by depriving the company of its franchise without its consent.[5]

The Supreme Court disagreed that the subsequently enacted Vermont law violated the Contract Clause.[6] Acknowledging the legislature's grant of a corporate charter to the company was a contract, the Court nevertheless determined that taking the corporation's franchise for public use upon payment of compensation was a proper exercise of the state's inherent and long-standing sovereign power of eminent domain over subordinate private property rights.[7] The Court noted the state's power of eminent domain constituted part of the background law and conditions under which parties entered into private contracts, and thus the state's exercise of that power could not impair the franchise contract.[8] However, the state would have to compensate the bridge company adequately for the taking.[9] *West River Bridge Co.* represents the Court's early recognition that the Contract Clause was not absolute, and that states retained some leeway to exercise their sovereign powers to protect the public interest, which they could not contract away, regardless of interference with contractual relationships.

During this era, the Supreme Court decided other important cases that recognized that a state could functionally abrogate the terms of a corporate charter to serve the public interest

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[1] James W. Ely, Jr., The Contract Clause: A Constitutional History 4 (2016) ("[Chief Justice] Taney both limited and strengthened the security of contractual obligations under the contract clause."). "On the other hand, . . . [the Taney Court] vigorously invoked the [Contract Clause] to safeguard the rights of parties under private agreements and to uphold clearly expressed tax exemptions." *Id.*

[2] *See* W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 530–31 (1848).

[3] *Id.* at 530.

[4] *Id.* at 530–31.

[5] *See id.* at 531, 533–34.

[6] *Id.* at 536.

[7] *See id.* at 530–36.

[8] *See* W. River Bridge Co. v. Dix, 47 U.S. 507, 532–33 (1848) ("[I]nto all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself, they are superinduced by the preexisting and higher authority of the laws of nature, of nations, or of the community to which the parties belong, they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force.").

[9] *Cf. id.* at 535.

through the exercise of its police powers. In *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*,[10] Chief Justice Taney, writing for the Court, held that a state could functionally abrogate the terms of a corporate charter to benefit its economy when the charter had not specifically preserved an exclusive toll franchise for a bridge company.[11] As one scholar has noted, the Taney Court "established the principle that corporate charters should be strictly construed and that privileges such as monopoly status . . . could never be implied."[12] Later in the nineteenth century, the Court carved out additional exceptions for state police powers. For example, the Court held that a state could use its police powers to revoke, on public moral grounds, a previously granted charter to a company to operate a lottery.[13]

From the late nineteenth to early twentieth centuries, the Contract Clause gradually took on a lesser role in the Court's jurisprudence. Although the Court's Contract Clause jurisprudence protected state tax exemptions in corporate charters and the rights of state bondholders from subsequent legislative impairment,[14] the Clause diminished in importance with the ratification of the Fourteenth Amendment.[15] Specifically, the Fourteenth Amendment's Due Process Clause offered a new avenue for the protection of private property interests, including contract rights, against unreasonable state interference.[16]

ArtI.S10.C1.6.4.3 Modern Doctrine on State Changes to State Contracts

Article I, Section 10, Clause 1:

> *No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.*

The Court revived the Contract Clause in the context of public contracts in the late twentieth century. A major case from this time period, in which the Supreme Court confirmed it would thoroughly scrutinize state legislation that modified the state's *own contracts*, is *United States Trust Co. v. New Jersey*.[1] In that case, holders of bonds issued by the Port Authority of New York and New Jersey challenged a New Jersey statute as violative of the Contract Clause.[2] The law, along with a parallel New York enactment, repealed a prior

[10] 36 U.S. (11 Pet.) 420 (1837).

[11] *Id.* at 448–53.

[12] Ely, *supra* note 1, at 4.

[13] *See* Stone v. Mississippi, 101 U.S. 814, 821 (1879) ("Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume [a prohibition on lotteries] at any time when the public good shall require, whether [the charter] be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will.").

[14] *See, e.g.*, Wilmington R.R. v. Reid, 80 U.S. (13 Wall.) 264, 266–68 (1871) (holding the North Carolina General Assembly violated the Contract Clause by taxing the property of a railroad corporation after agreeing not to tax the property in the company's charter); Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430, 438–39 (1869) ("Without pursuing the subject further, we are of the opinion that the State of Missouri did make a contract on sufficient consideration with the Home of the Friendless, to exempt the property of the corporation from taxation, and that the attempt made on behalf of the State through its authorized agent, notwithstanding this agreement, to compel it to pay taxes, is an indirect mode of impairing the obligation of the contract, and cannot be allowed.").

[15] Ely, *supra* note 1, at 5 ("Although both federal and state courts heard a steady stream of contract clause cases [during the late nineteenth century], they increasingly relied on other constitutional provisions, notably the due process clause of the Fourteenth Amendment, to protect economic rights.").

[16] Ely, *supra* note 1, at 5.

[1] 431 U.S. 1 (1977).

[2] *See id.* at 3.

statutory covenant that limited the Port Authority's discretion to use revenue and reserve funds pledged as security for the bonds in order to subsidize passenger rail transportation.[3] The bondholders argued that in repealing the covenant, which sought to promote investors' confidence in the bonds, the state impaired a contractual obligation in violation of the Contract Clause.[4]

The Supreme Court agreed with the New Jersey trial court that the state legislature's statutory covenant was a contract among New Jersey, New York, and the bondholders that fell within the Contract Clause's protection.[5] The Court further determined that repeal of the covenant impaired the obligation of the states' contract with the bondholders because the covenant had limited the Port Authority's deficits, which in turn protected bondholders from depletion of the Authority's general reserve fund, and the state had not replaced it with a comparable provision.[6] Moreover, the impairment violated the Contract Clause because it modified the express terms of the parties' agreement by repealing the covenant retroactively without being justified by a legitimate public purpose.[7] The state legislature's interests in protecting its citizens' welfare by financing new mass transit projects, conserving energy, and protecting the environment could not justify the repeal,[8] and the Court refused to defer to the state legislature's judgment when balancing the alleged benefits that would result from impairment of the covenant against the private financial loss that the private bondholders would incur from impairment of the covenant.[9] Instead, the Court considered whether the impairment was reasonable and necessary to serve the public purposes for which the State had accomplished it.[10]

In this vein, the Supreme Court determined that "a less drastic modification" of the covenant would have achieved the state's purposes, such as amending the covenant to exclude new revenues from the limitation in order to subsidize mass transit.[11] The repeal was also unreasonable because the original covenant had been made with full knowledge that the public might demand increased options for mass transit in the future.[12] In other words, the Court was not reviewing a case in which a contract had been made a long time ago and circumstances had changed significantly.

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[3] *Id.* "In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." *Id.* at 17 n.14. State law addressing interpretation and enforcement of contracts may be deemed a part of the obligation of the contract as well. *See id.*

[4] *Id.* at 17.

[5] *See* 431 U.S. 1, 17–18 (1977).

[6] *Id.* at 19.

[7] *See id.* at 19–32.

[8] *Id.* at 21–32. The Supreme Court also examined whether the state could properly enter into the covenant without giving up an essential element of its sovereign powers. *Id.* at 23 & n.20, 28–29 (discussing the example of a state's revocation of a twenty-five-year charter to operate a lottery as an illustration of the Contract Clause's limits on a state's power to bind itself not to exercise its police powers in the future). However, the Court determined the states could properly bind themselves to financial restrictions regarding use of revenues and reserves securing bonds to finance passenger railroads through the exercise of their spending (and, perhaps, taxing) powers, and thus the states could not argue that the 1962 covenant was invalid when it was adopted. *Id.* at 24–26. The Court listed a few examples of state powers that could not be contracted away, including its power of eminent domain and its police power. *Id.* at 24 n.21.

[9] *See id.* at 21–32.

[10] *Id.* at 29 ("[A] State cannot refuse to meets its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors. We can only sustain the repeal of the 1962 covenant if that impairment was both reasonable and necessary to serve the admittedly important purposes claimed by the State.").

[11] *Id.* at 29–31 & 30 n.28.

[12] *Id.* at 31–32.

Notably, in *United States Trust Co.*, the Court declined to defer to the state's characterization of the public interests affected by the challenged state legislation and refused to weigh these public interests against private contract rights.[13] Consequently, the Court established a heightened standard of review for state laws that modify a state's own obligations as opposed to laws that simply interfere with contracts between private parties.[14] The Court justified this "dual standard of review" on the grounds that the state was a self-interested party.[15]

ArtI.S10.C1.6.5 Private Contracts

ArtI.S10.C1.6.5.1 Early Cases on State Changes to Private Contracts

Article I, Section 10, Clause 1:

> *No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.*

The Supreme Court has long held that the Contract Clause limits a state's power to regulate contracts between private parties. In the 1819 case *Sturges v. Crowninshield*, the Court examined a New York bankruptcy law that allowed insolvent debtors to obtain the discharge of their debts by surrendering their property.[1] Notably, the law applied retroactively to debt contracts parties had entered into prior to its enactment, raising the question of whether it interfered with existing contracts in violation of the Contract Clause.[2]

The Supreme Court began its analysis by defining a "contract" for purposes of the Clause as "an agreement in which a party undertakes to do, or not to do, a particular thing."[3] In the Court's view, the "obligation" of the contract in *Sturges* was the underlying state law binding the defendant-debtor to pay the plaintiff-creditor money on or before a certain date in accordance with a promissory note's terms.[4] When New York enacted a law allowing debtors to obtain the discharge of their entire debts upon surrender of their property, the state impaired the obligation of the debt contracts by potentially limiting a debtor's liability to an amount less than provided for in the original contract.[5]

Having determined the New York law impaired the obligation of contracts, the Court turned next to an analysis of whether that impairment violated the Contract Clause.[6] The Court adopted a broad reading of the Clause that arguably extended beyond the Framers'

[13] *See id.* at 25–28.

[14] *See id.*

[15] *Id.* at 26 & n.25 ("As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.").

[1] 17 U.S. (4 Wheat.) 122, 197, 208 (1819).

[2] *See id.* at 197. The Court determined that Article I, Section 10 of the Constitution did not necessarily prohibit states from passing bankruptcy laws so long as those laws did not conflict with federal law. *Id.* at 196–97.

[3] *Id.* at 197.

[4] *Id.*

[5] *See id.* at 197–98.

[6] *See id.* at 204.

original understanding of its scope to encompass state bankruptcy laws.[7] To the extent the New York law operated retroactively, the Court found, it impaired the obligation of contracts in violation of the Constitution.[8]

Nearly a decade after its decision in *Sturges*, the Court addressed a question left unanswered in that case—that is, whether a state bankruptcy law that permits a debtor to obtain a discharge from liability under a contract entered into *after the passage of the law* impairs the obligations of that contract in violation of the Contract Clause.[9] In *Ogden v. Saunders*, a citizen of New York contracted a debt in that state and claimed to have been discharged from that debt under a bankruptcy law in force at the time he entered into the contract.[10]

As in *Sturges*, the Supreme Court began its analysis by defining the *obligation* of contracts as the state law that binds parties to contracts to perform their duties thereunder or, alternatively, to pay compensation.[11] Unless the parties agreed otherwise, such law became part of the contract and governed enforcement of parties' obligations before any tribunal, as well as the contract's validity, construction, and discharge.[12] As a result, a bankruptcy law that discharged a party from a contract made under the law of that state was part of the contract's terms and conditions and discharged the obligation in all other tribunals.[13] Such a law could not be said to impair that contract, the Court held, so long as it applied to future contracts rather than existing contracts.[14] The *Ogden* decision thus drew a distinction between state laws that impaired obligations of contracts already in existence at the time of enactment and laws that affected future contracts, deeming the former to be more problematic from a constitutional standpoint.

Following its decision in *Ogden*, the Supreme Court decided cases in the 1800s that often adopted a broad view of the Contract Clause's protections for both public and private contracts.[15] But, as noted, by the end of the nineteenth century, the Contract Clause diminished in importance with the ratification of the Fourteenth Amendment and the imposition of limits on state power in the Amendment's Due Process Clause.[16] And during the

[7] *See id.* at 204–05 ("It seems scarcely possible to suppose that the framers of the constitution, if intending to prohibit only laws authorizing the payment of debts by instalment, would have expressed that intention by saying 'no State shall pass any law impairing the obligation of contracts.'").

[8] *Id.* at 208.

[9] Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 254 (1827).

[10] *Id.* at 255–56.

[11] *Id.* at 257–59. The Court distinguished between a law that impairs a contract and a law that impairs a contractual obligation. *Id.* at 256–57. A law that impairs the contract itself "enlarges, abridges, or in any manner changes" the intention of the contracting parties by modifying the contract's validity or "the construction, the duration, the mode of discharge, or the evidence of the agreement." *Id.*

[12] *Id.* at 257–59.

[13] *Id.* at 260.

[14] *Id.* at 262–64 ("[A] bankrupt law, which operates prospectively, or in so far as it does so operate, does not violate the constitution of the United States.").

[15] *See, e.g.*, Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535, 550–55 (1867); Cook v. Moffat, 46 U.S. (5 How.) 295, 308–09 (1847); Green v. Biddle, 21 U.S. (8 Wheat.) 1, 84, 91–93 (1823). *But see* Stone v. Mississippi, 101 U.S. (11 Otto) 814, 819–21 (1880).

[16] James W. Ely, Jr., The Contract Clause: A Constitutional History 5 (2016) ("Although both federal and state courts heard a steady stream of contract clause cases [during the late nineteenth century], they increasingly relied on other constitutional provisions, notably the due process clause of the Fourteenth Amendment, to protect economic rights.").

early twentieth century, the Court further reduced the Contract Clause's protections, specifically holding that "private agreements as well as public contracts were subject to the police power."[17]

ArtI.S10.C1.6.5.2 Blaisdell Case and State Modifications to Private Contracts

Article I, Section 10, Clause 1:

> *No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.*

Although the Supreme Court had long recognized that states retained at least some sovereign power to regulate contracts to protect the public welfare[1]—and increasingly permitted states to modify private contract rights to respond to changes in the economy during the early twentieth century[2]—a major shift in Contract Clause doctrine resulted from the Court's decision in *Home Building & Loan Ass'n v. Blaisdell* in 1934.[3] Prior to the 1930s, the Court often adopted a robust interpretation of the Contract Clause when evaluating state legislation, applying it stringently to strike down state laws deemed to interfere with contract and property interests.[4] However, during the depths of the Great Depression, the Court significantly weakened the constraints that the Contract Clause imposes on state government regulation of private contracts.[5]

In *Blaisdell*, the State of Minnesota enacted the Minnesota Mortgage Moratorium Law, which allowed courts to extend temporarily the period of time during which a mortgagor (e.g., a homeowner) could redeem a home after the bank foreclosed on the property, preventing the mortgagee from obtaining possession during that time.[6] This right ran contrary to existing contracts, which granted the lender the right to foreclose.[7] In order to take advantage of this option, the mortgagor had to pay a "reasonable value of the income on" or "reasonable rental value of" the property to the mortgagee.[8]

Although the Minnesota law prevented the mortgagee from obtaining actual possession, the Supreme Court upheld the law as necessary and reasonable to address the economic crisis because it was appropriately tailored to address the emergency and was limited in duration.[9] The Court noted that a state had the power to regulate existing contracts in order to

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[17] *Id.* at 5–6.

[1] *See, e.g.*, W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 532–33 (1848).

[2] As one commentator noted, during the early twentieth century and before *Blaisdell*, the Supreme Court "expanded the basis upon which states could modify contract rights and advanced an interpretation of the Contract Clause that stressed judicial deference to local legislation enacted for the protection of the economic and social interests of all segments of society." Samuel R. Olken, *Charles Evans Hughes and the Blaisdell Decision: A Historical Study of the Contract Clause*, 72 Or. L. Rev. 548 (1993). Such legislation included laws that permitted tenants "to remain in possession of rental apartments upon the expiration of their leases." *Id.* at 547–51, 601 (citing Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922)).

[3] 290 U.S. 398 (1934).

[4] *See id.* at 431–32 (collecting cases).

[5] *See* James W. Ely, Jr., The Contract Clause: A Constitutional History 1 (2016).

[6] *Id.* at 415–16, 424–25.

[7] *See id.*

[8] *Id.* at 416–18.

[9] *Id.* at 425, 444–48; *see also* El Paso v. Simmons, 379 U.S. 497, 516–17 (1965) (holding a Texas law that limited the time in which a purchaser of land could exercise their reinstatement rights to five years following forfeiture to the state for non-payment of interest did not contravene the Contract Clause).

"safeguard the vital interests of its people"[10] as an exercise of its sovereignty.[11] The Court cited several examples of cases in which it upheld state regulation aimed at protecting citizen welfare despite interference with existing contracts. For example, a state could amend its constitution to forbid lotteries that it previously authorized[12] or regulate intoxicating liquors[13] without violating existing contracts. It could regulate to protect the public from nuisances[14] or regulate to further public safety more generally, even when such regulations disrupted existing contractual relationships.[15] The Court also cited cases in which a state exercised its sovereign powers to protect its own *economic* interests, despite interference with existing contracts, including cases in which the Court upheld a state's regulation of rates charged by public services corporations or laws that imposed various legal requirements on businesses.[16]

In addition to signaling that the Court would more often defer to state regulation of private contracts in the public interest, *Blaisdell* is also notable because the Court set forth a test for when such state regulation impairs private contractual obligations in violation of the Contract Clause. The Court adopted a balancing test, justifying a pragmatic approach on the grounds that contract rights were meaningful only if the state exercised its powers to "safeguard the economic structure upon which the good of all depends."[17] It held that a state may regulate existing private contractual relationships, consistent with the Contract Clause, if the law serves a legitimate public purpose and the "measures taken are reasonable and appropriate to that end."[18] This standard, which is more deferential to the state than the standard applicable to public contracts,[19] leaves judges with room to balance the states' reserved powers to regulate to protect the public welfare against the Contract Clause's limitation on state power, which aims to safeguard the sanctity of contractual relationships.[20]

ArtI.S10.C1.6.5.3 State Laws Creating New Contractual Obligations

Article I, Section 10, Clause 1:

> *No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.*

Although the Supreme Court has not had occasion to consider many Contract Clause challenges in the modern era, it has refined the test for private contracts it developed in the

[10] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434 (1934).

[11] *Id.* at 435 ("Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order.").

[12] *Id.* at 436 (citing Stone v. Mississippi, 101 U.S. 814, 819 (1880)).

[13] *Id.* (citing Beer Co. v. Massachusetts, 97 U.S. 25, 32–33 (1878)).

[14] *Id.* (citing Fertilizing Co. v. Hyde Park, 97 U.S. 659, 667 (1878)).

[15] *Id.* (citing Chi., Burlington & Quincy R.R. v. Nebraska, 170 U.S. 57, 70, 74 (1898)).

[16] *Blaisdell*, 290 U.S. at 437–38 (collecting cases).

[17] *Id.* at 442–44 ("If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. . . . With a growing recognition of public needs and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests.").

[18] *Id.* at 438.

[19] *See* U.S. Trust Co. v. New Jersey, 431 U.S. 1, 25–28 (1977).

[20] *See Blaisdell*, 290 U.S. at 439 ("The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects.").

1934 case *Home Building & Loan Ass'n v. Blaisdell*, focusing on whether the challenged state legislation is broadly applicable, was foreseeable, and has a legitimate purpose. For example, in the 1978 case *Allied Structural Steel Co. v. Spannaus*, the Court determined a state law that regulated private pension contracts violated the Contract Clause because it sought to address a limited societal problem through the imposition of a substantial new and retroactive payment obligation on a narrow class of companies.[1]

In *Allied Structural Steel Co.*, the Minnesota legislature enacted the Private Pension Benefits Protection Act, requiring certain companies having offices in the state and offering pension plans to employees to pay a fee to cover full pensions for employees who worked at least ten years if the employer terminated its pension plan or closed a Minnesota office.[2] The Court considered whether it would violate the Contract Clause to apply the law to the appellant, an Illinois steel corporation that closed a Minnesota office.[3] Minnesota charged the company $185,000 under the Act to cover the cost of pensions for eligible discharged employees.[4] In response, the company maintained the fee "unconstitutionally impaired its contractual obligations to its employees under its pension agreement."[5]

The Supreme Court held the Act impaired the company's employment contracts because it substantially increased the company's obligation to fund pensions beyond the terms of the existing contracts it had entered into with its employees.[6] However, the Court noted it had to further examine whether such an impairment violated the Contract Clause.[7] Although noting the Contract Clause does not "obliterate" the states' police powers,[8] the Court determined the Minnesota law amounted to a significant impairment that could not be justified for public policy reasons.[9]

First, the employer relied on the payment terms of the existing pension plan when determining how to allocate its resources, and the Act retroactively required the company to pay more to its employees than the company had foreseen because the company closed its office.[10] There was no indication in the record that the state targeted an issue of pressing social need by enacting sweeping legislation covering a variety of employers and circumstances.[11] Rather, the Act targeted for the first time a narrow societal problem by imposing on a specific class of companies a substantial retroactive and permanent payment obligation unforeseen at the time of the pension plans' creation and contrary to the company's employment agreements.[12] These factors, the Court held, amounted to a violation of the Contract Clause.[13] *Allied Structural Steel Co.* stands for the notion that a state law may impair the obligation of

[1] *See* 438 U.S. 234, 247–50 (1978).

[2] *Id.* at 238.

[3] *See id.* at 236, 239.

[4] *Id.* at 239.

[5] *Id.* at 239–40.

[6] *See id.*

[7] *See id.*

[8] *Id.* at 241.

[9] *See id.* at 246–50.

[10] *See id.* at 247 ("[T]he statute in question here nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability in potentially disabling amounts.").

[11] *See id.* at 247–48.

[12] *Id.* at 249–50; *cf.* Gen. Motors Corp. v. Romein, 503 U.S. 181, 183–88 (1992) (rejecting a Contract Clause challenge to a 1987 Michigan law that essentially required automobile companies to repay workers' compensation benefits withheld in reliance on a 1981 law, because the collective bargaining agreements entered into before the 1981 law did not address workers' compensation terms specifically and such terms could not be deemed to have been incorporated by law into the contracts, and thus there was no relevant contractual interest to impair).

[13] *See Allied Structural Steel Co.*, 428 U.S. at 250.

contracts not only when it abrogates contractual obligations, but also when it imposes substantial new and retroactive legal obligations on a specific subset of entities.

ArtI.S10.C1.6.5.4 Public Interest and State Modifications to Private Contracts

Article I, Section 10, Clause 1:

> *No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.*

In the 1980s, the Supreme Court upheld generally applicable state laws regulating private contracts, which it determined were intended to serve a broad public interest, against Contract Clause challenges. For example, in *Exxon Corp. v. Eagerton*, the Court considered the constitutionality of an Alabama law that increased the severance tax on oil and gas extracted from wells located in the state, which the state imposed on producers at the time of severance.[1] The law, which amended a statute that imposed a tax on oil and gas extracted from Alabama wells, exempted the owners of royalty interests from the tax increase and forbid producers from passing the tax increase on to purchasers or consumers.[2] Oil and gas producers argued the law impaired the obligations of their contracts with royalty owners and consumers in violation of the Contract Clause.[3]

The Supreme Court determined the royalty owner exemption did not violate the Contract Clause because it did not impair contractual obligations benefiting the producers.[4] The Alabama law merely provided that the royalty owners were not legally responsible for paying the tax to the state, and did not prevent the producers from shifting the burden of the tax to the royalty owners through contractual stipulations.[5]

With regard to the state law's prohibition on passing through the severance tax to consumers, the Supreme Court confronted a more difficult question.[6] The Court determined the prohibition interfered with producers' existing contracts that required consumers to absorb increases in severance taxes.[7] However, the Court noted the Contract Clause leaves some room for state regulation to protect the public welfare, even when such regulation would interfere with existing contracts.[8] The Court deemed the pass-through prohibition to be similar to state laws setting rates in heavily regulated industries, like the electricity industry or oil transportation sector, which were consistent with the Contract Clause despite their incidental effect on existing contracts.[9] Comparing the pass-through prohibition to a rate-setting scheme that displaced contractual rates, the Court determined the prohibition applied broadly, had a legitimate public interest justification (i.e., safeguarding consumers

[1] 462 U.S. 176, 178 (1983).

[2] *Id.* at 178–79.

[3] *Cf. id.* at 178–80. The producers were parties to contracts that allocated the tax among themselves, royalty owners, and nonworking interests "in proportion to each party's share of the sale proceeds." *Id.* at 180. They also were party to sales contracts that made purchasers responsible for reimbursing them for the severance tax on products sold. *Id.*

[4] *Id.* at 187–88.

[5] *Id.* at 188–89.

[6] *See id.* at 189.

[7] *Id.*

[8] *Id.* at 190–91.

[9] *See id.* at 192–94. In a separate section of its opinion, the Court determined that federal law preempted the pass-through prohibition as applied to sales of natural gas in interstate commerce. *Id.* at 187.

from high prices), and was not targeted specifically at contracts of oil and gas producers.[10] Thus, there was no violation of the Contract Clause.[11]

Another case in which the Supreme Court determined that a state's sovereign power to protect public interests justified the impairment of private contracts is *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[12] In that case, the Pennsylvania legislature, concerned about public safety, land conservation, and other issues, enacted a law prohibiting mining that would damage existing structures, such as public buildings and homes, by eliminating underground support.[13] Petitioners, including a coal industry association and companies that controlled subsurface coal reserves, sued to enjoin a state environmental agency from enforcing the act and regulations promulgated thereunder.[14] One of the petitioners' challenges was that the Act on its face violated the Contract Clause by nullifying the surface owner's contractual waiver of liability for damage to the surface estate from coal mining.[15] The Court agreed with the lower courts that "the Commonwealth's strong public interests in the legislation [were] more than adequate to justify the impact of the statute on petitioners' contractual agreements."[16]

The Court determined that a contract right had been impaired because the coal companies secured waivers of liability from property owners for damages from mining to surface structures and much of the land affected by the Subsidence Act.[17] The Act impaired this right by nullifying the surface owners' contractual waiver obligations.[18] However, the Court found that Pennsylvania's interest in preventing environmental damage and hazards to people and property outweighed this contract right.[19] Because the state was not a party to the contracts at issue, the court deferred to the state's judgment that the legislation was appropriately tailored to the public purpose justifying it.[20]

In a subsequent case, *Sveen v. Melin*, the Supreme Court examined state regulation of private contracts in the context of a life insurance policy.[21] In that case, the Court upheld against a Contract Clause challenge a Minnesota law that revoked any revocable beneficiary designation an individual made to his or her spouse (e.g., in a life insurance policy) if their marriage was dissolved or annulled.[22] The law operated on the theory that the policyholder would have supported the revocation, and it allowed the policyholder to redesignate the ex-spouse as the beneficiary at any time.[23]

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[10] *See id.* at 191–94 ("If a party that has entered into a contract to transport oil is not immune from subsequently enacted state regulation of the rates that may be charged for such transportation, parties that have entered into contracts to sell oil and gas likewise are not immune from state regulation of the prices that may be charged for those commodities.").

[11] *Id.* at 196.

[12] 480 U.S. 470 (1987).

[13] *Id.* at 474, 476.

[14] *Id.* at 478.

[15] *Id.* at 502.

[16] *Id.*

[17] *Id.* at 504.

[18] *Id.*

[19] *Id.* at 505 ("[T]he Commonwealth has a strong public interest in preventing this type of harm, the environmental effect of which transcends any private agreement between contracting parties.").

[20] *Id.* at 505–06.

[21] No. 16-1432, slip op. at 1 (U.S. June 11, 2018).

[22] *Id.* at 1.

[23] *Id.*

In *Sveen*, the life insurance policyholder designated his wife as the primary beneficiary prior to the state's passage of the law, which operated retroactively.[24] The policyholder and his wife subsequently divorced, and the divorce decree did not mention the insurance policy.[25] After the policyholder passed away, his wife, who would have been the primary beneficiary under the policy if the legislature had not enacted the law, and his children, who were the contingent beneficiaries, claimed a right to the insurance proceeds.[26] The Court examined whether retroactive application of the revocation-on-divorce law to the policyholder's designation violated the Contract Clause.[27]

The Supreme Court, in an opinion authored by Justice Elena Kagan, rejected the Contract Clause challenge to the Minnesota statute.[28] Although the Court determined that a life insurance policy was a contract subject to the Contract Clause,[29] its holding recognized that not all laws that retroactively alter contracts in existence at the time of their passage violate the Contract Clause.[30] Rather, a violation occurs only when (1) the law substantially impairs a contractual relationship (e.g., by undermining the agreement, interfering with a party's reasonable expectations, or preventing a party from safeguarding or reinstating its rights); and (2) the law was not a reasonable and appropriate means of furthering a "significant and legitimate public purpose."[31]

In *Sveen*, the Court determined the Minnesota law did not substantially impair the life insurance contract for three reasons.[32] First, the law supported the general objectives of life insurance contracts by attempting "to reflect a policyholder's intent."[33] Second, the law would not undermine the policyholder's expectations regarding his or her beneficiary designation because the policyholder could not significantly rely upon that designation; a divorce court could revoke the beneficiary designation.[34] Finally, the law provided a default rule the policyholder could modify simply by submitting paperwork.[35]

Clause 2—Import-Export

ArtI.S10.C2.1 Overview of Import-Export Clause

Article I, Section 10, Clause 2:

> *No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the*

[24] *Id.* at 5–6.
[25] *Id.* at 5.
[26] *Id.* at 5–6.
[27] *Id.* at 6.
[28] *Id.* at 1.
[29] *Id.* at 7.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 7–8.
[33] *Id.*
[34] *See id.* at 8–10.
[35] *Id.*

net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

In conjunction with several other provisions, particularly the Commerce Clause,[1] the Import-Export Clause was designed to limit the states' ability to interfere with commerce. To achieve this objective, the Clause generally prohibits States from imposing "imposts" or "duties" on imports and exports, absent congressional consent, except for purposes of covering charges associated with their inspection laws. The Clause further discourages States from imposing such duties by barring the States from using the funds collected from any such duties, instead requiring all funds to be deposited with the U.S. Treasury, and authorizing Congress to revise any State laws that impose duties.

ArtI.S10.C2.2 Historical Background on Import-Export Clause

Article I, Section 10, Clause 2:

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

Prior to the Constitution's adoption, the colonies, and later states, imposed tariffs on goods from foreign countries and from other colonies, often in response to adverse economic conditions that the governments believed were due to trade imbalances, and to protect or promote domestic industries. For example, in 1788, New Hampshire adopted the first law expressly imposing import duties to improve its economic conditions in response to what it considered an unreasonable trade imbalance that favored foreign countries, primarily Great Britain. This rationale subsequently informed the adoption or amendment of other colonial tariff legislation.[1] Similarly, Massachusetts imposed two types of import duties ("double duties") on vessels from foreign powers and other colonies, as well as additional duties on all commodities from the colonies directly surrounding it.[2] These measures were described as offering "the best protection" for the colonial shipping industry in the early to mid-1700s, resulting in Massachusetts having "the most shipping," and by 1789, "nearly all the shipping in the trade of Massachusetts was American."[3]

In response to the states' fragmented approach to controlling interstate and foreign commerce, the Continental Congress asked the states in 1786 to grant the Congress authority to control or prohibit trade with foreign powers for fifteen years. Although some states agreed to the request, others did not or did so with conditions on such power, which ultimately led to no federal action and a continuance of separate state actions and regulations.[4]

The question of state power to impose import and export duties inspired significant debate during the Constitutional Convention. The delegates considered and proposed multiple drafts that reflected different views about whether states should ever be permitted to impose import

[1] U.S. Const. art. I, § 8, cl. 3.

[1] William W. Bates, American Navigation 35–36 (1902).

[2] *Id.* at 33.

[3] *Id.* at 33, 38.

[4] *Id.* at 41–42.

and export duties, as well as what conditions should apply to any such duties that states could legally impose. This debate ultimately led to a relatively detailed constitutional provision that reflected these concerns.

An early draft of the Import-Export Clause applied only to duties on imports and was included within a larger list of actions that states generally could not undertake unless Congress authorized them to do so.[5] On August 28, 1787, however, the delegates voted 6-5 to add export duties to the general prohibition.[6] James Madison proposed moving the provision from the list of actions that states could not take without congressional consent to a different part of the Constitution that listed absolute prohibitions, thereby prohibiting states from imposing import and export duties in all circumstances. Colonel George Mason argued against such a blanket prohibition, asserting that states may wish to impose duties to assist the industries in which they had competitive advantages. Madison countered that allowing states to protect their industries through duties on foreign countries and other states would only continue the problems associated with lacking a unified, national power to regulate commerce.[7] The Convention rejected Madison's proposal by a vote of 4-7.[8]

In September 1787, the delegates continued debating amendments to the provision. On September 12, the Convention agreed to reconsider the version of the Import-Export Clause debated in August to add a qualifying phrase. This phrase stated that the Clause should not be interpreted to prevent the states from adopting export duties to cover the costs of inspection, packaging, and storage fees, as well as indemnifying the losses incurred while the goods were held by public officers.[9] Colonel Mason formally proposed the amendment on September 13 as follows:

> Provided that no State shall be restrained from imposing the usual duties on produce exported from such State, for the sole purpose of defraying the charges of inspecting, packing, storing, and indemnifying the losses on such produce, while in the custody of public officers: but all such regulations shall in case of abuse, be subject to the revision and controul of Congress.[10]

The delegates adopted this amendment by a vote of 7-3, agreeing to compare and reconcile that version with the proposed provision from the Committee on Style.[11] The Committee's version of the provision separated the issue of import and export duties from all other limits on state power, stating as follows: "No state shall, without the consent of Congress, lay imposts or duties on imports or exports, nor with such consent, but to the use of the treasury of the United States."[12]

On September 15, 1787, the delegates sought to reconcile these drafts. They chose to adopt the Committee of Style's decision to make the prohibition on import and export duties a standalone provision, rather than include the prohibition within a longer list of limits on state power. This allowed the delegates to incorporate the amendments adopted on September 13 into the version reflected in the Constitution.[13] Indicative of how divisive the provision

[5] 2 The Records of the Federal Convention of 1787, at 187 (Max Farrand ed., 1911).

[6] *Id.* at 435.

[7] *Id.* at 441.

[8] *Id.* at 435, 441.

[9] *Id.* at 583.

[10] *Id.* at 605.

[11] *Id.*

[12] *Id.* at 597.

[13] *Id.* at 624.

remained, however, a final motion was made to strike the Clause subjecting all state laws imposing import and export duties "to the Revision and Controul of the Congress." This motion failed, and the final text was adopted with ten delegates in favor, and Virginia the only vote in opposition.[14]

ArtI.S10.C2.3 Import-Export Clause Generally

Article I, Section 10, Clause 2:

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

Supreme Court jurisprudence on the Import-Export Clause can be divided into two periods: the first lasting from 1827 to 1976, and the second beginning thereafter. During the first phase, the Court construed the Clause broadly to give effect to the constitutional prohibition on state interference with foreign commerce, even holding that the Twenty-First Amendment, which allowed states to prohibit the sale of alcohol, did not alter the Import-Export Clause's general prohibition on such interference.[1] The Court's jurisprudence focused on determining whether the items subject to state charges qualified as imports or exports, and did not seek to define precisely what types of charges fell within the Clause's scope.

By contrast, during the second phase of jurisprudence, the Court clarified that the Clause's prohibition on state interference applied only to the extent the charges imposed qualified as "imposts" or "duties." In other words, not all state taxation on imports or exports fall within the constitutional prohibition; therefore, a court must assess whether the relevant charge is an "impost" or "duty." The Supreme Court has not overruled its jurisprudence from the first period insofar as it addresses whether items qualify as exports or imports. However, this jurisprudence's continued relevance to Import-Export cases remains unclear.

ArtI.S10.C2.4 Whether a Good Qualifies as an Import or Export

Article I, Section 10, Clause 2:

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

The first phase of Supreme Court doctrine on the Import-Export Clause focused on determining whether the challenged measures applied to goods that qualified as imports or exports. In a series of cases, the Court sought to clarify the Clause's scope by focusing on when products qualify as "imports" or "exports."

In the 1827 case of *Brown v. Maryland*, the Court established the primary contours of the doctrine applicable to the Import-Export Clause until the late 1970s. In *Brown*, the Court considered whether a state law requiring sellers of foreign goods to obtain and pay for a license

[14] *Id.*

[1] Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 346 (1964).

before being permitted to sell any such goods violated the Import-Export Clause.[1] Interpreting the Clause, the Court held that it applied not only to duties on the item imported, but also to "dut[ies] levied after it has entered the country," explaining that taking a more restrictive view would potentially allow states to prevent the importation of goods.[2] The Court further held that, at some point after entering the United States, goods no longer qualify as imports and may thereafter be subject to state charges. As identifying a single point in time or fact would not address sufficiently all circumstances, the Court indicated instead that a reviewing court must consider whether the "importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country."[3] However, while the item remained the importer's property, "in his warehouse, in the original form or package in which it was imported, a tax" on the item clearly fell within the constitutional prohibition.[4] The Court then held that the state law in question was effectively a tax on importation because it taxed only the occupation of importers and therefore violated the Import-Export Clause.[5]

In dicta, the *Brown* Court also addressed the Clause's territorial scope, suggesting that "import" and "export" covered goods transported in foreign as well as interstate commerce.[6] However, in *Woodruff v. Parham*, the Court held that the Import-Export Clause applied only to goods from or to foreign countries, and did not apply to measures affecting goods traveling only in interstate commerce.[7] Subsequent cases have consistently followed this holding.[8] The Court also extended the Clause's application to the Philippines, during the time it was a U.S. possession, on the ground that it remained outside of and therefore foreign to the United States for purposes of the Clause.[9]

Following *Brown*, the Court sought to clarify when a good no longer qualifies as an import or export. First, the Court maintained and applied the "original package" rule in a number of cases, holding that charges on imported goods kept in their original form within warehouses violated the Import-Export Clause. Such charges included ad valorem property taxes;[10] taxes on foreign goods sold at auction;[11] and franchise taxes on the landing, storage, or sale of imported goods.[12] By contrast, the Court held that once boxes with imported items were opened for sale or delivery, or once the goods were manipulated for use or sale, they no longer qualifed as imports.[13]

Second, the Court held that imports lose their character as imports once the goods fall within the purchaser's ownership or possession rather than the importer's,[14] or importation is

[1] 25 U.S. 419 (1827).

[2] *Id.* at 437–38.

[3] *Id.* at 441–42.

[4] *Id.* at 442.

[5] *Id.* at 444.

[6] *Id.* at 419.

[7] 75 U.S. 123, 133 (1868).

[8] Pervear v. Commonwealth of Mass., 72 U.S. (5 Wall.) 475 (1866); *In re* State Tax on Ry. Gross Receipts, 82 U.S. (15 Wall.) 284, 296–97 (1872); Pittsburgh & S. Coal Co. v. Louisiana, 156 U.S. 590, 600 (1895); Am. Steel & Wire Co. v. Speed, 192 U.S. 500, 519–20 (1904); New Mexico *ex rel.* E.J. McLean Co. v. Denver & Rio Grande R.R., 203 U.S. 38, 50 (1906); Toomer v. Witsell, 334 U.S. 385, 394 (1948).

[9] Hooven & Allison Co. v. Evatt, 324 U.S. 652, 679 (1945), *rev'd on other grounds*, 466 U.S. 353 (1984).

[10] Low v. Austin, 80 U.S. 29, 32 (1871).

[11] Cook v. Pennsylvania, 97 U.S. 566, 573 (1878).

[12] Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U.S. 218, 225 (1933).

[13] May v. New Orleans, 178 U.S. 496, 508–09 (1900); Gulf Fisheries Co. v. MacInerney, 276 U.S. 124, 126 (1928); Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534, 542 (1959).

[14] Waring v. Mayor, 75 U.S. 110, 116 (1868); *Hooven & Allison Co.*, 324 U.S. at 658.

otherwise complete (e.g., the goods reach their final resting place).[15] The Court also held that charges imposed on actions more remote from loading or unloading goods, such as transit through U.S. states, do not affect the import process and therefore do not fall within the Import-Export Clause's scope.[16]

The Court also extended *Brown* to exports expressly, holding that state taxes on the sale of goods abroad and on the ability to export qualify as unconstitutional charges on exports.[17] Further, consistent with other cases involving imports, the Court held that states may tax goods intended for export "until they have been shipped, or entered with a common carrier for transportation, to another state, or have been started upon such transportation in a continuous route or journey."[18]

A separate line of cases also clarifies that the terms "import" and "export" do not include natural persons. In several early cases, it was suggested that the Constitutional Convention's discussion of slaves in conjunction with the term "import" indicated that the Import-Export Clause extended to persons. However, in dicta in the *Passenger Cases* and in later cases' holdings, the Court decided that the Clause did not apply to natural persons.[19]

ArtI.S10.C2.5 Whether a Charge Qualifies as an Impost or Duty

Article I, Section 10, Clause 2:

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

The Import-Export Clause does not define what qualifies as an "impost" or "duty" that falls within its scope. Beginning with *Brown v. Maryland*, the Supreme Court interpreted these terms broadly, stressing that the form or name of the charge did not determine whether it falls within the Clause's scope. Rather, the focus of the inquiry was the substance or operation of the challenged measure.[1] Thus, for example, a duty on an importer, despite not being on the product itself, was effectively equivalent to a duty on imports and thereby prohibited.[2]

Following *Brown*, the Supreme Court applied the Import-Export Clause to a variety of state taxes and other charges.[3] As the Court later noted, the Court generally treated the Clause as potentially applicable to all forms of state taxation on imports or exports,[4] although

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[15] Pittsburgh & S. Coal Co. v. Bates, 156 U.S. 577, 598–99 (1895); New York v. Wells, 208 U.S. 14 (1908).

[16] Canton R.R. v. Rogan, 340 U.S. 511, 515 (1951); W. Md. Ry. v. Rogan, 340 U.S. 520, 521 (1951).

[17] Crew Levick Co. v. Pennsylvania, 245 U.S. 292, 295–96 (1917); Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69, 85–86 (1946).

[18] Empresa Siderurgica v. Cnty. of Merced, 337 U.S. 154, 156–57 (1949); Joy Oil Co. v. State Tax Comm'n of Mich., 337 U.S. 286, 288–89 (1949); Kosydar v. Nat'l Cash Reg. Co., 417 U.S. 62, 69 (1974).

[19] Passenger Cases, 48 U.S. 283 (1849); Crandall v. Nevada, 73 U.S. 35, 41 (1868); New York v. Compagnie Generale Transatlantique, 107 U.S. 59, 61–62 (1883).

[1] Brown v. Maryland, 25 U.S. 419, 444–45 (1827); Selliger v. Kentucky, 213 U.S. 200, 209 (1909).

[2] *Brown*, 25 U.S. at 444–45.

[3] *See, e.g.*, Almy v. California, 65 U.S. 169 (1860) (stamp tax on bills of lading for gold and silver exports); Crew Levick & Co. v. Pennsylvania, 245 U.S. 292 (1917) (state tax on the business of selling goods in foreign commerce, as measured by gross receipts from merchandise shipped abroad); Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U.S. 218 (1933) (franchise tax).

[4] Limbach v. Hooven & Allison Co., 466 U.S. 353, 360 (1984).

the Court also ruled that pilotage fees fell outside the Clause's scope, and that the measures must have some connection to importation or exportation to fall within the Clause.[5]

In 1976, the Court adopted a new approach to assessing whether a state measure violates the Import-Export Clause, cabining the Clause's scope by holding that the terms "impost" and "duty" do not encompass all taxes or charges. In *Michelin Tire Corp. v. Wages*, the Court considered the history and meaning of these terms to conclude that the Import-Export Clause did not reach non-discriminatory ad valorem property taxes. The Court also overruled *Low v. Austin* to the extent that case was inconsistent with the Court's new emphasis on defining "impost" and "duty."[6]

Under this new approach, to determine whether a charge may qualify as an impermissble impost or duty, a court must consider three factors: (1) whether it interferes with the Federal Government's ability to speak with one voice in commercial relations with foreign governments; (2) whether it diverts import revenues from the federal to state government; and (3) whether it may jeopardize harmony between the states.[7]

The Court reiterated its "different approach" to the Import-Export Clause in 1978, concluding in *Department of Revenue of the State of Washington v. Ass'n of Washington Stevedors*, that an occupution tax on stevedores did not fall within the Clause's scope.[8] Not until the 1984 case of *Limbach v. Hooven & Allison Co.*, however, did the Court expressly acknowledge that, in *Michelin*, it "adopted a fundamentally different approach to cases claiming the protection of the Import-Export Clause" and that therefore some of its prior cases, in addition to *Low*, were overruled.[9] Applying this new approach, the Court has held other state taxes, including ad valorem property taxes and sales taxes, to fall outside the Clause's scope.[10]

ArtI.S10.C2.6 State Inspection Charges

Article I, Section 10, Clause 2:

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

The Supreme Court has interpreted the Import-Export Clause's final phrase—"except what may be absolutely necessary for executing it's inspection Laws"—relatively rarely. However, the Court has upheld the constitutionality of charges for inspecting tobacco when the charges incurred were for services rendered, and when the challenged law's objective was to ensure the product's quality.[1] The Court has also suggested in dicta that whether an inspection charge is excessive "might be for congress to determine, and not the courts."[2]

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[5] Mager v. Grima, 49 U.S. 490, 494 (1850); Cooley v. Bd. of Wardens, 53 U.S. 299 (1851).

[6] 423 U.S. 276, 279–83 (1976).

[7] *Id.* at 285–86.

[8] 435 U.S. 734, 752–54 (1976).

[9] 466 U.S. at 359–61 (overruling Hooven & Allison Co. v. Evatt, 324 U.S. 652, 658 (1945)).

[10] R.J. Reynolds Tobacco Co. v. Durham Cnty., 479 U.S. 130, 153 (1986); Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 77 (1993).

[1] Turner v. Maryland, 107 U.S. 38, 54 (1883).

[2] Patapsco Guano Co. v. Bd. of Agric., 171 U.S. 345, 350–51 (1898).

Clause 3—Acts Requiring Consent of Congress

ArtI.S10.C3.1 Duties of Tonnage

ArtI.S10.C3.1.1 Overview of Duties of Tonnage

Article I, Section 10, Clause 3:

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

Article I, Section 10, Clause 3, prohibits states from interfering with interstate and foreign commerce by imposing duties of tonnage—charges to access a port based on a vessel's capacity (i.e., its tonnage)—without congressional consent. States may impose other types of taxes or charges on vessels provided they do not constitute duties of tonnage or otherwise violate the Constitution.

ArtI.S10.C3.1.2 Historical Background on Duties of Tonnage

Article I, Section 10, Clause 3:

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

Prior to the Constitution's enactment, many colonies, and later states, imposed duties of tonnage. While such duties most commonly applied to foreign vessels entering state ports,[1] some duties also applied to vessels from other colonies.[2] Colonies generally framed these duties as revenue-raising measures to provide for the public defense.[3] Because colonies considered these duties to be a potential way to protect and grow their own shipping industries, they often exempted their own ships from the tonnage duties.[4] Colonies also used duties of tonnage to retaliate economically when another colony imposed duties, offering to remove the retaliatory duties on a reciprocal basis. For example, Virginia adopted duties of tonnage in retaliation for Maryland's decision to impose such duties. While Virginia described the duty as "unneighborly," it insisted that "Maryland vessels must [also be subject to a duty] until [Maryland's] laws are repealed."[5]

During the Constitutional Convention, the delegates did not consider the question of duties of tonnage until August 1787. The committee considering whether to regulate state authority to impose these duties tabled a report that proposed prohibiting states from requiring vessels to pay duties to access their ports. The Committee concluded that tonnage duties should be "uniform throughout the United States."[6]

When the Constitutional Convention considered the committee's proposal in September 1787, the delegates debated whether such a clause was necessary and would appropriately balance the powers of the federal and state governments. Some delegates, including James

[1] William W. Bates, American Navigation 32 (1902).

[2] *Id.* at 33.

[3] *Id.* at 34.

[4] *Id.*

[5] *Id.*

[6] 2 The Records of the Federal Convention of 1787, at 434 (Max Farrand ed., 1911).

Madison, thought the power to impose duties of tonnage qualified as regulation of trade and therefore fell exclusively within Congress's general authority to regulate commerce.[7] Other delegates, who viewed the Commerce Clause's language as too vague to determine whether duties of tonnage fell within its scope, argued that the Constitution should expressly allow states to impose such duties in order to pay certain expenses, such as cleaning harbours and constructing lighthouses. Maryland delegates, James McHenry and Daniel Carroll, proposed that "no State shall be restrained from laying duties of tonnage for the purpose of clearing harbours and erecting light-houses."[8] Another delegate, Gouverneur Morris of Pennsylvania, thought Congress's power to regulate commerce did not extend to duties of tonnage.[9] The Clause's final text addressed the conflict over the Commerce Clause's scope and state needs for revenue from duties of tonnage by generally prohibiting states from imposing duties of tonnage unless permitted by Congress. This text was narrowly adopted with six delegations in favour, four against, and one divided.[10]

ArtI.S10.C3.1.3 Determining Whether a Measure Qualifies as a Duty of Tonnage

Article I, Section 10, Clause 3:

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

The Supreme Court first considered the Duty of Tonnage Clause in *Cooley v. Board of Wardens of the Port of Philadelphia* in 1851, and established what remain essential features of its jurisprudence. First, the Court concluded the term "duty of tonnage" was "well understood when the Constitution was formed" and thus should be interpreted as prohibiting states from imposing only such measures as would have been considered duties of tonnage at that time.[1] Second, by implication, states may impose other fees and charges that do not qualify as duties of tonnage, including pilot fees, wharfage, towage, and penalties imposed to enforce certain laws.[2] Thus, courts must determine whether or not a challenged measure constitutes a duty of tonnage. To make this determination, "it is the thing, and not the name, which is to be considered."[3] In other words, courts must consider the contents, substance, and effect of the measure to determine whether it qualifies as a duty of tonnage.

In subsequent cases, the Supreme Court expanded on these principles. First, in keeping with its broad reading of the Clause, the Court clarified in *In re State Tonnage Tax Cases* that the prohibition on imposing duties of tonnage covers all vessels, whether traveling in interstate or intrastate commerce, reasoning that the Framers would have made any exception express.[4] Second, in *Clyde Mallory Lines v. Alabama*, the Court stated expressly that the Duty of Tonnage Clause applies to "all taxes and duties regardless of their name or form, and even

[7] *Id.* at 625.
[8] *Id.*
[9] *Id.*
[10] *Id.* at 625–26.
[1] Cooley v. Bd. of Wardens, 53 U.S. 299, 314 (1851).
[2] *Id.*
[3] *Id.*
[4] *In re* State Tonnage Tax Cases, 79 U.S. 204, 226 (1870).

though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port."[5]

Although the Court has consistently interpreted the Clause broadly, its precise mode of determining whether a measure qualifies as a duty of tonnage has evolved in several respects. One line of cases involves measures qualifying as taxes, while another involves other fees or charges. In a series of cases decided between 1865 and 1876, the Court indicated that any tax measure that uses the tonnage of a ship to calculate the amount to charge to a vessel is a duty of tonnage.[6] By contrast, as the Court clarified in *Transportation Co. v. Wheeling*, taxes that treat vessels as personal property and assessed in the "same manner as other personal property" do not violate the duty of tonnage clause, although taxes not taxed in the "same manner" may violate the clause.[7]

In 1877, the Court clarified in *Packet Co. v. Keokuk* that using tonnage to calculate the amount to charge a vessel is not determinative in cases not involving taxes. Rather, the court must also consider the nature of the charge in dispute.[8] Following *Keokuk*, the Court has applied this more holistic approach to determine whether contested charges qualify as duties of tonnage. Thus, the Court has considered not only whether the state is using a vessel's tonnage to assess fees, but also whether the state is imposing the fees to compensate for costs incurred by the state or municipality in providing and maintaining ports or as another means to charge vessels to access a port. Applying this method of analysis, the Court has upheld the constitutionality of fees to cover services for the safety and upkeep of wharves and locks;[9] fees to cover quarantine services;[10] annual license fees;[11] and fees imposed to cover the costs of providing harbor police services.[12]

ArtI.S10.C3.1.4 Personal Property Taxes and Duties of Tonnage

Article I, Section 10, Clause 3:

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

While the Court's duties of tonnage jurisprudence has been consistent,[1] questions remain about how to evaluate disputed charges. In particular, the Court appears divided on how the Duty of Tonnage Clause interacts with state or municipal authority to impose personal property taxes. In the 2009 case, *Polar Tankers v. City of Valdez*, the Court considered a tax

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[5] Clyde Mallory Lines v. Alabama, 296 U.S. 261, 265–66 (1935).

[6] Steamship Co. v. Portwardens, 71 U.S. 31 (1867); *In re State Tonnage Tax Cases*, 79 U.S. 204; Peete v. Morgan, 86 U.S. 581 (1870); Cannon v. New Orleans, 87 U.S. 577 (1874); Inman Steamship Co. v. Tinker, 94 U.S. 238 (1876).

[7] Transp. Co. v. Wheeling, 99 U.S. 273, 284 (1878).

[8] Packet Co. v. Keokuk, 95 U.S. 80 (1877); *see also* Wiggins Ferry Co. v. City of E. St. Louis, 107 U.S. 365, 376 (1883) (noting that whether a rate is imposed based on tonnage is "not a conclusive circumstance . . . [but] is one of the tests applied to determine whether a tax is a tax on tonnage or not").

[9] *Keokuk*, 95 U.S. at 87–88; Vicksburg v. Tobin, 100 U.S. 430, 432–33 (1879); Packet Co. v. St. Louis, 100 U.S. 423, 429 (1879); Packet Co. v. Catlettsburg, 105 U.S. 559, 561–62 (1881); Transp. Co. v. Parkersburg, 107 U.S. 691, 706–07 (1883); Huse v. Glover, 119 U.S. 543, 550 (1886); Ouachita Packet Co. v. Aiken, 121 U.S. 444, 448 (1887).

[10] Morgan's S.S. Co. v. La. Bd. of Health, 118 U.S. 455, 463 (1886).

[11] *Wiggins Ferry Co.*, 107 U.S. at 376.

[12] *Clyde Mallory Lines*, 296 U.S. at 264.

[1] Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 6 (2009) ("The Court over the course of many years has consistently interpreted the language of the Clause in light of its purpose.").

ordinance imposed by the City of Valdez, Alaska. The Court identified four ways the ordinance might be constitutional as a personal property tax, although the Court ultimately held the tax at issue unconstitutional on other grounds.[2]

Polar Tankers involved an ordinance imposing a personal property tax on "boats and vessels of at least 95 feet in length that regularly travel to the City, are kept or used within the City, or which annually take on at least $1 million worth of cargo or engage in other business transactions of comparable value in the City."[3] A majority of seven Justices held the ordinance violated the Duty of Tonnage Clause[4] based on their findings that the ordinance applied in practice only to certain large vessels, the amount owed was effectively based on vessel capacity (i.e., tonnage), and a single entry into Valdez's port made the vessel liable to pay the tax. Further, the City did not impose the tax to compensate for a service provided. Thus, the ordinance's actual operation rendered it a duty of tonnage, not a personal property tax.[5]

Despite the 7-2 holding of *Polar Tankers*, the Justices diverged on how to approach determining whether the ordinance might qualify as a personal property tax, debating the principles and implications of the *State Tonnage Tax Cases* and *Wheeling*. Justice Stephen Breyer, writing for a plurality of four Justices, concluded that personal property taxes may be constitutional and not violate the general prohibition on duties of tonnage if vessels are taxed in the same manner as other property, as held in *Wheeling*. More precisely, this plurality interpreted the "same manner" requirement of *Wheeling* to require a state to impose similar taxes upon other businesses, effectively reading "same manner" as a non-discrimination requirement.[6] Justice Breyer concluded that the Valdez ordinance failed this requirement, as it applied in practice almost exclusively to large vessels.[7]

By contrast, Justice John Paul Stevens, joined in dissent by Justice David Souter, argued that the "same manner" criterion, as set out in *Wheeling* and the *State Tonnage Tax Cases*, required only that a property tax on vessels be calculated based on property valuation, instead on tonnage.[8] Chief Justice John Roberts, joined by Justice Clarence Thomas, wrote separately, contending that personal property taxes may be imposed only on a state's citizens, not on visiting vessels.[9] Justice Samuel Alito, in a concurrence, stated he disagreed with Justice Breyer's view regarding taxation, but offered no further comment.[10]

Finally, the Constitution permits states to impose duties of tonnage with congressional consent. However, as noted in dicta by the Supreme Court, the Constitution does not specify when or how such consent must be given.[11] To date, the Supreme Court has not had occasion to decide when or how congressional consent would be granted.

[2] *Id.*

[3] *Id.* at 5.

[4] *Id.* at 9–11; *id.* at 17 (Roberts, C.J., concurring in part and concurring in the judgment).

[5] *Id.* at 9–11; *id.* at 17.

[6] *Id.* at 12.

[7] *Id.*

[8] *Id.* at 22–23 (Stevens, J., dissenting).

[9] *Id.* at 18 (Roberts, C.J., concurring in part and concurring in the judgment).

[10] *Id.* at 19–20 (Alito, J., concurring in part and concurring in the judgment).

[11] Virginia v. Tennessee, 148 U.S. 503, 521 (1893).

ArtI.S10.C3.2 States and Military Affairs

Article I, Section 10, Clause 3:

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

The Supreme Court has stated that this provision contemplates the use of the state's military power to put down an armed insurrection too strong to be controlled by civil authority,[1] and held that the organization and maintenance of an active state militia is not a keeping of troops in time of peace within the prohibition of this clause.[2] The Supreme Court has also held that the divestments of state power in this Clause, together with Congress's express authority to build and maintain the Armed Forces under Article 1, Section 8, Clauses 12 and 13, reflect "a complete delegation of authority to the Federal Government to provide for the common defense" and show that the states renounced their right to interfere with national policy in this area in the plan of the Convention.[3]

ArtI.S10.C3.3 Compact Clause

ArtI.S10.C3.3.1 Overview of Compact Clause

Article I, Section 10, Clause 3:

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

The Compact Clause prohibits states from entering into "any Agreement or Compact with another State" or with a foreign government without the consent of Congress.[1] Whereas other provisions in Article I, Section 10 categorically deny states certain powers,[2] the Compact Clause allows states to retain what the Supreme Court has described as the sovereign right to make agreements and compacts, provided Congress consents.[3]

According to the Supreme Court, there is little difference between "agreements" and "compacts" in this clause.[4] Both terms refer to contracts between governments—although a compact may reflect a more "formal and serious engagement" than an agreement.[5] Once

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[1] Luther v. Borden, 48 U.S. (7 How.) 1, 45 (1849).

[2] Presser v. Illinois, 116 U.S. 252 (1886).

[3] Torres v. Tex. Dep't of Pub. Safety, No. 20-603, slip op. 6 (U.S. June 29, 2022) (holding that the states waived their sovereign immunity under Congress's Article I power pursuant to the plan of the Convention, such that Congress may enforce certain federal reemployment protections by authorizing private litigation against noncompliant state employers that do not wish to consent to suit).

[1] U.S. Const. art. I, § 10, cls. 1–2.

[2] *See* U.S. Const. art. I, § 10, cls. 1–2 (prohibiting states from, among other things, entering into treaties, coining money, impairing contracts, granting titles of nobility, and regulating most imports and exports). *See also* ArtI.S10.C1.1 Foreign Policy by States to ArtI.S10.C3.3.6 Legal Effect and Interpretation of Compacts.

[3] *See, e.g.,* Poole v. Fleeger's Lessee, 36 U.S. 185, 208–09 (1837) (explaining that the Constitution requres consent for a compact between states and that, in this instance, such consent had "been expressly given").

[4] *See*, *e.g.*, Virginia v. Tennessee, 148 U.S. 503, 520, 537 (1893); Rhode Island v. Massachusetts, 37 U.S. 657, 725 (1838).

[5] *Virginia*, 148 U.S. at 520. *See* Texas v. New Mexico, 482 U.S. 124, 128 (1987) (noting that a "Compact is, after all, a contract" between sovereigns) (quoting Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting)); Virginia v. West Virginia, 78 U.S. 39, 59 (1870) ("[A]greement means the mutual consent

approved by Congress, agreements and compacts have the force of federal law.[6] As a result, agreement and compacts have dual functions: they operate as contracts between governments and, if approved by Congress, part of the law of the United States.[7]

The ability to form compacts with other governments is a defining characteristic of sovereignty.[8] In the Compact Clause, the Constitution adapts the sovereign's traditional compact-making power to the American constitutional system in which both the Federal Government and the states have sovereign authority.[9] The clause safeguards national interests by giving Congress control over matters that reach beyond state lines but are not suitable for direct federal regulation.[10] It also protects states' interests by limiting an individual state's power to form compacts that might disadvantage other states or regional interests.[11]

A literal reading of the Compact Clause would require congressional approval for any agreement or compact.[12] In the context of interstate compacts, however, the Supreme Court has adopted a functional interpretation in which only compacts that increase the political power of the states while undermining federal sovereignty require congressional consent.[13] The Supreme Court has not said whether the same interpretation applies to states' compacts with foreign governments, but the proliferation of states' pacts[14] with foreign officials suggests Congress's approval is not required in many cases.[15]

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of the parties to a given proposition . . . ."); *see also Compact*, Black's Law Dictionary (11th ed. 2019) (defining "compact" as "[a]n agreement or covenant between two or more parties, esp. between governments or states"). Because the distinctions between "Agreement" and "Compact," are minor, this essay uses the terms interchangeably.

[6] *See* ArtI.S10.C3.3.6 Legal Effect and Interpretation of Compacts.

[7] For background on the Supremacy Clause, see ArtVI.C2.1 Overview of Supremacy Clause.

[8] *See, e.g.*, *Poole*, 36 U.S. at 209; Rhode Island v. Massachusetts, 37 U.S. 657, 725 (1838); ArtII.S2.C2.1.2 Historical Background on Treaty-Making Power (discussing the importance of international agreement-making to the concept of sovereignty).

[9] *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 104 (1938). For discussion of the dual sovereignty doctrine, see Amdt5.3.3 Dual Sovereignty Doctrine.

[10] *See* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 282 n.7 (1959). *See also* Texas v. New Mexico, No. 141, Orig., slip op. at 4 (U.S. Mar. 5, 2018) (noting that the Compact Clause "ensures that the Legislature can 'check any infringement of the rights of the national government.'") (quoting 3 Joseph Story, Commentaries on the Constitution of the United States § 1397 (1833)); Cuyler v. Adams, 449 U.S. 433, 440 (1981) ("[T]he Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority."); West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 27–28 (1951) (describing compacts as a "supple device" for addressing regional problems while protecting national interests).

[11] *See* Florida v. Georgia, 58 U.S. 478, 494 (1854).

[12] *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 459 (1978).

[13] *See*, *e.g.*, Cuyler v. Adams, 449 U.S. 433, 440 (1981); *U.S. Steel Corp.*, 434 U.S. at 468; New Hampshire v. Maine, 426 U.S. 363, 369–370 (1976); Virginia v. Tennessee, 148 U.S. 503, 519 (1893). For background on functionalism as a method of constitutional interpretation, see Intro.8.8 Structuralism and Constitutional Interpretation.

[14] This set of essays uses "pact" as a generic term for any international commitment to which a state is a party, regardless of its form, title, and whether it is legally binding.

[15] *See* ArtI.S10.C3.3.5 Requirement of Congressional Consent to Compacts. For discussion of the effect of historical practice on constitutional interpretation, see Intro.8.9 Historical Practices and Constitutional Interpretation.

ArtI.S10.C3.3.2 Historical Background on Compact Clause

Article I, Section 10, Clause 3:

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

The roots of the Compact Clause can be traced to interstate boundary disputes during the colonial period in American history.[1] As population in North America expanded and moved westward, some colonies sought control over greater shares of territory.[2] At the same time, land grants in the colonies' royal charters were often vague and indefinite, which led to disagreements about colonial borders.[3] The British legal system provided two methods for the colonies to resolve these disputes: a litigation-like process before the British Royal Commission or private negotiations between the colonies followed by settlements that were approved by the Crown.[4] Both processes were precursors to provisions in the Constitution. The litigation-like process continued in Article III, Section 2, which gives the Supreme Court original jurisdiction over disputes between states.[5] The private settlement process carried over into the Compact Clause.

In the period after the Revolutionary War but before the Constitution was adopted, the Articles of Confederation shifted the British system of compact-making slightly. The Articles of Confederation allowed the states to negotiate independently and form compacts, but they required approval from the newly created Congress rather than the Crown.[6] Despite the requirement for congressional consent, several states entered into interstate compacts without seeking approval during the Articles of Confederation period.[7]

At the Constitutional Convention, James Madison cited states' unapproved compacts as one reason to strengthen the National Government's general power over the states in a new system of government.[8] Later in the convention, the Committee of Detail included what would become the Compact Clause in its drafts of the Constitution,[9] and the Committee of Style

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[1] *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L. J. 685, 692 (1925).

[2] *See id.*

[3] *See*, *e.g.*, Rhode Island v. Massachusetts, 37 U.S. 657, 724 (1838); Virginia v. Tennessee, 148 U.S. 503, 504–07 (1893).

[4] *See* Frankfurter & Landis, *supra* note 1, at 693–95. *See also* Rhode Island v. Massachusetts, 37 U.S. at 739–44 (discussing boundary settlement processes in Great Britain).

[5] *See* ArtIII.S2.C2.2 Supreme Court Original Jurisdiction. The Supreme Court regularly encourages states to resolve their disputes through compacts rather than litigation. *See*, *e.g.*, Vermont v. New York, 417 U.S. 270, 277–78 (1974).

[6] Article VI of the Articles of Confederation states: "No State, without the Consent of the united States, in congress assembled, shall . . . enter into any confer[ ]ence, agreement, alliance, or treaty, with any King prince or state . . . . No two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the united states, in congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue." Articles of Confederation of 1781, art. VI, paras. 1, 3.

[7] *See* Frankfurter & Landis, *supra* note 1, at 732.

[8] *See* 1 The Records of the Federal Convention of 1787, at 316 (Max Farrand ed., 1911) [hereinafter Farrand's Records] ("[N]o two or more States can form among themselves any treaties . . . without the consent of Cong[ress] yet Virgi[ni]a & Mary[lan]d in one instance—Pen[nsylvania] & N[ew] Jersey in another, have entered into compacts, without previous application or subsequent apology.").

[9] The Committee of Detail's first draft provided: "No State shall enter into any . . . Treaty, Alliance (or) Confederation (with any foreign Power nor with[out] Cons[ent] of U.S. into any agreem[ent] or compact w[ith] (any other) another State or Power . . . ." 2 Farrand's Records, *supra* note 8, at 169. The Committee of Detail's later draft, which was submitted to the Constitutional Convention, stated: "No State, without the consent of the Legislature of the

revised the clause into its final form.[10] Minor elements of the Compact Clause differ from the Articles of Confederation,[11] but the clause retained its basic structure in which states can form agreements and compacts with one another and with foreign governments, provided Congress consents.[12]

Apart from Madison's remark about unapproved compacts, the Framers said little about the Compact Clause during the Constitutional Convention and state ratification debates.[13] In the *Federalist No. 44*, Madison wrote that the "particulars" of the Compact Clause "are either so obvious, or have been so fully developed, that they may be passed over without remark."[14] Despite Madison's confidence that the clause is self-explanatory, compact-making practice has evolved, and disagreements have required courts to interpret the Compact Clause's scope and requirements.[15]

ArtI.S10.C3.3.3 Subject Matter of Compacts

Article I, Section 10, Clause 3:

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

As instruments based on the combined powers of Congress and the states, compacts have a broad base of authority that can be leveraged for many governmental endeavors.[1] For many years after the Constitution was adopted, boundary disputes were the predominate subject of all compacts and agreements.[2] After the turn of the twentieth century, states began to use

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United states, shall . . . enter into any agreement or compact with another State, or with any foreign power . . . ." 2 Farrand's Records, *supra* note 8, at 187. Earlier in the Convention, Alexander Hamilton had proposed a draft constitution that included a similar clause. *See* 3 Farrand's Records, *supra* note 8, at 630 ("No State shall enter into a Treaty, alliance, or contract with another, or with a foreign power without the consent of the United States.").

[10] *See* 2 Farrand's Records, *supra* note 8, at 597 (revisions by Committee of Style); *See* 2 Farrand's Records, *supra* note 8, at 657 (final version of the Compact Clause in the Constitution).

[11] The Compact Clause conditionally allows "any Agreement or Compact" when Congress consents, but Clause 1 of Article I, Section 10 forbids the states from entering into three types of pacts—treaties, alliances, and confederations—even if Congress approves. *See* U.S. Const., art. I, § 10, cls. 1, 3. By contrast, the Articles of Confederation did not create a second category of pacts that were forbidden no matter if Congress consents. *See* Articles of Confederation of 1781, art. VI, paras. 1, 3. The Framers' writings suggest each category of pact mentioned in these provisions had a distinct and commonly understood meaning when the Constitution was drafted. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460–62 (1978). According to the Supreme Court, however, the meaning of these terms of art were lost within a generation, leaving later jurists and scholars to debate different theories of distinction. *See U.S. Steel Corp.*, 434 U.S. at 463.

[12] *Compare* Articles of Confederation of 1781, art. VI, paras. 1, 3, *with* U.S. Const., art. I, § 10, cl. 3.

[13] *See U.S. Steel Corp.*, 434 U.S. at 460–62 ("The records of the Constitutional Convention . . . are barren of any clue as to the precise contours of the agreements and compacts governed by the Compact Clause. . . . The records of the state ratification conventions also shed no light.").

[14] The Federalist No. 44 (James Madison).

[15] *See* ArtI.S10.C3.3.3 Subject Matter of Compacts and ArtI.S10.C3.3.6 Legal Effect and Interpretation of Compacts.

[1] *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L. J. 685, 688 (1925). The Supreme Court has stated in dicta that compacts may not be used to alter the Constitutional structure of government. *See* Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421, 433 (1855) (stating that Congress cannot not lose its power to regulate interstate commerce through a compact); Wilson v. Mason, 5 U.S. 45, 61, 2 L. Ed. 29 (1801) (declining to adopt a construction of an compact that would "annul the [C]onstitution" by depriving federal courts of constitutionally provided jurisdiction).

[2] *See*, *e.g.*, Frankfurter & Landis, *supra* note 1, at 735–48; Richard H. Leach, *The Federal Government and Interstate Compacts*, 29 Fordham L. Rev. 421, 421–22 (1961). The first compact approved under the Constitution was an

interstate compacts more often as a tool for solving complex regional problems.[3] States made compacts to apportion interstate water bodies, particularly rivers in the Western United States,[4] and to manage interstate resources and properties, such as oil and gas,[5] fisheries,[6] and parks.[7] States also began to use compacts for major public undertakings and infrastructure projects, such as the Port of New York and New Jersey.[8]

During this time, Congress began to pass legislation that provided advance consent to whole classes of compacts on some subjects. In one notable example, Congress passed legislation consenting to any interstate compact for the prevention of crime.[9] This law led to several widely adopted compacts addressing probationers' and parolees' travel between states and other law enforcement matters.[10]

Interstate compact usage eventually evolved to address an even wider range of issues. Congress authorized compacts addressing subjects as varied as education,[11] urban planning,[12] tourism and historic preservation,[13] tax,[14] emergency aid,[15] fire prevention,[16] transportation,[17] sewage disposal,[18] and radioactive waste management.[19]

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agreement between Virginia and the delegates of the then-district of Kentucky to set boundaries between Virginia the newly formed State of Kentucky. *See* 1 Stat. 189 (1791). *See also* De Veau v. Braisted, 363 U.S. 144, 154 (1960) (discussing history of congressional approval of state compacts).

[3] *See* Leach, *supra* note 2, at 421–22; Duncan B. Hollis, *The Elusive Foreign Compact*, 73 Mo. L. Rev. 1071, 1074–75 (2008). *See also* West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 27 (1951) ("The growing interdependence of regional interests, calling for regional adjustments, has brought extensive use of interstate compacts.").

[4] *See*, *e.g.*, La Plata River Compact, Pub. L. No. 68-346, 43 Stat. 796 (1925); South Platte River Compact, Pub. L. No. 69-37, 44 Stat. 195 (1926); Colorado River Compact, Pub. L. No. 70-642, § 13, 45 Stat. 1057 (1928); Rio Grande Compact of 1938, Pub. L. No. 76-96, 53 Stat. 785 (1939); Republican River Compact, Pub. L. No. 78-60, 57 Stat. 86 (1943).

[5] *See*, *e.g.*, Interstate Compact to Preserve Oil and Gas, Pub. Res. No. 74-64, 49 Stat. 939 (1935).

[6] *See*, *e.g.*, Columbia River Compact, Pub. L. No. 65-123, 40 Stat. 515 (1918); Pacific Marine Fisheries Compact, Pub. L. No. 80-232, 61 Stat. 419 (1947).

[7] *See*, *e.g.*, Palisades Interstate Park Compact, Pub. Res. No. 75-65, 50 Stat. 719 (1937); Breaks Interstate Park Compact, Pub. L. No. 83-543, 68 Stat. 571 (1954).

[8] *See* Joint Resolution Granting Consent of Congress to an Agreement or Compact for the Creation of the Port of New York District and the Establishment of the Port of New York Authority, Pub. Res. No. 67-17, 42 Stat. 174 (1921).

[9] *See* An Act Granting Consent of Congress to Any Two or More States to Enter into Agreements or Compacts for Cooperative Effort and Mutual Assistance in the Prevention of Crime, Pub. L. No. 73-292, 48 Stat. 909 (1934) (codified at 4 U.S.C. § 112).

[10] *See*, *e.g.*, Interstate Compact for Juveniles, codified in Va. Code Ann. § 16.1-323; Interstate Corrections Compact, codified in Ky. Rev. Stat. Ann. § 196.610; Agreement on Detainers, codified in Ala. Code § 15-9-81; New England Corrections Compact, codified in Conn. Gen. Stat. Ann. § 18–102; New England Police Compact, codified in 42 R.I. Gen. Laws Ann. § 42-37-1; Western Corrections Compact, codified in Wyo. Stat. Ann. § 7-3-401.

[11] *See*, *e.g.*, Western Regional Education Compact, Pub. L. No. 83–226, 67 Stat. 490 (1953); New Hampshire-Vermont Interstate School Compact, Pub. L. No. 91-21, 83 Stat. 14 (1969).

[12] *See*, *e.g.*, Delaware Valley Urban Area Compact, codified in N.J. Stat. Ann. §§ 32:27-1–32:27-27 (advance congressional consent provided by the Housing Act of 1961, Pub. L. No. 87-70, § 310, 75 Stat. 170 (1961) (previously codified in 40 U.S.C. § 461, *repealed by* Pub. L. No. 97-35, § 313, 95 Stat. 398 (1981))).

[13] *See*, *e.g.*, Historic Chattahoochee Compact, Pub. L. No. 95-462, 92 Stat 1271 (1978); Cumbres and Toltec Scenic Railroad Compact, Pub. L. No. 93-467, 88 Stat. 1421 (1974).

[14] *See* Compact on Taxation of Motor Fuels Consumed by Interstate Buses, Pub. L. No. 89-11, 79 Stat. 58 (1965).

[15] *See* Interstate Compact for Mutual Military Aid in an Emergency, Pub. L. No. 82-434, 66 Stat. 315 (1952) (amended by Pub. L. No. 84-564, 70 Stat. 247 (1956); Emergency Management Assistance Compact; Pub. L. No. 104-321, 110 Stat. 3877 (1996).

[16] *See*, *e.g.*, South Central Forest Fire Protection Compact, Pub. L. No. 83-642, 68 Stat. 783 (1954); Middle Atlantic Interstate Forest Fire Protection Compact, Pub. L. No. 84-790, 70 Stat. 636 (1956); Northwest Fire Protection Agreement, Pub. L. No. 105-377, 112 Stat. 33391 (1998).

[17] *See*, *e.g.*, Joint Resolution Granting the Consent of Congress to the Several States to Negotiate and Enter into Compacts for the Purpose of Promoting Highway Safety, Pub. L. No. 85-684, 72 Stat. 635 (1957).

Some compacts create administrative bodies empowered to implement the compact's requirements.[20] For example, in *West Virginia ex rel. Dyer v. Sims*, the Supreme Court addressed the Ohio River Valley Sanitation Compact, which authorized an interstate commission to issue orders requiring compliance with sewage disposal restrictions in interstate waterbodies.[21] A West Virginia state court deemed the compact invalid under the theory that it unlawfully delegated the state's sovereign power to a body outside the state.[22] The Supreme Court, however, reasoned that the "Framers left the [s]tates free to settle regional controversies in diverse ways[,]" including by delegating a state's traditional sovereign authority to an interstate compact commission.[23]

Unlike interstate compacts, Congress has given consent to a much smaller set of agreements between states and foreign governments.[24] The nature of states' pacts with foreign governments can be "elusive," as one Compact Clause scholar described it,[25] because states often make international pacts without seeking congressional approval.[26] Congress has approved state agreements with foreign governments on some distinct subjects, such as agreements for transnational highway infrastructure and bridges[27] and compacts with Canadian providences and territories for cross-border fire prevention[28] and emergency management.[29]

In a unique case, Congress authorized the Great Lakes Basin Compact—which included several states, Ontario, and Quebec—but declined to allow the Canadian provinces to join.[30]

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[18] *See* New Hampshire-Vermont Interstate Sewage Waste Disposal Facilities Compact, Pub. L. No. 94-403, 90 Stat. 1221 (1976).

[19] *See*, *e.g.*, 42 U.S.C. § 2021d; 42 U.S.C. § 2021d note.

[20] *See* Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 472 U.S. 159, 164 (1985) (describing the creation of a joint organization or body as one "classic indicia of a compact").

[21] *See* 341 U.S. 22, 24–25 (1951).

[22] *See West Virginia ex rel. Dyer*, 341 U.S. at 26–30.

[23] *See id.* at 26–31.

[24] *See* Hollis, *supra* note 3, at 1075.

[25] *See generally* Hollis, *supra* note 3.

[26] For discussion of the state's increase use of pacts with foreign governments that do not receive congressional approval, see ArtI.S10.C3.3.5 Requirement of Congressional Consent to Compacts.

[27] *See* Act to Authorize the Construction and Maintenance of a Bridge Across the Niagara River, 16 Stat. 173 (1870); Joint Resolution Granting Consent to New York to Enter into an Agreement or Compact with Canada for the Establishment of the Niagara Frontier Port Authority, Pub. L. No. 824, 70 Stat. 701 (1956), *repealed by* Pub. L. No. 85–145, 71 Stat. 367 (1957); 33 U.S.C. § 535a (granting consent to construction of international bridges to Canada and Mexico). In 1958, Congress authorized a compact between Minnesota and Manitoba, Canada for a highway construction project, but construction was never went forward. *See* Act of Sept. 2, 1958, Pub. L. No. 85–877, § 1, 72 Stat. 1701.

[28] *See* Act Granting the Consent and Approval of Congress to an Interstate Forest Fire Protection Compact, 63 Stat. 271 (1949); Act Granting the Consent and Approval of Congress to the Participation of certain Provinces of the Dominion of Canada in the Northeastern Interstate Forest Fire Protection Compact, Pub. L. No. 340, § 1, 66 Stat. 71 (1952), *repealed by* Act of June 30, 1978, Pub. L. No. 95–307, § 8, 92 Stat. 353 (agreements formed under the repealed authorization remain in effect under 16 U.S.C. § 1647(b)); Act Granting Consent and Approval of Congress to an Interstate Forest Fire Protection Compact, Pub. L. No. 105–377, 112 Stat. 3391 (1998).

[29] *See* International Emergency Management Assistance Memorandum of Understanding, Pub. L. No. 110–171, 121 Stat. 2467 (2007); Pacific Northwest Emergency Management Arrangement, Pub. L. No. 105–381, 112 Stat. 3402 (1998).

[30] *See* Act Granting Consent of Congress to a Great Lakes Basin Compact, Pub. L. No. 90–419 § 2, 82 Stat. 414 (1968).

Executive Branch officials believed Canadian participation would conflict with an existing treaty between the United States and Canada and interfere with the Federal Government's powers over foreign affairs.[31]

ArtI.S10.C3.3.4 Congressional Consent to Compacts

Article I, Section 10, Clause 3:

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

The Constitution does not dictate the timing or manner in which Congress must consent to a compact. The Supreme Court has interpreted the Constitution's silence to mean that Congress may use its wisdom and discretion to choose how and when it gives consent.[1] In an 1893 case, the Supreme Court stated that Congress ordinarily should provide authorization before the states join and carry out a compact, but Congress may consent later if the compact addresses an issue that is best considered after its "nature is fully developed[.]"[2] The Court has further explained that Congress can consent to a compact either in advance or by giving approval after the states already negotiated and joined the compact.[3]

As the number of compacts has increased over time, Congress has developed different ways of providing consent. Congress frequently approves specific compacts,[4] but it also has given approval in advance to broad classes of compacts.[5] Congress has, at times, given consent for an indefinite period;[6] other times it has put an end date on its authorization.[7] When approving a compact, Congress can consent to the participating states' later adoption of legislation that implements the compact.[8] Congress also can impose conditions on its consent, provided the conditions are "appropriate to the subject" and do not exceed a constitutional limitation.[9]

Congress's consent to a compact can be inferred from the circumstances and need not be expressly stated.[10] For example, when a compact sets up a formal procedure for resolving an

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[31] *See The Great Lakes Basin: Hearings before the Subcomm. on the Great Lakes Basin, S. Comm. Foreign Relations*, 84TH CONG. 6–9 (1956) (written statements of Robert C. Hill, Assistant Sec'y of State, and William P. Rogers, Deputy Att'y Gen.).

[1] *See* Green v. Biddle, 21 U.S. 1, 85–83 (1823) ("[T]he constitution makes no provision respecting the mode or form in which the consent of Congress is to be signified, very properly leaving that matter to the wisdom of that body . . . .").

[2] Virginia v. Tennessee, 148 U.S. 503, 521 (1893).

[3] Cuyler v. Adams, 449 U.S. 433, 440–41 (1981). Although not required under the Constitution, Congress often presents compacts which it has authorized to the President for approval. *See* Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071, 1103 n.30 (2008).

[4] *See e.g.*, Columbia River Compact, Pub. L. No. 65–123, 40 Stat. 515 (1918).

[5] *See*, *e.g.*, 4 U.S.C. § 112; 42 U.S.C. § 2021d(2); 33 U.S.C. § 567a.

[6] *See supra* note 5.

[7] *See*, *e.g.*, 7 U.S.C. § 7256(3).

[8] *See* De Veau v. Braisted, 363 U.S. 144, 150–51 (1960).

[9] James v. Dravo Contracting Co., 302 U.S. 134, 148 (1937). *See also*, *e.g.*, Arizona v. California, 292 U.S. 341, 351–52 (1934) (discussing conditions on the Colorado River Compact imposed by the Boulder Canyon Project Act of 1928); 7 U.S.C. § 7256(2) (limiting the Northeast Interstate Diary Compact).

[10] *See*, *e.g.*, Virginia v. Tennessee, 148 U.S. at 522; Virginia v. West Virginia, 78 U.S. 39, 60 (1870).

interstate problem, such as arbitration, the Supreme Court has held that consent can be inferred if Congress expressed approval of the proceedings' results.[11]

ArtI.S10.C3.3.5 Requirement of Congressional Consent to Compacts

Article I, Section 10, Clause 3:

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

One of the most common questions to arise in Compact Clause cases is whether congressional consent is required for a particular state commitment.[1] The plain language of the Compact Clause suggests congressional approval is mandatory for "any" compact with another state or foreign government,[2] but the Supreme Court has not adopted a literal interpretation of the clause in all cases. In the context of interstate compacts, the Supreme Court has held that only compacts that increase states' power and diminish federal supremacy need Congress's consent.[3] The Court has not said whether the same interpretation applies to states' compacts with foreign governments, but the frequency with which states make international pacts suggests congressional approval often is unnecessary.[4]

The closest the Supreme Court has come to invalidating a compact for lack of congressional approval came in a non-controlling 1840 opinion about a state's agreement with a foreign official.[5] In *Holmes v. Jennison*, the Governor of Vermont ordered a resident of Quebec (then part of Great Britain) arrested and returned to Quebec to stand trial for murder even though the United States did not have an extradition treaty with Britain at the time.[6] A crucial legal issue—whether the Supreme Court had jurisdiction—turned on the whether the Governor of Vermont had arrested the fugitive under an informal "agreement" with Canadian authorities within the meaning of the Compact Clause.[7] The case ultimately ended with an equally divided court on the jurisdiction issue,[8] with four Justices determining that the governor made an agreement that should have been submitted to Congress for consent.[9] This four-Justice

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[11] *See, e.g.*, Wharton v. Wise, 153 U.S. 155, 172–73 (1894); Virginia v. Tennessee, 148 U.S. at 537; Green v. Biddle, 21 U.S. 1, 86–87 (1823).

[1] *See e.g.*, Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 472 U.S. 159, 175 (1985); U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 469–70 (1978); New Hampshire v. Maine, 426 U.S. 363, 370 (1976); Virginia v. Tennessee, 148 U.S. 503, 518–19 (1893).

[2] *See U.S. Steel Corp*, 434 U.S. at 459 ("Read literally, the Compact Clause would require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States.").

[3] *See Ne. Bancorp, Inc.*, 472 U.S. at 175; *U.S. Steel Corp.*, 434 U.S. at 469–70; New Hampshire v. Maine, 426 U.S. at 370; Virginia v. Tennessee, 148 U.S. at 518–19. *See also* St. Louis & S.F. Ry. v. James, 161 U.S. 545, 562 (1896) (holding that state legislation authorizing a railroad organized under the laws of one state to extend services into a second state, subject to the second state's regulations, did not require congressional approval).

[4] *See infra* note 12.

[5] Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840) (affirmed by an equally divided court).

[6] *See id.* at 561 (Taney, C.J.).

[7] The Supreme Court had jurisdiction if the lower court's decision was final and implicated a question of whether Vermont's actions were "repugnant to the constitution[.]" An Act to Establish the Judicial Courts United States, 1 Stat. 73, 85 (1789). The constitutional repugnancy element hinged on whether the Governor of Vermont made an "agreement" under the Compact Clause. *See Holmes*, 39 U.S. at 562–86 (Taney, C.J.).

[8] When the Supreme Court is made up of an even number of justices and is equally divided on the merits of a case, the lower court's decision is affirmed. *See* Durant v. Essex Co., 74 U.S. 107 (1868).

[9] *See Holmes*, 39 U.S. at 573–74 (Taney, C.J.).

opinion, written by Chief Justice Roger Taney, was based on a literal interpretation of the Compact Clause that viewed congressional approval as necessary for "every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties."[10]

Chief Justice Taney's opinion has been influential, and the Supreme Court later cited it positively,[11] but the view that all pacts between states and foreign governments require Congress's consent has not been supported in practice.[12] To the contrary, states often conclude pacts with foreign officials without congressional approval, and the Supreme Court eventually developed a new line of cases that more narrowly interprets the congressional consent requirement in the context of interstate compacts.[13]

In 1893, the Supreme Court expressed doubt in *Virginia v. Tennessee* that Congress must approve every interstate compact regardless of its relevance to the Federal Government.[14] The *Virginia* Court saw no reason congressional approval would be necessary for compacts "to which the United States can have no possible objection" or desire to interfere.[15] The Court gave several examples of hypothetical agreements that would not concern the United States, such as two states contracting to send exhibits to the Chicago World's Fair via the Erie Canal.[16] Rather than require congressional approval in every case, the *Virginia* Court reasoned that interstate compacts only need Congress's consent if they have the potential to "increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."[17]

In later cases, the Supreme Court repeated *Virginia*'s test for determining when congressional consent is necessary and clarified how it applies to modern interstate compacts.[18] In *U.S. Steel Corp. v. Multistate Tax Commission*, for example, the Supreme Court held that a compact creating uniform rules for state taxation of multistate corporations did not require congressional consent even though it increased the states' bargaining power in relation to the taxed companies.[19] *Virginia*'s test does not focus on whether the compact makes

[10] *Id.* at 572.

[11] *See* United States v. Rauscher, 119 U.S. 407, 414 (1886) ("[T]here can be little doubt of the soundness of the opinion of Chief Justice [Taney], that the power exercised by the governor of Vermont is a part of the foreign intercourse of this country, which has undoubtedly been conferred upon the federal government[.]"); U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 465 n. 15 (1978) (discussing the consistency of Chief Justice Taney's opinion with later Compact Clause jurisprudence). The Supreme Court of Vermont relied, in part, on Chief Justice Taney's opinion in later proceedings when it concluded that the governor lacked the constitutional authority to transfer the fugitive to Canadian officials. See *Ex parte* Holmes, 12 Vt. 631, 635–42 (1840).

[12] *See* Memorandum from William H. Taft, IV, Legal Adviser, Dep't of State, to Senator Byron L. Dorgan (Nov. 20, 2001) [Taft Memorandum], *in* Digest of United States Practice in International Law 2001, at 182 (Sally J. Cummins & David P. Stewart eds., 2001) [2001 Digest] ("In general, the notion articulated by Chief Justice Taney that all U.S. state agreements constitute compacts that require congressional consent has not been widely supported."); Duncan B. Hollis, *Unpacking the Compact Clause*, 88 Tex. L. Rev. 741, 747–60 (2010) (cataloging and describing state agreements with foreign governments that did not receive congressional approval); Ryan M. Scoville, *The International Commitments of the Fifty States*, UCLA L. Rev. (forthcoming 2022) (updating research on the proliferation of states' agreements with foreign governments).

[13] *See supra* notes 1 & 12.

[14] *See* 148 U.S. 503, 518–19 (1893).

[15] *See id.* at 518.

[16] *See id.*

[17] *See id.* at 519.

[18] *See* Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 472 U.S. 159, 175 (1985); U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 469–70 (1978); New Hampshire v. Maine, 426 U.S. 363, 370 (1976).

[19] *See U.S. Steel Corp.*, 434 U.S. at 472–73.

the states more influential in general, the *U.S. Steel Corp.* Court explained, but whether it could enhance the states' power in relation to the Federal Government.[20]

The Supreme Court has also suggested that some engagements between states do not qualify as agreements or compacts at all.[21] In *Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System*,[22] Supreme Court rejected a Compact Clause challenge on the rationale that a system for reciprocal state legislation[23] lacked four "classic indicia of a compact" in the constitutional sense.[24] According to Court, those indicia are: (1) the creation of a joint organization or body; (2) conditioning one state's action on the actions of other states; (3) restrictions on states' ability to modify or repeal their laws unilaterally; and (4) a requirement for reciprocal constraints among all states.[25] The *Northeast Bancorp, Inc.* Court also held that, even if it assumed a compact existed, the scheme was authorized under existing federal banking law,[26] and therefore could infringe federal supremacy under the *Virginia* standard for congressional consent.[27]

After *Northeast Bancorp, Inc.*, the Supreme Court's interstate compact jurisprudence appears to establish a two-part inquiry for determining whether congressional consent is necessary: is the arrangement at issue a "compact or agreement" for constitutional purposes, and, if so, does it belong in that class of compacts described in *Virginia* that require congressional approval because it affects federal supremacy?[28] Unless the answer to both questions is "yes," consent is not mandatory.

While the Supreme Court's interstate compact cases are the most well-developed jurisprudence on the congressional consent issue, the Court has never held that these cases apply to states' *international* pacts with foreign governments.[29] Some scholars argue that two types of compacts present different concerns and should not share the same standard.[30] The greater weight of authority adopted in lower courts and Executive Branch statements, however, suggests *Virginia* applies in both scenarios.[31]

[20] *See id.* at 473.

[21] *See Ne. Bancorp, Inc.*, 472 U.S. at 175.

[22] 472 U.S. 159.

[23] *Northeast Bancorp, Inc.* concerned a system of reciprocal state legislation in which Massachusetts and Connecticut passed state laws that only allowed banks in their states to be acquired by New England-based holding companies. *See id.* at 164.

[24] *See id.*

[25] *See id.*

[26] *See* Bank Holding Company Act, 18 U.S.C. §§ 1841–52.

[27] *Ne. Bancorp, Inc.*, 472 U.S. at 176.

[28] *Accord*, *e.g.*, Taft Memorandum, *supra* note 12, *in* 2001 Digest, *supra* note 12, at 185; Hollis, *supra* note 12, at 765.

[29] *See*, *e.g.*, Taft Memorandum, *supra* note 12, *in* 2001 Digest, *supra* note 12, at 184 ("[I]t is not a settled question that the *Virginia* standard applies to state compacts with foreign powers[.]").

[30] *See*, *e.g.*, Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 Colum. L. Rev. 403, 506 (2003); Hollis, *supra* note 12, at 769–804.

[31] *See*, *e.g.*, United States v. California, 444 F. Supp. 3d 1181, 1196 n.13 (E.D. Cal. 2020); McHenry Cnty. v. Brady, 37 N.D. 59, 59 (1917); *In re* Manuel P., 215 Cal. App. 3d 48, 68–69 (Ct. App. 1989); Taft Memorandum, *supra* note 12, *in* 2001 Digest, *supra* note 12, at 184–85; Restatement (Third) of the Foreign Relations Law of the United States §302 cmt. f (1987); Louis Henkin, Foreign Affairs and the U.S. Constitution 152 (2d ed. 1997).

ArtI.S10.C3.3.6 Legal Effect and Interpretation of Compacts

Article I, Section 10, Clause 3:

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

Once Congress consents to a compact, the compact "transforms" from a contract between governments into a law of the United States.[1] As federal law, a congressionally approved compact preempts inconsistent state law,[2] and no court may order relief inconsistent with its terms.[3] The Supreme Court has held that boundaries established by congressionally approved interstate compacts bind the states' citizens and are conclusive as to their rights.[4] The Court also has held that compacts that equitably apportion interstate waterbodies can affect private property rights.[5]

The Supreme Court has final authority to decide a compact's meaning and validity.[6] The Court need not defer to state courts' views on whether a compact complies with the law of the states that joined it. Thus, in *West Virginia ex rel. Dyer*, the Supreme Court declined to adopt the highest state court in West Virginia's interpretation of whether an interstate compact complied with the West Virginia state constitution[7] even though the Court ordinarily defers to state courts' interpretation of their own state law.[8]

The Supreme Court often hears interstate compact cases through the Constitution's grant of original jurisdiction to hear disputes between states.[9] This means that interstate compact cases with only states as parties go directly to the Supreme Court without proceedings in lower courts. The Supreme Court views its role in these cases as different from its more standard disputes on appellate jurisdiction.[10] It approaches original jurisdiction cases in an "untechnical spirit" that allows the Court to mold the process in a way that best promotes the ends of justice.[11]

When private litigants are parties to cases involving compacts, the suits do not fall under the Supreme Court's original jurisdiction, but they can still be heard in federal courts because

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[1] *See* Cuyler v. Adams, 449 U.S. 433, 440 (1981). *See also* Texas v. New Mexico, No. 141, Orig., slip op. at 4 (U.S. Mar. 5, 2018); Kansas v. Nebraska, 574 U.S. 445, 456 n.5 (2015); Tarrant Reg'l Water Dist. v. Herrmann, 569 U.S. 614, 628 n.8 (2013); Alabama v. North Carolina, 560 U.S. 330, 351 (2010); Texas v. New Mexico, 482 U.S. 124, 128 (1987); Wedding v. Meyler, 192 U.S. 573, 582 (1904); Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518, 566 (1851).

[2] *See*, *e.g.*, *Tarrant Reg'l Water Dist.*, 569 U.S. at 627–28 (analyzing whether the Red River Compact preempted Oklahoma state water allocation statutes).

[3] *See*, *e.g.*, New Jersey v. New York, 523 U.S. 767, 811 (1999); *Culyer*, 449 U.S. at 438; Arizona v. California, 373 U.S. 546, 565–66 (1963); Washington v. Oregon, 211 U.S. 127, 135 (1908).

[4] *See*, *e.g.*, Virginia v. Tennessee, 148 U.S. 503, 525 (1893); Rhode Island v. Massachusetts, 37 U.S. 657, 725 (1838); Poole v. Fleeger, 36 U.S. 185, 209–10 (1837).

[5] *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 104–06 (1938).

[6] *See*, *e.g.*, Nebraska v. Iowa, 406 U.S. 117, 118 n.1 (1972); Petty v. Tenn.-Mo. Bridge Comm'n, 359 U.S. 275, 278 (1959); West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 28 (1951).

[7] *See West Virginia ex rel. Dyer*, 341 U.S. at 28–32.

[8] *See*, *e.g.*, Cunningham v. California, 549 U.S. 270, 306 n.8 (2007); Mullaney v. Wilbur, 421 U.S. 684, 691 (1975).

[9] *See* U.S. Const. art. III, § 2, cl. 2. For background on the Supreme Court's original jurisdiction and authority to hear suits between states, see ArtIII.S2.C2.2 Supreme Court Original Jurisdiction.

[10] *See*, *e.g.*, Florida v. Georgia, No. 142, Orig., slip op. at 10 (U.S. Apr. 1, 2018); Kansas v. Nebraska, No. 126, Orig., slip op. at 6 (U.S. Feb. 24, 2015); Kentucky v. Dennison, 65 U.S. (24 How.) 66, 98 (1861).

[11] *Florida*, No. 142, Orig., slip op. at 10 (quoting Virginia v. West Virginia, 220 U.S. 1, 27 (1911)).

they require interpretation of compacts in their status as federal law.[12] A compact that permits a state entity to "sue and be sued" waives the state's sovereign immunity provided under the Eleventh Amendment and can permit a private party to sue a state entity.[13]

Along with being federal law, compacts are contracts between states or between states and foreign governments.[14] As a result, the Supreme Court has, at times, used contract law remedies and principles in compact cases.[15] In *Green v. Biddle*, the Court held that interstate compacts fall under the protection of the Contract Clause,[16] which prohibits states from passing laws that impair contract rights.[17] At the same time, there are limits on how far the Supreme Court will treat compacts as ordinary contracts. In *Alabama v. North Carolina*, the Court declined to read an implied duty of good faith and fair dealing into an interstate compact even though the Court acknowledged every contract imposes that duty.[18]

[12] *See*, *e.g.*, Cuyler v. Adams, 449 U.S. 433, 439 (1981).

[13] *See* Petty v. Tenn.-Mo. Bridge Comm'n, 359 U.S. 275, 278–82 (1959). For discussion of the state sovereign immunity and the Eleventh Amendment, see Amdt11.5.1 General Scope of State Sovereign Immunity.

[14] *See*, *e.g.*, Texas v. New Mexico, 482 U.S. 124, 128 (1987).

[15] *See*, *e.g.*, Tarrant Reg'l Water Dist. v. Herrmann, 569 U.S. 614, 628 (2013); Texas v. New Mexico, 482 U.S. at 128; Kentucky v. Indiana, 281 U.S. 163, 177–78 (1930) (discussing the Court's ability to order specific performance in interstate compact cases between states).

[16] U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .)." *See also supra* ArtI.S10.C1.6.1 Overview of Contract Clause.

[17] *See* Green v. Biddle, 21 U.S. 1, 92 (1823) ("[A] State has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals."). *See also* Olin v. Kitzmiller, 259 U.S. 260, 262–63 (1922) (analyzing whether an Oregon fishing license law violated the Contract Clause by impairing the Columbia River Compact).

[18] *See* Alabama v. North Carolina, 560 U.S. 330, 351–52 (2010).

ARTICLE II
EXECUTIVE BRANCH

ARTICLE II
EXECUTIVE BRANCH

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ARTICLE II—EXECUTIVE BRANCH

ArtII.1 Overview of Article II, Executive Branch

Article II of the U.S. Constitution establishes the Executive Branch of the federal government. The Executive Vesting Clause, in Section 1, Clause 1, provides that the federal executive power is vested in the President. Section 3 of Article II further requires the President to "take Care that the Laws be faithfully executed."[1] The executive power thus consists of the authority to enforce laws and to "appoint the agents charged with the duty of such enforcement."[2] The President also has distinct authority over foreign affairs, and "alone has the power to speak or listen as a representative of the nation."[3] As a general matter, the Supreme Court has recognized that the Constitution vests the President not only with the authorities expressly delineated therein, but also with certain implied authorities,[4] such as the ability to supervise (and generally to remove) executive officials[5] and the power to recognize foreign governments.[6] At the same time, the Court has said that by granting the President the power of faithfully *executing* the laws, the Constitution "refutes the idea" that the President was intended "to be a lawmaker."[7] Nonetheless, the Court has recognized that officials appointed by the President—even those located within the Executive Branch—may exercise regulatory or adjudicative powers that are quasi-legislative or quasi-judicial.[8] Broadly, the Court has recognized that Executive Officers exercise authority to enforce and administer the laws, including rulemaking, administrative determinations, and the filing of lawsuits.[9]

The remaining provisions of Article II's Section 1 primarily outline the election of the President, including the establishment of the electoral college. Relatedly, Section 1 sets out the qualifications of the President, the oath of office, and compensation. Section 1 also creates succession provisions in the event of a President's removal or other inability to act, although the relatively sparse language in Clause 6 was later supplemented by the Twenty-Fifth Amendment and the Presidential Succession Act.[10]

Sections 2 and 3 define specific presidential powers and duties. Section 2, Clause 1 describes exclusive presidential powers: namely, the Commander in Chief authority, the power to require written opinions from the heads of executive departments, and the pardon power. Clause 2 defines the powers that the President shares with Congress, outlining the treaty-making power and the appointment power. Clause 3 expands on appointments by granting the President the power to unilaterally make temporary appointments during Senate recess. Section 3 requires the President to give Congress information on the state of the union. It also authorizes the President to recommend legislative measures and in extraordinary circumstances convene or adjourn Congress. Section 3 further grants the President the power

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[1] U.S. Const. art. II, § 3.

[2] Springer v. Government of Philippine Islands, 277 U.S. 189, 202 (1928).

[3] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

[4] *See generally* ArtII.S1.C1.1 Overview of Executive Vesting Clause.

[5] Seila Law LLC v. Consumer Fin. Prot. Bureau, No. 19-7, slip op. at 22 (U.S. June 29, 2020).

[6] Zivotofsky v. Kerry, 576 US. 1, 17 (2015). *Cf., e.g.*, United States *ex rel.* Knauff v. Snaughnessy, 338 U.S. 537, 543 (1950) (stating that the right to exclude aliens "is inherent in the executive power to control the foreign affairs of the nation," and when Congress legislates in this area, it "is implementing an inherent executive power").

[7] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

[8] *See* Buckley v. Valeo, 424 U.S. 1, 132–33 (1976).

[9] *See id.* at 138–41.

[10] U.S. Const. amend. XXV; 3 U.S.C. § 19.

to receive ambassadors and other public ministers. And as previously mentioned, Section 3 contains the Take Care Clause, requiring the President to ensure that the laws are faithfully executed.

Section 4 provides that the President—and all other "civil Officers of the United States"—may be removed from office if impeached and convicted on charges of "Treason, Bribery, or other high Crimes and Misdemeanors."[11] Article I contains further provisions bearing on impeachment procedures and judgments.[12]

As discussed elsewhere, Article I also contains some provisions bearing on presidential authority, perhaps most notably the President's authority to approve or veto legislation.[13]

Section 1—Function and Selection

Clause 1—President's Role

ArtII.S1.C1.1 Overview of Executive Vesting Clause

Article II, Section 1, Clause 1:

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

Under Article II, Section 1, Clause 1, the executive power is vested in a single person—the President of the United States. The nature and extent of the executive power is less clear.[1] Article II identifies exclusive powers of the President, including the President's authority as Commander in Chief and the power to pardon;[2] powers the President shares with the Senate, including the appointments and treaty-making powers;[3] and the President's duties, the most important of which is the duty to "take Care that the Laws be faithfully executed."[4] Moreover, the Supreme Court has recognized that "[b]ecause no single person could fulfill that responsibility," the Take Care Clause implicitly provides the President with authority to supervise subordinate officers assisting with this responsibility.[5] Likewise, Article I provides the President a role in the legislative process, including authority to veto legislation, subject to potential override by a two-thirds vote of both Houses of Congress.[6]

It is less clear from the text of the Constitution whether the executive powers expressly identified in the Constituion are exclusive or illustrative. Whereas the Article I Legislative Vesting Clause provides that "All legislative Powers *herein granted* shall be vested in a Congress,"[7] thereby distinguishing the powers granted by states from those they retained, the

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[11] U.S. Const. art. II, § 4.

[12] *Id.* art. I, § 2, cl. 5; *id.* art. I, § 3, cls. 6–7.

[13] *See* ArtI.S7.C2.1 Overview of Presidential Approval or Veto of Bills; ArtI.S7.C3.1 Presentation of Senate or House Resolutions.

[1] U.S. Const. art. II, § 1, cl. 1.

[2] *Id.* art. II, § 2, cl. 1. *See* ArtII.S2.C1.1.1 Historical Background on Commander in Chief Clause.

[3] *Id.* art. II, § 2, cl. 2. *See* ArtII.S2.C1.3.1 Overview of Pardon Power.

[4] *Id.* art. II, § 3. *See* ArtII.S3.3.1 Overview of Take Care Clause.

[5] Seila Law LLC v. Consumer Financial Protection Board, No. 19-7, slip op. at 2 (U.S. June 29, 2020). *See also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492–93 (2010).

[6] U.S. Const. art. I, § 7, cl. 2. *See* ArtI.S7.C2.1 Overview of Presidential Approval or Veto of Bills.

[7] *Id.* art. I, § 1, cl. 1 (emphasis added). *See* ArtI.S1.1 Overview of Legislative Vesting Clause.

Article II Executive Vesting Clause does not limit the "executive Power" in any way.[8] Consequently, since the earliest days of the Republic, the parameters of the executive power and, in particular, what implicit or residual powers such executive power encompasses have been the subject of debate.

ArtII.S1.C1.2 Historical Background on Executive Vesting Clause

Article II, Section 1, Clause 1:

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

The nature of the presidency ranked among the most important issues the Framers considered at the Constitutional Convention.[1] Reacting to how royal governors had exercised their powers, the framers of the state constitutions had generally created weak executives and strong legislatures. Likewise, the Articles of Confederation vested the national government's powers in a unicameral congress.[2] Experience during the period during which the Articles of Confederation had been in effect, however, had demonstrated to the delegates that an unfettered legislature, like an uncurbed executive, posed disadvantages, and that a legislature could not confer many of the advantages of a reasonably strong executive.[3] The Framers considered several ways to organize the Executive Branch, including plural executives, selection of the executive or executives by Congress, and whether the executive should be advised by a council.

The constitution of the State of New York, which provided for a Governor who was largely independent of the state legislature, offered one possible template for the Framers. Under New York's constitution, the Governor was directly elected by the people for three-year terms and eligible for re-election indefinitely. Because the state legislature did not select the Governor, the Governor was less beholden to it. Except with regard to appointments and vetoes, the Governor's decisions were unencumbered by a council. The Governor was also in charge of the militia, possessed the power to pardon, and was responsible for ensuring that the laws were faithfully executed.[4]

The Virginia Plan offered an alternative structure to that of the New York constitution. Under the Virginia Plan, the legislature would select the executive but would not be able to change the executive's salary during the executive's term in office. In addition, the executive would be ineligible for re-election, thereby reducing any incentive the executive might have to be overly deferential to the legislature. The Virginia Plan also provided for a council of revision, which included the executive, that could negate national and state legislation. The Virginia Plan provided that the executive power was the power to "execute the national laws" and to

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[8] *Id.* art. II, § 1, cl. 1.

[1] The background and the action of the Convention is comprehensively examined in Charles Thach, The Creation of the Presidency 1775–1789 (1923). *See also* John Hart, The American Presidency in Action 1789 (1948).

[2] 3 Joseph Story, Commentaries on the Constitution of the United States § 1407 (1833) ("Under the confederation there was no national executive. The whole powers of the national government were vested in a congress, consisting of a single body; and that body was authorized to appoint a committee of the states, composed of one delegate from every state, to sit in the recess, and to delegate to them such of their own powers, not requiring the consent of nine states, as nine states should consent to. This want of a national executive was deemed a fatal defect of the confederation.").

[3] Charles Thach, The Creation of the Presidency 1775–1789, at 1–64 (Amagi Books 2007) (1923).

[4] Alexander Hamilton observed the similarities and differences between the President and the New York Governor. The Federalist No. 69 (Alexander Hamilton). *See* New York Constitution of 1777, Articles XVII–XIX, *reprinted in* 5 Francis Thorpe, The Federal and State Constitutions (1909).

"enjoy the Executive rights vested in Congress by the Confederation," but it left open whether the executive would be a single or plural position.[5]

When the executive portion of the Virginia Plan was considered on June 1, 1787, James Wilson of Pennsylvania moved that the executive should consist of a single person.[6] In the course of his remarks, Wilson argued for a strong executive, directly elected by the people so that the executive would not be dependent on Congress or state legislatures. Wilson further proposed that the executive be eligible for reelection and granted power to negate legislation with the concurrence of a council of revision.[7] The vote on Wilson's motion was postponed until the method of selection, term, and mode of removal of, and powers to be conferred on the executive had been considered and subsequently approved.[8]

Ultimately, the Framers decided on a single executive and did not provide for an executive council, which would have participated in exercising the executive's veto, appointments, and treaty-making powers.[9] Instead, the Framers granted the Senate power to "advise and consent" on appointments and treaties[10] and gave the President power to require the "principal Officer in each of the executive Departments" to provide their "Opinion, in writing" on "any Subject relating to the Duties of their respective Offices."[11]

The Committee of Detail reported draft language providing that the executive be designated the "President of the United States,"[12] which the Convention accepted without discussion.[13] The same clause also provided that the President's title be "His Excellency,"[14] and, while this language was also accepted without discussion,[15] the Committee of Style and Arrangement subsequently omitted it from the final text without providing any reason.[16]

ArtII.S1.C1.3 Early Perspectives on Executive Power

Article II, Section 1, Clause 1:

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

While the Article I Legislative Vesting Clause provides that "All legislative Powers *herein granted* shall be vested in a Congress,"[1] thereby distinguishing the legislative powers that the states had granted to the National Government from those the states retained, the Article II Executive Vesting Clause refers only to a general "executive Power," which is vested in a single

[5] For discussion of the plans offered at the Constitutional Convention and the resulting debate, see Charles Thach, The Creation of the Presidency 1775–1789, at 65–91 (Amagi Books 2007) (1923). For the Virginia Plan, see 1 Records of the Federal Convention of 1787, at 20–23 (Max Farrand ed., 1911).

[6] 1 Records of the Federal Convention of 1787, at 65 (Max Farrand ed., 1911).

[7] *Id.* at 65–73.

[8] *Id.* at 93.

[9] The last proposal for a council was voted down on September 7, 1787. 2 *id.* at 542.

[10] *See* ArtII.S2.C2.1.1 Overview of President's Treaty-Making Power; ArtII.S2.C2.3.1 Overview of Appointments Clause.

[11] *See* ArtII.S2.C1.2 Executive Departments.

[12] 1 Records of the Federal Convention of 1787, at 185 (Max Farrand ed., 1911).

[13] *Id.* at 401.

[14] *Id.* at 185.

[15] *Id.* at 401.

[16] *Id.* at 597.

[1] U.S. Const. art. I, § 1, cl. 1 (emphasis added).

person—the President.[2] While the Constitution expressly identifies specific powers and duties that belong to the President—for example, the power to pardon and the duty to take care that the laws be faithfully enforced—the Founders differed on whether those powers were exclusive or illustrative.

The First Congress considered the parameters of the executive power and, in particular, the President's power to remove Executive Branch officers absent the consent of the Senate, the acquiescence of which is necessary for such Executive Branch officers' appointment.[3] Known as the Debate of 1789, the First Congress considered the President's removal power while it was establishing the Department of State.[4] As one commentator has noted: "Congress tacitly recognized the existence of an unrestrained presidential removal power from 1789 to 1867, and it developed into one of [the President's] most effective instruments for control of the executive branch."[5] While Congress subsequently passed laws limiting the President's ability to remove Executive Branch officers,[6] the Supreme Court did not address such a law until 1926 in *Myers v. United States*.[7]

Similar questions arose with respect to the President's authority over foreign affairs.[8] After President George Washington issued a proclamation declaring the United States neutral when France and Great Britain went to war in 1793, Alexander Hamilton and James Madison took competing positions on whether President Washington had exceeded his constitutional authority. Arguing that Article II does not enumerate all executive powers,[9] Hamilton wrote:

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[2] *Id.* art. II, § 1, cl. 1.

[3] *See* David P. Currie, the Constitution in Congress: The Federalist Period 1789–1801, at 36–41 (1997) (discussing James Madison's proposal for a department of foreign affairs). In the *Federalist No. 77*, Alexander Hamilton commented that the Senate's consent was necessary for the President to remove an Executive Officer, stating: "The consent of [the Senate] would be necessary to displace as well as to appoint. . . . Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him, by the apprehension that a discountenance of the Senate might frustrate the attempt and bring some degree of discredit upon himself." The Federalist No. 77 (Alexander Hamilton). While Congress expressly referred to the President's removal power in some legislation, *e.g.,* Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 87; Act of May 15, 1820, ch. 102, 3 Stat. 582, the Supreme Court in *Myers v. United States* observed that Congress adopted these provisions "to show conformity to the legislative decision of 1789." Myers v. United States, 272 U.S. 52, 146 (1926).

[4] For discussion on the Debate of 1789, see ArtII.S2.C2.3.15.2 Decision of 1789 and Removals in Early Republic. *See also* Charles Thach, The Creation of the Presidency 1775–1789, at 124–49 (Amagi Books 2007) (1923).

[5] C. Herman Pritchett, Constitutional Law of the Federal System 293 (1984). *See also* Act of May 15, 1820 (providing for removal of officers "at pleasure" of the President).

[6] Tenure of Office Act of 1867, ch. 154, 14 Stat. 430 (Mar. 2, 1867) (requiring, among other things, for the President to have the Senate's consent to remove the Secretary of War and certain other department heads); Act of July 12, 1876, ch. 179, 19 State. 80, 81 (providing that "Postmasters of the first, second and third classes shall be appointed by the President by and with the advice and consent of the Senate and shall hold their officers for four years unless sooner removed or suspended according to law."). *See also* United States v. Perkins, 116 U.S. 483 (1886). In *Perkins*, the Court addressed whether the Secretary of the Navy could discharge a naval cadet-engineer at will notwithstanding that the Act of August 5, 1882 provided that naval officers could not be discharged except pursuant to a court-martial. Ruling for the naval cadet-engineer, the Court stated: "The head of a Department has no constitutional prerogative of appointments to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto." *Id.* at 485. The Court, however, noted that it was not addressing a situation where an officer was appointed by the President with the advice and consent of the Senate. *Id.* ("Whether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President by and with the advice of the Senate under the authority of the Constitution (article 2, section 2) does not arise in this case and need not be considered.").

[7] The Court discussed the President's removal power in dicta in *Ex parte* Hennen, 38 U.S. (39 Pet.) 230 (1839) (recognizing authority of a District Judge to remove a clerk of the court). For further discussion of the removal power, see ArtII.S2.C2.3.15.1 Overview of Removal of Executive Branch Officers .

[8] *See* David P. Currie, the Constitution in Congress: The Federalist Period 1789–1801, at 174–82 (1997).

[9] *Id*. *See also* Charles Thomas, American Neutrality in 1793: A Study in Cabinet Government (1931).

> The enumeration [of executive powers in the Constitution] ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free government.[10]

Hamilton continued: "The general doctrine of our Constitution then is, that the *executive power* of the nation is vested in the President; subject only to the *exceptions* and *qualifications*, which are expressed in the instrument."[11] Rejecting Hamilton's view that the Constitution granted the President such broad powers, James Madison argued that, if executive powers were unfettered, "no citizen could any longer guess at the character of the government under which he lives; the most penetrating jurist would be unable to scan the extent of constructive prerogative."[12]

Unsurprisingly, Presidents have tended to interpret the Executive Vesting Clause's provision of executive power expansively. For example, President Thomas Jefferson justified the Louisiana Purchase based on implied executive power.[13]

ArtII.S1.C1.4 The President's Powers, Myers, and Seila

Article II, Section 1, Clause 1:

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

In 1926, Chief Justice and former President William Taft addressed the President's removal power in *Myers v. United States*, holding that the executive power includes the power to remove Executive Branch officers.[1] *Myers* concerned a law that required the Senate's advice and consent for the President to remove a Postmaster from office. In a 6-3 decision for the President, Chief Justice Taft reasoned that the removal power was necessary for the President to fulfill his constitutional duty to enforce the laws.[2] Absent power to hold subordinate Executive Branch officers accountable by removing them if necessary, the President would not be able to fulfill his obligation to "take Care that the Laws be faithfully executed."[3] Holding the removal power to be constitutionally vested in the President,[4] the *Myers* Court observed that powers vested in Congress must be strictly construed in favor of powers retained by the President.[5]

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[10] 7 Works of Alexander Hamilton 76, 80–81 (J. C. Hamilton ed., 1851).

[11] *Id.* (emphasis added).

[12] 1 Letters and Other Writings of James Madison 621 (J.B. Lippincott & Co., 1865).

[13] For discussion of the constitutionality of the Louisiana Purchase, see Everett Brown, The Constitutional History of the Louisiana Purchase, 1803–1812 (1920). For discussion of how the Jeffersonians and Federalists approached executive powers, see Leonard White, The Jeffersonians: A Study in Administrative History 1801–1829 (1951); Leonard White, The Federalists: A Study in Administrative History (1948).

[1] 272 U.S. 52 (1926). *See* Edward Corwin, The President's Removal Power under the Constitution, *in* 4 Selected Essays on Constitutional Law 1467 (1938).

[2] *Id.* art. II, § 3. *See* ArtII.S3.3.1 Overview of Take Care Clause.

[3] *Id.* art. II, § 3. *See* ArtII.S3.3.1 Overview of Take Care Clause.

[4] Charles Thach, The Creation of the Presidency, 1775–1789, at 92–123 (Amagi Books 2007) (1923).

[5] Myers v. United States, 272 U.S. 52, 163–64 (1926).

In the 1935 decision *Humphrey's Executor v. United States*[6] and the 1988 decision *Morrison v. Olson*, the Supreme Court[7] upheld limits on the President's removal power. However, the Court subsequently emphasized that those cases were limited to specific circumstances.[8] In *Humphrey's Executor*, the Court held that Congress could constitutionally provide that commissioners on the Federal Trade Commission (FTC) could only be removed for cause. The Court reasoned that "good-cause tenure" was permissible for the principal officers of independent agencies that performed a "quasi-legislative and quasi-judicial" role because "Congress could require [an agency] 'to act . . . independently of executive control.'"[9]

In *Morrison*, the Court examined the Ethics in Government Act of 1978, which provided for independent counsels to investigate and prosecute certain high-ranking government officials.[10] Under the independent counsel statute, the Attorney General notifies a special Article III court if he believes there are sufficient grounds to investigate a senior government official and the special court appoints a special counsel to investigate and, if warranted, prosecute. The Attorney General can only remove the special counsel for cause as prescribed in the statute.[11] Consequently, the independent counsel is generally free from Executive Branch supervision. After assessing how the law impacted executive power and whether Congress had attempted to aggrandize itself or enlarge judicial power at the executive's expense, the Court upheld for-cause removal for independent counsels.[12]

Notwithstanding *Humphrey's Executor* and *Morrison*, the Court later clarified that "the President's removal power is the rule rather than the exception."[13] In its 2010 decision, *Free Enterprise Fund v. Public Accounting Oversight Board*, the Court held unconstitutional a statute that structured a government office to restrict the President's ability to remove a principal officer and also restrict the principal officer's ability to remove an inferior officer who "determines the policy and enforces the laws of the United States."[14] The Court explained: "The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly."[15]

In its 2020 decision in *Seila Law LLC v. Consumer Financial Protection Board (CFPB)*, the Court rejected the proposition that *Humphrey's Executor*[16] and *Morrison*[17] "establish a general

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[6] 295 U.S. 602 (1935). *See also* Wiener v. United States, 357 U.S. 349 (1958).

[7] 487 U.S. 654, 685–93 (1988). *Morrison* concerned the Title VI of the Ethics of Government Act of 1978, which provided for the appointment of independent counsels who the Attorney General could only remove for "good cause." *See also* United States v. Perkins, 116 U.S. 483 (1886).

[8] Seila Law LLC v. Consumer Financial Protection Bureau, No. 19-7, slip op. at 7 (U.S. June 29, 2020).

[9] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 493 (2010) (quoting Humphrey's Executor, 295 U.S. 602, 627–29 (1935).

[10] *See* 28 U.S.C. §§ 591–599.

[11] Pub. L. No. 95-521, title VI, 92 Stat. 1867, *as amended by* Pub. L. No. 97-409, 96 Stat. 2039, and Pub. L. No. 100-191, 101 Stat. 1293, 28 U.S.C. §§ 49, 591 et seq.

[12] *Morrison v. Olson*, 487 U.S. at 693–96.

[13] Seila Law LLC v. CFPB, No. 19-7, slip op. at 27 (U.S. June 29, 2020). For discussion, on the President's removal authority in the twenty-first century, see ArtII.S2.C2.3.15.7 Twenty-First Century Cases on Removal.

[14] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 484 (2010).

[15] *Id.*

[16] 295 U.S. 602 (1935).

[17] 487 U.S. 654 (1988). While acknowledging that the independent counsel statute restricted a constitutionally delegated function (law enforcement), the *Morrison* Court upheld the statute, using a flexible analysis that

rule that Congress may impose 'modest' restrictions on the President's removal power."[18] Examining the CFPB, the Court noted that it had a single Director, who was insulated from the President's removal power and "accountable to no one."[19] Describing the President's role in the constitutional structure as the link that makes the administrative state answerable to the people, Chief Justice John Roberts, writing for the majority, stated:

> The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervison and control of the elected President. Through the President's oversight, "the chain of dependence [is] preserved," so that "the lowest officers, the middle grade, and the highest" all "depend, as they ought, on the President, and the President on the community."[20]

Finding the CFPB Director's protection from removal to be unconstitutional, the Court stated: "In our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead."[21]

ArtII.S1.C1.5 The President's Powers and Youngstown Framework

Article II, Section 1, Clause 1:

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

In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court considered the relationship between the President's powers and the powers Congress can exercise.[1] In a concurring opinion, Justice Robert Jackson set forth a framework that the Court has subsequently adopted to assess claims of presidential power.

Youngstown concerned an executive order that President Harry S. Truman issued on April 8, 1952, directing the Secretary of Commerce to seize and operate the Nation's steel industry in order to avert a nationwide strike that he believed would jeopardize national defense during the Korean War.[2] In the executive order, President Truman cited no specific statutory authorization but invoked generally the powers vested in the President by the Constitution and laws of the United States. The Secretary issued the order to steel executives and the President reported his action to Congress, conceding Congress's power to supersede the order,

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emphasized that neither the Legislative nor the Judicial Branch had aggrandized its power and that the statute, while infringing on executive power, did not impermissibly interfere with the President's constitutionally assigned functions. *Id.*

[18] Seila Law LLC v. CFPB, No. 19-7, slip op. at 26 (U.S. June 29, 2020).

[19] *Id.* at 23.

[20] *Id.* (quoting 1 Annals of Cong. 499) (James Madison).

[21] *Id.*

[1] 343 U.S. 579 (1952). For additional discussion on *Youngstown*, see Maeva Marcus, Truman and the Steel Seizure Case: The Limits of Presidential Power (1977).

[2] E.O. 10340, 17 Fed. Reg. 3139 (1952).

which Congress did not do.[3] The steel companies sued, a federal district court enjoined the seizure,[4] and the Supreme Court agreed to hear the case prior to a decision by the court of appeals.[5]

By a 6-3 vote, the Court held the seizure unconstitutional. In the controlling opinion, Justice Hugo Black rejected the Solicitor General's argument that the President's action was justified as an exercise of his executive power under Article II, Section 1; by his duty to enforce the laws; and by his power as Commander in Chief.[6] Instead, Justice Black observed that not only was there no statute that expressly or impliedly authorized the President to take possession of the property, but also Congress had refused to authorize seizures of property to prevent work stoppages and settle labor disputes when it considered the Taft-Hartley Act in 1947.[7] Because neither the aggregate of the President's Article II executive powers nor his powers as Commander in Chief supported the action, Justice Black reasoned that the President had sought to exercise a lawmaking power, which the Constitution vests solely in Congress:[8] Even if other Presidents had taken possession of private business enterprises without congressional authority to settle labor disputes, Congress retained its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested in it by the Constitution.[9] Consequently, while Congress could have directed the President to seize the steel mills, the President could not seize them absent congressional authorization, even if he believed that such an action "was necessary to avert a national catastrophe."[10]

In his concurring opinion, Justice Jackson outlined a framework for assessing the President's powers depending on its "disjunction or conjunction with those of Congress."[11] Justice Jackson divided presidential actions into three categories that looked at the extent to which the President was acting in concert with Congress. With regard to the first category, he stated:

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances and in these only, may he be said . . . to personify the federal sovereignty. If his act is held unconstitutional under thise circumstancies it usually means that the Federal Government as an undivided whole lacks power.[12]

Describing the second category, Justice Jackson stated:

> When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of

[3] H. Doc. No. 422, 82d Congress, 2d sess. (1952), 98 Cong. Rec. 3912 (1952); H. Doc. No. 496, 82d Congress, 2d sess. (1952), 98 Cong. Rec. 6929 (1952).

[4] 103 F. Supp. 569 (D.D.C. 1952).

[5] The court of appeals stayed the district court's injunction pending appeal. 197 F.2d 582 (D.C. Cir. 1952). The Supreme Court decision bringing the action up is at 343 U.S. 937 (1952).

[6] *Youngstown*, 343 U.S. at 587–88.

[7] *Id.* at 586.

[8] *Id.* at 588.

[9] *Id.* 585–89.

[10] *Id.* at 585–86.

[11] *Id.* at 635 (Jackson, J., concurring). *See also* Trump v Mazars USA, LLP, No. 19-715, slip op. at (U.S. July 9, 2020) ("Congress and the President—the two political branches established by the Constitution—have an ongoing relationship that the Framers intended to feature both rivalry and reprocity."). Justice Jackson's concurrence has been described as having "canonical status." Georgia v. Public Resource Org, Inc., No. 18-1150, slip op. at 48, n.10 (U.S. Apr. 27, 2020) (Thomas, J., dissenting).

[12] *Youngstown*, 343 U.S. at 635–37 (Jackson, J., concurring).

> twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes at least as a practical matter, enable, if not invite, measure on independent responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.[13]

The third category addressed situations where the President's actions were contrary to will of Congress. Justice Jackson observed:

> When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution for what is at stake is the equilibrium established by our constitutional system.[14]

Justice Jackson viewed the steel seizure as falling into the third category because Congress had adopted statutory policies inconsistent with President Truman's steel seizure. Accordingly, under Justice Jackson's framework, the President's action could only be sustained if the power to seize strike-bound industries was within the President's domain and beyond Congress's control.[15]

Since the decision in *Youngstown*, the Court has used Justice Jackson's framework when assessing assertions of presidential power.[16] For example in *Zivotofsky v. Kerry*, the Court applied Justice Jackson's "tripartite framework" to find that because the challenged presidential action "falls into Justice Jackson's third category, his claim must be 'scrutinized with caution,' and he may rely solely on powers the Constitution grants to him alone."[17]

ArtII.S1.C1.6 Separation of Powers and Executive Branch Functions

Article II, Section 1, Clause 1:

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

In his *Commentaries on the Constitution of the United States*, Justice Joseph Story noted the importance of an independent executive department to the separation of powers. He observed: "All America have at length concurred in the propriety of establishing a distinct executive department. The principle is embraced in every state constitution; and it seems now

[13] *Id.* at 637.

[14] *Id.* at 637–38 (footnotes omitted).

[15] *Id* at 639, 640. Myers v. United States, 272 U.S. 52 (1926); United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936). In *Dames & Moore v. Regan*, 453 U.S. 654, 659–62, 668–69 (1981), the Court turned to *Youngstown* as embodying "much relevant analysis" on an issue of presidential power. In *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006), the Court cited *Youngstown* with approval, as did Justice Anthony Kennedy, in a concurring opinion joined by three other Justices, *id.* at 638.

[16] *See* Zivotofsky v. Kerry, 576 U.S. 1, 10 (2015).

[17] *Id.*

to be assumed among us, as a fundamental maxim of government, that the legislative, executive, and judicial departments are to be separate, and the powers of one ought not to be exercised by either of the others."[1]

The Supreme Court has referred to principles of separation of powers when examining congressional actions that may infringe the President's exercise of executive power. For instance, in 1983, the Court in *INS v. Chadha*[2] struck down the congressional veto as circumventing Article I's bicameralism and presentment requirements to exercise legislative power. In *Chadha*, the Court suggested that Congress, by providing itself with the ability to veto the Attorney General's decision to suspend deportation of an alien, had enabled itself to participate impermissibly in executing the laws.[3] Writing for the majority, Chief Justice Warren Burger observed that "the powers delegated to the three Branches are functionally identifiable."[4] Under *Chadha*, when Congress exercises legislative power rather than delegates it, it must follow the prescribed bicameralism and presentment procedures.

In *Bowsher v. Synar* three years later,[5] the Court held that Congress had unconstitutionally vested executive functions in a Legislative Branch official through the Gramm-Rudman-Hollings Deficit Control Act. The Gramm-Rudman-Hollings Deficit Control Act set maximum deficit amounts for federal spending and directed across-the-board cuts in spending when projected deficits would exceed the target deficits.[6] Each fiscal year, the Comptroller General, who only Congress could remove, had to prepare a report identifying the reductions necessary to meet the deficit target, which the President had to implement. The Court stated: "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."[7] Because Congress could remove the Comptroller General from office, it could not delegate executive powers to him. The Court stated: "By placing the responsibility for execution of the [Act] in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function."[8]

In *Lujan v. Defenders of Wildlife*, the Court held that Congress could not legislate to grant citizens not suffering particularized injuries standing to sue the federal government to compel its compliance with congressional mandates. Such a law, the Court reasoned, would allow Congress to transfer the President's Take Care Clause duty to the Judiciary.[9]

The Court emphasized the importance of the separation of powers in *Seila Law LLC v. Consumer Financial Protection Board (CFPB)* in which the Court held that Congress encroached on Executive Branch powers when it limited the President's ability to remove the head of an independent agency to "for cause" removal.[10] In *Seila*, the Court noted that Congress had "vest[ed] significant governmental power in the hands of a single individual

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[1] 3 Joseph Story, Commentaries on the Constitution of the United States § 1410 (1833).

[2] 462 U.S. 919 (1983).

[3] The Court stated: "Disagreement with the Attorney General's decision on Chadha's deportation . . . involves determinations of policy that Congress can implement in only one way Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." 462 U.S. at 954–55. *See also* Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991).

[4] *Chadha,* 462 U.S. at 951.

[5] 478 U.S. 714 (1986)

[6] The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038.

[7] 478 U.S. at 732–33.

[8] *Id.* at 734.

[9] Lujan v. Defenders of Wildlife, 504 U.S. 555, 576–78 (1992).

[10] Seila Law LLC v. CFPB, No. 19-7, slip op. at 26 (U.S. June 29, 2020).

accountable to no one"[11] thereby violating the separation of powers.[12] Similarly, in *Collins v. Yellen*, the Court ruled that Congress could not restrict the President's authority to remove the director of the Federal Housing Finance Agency, which had a structure similar to the CFPB.[13]

ArtII.S1.C1.7 Major Questions Doctrine and Administrative Agencies

Article II, Section 1, Clause 1:

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

In several twenty-first century decisions with significant implications for the administrative state, the Court held that under the "major questions doctrine," the Executive Branch cannot interpret ambiguous legislation to effectuate sweeping changes of national consequence. Instead, Congress must, at a minimum, provide clear authorization that it intends to grant the Executive Branch such far-reaching powers.

In its 2014 decision in *Utility Air Regulatory Group v. Environmental Protection Agency (EPA)*, the Court found that EPA could not construe the Clean Air Act (CAA) to enable it to regulate millions of small sources of air pollution, including hotels and office buildings, when Congress had not sought to regulate these entities under the CAA in the past.[1] Although the Court did not explicitly refer to the major questions doctrine, it held that an agency exceeds its regulatory authority when (1) the agency's action involves an issue of "vast 'economic and political significance,'" and (2) Congress has not clearly granted the agency authority over the issue.[2] The Court noted that Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[3]

The Court's concern about the Executive Branch establishing law that exceeded the authority Congress had delegated was also evident during the coronavirus disease 2019 (COVID-19) pandemic. For example, in August 2021, the Court vacated a lower court's stay, effectively halting an eviction moratorium issued by the Centers for Disease Control and Prevention (CDC).[4] The Court noted that the CDC had no legal authority to mandate an eviction moratorium and that Congress itself had declined to extend the eviction moratorium.[5] Likewise, in *National Federation of Independent Business v. Department of Labor*, the Court stayed the Occupational Safety and Health Administration's (OSHA) COVID-19 vaccine mandate on the grounds that the plaintiffs were likely to succeed on the merits of their claim that OSHA did not have authority to require that "84 million Americans . . . either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense."[6] By comparison, on the same day, the Court vacated a stay of a a more limited vaccine mandate from the Secretary of Health and Human Services requiring that facilities receiving Medicare and Medicaid funding "ensure that their staff—unless exempt for medical or religious

[11] *Id.* at 23.

[12] *Id.* at 27.

[13] Collins v. Yellen, No. 19-422, slip op. (U.S. June 23, 2021).

[1] Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014).

[2] *Id.* at 324.

[3] *Id*.

[4] Alabama Ass'n of Realtors v. Dep't of Health and Human Servs., No. 21A23, slip op. at 3 (U.S. Aug. 26, 2021) (per curiam).

[5] *Id.* at 6–8.

[6] Nos. 21A244 and 21A247, slip op. at 8 (U.S. Jan. 13, 2022) (per curiam).

reasons—are vaccinated against COVID-19."[7] In reaching this decision, the Court agreed that "the Secretary's rule falls within the authorities that Congress has conferred upon him."[8]

In its 2022 decision *West Virginia v. EPA*, the Court held that EPA exceeded its CAA Section 111(d) authority[9] in the 2015 Clean Power Plan (CPP) by requiring "generation shifting" whereby coal-fired power plants would "reduce their own production of electricity or subsidize increased generation by natural gas, wind, or solar sources."[10] Stating that "[i]t is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme,"[11] the Court observed: "A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[12] Examining EPA's assertion that Section 111(d) provided EPA authority to require generation shifting, the Court noted that Section 111(d) was a little-used statutory "gap-filler" that allowed EPA to regulate emissions not covered by the CAA National Ambient Air Quality Standards (NAAQS)[13] or Hazardous Air Pollutants (HAP) programs.[14] In light of this, the Court held, Section 111(d) could not be read as granting EPA power to transform the national economy by adopting a "regulatory program that Congress had conspicuously and repeatedly declined to enact itself."[15]

ArtII.S1.C1.8 The President's Foreign Affairs Power, Curtiss-Wright, and Zivotofsky

Article II, Section 1, Clause 1:

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

The extent of the President's foreign affairs power has been subject to debate since the earliest days of the Republic.[1] The Constitution provides that the President "shall receive Ambassadors and other public Ministers."[2] In his *Commentaries on the Constitution of the United States,* Justice Joseph Story noted, "If the executive receives an ambassador, or other minister, as the representative of a new nation . . . it is an acknowledgment of the sovereign authority *de facto* of such new nation or party."[3] In addition, Article II provides that the

[7] Biden v. Missouri, Nos. 21A240 and 21A241, slip op. at 1 (U.S. Jan. 13, 2022) (per curiam).

[8] *Id.* at 4.

[9] Clean Air Act, 84 Stat. 1683, 42 U.S.C. § 7411(d)

[10] West Virginia v. EPA, No. 20-1530, slip op. (U.S. June 30, 2022). Through the CPP, EPA sought to reduce carbon dioxide emissions that were contributing to global warming by shifting the Nation's energy from coal-fired generation to natural gas and renewables. *Id.* at 10. According to EPA estimates at the time it issued the rule, such changes "would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors." *Id.*

[11] *Id.* at 31.

[12] *Id.*

[13] 42 U.S.C. §§ 7408-7410 (requiring states to adopt plans to comply with EPA standards for specified air pollutants).

[14] *Id.* § 7412 (requiring EPA to set standards to achieve "the maximum degree of reduction of emissions" for new and existing major sources of non-NAAQS hazardous air pollution that can be achieved using the "best existing technologies and methods").

[15] West Virginia v. EPA, No. 20-1530, slip op. at 20 (U.S. June 30, 2022).

[1] *See* ArtII.S1.C1.2 Historical Background on Executive Vesting Clause.

[2] U.S. Const. art. II, § 3, cl. 2. *See* ArtII.S3.2.1 Early Doctrine on Receiving Ambassadors and Public Ministers.

[3] 3 Joseph Story, Commentaries on the Constitution of the United States § 1560 (1833).

President, with the advice and consent of the Senate, shall "make Treaties" and "shall appoint Ambassadors" and "other public Ministers and consuls."[4]

Writing for the Court in the 1936 *United States v. Curtiss-Wright Export Corp.* decision,[5] Justice George Sutherland reasoned that the the President "has the sole power to negotiate treaties,"[6] although the President requires the Senate's advice and consent to complete them.[7] In *Curtiss-Wright*, the Curtiss-Wright Export Corp. challenged an embargo President Franklin D. Roosevelt had imposed pursuant to a congressional delegation. Indicted for violating the embargo, Curtiss-Wright argued that Congress had impermissibly delegated a legislative power to the President when it granted the President power to impose the embargo. Writing for a 7-1 majority in favor of the government, Justice Sutherland posited that the National Government's power in foreign relations is inherent. Consequently, the limits on Congress's ability to delegate power relating to domestic areas, Justice Sutherland reasoned, did not apply in the area of foreign affairs. Justice Sutherland stated:

> The broad statement that the Federal Government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. . . . As a result of the separation from Great Britain . . . . the powers of external sovereignty passed from the Crown . . . to the colonies in their collective and corporate capacity as the United States of America . . . . The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have been vested in the Federal Government as necessary concomitants of nationality. . . . In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.[8]

Notwithstanding *Curtiss-Wright*, the Court has recognized that the President may be subject to the delegated powers doctrine in matters implicating foreign relations.[9] For instance, in *Kent v. Dulles*,[10] the Court held that the standards that apply to congressional delegations to the President of domestic authorities likewise applied to a congressional delegation to the President of authority to issue passports.[11]

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[4] U.S. Const. art. II, § 2, cl. 2. *See* ArtII.S2.C2.1.1 Overview of President's Treaty-Making Power.

[5] 299 U.S. 304 (1936).

[6] Zivotofsky v. Kerry, 576 U.S. 1, 13 (2014).

[7] *See* ArtII.S2.C2.1.1 Overview of President's Treaty-Making Power.

[8] 299 U.S. at 315–16, 318, 319.

[9] *E.g.*, *Ex parte* Quirin, 317 U.S. 1, 25 (1942) (Chief Justice Harlan Stone); Reid v. Covert, 354 U.S. 1, 5–6 (1957) (plurality opinion, per Justice Black).

[10] 357 U.S. 116, 129 (1958).

[11] *Id. See also* Haig v. Agee, 453 U.S. 280 (1981). For *Haig's* reliance on *Curtiss-Wright*, *see id.* at 291, 293–94 & n.24, 307–08. *But see* Dames & Moore v. Regan, 453 U.S. 654, 659–62 (1981). *Compare* Webster v. Doe, 486 U.S. 592 (1988) (construing National Security Act as not precluding judicial review of constitutional challenges to CIA Director's dismissal of employee), *with* Department of the Navy v. Egan, 484 U.S. 518 (1988) (denying Merit Systems Protection Board authority to review the substance of an underlying security-clearance determination in reviewing an adverse action and noticing favorably President's inherent power to protect information without any explicit legislative grant). In *Loving v. United States*, 517 U.S. 748 (1996), the Court found that, although Congress had delegated authority over the death penalty provisions of military law to the President absent standards to guide the President's exercise of the authority, standards were not required because the President, as Commander in Chief had responsibility to superintend the military and Congress and the President had interlinked authorities with respect to the military. Where the entity exercising delegated authority possesses independent authority over the subject matter, the Court noted, familiar limitations on delegation do not apply. *Id.* at 771–74.

The Supreme Court's decision in *Zivotofsky v. Kerry* appears to be the first instance in which the Court held that an act of Congress unconstitutionally infringed upon a foreign affairs power of the President.[12] The case concerned a legislative enactment requiring the Secretary of State to identity a Jerusalem-born U.S. citizen's place of birth as "Israel" on his passport if requested by the citizen or his legal guardian.[13] The State Department had declined to follow this statutory command, citing long-standing executive policy of declining to recognize any country's sovereignty over the city of Jerusalem.[14] It argued the statute impermissibly intruded upon the President's constitutional authority over the recognition of foreign nations and their territorial bounds, and attempted to compel "the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns."[15]

The *Zivotofsky* Court evaluated the State Department's non-adherence to a statutory command using the framework established by Justice Robert Jackson's concurring opinion in *Youngstown*, under which executive action taken in contravention of a legislative enactment will only be sustained if the President's asserted power is both "exclusive" and "conclusive" on the matter.[16] The Constitution does not specifically identify the recognition of foreign governments among either Congress's or the President's enumerated powers. But in an opinion that employed multiple modes of constitutional interpretation, the Court concluded that the Constitution not only conferred recognition power to the President, but also that this power was not shared with Congress.

In its analysis, the Court first examined "the text and structure of the Constitution," which it construed as reflecting the Founders' understanding that the President exercises the recognition power.[17] In particular, the Court focused on the President's responsibility under the Reception Clause to "receive Ambassadors and other public Ministers."[18] At the time of the founding, the Court reasoned, receiving ambassadors of a foreign government was tantamount to recognizing the foreign entity's sovereign claims, and it was logical to infer "a Clause directing the President alone to receive ambassadors" as "being understood to acknowledge his power to recognize other nations."[19] In addition to the Reception Clause, *Zivotofsky* identified additional Article II provisions as providing support for the inference that the President

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[12] Zivotofsky v. Kerry, 576 U.S. 1 (2015). It appears that in every prior instance where the Supreme Court considered executive action in the field of foreign affairs that conflicted with the requirements of a federal statute, the Court had ruled the executive action invalid. *See id.* at 62 (Roberts, C.J., dissenting) ("For our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs."); Medellin v. Texas, 552 U.S. 491 (2008) (President could not direct state courts to reconsider cases barred from further review by state and federal procedural rules in order to implement requirements flowing from a ratified U.S. treaty that was not self-executing, as legislative authorization from Congress was required); Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (military tribunals convened by presidential order did not comply with the Uniform Code of Military Justice); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Little v. Barreme, 6 U.S. (2 Cr.) 170 (1804) (upholding damage award to owners of U.S. merchant ship seized during quasi-war with France, when Congress had not authorized such seizures).

[13] Foreign Relations Authorization Act, Fiscal Year 2003, Pub L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002).

[14] *Zivotofsky*, at 6–7. The State Department's Foreign Affairs Manual generally provides that in issuing passports to U.S. citizens born abroad, the passport shall identify the country presently exercising sovereignty over the citizen's birth location. 7 Foreign Affairs Manual § 1330 Appendix D (2008). The Manual provides that employees should "write JERUSALEM as the place of birth in the passport. Do not write Israel, Jordan or West Bank for a person born within the current municipal borders of Jerusalem." *Id.* at § 1360 Appendix D.

[15] *Zivotofsky*, 576 U.S. at 11–12 (quoting Brief from Respondent at 48).

[16] *Id. at 10* (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 637–38 (1952) (Jackson, J., concurring)).

[17] *Id.* at 10–13

[18] U.S. Const. art. II, § 3. *Zivotofsky*, 576 U.S. at 12.

[19] *Zivotofsky*, 576 U.S. at 12–13. The Court observed that records of the Constitutional Convention were largely silent on the recognition power, but that contemporary writings by prominent international legal scholars identified the act of receiving ambassadors as the virtual equivalent of recognizing the sovereignty of the sending state. *Id.* at 12.

retains the recognition power,[20] including the President's power to "make Treaties" with the advice and consent of the Senate,[21] and to appoint ambassadors and other ministers and consuls with Senate approval.[22]

The *Zivotofsky* Court emphasized "functional considerations" supporting the Executive's claims of exclusive authority over recognition,[23] stating that recognition is a matter on which the United States must "speak with . . . one voice,"[24] and the Executive Branch is better suited than Congress to exercise this power for several reasons, including its "characteristic of unity at all times," as well as its ability to engage in "delicate and often secret diplomatic contacts that may lead to a decision on recognition" and "take the decisive, unequivocal action necessary to recognize other states at international law."[25]

The Court also concluded that historical practice and prior jurisprudence gave credence to the President's unilateral exercise of the recognition power. The Court acknowledged that the historical record did not provide unequivocal support for this view, but characterized "the weight" of historical evidence as reflecting an understanding that the President's power over recognition is exclusive.[26] Although the Executive had consistently claimed unilateral recognition authority from the Washington Administration onward, and Congress had generally acquiesced to the President's exercise of such authority, there were instances in which Congress also played a role in matters of recognition. But the *Zivotofsky* Court observed that in all earlier instances, congressional action was consistent with, and deferential to, the President's recognition policy, and the Court characterized prior congressional involvement as indicating "no more than that some Presidents have chosen to cooperate with Congress, not that Congress itself has exercised the recognition power."[27] The Court also stated that a "fair reading" of its prior jurisprudence demonstrated a long-standing understanding of the recognition power as an executive function, notwithstanding "some isolated statements" in those cases that might have suggested a congressional role.[28]

Having determined that the Constitution assigns the President exclusive authority over recognition of foreign sovereigns, the *Zivotofsky* Court ruled that the statutory directive that the State Department honor requests of Jerusalem-born U.S. citizens to have their passports list their birthplace as "Israel" was an impermissible intrusion on the President's recognition

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[20] Justice Clarence Thomas, writing separately and concurring in part with the majority's judgment, would have located the primary source of the President's recognition power as the Vesting Clause. *Id.* at 31–32 (Thomas, J., concurring and dissenting in part with the Court's judgment). The controlling five-Justice opinion declined to reach the issue of whether the Vesting Clause provided such support. *Id.* at 13–14 (majority opinion).

[21] U.S. Const. art. II, § 2, cl. 2.

[22] *Id.*

[23] *Zivotofsky*, 576 U.S. at 13.

[24] *Id.* at 14 (quoting Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 424 (2003) and Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000)).

[25] *Id.*

[26] *Id.* at 22–23.

[27] *Id.* The Court observed that in no prior instance had Congress enacted a statute "contrary to the President's formal and considered statement concerning recognition." *Id.* at 24 (citing Zivotofsky v. Secretary of State, 725 F.3d 197, 203, 221 (D.C. Cir. 2013) (Tatel, J., concurring)).

[28] *See id.* at 17. The Court observed that earlier rulings touching on the recognition power had dealt with the division of power between the judicial and political branches of the federal government, or between the federal government and the states. *Id.* at 17–18 (citing Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398, 410 (1964) (involving the application of the act of state doctrine to the government of Cuba and stating that "[p]olitical recognition is exclusively a function of the Executive"); United States v. Pink, 315 U.S. 203 (1942) (concerning effect of executive agreement involving the recognition of the Soviet Union and settlement of claims disputes upon state law); United States v. Belmont, 301 U.S. 324 (1937) (similar to Pink); Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839) (ruling that an executive determination concerning foreign sovereign claims to the Falkland Islands was conclusive upon the judiciary)).

authority. According to the Court, Congress's authority to regulate the issuance of passports, though wide in scope, may not be exercised in a manner intended to compel the Executive "to contradict an earlier recognition determination in an official document of the Executive Branch" that is addressed to foreign powers.[29]

While the *Zivotofsky* decision establishes that the recognition power belongs exclusively to the President, its relevance to other foreign affairs issues remains unclear. The opinion applied a functionalist approach in assessing the exclusivity of executive power on the issue of recognition but did not opine on whether this approach was appropriate for resolving other inter-branch disputes concerning the allocation of constitutional authority in the field of foreign affairs. The *Zivotofsky* Court also declined to endorse the Executive's broader claim of exclusive or preeminent presidential authority over foreign relations, and it appeared to minimize the reach of some of the Court's earlier statements in *Curtiss-Wright*[30] regarding the expansive scope of the President's foreign affairs power.[31] The Court also repeatedly noted Congress's ample power to legislate on foreign affairs, including on matters that precede and follow from the President's act of foreign recognition and in ways that could render recognition a "hollow act."[32] For example, Congress could institute a trade embargo, declare war upon a foreign government that the President had recognized, or decline to appropriate funds for an embassy in that country. While all of these actions could potentially be employed by the Legislative Branch to express opposition to executive policy, they would not impermissibly interfere with the President's recognition power.[33]

ArtII.S1.C1.9 Term of the President

Article II, Section 1, Clause 1:

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

Article II, Section 1, Clause 1, provides for the President and Vice President to serve four-year terms. The Framers generally appear to have contemplated that, under the Constitution, the President, like Representatives and Senators, would not be subject to term limits but could run for office "as often as the people of the United States shall think him worthy of their confidence."[1] However, there was much debate and concern that the Constitution might grant the President too much power and that, as Thomas Jefferson observed, "the perpetual re-eligibility of the President" could produce "cruel distress to our country even in your day and mine."[2] Following precedent established by George Washington, the idea that no President would hold office for more than two terms was generally regarded as a fixed tradition until President Franklin Delano Roosevelt sought and won reelection for a

[29] *See id.* at 31. The Court approvingly cited its description in Urtetiqui v. D'Arcy, 34 U.S. (9 Pet.) 692 (1835), of a passport as being, "from its nature and object . . . addressed to foreign powers." *See Zivotofsky*, at 30.

[30] *See* United States v. Curtiss-Wright Export Co., 299 U.S. 304 (1936). For further discussion of this case, see ArtII.S1.C1.4 The President's Powers, Myers, and Seila, and *Youngstown*.

[31] The majority opinion observed that *Curtiss-Wright* had considered the constitutionality of a congressional delegation of power to the President, and that its description of the Executive as the sole organ of foreign affairs was not essential to its holding in the case. *Zivotofsky*, at 20–21.

[32] *Id.* at 15–16.

[33] *Id.* at 15–16.

[1] The Federalist No. 69 (Alexander Hamilton).

[2] Letter from Thomas Jefferson to Alexander Donald (Feb. 7, 1788), *reprinted in* 3 The Founders' Constitution 505 (Philip B. Kurland & Ralph Lerner eds., 2000).

third and fourth term in 1940 and 1944, respectively. In 1951, the states ratified the Twenty-Second Amendment limiting the President to two terms in office.[3]

When considering the term of the President during the Constitutional Convention, the Framers weighed how the President would be selected, whether a President should serve multiple times, and how to mitigate the danger that the Presidency might evolve into a "hereditary Monarchy"[4] or become the "mere creature" of Congress.[5] On June 1, 1787, James Wilson of Pennsylvania proposed to the Committee of the Whole that the term of the President be three years, "on the supposition that a re-eligibility would be provided for,"[6] while Charles Pinckney of South Carolina proposed a term of seven years.[7] George Mason of Virginia urged a term of "seven years at least, and for prohibiting a re-eligibility as the best expedient both for preventing the effect of a false complaisance on the side of the Legislature towards unfit characters; and a temptation on the side of the Executive to intrigue with the Legislature for a re-appointment."[8]

Although the Committee of the Whole voted for a seven-year term,[9] debate continued over how to select the President and whether he should be eligible for reelection. Efforts to offset the longer seven-year term with a bar on re-eligibility were met by concerns that prohibiting reelection would, among other things, "destroy the great motive to good behavior, the hope of being rewarded by a re-appointment."[10] Revisiting the appropriate term of office for the President in conjunction with whether the President should be eligible for reelection,[11] the Convention considered proposals for, among other things, fifteen-year, eleven-year, eight-year, six-year, and three-year terms,[12] as well as an indefinite term during Good Behavior.[13] In late August 1787, the Convention referred the matter to the Committee of Eleven, which, in turn, proposed a term of four years without a bar to reelection.[14]

While the four-year term was shorter than the originally contemplated seven-year term, critics of the Constitution maintained that it would still allow the President to establish a

[3] U.S. Const. amend XXII. The Twenty-Second Amendment was adopted largely in response to President Franklin Delano Roosevelt seeking and winning reelection for an unprecedented third and fourth terms in 1940 and 1944, respectively. The Twenty-Second Amendment became a part of the Constitution on February 27, 1951, after it was adopted by Minnesota, which provided the thirty-sixth state that was necessary for adoption of the Amendment. 2 Grossman, Constitutional Amendments 758–759 (2012). For additional discussion on the Twenty-Second Amendment, see Amdt22.1 Overview of Twenty-Second Amendment, Presidential Term Limits.

[4] 2 The Records of the Federal Constitution 35 (Max Farrand, ed. 1911) (statement of George Mason of Virginia).

[5] *Id.* at 103 (statement of Gouveneur Morris of Pennsylvania); *see also* Max Farrand, The Framing of the Constitution 117–118 (1913).

[6] 1 The Records of the Federal Constitution 68 (Max Farrand, ed. 1911)

[7] *Id.*

[8] *Id.*

[9] *Id.* at 69.

[10] 2 The Records of the Federal Constitution 33 (Max Farrand, ed. 1911) (statement of Gouverneur Morris of Pennsylvania in support of motion made by William Churchill Houston of New Jersey on July 17, 1787, to strike the bar to reelection).

[11] *See id.*

[12] *See, e.g.,* 1 The Records of the Federal Constitution 68 (Max Farrand, ed. 1911); 2 The Records of the Federal Constitution 102 (Max Farrand, ed. 1911) (Rufus King of Massachusetts also suggested a twenty-year term. However, given that King's proposal was "twenty years . . . [which is] the medium life of princes ", Max Farrand, the editor of the Records of the Constitution, observes that this was likely meant to be ironic, stating, "This might possibly be meant as a caricature of the previous motions in order to defeat the object of them."). *See also id.* at 100, 112,

[13] *Id.* at 33–35.

[14] *Id.* at 497.

dangerous influence over the United States.[15] Responding to such concerns in the *Federalist Papers*, Alexander Hamilton explained the advantages of a four-year term as striking a balance between the "personal firmness of the executive magistrate, in the employment of his constitutional powers; and to the stability of the system of administration which may have been adopted under his auspices."[16] He stated:

> Between the commencement and termination of such a [four-year] period, there would always be a considerable interval, in which the prospect of annihilation would be sufficiently remote, not to have an improper effect upon the conduct of a man endued with a tolerable portion of fortitude. . . . [A] duration of four years will contribute to the firmness of the Executive in a sufficient degree to render it a very valuable ingredient in the composition; so, on the other, it is not enough to justify any alarm for the public liberty.[17]

Hamilton also cited the three-year New York gubernatorial term to support that the President would be unlikely to acquire undue power across the entirety of the United States over four years when the Governor of New York had not done so over the much smaller state of New York over three years.[18]

In his *Commentaries of the Constitution of the United States,* Justice Joseph Story observed that the four-year term the Framers adopted for the President is "intermediate between the term of office of the senate, and that of the house of representatives" and, as a result, "[i]n the course of one presidential term, the house is, or may be twice recomposed; and two-thirds of the senate changed, or re-elected."[19] Because the President's four-year term is between the two- and six-year terms of the House and Senate, the President is subject to pressures that drive the House's need to respond to the people's immediate demands, even though such demands may be short-lived, and those that facilitate the Senate's greater focus on long-term objectives because its six-year term provides some insulation from political winds.[20]

Clause 2—Electors

ArtII.S1.C2.1 Overview of Electors Appointment Clause

Article II, Section 1, Clause 2:

> *Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State*

[15] *See, e.g.*, The Anti-Federalist Papers, No. 67 (Cato/George Clinton), *reprinted in* The Complete Federalist and Anti-Federalist Papers 709 (2014) ("It is remarked by Montesquieu, in treating of republics, that in all magistracies, the greatness of the power must be compensated by the brevity of the duration, and that a longer time than a year would be dangerous. The deposit of vast trusts in the hands of a single magistrate enables him in their exercise to create a numerous train of dependents. This tempts his ambition, which in a republican magistrate is also remarked to be pernicious, and the duration of his office for any considerable time favors his views, gives him the means and time to perfect and execute his designs; he therefore fancies that he may be great and glorious by oppressing his fellow citizens, and raising himself to permanent grandeur on the ruins of his country.").

[16] The Federalist No. 71 (Alexander Hamilton).

[17] *Id.*

[18] The Federalist No. 69 (Alexander Hamilton). *See also* The Federalist No. 72 (Alexander Hamilton) (describing five "ill effect[s]" of excluding the President either temporarily or permanently from subsequent terms of office).

[19] 3 Joseph Story, Commentaries on the Constitution of the United States §1432 (1833).

[20] *See generally id.*

may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Article II, Section 1, Clause 2, also known as the Electors Appointment Clause, provides for states to select electors to vote for the President and establishes that the number of each state's electors will equal the number of its Senators and Representatives.[1] The Framers adopted the Electors Appointment Clause as a compromise between the direct election of the President and his selection by Congress. Among the Framers' objectives was to provide for the President's selection by persons whose "sole purpose" would be choosing the best candidate for the President rather than by persons "selected for the general purposes of legislation."[2] Notwithstanding this electoral system, divorcing selection of the President from partisan politics proved elusive.[3]

ArtII.S1.C2.2 Historical Background on Electors Appointments Clause

Article II, Section 1, Clause 2:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

One of the key compromises of the Constitutional Convention was the appointment of electors to elect the President and Vice President. The delegates adopted the plan late in the Convention, having voted on four previous occasions for Congress to select the Executive and twice defeating proposals for direct election by the people.[1] As such, the Electors Appointment clause effected a compromise between selecting the President pursuant to a popular election or leaving Congress to determine the President. In his *Commentaries on the Constitution of the United States*, Justice Joseph Story explained that the Framers viewed having an electoral college select the President rather than Congress would commit the decision "to persons, selected for that sole purpose . . . instead of persons, selected for the general purposes of legislation"[2] and would avoid "those intrigues and cabals, which would be promoted in the legislative body by artful and designing men, long before the period of the choice, with a view to accomplish their own selfish purposes."[3]

While Justice Story noted that the Framers had viewed the electoral college as preserving the President from becoming "the mere tool of the dominant part in congress,"[4] the development of political parties during the early years of the Republic and their role in nominating presidential candidates and designating electors meant that electors, as a practical matter, were subject to partisan politics.[5] In 1826, Senator Thomas Hart Benton

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[1] *See* McPherson v. Blacker, 146 U.S. 1, 35 (1892) (holding that this clause confers "plenary power to the state legislatures in the matter of the appointment of electors"); *see also* Fitzgerald v. Green, 134 U.S. 377, 379 (1890) ("By the constitution of the United States, the electors for president and vice president in each state are appointed by the state in such manner as its legislature may direct.").

[2] 3 Joseph Story, Commentaries on the Constitution of the United States § 1450 (1833).

[3] *See* ArtII.S1.C2.2 Historical Background on Electors Appointments Clause.

[1] 1 The Records of the Federal Convention of 1787, at 21, 68–69, 80–81, 175–76, 230, 244 (Max Farrand ed., 1911); 2 *id.* at 29–32, 57–59, 63–64, 95, 99–106, 108–15, 118–21, 196–97, 401–04, 497, 499–502, 511–15, 522–29. *See also* 3 Joseph Story, Commentaries on the Constitution of the United States § 1449 (1833).

[2] 3 Joseph Story, Commentaries on the Constitution of the United States § 1450 (1833).

[3] *Id.*

[4] *Id.*

[5] *See* James Ceaser, Presidential Selection: Theory and Development (1979); Neal Pierce, The Peoples President: The Electoral College in American History and the Direct-Vote Alternative (1968).

observed that, while the Framers had intended electors to be men of "superior discernment, virtue, and information," who would select the President free from partisan influence, "this invention has failed of its objective in every election . . . ." Senator Benton further explained: "That it ought to have failed is equally uncontestable; for such independence in the electors was wholly incompatible with the safety of the people. [It] was, in fact, a chimerical and impractical idea in any community."[6]

By 1832, almost all states had adopted popular presidential elections, and "[b]y the early 20th century, citizens in most States voted for the presidential candidate himself; ballots increasingly did not even list the electors."[7] Instead, parties chose slates of electors, and states then appointed the electors proposed by the party whose presidential nominee won the popular vote statewide.[8]

ArtII.S1.C2.3 State Discretion Over Selection of Electors

Article II, Section 1, Clause 2:

> *Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.*

The Supreme Court has reasoned that the word "appoint" in Article II, Section 1, Clause 2, confers on state legislatures "the broadest power of determination."[1] In *McPherson v. Blacker,* the Supreme Court upheld a state law providing for electors to be selected by popular vote from districts rather than statewide.[2] Noting that states could choose from among a variety of permissible methods in selecting electors, the Supreme Court stated:

> [V]arious modes of choosing the electors were pursued, as, by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people voting in districts and partly by the legislature; by choice by the legislature from candidates voted for by the people in districts; and in other ways . . . .[3]

Although the Electoral College Clause seemingly vests complete discretion over how electors are appointed, the Court has recognized a federal interest in protecting the integrity of the electoral college process. Thus, in *Ex parte Yarbrough*, the Court upheld Congress's power to protect the right of all citizens as to the selection of any legally qualified person as a presidential elector.[4] In *Yarbrough,* the Court stated: "If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption. If it has not this power it is helpless before the two great natural and historical enemies of all republics, open violence and insidious

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[6] S. Rep. No. 22, 19th Cong., 1st Sess. 4 (1826).

[7] Chiafalo v. Washington, No. 19-465, slip op. at 4 (U.S. July 6, 2020).

[8] *Id.*

[1] McPherson v. Blacker, 146 U.S. 1, 27 (1892).

[2] *Id.*

[3] *Id.* at 28–29.

[4] *Ex parte* Yarbrough, 110 U.S. 651 (1884).

corruption."[5] In *Burroughs & Cannon v. United States,* the Supreme Court sustained Congress's power to protect the choice of electors from fraud or corruption.[6]

The Court and Congress have imposed limits on state discretion in appointing electors. In *Williams v. Rhodes*,[7] the Court struck down a complex state system that effectively limited access to the ballot to the electors of the two major parties. In the Court's view, the system violated the Equal Protection Clause of the Fourteenth Amendment because it favored certain individuals and burdened the right of individuals to associate together to advance political beliefs and the right of qualified voters to cast ballots for electors of their choice. The Court denied that the Electoral College Clause immunized such state practices from judicial scrutiny.[8]

Whether state enactments implementing the authority to appoint electors are subject to the ordinary processes of judicial review within a state, or whether placement of the appointment authority in state legislatures somehow limits the role of state judicial review, became an issue during the controversy over the Florida recount and the outcome of the 2000 presidential election. The Supreme Court did not resolve this issue, but in a remand to the Florida Supreme Court, suggested that the role of state courts in applying state constitutions may be constrained under Article II, Section 1, Clause 2.[9] Three Justices elaborated on this view in *Bush v. Gore*,[10] but the Court ended the litigation—and the recount—on the basis of an equal protection interpretation, without ruling on the Article II argument.

ArtII.S1.C2.4 Legal Status of Electors

Article II, Section 1, Clause 2:

> *Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.*

Electors are not "officers" by the usual tests of office.[1] In 1890, the Supreme Court addressed the constitutional status of electors, stating:

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[5] *Ex parte* Yarbrough, 110 U.S. 651, 657–58 (1884) (quoted in Burroughs and Cannon v. United States, 290 U.S. 534, 546 (1934)).

[6] *Burroughs & Cannon v. United States*, 290 U.S. 534 (1934).

[7] 393 U.S. 23 (1968).

[8] The Court stated: "There, of course, can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors. But the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution . . . . [It cannot be] thought that the power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws . . . . Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions." 393 U.S. at 29.

[9] Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78 (2000) (per curiam) (remanding for clarification as to whether the Florida Supreme Court "saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2").

[10] Bush v. Gore, 531 U.S. 98, 111 (2000) (opinion of Chief Justice William Rehnquist, joined by Justices Antonin Scalia and Clarence Thomas). Relying in part on dictum in *McPherson v. Blacker*, 146 U.S. 1, 27 (1892), the three Justices reasoned that, because Article II confers the authority on a particular branch of state government (the legislature) rather than on a state generally, the customary rule requiring deference to state court interpretations of state law is not fully operative, and the Supreme Court "must ensure that postelection state-court actions do not frustrate" the legislature's policy as expressed in the applicable statute. 531 U.S. at 113.

[1] United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868).

> The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the nation. Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the States when acting as electors of representatives in Congress.[2]

Electors have neither tenure nor salary and having performed their single function they cease to exist as electors. This function is, moreover, "a federal function,"[3] because electors' capacity to perform results from no power which was originally resident in the states, but instead springs directly from the Constitution of the United States.[4]

In the face of the proposition that electors are state officers, the Court has upheld the power of Congress to act to protect the integrity of the process by which they are chosen.[5] But, in *Ray v. Blair*, the Court clarified that although electors "exercise a federal function[,] . . . they are not federal officers or agents."[6] Instead, the Constitution provides that they act under state authority.[7]

ArtII.S1.C2.5 Discretion of Electors to Choose a President

Article II, Section 1, Clause 2:

> *Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.*

The Constitution does not prohibit electors from casting their ballots as they wish and occasionally electors have done so.[1] In 1968, for example, a Republican elector in North Carolina chose to cast his vote for George Wallace, the independent candidate who had won the second greatest number of votes rather than for Richard M. Nixon, who had won a plurality in the state. Members of the House of Representatives and the Senate objected to counting that vote for Mr. Wallace, insisting that it should be counted for Mr. Nixon, but both bodies decided to count the vote as cast.[2] More recently, the 2016 election saw a historic number of faithless electors, with seven electors recorded voting for someone other than their party's nominee.[3]

To prevent so-called "faithless electors" from departing from the preferences expressed by voters, most states require electors to pledge to support their parties' nominees.[4] In *Ray v. Blair*, the Supreme Court rejected a constitutional challenge to a party rule requiring elector candidates to pledge that they would support the nominees elected in the primary in the

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[2] *In re* Green, 134 U.S. 377, 379–80 (1890).

[3] Hawke v. Smith, 253 U.S. 221 (1920).

[4] Burroughs & Cannon v. United States, 290 U.S. 534, 535 (1934).

[5] *Ex parte* Yarbrough, 110 U.S. 651 (1884); Burroughs and Cannon v. United States, 290 U.S. 534 (1934).

[6] 343 U.S. 214, 224 (1952).

[7] *Id.* at 224–25.

[1] *See* Neal Pierce, The Peoples President: The Electoral College in American History and the Direct-Vote Alternative 122–24 (1968).

[2] 115 Cong. Rec. 9–11, 145–71, 197–246 (1969).

[3] *See, e.g.*, Alexander Gouzoules, *The "Faithless Elector" and 2016: Constitutional Uncertainty after the Election of Donald Trump*, 28 U. Fla. J.L.& Pus. Pol'y 215, 217 (2017).

[4] Chiafalo v. Washington, No. 19-465, slip op. (U.S. July 6, 2020).

general election.[5] The Court first concluded that excluding electors who refuse to pledge their support for the party's nominees was "an exercise of the state's right to appoint electors in such manner, subject to possible constitutional limitations, as it may choose."[6]

The Court also concluded that the pledge requirement did not violate the Twelfth Amendment, rejecting the argument that "the Twelfth Amendment demands absolute freedom for the elector to vote his own choice, uninhibited by a pledge."[7] Noting the long-standing practice supporting the expectation that electors will support party nominees, the Court said that "even if such promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, Article II, Section 1, to vote as he may choose in the electoral college, it would not follow that the requirement of a pledge in the primary is unconstitutional."[8]

Ray left open the question of whether states could *enforce* these pledge requirements through sanctions—a question later considered in *Chiafalo v. Washington*.[9] In *Chiafalo,* the Court considered a Washington law that provided that electors who failed to comply with a pledge to vote for their party nominees would face a civil fine.[10] Three electors who were fined after breaking their pledge in the 2016 presidential election challenged the law.[11] The Supreme Court confirmed that a state's power to appoint an elector includes the "power to condition his appointment,"[12] and further clarified that as long as no other constitutional provision prohibits it, the state's appointment power also "enables the enforcement of a pledge" through a law such as Washington's.[13] The Court emphasized that the "barebones" text of Article II and the Twelfth Amendment provide only for "[a]ppointments and procedures" and do not "expressly prohibit[ ] States from taking away presidential electors' voting discretion."[14] Finally, the Court recognized that historical practice supported Washington's law, as electors "have only rarely exercised discretion in casting their ballots for President" and "[s]tate election laws evolved to reinforce" this practice.[15]

Clause 3—Electoral College Count

ArtII.S1.C3.1 Electoral College Count Generally

Article II, Section 1, Clause 3:

> *The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they*

[5] Ray v. Blair, 343 U.S. 214, 222, 231 (1952). The party rule was adopted under the authority of an Alabama law authorizing parties to determine the qualifications of primary candidates and voters. *Id.* at 222.

[6] *Id.* at 227.

[7] *Id.* at 228.

[8] *Id.* at 230.

[9] Chiafalo v. Washington, No. 19-465, slip op. (U.S. July 6, 2020). In a companion case, the Supreme Court summarily reversed a Tenth Circuit decision ruling a Colorado faithless-elector law unconstitutional. Colo. Dep't of State v. Baca, No. 19-518, slip op. (U.S. July 6, 2020) (per curiam). The penalties in the Colorado case were different from a fine: after failing to honor his pledge, an elector's vote was vacated and he was removed as an elector. Baca v. Colo. Dep't of State, 935 F.3d 887, 904 (10th Cir. 2019).

[10] *Chiafalo*, slip op.

[11] *Id.*

[12] *See id.* at 9. *See also id.* at 9 n.4 ("A State, for example, cannot select its electors in a way that violates the Equal Protection Clause. And if a State adopts a condition on its appointments that effectively imposes new requirements on presidential candidates, the condition may conflict with the Presidential Qualifications Clause, *see* U.S. Const. art. II, § 1, cl. 5.").

[13] *Id.* at 10.

[14] *Id.*

[15] *Id.* at 13, 16.

shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

Article II, Section 1, Clause 3 outlined the process for selecting the President and Vice President. The provision is no longer operative because the Twelfth Amendment, ratified in 1804, superseded it. This essay discusses the history of Article II, Section 1, Clause 3 from its drafting until the adoption of the Twelfth Amendment.

The procedure for electing the President was a topic of considerable interest at the Constitutional Convention. Both the Virginia and New Jersey Plans for the Constitution contemplated that Congress would select the President.[1] In this, they were consistent with current practices where state legislatures generally selected the Governor.[2] During the Convention, however, it became apparent that how the President was selected would shape his role and relationship with the Legislative Branch. Urging that Congress select the President, Roger Sherman of Connecticut stated that the Executive was "nothing more than an institution for carrying the will of the Legislature into effect, that the person or persons ought to be appointed by and accountable to the Legislature only, which was the depositary of the supreme will of Society."[3] However, other delegates argued that the President should not be beholden to Congress for his office and that the separation of powers could only be ensured if the people elected the President.[4] Taking this position, James Madison stated:

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[1] The Virginia Plan, § 7, *reprinted in* Max Farrand, The Framing of the Constitution 226–227 (1913) ("Resolved that a National Executive be instituted; to be chosen by the National Legislature for the term of ____ years . . . and to be ineligible a second time; and that besides a general authority to execute the National Laws, it ought to enjoy the Executive rights vested in Congress by the Confederation."); The New Jersey Plan, § 4, *reprinted in id.* at 230–231 ("Resolved that the United States in Congress be authorized to elect a federal Executive to consist of ____ persons, to continue in office for the term of ____ years, . . . to be incapable of holding any other office or appointment during their time of service and for ____ years thereafter; to be ineligible a second time, and removable by Congress on application by a majority of the Executives of the several States; that the Executives besides their general authority to execute the federal acts ought to appoint all federal officers not otherwise provided for, and to direct all military operations; provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General, or in other capacity.").

[2] Lolabel House, A Study of the Twelfth Amendment of the Constitution of the United States 7 (1901). At the time of the Convention only Connecticut, Rhode Island, New Hampshire, New York, and Massachusetts selected their governors by a popular election; in all the other states, the state legislature selected the governor. *Id.*

[3] 1 The Records of the Federal Constitution 65 (Max Farrand ed., 1911). John Rutledge of South Carolina proposed that the Senate alone should elect the President. *Id.* at 69.

[4] *Id.* at 69 ("Mr. Wilson renewed his declarations in favor of an appointment by the people."); 2 The Records of the Federal Constitution 29 (Max Farrand ed. 1911) (noting that Gouverneur Morris believed that the President "ought to be elected by the people at large, by the freeholders of the Country").

ArtII.S1.C3.1
Electoral College Count Generally

> If it be a fundamental principle of free Govt. that the Legislative, Executive & Judiciary powers should be *separately* exercised; it is equally so that they be *independently* exercised. There is the same & perhaps greater reason why the Executive shd. be independent of the Legislature, than why the Judiciary should . . . . It is essential then that the appointment of the Executive should either be drawn from some source, or held by some tenure, that will give him a free agency with regard to the Legislature. . . . The people at large was in his opinion the fittest in itself.[5]

Debate over how the President should be selected also focused on which method would best ensure that the President represented the people's interests.[6] On July 19, 1787, Rufus King of Massachusetts proposed that the President be appointed "by electors chosen by the people for the purpose."[7] Madison, William Patterson of New Jersey, Elbridge Gerry of Massachusetts, and Oliver Ellsworth of Connecticut quickly voiced support for electors choosing the President, with Madison noting that using electors would account for differences among the states as to whom they granted suffrage.[8] On September 4, 1797, the Committee of Eleven submitted a report a that included a proposal on how to select the President which, after further debate and modification, the Convention ultimately adopted.[9]

The Framers' process for choosing the President blended federal and national aspects of the U.S. system of government. Reflecting that the United States was a federation of states, the election of the President was to be conducted on a state-by-state basis, and state legislatures would determine how their electors would be selected.[10] Reflecting that the United States was a single nation, the states were allocated electoral votes based on their total number of representatives and senators, with the result that the number of each state's electoral votes was based on its relative population.[11] Combining both federal and national aspects, in the event of a tie or if no candidate received a majority of votes, the House of Representatives would select the President.

Under Article II, Section 1, Clause 3, each state's electors would meet in their state and vote for two persons to be President, one of whom could not be from their state. The electors would then send a list of the persons for whom they had voted and the number of votes each had received to the President of the Senate. In the presence of the Senate and House of Representatives, the President of the Senate would then count the votes. The candidate with the greatest number of votes would become President, provided he had received a majority of the votes. In the event of a tie, provided the tying candidates had each received a majority of the votes, the House of Representatives would select the President by vote, but each state would have only one vote. If no person had received a majority of the votes, the House would select the President by vote from the five candidates who had received the greatest number of votes. Each state would have only one vote, notwithstanding how many representatives they had, and the candidate with the greatest number of votes would have to receive a majority of

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[5] 2 The Records of the Federal Constitution 56 (Max Farrand ed., 1911)

[6] *E.g., id.* at 29 (Roger Sherman of Connecticut stating that "the Nation would be better expressed by the Legislature, than by the people at large."); *id.* at 31 (Gouverneur Morris of Pennsylvania stating, "If the Executive be chosen by the Natl. Legislature, he will not be independent on it; and if not independent, usurpation & tyranny on the part of the Legislature will be the consequence.").

[7] *Id.* at 56.

[8] *Id.* at 56–58. Supporters of electors disagreed on how states would select the electors. While Rufus King of Massachusetts and James Madison supported popular election of electors, Oliver Ellsworth proposed that state legislatures appoint the electors and Elbridge Gerry proposed that state governors choose the electors. *Id.*

[9] *Id.* at 497–498, 517–531.

[10] U.S. Const. art. II, § 1, cl. 2.

[11] *Id. See also* Farrand, *supra* note 1, at 166–67.

the votes to win. Article II, Section 1, Clause 3 further provided that a quorum consisting of a Member or Members from two-thirds of the States would be necessary for a vote and a majority of all the States had to vote for the winner. Once the President was elected, the person with the second highest number of electoral votes would be the Vice President. In the event of a tie, the Senate would select the Vice President by vote.

The Article II, Section 1, Clause 3 process for choosing the President had unanticipated and unwelcome results. George Washington's overwhelming popularity minimized the problems with the provision during the elections of 1788 and 1792.[12] In 1796, Federalist John Adams won the Presidency while Republican Thomas Jefferson became the Vice President. This proved unworkable as Jefferson was the leader of the opposition to Adams.[13] In 1800, the Federalist candidates were John Adams and Thomas Pinckney, while the Republican-Democrat candidates were Thomas Jefferson and Aaron Burr. The Republican-Democrat electors gave both their votes to Jefferson and Burr, resulting in a tie between the two for the most votes.[14] Consequently, the election went to the House of Representatives where the Federalists were in the majority. As Jefferson was the leader of the opponents to the Federalists, the Federalists were not inclined to vote for him.[15] The result was a deadlock, which required thirty-six ballots to resolve.[16] After seven days of voting, the House of Representatives elected Jefferson President and Burr Vice President.[17]

To address problems that arose during the 1796 and 1800 elections, the states ratified the Twelfth Amendment on June 15, 1804.[18]

Clause 4—Electoral Votes

ArtII.S1.C4.1 Timing of Electoral Votes Generally

Article II, Section 1, Clause 4:

> *The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.*

In order to reduce the risk that cabals would manipulate selection of the President, the Framers provided for Congress to select a single day on which the electors would vote for the President.[1] Discussing the benefits of this provision at the Constitutional Convention, Gouverneur Morris of Pennsylvania stated: "As the Electors would vote at the same time throughout the U.S. and at so great a distance from each other, the great evil of cabal was avoided. It would be impossible to corrupt them."[2] In his *Commentaries on the Constitution of the United States*, Justice Joseph Story further explained the reasoning behind this provision, stating:

> Such a measure is calculated to repress political intrigues and speculations, by rendering a combination among the electoral colleges, as to their votes, if not utterly

[12] House, *supra* note 2, at 23–26.

[13] *Id.* at 39.

[14] Alan P. Grimes, Democracy and the Amendments to the Constitution 21 (1987).

[15] House, *supra* note 2, at 33.

[16] Grimes, Democracy and the Amendments to the Constitution 21 (1987).

[17] *Id.*

[18] 1 Mark Grossman, Constitutional Amendments 111 (2012). For discussion on the Twelfth Amendment, see Amdt12.1 Overview of Twelfth Amendment, Election of President.

[1] *See, e.g.*, 2 Records of the Federal Convention 500 (Max Farrand ed., 1911).

[2] *Id.*

> impracticable, at least very difficult; and thus secures the people against those ready expedients, which corruption never fails to employ to accomplish its designs. The arts of ambition are thus in some degree checked, and the independence of the electors against eternal influence in some degree secured.[3]

Supporters of the provision also noted that holding the vote on a single day would facilitate the election of the most highly respected and well-known persons, as only such persons would likely be familiar to an untainted pool of electors. For instance, during North Carolina's debates on ratification, future Supreme Court Justice James Iredell noted that requiring the electors to vote on the same day would increase the likelihood that "the man who is the object of the choice of thirteen different states, the electors in each voting unconnectedly with the rest, must be a person who possesses in a high degree the confidence and respect of his country."[4]

Clause 5—Qualifications

ArtII.S1.C5.1 Qualifications for the Presidency

Article II, Section 1, Clause 5:

> *No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.*

The Qualifications Clause set forth in Article II, Section 1, Clause 5 requires the President to be a natural-born citizen, at least thirty-five years of age, and a resident of the United States for at least fourteen years.[1]

Like the age requirements for membership in the House of Representatives[2] and the Senate,[3] the age requirement for the presidency set forth at Article II, Section 1, Clause 5 ensures that persons holding the office of President will have the necessary maturity for the position as well as sufficient time in a public role for the electorate to be able to assess the merits of a presidential candidate.[4] In his *Commentaries on the Constitution of the United States*, Justice Joseph Story stated: "Considering the nature of the duties, the extent of the information, and the solid wisdom and experience required in the executive department, no one can reasonably doubt the propriety of some qualification of age."[5]

The Framers appear to have adopted the requirement that citizens be natural born citizens to ensure that the President's loyalties would lie strictly with the United States. By barring naturalized citizens from the presidency, the requirement of being a natural born citizen, as Justice Story explained, protects the United States from "ambitious foreigners, who might otherwise be intriguing for the office; and interposes a barrier against those corrupt interferences of foreign governments in executive elections, which have inflicted the most

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[3] 3 Joseph Story, Commentaries on the Constitution of the United States § 1469 (1833).

[4] 3 The Debates, Resolutions, and other Proceedings, in Convention, on the Adoption of the Federal Constitution 101 (Jonathan Elliot ed., 1830).

[1] U.S. Const. art. II, § 1, cl. 5.

[2] *See* ArtI.S2.C2.1 Overview of House Qualifications Clause.

[3] *See* ArtI.S3.C3.1 Overview of Senate Qualifications Clause.

[4] The Federalist No. 64 (John Jay) (describing the age requirement as limiting presidential and senatorial candidates to "those who best understand our national interests . . . who are best able to promote those interests, and whose reputation for integrity inspires and merits confidence").

[5] 3 Joseph Story, Commentaries on the Constitution of the United States § 1472 (1833).

serious evils upon the elected monarchies of Europe."[6] Article II, however, provided an exception for foreign-born persons who had immigrated to the colonies prior to the adoption of the Constitution.[7] Justice Story explained that this was done "out of respect to those distinguished revolutionary patriots, who were born in a foreign land, and yet had entitled themselves to high honors in their adopted country."[8]

While the Constitution does not define "natural born Citizen," commentators have opined that the Framers would have understood the term to mean "someone who was a U.S. citizen at birth with no need to go through a naturalization proceeding at some later time."[9] British statutes from 1709 and 1731 expressly described children of British subjects who were born outside of Great Britain as natural born citizens and provided that they enjoyed the same rights to inheritance as children born in Great Britain.[10] In addition, in the Naturalization Act of 1790, the First Congress provided that "children of citizens of the United States, that may be born beyond the sea, . . . shall be considered as *natural born citizens* . . . ."[11] Consequently, under the principle that "British common law and enactments of the First Congress" are "two particularly useful sources in understanding constitutional terms,"[12] it would appear likely that the Framers would have understood natural born citizen to encompass the children of United States citizens born overseas.[13] Such an interpretation is further supported by the presidential candidacies of Senator John McCain of Arizona, who was born in the Panama Canal Zone; Governor George Romney of Massachusetts, who was born in Mexico, and Senator Barry Goldwater of Arizona, who was born in Arizona before it became a state.[14]

The Framers appear to have adopted the fourteen-year residency requirement to ensure that "the people may have a full opportunity to know [the candidate's] character and merits, and that he may have mingled in the duties, and felt the interests, and understood the principles, and nourished the attachments, belonging to every citizen in a republican government."[15] Justice Story further explained that the fourteen-year residence requirement is "not an absolute inhabitancy within the United States during the whole period; but such an inhabitancy as includes a permanent domicil in the United States."[16]

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[6] *Id.* § 1473.

[7] U.S. Const. art II, § 1, cl. 5 ("No person except a natural born Citizen, or a *Citizen of the United States, at the time of the Adoption of this Constitution* . . . .") (emphasis added).

[8] *Id.* Justice Story continued: "A positive exclusion of them from the office would have been unjust to their merits, and painful to their sensibilities." *Id.*

[9] Neal Katyal & Paul Clement, *On the Meaning of "Natural Born Citizen,"* 128 Harv. L. Rev. F. 161, 161 (2015). *See also* C. Herman Pritchett, Constitutional Law of the Federal System 262 (1984) ("[P]ersons born abroad to American citizen parents are considered natural-born American citizens"); Edward S. Corwin's The Constitution and What It Means Today (Harold W. Chase & Craig R. Ducat, eds., 1973) (noting that, "[a]lthough the courts have never been called upon to decide the question [of whether a child born abroad of American parents is 'a natural-born citizen' in the sense of the Qualifications Clause], there is a substantial body of authoritative opinion supporting the position that they are").

[10] 7 Anne, ch. 5, § 3 (1709); 4 Geo. 2, ch. 21 (1731).

[11] Act of March 26, 1790, 1 Stat. 103, 104 (emphasis supplied). For additional discussion, see Weedin v. Chin Bow, 274 U.S. 657, 661–66 (1927) and United States v. Wong Kim Ark, 169 U.S. 649, 672–75 (1898). With minor variations, the "natural born citizen" language remained law in subsequent reenactments of the Naturalization Act until the 1802 Act, which omitted the italicized words. *See* Act of Feb. 10, 1855, 10 Stat. 604 (enacting same provision, for offspring of American-citizen fathers, but omitting the italicized phrase).

[12] Katyal & Clement, *supra* note 9, at 161 (citing Smith v. Alabama, 124 U.S. 465, 478 (1888) and Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888)).

[13] *Id.*

[14] *See* Katyal & Clement, *supra* note 9, at 164.

[15] 3 Joseph Story, Commentaries on the Constitution of the United States § 1473 (1833).

[16] *Id.* Justice Story notes that a stricter construction would have barred U.S. citizens serving in the Nation's foreign embassies or military or civil officers "who should have been in Canada during the late war." *Id.*

Clause 6—Succession

ArtII.S1.C6.1 Succession Clause for the Presidency

Article II, Section 1, Clause 6:

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

The ratification of the Twenty-Fifth Amendment[1] in 1967 superseded Article I, Section 1, Clause 6. Article I, Section 1, Clause 6 provides for the "Powers and Duties" of the President to "devolve" upon the Vice President if the President is no longer able "to discharge" them due to his removal from office, death, resignation, or inability.[2] Although it was unclear in the republic's early years whether the Vice President became President or merely acted as President until a new presidential election was held, ratification of the Twenty-Fifth Amendment established incontrovertibly that the Vice President becomes President upon the President's removal from office, death, resignation, or inability to perform the powers and duties of the office.[3] In addition, Article I, Section 1, Clause 6 authorizes Congress to establish the line of succession to the presidency if both the President and Vice President are unable to discharge the "Powers and Duties" of the Presidency.[4]

Although the Twenty-Fifth Amendment was ratified in 1967, the succession of the Vice President to the office of President upon the President's death or resignation has been the practice of the Republic since its earliest days. On April 4, 1841, President William Henry Harrison became the first president to die in office.[5] His Vice President John Tyler, after initial hesitation, took the position that he had become the President automatically rather than "the Vice-President, now exercising the office of President,"[6] and thereby established a precedent which was subsequently followed until the Twenty-Fifth Amendment conclusively established that the Vice-President succeeds to the Presidency under the Constitution.[7]

In 1792, the Second Congress used its authority under Article II, Section 1, Clause 6 to provide for the succession to the Presidency in the event neither the President nor Vice President were able to perform the duties and powers of the office. Under the Succession Act of 1792,[8] the succession to the Presidency passed to the President Pro Tempore of the Senate and then to the Speaker of the House of Representatives. In 1886, Congress changed the presidential succession to the heads of the cabinet departments in the order in which the departments had been established.[9] In 1947, Congress adopted the Presidential Succession

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[1] *See* Amdt25.1 Overview of Twenty-Fifth Amendment, Presidential Vacancy.

[2] U.S. Const. art. I, § 1, cl. 6.

[3] U.S. Const. amend. XXV, § 1 ("In case of the removal of the President from office or of his death or resignation, the Vice President shall become President."). *See also* U.S. Const. amend. XX, § 3 ("If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice-President elect shall become President").

[4] U.S. Const. art. I, § 1, cl. 6.

[5] C. Herman Prittchett, Constitutional Law of the Federal System 274–75 (1984).

[6] *Id.*

[7] Amdt25.1 Overview of Twenty-Fifth Amendment, Presidential Vacancy.

[8] Act of Mar. 1, 1792, ch. 8, § 9, 1 Stat. 239, 240 (Succession Act of 1792).

[9] Act of Jan. 19, 1886, ch. 4, Pub. L. No. 49-4, 24 Stat. 1 (Succession Act of 1886).

Act,[10] which provided for the Speaker of the House to "act as President"[11] followed by the President Pro Tempore of the Senate, and then by the department heads in the order in which each department had been established.

Clause 7—Compensation and Emoluments

ArtII.S1.C7.1 Emoluments Clause and Presidential Compensation

Article II, Section 1, Clause 7:

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

To preserve the President's independence from Congress and state governments, Article II, Section 1, Clause 7 provides that Congress may not increase or decrease the President's compensation during his term in office and further bars the President from receiving "any other Emolument [beyond a fixed salary] from the United States, or any of them."[1] Consequently, Congress cannot use its control over the President's salary to influence him; the provision accordingly reinforces the separation of powers. As Justice Joseph Story observed in his *Commentaries on the Constitution of the United States*, "[a] control over a man's living is in most cases a control over his actions."[2] The Domestic Emoluments Clause—unlike the Foreign Emoluments Clause[3]—does not allow Congress to assent to the President receiving otherwise prohibited emoluments from the state or federal governments.

Modeled after similar provisions in state constitutions,[4] the Domestic Emoluments Clause received little attention at the Constitutional Convention.[5] In the *Federalist No. 73*, however, Alexander Hamilton explained that the Domestic Emoluments Clause was intended to isolate the President from potentially corrupting congressional influence. Because the President's salary is fixed "once for all" each term, Hamilton commented, Congress "can neither weaken his fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice."[6] Similarly, Hamilton explained that because "[n]either the Union, nor any of its members, will be at liberty to give . . . any other emolument," the President will "have no

[10] Presidential Succession Act of 1947, Pub. L. No. 80-199, 61 Stat. 380, *codified as amended at* 3 U.S.C. § 19.

[11] *Id.* § 19(1).

[1] U.S. Const. art. II, § 1, cl. 7.

[2] 3 Joseph Story, Commentaries on the Constitution of the United States § 1480 (1833).

[3] *See* U.S. Const. art. I, § 9, cl. 8; *see* ArtI.S9.C8.1 Overview of Titles of Nobility and Foreign Emoluments Clauses.

[4] *See, e.g.*, Mass Const. of 1780, pt. II, ch. II, § 1, art. XIII ("As the public good requires that the governor should not be under the undue influence . . . it is necessary that he should have an honorable stated salary, of a fixed and permanent value . . . ."); Md. Const. of 1776, art. XXXII ("That no person ought to hold, at the same time, more shall one office of profit, nor ought any person in public trust, to receive any present from any foreign prince or state, or from the United States, or any of them, without the approbation of this State.").

[5] Early in the Constitutional Convention, Benjamin Franklin proposed that the President should receive no compensation at all; this motion was politely postponed "with great respect, but rather for the author of it than from any apparent conviction of its expediency or practicability." 1 The Records of the Federal Convention of 1787, at 81–85 (Max Farrand ed., 1911) (Madison's notes). The Convention unanimously agreed to the fixed salary provision for the President on July 20, 1787. 2 *id.* at 69. On September 15, 1787, Franklin and John Rutledge moved to bar the President from receiving "any other emolument" from the federal or state governments, which the Convention approved by a 7-4 vote without noted debate. 2 *id.* at 626.

[6] The Federalist No. 73 (Alexander Hamilton).

pecuniary inducement to renounce or desert the independence intended for him by the Constitution."[7] Other Framers echoed this sentiment during the ratification debates.[8]

The Domestic Emoluments Clause has been rarely analyzed or interpreted by courts during its history.[9] During the administration of President Donald Trump, several litigants alleged that President Trump's retention of certain business and financial interests violated the Foreign and Domestic Emoluments Clauses, but the Supreme Court ultimately found these cases moot without addressing their merits.[10]

Clause 8—Presidential Oath of Office

ArtII.S1.C8.1 Oath of Office for the Presidency

Article II, Section 1, Clause 8:

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

What is the time relationship between a President's assumption of office and his taking the oath? Apparently, the former comes first, this answer appearing to be the assumption of the language of the clause. The Second Congress assumed that President George Washington took office on March 4, 1789,[1] although he did not take the oath until the following April 30.

That the oath the President is required to take might be considered to add anything to the powers of the President, because of his obligation to "preserve, protect and defend the Constitution," might appear to be rather a fanciful idea. But in President Andrew Jackson's message announcing his veto of the act renewing the Bank of the United States there is language which suggests that the President has the right to refuse to enforce both statutes and judicial decisions based on his own independent decision that they were unwarranted by the Constitution.[2] The idea next turned up in a message by President Abraham Lincoln justifying his suspension of the writ of habeas corpus without obtaining congressional authorization.[3] And counsel to President Andrew Johnson during his impeachment trial adverted to the theory, but only in passing.[4] Beyond these isolated instances, it does not appear to be seriously contended that the oath adds anything to the President's powers.

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[7] *Id.*

[8] *See, e.g.*, 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 446 (Jonathan Elliot ed., 1836) (statement of James Wilson) ("[The Domestic Emoluments Clause was designed] to secure the President from any dependence upon the legislature as to his salary.").

[9] *See generally* Michael A. Foster & Kevin J. Hickey, Cong. Rsch. Serv., R45992, The Emoluments Clauses and the Presidency: Background and Recent Developments (2019), https://crsreports.congress.gov/product/pdf/R/R45992. The few judicial or executive decisions on the Domestic Emoluments Clause include *Griffin v. United States*, 935 F. Supp. 1, 3–6 (D.D.C. 1995), *Nixon v. Sampson*, 389 F. Supp. 107, 136–37 (D.D.C. 1975), and *President Reagan's Ability to Receive Retirement Benefits from the State of California*, 5 Op. O.L.C. 187 (1981).

[10] For an overview of that litigation, see ArtI.S9.C8.3 Foreign Emoluments Clause Generally.

[1] Act of March 1, 1792, 1 Stat. 239, § 12.

[2] 2 J. Richardson, *supra*, at 576. Chief Justice Roger Taney, who as a member of Jackson's Cabinet had drafted the message, later repudiated this possible reading of the message. 2 C. Warren, The Supreme Court in United States History 223–224 (1926).

[3] 6 J. Richardson, *supra*, at 25.

[4] 2 Trial of Andrew Johnson 200, 293, 296 (1868).

Section 2—Powers

Clause 1—Military, Administrative, and Clemency

ArtII.S2.C1.1 Commander in Chief

ArtII.S2.C1.1.1 Historical Background on Commander in Chief Clause

Article II, Section 2, Clause 1:

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

Surprisingly little discussion of the Commander in Chief Clause occurred in the Constitutional Convention or in the ratifying debates. From the evidence available, it appears that the Framers vested the duty in the President because experience in the Continental Congress had disclosed the expediency of vesting command in a single official[1] and because the lesson of English history was that danger lurked in vesting command in a person separate from the responsible political leaders.[2]

Early cases and commentary emphasized the purely military aspects of the Commander in Chiefship. Alexander Hamilton said the office "would amount to nothing more than the supreme command and direction of the Military and naval forces, as first general and admiral of the confederacy."[3] In his *Commentaries on the Constitution of the United States*, Justice Joseph Story wrote of the debates accompanying the ratification of the Constitution, stating: "The propriety of admitting the president to be commander in chief, so far as to give orders, and have a general superintendency, was admitted."[4] Justice Story took note of the debate regarding the propriety of the President taking command of the armed forces in person, explaining the apparent consensus. He stated: "Though the president might, there was no necessity that he should, take the command in person; and there was no probability that he would do so, except in extraordinary emergencies, and when he was possessed of superior military talents."[5]

The Supreme Court did not think it apparent that the Commander in Chief Power necessarily entailed all of the attributes available to a sovereign under the laws and usages of

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[1] Earnest R. May, The President Shall Be Commander in Chief, in The Ultimate Decision: The President as Commander In Chief 3, 6–7 (E. May ed., 1960). During the North Carolina Ratifying Convention, James Iredell said: "From the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, dispatch, and decision, which are necessary in military operations can only be expected from one person." 4 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 107 (2d ed.1836).

[2] May, *supra* note 1, at 18. In the Virginia ratifying convention, Madison, replying to Patrick Henry's objection that danger lurked in giving the President control of the military, said: "Would the honorable member say that the sword ought to be put in the hands of the representatives of the people, or in other hands independent of the government altogether?" 3 Elliot, *supra* note 1, at 393.

[3] The Federalist No. 69 (Alexander Hamilton).

[4] 3 Joseph Story, Commentaries on the Constitution Of The United States § 1492 (1833).

[5] *Id.*

war, even in cases of war declared by Congress.[6] The Court held that a declaration of war, by itself, did not empower the President to confiscate enemy property.[7]

Chief Justice John Marshall, while suggesting that the President might, during the limited war authorized against France, have the authority as Commander in Chief to issue orders pertaining to the capture of certain vessels in the absence of legislation, denied the validity of such an order where Congress had enacted a contradictory staute.[8] A U.S. commander had captured, pursuant to presidential instructions, what he believed was a U.S. merchant ship bound *from* a French port, allegedly carrying contraband material.[9] Congress had, however, enacted the Non-Intercourse Act, which only provided for the seizure of such vessels bound *to* French ports.[10] The Court held that the President's instructions exceeded the authority granted by Congress and were not to be given the force of law, and the captain could be held liable for damages.[11]

In 1850, Chief Justice Roger Taney, writing for the Supreme Court, explained the President's power during wartime:

> His duty and his power are purely military. As Commander in Chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.[12]

Justice Taney continued and distinguished the role of the Commander in Chief and that of the British King:

> But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question.[13]

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[6] *See*, *e.g.*, The Thomas Gibbons, 12 U.S. (8 Cranch) 421, 427–28 (1814) ("As to the authority of the president, we do not think it necessary to consider how far he would be entitled, in his character of commander in chief of the army and navy of the United States, independent of any statute provision, to issue instructions for the government and direction of privateers. That question would deserve grave consideration; and we should not be disposed to entertain the discussion of it, unless it become unavoidable.").

[7] Brown v. United States, 12 U.S. (8 Cranch) 110, 128–29 (1814) ("It appears to the Court, that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war.").

[8] Little v. Barreme, 6 U.S. (2 Cranch) 170, 177–78 (1804).

[9] *Id.* at 177 (with reference to the Law of February 9, 1799, 1 Stat. 613).

[10] *Id.*

[11] *Id.* at 179. *See also* Talbot v. Seeman, 5 U.S. (1 Cranch) 1, (1801) ("The whole powers of war being by the constitution of the United States, vested in congress, the acts of that body can alone be restored to as our guides in this enquiry.").

[12] Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850). The Court explained that acquisition of foreign territory could be accomplished "only by the treaty-making power or the legislative authority, and [it] is not a part of the power conferred upon the President by the declaration of war." *Id.* Congress had declared war against Mexico in 1846. Act of May 13, 1846, ch. 16, 9 Stat. 9.

[13] *Fleming*, 50 U.S. (9 How.) at 618.

Even after the Civil War, a powerful minority of the Court, led by Chief Justice Salmon Chase, described the role of President as Commander in Chief simply as "the command of the forces and the conduct of campaigns."[14]

ArtII.S2.C1.1.2 Prize Cases and Commander in Chief Clause

Article II, Section 2, Clause 1:

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

The basis for a broader conception of the role of Commander in Chief was laid in certain early acts of Congress authorizing the President to employ military force in the execution of the laws.[1] In his famous message to Congress on July 4, 1861,[2] Abraham Lincoln advanced the claim that the "war power" was his for the purpose of suppressing rebellion, and in the *Prize Cases*[3] of 1863 a divided Court sustained this theory. The immediate issue was the validity of the blockade of the Southern ports that the President had established following the attack on Fort Sumter.[4] The argument was advanced that, in order for a blockade to be valid, it must be established during an incident of a "public war" validly declared, and that only Congress could, by virtue of its power "to declare war," constitutionally impart to a military situation this character and scope.[5] Speaking for the majority of the Court, Justice Robert Grier answered:

> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be '*unilateral*.'[6]

To support this principle with historical precedent, Justice Grier explained that the battles of Palo Alto and Resaca de la Palma had been fought before the enactment of the Act of Congress of May 13, 1846, "which recognized 'a state of war as existing by the act of the

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[14] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866).

[1] 1 Stat. 424 (1795); 2 Stat. 443 (1807) (codified at 10 U.S.C. §§ 251–254). *See also* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 32–33 (1827) (asserting the finality of the President's judgment of the existence of a state of facts requiring his exercise of the powers conferred by the act of 1795).

[2] 7 Messages and Papers of the Presidents 3221, 3224 (1897) ("So viewing the issue, no choice was left but to call out the war power of the Government and so to resist force employed for its destruction by force for its preservation."). Later in the address, President Lincoln submitted: "Recurring to the action of the Government, it may be stated that at first a call was made for 75,000 militia, and rapidly following this a proclamation was issued for closing the ports of the insurrectionary districts by proceedings in the nature of blockade. So far all was believed to be strictly legal. At this point the insurrectionists announced their purpose to enter upon the practice of privateering."

"Other calls were made for volunteers to serve three years unless sooner discharged, and also for large additions to the Regular Army and Navy. These measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress." *Id.* at 3225.

[3] 67 U.S. (2 Black) 635 (1863).

[4] *Id.* at 665.

[5] *Id.* at 644–45 (argument).

[6] *Id.* at 668–70.

Republic of Mexico.'"[7] Justice Grier stated, "This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress."[8]

The Court might have rested its opinion wholly on the President's authorities under statute to suppress insurrections and repel invasions,[9] coupled with Congress's ratification of the President's actions,[10] but it instead emphasized Executive power and duty:

> The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact . . . .
>
> Whether the President in fulfilling his duties, as Commander in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the government to which this power was entrusted. 'He must determine what degree of force the crisis demands.' The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.[11]

In brief, the powers that may be claimed for the President under the Commander in Chief Clause at a time of widespread insurrection were equated with his powers under the clause at a time when the United States is engaged in a formally declared foreign war.[12] No attention was given the fact that Lincoln had asked Congress to ratify and confirm his acts, which Congress promptly had,[13] with the exception of his suspension of habeas corpus, a power that many attributed to the President in the situation then existing, by virtue of his duty to take care that the laws be faithfully executed.[14] On the other hand, where Lincoln's proclamation suspending habeas corpus varied from legislation later enacted to ratify it, the Court looked to the statute[15] rather than to the proclamation[16] to determine the breadth of its application in the case of *Ex parte Milligan*.[17]

In a partial concurrence to the majority's decision in *Milligan*, Chief Justice Chase described the allocation of war powers as follows:

> The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes

[7] *Id.* at 668.

[8] *Id.*

[9] *Id.* at 668.

[10] 67 U.S. (2 Black) at 670–71 (taking note of various statutes and stating, "Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, . . . this ratification has operated to perfectly cure the defect.").

[11] *Id.* at 669–70.

[12] *See generally*, Edward Corwin, Total War and the Constitution (1946).

[13] 12 Stat. 326 (1861).

[14] J. G. Randall, Constitutional Problems Under Lincoln 118–139 (rev. ed. 1951).

[15] Act of Mar. 3, 1863, 12 Stat. 755 (authorizing the suspension of habeas corpus, but with limitations in Union states to those held as prisoners of war; all others were to be indicted or freed.)

[16] Proclamation of Sept. 15, 1863, 13 Stat. 734 (suspending habeas corpus with respect to those in federal custody as military offenders or "as prisoners of war, spies, or aiders and abettors of the enemy").

[17] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 115–16 (1866).

> all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President . . . .[18]

The Chief Justice described the Commander in Chief Power as entailing "the command of the forces and the conduct of campaigns,"[19] but nevertheless agreed that military trials of civilians accused of violating the law of war in Union states were invalid without congressional approval, despite the government's assertion that the "[Commander in Chief's] power to make an effectual use of his forces [must include the] power to arrest and punish one who arms men to join the enemy in the field against him."[20]

ArtII.S2.C1.1.3 Wartime Powers of President in World War II

Article II, Section 2, Clause 1:

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

In his message to Congress of September 7, 1942, in which he demanded that Congress repeal certain provisions of the Emergency Price Control Act,[1] President Franklin Roosevelt formulated his conception of his powers as President in wartime to act inconsistently with congressional statute:

> I ask the Congress to take this action by the first of October. Inaction on your part by that date will leave me with an inescapable responsibility to the people of this country to see to it that the war effort is no longer imperiled by threat of economic chaos.
>
> In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act.
>
> At the same time that farm prices are stabilized, wages can and will be stabilized also. This I will do.
>
> The President has the powers, under the Constitution and under Congressional acts, to take measures necessary to avert a disaster which would interfere with the winning of the war.
>
> I have given the most thoughtful consideration to meeting this issue without further reference to the Congress. I have determined, however, on this vital matter to consult with the Congress . . . .
>
> The American people can be sure that I will use my powers with a full sense of my responsibility to the Constitution and to my country. The American people can also be

[18] *Id.* at 139 (Chase, C.J., concurring and dissenting in part).

[19] *Id.* at 139–40 ("Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity . . . ").

[20] *Id.* at 17 (government argument).

[1] 56 Stat. 23 (1942).

> sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies in any part of the world where our own safety demands such defeat.
>
> When the war is won, the powers under which I act automatically revert to the people—to whom they belong.[2]

While congressional compliance with the President's demand rendered unnecessary an effort on his part to amend the Price Control Act, there were other matters as to which he repeatedly took action within the normal field of congressional powers, not only during the war, but in some instances prior to it. In exercising both the powers which he claimed as Commander in Chief and those which Congress conferred upon him to meet the emergency, President Roosevelt employed new emergency agencies, created by himself and responsible directly to him, rather than the established departments or existing independent regulatory agencies.[3]

ArtII.S2.C1.1.4 Evacuation of the West Coast Japanese

Article II, Section 2, Clause 1:

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

On February 19, 1942, President Roosevelt issued an Executive Order, "by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy," providing, as a safeguard against subversion and sabotage, power for his military commanders to designate areas from which "any person" could be excluded or removed and to set up facilities for such persons elsewhere.[1] Pursuant to this order, approximately 112,000 residents of the Western states, all of Japanese descent and more than two out of every three of whom were natural-born citizens, were removed from their homes and shipped to temporary camps and later into "relocation centers" in several states.[2]

It was apparently the Administration's original intention to rely on the general principle of military necessity and the power of the Commander in Chief in wartime as authority for the relocations.[3] Before any action was taken under the order, Congress ratified and adopted it by the Act of March 21, 1942,[4] by which it was made a misdemeanor to knowingly enter, remain in, or leave prescribed military areas contrary to the orders of the Secretary of War or of the commanding officer of the area. The cases which subsequently arose in consequence of the

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[2] 88 Cong. Rec. 7044 (1942). Congress promptly complied, 56 Stat. 765 (1942), so that the President was not required to act on his own. *But see* Edward Corwin, Total War and the Constitution 65–66 (1946) (listing examples to demonstrate an implied claim to "dispense with statutes").

[3] For a listing of the agencies and an account of their creation to the close of 1942, see Arthur T. Vanderbilt, *War Powers and Their Administration*, 1942 Ann. Surv. Am. L. 106–113 (1942).

[1] Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

[2] War Relocation Authority, The Evacuated People: A Quantitative Description 67 (1946).

[3] Exec. Order 9066 stated that "the successful prosecution of the war requires every possible protection against espionage and against sabotage" and cited as authority that vested "in the President of the United States, and Commander in Chief of the Army and Navy," but did not claim statutory authority. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

[4] 56 Stat. 173 (1942).

order were decided under the order plus the Act. The question at issue, said Chief Justice Harlan Stone for the Court, "is not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, acting in cooperation, Congress and the Executive have constitutional . . . [power] to impose the curfew restriction here complained of."[5] This question was answered in the affirmative, as was the similar question later raised by an exclusion order.[6] These two opinions, however, skirted the question of internment in relocation centers. On that question, the Court granted habeas relief to an "admittedly loyal citizen" of Japanese descent on the basis that internment was unsupported by the Executive Order or by statute.[7] Ultimately, the Court abrogated the *Korematsu* decision, holding that "[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority."[8]

ArtII.S2.C1.1.5 The President and Labor Relations in World War II

Article II, Section 2, Clause 1:

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

The most important segment of the home front regulated by what were in effect presidential edicts was the field of labor relations. Exactly six months before Pearl Harbor, on June 7, 1941, President Franklin Roosevelt, citing his proclamation thirteen days earlier of an unlimited national emergency, issued an Executive Order seizing the North American Aviation Plant at Inglewood, California, where, on account of a strike, production was at a standstill.[1] Attorney General Robert Jackson justified the seizure as growing out of the "duty constitutionally and inherently rested upon the President to exert his civil and military as well as his moral authority to keep the defense efforts of the United States a going concern," as well as "to obtain supplies for which Congress has appropriated the money, and which it has directed the President to obtain."[2] Other seizures followed, and on January 12, 1942, President Roosevelt, by Executive Order 9017, created the National War Labor Board. The order declared in part, "by reason of the state of war declared to exist by joint resolutions of Congress, . . . the

[5] Hirabayashi v. United States, 320 U.S. 81, 91–92 (1943).

[6] Korematsu v. United States, 323 U.S. 214 (1944). Long afterward, in 1984, a federal court granted a writ of *coram nobis* and overturned Korematsu's conviction, Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984), and in 1986, a federal court vacated Hirabayashi's conviction for failing to register for evacuation but let stand the conviction for curfew violations. Hirabayashi v. United States, 627 F. Supp. 1445 (W.D. Wash. 1986). Other cases were pending, but Congress then implemented the recommendations of the Commission on Wartime Relocation and Internment of Civilians by acknowledging "the fundamental injustice of the evacuation, relocation and internment," and apologizing on behalf of the people of the United States. Pub. L. 100–383, 102 Stat. 903 (1988), 50 U.S.C. §§ 4201–4251. Reparations were approved, and each living survivor of the internment was to be compensated in an amount roughly approximating $20,000.

[7] *Ex parte* Endo, 323 U.S. 283, 302 (1944).

[8] Trump v. Hawaii, No. 17–965, slip op. at 38 (U.S. June 26, 2018).

[1] Exec. Order No. 8773, 6 Fed. Reg. 2777 (1941).

[2] Edward Corwin, Total War and the Constitution 47–48 (1946). As Supreme Court Justice, Jackson would later deny that the President as Commander in Chief had authority to seize steel manufacturing plants affected by labor strife. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) ("What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment.").

national interest demands that there shall be no interruption of any work which contributes to the effective prosecution of the war; and . . . as a result of a conference of representatives of labor and industry which met at the call of the President on December 17, 1941, it has been agreed that for the duration of the war there shall be no strikes or lockouts, and that all labor disputes shall be settled by peaceful means, and that a National War Labor Board be established for a peaceful adjustment of such disputes."[3] In this field, too, Congress intervened by means of the War Labor Disputes Act of June 25, 1943,[4] which authorized plant seizures in support of war efforts but which, however, still left ample basis for presidential activity of a legislative character.[5]

ArtII.S2.C1.1.6 Presidential Directives and Sanctions in World War II

Article II, Section 2, Clause 1:

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

To implement his directives as Commander in Chief in wartime, and especially those which he issued in governing labor disputes, President Franklin Roosevelt often resorted to "sanctions," which may be described as penalties lacking statutory authorization. Ultimately, the President sought to put sanctions by the National War Labor Board on a systematic basis.[1] The order empowered the Director of Economic Stabilization, on receiving a report from the Board that someone was not complying with its orders, to issue "directives" to the appropriate department or agency requiring that privileges, benefits, rights, or preferences enjoyed by the noncomplying party be withdrawn.[2]

Sanctions were also occasionally employed by statutory agencies, such as the Office of Price Administration (OPA), to supplement the penal provisions of the Emergency Price Control Act of January 30, 1942.[3] In *Steuart & Bro. v. Bowles*,[4] the Supreme Court had the opportunity to regularize this type of executive emergency legislation. Here, a retail dealer in fuel oil was charged with having violated a rationing order of OPA by obtaining large quantities of oil from its supplier without surrendering ration coupons, by delivering many thousands of gallons of fuel oil without requiring ration coupons, and so on, and was prohibited by the agency from receiving oil for resale or transfer for the ensuing year. The offender conceded the validity of the rationing order in support of which the suspension order was issued but challenged the validity of the latter as imposing a penalty that Congress had not enacted and asked the district court to enjoin it.

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[3] 7 Fed. Reg. 237 (1942).

[4] 57 Stat. 163 (1943).

[5] *See* Arthur T. Vanderbilt, *War Powers and Their Administration*, 1942 Ann. Surv. Am. L. 271–273 (1942) (listing various Executive Orders, proclamations, and orders of the National War Labor Board).

[1] Exec. Order No. 9370, 8 Fed. Reg. 11,463 (1943).

[2] *Id.*

[3] 56 Stat. 23 (1942).

[4] 322 U.S. 398 (1944).

The court refused to do so[5] and was sustained by the Supreme Court in its position. Justice William Douglas wrote for the Court:

> "[W]ithout rationing, the fuel tanks of a few would be full; the fuel tanks of many would be empty. Some localities would have plenty; communities less favorably situated would suffer. Allocation or rationing is designed to eliminate such inequalities and to treat all alike who are similarly situated. But middlemen—wholesalers and retailers—bent on defying the rationing system could raise havoc with it. These middlemen are the chief if not the only conduits between the source of limited supplies and the consumers. From the viewpoint of a rationing system a middleman who distributes the product in violation and disregard of the prescribed quotas is an inefficient and wasteful conduit. Certainly we could not say that the President would lack the power under this Act to take away from a wasteful factory and route to an efficient one a precious supply of material needed for the manufacture of articles of war. From the point of view of the factory owner from whom the materials were diverted the action would be harsh . . . . But in times of war the national interest cannot wait on individual claims to preference. Yet if the President has the power to channel raw materials into the most efficient industrial units and thus save scarce materials from wastage it is difficult to see why the same principle is not applicable to the distribution of fuel oil."[6]

Sanctions not expressly supported by statue were, therefore, constitutional when the deprivations they wrought were a reasonably implied amplification of the substantive power which they supported and were directly conservative of the interests which this power was created to protect and advance. It is certain, however, that sanctions not uncommonly exceeded this pattern.[7]

ArtII.S2.C1.1.7 Treatment of Enemy Combatants and Nazi Saboteurs

Article II, Section 2, Clause 1:

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

In 1942 eight youths, seven Germans and one American, all of whom had received training in sabotage in Berlin, were brought to this country aboard two German submarines and put ashore, one group on the Florida coast, the other on Long Island, with the idea that they would proceed forthwith to practice their art on American factories, military equipment, and installations. Making their way inland, the saboteurs were soon picked up by the FBI, some in New York, others in Chicago, and turned over to the Provost Marshal of the District of Columbia. On July 2, the President appointed a military commission to try them for violation

[5] *L.P. Steuart & Bro. v. Bowles*, 55 F. Supp. 336, 337 (D.D.C, 1944) ("I see no reason why the O.P.A. should not revoke the allocation to and the authority of the agency. If it can do this, it can do the lesser. If it can put an end to the allocation it can suspend it.").

[6] 322 U.S at 405–06.

[7] Edward Corwin, The President, Office and Powers 284–85 (1984).

of the laws of war, to wit: for not wearing fixed emblems to indicate their combatant status.[1] In the midst of the trial, the accused petitioned the Supreme Court and the United States District Court for the District of Columbia for leave to bring habeas corpus proceedings. Their argument embraced the contentions: (1) that the offense charged against them was not known to the laws of the United States; (2) that it was not one arising in the land and naval forces; and (3) that the tribunal trying them had not been constituted in accordance with the requirements of the Articles of War.

The first argument the Court met as follows: The act of Congress in providing for the trial before military tribunals of offenses against the law of war is sufficiently definite, although Congress has not undertaken to codify or mark the precise boundaries of the law of war, or to enumerate or define by statute all the acts which that law condemns. ". . . [T]hose who during time of war pass surreptitiously from enemy territory into . . . [that of the United States], discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission."[2] The second argument it disposed of by showing that petitioners' case was of a kind that was never deemed to be within the terms of the Fifth and Sixth Amendments, citing in confirmation of this position the trial of Major Andre.[3] The third contention the Court overruled by declining to draw the line between the powers of Congress and the President in the premises,[4] thereby, in effect, attributing to the President the right to amend the Articles of War in a case of the kind before the Court ad libitum.[5]

The Court also rejected the jurisdictional challenge by one of the saboteurs on the basis of his claim to U.S. citizenship, finding U.S. citizenship wholly irrelevant to the determination of whether a wartime captive is an "enemy belligerent" within the meaning of the law of war.[6]

ArtII.S2.C1.1.8 World War II War Crimes Tribunals

Article II, Section 2, Clause 1:

> *The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive*

[1] Military Order of July 2, 1942, 7 Fed. Reg. 5103 (July 3, 1942). President Roosevelt by Proclamation established that "subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States." Proclamation No. 2561, of July 2, 1942, 7 Fed. Reg. 5101, 56 Stat. 1964. The Supreme Court disregarded the President's effort to deny the accused access to the court, stating "there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case." *Ex parte* Quirin, 317 U.S. 1, 25 (1942). Moreover, the Court observed, "neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission." *Id.*

[2] *Ex parte* Quirin, 317 U.S. at 29–30, 35.

[3] *Id.* at 41–42.

[4] *Id.* at 28–29.

[5] The Court would later take more seriously Congress's role in cabining the President's authority to establish military commissions. *See* ArtII.S2.C1.1.18 Detention Authority.

[6] *Ex parte* Quirin, 317 U.S. 1, 37–38 (1942) ("Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war."). *See also* Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956), cert. denied, 352 U.S. 1014 (1957) ("[T]he petitioner's citizenship in the United States does not . . . confer upon him any constitutional rights not accorded any other belligerent under the laws of war.").

Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

As a matter of fact, in General Tomoyuki Yamashita's case,[1] which was brought after the termination of hostilities for alleged "war crimes," the Court abandoned its restrictive conception altogether. In the words of Justice John Rutledge's dissenting opinion in this case:

> The difference between the Court's view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth Amendment apply.[2]

And the adherence of the United States to the Charter of London in August 1945, under which the Nazi leaders were brought to trial, is explicable by the same theory. These individuals were charged with the crime of instigating aggressive war, which at the time of its commission was not a crime either under international law or under the laws of the prosecuting governments. It must be presumed that the President is not in his capacity as Supreme Commander bound by the prohibition in the Constitution of ex post facto laws, nor did international law clearly forbid ex post facto laws.[3]

ArtII.S2.C1.1.9 Postwar Period and Commander in Chief Clause

Article II, Section 2, Clause 1:

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

The end of active hostilities did not terminate either the emergency or the Federal Government's response to it. President Harry Truman proclaimed the termination of hostilities on December 31, 1946,[1] and, in July 1947, Congress enacted a joint resolution that repealed a great variety of wartime statutes and set termination dates for others.[2] Signing the resolution, the President said that the emergencies declared in 1939 and 1940 continued to exist and that it was "not possible at this time to provide for terminating all war and emergency powers."[3] The hot war was giving way to the Cold War.

The postwar period was a time of reaction against the wartime exercise of power by President Franklin Roosevelt, and President Truman was not permitted the same liberties.

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[1] *In re* Yamashita, 327 U.S. 1 (1946).

[2] 327 U.S. at 81.

[3] *See* Leo Gross, *The Criminality of Aggressive War*, 41 Am. Pol. Sci. Rev. 205 (1947).

[1] Proc. 2714, 12 Fed. Reg. 1 (1947).

[2] S.J. Res. 123, 61 Stat. 449 (1947).

[3] Woods v. Cloyd W. Miller Co., 333 U.S. 138, 140 n.3 (1948).

The Supreme Court signaled this reaction when it struck down the President's action in seizing the steel industry while it was struck during the Korean War.[4]

Nonetheless, the long period of the Cold War and of active hostilities in Korea and Indochina, in addition to the issue of the use of troops in the absence of congressional authorization, further created conditions for consolidation of powers in the President. In particular, a string of declarations of national emergencies, most, in whole or part, under the Trading with the Enemy Act,[5] undergirded the exercise of much presidential power. In the storm of response to the Vietnamese conflict, here, too, Congress reasserted legislative power to curtail what it viewed as excessive executive power, limiting the Trading with the Enemy Act to wartime and enacting the International Emergency Economic Powers Act,[6] which delegated most of the same range of powers to the President, but which changed the scope of the power delegated to declare national emergencies.[7] Congress also passed the National Emergencies Act,[8] prescribing procedures for the declaration of national emergencies, for their termination, and for presidential reporting to Congress in connection with national emergencies. To end the practice of declaring national emergencies for an indefinite duration, Congress provided that any emergency not otherwise terminated would expire one year after its declaration unless the President published in the Federal Register and transmitted to Congress a notice that the emergency would continue in effect.[9]

ArtII.S2.C1.1.10 Use of Troops Overseas and Congressional Authorization

Article II, Section 2, Clause 1:

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

In 1912, the Department of State published a memorandum prepared by its Solicitor which set out to justify the Right to Protect Citizens in Foreign Countries by Landing Forces.[1] In addition to the justification, the memorandum summarized forty-seven instances in which force had been used, in most of them without any congressional authorization.[2] Twice revised and reissued, the memorandum was joined by a 1928 independent study and a 1945 work by a former government official in supporting conclusions that drifted away from the original

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[4] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The majority stated, "Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production." *Id.* at 587.

[5] First War Powers Act § 301(1), 55 Stat. 838, 839–840 (1941) (amending § 5 of the Trading with the Enemy Act of 1917, 40 Stat. 411, now codified at 50 U.S.C. § 4305).

[6] Pub. L. No. 95-223, 91 Stat. 1626, 50 U.S.C. §§ 1701–1706 (1977).

[7] Congress authorized the declaration of a national emergency based only on "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or the economy of the United States." 50 U.S.C. § 1701.

[8] Pub. L. No. 94-412, 90 Stat. 1255, 50 U.S.C. §§ 1601–1651 (1976).

[9] 50 U.S.C. § 1622.

[1] J. Clark, Memorandum by the Solicitor for the Department of State, Right to Protect Citizens in Foreign Countries by Landing Forces (1912).

[2] *Id.* appendix.

justification of the use of United States forces abroad to the use of such forces at the discretion of the President and free from control by Congress.[3]

New lists and revised arguments were published to support the actions of President Harry Truman in sending troops to Korea and of Presidents John Kennedy and Lyndon Johnson in sending troops first to Vietnam and then to Indochina generally,[4] and new lists have since been propounded.[5] The great majority of the instances cited involved fights with pirates, landings of small naval contingents on barbarous or semibarbarous coasts to protect commerce, the dispatch of small bodies of troops to chase bandits across the Mexican border, and the like, and some incidents supposedly without authorization from Congress did in fact have underlying statutory or other legislative authorization.[6] Some instances, e.g., President James Polk's use of troops to precipitate war with Mexico in 1846, President Ulysses Grant's attempt to annex the Dominican Republic, President William McKinley's dispatch of troops into China during the Boxer Rebellion, involved considerable exercises of presidential power, but in general purposes were limited and congressional authority was sought for the use of troops against a sovereign state or in such a way as to constitute war. The early years of the twentieth century saw the expansion in the Caribbean and Latin America both of the use of troops for the furthering of what was perceived to be our national interests and of the power of the President to deploy the military force of the United States without congressional authorization.[7]

The pre-war actions of Presidents Woodrow Wilson and Franklin Roosevelt advanced in substantial degrees the fact of presidential initiative, although the theory did not begin to catch up with the fact until the "Great Debate" over the commitment of troops by the United States to Europe under the Atlantic Pact. While congressional authorization was obtained, that debate, the debate over the United Nations charter, and the debate over Article 5 of the North Atlantic Treaty of 1949, declaring that "armed attack" against one signatory was to be

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[3] *Id.* Milton Offutt, The Protection of Citizens Abroad by the Armed Forces of the United States (1928); James Grafton Rogers, World Policing and the Constitution app. (1945). The last volume examined whether the President was empowered to participate in United Nations peacekeeping actions absent congressional authorization.

[4] *E.g.*, H. Rep. No. 127, 82d Congress, 1st Sess. (1951), 55–62; Edward Corwin, *Who Has the Power to Make War?*, New York Times Magazine 11 (July 31, 1949); Authority of the President to Repel the Attack in Korea, 23 Dept. State Bull. 173 (1950); Dept. of State, Historical Studies Div., Armed Actions Taken by the United States Without a Declaration of War, 1789–1967 (1967). One commentator stated:

"There has never, I believe, been any serious doubt—in the sense of non-politically inspired doubt—of the President's constitutional authority to do what he did. The basis for this conclusion in legal theory and historical precedent was fully set out in the State Department's memorandum of July 3, 1950, extensively published. But the wisdom of the decision not to ask for congressional approval has been doubted."

After discussing several reasons establishing the wisdom of the decision, the Secretary continued:

"The President agreed, moved also, I think, by another passionately held conviction. His great office was to him a sacred and temporary trust, which he was determined to pass on unimpaired by the slightest loss of power or prestige. This attitude would incline him strongly against any attempt to divert criticism from himself by action that might establish a precedent in derogation of presidential power to send our forces into battle. The memorandum that we prepared listed eighty-seven instances in the past century in which his predecessors had done this. And thus yet another decision was made."

Dean Acheson, Present at the Creation 414, 415 (1969).

[5] War Powers Legislation: Hearings Before the Senate Foreign Relations Committee, 92d Congress, 1st Sess. (1971), 347, 354–355, 359–379 (Sen. Barry Goldwater); J. Terry Emerson, War Powers Legislation, 74 W. Va. L. Rev. 53 (1972). United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990) (citing Instances of Use of United States Armed Forces Abroad, 1798–1989, Cong. Rsch. Serv. (1989). For an effort to reconstruct the development and continuation of the listings, see Francis D. Wormuth & Edwin B. Firmage, To Chain the Dog of War 142–145 (1989).

[6] *See*, *e.g.*, Act of Mar. 3, 1819, ch. 77, §1, 3 Stat. 510; extended by Act of Jan. 30, 1823, ch. 7, 3 Stat. 721 (authorizing public armed vessels of the United States to suppress piracy), *codified at* 33 U.S.C. § 381.

[7] Considerable debate continues with respect to the meaning of the historical record. For reflections of the narrow reading, see Nat'l Commitments Resolution, Rep. of the Sen. Committee on Foreign Relations, S. Rep. No. 91-129, 1st Sess. (1969); John Hart Ely, War And Responsibility: Constitutional Lessons Of Vietnam And Its Aftermath (1993). *See* Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power: The Origins (1976); J. Terry Emerson, *Making War Without a Declaration*, 17 J. Legis. 23 (1990).

considered as "an attack" against all signatories, provided the occasion for the formulation of a theory of independent presidential power to use the armed forces in the national interest at his discretion.[8] Thus, Secretary of State Dean Acheson told Congress: "Not only has the President the authority to use the armed forces in carrying out the broad foreign policy of the United States implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution."[9]

President Truman did not seek congressional authorization before sending troops to Korea, and subsequent Presidents similarly acted on their own in putting troops into many foreign countries, including the Dominican Republic, Lebanon, and most notably Indochina.[10] Eventually, public opposition precipitated another constitutional debate whether the President had the authority to commit troops to foreign combat without the approval of Congress, culminating in the enactment of the War Powers Resolution.[11] The Resolution did little to inhibit Presidents from sending troops abroad without prior congressional authorization, and the Supreme Court has not squarely addressed the issue.[12]

ArtII.S2.C1.1.11 Presidential Power and Commander in Chief Clause

Article II, Section 2, Clause 1:

> *The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive*

[8] For some popular defenses of presidential power during the "Great Debate," see Edward Corwin, *Who Has the Power to Make War?* New York Times Magazine 11 (July 31, 1949); Henry Commager, *Presidential Power: The Issue Analyzed*, New York Times Magazine 11 (January 14, 1951). *Cf.* Douglas, The Constitutional and Legal Basis for the President's Action in Using Armed Forces to Repel the Invasion of South Korea, 96 Cong. Rec. 9647–49 (1950). President Truman and Secretary Acheson used the argument from the U.N. Charter in defending the United States' actions in Korea. *See, e.g.*, Jane Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 Geo. L. J. 597 (1993).

[9] Assignment of Ground Forces of the United States to Duty in the European Area: Hearings Before the Senate Foreign Relations and Armed Services Committees, 82 Cong., 1st Sess. (1951), 92.

[10] See the discussion in National Commitments Resolution, Report of the Senate Committee on Foreign Relations, S. Rep. No. 91–129, 91st Cong., 1st Sess. (1969); U.S. Commitments to Foreign Powers: Hearings Before the Senate Committee on Foreign Relations, 90th Cong., 1st Sess. 16–19 (1967) (Professor Bartlett).

[11] Pub. L. No. 93-148, 87 Stat. 555, 50 U.S.C. §§ 1541–1548.

[12] Lower courts have largely avoided resolving challenges to presidential authority to insert U.S. forces into hostile situations without congressional authorization on grounds of non-justiciability, mootness, ripeness, or standing. *See, e.g.*, Kucinich v. Obama, 821 F. Supp. 2d 110, 125 (D.D.C. 2011) (finding that Members of the House of Representatives and group of taxpayers lacked standing to challenge military operations in Libya); Doe v. Bush, 323 F.3d 133, 139 (1st Cir. 2003) (holding challenge to planned military action under the Authorization for Use of Military Force Against Iraq Resolution of 2002 Pub L. No. 107–243, 116 1498 not ripe for adjudication); Campbell v. Clinton, 52 F. Supp.2d 34 (D.D.C. 1999) (dismissing challenge to military air campaign in Kosovo for lack of standing), *aff'd*, 203 F.2d 19 (D.C. Cir.), *cert. den.,* 531 U.S. 815 (2000); Dellums v . Bush, 752 F.Supp. 1141 (D.D.C. 1990) (dismissing suit to enjoin military intervention in Iraq on ripeness grounds); Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987) (dismissing lawsuit to require reporting of reflagging of Kuwaiti vessels on grounds of equitable discretion and political question doctrines), *aff'd*, No. 87–5426 (D.C. Cir. 1988); Conyers v. Reagan, 578 F. Supp. 324 (D.D.C. 1984), *aff'd*, 765 F.2d 1124 (D.C. Cir. 1985) (dismissing challenge by Members of Congress to military intervention in Grenada on the basis of the doctrine of equitable/remedial discretion); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985) (dismissing challenge to military support to paramilitary operations designed to overthrow the government of Nicaragua as a nonjusticiable political question); dismissing House Members' challenge to military aid supplied to the government of El Salvador, including sending U.S. military advisers, on political question grounds); Holtzman v. Schlesinger, 484 F.2d 1307, 1309–11 (2d Cir. 1973) (rejecting challenge to hostilities in Cambodia as political question).

Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

The President's power with regard to the armed forces has long been debated. In defense of executive action in Indochina, the Legal Adviser of the State Department, in a widely circulated document, contended:

> Under the Constitution, the President, in addition to being Chief Executive, is Commander in Chief of the Army and Navy. He holds the prime responsibility for the conduct of United States foreign relations. These duties carry very broad powers, including the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States.
>
> In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States. In the 20th century, the world has grown much smaller. An attack on a country far from our shores can impinge directly on the Nation's security. In the SEATO treaty, for example, it is formally declared that an armed attack against Viet Nam would endanger the peace and security of the United States.
>
> Under our Constitution it is the President who must decide when an armed attack has occurred. He has also the constitutional responsibility for determining what measures of defense are required when the peace and safety of the United States are endangered. If he considers that deployment of U.S. forces to South Viet Nam is required, and that military measures against the source of Communist aggression in North Viet Nam are necessary, he is constitutionally empowered to take those measures.[1]

Opponents of such expanded presidential powers have contended, however, that the authority to initiate war was not divided between the Executive and Congress but was vested exclusively in Congress. The President had the duty and the power to repeal sudden attacks and act in other emergencies, and in his role as Commander in Chief he was empowered to direct the armed forces for any purpose specified by Congress.[2] Though Congress asserted itself in some respects, it never really managed to confront the President's power with any sort of effective limitation, until the 1970s.

ArtII.S2.C1.1.12 Congressional Control Over President's Discretion

Article II, Section 2, Clause 1:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;

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[1] Leonard C. Meeker, *The Legality of United States Participation in the Defense of Viet Nam*, 54 Dep't State Bull. 474, 484–485 (1966). *See also* John N. Moore, *The National Executive and the Use of the Armed Forces Abroad*, 21 Naval War College Rev. 28 (1969); Quincy Wright, *The Power of the Executive to Use Military Forces Abroad*, 10 Va. J. Int. L. 43 (1969); Documents Relating to the War Powers of Congress, The President's Authority as Commander in Chief and the War in Indochina, Senate Committee on Foreign Relations, 91st Congress, 2d sess. (1970), 1 (Under Secretary of State Katzenbach), 90 (J. Stevenson, Legal Adviser, Department of State), 120 (Professor Moore), 175 (Assistant Attorney General Rehnquist).

[2] *E.g.*, F. Wormuth & E. Firmage, To Chain the Dog of War (1989), F.J. Ely, War and Responsibility: Constitutional Lessons of the Vietnam War and its Aftermath (1993); U.S. Commitments to Foreign Powers: Hearings Before the Senate Committee on Foreign Relations, 90th Cong., 1st sess. 9 (1967) (Bartlett); War Powers Legislation: Hearings Before the Senate Committee on Foreign Relations, 92d Cong., 1st sess. 7 (1971).

he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Over the President's veto, Congress enacted in 1973 the War Powers Resolution,[1] designed to redistribute the war powers between the President and Congress. Although ambiguous in some respects, the Resolution appears to define restrictively the President's powers, to require him to report fully to Congress upon the introduction of troops into foreign areas, to specify a maximum time limitation on the engagement of hostilities absent affirmative congressional action, and to provide a means for Congress to require cessation of hostilities in advance of the time set.

The Resolution states that the President's power to commit United States troops into hostilities, or into situations of imminent involvement in hostilities, is limited to instances of (1) a declaration of war, (2) a specific statutory authorization, or (3) a national emergency created by an attack on the United States, its territories or possessions, or its armed forces.[2] In the absence of a declaration of war, a President must within 48 hours report to Congress whenever he introduces troops (1) into hostilities or situations of imminent hostilities, (2) into a foreign nation while equipped for combat, except in certain nonhostile situations, or (3) in numbers which substantially enlarge United States troops equipped for combat already located in a foreign nation.[3] If the President introduces troops in the first of these three situations, then he must terminate the use of troops within 60 days after his report was submitted or was required to be submitted to Congress, unless Congress (1) has declared war, (2) has extended the period, or (3) is unable to meet as a result of an attack on the United States, but the period can be extended another 30 days by the President's certification to Congress of unavoidable military necessity respecting the safety of the troops.[4] Congress may through the passage of a concurrent resolution require the President to remove the troops sooner.[5] The Resolution further states that no legislation, whether enacted prior to or subsequent to passage of the Resolution will be taken to empower the President to use troops abroad unless the legislation specifically does so and that no treaty may so empower the President unless it is supplemented by implementing legislation specifically addressed to the issue.[6]

Aside from its use as a rhetorical device, the War Powers Resolution has been of little worth in reordering presidential-congressional relations in the years since its enactment. In general, Presidents operating under it have expressly or implicitly considered it to be at least in part an

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[1] Pub. L. No. 93-148, 87 Stat. 555 (1973), *codified at* 50 U.S.C. §§ 1541–1548. For congressional intent and explanation, see H. Rep. No. 93-287, S. Rep. No. 9-220, and H. Rep. No. 93-547 (Conference Report), 93d Cong., 1st sess. (1973). The President's veto message is H. Doc. No. 93-171, 93d Cong. 1st Sess. (1973); The War Powers Resolution: Relevant Documents, Reports, Correspondence, House Committee on Foreign Affairs, 103d Cong., 2d Sess. 1–46 (1994) (Comm. Print). For an account of passage and assessment of the disputed compliance from the congressional point of view, see The War Powers Resolution, A Special Study of the House Committee on Foreign Affairs, 102d Cong., 2d Sess. (Comm. Print) (1982).

[2] 87 Stat. 554, § 2(c), 50 U.S.C. § 1541.

[3] 50 U.S.C. § 1543(a).

[4] 50 U.S.C. § 1544(b).

[5] *Id.* at § 1544(c). Following *INS v. Chadha*, 462 U.S. 919 (1983), Congress subsequently enacted expedited procedures for considering joint resolutions or bills to require removing U.S. Armed Forces from situations of hostilities. Department of State Authorization Act, Fiscal Years 1984 and 1985, Pub. L. No. 98–164 § 1013, 97 Stat. 1062 (1983), *codified at* 50 U.S.C. § 1546(a).

[6] 50 U.S.C. § 1547(a).

unconstitutional infringement on presidential powers,[7] and on each occasion of use abroad of United States troops the President in reporting to Congress has done so "consistent[ly] with" the reporting section but not pursuant to the provision.[8] Upon the invasion of Kuwait by Iraqi troops in 1990, President George H.W. Bush sought not congressional authorization but a United Nations Security Council resolution authorizing the use of force by member Nations. Only at the last moment did the President seek authorization from Congress, he and his officials contending that he had the power to act unilaterally.[9] After intensive debate, Congress voted, 250 to 183 in the House of Representatives and 53 to 46 in the Senate, to authorize the President to use United States troops pursuant to the U.N. resolution and purporting to bring the act within the context of the War Powers Resolution.[10]

Presidents have continued to claim independent authority to commit U.S. Armed Forces to involvements abroad absent any congressional participation other than consultation and after-the-fact financing. In 1994, for example, President Bill Clinton based his authority to order the participation of U.S. forces in NATO actions in Bosnia-Herzegovina on his "constitutional authority to conduct U.S. foreign relations" and as his role as Commander in Chief,[11] and protested efforts to restrict the use of military forces there and elsewhere as an improper and possibly unconstitutional limitation on his "command and control" of U.S. forces.[12] In March 2011, President Barack Obama ordered U.S. military forces to take action as part of an international coalition to enforce U.N. Security Council Resolution 1973, which authorized U.N. Member States to take all necessary measures (other than through military occupation) to protect civilians from attacks by the Libyan government and to establish a no-fly zone over the country. Although these operations had not been authorized by legislation, the Executive Branch submitted a report to Congress which claimed that the President has the "constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct such limited military operations abroad."[13]

By contrast, President George W. Bush sought a resolution from Congress in 2002 to approve the eventual invasion of Iraq before seeking a U.N. Security Council resolution, all the

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[7] *See generally* Dept. of Justice, Office of Legal Counsel, *Authority of the President under Domestic and International Law to Use Military Force against Iraq*, 26 Op. O.L.C. 1, 39–45 (2002) (discussing presidential views and Dept. of Justice opinions concerning the constitutionality of the War Powers Resolution).

[8] *See The War Powers Resolution: Relevant Documents, Reports, Correspondence*, footnote 91 at 47 (Pres. Ford on transport of refugees from Danang), 55 (Pres. Jimmy Carter on attempted rescue of Iranian hostages), 73 (Pres. Ronald Reagan on use of troops in Lebanon), 113 (Pres. Ronald Reagan on Grenada), 144 (Pres. George H.W. Bush on Panama), 147, 149 (Pres. George H.W. Bush on Persian Gulf), 189 (Pres. George H.W. Bush on Somalia), 262 (Pres. William J. Clinton on Haiti).

[9] *See* Crisis in the Persian Gulf Region: U.S. Policy Options and Implications: Hearings Before the Senate Committee on Armed Services, 101st Cong., 2d Sess. 701 (1990) (Secretary Cheney) (President did not require "any additional authorization from the Congress" before attacking Iraq). On the day following his request for supporting legislation from Congress, President George H.W. Bush answered a question about the requested action, stating: "I don't think I need it. I feel that I have the authority to fully implement the United Nations resolutions." 27 Weekly Comp. Pres. Doc. 25 (Jan. 8, 1991).

[10] Pub. L. No. 102-1, 105 Stat. 3 (1991).

[11] 30 Weekly Comp. Pres. Doc. 406 (March 2, 1994).

[12] *See* Interview with Radio Reporters, 1993 Pub. Papers 1763–64.

[13] *Report to the House of Representatives on United States Activities in Libya*, submitted June 15, 2011. The Department of Justice's Office of Legal Counsel issued a legal opinion which claimed that the President possessed independent constitutional authority to commence U.S. military operations in Libya without prior congressional authorization because these operations would be "limited" in scope and the President could "reasonably determine that such use of force was in the national interest." Dept. of Justice, Office of Legal Counsel, *Authority to Use Military Force in Libya* (2011). The opinion stated that "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period" may generally require prior congressional authorization, but claimed that "historical practice of presidential military action without congressional approval precludes any suggestion that Congress's authority to declare war covers every military engagement, however limited, that the President initiates." *Id.* at 8.

while denying that express authorization from Congress, or for that matter, the U.N. Security Council, was necessary to renew hostilities in Iraq. Prior to adjourning for its midterm elections, Congress passed the Authorization for Use of Military Force against Iraq Resolution of 2002,[14] which it styled as "specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." On signing the measure, the President noted that he had sought "an additional resolution of support" from Congress, and expressed appreciation for receiving that support, but stated, "my request for it did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use force to deter, prevent, or respond to aggression or other threats to U.S. interests or on the constitutionality of the War Powers Resolution."[15] In the Bush administration's view, the primary benefit of receiving authorization from Congress seems to have been the message of political unity it conveyed to the rest of the world rather than the fulfillment of any constitutional requirements.

Although there is recurrent talk within Congress and without as to amending the War Powers Resolution to strengthen it, no consensus has emerged, and there is little evidence that there exists within Congress the resolve to exercise the responsibility concomitant with strengthening it.[16]

ArtII.S2.C1.1.13 President as Commander of Armed Forces

Article II, Section 2, Clause 1:

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

While the President customarily delegates supreme command of the forces in active service, there is no constitutional reason why he should do so, and he has been known to resolve personally important questions of military policy. President Abraham Lincoln early in 1862 issued orders for a general advance in the hopes of stimulating General George McClellan to action; President Woodrow Wilson in 1918 settled the question of an independent American command on the Western Front; President Harry Truman in 1945 ordered that the bomb be dropped on Hiroshima and Nagasaki.[1] As against an enemy in the field, the President possesses all the powers which are accorded by international law to any supreme commander. "He may invade the hostile country, and subject it to the sovereignty and authority of the United States."[2] In the absence of attempts by Congress to limit his or her power, the President may establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the

[14] Pub. L. No. 107-243; 116 Stat. 1498 (2002). The House approved the resolution by a vote of 296-133. The Senate passed the House version of H.J. Res. 114 by a vote of 77-23.

[15] *See* President's Statement on Signing H.J. Res. 114, Oct. 16, 2002, by Gerhard Peters and John T. Woolley, The American Presidency Project.

[16] *See*, on proposals to amend and on congressional responsibility, John Hart Ely, War And Responsibility: Constitutional Lessons Of Vietnam And Its Aftermath 115–138 (1993).

[1] For a review of how several wartime Presidents have operated in this sphere, see The Ultimate Decision: The President As Commander In Chief (1960).

[2] Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850).

United States, and his or her authority to do this sometimes survives cessation of hostilities.[3] The President may employ secret agents to enter the enemy's lines and obtain information as to its strength, resources, and movements.[4] He or she may, at least with the assent of Congress, authorize commercial intercourse with the enemy.[5] The President may also requisition property and compel services from American citizens and friendly aliens who are situated within the theater of military operations when necessity requires, thereby incurring for the United States the obligation to render "just compensation."[6] By the same warrant, a President may bring hostilities to a conclusion by arranging an armistice, stipulating conditions that may determine to a great extent the ensuing peace.[7] The President may not, however, effect a permanent acquisition of territory,[8] though he or she may govern recently acquired territory until Congress sets up a more permanent regime.[9]

The President is the ultimate tribunal for the enforcement of the rules and regulations that Congress adopts for the government of the forces, and that are enforced through courts-martial.[10] Indeed, until 1830, courts-martial were convened solely on the President's authority as Commander in Chief.[11] Such rules and regulations are, moreover, it seems, subject in wartime to his or her amendment at discretion.[12] Similarly, the power of Congress to "make rules for the government and regulation of the land and naval forces" (Art. I, § 8, cl. 14) did not prevent President Lincoln from promulgating, in April 1863, a code of rules to govern the conduct in the field of the armies of the United States, which was prepared at his instance by a commission headed by Francis Lieber and which later became the basis of all similar codifications both here and abroad.[13] One important power that the President lacks is that of choosing his or her subordinates, whose grades and qualifications are determined by Congress and whose appointment is ordinarily made by and with the advice and consent of the Senate, though undoubtedly Congress could if it wished vest their appointment in "the President alone."[14] Also, the President's power to dismiss an officer from the service, once unlimited, is today confined by statute in time of peace to dismissal pursuant to a sentence of a general court-martial or in commutation of a sentence of a court-martial.[15] But the provision is not regarded by the Court as preventing the President from displacing an officer of the Army or Navy by appointing with the advice and consent of the Senate another person in his or her place.[16] Congress has not limited the President's power of dismissal in time of war.

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[3] Madsen v. Kinsella, 343 U.S. 341, 348 (1952). *See also* Johnson v. Eisentrager, 339 U.S. 763, 789 (1950).

[4] Totten v. United States, 92 U.S. 105 (1876).

[5] Hamilton v. Dillin, 88 U.S. (21 Wall.) 73 (1875); Haver v. Yaker, 76 U.S. (9 Wall.) 32 (1869).

[6] Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1852); United States v. Russell, 80 U.S. (13 Wall.) 623 (1871); Totten v. United States, 92 U.S. 105 (1876); 40 Ops. Atty. Gen. 250, 253 (1942).

[7] *Cf.* the Protocol of August 12, 1898, which largely foreshadowed the Peace of Paris, 30 Stat. 1742 and President Wilson's Fourteen Points, which were incorporated in the Armistice of November 11, 1918.

[8] Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850).

[9] Santiago v. Nogueras, 214 U.S. 260 (1909). As to temporarily occupied territory, see Dooley v. United States, 182 U.S. 222, 230–31 (1901).

[10] 15 Ops. Atty. Gen. 297, n; cf. 1 Ops. Atty. Gen. 233, 234 (Attorney General Wirt stating the contrary view).

[11] Swaim v. United States, 165 U.S. 553 (1897); and cases there reviewed. *See also* Givens v. Zerbst, 255 U.S. 11 (1921).

[12] *Ex parte* Quirin, 317 U.S. 1, 28–29 (1942).

[13] 3 General Orders, No. 100, Official Records, War Rebellion (Apr. 24, 1863) (ser. III).

[14] *See*, *e.g.*, Mimmack v. United States, 97 U.S. 426, 437 (1878); United States v. Corson, 114 U.S. 619 (1885).

[15] 10 U.S.C. § 1161. *See also* 10 U.S.C. § 804 (permitting officer dismissed by presidential order to demand court-martial).

[16] Mullan v. United States, 140 U.S. 240 (1891); Wallace v. United States, 257 U.S. 541 (1922).

ArtII.S2.C1.1.14 Martial Law Generally

Article II, Section 2, Clause 1:

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

Martial law can be validly and constitutionally established by supreme political authority in wartime as held in *Luther v. Borden*.[1] In *Luther*, the Court held that state declarations of martial law were conclusive and therefore not subject to judicial review.[2] In this case, the Court found that the Rhode Island legislature had been within its rights in resorting to the rights and usages of war in combating insurrection in that state.[3] The decision in the *Prize Cases*,[4] although not dealing directly with the subject of martial law, gave national scope to the same general principle in 1863.

After the Civil War, a divided Court, in *Ex parte Milligan*,[5] pronounced President Abraham Lincoln's suspension of the writ of habeas corpus in September 1863 void. The salient passage of the Court's opinion bearing on this point is the following:

> "If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."[6]

Four Justices, speaking by Chief Justice Salmon Chase, while holding Milligan's trial to have been void because it violated the Act of March 3, 1863, governing the custody and trial of persons who had been deprived of the habeas corpus privilege, declared their belief that Congress could have authorized Milligan's military trial. The Chief Justice wrote:

> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander in Chief. Both

[1] 48 U.S. (7 How.) 1 (1849). *See also* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 32–33 (1827) ("When the President exercises an authority confided to him by law, the presumption is, that it is exercised in pursuance of law.").

[2] 48 U.S. (7 How.) at 45.

[3] *Id.*

[4] 67 U.S. (2 Bl.) 635 (1863).

[5] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

[6] *Id.* at 127.

> these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions . . . .
>
> We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists.
>
> Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety.[7]

In short, only Congress can authorize the substitution of military tribunals for civil tribunals for the trial of offenses; and Congress can do so only in wartime.

Early in the twentieth century, however, the Court appeared to retreat from its stand in *Milligan* insofar as it held in *Moyer v. Peabody*[8] that:

> "[T]he Governor's declaration that a state of insurrection existed is conclusive of that fact. . . . [T]he plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. . . . So long as such arrests are made in good faith and in honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief."[9]

The "good faith" test of *Moyer*, however, was superseded by the "direct relation" test of *Sterling v. Constantin*,[10] where the Court made it very clear that "[i]t does not follow that every sort of action the Governor may take, no matter how justified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."[11]

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[7] *Id.* at 139–40 (Chase, C.J., concurring). In *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1864), the Court had held, while war was still flagrant, that it had no power to review by certiorari the proceedings of a military commission ordered by a general officer of the Army, commanding a military department.

[8] 212 U.S. 78 (1909).

[9] 212 U.S. at 83–85.

[10] 287 U.S. 378, 400 (1932) (distinguishing *Moyer* because "[i]n that case it appeared that the action of the Governor had direct relation to the subduing of the insurrection by the temporary detention of one believed to be a participant, and the general language of the opinion must be taken in connection with the point actually decided"). The Court stated: "The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decision, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace." *Id.* at 399–400.

[11] *Id.* at 400–401. State governors have ignored this holding on numerous occasions. *E.g.*, Allen v. Oklahoma City, 175 Okla. 421, 52 P.2d 1054 (1935) ("[T] he martial law decree afforded no justification whatever for the enactment of the [segregation] ordinance, nor did this instrument impart any validity to the ordinance."); Hearon v. Calus, 178 S.C. 381, 183 S.E. 13, 21 (1935) ("In the case now before this court [involving the governor's takeover of the state highway commission] there is no particle of evidence, nor even suggestion, that there existed a state of war, or anything approaching disorder"); and Joyner v. Browning, 30 F. Supp. 512 (W.D. Tenn. 1939) (enjoining governor from employing martial law to disenfranchise voters on the basis of sex and race).

ArtII.S2.C1.1.15 Martial Law in Hawaii

Article II, Section 2, Clause 1:

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

The question of the constitutional status of martial law was raised again in World War II by the proclamation of Governor Joseph Poindexter of Hawaii, on December 7, 1941, suspending the writ of habeas corpus and conferring on the local commanding General of the Army all his own powers as governor and also "all of the powers normally exercised by the judicial officers of this territory during the present emergency and until the danger of invasion is removed." Two days later the Governor's action was approved by President Franklin Roosevelt. The regime which the proclamation set up continued with certain abatements until October 24, 1944.

By section 67 of the Organic Act of April 30, 1900,[1] the Territorial Governor was authorized "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, [to] suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known." By section 5 of the Organic Act, "the Constitution shall have the same force and effect within the said Territory as elsewhere in the United States."[2] In a brace of cases which reached it in February 1945, but which it contrived to postpone deciding until February 1946,[3] the Court, speaking by Justice Hugo Black, held that the term "martial law" as employed in the Organic Act, "while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals."[4]

The Court relied on the majority opinion in *Ex parte Milligan*. Chief Justice Harlan Stone concurred in the result. "I assume also," he said, "that there could be circumstances in which the public safety requires, and the Constitution permits, substitution of trials by military tribunals for trials in the civil courts,"[5] but added that the military authorities themselves had failed to show justifying facts in this instance.[6] Justice Harold Burton, speaking for himself and Justice Felix Frankfurter, dissented. He stressed the importance of Hawaii as a military outpost and its constant exposure to the danger of fresh invasion.[7] He warned that "courts must guard themselves with special care against judging past military action too closely by the inapplicable standards of judicial, or even military, hindsight."[8]

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[1] 31 Stat. 141, 153 (1900).

[2] 31 Stat. at 141–142.

[3] Duncan v. Kahanamoku, 327 U.S. 304 (1946).

[4] *Id.* at 324.

[5] *Id.* at 336 (Stone, C.J., concurring in the result).

[6] *Id.* at 337.

[7] *Id.* at 344 (Burton, J., dissenting).

[8] *Id.* at 343.

ArtII.S2.C1.1.16 Martial Law and Domestic Disorder

Article II, Section 2, Clause 1:

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

President Washington himself took command of state militia called into federal service to quell the Whiskey Rebellion, but there were not too many occasions subsequently in which federal troops or state militia called into federal service were required.[1] Since World War II, however, the President, by virtue of his own powers and the authority vested in him by Congress,[2] has used federal troops on a number of occasions, five of them involving resistance to desegregation decrees in the South.[3] In 1957, Governor Orval Faubus employed the Arkansas National Guard to resist court-ordered desegregation in Little Rock, and President Dwight Eisenhower dispatched federal soldiers and brought the Guard under federal authority.[4] In 1962, President John Kennedy dispatched federal troops to Oxford, Mississippi, when federal marshals were unable to control rioting that broke out upon the admission of an African American student to the University of Mississippi.[5] In June and September of 1964, President Lyndon Johnson sent troops into Alabama to enforce court decrees opening schools to Black students.[6] And, in 1965, the President used federal troops and federalized local Guardsmen to protect participants in a civil rights march. The President justified his action on the ground that there was a substantial likelihood of domestic violence because state authorities were refusing to protect the marchers.[7]

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[1] United States Adjutant-General, Federal Aid in Domestic Disturbances 1787–1903, S. Doc. No. 209, 57th Congress, 2d sess. (1903); D.H. Pollitt, *Presidential Use of Troops to Enforce Federal Laws: A Brief History*, 36 N.C. L. Rev. 117 (1958). United States Marshals were also used on approximately thirty occasions. United States Commission on Civil Rights, Law Enforcement: A Report on Equal Protection in the South 155–159 (1965).

[2] 10 U.S.C. §§ 251–255, 12406, deriving from laws of 1795, 1 Stat. 424; 1861, 12 Stat. 281; and 1871, 17 Stat. 14.

[3] The other instances were in domestic disturbances at the request of state governors.

[4] Proc. No. 3204, 22 Fed. Reg. 7628 (1957); Exec. Order 10730, 22 Fed. Reg. 7628. *See* 41 Op. Att'y Gen. 313 (1957); *see also* Cooper v. Aaron, 358 U.S. 1, 12 (1958) (reporting that federalized National Guard troops replaced regular troops to protect Black students from November 27, 1957, through the balance of the school year); Aaron v. McKinley, 173 F. Supp. 944 (E.D. Ark. 1959) (state law authorizing the governor to close schools to prevent desegregation held unconstitutional)), *aff'd sub nom* Faubus v. Aaron, 361 U.S. 197 (1959); Faubus v. United States, 254 F.2d 797, 806 (8th Cir.) ("We think there is no merit in the appellants' argument that the discretion of the Governor in using the National Guard in derogation of the judgment and orders of the federal District Court and in violation of the constitutional rights of the eligible Negro students could not be questioned."), *cert. denied*, 358 U.S. 829 (1958).

[5] Proc. No. 3497, 27 Fed. Reg. 9681 (1962); Exec. Order No. 11053, 27 Fed. Reg. 9693 (1962). *See* United States v. Barnett, 346 F.2d 99, 109 (5th Cir. 1965) (Wisdom, C.J., dissenting) (objecting to dismissal of civil contempt charges against the state governor and lieutenant governor for their role in preventing execution of federal court order and in the ensuing riot, commenting, "To win this battle, the United States Army had more soldiers under arms at Oxford, Mississippi, or held close by in reserve, than George Washington in the Revolutionary War ever commanded at one time").

[6] Proc. 3542, 28 Fed. Reg. 5707 (1963); Exec. Order No. 11111, 28 Fed. Reg. 5709 (1963); Proc. No. 3554, 28 Fed. Reg. 9861; Exec. Order No. 11118, 28 Fed. Reg. 9863 (1963). *See* Alabama v. United States, 373 U.S. 545 (1963) (per curiam) (denying Governor's motion to file complaint on the basis that "[s]uch purely preparatory measures [of alerting and stationing military personnel in the Birmingham area] and their alleged adverse general effects upon the plaintiffs afford no basis for the granting of any relief").

[7] Proc. No. 3645, 30 Fed. Reg. 3739 (1965); Exec.Order No. 11207, 30 Fed. Reg. 2743 (1965).

ArtII.S2.C1.1.17 Response to Terrorist Attacks of September 11, 2001

Article II, Section 2, Clause 1:

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

In response to the September 11, 2001, terrorist attacks on New York City's World Trade Center and the Pentagon in Washington, D.C., Congress passed the "Authorization for Use of Military Force,"[1] which provided that the President may use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks [or] harbored such organizations or persons." President George W. Bush issued a military authorizing the Department of Defense to detain and prosecute by military commission any non-U.S. citizen the President deemed to be a member of Al Qaeda or otherwise engaged in international terrorism.[2] The military order also purported to deny individuals subject to it access to U.S. courts or international tribunals.[3] Judicial inquiry has mainly involved the President's authority to detain those deemed "enemy combatants" and to prosecute them for war crimes by military commission.

ArtII.S2.C1.1.18 Detention Authority

Article II, Section 2, Clause 1:

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

During a military action in Afghanistan pursuant to the congressional authorization for the use of force, a United States citizen, Yaser Hamdi, was taken prisoner. The Executive Branch argued that it had plenary authority under Article II to hold such an "enemy combatant" for the duration of hostilities, and to deny him meaningful recourse to the federal courts. In *Hamdi v. Rumsfeld*, the Court agreed that the President was authorized to detain a United States citizen seized in Afghanistan, although a majority of the Court appeared to reject the notion that such power was inherent in the Presidency, relying instead on statutory

[1] Pub. L. No. 107-40, 115 Stat. 224 (2001).

[2] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57831 (Nov. 13, 2001) (citing as authority the President's powers under the Constitution and laws of the United States, including the Authorization for Use of Military Force and 10 U.S.C. §§ 821 & 836).

[3] *Id.* § 7(b)(2). The language denying those subject to the order access to judicial relief was strikingly similar to that in President Franklin D. Roosevelt's 1942 proclamation to the same effect with respect to Nazi saboteurs. *See* Enemies Denied Access to United States Courts, Proc. No. 2561, 7 Fed. Reg. 5101 (July 2, 1942). Roosevelt's proclamation was ineffective in persuading the Supreme Court to refuse to consider petitions for writs of habeas corpus. *Ex parte* Quirin, 317 U.S. 1, 25 (1942) ("But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case.").

grounds.[1] However, the Court did find that the government may not detain the petitioner indefinitely for purposes of interrogation,[2] and must afford him the opportunity to offer evidence that he is not an enemy combatant.[3]

In *Rasul v. Bush*,[4] the Court rejected an Executive Branch argument that foreign prisoners being held at Guantanamo Bay were outside of federal court jurisdiction. The Court distinguished earlier case law arising during World War II that denied habeas corpus petitions from German citizens who had been captured and tried overseas by United States military tribunals.[5] In *Rasul*, the Court noted that the Guantanamo petitioners were not citizens of a country at war with the United States,[6] had not been afforded any form of tribunal, and were being held in a territory over which the United States exercised exclusive jurisdiction and control.[7] In addition, the Court found that statutory grounds existed for the extension of habeas corpus to these prisoners.[8]

In response to *Rasul*, Congress amended the habeas statute to eliminate all federal habeas jurisdiction over detainees, whether its basis was statutory or constitutional.[9] This amendment was challenged in *Boumediene v. Bush*,[10] as a violation of the Suspension

[1] 542 U.S. 507 (2004). There was no opinion of the Court. Justice Sandra Day O'Connor, joined by Chief Justice William Rehnquist, Justice Anthony Kennedy and Justice Stephen Breyer, avoided ruling on the Executive Branch argument that such detentions could be authorized by its Article II powers alone, and relied instead on the "Authorization for Use of Military Force" passed by Congress. Justice Clarence Thomas also found that the Executive Branch had the power to detain the petitioner, although his dissenting opinion found that such detentions were authorized by Article II in addition to the authorization statute. *Id.* at 579, 587 (Thomas, J. dissenting). Justice David Souter, joined by Justice Ruth Bader Ginsburg, rejected the argument that the Congress had authorized such detention of American citizens in light of the requirement for express statutory authority found in the Non-Detention Act and the fact that the government was not treating the petitioner as a prisoner of war. *Id.* at 548–551 (Souter, J., concurring in part and dissenting in part) (referring to Pub. L. No. 92–128 (1971), 85 Stat. 347 (codified at 18 U.S.C. § 4001(a)) and Article 4 of the Third Geneva Convention, 6 U. S. T. 3316, 3320, T. I. A. S. No. 3364 (1949)). Justice Antonin Scalia, joined with Justice John Paul Stevens, denied that such congressional authorization was possible without a suspension of the writ of habeas corpus. *Id.* at 553 (Scalia, J. dissenting).

[2] *Id.* at 521.

[3] At a minimum, the petitioner must be given notice of the asserted factual basis for holding him, must be given a fair chance to rebut that evidence before a neutral decisionmaker, and must be allowed to consult an attorney. 542 U.S. at 533, 539. Justices Souter and Ginsburg, concurring in the result, agreed the case should be remanded for due process reasons. *Id.* at 553.

[4] 542 U.S. 466 (2004).

[5] Johnson v. Eisentrager, 339 U.S. 763, 789 (1950).

[6] The petitioners were Australians and Kuwaitis.

[7] *Rasul*, 542 U.S. at 467.

[8] The Court found that 28 U.S.C. § 2241—which had previously been construed to require the presence of a petitioner in a district court's jurisdiction—was now satisfied by the presence of a jailor-custodian. *See* Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973). Another "enemy combatant" case, this one involving an American citizen arrested on American soil, was remanded after the Court found that a federal court's habeas jurisdiction under 28 U.S.C. § 2241 was limited to jurisdiction over the immediate custodian of a petitioner. Rumsfeld v. Padilla, 542 U.S. 426 (2004) (federal court's jurisdiction over Secretary of Defense Donald Rumsfeld not sufficient to satisfy presence requirement under 28 U.S.C. § 2241). In Munaf v. Geren, 553 U.S. 674 (2008), the Court held that the federal habeas statute—28 U.S.C. § 2241—applied to American citizens held by the Multinational Force—Iraq, an international coalition force operating in Iraq and composed of twenty-six different nations, including the United States. The Court concluded that the habeas statute extends to American citizens held overseas by American forces operating subject to an American chain of command, even when those forces are acting as part of a multinational coalition.

[9] Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1) (providing that "no court . . . shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay"). After the Court decided, in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), that this language of the Detainee Treatment Act did not apply to detainees whose cases were pending at the time of enactment, the language was amended by the Military Commissions Act of 2006, Pub. L. No. 109–366, to also apply to pending cases where a detainee had been determined to be an enemy combatant.

[10] 553 U.S. 723 (2008).

Clause.[11] Although the historical record did not contain significant common-law applications of the writ to foreign nationals who were apprehended and detained overseas, the Court did not find this conclusive in evaluating whether habeas applied in this case.[12] Emphasizing a "functional" approach to the issue,[13] the Court considered (1) the citizenship and status of the detainee and the adequacy of the process through which the status determination was made; (2) the nature of the sites where apprehension and detention took place; and (3) any practical obstacles inherent in resolving the prisoner's entitlement to the writ. As in *Rasul*, the Court distinguished previous case law, noting that the instant detainees disputed their enemy status, that their ability to dispute their status had been limited, that they were held in a location (Guantanamo Bay, Cuba) under the de facto jurisdiction of the United States, and that complying with the demands of habeas petitions would not interfere with the government's military mission. Thus, the Court concluded that the Suspension Clause was in full effect regarding these detainees.

ArtII.S2.C1.1.19 Military Commissions

Article II, Section 2, Clause 1:

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

In *Hamdan v. Rumsfeld*,[1] the Supreme Court reviewed the validity of military tribunals established pursuant to President George W. Bush's military order[2] to try suspected terrorists for violations of the law of war. The petitioner Hamdan was charged with conspiracy to commit a violation of the law of war. The Supreme Court declined the government's invitation to invoke the doctrine established in *Schlesinger v. Councilman*[3] to abstain from reviewing the merits of the case until the military commission had issued a verdict.[4] The Court found the military commissions unlawful, holding that the tribunals as convened did not comply with the Uniform Code of Military Justice (UCMJ)[5] or the law of war, as incorporated in the UCMJ and embodied in the 1949 Geneva Conventions, which, despite a presidential determination to the

[11] U.S. Const. art. I, § 9, cl. 2 provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." In *Boumediene*, the government argued only that the Suspension Clause did not apply to the detainees; it did not argue that Congress had acted to suspend habeas.

[12] "[G]iven the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one. We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on this point." 553 U.S. at 752.

[13] 553 U.S. at 764. "[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.*

[1] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[2] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57831 (Nov. 13, 2001).

[3] Schlesinger v. Councilman, 420 U.S. 738, 740 (1975), ("[T]he balance of factors governing exercise of equitable jurisdiction by federal courts normally weighs against intervention, by injunction or otherwise, in pending court-martial proceedings.").

[4] *Hamdan*, 548 U.S. at 587 (holding that comity considerations weighed against abstention where concerns about military discipline do not apply and the petitioner did not have the opportunity to appeal any verdict the military commission may render to an independent appellate body).

[5] 10 U.S.C. §§ 801–946a.

contrary,[6] the Court held applicable to the armed conflict with Al Qaeda. The Court concluded that, at a minimum, Common Article 3 of the Geneva Conventions applies to persons captured in the conflict with Al Qaeda, according to them a minimum baseline of protections, including protection from the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[7] The Court held that military commissions were not "regularly constituted" because they deviated too far from the rules that apply to courts-martial, without a satisfactory explanation of the need for departing from such rules.[8] In particular, the Court noted that the commission rules allowing the exclusion of the defendant from attending portions of his trial or hearing some of the evidence against him deviated substantially from court-martial procedures.[9]

A four-Justice plurality of the Court also recognized that for an act to be triable under the common law of war, the precedent for it being treated as an offense must be "plain and unambiguous."[10] After examining the history of military commission practice in the United States and internationally, the plurality further concluded that conspiracy to violate the law of war was not in itself a crime under the common law of war or the UCMJ.

ArtII.S2.C1.2 Executive Departments

Article II, Section 2, Clause 1:

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

Article II, Section 2, Clause 1 authorizes the President to require the department heads of the Executive Branch to advise the President in writing on matters relating to their duties. The Framers adopted this provision when proposals to establish a Council of State to advise the President failed to win the necessary support at the Constitutional Convention.[1] In the *Federalist No. 74*, Alexander Hamilton credited Article II, Section 2, Clause 1 with little importance, stating that he considered the provision to be a "mere redundancy" because "the right for which it provides would result of itself from the office."[2] Discussing the provision in his *Commentaries on the Constitution of the United States*, Justice Joseph Story opined that while the President's right to require such opinion "would result from the very nature of the office," the provision serves a purpose by "impos[ing] a more strict responsibility, and recognizes a public duty of high importance and value in critical times."[3]

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[6] White House Memorandum, Humane Treatment of Taliban and al Qaeda Detainees ¶ 2 (Feb. 7, 2002), available at https://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

[7] *Hamdan*, 548 U.S. at 629.

[8] *Id.* at 632.

[9] *Id.* at 634.

[10] *Id.* at 602 (2006) (Stevens, J., plurality opinion, joined by Souter, J., Ginsburg, J., and Breyer, J.).

[1] 1 Records of the Federal Convention of 1787, at 70, 97, 110 (Max Farrand ed., 1911); 2 *id.* at 285, 328, 335–37, 367, 537–42. Debate on the issue in the Convention is discussed in Charles Thach, The Creation of the Presidency 1775–1789 105–110, 116 (Amagi Books 2007) (1923).

[2] The Federalist No. 74 (Alexander Hamilton).

[3] 3 Joseph Story, Commentaries on the Constitution of the United States § 1487 (1837).

President George Washington established the practice of the Executive Branch department heads meeting collectively to advise the President as a Cabinet.[4] Consequently, Cabinet meetings are not required under the Constitution.[5]

ArtII.S2.C1.3 Pardons

ArtII.S2.C1.3.1 Overview of Pardon Power

Article II, Section 2, Clause 1:

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

The Constitution establishes the President's authority to grant clemency, encompassing not only pardons of individuals but several other forms of relief from criminal punishment as well.[1] The power, which has historical roots in early English law,[2] has been recognized by the Supreme Court as quite broad. In the 1886 case *Ex parte Garland*, the Court referred to the President's authority to pardon as "unlimited" except in cases of impeachment, extending to "every offence known to the law" and able to be exercised "either before legal proceedings are taken, or during their pendency, or after conviction and judgment."[3] Much later, the Court wrote that the "broad power conferred" in the Constitution gives the President "plenary authority" to "'forgive' [a] convicted person in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it" with certain conditions.[4]

Despite the breadth of the President's authority under the Pardon Clause, the Constitution's text provides for at least two limits on the power: first, clemency may only be granted for "Offenses against the United States,"[5] meaning that state criminal offenses and federal or state civil claims are not covered.[6] Second, the President's clemency authority cannot be used "in Cases of impeachment."[7]

Beyond textual limits, certain external constitutional and legal considerations may act as constraints on the power. For instance, the Court has indicated that the power may be

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[4] Leonard White, The Federalists: A Study in Administrative History ch. 4 (1948).

[5] Edward S. Corwin, Presidential Power and the Constitution 89 (Richard Loss, ed., 1976)

[1] *See Clemency*, Black's Law Dictionary (11th ed. 2019) (defining clemency, in part, as "the power of the President . . . to pardon a criminal or commute a criminal sentence").

[2] 1 Benjamin Thorpe, Ancient Laws and Institutes of England 46 (1840) (reflecting law "of fighting" in the Laws of King Ine: "If any one fight in the king's house, let him be liable in all his property, and be it in the king's doom whether he shall or shall not have life").

[3] 71 U.S. 333, 380 (1866); *see also* United States v. Klein, 80 U.S. 128, 147 (1871) ("To the executive alone is intrusted the power of pardon; and it is granted without limit.").

[4] Schick v. Reed, 419 U.S. 256, 266 (1974).

[5] U.S. Const. art. II, § 2, cl. 1.

[6] *Ex parte* Grossman, 267 U.S. 87, 111, 115, 122 (1925) (acknowledging that phrase was included "presumably to make clear that the pardon of the President was to operate upon offenses against the United States as distinguished from offenses against the states" and distinguishing between civil and criminal contempt for purposes of pardon authority).

[7] U.S. Const. art. II, § 2, cl. 1; *see Garland*, 71 U.S. at 373 (acknowledging that the President's authority to grant pardons is subject to the exception of "cases of impeachment" and that "[w]ith that exception the power is unlimited").

exercised "at any time after [an offense's] commission,"[8] reflecting that the President may not preemptively immunize future criminal conduct. In *Schick v. Reed*, the Court recognized that an exercise of clemency may include "any condition which does not otherwise offend the Constitution,"[9] suggesting that the President may not make clemency subject to a condition that is prohibited by another constitutional provision.[10] Other apparent limitations include not affecting vested rights of third parties, such as where forfeited property is sold,[11] or proceeds "paid into the treasury," which "can only be secured to the former owner . . . through an act of [C]ongress."[12] The Court in *The Laura* also alluded to an exception for "fines . . . imposed by a co-ordinate department of the government for contempt of its authority,"[13] though a later case recognized that the President may pardon one who is subject to criminal punishment for contempt of court.[14]

Assuming the recognized limitations are not transgressed, a full pardon granted by the President and accepted by its subject[15] prevents or removes "any of the penalties and disabilities consequent upon conviction . . . ."[16] In several nineteenth-century cases, the Supreme Court suggested that a pardon broadly obviates all legal guilt of the offender, effectively erasing the crime from existence.[17] Subsequent cases appear to have backed away from this understanding,[18] suggesting instead that, although a full pardon precludes punishment for the offense in question, a prior and pardoned offense may still be considered in subsequent proceedings.[19]

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[8] *Garland*, 71 U.S. at 380.

[9] 419 U.S. at 267.

[10] *See Id.* ("Of course, the President may not aggravate punishment.").

[11] Knote v. United States, 95 U.S. 149, 154 (1877) ("Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offence, or which have been acquired by others whilst that judgment was in force.").

[12] Ill. C.R. Co. v. Bosworth, 133 U.S. 92, 104–05 (1890); *see also Ex parte* Garland, 71 U.S. 333, 381 (1866) (explaining that pardons do not "restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment"); Semmes v. United States, 91 U.S. 21, 27 (1875) (holding that a pardon did not interfere with the right of a purchaser of forfeited property).

[13] 114 U.S. 411, 413 (1885).

[14] *Ex parte* Grossman, 267 U.S. 87, 122 (1925). Other possible limitations—for instance, whether the President may issue a self-pardon or pardon contempt of Congress—have been the subject of debate but have not been addressed by the Supreme Court. *E.g.*, Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, If Not, Should There Be?*, 51 Ariz. St. L.J. 71, 97–100 (2019) (surveying arguments regarding authority to self-pardon); Charles D. Berger, *The Effect of Presidential Pardons on Disclosure of Information: Is Our Cynicism Justified?*, 52 Okla. L. Rev. 163, 181 (1999) (describing pardon of Dr. Francis Townsend for contempt of Congress, without court challenge, during the presidency of Franklin D. Roosevelt).

[15] *See* Burdick v. United States, 236 U.S. 79, 94 (1915) ("Granting, then, that the pardon was legally issued and was sufficient for immunity, it was Burdick's right to refuse it[.]"); *but cf.* Biddle v. Perovich, 274 U.S. 480, 486–87 (1927) (indicating that consent is not required in the context of commutation or remission, and that "the public welfare, not [the individual's] consent, determines what shall be done").

[16] *Ex parte* Garland, 71 U.S. 333, 381 (1866).

[17] *See Id.* at 381–82 ("A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt[.]"); Carlisle v. United States, 83 U.S. 147, 151 (1872) (reflecting understanding that pardon "not merely releases the offender from the punishment prescribed for the offence, but . . . obliterates in legal contemplation the offence itself").

[18] *See Burdick*, 236 U.S. at 94 ("[A pardon] carries an imputation of guilt; acceptance a confession of it").

[19] *See* Carlesi v. New York, 233 U.S. 51, 59 (1914) (determining that pardoned offense could still be considered "as a circumstance of aggravation" under a state habitual-offender law); Nixon v. United States, 506 U.S. 224, 232 (1993) (stating in dicta that a pardon "is in no sense an overturning of a judgment of conviction by some other tribunal; it is '[a]n executive action that mitigates or sets aside *punishment* for a crime'"); *see also* Angle v. Chicago, St. P., M. & O. Ry., 151 U.S. 1, 19 (1894) ("An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong, or relieve the wrongdoer from civil liability to the individual he has wronged.").

ArtII.S2.C1.3.1
Overview of Pardon Power

Congress generally cannot substantively constrain the President's pardon authority through legislation, as the Court has held that the "power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."[20] Nevertheless, there is historical precedent for legislation *facilitating* the exercise of the pardon power through funding of Executive Branch positions to review clemency petitions.[21] Congress also has other constitutional tools that it may use in relation to the President's pardon authority, provided the legal conditions associated with those tools are met, such as oversight,[22] impeachment,[23] and constitutional amendment.[24]

ArtII.S2.C1.3.2 Historical Background on Pardon Power

Article II, Section 2, Clause 1:

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

The presidential power to "grant [r]eprieves and [p]ardons" is, at its core, the authority to grant relief from the consequences of a criminal act.[1] The President's authority under Article II, Section 2 encompasses several distinct forms of relief that may be temporary or permanent, partial or wholesale, and may be granted at any time after alleged commission of a federal crime.[2]

The broad concept of governmental authority to provide relief from criminal punishment has deep historical roots.[3] The power vested in the President by the Constitution traces its origins to authority held by the English Crown,[4] leading the Supreme Court to look to legal

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[20] *Garland*, 71 U.S. at 380; *see also* Schick v. Reed, 419 U.S. 256, 266 (1974) ("[T]he power [of clemency] flows from the Constitution alone, not from any legislative enactments, and . . . it cannot be modified, abridged, or diminished by the Congress.").

[21] *E.g.*, An Act Amendatory of the Acts Relative to the Attorney-General's Office, and to Fix the Compensation of his Assistant and Clerks, ch. 98, 13 Stat. 516 (1865) (authorizing Attorney General to employ and provide salary for "pardon clerk," among others). Some early Supreme Court language also suggested Congress can itself grant pardons or amnesties through legislation, *see* Brown v. Walker, 161 U.S. 591, 601 (1896) (noting that pardon power of President "has never been held to take from congress the power to pass acts of general amnesty"), though the continued vitality of this ostensible authority is unclear.

[22] *E.g.*, *Pardon of Richard M. Nixon, and Related Matters: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93D CONG. 90–151 (1974) (testimony of President Gerald Ford).

[23] *See Ex parte* Grossman, 267 U.S. 87, 121 (1925) (indicating that hypothetical effort by President to "deprive a court of power to enforce its orders" through successive pardons "would suggest a resort to impeachment").

[24] *E.g.*, S.J.Res. 241, 93rd Cong. (1974) (proposing constitutional amendment to provide mechanism for congressional disapproval of pardons).

[1] *See, e.g.*, Biddle v. Perovich, 274 U.S. 480, 486 (1927) (stating that a pardon "is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed").

[2] *See* ArtII.S2.C1.3.5 Scope of Pardon Power.

[3] *See* 3 Dep't of Just., The Attorney General's Survey of Release Procedures 2–13 (1939) (discussing pardon principles under Mosaic, Greek, and Roman law).

[4] Schick v. Reed, 419 U.S. 256, 260 (1974) (recognizing that the Framers "were well acquainted with the English Crown authority to alter and reduce punishments as it existed in 1787").

principles underlying the latter in interpreting the scope of the former.[5] A "prerogative of mercy" held by the King appeared during the reign of King Ine of Wessex (688–725 A.D.)[6] and by 1535 had been declared by Parliament, during the reign of King Henry VIII (1509–1547 A.D.), as a right exclusive to the Crown.[7] Though broad in application, the power as it existed through the colonial period did have legal limits, which grew in number in response to perceived abuses of the King's authority.[8] For instance, a pardon could not impair certain rights of third parties[9] and, by act of Parliament in 1701, pardons could not be pleaded to bar impeachment (though a pardon following sentence was still available).[10]

Prior to the American Revolution, the King's pardon authority applied in the American colonies through delegation to colonial authorities.[11] The English legal tradition of pardon then directly influenced the framers of the U.S. Constitution following independence.[12] The two major plans offered at the Constitutional Convention—the Virginia and New Jersey Plans—did not address pardons.[13] In suggested amendments to the Virginia Plan, however, Alexander Hamilton included a pardon power vested in an "Executive authority" that could be exercised over "all offences except Treason," with a pardon for treason requiring Senate approval.[14] The first report of the Committee of Detail included a proposed provision giving the President power to grant reprieves and pardons, with the only exception being that a pardon would "not be pleadable in bar of an impeachment."[15]

There was little debate at the Constitutional Convention of the pardon power,[16] though several exceptions and limitations were proposed. Edmund Randolph proposed reincorporating an exception for cases of treason, arguing that extending pardon authority to such cases "was too great a trust," that the President "may himself be guilty," and that the "Traytors may be his own instruments."[17] George Mason likewise argued that treason should be excepted for fear that the President could otherwise "frequently pardon crimes which were advised by himself" to "stop inquiry and prevent detection," eventually "establish[ing] a

[5] United States v. Wilson, 32 U.S. 150, 160 (1833) ("As this power has been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.").

[6] 1 Benjamin Thorpe, Ancient Laws and Institutes of England 46 (1840) (reflecting law "of fighting" in the Laws of King Ine: "If any one fight in the king's house, let him be liable in all his property, and be it in the king's doom whether he shall or shall not have life").

[7] 4 William Blackstone, Commentaries on the Laws of England 397 (1765) (recognizing declaration in statute during reign of King Henry VIII that "the king hath the whole and sole" power to pardon).

[8] Schick, 419 U.S. at 260–61 (referring to "gradual contraction" or English pardon power through "specifically defined" legal limits "as potential or actual abuses were perceived").

[9] *E.g.*, 4 Blackstone, *supra* note 7, at 398 ("Neither . . . can the king pardon an offence against a popular or penal statute after information brought; for thereby the informer hath acquired a private property in his part of the penalty.").

[10] *Id.* at 399–400.

[11] See, e.g., 7 Francis Newton Thorpe, American Charters, Constitutions and Organic Laws 3800–01 (1909) (granting, in Second Charter of Virginia from 1609, "full and absolute Power and Authority to correct, punish, pardon, govern, and rule all" subjects).

[12] *E.g.*, 3 Joseph Story, Commentaries on the Constitution of the United States § 1496 (1833) (noting that exception for impeachment "was probably borrowed" from England).

[13] 1 The Records of the Federal Convention of 1787, at 20–23 (Max Farrand ed., 1911) [hereinafter Farrand's Records] (Virginia Plan, in Madison's notes); *Id.* at 242–45 (New Jersey Plan, in Madison's notes).

[14] *Id.* at 292.

[15] 2 Farrand's Records, *supra* note 13, at 185.

[16] Schick v. Reed, 419 U.S. 256, 262 (1974).

[17] 2 Farrand's Records, *supra* note 13, at 626 (Madison's notes).

monarchy, and destroy[ing] the republic."[18] James Wilson responded to such arguments by pointing out that if the President were himself involved in treasonous conduct, he could be impeached.[19] Randolph's motion was defeated by an 8-2 vote, with one divided.[20] Another proposal would have made reprieves and pardons available only after conviction.[21] However, when James Wilson pointed out that pre-conviction pardons might be needed to secure accomplice testimony, the motion to add the language was withdrawn.[22]

Additional proposals and discussion at the Constitutional Convention centered on what role, if any, the legislature should play in the pardon power's exercise. For instance, during debate of Edmund Randolph's proposal to except treason, James Madison expressed a preference for Senate consultation in such cases.[23] Others, however, conveyed unease at the prospect of giving the legislature a role in the pardon process, arguing that a body "governed too much by the passions of the moment" was "utterly unfit for the purpose" and that such a role would be inconsistent with the constitutional separation of powers.[24] Separately, Roger Sherman proposed making reprieves applicable only until the ensuing Senate session and requiring Senate consent for all pardons.[25] Sherman's motion was defeated by a vote of 8-1.[26]

During the same session, the final language of the impeachment exception—"except in cases of impeachment"—was added without noted discussion, supplanting proposed language more closely mirroring the English limitation that a pardon should "not be pleadable in bar."[27] It appears to have been understood that, in its final form, the impeachment exception did not permit pardon following conclusion of impeachment proceedings (as had been the case under English law)—in a pamphlet published during the ratification debates, James Iredell noted that the king "may pardon after conviction, even on an impeachment; which is an authority not given to our President, who in case of impeachments has no power either of pardoning or reprieving."[28]

In the *Federalist No. 74*, Alexander Hamilton maintained that the broad, Executive-held pardon power encompassed in the Constitution was desirable, arguing such a power "should be as little as possible fettered or embarrassed" to ensure "easy access to exceptions in favour of unfortunate guilt."[29] Hamilton also averred that locating the power solely with the President would lead to its most beneficial exercise, as a single person would be "a more eligible dispenser of the mercy of the government than a body of men" who "might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency."[30] With respect to concerns that cases of treason should not be pardonable or should be dependent on legislative assent, Hamilton raised several points in response, including (1) treason might often be connected with sedition involving a broader portion of the community, in which case "the representation of the people

[18] 3 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, As Recommended by the General Convention at Philadelphia in 1787, at 497 (Jonathan Elliot ed., 1836).

[19] 2 Farrand's Records, *supra* note 13, at 626 (Madison's notes).

[20] *Id.* at 627.

[21] *Id.* at 426.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 626.

[25] *Id.* at 419.

[26] *Id.*

[27] *Id.*

[28] Pamphlets on The Constitution of the United States 351 n.* (P. Ford ed., 1888).

[29] The Federalist No. 74 (Alexander Hamilton).

[30] *Id.*

[might be] tainted with the same spirit which had given birth to the offence"[31]; (2) during an insurrection or rebellion, a "well-timed" offer of pardon to insurgents might be necessary but could be stymied if it were necessary to convene the legislature and obtain its sanction;[32] and (3) the exception for impeachment was sufficient to protect against abuses of the pardon power related to potentially treasonous conduct in which the President himself was implicated, as he "could shelter no offender, in any degree, from the effects of impeachment and conviction."[33]

ArtII.S2.C1.3.3 Pardon Power and Forms of Clemency Generally

Article II, Section 2, Clause 1:

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

Article II, Section 2 of the Constitution gives the President power to "grant Reprieves and Pardons."[1] Encompassed in this provision is the authority to provide relief from the punishment that would otherwise follow from commission of an "Offence[ ] against the United States," i.e., a federal crime.[2] The President's power in this respect encompasses several related forms of relief, including not only a full, individual pardon and time-limited reprieve but also amnesty for groups of offenders, commutation of a criminal sentence, and remission of fines or penalties.[3]

ArtII.S2.C1.3.4 Types

ArtII.S2.C1.3.4.1 Pardons Generally

Article II, Section 2, Clause 1:

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

A full or absolute pardon obviates any punishment for the crime at issue and restores the offender's civil rights, if applicable.[1] In the 1866 case *Ex parte Garland*, the Supreme Court recognized that a pardon granted before conviction "prevents any of the penalities and

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[31] *Id.*

[32] *Id.*

[33] The Federalist No. 69 (Alexander Hamilton).

[1] U.S. Const. art. II, § 2, cl. 1.

[2] United States v. Klein, 80 U.S. 128, 147 (1871) (stating that a pardon "blots out the offence pardoned and removes all its penal consequences").

[3] *See Ex parte* Wells, 59 U.S. 307, 309–10, 314 (1855) (indicating that the pardon power extends "to all kinds of pardons known in the law as such, whatever may be their denomination," including not only "absolute pardon[s]" but also more limited forms of release, remission, and repreive); *Klein*, 80 U.S. at 147 ("Pardon includes amnesty.").

[1] The Supreme Court's view of the legal effect of a pardon has changed somewhat over time and is discussed in more detail at ArtII.S2.C1.3.7 Legal Effect of a Pardon.

disabilities consequent upon conviction from attaching," and "if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights . . . ."[2]

A pardon may be made subject to conditions. In *Ex parte Wells*, the Court directly addressed the question of whether the pardon power included the power to pardon conditionally and concluded, in reliance on English precedent, that it does.[3] Yet the scope of the President's power to grant pardons has limits. With respect to conditions, the Court in the 1974 case *Schick v. Reed* stated that "considerations of public policy and humanitarian impulses support an interpretation of [the] power so as to permit the attachment of any condition which does not otherwise offend the Constitution,"[4] though the Court has not addressed the scope of this limitation on conditional pardons in any subsequent case. Regardless, a pardon may only be granted after the commission of the eligible offense,[5] though the clemency may precede any institution of formal proceedings.[6] A pardon is also waivable. In *United States v. Wilson*, the defendant pled guilty to a federal offense and, upon inquiry by the lower court as to the effect of a pardon known to have been granted to him, "waived and declined any advantage or protection which might be supposed to arise from the pardon referred to."[7] The Supreme Court gave effect to the defendant's wish, concluding that because the pardon was not "brought judicially before the court, by plea, motion or otherwise, ought not to be noticed by the judges, or in any manner to affect the judgment of the law."[8] As a corollary, a pardon must be accepted to be effective,[9] though this principle appears to differ as between pardons on the one hand and commutation and remission on the other.[10]

ArtII.S2.C1.3.4.2 Amnesties

Article II, Section 2, Clause 1:

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

Amnesty is essentially identical to pardon in ultimate effect, with the principal distinction between the two being that amnesty typically "is extended to whole classes or communities,

[2] 71 U.S. 333, 380 (1866).

[3] 59 U.S. at 315 (explaining that the "power to pardon conditionally is not one of inference at all, but one conferred in terms"); *see also Klein*, 80 U.S. at 147 (recognizing that pardon "may be granted on conditions"). Though referred to in places as a conditional pardon, the act of clemency in *Wells* was in practice a commutation, that is, substitution of a less severe punishment in place of a more severe one, which is discussed in more detail *infra*.

[4] 419 U.S. 256, 266 (1974). The Court in *Schick* addressed a conditional commutation, and Justice Thurgood Marshall, writing in dissent and joined by Justices William O. Douglas and William Brennan, argued that the condition at issue could not be constitutionally imposed. *See id.* at 274 (Marshall, J., dissenting).

[5] *Garland*, 71 U.S. at 380 (stating that a pardon "may be exercised at any time after [an offense's] commission").

[6] *Id.* (recognizing that pardon may be granted "either before legal proceedings are taken, or during their pendency, or after conviction and judgment"). For instance, President Gerald Ford pardoned former President Richard Nixon for any federal crimes he may have committed in relation to the Watergate scandal, before any charges could be brought. *See Pardon of Richard M. Nixon and Related Matters: Hearings Before the House Judiciary Subcommittee on Criminal Justice*, 93d Cong. (1974).

[7] United States v. Wilson, 32 U.S. 150, 158 (1833).

[8] *Id.* at 163.

[9] *Id.* at 161; Burdick v. United States, 236 U.S. 79, 94 (1915) (holding that "it was Burdick's right to refuse [the pardon]" and his refusal allowed him to maintain "his right under the Constitution to decline to testify").

[10] *See* ArtII.S2.C1.3.6 Rejection of a Pardon.

instead of individuals[.]"[1] As with other forms of clemency, amnesty may be partial or conditional.[2] Among others, prominent examples of amnesty ocurred during and after the Civil War and the Vietnam War. For instance, Presidents Abraham Lincoln and Andrew Johnson issued a series of proclamations offering and ultimately granting amnesty to those who participated in the Civil War on the side of the Confederacy,[3] and the Supreme Court decided several cases addressing the implications of such amnesty for property seized by statute.[4] Beyond the Civil War, a more recent historical example of amnesty came in the 1970s, when President Jimmy Carter granted amnesty to many who violated the Selective Service Act by evading the draft during the Vietnam War.[5]

ArtII.S2.C1.3.4.3 Commutations, Remissions, and Reprieves

Article II, Section 2, Clause 1:

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

Rather than obviating punishment in its entirety, as pardon and amnesty may do, commutation substitutes the punishment imposed by a federal court for a less severe punishment, such as by reducing a sentence of imprisonment.[1] Similarly, remission operates to reduce or discharge criminal "fines, penalties, and forfeitures of every description arising

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[1] Knote v. United States, 95 U.S. 149, 153 (1877); *see id.* (indicating that distinction between the two terms "is one rather of philological interest than of legal importance"); Brown v. Walker, 161 U.S. 591, 601–02 (1896) (dismissing any "distinction between amnesty and pardon" as "of no practical importance" and describing amnesty as "a general pardon for a past offense" that "is rarely, if ever, exercised in favor of single individuals, and is usually exerted in behalf of certain classes ofp ersons, who are subject to trial, but have not yet been convicted"). In *Burdick v. United States*, the Court suggested that there are other "incidental differences of importance" between pardon and amnesty, including that amnesty "overlooks offense" rather than "remit[ting] punishment" and is "usually addressed to crimes against the sovereignty of the state, to political offenses, deemed more expedient for the public welfare than prosecution and punishment." 236 U.S. at 95.

[2] *See* Semmes v. United States, 91 U.S. 21, 26 (1875) (describing proclamation of amnesty with certain exceptions and recognizing that property at issue fell "within [an] exception contained in that proclamation; which is all that need be said upon that subject").

[3] *See* United States v. Klein, 80 U.S. 128, 139–41 (1871) (tracing series of proclamations and ultimate grant of amnesty).

[4] *See* United States v. Padelford 76 U.S. 531, 543 (1869) (holding that amnesty covering offenses connected with the rebellion operated as "a complete substitute for proof that [the recipient] gave no aid or comfort" to the same and that "he was purged of whatever offence against the laws of the United States he had committed . . . and relieved from any penalty which he might have incurred"); *see also* Armstrong v. United States, 80 U.S. 154, 155–56 (1871) (ruling amnesty for participation in rebellion entitled claimant to proceeds of property under Abandoned and Captured Property Act); Pargoud v. United States, 80 U.S. 156, 157 (1871) (same); *but cf. Knote*, 95 U.S. at 154 (holding that amnesty for participation on the side of the Confederacy did not entitle a recipient to claim monies from property seized and paid into the Treasury, as pardons and amnesties "cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress"); Hart v. United States, 118 U.S. 62, 67 (1886) ("[N]o pardon could have had the effect to authorize the payment out of a general appropriation of a debt which a law of congress had said should not be paid out of it."). For the Court's treatment of Congress's subsequent effort to prevent pardon recipients from taking advantage of the restoration procedures under the Act, in *Klein*, see ArtII.S2.C1.3.8 Congress's Role in Pardons.

[5] *See* Exec. Order No. 11967, 42 Fed. Reg. 4393 (Jan. 21, 1977).

[1] *See* Biddle v. Perovich, 274 U.S. 480, 486–87 (1927) (approving commutation of death sentence to life imprisonment, writing, "No one doubts that a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side and on the other would leave the reduced term or fine valid and to be enforced"); *Ex parte* Wells, 59 U.S. 307, 315 (1855) (affirming President's power to conditionally pardon where clemency

under the laws of [C]ongress."[2] As discussed elsewhere, however, money paid into the treasury or property in which the rights of a third party have vested are beyond the reach of the President's authority.[3]

As with other forms of clemency, commutation or remission may be conditional. In *Schick v. Reed*, the Court addressed a challenge to the validity of a condition attached to a commutation of the petitioner's death sentence to life imprisonment that prohibited the petitioner from ever being eligible for parole.[4] The petitioner argued that the condition exceeded the President's authority because it was not authorized by statute and, had the commutation not been granted, the petitioner's death sentence would have been set aside by an intervening Supreme Court decision regardless.[5] The Court rejected these arguments, holding that the conditional commutation "was lawful," as "the pardoning power was intended to include the power to commute sentences on conditions which do not in themselves offend the Constitution, but which are not specifically provided for by statute."[6]

Despite the explicit inclusion of reprieve in the constitutional text, Supreme Court discussion of its contours is scant. In *Ex parte Wells*, the Court described reprieve in dicta as "delay [of] a judicial sentence when the President shall think the merits of the case, or some cause connected with the offender, may require it," as well as cases of legal necessity (with the two examples given being pregnancy and the onset of "insan[ity]").[7] Historical practice has been consistent with the understanding that the President's power includes authority to temporarily delay execution of a criminal sentence. For example, President Bill Clinton issued reprieves delaying twice the execution date of Juan Raul Garza, who had been convicted of capital homicide offenses, so that the Department of Justice could conduct a study of certain disparities in imposition of the federal death penalty.[8]

ArtII.S2.C1.3.5 Scope of Pardon Power

Article II, Section 2, Clause 1:

> *The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive*

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granted was, in practice, a commutation of death sentence to life imprisonment, substituting "a lesser punishment than the law has imposed upon him"). For a discussion of *Biddle* in the context of acceptance of commutation or remission, see ArtII.S2.C1.3.6 Rejection of a Pardon.

[2] The Laura, 114 U.S. 411, 413–14 (1885); *see* Osborn v. United States, 91 U.S. 474, 478 (1875) ("[T]he constitutional grant to the President of the power to pardon offences must be held to carry with it, as an incident, the power to release penalties and forfeitures which accrue from the offences.").

[3] *Knote*, 95 U.S. at 154 ("Neither does the pardon affect any rights which have vested in others . . . . If, for example, by the judgment a sale of the offender's property has been had, the purchaser will hold the property notwithstanding the subsequent pardon. . . . So, also, if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress."); Illinois Cent. R.R. v. Bosworth, 133 U.S. 92, 103 (1890) (quoting extensively from *Knote* and recognizing that "a pardon does not affect vested interests").

[4] 419 U.S. 256, 257 (1974).

[5] *Id.* at 259–60.

[6] *Id.* at 264, 268.

[7] 59 U.S. 307, 314 (1855).

[8] *See Commutations Granted by President William J. Clinton (1993–2001)*, U.S. Dep't of Justice: Off. of the Pardon Att'y, https://www.justice.gov/pardon/commutations-granted-president-william-j-clinton-1993–2001 (last updated Apr. 28, 2021).

Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Regardless of the type of clemency at issue, the President's power extends only to "offences against the United States," meaning federal crimes but not state or civil wrongs.[1] One question the Supreme Court has addressed concerns the extent to which the pardon power reaches contempt of another branch's authority; specifically, contempt of court. In the 1885 case *The Laura*, the Court recognized that the pardon power includes the power to remit fines, penalties, and forfeitures but noted an exception for "fines . . . imposed by a co-ordinate department of the government for contempt of its authority."[2] Forty years later, the Court in *Ex parte Grossman* held that the President may pardon criminal (but not civil) contempts of a federal court.[3] The Court explained that the independence of each branch of the federal government was "qualified" by "co-ordinating checks and balances of the Constitution" and thus did not "constitute a broadly positive injunction or a necessarily controlling rule of construction" on the question of the scope of the President's pardon authority.[4]

Whether the Court's ruling in *Grossman* extends to contempt of Congress is an open question.[5] Supreme Court Justice Joseph Story, in his famous 1833 treatise *Commentaries on the Constitution of the United States*, asserted that contempt of Congress is excluded from the scope of the pardon power "by implication," as presidential authority to pardon congressional contemnors would result in Congress being "wholly dependent upon his good will and pleasure for the exercise of their own powers."[6] Nevertheless, in *Grossman*, the Court suggested that the remedy of impeachment would be sufficient to counter abuse of the pardon power.[7] It appears that there is at least one historical example of a pardon of contempt of Congress, granted by President Franklin D. Roosevelt, which apparently went unchallenged in court.[8]

The textual exception to the pardon power, "in Cases of Impeachment," likewise has not been the subject of sustained Supreme Court analysis. Historically, a similar exception under English law prevented a pardon from being *pleaded* to bar impeachment but still permitted pardon following conviction.[9] The exception in the U.S. Constitution appears to have been

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[1] *Ex parte* Grossman, 267 U.S. 87, 113 (1925) (stating that phrase was included "presumably to make clear that the pardon of the President was to operate upon offenses against the United States as distinguished from offenses against the states" and recognizing that criminal, but not civil, contempt is pardonable); Young v. United States, 97 U.S. 39, 66 (1877) ("But if there is no offence against the laws of the United States, there can be no pardon by the President.").

[2] 114 U.S. 411, 413 (1885).

[3] 267 U.S. at 122.

[4] *Id.* at 120, 122. Although the Court in *Grossman* did not find that separation of powers concerns warranted an exclusion of contempt of court from clemency's reach, the Court had previously suggested that permanent judicial suspension of a required and legally valid final sentence "based upon considerations extraneous to the legality of the conviction or the duty to enforce the sentence" is an incursion on the President's pardon authority. *Ex parte* United States, 242 U.S. 27, 37(1916); *see id.* at 42 (referring to "disregard of the Constitution which would result" from contrary ruling, as, among other things, "the right to relieve from the punishment fixed by law and ascertained according to the methods by it provided, belongs to the executive department."); *but cf.* United States v. Benz, 282 U.S. 304, 311 (1931) (concluding that judicial amendment of sentence during same court term to reduce length of imprisonment was judicial act "readily distinguishable" from act of clemency that "abridges the enforcement of the judgment").

[5] *See* Grossman, 267 U.S. at 118 (acknowledging view of former Attorney General that "the pardoning power did not include impeachments or contempts" but noting that "the author's exception of contempts had reference only to contempts of a House of Congress").

[6] 3 Joseph Story, Commentaries on the Constitution of the United States 353 (1833).

[7] *Grossman*, 267 U.S. at 121.

[8] *See* Townsend Freed, Feels 'Vindicated,' N.Y. Times (Apr. 19, 1938),

[9] 4 William Blackstone, Commentaries on the Laws of England 399–400 (1765).

understood to reach more broadly, however, with James Iredell remarking during the ratification debates that such "authority [is] not given to our President."[10] And in *Ex parte Wells*, the Supreme Court noted in passing the English provision and referred to the impeachment exception in the Constitution as "an improvement upon the same."[11]

ArtII.S2.C1.3.6 Rejection of a Pardon

Article II, Section 2, Clause 1:

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

In the 1833 case *United States v. Wilson*, Chief Justice John Marshall wrote for the Court that a pardon is a private "act of grace," a "deed, to the validity of which, delivery is essential, and delivery is not complete, without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him."[1] Though the Court in *Wilson* doubted that a "being condemned to death would reject a pardon," it recognized that a pardon might be rejected regardless of the gravity of the punishment, as, for instance, if the pardon were conditional "the condition may be more objectionable than the punishment inflicted by the judgment."[2]

Almost a century later, in *Burdick v. United States*, the Court confirmed that a pardon may be refused, at least where other constitutional rights are at stake.[3] *Burdick* involved a pardon issued by President Woodrow Wilson to George Burdick, an editor at the *New York Tribune*, for any federal offenses he "may have committed" in connection with the publication of an article regarding alleged customs fraud, despite the fact that Burdick had not been charged with any crime at the time of the pardon.[4] The apparent motivation for the pardon was that Burdick had refused to testify before a grand jury investigating the involvement of Treasury Department officials in leaks concerning the wrongdoing, asserting his Fifth Amendment right not to provide testimony that would tend to incriminate him.[5] Despite President Wilson's issuance of the pardon, Burdick "refused to accept" it and continued to refuse to answer certain questions put to him before the grand jury.[6] The Supreme Court in *Burdick* assumed that the pardon was within the President's power to issue and concluded that "it was Burdick's right to refuse it" and stand on his Fifth Amendment objection.[7]

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[10] Pamphlets on The Constitution of the United States 351 n.* (P. Ford ed., 1888); *see also* 3 Story, *supra* note 6, at 352 (stating that the President "possesses no such power in any case of impeachment").

[11] 59 U.S. 307, 312 (1855); *see also* Nixon v. United States, 506 U.S. 224, 232 (1993) ("The exception from the President's pardon authority of cases of impeachment was a separate determination by the Framers that executive clemency should not be available in such cases."); ArtII.S2.C1.3.2 Historical Background on Pardon Power.

[1] 32 U.S. 150, 160–61 (1833).

[2] *Id.*

[3] 236 U.S. 79, 94 (1915).

[4] *Id.* at 85–86.

[5] *Id.*

[6] *Id.* at 87.

[7] *Id.* at 94. The Court relied on *Burdick* to decide a separate case the same day on "almost identical" facts. Curtin v. United States, 236 U.S. 96, 97 (1915).

Burdick notwithstanding, if a pardon *is* accepted, it obviates a Fifth Amendment objection to providing testimony.[8] Additionally, it appears that the *Wilson*/*Burdick* rule does not extend to commutations and remissions. In the later case *Biddle v. Perovich*, the Court considered a commutation of a death sentence to life imprisonment that the recipient argued was "without his consent and without legal authority."[9] The *Biddle* Court disagreed with this assessment, stating, contrary to the language of *Wilson*, that a pardon "is not a private act of grace" but is rather a determination of what the public welfare requires.[10] As such, in the *Biddle* Court's view, "the public welfare, not [a recipient's] consent determines what shall be done."[11] On this basis, the Court in *Biddle* concluded that *Burdick* should not "be extended to the present case," indicating that no one doubted "a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side and on the other would leave the reduced term or fine valid and to be enforced" with "the convict's consent . . . not required."[12]

ArtII.S2.C1.3.7 Legal Effect of a Pardon

Article II, Section 2, Clause 1:

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

The legal significance of a pardon has been a subject of shifting judicial views over time. In the 1866 case *Ex parte Garland*, the Court took a broad view of the nature and consquence of a pardon:

> A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.[1]

Subsequent cases of the era maintained this view that pardon "blots out" both guilt and punishment—for instance, in *Carlisle v. United States*, the Court wrote that a pardon "not merely releases the offender from the punishment prescribed for the offence, but . . . obliterates in legal contemplation the offence itself."[2] As such, the Court in *Carlisle* determined that a pardon entitled its recipient to obtain the proceeds of property previously abandoned or

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[8] Brown v. Walker, 161 U.S. 591, 599 (1896) ("[I]f the witness has already received a pardon, he cannot longer set up his privilege, since he stands, with respect to such offense, as if it had never been committed.").

[9] 274 U.S. 480, 485 (1927).

[10] *Id.* at 486.

[11] *Id.*

[12] *Id.* at 486–88. In the much earlier case *Ex parte Wells*, the Court appeared to assume that a pardon of a convict sentenced to death, conditioned on his imprisonment for life—effectively a commutation similar to the one at issue in *Biddle*—was based on consent of the recipient. 59 U.S. 307, 315 (1855) (rejecting argument that conditional pardon was not "voluntarily accepted," as recipient was legally imprisoned).

[1] *Ex parte* Garland, 71 U.S. 333, 380–81 (1866).

[2] 83 U.S. 147, 151 (1872).

captured without having to establish loyalty to the Union during the Civil War as would otherwise have been required by statute.[3] More broadly, the Court ruled in several cases during this period that pardons entitled their recipients to recover property forfeited or seized on the basis of the underlying offenses, so long as vested third-party rights would not be affected and money had not already been paid into the Treasury (except as authorized by statute).[4] In *Boyd v. United States*, the Court addressed one of the "disabilities" referred to in *Garland* that a pardon removes, recognizing that the ability of a man convicted of larceny to act as a witness in court was restored by President Benjamin Harrison's pardon.[5] According to the Court, because the "disability to testify" was "a consequence, according to the principles of the common law, of the judgment of conviction, the pardon obliterated that effect. The competency as a witness of the person so pardoned was therefore completely restored."[6]

Cases following *Garland* and *Carlisle* also began to note limits to the Court's broad framing of the effect of a pardon, however; in *Knote*, the Court wrote that although a pardon "blots out the offence" in a legal sense, "it does not make amends for the past. . . . The offence being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required."[7] Later cases underscored the limits of the Court's previous sweeping language. First, contrary to the suggestion of *Garland* that a pardon "blots out of existence the guilt" associated with the offense,[8] the Court in *Burdick* stated that a pardon "carries an imputation of guilt; acceptance a confession of it."[9] Then, in *Carlesi v. New York*, the Court determined that a pardoned offense could still be considered "as a circumstance of aggravation" under a state habitual-offender law,[10] reflecting that although a pardon may obviate the punishment for a federal crime, it does not erase the facts associated with the crime or preclude all collateral effects arising from those facts.[11]

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[3] *Id.* at 153; *see also* Armstrong v. United States, 80 U.S. 154, 155–56 (1871) (stating that pardon "blots out the offence," and "the person so pardoned is entitled to the restoration of the proceeds of captured and abandoned property, if suit be brought within 'two years after the suppression of the rebellion'").

[4] *See* Osborn v. United States, 91 U.S. 474, 477 (1875) ("But, unless rights of others in the property condemned have accrued, the penalty of forfeiture annexed to the commission of the offence must fall with the pardon of the offence itself, provided the full operation of the pardon be not restrained by the conditions upon which it is granted."); Knote v. United States, 95 U.S. 149, 154 (1877) ("Where, however, property condemned, or its proceeds, have not thus vested, but remain under control of the Executive, or of officers subject to his orders, or are in the custody of the judicial tribunals, the property will be restored or its proceeds delivered to the original owner, upon his full pardon. The property and the proceeds are not considered as so absolutely vesting in third parties or in the United States as to be unaffected by the pardon until they have passed out of the jurisdiction of the officer or tribunal. The proceeds have thus passed when paid over to the individual entitled to them, in the one case, or are covered into the treasury, in the other."); *see also In re Armstrong's Foundry*, 73 U.S. 766, 769 (1867) ("The general pardon of Armstrong, therefore, relieved him of so much of the penalty as accrued to the United States."); Illinois Cent. R.R. v. Bosworth, 133 U.S. 92, 103–05 (1890) (pardon restored property rights but subject to interest of third party acquired in interim); Jenkins v. Collard, 145 U.S. 546, 560–61 (1892) (same).

[5] 142 U.S. 450, 453–54 (1892).

[6] *Id.* at 454.

[7] *Knote*, 95 U.S. at 153–54.

[8] *Garland*, 71 U.S. at 380.

[9] Burdick v. United States, 236 U.S. 79, 94 (1915).

[10] 233 U.S. 51, 59 (1914).

[11] *See* Nixon v. United States, 506 U.S. 224, 232 (1993) ("[T]he granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal; it is an executive action that mitigates or sets aside *punishment* for a crime." (citation, internal quotation marks, and alteration omitted)).

ArtII.S2.C1.3.8 Congress's Role in Pardons

Article II, Section 2, Clause 1:

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

The Supreme Court has recognized that Congress cannot substantively limit the effect of a pardon through legislation. In *Ex parte Garland*, the Court held that the power of the President to pardon "is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."[1] In *United States v. Klein*, the Court voided a law that sought to bar the use of a pardon or amnesty as a substitute for proof of loyalty necessary to recover property abandoned and sold by the government during the Civil War.[2] The *Klein* Court held that the provision was an impermissible attempt to change the effect of pardons by requiring courts to "treat them as null and void," i.e., to "disregard pardons . . . and to deny them their legal effect."[3] Over a century after *Klein*, in rejecting the proposition that a condition attached to clemency must be authorized by statute, the Court in *Schick v. Reed* reaffirmed that "the power [of clemency] flows from the Constitution alone, not from any legislative enactments, and . . . it cannot be modified, abridged, or diminished by the Congress."[4]

Despite the Supreme Court's rigid view of the limits of legislative authority over pardons, Congress may have a role to play in exercise of the pardon power through other legal and constitutional processes. For instance, there is historical precedent for Congress facilitating exercise of the power by funding positions in the Department of Justice to assist in considering clemency petitions.[5] The Court in *The Laura* also upheld a statute vesting in a subordinate officer, the Secretary of the Treasury, the authority to remit fines or penalties provided for in laws related to steam-vessels, with exceptions, rejecting the argument that the law encroached on the President's power to pardon based on precedent for the practice going back to England.[6]

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[1] 71 U.S. 333, 380 (1866); *see also Ex parte* Grossman, 267 U.S. 87, 120 (1925) ("The executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress.").

[2] 80 U.S. 128, 143 (1871).

[3] *Id.* at 148.

[4] 419 U.S. 256, 266 (1974).

[5] *E.g.*, An Act Amendatory of the Acts Relative to the Attorney-General's Office, and to Fix the Compensation of his Assistant and Clerks, ch. 98, 13 Stat. 516 (1865) (authorizing Attorney General to employ and provide salary for "pardon clerk," among others). In a concurring opinion in an otherwise-unrelated 1990 Supreme Court decision, Justice Byron White noted that statutory appropriations *restrictions* may fall if "they encroach on the powers reserved to another branch of the Federal Government," using as an example a hypothetical effort by Congress to "impair the President's pardon power by denying him appropriations for pen and paper." Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 435 (1990) (White, J., concurring).

[6] 114 U.S. 411, 412–414 (1885). In the later case of Brown v. Walker, the Court upheld what was essentially an immunity statute for testimony given to the Interstate Commerce Commission, but in doing so suggested that Congress has "the power to pass acts of general amnesty[.]" 161 U.S. 591, 601 (1896). The Court has not revisited its suggestion that Congress has some degree of clemency authority parallel to the President's, though the validity of the suggestion has been disputed in other quarters. *See id.* at 609 (Field, J., dissenting) ("Congress cannot grant a pardon. That is an act of grace which can only be performed by the president."); Legislative Proposal to Nullify Criminal Convictions Obtained Under the Ethics in Government Act, 10 Op. O.L.C. 93, 94 (1986) ("[T]he Constitution gives Congress no authority to legislate a pardon for any particular individual or class of individuals[.]").

Beyond legislation, Congress has invoked its Article I authority to conduct oversight as a more indirect constraint on use of the pardon power,[7] and the Supreme Court has alluded to the possibility of impeachment as a check on misuse of the power.[8] Congress can also seek to amend the Constitution to clarify or constrain the President's clemency authority.[9] These constitutional processes are subject to constraints, which are discussed in more detail in their respective annotations.[10]

Clause 2—Advice and Consent

ArtII.S2.C2.1 Treaty-Making Power

ArtII.S2.C2.1.1 Overview of President's Treaty-Making Power

Article II, Section 2, Clause 2:

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

In the Treaty Clause, the Constitution returns to the realm of foreign affairs and vests the power to make treaties in the national government. Earlier in the Constitution, Article I prohibits the states from concluding treaties and limits the states' role in other forms of international relations.[1] Article I also assigns several foreign affairs-related powers to the Legislative Branch, including powers to regulate commerce with foreign nations, define and punish offenses against the Law of Nations and on the high seas, and regulate many aspects of the military.[2] In Article II's Treaty Clause, the Constitution, for the first time, addresses international affairs from the vantage of the President's powers. The clause vests the President, acting with the advice and consent of the Senate, with the authority to make treaties for the United States.

Treaties—which the Supreme Court traditionally defines as pacts among sovereign countries[3]—have been tools of international relations since antiquity.[4] After the United States

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[7] *See, e.g.*, *Pardon of Richard M. Nixon, and Related Matters: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93d Cong. 90–151 (1974) (testimony of President Gerald Ford). The Department of Justice has, in the past, taken the position that instances of Executive Branch compliance with congressional requests for information regarding pardon decisions have been purely voluntary and are not indicative of congressional authority to review clemency decisions. *See* Letter from Janet Reno, Att'y Gen., to President Bill Clinton (Sept. 16, 1999) (quoted in H.R. Rep. No. 106-488, at 119–20 (1999)).

[8] *Ex parte* Grossman, 267 U.S. 87, 121 (1925) (indicating that if the President ever sought to "deprive a court of power to enforce its orders" by issuing "successive pardons of constantly recurring contempts in particular litigation," such an "improbable" situation "would suggest a resort to impeachment, rather than a narrow and strained construction of the general powers of the President").

[9] U.S. Const. art. V.

[10] *See* ArtI.S2.C5.3 Impeachment Doctrine; ArtV.3.2 Congressional Proposals of Amendments.

[1] *See* ArtI.S10.C1.1 Foreign Policy by States.

[2] *Id.*

[3] *See*, *e.g.*, Lozano v. Montoya Alvarez, 572 U.S. 1, 11, (2014) ("[T]reaties . . . are primarily 'compact[s] between independent nations[.]'") (first set of brackets in original) (quoting Medellín v. Texas, 552 U.S. 491, 505 (2008)); Altman & Co. v. United States, 224 U.S. 583, 600 (1912) ("Generally, a treaty is defined as 'a compact made between two or more independent nations, with a view to the public welfare.'") (citation omitted)); Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on

won its independence from Great Britain, many Americans viewed the Articles of Confederation as a form of a treaty among the individual states of the union.[5] But the Framers criticized how the Articles of Confederation addressed the new union's treaty obligations to foreign countries.[6] The Articles lacked a mechanism to ensure individual states complied with the United States' international obligations, particularly its obligations to England under the 1783 Treaty of Peace that ended the Revolutionary War.[7] When drafting the Constitution, the Framers sought to remedy this problem by including treaties among the sources of the "supreme Law of the Land" in the Supremacy Clause.[8] Because of this change, treaties occupy a unique place in the constitutional system: they can operate simultaneously as domestic law of the United States and as tools of foreign policy in the form of pacts between nations.[9]

Elements of the treaty-making process may vary depending on the treaty, but the standard process generally operates as follows:[10] a member of the Executive Branch negotiates the terms of a treaty, and the President or another Executive Branch official signs the completed draft when negotiations conclude.[11] Next, the President submits the treaty to the Senate.[12] If "two thirds of the Senators present" pass a resolution of advice and consent, the process shifts

public law."); Head Money Cases (Edye v. Robertson), 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations."). Although sovereign nations are the primary subject of treaties, in modern practice, other entities, such as international organizations, occasionally have joined treaties. *See generally* James Crawford, Brownlie's Principles of Public International Law 115–16 (8th ed. 2012) [hereinafter Brownlie's Principles].

[4] *See generally* Arthur Nussbaum, A Concise History of the Law of Nations (1954).

[5] *See* Intro.6.1 Continental Congress and Adoption of the Articles of Confederation. *See also* David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 Stan. L. Rev. 1697, 1706–10 (2003) (discussing historical evidence for the conclusion that the predominant, but not universal, view at the time of the Framing was that the Articles of Confederation formed a treaty-based body); Richard Beeman, Plain, Honest Men: The Making of The American Constitution 8 (2009) ("The Articles of Confederation, America's first 'constitution,' was not really a proper constitution, but rather a peace treaty among thirteen separate and sovereign states."); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 167, 237 (1996) ("[T]he [Confederation] Congress had judicial, legislative, and executive functions more typical of a treaty organization than a sovereign government.").

[6] *See* ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties.

[7] *See id*.

[8] U.S. Const. art. VI, cl. 2. For discussion of the relationship between treaties and the Supremacy Clause, see ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties, and for broader analysis of the Supremacy Clause, see ArtVI.C2.1 Overview of Supremacy Clause.

[9] *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) ("A treaty is in its nature a contract between two nations, not a legislative act. . . . In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."); The Head Money Cases, 112 U.S. at 598 ("A treaty is primarily a compact between independent nations. . . . But a treaty may also . . . partake of the nature of municipal law[.]"); Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty, 20 Op. O.L.C. 389, 390 (1996) (discussing the "dual nature of treaties, as instruments of both domestic and international law").

[10] For analysis of the U.S. treaty-making process, see Cong. Research Serv., *Treaties and Other International Agreements: The Role of the United States Senate*, S. Rep. No. 106-71, at 107–56 (2001) [hereinafter Treaties and Other International Agreements].

[11] *Id.* at 96–97. *See also* Zivotofsky v. Kerry, 576 U.S. 1, 13 (2015) [hereinafter Zivotofsky II] ("The President has the sole power to negotiate treaties[.]"); United States v. Curtiss–Wright Export Corp., 299 U.S. 304, 319 (1936) ("[T]he President . . . makes treaties with the advice and consent of the Senate; but he alone negotiates."); Procedures for Exchanging Instruments of Ratification for Bilateral Law Enforcement Treaties, 8 Op. O.L.C. 157, 157 (1984) (discussing the "President's negotiating authority with respect to bilateral treaties"). Although the Executive Branch generally is responsible for treaty negotiations, Congress occasionally plays a role by, among other things, enacting legislation encouraging the Executive Branch to pursue certain objectives in its international negotiations. *See Treaties and Other International Agreements*, *supra* note 10, at 100–02.

[12] *Id.* at 118 ("All treaties are transmitted to the Senate in the President's name").

back to the Executive Branch.[13] At this stage, the President decides whether to make the final decision to enter the treaty on behalf of the United States.[14] It is thus the President, and not the Senate, who has final responsibility for completing the treaty-making process.[15] However, the President has no obligation to ratify a Senate-approved treaty, and, in some cases, the President has declined to do so.[16]

Although many important events in U.S. foreign relations have culminated in treaties,[17] the United States does not conclude all agreements with foreign nations through the process outlined in the Treaty Clause. The President regularly enters into executive agreements, which do not receive the Senate's advice and consent, and "political commitments" and other nonlegal pacts that are not intended to be binding.[18] Since the turn of the twentieth century, Presidents have increasingly used alternatives to treaties,[19] which are examined in the discussion of the President's inherent power over foreign affairs.[20] The following essay focuses

[13] *See Zivotofsky II*, 576 U.S. at 13 ("[T]he Senate may not conclude or ratify a treaty without Presidential action."); Procedures for Exchanging Instruments of Ratification for Bilateral Law Enforcement Treaties, 8 Op. O.L.C. 157, 158 (1984) ("Once the Senate gives its advice and consent, the treaty is returned to the President, who must ratify it by signing the instrument of ratification.").

[14] *See supra* note 13. *See also* Restatement (Fourth) of Foreign Relations Law § 303(3) (2018) [hereinafter Fourth Restatement] ("After the Senate provides its advice and consent, the President determines whether to ratify or otherwise make the treaty on behalf of the United States."). While the Restatement of Foreign Relations Law of the United States is nonbinding and prepared by a private organization, the Supreme Court has cited it on several occasions, *e.g.*, United States v. Stuart, 489 U.S. 353, 375 (1989) (citing Restatement (Third) of Foreign Relations Law § 314 (1987)); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 259 (1984) (citing Restatement (Second) of the Foreign Relations Law § 147(1)(f) (1965)), and commentators often describe it as authoritative, *e.g.*, Anthony S. Winer et al., International Law Legal Research 242–43 (2013).

[15] *See*, *e.g.*, Samuel B. Crandall, Treaties, Their Making and Enforcement 81 (2d ed. 1916) ("[T]he approval, whether qualified or unqualified, of the treaty by the Senate is not to be confused with the act of ratification. The latter is performed by the President[.]"); Fourth Restatement, *supra* note 14, § 303 reporters' n.5 ("Properly speaking, the Senate does not ratify a treaty; the Senate gives its advice and consent to ratification. It is the President who then 'ratifies,' or makes, the treaty by signing an instrument of ratification and then arranging for the deposit or exchange of the instrument, as indicated by the treaty's terms."). Although the President is the final actor in expressing the United States' assent to be bound to a treaty, additional action by Congress may be necessary to implement the treaty into domestic law. *See* ArtII.S2.C2.1.5 Congressional Implementation of Treaties. Once the parties to the treaty complete the processes necessary to express their final assent to be bound—often through an exchange of instruments of ratification—the President may "proclaim" the treaty, and declare it to be in force by Executive Order. *See* Procedures for Exchanging Instruments of Ratification for Bilateral Law Enforcement Treaties, 8 Op. O.L.C. 157, 158 (1984).

[16] For examples when the President declined to ratify treaties that received the Senate's advice and consent, see Crandall, *supra* note 15, at 97–99 and Fourth Restatement, *supra* note 14, § 303 reporters' n.5.

[17] *See, e.g.*, Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80 (peace treaty with Great Britain following the Revolutionary War); Cessation of Louisiana: A Financial Arrangement—Convention Between the United States and the French Republic, U.S.-Fr., Apr. 30, 1803, 8 Stat. 206 (treaty defining the terms of the Louisiana Purchase); Peace, Friendship, Limits, and Settlement (Treaty of Guadalupe Hidalgo), U.S.-Mex., Feb. 2, 1848, 9 Stat. 922 (Treaty of Guadalupe Hidalgo ending the Mexican-American War and giving the United States control over what would become several southwestern U.S. states).

[18] For discussion of international pacts that are not concluded through the process defined in the Treaty Clause, see ArtII.S2.C2.2.2 Legal Basis for Executive Agreements.

[19] *See Treaties and Other International Agreements*, *supra* note 10, at 38–41; Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 Harv. L. Rev. 1201, 1209–12 (2018).

[20] *See* ArtII.S2.C2.2.1 Overview of Alternatives to Treaties; ArtII.S2.C2.2.2 Legal Basis for Executive Agreements; ArtII.S2.C2.2.3 Legal Effect of Executive Agreements; ArtII.S2.C2.2.5 Congressional Executive Agreements.

on treaties in the constitutional sense, meaning international agreements[21] that the President concludes after receiving the Senate's advice and consent through the process defined in the Treaty Clause.[22]

ArtII.S2.C2.1.2 Historical Background on Treaty-Making Power

Article II, Section 2, Clause 2:

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

Jurists, courts, and legal analysts have long viewed a country's capacity to enter into international pacts as an essential element of national sovereignty.[1] Under the British system of treaty-making, the power to conclude and ratify treaties falls within the prerogative of the Crown.[2] After the United States achieved its independence from Great Britain, the treaty-making power was transferred to the newly established Congress under the Articles of Confederation.[3] But the United States soon faced practical difficulties in attempting to negotiate treaties through a large legislative body.[4] And even when the national government

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[21] As used in this essay, the term "international agreements" refers to agreements between two or more countries (or between one or more countries and an entity, such as a public international organization, with capacity to conclude an international agreement) that is intended to be legally binding and is governed by international law. *See* Fourth Restatement, *supra* note 14, § 302 cmt. a.

[22] The meaning of the term "treaty" differs in its constitutional usage when compared to international law. Under international law, the term "treaty" refers to an international agreement that is binding and governed by international law regardless of how the agreement is brought into force. *See* Weinberger v. Rossi, 456 U.S. 25, 31–32 (1982); *Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty*, *supra* note 9, at 389 n.2. Under U.S. law, "treaty" generally refers to a narrower subset of international agreements that receive senatorial advice and consent under the process defined in the Treaty Clause. *See* Weinberger, 456 U.S. at 30; Fourth Restatement, *supra* note 14, § 302 cmt. a. But courts occasionally have interpreted the term "treaty" in U.S. statutes to encompass executive agreements. *See* Weinberger, 456 U.S. at 31–32 (interpreting statute barring discrimination except where permitted by "treaty" to refer to both treaties and executive agreements); B. Altman & Co. v. United States, 224 U.S. 583, 601 (1912) (construing "treaty," as used in statute conferring appellate jurisdiction, to also refer to executive agreements).

[1] *See, e.g.*, Emer De Vattel, The Law of Nations, or Principles of the Law of Nations, Applied to the Conduct and Affairs of Nations and Sovereigns 67 (Liberty Fund ed., 2008) (originally published 1758) (defining "what is meant by a nation or state" and including the ability to be "susceptible of obligations and rights"). *See also* S.S. Wimbledon (U.K., Fr., Italy, Japan v. Germany), Judgment, 1923 P.C.I.J. (ser. A) No. 1, at 25 (Aug. 17) ("[T]he right of entering into international engagements is an attribute of State sovereignty."); Anne Peters, *Treaty-Making Power*, *in* 10 The Max Planck Encyclopedia of Public International Law 57 (Rudiger Wolfrum ed., 2012) ("Treaty-making power is often considered as a corollary, or as a fundamental attribute, of the international legal personality understood as the ability to have rights and obligations under international law."); Rosalyn Higgins, The Development of International Law Through the Political Organs of the United Nations 13 (1963) (describing the "capacity to enter into international relations with other states" as one of the traditional criteria necessary for independent statehood).

[2] *See* James Crawford, Brownlie's Principles of Public International Law 63 (8th ed. 2012). *See also* 1 William Blackstone, Commentaries on the Laws of England 257 (Lippincott ed., 1859) ("It is also the king's prerogative to make treaties, leagues, and alliances with foreign states and princes."). In modern usage, "the Crown" generally refers to the Executive Branch of the British government rather than an individual monarch. *See* Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 Wash. L. Rev. 1, 75 & n.290 (1979) [hereinafter Bestor, Respective Roles].

[3] Articles of Confederation of 1781 art. IX, para. 1.

[4] *See* Bestor, Respective Roles, *supra* note 2, at 49–72.

was able to conclude treaties, the new nation often found itself unable to perform its treaty obligations without the cooperation of the state governments.[5]

By the time of the Constitutional Convention, the delegates had largely come to agree that the national government required a stronger power to enforce treaties throughout the United States, but there were many differences of opinion as to where the newly enhanced treaty power should reside.[6] In August 1787, the Committee of Detail proposed an early draft of the Constitution that would have provided the Senate alone with the power to make treaties.[7] But the delegates raised widespread objections to the provision.[8] Some delegates proposed that treaty-making include a role for the President or be granted to the President exclusively.[9] Others argued that both chambers of Congress should be included in the process.[10] Ultimately, the delegates decided that the Executive Branch was best equipped to act with the confidentiality and efficiency necessary for treaty negotiations.[11] In the *Federalist No. 64*, John Jay expanded on this rationale, arguing that individuals with useful information in treaty negotiations would "rely on the secrecy of the President, but . . . would not confide in that of the Senate, and still less in that of a large popular Assembly."[12]

While the delegates to the Constitutional Convention concluded that the President should play a role in treaty-making, they also decided that no single component of the government should have the power to bind the United States to a treaty.[13] Because of treaties' dual nature as tools of foreign policy and part of the law of the land, the *Federalist Papers* describe treaty-making as a "peculiar" combination of two functions that did not fit neatly into the founding era understanding of separation of powers.[14] In the *Federalist Papers*, Alexander Hamilton and John Jay argued that treaty-making contains elements of executive power

[5] *See* ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties.

[6] *See*, *e.g.*, 2 The Records of the Federal Convention of 1787, at 297, 392–93, 495, 498–99, 438, 540–41, 538–50, 638 (Max Farrand ed., 1911) [hereinafter Farrand's Records] (debate over treaty-making power during the Constitutional Convention); 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 263–65 (Jonathan Elliot ed., 1836) [hereinafter Debates in the Several State Conventions] (discussion of treaty-making power during the South Carolina ratifying convention); *id.* at 306 (statements concerning the treaty-making power by Alexander Hamilton to the New York ratifying convention); 2 Documentary History of the Ratification of the Constitution 563 (Merrill Jensen et al., eds.) (arguments concerning the Treaty Clause to the Pennsylvania ratifying convention).

[7] *See* 2 Farrand's Records, *supra* note 6, at 176, 183.

[8] *Id.* at 393 ("Mr. [Edmund] Randolph observing that almost every Speaker had made objections to the clause as it stood, moved in order to a further consideration of the subject[.]"). *See also* Bestor, Respective Roles, *supra* note 2, at 93–96 (discussing objections to the Senate the exclusive treaty-making authority).

[9] For example, John Mercer of Maryland argued that the "Senate ought not to have the power of treaties" at all, contending that the power should reside in the Executive alone. 2 Farrand's Records, *supra* note 6, at 297. And James Madison argued that "the President should be an agent in Treaties" because "the Senate represented the States alone" rather than the federal government. *Id.* at 392–93.

[10] *See id.* at 538 (motion by James Wilson of Pennsylvania to require the advice and consent of both chambers of Congress before conclusion of a treaty).

[11] *See id.* at 499 (proposal by the Committee of Postponed Parts to allow presidential participation in treaty-making). *See also* The Federalist No. 75 (Alexander Hamilton) (explaining the rationale for the "union of the Executive with the Senate" in treaty-making); The Federalist No. 64 (John Jay) ("[W]e see that the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from [the Senate's] talents, information, integrity, and deliberate investigations, on the one hand, and from [the President's] secrecy and despatch on the other.").

[12] The Federalist No. 64 (John Jay).

[13] *See*, *e.g.*, 2 Debates in the Several State Conventions, *supra* note 6, at 507 (statement of James Wilson) ("Neither the President nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people.").

[14] *See* The Federalist No. 75 (Alexander Hamilton) ("[T]he particular nature of the power of making treaties indicates a peculiar propriety in that union" of the Executive with the Senate in making treaties.).

because it involves diplomacy and the management of foreign relations.[15] Hamilton and Jay also believed treaty-making invokes the legislative power because treaties can have the force of domestic law.[16] As Hamilton summarized in the *Federalist No. 75*, the power to make treaties belongs "neither to the legislative nor to the executive."[17] For that reason, the delegates to the Constitutional Convention saw fit to divide this dual natured power between dual branches.[18]

The delegates chose to include the Senate in the treaty-making process rather than the House of Representatives because they believed the House would be too large and that its membership would change too often to act with the secrecy and speed necessary for treaty-making.[19] The delegates also believed the Senate would represent and protect the interests of the states,[20] which the Constitution denies the power to make treaties.[21]

The delegates viewed the requirement that a supermajority of two thirds of Senators present provide their advice and consent as a method to prevent the federal government from making treaties that would promote regional interests or discriminate against a minority of states.[22] In particular, the Southern states were concerned that the federal government would give Spain navigation rights on the Mississippi River, which were essential to the Southern economy, in exchange for trade concessions that would benefit the Northern economy.[23] And

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[15] *Id.* ("The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions[.] . . . [T]he ministerial servant of the Senate could not be expected to enjoy the confidence and respect of foreign powers in the same degree with the constitutional representatives of the nation[.]"); The Federalist No. 64 (John Jay) (discussing the benefits of authorizing the President to negotiate treaties).

[16] *See* The Federalist No. 75 (Alexander Hamilton) ("[T]he vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.").

[17] *Id.*

[18] *Id. See also supra* notes 6, 8.

[19] *See* at 2 Farrand's Records, *supra* note 6, at 534 (vote 475) (voting, ten states to one, against the motion to include the House of Representatives in the treaty-making process); *Id.* at 538 ("[Roger Sherman of Connecticut] thought . . . that the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature."); The Federalist No. 75 (Alexander Hamilton) ("The fluctuating and, taking its future increase into the account, the multitudinous composition of [the House of Representatives], forbid us to expect in it those qualities which are essential to the proper execution of such a trust [necessary to conclude a treaty]."); The Federalist No. 64 (John Jay) ("They who wish to commit the [treaty] power under consideration to a popular assembly, composed of members constantly coming and going in quick succession, seem not to recollect that such a body must necessarily be inadequate to the attainment of those great objects[.]").

[20] *See* 3 Farrand's Records, *supra* note 6, at 348 (statement of William Davie to the North Carolina Ratifying Convention) ("[T]he extreme jealousy of the little states, and between the commercial states and the non-importing states, produced the necessity of giving an equality of suffrage to the Senate. The same causes made it indispensable to give to the senators, as representatives of states, the power of making, or rather ratifying, treaties. Although it militates against every idea of just proportion that the little state of Rhode Island should have the same suffrage with Virginia, or the great commonwealth of Massachusetts, yet the small states would not consent to confederate without an equal voice in the formation of treaties. . . . It therefore became necessary to give them an absolute equality in making treaties."); 2 Farrand's Records, *supra* note 6, at 392 (James Madison advocating for the President to play a role in treaty-making because "the Senate represents the States alone.").

[21] *See* U.S. Const. art. I, § 10, cl. 1. *See also* ArtI.S10.C1.1 Foreign Policy by States.

[22] *See infra* notes 23–24; Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States* 117 Yale L.J. 1236, 1282 (2008) [hereinafter Hathaway, *Treaties' End*] (stating that the focus of the supermajority requirement in the Senate "was not the result of general or theoretical concerns. It was, instead, formed in direct response to a recent controversy over treaty negotiations with Spain" implicating regional interests); Bestor, Respective Roles, *supra* note 2, at 100 (discussing the role of sectional interests in the crafting of the treaty power at the constitutional convention); Jack N. Rakove, Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study, *in* 1 Perspectives in American History 272–74 (1984) (analyzing historical events influencing the two-thirds requirement in the Treaty Cause).

[23] For analysis of the impact of negotiations with Spain over navigation rights to the Mississippi, see Charles Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 Geo. Wash. L. Rev. 271, 274 (1934).

the Northern states feared they could lose access to fisheries in Newfoundland through a treaty.[24] The Treaty Clause's supermajority requirement—one of several in the Constitution[25]—was designed to alleviate these concerns by allowing a minority of states, through their representatives in the Senate, to block treaties that could disproportionately disadvantage segments of the nation.[26]

The exact number of Senators required to approve a treaty under the Treaty Clause differs from its predecessor provision in the Articles of Confederation. Whereas the Articles of Confederation required nine of thirteen states to approve all treaties, the Framers deliberately changed the advice and consent threshold to "two thirds of the Senators present[.]"[27] Hamilton explained in the *Federalist No. 75* that the change from a fixed number to a percentage would account for the possibility that new states would join the union.[28] Hamilton also argued that it would limit individual Senators' ability to block a treaty simply by declining to appear in the Senate for a vote.[29] And whereas each state voted as a unit under the Articles, the Treaty Clause permits Senators to vote individually, creating the possibility that one state's Senator could vote for a treaty and the other against it.[30]

Many scholars have concluded that the Framers intended "advice" and "consent" to be separate aspects of the treaty-making process, although there is still some debate on the issue.[31] According to the prevailing interpretation, the "advice" element required the President

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[24] *See*, *e.g.*, 3 Debates in the Several State Conventions, *supra* note 6, at 604 (statement of George Mason) ("The Newfoundland fisheries will require that kind of security which we are now in want of. The Eastern States therefore agreed, at length, that treaties should require the consent of two thirds of the members present in the Senate."); R. Earl McClendon, *Origin of the Two-Thirds Rule in Senate Action Upon Treaties*, 36 Am. Hist. Rev. 768, 768–69 (1931) (providing a historical analysis of the importance of Newfoundland fisheries and their role in leading to the two-thirds requirement in the Treaty Clause).

[25] *See* U.S. Const. art. I, § 3, cl. 6 (convictions on impeachment); *Id.* § 5, cl. 2 (expulsion of a Member of Congress); *Id.* § 7, cl. 2 (overriding presidential veto); *Id.* art. V (proposing a constitutional amendment in Congress); *Id.* amend. XIV, § 3 (restoring the ability of those who "engaged in insurrection or rebellion against the [United States], or given aid or comfort to the enemies thereof" to serve in public office); *Id.* amend. XXV, § 4 (congressional approval of removal of the President for inability to discharge powers and duties of the office after the Vice President and the Cabinet approve such removal and after the President contests removal).

[26] *See supra* notes 22–24.

[27] *Compare* Articles of Confederation of 1781 art. IX, *with* U.S. Const. art. II, § 2, cl. 2.

[28] *See* The Federalist No. 75 (Alexander Hamilton) (discussing the "probable augmentation of the Senate, by the erection of new States").

[29] *Id.* ("[M]aking a determinate number at all times requisite to a resolution, diminishes the motives to punctual attendance. . . . [M]aking the capacity of the body to depend on a PROPORTION which may be varied by the absence or presence of a single member, has the contrary effect.")

[30] For example, in voting on the first treaty that was to be ratified by the United States after the adoption of the Constitution—dubbed the Jay Treaty because it was negotiated by the first Chief Supreme Court Justice of the United States, John Jay, who was appointed a special envoy to Great Britain despite his role in the Judicial Branch—Senators from six states split their votes. *See* Amity, Commerce, and Navigation (Jay Treaty): Treaty of Amity, Commerce and Navigation, between His Britannick Majesty;—and The United States of America, by Their President, with the Advice and Consent of Their Senate, Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116; 4 Annals of Cong. 862 (1795).

[31] *Compare*, *e.g.*, Louis Henkin, Foreign Affairs and the U.S. Constitution 177 (2d ed. 1996) ("As originally conceived, no doubt, the Senate was to be a kind of Presidential council, affording him advice throughout the treaty-making process and on all aspects of it[.]"); Arthur Bestor, *"Advice" from the Very Beginning, "Consent" When the End Is Achieved*, 83 Am. J. Int'l L. 718, 726 (1989) ("[T]he use of the phrase 'advice and consent' to describe the relationship between the two partners clearly indicated that the Framers' conception was of a council-like body in direct and continuous consultation with the Executive on matters of foreign policy."); Rakove, *supra* note 22, at 249 ("Advice . . . was to be given at every stage of diplomacy, from the framing of policy and instructions [to treaty negotiators] to the final bestowal of consent."); Ralston Hayden, The Senate and Treaties, 1789–1817, at 6 (1920) ("[T]he [Senate] really was a council of advice upon treaties and appointments—a council which expected to discuss these matters directly with the other branch of the government."); Hathaway, Treaties' End, *supra* note 22, at 1278–81 (discussing the Senate's role as a "Council of Advice" to the President), *with* Michael D. Ramsey, The Constitution's Text in Foreign Affairs 139 (2007) ("'[A]dvice and consent' . . . seems capable of . . . meaning[ ] an after-the-fact review of the President's proposal, coupled with 'advice' that the President process or adopt an alternate course.").

to consult with the Senate during treaty negotiations before seeking the Senate's final "consent."[32] President George Washington appears to have understood that the Senate had such a consultative role,[33] but he and other early Presidents soon declined to seek the Senate's input during the negotiation process.[34] In modern treaty-making practice, the Executive Branch generally is responsible for negotiations, and the Supreme Court stated in dicta that the President's power over treaty negotiations is exclusive.[35]

Although Presidents since Washington have not formally consulted with the Senate as a body, the Senate maintains an aspect of its "advice" function through its conditional consent authority.[36] In considering when to provide its advice and consent to a treaty, the Senate may condition its approval on reservations,[37] declarations,[38] understandings,[39] and provisos[40] concerning the treaty's application.[41] Under established U.S. practice, the President cannot

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[32] *See*, *e.g.*, Henkin, *supra* note 31, at 177; Bestor, *supra* note 31, at 726; Rakove, *supra* note 22, at 249; Hathaway, Treaties' End, *supra* note 22, at 1278–81; Hayden, *supra* note 31, at 6.

[33] On an occasion that has been described as the first and last time the President personally visited the Senate chamber to receive the Senate's advice on a treaty, President Washington went to the Senate in August 1789 to consult about proposed treaties with the Southern Indians. *See* 1 Annals of Cong. 65–71 (1789). But observers reported that he was so frustrated with the experience that he vowed never to appear in person to discuss a treaty again. *See*, *e.g.*, William Maclay, Sketches of Debate in the First Senate of the United States 122–24 (George W. Harris ed., 1880) (record of the President's visit by Senator William Maclay of Pennsylvania); Hayden, *supra* note 31, at 21–26 (providing a historical account of Washington's visit to the Senate).

[34] *See* VI Memoirs of John Quincy Adams 427 (Charles Francis Adams ed., 1875) ("[E]ver since [President Washington's first visit to the Senate to seek its advice], treaties have been negotiated by the Executive *before* submitting them to the consideration of the Senate.").

[35] *See* Zivotofsky v. Kerry, 576 U.S. 1, 13 (2015) ("The President has the sole power to negotiate treaties, . . . and the Senate may not conclude or ratify a treaty without Presidential action."); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("[T]he President . . . makes treaties with the advice and consent of the Senate; but he alone negotiates.").

[36] *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399, 405 (2000) ("The exercise of the conditional consent power has been in part a response by the Senate to its loss of any substantial 'advice' role in the treaty process."); Samuel B. Crandall, Treaties, Their Making and Enforcement 81 (2d ed. 1916) ("Not usually consulted as to the conduct of negotiations, the Senate has freely exercised its co-ordinate power in treaty making by means of amendments."). Not all legal scholars view the Senate's conditional consent authority as an effective substitute for the role as a council of advice. *See* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 799, 905 (1995) (describing the Senate's assertion of conditional consent power as a "dysfunctional" and counterproductive system generated after "the Senate lost its effective capacity to give advice").

[37] As a general matter, "[r]eservations change U.S. obligations without necessarily changing the text, and they require the acceptance of the other party." *See* Cong. Research Serv., *Treaties and Other International Agreements: The Role of the United States Senate*, S. Rep. No. 106-71, at 11 (2001) [hereinafter *Treaties and Other International Agreements*]. *See also* Restatement (Fourth) of Foreign Relations Law § 305 reporters' n.2 (2018) [hereinafter Fourth Restatement] ("Although the Senate has not been entirely consistent in its use of the labels, in general the label . . . 'reservation' [has been used] when seeking to limit the effect of the existing text for the United States[.]").

[38] Declarations are "statements expressing the Senate's position or opinion on matters relating to issues raised by the treaty rather than to specific provisions." *Treaties and Other International Agreements*, *supra* note 37, at 11. *See also* Fourth Restatement, *supra* note 37, § 305 reporters' n.2 (describing declarations as the Senate's "policy statements about a treaty" or statements concerning the treaty's domestic status).

[39] Understandings are "interpretive statements that clarify or elaborate provisions but do not alter them." *Treaties and Other International Agreements*, *supra* note 37, at 11. *See also* Fourth Restatement, *supra* note 37, § 305 reporters' n.2 ("[I]n general [the Senate uses] the label . . . 'understanding' when seeking to set forth the U.S. interpretation of a treaty provision[.]").

[40] Provisos concern "issues of U.S. law or procedure and are not intended to be included in the instruments of ratification to be deposited or exchanged with other countries." *Treaties and Other International Agreements*, *supra* note 37, at 11. *See also* Fourth Restatement, *supra* note 37, § 305 reporters' n.2 (stating that the Senate uses the term "proviso" when "setting forth a condition relating to the process by which the President makes the treaty or the process by which it is implemented within the United States, or to impose reporting or other obligations on the President").

[41] Haver v. Yaker, 76 U.S. (9 Wall.) 32, 35 (1869) (stating that "the Senate are not required to adopt or reject [a treaty] as a whole, but may modify or amend it, as was done with the treaty under consideration"); The Diamond Rings, 183 U.S. 176, 183 (1901) (Brown, J., concurring) (noting that the Senate may "make . . . ratification conditional upon

ratify a treaty unless the President accepts the Senate's conditions.[42] If accepted by the President, these conditions may modify or define U.S. rights and obligations under the treaty.[43] The Senate also may propose to amend the text of the treaty itself, after which other nations that are parties to the treaty must consent to the changes for them to take effect.[44]

ArtII.S2.C2.1.3 Scope of Treaty-Making Power

Article II, Section 2, Clause 2:

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

The Articles of Confederation limited the scope of the treaty power by carving out two acts that the United States could not take in a treaty: limiting the states' power to impose "imposts on duties on foreigners" and "prohibiting the exportation or importation of any species of goods or commodities whatsoever[.]"[1] The Constitution's Treaty Clause, by contrast, contains no such restrictions.[2] During the Constitutional Convention and the ratification debates, some delegates expressed concern that the treaty power was too broad and subject to abuse.[3] But James Madison and others defended the structure of the treaty power, arguing that it was not possible to enumerate all circumstances in which the government could misuse the treaty

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the adoption of amendments to the treaty"); Fourth Restatement, *supra* note 37, § 305 reporters' n.3 (collecting lower court cases giving effect to the Senate's conditions when interpreting or applying a treaty).

[42] *See United States v. Stuart,* 489 U.S. 353, 374–75 (1989) (Scalia, J., concurring) ("[The Senate] may, in the form of a resolution, give its consent on the basis of conditions. If these are agreed to by the President and accepted by the other contracting parties, they become part of the treaty and of the law of the United States[.]"); Relevance of Senate Ratification History to Treaty Interpretation, 11 Op. O.L.C. 28, 32–33 (1987) ("[S]uch understandings or other conditions expressly imposed by the Senate are generally included by the President with the treaty documents deposited for ratification or communicated to the other parties at the same time the treaty is deposited for ratification. Because such conditions are considered to be part of the United States's position in ratifying the treaty, they are generally binding on the President, both internationally and domestically, in his subsequent interpretation of the treaty.") (citations and footnotes omitted).

[43] For discussion of historical examples of conditions attached by the Senate to treaties, see Fourth Restatement, *supra* note 37, § 305 reporters' n.5.

[44] For example, in giving its advice and consent to the Jay Treaty, the Senate insisted on suspending an article allowing Great Britain to restrict U.S. trade in the British West Indies. *See* Amity, Commerce, and Navigation (Jay Treaty): Treaty of Amity, Commerce and Navigation, between His Britannick Majesty;—and The United States of American, by Their President, with the Advice and Consent of Their Senate, Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116; S. Exec. Journal, 4th Cong., 10th Sess. 186 (1795). Great Britain ratified the Jay Treaty without objection to the Senate's changes. *See* Hayden, *supra* note 31, at 86–88.

[1] Articles of Confederation of 1781, art. IX, para. 1.

[2] *See* U.S. Const. art II, § 2, cl. 2.

[3] *See*, *e.g.*, 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 509 (Jonathan Elliot ed., 1836) [hereinafter Debates in the Several State Conventions] (George Mason arguing for more stringent limits on the treaty power, stating "[t]he President and Senate can make any treaty whatsoever. We wish . . . to guard, this power[.]"); *id.* at 504 (Patrick Henry calling the treaty power so broad as to be "dangerous and destructive."); 2 The Records of the Federal Convention of 1787, at 393 (Max Farrand ed., 1911) [hereinafter Farrand's Records] (statement of James Wilson) ("Under the clause, without the amendment, the Senate alone can make a Treaty, requiring all the Rice of S. Carolina to be sent to some one particular port.").

power,[4] and that other checks and balances would provide appropriate limitations.[5] In the end, the Framers did not include express limitations in the Treaty Clause on the types of subjects that may be addressed in a treaty.[6]

Despite the absence of subject matter limitations in the Treaty Clause's text, there have been suggestions since the founding era that the treaty-making power is implicitly limited to matters that traditionally have been the subject of intercourse between sovereign nations.[7] The status and scope of such a limitation, however, remains unclear. In several cases from the turn of the nineteenth century, the Supreme Court stated that the treaty power is not limited to a set of enumerated subjects in the way that Congress's legislative powers are so constrained.[8] Yet, in those same cases, the Court suggested that the treaty power might only extend to topics that "properly pertain" to foreign relations[9] or are the "proper subjects"[10] of negotiations between the United States and foreign nations.

Some jurists and commentators assert that the only proper subjects for treaties under the Constitution are "matters of international concern."[11] Under this view, treaties must relate to "external concerns," as distinguished from "purely internal" subjects.[12] In 2014, three Supreme Court Justices joined a concurring opinion arguing that the treaty power "can be used to

[4] *See*, *e.g.*, 3 Debates in the Several State Conventions, *supra* note 3, at 514–15 (James Madison arguing that an attempt to "enumerate all the cases" in which treaty power should be restrained "might, and probably would be defective"); *id.* at 504 (statement of Edmund Randolph: "It is said there is no limitation of treaties. I defy the wisdom . . . to show how they ought to be limited.").

[5] *See*, *e.g.*, *id.* at 516 (James Madison arguing that impeachment, criminal convictions, and regular elections in the Senate were checks on abuse of the treaty power.).

[6] *See* U.S. Const. art. II, § 2, cl. 2. *See also* Alexander Hamilton, The Defence No. XXXVI (Jan. 2, 1796), *reprinted in* 20 Papers of Alexander Hamilton 6 (Harold C. Syrett ed., 1974) ("A power 'to make treaties,' granted in these indefinite terms, extends to all kinds of treaties and with all the latitude which such a power under any form of Government can possess.").

[7] *See*, *e.g.*, 2 Debates in the Several State Conventions, *supra* note 3, at 378 (statement of James Madison: "The object of treaties is the regulation of intercourse with foreign nations, and is external."); Thomas Jefferson, A Manual of Parliamentary Practice 310 (Samuel Harrison Smith ed., 1801) ("[T]he Constitution must have intended to comprehend only those subjects which are usually regulated by treaty, and cannot otherwise be regulated.").

[8] *See infra* note 10.

[9] *See* Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) ("There can be no question as to the power of the government of the United States to make the treaty with Persia or the Consular Convention with Italy. The treatymaking power is broad enough to cover all subjects that properly pertain to our foreign relations[.]").

[10] *See* Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) ("The treaty-making power of the United States is not limited by any express provision of the Constitution, and, . . . it does extend to all proper subjects of negotiation between our government and other nations."); Holden v. Joy, 84 U.S. (17 Wall.) 211, 243 (1872) ("[T]he [treaty] power is given, in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty."). *See also* De Geofroy v. Riggs, 133 U.S. 258, 267 (1890) ("[I]t is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."); Ross v. McIntyre, 140 U.S. 453, 463 (1891) ("The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments."); Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 569 (1840) (Taney, C.J.) ("The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it; and, consequently, it was designed to include all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty.") (affirmed by equally divided court).

[11] The "international concern" requirement is most often associated with remarks by Charles Evans Hughes shortly before Hughes became Chief Justice of the Supreme Court, and after he served as an Associate Justice and as Secretary of State. *See Statement of Charles Evans Hughes*, 1929 Am. Soc. Int'l. L. Proc. 194, 194–96 (1929). *See also infra* notes 12–14, 20.

[12] *See*, *e.g.*, Power Auth. of N.Y. v. Fed. Power Comm'n, 247 F.2d 538, 542–43 (D.C. Cir.1957) ("No court has ever said . . . that the treaty power can be exercised without limit to affect matters which are of purely domestic concern and do not pertain to our relations with other nations."), *vacated as moot*, 355 U.S. 64, 78 (1957) (per curiam); Hughes, *supra* note 11, at 194 ("[The treaty power] is not a power intended to be exercised . . . with respect to matters that have no relation to international concerns."); Treaties and Executive Agreements: Hearing on S.J. Res. 1 Before the

arrange intercourse with other nations, but not to regulate purely domestic affairs."[13] But the Court has not ruled on the issue, and there is no consensus on whether the Constitution contains such a limitation.[14] Nor has the Supreme Court defined what, if any, matters are insufficiently international in nature to be an improper subject for a treaty.

To the extent there once was a common understanding of the line between internal and external matters, changes in international treaty practice have complicated this distinction.[15] Early U.S. treaties often were bilateral and addressed matters such as relations with Indian tribes,[16] military alliances, international trade, and military neutrality.[17] But treaties have expanded greatly in number and in the scope of their subject matter since World War II.[18] Treaties often now take the form of multilateral instruments that address matters that were not common subjects of international intercourse during the founding era, such as environmental protection and human rights.[19] Scholars actively debate whether the Constitution limits the scope of modern treaties and multilateral instruments to "international" matters.[20]

Subcomm. of the S. Comm. on the Judiciary, 84th Cong. 183 (1955) (statement of John Foster Dulles, Sec'y of State) (stating that a treaty cannot regulate issues that "do not essentially affect the actions of nations in relation to international affairs, but are purely internal").

[13] *See* Bond v. United States, 572 U.S. 844, 884 (2014) (Thomas, J., concurring in the judgment joined by Scalia & Alito, JJ.).

[14] For example, the authors of the Restatement of Foreign Relations Law changed their view of the "international concern" requirement in each iteration of the Restatement. *See* Restatement (Second) of Foreign Relations Law § 117(1) (1965) ("The United States has the power under the Constitution to make an international agreement if . . . the matter is of international concern[.]"); Restatement (Third) of Foreign Relations § 302 cmt. c (1987) ("Contrary to what was once suggested, the Constitution does not require that an international agreement deal only with 'matters of international concern.'"); Restatement (Fourth) of Foreign Relations Law § 312 reporters' n.8 (2018) [hereinafter Fourth Restatement] ("Unlike in the prior two Restatements, this Section does not take a position on whether there is some sort of subject-matter limitation on the treaty power. . . . The Reporters for the present Restatement concluded that the issue had not been sufficiently addressed in judicial decisions and other relevant legal materials to warrant taking a definitive position.").

[15] Some scholars have argued that the divide between internal and external affairs was not well-defined even in the Founding era. *See*, *e.g.*, David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 954, 989 (2010). Others contend the Framers had a clearer conception of the distinction. *See*, *e.g.*, Duncan B. Hollis, *An Intersubjective Treaty Power*, 90 Notre Dame L. Rev. 1415, 1420–25 (2015); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 411–17 (1998) [hereinafter Bradley, *American Federalism Part I*].

[16] For the first eighty years after the adoption of the Constitution, it was the United States' practice to negotiate and conclude treaties with Indian tribes through the process outlined in the Treaty Clause. *See* 2 C. Butler, The Treaty Making Power of the United States § 404, at 198–99 (1902). That practice ended when Congress passed the Indian Appropriations Act of March 3, 1871, which affirmed the continued validity of prior Indian treaties, but also declared that hereafter "[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566, codified at 25 U.S.C. § 71. *See also* ArtI.S8.C3.9.1 Scope of Commerce Clause Authority and Indian Tribes (analyzing Congress's power to regulate commerce with Indian tribes).

[17] *See*, *e.g.*, Ralston Hayden, The Senate and Treaties, 1789–1817, at 1–168 (1920) (analyzing the development of the treaty-making power in the Washington, Adams, and Jefferson Administrations); William Rawle, A View of the Constitution of the United States 578–88 (1825) (stating that the treaty power was appropriate for those subjects "which properly arise from intercourse with foreign nations" and listing as subjects "peace, alliance, commerce, neutrality, and others of a similar nature"). *See also* The Federalist No. 64 (John Jay) ("The power of making treaties is an important one, especially as it relates to war, peace, and commerce[.]").

[18] *See*, *e.g.*, David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1304 (2000) ("[I]nternational treaty practice has greatly expanded in the past half century and promises to expand further in the decades ahead as globalization proceeds."); Bradley, *American Federalism Part I*, *supra* note 15, at 396 ("[A]t one time in American history . . . treaties were generally bilateral and regulated matters such as diplomatic immunity, military neutrality, and removal of trade barriers. The nature of treaty-making, however, has undergone a radical transformation, especially in the years since World War II.").

[19] *See*, *e.g.*, United Nations Framework Convention on Climate Change art. 25, May 9, 1992, 1771 U.N.T.S. 107; United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or

ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties

Article II, Section 2, Clause 2:

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

The Supremacy Clause of the Constitution, Article VI, Clause 2, states that treaties concluded in accordance with constitutional requirements have the status of the "supreme Law of the Land[.]"[1] The Founders included treaties in the Supremacy Clause in direct response to one of the major weaknesses of the Articles of Confederation: the national government's inability to enforce the United States' treaty obligations.[2] Although the Articles of Confederation gave exclusive treaty-making power to Congress,[3] the United States depended on state legislatures to enact laws necessary to ensure compliance with the Nation's treaty commitments.[4] When states ignored or violated the United States' obligations—most famously, by refusing to permit British citizens' to collect pre-Revolutionary War debts[5]—some

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Punishment, Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85. Scholars debate the extent to which modern treaties are more likely to address matters that historically were regulated by domestic governments. *Compare*, *e.g.*, Bradley, *American Federalism Part I*, *supra* note 15, at 396–97 ("While many treaties continue to concern matters traditionally viewed as *inter*-national in nature, numerous others concern matters that in the past countries would have addressed wholly domestically."), *with* Golove, *supra* note 18, at 1101 ("[F]rom the beginning, treaties have invaded the most sensitive spheres of state autonomy[.]").

[20] *See*, *e.g.*, Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867, 1876 (2005) (describing the issue of whether the Constitution limits the subject matter of treaties as one of the "great academic debates about the treaty power"); Hollis, *supra* note 15, at 1415–34 (contending that the Constitution requires modern treaties to address matters of international concern, but suggesting a revision of the traditional understanding of the international concern requirement); Louis Henkin, *"International Concern" and the Treaty Power of the United States*, 63 Am. J. Int'l L. 272, 273 (1969) ("[T]he 'international concern' limitation may not in fact exist; . . . if there is some such limitation, it has been unduly and needlessly elevated to independent doctrine and its scope exaggerated[.]"). Much of the recent debate over the scope of the treaty power concerns whether the Constitution's federalism limitations apply to treaty-making, which is discussed ArtII.S2.C2.1.5 Congressional Implementation of Treaties.

[1] U.S. Const. art. VI, cl. 2. For analysis of the Supremacy Clause, see ArtVI.C2.1 Overview of Supremacy Clause.

[2] *See* Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 Wash. L. Rev. 1, 49–72 (1979); Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 Yale L. J. 2202, 2204 (2015) ("One of the principal aims of the U.S. Constitution was to give the federal government authority to comply with the United States's international legal commitments."); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1102 (2000) ("It was famously the difficulty of obtaining state compliance with treaties that was among the foremost reasons impelling the movement toward Philadelphia, and that experience left an unmistakable imprint on the text adopted.").

[3] Articles of Confederation of 1781, arts. VI, IX.

[4] *See infra* notes 5–7. *See also* Frederick W. Marks III, Independence on Trial: Foreign Affairs and the Making of the Constitution 3 (1973) ("Among the most important defensive powers which the United States lacked in 1783 was the power to enforce treaties."); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932, 989–90 (2010) ("Because the foreign affairs powers were, for the most part, already nominally in the Confederation under the Articles, the main goal [of the Constitution] was to make those powers effective by eliminating the national government's dependence on the states for carrying its powers into effect and by enabling it to discipline state obstructionism.").

[5] *See Report of Secretary of Foreign Affairs*, John Jay (Oct. 13, 1786), *reprinted in* Secret Journals of the Congress of the Confederation 185–287 (Boston, Thomas B. Wait 1820) (report of John Jay, then-Secretary of Foreign Affairs under the Articles of Confederation, regarding state laws that violated the United States' treaty obligations to Great Britain); *Letter from John Jay to John Adams* (Nov. 1, 1786) *in* 2 The Diplomatic Correspondence of the United States

foreign nations considered the United States an unreliable treaty partner[6] or cited U.S. noncompliance as grounds to disregard their own treaty commitments.[7] The Framers sought to remedy this problem by making treaties part of the "supreme Law of the Land" to which "the Judges in every State shall be bound[.]"[8] The Supremacy Clause marked a shift from the British system under which treaties generally have domestic effect only after being implemented by Parliament.[9]

Despite the Supremacy Clause's seeming simplicity, not all treaties have the status of domestic law that is enforceable in U.S. courts.[10] Some treaties or (provisions within treaties[11]) are "self-executing," meaning domestic courts can enforce them directly.[12] Other treaty provisions are "non-self-executing" and occupy a more complex status in the U.S. legal system.[13] Non-self-executing treaty provisions are not directly enforceable in U.S. courts, and Congress generally must pass legislation implementing the provision in a domestic statute to make it judicially enforceable.[14]

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from the Signing of the Definitive Treaty of Peace, 10th September 1783, to the Adoption of the Constitution, March 4, 1789, at 674 (Washington, D.C., Blair & Rives 1837) ("[T]here has not been a single day, since [the 1783 Treaty of Peace] took effect, on which it has not been violated in America, by one or other of the States.").

[6] *See*, *e.g.*, 1 The Records of the Federal Convention of 1787, at 316 (Max Farrand ed., 1911) [hereinafter Farrand's Records (records of James Madison) ("The files of [Congress under the Articles of Confederation] contain complaints already, from almost every nation with which treaties have been formed."); The Federalist No. 22 (Alexander Hamilton) (suggesting that, under the Articles of Confederation, foreign nations could not "respect or confide" in the United States because U.S. treaties were "liable to the infractions" by state governments).

[7] For example, Great Britain cited U.S. state laws impeding British citizens' debt-collection abilities as grounds for not complying with Britain's treaty-based obligations to withdraw its forces from military forts in the northwestern United States. *See* Marks, *supra* note 4, at 3–51.

[8] U.S. Const. art. VI, cl. 2. Early in the Constitutional Convention, the Framers considered giving Congress the power to "negative" (i.e., veto) state law that contravened any treaty, 1 Farrand's Records, *supra* note 6, at 47, 54, but they later adopted language originating in the New Jersey plan making treaties part of the "supreme law" that is binding upon state courts, *id.* at 245; 2 Farrand's Records, *supra* note 6, at 27–29, 182–83, 389–90, 603.

[9] *See* James Crawford, Brownlie's Principles of Public International Law 63 (8th ed. 2012) (quoting Thomas v. Baptiste [2000] 2 AC 1 PC, 23 (Lord Millett)).

[10] *See*, *e.g.*, Bond v. United States, 572 U.S. 844, 850–51 (2014) (recognizing that the Convention on Chemical Weapons "creates obligations only for State Parties and 'does not by itself give rise to domestically enforceable federal law'") (quoting Medellín v. Texas, 552 U.S. 491, 505 n.2 (2008)); Cameron Septic Tank Co. v. City of Knoxville, 227 U.S. 39, 50 (1913) (holding that a provision in an industrial property convention regulating patents was not self-executing and did not govern the date of expiration of a challenged patent).

[11] *See*, *e.g.*, United States v. Postal, 589 F.2d 862, 884 n.35 (5th Cir. 1979) ("A treaty need not be wholly self-executing . . . . [A] self-executing interpretation of [one article] would not necessarily call for a similar interpretation of [a different article in the same treaty]."), *cert. denied*, 44 U.S. 832 (1979); Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities, 13 Op. O.L.C. 163, 179 n.28 (1989) ("[T]he question should be whether individual provisions of the treaty are self-executing.").

[12] *See*, *e.g.*, *Medellín*, 552 U.S. at 505 n.2 ("What we mean by 'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification."); Cook v. United States, 288 U.S. 102, 119 (1933) ("For in a strict sense the [t]reaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions."); Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("When the [treaty] stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect.").

[13] *See*, *e.g.*, *Medellín*, 552 U.S. at 516 ("The point of a non-self-executing treaty is that it 'addresses itself to the political, *not* the judicial department; and the legislature must execute the contract before it can become a rule for the Court.'") (quoting Foster v. Neilson, 27 U.S. (2 Pet.) 253, 254 (1829), *overruled on other grounds by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833)).

[14] *See Medellín*, 552 U.S. at 525–26 ("The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress."); *id.* at 526 ("[T]he terms of a non-self-executing treaty can become domestic law only in the same way as any other law—through passage of legislation by both Houses of Congress, combined with either the President's signature or a congressional override of a Presidential veto."). Apart from implementing legislation, compliance with non-self-executing treaty provisions may be achieved through other avenues, including by judicial enforcement of legislation that pre-dates the treaty or through other executive or administrative action outside the judicial system. *See* Restatement (Fourth) of Foreign Relations Law § 310(1) (2018) [hereinafter Fourth Restatement]; Jean Galbraith, *Making Treaty Implementation More Like Statutory Implementation*, 115 Mich. L. Rev. 1309, 1333–63 (2017).

The Supreme Court first recognized the self-execution dichotomy in an 1829 decision, *Foster v. Neilson*.[15] In his opinion for the Court, Chief Justice John Marshall explained: "[o]ur [C]onstitution declares a treaty to be the law of the land. It is, consequently to be regarded in courts of justice as equivalent to an act of the legislature[.]"[16] But Chief Justice Marshall then immediately qualified this explanation, stating that a treaty is only the equivalent of a legislative act when the treaty "operates of itself without the aid of any legislative provision."[17] When the terms of treaty "import a contract" or suggest that some future legislative act is necessary, Marshall explained, "the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."[18] Using this test, the *Foster* Court held that the treaty provision at issue—which stated that certain land grants from the King of Spain "shall be ratified and confirmed"—was non-self-executing because it suggested that Congress would ratify the land grants through a future legislative act.[19]

The Supreme Court revisited the self-execution doctrine in a 2008 decision, *Medellín v. Texas*.[20] In that case, the United Nation's principal judicial body, the International Court of Justice (ICJ), had entered a judgment directing the United States to reconsider the criminal convictions and sentences of a group of Mexican nationals.[21] The ICJ concluded that U.S. state and local authorities had not afforded the foreign nationals their rights to communicate with Mexican consular officials as required by the Vienna Convention on Consular Relations.[22] One of the foreign nationals, Ernesto Medellín, argued that the ICJ's judgment was directly enforceable in U.S. courts because of a provision in another treaty, Article 94 of the Charter of the United Nations. That article provides that the United States (and any member nation of the United Nations) "undertakes to comply with the decision of the [ICJ] in any case to which it is a party."[23] Medellín argued that Article 94 required Texas state authorities to reevaluate his conviction and stay his upcoming execution, but the Supreme Court disagreed.[24] The Court held that Article 94 of the Charter of the United Nations was not self-executing, in part, because Article 94 states that a party to the Charter "undertakes to comply" with ICJ decisions, rather than stating that a country "shall" or "must" comply.[25] Article 94 was not

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[15] *See Foster*, 27 U.S. (2 Pet.) at 273–74. The Court's *Percheman* decision is discussed *infra* note 19. While *Foster* first articulated the concept that some treaties require implementing legislation to be made judicially enforceable, the Supreme Court did not use the term "self-executing" when discussing treaties until 1887. *See* Bartram v. Robertson, 122 U.S. 116, 120 (1887). *See also* Galbraith, *supra* note 14, at 1341–42 (discussing development and usage of the term "self-executing" in the context of treaties, statutes, and constitutional law).

[16] *Foster*, 27 U.S. (2 Pet.) at 314.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 315. Four years after *Foster*, the Supreme Court reviewed the Spanish language version of the same treaty, which was translated to state that the land grants "shall *remain* ratified and confirmed." *Percheman*, 32 U.S. (7 Pet.) at 69 (emphasis added). Using the Spanish language version, the Court concluded that the same obligation was self-executing, explaining that the subtle difference in translations led to a different result in its holding: The difference between declaring that these *grants shall be* ratified and *confirmed* to the persons in possession *of the lands*, . . . and saying that all *concessions* of land shall *remain confirmed* and *acknowledged* to the persons in possession . . . is sufficiently obvious and important; the sense is materially different. The English side of the treaty leaves the ratification of the grants executory—they shall be ratified; the Spanish, executed. *Id.*

[20] 552 U.S. 491.

[21] Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. Rep. 12, ¶ 64 (Mar. 31).

[22] *Id.* ¶ 128. *See also* Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Consular Convention].

[23] Charter of the United Nations art. 94(1), 59 Stat. 1051 (June 26, 1945).

[24] *See Medellín*, 552 U.S. at 508–09.

[25] *Id.*

self-executing because it was not "a directive to domestic courts" and could not be judicially enforced in the face of contrary state law, the Supreme Court concluded.[26]

Determining whether a treaty provision is self-executing is not always a straightforward task.[27] In some cases, a treaty may specify whether it is intended to be given immediate domestic legal effect without further action.[28] However, the *Medellín* Court disapproved of the notion that certain special words or phrases are necessary to make a treaty self-executing.[29] *Medellín* also rejected a multi-factor analysis, advanced by three Justices in a dissent, which would look outside the treaty's text and analyze a variety of "practical, context-specific criteria"[30] to determine self-execution.[31] Instead, the *Medellín* Court explained that the primary question is whether the President and Senate intended the treaty to be self-executing.[32] The Supreme Court has deemed a treaty non-self-executing when the text manifested an intent that the treaty would not be directly enforceable in U.S. courts,[33] or when the Senate conditioned its advice and consent on the understanding that the treaty was non-self-executing.[34] Other relevant factors include whether the treaty provisions are suitably precise or obligatory to be capable of judicial enforcement and whether the provision contemplates that implementing legislation or other legal measures, such as administrative action, will follow the treaty's ratification.[35]

Many courts and commentators agree that treaty provisions that would require the United States to exercise authority that the Constitution assigns to Congress exclusively must be deemed non-self-executing.[36] Although the Supreme Court has not addressed these constitutional limitations, lower courts have concluded that, because Congress controls the power of the purse,[37] a treaty provision that requires expenditure of funds must be treated as non-self-executing.[38] Other lower courts have suggested that treaty provisions that purport to create criminal liability[39] or raise revenue[40] must be non-self-executing because those powers are the exclusive prerogative of Congress.

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[26] *Id.*

[27] *See*, *e.g.*, Postal, 589 F.2d at 876 ("The self-execution question is perhaps one of the most confounding in treaty law."); Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 Yale J. Int'l L. 51, 51–52 (2012) (describing the self-execution doctrine as "[o]ne of the great challenges for scholars, judges, and practitioners alike"); Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695, 722 (1995) ("The distinction between self-executing and non-self-executing treaties has particularly confounded the lower courts, whose decisions on the issue have produced a body of law that can only be described as being in a state of disarray.").

[28] *See*, *e.g.*, Trademark and Commercial Protection; Registration of Trademarks (Inter-American): General Inter-American Convention for Trade Mark and Commercial Protection art. 35, Feb. 20, 1929, 46 Stat. 2907 ("The provisions of this Convention shall have the force of law in those States in which international treaties possess that character, as soon as they are ratified by their constitutional organs.").

[29] *See Medellín,* 552 U.S. at 521 ("[N]either our approach nor our cases require that a treaty provide for self-execution in so many talismanic words.").

[30] *Id.* at 549 (Breyer, J., dissenting joined by Souter & Ginsberg, JJ.).

[31] *Id.* at 514–16.

[32] *See id.* at 509, 523.

[33] *See supra* note 10.

[34] *See*, *e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004) ("[T]he United States ratified the [International Covenant on Civil and Political Rights] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.").

[35] *See* Fourth Restatement, *supra* note 14, § 310(2) & reporters' nn.5, 6.

[36] *See*, *e.g.*, *id.* § 310(3) & reporters' n.11. *See also infra* notes 37–38.

[37] For discussion of the Appropriations Clause and Congress's power of the purse, see ArtI.S9.C7.1 Overview of Appropriations Clause.

[38] *See* Edwards v. Carter, 580 F.2d 1055, 1058 (D.C. Cir. 1978) (per curiam) ("[E]xpenditure of funds by the United States cannot be accomplished by self-executing treaty; implementing legislation appropriating such funds is

The doctrine of non-self-execution appears to be in some tension with the Supremacy Clause's declaration that "all treaties" are part of the supreme law of the land.[41] The Supreme Court has never fully explained the relationship between non-self-executing treaties and the Supremacy Clause.[42] Opinions from some lower courts and the Office of Legal Counsel (OLC) in the Department of Justice[43] suggest non-self-executing treaties lack any domestic legal status.[44] However, other courts and scholars contend that, although non-self-executing treaties may not be enforced in courts, they may still form part of the supreme law of the land that is carried out and enforced outside the judicial system.[45]

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indispensable."), *cert. denied*, 436 U.S. 907 (1978); The Over the Top (Schroeder v. Bissell), 5 F.2d 838, 845 (D. Conn. 1925) ("All treaties requiring payments of money have been followed by acts of Congress appropriating the amount. The treaties were the supreme law of the land, but they were ineffective to draw a dollar from the treasury."); Turner v. Am. Baptist Missionary Union, 24 F. Cas. 344, 345 (C.C.D. Mich. 1852) (No. 14251) ("[M]oney cannot be appropriated by the treaty-making power. This results from the limitations of our government.").

[39] *See* Hopson v. Kreps, 622 F.2d 1375, 1380 (9th Cir. 1980) ("Treaty regulations that penalize individuals . . . require domestic legislation before they are given any effect."); *Postal*, 589 F.2d at 877 (noting that constitutional restrictions on the use of a self-executing treaty to withdraw money from the treasury would also "be the case with respect to criminal sanctions"), *cert. denied*, 444 U.S. 832 (1979).

[40] *See Edwards*, 580 F.2d at 1058 ("[T]he constitutional mandate that 'all Bills for raising Revenue shall originate in the House of Representatives,' . . . appears, by reason of the restrictive language used, to prohibit the use of the treaty power to impose taxes.") (quoting U.S. Const. art. I, § 7, cl. 1); Swearingen v. United States, 565 F. Supp. 1019, 1022 (D. Colo. 1983) ("[A] treaty which created an exemption from the taxation of income of United States citizens . . . would be in contravention of the exclusive constitutional authority of the House of Representatives to originate all bills for raising revenues."). For analysis of the Origination Clause and Congress's power to raise revenue, see discussion *supra* ArtI.S7.C1.1 Origination Clause and Revenue Bills.

[41] U.S. Const. art. VI, cl. 2.

[42] *See*, *e.g.*, Fourth Restatement, *supra* note 14, § 310 reporters' n.12. Some passages of *Medellín* suggest non-self-executing treaties have no status in domestic law. *See*, *e.g.*, *Medellín*, 552 U.S. at 504 ("This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law."); *id.* at 526 ("[A] non-self-executing treaty can become domestic law only in the same way as any other law—through passage of legislation by both Houses of Congress, combined with either the President's signature or a congressional override of a Presidential veto."). Other passages suggest self-execution addresses whether the treaty is enforceable in U.S. courts rather than whether the treaty constitutes "law" in the constitutional sense. *See*, *e.g.*, *id.* at 519 ("[W]hether the treaties underlying a judgment are self-executing so that the judgment is directly enforceable as domestic law in our courts is, of course, a matter for this Court to decide."); *id.* at 523 ("[T]he [ICJ's] judgment is not a rule of domestic law binding in state and federal courts.").

[43] OLC has stated that its opinions are "controlling" on questions of law within the Executive Branch, subject to the ultimate authority of the President. *See* Memorandum from David J. Barron, Acting Asst. Att'y Gen., Office of Legal Counsel to Att'ys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions 1 (July 16, 2010) ("OLC's core function . . . is to provide controlling advice to Executive Branch officials on questions of law."), https://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf; Memorandum from Steven G. Bradbury, Principal Deputy Asst. Att'y Gen., Office of Legal Counsel to Att'ys of the Office, Re: Best Practices for OLC Opinions 1 (May 16, 2005) ("[S]ubject to the President's authority under the Constitution, OLC opinions are controlling on questions of law within the Executive Branch."), https://fas.org/irp/agency/doj/olc/best-practices.pdf. *See also* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 Colum. L. Rev. 1448, 1525 n.31 (2010) (collecting statements from OLC and its officials on the status of OLC opinions). However, OLC's opinions are not "law" that is binding outside of the Executive Branch. *See*, *e.g.*, McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 285–86 (1960) (declining to follow an Attorney General opinion and noting that such opinions are "entitled to some weight," but "do not have the force of judicial decisions").

[44] *See* ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 162 n.21 (2d Cir. 2007) ("Non-self-executing treaties do not become effective as domestic law until implementing legislation is enacted."), *certified question answered*, 880 N.E.2d 852 (2007); Renkel v. United States, 456 F.3d 640, 643 (6th Cir. 2006) ("'[N]on-self-executing' treaties do require domestic legislation to have the force of law."); Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities, *supra* note 11, at 178–79 ("[T]he decision whether to act consistently with an unexecuted treaty is a political issue rather than a legal one, and unexecuted treaties . . . are not legally binding on the political branches.") (footnote omitted).

[45] *See*, *e.g.*, The Over the Top, 5 F.2d at 845 ("The treaties were the supreme law of the land, but they were ineffective to draw a dollar from the treasury."); Fourth Restatement, *supra* note 14, § 310 reporters' n.12 ("[T]here is no

Despite the importance of the self-execution doctrine in U.S. domestic law, self-execution does not impact treaties' status under international law.[46] Under international law, treaties create rights and obligations that nations owe to one another that are independent of each nation's domestic law.[47] International law generally allows each country to decide how to implement its treaty commitments into its own domestic legal system.[48] The self-execution doctrine concerns domestic enforcement of treaties, but it does not affect the United States' obligation to comply with the provision under international law.[49] Thus, even if courts cannot enforce a treaty provision in domestic courts because it is non-self-executing, that provision may still be binding under international law, and the United States may still have an international legal obligation to comply.

ArtII.S2.C2.1.5 Congressional Implementation of Treaties

Article II, Section 2, Clause 2:

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

When a treaty provision requires implementing legislation or appropriation of funds to carry out the United States' obligations, the task of providing that legislation falls to Congress.[1] In the early years of constitutional practice, debate arose over whether Congress was obligated—rather than simply empowered—to enact legislation implementing non-self-executing treaty provisions into domestic law.[2] But the issue has not been resolved in any definitive way.[3]

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clear reason at present to conclude that non-self-executing provisions are, as a general matter, less than supreme law."); Curtis Bradley, International Law in the U.S. Legal System 44 (2d ed. 2015) (summarizing the debate of the domestic status of non-self-executing treaties).

[46] *See*, *e.g.*, *Medellín*, 552 U.S. at 504–06 (discussing the distinction between the binding effect of treaties under international law versus domestic law).

[47] *See id.*; Fourth Restatement, *supra* note 14, § 301(3) & cmt. d. *See also* Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty, 20 Op. O.L.C. 389, 391 (1996) ("A 'treaty,' . . . has two aspects: insofar as it is self-executing, it prescribes a rule of domestic or municipal law; and, as a compact or contract between nations, it gives rise to binding obligations in international law.") (footnote omitted).

[48] *See*, *e.g.*, Head Money Cases (Edye v. Robertson), 112 U.S. 580, 598 (1884) ("[A treaty] depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it."); Fourth Restatement, *supra* note 14, § 310 cmt. c ("It is ordinarily up to each nation to decide how to implement domestically its international obligations.").

[49] *See Medellín*, 552 U.S. at 522–23 (explaining that, although the ICJ's judgment was non-self-executing and did "not of its own force constitute binding federal law[,]" the judgment "create[d] an international law obligation" for the United States); Fourth Restatement, *supra* note 14, § 310(1) ("Whether a treaty provision is self-executing concerns how the provision is implemented domestically and does not affect the obligation of the United States to comply with it under international law.").

[1] *See* Medellín v. Texas, 552 U.S. 491, 525–26 (2008). *See also* ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties (discussing Congress's role in implementing non-self-executing treaties).

[2] Whereas Alexander Hamilton argued that the House of Representatives was obligated to appropriate funds for the Jay Treaty, James Madison, then a Member of the House, and others disagreed. *Compare* Enclosure to Letter from Alexander Hamilton to George Washington (Mar. 29, 1796), *in* 20 Papers of Alexander Hamilton 98 (Harold C. Syrett ed., 1974) ("[T]he [H]ouse of [R]epresentatives have no moral power to refuse the execution of a treaty, which is not contrary to the [C]onstitution, because it pledges the public faith, and have no legal power to refuse its execution

By contrast, the Supreme Court did address the scope of Congress's power to enact legislation implementing a treaty in a 1920 case. In *Missouri v. Holland*,[4] the Supreme Court considered a constitutional challenge to a federal statute that implemented a treaty prohibiting the killing, capturing, or selling of certain birds that traveled between the United States and Canada.[5] In the preceding decade, two federal district courts had held that similar statutes enacted prior to the treaty violated the Tenth Amendment because they infringed on the reserved powers of the states to control natural resources within their borders.[6] But the *Holland* Court determined that, even if those district court decisions were correct, their reasoning no longer applied once the United States concluded a valid migratory bird treaty.[7] In an opinion authored by Justice Oliver Wendell Holmes, the *Holland* Court concluded that the federal government can use the treaty power to regulate matters that the Tenth Amendment otherwise might reserve to the states.[8] And if the treaty itself is constitutional, the *Holland* Court held, Congress has the power under the Necessary and Proper Clause[9] to enact legislation implementing the treaty into domestic law of the United States without restraint by the Tenth Amendment.[10]

Some legal commentators and jurists have questioned aspects of the Justice Holmes's reasoning in *Holland*.[11] Some of *Holland*'s critics contend that the decision gives the federal government too broad a power to legislate in areas reserved to the states, especially when

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because it is a law—until at least it ceases to be a law by a regular act of revocation of the competent authority."), *with* 5 Annals of Cong. 493–94 (1796) (statement of Rep. Madison) ("[T]his House, in its Legislative capacity, must exercise its reason; it must deliberate; for deliberation is implied in legislation. If it must carry all Treaties into effect, . . . it would be the mere instrument of the will of another department, and would have no will of its own."); 5 Annals of Cong. 771 (1796) (proposed resolution of Rep. William Blount) ("[W]hen a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.").

[3] *See* Louis Henkin, Foreign Affairs and the U.S. Constitution 205 (2d ed. 1996).

[4] 252 U.S. 416 (1920).

[5] *See* Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918); Convention for the Protection of Migratory Birds art. VIII, Aug. 16, 1916, U.S.-Gr. Brit., 39 Stat. 1702.

[6] United States v. McCullagh, 221 F. 288, 295–96 (D. Kan. 1915); United States v. Shauver, 214 F. 154, 160 (E.D. Ark. 1914).

[7] *See Holland*, 252 U.S. at 433.

[8] *See id* at 433–34 (concluding that the "treaty in question does not contravene any prohibitory words to be found in the Constitution" and is not "forbidden by some invisible radiation from the general terms of the Tenth Amendment").

[9] *See* U.S. Const. art. I, § 8. *See also* ArtI.S8.C18.1 Overview of Necessary and Proper Clause (analyzing the Necessary and Proper Clause).

[10] *See Holland*, 252 U.S. at 432 ("If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government."). *Accord* Neely v. Henkel, 180 U.S. 109, 121 (1901) ("The power of Congress to make all laws necessary and proper . . . includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power.").

[11] *See* Bond v. United States, 572 U.S. 844, 873 (2014) (Scalia, J., concurring in the judgment joined by Thomas, J.) (describing *Holland*'s interpretation of the Necessary and Proper Clause as consisting of an "unreasoned and citation-less sentence" that is unsupported by the Constitution's text or structure); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867, 1868 (2005) (arguing that *Holland*'s interpretation of the Necessary and Proper Clause "is wrong and the case should be overruled"). *See also* ArtII.S2.C2.1.9 Effect of Treaties on the Constitution, at n.1 (discussing subsequent Supreme Court decisions responding to questions raised in *Holland* concerning the Supremacy Clause). In the 1950s, there was an effort, led by Senator John Bricker of Ohio, to limit the scope of the treaty power as described in *Holland* through a constitutional amendment. One version of the proposed amendment, which became known as the "Bricker Amendment," would have provided that a "treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty." *See* S. Comm. on the Judiciary, 83d Cong., Proposals to Amend the Treaty-Making Provisions of the Constitution: Views of Deans and Professors of Law 3 (Comm. Print 1953). No version of the Bricker Amendment was ever adopted.

coupled with twentieth century changes in international lawmaking that have expanded the types of issues addressed in treaties.[12] Others argue that a combined reading of the Necessary and Proper Clause and the Treaty Clause only permits Congress to pass laws necessary to *make* treaties, not to *implement* them, as Justice Holmes reasoned.[13] Under this view, Congress could use the Necessary and Proper Clause to, for example, appropriate funds for U.S. diplomats to engage in overseas treaty negotiations, but Congress must rely on its other Article I powers to implement treaties that have been signed and ratified.[14] Other legal scholars respond to these critiques by contending that the power to make treaties is hollow without the power to implement them,[15] that political and structural checks safeguard federalism,[16] and that *Holland* comports with the Constitution's text and historical practice.[17]

As the academic debate continues, the Supreme Court has not overturned *Holland*'s holding related to Congress's power to implement treaties.[18] Rather, the Court has sometimes discussed it favorably.[19] Nevertheless, principles of federalism embodied in the Tenth Amendment continue to influence constitutional challenges to U.S. treaties and their implementing statutes, including in the 2014 Supreme Court decision, *Bond v. United States*.[20]

Bond concerned a criminal prosecution arising from a case of "romantic jealousy" when a jilted spouse spread toxic chemicals on the mailbox of a woman with whom her husband had an affair.[21] Although the victim only suffered a minor thumb burn, the United States brought criminal charges under the Chemical Weapons Convention Implementation Act of 1998—a

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[12] *See*, *e.g.*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 433 (1998); Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 Mich. L. Rev. 98, 98–99 (2000); John C. Eastman, *Will Mrs. Bond Topple Missouri v. Holland?*, Cato Sup. Ct. Rev. 185, 202 (2010–2011). For discussion of changes in international treaty practice, see ArtII.S2.C2.1.3 Scope of Treaty-Making Power.

[13] *See*, *e.g.*, Bond v. United States, 572 U.S. 844, 874–76 (2014) (Scalia, J., concurring in the judgment joined by Thomas, J.) ("[A] power to help the President *make* treaties is not a power to *implement* treaties already made."); Rosenkranz, *supra* note 11, at 1882 ("The power granted to Congress is emphatically not the power to make laws for carrying into execution 'the treaty power,' let alone the power to make laws for carrying into execution 'all treaties.' Rather, on the face of the conjoined text, Congress has power 'To make all Laws which shall be necessary and proper for carrying into Execution . . . [the] Power . . . to make Treaties.'") (alterations in original).

[14] *See Bond*, 572 U.S. at 876 (Scalia, J., concurring in the judgment joined by Thomas, J.) ("Once a treaty has been made, Congress's power to do what is 'necessary and proper' to assist the making of treaties drops out of the picture. To legislate compliance with the United States' treaty obligations, Congress must rely upon its independent (though quite robust) Article I, § 8, powers."); Rosenkranz, *supra* note 11, at 1882–85 (discussing the scope of legislation Congress could pass under a more restrictive view of the Necessary and Proper Clause and its relationship to the Treaty Clause).

[15] *See*, *e.g.*, Edward T. Swaine, *Putting Missouri v. Holland on the Map*, 73 Mo. L. Rev. 1007, 1012–18 (2008) (critiquing the view that Congress has the power to pass legislation necessary to make treaties but not to enforce or implement them); Michael D. Ramsey, *Congress's Limited Power to Enforce Treaties*, 90 Notre Dame L. Rev. 1539, 1542–43 (2015) (contending that the power to make treaties includes the power to enforce them "because absent reliable methods of enforcement, the power to make treaties as a practical matter would be greatly impaired").

[16] *See*, *e.g.*, David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 Stan. L. Rev. 1963, 1964 (2003); Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 Cornell L. Rev. 239, 324–26 (2013).

[17] *See*, *e.g.*, David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1313–15 (2000).

[18] *See Bond*, 572 U.S. at 855–56 (declining to revisit *Holland* or decide that a prosecution under legislation implementing a treaty was not "a necessary and proper means of executing the National Government's power to make treaties").

[19] *See* United States v. Lara, 541 U.S. 193, 201 (2004) ("[A]s Justice Holmes pointed out, treaties made pursuant to [the treaty] power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'") (quoting Missouri v. Holland, 252 U.S. 416, 433 (1920)); Reid v. Covert, 354 U.S. 1, 18 (1957) (plurality opinion) ("To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.").

[20] 572 U.S. 844.

[21] *See Id.* at 861.

federal statute that implemented a multilateral treaty prohibiting the use of chemical weapons.[22] The accused asserted that the Tenth Amendment reserved the power to prosecute her "purely local" crime to the states, and she asked the Court to overturn or limit *Holland*'s holding on the relationship between treaties and the Tenth Amendment.[23]

A majority in *Bond* declined to revisit *Holland*'s interpretation of the Tenth Amendment,[24] but the *Bond* Court ruled in the accused's favor based on principles of statutory interpretation.[25] When construing a statute interpreting a treaty, *Bond* explained, "it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute"[26] Applying these principles through a presumption that Congress did not intend to intrude on areas of traditional state authority, the *Bond* Court held that the Chemical Weapons Convention Implementation Act did not apply to the jilted spouse's actions.[27] In other words, the majority in *Bond* did not disturb *Holland*'s conclusion that the Tenth Amendment does not limit Congress's power to enact legislation implementing treaties, but *Bond* did hold that principles of federalism reflected in the Tenth Amendment may dictate how courts interpret such implementing statutes.[28]

ArtII.S2.C2.1.6 Interpreting Treaties

Article II, Section 2, Clause 2:

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

All three branches of government play a part in treaty interpretation. When analyzing a treaty for purposes of applying it as domestic law of the United States, U.S. courts have final authority to interpret the treaty's meaning.[1] The Supreme Court has stated that its goal in interpreting a treaty is to discern the intent of the nations that are parties to the treaty.[2] The interpretation process begins by examining "the text of the treaty and the context in which the

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[22] Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, div. I, tit. II, § 201(a), 112 Stat. 2681–856, 2681–866 (codified at 22 U.S.C. § 6701 et seq.); Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction art. 1, Jan. 13, 1993, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 317.

[23] *Bond*, 572 U.S. at 848.

[24] *See id.* at 855–66. Justice Scalia and Justice Thomas criticized *Holland* and argued that the Supreme Court should depart from its interpretation of congressional power to enact legislation that is necessary and proper to implement treaties. *See Id.* at 873–81 (Scalia, J., concurring in the judgment joined by Thomas, J.).

[25] *See id.* at 859.

[26] *Id.* at 855–60.

[27] *See id.*

[28] *Accord* William S. Dodge, *Bond v. United States and Congress's Role in Implementing Treaties*, 108 AJIL Unbound 86, 87 (2014) ("The central holding of *Bond* is that statutes implementing treaties are not exceptions to the rules of statutory interpretation that the Supreme Court has developed to protect federalism.").

[1] *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 353–54 (2006) ("If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department.'") (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[2] *See*, *e.g.*, BG Grp., PLC v. Republic of Argentina, 572 U.S. 25, 37 (2014); Lozano v. Montoya Alvarez, 572 U.S. 1, 11 (2014); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 183 (1982); Wright v. Henkel, 190 U.S. 40, 57 (1903).

written words are used."[3] When a treaty provides that it is to be concluded in multiple languages, the Supreme Court has analyzed foreign language versions to help understand the treaty's terms.[4] The Court also considers the broader "object and purpose" of a treaty.[5] In some cases, the Supreme Court examines extratextual materials, such as drafting history,[6] the views of other state parties,[7] and the post-ratification practices of other nations.[8] But the Court has cautioned that consulting sources outside the text may not be appropriate when the treaty is unambiguous.[9]

The Executive Branch also plays a role in interpreting treaties, especially outside the context of domestic litigation and when operating in the realm of international affairs. The Executive Branch generally is responsible for carrying out treaties' requirements and determining whether other countries fulfill their obligations to the United States.[10] In performing this role, the Executive Branch often must interpret treaties' provisions and mandates.[11] In addition, some questions of treaty interpretation may involve presidential discretion or otherwise may present "political questions" that are more appropriately resolved in the political branches than in the courts.[12]

Within the Executive Branch, the Department of Justice participates in treaty interpretation as part of its statutory responsibilities to provide legal opinions within the Executive Branch[13] and represent the United States in litigation.[14] The Department of State, which oversees treaty negotiations,[15] often is able to provide authoritative interpretations

[3] *See*, *e.g.*, Monasky v. Taglieri, No. 18-935, slip. op. 1, 7 (U.S. Feb. 25, 2020) (quoting Air France v. Saks, 470 U.S. 392, 397 (1985)); Water Splash, Inc. v. Menon, No. 16-254, slip. op. 1, 4 (U.S. May 22, 2017) (quoting Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988)); Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522, 534 (1987).

[4] *See*, *e.g.*, *Water Splash*, No. 18-935, slip. op. at 7–8; *Schlunk*, 486 U.S. at 699. In one case, the Supreme Court changed its conclusion about the self-executing effect of a provision in an 1819 treaty with Spain after analyzing an authenticated Spanish-language version of the text. *See supra* ArtII.S2.C2.1.9 Effect of Treaties on the Constitution, at n.19.

[5] *See*, *e.g.*, Abbott v. Abbott, 560 U.S. 1, 20 (2010); *Sanchez-Llamas*, 548 U.S. at 347; *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 530; E. Airlines, Inc. v. Floyd, 499 U.S. 530, 552 (1991).

[6] *See*, *e.g.*, *Monasky*, No. 18-935, slip. op. at 8–9; *Water Splash*, No. 18-935, slip. op. at 7–8; Medellín v. Texas, 552 U.S. 491, 507 (2008); *Air France*, 470 U.S. at 400; *Schlunk*, 486 U.S. at 700.

[7] *See*, *e.g.*, *Water Splash*, No. 18-935, slip. op. at 7–9; *Abbott*, 560 U.S. at 16; *Lozano*, 572 U.S. at 12; *Air France*, 470 U.S. at 404.

[8] *See*, *e.g.*, *Medellín*, 552 U.S. at 507; Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 259 (1984).

[9] *See* Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989) ("We must thus be governed by the text—solemnly adopted by the governments of many separate nations—whatever conclusions might be drawn from the intricate drafting history that petitioners and the United States have brought to our attention. The latter may of course be consulted to elucidate a text that is ambiguous . . . . But where the text is clear, as it is here, we have no power to insert an amendment.").

[10] *See* Cong. Research Serv., *Treaties and Other International Agreements: The Role of the United States Senate*, S. Rep. No. 106-71, at 12–13 (2001) [hereinafter Treaties and Other International Agreements] ("The executive branch has the primary responsibility for carrying out treaties and ascertaining that other parties fulfill their obligations after treaties and other international agreements enter into force . . . . The executive branch interprets the requirements of an agreement as it carries out its provisions."); Constitutionality of Legislative Provision Regarding ABM Treaty, 20 Op. O.L.C. 246, 248–49 (1996) (discussing the Executive Branch's view on the President's power over treaty interpretation and execution); Restatement (Fourth) of Foreign Relations Law §306 cmt. g (2018) ("Execution of a treaty requires interpretation, and the President often determines what a treaty means in the first instance.").

[11] *See supra* note 10.

[12] In *Charlton v. Kelly*, for example, the Supreme Court declined to decide whether Italy violated its extradition treaty with the United States, reasoning that, even if a violation occurred, the President "elected to waive any right" to respond to the breach by voiding the treaty. *See* 229 U.S. 447, 475 (1913). For discussion of *Charlton* and the political question doctrine, see ArtIII.S2.C1.9.1 Overview of Political Question Doctrine.

[13] *See* 28 U.S.C. § 512 ("The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department."). For background on the Department of Justice's advice-giving function, see ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties, at n.43.

based on its access to information about negotiating history and the views of treaty partners.[16] Because the Executive Branch may have special insight into a treaty's meaning, the Supreme Court has stated that the Executive Branch's views are entitled to "great weight."[17] But the Court has not adopted the Executive Branch's interpretation in every case.[18] And interbranch disputes may arise if the Executive Branch changes its interpretation and departs from the shared understanding of the executive and the Senate at the time of ratification.[19]

The Legislative Branch also influences treaty interpretation. The Senate may directly shape interpretation during the advice-and-consent process by making its consent to ratification conditioned upon a particular understanding of a treaty's terms.[20] The President may not ratify a treaty unless he accepts the Senate's interpretation or the Senate agrees to withdraw it.[21] After the advice-and-consent process, however, the Senate's ability to influence treaty interpretation is more restrained. According to a 1901 Supreme Court decision, Senate resolutions that purport to interpret a treaty after ratification are "without legal significance" because the "meaning of the treaty cannot be controlled by subsequent explanations of some of

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[14] *See* 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.").

[15] *See* U.S. Dep't of State, 11 Foreign Affairs Manual § 724.1 (2006), https://fam.state.gov/fam/11fam/11fam0720.html ("Negotiations of treaties . . . are not to be undertaken, nor any exploratory discussions undertaken with representatives of another government or international organization, until authorized in writing by the Secretary [of State] or an officer specifically authorized by the Secretary for that purpose.").

[16] *See*, *e.g.*, *Lozano*, 572 U.S. at 21–22 (accepting the State Department's interpretation of the Hague International Child Abduction Convention); *Sumitomo Shoji Am.*, 457 U.S. at 184–85 (adopting the State Department's interpretation of a Treaty of Friendship, Commerce and Navigation between Japan and the United States); Kolovrat v. Oregon, 366 U.S. 187, 194–95 (1961) (examining the State Department's diplomatic notes and correspondence in examining an 1881 Treaty between the United States and Serbia for Developing Commercial Relations).

[17] *See Water Splash*, No. 18-935, slip. op. at 7–8 (quoting *Abbott*, 560 U.S. at 15); *Medellín*, 552 U.S. at 513; *Sumitomo Shoji Am.*, 457 U.S. at 184–85; *Kolovrat*, 366 U.S. at 194.

[18] *See BG Grp.*, 572 U.S. at 37 (construing a dispute resolution provision in an investment treaty between the United Kingdom and Argentina and concluding "[w]e do not accept the Solicitor General's view as applied to the treaty before us"); Hamdan v. Rumsfeld, 548 U.S. 557, 629–30 (2006) (declining to adopt the Executive Branch's interpretation of Common Article 3 of the 1949 Geneva Conventions).

[19] For example, the Reagan Administration proposed to advance a new interpretation of the 1972 Treaty on the Limitation of Anti-Ballistic Missile Systems (AMB Treaty) with the Soviet Union that would have allowed the U.S. to test a space-based missile defense system. *See generally* ABM Treaty Interpretation Dispute: Hearing Before the Subcomm. on Arms Control, Int'l Sec. & Sci. of the H. Comm. on Foreign Affairs, 99th Cong. (1985); Strategic Defense Initiative: Hearing Before the Subcomm. on Strategic & Theater Nuclear Forces of the S. Comm. on Armed Servs., 99th Cong. (1985); ABM Treaty and the Constitution: Joint Hearings Before the S. Comm. on Foreign Relations & the S. Comm. on the Judiciary, 100th Cong. 81–105 (1987); Abraham D. Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 Harv. L. Rev. 1972 (1986). Some in Congress argued that the new interpretation contradicted the shared understanding of the Executive Branch and the Senate when the ABM Treaty was ratified, and the Reagan Administration ultimately decided not to rely on its new interpretation. *See* Treaties and Other International Agreements, *supra* note 10, at 128–29; John Yoo, *Politics As Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 Cal. L. Rev. 851, 860 (2001). Since this controversy, the Senate at times has conditioned its advice and consent to treaties on what has become known as the "Biden Condition," which provides that "the United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification." *See*, *e.g.*, 134 Cong. Rec. 12849 (1988).

[20] *See*, *e.g.*, 164 Cong. Rec. S8052 (daily ed. Jan. 2, 2019) (providing the Senate's advice and consent to ratification of the U.N. Convention on Assignment of Receivables in International Trade conditioned on, among other things, the understanding that the treaty would not regulate securities); 143 Cong. Rec. 22795 (1997) (resolution of advice and consent to the Constitution and Convention of the International Telecommunications Union conditioned on, among other things, the understanding that the treaty's reference to "geographical situation of particular countries" would not "imply a recognition of claim to any preferential rights to the geostationary-satellite orbit"). For discussion of the Senate's conditional consent authority and its ability to issue reservations, understandings, and declarations, see ArtII.S2.C2.1.2 Historical Background on Treaty-Making Power

[21] *See* ArtII.S2.C2.1.2 Historical Background on Treaty-Making Power.

those who may have voted to ratify it."[22] That said, the Legislative Branch may still play a role in treaty interpretation when it passes implementing legislation or other treaty-related laws.[23] For example, when treaties require countries to ensure certain actions are criminalized in domestic law, Congress might interpret the treaty during the legislative process when it defines the prohibited actions in U.S. law; determines appropriate punishments; and decides whether domestic law already prohibits the conduct.[24]

ArtII.S2.C2.1.7 Legal Effect of Treaties on Prior Acts of Congress

Article II, Section 2, Clause 2:

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

The Constitution provides that both federal statutes and treaties are part of the supreme law of the land, but it does not define the relationship between federal legislation and treaties.[1] As a result, disputes have arisen over which law governs when there are differences between a self-executing treaty and a federal statute. The Supreme Court has resolved this issue through what has become known as the "last-in-time" or "later-in-time" rule: when there is a conflict between a self-executing treaty and a federal statute, U.S. courts must apply whichever of the two reflects the "latest expression of the sovereign will" of the United States.[2]

The Supreme Court has frequently applied the last-in-time rule to give effect to a statute that conflicts with an earlier ratified treaty.[3] Although the situation has arisen less often, the Supreme Court has also held that a treaty can override an earlier-in-time federal statute.[4] The last-in-time rule, however, only applies when the treaty at issue is self-executing.[5] Because a

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[22] *See* The Diamond Rings, 183 U.S. 176, 180 (1901).

[23] *Accord* Louis Henkin, Foreign Affairs and the U.S. Constitution 206 (2d ed. 1996) ("Congress . . . has occasion to interpret a treaty when it considers enacting implementing legislation, or other legislation to which the treaty might be relevant.").

[24] For example, the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) requires countries to make torture and other defined offenses punishable by "appropriate" penalties in domestic law. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85 [hereinafter Torture Convention] ("Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."). The legislation implementing the Torture Convention appears to interpret this provision by making torture resulting in death a capital offense and torture that does not result in death punishable by imprisonment up to 20 years. 18 U.S.C. § 2340A(a).

[1] U.S. Const. art. VI, cl. 2.

[2] Whitney v. Robertson, 124 U.S. 190, 195 (1888). *See also* Chinese Exclusion Case (Ping v. United States), 130 U.S. 581, 600 (1889) ("[T]he last expression of the sovereign will must control.").

[3] *See*, *e.g.*, Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam on denial of certiorari); *Chinese Exclusion Case*, 130 U.S. at 600–01; *Whitney*, 124 U.S. at 194–95; Head Money Cases (Edye v. Robertson), 112 U.S. 580, 596–99 (1884).

[4] *See* Cook v. United States, 288 U.S. 102, 118–19 (1933) (holding that a 1924 treaty between the United States and Great Britain superseded the terms of the Tariff Act of 1922 and limited the authority of the Coast Guard to board a British vessel outside U.S. territorial waters). *See also* The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870) ("A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.") (footnote omitted).

[5] *Whitney*, 124 U.S. at 194 ("[I]f the [treaty and statute] are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing."). *See also* Medellín v. Texas, 552 U.S. 491, 505–06 (2008) ("Only '[i]f the treaty contains stipulations which are self-executing, that is, require no legislation

non-self-executing treaty is not judicially enforceable,[6] courts will apply a federal statute over a non-self-executing treaty regardless of the timing of the statute's enactment.[7]

ArtII.S2.C2.1.8 Preemptive Effect of Treaties

Article II, Section 2, Clause 2:

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

One of the Framers' primary objectives in including treaties in the Supremacy Clause was to ensure that the United States' treaty obligations would prevail over inconsistent state legislation.[1] During the pre-constitutional period, some states resisted complying with the 1783 Treaty of Peace with Great Britain, which prohibited the United States from placing "legal impediments" on British citizens' attempts to collect pre-Revolutionary War debts.[2] Soon after the states adopted the Constitution, the Supreme Court addressed whether this treaty obligation would prevail over a state statute that allowed Virginians to satisfy debts to British creditors by making payment to a state loan office rather than to the creditors themselves.[3] In *Ware v. Hylton*—the first Supreme Court case to address the legal effect of treaties—the Court struck down the Virginia law on the ground that it conflicted with the Treaty of Peace.[4] "A treaty cannot be the Supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way[,]" Justice Samuel Chase explained.[5]

Since *Ware*, the Supreme Court has held that treaty provisions preempt contrary state or local laws on many occasions.[6] But just as only self-executing treaty provisions can prevail over earlier-in-time federal statutes, a treaty provision must be self-executing to preempt inconsistent state law.[7] Before the mid-twentieth century, courts routinely held that treaties displaced state or local law without examining closely whether the treaty provision was

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to make them operative, [will] they have the force and effect of a legislative enactment.'") (quoting *Whitney*, 124 U.S. at 194); Apparatus for Radio Communication on Steam Vessels, 30 Op. Att'y Gen. 84, 86 (1913) ("[U]nless a treaty is self-executing, it will not necessarily repeal a prior and inconsistent statute on the same subject.").

[6] *See* ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties.

[7] *See supra* note 5. *See also* Restatement (Fourth) of Foreign Relations Law § 109 cmt. c (2018); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1100–04 (2000).

[1] *See* ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties.

[2] Treaty of Peace art. 4, Sept. 3, 1783, U.S.-Gr. Brit., 8 Stat. 80.

[3] *See* Act for Sequestering British Property, *in* 9 The Statutes at Large; Being a Collection of All the Laws of Virginia in the Year 1619, at 379 (William Waller Hening ed., 1821) (passed Oct. 20, 1777).

[4] 3 U.S. (3 Dall.) 199 (1796).

[5] *Id.* at 236–37 (Chase, J.).

[6] *See* Restatement (Fourth) of Foreign Relations Law § 108 reporters' n.1 (2018) [hereinafter Fourth Restatement] (collecting Supreme Court cases).

[7] *See Medellín*, 552 U.S. at 513. *See also* Buell v. Mitchell, 274 F.3d 337, 372 (6th Cir. 2001) (concluding that certain human rights treaties to which the United States is a party did not prevail over an Ohio death penalty statute because, *inter alia*, the treaties were non-self-executing).

self-executing.[8] But in more recent cases, courts have closely considered whether a treaty provision is self-executing before applying it to preempt state law.[9]

ArtII.S2.C2.1.9 Effect of Treaties on the Constitution

Article II, Section 2, Clause 2:

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

While treaties may preempt contradictory state law and supplant earlier-in-time federal legislation, the treaty power is not so broad as to override the Constitution.[1] The Supreme Court stated in dicta in several cases that treaties may not alter the Constitution or authorize acts that the Constitution expressly prohibits.[2] Although the Court has never invalidated a treaty itself on constitutional grounds,[3] it has held that courts may not give treaties domestic effect in a way that interferes with individual rights guaranteed in the Constitution.[4] In *Boos v. Berry*, the Supreme Court held that a treaty-based obligation to protect foreign embassies did not authorize Congress to enact legislation that infringed on individuals' First Amendment

[8] *See*, *e.g.*, Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); Hauenstein v. Lynham, 100 U.S. 483, 490 (1879). *See also* David Sloss, The Death of Treaty Supremacy 85–95 (2016) (finding no cases between 1800 and 1945 in which state or local law prevailed over an inconsistent treaty because the treaty was deemed non-self-executing); Fourth Restatement, *supra* note 6, § 308 cmt. b ("Before the mid-20th century, courts routinely enforced treaty obligations to displace contrary State or local law, often without focusing on the question of self-execution. . . . In more recent cases, once courts have identified a conflict between a treaty and State or local law, they tend to consider whether a treaty provision is self-executing before applying it to preempt State or local law.").

[9] *See supra* note 7.

[1] In *Missouri v. Holland*, the Supreme Court noted that, whereas the Supremacy Clause gives acts of Congress the status of supreme law of the land only when "made in pursuance" of the Constitution, treaties are deemed supreme law of the land when made "under the authority of the United States." *See* 252 U.S. 416, 432 (1920) (discussing U.S. Const. art VI, cl. 2). *Holland* described it as "an open question" whether the "authority" underlying the treaty power could extend beyond what the Constitution permits. *Id.* But the Court clarified in subsequent decisions that the treaty power is subject to certain constitutional restraints, and the variation in language in the Supremacy Clause was intended to ensure that treaties made under the Articles of Confederation would remain in effect under the Constitution. *See* Reid v. Covert, 354 U.S. 1, 16–17 (1957) (plurality opinion). *See also infra* notes 4–7.

[2] *See* Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853) ("The treaty is . . . a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States."); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620 (1870) ("It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument."); De Geofroy v. Riggs, 133 U.S. 258, 267 (1890) ("It would not be contended that [the treaty power] extends so far as to authorize what the constitution forbids."); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) ("The treaty-making power of the United States . . . does not extend 'so far as to authorize what the Constitution forbids.'") (quoting *De Geofroy*, 133 U.S. at 267). *See also Reid*, 354 U.S. at 16 ("This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.").

[3] *See* Louis Henkin, Foreign Affairs and the U.S. Constitution 185 (2d ed. 1996); Restatement (Fourth) of Foreign Relations § 307 cmt. a (2018).

[4] *See* Boos v. Barry, 485 U.S. 312, 324 (1988) ("It is well established that 'no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.'") (quoting *Reid*, 354 U.S. at 16 (plurality opinion)). *See also* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 416–17 & n.9 (2003) (stating that the power of a treaty to preempt state law is "[s]ubject . . . to the Constitution's guarantees of individual rights").

right to freedom of speech.[5] Similarly, in *Reid v. Covert*, a plurality of the Court determined that the United States could not rely on international agreements as authority to conduct criminal proceedings that did not comply with the grand-jury and jury-trial guarantees in the Fifth and Sixth Amendments.[6] The Supreme Court has since cited the *Reid* plurality opinion and described its conclusions related to the constitutional constraints on the treaty power as "well established."[7]

ArtII.S2.C2.1.10 Breach and Termination of Treaties

Article II, Section 2, Clause 2:

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

The Constitution sets forth a definite procedure by which the President has the power to make treaties with the advice and consent of the Senate, but it is silent on who has the power to terminate them and how this power should be exercised.[1] The United States terminated a treaty under the Constitution for the first time in 1798. On the eve of possible hostilities with France, Congress passed, and President John Adams signed, legislation stating that four U.S. treaties with France "shall not henceforth be regarded as legally obligatory on the government or citizens of the United States."[2] When he was Vice-President, Thomas Jefferson referred to the episode as support for the notion that only an "act of the legislature" can terminate a treaty.[3] But commentators have since come to view the 1798 statute as a historical anomaly because it is the only instance in which Congress purported to terminate a treaty directly through legislation without relying on the President to provide a notice of termination to the

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[5] *See Boos,* 484 U.S. at 324, 334. Although the Supreme Court has not addressed the issue, several lower courts and commentators have concluded that the United States cannot exercise powers that the Constitution assigns exclusively to Congress, such as the appropriations of funds, through a treaty. *See* ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties.

[6] The plurality in *Reid* rejected the argument that an executive agreement between the United States and Great Britain and the North American Treaty Organization Status of Forces Agreement permitted military courts to try the dependents of U.S. military personnel living at overseas posts when the criminal process did not comport with constitutional guarantees of the Fifth and Sixth Amendments. *See Reid*, 354 U.S. at 15–19 & n.29. *See also* Amdt5.2.1 Historical Background on Grand Jury Clause and Amdt6.4.2 Historical Background on Right to Trial by Jury (discussing the constitutional guarantees of a grand jury and trial by jury). While only four Justices joined the *Reid* plurality opinion, none of the separately concurring or dissenting Justices questioned the plurality's analysis of the treaty power. *See Reid*, 354 U.S. at 41–64 (1957) (Frankfurter, J., concurring in the judgment); *Id.* at 65–78 (Harlan, J., concurring in the judgment); *Id.* at 78–90 (Clark, J., dissenting joined by Burton, J.).

[7] *Boos*, 484 U.S. at 324. *See also Garamendi*, 539 U.S. at 417 n.9 (citing plurality opinion in *Reid*).

[1] *See*, *e.g.*, Goldwater v. Carter, 444 U.S. 996, 1003 (1979) (plurality opinion) ("[W]hile the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty.").

[2] Act of July 7, 1798, ch. 67, 1 Stat. 578 (An Act To Declare the Treaties Heretofore Concluded with France, No Longer Obligatory on the United States).

[3] *See* Thomas Jefferson, A Manual of Parliamentary Practice 52 (Samuel Harrison Smith ed., 1801) ("Treaties being declared, equally with the laws of the U[nited] States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded. This was accordingly the process adopted in the case of France in 1798.").

foreign government.[4] Moreover, because the 1798 statute was part of a series of congressional measures authorizing limited hostilities against the French Republic, some view the statute as an exercise of Congress's war powers rather than precedent for a permanent congressional power to terminate treaties.[5]

During the nineteenth century, government practice treated the power to terminate treaties as shared between the Legislative and Executive Branches.[6] Congress often authorized[7] or instructed[8] the President to provide notice of treaty termination to foreign governments during this time. On rare occasions, the Senate alone passed a resolution authorizing the President to terminate a treaty.[9] Presidents often complied with the Legislative Branch's authorization or direction,[10] although they sometimes resisted attempts to compel termination of specific articles in treaties when the treaties did not authorize partial termination.[11] On other occasions, Congress or the Senate approved the President's termination after-the-fact, when the Executive Branch had already provided notice of termination to the foreign government.[12]

At the turn of the twentieth century, a new form of treaty termination emerged: unilateral termination by the President without approval by the Legislative Branch. This method first

[4] *See*, *e.g.*, Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 Tex. L. Rev. 773, 789 (2014) [hereinafter Bradley, *Historical Gloss*]; Restatement (Fourth) of Foreign Relations Law § 313, reporters' n.2 (2018) [hereinafter Fourth Restatement]; Cong. Research Serv., *Treaties and Other International Agreements: The Role of the United States Senate*, S. Rep. No. 106-71, at 207 (2001).

[5] *See* S. Rep. No. 34-97, at 5 (1856) (Senate Foreign Relations Committee describing the 1798 treaty abrogation statute as a "rightful exercise of the war power, without viewing it in any manner as a precedent establishing in Congress alone, and under any circumstances, the power to annul a treaty."). *Cf.* Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40 (1800) (opinion of Washington, J.) (treating the 1798 statute as one in a bundle of congressional acts declaring a limited "public war" on the French Republic).

[6] For analysis of nineteenth century understanding and practice related to treaty termination, see Bradley, *Historical Gloss*, *supra* note 4, at 788–801; Samuel B. Crandall, Treaties, Their Making and Enforcement 423–66 (2d ed. 1916).

[7] *See*, *e.g.*, Joint Resolution of April 27, 1846 Concerning the Oregon Territory, 9 Stat. 109 (providing that the President "is hereby authorized, at his discretion, to give to the government of Great Britain the notice required by" a convention allowing for joint occupancy of parts of the Oregon Territory); Joint Resolution of June 17, 1874, 18 Stat. 287 (authorizing the President to give notice of termination of a Treaty of Commerce with Belgium).

[8] *See*, *e.g.*, Joint Resolution of January 18, 1865, 13 Stat. 566 ("Resolved . . . That notice be given of the termination of the Reciprocity Treaty . . . and the President of the United States is hereby charged with the communication of such notice to the government of the United Kingdom."); Joint Resolution of March 3, 1883, 22 Stat. 641 ("[T]he President . . . hereby is directed to give notice to the Government of Her Britannic Majesty that the provisions of each and every of the articles aforesaid will terminate . . . on the expiration of two years next after the time of giving such notice.").

[9] In 1855, the Senate authorized President Franklin Pierce to terminate a Friendship, Commerce, and Navigation Treaty with Denmark, and the President subsequently relied on the Senate's action in carrying out the termination. Franklin Pierce, Third Annual Message (Dec. 31, 1855) *in* 7 A Compilation of the Messages and Papers of the Presidents 2860, 2867 (James D. Richardson ed., 1897) ("In pursuance of the authority conferred by a resolution of the Senate of the United States passed on the 3d of March last, notice was given to Denmark" that the United States would "terminate the [treaty] at the expiration of one year from the date of notice for that purpose.").

[10] For example, after Congress enacted a joint resolution calling for the termination of the Oregon Territory Treaty, *supra* note 7, the Secretary of State informed the U.S. Ambassador to Great Britain that "Congress have spoken their will upon the subject, in their joint resolution; and to this it is his (the President's) and your duty to conform." S. Doc. No. 29-489, at 15 (1846). As required by the Joint Resolution of January 18, 1865, *see supra* note 8, the Andrew Johnson Administration terminated an 1854 treaty with Great Britain concerning trade with Canada. Letter from William H. Seward, U.S. Sec'y of State to Charles Francis Adams, Minister to the U.K. (Jan. 18, 1865) *in* Papers Relating to Foreign Affairs, pt. 1, at 93 (1866).

[11] *See*, *e.g.*, Rutherford B. Hayes, Veto of the Chinese Immigration Bill, H.R. Exec. Doc. No. 45-102, at 5 (1879) (disputing that Congress can direct the abrogation of specific articles in a treaty, but accepting that the "authority of Congress to terminate a treaty with a foreign power, by expressing the will of the nation no longer to adhere to it, is . . . free from controversy under our Constitution ").

[12] *See*, *e.g.*, Joint Resolution to Terminate the Treaty of 1817 Regulating the Naval Force on the Lakes, 13 Stat. 568 (1865) ("[T]he notice given by the President of the United States to [the] government of Great Britain and Ireland to

occurred in 1899, when the McKinley Administration terminated certain articles in a commercial treaty with Switzerland,[13] and then again in 1927, when the Coolidge Administration withdrew the United States from a convention to prevent smuggling with Mexico.[14] During the Franklin Roosevelt Administration and World War II, unilateral presidential termination increased markedly.[15] Although Congress at times enacted legislation authorizing or instructing the President to terminate treaties during the twentieth century,[16] unilateral presidential termination became the norm.[17]

Some scholars and Members of Congress have challenged the President's assertion of unilateral authority to terminate treaties under the rationale that treaty termination is analogous to the termination of federal statutes.[18] Because domestic statutes may be terminated only through the same process in which they were enacted[19]—i.e., through a majority vote in both houses and with the signature of the President or a veto override—these observers contend that treaties likewise must be terminated through a procedure that resembles their making and that includes the Legislative Branch.[20] On the other hand, treaties do not share every feature of federal statutes. Whereas statutes can be enacted over the President's veto, treaties can never be concluded without the President's final act of ratification.[21] Moreover, some argue that, just as the President has some unilateral authority to remove Executive Officers who were appointed with senatorial consent,[22] the President may unilaterally terminate treaties made with the Senate's advice and consent.[23]

The President's exercise of treaty termination authority has not generated opposition from the Legislative Branch in most cases, but there have been occasions in which Members of Congress sought to block unilateral presidential action. In 1978, a group of Members filed suit in *Goldwater v. Carter*[24] seeking to prevent President Jimmy Carter from terminating a

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terminate the treaty . . . is hereby adopted and ratified as if the same had been authorized by Congress."); Joint Resolution of Dec. 21, 1911, 37 Stat. 627 (1911) (stating that President Taft's notice of termination of a treaty with Russia was "adopted and ratified").

[13] *See* Letter from John Hay, U.S. Sec'y of State to Ambassador Leishman (Mar. 8, 1899) *in* Papers Relating to the Foreign Relations of the United States 753–54 (1901).

[14] *See* Letter from Frank B. Kellogg, U.S. Sec'y of State to Ambassador Sheffield (Mar. 21, 1927) *in* 3 Papers Relating to the Foreign Relations of the United States, 1927, at 230, 230–31 (1942).

[15] *See* Bradley, *Historical Gloss*, *supra* note 4, at 807–09; Authority to Withdraw from the North American Free Trade Agreement, 42 Op. O.L.C. slip op. at 11 (Oct. 17, 2018), https://www.justice.gov/olc/opinion/authority-withdraw-north-american-free-trade-agreement; Fourth Restatement, *supra* note 4, § 303 reporters' n.3.

[16] *See*, *e.g.*, Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 313, 100 Stat. 1086, 1104 (mandating that "[t]he Secretary of State shall terminate immediately" a tax treaty and protocol with South Africa), *repealed by* South African Democratic Transition Support Act of 1993, Pub. L. No. 103-149, § 4, 107 Stat. 1503, 1505; Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 202(b), 90 Stat. 331, 340–41 (authorizing the Secretary of State to renegotiate certain fishing treaties and expressing the "sense of Congress that the United States shall withdraw from any such treaty, in accordance with its provisions, if such treaty is not so renegotiated within a reasonable period of time after such date of enactment").

[17] *See* Bradley, *Historical Gloss*, *supra* note 4, at 807–15.

[18] *See*, *e.g.*, Barry M. Goldwater, *Treaty Termination is a Shared Power*, 65 A.B.A. J. 198, 199–200 (1979).

[19] *See*, *e.g.*, Clinton v. City of New York, 524 U.S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."); INS v. Chadha, 462 U.S. 919, 954 (1983) ("[R]epeal of statutes, no less than enactment, must conform with Art. I.").

[20] *See*, *e.g.*, David Gray Adler, The Constitution and the Termination of Treaties 89–110 (1986).

[21] For discussion of the federal law-making process, see ArtI.S7.C2.1 Overview of Presidential Approval or Veto of Bills.

[22] For further discussion of the presidential power to remove officers, see ArtII.S2.C2.3.15.1 Overview of Removal of Executive Branch Officers.

[23] *See*, *e.g.*, Adler, *supra* note 21, at 94; Kristen E. Eichensehr, *Treaty Termination and the Separation of Powers*, 53 Va. J. Int'l L. 247, 269 (2013).

[24] 444 U.S. 996.

mutual defense treaty with the government of Taiwan[25] as part of the United States' recognition of the government of mainland China.[26] A divided Supreme Court ultimately ruled that the litigation should be dismissed, but it did so without reaching the merits of the constitutional question and with no majority opinion.[27] Citing a lack of clear guidance in the Constitution's text and a reluctance "to settle a dispute between coequal branches of our Government each of which has resources available to protect and assert its interests[,]" four Justices concluded that the case presented a nonjusticiable political question.[28] This four-Justice opinion, written by Justice William Rehnquist, has proven influential since *Goldwater*, and federal district courts have invoked the political question doctrine as a basis to dismiss challenges to unilateral treaty terminations by President Ronald Reagan[29] and President George W. Bush.[30]

Regardless of whether constitutional disputes over treaty termination are resolved in federal courts or through the political process, the power of treaty termination may depend on the specific features of the treaty at issue.[31] For example, if termination of a particular treaty implicates the exercise of independent executive powers—such as the power to recognize foreign governments[32]—the President perhaps may have a stronger claim to unilateral authority.[33] On the other hand, if the Senate were to condition its advice and consent to a treaty on a requirement that termination only occur with the approval of the Legislative Branch, some commentators argue that the President would be bound by that condition.[34] Finally, when Congress has passed legislation implementing a treaty into domestic law of the

[25] Mutual Defense Treaty Between the United States of America and the Republic of China, Dec. 2, 1954, 6 U.S.T. 433.

[26] For background on *Goldwater*, see Victoria Marie Kraft, The U.S. Constitution and Foreign Policy: Terminating the Taiwan Treaty 1–52 (1991).

[27] *See Goldwater*, 444 U.S. at 996 (vacating with instructions to dismiss with no majority opinion).

[28] *See id.* at 1002–05 (Rehnquist, J., concurring joined by Stewart & Stevens, JJ. & Burger, C.J.). Justice Lewis Powell also voted for dismissal, but did so based on the ground that the case was not ripe for judicial review until the Senate passed a resolution disapproving of the President's termination. *See id.* at 998 (Powell, J., concurring). Justice William Brennan would have held that President Carter possessed the power to terminate the Mutual Defense Treaty with Taiwan, but his opinion centered on the President's power over recognition of foreign governments, and not because he believed the President possessed a general, constitutional power to terminate treaties. *See id*. at 1006–07 (Brennan, J., dissenting). For discussion of *Goldwater* in the context of the political question doctrine, see ArtIII.S2.C1.9.6 Foreign Affairs as a Political Question.

[29] In 1986, a federal district court dismissed a group of private plaintiffs' suit seeking to prevent President Reagan from unilaterally terminating a Treaty of Friendship, Commerce, and Navigation with Nicaragua. *See* Beacon Prods. Corp. v. Reagan, 633 F. Supp. 1191, 1198–99 (D. Mass. 1986), *aff'd on other grounds*, 814 F.2d 1 (1st Cir. 1987).

[30] In 2002, the United States District Court for the District of Columbia dismissed as nonjusticable a challenge brought by 32 Members of Congress to President George W. Bush's termination of the Anti-Ballistic Missile Treaty with Russia. *See* Kucinich v. Bush, 236 F. Supp. 2d 1, 14–17 (D.D.C. 2002).

[31] *See*, *e.g.*, *Goldwater*, 444 U.S. at 1003 ("[D]ifferent termination procedures may be appropriate for different treaties."); Curtis Bradley, International Law in the U.S. Legal System 71 (2d ed. 2015) [hereinafter Bradley, U.S. Legal System] ("It is possible that the President has the authority to terminate treaties in some situations but not others.").

[32] *See* ArtII.S3.2.3 Modern Doctrine on Receiving Ambassadors and Public Ministers.

[33] *Compare*, *e.g.*, Bradley, U.S. Legal System, *supra* note 31, at 71 ("[E]ven if the President does not have the authority to terminate treaties in all instances, the president may be able to terminate a treaty when the termination is related to the exercise of some other presidential power, such as the recognition of a foreign government."), *with* Goldwater, *supra* note 18, at 199 (arguing that separation of powers principles call for joint termination of treaties).

[34] *See* Fourth Restatement, *supra* note 4, § 313, reporters' n.6 ("If treaty termination is a concurrent, rather than exclusive, power, it is possible that it could be limited by the Senate in its advice and consent to a particular treaty, and possibly also by Congress through statute."); Michael J. Glennon, Constitutional Diplomacy 156 (1990) ("Where the Senate specifies a procedure for termination, the President is compelled constitutionally to adhere to that procedure."). *But see* Congressionally Mandated Notice Period for Withdrawing from the Open Skies Treaty, 44 Op. O.L.C. slip op. at 10 (Sept. 22, 2020) (contending that treaty withdrawal is an exclusive presidential power that cannot be regulated by the Legislative Branch), https://www.justice.gov/olc/opinion/congressionally-mandated-notice-period-withdrawing-open-skies-treaty.

United States, the President likely lacks the authority to terminate the domestic effect of that legislation without going through the full legislative process for repeal of the statute.[35]

A party's breach of treaty obligations also can affect termination and withdrawal. Under international law, a party may suspend or terminate a treaty if another party materially breaches its obligations.[36] The Supreme Court has appeared to recognize that, at least in the absence of direction from Congress, the President has the power to deem a treaty that has been breached by a foreign nation void and therefore no longer binding.[37] The Court also has stated that Congress possesses the power to breach and abrogate a treaty by passing later-in-time legislation that conflicts with U.S. treaty obligations.[38]

When considering all elements of the treaty-making process, the treaty power remains an area in which all three branches of government shape constitutional practice and influence foreign relations. The Judicial Branch determines treaties' effect on domestic law and enforces self-executing treaty provisions in U.S. courts.[39] Presidents claim authority to negotiate with foreign countries, ratify treaties approved by the Senate, interpret treaties' terms outside the context of domestic litigation, and terminate the United States' treaty commitments.[40] The Senate maintains its authority to provide (or withhold) consent to treaties proposed by the President, and it shapes treaties' scope and meaning through its power to condition consent on reservations, understandings, and declarations.[41] Congress also plays a role when it enacts legislation implementing treaties' requirements into U.S. statutes.[42] While unresolved questions about the treaty power have persisted since the Constitution was written, treaty-making remains a unique and dynamic part of American constitutional law and practice.

ArtII.S2.C2.2 Alternatives to Treaties

ArtII.S2.C2.2.1 Overview of Alternatives to Treaties

Article II, Section 2, Clause 2:

> *He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with*

[35] *See* Julian Ku & John Yoo, *Bond, The Treaty Power, and the Overlooked Value of Non-Self-Executing Treaties*, 90 Notre Dame L. Rev. 1607, 1628 (2015) ("A President's termination of a treaty will dissolve the formal legal obligation, but the policy of the United States will still continue because he cannot repeal the implementing legislation."); John Setear, *The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. Legal Stud. S5, S15 n.20 (2002) ("If only legislation can repeal legislation, then the formal status of implementing legislation does not change merely because the president takes some action, namely, terminating the treaty that the legislation implements.").

[36] Vienna Convention on the Law of Treaties art. 2, Apr. 24, 1970, 1155 U.N.T.S. 331. Although the United States has not ratified the Vienna Convention on the Law of Treaties, U.S. officials have stated that its provisions concerning treaty termination and withdrawal reflect customary international law. *See* Fourth Restatement, *supra* note 4, § 303 reporters' n.1 (collecting statements).

[37] *See* Charlton v. Kelly, 229 U.S. 447, 473–76 (1913) (concluding that, because the "Executive Department . . . elected to waive any right to free itself" from its obligations under an extradition treaty, the Supreme Court must enforce the treaty even if had been breached and made voidable.).

[38] *See*, *e.g.*, La Abra Silver Mining Co. v. United States, 175 U.S. 423, 460 (1899) ("It has been adjudged that Congress by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country which had been negotiated by the President and approved by the Senate."). *See also* ArtII.S2.C2.1.7 Legal Effect of Treaties on Prior Acts of Congress (discussing the last-in-time rule).

[39] *See* ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties–ArtII.S2.C2.1.6 Interpreting Treaties.

[40] *See* ArtII.S2.C2.1.2 Historical Background on Treaty-Making Power–ArtII.S2.C2.1.6 Interpreting Treaties.

[41] *See* ArtII.S2.C2.1.2 Historical Background on Treaty-Making Power–ArtII.S2.C2.1.6 Interpreting Treaties.

[42] *See* ArtII.S2.C2.1.5 Congressional Implementation of Treaties.

ArtII.S2.C2.2.1
Overview of Alternatives to Treaties

the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The capacity of the United States to enter into agreements with other nations is not exhausted in the treaty-making power. The Constitution recognizes a distinction between "treaties" and "agreements" or "compacts" but does not indicate what the difference is.[1] The differences, which once may have been clearer, have been seriously blurred in practice within recent decades. Once a stepchild in the family in which treaties were the preferred offspring, the executive agreement has surpassed in number and perhaps in international influence the treaty formally signed, submitted for ratification to the Senate, and proclaimed upon ratification.

During the first half-century of its independence, the United States was party to sixty treaties but to only twenty-seven published executive agreements. By the beginning of World War II, there had been concluded approximately 800 treaties and 1,200 executive agreements. In the period 1940–1989, the Nation entered into 759 treaties and into 13,016 published executive agreements. Cumulatively, in 1989, the United States was a party to 890 treaties and 5,117 executive agreements. To phrase it comparatively, in the first 50 years of its history, the United States concluded twice as many treaties as executive agreements. In the 50-year period from 1839 to 1889, a few more executive agreements than treaties were entered into. From 1889 to 1939, almost twice as many executive agreements as treaties were concluded. Between 1939 and 1993, executive agreements comprised more than 90% of the international agreements concluded.[2]

One must, of course, interpret the raw figures carefully. Only a very small minority of all the executive agreements entered into were based solely on the powers of the President as Commander in Chief and organ of foreign relations; the remainder were authorized in advance by Congress by statute or by treaty provisions ratified by the Senate.[3] Thus, consideration of the constitutional significance of executive agreements must begin with a differentiation among the kinds of agreements which are classed under this single heading.[4]

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[1] *Compare* Article II, § 2, cl. 2, and Article VI, cl. 2, *with* Article I, 10, cls. 1 and 3. *Cf.* Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570–72 (1840). And note the discussion in *Weinberger v. Rossi,* 456 U.S. 25, 28–32 (1982).

[2] CRS Study, xxxiv–xxxv, *supra*, 13–16. Not all such agreements, of course, are published, either because of national-security/secrecy considerations or because the subject matter is trivial. In a 1953 hearing exchange, Secretary of State John Foster Dulles estimated that about 10,000 executive agreements had been entered into in connection with the NATO treaty. "Every time we open a new privy, we have to have an executive agreement." *Hearing on S.J. Res. 1 and S.J. Res. 43: Before a Subcommittee of the Senate Judiciary Committee*, 83d Congress, 1st Sess. (1953), 877.

[3] One authority concluded that of the executive agreements entered into between 1938 and 1957, only 5.9% were based exclusively on the President's constitutional authority. C.H. McLaughlin, *The Scope of the Treaty Power in the United States—II*, 43 Minn. L. Rev. 651, 721 (1959). Another, somewhat overlapping study found that in the period 1946–1972, 88.3% of executive agreements were based at least in part on statutory authority; 6.2% were based on treaties, and 5.5% were based solely on executive authority. *International Agreements: An Analysis of Executive Regulations and Practices*, Senate Committee on Foreign Relations, 95th Cong., 1st Sess. (Comm. Print) (1977), 22 (prepared by CRS).

[4] "[T]he distinction between so-called 'executive agreements' and 'treaties' is purely a constitutional one and has no international significance." Harvard Research in International Law, *Draft Convention on the Law of Treaties*, 29 Amer. J. Int. L. 697 (Supp.) (1935). *See* E. Byrd, *supra* at 148–51. Many scholars have aggressively promoted the use of executive agreements, in contrast to treaties, as a means of enhancing the role of the United States, especially the role of the President, in the international system. *See* Myers McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy (Pts. I & II)*, 54 Yale L. J. 181, 534 (1945).

ArtII.S2.C2.2.2 Legal Basis for Executive Agreements

Article II, Section 2, Clause 2:

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

Many types of executive agreements comprise the ordinary daily grist of the diplomatic mill. Among these are such as apply to minor territorial adjustments, boundary rectifications, the policing of boundaries, the regulation of fishing rights, private pecuniary claims against another government or its nationals, in Justice Joseph Story's words, "the mere private rights of sovereignty."[1] Crandall lists scores of such agreements entered into with other governments by the authorization of the President.[2] Such agreements were ordinarily directed to particular and comparatively trivial disputes and by the settlement they effect of these cease ipso facto to be operative. Also, there are such time-honored diplomatic devices as the "protocol" which marks a stage in the negotiation of a treaty, and the modus vivendi, which is designed to serve as a temporary substitute for one. Executive agreements become of constitutional significance when they constitute a determinative factor of future foreign policy and hence of the country's destiny. In consequence particularly of our participation in World War II and our immersion in the conditions of international tension which prevailed both before and after the war, Presidents have entered into agreements—some of which have approximated temporary alliances—with other governments. It cannot be justly said, however, that in so doing they have acted without considerable support from precedent.

An early instance of executive treaty-making was the agreement by which President James Monroe in 1817 defined the limits of armaments on the Great Lakes. The arrangement was effected by an exchange of notes, which nearly a year later were laid before the Senate with a query as to whether it was within the President's power, or whether advice and consent of the Senate was required. The Senate approved the agreement by the required two-thirds vote, and it was forthwith proclaimed by the President without there having been a formal exchange of ratifications.[3] Commenting on a treaty with Russia providing that U.S. authorities would assist in arresting and returning Russian deserters, the Court remarked, a bit uncertainly: "While no act of Congress authorizes the executive department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander in chief of the military and naval forces of the United States. It may be doubted, however, whether such power could be extended to the apprehension of deserters [from foreign vessels] in the absence of positive legislation to that effect."[4] Justice Horace Gray and three other Justices believed that such action by the President must rest upon express treaty or statute.[5]

Notable expansion of presidential power in this field first became manifest in the administration of President William McKinley. At the outset of war with Spain, the President

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[1] 3 Joseph Story, Commentaries on the Constitution of the United States 1397 (1833).

[2] S. Crandall, *supra*, ch. 8; *see also* W. McClure, *supra*, chs. 1, 2.

[3] *Id.* at 49–50.

[4] Tucker v. Alexandroff, 183 U.S. 424, 435 (1902).

[5] *Id.* at 467. The first of these conventions, signed July 29, 1882, had asserted its constitutionality in very positive terms. Q. Wright, *supra* at 239 (quoting Watts v. United States, 1 Wash. Terr. 288, 294 (1870)).

proclaimed that the United States would consider itself bound for the duration by the last three principles of the Declaration of Paris, a course which, as Professor Wright observes, "would doubtless go far toward establishing these three principles as international law obligatory upon the United States in future wars."[6] Hostilities with Spain were brought to an end in August, 1898, by an armistice the conditions of which largely determined the succeeding treaty of peace,[7] just as did the Armistice of November 11, 1918, determine in great measure the conditions of the final peace with Germany in 1918. It was also President McKinley who in 1900, relying on his own sole authority as Commander in Chief, contributed a land force of 5,000 men and a naval force to cooperate with similar contingents from other Powers to rescue the legations in Peking from the Boxers; a year later, again without consulting either Congress or the Senate, he accepted for the United States the Boxer Indemnity Protocol between China and the intervening Powers.[8] Commenting on the Peking protocol, Willoughby quotes with approval the following remark: "This case is interesting, because it shows how the force of circumstances compelled us to adopt the European practice with reference to an international agreement, which, aside from the indemnity question, was almost entirely political in character . . . purely political treaties are, under constitutional practice in Europe, usually made by the executive alone. The situation in China, however, abundantly justified President McKinley in not submitting the protocol to the Senate. The remoteness of Peking, the jealousies between the allies, and the shifting evasive tactics of the Chinese Government, would have made impossible anything but an agreement on the spot."[9]

It was also during this period that John Hay, as McKinley's Secretary of State, initiated his "Open Door" policy, by notes to Great Britain, Germany, and Russia, which were soon followed by similar notes to France, Italy, and Japan. These in substance asked the recipients to declare formally that they would not seek to enlarge their respective interests in China at the expense of any of the others; and all responded favorably.[10] Then, in 1905, the first Roosevelt, seeking to arrive at a diplomatic understanding with Japan, instigated an exchange of opinions between Secretary of War William Howard Taft, then in the Far East, and Count Katsura, amounting to a secret treaty, by which the Roosevelt administration assented to the establishment by Japan of a military protectorate in Korea.[11] Three years later, Secretary of State Elihu Root and the Japanese ambassador at Washington entered into the Root-Takahira Agreement to uphold the status quo in the Pacific and maintain the principle of equal opportunity for commerce and industry in China.[12] Meantime, in 1907, by a "Gentleman's Agreement," the Mikado's government had agreed to curb the emigration of Japanese subjects to the United States, thereby relieving the Washington government from the necessity of taking action that would have cost Japan loss of face. The final result of this series of executive agreements touching American relations in and with the Far East was the product of President Woodrow Wilson's diplomacy. This was the Lansing-Ishii Agreement, embodied in an exchange of letters dated November 2, 1917, by which the United States recognized Japan's "special interests" in China, and Japan assented to the principle of the Open Door in that country.[13]

The executive agreement attained its modern development as an instrument of foreign policy under President Franklin D. Roosevelt, at times threatening to replace the

[6] *Id.* at 245.

[7] S. Crandall, *supra* at 103–04.

[8] *Id.* at 104.

[9] 1 W. Willoughby, *supra* at 539.

[10] W. McClure, *supra* at 98.

[11] *Id.* at 96–97.

[12] *Id.* at 98–99.

[13] *Id.* at 99–100.

treaty-making power, not formally but in effect, as a determinative element in the field of foreign policy. The President's first important utilization of the executive agreement device took the form of an exchange of notes on November 16, 1933, with Maxim M. Litvinov, the USSR Commissar for Foreign Affairs, whereby American recognition was extended to the Soviet Union and certain pledges made by each official.[14]

With the fall of France in June, 1940, President Roosevelt entered into two executive agreements the total effect of which was to transform the role of the United States from one of strict neutrality toward the European war to one of semi-belligerency. The first agreement was with Canada and provided for the creation of a Permanent Joint Board on Defense which would "consider in the broad sense the defense of the north half of the Western Hemisphere."[15] Second, and more important than the first, was the Hull-Lothian Agreement of September 2, 1940, under which, in return for the lease for ninety-nine years of certain sites for naval bases in the British West Atlantic, the United States handed over to the British Government fifty over-age destroyers which had been reconditioned and recommissioned.[16] And on April 9, 1941, the State Department, in consideration of the just-completed German occupation of Denmark, entered into an executive agreement with the Danish minister in Washington, whereby the United States acquired the right to occupy Greenland for purposes of defense.[17]

Post-war diplomacy of the United States was greatly influenced by the executive agreements entered into at Cairo, Teheran, Yalta, and Potsdam.[18] For a period, the formal treaty—the signing of the United Nations Charter and the entry into the multinational defense pacts, like NATO, SEATO, CENTRO, and the like—re-established itself, but soon the executive agreement, as an adjunct of treaty arrangement or solely through presidential initiative, again became the principal instrument of United States foreign policy, so that it became apparent in the 1960s that the Nation was committed in one way or another to assisting over half the countries of the world protect themselves.[19] Congressional disquietude did not result in anything more substantial than passage of a "sense of the Senate" resolution expressing a desire that "national commitments" be made more solemnly in the future than in the past.[20]

ArtII.S2.C2.2.3 Legal Effect of Executive Agreements

Article II, Section 2, Clause 2:

> *He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers*

[14] *Id.* at 140–44.

[15] *Id.* at 391.

[16] *Id.* at 391–93. Attorney General Robert Jackson's defense of the presidential power to enter into the arrangement placed great reliance on the President's "inherent" powers under the Commander in Chief Clause and as sole organ of foreign relations but ultimately found adequate statutory authority to take the steps deemed desirable. 39 Ops. Atty. Gen. 484 (1940).

[17] 4 Dept. State Bull. 443 (1941).

[18] *See A Decade of American Foreign Policy, Basic Documents 1941–1949*, S. Doc. No. 123, 81st Congress, 1st Sess. (1950), pt. 1.

[19] For a congressional attempt to evaluate the extent of such commitments, *see United States Security Agreements and Commitments Abroad: Hearings Before a Subcommittee of the Senate Foreign Relations Committee*, 91st Congress, 1st Sess. (1969), 10 pts.; *see also U.S. Commitments to Foreign Powers: Hearings on S. Res. 151 Before the Senate Foreign Relations Committee*, 90th Congress, 1st Sess. (1967).

[20] The "National Commitments Resolution," S. Res. 85, 91st Congress, 1st Sess., passed by the Senate June 25, 1969. *See also* S. Rep. No. 797, 90th Congress, 1st sess. (1967). *See* the discussion of these years in CRS Study, *supra* at 169–202.

and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

When the President enters into an executive agreement, what sort of obligation does it impose on the United States? That it may impose international obligations of potentially serious consequences is obvious and that such obligations may linger for long periods of time is equally obvious.[1] Not so obvious is the nature of the domestic obligations imposed by executive agreements. Do treaties and executive agreements have the same domestic effect?[2] Treaties preempt state law through operation of the Supremacy Clause. Although it may be that executive agreements entered into pursuant to congressional authorization or treaty obligation also derive preemptive force from the Supremacy Clause, that textual basis for preemption is arguably lacking for executive agreements resting solely on the President's constitutional powers.

Initially, it was the view of most judges and scholars that executive agreements based solely on presidential power did not become the "law of the land" pursuant to the Supremacy Clause because such agreements are not "treaties" ratified by the Senate.[3] The Supreme Court, however, found another basis for holding state laws to be preempted by executive agreements, ultimately relying on the Constitution's vesting of foreign relations power in the national government.

A different view seemed to underlie the Supreme Court decision in *United States v. Belmont*,[4] giving domestic effect to the Litvinov Assignment. The Court's opinion by Justice George Sutherland built on his *Curtiss-Wright*[5] opinion. A lower court had erred, the Court ruled, in dismissing an action by the United States, as assignee of the Soviet Union, for certain moneys which had once been the property of a Russian metal corporation the assets of which had been appropriated by the Soviet government. The President's act in recognizing the Soviet government, and the accompanying agreements, constituted, said the Justice, an international compact which the President, "as the sole organ" of international relations for the United States, was authorized to enter upon without consulting the Senate. Nor did state laws and policies make any difference in such a situation; while the supremacy of treaties is established by the Constitution in express terms, the same rule holds "in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the National Government and is not and cannot be subject to any curtailment or interference on the part of the several States."[6]

The Court elaborated on these principles five years later in *United States v. Pink*,[7] another case involving the Litvinov Assignment and recognition of the Soviet Government. The

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[1] In 1918, Secretary of State Robert Lansing assured the Senate Foreign Relations Committee that the Lansing-Ishii Agreement had no binding force on the United States, that it was simply a declaration of American policy so long as the President and State Department might choose to continue it. 1 W. Willoughby, *supra* at 547. In fact, it took the Washington Conference of 1921, two formal treaties, and an exchange of notes to eradicate it, while the "Gentlemen's Agreement" was finally ended after 17 years only by an act of Congress. W. McClure, *supra* at 97, 100.

[2] *See* E. Byrd, *supra* at 151–57.

[3] *E.g.*, United States v. One Bag of Paradise Feathers, 256 F. 301, 306 (2d Cir. 1919); 1 W. Willoughby, *supra* at 589. The State Department held the same view. G. Hackworth, 5 Digest of International Law 426 (1944).

[4] 301 U.S. 324 (1937). In *B. Altman & Co. v. United States,* 224 U.S. 583 (1912), the Court had recognized that a jurisdictional statute's reference to a "treaty" encompassed an executive agreement.

[5] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[6] 301 U.S. at 330–31.

[7] 315 U.S. 203 (1942).

question presented was whether the United States was entitled to recover the assets of the New York branch of a Russian insurance company. The company argued that the Soviet Government's decrees of confiscation did not apply to its property in New York and could not apply consistently with the Constitution of the United States and that of New York. The Court, speaking by Justice William O. Douglas, brushed these arguments aside. An official declaration of the Russian government itself settled the question of the extraterritorial operation of the Russian decree of nationalization and was binding on American courts. The power to remove such obstacles to full recognition as settlement of claims of our nationals was "a modest implied power of the President who is the 'sole organ of the Federal Government in the field of international relations'. . . . It was the judgment of the political department that full recognition of the Soviet Government required the settlement of outstanding problems including the claims of our nationals. . . . We would usurp the executive function if we held that the decision was not final and conclusive on the courts. . . ."

"It is, of course, true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy. . . . But state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement. . . . Then, the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum . . . must give way before the superior Federal policy evidenced by a treaty or international compact or agreement. . . ."

"The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system. To permit it would be to sanction a dangerous invasion of Federal authority. For it would 'imperil the amicable relations between governments and vex the peace of nations.' . . . It would tend to disturb that equilibrium in our foreign relations which the political departments of our national government has diligently endeavored to establish. . . ."

"No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts."[8]

This recognition of the preemptive reach of executive agreements was an element in the movement for a constitutional amendment in the 1950s to limit the President's powers in this field, but that movement failed.[9]

Belmont and *Pink* were reinforced in *American Ins. Ass'n v. Garamendi*.[10] In holding that California's Holocaust Victim Insurance Relief Act was preempted as interfering with the Federal Government's conduct of foreign relations, as expressed in executive agreements, the

[8] 315 U.S. at 229–31, 233–34.

[9] There were numerous variations in language for the Bricker Amendment, but typical was § 3 of S.J. Res. 1, as reported by the Senate Judiciary Committee, 83d Congress, 1st Sess. (1953), which provided: "Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article." The limitation relevant on this point was in § 2, which provided: "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty."

[10] 539 U.S. 396 (2003). The Court's opinion in *Dames & Moore v. Regan,* 453 U.S. 654 (1981), was rich in learning on many topics involving executive agreements, but the preemptive force of agreements resting solely on presidential power was not at issue, the Court concluding that Congress had either authorized various presidential actions or had long acquiesced in others.

Court reiterated that "valid executive agreements are fit to preempt state law, just as treaties are."[11] The preemptive reach of executive agreements stems from "the Constitution's allocation of the foreign relations power to the National Government."[12] Because there was a "clear conflict" between the California law and policies adopted through the valid exercise of federal executive authority (settlement of Holocaust-era insurance claims being "well within the Executive's responsibility for foreign affairs"), the state law was preempted.[13]

ArtII.S2.C2.2.4 State Laws Affecting Foreign Relations

If the foreign relations power is truly an exclusive federal power, with no role for the states, a logical consequence, the Supreme Court has held, is that some state laws impinging on foreign relations are invalid even in the absence of a relevant federal policy. There is, in effect, a "dormant" foreign relations power. The scope of this power remains undefined, however, and its constitutional basis is debated by scholars.

The exclusive nature of the federal foreign relations power has long been asserted by the Supreme Court. In 1840, for example, the Court declared that "it was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities."[1] A hundred years later the Court remained emphatic about federal exclusivity. "No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts."[2]

It was not until 1968, however, that the Court applied the general principle to invalidate a state law for impinging on the Nation's foreign policy interests in the absence of an established federal policy. In *Zschernig v. Miller*[3] the Court invalidated an Oregon escheat law that operated to prevent inheritance by citizens of Communist countries. The law conditioned inheritance by nonresident aliens on a showing that U.S. citizens would be allowed to inherit estates in the alien's country, and that the alien heir would be allowed to receive payments from the Oregon estate "without confiscation."[4] Although a Justice Department amicus brief asserted that application of the Oregon law in this one case would not cause any "undu[e] interfer[ence] with the United States' conduct of foreign relations," the Court saw a "persistent and subtle" effect on international relations stemming from the "notorious" practice of state

[11] 539 U.S. at 416.

[12] 539 U.S. at 413.

[13] 539 U.S. at 420.

[1] Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575–76 (1840). *See also* United States v. Belmont, 301 U.S. 324, 331 (1937) ("The external powers of the United States are to be exercised without regard to state laws or policies. . . . [I]n respect of our foreign relations generally, state lines disappear"); The Chinese Exclusion Case, 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist; but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power"); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("Our system of government . . . requires that federal power in the field affecting foreign relations be left entirely free from local interference").

[2] United States v. Pink, 315 U.S. 203, 233–34 (1942). Chief Justice Harlan Stone and Justice Owen Roberts dissented.

[3] 389 U.S. 429 (1968).

[4] In *Clark v. Allen*, 331 U.S. 503 (1947), the Court had upheld a simple reciprocity requirement that did not have the additional requirement relating to confiscation.

probate courts in denying payments to persons from Communist countries.[5] Regulation of descent and distribution of estates is an area traditionally regulated by states, but such "state regulations must give way if they impair the effective exercise of the Nation's foreign policy." If there are to be travel, probate, or other restraints on citizens of Communist countries, the Court concluded, such restraints "must be provided by the Federal Government."[6]

Zschernig lay dormant for some time, and, although it has been addressed recently by the Court, it remains the only holding in which the Court has applied a dormant foreign relations power to strike down state law. There was renewed academic interest in *Zschernig* in the 1990s, as some state and local governments sought ways to express dissatisfaction with human rights policies of foreign governments or to curtail trade with out-of-favor countries.[7] In 1999, the Court struck down Massachusetts's Burma sanctions law on the basis of statutory preemption, and declined to address the appeals court's alternative holding applying *Zschernig*.[8] Similarly, in 2003, the Court held that California's Holocaust Victim Insurance Relief Act was preempted as interfering with federal foreign policy reflected in executive agreements, and, although the Court discussed *Zschernig* at some length, it saw no need to resolve issues relating to its scope.[9]

Dictum in *Garamendi* recognizes some of the questions that can be raised about *Zschernig*. The *Zschernig* Court did not identify what language in the Constitution mandates preemption, and commentators have observed that a respectable argument can be made that the Constitution does not require a general foreign affairs preemption not tied to the Supremacy Clause, and broader than and independent of the Constitution's specific prohibitions[10] and grants of power.[11] The *Garamendi* Court raised "a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions." Instead, Justice David Souter suggested for the Court, field preemption may be appropriate if a state legislates "simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," and conflict preemption may be appropriate if a state legislates within an area of traditional responsibility, "but in a way that affects foreign relations."[12] We must await further litigation to see whether the Court employs this distinction.[13]

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[5] 389 U.S. at 440.

[6] 389 U.S. at 440, 441.

[7] *See, e.g.*, Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 Notre Dame L. Rev. 341 (1999); Carlos Manuel Vazquez, *Whither Zschernig?*, 46 Vill. L. Rev. 1259 (2001); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617 (1997); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. Colo. L. Rev. 1223 (1999). *See also* Louis Henkin, Foreign Affairs and the Constitution 149–69 (2d ed. 1996).

[8] Crosby v. National Foreign Trade Council, 530 U.S. 363, 374 n.8 (2000). For the appeals court's application of *Zschernig*, see National Foreign Trade Council v. Natsios, 181 F.3d 38, 49–61 (1st Cir. 1999).

[9] *American Ins. Ass'n v. Garamendi*, 539 U.S. at 419 & n.11 (2003).

[10] It is contended, for example, that Article I, § 10's specific prohibitions against states engaging in war, making treaties, keeping troops in peacetime, and issuing letters of marque and reprisal would have been unnecessary if a more general, dormant foreign relations power had been intended. Similarly, there would have been no need to declare treaties to be the supreme law of the land if a more generalized foreign affairs preemptive power existed outside of the Supremacy Clause. *See* Ramsey, *supra*.

[11] Arguably, part of the "executive power" vested in the President by Art. II, § 1 is a power to conduct foreign relations.

[12] 539 U.S. at 419 n.11.

[13] Justice Ruth Bader Ginsburg's dissent in *Garamendi*, joined by the other three Justices, suggested limiting *Zschernig* in a manner generally consistent with Justice David Souter's distinction. *Zschernig* preemption, Justice Ginsburg asserted, "resonates most audibly when a state action 'reflects a state policy critical of foreign governments and involve[s] sitting in judgment on them.'" 539 U.S. at 439 (quoting Henkin, *supra*, at 164). But Justice Ginsburg also

ArtII.S2.C2.2.5 Congressional Executive Agreements

Article II, Section 2, Clause 2:

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

Congress early authorized officers of the Executive Branch to enter into negotiations and to conclude agreements with foreign governments, authorizing the borrowing of money from foreign countries[1] and appropriating money to pay off the government of Algiers to prevent pirate attacks on United States shipping.[2] Perhaps the first formal authorization in advance of an executive agreement was enactment of a statute that permitted the Postmaster General to "make arrangements with the Postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post offices."[3] Congress has also approved, usually by resolution, other executive agreements, such as the annexing of Texas and Hawaii and the acquisition of Samoa.[4] A prolific source of executive agreements has been the authorization of reciprocal arrangements between the United States and other countries for the securing of protection for patents, copyrights, and trademarks.[5]

The most copious source of executive agreements has been legislation which provided authority for entering into reciprocal trade agreements with other nations.[6] Such agreements in the form of treaties providing for the reciprocal reduction of duties subject to implementation by Congress were frequently entered into,[7] but beginning with the Tariff Act of 1890,[8] Congress began to insert provisions authorizing the Executive to bargain over reciprocity with no necessity of subsequent legislative action. The authority was widened in successive acts.[9] Then, in the Reciprocal Trade Agreements Act of 1934,[10] Congress authorized the President to enter into agreements with other nations for reductions of tariffs and other impediments to international trade and to put the reductions into effect through proclamation.[11]

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voiced more general misgivings about judges' becoming "the expositors of the Nation's foreign policy." *Id.* at 442. In this context, *see* Goldsmith, *supra*, at 1631, describing *Zschernig* preemption as "a form of the federal common law of foreign relations."

[1] 1 Stat. 138 (1790). *See* E. Byrd, *supra* at 53 n.146.

[2] W. McClure, International Executive Agreements 41 (1941).

[3] *Id.* at 38–40. The statute was 1 Stat. 232, 239, 26 (1792).

[4] McClure, *supra* note 2, at 62–70.

[5] *Id.* at 78–81; S. Crandall, *supra* at 127–31; *see* CRS Study, *supra* at 52–55.

[6] *Id.* at 121–27; McClure, *supra* note 2, at 83–92, 173–89.

[7] *Id.* at 8, 59–60.

[8] § 3, 26 Stat. 567, 612.

[9] Tariff Act of 1897, § 3, 30 Stat. 15, 203; Tariff Act of 1909, 36 Stat. 11, 82.

[10] 48 Stat. 943, § 350(a), 19 U.S.C. §§ 1351–1354.

[11] *See* the continued expansion of the authority. Trade Expansion Act of 1962, 76 Stat. 872, § 201, 19 U.S.C. § 1821; Trade Act of 1974, 88 Stat. 1982, as amended, 19 U.S.C. §§ 2111, 2115, 2131(b), 2435. Congress has, with respect to the authorization to the President to negotiate multilateral trade agreements under the auspices of GATT, constrained itself in considering implementing legislation, creating a "fast-track" procedure under which legislation is brought up under a tight timetable and without the possibility of amendment. 19 U.S.C. §§ 2191–2194.

In *Field v. Clark*,[12] legislation conferring authority on the President to conclude trade agreements was sustained against the objection that it attempted an unconstitutional delegation "of both legislative and treaty-making powers." The Court met the first objection with an extensive review of similar legislation from the inauguration of government under the Constitution. The second objection it met with a curt rejection: "What has been said is equally applicable to the objection that the third section of the act invests the President with treaty-making power. The Court is of opinion that the third section of the act of October 1, 1890, is not liable to the objection that it transfers legislative and treaty-making power to the President."[13] Although two Justices disagreed, the question has never been revived. However, in *B. Altman & Co. v. United States*,[14] decided twenty years later, a collateral question was passed upon. This was whether an act of Congress that gave the federal circuit courts of appeal jurisdiction of cases in which "the validity or construction of any treaty . . . was drawn in question" embraced a case involving a trade agreement which had been made under the sanction of the Tariff Act of 1897. The Court answered: "While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, § 3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless, it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act, and, where its construction is directly involved, as it is here, there is a right of review by direct appeal to this court."[15]

The most extensive delegation of authority ever made by Congress to the President to enter into executive agreements occurred within the field of the cognate powers of the two departments, the field of foreign relations, and took place at a time when war appeared to be in the offing and was in fact only a few months away. The legislation referred to is the Lend-Lease Act of March 11, 1941,[16] by which the President was empowered for over two years—and subsequently for additional periods whenever he deemed it in the interest of the national defense to do so—to authorize "the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government," to manufacture in the government arsenals, factories, and shipyards, or "otherwise procure," to the extent that available funds made possible, "defense articles"—later amended to include foodstuffs and industrial products—and "sell, transfer title to, exchange, lease, lend, or otherwise dispose of," the same to the "government of any country whose defense the President deems vital to the defense of the United States," and on any terms that he "deems satisfactory." Under this authorization the United States entered into Mutual Aid Agreements under which the government furnished its allies in World War II with 40 billion dollars' worth of munitions of war and other supplies.

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[12] 143 U.S. 649 (1892).

[13] 143 U.S. at 694. *See also* Dames & Moore v. Regan, 453 U.S. 654 (1981), in which the Court sustained a series of implementing actions by the President pursuant to executive agreements with Iran in order to settle the hostage crisis. The Court found that Congress had delegated to the President certain economic powers underlying the agreements and that his suspension of claims powers had been implicitly ratified over time by Congress's failure to set aside the asserted power. *See also* Weinberger v. Rossi, 456 U.S. 25, 29–30 n.6 (1982).

[14] 224 U.S. 583 (1912).

[15] 224 U.S. at 601.

[16] 55 Stat. 31.

Overlapping of the treaty-making power through congressional-executive cooperation in international agreements is also demonstrated by the use of resolutions approving the United States joining of international organizations[17] and participating in international conventions.[18]

ArtII.S2.C2.3 Appointments

ArtII.S2.C2.3.1 Overview of Appointments Clause

Article II, Section 2, Clause 2:

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

The Appointments Clause requires that "Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States" be appointed by the President subject to the advice and consent of the Senate, although Congress may vest the appointment of "inferior" officers "in the President alone, in the Courts of Law, or in the Heads of Departments."[1] The Supreme Court has interpreted these requirements as distinguishing between two types of officers: (1) "principal" officers who must be appointed by the President and confirmed by the Senate to their position, and (2) "inferior" officers, whose appointment Congress may place with the President, judiciary, or department heads.[2] These constitutional provisions are instrumental in ensuring the separation of powers, as the Framers of the Constitution deliberately separated Congress's power to create offices in the federal government from the President's authority to nominate officers to fill those positions.[3] At the same time, placing the power to appoint principal officers with the President alone ensures a measure of accountability for his choices in staffing important government positions.[4]

While the Constitution specifies that certain persons, such as Supreme Court Justices, qualify as "Officers of the United States," the Appointments Clause does not specify all persons who fall under its purview. Thus, the Appointments Clause's reach and scope has been disputed. In the 1976 case of *Buckley v. Valeo*, the Supreme Court explained that whether an individual wields "significant authority" informs the assessment of whether that person is an officer, but the Court has not significantly elaborated on this test since that decision.[5] Likewise, determining the difference between "principal" and "inferior" officers has generated

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[17] *E.g.*, 48 Stat. 1182 (1934), authorizing the President to accept membership for the United States in the International Labor Organization.

[18] *See* Edward Corwin, *supra* at 216.

[1] U.S. CONST. art. II, § 2, cl. 2.

[2] Buckley v. Valeo, 424 U.S. 1, 132 (1976) (per curiam) ("Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary."), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

[3] *See* ArtII.S2.C2.3.2 Historical Background on Appointments Clause.

[4] *See* ArtII.S2.C2.3.2 Historical Background on Appointments Clause.

[5] *Buckley*, 424 U.S. at 126.

controversy. Examining the history of the appointment power in the United States and the treatment of the Appointments Clause by the Supreme Court can shed light on the structural makeup of the federal government and the balancing of power between the branches.

ArtII.S2.C2.3.2 Historical Background on Appointments Clause

Article II, Section 2, Clause 2:

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

The deliberations at the Constitutional Convention in Philadelphia, major writings of the prominent supporters of ratification,[1] and the words and records of the state ratifiers of the federal Constitution reveal careful consideration about the proper method of appointment for federal offices. The delegates to the Constitutional Convention, in designing a system of appointments for federal government offices, drew on "their experiences with two flawed methods of appointment."[2]

First, the colonists who lived during the American Revolution resented the often unilateral power of the English Crown and the royal governors in the colonies to create and fill government offices.[3] The "manipulation of official appointments"—generally achieved by creating and filling the key offices of government with political favorites, who were in turn dependent on the entity who appointed them—was "one of the American revolutionary generation's greatest grievances against executive power."[4]

Second, many early state constitutions, adopted after the Declaration of Independence was written, reacted to the perceived abuses of the appointment power by the Crown and royal governors by lodging the power to appoint officials with the state legislature alone.[5] But placing the appointment power with state representative assemblies also caused considerable turmoil.[6] Those legislatures were seen as consolidating all governmental power—executive, judicial, and legislative—for themselves.[7] This consolidation of power "had become the principal source of division and faction in the states."[8] At least in the views of many delegates to the Constitutional Convention, the failure to give governors a stronger role in the appointment process was damaging to many state governments whose legislatures "had fallen

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[1] *See* The Federalist Papers.

[2] Weiss v. United States, 510 U.S. 163, 184 (1994) (Souter, J., concurring).

[3] *See* Gordon Wood, The Creation of The American Republic, 1776–1787, at 143–48 (1969); Freytag v. Comm'r, 501 U.S. 868, 883–84 (1991); Edward Corwin, The President: Office and Powers 1787–1957, at 69–70 (4th ed. 1957); Saikrishna B. Prakash, Imperial From the Beginning 171 (2015).

[4] *Freytag*, 501 U.S. at 883 (quoting Wood, *supra* note 3, at 79).

[5] Wood, *supra* note 3, at 143–50; Michael J. Gerhardt, The Federal Appointments Process 16–20 (2003). *See, e.g.*, Va. Const. (1776). Some state constitutions provided that the appointment power was shared between the governor and state assembly. Wood, *supra* note 3, at 148–50; Gerhardt, *supra*, at 17–20.

[6] *See* Wood, *supra* note 3, at 407; *Freytag*, 501 U.S. at 903–07 (Scalia, J., concurring in part and concurring in the judgment); Weiss v. United States, 510 U.S. 163, 184 (1994) (Souter, J., concurring).

[7] Wood, *supra* note 3, at 407.

[8] Wood, *supra* note 3, at 407.

easy prey to demagogues, provincialism, and factions" in their exercise of appointments.[9] Likewise, the Articles of Confederation—which provided the governing framework for the young Republic before the adoption of the federal Constitution—authorized the Continental Congress to appoint officers.[10]

The delegates to the Constitutional Convention at Philadelphia were aware of the weaknesses of these models of appointment, and thus chose instead to separate "the power to create federal offices . . . from the power to fill them."[11] They chose to vest Congress with the legislative power, including the authority to create federal offices, while the power "to appoint the most important officers" was placed with the single-person President, subject to confirmation by the Senate.[12] Separating the power to create offices from the authority to appoint officers would, in the words of James Madison, provide "[o]ne of the best securities against the creation of unnecessary offices or tyrannical powers."[13]

At the Constitutional Convention, an early general consensus emerged among the delegates that the chief executive should play a more prominent role in the appointment of officers whose method of appointment was "not otherwise provided for" specifically in the Constitution.[14] The delegates also debated where the power of appointment should be vested for a number of federal offices, including ambassadors, judges (including judges on the Supreme Court), as well as a treasurer.[15] Some argued that placing the appointment power with the legislature would result in factional disputes and partisanship; others that granting such authority to the Executive would tend too much towards a monarchical system of government.[16] The compromise that was eventually reached authorized the President to appoint high-level officers in the federal government, including certain postions named explicitly, as well as "all other officers" not mentioned, subject to Senate confirmation.[17] This arrangement avoided the potential weaknesses of a legislative body making appointments, but preserved a check on the excesses of the Executive by preventing the President from making appointments unilaterally.[18] Congress was also permitted to place the appointment of "inferior" officers with "the President alone, in the courts of law, or in the Heads of Departments."[19]

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[9] *See* Gerhardt, *supra* note 5, at 18.

[10] Articles of Confederation of 1781, art. IX, para. 5 ("The united states in congress assembled shall have authority . . . to appoint such . . . civil officers as may be necessary for managing the general affairs of the united states under their direction . . . .").

[11] *Weiss*, 510 U.S. at 184 (Souter, J., concurring); *see* Myers v. United States, 272 U.S. 52, 111 (1926).

[12] *Weiss*, 510 U.S. at 184 (Souter, J., concurring).

[13] Madison's Observations on Jefferson's Draft of a Constitution for Virginia (1788), *reprinted in* 6 Papers of Thomas Jefferson 308, 311 (J. Boyd ed., 1952).

[14] 1 The Records Of The Federal Convention Of 1787, at 67 (Max Farrand ed., 1966). *See* Joseph P. Harris, The Advice and Consent of the Senate 18 (1953). During the proceedings, the Convention adopted a motion to authorize judges to be appointed by the Senate, but ultimately rejected this framework in favor of Presidential appointment of all principal officers. *Id.* at 19.

[15] *See* Harris, *supra* note 14, at 19–24; Gerhardt, *supra* note 5, at 16–23.

[16] Gerhardt, *supra* note 5, at 16–23.

[17] *See Weiss*, 510 U.S. at 184 (Souter, J., concurring) ("With error and overcorrection behind them, the Framers came to appreciate the necessity of separating at least to some degree the power to create federal offices (a power they assumed would belong to Congress) from the power to fill them, and they came to see good reason for placing the initiative to appoint the most important federal officers in the single-person presidency, not the multimember Legislature."); *see* ArtII.S2.C2.3.6 Creation of Federal Offices to ArtII.S2.C2.3.9 Restrictions on Congress's Authority.

[18] *See Weiss*, 510 U.S. at 184–85 (Souter, J., concurring). *See* The Federalist No. 76 (Alexander Hamilton); 3 Joseph Story, Commentaries on the Constitution of the United States §§ 1522–1525 (1833).

[19] U.S. Const. art. II, § 2, cl. 2.

The Framers' decision to place the power to appoint principal officers with the President ensures accountability for his choices.[20] Placing the power of nomination with the President alone guarantees that the public knows who to blame for poor (or corrupt) choices.[21] Alexander Hamilton's arguments in the *Federalist Papers*, which "contain the most thorough contemporary justification for the method of appointing principals officers that the Framers adopted,"[22] stressed that placing the appointment power with a single individual, rather than a multi-member body, ensured a measure of accountability for those appointments.[23] Although the public can reasonably hold a single individual accountable for his appointment choices, doing so for a multi-member body is much more difficult as the individual ultimately responsible for an appointment is "impenetrable to the public eye."[24] Granting the appointment power to a single President was preferable to "a body of men" because a single individual would have a "livelier sense of duty and a more exact regard to reputation" in making appointments. A single President would have "fewer personal attachments to gratify[ ] than a body of men," and "cannot be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body."[25] Rather than selecting the best candidate for an office on the merits, a collective body could simply trade votes in order to select their personal favorites based on "friendship and of affection."[26] On the other hand, requiring Senate concurrence with regard to major appointments served as "an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters."[27]

The Framers of the Constitution thus placed the power of appointment for principal officers with a single individual—the President—because a single actor would more likely be held accountable for his choices.[28] This principle of accountability extended to the Framers' provision that inferior officers may be appointed by the heads of executive departments, as the latter "possess a reputational stake in the quality of the individuals they appoint [and] are directly answerable to the President, who is responsible to *his* constituency."[29] Further, at the Constitutional Convention, the delegates were also careful to prevent the "diffusion" of the

[20] *See* 1 The Records of the Federal Convention of 1787, at 70 (Max Farrand ed., 1911) (Mr. Wilson: "If appointments of Officers are made by a sing. Ex he is responsible for the propriety of the same. [N]ot so where the Executive is numerous."); *Id.* at 42 ("As the Executive will be responsible in point of character at least, . . . he will be careful to look through all the States for proper characters.") (statement of Mr. Ghorum); Freytag v. Comm'r, 501 U.S. 868, 884 (1991) ("The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people."); *see* Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443, 456 (2018).

[21] *See* Mascott, *supra* note 20, at 456.

[22] *See Weiss*, 510 U.S. at 185 n.1 (Souter, J., concurring).

[23] *See* The Federalist No. 76 (Alexander Hamilton) ("I proceed to lay it down as a rule, that one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment.").

[24] *Id. See Freytag*, 501 U.S. at 884 (majority opinion); *id.* at 903–07 (Scalia, J., concurring in part and concurring in the judgment). *See also* 1 Works of James Wilson 359–360 (J. Andrews ed., 1896) (arguing that placing the appointment power in a multi-member executive would inhibit holding that body accountable for its appointments).

[25] *See* The Federalist No. 76 (Alexander Hamilton).

[26] *Id.*

[27] *Id.*

[28] *See, e.g.*, 2 The Records Of The Federal Convention Of 1787, at 42 (Max Farrand ed., 1911) ("As the Executive will be responsible in point of character at least, . . . he will be careful to look through all the States for proper characters.") (statement of Mr. Ghorum). *See* Mascott, *supra* note 20, at 456.

[29] *See Freytag*, 501 U.S. at 907 (Scalia, J., concurring in part and concurring in the judgment). Inferior officers may also sometimes be appointed by the President alone or the courts of law. U.S. Const. art. II, § 2, cl. 2. The appointment of Judicial Branch officials might raise distinct issues from the accountability demanded for Executive Branch officers. *See* ArtIII.S1.10.2.1 Overview of Good Behavior Clause to ArtIII.S1.10.2.3 Good Behavior Clause Doctrine; The Federalist No. 78 (Alexander Hamilton).

appointment power by strictly limiting who can make appointments.[30] The Framers' careful "husbanding [of] the appointment power to limit its diffusion . . . ensure[d] that those who wielded it were accountable to political force and the will of the people."[31] The importance of accountability for federal appointments and the crucial check the Appointments Clause provides between the branches of government are principles that have informed subsequent Supreme Court jurisprudence concerning the appointment of federal officials.

ArtII.S2.C2.3.3 Process of Appointment for Principal Officers

Article II, Section 2, Clause 2:

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

The appointment of principal officers of the United States consists of three steps.[1] First, the President nominates an individual to an office; second, the Senate decides whether to confirm that person to the office; [2] and third, the President commissions the officer to the post.[3] The Supreme Court has made clear that compliance with the procedures established in the Constitution for the appointment of officers, both principal and inferior, is not a mere formality. Indeed, the Court has sometimes invalidated actions taken by individuals whose selection conflicts with the requirements of the Appointments Clause and has severed provisions of statutes that violate those constraints.[4]

As an initial matter, Senate confirmation of an individual nominated to an office is insufficient to vest an individual with an appointment to that office absent a final act of

[30] *See Freytag*, 501 U.S. at 883 (majority opinion).

[31] *See id.* at 883–84 (majority opinion); Weiss v. United States, 510 U.S. 163, 188 n.3 (1994) (Souter, J., concurring) ("And if Congress, with the President's approval, authorizes a lower level Executive Branch official to appoint a principal officer, it again has adopted a more diffuse and less accountable mode of appointment than the Constitution requires; this time it has violated the bar on abdication."); *see, e.g.*, Ryder v. United States, 515 U.S. 177, 179 (1995) (holding invalid the affirmance of a conviction by a military court whose members, though appointed by Executive Branch officials, were not appointed in accordance with the Appointments Clause).

[1] United States v. Le Baron, 60 U.S. 73, 78 (1856) ("When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete."). The appointment of inferior officers, by contrast, may be vested in the President alone, the courts of law, or the heads of departments. U.S. Const. art. II, § 2, cl. 2.

[2] U.S. Const. art. II, § 2, cl. 2. *See also* United States v. Smith, 286 U.S. 6, 30–49 (1932) (concluding that the Senate's rules did not authorize that body to revoke a previously-given confirmation).

[3] U.S. Const. art. II, § 3. *See* Quackenbush v. United States, 177 U.S. 20, 27 (1900) ("The appointment and the commission are distinct acts . . . ."); Appointment of a Senate-Confirmed Nominee, 23 Op. O.L.C. 232, 232 (1999).

[4] *See* Ryder v. United States, 515 U.S. 177, 182–83 (1995) ("We think that one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred."); Buckley v. Valeo, 424 U.S. 1, 140 (1976) (per curiam) (invalidating sections of the Federal Election Campaign Act that violated the Appointments Clause), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81. *But see* United States v. Arthrex, Inc., No. 19-1434, slip op. at 23 (U.S. June 21, 2021) (plurality opinion) ("Because the source of the constitutional violation is the restraint on the review authority of the Director, rather than the appointment of APJs by the Secretary, Arthrex is not entitled to a hearing before a new panel of APJs.").

appointment by the President.[5] In other words, the President retains discretion not to appoint an individual even after Senate confirmation.[6] In the seminal Supreme Court case of *Marbury v. Madison*, the Supreme Court held that the relevant final act of appointment for principal officers is the signing of a commission by the President, which is expressly required by Article II, Section 3 of the Constitution.[7]

The controversy in *Marbury* arose when President Thomas Jefferson ordered his Secretary of State, James Madison, not to deliver a commission to William Marbury, even though his predecessor, President John Adams, had already signed the commission.[8] Marbury filed suit seeking a writ of mandamus to compel Madison to deliver the commission.[9] The Court, in an opinion by Chief Justice John Marshall, ultimately held that it lacked jurisdiction to issue mandamus because the statute authorizing the Court to do so violated Article III by improperly expanding the original jurisdiction of the Supreme Court.[10] Before reaching this conclusion, however, the Court ruled that Marbury did have a right to the commission because it had been signed by the President, thereby becoming "conclusive evidence" of Marbury's appointment.[11] Justice John Marshall reasoned that an appointment is complete once the "last act" required of the appointing authority is completed.[12] Because the last act required of the President, as the relevant appointing authority, was the signing of the commission, Marbury's appointment was completed when the President signed the commission.[13]

ArtII.S2.C2.3.4 Ambassadors, Ministers, and Consuls Appointments

Article II, Section 2, Clause 2:

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

The appointment of foreign diplomats stands in some contrast to the appointment of most domestic officers. Given the lack of Supreme Court precedent on the appointment of foreign diplomats, it appears that the appointment of such positions is primarily informed by the

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[5] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 157 (1803) ("The last act to be done by the President, is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed."); D'Arco v. United States, 441 F.2d 1173, 1175 (Ct. Cl. 1971) ("Chief Justice Marshall's reasoning teaches that, even if the office had been for a term of years, like Marbury's, the executive could still refuse to complete the appointment, after Senate confirmation, by failing to prepare or sign the commission."); Appointment of a Senate-Confirmed Nominee, 23 Op. O.L.C. 232, 232–34 (1999).

[6] *D'Arco*, 441 F.2d at 1175; Appointment of a Senate-Confirmed Nominee, 23 Op. O.L.C. 232, 232–34 (1999).

[7] *Marbury*, 5 U.S. (1 Cranch) at 162. *See also* U.S. Const. art. II, § 3 (stating that the President "shall Commission all the Officers of the United States").

[8] *See Marbury*, 5 U.S (1 Cranch) at 153–55.

[9] *Id.* at 153–54.

[10] *Id.* at 176–80.

[11] *Id.* at 158, 162.

[12] *Id.* at 157.

[13] *See* United States v. Le Baron, 60 U.S. 73, 78 (1856) ("The transmission of the commission to the officer is not essential to his investiture of the office. If, by any inadvertence or accident, it should fail to reach him, his possession of the office is as lawful as if it were in his custody.").

historical practice of the political branches. As discussed later, while positions in the federal government occupied by "officers of the United States" are typically established through statute by Congress or via authority delegated by Congress,[1] the Executive Branch has generally taken the view that the President enjoys an independent, inherent authority to create diplomatic offices.[2] The Executive Branch has espoused this view for most of the Republic's history,[3] and it appears to find support in the earliest governmental practices.[4] The first Congresses appropriated money for conducting foreign relations but did not create any diplomatic posts; instead, Presidents simply appointed diplomats, subject to Senate confirmation.[5] Generally speaking, it seems that Congress has acceded to this practice.[6] In other words, the President has often appointed ambassadors to foreign countries even though no congressional statute explicitly created a particular diplomatic office to fill. At the same time, Congress has exercised some control over the creation and operation of foreign diplomatic posts, including by appropriating specific sums of money for salaries, creating particular offices which are then filled by the President, and imposing requirements for the selection of foreign officers via statute.[7]

Notwithstanding the practice of presidential appointment of diplomats to posts not necessarily created by statute, those diplomatic offices are generally considered to possess "the delegated sovereign authority to speak and act on behalf of the United States" and their selection must comply with the requirements of the Appointments Clause.[8] Writing in the *Federalist Papers*, Alexander Hamilton noted that ambassadors and other public ministers are

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[1] *See* ArtII.S2.C2.3.6 Creation of Federal Offices to ArtII.S2.C2.3.9 Restrictions on Congress's Authority.

[2] *See* Nomination of Sitting Member of Cong. to Be Ambassador to Vietnam, 20 Op. O.L.C. 284, 286 (1996).

[3] *See* Ambassadors and Other Pub. Ministers, 7 Op. Att'ys Gen. 186, 189, 193 (1855) ("Hence, the President has power by the Constitution to appoint diplomatic agents of the United States of any rank, at any place, and at any time, in his discretion, subject always to the constitutional conditions of relation to the Senate. The power to make such appointments is not derived from, and cannot be limited by, any act of Congress, except in so far as appropriations of money are necessary to provide means for defraying the expense of this as of any other business of the Government.").

[4] *See* 1 A Compilation of the Messages and Papers of the Presidents 58 (James D. Richardson ed., 1896) (letter from President George Washington to the Senate (June 15, 1789)); *see* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231, 304–10 (2001) ("Washington went beyond merely instructing and firing diplomats, however. He also effectively created them."); Saikrishna B. Prakash, Imperial From the Beginning 172–73 (2015).

[5] *See* Byers v. United States, 22 Ct. Cl. 59, 63–64 (1887) ("During the whole of the administration of President Jefferson, and part of the terms of other early Presidents, Congress annually appropriated a sum in gross 'for the expenses of intercourse with foreign nations,' leaving it to the Executive to fix the salaries of its several appointees. In some cases appropriations have been made for particular officers *not to exceed* the sums named, still leaving to the Executive a discretion to determine the amounts to be paid.") (quoting 7 Op. Att'ys Gen. 186 (1855); David Currie, The Constitution in Congress: The Federalist Period 1789–1801, at 44 (1997); Ambassadors and Other Pub. Ministers, 7 Op. Att'ys Gen. 186, 189, 193 (1855); Nomination of Sitting Member of Cong. to Be Ambassador to Vietnam, 20 Op. O.L.C. 284, 286–92 (1996).

[6] *See* Francis v. United States, 22 Ct. Cl. 403, 405 (1887) ("In the diplomatic service, Congress seems to have practically conceded, whether on constitutional grounds rightly or wrongly taken or otherwise, the duty, power, or right of the Executive to appoint diplomatic agents, of any rank or title, at any time and at any place, subject to such compensation, or none at all, as the legislative branch of the Government should in its wisdom see fit to provide . . . ."); *Byers*, 22 Ct. Cl. at 63–64.

[7] *See Byers*, 22 Ct. Cl. at 63–67 ("The Executive, again conforming to the wishes of Congress, duly appointed a secretary of legation to Italy and a consul-general at Rome, superseding the combined office, which thereupon ceased to exist."); Foreign Service Act of 1980, 22 U.S.C. § 3942. Congress has sometimes asserted authority in the past to control the creation of diplomatic offices. *See* Act of Mar. 2, 1909, ch. 235, 35 Stat. 672 ("[H]ereafter no new ambassadorship shall be created unless the same shall be provided for by an Act of Congress.") (repealed 1946). But the Executive Branch has not complied. Graham H. Stuart, American Diplomatic and Consular Practice 137 (1952). Nomination of Sitting Member of Cong. to Be Ambassador to Vietnam, 20 Op. O.L.C. 284, 286 (1996).

[8] *See* Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 91–93 (2007); Nomination of Sitting Member of Cong. to Be Ambassador to Vietnam, 20 Op. O.L.C. 284, 286 (1996); Ambassadors and Other Pub. Ministers of the United States, 7 Op. Att'ys Gen. 186, 190 (1855).

"the immediate representatives of their sovereigns" and consuls are the "public agents" of the nation.[9] The view that such foreign diplomats constitute officers whose appointment must comply with the Appointments Clause is confirmed by the earliest historical practices of the Republic. For instance, President George Washington nominated William Short to be "chargé d'affaires"[10] for France in 1789, and nominated ministers to London, Paris, and the Hague in 1791.[11] All were confirmed by the Senate.[12] The Executive Branch has consistently expressed its view that ambassadors, ministers, and consuls constitute officers of the United States whose appointments must conform to the Appointments Clause.[13]

In contrast, Presidents have routinely dispatched envoys, emissaries, and secret (sometimes known as special) agents on limited diplomatic missions without nominating them to the Senate.[14] In one of his first acts as President, George Washington unilaterally appointed Gouverneur Morris as a "special agent" to England to consider the possibility of a commercial treaty.[15] Additionally, President Thomas Jefferson unilaterally appointed Senator Daniel Smith to negotiate treaties with the Cherokee Indians.[16] The justification for this historical practice appears to be that such agents are not officers of the United States under the Appointments Clause because their duties are limited in duration and exist only for a temporary purpose.[17]

ArtII.S2.C2.3.5 Appointments of Justices to the Supreme Court

Article II, Section 2, Clause 2:

> *He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers*

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[9] *See* The Federalist No. 81 (Alexander Hamilton). *See* Appointment of Consuls, 7 Op. Att'ys Gen. 242, 248 (1855) ("We may conveniently regard the word of the Constitution, 'consuls,' as the generic designation of a class of public officers existing by public law, and recognised by numerous treaties, who are appointed by their government to reside in foreign countries, and especially in seaports, and other convenient points, to discharge administrative, and sometimes judicial, functions in regard to their fellow-citizens, merchants, mariners, travellers, and others, who dwell or happen to be in such places; to aid, by the authentication of documents abroad, in the collection of the public revenue; and, generally, to perform such other duties as may be assigned to them by the laws and orders of their government. Congress cannot, by legislative act, appoint or remove consuls any more than ministers; but it may increase at will the descriptions of consular officers; it may enlarge or diminish their functions; it may regulate their compensation; it may distinguish between some officers appointable with advice of the Senate, and others appointable by the President alone, or by a Head of Department.").

[10] A chargé d'affaires refers to a "person accredited by letter to the secretary of state or minister for foreign affairs of one country by the secretary of state or minister for foreign affairs of another country, in place of a duly accredited ambassador or minister." U.S. Dep't, Foreign Affairs Manual and Handbook, 5 FAH-1 Exhibit H-611, https://fam.state.gov/fam/05fah01/05fah010610.html#X611 (last visited June 22, 2022).

[11] Joseph P. Harris, The Advice and Consent of the Senate 36–40 (1953).

[12] *Id.*

[13] Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 91–93 (2007); Appointment of Consuls, 7 Op. Att'ys Gen. 242, 248 (1855).

[14] *See* Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 102 (2007). *But see* 22 U.S.C. § 7817 (establishing a "special envoy for North Korean human rights issues" who shall be appointed by the President and confirmed by the Senate).

[15] Currie, *supra* note 5, at 44.

[16] *See* 7 American State Papers: Indian Affairs 697–98 (1805).

[17] *See* Officers of the United States Within the Meaning of the Appointments Clause,31 Op. O.L.C. 73, 102–05 (2007); Edward Corwin, The President: Office and Powers 1787–1957, at 71 (4th ed. 1957); *see* 39 Annals of Cong. 1407, 1409–10 (1822) (finding by a House Select Committee that Senator Smith's position negotiating the treaty did not constitute an office); S. Rep. No. 53-227 at 25 (1894) (finding of a Senate Committee that the appointment of J.H. Blount to Hawaii did not require Senate confirmation).

and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Appointments Clause provides that the President shall appoint, subject to Senate confirmation, "Judges of the supreme Court, and all other officers of the United States."[1] Thus Supreme Court Justices are officers of the United States whose appointment must comply with the requirements of the Appointments Clause. Importantly, the Constitution provides that presidential nominees are subject to the "advice and consent" of the Senate. A range of matters are potentially relevant when the Senate considers whether to give its consent for nominations to the Nation's highest court, including political considerations, a nominee's judicial philosophy, fitness for the bench, past statements on issues relevant to the Court, and the overall balance of power between political factions.

Since the beginning of the Nation's history, just as the confirmation of Executive Branch officers has included political considerations, so to have nominees to the Supreme Court been accepted or rejected on political grounds.[2] For instance, the Senate rejected President George Washington's choice to replace the first Chief Justice of the Supreme Court on largely political considerations.[3] In 1795, President Washington chose John Rutledge, who had previously served on the Supreme Court as an Associate Justice from 1789 to 1791, to replace John Jay, who had been elected Governor of New York.[4] After serving on the Court from 1789 to 1791, Rutledge had resigned his seat in order to serve as the chief justice of South Carolina's Supreme Court.[5] Prior to receiving a nomination to serve as Chief Justice on the U.S. Supreme Court, however, Rutledge gave a speech critical of the Jay Treaty reached with Great Britain, which had recently been approved for ratification by the Senate on June 24, 1795.[6] The Federalists strongly supported the treaty, and their opposition in the Senate to Rutledge's views ultimately sunk his nomination.[7] The Senate voted to reject the nomination in December 1795.[8] Of course, the Senate is not unique in considering politics and partisan considerations in this arena—every one of the twelve appointments President Washington made to the Supreme Court came from the Federalist Party,[9] and subsequent Presidents have considered politics in making their own appointments.[10]

Indeed, the political landscape profoundly informs and shapes the Supreme Court nomination and confirmation process. For instance, the timing of a Supreme Court vacancy can be crucially important: a vacancy occurring shortly before an election can alter the type of candidate that can realistically be confirmed; and prominent legal issues facing the country

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[1] U.S. Const. art. II, § 2, cl. 2.

[2] *See generally* Joseph P. Harris, The Advice and Consent of the Senate 303 (1953).

[3] 1 Charles Warren, The Supreme Court in United States History 1789–1835, at 124–27 (1926).

[4] Harris, *supra* note 2, at 43; Supreme Court of the United States, About the Court, https://www.supremecourt.gov/about/members_text.aspx (last visited June 22, 2022). Rutledge served as Chief Justice on a recess appointment during the Court's 1795 August term. Michael J. Gerhardt, The Federal Appointments Process 51 (2003).

[5] Harris, *supra* note 2, at 42.

[6] Harris, *supra* note 2, at 43.

[7] Gerhardt, *supra* note 4, at 51–52; Harris, *supra* note 2, at 43; Warren, *supra* note 3, at 128–37.

[8] United States Senate, Chief Justice Nomination Rejected, https://www.senate.gov/about/powers-procedures/nominations/a-chief-justice-rejected.htm (last visited June 22, 2022).

[9] Gerhardt, *supra* note 4, at 51–52.

[10] Harris, *supra* note 2, at 302–03. *See generally* Henry Abraham, Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II (2007).

can affect the scope of appropriate views that a nominee must have.[11] The Senate's composition can also restrict a President's choices of who to nominate. A shift in party control of the Senate can dramatically alter the type of nominees a President can expect to be confirmed.[12] Likewise, public opinion of the President can shape the type of nominee a President can expect the Senate to support: a President with strong approval ratings, for instance, might face an easier task in achieving confirmation for a Justice, or might enjoy broader leeway in the type of Justice he could nominate in the first place.[13] An outgoing Justice's attributes can narrow the options available to a President. The President might find himself limited to moderate nominees when replacing a Justice seen as a swing vote on the Court. He might also find replacing a pillar of the right or left to require a nominee that appeals to one political side more strongly.[14] Finally, traditional norms of professional expectations play a role in circumscribing the eligible range of potential Supreme Court nominees—every single Justice has been a lawyer (though this is not required by the Constitution); since 1943, all Justices have graduated from accredited law schools; and most modern Justices graduated from top-ranked law schools and served on federal courts or in academia before confirmation.[15]

The rise of interest groups influencing the selection of Supreme Court Justices also reflects the increasing role of issue partisanship in the process. The nomination of Louis Brandeis to the Court in 1916 sparked a four month struggle with opposition from big business and past presidents of the American Bar Association.[16] Objections to his nomination included his judicial temperament and character, the alleged radicalism of his views, and also arguably reflected an anti-Semitic character.[17] He was eventually confirmed with the support of labor, consumer, and some religious groups.[18] Opposition to President Ronald Reagan's nomination of Robert Bork to the Supreme Court is a particularly prominent example of the role interest groups may play.[19] Both labor and civil rights groups mounted significant opposition to the nomination. In the wake of that opposition's success, conservative groups were organized to counteract the perceived role of liberal interest organizations in influencing judicial nominations.[20]

Another important development regarding the selection of Supreme Court nominees is the increasingly public nature of the process. It was not until the twentieth century that open hearings were held over a Supreme Court nomination.[21] In 1916, the Senate did so for the

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[11] *See* David Alistair Yalof, Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees 4 (1999). More recently, following the death of Associate Justice Antonin Scalia, President Barack Obama's nomination of Merrick Garland in 2016 to the High Court did not receive a hearing or a vote in the Republican-controlled Senate. That body refused to consider a Supreme Court nomination until after the fall's election. In 2017, President Donald Trump nominated and the Senate confirmed Neil Gorsuch to the Court. Sarah Lyall, *Liberals Are Still Angry, but Merrick Garland Has Reached Acceptance*, N.Y. Times (Feb. 19, 2017), https://www.nytimes.com/2017/02/19/us/politics/merrick-garland-supreme-court-obama-nominee.html; Audrey Carlsen & Wilson Andrews, *How Senators Voted on the Gorsuch Nomination*, N.Y. Times (Apr. 7, 2017), https://www.nytimes.com/interactive/2017/04/07/us/politics/gorsuch-confirmation-vote.html

[12] Yalof, *supra* note 11, at 5.

[13] Yalof, *supra* note 11, at 5.

[14] Yalof, *supra* note 11, at 5.

[15] Yalof, *supra* note 11, at 6, 170; Adrian Vermeule, *Should We Have Lay Justices?*, 59 Stan. L. Rev. 1569, 1574 (2007); Lee Epstein, et. al, The Supreme Court Compendium: Data, Decisions, and Developments 321–85 (6th ed. 2015).

[16] Gerhardt, *supra* note 4, at 69.

[17] Gerhardt, *supra* note 4, at 69.

[18] Gerhardt, *supra* note 4, at 69–70.

[19] Gerhardt, *supra* note 4, at 71–72.

[20] Gerhardt, *supra* note 4, at 71–72.

[21] Yalof, *supra* note 11, at 14–15.

nomination of Louis Brandeis.[22] Nine years later, Harlan Fiske Stone was the first nominee to appear personally before the Senate Judiciary Committee.[23] Stone's testimony was limited to the Teapot Dome Scandal. In 1939, Felix Frankfurter appeared before the Senate Judiciary Committee and was "the first nominee to take unrestricted questions in an open, transcribed, public hearing."[24] Almost all nominees since 1955 have testified formally before the Senate Judiciary Committee.[25] Those hearings have been televised since 1981.[26] Finally, the particular procedures used by the Senate in considering nominations can affect the likelihood of confirmation for a Supreme Court Justice. In cases where the Senate has eliminated the sixty vote threshold necessary for confirmation, it may be easier to confirm a nominee to the bench (notwithstanding accompanying political ramifications).[27]

ArtII.S2.C2.3.6 Creation of Federal Offices

Article II, Section 2, Clause 2:

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

The Constitution gives Congress substantial power to establish federal government offices. As an initial matter, the Constitution vests the legislative power in Congress.[1] Article I bestows on Congress certain specified, or enumerated, powers.[2] The Court has recognized that these powers are supplemented by the Necessary and Proper Clause, which provides Congress with "broad power to enact laws that are 'convenient, or useful' or 'conducive' to [the] beneficial exercise" of its more specific authorities.[3] The Supreme Court has observed that the Necessary and Proper Clause authorizes Congress to establish federal offices.[4] Congress accordingly enjoys broad authority to create government offices to carry out various statutory functions

[22] Yalof, *supra* note 11, at 14–15. Brandeis did not testify in the hearings, which were quite contentious and lasted months. *See* Harris, *supra* note 2, at 99–114.

[23] Yalof, *supra* note 11, at 14–15.

[24] Paul M. Collins, Jr. & Lori A. Ringhand, Supreme Court Confirmation Hearings and Constitutional Change 35 (2013).

[25] Yalof, *supra* note 11, at 14–15. In 1987, Douglas Ginsburg withdrew his nomination before a formal hearing was conducted. In 2016, Merrick Garland was nominated but was not given a hearing in the Senate.

[26] Yalof, *supra* note 11, at 14–15.

[27] 163 Cong. Rec. S2390 (daily ed. Apr. 6, 2017).

[1] U.S. Const. art. I, § 1.

[2] *Id.* art. I; United States v. Morrison, 529 U.S. 598, 607 (2000).

[3] United States v. Comstock, 560 U.S. 126, 134 (2010) (quoting McCulloch v. Maryland, 17 U.S. (Wheat.) 316, 413, 418 (1819)). *See* ArtI.S8.C18.1 Overview of Necessary and Proper Clause.

[4] *See* Freytag v. Comm'r, 501 U.S. 868, 883 (1991) (noting "Congress's authority to create offices and to provide for the method of appointment to those offices"); Buckley v. Valeo, 424 U.S. 1, 138 (1976) (per curiam) ("Congress may undoubtedly under the Necessary and Proper Clause create 'offices' in the generic sense and provide such method of appointment to those 'offices' as it chooses."), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

and directives.[5] The legislature may establish government offices not expressly mentioned in the Constitution in order to carry out its enumerated powers.[6]

The Appointments Clause supplies the method of appointment for certain specified officials, but also for "other [o]fficers" whose positions are "established by [l]aw." Although principal officers must be nominated by the President and confirmed by the Senate, Congress "may by [l]aw" place the appointing power for inferior officers with the President alone, a department head, or a court.[7] As this section will explain, the Supreme Court has recognized Congress's discretion to establish a wide variety of governmental entities in the Executive, Legislative, and Judicial Branches.

Congress's authority to establish offices is limited by the terms of the Appointments Clause. The structure of federal agencies must comply with the requirement that the President appoint officers, subject to Senate confirmation, although the appointment of "inferior officers" may rest with the President alone, department heads, or the courts.[8] More broadly, the Supreme Court has made clear that the Constitution imposes important limits on Congress's ability to influence or control the actions of officers once they are appointed. Likewise, it is widely believed that the President must retain a certain amount of independent discretion in selecting officers that Congress may not impede. These principles ensure that the President may fulfill his constitutional duty under Article II to "take [c]are" that the laws are faithfully executed.[9]

ArtII.S2.C2.3.7 Creation of Federal Offices with Blended Features

Article II, Section 2, Clause 2:

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

The Supreme Court has recognized that the Constitution grants broad discretion to Congress to establish various offices across the federal government. Aside from Congress's clear authority to create Executive Branch offices to be filled by officers that execute the law,[1] as well as federal courts filled with judicial officers to adjudicate cases and controversies,[2] Congress may sometimes merge features of various federal entities and establish unique agencies within the federal government. For instance, in the 1989 case of *Mistretta v. United States*, the Court ruled that the structure of the United States Sentencing Commission, an entity placed by Congress in the Judicial Branch and charged with promulgating sentencing

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[5] *See* Myers v. United States, 272 U.S. 52, 129 (1926) ("To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed and their compensation—all except as otherwise provided by the Constitution.").

[6] *See Freytag*, 501 U.S. at 883; *Buckley*, 424 U.S. at 138.

[7] U.S. Const. art. II, § 2, cl. 2.

[8] U.S. Const. art. II, § 2, cl. 2.

[9] U.S. Const. art. II, § 3.

[1] *See* Myers, 272 U.S. 52, 129 (1926).

[2] U.S. Const. art. III, § 1; Judiciary Act of 1789, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1350).

guidelines for the federal courts, did not violate the separation of powers.[3] The Commission was composed of seven voting members appointed by the President with Senate confirmation.[4] The law required at least three members to be federal judges, and the President could remove Commission members for cause.[5] The challenger in that case argued, among other things,[6] that Congress's delegation of power to the Judiciary, and individual Article III judges, to promulgate sentencing guidelines was unconstitutional as it enlisted the Judiciary in exercising legislative authority.[7] In addition, the challenger argued that Congress had "eroded the integrity and independence of the Judiciary" by forcing Article III judges to share their power with non-judges and engage in the political work of promulgating sentencing guidelines. Further, while Article III judges enjoy constitutional protection from removal except for impeachment, here the statute required Article III judges to serve on the Commission subject to removal by the President.[8]

Acknowledging that the Commission constituted "an unusual hybrid in structure and authority" within the federal government, the Supreme Court upheld, in a vote of 8-1, the constitutionality of the Commission's design and duties.[9] In an opinion by Justice Harry Blackmun, the Court first examined whether creating an independent body, placed in the Judicial Branch, with the power to issue sentencing guidelines "vested in the Commission powers that are more appropriately performed by the other Branches or . . . undermine[d] the integrity of the judiciary."[10] The Court noted that "Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary."[11] Because judges have historically exercised discretion in sentencing decisions and the Judiciary has long exercised authority to issue rules "for carrying into execution [its] judgments," the Court reasoned that Congress could combine these features in the Commission and entrust it with the power to promulgate sentencing guidelines.[12] Although technically located in the Judicial Branch, the Commission's powers, the Court observed, were not unconstitutionally "united with the powers of the Judiciary."[13] The Commission was not a court, did not exercise judicial power, and was not controlled by the Judicial Branch; instead, the Commission was an independent agency accountable to Congress and its members were removable by the President.[14] In addition, placement of the Commission in the Judicial Branch did not increase that branch's authority.[15] Judges had historically decided sentencing questions in individual cases; the Commission simply did this via the promulgation of sentencing guidelines.[16]

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[3] 488 U.S. 361, 412 (1989).

[4] 28 U.S.C. § 991(a).

[5] *Id.*

[6] The Court also rejected the argument that the Commission's structure violated the "nondelegation" doctrine. *See* ArtI.S1.5.2 Historical Background on Nondelegation Doctrine.

[7] *Mistretta*, 488 U.S. at 383.

[8] *Id.* at 384.

[9] *Id.* at 412. The Court also held that Congress's grant of authority to the Commission did not violate the nondelegation doctrine. *Id.* at 379.

[10] *Id.* at 385.

[11] *Id.* at 388.

[12] *Id.* at 384–97.

[13] *Id.* at 393.

[14] *Id.* at 393–94.

[15] *Id.* at 395.

[16] *Id.*

The Court next turned to the composition of the Commission and concluded that its design did not undermine the integrity of the Judicial Branch.[17] The service of three federal judges on the Commission, though "somewhat troublesome" in the eyes of the Court, did not on balance interfere with the integrity of the federal Judiciary as a whole.[18] The Court looked to the early historical practices of the country and determined that Article III of the Constitution did not bar judges from undertaking certain extrajudicial duties.[19] The judges on the Commission did not serve "pursuant to their status and authority as Article III judges, but solely because of their appointment by the President as the Act directs."[20] The power wielded by the judges as Commissioners thus was not judicial in nature, but administrative, pursuant to the legislation creating the commission.[21] The judges' service did not ultimately undermine the impartiality of the Judiciary because the Commission's task did "not enlist the resources or reputation of the Judicial Branch in either the legislative business of determining what conduct should be criminalized or the executive business of enforcing the law."[22] Instead, the Commission was dedicated to promulgating rules for sentencing, a topic traditionally within the province of the Judiciary.[23]

Finally, the Court examined the extent of the President's control over the Commission's functioning.[24] The Court determined that the President's power to remove the Commissioners for cause did not "compromise the impartiality" of the Judiciary or prevent that branch from performing its constitutional function because, even if removed as a Commissioner, a judge retained the status of an Article III judge.[25]

ArtII.S2.C2.3.8 Federal Versus Territorial Officers

Article II, Section 2, Clause 2:

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

Not every office created by Congress is a federal office subject to the Appointments Clause.[1] In *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment,*

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[17] *Id.* at 397–408.

[18] *Id.* at 397.

[19] *Id.* at 398–99 ("The first Chief Justice, John Jay, served simultaneously as Chief Justice and as Ambassador to England, where he negotiated the treaty that bears his name. Oliver Ellsworth served simultaneously as Chief Justice and as Minister to France. While he was Chief Justice, John Marshall served briefly as Secretary of State and was a member of the Sinking Fund Commission with responsibility for refunding the Revolutionary War debt.").

[20] *Id.* at 404.

[21] *Id.*

[22] *Id.* at 407–08.

[23] *Id.*

[24] *Id.* at 408–11.

[25] *Id.* at 409–11.

[1] *See generally* S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 526, 543–44 (1987) (reasoning that the congressional grant of a corporate charter, as well as "the right to prohibit certain commercial and promotional uses of the word 'Olympic,'" did not render the Olympic Committee a government actor subject to constitutional challenge).

LLC, the Court considered the constitutionality of an oversight board (the Board) that Congress created in 2016 to manage financial issues of the Commonwealth of Puerto Rico, a U.S. territory.[2] Writing for the Court, Justice Stephen Breyer explained that provisions in Articles I and IV of the Constitution "empower Congress to create local offices for the District of Columbia and for Puerto Rico and the Territories."[3] Based on the Constitution's text, structure, and history, the Court reasoned that creating a local office "does not automatically make its holder an 'Officer of the United States'" within the meaning of Article II's Appointments Clause.[4] At the same time, an official's location in a territory does not, standing alone, exempt that office from the Appointment Clause's reach.[5] Instead, when Congress exercises its Article I or IV powers to create a local or territorial office, the Court examines whether Congress vested that official with "primarily local powers and duties."[6] If so, the official is not an "Officer of the United States" subject to the Appointments Clause.[7]

Based on the text of the 2016 law, the *Aurelius* Court concluded that when Congress created the Board, it exercised its Article IV powers under the Territories Clause.[8] And the Court concluded that the powers and duties that Congress assigned to the Board were "primarily local in nature."[9] Justice Breyer cited several factors that "taken together" demonstrated the Board's local nature: (1) the government of Puerto Rico paid the Board's expenses; (2) the Board developed fiscal plans with the elected government of Puerto Rico and could initiate bankruptcy proceedings for Puerto Rico; and (3) the Board's "broad investigatory powers"—akin to what federal officers exercise—were "backed by Puerto Rican, not federal, law."[10] Accordingly, the Court held that Board members were territorial officers, not federal "Officers," and thus their selection need not comply with the Appointments Clause.[11]

ArtII.S2.C2.3.9 Restrictions on Congress's Authority

Article II, Section 2, Clause 2:

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

While Congress enjoys a certain amount of discretion when designing federal agencies, the Supreme Court has regularly invalidated congressional attempts to "aggrandiz[e] its own

[2] No. 18-1334, slip op. at 2–6 (U.S. June 1, 2020). Congress created the Board as part of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified at 48 U.S.C. § 2101 et seq.).

[3] *Aurelius Inv., LLC*, slip op. at 2.

[4] *Id.* at 10.

[5] *Id.* at 6–9.

[6] *Id.* at 14.

[7] *Id.* at 14–17

[8] *Id.* at 4–8; *see also* U.S. Const. art. IV, § 3, cl. 2.

[9] *Aurelius Inv., LLC*, slip op. at 16.

[10] *Id.* at 15, 17.

[11] *Id.* at 15–17.

power at the expense of another branch."[1] For instance, while Congress may undoubtedly establish a wide variety of federal offices to carry out statutory duties, it may not appoint its own Members to carry out executive functions or reserve for itself the power of appointment.[2] In the 1991 case of *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, the Supreme Court examined the constitutionality of legislation that authorized a review board composed of Members of Congress to review and reverse decisions of the Metropolitan Washington Airports Authority (MWAA).[3] The MWAA is a regional body established to oversee the management and operations of Ronald Reagan Washington National Airport and Dulles International Airport.

The Court first ruled that Members of Congress on the Board exercised federal authority, even though the law specified that they would serve "in their individual capacities"[4] as opposed to serving in their official role as legislators.[5] In support of this conclusion, the Court noted that control over the airports in question was originally placed with the federal government and was transferred to the MWAA on condition that the States create the Board; the federal government has a significant interest in the operation of airports, which are crucial to government operations; and membership on the Board was limited to federal officials.[6]

Moreover, Congress exercised significant power over the appointment and removal of the Board members. The law required that the Board consist of nine members of Congress, eight of whom had to sit on specific congressional committees, chosen from a list provided by congressional leadership.[7] There was no requirement that the lists contain more recommendations than openings on the Board.[8] The Court concluded that this structure ensured congressional control of appointments.[9] Further, by controlling committee assignments, Congress had removal power over the Board "because depriving a Board member of membership in the relevant committees deprives the member of authority to sit on the Board."[10]

The Court ruled that the statute's provision requiring Members of Congress to sit on the Board violated the separation of powers.[11] The Court did not expressly decide whether the Board's power was executive or legislative in nature, but reasoned that, no matter how it was characterized, the statute's grant of authority to the Board was not constitutional.[12] If the Board's power was executive in nature, the Court explained, the Constitution barred an agent

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[1] Ryder v. United States, 515 U.S. 177, 182 (1995); Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81; INS v. Chadha, 462 U.S. 919, 951 (1983); Bowsher v. Synar, 478 U.S. 714, 735–36 (1986).

[2] In *Buckley v. Valeo*, discussed in more detail at ArtII.S2.C2.3.10 Officer and Non-Officer Appointments, the Court ruled that statutory provisions authorizing members of Congress to appoint Commissioners to the Federal Elections Commission were unconstitutional. 424 U.S. at 143 (per curiam).

[3] 501 U.S. 252, 255–61 (1991). *See* Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-591, 100 Stat. 3341. The legislation authorized the transfer of Dulles International Airport and Washington National Airport from federal control to the MWAA conditioned on the creation of a Board of Review created by the MWAA. *Wash. Airports*, 501 U.S. at 255–61. Virginia and the District of Columbia passed legislation authorizing the MWAA to create the Review Board. *Id.* at 261.

[4] Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-500, 100 Stat. 3341, § 6007(f)(1).

[5] *Wash. Airports*, 501 U.S. at 265–71.

[6] *Id.* at 266–69.

[7] One member was "chosen alternately . . . from a list provided by the Speaker of the House or the President pro tempore of the Senate, respectively." *Id.* at 268.

[8] *Id.*

[9] *Id.* at 268–69.

[10] *Id.* at 268–70.

[11] *Id.* at 274–76.

[12] *Id.* at 275–76.

of Congress from exercising it; and if the Board's power was legislative, then the Board could not operate without following the constitutional requirements of bicameralism and presentment for legislative action.[13]

Congress's control over appointments is further limited on the question of who can remove an incumbent officer.[14] In the 1986 case of *Bowsher v. Synar*, the Supreme Court invalidated a statute that gave an official controlled by Congress the power to order a decrease in federal spending.[15] A 1985 act[16] gave the Comptroller General authority, in the event of a budget shortfall, to issue a report detailing federal revenue and expenditure estimates, along with the specific reductions needed to cut the deficit to meet a statutory target.[17] The President was then required to order the "sequestration" of those funds pursuant to the Comptroller General's report.[18] The Court held that the Comptroller's power to trigger sequestration violated the separation of powers because a preexisting provision authorized Congress to remove the Comptroller General, who Congress viewed as an officer of the legislature,[19] through a joint resolution.[20] The High Court explained that the Constitution's division of power among the three branches of government barred "an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."[21] The Court rejected the argument that the Comptroller Generalwas sufficiently independent from Congress such that there was no constitutional violation. The power of removal, for the Court, is a crucial tool of control; Congress's ability to remove the Comptroller General "dictate[s] that he will be subservient to Congress."[22] As a remedy for this constitutional defect, the Court left Congress's removal power in place, but invalidated the executive functions given to the Comptroller General.[23]

Just as Congress may not appoint Members to wield executive power or exercise direct control over Executive Branch officers, its authority to impose procedural restrictions on the President's nomination of an officer may also be limited. This issue arose in the 1989 Supreme Court case of *Public Citizen v. Department of Justice*, which examined whether the Federal Advisory Committee Act (FACA) applied to consultations between the Department of Justice (DOJ) and the American Bar Association's Standing Committee on Federal Judiciary (ABA Committee).[24] The FACA required committees that advise the President, or other officers and agencies in the federal government, to follow a number of procedural requirements, such as filing a charter; keeping detailed minutes of meetings; and having meetings chaired by a federal government employee or officer authorized to adjourn any meeting.[25] The Court

[13] *Id.*

[14] Springer v. Gov't of Philippine Islands, 277 U.S. 189, 202 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.").

[15] 478 U.S. 714, 735–36 (1986). For more on the Court's decision in *Bowsher v. Synar*, *see* ArtII.S2.C2.3.15.6 Later Twentieth Century Cases on Removal.

[16] Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1038.

[17] *Bowsher*, 478 U.S. at 718, 732.

[18] *Id.* at 718.

[19] *Id.* at 731.

[20] *Id.* at 736.

[21] *Id.* at 722.

[22] *Id.* at 730.

[23] *Id.* at 734–36.

[24] 491 U.S. 440, 443 (1989).

[25] *See* 5 U.S.C. App. § 1 et seq. 5 U.S.C. App. § 3(2) ("The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—(A) established by statute or reorganization

considered whether the Act covered consultations between DOJ and the ABA Committee regarding presidential nominations of federal judges. It noted that a strictly literal interpretation of the statute would conceivably reach every instance in which the President or an agency sought advice from "any group of two or more persons, or at least any formal organization," including private entities.[26] The Court concluded that Congress did not intend that result, as it would mean the procedural requirements of FACA applied every time the President sought the views of a group of two or more people, "or at least any formal organization."[27]

Accordingly, the Court examined Congress's intention in passing the FACA, including that Act's legislative history as well as the history of other efforts "to regulate the Federal Government's use of advisory committees."[28] The Court reasoned that it ultimately was a "close question whether FACA should be construed to apply to the ABA Committee," but constitutional considerations "tip[ped] the balance decisively against FACA's application."[29] The Court invoked the concept of constitutional avoidance, which essentially teaches that when faced with statutory ambiguity, if one interpretation of a statute would raise constitutional problems, but another, fairly possible interpretation does not, courts should adopt the latter construction.[30] The Court concluded that applying FACA to DOJ's consultations with the ABA Committee "would present formidable constitutional difficulties," namely, potentially infringing on the President's constitutional duty under Article II to nominate federal judges.[31] The Court accordingly concluded that FACA did not apply to DOJ's confidential consultations with the ABA Committee.[32]

ArtII.S2.C2.3.10 Officer and Non-Officer Appointments

Article II, Section 2, Clause 2:

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

Supreme Court case law concerning which individuals in the federal government constitute "Officers of the United States"—and thus must be appointed pursuant to the requirements of the Appointments Clause—has been relatively sparse over the course of the

plan, or (B) established or utilized by the President, or (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.").

[26] *Pub. Citizen*, 491 U.S. at 452, 455–64.

[27] *Id.* at 452–53.

[28] *Id.* at 452–64.

[29] *Id.* at 465.

[30] *Id.* at 465–66 (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)).

[31] *Id.* at 466–67.

[32] *Id.* at 467; *id.* at 467–88 (1989) (Kennedy, J., concurring) (concluding that the statute did apply to the ABA's consultations with DOJ but that this was an unconstitutional interference with the President's power to nominate judges).

Nation's history,[1] with many of the key Supreme Court decisions occurring in the late twentieth and early twenty-first centuries.[2] In one of the earliest cases addressing the issue, Chief Justice John Marshall, riding circuit in the 1823 case of *United States v. Maurice*, defined an officer as one entrusted with a duty that is "a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform."[3] A similar principle was espoused in an opinion issued by Attorney General Hugh Legare in 1843, wherein he contrasted the appointment of "permanent" customs inspectors who qualify as officers of the United States, with the appointment by customs collectors of "occasional inspectors" who do not.[4] In 1878, the Supreme Court held in *United States v. Germaine* that federal civil surgeons were *employees* not subject to the constitutional requirements of the Appointments Clause, rather than officers, because their positions were "occasional and intermittent," rather than "continuing and permanent."[5] However, some of the Court's early decisions addressing which individuals constitute officers tended not to examine closely the substantive differences between officers and non-officers, and instead simply relied on an individual's method of appointment.[6] In other words, according to some of these early cases, no matter the duties assigned to a position, if an individual was not appointed according to the strictures of the Appointments Clause, then by definition he or she could not constitute an officer; but if an individual was appointed pursuant to the Appointments Clause, then he or she did qualify as an officer.[7]

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[1] Stacy M. Lindstedt, *Developing the Duffy Defect: Identifying Which Government Workers Are Constitutionally Required to Be Appointed*, 76 Mo. L. Rev. 1143, 1151 (2011). The Executive Branch has taken the position, which does not appear to contradict Supreme Court case law, that temporary designations to offices are permissible without complying with the Appointments Clause. Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 106 (2007); Designation of Acting Dir. of the Off. of Mgmt. & Budget, 27 Op. O.L.C. 121, 123–25 (2003); Auth. of Lieutenant Colonel Commandant of Marine Corps, 2 Op. Att'ys Gen. 77, 78–79 (1828). Appointment & Removal of Inspectors of Customs, 4 Op. Att'ys Gen. 162, 163 (1843); The Reconstruction Acts, 12 Op. Att'ys Gen. 141, 155–56 (1867). *But see* NLRB v. SW Gen., Inc., No. 15-1251, slip op. at 1–2 (U.S. Mar. 21, 2017) (Thomas, J., concurring) (arguing that a temporary designation under the Federal Vacancies Reform Act was unconstitutional because the procedures of the Appointments Clause were not followed).

[2] *See* Gary Lawson, Federal Administrative Law 190 (7th ed. 2016).

[3] 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823).

[4] Appointment & Removal of Inspectors of Customs, 4 Op. Att'ys Gen. 162, 163 (1843); *see also* Tenure of Off. of Inspectors of Customs, 1 Op. Att'ys Gen. 459, 459 (1821); Tenure of Off. of Inspectors of Customs, 2 Op. Att'ys Gen. 410, 412 (1831). In 1865, Attorney General James Speed reasoned that a statute which vested in assessors the power to appoint assistant assessors of the internal revenue service was unconstitutional because the former were not Heads of Departments. Appointment of Assistant Assessors of Internal Revenue, 11 Op. Att'ys Gen. 209, 209–12 (1865); *see* Act of Mar. 3, 1865, § 1, 13 Stat. 469. He concluded that assistant assessors constituted officers because Congress has created their office and they exercised independent authority. Appointment of Assistant Assessors of Internal Revenue, 11 Op. Att'ys Gen. 209, 211 (1865). The following year, Congress amended the statute to authorize the Treasury Secretary to appoint assistant assessors. Act of Jan. 15, 1866, 14 Stat. 2. For more on early Attorney General opinions regarding the Appointments Clause, see Aditya Bamzai, *The Attorney General and Early Appointments Clause Practice*, 93 Notre Dame L. Rev. 1501, 1504–14 (2018).

[5] 99 U.S. 508, 511–12 (1878) (noting that the term officer "embraces the ideas of tenure, duration, emolument, and duties") (citing United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393–94 (1867)); *see* Auffmordt v. Hedden, 137 U.S. 310, 327 (1890) ("His position is without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily. Therefore, he is not an 'officer,' within the meaning of the clause of the constitution referred to."); Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 100–11 (2007).

[6] *See* Landry v. FDIC, 204 F.3d 1125, 1132–33 (D.C. Cir. 2000) ("In fact, the earliest Appointments Clause cases often employed circular logic, granting officer status to an official based in part upon his appointment by the head of a department.") (citing United States v. Mouat, 124 U.S. 303, 307 (1888); *Germaine*, 99 U.S. at 510; United States v. Hartwell, 73 U.S. (6 Wall) 385, 393 (1867)); Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806); John M. Burkoff, *Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo*, 22 Wayne L. Rev. 1335, 1347 (1976).

[7] *See, e.g.*, United States v. Smith, 124 U.S. 525, 531–32 (1888); *Mouat*, 124 U.S. at 307; Burnap v. United States, 252 U.S. 512, 516 (1920).

In the 1976 case of *Buckley v. Valeo*, the Court established that "Officers of the United States" are those persons "exercising *significant authority* pursuant to the laws of the United States."[8] In that case, the Court examined the appointment of members of the Federal Election Commission (FEC) charged with regulating federal elections by enforcing the Federal Election Campaign Act.[9] The FEC was composed of six members: four nominated by congressional leadership and two by the President, all of whom were subject to confirmation by both the Senate and House.[10] In examining whether the FEC members wielded significant authority, the *Buckley* Court distinguished among three types of powers the members exercised: functions concerning (1) the flow of information—"receipt, dissemination, and investigation"; (2) the implementation of the statute—"rulemaking and advisory opinions"; and (3) the enforcement of the statute"informal procedures, administrative determinations and hearings, and civil suits."[11]

The *Buckley* Court held that the first category of FEC duties could be performed by non-officers because they were "investigative and informative," essentially "in aid of the legislative function of Congress."[12] Such functions could therefore be exercised by individuals not appointed in conformity with the Appointments Clause.[13] The latter two categories of functions, however, were executive in nature and constituted "significant authority." The duties regarding implementation of the statute—including rulemaking, disbursal of funds, and decisions about who may run for a federal office—constituted significant authority that could be executed only by "Officers of the United States."[14] Likewise, the power to enforce the underlying statute, "exemplified by [the Commissioner's] discretionary power to seek judicial relief" by instituting civil litigation to vindicate public rights, amounted to authority that, according to the Court, must be exercised by an officer appointed pursuant to the Appointments Clause.[15] In a footnote, the Court contrasted the duties of officers with "employees of the United States," who are "lesser functionaries subordinate to officers" and may be selected outside of the requirements of the Appointments Clause.[16] The Court thus concluded that most of the powers granted to the FEC could only be wielded by officers of the United States, and therefore could not be exercised by the FEC because the selection of its members did not comply with the Appointments Clause.[17]

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[8] 424 U.S. 1, 126 (1976) (per curiam) (emphasis added), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81. Subsequent cases have followed the Court's analysis of "significant authority." *See, e.g.*, Edmond v. United States, 520 U.S. 651, 662 (1997) (acknowledging that military appellate judges exercise "significant authority"); *Freytag v. Comm'r*, 501 U.S. 868, 881–82 (1991) (holding that special trial judges of Article I tax courts are "Officers of the United States" based on the degree of authority they exercise).

[9] *Buckley*, 424 U.S. at 126. Congress had provided that the FEC be composed of eight members, which included six voting members and two nonvoting ex officio members. *Id.* at 113.

[10] *Id.*

[11] *Id.* at 137.

[12] *Id.* at 138.

[13] *Id.*

[14] *Id.* at 140–41. The Court also noted with approval that prior decisions had found that a postmaster first class and the clerk of a district court qualified as officers. *Id.* at 126 (citing Myers v. United States, 272 U.S. 52 (1926) (postmaster) and *Ex parte* Hennen, 38 U.S. (13 Pet.) 225 (1839) (clerk)).

[15] Buckley, 424 U.S. at 138, 140–41.

[16] *Id.* at 126 n.162.

[17] *Id.* at 143; *see id.* at 267–82 (White, J., concurring in part and dissenting in part) (confirming the majority opinion's analysis on this point). While *Buckley's* "significant authority" definition of an officer went beyond the Court's prior jurisprudence on the matter, it arguably did not establish a *conclusive* test for what precisely constitutes significant authority. It bears mention in this vein that a Department of Justice Office of Legal Counsel (OLC) opinion, issued after *Buckley*, argued that two characteristics define an office of the United States. *See* Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 73 (2007). According to the OLC, the position must first be endowed with delegated sovereign authority, such as the power to "bind third parties, or the Government

Nearly fifteen years after *Buckley*, the Supreme Court's opinion in *Freytag v. Commissioner of Internal Revenue* again examined what responsibilities make an individual an officer of the United States, concluding that a special trial judge of the U.S. Tax Court qualified as such an officer.[18] The Court ruled that special trial judges were officers because of the "significance of the duties and discretion" they possessed.[19] First, the Court noted that the office of special trial judge was "established by Law"[20] and its "duties, salary, and means of appointment" were specified in statute.[21] The Court contrasted the special trial judges with the position of special masters, who temporarily assisted Article III judges on an "episodic" basis, and whose positions, duties, and functions were not "delineated in a statute."[22] Second, special trial judges were entrusted with duties beyond "ministerial tasks," exercising significant discretion in taking testimony, conducting trials, ruling on evidence, and enforcing compliance with discovery orders.[23] In addition, the Court noted that, even leaving aside these duties, special trial judges qualified as officers because the underlying statute authorized special trial judges, in certain circumstances, to render independently binding decisions.[24] The Commissioner conceded that for these purposes, special trial judges acted as officers, but argued that the petitioners lacked standing to challenge those aspects of the judges' power.[25] The Court rejected this contention, concluding that it made no sense to consider special trial judges to operate as officers for some purposes, but not others.[26]

In the 2018 case of *Lucia v. SEC*, the Supreme Court reaffirmed its analysis in *Freytag* and concluded that administrative law judges (ALJs) within the Securities and Exchange Commission (SEC) qualified as officers of the United States.[27] The Court reasoned that because the duties of SEC ALJs essentially mirrored those of the special trial judges in *Freytag*, the SEC ALJs also constituted officers.[28] As an initial matter, both held "a continuing office established by law."[29] Further, special trial judges and SEC ALJs "exercise[d] the same 'significant discretion' when carrying out the same 'important functions.'"[30] Both types of

itself, for the public benefit." *Id.* at 87. In addition, the position must be "continuing." *Id.* at 74. The OLC opinion offers two indicia of a continuing position. A position is continuing if it is "permanent, meaning that it is not limited by time or by being of such a nature that it will terminate by the very act of performance." *Id.* at 111 (internal quotations omitted). Alternatively, even if a position is temporary (because of an expiration date, or due to the nature of its duties), the presence of three factors can nevertheless indicate a "continuing" position: (1) the existence of the position is not personal, meaning that the duties continue even if the person changes; (2) it is not a "transient" position, meaning that the more enduring the position is the more likely it constitutes an office; and (3) the duties of the position are more than "incidental" to the government's operations. *Id.* at 100, 112.

[18] The Court held that the special trial judge was an inferior officer, rather than an employee. Freytag v. Comm'r, 501 U.S. 868, 881–82 (1991). The Court subsequently made clear that the exercise of significant authority establishes the line not between inferior and principal officers, but between "officer and non-officer." Edmond v. United States, 520 U.S. 651, 662 (1997). In other words, whether a position qualifies as an "inferior officer" under *Freytag* concerns the difference between employees and officers and is conceptually distinct from whether an officer is properly viewed as a principal or inferior officer. *See* ArtII.S2.C2.3.11.1 Overview of Principal and Inferior Officers.

[19] *Freytag*, 501 U.S. at 881.

[20] *Id.* (quoting U.S. Const. art. II, § 2, cl. 2.).

[21] *Freytag*, 501 U.S. at 881.

[22] *Id.*

[23] *Id.* at 881–82.

[24] *Id.* at 882.

[25] *Id.*

[26] *Id.*

[27] Lucia v. SEC, No. 17-130, slip op. at 1–4 (U.S. June 21, 2018).

[28] *Id.* at 6–8.

[29] *Id.* at 8.

[30] *Id.* (quoting *Freytag*, 501 U.S. at 878).

officials were authorized to (1) "take testimony,"[31] (2) "conduct trials,"[32] (3) "rule on the admissibility of evidence,"[33] and (4) were entrusted with "the power to enforce compliance with discovery orders."[34] Moreover, the Court observed, SEC ALJs actually had somewhat more independent authority to render decisions than did the special trial judges in *Freytag*: while a major decision made by the special trial judges had no force unless a Tax Court judge adopted it as his own, the SEC could decline to review an ALJ's decision, in which case the decision became final and was "deemed the action of the Commission."[35] Accordingly, because SEC ALJs were "near-carbon-copies" of the special trial judges in *Freytag*, they were officers who must be appointed pursuant to the Appointments Clause.[36] Importantly, the Court declined to elaborate on the significant authority test for determining whether an individual is an officer, reasoning that its analysis in *Freytag* resolved the case before it.[37] Because the petitioner had raised a "timely" Appointments Clause challenge, the Court remanded the case for a new hearing before a properly appointed ALJ or the Commission itself.[38]

In addition, while not directly applying the significant authority test to determine whether an individual counts as an officer, at least one other case discussed previously may at least shed some light on what types of duties might be relevant in determining if an individual qualifies as an officer, at least in the Executive Branch. In the 1986 case of *Bowsher v. Synar*,[39] the Court held that a statute authorizing an official controlled by Congress to carry out duties that were executive in nature violated the separation of powers.[40] The statute entrusted the Comptroller General with preparing a report detailing estimates of projected federal revenues and outlays as well as any necessary reductions to reduce the projected deficit to a specified target.[41] The Court reasoned that this required the Comptroller to "exercise judgment

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[31] *Id.* at 9 (quoting *Freytag*, 501 U.S. at 881) (quotation marks omitted). The Court noted that this included the authority to "receive evidence," "examine witnesses," and conduct pre-hearing depositions. *Id.* (quoting 17 C.F.R. §§ 201.111(c), 200.14(a)(4)) (quotation marks omitted).

[32] *Id.* at 9 (quoting *Freytag*, 501 U.S. at 882) (quotation marks omitted). This power includes the ability to administer oaths, rule on motions, and determine the course of the hearing. *Id.*

[33] *Id.* (quoting *Freytag*, 501 U.S. at 882) (quotation marks omitted).

[34] *Id.* (quoting *Freytag*, 501 U.S. at 882) (quotation marks omitted). In arguing that SEC ALJs are not officers under *Freytag*, the amicus appointed by the Court to argue that SEC ALJs were employees (the Solicitor General agreed with the challengers in the case) proffered two distinctions between the power of Tax Court special trial judges and SEC ALJs. First, the amicus noted that the Tax Court special trial judges have more expansive power to compel compliance with discovery orders—including ordering fines and imprisonment—than do SEC ALJs. Writing for the Court, Justice Elena Kagan rejected this argument, noting that *Freytag* did not reference any particular method of compelling compliance with discovery, and observing that the less stringent power wielded by SEC ALJs, including the power to exclude parties and attorneys from the proceedings, was sufficient under the reasoning of *Freytag*. *Id.* at 9–11. Second, the amicus noted that the Tax Court's rules provide that a special trial judge's factual finding "shall be presumed" correct, Tax Court Rule 183(d), whereas the SEC regulations do not contain a similar deferential standard. Justice Kagan rejected this argument as well, noting that the level of deference given to factual findings was not relevant to the *Freytag* Court's analysis. Further, Justice Kagan noted, the SEC frequently does afford a similar deference to its ALJs as a matter of practice. *Id.* at 9–13.

[35] *Id.* at 10 (quoting 15 U.S.C. § 78d–1(c)). *See* 17 C.F.R. §§ 201.360(d)(2).

[36] *Id.* at 6.

[37] *Id.*

[38] *Id.* at 12; *see also* Ryder v. United States, 515 U.S. 177, 182 (1995) (holding that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred"). *Cf.* Carr v. Saul, Nos. 19-1442, 20-105, slip op. at 2 (U.S. Apr. 22, 2021) (holding that petitioners, Social Security claimants, did not forfeit their Appointments Clause challenges by raising them for the first time in federal court and not before the administrative law judges who presided over their agency hearings).

[39] *See* ArtII.S2.C2.3.15.6 Later Twentieth Century Cases on Removal for additional discussion of the *Bowsher* decision.

[40] 478 U.S. 714, 717 (1986).

[41] *Id.* at 732.

concerning facts that affect the application of the Act [and] interpret the provisions of the Act to determine precisely what budgetary calculations are required."[42] The Comptroller enjoyed the final authority to determine budgetary cuts; and the President himself had to carry out the official's directives.[43] The Court concluded that these duties were executive in nature.[44] However, under a statute passed years before, only Congress could remove the Comptroller through a joint resolution.[45] The Court ruled that, by placing executive power in an officer that Congress itself controlled, the legislature had "intruded into the executive function" and violated the Constitution's separation of powers.[46]

ArtII.S2.C2.3.11 Principal and Inferior Officers

ArtII.S2.C2.3.11.1 Overview of Principal and Inferior Officers

Article II, Section 2, Clause 2:

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

The Appointments Clause[1] establishes two tiers of officers:[2] (1) *principal* (or superior) officers, who must be appointed by the President with the Senate's advice and consent;[3] and (2)

[42] *Id.* at 733.

[43] *Id.*

[44] *Id.* at 732–33.

[45] The Comptroller could also have been removed through impeachment. *Id.* at 728.

[46] *Id.* at 734.

[1] U.S. Const. art. II, § 2, cl. 2.

[2] *See* United States v. Germaine, 99 U.S. 508, 509 (1878) ("The Constitution for purposes of appointment very clearly divides all its officers into two classes.").

[3] *See* Buckley v. Valeo, 424 U.S. 1, 132 (1976) (per curiam) ("Principal officers are selected by the President with the advice and consent of the Senate."), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81. Although the Supreme Court has long used the term "principal officer" to describe the first category of officers subject to the Appointments Clause, the term itself derives, not from the Appointments Clause, but from the first clause of article II, section 2, which allows the President to require the written opinion of "the principal Officer in each of the executive Departments," on subjects relating to the duties of their respective offices. *See* U.S. Const. art. II, § 2, cl. 1; NLRB v. SW Gen., Inc., No. 15-1251, slip op. at 1–2 (U.S. Mar. 21, 2017) (Thomas, J., concurring) (noting that the Court has "long denominated" the noninferior officers referenced in the Appointments Clause "principal" officers (citing *Germaine*, 99 U.S. at 509, 511)); *Germaine*, 99 U.S. at 511 (noting that in the same section of the Constitution that contains the Appointments Clause, "the President may require the opinion in writing of the principal officer in each of the executive departments, relating to the duties of their respective offices"); Tucker v. Comm'r, 135 T.C. 114, 122 (2010) (stating that "[t]he term 'principal officer' is not in the Appointments Clause but is borrowed from the immediately preceding clause (i.e., U.S. Const. art. II, sec. 2, cl. 1)"). Similarly, the Twenty-Fifth Amendment mentions the "principal officers of the executive departments. However, while the term "departments" is found in both clauses, it is unclear precisely how much relevance either provision has for interpreting the Appointments Clause." *Compare* Freytag v. Comm'r, 501 U.S. 868, 886 (1991) (concluding that the Court should interpret the meaning of "Heads of Departments" "consistently with its interpretation in other constitutional provisions" and ruling that the Tax Court was not a department), *with id.* at 915 (Scalia, J., concurring in part and concurring in judgment) (arguing that the Tax Court is a Department because it is a "free-standing, self-contained entity in the Executive Branch"); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 511 (2010) (adopting the reasoning of Justice Antonin Scalia's concurrence in *Freytag* and concluding that because the Securities and Exchange Commission "is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a 'Departmen[t]' for the purposes of the Appointments Clause"). Likewise,

inferior officers, who must be appointed in the same manner unless Congress, by law, has vested their appointment in the President alone, in a court, or in a department head.[4] Both types of "officers" are those individuals who occupy positions that wield "significant authority."[5] The difference between the two is nevertheless important as the Constitution provides different requirements for their appointment. The Supreme Court has observed that the Framers provided "little guidance" into where the line between principal and inferior officers "should be drawn."[6] Accordingly, the Court has fashioned its own standards for distinguishing these officers which have evolved over time.

The focus of the Court's analysis in cases addressing the difference between principal and inferior officers has varied over time. The Court's early Appointments Clause cases did not present a clear picture of the differences between principal and inferior officers, often focusing on the method Congress prescribed for a given officer's appointment or the duration of an officer's tenure.[7] When questions concerning the principal-inferior officer distinction surfaced again in the second half of the twentieth century, the Court applied a functional, mulit-factor analysis, which emphasized that inferior officers, relative to principal officers, had more constrained duties and less discretion.[8] In 1997, the Court took a more formalist approach in defining the line between principal and inferior officers, holding that an inferior officer is one "whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate."[9]

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while the Opinions Clause includes the term "principal officer" and the Twenty-Fifth Amendment includes "principal officers," whether the substantive construction of either term is relevant to the Appointments Clause is unclear. *See* Morrison v. Olson, 487 U.S. 654, 722 (Scalia, J., dissenting) ("Even an officer who is subordinate to a department head can be a principal officer."); Edmond v. United States, 520 U.S. 651, 667 (1997) (Souter, J., concurring in part and concurring in the judgment) (reasoning that an individual may be a principal officer even if he has a superior); NLRB v. SW Gen., Inc., slip op. at 1–2 (Thomas, J., concurring) (arguing that the general counsel of the NLRB may be a principal officer).

[4] U.S. CONST. art. II, § 2, cl. 2; *see also Edmond*, 520 U.S. at 660 ("The prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers."). By default all "Officers of the United States"—both those specifically enumerated in the Clause (e.g., ambassadors) and "all other Officers . . . whose Appointments are not . . . otherwise provided for"—must be appointed by the President with the Senate's advice and consent, subject to Congress's power to vest the appointment of "such inferior Officers, as they think proper" in the President alone, the courts of law, or department heads. U.S. CONST. art. II, § 2, cl. 2; *see also* Myers v. United States, 272 U.S. 52, 126–27 (1926) ("[T]he appointment of all officers, whether superior or inferior, by the President is declared to be subject to the advice and consent of the Senate. . . . [T]he legislative power of Congress . . . is excluded save by the specific exception as to inferior offices in the clause that follows, viz, 'but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.'").

[5] *See* ArtII.S2.C2.3.10 Officer and Non-Officer Appointments. *See also Freytag*, 501 U.S. at 880–81 (examining the division between inferior officers and employees and analyzing the duties of particular inferior officers).

[6] *Morrison*, 487 U.S. at 671.

[7] The Court's early focus on who appointed an individual has led some courts and commentators to describe the Court's early Appointments Clause decisions as "circular." *See* Landry v. FDIC, 204 F.3d 1125, 1132–33 (D.C. Cir. 2000) (stating that "the earliest Appointments Clause cases often employed circular logic, granting officer status to an official based in part upon his appointment by the head of a department"); John M. Burkoff, *Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo*, 22 WAYNE L. REV. 1335, 1347 (1976) (arguing that the Court's reasoning in its 1878 decision in *United States v. Germaine* "like much of the early law in this area, is entirely circular" because the *Germaine* Court had reasoned that a civil surgeon was an employee, not an inferior officer, because "none of the prescribed modes of appointment was used" in the surgeon's hiring). *See* United States v. Germaine, 99 U.S. 508, 509 (1878).

[8] The Supreme Court's shift in focus to an official's duties and discretion is also reflected in the test the Court announced in *Buckley* for who constitutes an officer (rather than a mere employee) under the Appointments Clause: an officer is "any appointee exercising significant authority pursuant to the laws of the United States." Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81; *see also* ArtII.S2.C2.3.10 Officer and Non-Officer Appointments.

[9] Edmond v. United States, 520 U.S. 651, 662–63 (1997). For more on the difference between functional and formalist approaches in separation of powers cases, see Intro.7.2 Separation of Powers Under the Constitution.

ArtII.S2.C2.3.11.2 Early Doctrine on Principal and Inferior Officers

Article II, Section 2, Clause 2:

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

In cases arising in the nineteenth century and the early twentieth century, the Supreme Court—when it analyzed the issue at all—considered a range of factors in determining whether an official was a principal or an inferior officer, including who appointed the individual, the nature and purpose of the position established by Congress, the historical practice surrounding the appointment of such officials, and the practical consequences of requiring a particular method of appointment.[1] The following cases illustrate the Court's varied approaches to the question.

In *Ex parte Hennen*, the Supreme Court considered the authority of the U.S. District Court for the Eastern District of Louisiana (Louisiana district court) to appoint, and later to remove, the clerk of that court.[2] The Court held that without question, "a clerk is one of the inferior officers contemplated by [the] provision" in the Appointments Clause allowing Congress to vest the appointment of inferior officers in the courts of law.[3] The Court appeared to base its holding on the fact that Congress, through a series of statutes, established the Louisiana district court and directed the judge of that court to appoint a clerk.[4] In other words, Congress may have thought that clerks did not need to be appointed by the President because they did not constitute principal officers.

In *Ex parte Siebold*, the Supreme Court considered, among other issues, whether Congress had the authority to enact a law that required federal circuit courts to appoint election supervisors, who would monitor voting precincts within states where elections for congressional office were held. The challengers alleged that the election supervisors' duties were "entirely executive" (rather than judicial) in nature, so courts should not be permitted to appoint such officers.[5] The Court analyzed the constitutionality of the allegedly interbranch

[1] *See, e.g.*, United States v. Germaine, 99 U.S. 508, 510 (1878) (considering whether a civil surgeon appointed by the Commissioner of Pensions was an "Officer of the United States" by examining who appointed him and the nature of his employment); Rice v. Ames, 180 U.S. 371, 378 (1901) (holding that Congress had the authority to invest federal courts with the power to appoint "commissioners," whose position Congress created and "who are not judges in the constitutional sense"); *see generally* John M. Burkoff, *Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo*, 22 Wayne L. Rev. 1335, 1349 n.61 (1976) (positing that "[a]t this point in our constitutional history, the Supreme Court was rather clearly deferring to established appointment practice rather than leading the way in defining on its own who were officers and who were not through the exercise of certain substantive duties").

[2] 38 U.S. (13 Pet.) 230, 256–61 (1839).

[3] *Id.* at 258.

[4] *Id.* The Court noted that Louisiana was not a state when Congress first established federal district courts and authorized them to appoint clerks who would serve in both the district courts and the circuit courts located in those districts. *Id.* However, through subsequent laws concerning Louisiana (i.e., providing for a temporary government, admitting Louisiana into the Union, and including it in the circuit court system), Congress established the Louisiana district court and gave the judge of that court the authority to appoint a clerk for the district who would also serve as the circuit court clerk. *Id.* The Court ultimately held that although the Louisiana district court had appointed the petitioner as its clerk, the court's subsequent appointment of a different clerk and notice to the petitioner effected his removal from that office. *Id.* at 258–61.

[5] 100 U.S. 371, 397 (1879).

appointments on the apparent assumption that election supervisors were inferior officers.[6] The Court reasoned that although "[i]t is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain," the Constitution does not contain an "absolute requirement to this effect."[7]

Just before the turn of the century, in *United States v. Eaton*, the Supreme Court considered the constitutionality of a statute allowing the President to "provide for the appointment of vice-consuls . . . in such manner and under such regulations as he shall deem proper," in view of the Appointments Clause's requirement of presidential nomination and Senate confirmation for the appointment of "consuls."[8] The Court held that vice-consuls, as defined in the statute, were inferior officers.[9] The Court looked to the nature of the office and noted that it was temporary and subordinate to other offices. In particular, the President could only appoint vice-consuls in temporary situations, when there was an absence or vacancy. Even though vice-consuls assumed the duties of their superior officers in those circumstances,[10] the Court reasoned that the delegation was "for a limited time and under special and temporary conditions," and thus did not "transform[ ]" the vice-consuls into principal officers.[11]

The Court also examined historical practices concerning the vice-consul position. The Court noted that while vice-consuls were nominated by the President and confirmed by the Senate in "the earlier periods of the Government," those vice-consuls served as "permanent and in reality principal officers."[12] The Executive's prevailing practice in the case of consular office vacancies was to pay the acting officials as "de facto officers" for their temporary service, without requiring an appointment.[13] Finally, the Court expressed concern that "the discharge of administrative duties would be seriously hindered" if the Court invalidated "any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer."[14]

The Court thus concluded that the Appointments Clause's reference to "consuls" (who appear to qualify as principal officers) "does not embrace a subordinate and temporary office like that of vice-consul as defined in the statute."[15] Because vice-consuls qualified as inferior officers, Congress could place the power to appoint them with the President alone as provided in the Appointments Clause.

In its 1931 decision in *Go-Bart Importing Co. v. United States*, the Court determined that a United States commissioner was an inferior officer based on his relationship with the federal

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[6] *See id.* (citing the portion of the Appointments Clause allowing Congress to vest the appointment of inferior officers in the President, the courts, or department heads).

[7] *Id.*; *see also id.* at 398 ("The observation in the case of *Hennen* . . . that the appointing power in the clause referred to 'was no doubt intended to be exercised by the department of the government to which the official to be appointed most appropriately belonged,' was not intended to define the constitutional power of Congress in this regard, but rather to express the law or rule by which it should be governed.").

[8] 169 U.S. 331, 336 (1898) (internal quotation marks and citation omitted); U.S. CONST. art. II, § 2, cl. 2; *see also Eaton*, 169 U.S. at 339, 343–44.

[9] *Eaton*, 169 U.S. at 343. The President subsequently delegated the appointment of vice-consuls, through regulations, to the Secretary of State. *Id.* at 337. The *Eaton* Court did not question the constitutionality of this delegation or the resulting method of appointment. *See id.* at 339, 343–44.

[10] *Id.* at 336–37, 339.

[11] *Id.* at 343.

[12] *Id.* at 343–44.

[13] *Id.* at 344.

[14] *Id.* at 343.

[15] *Id.*

district court that appointed him.[16] At that time, a federal statute authorized federal district courts to appoint commissioners, and authorized the commissioners to perform numerous functions, including making arrests, imposing pretrial imprisonment or bail, issuing warrants, and enforcing the arbitration awards of foreign consuls in certain disputes.[17] The Court held that, at least on the facts of the *Go-Bart* case, in considering the commissioner's ability to issue an arrest warrant and conducted an arraignment, the commissioner was an inferior officer.[18] The Court reasoned that all of the commissioner's acts "were preparatory and preliminary to a consideration of the charge by a grand jury and . . . [upon indictment,] the final disposition of the case in the district court."[19] In this regard, the Court reasoned, the commissioner "acted not as a court, or as a judge of any court, but as a mere officer of the district court in proceedings of which that court had authority to take control at any time."[20]

As the foregoing cases demonstrate, no clear line separated principal from inferior officers during this time.

ArtII.S2.C2.3.11.3 Modern Doctrine on Principal and Inferior Officers

Article II, Section 2, Clause 2:

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

In the late twentieth century, in cases addressing the difference between principal and inferior officers, the Court began to emphasize the duties and discretion accompanying each office in a multi-factor analysis.[1]

In the 1988 case of *Morrison v. Olson*, the Court considered the constitutionality of the "independent counsel" provisions of the Ethics in Government Act.[2] The Act required the Attorney General to conduct a preliminary investigation into potential violations of certain federal criminal laws by certain high-ranking federal officials and to report his findings to a special court created by the act called the Special Division.[3] It also authorized the Special Division to appoint an independent counsel upon the Attorney General's application.[4]

In considering whether this independent counsel was a principal or an inferior officer, the Court declined to decide "exactly where the line falls" between the two types of officers.[5]

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[16] 282 U.S. 344, 352–53 (1931).

[17] *Id.* at 353 n.2.

[18] *Id.* at 352 ("United States commissioners are inferior officers."); *see also id.* at 353–54 (declining to consider the relationship between the district court and its commissioners in "matters unlike that now before us").

[19] *Id.* at 354.

[20] *Id.*

[1] *See, e.g.*, Weiss v. United States, 510 U.S. 163, 194 (1994) (Souter, J., concurring) (concluding that military judges were inferior officers under the functional reasoning of *Morrison*). *See supra* Intro.7.2 Separation of Powers Under the Constitution.

[2] 487 U.S. 654, 659 (1988).

[3] *Id.* at 660–61.

[4] *Id.* at 661.

[5] *Id.* at 671.

However, in the Court's view, "several factors" placed the independent counsel squarely on the "'inferior officer' side of that line."[6] First, the Attorney General had the authority to remove the independent counsel, which suggested that the latter was "to some degree 'inferior' in rank and authority."[7] Second, Congress, through the Ethics in Government Act, limited the independent counsel's role to investigating and prosecuting specific federal crimes, granting him or her no authority to formulate federal policy or to exercise administrative duties apart from those necessary to operate this office.[8] Third, the Special Division defined and thereby circumscribed the independent counsel's prosecutorial jurisdiction to a "limited" sphere.[9] And fourth, the independent counsel's office was temporary in that it terminated upon the conclusion of the investigation.[10] The Court held that "these factors relating to the 'ideas of tenure, duration . . . and duties' of the independent counsel are sufficient to establish that appellant is an 'inferior' officer in the constitutional sense."[11]

In *Edmond v. United States*, the Supreme Court considered whether judges of the Coast Guard Court of Criminal Appeals (Coast Guard Court) were principal or inferior officers in order to determine the constitutionality of the Secretary of Transportation's appointments of civilian judges to that court.[12] The Supreme Court began by observing that its cases up to that point had "not set forth an exclusive criterion for distinguishing between principal and inferior officers"[13] and that Coast Guard Court judges did not share all of the characteristics of officials previously held to be inferior officers.[14] For instance, the position of Coast Guard Court judge was not limited in tenure or jurisdiction in the same way as the independent counsel position deemed to be an inferior office in *Morrison*.[15] Although the Supreme Court acknowledged that the Coast Guard Court judges exercised "significant authority on behalf of the United States" (and were therefore officers), it held that such authority is a shared feature of inferior and principal officers and "marks, not the line between principal and inferior officer[s] . . . [but] the line between officer and non-officer."[16] Departing from its functional analysis in *Morrison*, the Court applied a more formal test—inferior officers are those "whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate."[17]

The Supreme Court proceeded to identify two entities that directed and supervised the Coast Guard Court judges' work.[18] The first, the Judge Advocate General, exercised

[6] *Id.*

[7] *Id.*

[8] *Id.* at 671–72.

[9] *Id.* at 661, 672.

[10] *Id.* at 672.

[11] *Id.* (internal citation omitted) (quoting United States v. Germaine, 99 U.S. 508, 511 (1878)). The Court went on to hold that Congress had the authority to vest the power to appoint the independent counsel in the Special Division, a "specially created federal court," because the Appointments Clause allows Congress to vest the appointment of inferior officers in, among other entities, the "Courts of Law." *Id.* at 673–76.

[12] 520 U.S. 651, 658 (1997). At the time, the Coast Guard was situated within the Department of Transportation during times of peace. In 2002, Congress transferred the Coast Guard to the Department of Homeland Security for peacetime operations. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2249 (codified at 6 U.S.C. § 468(b)).

[13] *Edmond*, 520 U.S. at 661.

[14] *See id.*

[15] *Id.*

[16] *Id.* at 662 (citing Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81).

[17] *Id.* at 662–63. *See* Intro.7.2 Separation of Powers Under the Constitution.

[18] *Edmond*, 520 U.S. at 664.

"administrative oversight" over the court by prescribing procedural rules for the court and formulating policies applicable to appeals of court-martial cases.[19] The Judge Advocate General also had authority to remove Coast Guard Court judges from their judicial assignments at will.[20] The Supreme Court observed that the second entity exercising supervisory authority—the Court of Appeals for the Armed Forces (Appeals Court)—reviewed decisions of the Coast Guard Court in certain circumstances. In such cases, the Appeals Court deferred to the factual findings of the Coast Guard Court when there was "some competent evidence in the record to establish each element of the offense beyond a reasonable doubt" but ultimately had the power to reverse the Coast Guard Court's decisions.[21] The Supreme Court held that in view of the supervisory roles of the Judge Advocate General and the Appeals Court, and notwithstanding the limitations on the latter's scope of review, the Coast Guard Court judges had "no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers," and thus were inferior, not principal, officers.[22] Accordingly, the Court affirmed the validity of the Secretary of Transportation's civilian appointments to the Coast Guard Court.[23]

In 2010, the Supreme Court decided *Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB or Board)*, a case centrally concerned with the constitutionality of limitations on the removal of members of the PCAOB, a board overseen by the Securities and Exchange Commission (SEC) and charged with, among other things, enforcing federal securities laws and promulgating professional accounting standards.[24] The Court first invalidated a statutory restriction on removing the PCAOB members, concluding that this good-cause removal protection violated Article II when combined with a second good-cause restriction on removing SEC members.[25] With this provision severed from the statute, the Court then rejected an additional constitutional challenge to the method of appointment of PCAOB members: the plaintiffs argued that, due to the significance of the duties the PCAOB members had, they were principal officers who must be appointed by the President and confirmed by the Senate.[26] The Court held, however, that the Board members were inferior, rather than principal, officers based on its reasoning in *Edmond*.[27] Specifically, the Court held that "[g]iven that the Commission is properly viewed, under the Constitution, as possessing the power to remove Board members at will, and given the Commission's other oversight authority, we have no hesitation in concluding that under *Edmond* the Board members are inferior officers."[28]

[19] *Id.*

[20] *Id.*

[21] *Id.* at 654–55.

[22] *Id.* at 655.

[23] *Id.* at 666.

[24] 561 U.S. 477, 485–86 (2010).

[25] The Court held that Congress could constitutionally limit the President's power to remove a principal officer at will in certain circumstances, and it could likewise limit a principal officer's power to remove an inferior officer at will, but it could not do both. *Id.* at 484, 495–96. Such "dual" limitations on removal were unconstitutional. *Id.* at 484, 492. For additional discussion of the *Free Enterprise Fund* decision as it relates to the removal of officers, see ArtII.S2.C2.3.15.7 Twenty-First Century Cases on Removal.

[26] *Free Enter. Fund*, 561 U.S. at 510. The Court held that the multi-member Commission is a department head for purposes of the Appointments Clause. *Id.* at 510–13.

[27] *Id.* at 510.

[28] *Id.* at 503–04 ("The Commission may, for example, approve the Board's budget, § 7219(b), issue binding regulations, §§ 7202(a), 7217(b)(5), relieve the Board of authority, § 7217(d)(1), amend Board sanctions, § 7217(c), or enforce Board rules on its own, §§ 7202(b)(1), (c).").

The Court considered the potential for review by a superior, Executive Branch official to be similarly critical in its 2021 decision in *United States v. Arthrex, Inc.*.[29] *Arthrex* held that administrative patent judges' ability to render unreviewable decisions in certain proceedings, combined with protections against at-will removal, was "incompatible" with their appointment as inferior officers.[30] To remedy the constitutional defect, the Court ruled that the Director of the Patent and Trademark Office could review administrative patent judges' decisions unilaterally in the proceedings at issue, rendering "unenforceable" a particular statutory provision limiting the Director's review.[31]

ArtII.S2.C2.3.12 Departments Heads and Courts of Law

Article II, Section 2, Clause 2:

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

A related, recurring issue in the Court's Appointments Clause jurisprudence is the meaning of the terms "Heads of Departments" and "Courts of Law." For example, the Court in *Freytag v. Commissioner* analyzed whether the United States Tax Court was a "department" (headed by the Chief Judge) or a "court of law" in discussing the appointing authority for special trial judges of that court.[1] All nine Justices agreed that the Chief Judge could constitutionally appoint special trial judges, but they disagreed on the rationale. The five Justices in the majority opined that the Tax Court could not be a department because "departments" usually were denominated as such and headed by a cabinet officer.[2] The Court also observed that "[c]onfining the term 'Heads of Departments' . . . to executive divisions like the Cabinet-level departments constrains the distribution of the appointment power" because "Cabinet-level departments are limited in number and easily identified" and their heads "are subject to the exercise of political oversight and share the President's accountability to the people."[3] In the end, the Court sustained the challenged provision by holding that the Tax Court, as an Article I court, was a "Court of Law" within the meaning of the Appointments Clause.[4] The other four Justices would have held that the Tax Court, as an independent establishment in the Executive Branch, was a "Department" for purposes of the Appointments Clause.[5]

The Court has also indicated that for purposes of the Appointments Clause, "Heads of Departments" can be understood more broadly than simply applying to the head of a traditional Cabinet-level agency. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court invalidated as unconstitutional the combination of two layers of

[29] No. 19-1434 (U.S. June 21, 2021).

[30] *Id.* at 14.

[31] *Id.* at 22.

[1] Freytag v. Comm'r, 501 U.S. 868, 884 (1991).

[2] *Id.*

[3] *Id.* at 886

[4] *Id.* at 890–92.

[5] *Id.* at 901 (Scalia, J., concurring in part and concurring in the judgment).

removal protection for members of the PCAOB.[6] The underlying statute provided that PCAOB members could only be removed for cause by the Securities and Exchange Commission (SEC). But the SEC members themselves could not be removed by the President except for cause. After invalidating the statutory removal protection for the PCAOB members, the Court ruled that appointment by the SEC of the PCAOB members was permissible under the Constitution.[7]

Because the Court had invalidated the removal protections for the PCAOB members, they were now removable at will by the SEC. And combined with the other oversight authority the SEC had over the PCAOB, according to its reasoning in *Edmond v. United States*, discussed earlier,[8] the Court concluded that the Board members were inferior officers eligible to be appointed by head of a department under the Appointments Clause.[9] Finally, the Court ruled that because the SEC "is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component," the SEC members qualified as a "Head" of a "Department" under the Appointments Clause.[10]

ArtII.S2.C2.3.13 Changing the Duties of an Existing Officer

Article II, Section 2, Clause 2:

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

Once an individual has been appointed to an office pursuant to the Appointments Clause, questions can arise concerning the circumstances in which an officer's duties may be altered after the officer's appointment. In the 1893 case of *Shoemaker v. United States*, the Court examined a statute that established a commission to oversee development of Rock Creek Park in the District of Columbia.[1] The Commission included two government officials who had already been appointed by the President and confirmed by the Senate to other positions, but the plaintiffs argued that they needed to be separately appointed and confirmed in order to serve on the Commission.[2] They argued that while Congress may create offices, it may not circumvent the Appointments Clause by vesting additional powers in an existing officer. The Court ruled that because the officers in question had already been appointed through advice and consent, new duties "germane" to their offices could be assigned to them without a subsequent appointment and confirmation.[3] The Court rejected the appointments challenge because the new duties assigned to the officers were not "dissimilar to, or outside of the sphere

[6] *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010).

[7] *Id.* at 510–13.

[8] *See* ArtII.S2.C2.3.11.3 Modern Doctrine on Principal and Inferior Officers.

[9] *Free Enter. Fund*, 561 U.S. at 510.

[10] *Id.* at 511.

[1] 147 U.S. 282, 298–99 (1893).

[2] *Id.* at 300–01.

[3] *Id.*

of, their official duties."[4] Congress thus enjoys some discretion to "increase the power and duties of an existing office" without the necessity of a new appointment.[5]

Similarly, in the 1994 case of *Weiss v. United States*, the Court considered whether the selection of military judges to try criminal cases in the military justice system violated the Appointments Clause.[6] Like the commissioners in *Shoemaker*, the military judges were already appointed by the President and confirmed by the Senate when they received their commissions as military officers.[7] Selection for the role of military judges was made by the Judge Advocate General for each of the military service branches.[8] The question in *Weiss* was whether serving as a military judge necessitated another appointment consistent with the Appointments Clause.[9] The Court distinguished the situation in *Shoemaker*. *Shoemaker*'s germaneness test, the Court explained, helped to "ensure that Congress was not circumventing the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office."[10] Unlike in *Shoemaker* where Congress had assigned specific, incumbent officers to new roles, here Congress had authorized the selection of an "indefinite number" of military judges "from among hundreds or perhaps thousands" of qualified commissioned officers.[11] Thus, in *Weiss*, the Court found "no ground for suspicion" that "Congress was trying to both create an office and also select a particular individual to fill" that office.[12]

Further, even if *Shoemaker's* germaneness standard applied, the Court concluded that the test was nevertheless satisfied in *Weiss*.[13] All military officers, the Court reasoned, "play a role in the operation of the military justice system," as they are authorized to impose punishments and act as a summary court-martial or president of a court-martial without a judge.[14] In the Court's view, the military judge position is less distinct from other positions in the military than a judge in civilian society is from other civilian offices. Unless detailed to a court-martial, military judges have no more authority than another commissioned military officer.[15] The Court concluded that the Appointments Clause did not require a separate appointment for military officers to the position of military judge.[16]

The Constitution thus does not give Congress unfettered discretion to augment the powers of existing offices. However, it may permit Congress to add duties that are germane to an office or to make an existing category of officers eligible for a new assignment akin to their existing duties, without requiring a new appointment. Given the paucity of case law on these issues, there may be limits that have not received extensive treatment by the Supreme Court. For instance, the Court has not had occasion to squarely address the hypothetical situation where

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[4] *Id.* at 301.

[5] *Id.*

[6] 510 U.S. 163, 165–69 (1994).

[7] *Id.* at 170.

[8] *Id.* at 168–69. The Court declined to rule on the constitutionality of a statutory provision authorizing the selection of civilians as military judges as that issue was not presented here, as the relevant military judges were military officers. *Id.* at 170 n.4. *See* 10 U.S.C. § 866(a)(1).

[9] *Weiss*, 510 U.S. at 165.

[10] *Id.* at 174.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 175–76.

[15] *Id.*

[16] *Id.* at 176. *See also* Ortiz v. United States, No. 16-1423 (U.S. June 22, 2018) (rejecting the argument that a military judge's dual service on the military Court of Criminal Appeals (CCA) and the Court of Military Commission Review (CMCR) violated the Appointments Clause).

Congress grants additional duties to an inferior officer (who was not subject to Senate advice and consent) such that the new duties transform the position to that of a principal officer.[17]

ArtII.S2.C2.3.14 Interbranch Appointments

Article II, Section 2, Clause 2:

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

The Appointments Clause provides that Congress may vest the appointment of inferior officers with the President alone, department heads, or the courts of law.[1] Both the Executive and Judicial Branches may thus be vested with authority to appoint inferior officers, as that term has been understood by the Supreme Court.[2] One recurring issue in litigation in this area has been whether Congress may authorize one branch of government to appoint inferior officers in another branch. For instance, may Congress entrust the courts of law with the power to appoint officers in the Executive Branch? The Supreme Court first squarely addressed the issue in the 1879 case of *Ex parte Siebold*, which examined the constitutionality of placing the power to appoint election supervisors—officers whose duties were allegedly "entirely executive in character"—with the Circuit Courts.[3] At issue was whether the Constitution permits "the courts of the United States to appoint officers whose duties are not connected with the judicial department."[4] The Supreme Court noted that the Constitution included no "absolute requirement" that Congress vest the "appointment of inferior officers in that department of the government . . . to which the duties of such officers pertain."[5] The Court reasoned that there was no "incongruity" between the judicial function and the appointment of election supervisors.[6] Therefore, the Court ruled, the interbranch appointment by the Judiciary of election supervisors did not violate the Constitution.

Likewise, the 1987 Supreme Court case of *Young v. United States ex rel. Vuitton et Fils S.A.* affirmed the inherent power of the Judiciary to appoint individuals to prosecute certain

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[17] *See generally Weiss*, 510 U.S. at 182–83 (Souter, J., concurring) (explaining that such a situation, though not presented in the case, would violate the Constitution).

[1] U.S. CONST. art. II, § 2, cl. 2.

[2] *See* ArtII.S2.C2.3.11.1 Overview of Principal and Inferior Officers to ArtII.S2.C2.3.11.3 Modern Doctrine on Principal and Inferior Officers.

[3] 100 U.S. 371, 397–99 (1879).

[4] *Id.* at 397. The Court distinguished a prior case, *Ex parte Hennen*, which stated that the appointment power "was no doubt intended to be exercised by the department of the government to which the official to be appointed most appropriately belonged," 38 U.S. (13 Pet.) 230, 258 (1839), as "not intended to define the constitutional power of Congress in this regard, but rather to express the law or rule by which it should be governed." *Ex parte Siebold*, 100 U.S. at 398.

[5] *Ex parte Siebold*, 100 U.S. at 397.

[6] *Id.* at 398. The Court also appeared to approve of the judicial appointment of United States commissioners, who were granted certain executive powers by Congress, in Go-Bart Importing Co. v. United States, 282 U.S. 344, 353–54, 353 n.2 (1931). *See* Morrison v. Olson, 487 U.S. 654, 676 (1988) (describing the Court's decision in *Go-Bart* as "approv[ing] [the] court appointment of United States commissioners, who exercised certain limited prosecutorial powers").

crimes—namely, contempt proceedings.[7] In that case, a federal district court appointed private attorneys to prosecute the defendants in a criminal contempt proceeding for violating a judicial injunction.[8] The Court ultimately reversed the convictions because those private attorneys represented the beneficiary of the injunction and were thus unable to function as disinterested prosecutors on behalf of the government.[9] However, it first expounded on the inherent power of the Judiciary to appoint private attorneys to prosecute criminal contempt proceedings.[10] Although the power of prosecution is traditionally an executive function, the Judiciary nevertheless retains the inherent power to appoint attorneys to prosecute a contempt action in order to "vindicate" the Judiciary's authority to "enforce orders and to punish acts of disobedience."[11] The Court reasoned that a court's power to initiate prosecutions for contempt was not limited to punishing "in-court contempts that interfere with the judicial process," but included "out-of-court contempt[s], which require prosecution by a party other than the court."[12]

One year later in 1988, the Supreme Court also upheld Congress's power to vest the appointment of an independent prosecutor with the Judiciary. In *Morrison v. Olson*,[13] the Court considered the constitutionality of the independent counsel statute,[14] which required the Attorney General to apply in certain circumstances to a Special Division of the U.S. Court of Appeals for the D.C. Circuit for the appointment of an independent counsel.[15] The Special Division was composed of three federal judges[16] and enjoyed final authority to appoint and define the jurisdiction of an independent counsel, who would investigate and prosecute crimes committed by certain Executive Branch officials as well as individuals connected to presidential campaign committees.[17] In considering a challenge to Congress's authority to vest the appointment of the independent counsel outside the Executive Branch, the Court observed that the text of the Constitution appeared to give Congress broad discretion in choosing whether to place the appointment of inferior officers with the Judiciary, department heads, or the President.[18] Further, the Court noted that its prior decision in *Siebold* rejected a requirement that the appointment of inferior officers be vested in the specific branch of government to which the duties of those officers relate.[19] The Court explained that its prior decision in *Vuitton* had recognized a court's inherent power to appoint private attorneys to prosecute criminal contempt proceedings. The Court also noted with approval Congress's vestment of power with district courts to make interim appointments of United States Attorneys.[20] In light of these considerations, combined with the fact that the independent counsel statute barred judges of the Special Division from participating in any judicial

[7] 481 U.S. 787, 793–801 (1987). *See also* 28 U.S.C. § 546(d) (authorizing district courts to appoint United States attorneys to fill vacancies in certain situations).

[8] 481 U.S. at 789–92.

[9] *Id.* at 803–14.

[10] *Id.* at 793–801.

[11] *Id.* at 796 (quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911)).

[12] *Id.* at 797.

[13] 487 U.S. 654 (1988).

[14] 28 U.S.C. §§ 591–599.

[15] *Id.* §§ 591–593. For more on *Morrison v. Olson*, see ArtII.S2.C2.3.15.6 Later Twentieth Century Cases on Removal.

[16] 28 U.S.C. §§ 49, 593.

[17] *Id.* § 593.

[18] *Morrison*, 487 U.S. at 673–74.

[19] *Id.*

[20] *Id.* at 676–77; *see* 28 U.S.C. § 546.

proceeding concerning matters that involve an independent counsel they appointed, the appointment of the independent counsel by the Judiciary did not infringe upon "the constitutional limitation on 'incongruous' interbranch appointments."[21]

ArtII.S2.C2.3.15 Removals

ArtII.S2.C2.3.15.1 Overview of Removal of Executive Branch Officers

Article II, Section 2, Clause 2:

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

The Appointments Clause delineates the method of appointment for "Officers of the United States." Other provisions of the Constitution indicate that both judges and Executive Officers may be removed through impeachment;[1] and both may also voluntarily retire from their positions.[2] However, while the Constitution elsewhere provides that judicial officers maintain their office for life,[3] it is silent as to the tenure for Executive Branch officers.[4] Historical practice and judicial decisions acknowledge that the President is empowered to remove those officers he appoints without assent from Congress.[5] Congress has, however, historically enacted legislation that shields certain Executive Branch officials from removal except for cause, although exactly which types of officials may be protected is not settled definitively. Even for those officers who may be protected from at-will removal, Congress's ability to insulate them from presidential control is not unlimited; for instance, Congress generally may not impose two layers of removal protection on a specific office (i.e., Congress may not provide that an inferior officer may only be removed for cause if his superior officer is also protected by a for-cause removal provision).[6] As explained *infra*, in examining statutory protections from removal for Executive Branch officers, the Court has sometimes applied a formalist approach to interpreting the Constitution, stressing the importance of the text's division of powers

[21] *Morrison*, 487 U.S. at 677.

[1] *See* ArtII.S4.1 Overview of Impeachment Clause.

[2] *See* Mimmack v. United States, 97 U.S. 426, 436–37 (1878).

[3] U.S. Const. art. III, § 1.

[4] *Id.* art. II, § 2, cl. 2.

[5] The assent of the Senate is required when an individual's appointment to an office serves to replace an existing principal officer. In that case, the prior officer is removed through the new appointment. Blake v. United States, 103 U.S. 227, 230, 237 (1880) ("It results that the appointment of Gilmore, with the advice and consent of the Senate, to the office held by Blake, operated in law to supersede the latter, who thereby, in virtue of the new appointment, ceased to be an officer in the army from and after, at least, the date at which that appointment took effect . . . ."); Keyes v. United States, 109 U.S. 336, 339 (1883); Mullan v. United States, 140 U.S. 240, 246–247 (1891); Wallace v. United States, 257 U.S. 541, 545 (1922). This principle does not extend to Article III judges, who enjoy life tenure. *See* Auth. of the President to Prospectively Appoint a Sup. Ct. Justice, 46 Op. O.L.C. 1, 1–2 (2022). In addition, the lawful appointment of a new inferior officer by the proper appointing authority can serve to remove the prior inferior officer from his position. *Ex parte* Hennen, 38 U.S. (13 Pet.) 230, 261 (1839) ("The power vested in the Court was a continuing power; and the mere appointment of a successor would, per se, be a removal of the prior incumbent, so far at least as his rights were concerned.").

[6] *See* ArtII.S2.C2.3.15.7 Twenty-First Century Cases on Removal.

among the three branches.[7] At other times it has applied a more functional analysis, giving Congress more room to design agencies as long as the broad background principle of a balance of power between the branches is respected.[8]

ArtII.S2.C2.3.15.2 Decision of 1789 and Removals in Early Republic

Article II, Section 2, Clause 2:

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

While the Constitution provides that federal judges shall retain their "offices during good behavior," which the Court has interpreted to mean that judges are entitled to life tenure absent resignation or impeachment,[1] it does not expressly specify how long Executive Branch officers may remain in office (although they may retire and are subject to impeachment).[2] The Framers' understanding of the removal power—regarding both who wields the power to remove Executive Branch officers as well as the circumstances in which they may be removed—is not clear from the records of the Constitutional Convention or other contemporaneous documents.[3] However, a major debate and decision of the First Congress on the matter, commonly known as the "Decision of 1789," has informed the Nation's understanding of where the removal power is placed,[4] although scholars and judges disagree

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[7] *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, No. 19-7, slip op. at 11 (U.S. June 29, 2020) ("The entire 'executive Power' belongs to the President alone."). For more on the difference between functional and formalist approaches in separation of powers cases, see Intro.7.2 Separation of Powers Under the Constitution.

[8] *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 689–90 (1988) ("The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II."); *see* John F. Manning, *Separation of Powers As Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 1952 (2011).

[1] *See* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 668 (2015) (describing "the protections of Article III" enjoyed by federal judges as including "life tenure and pay that cannot be diminished").

[2] *Compare* U.S. Const. art. III, § 1 (federal judges) *with id.* art. II, § 2, cl. 2 (officers generally).

[3] For instance, courts and scholars have debated the significance of Alexander Hamilton's understanding, expressed in the *Federalist Papers*, of the scope of the President's removal power and the role of the Senate in removal decisions. *See* The Federalist No. 77 (Alexander Hamilton) (appearing to argue that the President would require Senate consent under the Constitution to remove Executive Branch officers); Alexander Hamilton, Pacificus No. I (June 29, 1793), *in* 4 The Works of Alexander Hamilton 432, 439 (Henry C. Lodge ed., 1971); Myers v. United States, 272 U.S. 52, 136–37 (1926) (majority opinion) (arguing that Hamilton originally believed that Senate consent was required to remove Executive Branch officers, but that he later changed his mind); *id.* at 293 & n.86 (Brandeis, J., dissenting) (noting Hamilton's position in the *Federalist No. 77*); Seth Barrett Tillman, *The Puzzle of Hamilton's Federalist No. 77*, 33 Harv. J.L. & Pub. Pol'y 149, 151 (2010) (arguing against the "standard or consensus view . . . that Hamilton was speaking to *removal*, [which] has been adopted by Supreme Court majorities and dissents, lower federal courts, and by academics in law and in other fields"); Jeremy D. Bailey, *The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton*, 102 Am. Pol. Sci. Rev. 453, 458 (2008) ("If Hamilton is the father of the unitary executive, why did he write in *The Federalist* that the president would share the removal power with the Senate?").

[4] Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021, 1022 (2006) ("One of the most significant yet less-well-known constitutional law decisions is the 'Decision of 1789.'"); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 23 (1994) (noting the "great debate about the President's removal powers that occurred when the first Congress created the first departments in the new government—a debate known as the Decision of 1789").

about the best understanding of that decision.[5] The implications of the Decision of 1789 are particularly important because the Supreme Court has made clear that the views of the First Congress are "weighty evidence" of the Constitution's meaning since many of the Framers were elected to that body.[6]

The Decision of 1789 concerns the debate in the First Congress over whether the Constitution authorizes the President to remove Executive Branch officers unilaterally.[7] On May 19, 1789, Representative Elias Boudinot proposed establishing the executive departments of the Treasury, War, and Foreign Affairs;[8] Representative James Madison subsequently proposed that the Secretaries of these Departments be removable by the President alone.[9] The House debated the issue for over a month,[10] focusing in particular on whether the President enjoyed power under the Constitution to remove government officers absent legislation specifically authorizing him to do so.[11] Congress eventually passed bills for each department that removed any explicit mention of removal authority, but provided that a lower-level department official would take custody of the department's records whenever the department head "shall be removed from office by the President of the United States" or in any other case of a vacancy.[12]

The Supreme Court has cited the Decision of 1789 a number of times as congressional acknowledgment that Congress does not possess a direct role in the removal process.[13] There is some dispute over whether a majority of legislators affirmed that the Constitution vests the President with removal authority, or whether no majority actually supported a specific position on the issue.[14] Still, early historical practice confirms that the President's power to appoint Executive Branch officers includes authority to remove them. In the 1926 case of *Myers v. United States*, the Supreme Court opined that the Decision of 1789 affirmed that the President is entrusted with power to remove those officers he appoints, a proposition that "was soon accepted as a final decision of the question by all branches of the government."[15]

The Nation's first two Presidents, George Washington and John Adams, each unilaterally removed Executive Branch officers, although neither of them removed a large number of

[5] *See* Prakash, *supra* note 4, at 1023–25 (describing different understandings of the debate espoused by scholars and judges). *Compare* Myers v. United States, 272 U.S. 52, 114 (1926) (Taft, J.) ("[T]here is not the slightest doubt, after an examination of the record, that the vote was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone, and until the Johnson impeachment trial in 1868 its meaning was not doubted, even by those who questioned its soundness."), *and* 5 John Marshall, The Life of George Washington 200 (1807), *with* David P. Currie, The Constitution in Congress: The Federalist Period 1789–1801, at 41 (1997) (arguing that "there was no consensus" in the House regarding whether the President received the removal power from "Congress or the Constitution itself"), *and* 1 Corwin on the Constitution 332 (Richard Loss ed., 1981).

[6] Bowsher v. Synar, 478 U.S. 714, 723 (1986) (quoting Marsh v. Chambers, 463 U.S. 783, 790 (1983)); Myers v. United States, 272 U.S. 52, 146 (1926).

[7] *See* Josh Chafetz, Congress's Constitution, Legislative Authority and the Separation of Powers 100 (2017); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 Yale L.J. 1256, 1282–89 (2006). For a record of the debate in Congress, see 1 Annals of Cong. 384–412, 473–608, 614–31, 635–39 (1789).

[8] 1 Annals of Cong. 368–69 (1789).

[9] 1 Annals of Cong. 371 (1789).

[10] Currie, *supra* note 5, at 36.

[11] Currie, *supra* note 5, at 36–41.

[12] *See* Act of Jul. 27, 1789, ch. 4, § 2, 1 Stat. 28, 29; Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 65, 67; Act of Aug. 7, 1789, ch. 7, § 2, 1 Stat. 49, 50.

[13] *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 723 (1986); Myers v. United States, 272 U.S. 52, 146 (1926); Parsons v. United States, 167 U.S. 324, 338–43 (1897).

[14] Chafetz, *supra* note 7, at 100–01; Prakash, *supra* note 4, at 1023–25.

[15] 272 U.S. 52, 136 (1926).

officials.[16] President Thomas Jefferson, although initially considered an opponent of a powerful Executive, likewise exercised this power, removing more officials than either Washington or Adams.[17] Presidents James Madison, James Monroe, and John Quincy Adams also exercised the power of removal over Executive Branch officers, although they appear to have each removed a smaller number than Jefferson.[18] This historical practice of presidential removal of Executive Branch officers was reinforced by Attorney General opinions affirming the President's constitutional power to do so.[19] Congress, however, asserted some control over the tenure of certain Executive Branch positions. During the Administration of President Monroe, Congress passed the Tenure of Office Act of 1820, which provided that certain Executive Officers be appointed for a term of four years, "but shall be removable from office at pleasure."[20]

ArtII.S2.C2.3.15.3 Removals in Jacksonian America Through the Nineteenth Century

Article II, Section 2, Clause 2:

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

While the first six Presidents of the young Republic exercised the power of removal over Executive Branch officers on a somewhat limited basis, President Andrew Jackson replaced more officials than all Presidents before him combined.[1] He instituted what was commonly known as the "spoils system," wherein a new presidential administration would remove a large number of federal officials and replace them with supporters.[2] Jackson embraced the Tenure of Office Act of 1820[3] and argued that "rotation in office" would improve government operations and serve a democratizing function that would curb the importance of privilege in

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[16] 3 Joseph Story, Commentaries on the Constitution of the United States § 1537 (1833).

[17] Story, *supra* note 16, § 1537; Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 Case W. Res. L. Rev. 1451, 1478–95, 1499–1501 (1997); Leonard D. White, The Federalists: A Study in Administrative History 285–88 (1948).

[18] Story, *supra* note 16, § 1537; Calabresi & Yoo, *supra* note 17, at 1507–26; Leonard D. White, The Jeffersonians: A Study in Administrative History 1801–1829, at 379–80 (1951).

[19] *See, e.g.*, Dismission of a Paymaster Under Act of 1823, 2 Op. Att'ys Gen. 67 (1828) ("Mr. Clark held his commission as paymaster during the pleasure of the President; and the power of the President to dismiss him, at pleasure, is not disputed.").

[20] Act of May 15, 1820, ch. 102, § 1, 3 Stat. 582, 582.

[1] Daniel Walker Howe, What Hath God Wrought: The Transformation of America, 1815–1848 at 331–34 (2007); Michael J. Gerhardt, The Federal Appointments Process 52–53 (2003) [hereinafter Gerhardt, Appointments]; Carl R. Fish, The Civil Service and the Patronage 74 (1905). It appears that although President Jackson removed more officers than all his predecessors had combined, due to the smaller size of government at the time, President Jefferson removed a larger percentage of federal officers. Paul P. Van Riper, History of the United States Civil Service 30, 34–36 (1958); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 Case W. Res. L. Rev. 1451, 1533 (1997).

[2] Howe, *supra* note 1, at 333–34; Arthur Schlesinger, Jr., The Age of Jackson 46–47 (1945).

[3] Gerhardt, Appointments, *supra* note 1, at 52–53.

governmental offices.[4] Perhaps most famously, amidst conflict with Congress over the status of the Second Bank of the United States, Jackson dismissed Treasury Secretary William Duane.[5] Duane had effectively refused to withdraw federal monies from the Bank as instructed by President Jackson, so he was replaced by Roger Taney, who did.[6] A major fight with Congress ensued, and the Senate eventually passed a resolution in 1834 condemning Jackson's actions.[7] Congress did not, however, reverse Jackson's decision or pass legislation preventing such action in the future. Following a change in party control, the Senate expunged the prior censure in 1837.[8]

Presidents that followed Jackson largely continued the practice of removing Executive Branch officers, although their stated reasons for doing so varied. For example, President Martin Van Buren, who succeeded Jackson in office, continued the spoils system, removing Executive Branch officers at will and replacing them with party loyalists.[9] In contrast, the Nation's ninth president, William Henry Harrison, who had defeated Van Buren in 1841 and became the first Whig elected president, pledged not to replace Executive Branch officers for political reasons. Though Harrison died within a month after his inauguration, his brief record is somewhat mixed on the matter.[10] Harrison was succeeded by his Vice President John Tyler.[11] Although Tyler initially vowed, consistent with Harrison's Whig principles, not to remove Executive Branch officials for partisan reasons, he quickly did exactly that during his nearly four full years in office.[12] Opinions from his Attorney General issued during Tyler's time in office affirmed presidential removal authority in opinions that have informed subsequent practice and consideration of the removal power.[13] Attorney General Hugh S. Legare argued that, following the Decision of 1789, the whole country had acquiesced to the power of the President to remove Executive Branch officers.[14] One year later, he reaffirmed this conviction, noting that "Whatever I might have thought of the power of removal from office, if the subject were *res integra*, it is now too late to dispute the settled construction of 1789."[15] Likewise, President Zachary Taylor, also a member of the Whig party, removed nearly two-thirds of the prior President James Polk's appointees in his first year in office.[16]

The scope of the President's removal authority was at the center of the first impeachment of a United States President.[17] Congress on March 2, 1867 reauthorized (and amended), over

[4] Andrew Jackson, First Annual Message (Dec. 8, 1829), *in* 3 A Compilation of the Messages and Papers of the Presidents 309, 310 (James D. Richardson ed., 1897); Calabresi & Yoo, *supra* note 1, at 1478–95, 1531–32; Howe, *supra* note 1, at 333–34. It appears that Presidents Jefferson and Monroe also embraced rotation in office. Michael J. Gerhardt, Forgotten Presidents 32 (2013) [hereinafter Gerhardt, Forgotten].

[5] Howe, *supra* note 1, at 373–92; Calabresi & Yoo, *supra* note 1, at 1538–59.

[6] Howe, *supra* note 1, at 388.

[7] 10 Reg. Deb. 58 (1833); 10 Reg. Deb. 1187 (1834). *See* Claude G. Bowers, The Party Battles of the Jackson Period 330 (1965).

[8] 13 Reg. Deb. 504–05 (1837); Calabresi & Yoo, *supra* note 1, at 1558–59; *see* United States Senate, Party Division, https://www.senate.gov/history/partydiv.htm (last visited June 27, 2022).

[9] Gerhardt, Forgotten, *supra* note 4, at 18–19; Leonard D. White, The Jacksonians: A Study in Administrative History, 1829–1861, at 309 (1954).

[10] Gerhardt, Forgotten, *supra* note 4, at 31–33; White, *supra* note 9, at 311.

[11] Gerhardt, Forgotten, *supra* note 4, at 37–45. Tyler was initially a member of the Democratic party, but left and was elected on the newly-formed Whig ticket. He was expelled from the Whigs after vetoing a legislative bill. *Id*.

[12] Gerhardt, Forgotten, *supra* note 4, at 50–51.

[13] Gerhardt, Forgotten, *supra* note 4, at 50–51.

[14] Power of President to Fill Vacancies, 3 Op. Att'ys Gen. 673, 673–76 (1841).

[15] Military Power of the President to Dismiss From Serv., 4 Op. Att'ys Gen. 1, 1–2 (1842).

[16] Gerhardt, Forgotten, *supra* note 4, at 74; Gerhardt, Appointments, *supra* note 1, at 52–55.

[17] *See* ArtII.S4.4.4 President Andrew Johnson and Impeachable Offenses.

the veto of President Andrew Johnson, the Tenure of Office Act.[18] That law provided that Executive Branch officers who had been Senate-confirmed (as well as future such officers) were entitled to remain in their position until a replacement was confirmed.[19] The law also provided that certain positions would retain their offices for the full term of the President who appointed them, plus one month thereafter, unless the Senate consented to their removal.[20] Johnson subsequently fired his Secretary of War Edwin Stanton without Senate approval. On February 24, 1868, the House voted to impeach President Johnson.[21] An important point of contention at the trial in the Senate was whether the Tenure of Office Act protected Stanton at all due to his appointment by President Abraham Lincoln, rather than President Johnson.[22] The Senate ultimately failed to convict President Johnson by one vote on three different articles, and it failed to vote on the remaining eight.[23] The Tenure of Office Act of 1867 was amended in 1869[24] and requirements concerning Senate approval for removal were repealed in 1887.[25]

By the end of the nineteenth century, the Supreme Court affirmed that the President enjoyed the sole power of removal over Executive Branch officers.[26] In the 1897 case of *Parsons v. United States*, the Court concluded that the President was authorized to remove a U.S. attorney, even though the Tenure of Office Act of 1820 provided that the term of appointment was four years.[27] The Court reasoned that the Decision of 1789 and consistent government practice since indicated that the President enjoys the power of removal.[28] It thus interpreted the statute to establish that a term of office expired after four years, but did not bar the President from removing a U.S. attorney before that time.[29] Likewise, in 1903, the Court in *Shurtleff v. United States* reaffirmed this understanding of the President's power.[30] That case concerned a suit for back pay by a Senate-confirmed Executive Branch official who was removed without notice or a hearing. The statute establishing the officer's position provided that the President could remove him "for inefficiency, neglect of duty, or malfeasance in office."[31] The Court concluded that while notice and a hearing might be required when an officer is removed for the reasons specified in the statute, the President also had authority to remove the officer for other reasons entirely and, in those circumstances, was not required to

[18] Tenure of Office Act, ch. 154, 14 Stat. 430 (1867).

[19] *Id.*

[20] *Id.*

[21] Cong. Globe, 40th Cong. 2d Sess., 1400 (1868).

[22] William H. Rehnquist, Grand Inquests: The Historic impeachments of Justice Samuel Chase and President Andrew Johnson 221 (1992).

[23] 3 Hinds' Precedents of the House of Representatives § 2443 (1907); *see* Rehnquist, *supra* note 22, at 234–35.

[24] *See* Act of Apr. 5, 1869, ch. 10, §§ 1–2, 16 Stat. 6, 6–7. *See* Rev. Stat. 1767 (1875) ("Every person holding any civil office . . . by and with the advice and consent of the Senate . . . shall be entitled to hold such office during the term for which he was appointed, unless" removed with Senate consent or replaced with Senate consent).

[25] Act of Mar. 3, 1887, ch. 353, 24 Stat. 500.

[26] Parsons v. United States, 167 U.S. 324, 338–43 (1897). The Court in 1886 affirmed the authority of Congress to restrict the removal of inferior officers by the head of a department for cause. United States v. Perkins, 116 U.S. 483, 485 (1886).

[27] *Parsons*, 167 U.S. at 338–43.

[28] *Id.* at 338–39.

[29] *Id.*

[30] 189 U.S. 311 (1903).

[31] *Id.* at 313.

provide such procedural protection.[32] The Court thus rejected the suit because the President removed the officer for reasons other than those mentioned in the statute.[33]

ArtII.S2.C2.3.15.4 Removals in the 1920s

Article II, Section 2, Clause 2:

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

Congress's authority to restrict the President's power to remove Executive Branch officers was squarely addressed by the Supreme Court in the 1926 case of *Myers v. United States*.[1] *Myers* concerned a postmaster who was removed from office in violation of a statute providing that postmasters could only be removed with the Senate's consent.[2] Chief Justice William Taft, a former President, writing for the Court in an opinion that took a formalist approach to the separation of powers, espoused a broad view of the President's authority under Article II.[3] His opinion examined the history of removals of Executive Branch officials as well as the constitutional text, and concluded that Article II's vestment of executive power in the President bestowed on him "the general administrative control of those executing the laws,"[4] including the "exclusive power of removal."[5] The Chief Justice described the Decision of 1789 at length, concluding that the First Congress had determined that "the power of appointment carried with it the power of removal," a rule that was "acquiesce[d] [to] for nearly three-quarters of a century by all branches of the government."[6] Congress had, Chief Justice Taft noted, disrupted this understanding by passing the Tenure of Office Act in 1867—which required Senate approval to remove Executive Branch officials and resulted in the impeachment of President Andrew Johnson—but, in the view of the Court, the Executive Branch never acquiesced to this assertion of power.[7]

The Court in *Myers* reasoned that Article II's vestment of executive power in the President authorized him to select subordinate officers and direct them in executing the law; and just as it was "essential" to select officers to execute the law, "so must be his power of removing those for whom he cannot continue to be responsible."[8] In the Court's reading of the Constitution, the grant of the executive power to the President, supplemented by the duty to take care that the law is faithfully executed, meant that executive power includes "the exclusive power of

[32] *Id.* at 315–19.

[33] *Id.*

[1] 272 U.S. 52 (1926). *See Ex parte* Hennen, 38 U.S. (13 Pet.) 230, 261 (1839) (concluding that courts authorized to appoint their own clerks also were empowered to remove them).

[2] *Myers*, 272 U.S. at 106–07. The case was brought by the postmaster's intestate and sought backpay. *Id*.

[3] *Id.* at 131–77.

[4] *Id.* at 163–64 ("[T]o hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed.").

[5] *Id.* at 122.

[6] *Id.* at 119, 148.

[7] *Id.* at 166–71.

[8] *Id.* at 117.

removal."[9] The Court thus invalidated the statute before it insofar as the law denied to the President "the unrestricted power of removal" of Executive Branch officers.[10]

ArtII.S2.C2.3.15.5 Removals in the 1930s

Article II, Section 2, Clause 2:

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

Nine years after its decision in *Myers v. United States*, in which the Court invalidated a statute that prohibited the President from removing an executive official absent Senate approval,[1] the Supreme Court applied a much more functionalist approach in its analysis in another case addressing Congress's authority to restrict the President's removal authority.[2] In the 1935 case of *Humphrey's Executor v. United States*, the Court upheld a statute that limited the President's power to remove a Commissioner of the Federal Trade Commission (FTC).[3] The statute in question provided that a Commissioner could be removed for "inefficiency, neglect of duty, or malfeasance in office."[4] The Commissioner's estate brought suit seeking backpay after President Franklin Roosevelt dismissed him.[5] In an opinion by Justice George Sutherland, the Court ruled that the President violated the statute because the law's specification of reasons for removal was meant to be exclusive and he did not base his removal of the Commissioner on any of the grounds listed in the statute.[6] The Court distinguished its prior decision in *Shurtleff*

[9] *Id.* at 122.

[10] *Id.* at 176.

[1] 272 U.S. 52 (1926).

[2] John F. Manning, *Separation of Powers As Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 1952 (2011) (describing the Court in *Humphrey's Executor* as "using functionalist reasoning to sustain independent regulatory agencies").

[3] 295 U.S. 602 (1935). It appears that the only instances of a President expressly removing an officer with for-cause protection after notice, a hearing, and finding that the statutory reasons for removal were met occurred in late 1912 and early 1913 when President Taft removed two members of the Board of General Appraisers. *See* Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. Rich. L. Rev. 691, 691–737 (2018). President Richard Nixon removed Raymond Lapin from his position as President of the Federal National Mortgage Association for "good cause," but without conducting a hearing for articulating what behavior constituted that cause. *Id.* at 746–47. Lapin brought suit challenging the action but eventually dropped his challenge. *Id*. Following the Supreme Court's 2021 decision in *Collins v. Yellen*, in which the Court ruled that a statutory removal protection for an agency with a single director was unconstitutional, President Biden removed the heads of two other agencies that had similar structural features and protection. *See* Matthew Goldstein et al., *Biden Removes Chief of Housing Agency After Supreme Court Ruling*, N.Y. Times (June 23, 2021), https://www.nytimes.com/2021/06/23/us/biden-housing-agency-supreme-court.html; Andrew Ackerman & Brent Kendall, *Biden Administration Removes Fannie, Freddie Overseer After Court Ruling*, Wall St. J. (June 23, 2021), https://www.wsj.com/articles/supreme-court-issues-mixed-ruling-on-government-seizure-of-fannie-freddie-profits-11624459222. Jim Tankersley, *Biden Fires Trump Appointee as Head of Social Security Administration*, N.Y. Times (July 9, 2021), https://www.nytimes.com/2021/07/09/business/biden-social-security-administration.html; Andrew Restuccia & Richard Rubin, *Biden Ousts Social Security Chief*, Wall St. J. (July 9, 2021), https://www.wsj.com/articles/biden-ousts-social-security-chief-11625871710.

[4] *See* 15 U.S.C. § 41.

[5] *Humphrey's Ex'r*, 295 U.S. at 618–19.

[6] *Id.* at 625–26.

v. United States, which interpreted a statutory list of grounds for removal not to be exclusive,[7] noting that while FTC Commissioners in *Humphrey's Executor* were appointed to a specific term of office, the officer in *Shurtleff* had no such restriction on his tenure.[8] In addition, the Court observed that Congress intended the Commission to be nonpartisan and not subject to the direction of the President.[9]

Turning to the constitutionality of limiting the President's power of removal, the Court read its recent decision in *Myers* narrowly to establish only that Congress could not condition the President's power to remove an Executive Branch officer on Senate approval.[10] Because the statute before it did not do that, it did not run afoul of *Myers*. The Court determined that the officer in that case, a postmaster, was charged solely with executive functions, whereas the office of an FTC Commissioner was tasked with "quasi-legislative" and "quasi-judicial" functions. The Commission was not "an arm or an eye of the executive" and it "must be free from executive control" "in the exercise of its duties."[11] The Court ruled that the Constitution permitted Congress, with respect to officers charged with quasi-legislative and quasi-judicial functions, to "fix the period during which they shall continue in office, and to forbid their removal except for cause . . . ."; and that the President's removal of a FTC Commissioner for reasons not listed in the statute thus violated the law.[12]

The Court's approval in *Humphrey's Executor* of restrictions on the President's power of removal over the heads of certain federal agencies has influenced the structure of the modern administrative state.[13] Congress has established a number of "independent" agencies that are headed by multi-member bodies whose officers may only be removed by the President for cause.[14] These independent agencies stand in contrast to what may be considered traditional Executive Branch agencies, with a single head who is removable at will by the President.[15] Because Congress has created a variety of agencies with various structural features,[16] certain

[7] *See* 189 U.S. 311 (1903).

[8] *Humphrey's Ex'r*, 295 U.S. at 622–24. The Court indicated that for the *Shurtleff* Court to interpret the removal provision as ensuring the life tenure of the appraiser "was so extreme as to forbid, in the opinion of the court, any ruling which would produce that result if it reasonably could be avoided." *Id.* at 23.

[9] *Id.* at 624–25.

[10] *Id.* at 626.

[11] *Id.* at 628.

[12] *Id.* at 629–32.

[13] The Court's view in *Humphrey's Executor* that the FTC did not wield executive power is no longer shared by the modern Court. Seila Law LLC v. Consumer Fin. Prot. Bureau, No. 19-7, slip op. at 14 n.2 (U.S. June 29, 2020) ("The Court's conclusion that the FTC did not exercise executive power has not withstood the test of time."); City of Arlington v. FCC, No. 11-1545, slip op. at 13 n.4 (U.S. May 20, 2013) (noting that agency "activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they must be exercises of—the 'executive Power'"); *id.* at 4 (Roberts, C. J. dissenting, joined by Kennedy & Alito, JJ.) ("What the Court says in footnote 4 of its opinion is good, and true . . . The Framers did divide governmental power in the manner the Court describes, for the purpose of safeguarding liberty.").

[14] There are other indicia of independence for federal agencies, although for cause removal protection is likely the most prominent indicator. *See* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2376 (2001) (describing the "core legal difference" between independent and Executive Branch agencies as "the strength of the President's removal power"); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 775–76 (2013) ("[T]he conventional wisdom is that there are two types of agencies: executive and independent. Each type of agency comes with a set of rules that govern how the President can interact with them. The consensus view is that the dividing line is the presence of a for-cause removal protection clause."). *But see* Adrian Vermeule, *Conventions of Agency Independence*, 113 Colum. L. Rev. 1163, 1166 (2011) ("Legally enforceable for-cause tenure protection is neither necessary nor sufficient for operational independence.").

[15] Kagan, *supra* note 14, at 2376–77.

[16] Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. Pa. L. Rev. 841, 846 (2014) ("And there are organizations entirely within the federal government that do not fit squarely within the Executive Branch, including but encompassing far more than independent regulatory commissions and boards.").

functions of a particular agency may (at least for constitutional purposes) be considered "executive" while others in the same agency may not.[17]

In the years following *Humphrey's Executor*, scholars have debated the constitutionality of independent agencies whose heads are insulated from presidential control, as well as what limits the Constitution may place on Congress's power to shield Executive Branch officers from removal.[18] As discussed *infra*, Congress in the twentieth century has also enacted legislation insulating agency officials other than the heads of multimember boards from removal.[19] However, Supreme Court decisions in the twenty-first century appear to reflect an increasing skepticism of such congressional limits on the President's power to remove agency officials.[20]

ArtII.S2.C2.3.15.6 Later Twentieth Century Cases on Removal

Article II, Section 2, Clause 2:

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

Although the number of cases squarely presenting the validity of for-cause removal protections is limited, the Court applied a functional analysis similar to *Humphrey's Executor* in a number of twentieth-century cases that affirmed the constitutionality of statutory independence from the President for certain Executive Branch officers.[1] For instance, in the 1958 case of *Wiener v. United States*,[2] the Court ruled that even in the absence of an express statutory restriction on removal, the President acted illegally by removing a member of the War Claims Commission on the grounds that the President simply wanted a member of his own choosing.[3] The Court read *Humphrey's Executor* as limiting the scope of *Myers* to "purely executive officers" and approving for-cause protections for "quasi-judicial" officers.[4] Examining the scope of the President's power to remove members of the Commission, the Court focused on the "nature of the function[s] Congress vested" in the Commission and concluded that its purpose was judicial—adjudicating claims free from presidential or congressional influence.[5]

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[17] *See, e.g.*, Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332, 1341–42 (D.C. Cir. 2012) (concluding that "the powers in the Library [of Congress] and the [Copyright Royalty] Board to promulgate copyright regulations, to apply the statute to affected parties, and to set rates and terms case by case are ones generally associated in modern times with executive agencies rather than legislators. In this role the Library is undoubtedly a 'component of the Executive Branch'") (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 511 (2010)).

[18] *Compare* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 2–4 (1994) (asserting that the Framers did not envision a unitary Executive), *with* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 547–50 (1994) (arguing that the theory of a unitary Executive flows from an originalist interpretation of the Constitution's meaning). *See also* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1276 (2014).

[19] *See* ArtII.S2.C2.3.15.6 Later Twentieth Century Cases on Removal.

[20] *See* ArtII.S2.C2.3.15.6 Later Twentieth Century Cases on Removal.

[1] *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 659–60 (1988).

[2] The case presented another suit for backpay premised on an allegedly illegal removal.

[3] 357 U.S. 349 (1958).

[4] *Id.* at 352 (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935).

[5] *Id.* at 353–56.

Even though the statute was silent as to removal, the Court reasoned that because, "as one must take for granted," the President was precluded from influencing the Commission with regard to adjudicating claims, Congress must not have intended "to have hang over the Commission the Damocles' sword of removal" at will.[6] The Court thus concluded that, due to its judicial character, the President lacked an inherent power of removal at will over the Commission.

The Court also took a functional approach in upholding the constitutionality of a statute insulating a federal prosecutor from executive control. Following the scandal of Watergate and resignation of President Richard Nixon, Congress passed the Ethics of Government Act of 1978.[7] Title VI of that Act, the independent counsel statute, established a statutory mechanism for the appointment of a prosecutor by a Special Division of the U.S. Court of Appeals for the D.C. Circuit vested with a measure of independence from the Executive Branch.[8] The Special Division enjoyed authority to appoint and define the jurisdiction of the prosecutor, who could only be removed "by the personal action of the Attorney General and only for good cause, physical or mental disability . . . , or any other condition that substantially impairs the performance of such independent counsel's duties."[9]

In the 1988 case of *Morrison v. Olson*, the Supreme Court upheld the independent counsel statute against a constitutional challenge.[10] Writing for the Court, Chief Justice William Rehnquist concluded that the independent counsel was an inferior, rather than a principal, officer, whose appointment was not required to be made by the President subject to Senate confirmation.[11]

The Court also held that the Independent Counsel Act's provision limiting the authority of the Attorney General to remove the independent counsel for good cause did not impermissibly intrude on the President's power under Article II.[12] The Court rejected a formalist rule that would bar statutory for-cause removal protections for any individual tasked with "purely executive" functions; instead, it applied a functional test and asked whether Congress has "interfere[d] with the President's" executive power and his "duty to 'take care that the laws be faithfully executed.'"[13] The Court recognized that the independent counsel exercised "law enforcement functions that typically have been undertaken by officials within the Executive Branch,"[14] but noted that the position nevertheless has a "limited jurisdiction and tenure and lack[ed] policymaking or significant administrative authority."[15] The Court reasoned that it did "not see how the President's need to control" the independent counsel's discretion "is so central to the functioning of the Executive Branch" as to demand a constitutional rule

[6] *Id.* at 356.

[7] *See* Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

[8] *Id.* §§ 601–04, 92 Stat. at 1867–75 (codified at 28 U.S.C. §§ 591–99). The independent counsel provisions have since expired. 28 U.S.C. § 599. The statute required the Attorney General to apply in certain circumstances to a Special Division of the U.S. Court of Appeals for the D.C. Circuit for the appointment of an independent prosecutor. *Id.* § 593(a).

[9] *Id.* § 596(a)(1).

[10] 487 U.S. 654, 659–60 (1988). This issue was foreshadowed in the experiences of the special prosecutor charged with investigating events connected to the break-in at the Watergate Hotel and Office Building. *See* ArtII.S4.4.7 President Richard Nixon and Impeachable Offenses.

[11] *Morrison*, 487 U.S. at 671. The Court concluded that the independent counsel was an inferior officer because the independent counsel (1) was removable by the Attorney General for cause; (2) had a limited scope of duties; (3) possessed limited jurisdiction; and (4) was limited in tenure. *Id.* at 671–72. For more on the distinction between principal and inferior officers, *see* ArtII.S2.C2.3.11.3 Modern Doctrine on Principal and Inferior Officers.

[12] *Morrison*, 487 U.S. at 686–93.

[13] *Id.* at 690 (quoting U.S. Const. art. II, § 3, cl. 5).

[14] *Id.* at 691.

[15] *Id*.

mandating removal at will.[16] The Court also concluded that the removal provision did not "impermissibly burden[ ]" the President's ability to control the independent counsel because the position could still be eliminated for cause.[17]

In addition, the Court concluded that the statute did not violate the separation of powers by undermining the Executive Branch's powers or prohibiting that branch from carrying out its constitutional duties.[18] The majority opinion reasoned that the statute ultimately gave "the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties."[19] This control, the Court concluded, arose from the ability of the Attorney General to remove the independent counsel for good cause.[20]

While the Court's functional analyses in *Humphrey's Executor*, *Wiener*, and *Morrison* effectively allow removal protections for a range of federal entities, Congress's power to create agencies independent from executive control is far from absolute. For instance, in the 1986 case of *Bowsher v. Synar*, the Supreme Court applied a much more formalist approach to a separation of powers dispute and invalidated a statute that gave an official controlled by Congress power to order decreases in federal spending.[21] The Balanced Budget and Emergency Deficit Control Act of 1985[22] gave the Comptroller General authority, in the event of a budget shortfall, to issue a report detailing federal revenue and expenditure estimates and the specific reductions needed to reduce the deficit to a statutory target.[23] The President was then required to order the "sequestration" of those funds pursuant to the Comptroller General's report.[24]

The Court held that vesting the Comptroller General with these authorities violated the separation of powers in light of Congress's removal authority; a prior law had authorized Congress to remove the Comptroller General through a joint resolution.[25] The High Court explained that the Constitution's division of power among the three branches of government barred "an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."[26] The Constitution explicitly provides no role for Congress in the removal of officers beyond impeachment.[27] Allowing Congress to exercise removal power over an officer engaged in executive functions "would, in practical terms, reserve in Congress control over the execution of the laws."[28] Just as Congress may not itself execute the law, the Court said that it may not indirectly do so by "grant[ing] to an officer under its control what it does not

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[16] *Id.* at 691–92.

[17] *Id.* at 692–93.

[18] *Id.* at 695.

[19] *Id.* at 693–96.

[20] *Id.* at 695–96; *cf. Id.* at 706 (Scalia, J., dissenting) (characterizing the Court's assertion as "somewhat like referring to shackles as an effective means of locomotion").

[21] 478 U.S. 714, 735–36 (1986). *See* ArtII.S2.C2.3.6 Creation of Federal Offices to ArtII.S2.C2.3.9 Restrictions on Congress's Authority.

[22] Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified at 2 U.S.C. § 901 et seq.).

[23] *Bowsher*, 478 U.S. at 718, 732.

[24] *Id.* at 718.

[25] *Id.* at 736.

[26] *Id.* at 722.

[27] *Id.*

[28] *Id.* at 726. *Cf. Id.* at 740 (Stevens, J., concurring in the judgment) ("The fact that Congress retained for itself the power to remove the Comptroller General thus is not necessarily an adequate reason for concluding that his role in the Gramm-Rudman-Hollings budget reduction process is unconstitutional. It is, however, a fact that lends support to my ultimate conclusion that, in exercising his functions under this Act, he serves as an agent of the Congress."); *Id.* at 765 (White, J., dissenting) ("I cannot accept, however, that the exercise of authority by an officer removable for cause by a

possess."[29] The Court reasoned that the Comptroller General's duties under the statute amounted to "execution of the law" because he was charged with interpreting statutory provisions and exercising independent judgment in preparing budget estimates and reductions. Additionally, the Comptroller General had "the ultimate authority to determine the budget cuts to be made," given that the President was required to carry out the Comptroller General's report through a sequestration order.[30] The Court concluded that by entrusting an officer "subject to removal only by itself" with execution of the law, "Congress in effect has retained control over the execution of the Act and has intruded into the executive function."[31]

ArtII.S2.C2.3.15.7 Twenty-First Century Cases on Removal

Article II, Section 2, Clause 2:

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

In the twenty-first century, the Court has applied a somewhat formalist approach to removal cases, invalidating removal protections for Executive Branch officials in three different decisions. In the 2010 case of *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court ruled that two layers of removal protection for an Executive Branch official impermissibly interfered with the President's powers under Article II of the Constitution.[1] In that case, the Court examined the Public Company Accounting Oversight Board (PCAOB or Board), an entity created by the Sarbanes-Oxley Act of 2002 to oversee aspects of the accounting industry.[2] The Board's members were appointed by the Securities and Exchange Commission (SEC) and were subject to the Commission's oversight when issuing rules and sanctions.[3] But the members of the PCAOB could not be removed from office except for good cause shown by the SEC in a formal proceeding.[4] Because the President could not remove the SEC Commissioners themselves without cause,[5] the Board members were thus insulated by two layers of removal protection.[6]

The Court's opinion stressed the importance of accountability for government officers that the Appointments Clause and its concomitant power of removal ensure. The Court

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joint resolution of Congress is analogous to the impermissible execution of the law by Congress itself, nor would I hold that the congressional role in the removal process renders the Comptroller an 'agent' of the Congress, incapable of receiving 'executive' power.").

[29] *Id.* at 726.

[30] *Id.* at 732–33.

[31] *Id.* at 734.

[1] *See* 561 U.S. 477, 484 (2010).

[2] 15 U.S.C. §§ 7211–20.

[3] *Id.* § 7217.

[4] *Free Enter. Fund*, 561 U.S. at 486.

[5] SEC Commissioners do not actually have an explicit statutory removal protection, but both parties agreed and the Court decided the case with the understanding that the Commissioners nonetheless may not be removed by the President except for the standard enunciated in *Humphrey's Executor*, 295 U.S. 602 (1935). *Id.* at 487.

[6] *Id.* at 495–98.

acknowledged that it had upheld removal restrictions for the principal officers of independent agencies in *Humphrey's Executor* and for certain inferior officers in *Morrison*, but concluded that the "novel" combination of dual for-cause removal restrictions "tranform[ed]" the independence of the Board in a manner that impaired the President's duty to execute the law.[7] A second layer of removal protection meant that "[n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control of the Board."[8] Dual for-cause removal protections inhibit the principle of accountability for Executive Branch officers because they infringe on the President's "ability to execute the laws," by preventing him from "holding his subordinates accountable for their conduct."[9] The Court emphasized that the public does not vote for agency officials, but "look[s] to the President to guide the 'assistants or deputies . . . subject to his superintendence.'"[10] In other words, the President must be able to hold agency officers accountable for their actions, because it is ultimately the President who is accountable to the people for actions of the Executive Branch, rather than Executive Branch officers.[11] Because the statute "grant[ed] the Board executive power without the Executive's oversight," Congress had "subvert[ed] the President's ability to ensure that the laws are faithfully executed" in violation of Article II's vestment of executive power in the President.[12]

The Court's turn in the modern era toward a more formalist approach to interpreting the strictures of the Appointments Clause has been applied in two recent cases that further limit Congress's ability to shape the administrative state. These decisions concluded that an independent agency with a single director insulated from presidential control violated the separation of powers.

In *Seila Law LLC v. Consumer Financial Protection Bureau (CFPB)*, the Supreme Court concluded that Congress could not provide for-cause removal protections for the head of the CFPB, an independent financial regulatory agency led by a single Director.[13] The Court described the President's removal power as "unrestricted,"[14] rejecting the view that *Humphrey's Executor* and *Morrison* "establish a general rule that Congress may impose 'modest' restrictions on the President's removal power."[15] Instead, "the President's removal power is the rule, not the exception."[16] The Court explained that after *Free Enterprise Fund*, only "two exceptions" to the rule requiring removability remained.[17] First, under *Humphrey's Executor*, Congress may sometimes "create expert agencies led by a *group* of principal officers

[7] *Id.* at 496.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 497–98 (quoting The Federalist No. 72 (Alexander Hamilton)).

[11] *Id.* at 499 ("The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people.").

[12] *Id.* at 498.

[13] No. 19-7, slip op. at 2–3 (U.S. June 29, 2020). This case also involved questions of standing. *Id.* at 9. Among other arguments, a court-appointed amicus curiae claimed that "a litigant wishing to challenge an executive act on the basis of the President's removal power must show that the challenged act would not have been taken if the responsible official had been subject to the President's control." *Id.* The Court rejected the idea that such a challenger has to prove this type of counterfactual, finding it sufficient to demonstrate an injury "from an executive act that allegedly exceeds the official's authority." *Id.* at 10.

[14] *Id.* at 2.

[15] *Id.* at 26. The court-appointed amicus curiae argued that the Court's precedent established that Congress may generally limit the President's removal power, with two exceptions: (1) "Congress may not reserve a role for *itself* in individual removal decisions"; and (2) Congress may not completely eliminate the President's removal power. *Id.* at 26–27.

[16] *Id.* at 27.

[17] *Id.* at 13.

removable by the President only for good cause" if the agency does not exercise substantial executive power.[18] In interpreting this 1935 case, the *Seila Law* Court interpreted *Humphrey's Executor* narrowly, saying that this exception permitted for-cause removal protections for "a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions *and* was said not to exercise any executive power."[19] The Court said that the second exception to the President's removal power allowed at least some removal protections for inferior officers, as in *Morrison*, if those officers have "limited duties and no policymaking or administrative authority."[20]

The Court concluded in *Seila Law* that the CFPB Director did not fall within either of these two exceptions.[21] The single Director was not a multimember expert body, and, in the view of the Court, could not be considered "a mere legislative or judicial aid."[22] Rather than performing merely reporting and advisory functions, the CFPB Director exercised executive power, possessing the authority "to promulgate binding rules fleshing out 19 federal statutes, [to] issue final decisions awarding legal and equitable relief in administrative adjudications," and to seek "daunting monetary penalties" in enforcement actions in federal court.[23] Neither could the CFPB Director be considered an inferior officer with limited duties.[24] And the Court ruled that it would not recognize a new exception to the President's removal authority for "an independent agency led by a single Director and vested with significant executive power."[25] The Court described the CFPB's structure as "unprecedented"[26] and "incompatible with our constitutional structure,"[27] saying that the agency's structure violated the Constitution "by vesting significant governmental power in the hands of a single individual accountable to no one."[28] Consequently, the Court concluded that the provision insulating the Director from removal was unconstitutional, severing the for-cause removal provision from the governing statute.[29]

Shortly thereafter, in *Collins v. Yellen*, the Supreme Court ruled that the structure of the Federal Housing Finance Agency (FHFA) violated the Constitution's separation of powers.[30]

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[18] *Id.* at 2, 15–16. The Court said its decision in *Wiener* also fell within this exception. *Id.* at 15 (discussing Wiener v. United States, 357 U.S. 349 (1958).

[19] *Id.* at 15 (emphasis added). The Court stressed that "[r]ightly or wrongly, the Court viewed the [Federal Trade Commission ('FTC')] (as it existed in 1935) as exercising 'no part of the executive power.'" *Id.* at 14 (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935). However, the Court also said that this conclusion has not withstood the test of time, and that the powers of the FTC—even as they existed in 1935—are now considered executive. *Id.* at 14 n.2.

[20] *Id.* at 16. This principle also extended to *Perkins*. *Id.* at 15 (discussing United States v. Perkins, 116 U.S. 483 (1886).

[21] *Id.* at 16–18.

[22] *Id.*

[23] *Id.* at 17.

[24] *Id.*

[25] *Id.* at 18.

[26] *Id.* The Court acknowledged that there were four other relatively recent historical examples of Congress providing good-cause tenure to principal officers leading an agency, but dismissed these examples as also being controversial. *Id.* at 18–21 (discussing the Comptroller of the Currency, Office of the Special Counsel, Social Security Administration, and Federal Housing Finance Agency).

[27] *Id.* at 21.

[28] *Id.* at 23. The Court noted that the Executive Branch is the only branch led by a unitary head, and that the President's power is checked through democratic and political accountability. *Id.* at 22–23. Individual Executive Branch officials may still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. *Id.* at 23.

[29] *Id.* at 30–33 (plurality opinion); *id.* at 1 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

[30] No. 19-422, slip op. at 26–32 (U.S. June 23, 2021).

Like the CFPB, the FHFA is headed by a single Director whom, under the statute establishing the agency, the President could remove only for cause.[31] The *Collins* Court considered *Seila Law* to be "all but dispositive" of the constitutional question, reasoning that differences in the "nature and breadth" of the agencies' respective regulatory authorities did not justify the constraint on the President's removal power.[32] The Court remanded the case for the lower courts to decide whether the challengers—shareholders of FHFA-regulated entities—were actually harmed by the existence of the statutory removal protection.[33]

Clause 3—Senate Recess

ArtII.S2.C3.1 Overview of Recess Appointments Clause

Article II, Section 2, Clause 3:

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

The Recess Appointments Clause, authorizing the President to make temporary appointments when the Senate is not in session, was adopted by the Constitutional Convention without dissent and without debate regarding the intent and scope of its terms. In the *Federalist No. 67*, Alexander Hamilton refers to the recess appointment power as "nothing more than a supplement . . . for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate." It is generally accepted that the Clause was designed to enable the President to ensure the unfettered operation of the government during periods when the Senate was not in session and therefore unable to perform its advice and consent function. In addition to fostering administrative continuity, Presidents have exercised authority under the Recess Appointments Clause for political purposes, appointing officials who might have difficulty securing Senate confirmation.

Two fundamental textual issues arise when interpreting the Recess Appointments Clause. The first is the meaning of the phrase "the Recess of the Senate." The Senate may recess both between and during its annual sessions,[1] but the time period during which the President may make a recess appointment is not clearly answered by the text of the Constitution. The second fundamental textual issue is what constitutes a vacancy that "may happen" during the recess of the Senate. If the words "may happen" are interpreted to refer only to vacancies that arise during a recess, then the President would lack authority to make a recess appointment to a vacancy that existed before the recess began. For over two centuries the Supreme Court did not address either of these issues,[2] leaving it to the lower courts and other branches of government to interpret the scope of the Recess Appointments Clause.[3]

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[31] 12 U.S.C. § 4512(b)(2).

[32] *Collins*, slip op. at 26–29.

[33] *Id.* at 36.

[1] For a discussion of the procedural requirements that apply to "adjourn[ments]," see ArtI.S5.C4.1 Adjournment of Congress.

[2] *See* NLRB v. Noel Canning, 573 U.S. 513, 526 (2014).

[3] For lower court decisions on the Recess Appointments Clause, see, e.g., Evans v. Stephens, 387 F.3d 1220, 122627 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005); United States v. Woodley, 751 F.2d 1008, 1012 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048 (1986); United States v. Allocco, 305 F.2d 704, 712 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963); *In re* Farrow, 3 Fed. 112 (C.C.N.D. Ga. 1880). For prior Executive Branch interpretations of the Recess Appointments Clause, *see* 25 Op. OLC 182 (2001); 20 Op. OLC 124, 161 (1996); 16 Op. OLC 15 (1992); 13 Op. OLC 271 (1989); 6 Op. OLC 585, 586 (1982); 3 Op. OLC 314, 316 (1979); 41 Op. Att'y Gen. 463 (1960); 33 Op. Att'y Gen. 20 (1921); 30 Op. Att'y Gen. 314 (1914); 26 Op. Att'y Gen. 234 (1907); 23 Op. Att'y Gen. 599 (1901); 22 Op. Att'y Gen. 82 (1898); 19 Op. Att'y Gen. 261 (1889); 18 Op. Att'y Gen. 28 (1884); 16 Op. Att'y Gen. 523 (1880); 15 Op. Att'y Gen. 207 (1877); 14 Op. Att'y Gen. 563 (1875); 12 Op. Att'y Gen. 455 (1868); 12 Op. Att'y Gen. 32 (1866); 11 Op. Att'y Gen. 179 (1865); 10 Op.

ArtII.S2.C3.1
Overview of Recess Appointments Clause

The Supreme Court ultimately adopted a relatively broad interpretation of the Clause in *National Labor Relations Board v. Noel Canning*.[4] With respect to the meaning of the phrase "Recess of the Senate," the Court concluded that the phrase applied to both inter-session recesses and intra-session recesses. In so holding, the Court, finding the text of the Constitution ambiguous,[5] relied on (1) a pragmatic interpretation of the Clause that would allow the President to ensure the "continued functioning" of the federal government when the Senate is away,[6] and (2) "long settled and established [historical] practice" of the President making intra-session recess appointments.[7] The Court declined, however, to say how long a recess must be to fall within the Clause, instead holding that historical practice counseled that a recess of more than three days but less than ten days is "presumptively too short" to trigger the President's appointment power under the Clause.[8] With respect to the phrase "may happen," the majority, again finding ambiguity in the text of the Clause,[9] held that the Clause applied both to vacancies that first come into existence during a recess and to vacancies that initially occur before a recess but continue to exist during the recess.[10] In so holding, the Court again relied on both pragmatic concerns[11] and historical practice.[12]

Even under a broad interpretation of the Recess Appointments Clause, the Senate may limit the ability to make recess appointments by exercising its procedural prerogatives. The Court in *Noel Canning* held that, for the purposes of the Recess Appointments Clause, the Senate is in session when the Senate says it is, provided that, under its own rules, it retains the capacity to transact Senate business.[13] In this vein, *Noel Canning* provides the Senate with the means to prevent recess appointments by a President who attempts to employ the "subsidiary

Att'y Gen. 356 (1862); 4 Op. Att'y Gen. 523 (1846); 4 Op. Att'y Gen. 361 (1845); 3 Op. Att'y Gen. 673 (1841); 2 Op. Att'y Gen. 525 (1832); 1 Op. Att'y Gen. 631, 63334 (1823). For the early practice on recess appointments, *see* GEORGE HAYNES, THE SENATE OF THE UNITED STATES 77278 (1938).

[4] *Noel Canning*, at 522–50 (2014).

[5] *Id.* at 526–29. More specifically, the Court found nothing in dictionary definitions or common usage contemporaneous to the Constitution that would suggest that an intra-session recess was not a recess. The Court noted that, while the phrase "the Recess" might suggest limiting recess appointments to the single break between sessions of Congress, the word "the" can also be used "generically or universally," *see, e.g.*, U.S. CONST. art. I, § 3, cl. 5 (directing the Senate to choose a President pro tempore "in the Absence of the Vice-President"), and that there were examples of "the Recess" being used in the broader manner at the time of the founding. *Noel Canning*, at 526–29.

[6] *Noel Canning*, at 528. ("The Senate is equally away during both an inter-session and an intra-session recess, and its capacity to participate in the appointments process has nothing to do with the words it uses to signal its departure.").

[7] The Court noted that Presidents have made "thousands" of intra-session recess appointments and that presidential legal advisors had been nearly unanimous in determining that the clause allowed these appointments. *Id.* at 529.

[8] *Id.* at 538. The Court left open the possibility that some very unusual circumstance, such as a national catastrophe that renders the Senate unavailable, could require the exercise of the recess appointment power during a shorter break. *Id.*

[9] The Court noted, for instance, that Thomas Jefferson thought the phrase in question could point to both vacancies that "*may happen to be*" during a recess as well as those that "*may happen to fall*" during a recess. *Id.* at 539 (emphasis added).

[10] *Id.* at 518–20.

[11] *Id.* at 542–43 ("[W]e believe the narrower interpretation risks undermining constitutionally conferred powers [in that] . . . [i]t would prevent the President from making any recess appointment that arose before a recess, no matter who the official, no matter how dire the need, no matter how uncontroversial the appointment, and no matter how late in the session the office fell vacant.").

[12] *Id.* at 543 ("Historical practice over the past 200 years strongly favors the broader interpretation. The tradition of applying the Clause to pre-recess vacancies dates at least to President James Madison.").

[13] *Id.* In the context of *Noel Canning*, the Court held that the Senate was in session even during a pro forma session, a brief meeting of the Senate, often lasting minutes, in which no legislative business is conducted. *Id.* at 554–56. Because the Journal of the Senate (and the Congressional Record) declared the Senate in session during those periods, and because the Senate could, under its rules, have conducted business under unanimous consent (a quorum being presumed), the Court concluded that the Senate was indeed in session. In so holding, the Court deferred to the

method" for appointing officers of the United States (i.e., recess appointments) to avoid the "norm"[14] for appointment (i.e., appointment pursuant to the Article II, Section 2, Clause 2).[15]

ArtII.S2.C3.2 Recess Appointments of Article III Judges

Article II, Section 2, Clause 3:

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

Federal judges clearly fall within the terms of the Recess Appointments Clause, in the sense that the Clause broadly authorizes temporary appointments for "all Vacancies." Nonetheless, other constitutional provisions could suggest hesitation before applying the Clause to Article III judges—although historically, Presidents have in fact made recess appointments to Article III courts.[1] The constitutional concern stems from the fact that Article III judges are appointed "during good behavior," subject only to removal through impeachment.[2] A judge, however, who is given a recess appointment may be "removed" by the Senate's failure to advise and consent to his appointment; moreover, on the bench, prior to Senate confirmation, he or she may be subject to influence not felt by other judges. Although the Supreme Court has not considered this issue, some federal appeals courts have rejected constitutional attacks upon the status of federal judges given recess appointments.[3]

Section 3—Duties

ArtII.S3.1 The President's Legislative Role

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other*

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authority of Congress to "determine the Rules of its Proceedings," *see* U.S. Const. art. I, § 5, cl. 2, relying on previous case law in which the Court refused to question the validity of a congressional record. *Noel Canning*, at 555 (citing United States v. Ballin, 144 U.S. 1, 5 (1892)).

[14] *Noel Canning*, at 556–57.

[15] It should be noted that, by an act of Congress, if a vacancy existed when the Senate was in session, the ad interim appointee, subject to certain exceptions, may receive no salary until he has been confirmed by the Senate. 5 U.S.C. § 5503 (2012). By targeting the compensation of appointees, as opposed to the President's recess appointment power itself, this limitation acts as an indirect control on recess appointments, but its constitutionality has not been adjudicated. A federal district court noted that "if any and all restrictions on the President's recess appointment power, however limited, are prohibited by the Constitution," restricting payment to recess appointees might be invalid. Staebler v. Carter, 464 F. Supp. 585, 596 n.24 (D.D.C. 1979).

[1] *See generally*, *e.g.*, Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377 (2005).

[2] *See* ArtIII.S1.10.2.1 Overview of Good Behavior Clause.

[3] United States v. Woodley, 751 F.2d 1008, 1012 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048 (1986). Other cases holding that the President's power under the Recess Appointments Clause extends to filling judicial vacancies in Article III courts include United States v. Allocco, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963), and Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005). The opinions in the courts of appeals provide a wealth of data on the historical practice of giving recess appointments to judges, including the developments in the Eisenhower Administration, when three Justices, Earl Warren, William Brennan, and Potter Stewart, were so appointed and later confirmed after participation on the Court. The Senate in 1960 adopted a "sense of the Senate" resolution suggesting that the practice was not a good idea. 106 Cong. Rec. 18130–18145 (1960).

public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

The first two clauses of Article II, Section 3 relate to the President's legislative role. The first clause, directing the President to report to the Congress on the state of the union, imposes a duty rather than confers a power and serves as the formal basis of the President's legislative leadership. The President's legislative role has grown substantially since 1900. This development, however, reflects changes in political and social forces rather than any pronounced change in constitutional interpretation. The rise of parties and the accompanying recognition of the President as party leader, the appearance of the National Nominating Convention and the Party Platform, and the introduction of the Spoils System all contributed to the growth of the President's legislative role.[1] While certain pre-Civil War Presidents, mostly of Whig extraction, professed hesitation regarding "usurping" legislative powers,[2] still earlier Presidents—including George Washington, Thomas Jefferson, and Andrew Jackson—took a very different line, albeit less boldly and persistently than their later successors.[3] Today, there is no subject on which the President may not appropriately communicate to Congress, in as precise terms as he chooses, his conception of its duty. Conversely, the President is not obliged by this Clause to impart information which, in his judgment, should in the public interest be withheld.[4]

The second clause of Article II, Section 3 authorizes the President to convene or adjourn the Houses of Congress in certain circumstances. The President has frequently summoned both Houses into "extra" or "special sessions" for legislative purposes, and the Senate alone for the consideration of nominations and treaties. His power to adjourn the Houses has never been exercised.

ArtII.S3.2 Head of State

ArtII.S3.2.1 Early Doctrine on Receiving Ambassadors and Public Ministers

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

The third clause of Article II, Section 2 directs the President to "receive Ambassadors and other public ministers." An early opinion from Attorney General Caleb Cushing interpreted "Ambassadors and other public ministers" to encompass "all possible diplomatic agents which any foreign power may accredit to the United States."[1] According to John Bassett Moore in his famous International Law Digest, the term, as a practical construction of the Constitution, also

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[1] N. Small, Some Presidential Interpretations of the Presidency (1932); W. Binkley, The President and Congress (2d ed. 1962); Edward Corwin, Total War and the Constitution chs. 1, 7 (1946).

[2] Presidents William Harrison, James Polk, Zackary Taylor, and Millard Fillmore all fathered sentiments to this general effect. *See* 4 Messages and Papers of the Presidents 1860, 1864 (J. Richardson ed. 1896); 6 *id.* at 2513–19, 2561–62, 2608, 2615.

[3] *See* sources cited *supra*.

[4] Warren, *Presidential Declarations of Independence*, 10 B.U. L. Rev. 1 (1930).

[1] 7 Ops. Atty. Gen. 186, 209 (1855).

encompasses all foreign consular agents who may not exercise their functions in the United States without an exequatur from the President.[2] The power to "receive" ambassadors and other foreign diplomatic and consular agents includes the right to refuse to receive them, to request their recall, to dismiss them, and to determine their eligibility under our laws.[3]

During the United States' formative years, the Founders expressed differing views regarding the scope of the President's reception power. Writing in 1790, Thomas Jefferson stated that "[t]he transaction of business with foreign nations is executive altogether."[4] The function "belongs . . . to the head of that department, except as to such portions of it as are specially submitted to the Senate."[5] Thus, when Edmond-Charles Genet, envoy to the United States from the first French Republic, sought an exequatur for a consul whose commission was addressed to the Congress of the United States, then-Secretary of State Jefferson informed Genet that as the President was the only channel of communication between the United States and foreign nations, it was from him alone "that foreign nations or their agents are to learn what is or has been the will of the nation." [6] Secretary Jefferson accordingly returned the consul's commission and declared that the President would issue no exequatur to a consul except upon a commission correctly addressed.

Consistent with Jefferson's view, Congress later in 1798 passed An Act to Prevent Usurpation of Executive Functions, or the Logan Act, which prohibits U.S. citizens from engaging in unauthorized negotiations with foreign governments having a dispute with the United States.[7] Congress enacted the law in response to the actions of a Philadelphia Quaker named George Logan, who went to Paris on his own to negotiate with the French Government in an effort to avert war between France and the United States.[8] The next year, John Marshall, then a Member of the House of Representatives, defended President John Adams for delivering a fugitive from justice to Great Britain under the twenty-seventh article of the Jay Treaty rather than leaving the matter to the courts. In Marshall's view, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." Thus, according to Marshall, "the demand of a foreign nation can only be made on [the President]," and "any act to be performed by the force of the nation is to be performed through him."[9] Ninety-nine years later, a Senate Foreign Relations Committee took occasion to reiterate Marshall's doctrine with elaboration.[10]

In contrast, James Madison expressed a more limited view of the President's reception power. In his attack upon President George Washington's Proclamation of Neutrality in 1793 at the outbreak of war between France and Great Britain, Madison argued that all large

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[2] 5 John Bassett Moore, International Law Digest 15–19 (1906).

[3] *Id.* at 4:473–548; 5:19–32.

[4] *Opinion on the Question Whether the Senate Has the Right to Negative the Grade of Persons Appointed by the Executive to Fill Foreign Missions* (April 24, 1790) *in* 5 Writings of Thomas Jefferson 161, 162 (P. Ford ed., 1895).

[5] *Id.*

[6] 4 John Bassett Moore, *supra* note 2, at 680–81.

[7] This measure is now contained in 18 U.S.C. § 953.

[8] *See* Memorandum on the History and Scope of the Law Prohibiting Correspondence with a Foreign Government, S. Doc. No. 696, 64th Cong. (2d Sess. 1917). The author was Mr. Charles Warren, then Assistant Attorney General. Further details concerning the observance of the Logan Act are given in Edward Corwin, *supra* note 1, at 183–84, 430–31.

[9] 10 Annals of Cong. 596, 613–14 (1800). Marshall's statement is often cited, *e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318, 319 (1936), as if he were claiming sole or inherent executive power in foreign relations, but Marshall carefully propounded the view that Congress could provide the rules underlying the President's duty to extradite. When, in 1848, Congress did enact such a statute, the Court sustained it. Fong Yue Ting v. United States, 149 U.S. 698, 714 (1893)

[10] 9S. Doc. No. 56, 54th Congress, 2d Sess. (1897).

questions of foreign policy fell within the ambit of Congress, by virtue of its power to declare war. In support of this proposition, Madison disparaged the presidential function of reception, asserting that "little, if anything, more was intended by the [reception] clause, than to provide for a particular mode of communication, almost grown into a right among modern nations."[11] The Clause, in his view, did nothing more than "point[ ] out the department of the government" that is "most proper for the ceremony of admitting public ministers, of examining their credentials, and of authenticating their title to the privileges annexed to their character by the law of nations."[12] Accordingly, Madison concluded that "it would be highly improper to magnify the function into an important prerogative."[13] The right to receive ambassadors, in his view, did not grant the Executive the right to, for instance, recognize a new foreign government—a right that "belongs to the nation."[14]

In defending Washington's proclamation, Alexander Hamilton advocated for a broader view of the President's reception power. Writing under the pseudonym Pacificus, Hamilton opined that

> The right of the executive to receive ambassadors and other public ministers, may serve to illustrate the relative duties of the executive and legislative departments. This right includes that of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognized, or not; which, where a treaty antecedently exists between the United States and such nation, involves the power of continuing or suspending its operation . . . . This power of determining virtually upon the operation of national treaties, as a consequence of the power to receive public ministers, is an important instance of the right of the executive, to decide upon the obligations of the country with regard to foreign nations.[15]

In Hamilton's view, this right of the Executive, in certain cases, "to determine the condition of the nation" can sometimes "affect the exercise of the power of the legislature to declare war."[16] Nevertheless, Hamilton acknowledged that the Executive cannot control Congress's exercise of that power. In his view, however, "the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decision," such that the two braches share concurrent authorities in particular circumstances.[17]

Jefferson likewise did not officially support Madison's point of view. Writing about his July 10, 1793 conversation with Genet, Jefferson noted that he informed Genet that Congress was not the United States' sovereign. Instead, Congress was "sovereign in making laws only, the executive was sovereign in executing them, and the judiciary in construing them where they related to their department."[18] Thus, Jefferson explained to Genet, it is the President's—and not Congress's—responsibility "to see that treaties are observed," and that "the Constitution had made the President the last appeal" for his decisions related to treaties.[19]

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[11] 1 Letters and Other Writings of James Madison 611 (1865).

[12] *Id.*

[13] *Id.*

[14] Letters of Helvidius, 5 Writings of James Madison 133 (G. Hunt ed., 1905).

[15] Letter of Pacificus, No. 1, 7 Works of Alexander Hamilton 76, 82–83 (J. Hamilton ed., 1851).

[16] *Id.*

[17] *Id.*

[18] 4 J. Moore, *supra* note 2, at 680–81.

[19] *Id.*

History has largely affirmed Hamilton's view of the President's reception power. After reviewing the circumstances surrounding the United States' recognition of new states, governments, and belligerency before 1906, John Basset Moore observed that "[i]n every case, . . . the question of recognition was determined solely by the Executive."[20] The President's power to receive thus encompasses the power to recognize new states, communities claiming the status of belligerency, and changes of government in established states. By the same token, the power also encompasses the power to decline recognition, and thereby decline diplomatic relations with such new states or governments.[21]

ArtII.S3.2.2 Specific Cases on Receiving Ambassadors and Public Ministers

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*

The question concerning whether Congress shares with the President the right to recognize new states was prominently raised in connection with Cuba's successful struggle for independence. Beset by numerous legislative proposals of a more or less mandatory character, urging recognition upon the President, the Senate Foreign Relations Committee, in 1897, made an elaborate investigation of the subject. The Committee concluded in a memorandum that "[t]he executive branch is the sole mouthpiece of the nation in communication with foreign sovereignties," and that "[i]n the department of international law, . . . a Congressional recognition of belligerency or independence would be a nullity."[1]

The Committee reasoned that the recognition of independence or belligerency of a foreign power "is distinctly a diplomatic matter" evidenced "either by sending a public minister to the government thus recognized, or by receiving a public minister therefrom."[2] The reception of a foreign envoy, the Committee stated, "is the act of the President alone."[3] The next step of sending a public minister to the nation thus recognized, is likewise "primarily the act of the President."[4] The Committee noted that the Senate can take no part in the selection at all until the President has sent in a nomination, and upon such nomination, act "in its executive capacity, and, customarily, in 'executive session.'"[5] Because "[f]oreign nations communicate only through their respective executive departments," their legislative departments' resolutions upon diplomatic matters "have no status in international law." Thus, while

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[20] *Id* at 243–44. (noting that "In the case of the Spanish-American republics, of Texas, of Hayti, and of Liberia, the President, before recognizing the new state, invoked the judgment and cooperation of Congress; and in each of these cases provision was made for the appointment of a minister, which, when made in due form, constitutes, as has been seen, according to the rules of international law, a formal recognition. In numerous other cases, the recognition was given by the Executive solely on his own responsibility"), *See also* Restatement, Foreign Relations §§ 204, 205.

[21] *See* 4 J. Moore, *supra* note 2, at 243–44.

[1] S. Doc. No. 56, 54th Congress, 2d Sess. (1897), 20–22.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

Congress can help the Cuban insurgents by legislation in many ways, "it cannot help them legitimately by mere declarations, or by attempts to engage in diplomatic negotiations, if our interpretation of the Constitution is correct."[6]

Congress was able ultimately to bundle a clause recognizing the independence of Cuba, as distinguished from its government, into the declaration of war of April 11, 1898, against Spain. For the most part, the sponsors of the clause defended it by arguing that at that point, diplomacy had come to an end, after the President himself had appealed to Congress to provide a solution for the Cuban situation. In response, Congress was about to exercise its constitutional power of declaring war, and as part of the exercise of that power, it has the right to state the purpose of the war which it was about to declare.[7]

After Cuba, numerous presidents had occasions to exercise their power to recognize—or in some cases, not recognize—new foreign states or governments. The recognition of the Union of Soviet Socialist Republics in 1933, for instance, was an exclusively presidential act. President Woodrow Wilson, early in 1913, refused to recognize Provisional President José Victoriano Huerta as the de facto government of Mexico, thereby contributing materially to Huerta's downfall the year following. President Wilson also announced a general policy of nonrecognition of any government founded on acts of violence. While he observed this rule with considerable discretion, he consistently refused to recognize the Union of Soviet Socialist Republics, and his successors prior to President Franklin D. Roosevelt did the same. President Herbert Hoover's Administration similarly refused in 1932 to recognize the independence of the Japanese puppet state of Manchukuo. The People's Republic of China (PRC) likewise remained unrecognized from President Harry Truman's Administration until President Richard Nixon's de facto recognition through a 1972 visit, not long after the People's Republic of China was admitted to the United Nations and Taiwan excluded. President Jimmy Carter's official recognition of the PRC became effective on January 1, 1979.[8] The earlier nonrecognition of the PRC proved to be an important part of American foreign policy during the Cold War.[9]

ArtII.S3.2.3 Modern Doctrine on Receiving Ambassadors and Public Ministers

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other*

[6] *Id.*

[7] Senator Knute Nelson of Minnesota said: The President has asked us to give him the right to make war to expel the Spaniards from Cuba. He has asked us to put that power in his hands; and when we are asked to grant that power—the highest power given under the Constitution—we have the right, the intrinsic right, vested in us by the Constitution, to say how and under what conditions and with what allies that war-making power shall be exercised. 31 Cong. Rec. 3984 (1898).

[8] Joint Communique of the United States of America and the People's Republic of China (Jan. 1, 1979).

[9] President Carter's termination of the Sino-American Mutual Defense Treaty (SAM Defense Treaty) with Taiwan, which precipitated a constitutional and political debate, was perhaps an example of nonrecognition or more appropriately derecognition. The Supreme Court declined to hear a challenge to whether President Carter could unilaterally terminate the SAM Defense Treaty absent Senate consent. Goldwater v. Carter, 444 U.S. 996 (1979) (per curiam) (holding that the case was not justiciable). On recognition and nonrecognition policies in the post-World War II era, see Restatement, Foreign Relations, §§ 202, 203.

public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

The Supreme Court considered whether the President has the exclusive power to grant formal recognition to a foreign sovereign in *Zivotofsky v. Kerry*.[1] At issue in that case was a provision of the Foreign Relations Authorization Act that allowed United States citizens born in Jerusalem to list their place of birth as "Israel" in their passports.[2] This provision sought to override legislatively a State Department policy that instructed agency employees to list the place of birth for citizens born in Jerusalem as "Jerusalem" in passports because the United States did not recognize any country as having sovereignty over Jerusalem.[3]

After examining the historical practice related to recognition and other functional considerations, the Supreme Court held that the President retains exclusive authority over the recognition of foreign sovereigns and their territorial bounds.[4] Although Congress, pursuant to its enumerated powers in the field of foreign affairs, may properly legislate on matters which precede and follow a presidential act of recognition—including in ways which may undercut the policies that inform the President's recognition decision—it may not alter the President's recognition decision.[5]

ArtII.S3.3 Enforcer of Laws

ArtII.S3.3.1 Overview of Take Care Clause

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

The Constitution provides that the President "shall take Care that the Laws be faithfully executed . . . ." This duty potentially implicates at least five categories of executive power, including: (1) powers the Constitution confers directly upon the President by the opening and succeeding clauses of Article II; (2) powers that congressional acts directly confer upon the President; (3) powers that congressional acts confer upon heads of departments and other executive agencies of the federal government; (4) power that stems implicitly from the duty to enforce the criminal statutes of the United States; and (5) power to carry out the so-called "ministerial duties," regarding which an executive officer can exercise limited discretion as to the occasion or manner of their discharge. The following essays explore some of the questions raised by these executive powers, including how the President may exercise the powers which the Constitution or the statutes confer upon him, the relationship between the Take Care

[1] 576 U.S. 1 (2015).

[2] *Id.* at 7.

[3] *Id.*

[4] The Court identified the Reception Clause, along with additional provisions in Article II, as providing the basis for the Executive's power over recognition. *Id.* at 11–15.

[5] *See Zivotofsky*, 576 U.S. at 29–30. While observing that Congress may not enact a law that directly contradicts a presidential recognition decision, the Court stated that Congress could still express its disagreement in multiple ways: For example, it may enact an embargo, decline to confirm an ambassador, or even declare war. But none of these acts would alter the President's recognition decision. *Id.* at 30

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Overview of Take Care Clause

Clause and the President's power to remove—and thus supervise—those who wield executive power on his behalf, and the extent to which Congress can direct the actions of executive officials.

ArtII.S3.3.2 Who Can Fulfill the Take Care Duty

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*

Whereas the British monarch is constitutionally required to always act through agents if his acts are to receive legal recognition, the President is presumed to exercise certain of his constitutional powers personally. In an 1855 opinion, Attorney General Caleb Cushing identified several such examples, including the President's granting of reprieves and pardons for offenses against the United States and his role as "the supreme commander in chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States."[1] According to Cushing, the President's power as Commander in Chief is "constitutionally inherent in the person of the President" such that "[n]o act of Congress, no act even of the President himself, can, by constitutional possibility, authorize or create any military officer not subordinate to the President."[2]

Moreover, according to Cushing, the President's obligation to act personally may be sometimes enlarged by statute. The act organizing the President with other designated officials into "an Establishment by name of the Smithsonian Institute," in Cushing's view, is one such example. Cushing also believed that expenditures from the "secret service" fund, in order to be valid, must be vouched for by the President personally.[3] On like grounds the Supreme Court once held void a court martial decree because it was not specifically approved by the President as required by the 65th Article of War.[4] The Court, however, has effectively overruled this case, and at any rate such cases are exceptional.[5]

Over time, the general rule that developed is that when any duty is cast by law upon the President, it may be exercised by him through the head of the appropriate department, whose acts, if performed within the law, become the President's acts.[6] In *Williams v. United States*,[7] for instance, the Supreme Court considered a statute that prohibited the advance of public

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[1] 7 Ops. Atty. Gen. 453, 464–65 (1855).

[2] *Id.*

[3] *Cf.* 2 Stat. 78. The provision has long since dropped out of the statute book.

[4] Runkle v. United States, 122 U.S. 543 (1887).

[5] *Cf.* In *In re Chapman*, 166 U.S. 661, 670–671 (1897), the Supreme Court held that presumptions in favor of official action preclude collateral attack on the sentences of courts-martial. *See also* United States v. Fletcher, 148 U.S. 84, 88–89 (1893); Bishop v. United States, 197 U.S. 334, 341–42 (1905), both of which in effect repudiate *Runkle*.

[6] In exercising his or her executive power under the Constitution, the President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. The heads of the departments are the President's authorized assistants in the performance of the his or her executive duties, and their official acts, promulgated in the regular course of business, are presumptively the President's acts. Wilcox v. McConnel, 38 U.S. (13 Pet.) 498, 513 (1839). *See also* United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842); Williams v. United States, 42 U.S. (1 How.) 290, 297 (1843); United States v. Jones, 59 U.S. (18 How.) 92, 95 (1856); The Confiscation Cases, 87 U.S. (20 Wall.) 92 (1874); United States v. Farden, 99 U.S. 10 (1879); Wolsey v. Chapman, 101 U.S. 755 (1880).

[7] 42 U.S. (1 How.) 290 (1843).

money in any case whatsoever to disbursing officers of the United States, except under special direction by the President.[8] The Supreme Court held that the act did not require the personal performance by the President of this duty.[9] Such a practice, said the Court, would "absorb the duties of the various departments of the government in the personal acts of one chief executive officer" and be not just impracticable but "impossible."[10] While "[t]he President's duty in general requires his superintendence of the administration," the Court reasoned that "he cannot be required to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services" which he is technically required by the Constitution and applicable laws to perform.[11] As a matter of administrative practice, in fact, most orders and instructions are attributed to the heads of the departments, even though such orders and instructions are based on powers conferred by statute on the President.[12]

ArtII.S3.3.3 Relationship Between Take Care Clause and President's Removal Power

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*

As the Supreme Court has observed, the Constitution vests all executive power in the President, who must "take Care that laws be faithfully executed."[1] Because no single person could fulfill that responsibility alone, the Court notes, "the Framers expected that the President would rely on subordinate officers for assistance."[2] As a result, the Court reasoned that "[t]he President's power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II."[3]

Some early views of the President's removal power grounds this authority in large part in the Take Care Clause. In a 1789 debate in the First Congress concerning whether the Constitution authorizes the President to remove Executive Branch officers unilaterally, for instance, Representative James Madison expressed the view that the heads of certain executive departments should be removable by the President alone. According to him, it was "the intention of the Constitution, expressed especially in the faithful execution clause, that the first magistrate should be responsible" for the executive department, and this responsibility carried with it the power to "inspect and control" the conduct of subordinate

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[8] 3 Stat. 723 (1823), now covered in 31 U.S.C. § 3324.

[9] *See Williams*, 42 U.S. at 297.

[10] *Id.*

[11] 942 U.S. (1 How.) at 297–98.

[12] *See* 38 Ops. Atty. Gen. 457, 458 (1936). If the President exercises his or her duty through subordinates, the President must appoint them or appoint the officers who appoint them, Buckley v. Valeo, 424 U.S. 1, 109–143 (1976), and he or she must have the power to discharge those officers in the Executive Branch, Myers v. United States, 272 U.S. 52 (1926).

[1] Seila Law LLC v. Consumer Financial Protection Bureau, No. 19-7, slip op. 2 (U.S. 2020).

[2] *Id.*

[3] *Id.*

Executive Officers.[4] Vesting removal power in the Senate jointly with the President would, in Madison's view, "abolish at once the great principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good."[5]

Over time, however, as the Supreme Court refined its jurisprudence on the President's removal power, it came to characterize the basis of this power as stemming more generally from separation of power principles embedded in the Constitution's scheme, as evidenced by provisions including the Vesting Clause, Take Care Clause, and the Appointment Clause.[6]

ArtII.S3.3.4 Removal Power as the President's Primary Means of Supervision

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*

If the President's duty to "take care" that laws are faithfully executed in part provides the basis for his authority to remove the principal officers who wield executive power on his behalf, a related question is whether such duty also entitles the President to substitute his own judgment for that of such principal officers regarding the discharge of such duty.[1] Put another way, does the Take Care Clause allows Congress to vest, in a head of an executive department, certain discretion which the President is not entitled to control, such that the President's only means of supervision is through the exercise of his removal authority?

An 1823 opinion rendered by Attorney General William Wirt asserted the proposition that the President's duty under the Take Care Clause generally required him to do no more than exercise his removal authority when those subordinate officers failed to discharge their duty to execute the laws faithfully, including by removing them or by setting in motion against them the processes of impeachment or of criminal prosecutions.[2]

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[4] 1 Annals of Cong. 495, 499 (1789). For more information about the 1789 debate, also known as the "decision of 1789", see ArtII.S2.C2.3.15.2 Decision of 1789 and Removals in Early Republic.

[5] *Id.* Shortly thereafter, however, when the question arose as to the power of Congress to regulate the tenure of the Comptroller of the Treasury, Madison assumed a very different position. He conceded in effect that this office was to be an arm of certain of Congress's own powers and should therefore be protected against the President's removal power. *Id.* at 611–612. In *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803), Justice John Marshall drew a parallel distinction between the duties of the Secretary of State under the original act which had created a "Department of Foreign Affairs" and those which had been added by a later act. *Id.* at 166. The former duties were, according to Chief Justice Marshall, entirely political and thus must "conform precisely to the will of the President." *Id.* The latter duties, on the other hand, were exclusively of statutory origin and sprang from the powers of Congress. *Id.* Chief Justice John Marshall reasoned that with respect to these duties, the Secretary was "an officer of the law" and "amenable to the law for his conduct," suggesting that Congress may exercise certain removal power over Executive Officers.

[6] For a detailed discussion of the President's removal power and the evolution in its interpretation, see ArtII.S3.3.1 Overview of Take Care Clause through ArtII.S2.C2.3.15.7 Twenty-First Century Cases on Removal.

[1] For more information about the distinction between principal and inferior executive officers, see ArtII.S2.C2.3.11.1 Overview of Principal and Inferior Officers through ArtII.S2.C2.3.11.3 Modern Doctrine on Principal and Inferior Officers.

[2] 1 Ops. Atty. Gen. 624 (1823). See also B. Wyman, The Principles of the Administrative Law Governing the Relations of Public Officers 231–32 (1903) (describing the case of the Jewels of the Princess of Orange, in which the King of the Netherlands requested the return of certain jewels belonging to the Princess of Orange that were allegedly illegally imported into the United States and later seized by officers of the United States Customs; then Attorney General Roger Taney expressed the view that while the President may order the District Attorney to discontinue a prosecution,

In its 1838 decision *Kendall v. United States ex rel. Stokes*,[3] the Supreme Court agreed that the President's Take Care duty does not foreclose the possibility that Congress may entrust the construction of its statutes to an executive officer other than the President. In that case, the United States owed several mail carriers, who had performed services under contract, money. When Postmaster General Amos Kendall, at President Andrew Jackson's instigation, refused to pay it, Congress passed a special act ordering payment.[4] When Kendall continued to refuse to pay, the mail carriers sued and obtained a mandamus in the United States circuit court for the District of Columbia. The lower court concluded that the duty of the President under the Take Care Clause gave him no other control over the officer than to see that he acts honestly, with proper motives, but no power to construe the law and see that the executive action conforms to it.[5]

The Supreme Court affirmed, rejecting the argument every officer in the Executive Branch is under the exclusive direction of the President.[6] The Court noted that while there are "certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President," it would be "an alarming doctrine" to hold "that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution."[7] In such cases, the Court continued, "the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President."[8] This was especially the case, the Court added, "where the duty enjoined is of a mere ministerial character."[9] In short, the Court recognized the underlying question of the case to be whether the President's duty to "take Care that the Laws be faithfully executed" made it constitutionally impossible for Congress ever to entrust the construction of its statutes to anybody but the President, and it answered this in the negative.

ArtII.S3.3.5 Interpretations of Law as Part of the President's Take Care Duties

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*

Because the interpretation of law and its scope is a necessary prerequisite to any enforcement action, the precise scope of the President's authority to "take Care that the laws be faithfully executed" is informed and shaped by this interpretive task. The power accruing to

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the decision to comply resides with the District Attorney, and in the event he "still continues a prosecution which the President is satisfied ought not to continue, the removal of the disobedient officer and the substitution of one more worthy in his place would enable the President through him faithfully to execute the law.").

[3] 37 U.S. (12 Pet.) 524 (1838).

[4] *See id.* at 528.

[5] *See id.* at 543.

[6] *See id.* at 610.

[7] *Id.*

[8] *Id.*

[9] *Id.*

the President from such interpretations is daily illustrated in relation to such statutes as the Anti-Trust Acts, the Taft-Hartley Act, and many other statutes.

Nor is this interpretive task the whole story. Not only do all presidential regulations and orders based on statutes that vest power in him or on his own constitutional powers have the force of law, provided they do not transgress the Supreme Court's reading of such statutes or of the Constitution,[1] but in several early cases, the Supreme Court has suggested that the President can sometimes make law in a more special sense. In the famous *Neagle* case,[2] an order of the Attorney General to a United States marshal to protect a Justice of the Supreme Court whose life has been threatened by a suitor was attributed to the President and held to be "a law of the United States" in the sense of section 753 of the Revised Statutes, and as such to afford basis for a writ of habeas corpus transferring the marshal, who had killed the attacker, from state to national custody. Speaking for the Court, Justice Samuel Miller inquired: "Is this duty [the duty of the President to take care that the laws be faithfully executed] limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?"[3] The Court assumed an affirmative answer to the second branch of this inquiry, after noting several historical precedents.[4] And, in *United States v. Midwest Oil Co.*,[5] the Court ruled that the President had, by dint of repeated assertion of it from an early date, acquired the right to withdraw, via the Land Department, public lands, both mineral and non-mineral, from private acquisition, particularly given that Congress had never repudiated the practice.[6]

ArtII.S3.3.6 The President's Take Care Duties and International Law

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*

The President's duty to discharge the responsibilities of the United States in international law raises unique foreign relations considerations. One example of a significant exercise of the President's powers in this context was the closure of the Marconi Wireless Station at Siasconset, Massachusetts, by President Woodrow Wilson—in effort to avoid difficulties with other foreign governments—on the outbreak of the European War in 1914, after the company

[1] United States v. Eliason, 41 U.S. (16 Pet.) 291, 301–02 (1842); Kurtz v. Moffitt, 115 U.S. 487, 503 (1885); Smith v. Whitney, 116 U.S. 167, 180–81 (1886). For an analysis of the approach to determining the validity of presidential, or other executive, regulations and orders under purported congressional delegations or implied executive power, *see* Chrysler Corp. v. Brown, 441 U.S. 281, 301–16 (1979).

[2] *In re* Neagle, 135 U.S. 1 (1890).

[3] 135 U.S. at 64. The phrase, "a law of the United States," came from the Act of March 2, 1833 (4 Stat. 632). However, in the Act of June 25, 1948, 62 Stat. 965, 28 U.S.C. § 2241(c)(2), the phrase is replaced by the term, "an act of Congress," thereby eliminating the basis of the holding in *Neagle*.

[4] *Neagle*, 135 U.S. at 64–65.

[5] 236 U.S. 459 (1915). *See also* Mason v. United States, 260 U.S. 545 (1923).

[6] *See Midwest Oil*, 236 U.S. at 471–72.

refused to assure that it would comply with naval censorship regulations. Justifying this drastic invasion of private rights, Attorney General Thomas Gregory said:

> The President of the United States is at the head of one of the three great coordinate departments of the Government. He is Commander in Chief of the Army and the Navy. . . . If the President is of the opinion that the relations of this country with foreign nations are, or are likely to be endangered, by action deemed by him inconsistent with a due neutrality, it is his right and duty to protect such relations; and in doing so, in the absence of any statutory restrictions, he may act through such executive office or department as appears best adapted to effectuate the desired end. . . . I do not hesitate, in view of the extraordinary conditions existing, to advise that the President, through the Secretary of the Navy or any appropriate department, close down, or take charge of and operate, the plant . . . should he deem it necessary in securing obedience to his proclamation of neutrality.[1]

ArtII.S3.3.7 Impounding Appropriated Funds

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*

The Take Care Clause has figured in debates between the political branches over the Executive Branch practice of impounding appropriated funds. No definition for this term exists in statute or in Supreme Court case law. One possible definition, though, describes Executive Branch action or inaction that results in a delay or refusal to spend appropriated funds, whether or not a statute authorizes the withholding.

It is difficult to state with certainty how frequently the Executive Branch has used impoundment. In perhaps the earliest example, President Thomas Jefferson delayed spending funds appropriated in 1803 for the purchase of gun boats, a response to international tensions concerning the port of New Orleans.[1] After Congress made the funds available, the President negotiated the Louisiana Purchase, rendering the immediate use of the gun-boat appropriation "unnecessary."[2] Presidents in the nineteenth[3] and twentieth centuries[4] similarly signaled a willingness to delay or withhold spending appropriated funds.

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[1] 30 Ops. Atty. Gen. 291 (1914).

[1] *See* Sally K. & William D. Reeves, *Two Hundred Years of Maritime New Orleans: An Overview*, 35 Tul. Mar. L.J. 183, 186 (2010) (describing the Spanish intendant's refusal to allow American use of the port of New Orleans before its acquisition by the United States).

[2] 10 The Works of Thomas Jefferson in Twelve Volumes 41 (Paul L. Ford ed., 1905) (Third Annual Message to Congress). The next year, President Jefferson reported that the appropriation was slated for use. *See Id.* at 115 (Fourth Annual Message to Congress) (stating that the 1803 appropriation "is now in a course of execution to the extent there provided for").

[3] *See, e.g.*, Ulysses S. Grant, Special Message to the House of Representatives (Aug. 14, 1876), *reprinted in* 7 A Compilation of the Messages and Papers of the Presidents: 1789–1897, at 377 (James D. Richardson, ed., 1898) (asserting that though he approved of an act providing appropriations for river and harbor projects, no funds would be spent on projects that served "purely private or local interest" as opposed to national interests).

[4] *See, e.g.*, H.R. Doc. No. 89–492, at 4 (1966) (message from President Lyndon B. Johnson stating that, as a means of controlling inflation, his Administration would withhold sums appropriated above the levels set forth in the

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Impoundments usually proceeded on the view that an appropriation sets a ceiling on spending for a particular purpose but typically did not mandate that all such sums be spent.[5] According to this view, if that purpose could be accomplished by spending less than the appropriation's total amount, there would be no impediment in law to realizing savings.[6] Impoundments were also justified on the ground that a statute, other than the appropriation itself, authorized the withholding.[7]

Executive impoundment reached its apex under President Richard Nixon, who employed impoundment more frequently than his predecessors.[8] Often, his Administration justified impoundments by stating that different funding levels,[9] or different funding models,[10] were preferable to the ones that Congress had selected when it appropriated the funds.

The Nixon impoundments were scrutinized in congressional hearings.[11] Members of Congress likened the impoundments to an unconstitutional assertion of a line-item veto.[12] By withholding funding for a program, these Members argued, the President could modify or terminate the program without having to veto formally the entire act that made the withheld funds available.[13] Administration officials, on the other hand, located the President's authority to impound funds in, among other places, the Take Care Clause.[14] These officials argued that the President's duty to ensure faithful execution of the laws was not confined to mechanically spending the funds provided in a particular appropriation. Instead, the President had to "consider all the laws" that bore on fiscal policy (e.g., statutes allegedly bearing on inflation)

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administration's budget request); Budget of the United States Government For The Fiscal Year Ending June 30, 1943, at IX (1942) (relaying President Franklin D. Roosevelt's plan to restrict expenditures for certain civilian construction projects so as to focus on the war effort).

[5] *See* H.R. Exec. Doc. No. 44–23, at 2 (1876) (report of Secretary of War James Cameron arguing that spending "the full amount" of an appropriation "was in no way mandatory").

[6] Presidential Authority to Direct Departments and Agencies to Withhold Expenditures from Appropriations Made, 1 Op. O.L.C. Supp. 12, 16 (1937). In 1950, Congress authorized the use of reserves to realize savings. *See* General Appropriations Act of 1951, ch. 896, § 1211, 64 Stat. 595, 765–66 (1950).

[7] Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary, 92nd Cong. 96 (1971) [hereinafter *1971 Impoundment Hearings*] (statement of C. Weinberger, Deputy Director, Off. of Mgmt. & Budget, Exec. Off. of the President) (asserting that to stay within the statutory debt limit President Eisenhower directed that fiscal year (FY) 1958 spending not exceed FY1957 levels).

[8] Josh Chafetz, Congress's Constitution: Legislative Authority and the Separation of Powers 64 (2017) (noting estimates of $18 billion in Nixon-era withholdings and scholarly opinion that the extent of these impoundments constituted "a difference in kind, not simply in degree," from prior impoundments).

[9] Withholding of Funds for Housing and Urban Development Programs, Fiscal Year 1971, 92nd Cong. 163, 165 (1971) (statement of George Romney, Sec. of Transp.) (explaining that the administration did not "intend to accelerate" grant programs it had "scheduled for termination" and that therefore "extra" funds provided by Congress for one fiscal year would not be spent until the next).

[10] Letter to Rep. Clement J. Zablocki, U.S. House of Representatives, from Caspar W. Weinberger, Deputy Director, Office of Management and Budget (Mar. 9, 1971), *reprinted in* 1971 Impoundment Hearings, *supra* note 7, at 310 (urging that sums the administration was withholding from infrastructure categorical grant programs be repurposed for a revenue sharing program).

[11] This congressional interest eventually resulted in the Congressional Budget and Impoundment Control Act of 1974, which establishes the statutory framework that today governs the delay or withholding of budget authority. *See* Pub. L. No. 93-344, Title X, 88 Stat. 297, 332 (1974).

[12] For a discussion of line-item vetoes, see ArtI.S7.C2.3 Line Item Veto.

[13] *See, e.g.*, Impoundment of Appropriated Funds by the President, Joint Hearings Before the Ad Hoc Subcomm. on Impoundments of Funds of the S. Comm. on Gov't Ops. and the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary, 93d Cong. 59 (1973) (statement of Sen. Hubert H. Humphrey).

[14] Officials also argued that, acting under his foreign affairs or Commander in Chief powers, the President could withhold spending in these areas. *See Id.* at 271 (statement of Roy L. Ash, Director-Designate, Off. of Mgmt. & Budget, Exec. Off. of the President).

and accommodate the "purposes" of these other laws when deciding whether to spend all, or only some, of the funds appropriated for a particular program.[15]

The constitutional dimensions of impoundment disputes have been confined to the political branches. The Supreme Court has not directly considered the extent of the President's constitutional authority, if any, to impound funds.[16] However, a case decided in 1838, *United States v. Kendall*,[17] has been cited as standing for the proposition that the President may not direct the withholding of certain appropriations that, by their terms, mandate spending.[18]

In that case, the Court considered a statute directing one official (the Solicitor of the Treasury) to determine amounts the government owed to a mail contractor.[19] A second official (the Postmaster General) was then required to credit the contractor's account according to the Solicitor's findings.[20] The Postmaster General refused to make the full credit.[21] When the contractor then asked the federal courts to order that the full credit be made, the Postmaster General responded that only the President could control his execution of the law.[22] The Court rejected that argument. The President's duty to see that the laws be faithfully executed did not include the power to forbid the execution of a law requiring a precise, definite action, such as updating Post Office accounts to reflect the Solicitor's credit findings.[23]

ArtII.S3.4 Executive Privilege

ArtII.S3.4.1 Overview of Executive Privilege

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*

The doctrine of executive privilege defines the authority of the President to withhold documents or information in his possession or in the possession of the Executive Branch from the Legislative or Judicial Branch of the government. While the Constitution does not expressly confer upon the Executive Branch any such privilege, the Supreme Court has held that executive privilege derives from the constitutional separation of powers and from a necessary and proper concept respecting the carrying out of the duties of the presidency

[15] *See id.* at 372, 381 (testimony of Joseph T. Sneed, Deputy Att'y Gen. of the United States).

[16] The Supreme Court resolved one impoundment-related dispute on statutory grounds. *See* Train v. City of New York, 420 U.S. 35, 43–44 (1975).

[17] 37 U.S. 524 (1838).

[18] *See, e.g.*, The President's Veto Power, 12 U.S. Op. Off. Legal Counsel 128, 167 (1988) (noting that the Supreme Court has not recognized "an inherent power to impound" and that *Kendall* "can be read to support the proposition that the executive's duty faithfully to execute the laws requires it to spend funds at the direction of Congress"). *Kendall* did not involve foreign affairs or defense duties, where additional considerations might apply for determining the President's authority to engage in impoundment.

[19] An Act for the Relief of William B. Stokes, Richard C. Stockton, Lucius W. Stockton, and Daniel Moore, ch. 284, 6 Stat. 665 (1836)

[20] *Id.*

[21] *Kendall*, 37 U.S. at 611.

[22] *Id.* at 612–13.

[23] *Id.*

ArtII.S3.4.1
Overview of Executive Privilege

imposed by the Constitution.[1] Although there are various and distinct components to executive privilege,[2] the privilege's foundation lies in the proposition that in making judgments and reaching decisions, the President and his advisors must be free to discuss issues candidly, express opinions, and explore options without fear that those deliberations will later be made public.[3]

Conceptually, the doctrine of executive privilege may well reflect different considerations in different factual situations. Congress may seek information within the possession of the President in the course of exercising its investigatory powers;[4] government prosecutors may seek information in the course of investigating and prosecuting crimes;[5] and private parties may seek information in the possession of the President for use as evidence in either a criminal or civil proceeding.[6] In all of these contexts, the courts have generally assessed any asserted privilege by weighing the President's need for confidentiality against the interests of the party seeking the information.[7]

Today, it is apparent that executive privilege is qualified rather than absolute. For the vast majority of U.S. history, however, the existence and appropriate scope of the privilege was uncertain and nearly untouched by the courts.[8] Chief Justice John Marshall referred to the confidentiality of presidential communications in *Marbury v. Madison* and during the treason trial of former Vice President Aaron Burr,[9] but in "neither instance [ ] was Marshall forced to definitively decide whether such a presidential privilege existed and if so, in what form."[10] In fact, the judiciary's involvement in addressing the privilege's use in resisting disclosure in the face of either judicial or legislative subpoenas did not begin in earnest until the 1970s and the Administration of Richard Nixon.[11] Prior to the Nixon era, executive privilege's contours were defined, if at all, by historical practice and the actions and interpretations of Congress and the President. And with little further explication coming from the Supreme Court since, the Nixon era remains the defining era of judicial consideration of the privilege.

This lack of judicial involvement is most pronounced in the context of executive privilege disputes between Congress and the President. The Supreme Court has never directly considered the application of executive privilege in the context of a congressional

[1] *See* United States v. Nixon, 418 U.S. 683, 711 (1974) ("Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.").

[2] See CRS Report R47102, Executive Privilege and Presidential Communications: Judicial Principles, by Todd Garvey at 3–5.

[3] *Id.* at 708.

[4] *See, e.g.,* Senate Select Comm. On Presidential Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974).

[5] *See, e.g., Nixon*, 418 U.S. at 686.

[6] *See, e.g.,* Dellums v. Powell, 561 F.2d 242 (D.C. Cir. 1977).

[7] *Nixon*, 418 U.S. at 707.

[8] *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977).

[9] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169–70 (1803) (suggesting that "[t]he intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation"); United States v. Burr, 25 F. Cas. 30, 37 (noting that if a letter to President Jefferson "does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed").

[10] *In re* Sealed Case, 121 F.3d 729, 738 (D.C. Cir. 1997).

[11] *Id.* at 739–40 ("[I]t was not until the 1970s and Watergate-related lawsuits seeking access to President Nixon's tapes as well as other materials that the existence of the presidential privilege was definitively established as a necessary derivation from the President's constitutional status in a separation of powers regime."); *see also Id.* at 742 ("These lawsuits, referred to generically as the Nixon cases, remain a quarter century later the leading—if not the only—decisions on the scope of the presidential communications privilege.").

investigation.[12] Lower federal court decisions are similarly scarce. The only appellate-level decision to reach the merits of an executive privilege dispute between Congress and a sitting President occurred nearly 50 years ago.[13] In light of this near judicial vacuum, the historical actions and interpretations of the branches necessarily play a significant role in establishing the meaning of executive privilege.

ArtII.S3.4.2 Defining Executive Privileges

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*

There is not a single "executive privilege." Instead, a suite of distinct privileges exist, each of different—though sometimes overlapping—scope.[1] The political branches, in support of their often competing interests and priorities, have adopted somewhat divergent views on these different component privileges. Whereas Congress has generally interpreted executive privilege narrowly, limiting its application to the types of presidential, national security, and diplomatic communications referenced by judicial decisions,[2] the Executive Branch has historically viewed executive privilege more broadly, providing protections to different categories of documents and communications that implicate Executive Branch confidentiality interests.[3] Under the Executive Branch's interpretation, these privileges include

- the *State Secrets Privilege*, which protects certain military, diplomatic, and national security information;[4]

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[12] The Supreme Court recently issued an opinion addressing congressional subpoenas for presidential records, but that case did not involve an assertion of executive privilege. *See* Trump v. Mazars USA, LLP, No. 19-760, slip op. at 5 (U.S. July 9, 2020) ("The President did not, however, resist the subpoenas by arguing that any of the requested records were protected by executive privilege."); *Id.* at 2 ("We have never addressed a congressional subpoena for the President's information.").

[13] *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). The D.C. Circuit recently reached the merits of a dispute between the House and a *former* President. Trump v. Thompson, 20 F.4th 10 (D.C. Cir. 2021), *cert. denied*, No. 21A272, slip op. (U.S. Jan. 20, 2022) (2022).

[1] *In re* Sealed Case, 121 F.3d at 736 (noting that "executive officials have claimed a variety of privileges to resist disclosure of information"). *See also* John E. Bies, *Primer on Executive Privilege and the Executive Branch Approach to Congressional Oversight*, Lawfare (June 16, 2017) ("[A] review of Executive Branch practice identifies a number of categories of information that the Executive Branch, at least, believes may be protected by an invocation of the privilege."), https://www.lawfareblog.com/primer-executive-privilege-and-executive-branch-approach-congressional-oversight.

[2] *See* H. Comm. on Oversight and Gov't Reform, 110th Cong., Rep. on President Bush's Assertion of Executive Privilege in Response to the Committee Subpoena to Attorney General Michael B. Mukaskey 8 (Comm. Print 2008) (rejecting an executive privilege claim on the grounds that "[t]he Attorney General did not cite a single judicial decision recognizing this alleged privilege"); H.R. Rep. No. 105–728, at 16 n. 43 (1998) ("As the D.C. Circuit has recently held, the doctrine of executive privilege which arises from the constitutional separation of powers applies only to decisionmaking of the President. Since the subject of the Committee's subpoena is not one that does (or legally could) involve Presidential decisionmaking, no constitutional privilege could be invoked here.") (citations omitted)).

[3] *See* Dep't of Justice, Office of Legal Counsel, Assertion of Executive Privilege Over Documents Generated in Response to Congressional Investigation into Operation Fast and Furious, 8 Op. O.L.C. 101, 116 (2012) ("The scope of executive privilege includes several related areas in which confidentiality within the Executive Branch is necessary for the effective execution of the laws.").

[4] *Id.* at 116–17.

- the *Presidential Communications Privilege*, which generally protects confidential communications between the President and his advisers that relate to presidential decisionmaking, as well as a certain subset of communications not involving the President but that are still made for purposes of advising the President;[5]
- the *Deliberative Process Privilege*, which protects pre-decisional and deliberative communications within Executive Branch agencies;[6] and
- the *Law Enforcement Privilege*, which protects the contents of open (and sometimes closed) law enforcement files, including communications related to investigative and prosecutorial decisionmaking.[7]

The Executive Branch has tended to consolidate these various privileges into one "executive privilege," particularly when responding to congressional investigative requests.[8] Congressional committees, on the other hand, have typically distinguished among the different individual privileges.[9]

The executive privileges may appropriately be treated as distinct, not only because of the different communications they protect, but also because the privileges appear to arise from different sources of law, with some more firmly established in judicial precedent than others. In short, the different privileges apply with different strengths and, in the congressional context, are balanced against Congress's Article I powers differently. For example, courts have "traditionally shown the utmost deference" to presidential claims of a need to protect military or diplomatic secrets.[10] The President's more generalized interest in the confidentiality of his other communications, though arising implicitly from the Constitution, has not been "extended this high degree of deference."[11] Because the other privileges have been given less weight, they are assessed differently in the face of an exercise of Congress's investigative powers. For example, when compared to the Presidential Communications Privilege, the Deliberative Process Privilege is more easily overcome by Congress and "disappears altogether when there is any reason to believe government misconduct occurred."[12] Its legal source also appears to be different from the Presidential Communications Privilege, as it arises "primarily" from the

[5] *Id.* at 116.

[6] *See* Dep't of Justice, Office of Legal Counsel, Assertion of Executive Privilege Over Documents Generated in Response to Congressional Investigation into Operation Fast and Furious, 36 Op. O.L.C. 1 (2012).

[7] *See* Dep't of Justice, Office of Legal Counsel, Protective Assertion of Executive Privilege Over Unredacted Mueller Report and Related Investigative Files, 43 Op. O.L.C. 374 (2019).

[8] *See* 8 Op. O.L.C. 101, 116 (reasoning that "[t]he scope of executive privilege includes several related areas"); 13 Op. O.L.C. 153, 154 (reasoning that "the Executive Branch's interest in keeping the information confidential" is "usually discussed in terms of 'executive privilege'").

[9] *See* H. Comm. on Oversight and Gov't Reform, 110th Cong., Rep. on President Bush's Assertion of Executive Privilege in Response to the Committee Subpoena to Attorney General Michael B. Mukaskey 8 (Comm. Print 2008) ("The Attorney General's argument that the subpoena implicates the 'law enforcement component' of executive privilege is equally flawed. There is no basis to support the proposition that a Law Enforcement Privilege, particularly one applied to closed investigations, can shield from congressional scrutiny information that is important for addressing congressional oversight concerns. The Attorney General did not cite a single judicial decision recognizing this alleged privilege."); H.R. Rep. No. 105–728, at 16 n. 43 (1998) ("As the D.C. Circuit has recently held, the doctrine of executive privilege which arises from the constitutional separation of powers applies only to decisionmaking of the President. Since the subject of the Committee's subpoena is not one that does (or legally could) involve Presidential decisionmaking, no constitutional privilege could be invoked here.") (citations omitted).

[10] United States v. Nixon, 418 U.S. 683, 710 (1974).

[11] *Id.* at 711.

[12] *In re* Sealed Case, 121 F.3d 729, 746 (D.C. Cir. 1997). Given its broad scope, the Deliberative Process Privilege is "the most frequent form of executive privilege raised." *Id.* at 737.

common law,[13] but may have a "constitutional dimension."[14] Least potent are those executive privileges that arise purely from the common law, which have generally been viewed, at least by Congress, as legally insufficient to justify noncompliance with a congressional subpoena.[15]

ArtII.S3.4.3 State Secrets Privilege

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*

In civil cases, the government may invoke the State Secrets Privilege to ensure the government is not forced to reveal military or other secrets. By contrast, in criminal cases, the Sixth Amendment guarantees a defendant compulsory process to obtain witnesses, and the Due Process Clause of the Fifth Amendment guarantees access to relevant exculpatory information in possession of the prosecution.[1] Generally speaking, when a judicial order directs the prosecution to provide information to a defendant that the prosecution does not wish to make available, the prosecution has the option of dropping the prosecution to avoid disclosure.[2]

In 1876, the Supreme Court first recognized the State Secrets Privilege in *Totten v. United States*.[3] *Totten* involved a breach of contract claim brought by the estate of a former Union Civil War spy against the government for compensation owed for secret wartime espionage services.[4] The Court dismissed the claim because "as a general principle, [ ] public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential."[5] The Court reasoned

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[13] In *In re Sealed Case*, the D.C. Circuit determined that "the deliberative process privilege is primarily a common law privilege," but that "[s]ome aspects of the privilege, for example the protection accorded the mental processes of agency officials, have roots in the constitutional separation of powers." 121 F.3d at 745, 737 n.4.

[14] Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 104 (D.D.C. 2016). The scope and source of the Law Enforcement Privilege is unclear, particularly when asserted in the context of congressional investigations where committees have voiced consistent objections to its use. Congress has previously viewed the Executive Branch's position on the confidentiality of law enforcement information as a nondisclosure "policy" rather than a constitutionally based privilege. *See* H. Comm. on Oversight and Gov't Reform, 110th Cong., Rep. on President Bush's Assertion of Executive Privilege in Response to the Committee Subpoena to Attorney General Michael B. Mukaskey 8 (Comm. Print 2008).

[15] The Supreme Court recently stated in dicta that the recipients of a congressional subpoena "have long been understood to retain common law . . . privileges with respect to certain materials. . . ." Trump v. Mazars USA, LLP, No. 19-760, slip op. at 12 (U.S. July 9, 2020). This statement is in tension with the congressional practice of treating common law privileges as discretionary and has been subject to some criticism. *See* CRS Report RL30240, *Congressional Oversight Manual*, coordinated by Christopher M. Davis, Todd Garvey, and Ben Wilhelm at 62–63.

[1] *See* Brady v. Maryland, 373 U.S. 83 (1963), and Rule 16, Federal Rules of Criminal Procedure. For an early judicial dispute involving executive privilege concerns, see United States v. Burr, 25 F. Cas. 30 and 187 (C.C.D. Va. 1807), where Aaron Burr sought certain exculpatory material from President Thomas Jefferson.

[2] *See, e.g.*, Alderman v. United States, 394 U.S. 165 (1969).

[3] 92 U.S. 105 (1876).

[4] *Id.*

[5] *Totten v. U.S.*, 92 U.S. at 107.

that "[t]he service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed."[6]

Totten has continued to inform the treatment of claims brought against the government. In 2005, the Supreme Court considered a contract claim brought against the Central Intelligence Agency (CIA) by alleged Cold War spies in *Tenet v. Doe.*[7] Affirming the "*Totten*" bar,[8] the *Tenet* Court stated: "*Totten* precludes judicial review in cases such as respondents' where success depends upon the existence of their secret espionage relationship with the [g]overnment."[9] In 2011, the Supreme Court again applied the *Totten* bar to dismiss a suit against the United States but this time outside the context of espionage contracts. In *General Dynamics Corp. v. United States*, the federal government asserted the State Secrets Privilege to prevent disclosing sensitive stealth technology in a defense contract dispute. While the government contractor in *General Dynamics* had set forth a prima facie valid affirmative defense to the government's allegation of breach of contract,[10] the Court held that the underlying subject matter of the suit rendered it nonjusticiable and the parties must remain "where they stood when they knocked on the courthouse door."[11] Referring to *Totten* and *Tenet*, the Court stated: "We think a similar situation obtains here, and that the same consequence should follow."[12] In not finding an enforceable contract, the Court held that "[w]here liability depends upon the validity of a plausible . . . defense, and when full litigation of that defense 'would inevitably lead to the disclosure of' state secrets, neither party can obtain judicial relief."[13] The Court reasoned: "Both parties—the [g]overnment no less than petitioners—must have assumed the risk that state secrets would prevent the adjudication of claims of inadequate performance."[14]

In a separate line of judicial inquiry regarding protection of state secrets outside the context of contract claims, the Supreme Court articulated an analytical framework for the State Secrets Privilege in its 1953 decision in *United States v. Reynolds*.[15] *Reynolds* involved multiple wrongful death claims against the government brought by the widows of three civilians who died aboard a military aircraft that crashed while testing secret electronic equipment.[16] The plaintiffs sought discovery of the official Air Force post-incident report and survivors' statements that were in the possession of the U.S. Air Force.[17] The Air Force opposed disclosure of the documents as the aircraft and its occupants were engaged in a secret mission.[18]

While *Reynolds* recognized that it is the judiciary's role to evaluate the validity of a claim of privilege, the Court declined to require that courts automatically compel inspection of the underlying information. The Court stated: "[T]oo much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a

[6] *Id.* at 106.

[7] 544 U.S. 1 (2005).

[8] The *Totten* bar has been labeled a "rule of non-justiciability, akin to a political question." Al-Haramain Islamic Found. Inc. v. Bush, 507 F.3d 1190, 1197 (9th Cir. 2007).

[9] *Id.* at 8.

[10] General Dynamics Corporation v. United States, 563 U.S. 478, 482 (2011).

[11] *Id.* at 487.

[12] *Id.* at 486.

[13] *Id.* at 486 (quoting Totten v. United States, 92 U.S. 105, (1876)).

[14] *Id.* at 491.

[15] 345 U.S. 1 (1953).

[16] *Id. at 3*.

[17] *Id.*

[18] 345 U.S. 1 (1953).

complete abandonment of judicial control would lead to intolerable abuses." To evaluate assertions of the State Secrets Privilege, the *Reynolds* Court identified a two-step analysis. The first requirement is a largely procedural hurdle to assure that the privilege is not "lightly invoked," in which the head of the department in control of the information in question, after "personal consideration," invokes the privilege in writing. The second requirement asks the court to evaluate whether there is a reasonable danger that disclosure "will expose military matters which, in the interest of national security, should not be divulged."

The Supreme Court accepted the government's claim, holding that courts "must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."[19] According to the Court, a private litigant's specific showing of necessity for the information should govern how far the trial court should probe. Where the necessity is strong, the trial court should require a strong showing that the privilege is appropriate, but once that is satisfied, the privilege must prevail no matter how compelling the need.[20] While *Reynolds* dealt with an evidentiary privilege, cases may be "dismissed on the pleadings without ever reaching the question of evidence" in other circumstances.[21]

While *Reynolds* and *Totten* remain the foundational cases on the state secrets privilege, the Supreme Court issued a pair of decisions in 2022 that impact the judicial understanding of that privilege. First, in *United States v. Zubaydah*, the Court determined that a court cannot declare that classified information apparently in the public domain is exempt from the State Secrets Privilege when the United States has not officially confirmed or denied such information.[22] Second, in *Federal Bureau of Investigation v. Fazaga*, the Court decided that certain Foreign Intelligence Surveillance Act of 1978 (FISA) provisions, which specifically require courts to review the underlying classified FISA applications and information to determine the lawfulness of surveillance, do not displace the traditional *Reynolds* privilege that protects information that would harm national security if disclosed.[23]

ArtII.S3.4.4 Presidential Communications Privilege Generally

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*

Deriving implicitly from the President's powers under Article II and the separation of powers doctrine, the Presidential Communications Privilege (Communications Privilege)

[19] *Id.* at 8.

[20] *Id.* at 7–8, 9–10, 11. Privilege is often claimed for information relating to government employee clearances, disciplines, or discharges. *See, e.g.*, Webster v. Doe, 486 U.S. 592 (1988); Department of the Navy v. Egan, 484 U.S. 518 (1988). After the Court approved a government secrecy agreement for CIA employees, Snepp v. United States, 444 U.S. 507 (1980), the government expanded its secrecy program for classified and "classifiable" information. When Congress sought to curb this policy, a federal district judge declared the restrictions void as they encroached on the President's executive powers. Nat'l Fed'n of Fed. Emps. v. United States, 688 F. Supp. 671 (D.D.C. 1988), vacated and remanded sub nom. Am. Foreign Serv. Ass'n v. Garfinkel, 490 U.S. 153 (1989).

[21] *Reynolds*, 345 U.S. at 11, n.26.

[22] No. 20-827, slip op. (U.S. Mar. 3, 2022).

[23] No. 20-828, slip op. (U.S. Mar. 4, 2022).

protects the confidentiality of the President's decisionmaking process.[1] The Communications Privilege is grounded on the proposition that to make judgments and reach decisions the President and his advisers must be free to discuss issues candidly, express opinions, and explore options without fear that those deliberations will later be made public.[2]

The Communications Privilege is qualified, rather than absolute, and applies only to confidential communications made in support of official presidential decisionmaking that directly involve the President or close presidential advisers.[3] For the vast majority of U.S. history, however, the existence and appropriate scope of the Communications Privilege was uncertain and nearly untouched by the courts.[4] While Chief Justice John Marshall referred to the confidentiality of presidential communications in *Marbury v. Madison* and during the treason trial of former Vice President Aaron Burr,[5] in "neither instance [ ] was Marshall forced to definitively decide whether such a presidential privilege existed and if so, in what form."[6] In fact, the Judiciary's involvement in addressing the Communications Privilege's use in resisting disclosure in the face of either judicial or legislative subpoenas did not begin in earnest until the 1970s and the Administration of President Richard Nixon.[7] Prior to the Nixon era, the Communications Privilege's contours were instead left to be defined, if at all, by historical practice and the actions and interpretations of Congress and the President.

The years during and immediately following the Nixon Administration are arguably the defining era of the Communications Privilege's judicial development. It was during that time period (1972–1977) that the courts first confirmed the Communications Privilege's existence and began to delineate—but did not significantly develop—its application in criminal and civil proceedings, as well as its use in response to exercises of Congress's oversight and legislative powers.[8] In each of these contexts, courts were asked to resolve significant but unsettled

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[1] *See Nixon*, 418 U.S. at 705–06.

[2] *Id.* at 708. In this sense, executive privilege is partly based on the theory that transparency can inhibit decisionmaking.

[3] *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977).

[4] *See, e.g.,* Raoul Berger, Executive Privilege: A Constitutional Myth 1 (1974) (describing executive privilege as a "myth" and a "product of the nineteenth century, fashioned by a succession of presidents who created 'precedents' to suit the occasion.").

[5] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169–70 (1803) (suggesting that "[t]he intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation"); United States v. Burr, 25 F. Cas. 30, 37 (noting that if a letter to President Jefferson "does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed"). The Supreme Court addressed the State Secrets Privilege in United States v. Reynolds, 345 U.S. 1, 7–8 (1953) (articulating a "privilege which protects military and state secrets" that "belongs to the Government and must be asserted by it" but "is not to be lightly invoked.").

[6] *In re Sealed Case*, 121 F.3d at 738.

[7] *Id.* at 739–40 ("[I]t was not until the 1970s and Watergate-related lawsuits seeking access to President Nixon's tapes as well as other materials that the existence of the presidential privilege was definitively established as a necessary derivation from the President's constitutional status in a separation of powers regime."); *see also Id.* at 742 ("These lawsuits, referred to generically as the Nixon cases, remain a quarter century later the leading—if not the only—decisions on the scope of the presidential communications privilege.").

[8] *See, e.g.*, *Nixon*, 418 U.S. 683, 707 (1974) (assessing the Privilege in the context of a criminal trial); *Sirica*, 487 F.2d at 717 (assessing the Privilege in the context of a grand jury investigation); *Senate Select*, 498 F.2d at 731 (assessing the Privilege in the context of a congressional investigation); Dellums v Powell, 561 F.2d 242, 249 (D.C. Cir. 1977) (assessing the Privilege in the context of civil case).

questions of constitutional law, ranging from whether the President is immune from all compulsory process to the scope and force of presidential claims of the Communications Privilege.[9]

ArtII.S3.4.5 Congressional Access to Presidential Information

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*

Presidents have claimed a right to withhold their communications from Congress since the start of the Republic.[1] Congress's resistance to such claims, however, is equally grounded in history.[2] The resulting, recurring, and often prominent disagreements over what has come to be known broadly as "executive privilege" tend to place in opposition two implied and often competing constitutional principles: Congress's right to obtain information necessary to carry out its legislative functions and the President's interest in protecting the confidentiality of his (and sometimes his subordinates') communications.[3]

Unlike more traditional legal disagreements between parties, resolution of these interbranch executive privilege disputes has not historically come from the courts. Instead, when conflict has been avoided, it has typically been because of a process of compromise and accommodation in which absolute claims—for either access or confidentiality—are relinquished and replaced by a negotiated resolution acceptable to both Congress and the Executive.[4]

The traditional preference for political rather than judicial solutions is supported by the fact that neither Congress nor the President appears to have sought judicial resolution of an

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[9] President Nixon also asserted the Privilege in the impeachment context in response to subpoenas issued by the House Judiciary Committee. The House did not, however, enlist the aid of the courts in order to enforce its demands for information in that context, and instead chose to respond to the President's refusals by adopting a specific article of impeachment rebuking the President for his failure to comply with the committee's subpoenas. *See* H. Rep. No. 93-1305, 93rd Cong., at 206–13 (1974).

[1] *See In re* Sealed Case, 121 F.3d 729, 736 (D.C. Cir. 1997) ("Since the beginnings of our nation, executive officials have claimed a variety of privileges to resist disclosure of information the confidentiality of which they felt was crucial to fulfillment of the unique role and responsibilities of the executive branch of our government.").

[2] Disputes between Congress and the President over executive privilege can be traced back to the 1790s. *See* Mark J. Rozell, Executive Privilege: Presidential Power, Secrecy, and Accountability 31–32 (2002) (describing the House's resistance to President Washington's refusal to disclose information relating to the Jay Treaty).

[3] United States v. Nixon, 418 U.S. 683, 711 (1974) ("Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based."); Watkins v. United States, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations is inherent in the legislative process."). For a thorough discussion of the judicial treatment of executive privilege see CRS Report R47102, Executive Privilege and Presidential Communications: Judicial Principles, by Todd Garvey.

[4] *See In re* Sealed Case, 121 F.3d at 729 ("[G]iven the restrictions on congressional standing and the courts' reluctance to interfere in political battles, few executive-congressional disputes over access to information have ended up in the courts."); *see also Breaking the Logjam: Principles and Practice of Congressional Oversight and Executive Privilege*, Hearing before the Senate Committee on the Judiciary, Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights, Aug. 3, 2021.

interbranch executive privilege dispute until the 1970s.[5] Courts have also been wary of judicially declared outcomes and have generally sought to avoid adjudicating executive privilege disputes, instead encouraging the political branches to settle their differences while noting that judicial intervention should, as a prudential matter, "be avoided whenever possible" or at least "delayed until all possibilities for settlement have been exhausted."[6]

As a result, the judiciary has historically played a limited role in determining how executive privilege may be used to restrict congressional access to information.[7] The Supreme Court has never directly considered applying executive privilege in the context of a congressional investigation.[8] Lower federal court decisions are similarly scarce.[9] The only appellate-level decision to reach the merits of an executive privilege dispute between Congress and a sitting President occurred nearly fifty years ago during President Richard Nixon's administration.[10] In that case, the Senate Select Committee on Presidential Campaign Activities elected to seek a declaratory judgment in the courts with respect to the President's obligations to obey its subpoenas.[11]

Although not involving executive privilege, the Court in its 2020 decision, *Trump v. Mazars*, nevertheless recognized several important separation of powers-based limitations on Congress's ability to access presidential records.[12] Writing on behalf of the Court, Chief Justice John Roberts began by acknowledging three central limits on all congressional inquiries, regardless of the target of the inquiry: (1) there must be a valid legislative purpose related to a subject of legislation, (2) the purpose of the inquiry must not be for law enforcement or to expose for the sake of exposure, and (3) certain constitutional and common law privileges can limit disclosures of information.[13] The Court, however, viewed these limitations, standing alone, as inadequately checking Congress's powers in a dispute with the Executive Branch.[14]

[5] *See* Senate Select Comm. On Presidential Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974); *see also* James Hamilton, The Power to Probe: A Study of Congressional Investigations 197 (1976) (noting that the Senate Select Committee's lawsuit to enforce the subpoena issued to President Nixon was "the first civil action to enforce a congressional subpoena issued to the executive").

[6] *See* Cheney v. United States Dist. Court, 541 U.S. 913, 389 (2004) ("These 'occasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible"); *see also* CRS Legal Sidebar LSB10432, Resolving Subpoena Disputes Between the Branches: Potential Impacts of Restricting the Judicial Role, by Todd Garvey.

[7] In addition to other justiciability issues, the Speech or Debate Clause, which generally prevents direct pre-enforcement challenges to congressional subpoenas, also plays a role in limiting litigation connected to Congress's investigatory powers. *See* CRS Report R45043, Understanding the Speech or Debate Clause, by Todd Garvey.

[8] *See* Trump v. Mazars USA, LLP, No. 19-760, slip op. at 2 (U.S. July 9, 2020) ("We have never addressed a congressional subpoena for the President's information.").

[9] There has been a recent increase in information access disputes between the branches making their way to the courts. *See, e.g.*, CRS Testimony TE10064, Civil Enforcement of Congressional Authorities, by Todd Garvey. These cases have not, however, directly involved the merits of an interbranch executive privilege disputes.

[10] *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). The D.C. Circuit reached the merits of a dispute between a House committee and a *former* President in 2021. Trump v. Thompson, 20 F.4th 10 (D.C. Cir. 2021), cert. denied, 142 S. Ct. 1350 (2022).

[11] Senate Select, 498 F.2d at 726. The House Judiciary Committee's subpoenas were similarly rejected by the President, but instead of going to the courts for enforcement, the Committee adopted as one of its Articles of Impeachment the refusal of the President to honor its subpoenas. President Nixon's position was set out in a June 9, 1974, letter to the Chairman of the House Judiciary Committee. 10 Wkly. Comp. Pres. Docs. 592 (1974). The impeachment article and supporting material are set out in H. Rep. No. 93–1305, 93d Cong., 2d Sess. (1974).

[12] *See* Trump v. Mazars USA, LLP, No. 19-760, slip op. at 2 (U.S. July 9, 2020).

[13] Trump v. Mazars USA, LLP, No. 19-760, slip op. at 2 (U.S. July 9, 2020).

[14] *Id.* at 3.

After all, according to *Mazars*, any paper possessed by a President could relate to a conceivable subject of legislation, possibly allowing Congress significant authority to interfere with the Executive Branch.[15]

Recognizing that the typical limits on the subpoena power did not prevent Congress from attempting to "aggrandize itself at the President's expense," the Chief Justice feared that judicial resolution of such a dispute using only those limits could deter negotiation between the two branches, historically the hallmark of such inquiries, and encourage Congress to seek compliance through the courts.[16] As a result, the Chief Justice instructed lower courts to perform a "careful analysis" using "[s]everal special considerations" that take "adequate account" of the separation of powers principles at stake during a legislative inquiry into the President's records.[17] Specifically, in such a dispute, courts should, among other considerations, (1) carefully assess whether the confrontation can be avoided by relying on other sources to provide Congress the information it needs in light of its legislative objective; (2) "insist" on a subpoena that is no broader than is reasonably necessary to support Congress's objective; (3) consider the nature of the evidence of Congress's legislative purpose, preferring more detailed and substantial evidence to vague or loosely worded evidence of Congress's purpose; and (4) assess the burdens, such as time and attention, the subpoena imposes on the President.[18]

ArtII.S3.4.6 Prosecutorial and Grand Jury Access to Presidential Information

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*

Recognizing that the "public has a right to every man's evidence," the Supreme Court has held that the President may be required to testify or produce documents in criminal proceedings when required by the courts.[1] This principle dates to the earliest days of the Republic, when Chief Justice John Marshall presided as the Circuit Justice for Virginia over the infamous treason trial of Aaron Burr. In that case, Chief Justice Marshall concluded that President Thomas Jefferson could be subject to a subpoena to provide a document relevant to

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[15] *Id.*

[16] *Id.* While the papers at stake in *Mazars* were the President's personal records, the Court concluded that the close connection between the Office of the President and its occupant did not diminish the separation of powers concerns at issue, and may have even posed a "heightened risk" given the records' "less evident connection to a legislative task." *Id.* at 2. The *Mazars* Court likewise rejected the argument that separation of powers concerns were diminished because the records at issue were in the hands of a third party, as opposed to the President himself. *Id.* For the Court, the central issue was that the President's information was at stake, and ruling otherwise would have encouraged side-stepping constitutional requirements. *Id.*

[17] *Id*.

[18] *Id.* at 5. The Court observed that "[o]ther considerations may be pertinent as well." *Id.* at 6. While adopting this four-factor test, the Court rejected the need for a more "demanding" standard that would have required Congress to demonstrate a specific need for particular records that were "critical" to a legislative purpose. *Id.* at 2 (concluding that imposing a standard akin to the one governing executive privilege claims would "risk seriously impeding Congress in carrying out" inquiries to obtain information it needs to legislate effectively).

[1] *See* Trump v. Vance, No. 19-635, slip op. (U.S. July 9, 2020).

the trial.[2] Specifically, he declared that, in contrast to common law privileges afforded the King of England, the President was not "exempt from the general provisions of the constitution," like the Sixth Amendment, that provide for compulsory process for the defense.[3] Nonetheless, Chief Justice Marshall recognized that while the President could be subject to a criminal subpoena, the President could still withhold specific information from disclosure based on the existence of a privilege.[4] In the two centuries since the Burr trial, historical practice by the Executive Branch[5] and Supreme Court rulings "unequivocally and emphatically endorsed" Chief Justice Marshall's position that the President was subject to federal criminal process.[6] In 2020, the Court extended the precedent developed in federal criminal proceedings to *state* criminal proceeding in *Trump v. Vance*, concluding that the President was not absolutely immune from state criminal subpoenas.[7]

While the President is subject to criminal process, the question remains as to the limits on that process. The Court has recognized several constraints on the ability of a prosecutor to obtain evidence from the President through the use of a criminal subpoena.[8] First, like any citizen, the President can challenge a particular subpoena on the grounds that it was issued in bad faith or was unduly broad.[9] Second, the timing and scope of criminal discovery must be informed by the nature of the office of the President—for example, granting deference in scheduling proceedings to avoid significant interference with the President's official responsibilities.[10] Third, the President can raise subpoena-specific constitutional challenges, arguing that compliance with a particular subpoena would significantly interfere with his efforts to carry out an official duty.[11] As the Court first recognized in *United States v. Nixon*, one particularly notable constitutionally based challenge that a President can lodge against a criminal subpoena is a claim of executive privilege in certain presidential communications.[12]

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[2] United States v. Burr, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692D).

[3] *See id*. (observing that while the King is born to power and can "do no wrong," the President, by contrast is "of the people" and subject to the law).

[4] United States v. Burr, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694).

[5] *Vance*, No. 19-635, slip op. (discussing historical practices of Presidents Monroe, Grant, Ford, Carter, and Clinton).

[6] Clinton v. Jones, 520 U.S. 681, 704 (1997) (citing United States v. Nixon, 418 U.S. 683, 706 (1974)). In rejecting separation of powers challenges to claims that the President is immune from federal criminal process, the Court rejected the argument that criminal subpoenas "rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Id.* at 702–03.

[7] *See Vance*, No. 19-635, slip op. (rejecting the categorical argument that state criminal subpoenas would unduly distract the President, impose a stigma on the presidency, or result in harassment by state prosecutors). The *Vance* Court also rejected the argument that a state prosecutor should have to satisfy a heightened standard of need before seeking a sitting President's records, absent any constitutional privileges. *Id* . Importantly, in *Vance*, the state prosecutor was seeking private presidential records, and no claim of executive privilege was at stake. *Id.* (Kavanaugh, J., concurring in the judgment). The Court refused to extend the heightened-need standard established in *Nixon* to private records, discussed *infra*, reasoning that: (1) *Burr* and its progeny foreclosed that argument; (2) the heightened-need standard was unnecessary to allow the President to fulfill his Article II functions; and (3) the public interest in fair and effective law enforcement favors "comprehensive access to evidence." *Id.* (majority opinion).

[8] *See id.*

[9] *Id*.

[10] *Id.*

[11] *Id.*

[12] 418 U.S. 683, 708 (1974)

In *Nixon*,[13] the Court confirmed several fundamental principles of the privilege protecting presidential communications.[14] First, *Nixon* recognized an implied constitutional privilege protecting presidential communications.[15] The Court stated that the "privilege of confidentiality of presidential communications" is "fundamental to the operation of Government and inextricably rooted in the separation of powers" and "the supremacy of each branch within its own assigned area of constitutional duties."[16] The Court held that the Communications Privilege, however, must not be "expansively construed" as it, like other privileges, is "in derogation of the search for truth."[17]

Second, the Court explicitly reaffirmed its role as the "ultimate interpreter of the Constitution" and the privileges emanating from it, noting that it was the Court, and not the President, that must have the final say on the Communications Privilege.[18]

Third, the Court held that the underlying justification for the Communications Privilege related to the "public interest" in the integrity of presidential decisionmaking.[19] "Human experience," the Court reasoned, "teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."[20] The Court added that there is a

> public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.[21]

As such, the Court held that "[t]he President's need for complete candor and objectivity from advisers calls for great deference from the courts" and justified a "presumptive privilege for Presidential communications" made in "the exercise of Art. II powers."[22]

Fourth, the Court emphasized that the implied constitutional Privilege was not "absolute" or "unqualified," at least not when founded upon a "generalized" need for confidentiality in "nonmilitary and nondiplomatic discussions."[23] Instead, when the Communications Privilege is invoked in response to a judicial subpoena, a "confrontation with other values arise[s]" requiring courts to "resolve those competing interests in a manner that preserves the essential functions of each branch."[24] The President's interest, therefore, would need to be balanced

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[13] United States v. Nixon, 418 U.S. 683 (1974). The *Nixon* opinion, which was before the Court on expedited direct appeal from the district court decision in *Mitchell*, was issued with some urgency. Noting the "public importance of the issues presented and the need for their prompt resolution," the Court issued its opinion only sixteen days after oral argument.

[14] *Id.* at 706 ("[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.").

[15] *Id.* at 711 ("Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.").

[16] *Id.* at 708, 705.

[17] *Id.* at 709–10 ("These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

[18] *Id.* at 704.

[19] *Nixon*, 418 U.S. at 705.

[20] *Id.* at 705.

[21] *Id.* at 708.

[22] *Id.* at 706.

[23] *Id.* at 707.

[24] *Id*.

against the "fundamental and comprehensive" need to "develop all relevant facts" and evidence in a criminal case.[25] In weighing these interests, the Court held the following:

> We cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution. On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic functions of the courts.

As a result, the Communications Privilege, when based "only on a generalized interest in confidentiality," "cannot prevail over the fundamental demands of . . . the fair administration of justice" and therefore "must yield to the demonstrated, specific need for evidence in a pending criminal trial."[26]

Finally, *Nixon* approved a "staged decisional structure." If a President determines that "compliance with a subpoena would be injurious to the public interest he may properly . . . invoke a claim of privilege."[27] Such an invocation creates "presumptive" protections for the subpoenaed material. As a result of these initial protections, a court may only order *in camera* review when the party has "made a sufficient showing to rebut the presumption."[28] Once the presumptively privileged material is reviewed *in camera*, a court may then direct the further disclosure of all "relevant" and "admissible" information.[29]

The *Nixon* opinion made two additional points worth noting. First, the Court repeatedly suggested that its analysis may have been different if instead of a generalized interest in the confidentiality of his communications, the President had asserted a claim of "military or diplomatic secrets."[30] "As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities."[31] Second, the Court explicitly disclaimed any attempt to assess the application of the Communications Privilege in a congressional investigation: "we are not here concerned with the balance between the President's generalized interest in confidentiality . . . and congressional demands for information."[32]

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[25] *Nixon*, 418 U.S. at 711–12 ("In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice.").

[26] *Id.* at 713.

[27] *Id*.

[28] *Id.* at 714.

[29] During that review (at least when the Privilege is asserted in response to a criminal trial subpoena) a court must distinguish between material that is both "probably admissible in evidence and relevant" and that which is not. *Id.* at 714. The latter material must be "restored to its privileged status" and "accorded that high degree of respect due the President of the United States," while the former would be provided to the requesting party. *Id.* at 714–16.

[30] *Id.* at 710.

[31] *Id.* at 710.

[32] *Id.* at 712 n.19. Shortly after the Supreme Court's opinion in *Nixon*, the House Judiciary Committee voted to recommend articles of impeachment against President Nixon for obstruction of justice, abuse of power, and contempt of Congress for his refusal to comply with congressional subpoenas. The contempt of Congress allegation was based on the President's failure to comply with subpoenas issued by the House Judiciary committee as part of its impeachment investigation. H.R. Rep. No. 93–1305 at 4 (1974). On August 9, 1974, before the full House considered the articles of impeachment but after determining that he had lost support in Congress and would not survive impeachment, President Nixon resigned.

ArtII.S3.4.7 Statutory Requirements and Communications Privilege

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*

The Supreme Court considered the nature of executive privilege in a statutory context in its 1977 decision of *Nixon v. Administrator of General Services* (*Nixon II*).[1] In that case, former President Richard Nixon challenged the Presidential Recordings and Materials Preservation Act, a statute that nullified a contract that gave Nixon control over his own presidential records. The Act instead established a process to secure and preserve his records with a government agency.[2] Along with other claims, Nixon argued that provisions of the law permitting the screening and cataloguing of presidential materials by Executive Branch archivists impermissibly infringed on his Privilege. *Nixon II* was therefore distinct from *Nixon I*, because it concerned disclosure within the Executive Branch pursuant to a statutory provision, rather than disclosure outside the Executive Branch pursuant to a subpoena.

The Court rejected former President Nixon's position, holding that the statutory arrangement for preservation of the President's records worked only a "very limited intrusion" into the President's confidentiality interests, especially given that the law built in safeguards to prevent the public disclosure of protected materials.[3] Like the previous cases, the Court engaged in a balancing test, evaluating whether the public interest justified such an intrusion, ultimately holding that it did. Congress had acted, the Court determined, based on a variety of "important objectives," including to "preserve the materials for legitimate historical and governmental purposes"; "restore public confidence in our political processes by preserving the materials as a source for facilitating a full airing of the events leading to appellant's resignation"; and based on its "need to understand how those political processes had in fact operated in order to gauge the necessity for remedial legislation."[4]

The Court's view of the severity of the intrusion appears to have been colored by the fact that the claim was being made by a former President.[5] Although recognizing that the Communications Privilege "survives the individual President's tenure" and thus can be invoked by former Presidents to protect covered communications occurring while in office, the Court nonetheless noted that the President's interest in confidentiality is "subject to erosion over time after an administration leaves office."[6]

Nixon II also provided the Court's clearest explanation of the types of communications covered by the Communications Privilege. Interpreting *Nixon*, the Court held that the "the privilege is limited to communications 'in performance of [a President's] responsibilities,' 'of his

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[1] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977) [hereinafter Nixon II].

[2] *Id.* at 430–33.

[3] *Id.* 451 (noting a "consistent historical practice" in which archivists "have performed the identical task in each of the Presidential libraries without any suggestion that such activity has in any way interfered with executive confidentiality").

[4] *Id.* at 452–54.

[5] *See* ArtII.S3.4.9 Former Presidents and Communications Privilege.

[6] *Nixon II*, 433 U.S. at 451.

office,' and made 'in the process of shaping policies and making decisions.'"[7] This passage reflects the fundamental principle that the Communications Privilege does not act as a generalized safeguard for "Presidential privacy," but instead protects the public interest in effective and deliberative presidential decisionmaking. As such, the Communications Privilege applies not to all presidential communications, but only those that bear a relationship to a presidential decision.

Nixon II marked the end of President Nixon's lengthy and largely unsuccessful legal battles over the release of his communications. But the importance of the Nixon-era cases transcends those materials. The cases established the fundamental characteristics of the Communications Privilege: (1) there is a qualified constitutional privilege that provides presumptive protections to confidential communications made to assist presidential decisionmaking; (2) the Communications Privilege can be invoked to resist disclosure of covered communications in various contexts; and (3) the Communications Privilege is not absolute, and can be overcome when the party seeking the information can articulate a sufficient showing of need.

ArtII.S3.4.8 Separation of Powers and Communications Privilege

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*

In 2004, the Supreme Court issued *Cheney v. United States District Court*[1] in which it reaffirmed distinctions first articulated in the Nixon-era cases between civil and criminal proceedings and expounded on the relationship between the Communications Privilege and the separation of powers.

The *Cheney* decision interacted with the Communications Privilege in a complicated procedural posture, and for this reason the implications of the decision to more traditional scenarios, especially to the congressional context, are difficult to discern. In *Cheney*, a federal district court had entered orders in a Federal Advisory Committee Act (FACA) lawsuit allowing discovery of documents relating to the structure and operation of the National Energy Policy Development Group (NEPDG), a task force chaired by the Vice President and established to give policy recommendations on energy issues to the President.[2] The George W. Bush Administration, though not asserting executive privilege, challenged that discovery order on the ground that it represented a "substantial intrusion[ ] on the process by which those in closest operational proximity to the President advise the President" in violation of the separation of powers.[3] The district court and the D.C. Circuit rejected the Administration's

[7] *Id.* at 449 (citations omitted). As such, it was only a "small fraction" of Nixon's complete collection of presidential records that would be covered by the Privilege. *Id.* at 454.

[1] Cheney v. United States Dist. Court, 542 U.S. 367, 383–91 (2004)

[2] *Id.* at 376.

[3] *Id.* at 381. That action was in the form of mandamus, which among other things requires a party to show that there is "no other adequate means to attain the relief" desired. *Id.* at 403.

arguments, mainly because the Administration had another means to protect its interests; it could assert executive privilege in response to the civil discovery subpoena.[4]

The Supreme Court reversed, holding that when a lower court has allowed "unnecessarily broad" discovery, reviewing courts have authority to "explore other avenues, short of forcing the Executive to invoke privilege."[5] The Court reasoned that to *require* the Executive Branch to assert the Communications Privilege in such a scenario would ignore the "weighty separation of powers objections raised in the case," because "[o]nce executive privilege is asserted, coequal branches of the Government are set on a collision course."[6] The Court determined that the lower courts had "labored under the mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government's separation of powers objections."[7] *Cheney*, therefore, appears to suggest that there are separation of powers concerns associated with executive confidentiality issues that attach *even before* executive privilege is asserted.[8]

Cheney also reaffirmed the principle that the confidentiality interests associated with the Communications Privilege are weighed differently in different types of proceedings. In fact, the nature of the proceeding, whether civil or criminal, appears to affect both sides of the judicially developed balancing test. As for the requesting party, the Court held that "[t]he need for information for use in civil cases, while far from negligible, does not share the urgency or significance of [a] criminal subpoena," where the need for the information "is much weightier."[9] As for the President's interest, the court viewed the potential for a civil subpoena to disrupt the functioning of the Executive Branch as far greater than a criminal subpoena. In the criminal context, "there are various constraints . . . to filter out insubstantial legal claims," but "there are no analogous checks in the civil discovery process."[10] Like past cases, however, *Cheney* did not address how a congressional proceeding relates to either civil or criminal proceedings.[11]

ArtII.S3.4.9 Former Presidents and Communications Privilege

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other*

[4] *Id.* at 376–77.

[5] *Id.* at 390.

[6] *Id.* at 391, 389.

[7] *Cheney*, 542 U.S. at 391.

[8] *Id.* at 385 (noting that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated."). *See also*, Karnoski v. Trump, 926 F.3d 1180, 1205–06 (9th Cir. 2019).

[9] *Cheney*, 542 U.S. at 384.

[10] *Id.* at 386 (noting that in the criminal system decisions are made by a "publicly accountable prosecutor subject to budgetary considerations" and subject to the "responsible exercise of prosecutorial discretion").

[11] The Supreme Court did appear to draw a distinction between the criminal process and the legislative process in Trump v. Mazars USA, LLP, No. 19-715, slip op. (U.S. May 12, 2020) ("Unlike in criminal proceedings, where '[t]he very integrity of the judicial system' would be undermined without 'full disclosure of all the facts,' efforts to craft legislation involve predictive policy judgments that are 'not hamper[ed] . . . in quite the same way' when every scrap of potentially relevant evidence is not available. While we certainly recognize Congress's important interests in obtaining information through appropriate inquiries, those interests are not sufficiently powerful to justify access to the President's personal papers when other sources could provide Congress the information it needs.") (citations omitted).

> *public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*

In *Nixon II*, the Supreme Court determined that the Communications Privilege continues to protect presidential communications after the conclusion of the Administration within which the communication occurred and may be asserted by the former President.[1] As described above, the Court found that a former President may "legitimately" assert the Communications Privilege to prevent disclosure of his official records after he has left office.[2] The Court reasoned that the confidentiality necessary to ensure the free exchange of ideas between the President and his advisers while the President is in office

> cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure.[3]

The Court's determination appears to have rested on the reasoning that the general purpose of the Communications Privilege—ensuring the provision of frank advice to the President—could be threatened or undermined no matter when the disclosure of the covered communications occurs. *Nixon II* distinguished former Presidents from incumbents in three important ways. First, the Court explicitly stated that "to the extent that the privilege serves as a shield for executive officials against burdensome requests for information which might interfere with the proper performance of their duties, a former President is in less need of it than an incumbent."[4] Second, the Court concluded that the "expectation of the confidentiality of executive communications" is "subject to erosion over time after an administration leaves office."[5] Thus, the strength of a former President's Communications Privilege claim appears to dwindle as time passes.

Third and perhaps most importantly, the Court determined that because only the sitting President is "charged with performance of executive duty under the Constitution," he is "in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly."[6] In *Nixon II*, the fact that President Carte—the sitting President at the time—did not support former President Nixon's privilege claim "detract[ed] from the weight of" Nixon's assertion.[7] In the Court's view, it is the incumbent President who is better situated to make determinations about the need for executive confidentiality, because it is the incumbent President who may suffer the harm that the Communications Privilege purports to protect against if privileged documents were disclosed (namely that current advisers would be dissuaded from giving the incumbent President candid advice).[8] As a result, when the incumbent President does not support a former President's privilege claim, the strength of the claim declines.

The importance of the incumbent's concurrence to a privilege claim by a former President was recently reaffirmed in *Trump v. Thompson*.[9] *Thompson* arose from the inquiry conducted

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[1] *Nixon II*, 433 U.S. at 446–49.

[2] *Id.* at 449.

[3] *Id*. (citations omitted).

[4] *Id.* at 448.

[5] *Id.* at 451.

[6] *Id.* at 449.

[7] *Nixon II*, 433 U.S. at 449.

[8] *Id.*

[9] Trump v. Thompson, 20 F.4th 10 (D.C. Cir. 2021), *cert. denied*, No. 21A272, slip op. (U.S. Jan. 20, 2022).

by the House Select Committee to Investigate the January 6th Attack on the U.S. Capitol (Select Committee). As part of its investigation, the Select Committee requested that the National Archives and Records Administration (NARA) produce relevant presidential records from the former Trump Administration pursuant to the Presidential Records Act (PRA).[10] The request sought various categories of White House communications and documents created on or around January 6, 2021. Under the PRA, if any congressional committee requests a presidential record on a "matter within its jurisdiction" that is "needed for the conduct of its business and that is not otherwise available," the National Archives "shall" make the record available.[11] However, consistent with principles established in *Nixon* and *Nixon II*, the PRA also preserves the right of both current and former Presidents to assert privilege claims by providing that disclosure by NARA is "subject to any rights, defenses, or privileges which the United States or any agency or person may invoke."[12]

Shortly thereafter, President Joseph Biden determined that under the "unique and extraordinary circumstances" and because of Congress's "compelling need" to understand the "horrific events" of January 6, asserting executive privilege over the requested documents would not be "in the best interests of the United States."[13] Former President Trump disagreed and notified the Archivist that he was asserting the Communications Privilege. After President Biden clarified that he would "not uphold the former President's assertion of Privilege," former President Trump filed suit in federal district court to block NARA from disclosing privileged documents to the Select Committee.[14]

The D.C. District Court in *Thompson* viewed the case as "a dispute between a former and incumbent President."[15] Citing to *Nixon II*, the court stated that because the incumbent President is "best suited" to identify and determine the best interests of the Executive Branch, former President Trump's Privilege claim was "outweighed by President Biden's decision not to uphold the Privilege."[16] Moreover, the court reasoned that to side with the former President would not only second guess the sitting President's judgment, but also the Legislative Branch's judgment—for both President Biden and the House agreed that the requested documents should be disclosed.[17]

The D.C. Circuit affirmed the district court decision on appeal. The court acknowledged, with reference to *Nixon II*, that there was "no question" that former President Trump could assert the Communications Privilege and that the Communications Privilege was "of constitutional stature."[18] Nevertheless, the court held that a "rare and formidable alignment of [three] factors" supported disclosure of the documents to the Committee and outweighed the former President's interest in confidentiality.[19]

First, the court stated that President Biden's determination that it was neither in the Executive Branch's nor the public's interest to assert Privilege over the requested documents

[10] *Id.* at 16.

[11] 44 U.S.C. § 2205(2)(C).

[12] *Id.* at § 2205(2).

[13] *Thompson*, 20 F.4th at 20–21.

[14] *Id.* at 21–22.

[15] Trump v. Thompson, Civil Action No. 21-cv-2769 (TSC), 2021 U.S. Dist. LEXIS 216812, at *26 (D.D.C. Nov. 9, 2021).

[16] *Id.* at *29.

[17] *Id.* at *27–29.

[18] *Thompson*, 20 F. 4th at 32.

[19] *Id.* at 33.

"carries immense weight in overcoming the former President's" claim.[20] Consistent with previous case law, the court viewed President Biden as "the principal holder and keeper of executive privilege" and the judiciary as "ill equipped to . . . second guess the expert judgment of the sitting President."[21]

Second, the House had a "uniquely weighty interest in investigating the causes and circumstances" of the January 6 attack on the U.S. Capitol.[22] Indeed, the court noted that having presented a "sound factual predicate" for the requested documents, "there would seem to be few, if any, more imperative interests squarely within Congress's wheelhouse than ensuring the safe and uninterrupted conduct of its constitutionally assigned business."[23]

Third, and "weighing still more heavily" against former President Trump, was "the fact that the judgment of the Political Branches is unified as to these particular documents."[24] The court was unwilling to "needlessly disturb 'the compromises and working arrangements that" the Congress and the President had already reached.[25]

In light of these three factors, the D.C. Circuit held that "the profound interests in disclosure advanced by President Biden and the January 6th Committee far exceed [former President Trump's] generalized concerns for Executive Branch confidentiality."[26] That holding was given added significance by the court's determination that it would have been compelled to reach that conclusion "under any of the tests advocated by former President Trump," including the "demonstrated, specific need" standard from *Nixon* or the "demonstrably critical" standard from *Senate Select*.[27] As such, it appears the Select Committee would have been able to overcome the Communications Privilege in this circumstance even if President Biden had supported former President Trump's Privilege claim.

The Supreme Court picked up on this point in denying former President Trump's petition to stay the D.C. Circuit decision.[28] In interpreting the opinion below, the Supreme Court—in an unsigned order—reasoned that Mr. Trump's "status as a former President [ ] made no difference to the court's decision" since the D.C. Circuit had "concluded that President Trump's claims would have failed even if he were an incumbent."[29] Because the former President's assertion of privilege would have been unsuccessful either way, the Court declared the D.C. Circuit's discussion of when executive privilege claims could properly be asserted by former Presidents to be nonbinding dictum.[30]

[20] *Id*.

[21] *Id.* at 35.

[22] *Id*.

[23] *Id.* at 35–36.

[24] *Thompson*, 20 F.4th at 37.

[25] *Id.* at 38 (quoting Trump v. Mazars USA, LLP, No. 19-715, slip op. (U.S. May 12, 2020)).

[26] *Id.* at 33.

[27] *Id.* at 41 ("The legislative interest at stake passes muster under any of the tests pressed by former President Trump.").

[28] Trump v. Thompson, No. 21A272, slip op. (U.S. Jan. 20, 2022). The Supreme Court later denied certiorari. No. 21A272, slip op. (U.S. Jan. 20, 2022).

[29] *Id.* Justice Clarence Thomas would have granted the former President's application. Justice Brett Kavanaugh authored a concurrence to clarify his position that "[a] former President must be able to successfully invoke the Presidential communications privilege for communications that occurred during his Presidency." *Id*. (Kavanaugh, J., concurring) Once invoked, it appears to be Justice Kavanaugh's view that the tests from *Nixon* and *Senate Select* "may apply to a former President's privilege claim as they do to a current President's privilege claim." *Id.* at 681.

[30] *Id.* at 680.

ArtII.S3.4.10 Deliberative Process and Law Enforcement Privileges

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*

Of the various executive privileges, the Deliberative Process Privilege is the one most frequently asserted.[1] The purpose underlying the Privilege is to protect the "'quality of agency decisions' by allowing government officials freedom to debate alternative approaches in private."[2] But the Deliberative Process Privilege applies only to those documents and communications that are *predecisional*, meaning they are created prior to the agency reaching its final decision, and *deliberative*, meaning they relate to the thought process of Executive officials and are not purely factual.[3] The Privilege does not protect entire documents. Rather, the Executive Branch must disclose non-privileged factual information that can be reasonably segregated from privileged information in the requested documents. And like the other executive privileges, the Deliberative Process Privilege is overcome by an adequate showing of need.[4]

The idea of the Deliberative Process Privilege was developed under the Freedom of Information Act (FOIA) to provide limited protection for communications and documents evidencing the predecisional considerations of agency officials.[5] Over time, the Executive Branch has melded this deliberative process idea with the recognized confidentiality interest in the President's communications with close advisers, such that the privilege would extend to any policy deliberations or communications within the Executive Branch in which the President may have an interest.

The result has been a presumption by the Executive, though regularly contested by Congress, that its predecisional deliberations are beyond the scope of congressional demand. For instance, Attorney General William French Smith advised President Ronald Reagan that "Congress will have a legitimate need to know the preliminary positions taken by Executive Branch officials during internal deliberations only in the rarest of circumstances."[6] According

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[1] Given its broad scope, the Deliberative Process Privilege is "the most frequent form of executive privilege raised." *In re* Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997).

[2] *Id.* at 737 (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975)).

[3] See Assassination Archives & Research Ctr. v. CIA, No. 18–5280, 2020 U.S. App. LEXIS 40001, 5–6 (D.C. Cir. Dec. 21, 2020) ("The privilege covers information that is both 'predecisional' and 'deliberative.' Documents are predecisional if they were 'generated before the adoption of an agency policy,' and deliberative if they 'reflect[ ] the give-and-take of the consultative process.'") (quoting Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

[4] *See* Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 112–14 (D.D.C. 2016) (finding that a congressional committee's need for deliberative materials outweighed the Executive Branch's interest in confidentiality).

[5] *See* EPA v. Mink, 410 U.S. 73, 85–90 (1973).

[6] Letter from Attorney General William French Smith to President Reagan, October 31, 1981, reprinted in 5 Op. O.L.C. 27, 31 (1981) [hereinafter Smith Letter/Watt]; *accord* Memorandum to General Counsels' Consultative Group Re: Congressional Requests for Confidential Executive Branch Information, 13 Op. O.L.C. 153, 192 (1989) ("Congress will seldom have any legitimate legislative interest in knowing the precise predecisional positions and statements of particular Executive Branch officials.") [hereinafter Barr Memo]; Letter from Assistant Attorney General Robert Rabkin, Office of Legislative Affairs, DOJ, to Honorable John Linder, Chairman House Subcommittee on Rules and Organization of the House, Committee on Rules, June 27, 2000 at 5–6 ("[T]he Department has a broad confidentiality

to this view, the need for the Executive to prevent disclosure of its deliberations is at its apex when Congress attempts to discover information about ongoing policymaking within the Executive Branch. In that case, the Executive has argued, the deliberative process exemption serves as an important boundary marking the separation of powers. When congressional oversight "is used as a means of participating directly in an ongoing process of decisionmaking within the Executive Branch, it oversteps the bounds of the proper legislative function."[7]

The legal justifications asserted by the Barack Obama Administration for withholding documents from Congress during a House probe into Operation Fast and Furious appear to reflect a heavy reliance on the Deliberative Process Privilege. In a letter to the President asking him to invoke executive privilege over the subpoenaed documents, Attorney General Eric Holder noted that "Presidents have repeatedly asserted executive privilege to protect confidential Executive Branch deliberative materials from congressional subpoena."[8] The Attorney General went on to argue that "[i]t is well established that 'the doctrine of executive privilege . . . encompasses Executive Branch deliberative communications.'"[9] The dispute ultimately reached the courts, and although the litigation was eventually settled, a federal district court initially held that after "balancing the competing interests" at stake, in this instance the Deliberative Process Privilege must yield to Congress's "legitimate need" for the documents.[10]

Similar to Deliberative Process Privilege, the Law Enforcement Privilege operates to protect information, the disclosure of which by the Executive Branch would have a chilling effect on conducting "the candid and independent analysis essential to just and effective law enforcement."[11]

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interest in matters that reflect its internal deliberative process. In particular, we have sought to ensure that all law enforcement and litigation decisions are products of open, frank, and independent assessments of the law and facts—uninhibited by political and improper influences that may be present outside the department. We have long been concerned about the chilling effect that would ripple throughout government if prosecutors, policy advisors at all levels and line attorneys believed that their honest opinion—be it 'good' or 'bad'—may be the topic of debate in Congressional hearings or floor debates. These include assessments of evidence and law, candid advice on strength and weaknesses of legal arguments, and recommendations to take or not to take legal action against individuals and corporate entities."); *see also* Smith Letter/Watt, *supra,* at 30 ("congressional oversight interest will support a demand for predecisional, deliberative documents in the possession of the Executive Branch only in the most unusual circumstances").

[7] Smith Letter/Watt at 30; *see also* Statement of Assistant Attorney General William H. Rehnquist, reprinted in Executive Privilege: The Withholding of Information by the Executive: Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 92nd Cong., 1st Sess. 424 ("The notion that the advisors whom he has chosen should bear some sort of a hybrid responsibility to opinion makers outside of the government, which notion in practice would inevitably have the effect of diluting their responsibility to him, is entirely inconsistent with our tripartite systems of government. The President is entitled to undivided and faithful advice from his subordinates, just as Senators and Representatives are entitled to the same sort of advice from their legislative and administrative assistants, and judges to the same sort of advice from their law clerks.").

[8] Letter to President Barack Obama from Eric Holder, Attorney General, June 19, 2012, at 3.

[9] *Id.*

[10] Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 112, 115 (D.D.C. 2016).

[11] Letter from Assistant Attorney General Robert Rabkin, Office of Legislative Affairs, DOJ, to Honorable John Linder, Chairman House Subcommittee on Rules and Organization of the House, Committee on Rules, June 27, 2000 at 5–6 ("The foregoing concerns apply with special force to Congressional requests for prosecution and declination memoranda and similar documents. These are extremely sensitive law enforcement materials. The Department's attorneys are asked to render unbiased, professional judgments about the merits of potential criminal and civil law enforcement cases. If their deliberative documents were made subject to Congressional challenge and scrutiny, we would face a grave danger that they would be chilled from providing the candid and independent analysis essential to just and effective law enforcement or just as troubling, that our assessments of the strengths and weaknesses of evidence of the law, before they are presented in court. That may result in an unfair advantage to those who seek public funds and deprive the taxpayers of confidential representation enjoyed by other litigants."). *See also* Dep't of Justice, Office of Legal Counsel, Protective Assertion of Executive Privilege Over Unredacted Mueller Report and Related Investigative Files, 43 Op. O.L.C. 374 (2019).

ArtII.S3.5 Presidential Immunity

ArtII.S3.5.1 Presidential Immunity to Suits and Official Conduct

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*

In its 1867 decision *Mississippi v. Johnson*, the Supreme Court established that the President is largely beyond the reach of the judiciary by holding that it could not direct President Andrew Johnson in how he exercised his "purely executive and political" powers.[1] The Court stated, it had "no jurisdiction . . . to enjoin the President in the performance of his official duties."[2]

In subsequent decisions, however, the Court made clear that *Johnson* does not stand for the proposition that the President is immune from judicial process. For example, in *United States v. Nixon*,[3] the Court held that President Richard Nixon was amenable to a subpoena to produce evidence for use in a federal criminal case. There, the President had argued that he was immune to judicial process, claiming "that the independence of the Executive Branch within its own sphere insulates a President from a judicial subpoena in an ongoing criminal prosecution."[4] The Supreme Court unanimously disagreed, holding that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."[5] The Court noted that the constitutional duty of courts "to do justice in criminal prosecutions" was counterbalanced by the claim of presidential immunity. To accept the President's argument, the Court further reasoned, would undermine the separation of powers that was at the core of "a workable government" as well as "gravely impair the role of the courts under Art. III."[6]

Throughout the Watergate investigation, it was unclear whether the President could be subject to criminal prosecution prior to being convicted upon impeachment.[7] The Court, however, resolved that courts may require the President to testify or produce documents in

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[1] 71 U.S. (4 Wall.) 475 (1867). The Court declined to express an opinion on "whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime." 71 U.S. at 498. *See* Franklin v. Massachusetts, 505 U.S. 788, 825–28 (1992) (Scalia, J., concurring). In NTEU v. Nixon, 492 F.2d 587 (D.C. Cir. 1974), the court held that it could issue a writ of mandamus to compel the President to perform a ministerial act, although it said that if any other officer were available to whom the writ could run, it should be applied to him.

[2] *Johnson*, 71 U.S. at 501.

[3] United States v. Nixon, 418 U.S. 683 (1974)

[4] 418 U.S. at 706.

[5] *Id.*

[6] *Id.* at 706–07. The lower courts considered the issue more fully. In re Grand Jury Subpoena to Richard M. Nixon, 360 F. Supp. 1, 6–10 (D.D.C. 1973) (Judge Sirica), *aff'd sub nom.*, Nixon v. Sirica, 487 F.2d 700, 708–712 (D.C. Cir. 1973) (en banc) (refusing to find President immune from process). Assessments of the subpoena of President Jefferson in the *Burr* trial have conflicted. United States v. Burr, 25 F. Cas. 187 (No. 14694) (C.C.D.Va. 1807). For the history, *see* Freund, *Foreword: On Presidential Privilege, The Supreme Court, 1973 Term*, 88 Harv. L. Rev. 13, 23–30 (1974).

[7] The Impeachment Clause, Article I, § 3, cl. 7, provides that a party convicted upon impeachment shall nonetheless be liable for criminal proceedings. Gouveneur Morris in the Convention and Alexander Hamilton in the

criminal proceedings.[8] This principle dates to the earliest days of the Republic, when Chief Justice John Marshall presided as the Circuit Justice for Virginia over the treason trial of Aaron Burr. In that case, Chief Justice Marshall concluded that President Thomas Jefferson could be subject to a subpoena to provide a document relevant to the trial.[9] Specifically, Chief Justice Marshall declared that, in contrast to common law privileges afforded the King of England, the President was not "exempt from the general provisions of the constitution," like the Sixth Amendment, which provides the defense compulsory process.[10]

Nonetheless, Chief Justice Marshall recognized that while the President could be subject to a criminal subpoena, the President could still withhold information from disclosure based on executive privilege.[11] In the two centuries since the Burr trial, the Executive Branch's practices[12] and Supreme Court rulings "unequivocally and emphatically endorsed" Chief Justice Marshall's position that the President was subject to federal criminal process.[13] In its 2020 opinion in *Trump v. Vance*, the Court extended this precedent to *state* criminal proceedings, concluding that the President was not absolutely immune from state criminal subpoenas.[14]

Finally, with respect to civil liability, the Court held in *Nixon v. Fitzgerald* that the President is absolutely immune in actions for civil damages for all acts within the "outer perimeter" of his official duties.[15] The Court's close decision was premised on the President's "unique position in the constitutional scheme," that is, the Court conducted a "kind of 'public policy' analysis" of the "policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers."[16] Although the Constitution expressly afforded Members of Congress immunity in matters arising from "speech or debate" and was silent on presidential immunity, the Court nonetheless considered immunity to be "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."[17]

Federalist Papers asserted that a criminal trial would follow a successful impeachment. See 2 The Records of the Federal Convention of 1787, at 500 (Max Farrand ed., 1937); The Federalist Nos. 65 & 69.

[8] *See* Trump v. Vance, No. 19-635, slip op. (July 9, 2020) (recognizing that the "public has a right to every man's evidence").

[9] *See* United States v. Burr, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692D).

[10] *See id.* (observing that while the King is born to power and can "do no wrong," the President, by contrast, is "of the people" and subject to the law).

[11] *See* United States v. Burr, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694).

[12] *See Vance*, No. 19-635, slip op. at 7–9 (discussing historical practices of Presidents James Monroe, Ulysses S. Grant, Gerald Ford, Jimmy Carter, and William Clinton).

[13] Clinton v. Jones, 520 U.S. 681, 704 (1997) (citing United States v. Nixon, 418 U.S. 683, 706 (1974)). In rejecting separation of powers challenges to claims that the President is immune from federal criminal process, the Court rejected the argument that criminal subpoenas "rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Id.* at 702–03.

[14] *See Vance*, No. 19-635, slip op. at 12–15 (rejecting the categorical argument that state criminal subpoenas would unduly distract the President, impose a stigma on the presidency, or result in harassment by state prosecutors). The *Vance* Court also rejected the argument that a state prosecutor should satisfy a heightened standard of need when seeking a sitting President's records. *Id.* at 15–16. More important, in *Vance*, the state prosecutor sought private presidential records, and executive privilege was not at issue. *Id.* (Kavanaugh, J., concurring in the judgment). The Court refused to extend the heightened-need standard established in Nixon to private records, discussed *infra*, reasoning that: (1) *Burr* and its progeny foreclosed that argument; (2) the heightened-need standard was unnecessary to allow the President to fulfill his Article II functions; and (3) the public interest in fair and effective law enforcement favors "comprehensive access to evidence." *Id.* (majority opinion).

[15] Nixon v. Fitzgerald, 457 U.S. 731 (1982)

[16] *Id.* at 748.

[17] *Id.* at 749.

While the Court relied, in part, upon its practice of finding immunity for officers, such as judges, for whom the Constitution is silent, but for which a long common-law history exists, and in part upon historical evidence, which it admitted was fragmentary and ambiguous,[18] the Court focused on the fact that the President is different from all other executive officials. The President is charged with a long list of "supervisory and policy responsibilities of utmost discretion and sensitivity,"[19] and diversion of his energies by concerns with private lawsuits would "raise unique risks to the effective functioning of government."[20] Moreover, the presidential privilege is rooted in the separation of powers doctrine, counseling courts to tread carefully before intruding. While some interests are important enough to require judicial action, the Court reasoned that "merely private suit[s] for damages based on a President's official acts" do not serve this "broad public interest" necessitating the courts to act.[21] Finally, qualified immunity would not adequately protect the President, because judicial inquiry into a functional analysis of his actions would bring with it the evil immunity it was to prevent; absolute immunity was required.[22]

ArtII.S3.5.2 Presidential Immunity to Suits and Unofficial Conduct

Article II, Section 3:

> *He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*

In *Clinton v. Jones*,[1] the Court, in a case of first impression, held that President William Clinton did not have qualified immunity from civil suit for conduct alleged to have taken place prior to his election, and therefore denied President Clinton's request to delay both the trial and discovery. The Court held that its precedents affording the President immunity from suit for his official conduct—primarily so that the President could perform his duties effectively absent fear that a particular decision might lead to personal liability—did not apply when the alleged conduct at issue had occurred before his election. Moreover, the Supreme Court observed, the separation of powers doctrine did not require a stay of all private actions against the President, as the trial court had sufficient powers to accommodate the President's schedule and his workload so as not to impede the President from performing his duties. Finally, the Court stated that allowing such suits to proceed would not generate a large volume of politically motivated harassing and frivolous litigation. Congress has the power, the Court advised, if it should think necessary, to protect the President.[2].

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[18] *Id.* at 750–52 n.31.

[19] *Id.* at 750.

[20] *Id.* at 751.

[21] *Id.* at 754.

[22] *Id.* at 755–57. Justices Byron White, William Brennan, Thurgood Marshall, and Henry Blackmun dissented. The Court reserved decision on whether Congress could expressly create a damages action against the President and abrogate immunity, *id.* at 748–49 n.27, thus appearing to disclaim that the Constitution mandated the decision; Chief Justice Warren Burger disagreed with the implication of this footnote, *id.* at 763–64 n.7 (concurring opinion), and the dissenters noted they agreed with the Chief Justice on this point. *Id.* at 770 & n.4.

[1] 520 U.S. 681 (1997)

[2] 457 U.S. at 749.

ArtII.S3.5.2
Presidential Immunity to Suits and Unofficial Conduct

While courts may be unable to compel the President to act or prevent him from acting, his acts, when performed, are generally subject to judicial review and disallowance. Typically, the President's subordinates, through whom he acts, may be sued pursuant to a legal fiction to enjoin committing acts that might lead to irreparable damage[3] or to compel by writ of mandamus performing a duty required by law.[4] Such suits are usually brought in the United States District Court for the District of Columbia.[5] In common law, courts may hold a subordinate executive officer personally liable for damages that resulted from any act the officer committed that was beyond his authority,[6] although he has immunity for anything, even malicious wrongdoing, that he does in performing his duties.[7]

Different rules prevail when a plaintiff sues an officer for wrongs based on a "constitutional tort."[8] The Court has suggested that, in some "sensitive" areas, officers acting in the "outer perimeter" of their duties may be accorded absolute immunity from liability.[9] To reach such officers for acts for which they can be held responsible, courts must use the general "federal question" jurisdictional statute.[10]

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[3] *E.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (suit to enjoin Secretary of Commerce to return steel mills seized on President's order); Dames & Moore v. Regan, 453 U.S. 654 (1981) (suit against Secretary of Treasury to nullify presidential orders on Iranian assets). *See also* Noble v. Union River Logging Railroad, 147 U.S. 165 (1893); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912).

[4] *E.g.*, Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803) (suit against Secretary of State to compel delivery of commissions of office); Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524 (1838) (suit against Postmaster General to compel payment of money owed under act of Congress); Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840) (suit to compel Secretary of Navy to pay a pension).

[5] This was based on the theory that the Supreme Court of the District of Columbia had inherited, via the common law of Maryland, the jurisdiction of the King's Bench "over inferior jurisdictions and officers." Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 614, 620–21 (1838). Congress has since authorized federal district courts outside the District of Columbia to entertain such suits. 76 Stat. 744 (1962), 28 U.S.C. §1361.

[6] *E.g.*, Little v. Barreme, 6 U.S. (2 Cr.) 170 (1804); Bates v. Clark, 95 U.S. 204 (1877); United States v. Lee, 106 U.S. 196 (1882); Virginia Coupon Cases (Poindexter v. Greenhow), 114 U.S. 270 (1885); Belknap v. Schild, 161 U.S. 10 (1896).

[7] Spalding v. Vilas, 161 U.S. 483 (1896); Barr v. Matteo, 360 U.S. 564 (1959). *See* Westfall v. Erwin, 484 U.S. 292 (1988) (an action must be discretionary in nature as well as within the scope of employment, before a federal official is entitled to absolute immunity). Following the *Westfall* decision, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Westfall Act), which authorized the Attorney General to certify that an employee was acting within the scope of his office or employment at the time an incident occurred that led to a lawsuit; upon certification, the employee is dismissed from the action, and the United States is substituted. As a result, sometimes the action will be dismissed against the government because the government has not waived sovereign immunity under the Federal Tort Claims Act. United States v. Smith, 499 U.S. 160 (1991) (the Westfall Act bars suit against federal employee even if sovereign immunity forecloses suit against the government). Cognizant of the temptation of the government to immunize both itself and its employee, the Court in *Gutierrez de Martinez v. Lamagno,* 515 U.S. 417 (1995), held that an Attorney General's certification is subject to judicial review.

[8] The Supreme Court recognized an implied cause of action against officers accused of constitutional violations in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). In *Butz v. Economou,* 438 U.S. 478 (1978), which concerned a *Bivens* action, the Court distinguished between common-law torts and constitutional torts and denied high federal officials, including cabinet secretaries, absolute immunity, in favor of the qualified immunity Congress had previously accorded high state officials under 42 U.S.C. § 1983. In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), the Court denied presidential aides derivative absolute presidential immunity, but it modified the rules of qualified immunity, making it more difficult to hold such aides, other federal officials, and state and local officials, liable for constitutional torts. In *Mitchell v. Forsyth,* 472 U.S. 511 (1985), the Court extended qualified immunity to the Attorney General for authorizing a warrantless wiretap in a case involving domestic national security. Although the Court later held such warrantless wiretaps violated the Fourth Amendment, at the time of the Attorney General's authorization, this interpretation was not "clearly established," and *Harlow* immunity protected officials exercising discretion on such open questions. *See also* Anderson v. Creighton, 483 U.S. 635 (1987) (in an exceedingly opaque opinion, the Court extended similar qualified immunity to FBI agents who conducted a warrantless search).

[9] Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982)

[10] *See* 28 U.S.C. § 1331. On deleting the jurisdictional amount, see Pub. L. No. 94-574, 90 Stat. 2721 (1976), and Pub. L. No. 96-486, 94 Stat. 2369 (1980). If such suits are brought in state courts, they can be removed to federal district courts. 28 U.S.C. § 1442(a). *See* 28 U.S.C. § 1331.

ArtII.S3.5.3 Qualified Immunity Doctrine

Article II, Section 2, Clause 2:

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

While the courts may be unable to compel the President to act or to prevent him from acting, his acts, when performed, are in proper cases subject to judicial review and disallowance. Typically, the subordinates through whom he acts may be sued, in a form of legal fiction, to enjoin the commission of acts which might lead to irreparable damage[1] or to compel by writ of mandamus the performance of a duty definitely required by law.[2] Such suits are usually brought in the United States District Court for the District of Columbia.[3] In suits under the common law, a subordinate executive officer may be held personally liable in damages for any act done in excess of authority,[4] although immunity exists for anything, even malicious wrongdoing, done in the course of his duties.[5]

Different rules prevail when such an official is sued for a "constitutional tort" for wrongs allegedly in violation of our basic charter,[6] although the Court has hinted that in some

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[1] *E.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (suit to enjoin Secretary of Commerce to return steel mills seized on President's order); Dames & Moore v. Regan, 453 U.S. 654 (1981) (suit against Secretary of Treasury to nullify presidential orders on Iranian assets). *See also* Noble v. Union River Logging Railroad, 147 U.S. 165 (1893); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912).

[2] *E.g.*, Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803) (suit against Secretary of State to compel delivery of commissions of office); Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524 (1838) (suit against Postmaster General to compel payment of money owed under act of Congress); Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840) (suit to compel Secretary of Navy to pay a pension).

[3] This was originally on the theory that the Supreme Court of the District of Columbia had inherited, via the common law of Maryland, the jurisdiction of the King's Bench "over inferior jurisdictions and officers." Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 614, 620–21 (1838). Congress has now authorized federal district courts outside the District of Columbia also to entertain such suits. 76 Stat. 744 (1962), 28 U.S.C. § 1361.

[4] *E.g.*, Little v. Barreme, 6 U.S. (2 Cr.) 170 (1804); Bates v. Clark, 95 U.S. 204 (1877); United States v. Lee, 106 U.S. 196 (1882); Virginia Coupon Cases (Poindexter v. Greenhow), 114 U.S. 270 (1885); Belknap v. Schild, 161 U.S. 10 (1896).

[5] Spalding v. Vilas, 161 U.S. 483 (1896); Barr v. Matteo, 360 U.S. 564 (1959). *See* Westfall v. Erwin, 484 U.S. 292 (1988) (action must be discretionary in nature as well as being within the scope of employment, before federal official is entitled to absolute immunity). Following the *Westfall* decision, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Westfall Act), which authorized the Attorney General to certify that an employee was acting within the scope of his office or employment at the time of the incident out of which a suit arose; upon certification, the employee is dismissed from the action, and the United States is substituted, the Federal Tort Claims Act (FTCA) then governing the action, which means that sometimes the action must be dismissed against the government because the FTCA has not waived sovereign immunity. United States v. Smith, 499 U.S. 160 (1991) (Westfall Act bars suit against federal employee even when an exception in the FTCA bars suit against the government). Cognizant of the temptation of the government to immunize both itself and its employee, the Court in *Gutierrez de Martinez v. Lamagno,* 515 U.S. 417 (1995), held that the Attorney General's certification is subject to judicial review.

[6] An implied cause of action against officers accused of constitutional violations was recognized in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). In *Butz v. Economou,* 438 U.S. 478 (1978), a *Bivens* action, the Court distinguished between common-law torts and constitutional torts and denied high federal officials, including cabinet secretaries, absolute immunity, in favor of the qualified immunity previously accorded high state officials under 42 U.S.C. § 1983. In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), the Court denied presidential aides derivative absolute presidential immunity, but it modified the rules of qualified immunity, making it more difficult to hold such aides, other federal officials, and indeed state and local officials, liable for constitutional torts. In *Mitchell v. Forsyth,* 472 U.S. 511 (1985), the Court extended qualified immunity to the Attorney General for

"sensitive" areas officials acting in the "outer perimeter" of their duties may be accorded an absolute immunity from liability.[7] Jurisdiction to reach such officers for acts for which they can be held responsible must be under the general "federal question" jurisdictional statute, which, as recently amended, requires no jurisdictional amount.[8]

Section 4—Impeachment

ArtII.S4.1 Overview of Impeachment Clause

Article II, Section 4:

> *The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.*

The Constitution gives Congress the authority to impeach and remove the President,[1] Vice President, and all federal "civil officers" for treason, bribery, or other high crimes and misdemeanors.[2] This tool was inherited from English practice, in which Parliament impeached and convicted ministers and favorites of the Crown in a struggle to rein in the Crown's power.

Congress's power of impeachment is an important check on the Executive and Judicial Branches, recognized by the Framers as a crucial tool for holding government officers accountable for violations of the law and abuses of power.[3] Congress has most notably employed the impeachment tool against the President and federal judges, but all federal civil officers are subject to removal by impeachment.[4] The Senate has also concluded (by majority vote) on various occasions that an official impeached while in office remains subject to trial, conviction, and imposition of the penalty of disqualification even after he or she leaves office.[5] The practice of impeachment makes clear, however, that Members of Congress are not civil officers subject to impeachment and removal.[6]

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authorizing a warrantless wiretap in a case involving domestic national security. Although the Court later held such warrantless wiretaps violated the Fourth Amendment, at the time of the Attorney General's authorization this interpretation was not "clearly established," and the *Harlow* immunity protected officials exercising discretion on such open questions. *See also* Anderson v. Creighton, 483 U.S. 635 (1987) (in an exceedingly opaque opinion, the Court extended similar qualified immunity to FBI agents who conducted a warrantless search).

[7] Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982).

[8] *See* 28 U.S.C. § 1331. On deleting the jurisdictional amount, see Pub. L. No. 94-574, 90 Stat. 2721 (1976), and Pub. L. No. 96-486, 94 Stat. 2369 (1980). If such suits are brought in state courts, they can be removed to federal district courts. 28 U.S.C. § 1442(a).

[1] The Constitution contains a number of provisions that are relevant to the impeachment of federal officials. Article I, Section 2, Clause 5 grants the sole power of impeachment to the House of Representatives; Article I, Section 3, Clause 6 assigns the Senate sole responsibility to try impeachments; Article I, Section 3, Clause 7 provides that the sanctions for an impeached and convicted individual are limited to removal from office and potentially a bar from holding future office, but an impeachment proceeding does not preclude criminal liability; Article II, Section 2, Clause 1 provides that the President enjoys the pardon power, but it does not extend to cases of impeachment; and Article II, Section 4 defines which officials are subject to impeachment and what kinds of misconduct constitute impeachable behavior. Article III does not mention impeachment expressly, but Section 1, which establishes that federal judges shall hold their seats during good behavior, is widely understood to provide the unique nature of judicial tenure. And Article III, Section 2, Clause 3 provides that trials, "except in Cases of Impeachment, shall be by jury."

[2] U.S. Const. art. II, § 4.

[3] *See* The Federalist Nos. 65, 81 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[4] U.S. Const. art. II, § 4; *see* ArtII.S4.4.5 Jurisprudence on Impeachable Offenses (1865–1900).

[5] *See* 167 Cong. Rec. S609 (daily ed. Feb. 9, 2021) (determining that "Donald John Trump is subject to the jurisdiction of a Court of Impeachment for acts committed while President of the United States, notwithstanding the expiration of his term in that office"); Jared P. Cole & Todd Garvey, Cong. Rsch. Serv., R46013, Impeachment and the Constitution 47–48 (2019), https://crsreports.congress.gov/product/pdf/R/R46013.

[6] *See* ArtII.S4.4.3 Jurisprudence on Impeachable Offenses (1789–1860).

While judicial precedents inform the effective substantive meaning of various provisions of the Constitution, impeachment is at bottom a unique political process largely unchecked by the judiciary. While the meaning of treason and bribery is relatively clear, the scope of high crimes and misdemeanors lacks a formal definition and has been fleshed out over time, in a manner perhaps analogous to the common law, through the practice of impeachments in the United States Congress.[7] The type of behavior that qualifies as impeachable conduct, and the circumstances in which impeachment is an appropriate remedy for such actions, are thus determined by, among other things, competing political interests, changing institutional relationships among the three branches of government, and legislators' interaction with and accountability to the public.[8] The weight of historical practice, rather than judicial precedent, is thus central to understanding the nature of impeachment in the United States.

ArtII.S4.2 Offices Eligible for Impeachment

Article II, Section 4:

> *The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.*

The Constitution provides that "[t]he President, Vice President, and all civil Officers of the United States" are subject to removal from office upon impeachment and conviction.[1] However, neither the text nor early historical sources precisely delineate *who qualifies* as a "civil officer." For example, debates at the Constitutional Convention do not appear to reveal the scope of who may be impeached beyond the provision's applicability to the President.[2] And while the *Federalist Papers* emphasized that the power of impeachment serves as a check on the Executive[3] and Judicial Branches,[4] they did not outline exactly what types of officials were considered to be civil officers.[5]

Historical practice thus informs the understanding of who qualifies as a civil officer. Aside from the President and Vice President, who are plainly identified in the Constitution's text as impeachable officials, historical practice indicates that federal judges clearly qualify as officers subject to impeachment and removal, as the majority of proceedings have applied to those positions.[6] Congress has also impeached the head of a cabinet-level Executive department.[7]

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[7] 2 Joseph Story, Commentaries on the Constitution of the United States § 762 (1833) ("Not but that crimes of a strictly legal character fall within the scope of the power, (for, as we shall presently see, treason, bribery, and other high crimes and misdemeanours are expressly within it;) but that it has a more enlarged operation, and reaches, what are aptly termed, political offences, growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law."); *id.* §§ 795–98.

[8] *See* Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis x--xi (2000). *See also* Story, *supra* note 7, at § 762.

[1] U.S. Const. art. II, § 4.

[2] Statements from at least one delegate indicate that participants at the Constitutional Convention assumed that judges were subject to impeachment. *See* 2 The Records of the Federal Convention of 1787, at 66 (Max Farrand ed., 1911) (describing Rufus King's observation that judges would be impeachable because they hold their office during good behavior).

[3] The Federalist No. 66 (Alexander Hamilton).

[4] *Id.* at No. 79; *Id.* at No. 81; *see generally* ArtIII.S1.10.2.1 Overview of Good Behavior Clause et seq.

[5] *See, e.g.*, Va. Const. of 1776, para. 14 (providing that the chief executive of the state could only be impeached after leaving office); Del. Const. of 1776, art. 23 (same).

[6] *See* List of Individuals Impeached by the House of Representatives, U.S. House of Representatives, http://history.house.gov/Institution/Impeachment/Impeachment-List/ (last visited Jan. 24, 2018).

While this indicates a congressional understanding that high-level Executive officers may be subject to impeachment, it is unclear how far down the ranks of the federal bureaucracy this principle travels.[8]

The second impeachment trial of President Donald Trump centered on the question of whether former officials remain subject to trial by the Senate after leaving office. There is historical evidence to support an original understanding that former officials remain subject to conviction and punishment by the Senate for actions taken while in office.[9] The constitutional text, however, does not directly address the question. Former President Trump's attorneys viewed the Constitution's command that "[t]he President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment . . . and Conviction," as supporting a requirement that the impeachment process applies only to officials who are holding office during the impeachment proceedings.[10] Justice Joseph Story, in his influential *Commentaries on the Constitution of the United States*, similarly argued that "the language of the constitution may create some doubt, whether [disqualification] can be pronounced without being coupled with a removal from office."[11] Moreover, to extend the impeachment process to former officials could be viewed as in tension with the Constitution's otherwise clear break from the British model, which permitted impeachment of private citizens.[12]

But it has also been argued, including by the House managers in the second Trump trial, that the constitutionally enumerated punishments of removal from office and disqualification from future office are distinct components of the remedy for impeachable misconduct.[13] The fact that an official has left office, and is therefore no longer subject to removal, does not "exempt" them from the remaining penalty of disqualification.[14] Moreover, if impeachment does not extend to officials who are no longer in office, then an important aspect of the

[7] *See* 3 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States §§ 2444–68 (1907), https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/pdf/GPO-HPREC-HINDS-V3.pdf [hereinafter Hinds]; *see infra* ArtII.S4.4.5 Jurisprudence on Impeachable Offenses (1865–1900).

[8] Judicial interpretations of which positions qualify as officers under the Appointments Clause may shed light on which Executive Branch positions are filled by civil officers that are subject to impeachment. *See* Akhil Reed Amar, *On Impeaching Presidents*, 28 Hofstra L. Rev. 291, 303 (1999); Michael J. Broyde & Robert A. Schapiro, *Impeachment and Accountability: The Case of the First Lady*, 15 Const. Comment. 479 (1998). The Supreme Court, in interpreting those provisions, has distinguished between officers, who exercise "significant authority" of the United States, *Buckley v. Valeo,* 424 U.S. 1, 126 (1976), and employees, or non-officers who are "lesser functionaries subordinate to the officers of the United States." *Id.* at 126 n.162. The Court has further recognized the Constitution's distinction between principal officers, who must be appointed by the President and confirmed by the Senate, and inferior officers, whose appointment may be placed in the President, department heads, or the courts of law. Edmond v. United States, 520 U.S. 651, 663 (1997). Assuming this line of cases serves as a guide in deciding who is a civil officer subject to impeachment, it appears that "employees," as non-officers, are not subject to impeachment, while principal officers, such as the head of a cabinet-level Executive department, are. In between these two categories, historical practice does not indicate whether an inferior officer is subject to impeachment, as the House has never impeached such an individual.

[9] For a historical and textual interpretation of whether a former official is subject to trial for impeachment, see Jared P. Cole & Todd Garvey, Cong. Rsch. Serv., LSB10565, The Impeachment and Trial of a Former President (2021), https://crsreports.congress.gov/product/pdf/LSB/LSB10565.

[10] U.S. Const. art. II § 4; Proceedings of the United States Senate in the Impeachment Trial of Donald John Trump, Part II, 117th Cong., S. Doc. No. 117-2, at 122–32 (2021).

[11] 3 Joseph Story, Commentaries on the Constitution of the United States § 801 (1833).

[12] *Id.* at § 788.

[13] Proceedings of the United States Senate in the Impeachment Trial of Donald John Trump, Part I, 117th Cong., S. Doc. No. 117-2, at 70–97 (2021).

[14] Proceedings of the United States Senate in the Impeachment Trial of Donald John Trump, Part III, 117th Cong., S. Doc. No. 117-2, at 101 (2021).

impeachment punishment would be lost as Congress could never bar an official from holding office in the future as long as that individual resigns at some point prior to a Senate conviction.[15]

While these interpretive arguments have, and likely will continue to be raised, the Senate has determined by majority vote on multiple occasions that they retain the power to proceed against an Executive Branch official who has resigned from office. These decisions span from the trial of former Secretary of War William Belknap in 1876 to former President Trump in 2020.[16] Nevertheless, it appears that while Congress may have legal authority to impeach and try a former official, current disagreement on the matter may be widespread enough to create a practical obstacle to obtaining the supermajority necessary to convict a former official.

The Constitution's structure and historical practice also indicate that impeachment likely does not apply to Members of Congress.[17] First, Article II, Section 3 provides that officers of the United States are commissioned by the President;[18] Members of Congress receive no such commission. Second, Members may be removed from office by other means explicitly provided in the Constitution.[19] Third, the Ineligibility Clause bars any person "holding any office under the United States" from serving in any house of Congress, indicating the Members of Congress are not considered officers of the United States.[20]

Finally, congressional practice indicates that Members of Congress are not officers of the United States.[21] In 1797, the House of Representatives voted to impeach Senator William Blount, the first impeachment in the history of the young Republic.[22] Two years later, the Senate concluded that Senator Blount was not a civil officer subject to impeachment and voted to dismiss the articles because that body lacked jurisdiction over the matter.[23] This determination has been accepted ever since by the House and the Senate, and since then, the House has never again voted to impeach a Member of Congress.[24]

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[15] *Id.* at 191.

[16] *See* Cole & Garvey, *supra* note 9 (discussing the Senate's decision to exercise jurisdiction in the Belknap impeachment); 167 Cong. Rec. S609 (daily ed. Feb. 9, 2021).

[17] *See* ArtII.S4.4.3 Jurisprudence on Impeachable Offenses (1789–1860); The Federalist No. 66 (Alexander Hamilton).

[18] U.S. Const. art. II, § 3.

[19] *Id.* art. I, § 5.

[20] *Id.* § 6.

[21] *See* Legal Aspects of Impeachment: An Overview, DOJ, Office of Legal Counsel 55 n.31 (1974), https://www.justice.gov/olc/page/file/980036/download ("The Senator William Blount precedent of 1798 does seem to have determined that the Senate will not try its members on an impeachment."); David Currie, The Constitution in Congress: The Federalist Period 1789–1801 275–281 (1997).

[22] 3 Hinds, *supra* note 7, at §§ 2300–02.

[23] *Id.* at § 2318.

[24] *See* Charles W. Johnson, John V. Sullivan, and Thomas J. Wickham, Jr., House Practice: A Guide to the Rules, Precedents and Procedures of the House 604–06 (2017); Staff of H. Comm. on the Judiciary, 93d Cong., Impeachment, Selected Materials 692 (Comm. Print 1973); Motions Sys. Corp. v. Bush, 437 F.3d 1356, 1373 (Fed. Cir. 2006) ("This principle has been accepted since 1799, when the Senate, presented with articles of impeachment against Senator William Blount, concluded after four days of debate that a Senator was not a civil officer for purposes of the Impeachment Clause."); Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 48 (2000). In addition, in contrast to English practice, impeachment does not extend to private citizens or state officers, but is limited to officers of the federal government. 3 Hinds, *supra* note 7, at §§ 2007, 2315. No military officer has ever been impeached, which is consistent with the views of some early constitutional commentary that military officers are not subject to impeachment. Justice Joseph Story has suggested that "civil officers" was not intended to cover military officers. *See* II Joseph Story, Commentaries on the Constitution of the United States § 789 (1833) (concluding that "[t]he sense, in which [civil] is used in the Constitution, seems to be in contradistinction to military, to indicate the rights and duties relating to citizens generally, in contradistinction to those of persons engaged in the land or naval service of the government").

ArtII.S4.3 Future of Impeachment Remedy

Article II, Section 4:

> *The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.*

While the historical practices of Congress offer the best guide as to what behavior constitutes a high crime or misdemeanor, this principle does not necessarily preclude the development or expansion of impeachment's reach in the future. Indeed, as noted previously,[1] the absence of impeachment proceedings directed against particular conduct in the past does not mean that such conduct would not be deemed impeachable in different circumstances.[2] For example, certain conduct giving rise to impeachment might not have occurred or attracted notice at an earlier time. Understandings of impeachable behavior might also change over time to recognize impeachment as available for a wider range of behavior than has been previously recognized. One possibility, among others, is that impeachment may be seen as appropriate to punish violations of the law or the Constitution that lack an alternative remedy, such as redress in the federal courts.[3] For example, impeachment has been proposed, but never applied, for alleged violations of constitutional and statutory requirements relating to the use of military force without congressional authorization.[4]

Likewise, future impeachments might shed light on unresolved issues pertinent to the impeachment process. For instance, the applicability of the Due Process Clause of the Fifth Amendment to federal impeachments is unclear.[5] In a suit challenging his impeachment and removal from office, former Judge Alcee Hastings argued that he had a property interest in his seat and salary and the government could not deprive him of these without according him due process—including a full trial before the entire Senate.[6] The U.S. District Court for the District of Columbia ruled that due process applied to impeachment proceedings.[7] However, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the ruling[8] because of the Supreme Court's intervening decision of *Nixon v. United States*.[9] On remand, the district court dismissed the case as nonjusticiable without commenting on the merits of the due process claim.[10] Presently, therefore, individual Senators themselves must decide whether the Due Process Clause applies to impeachment trials and what procedures such a requirement might entail. At times, this has led to inconsistent practices. For example, at the

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[1] *See* ArtII.S4.4.2 Historical Background on Impeachable Offenses and accompanying notes.

[2] *See* Charles Black, Impeachment 33–36 (1974).

[3] *Id.*

[4] *See, e.g.*, H. Comm. on the Judiciary, Impeachment of Richard M. Nixon, President of the United States, 93d Cong., 2d Sess., H.R. Rep. No. 93-1305, at 220–26 (1974); H. Res. 370, 98th Cong. (1983) (alleging that President committed high crimes or misdemeanors by ordering the invasion of Grenada).

[5] The issue of due process in the House impeachment investigation was raised by the President's attorneys in the first Trump impeachment trial. *See* Proceedings of the United States Senate in the Impeachment Trial of Donald John Trump, Part II, 117th Cong., S. Doc. No. 117-2, at 175–80 (2021). The managers asserted that the argument that the President had been denied due process in the House impeachment investigation had "no grounding in law or fact." Proceedings of the United States Senate in the Impeachment Trial of Donald John Trump, Part III, 117th Cong., S. Doc. No. 117-2, at 211 (2021). For a discussion of the application of the Due Process Clause in House and Senate impeachment proceedings see Todd Garvey, Cong. Rsch. Serv., R45983, Congressional Access to Information in an Impeachment Investigation 17 n.118 (2019), https://crsreports.congress.gov/product/pdf/R/R45983.

[6] Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 41 (2000).

[7] Hastings v. United States, 802 F. Supp. 490, 502 (D.D.C. 1992).

[8] Hastings v. United States, 988 F.2d 1280 (D.C. Cir. 1993).

[9] Nixon v. United States, 506 U.S. 224 (1993).

[10] Hastings v. United States, 837 F. Supp. 3 (D.D.C. 1993).

trial of Alcee Hastings, several Senators had been Members of the House in the previous session that voted for impeachment.[11] All three recused themselves from trial to avoid the appearance of a conflict.[12] In contrast, the same situation presented itself at the trials of Judge John Pickering and President Bill Clinton, but no Senators recused themselves in those cases.[13]

ArtII.S4.4 Impeachable Offenses

ArtII.S4.4.1 Overview of Impeachable Offenses

Article II, Section 4:

> *The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.*

The Constitution provides that the grounds of impeachment are for "treason, bribery, or other high Crimes and Misdemeanors." While the types of conduct constituting treason and bribery are relatively well-understood terms,[1] the meaning of "high Crimes and Misdemeanors" is not defined in the Constitution or in statute.[2] The basic framework for impeachment was inherited from English practice by the colonies in their adoption of state constitutions.[3] Both experiences informed the adoption of impeachment provisions in the federal Constitution.

The common method for interpreting the Constitution's impeachment provisions stands in some contrast to that of other constitutional provisions. Whereas judicial precedent drives the prevailing understanding of many provisions of the Constitution, impeachment is essentially a political process that is largely unreviewable by the Judicial Branch.[4] As such, the historical practice of impeachment proceedings, rather than judicial decisions, informs our understanding of the Constitution's meaning in this area. In this vein, the meaning of "high crimes and misdemeanors" is informed not by judicial decisions, but by the history of congressional impeachments.[5]

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[11] Gerhardt, *supra* note 6, at 41.

[12] Peter Hoffer & N.E.H. Hull, Impeachment in America, 1635–1805 213 (1984).

[13] Gerhardt, *supra* note 6, at 41

[1] *See* U.S. Const. art. III, § 3 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."); 18 U.S.C. § 201 (bribery of public officials and witnesses). *See also* Act of April 30, 1790 § 21, 1 Stat. 112 (1845) (establishing bribery as a federal criminal offense).

[2] *See* Charles Black, Impeachment 27 (1974).

[3] The Federalist No. 65 (Alexander Hamilton); Peter Hoffer & N.E.H. Hull, Impeachment in America, 1635–1805 59–95 (1984).

[4] *See Nixon*, 506 U.S. at 237–38 (1993) (ruling that a challenge to the Senate's use of a trial committee to take evidence posed a nonjusticiable political question).

[5] 2 Joseph Story, Commentaries on the Constitution of the United States § 795 (1833) ("Again, there are many offences, purely political, which have been held to be within the reach of parliamentary impeachments, not one of which is in the slightest manner alluded to in our statute book. And, indeed, political offences are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it."); *id.* at § 798 ("In examining the parliamentary history of impeachments, it will be found, that many offences, not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanours worthy of this extraordinary remedy.").

ArtII.S4.4.1
Overview of Impeachable Offenses

Impeachment has been used to remove government officers who abuse the power of the office; conduct themselves in a manner incompatible with the purpose and function of their office; or misuse the office for improper or personal gain.[6]

ArtII.S4.4.2 Historical Background on Impeachable Offenses

Article II, Section 4:

> *The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.*

The concept of impeachment and the standard of "high crimes and misdemeanors"[1] originally stems from English Parliamentary practice.[2] The House of Commons impeached and tried before the House of Lords both private citizens and government officers, but not the Crown itself, for offenses considered beyond the reach of the common-law criminal courts.[3] The tool was used by Parliament to corral the power of the Crown and police political offenses committed by ministers and favorites of the King.[4] Impeachment applied to conduct that damaged the state or subverted the government.[5] The standard of "high crimes and misdemeanors" appears intended to address conduct involving an individual's abuse of power or office.[6] Punishment for a conviction could include a range of penalties, including imprisonment, fines, or even death.[7]

The American colonies adopted their own impeachment procedures that informed the Framers' understanding of impeachment.[8] These traditions extended into state constitutions established during the early years of the Republic. During the years of 1776–1787, states adopted into their constitutions' impeachment provisions that limited impeachment to government officials and restricted the punishment for impeachment to removal from office with the possibility of future disqualification from office.[9] At the state level, the body charged with trying an impeachment varied.[10]

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[6] *See* Cong. Globe, 40th Cong., 2d Sess. 1400 (1868) (impeaching President Andrew Johnson for violating the Tenure of Office Act); 132 Cong. Rec. H4710–22 (daily ed. July 22, 1986) (impeaching Judge Harry E. Claiborne for providing false information on federal income tax forms); 156 Cong. Rec. 3155–57 (2010) (impeaching Judge G. Thomas Porteous for engaging in a corrupt relationship with bail bondmen where he received things of value in return for helping bondsman develop relationships with state judges).

[1] For more on the historical background of the impeachment clauses, see ArtIII.S1.10.2.2 Historical Background on Good Behavior Clause; ArtI.S2.C5.2 Historical Background on Impeachment; ArtI.S3.C6.2 Historical Background on Impeachment Trials.

[2] *See* The Federalist No. 65 (Alexander Hamilton); Raoul Berger, Impeachment: The Constitutional Problems 54 (1973); H. Comm. on the Judiciary, 93d Cong., Constitutional Grounds for Presidential Impeachment 4 (Comm. Print 1974) [hereinafter Constitutional Grounds].

[3] Berger, *supra* note 2, at 59; Constitutional Grounds, *supra* note 2, at 4. The availability of impeachment in England appears to have depended on whether the offense endangered the government or society. *See* Peter Hoffer & N.E.H. Hull, Impeachment in America, 1635–1805 3 (1984).

[4] Constitutional Grounds, *supra* note 2, at 4–5.

[5] *Id.* (citing John Rushworth, *The Tryal of Thomas Earl of Stafford*, *in* 8 Historical Collections 8 (1686)).

[6] *Id.* at 4–6.

[7] Berger, *supra* note 2, at 67.

[8] *See* Hoffer & Hull, *supra* note 3, at 15–26.

[9] *See id.* at 68–95; *see, e.g.*, Mass. Const. of 1780 § 2, art. VIII; § 3, art. VI; New York Const. of 1777 art. XXXIII.

[10] *See* Gordon S. Wood, The Creation of the American Republic 141 (1969); *see, e.g.*, N.Y. Const. of 1777 arts. XXXII–XXXIII (providing that impeachments be tried before a court composed of Senators, judges of the Supreme Court, and the chancellor).

The standards for impeachments adopted at the Constitutional Convention were thus inspired by both English and colonial practice, but ultimately differed in structure from both these traditions. In particular, the Framers aimed to narrow the scope of impeachable offenses and persons subject to impeachment as compared to English practice.[11] For example, while according to English practice at the time of the Constitution's enactment, impeachment extended to anyone except a member of the royal family, the federal Constitution limited impeachment to federal government officers (including the President and Vice President).[12] In addition, whereas the English Parliament never formally defined the parameters of what counted as impeachable conduct, the Framers restricted impeachment to treason, bribery, and high crimes and misdemeanors.[13] In English practice, the Crown could pardon individuals following an impeachment conviction.[14] In contrast, the Framers restricted the pardon power from being applied to impeachments, rendering the impeachment process essentially unchecked by the Executive Branch.[15]

The Framers also rejected a proposal made during the Constitutional Convention to include—in addition to treason and bribery[16]—"maladministration" as an impeachable offense, which would have presumably incorporated a broad range of common-law offenses.[17] Although "maladministration" was a ground for impeachment in many state constitutions at the time of the Constitution's drafting,[18] the Framers instead adopted the term "high Crimes and misdemeanors" from English practice. James Madison, at the Constitutional Convention, objected to the inclusion of "maladministration" as grounds for impeachment because such a vague impeachment standard would "be equivalent to a tenure during pleasure of the Senate."[19] Immediately thereafter, the Convention voted to include "high crimes and misdemeanors" instead.[20] Arguably, the Framers' rejection of such a broad term supports the view that congressional disagreement with a President's policy goals is not sufficient grounds for impeachment.[21]

Of particular importance to the understanding of the practice in America were the roughly contemporaneous British impeachment proceedings of Warren Hastings, the governor general of India, which were transpiring at the time of the Constitution's formulation and ratification.[22] Hastings was charged with high crimes and misdemeanors, which included

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[11] *See* Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 St. Louis U. L.J. 905, 908–12 (1999).

[12] 15 The American and English Encyclopedia of Law 1061, 1064 (David S. Garland & Lucius P. McGehee eds., 1900).

[13] *Id.* at 1066 (David S. Garland & Lucius P. McGehee eds., 1900). Further, the English House of Lords could convict on a bare majority, while the Framers required a two-thirds vote of the Senate to remove an officer. *Id.* at 1071. The House of Lords could also require any punishment upon conviction, while the federal Constitution limits the results of impeachment to removal from office and, potentially, disqualification from holding federal office in the future. *Id.* at 1072. Finally, British judges could be removed for a variety of reasons, while impeachment is the sole remedy to remove federal judges under the Constitution.

[14] 15 The American and English Encyclopedia of Law, *supra* note 12, at 1071–72.

[15] *See* U.S. Const. art. II, § 2, cl. 1 (providing that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment").

[16] 2 James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America 508 (Gaillard Hunt & James Brown Scott eds., 1987).

[17] 2 The Records of the Federal Convention of 1787, at 550 (Max Farrand ed., 1911); *see* Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 Tex. L. Rev. 1, 14–15 (1989).

[18] Gerhardt, Constitutional Limits, *supra* note 17, at 29; Constitutional Grounds, *supra* note 2, at 11; Charles Black, Impeachment 29 (1974).

[19] 2 Records of the Federal Convention of 1787, *supra* note 17, at 550; Black, *supra* note 17, at 29–30.

[20] 2 Records of the Federal Convention of 1787, *supra* note 17, at 64–65; Black, *supra* note 17, at 28.

[21] Black, *supra* note 17, at 30.

[22] Constitutional Grounds, *supra* note 2, at 7; Hoffer & Hull, *supra* note 3, at 113–15.

corruption and abuse of power.[23] At the Constitutional Convention, George Mason positively referenced the impeachment of Hastings. At that point in the Convention, a proposal to define impeachment as appropriate for treason and bribery was under consideration. George Mason objected, noting that treason would not cover the misconduct of Hastings.[24] Moreover, he thought impeachment should extend to "attempts to subvert the Constitution."[25] Accordingly, he proposed that maladministration be included as an impeachable offense, although, as noted earlier, this was eventually rejected in favor of "high crimes and misdemeanors."[26]

The Framers thus ultimately considered impeachment to be an essential tool to hold government officers accountable for political crimes.[27] The representatives of the people were best placed to investigate the "conduct of public men."[28] Moreover, impeachment is an essential bulwark in the separation of powers for the legislature against the power of the Executive and Judicial Branches. The President enjoys the power to appoint—with Senate approval—officers of the United States in the Executive and Judicial Branches, as well as the authority to remove those in the Executive Branch.[29] Judicial officers, once appointed, maintain their positions for life.[30] Consequently, Congress's power of impeachment serves as a crucial legislative check on the potential "encroach[ing]" power of Executive Branch officers[31] and likewise guards against judicial "usurpations on the authority of the legislature."[32]

Evidence of precisely what conduct the Framers and ratifiers of the Constitution considered to constitute high crimes and misdemeanors is relatively sparse. At the North Carolina ratifying convention, James Iredell, later to serve as an associate Justice of the Supreme Court, noted the difficulty in defining what constitutes an impeachable offense, beyond causing injury to the government.[33] For him, impeachment was "calculated to bring [offenders] to punishment for crime which is not easy to describe, but which every one must be convinced is a high crime and misdemeanor against government. [T]he occasion for its exercise will arise from acts of great injury to the community."[34] He thought the President would be impeachable for receiving a "bribe or act[ing] from some corrupt motive or other,"[35] but not merely for "want of judgment."[36] Similarly, Samuel Johnston, then the governor of North Carolina and later the state's first Senator, thought impeachment was reserved for "great misdemeanors against the public."[37]

At the Virginia ratifying convention, a number of individuals claimed that impeachable offenses were not limited to indictable crimes.[38] For example, James Madison argued that were the President to assemble a minority of states in order to ratify a treaty at the expense of the

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[23] Constitutional Grounds, *supra* note 2, at 7; Hoffer & Hull, *supra* note 3, at 113–15.

[24] 2 The Records of the Federal Convention of 1787, *supra* note 17, at 550.

[25] *Id.*

[26] *See* ArtII.S4.4.2 Historical Background on Impeachable Offenses and accompanying notes.

[27] *See* The Federalist No. 65 (Alexander Hamilton).

[28] *Id.*

[29] U.S. Const. art. II, § 2, cl. 2.

[30] *Id.* art. III, § 1.

[31] *See* The Federalist No. 66 (Alexander Hamilton).

[32] *See Id.* No. 81.

[33] *See* Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 19 (2000).

[34] 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 113 (Jonathan Elliot ed., 1827) [hereinafter Elliot's Debates] (North Carolina, statement of James Iredell).

[35] *Id.* at 127.

[36] *Id.* at 126.

[37] *Id. See* Gerhardt, *supra* note 33, at 19.

[38] *See Id.*

other states, this would constitute a impeachable "misdemeanor."[39] And Virginia governor Edmund Randolph, who would later become the Nation's first Attorney General, noted that impeachment was appropriate for a "willful mistake of the heart," but not for incorrect opinions.[40] In addition, Randolph argued that impeachment was appropriate for a President's violation of the Foreign Emoluments Clause, which, he noted, guards against corruption.[41]

James Wilson, delegate to the Constitutional Convention and later a Supreme Court Justice, delivered talks at the College of Philadelphia following the adoption of the federal Constitution concerning impeachment. He claimed that impeachment was reserved to "political crimes and misdemeanors, and to political punishments."[42] He argued that, in the eyes of the Framers, impeachments did not come "within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims; and are directed to different objects."[43] Consequently, for Wilson, the impeachment and removal of an individual did not preclude a later trial and punishment for a criminal offense predicated on the same behavior.[44]

At the time of ratification of the Constitution, the phrase "high crimes and misdemeanors" thus appears understood to have applied to uniquely "political" offenses, or misdeeds committed by public officials against the state.[45] Alexander Hamilton, in explaining the Constitution's impeachment provisions, described impeachable offenses as arising from "the misconduct of public men, or in other words from the abuse or violation of some public trust."[46] Such offenses were "*Political*, as they relate chiefly to injuries done immediately to the society itself."[47] In the centuries following the Constitution's ratification, precisely what behavior constitutes a high crime or misdemeanor has been the subject of much debate.[48]

ArtII.S4.4.3 Jurisprudence on Impeachable Offenses (1789–1860)

Article II, Section 4:

> *The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.*

Congressional understanding of the scope of activities subject to impeachment and the potential persons who may be impeached was first put to the test during the Adams Administration. In 1797, letters sent to President John Adams revealed a conspiracy by Senator William Blount—in violation of the United States government's policy of neutrality on

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[39] 1 Elliot's Debates, *supra* note 34, at 500.

[40] 2 *id.* at 401.

[41] David Robertson, Debates and Other Proceedings of the Convention of Virginia 345 (2d ed. 1805).

[42] James Wilson, *Lectures on Law*, *reprinted in*, 1 The Works of James Wilson 426 (Robert Green McCloskey ed., 1967).

[43] *Id.* at 408.

[44] *Id.*

[45] Gary L. McDowell, *High Crimes and Misdemeanors: Recovering the Intentions of the Founders*, 67 Geo. Wash. L. Rev. 626, 638 (1999); Berger, *supra* note 2, at 59–61.

[46] The Federalist No. 65 (Alexander Hamilton).

[47] *Id.*

[48] *Compare* H.R. Rep. No. 105-830, at 110–18 (1998) (majority views), *with id.* at 204 (minority views). *See* Gary L. McDowell, *High Crimes and Misdemeanors: Recovering the Intentions of the Founders*, 67 Geo. Wash. L. Rev. 626, 627 (1999); Laurence H. Tribe, *Defining "High Crimes and Misdemeanors": Basic Principles*, 67 Geo. Wash. L. Rev. 712, 717 (1999).

the matter and the Neutrality Act[1]—to organize a military expedition with the British to invade land in the American Southwest under Spanish control.[2] The House voted to impeach Senator Blount on July 7, 1797,[3] while the Senate voted to expel Senator William Blount the next day.[4] Before impeaching Senator Blount, several House Members questioned whether Senators were "civil officers" subject to impeachment.[5] But Samuel W. Dana of Connecticut argued that Members of Congress must be civil officers, because other provisions of the Constitution that mention offices appear to include holding legislative office.[6] Despite already having voted to impeach Senator Blount, it was not until early in the next year that the House actually adopted specific articles of impeachment against Senator Blount.[7]

At the Senate impeachment trial in 1799, Blount's attorneys argued that impeachment was improper because Blount had already been expelled from his Senate seat and had not been charged with a crime.[8] However, the primary issue of debate was whether Members of Congress qualified as civil officers subject to impeachment. The House prosecutors argued that under the American system, as in England, virtually anyone was subject to impeachment.[9] The defense responded that this broad interpretation of the impeachment power would enable Congress to impeach state officials as well as federal, upending the proper division of federal and state authorities in the young Republic.[10] The Senate voted to defeat a resolution that declared Blount was a "civil officer" and therefore subject to impeachment.[11] The Senate ultimately voted to dismiss the impeachment articles brought against Blount because it lacked jurisdiction over the matter, although the impeachment record does not indicate precisely the basis for this conclusion.[12] Regardless, the House has not impeached a Member of Congress since.

The first federal official to be impeached and removed from office was John Pickering, a federal district judge. The election of President Thomas Jefferson in 1800, along with Jeffersonian Republican majorities in both House of Congress, signaled a shift from Federalist party control of government.[13] Much of the federal judiciary at this early stage of the Republic were members of the Federalist party, and the new Jeffersonian Republican majority strongly

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[1] 1 Stat. 381, 384 § 5 (June 5, 1794).

[2] *See* Buckner F. Melton, The First Impeachment 60–103 (1998); Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 48 (2000); David Currie, The Constitution in Congress: The Federalist Period 1789–1801 275–81 (1997).

[3] Emily F.V. Tassel & Paul Finkelman, Impeachable Offenses: A Documentary History from 1787 to the Present 87–88 (1999).

[4] Gerhardt, *supra* note 2, at 48; *see* U.S. Const. art. I, § 5.

[5] Currie, *supra* note 2, at 276.

[6] *Id.* (noting Article I, Section 9 and Article I, Section 3).

[7] Tassel & Finkelman, *supra* note 3, at 87–88; Melton, *supra* note 2, at 104–89.

[8] Currie, *supra* note 2, at 277.

[9] *Id.* at 279.

[10] *Id.*

[11] 8 Annals of Cong. 2317 (1799).

[12] Peter Hoffer & N.E.H. Hull, Impeachment in America, 1635–1805 155 (1984). 9 Annals of Cong. 2648–49 (1799). Currie, *supra* note 2, at 2780–81. While the Senate's vote to dismiss for lack of jurisdiction might also be based on the fact that the Senator had been expelled from Congress, and therefore did not occupy an "office," it is generally accepted that the Senate's decision stands for the proposition that impeachment does not extend to Members of Congress. *See* Charles W. Johnson, John V. Sullivan, and Thomas J. Wickham, Jr., House Practice: A Guide to the Rules, Precedents and Procedures of the House 604–06 (2017); Staff of H. Comm. on the Judiciary, 93d Cong., Impeachment, Selected Materials 692 (Comm. Print 1973); Motions Sys. Corp. v. Bush, 437 F.3d 1356, 1373 (Fed. Cir. 2006) ("This principle has been accepted since 1799, when the Senate, presented with articles of impeachment against Senator William Blount, concluded after four days of debate that a Senator was not a civil officer for purposes of the Impeachment Clause.").

[13] Hoffer & Hull, *supra* note 12, at 181.

opposed the Federalist-controlled courts.[14] John Pickering was impeached by the House of Representatives in 1803[15] and convicted by the Senate on March 12, 1804.[16] The circumstances of Judge Pickering's impeachment are somewhat unique as it appears that the judge had been mentally ill for some time, although the articles of impeachment did not address Pickering's mental faculties but instead accused him of drunkenness, blasphemy on the bench, and refusing to follow legal precedent.[17] Judge Pickering did not appear at his trial, and Senator John Quincy Adams apparently served as a defense counsel.[18] Following debate in a closed session, the Senate voted to permit evidence of Judge Pickering's insanity, drunkenness, and behavior on the bench.[19] The Senate also rejected a resolution to disqualify three Senators, who were previously in the House and had voted to impeach Judge Pickering, from participating in the impeachment trial.[20] The Senate voted to convict Judge Pickering guilty as charged, but the articles did not explicitly specify that any of Pickering's behavior constituted a high crime or misdemeanor.[21] Objections to the framing of the question at issue caused several Senators to withdraw from the trial.[22]

On the same day the Senate convicted Judge Pickering, the House of Representatives impeached Supreme Court Justice Samuel Chase.[23] Like the impeachment trial of Judge Pickering, the proceedings occurred following the election of President Thomas Jefferson and amidst intense conflict between the Federalists and Jeffersonian Republicans.[24] Justice Chase was viewed by Jeffersonian Republicans as openly partisan, and in fact the Justice did openly campaign for the election of Federalist John Adams in the election of 1800.[25] In addition, Republicans took issue with Justice Chase's aggressive approach to jury instructions in Sedition Act prosecutions.[26] The eight articles of impeachment accused him of acting in an "arbitrary, oppressive, and unjust" manner at trial, misapplying the law, and expressing partisan political views to a grand jury.[27] The Senate trial began on February 4, 1805. Both the House managers and defense counsel for Justice Chase presented witnesses detailing the Justice's behavior.[28] While some aspects of the dispute focused on whether Justice Chase took certain actions, the primary conflict centered on whether his behavior was impeachable.[29] Before reaching a verdict, the Senate approved a motion from Senator James Bayard, a Federalist from Delaware, that the underlying question be whether Justice Chase was guilty of

[14] *Id.* at 181.

[15] *See* 12 Annals of Cong. 642 (1803); 13 Annals of Cong. 380 (1803).

[16] *See* 13 Annals of Cong. 368 (1804); Hoffer & Hull, *supra* note 12, at 208, 216–17.

[17] Eleanore Bushnell, Crimes, Follies, and Misfortunes: The Federal Impeachment Trials 45–46 (1992).

[18] Hoffer & Hull, *supra* note 12, at 211–13.

[19] Bushnell, *supra* note 17, at 48–51. Scholars have noted that the Senate vote in favor of admitting evidence of insanity likely stemmed from two opposing reasons. The minority party Federalists—of which Judge Pickering was a member—considered evidence of insanity a reason to acquit the judge because it was not an impeachable offense. The majority party Republicans, in contrast, considered insanity a reason to remove him from the bench. *Id.* at 48–49.

[20] *Id.* at 47.

[21] 13 Annals of Cong. 367 (1804); Bushnell, *supra* note 17, at 53–54.

[22] Bushnell, *supra* note 17, at 53–54.

[23] 13 Annals of Cong. 1180 (1804); Bushnell, *supra* note 17, at 60.

[24] Hoffer & Hull, *supra* note 12, at 228–138.

[25] Bushnell, *supra* note 17, at 63.

[26] Josh Chafetz, Congress's Constitution 108 (2017).

[27] Impeachment, Selected Materials, *supra* note 12, at 133–35.

[28] Bushnell, *supra* note 17, at 63–73.

[29] Bushnell, *supra* note 17, at 67–84; *see* Gerhardt, *supra* note 2, at 181.

high crimes and misdemeanors, rather than guilty as charged.[30] The Senate vote ultimately fell short of the necessary two-thirds majority to secure a conviction on any of the articles.[31] Of the eight articles, a majority of Senators voted to convict on three, while the remaining five did not muster a majority for conviction.[32]

The trial raised a number of questions which have recurred throughout the history of impeachments. For example, is impeachment limited to criminal acts, or does it extend to non-criminal behavior?[33] The opposing sides in the Chase case took differing views on this matter, as they would in later impeachments to come.[34] Due in part to the charged political atmosphere of the historical context, the attempted impeachment of Justice Chase has also come to represent an important limit on the scope of the impeachment remedy. Commentators have interpreted the acquittal of Justice Chase as establishing that impeachment does not extend to congressional disagreement with a judge's opinions or judicial philosophy.[35] At least some of the Senators who voted to acquit did not consider the alleged offenses as rising to the level of impeachable behavior.[36]

By the time of the next impeachment in 1830, both houses of Congress were controlled by Jacksonian Democrats, and the federal courts were unpopular with Congress and the public.[37] The House of Representatives impeached James Peck, a federal district judge, for abusing his judicial authority. The sole article accused the judge of holding an attorney in contempt for publishing an article critical of Peck and barring the attorney from practicing law for 18 months. The context surrounding Judge Peck's actions involved disputes over French and Spanish land grant titles following the transfer of land in the Louisiana territory from French to U.S. control.[38] Shortly after Missouri was admitted to the United States as part of the Missouri Compromise in 1821, Judge Peck decided a land rights case against the claimants in favor of the United States.[39] The attorney for the plaintiffs wrote an article critical of the decision in a local paper.[40] Judge Peck held the attorney in contempt, sentenced him to jail for twenty-four hours, and barred him from practicing law for eighteen months.[41]

The House impeached Judge Peck by a wide margin.[42] Of central concern during the Senate trial were the limits of a judge's common law contempt power, a matter that appeared to be in dispute.[43] The Senate ultimately acquitted Judge Peck, with roughly half of the

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[30] Bushnell, *supra* note 17, at 84.

[31] Tassel & Finkelman, *supra* note 3, at 103.

[32] 14 Annals of Cong. 664–69 (1805); Tassel & Finkelman, *supra* note 3, at 103.

[33] Bushnell, *supra* note 17, at 82–87.

[34] H. Comm. on the Judiciary, Impeachment of Richard M. Nixon, President of the United States, 93d Cong., 2d Sess., H.R. Rep. No. 93–1305, at 362–72 (1974) (minority views); 3 Lewis Deschler, Precedents of the United States of the House of Representatives, H.R. Doc. No. 94-661, at Ch. 14 § 3.8 (1974), https://www.govinfo.gov/content/pkg/GPO-HPREC-DESCHLERS-V3/pdf/GPO-HPREC-DESCHLERS-V3.pdf.

[35] *See* David P. Currie, *The Constitution in Congress: the Most Endangered Branch, 1801–1805*, 33 Wake Forest L. Rev. 219, 259 (1998); William H. Rehnquist, Grand Inquests: The Historic Impeachments 114 (1992); Chafetz, *supra* note 26, at 150. *But see* Chafetz, *supra* note 26, at 109 (arguing that Justice Chase returned to the bench "humbled" and that one result of the affair was that the Marshall Court "made its peace with Republican politics").

[36] *See* Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 St. Louis U. L.J. 905, 921 (1999).

[37] Bushnell, *supra* note 17, at 91.

[38] Tassel & Finkelman, *supra* note 3, at 108–09; Bushnell, *supra* note 17, at 92.

[39] Tassel & Finkelman, *supra* note 3, at 108–09.

[40] *Id.*

[41] *Id.*

[42] 6 Cong. Deb. 818–19 (1830).

[43] Bushnell, *supra* note 17, at 91–113.

Jacksonian Democrats voting against conviction.[44] Shortly thereafter, Congress passed a law reforming and defining the scope of the judicial contempt power.[45]

Finally, in the midst of the Civil War, federal district judge West H. Humphreys was appointed to a position as a judge in the Confederate government, but he did not resign as a United States federal judge.[46] In 1862, the House impeached and the Senate convicted Judge Humphreys for joining the Confederate government and abandoning his position.[47] As in the trial of Judge Pickering previously, Judge Humphreys did not attend the proceedings.[48] Unlike in the case of Judge Pickering, however, no defense was offered in the impeachment trial of Judge Humphreys.[49]

ArtII.S4.4.4 President Andrew Johnson and Impeachable Offenses

Article II, Section 4:

> *The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.*

The impeachment and trial of President Andrew Johnson transpired in the shadow of the Civil War and the assassination of President Abraham Lincoln.[1] President Johnson was a Democrat and former slave owner who was the only Southern Senator to remain in his seat when the South seceded from the Union.[2] President Lincoln, a Republican, appointed Johnson military governor of Tennessee in 1862,[3] and Johnson was later selected as Lincoln's second-term running mate on a "Union" ticket.[4] Given these unique circumstances, President Johnson lacked both a party and geographic power base when in office, which likely isolated him when he assumed the presidency following the assassination of President Lincoln.[5]

The majority Republican Congress and President Johnson clashed over, among other things, Reconstruction policies implemented in the former slave states and control over officials in the Executive Branch.[6] President Johnson vetoed twenty-one bills while in office, compared to thirty-six vetoes by all prior Presidents. Congress overrode fifteen of Johnson's vetoes, compared to just six with prior Presidents.[7] On March 2, 1867, Congress reauthorized, over President Johnson's veto, the Tenure of Office Act, extending its protections for all officeholders.[8] In essence, the Act provided that all federal officeholders subject to Senate

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[44] 7 Cong. Deb. 45 (1831).

[45] *See* Act of Mar. 2, 1831, ch. 99, 4 Stat. 487.

[46] Tassel & Finkelman, *supra* note 3, at 114–16.

[47] 2 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States §§ 2385–97 (1907), https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V2/pdf/GPO-HPREC-HINDS-V2.pdf.

[48] Bushnell, *supra* note 17, at 115.

[49] *Id.*

[1] *See* William H. Rehnquist, Grand Inquests: The Historic Impeachments 185–98 (1992).

[2] Eleanore Bushnell, Crimes, Follies, and Misfortunes: The Federal Impeachment Trials 128 (1992).

[3] *Id.*

[4] Emily F.V. Tassel & Paul Finkelman, Impeachable Offenses: A Documentary History from 1787 to the Present 222 (1999)

[5] Bushnell, *supra* note 2, at 128.

[6] Michael Les Benedict, The Impeachment and Trial of Andrew Johnson 1–25 (1973); Keith Whittington, Constitutional Construction 113–57 (1999).

[7] Tassel & Finkelman, *supra* note 4, at 222–23.

[8] Tenure of Office Act, 14 Stat. 430 (1867). Tassel & Finkelman, *supra* note 4, at 224.

confirmation could not be removed by the President except with Senate approval,[9] although the reach of this requirement to officials appointed by a prior administration was unclear.[10] Congressional Republicans apparently anticipated the possible impeachment of President Johnson when drafting the legislation; Republicans already knew of President Johnson's plans to fire Secretary of War Edwin Stanton and the Act provided that a violation of its terms constituted a "high misdemeanor."[11]

President Johnson subsequently fired Secretary Stanton without the approval of the Senate. Importantly, his cabinet unanimously agreed that the new restrictions on the President's removal power imposed by the Tenure of Office Act were unconstitutional.[12] Shortly thereafter, on February 24, 1868, the House voted to impeach President Johnson.[13] The impeachment articles adopted by the House against President Johnson included defying the Tenure of Office Act by removing Stanton from office[14] and violating (and encouraging others to violate) the Army Appropriations Act.[15] In addition, one article of impeachment accused the President of making "utterances, declarations, threats, and harangues" against Congress.[16]

The Senate appointed a committee to recommend rules of procedure for the impeachment trial which subsequently were adopted by the Senate, including a one-hour time limit for each side to debate questions of law that would arise during the trial.[17] Chief Justice Salmon P. Chase presided over the trial and was sworn in by Associate Justice Samuel Nelson.[18] During the swearing-in of the individual Senators, the body paused to debate whether Senator Benjamin Wade of Indiana, the president pro tempore of the Senate, was eligible to participate in the trial. Because the office of the Vice President was empty, under the laws of succession at that time Senator Wade would assume the presidency upon a conviction of President Johnson. Ultimately, the Senator who raised this point, Thomas Hendricks of Indiana, withdrew the issue and Senator Wade was sworn in.[19]

An important point of contention at the trial was whether the Tenure of Office Act protected Stanton at all due to his appointment by President Lincoln, rather than President Johnson.[20] Counsel for President Johnson argued that impeachment was inappropriate for violation of a statute whose meaning was unclear, and the statute barring removal of the Secretary of War was an unconstitutional intrusion into the President's authority under Article II.[21]

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[9] Tenure of Office Act, 14 Stat. 430 (1867). *See* Michael J. Gerhardt, *Constitutional Arrogance*, 164 U. Pa. L. Rev. 1649, 1663 (2016).

[10] Rehnquist, *supra* note 1, at 228.

[11] Les Benedict, *supra* note 6, at 92–125.

[12] Rehnquist, *supra* note 1, at 230.

[13] Cong. Globe, 40th Cong., 2d Sess. 1400 (1868).

[14] *See* Act of March 2, 1867, ch. 154, § 6, 14 Stat. 430. Incidentally, such tenure protections were later invalidated as unconstitutional by the Supreme Court. *See* Myers v. United States, 272 U.S. 52, 106 (1926).

[15] Tassel & Finkelman, *supra* note 4, at 226.

[16] *Id.* at 235.

[17] Rehnquist, *supra* note 1, at 219–20.

[18] *Id.* at 221.

[19] *See* Akhil Reed Amar, America's Unwritten Constitution (2012).

[20] Rehnquist, *supra* note 1, at 221.

[21] *Id.* at 230–31.

The Senate failed to convict President Johnson by one vote on three different articles, and it failed to vote on the remaining eight.[22] However, reports indicate that several Senators were prepared to acquit if their votes were needed.[23] Seven Republicans voted to acquit; of those Senators, some thought it questionable whether the Tenure of Office Act applied to Stanton and that it was improper to impeach a President for incorrectly interpreting an arguably ambiguous law.[24]

Certain commentators have concluded that the failure to convict President Johnson coincides with a general understanding that impeachment is appropriate for abuses of power or violations of the public trust, but does not pertain to political or policy disagreements with the President, no matter how weighty.[25]

ArtII.S4.4.5 Jurisprudence on Impeachable Offenses (1865–1900)

Article II, Section 4:

> *The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.*

The post-bellum experience in American history saw a variety of government officials impeached on a number of different grounds. These examples provide important principles that guide the practice of impeachment through the present day. For example, the Senate has not always conducted a trial following an impeachment by the House. In 1873, the House impeached federal district judge Mark. H. Delahay for, among other things, drunkenness on and off the bench.[1] The impeachment followed an investigation by a subcommittee of the House Judiciary Committee into his conduct.[2] Following the House vote on impeachment, Judge Delahay resigned before written impeachment articles were drawn up and the Senate did not hold a trial.[3] The impeachment of Judge Delahay indicates that the scope of impeachable behavior is not limited to strictly criminal behavior; Congress has been willing to impeach individuals for behavior that is not indictable, but nonetheless constitutes an abuse of an individual's power and duties.

This period of American history was fraught with partisan conflict over Reconstruction.[4] In addition to President Johnson, a number of other individuals were investigated by Congress during this time for purposes of impeachment. For example, in 1873, the House voted to authorize the House Judiciary Committee to investigate the behavior of Edward H. Durrell,

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[22] 3 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States § 2443 (1907), https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/pdf/GPO-HPREC-HINDS-V3.pdf; *see* Rehnquist, *supra* note 1, at 234–35.

[23] Tassel & Finkelman, *supra* note 4, at 221; Hans L. Trefousse, Impeachment of a President: Andrew Johnson, the Blacks, and Reconstruction 169 (1975).

[24] Rehnquist, *supra* note 1, at 240–46.

[25] Peter Hoffer & N.E.H. Hull, Impeachment in America, 1635–1805 101 (1984); Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 St. Louis U. L.J. 905, 921–22 (1999).

[1] 3 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States §§ 2504–05 (1907), https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/pdf/GPO-HPREC-HINDS-V3.pdf [hereinafter Hinds]; Charles W. Johnson, John V. Sullivan, and Thomas J. Wickham, Jr., House Practice: A Guide to the Rules, Precedents and Procedures of the House 608–13 (2017).

[2] 3 Hinds, *supra* note 1, at §§ 2504–05.

[3] Emily F.V. Tassel & Paul Finkelman, Impeachable Offenses: A Documentary History from 1787 to the Present 119 (1999).

[4] *See generally* Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877 (1988).

federal district judge for Louisiana.[5] A majority of the House Judiciary Committee reported in favor of impeaching Judge Durell for corruption and usurpation of power, including interfering with the state's election.[6] Judge Durrell resigned on December 1, 1874, and the House discontinued impeachment proceedings.[7]

The first and only time a Cabinet-level official was impeached occurred during the presidential administration of Ulysses S. Grant. Grant's Secretary of War, William W. Belknap, was impeached in 1876 for allegedly receiving payments in return for appointing an individual to maintain a trading post in Indian territory.[8] Belknap resigned two hours before the House unanimously impeached him,[9] but the Senate nevertheless conducted a trial in which Belknap was acquitted.[10] During the trial, upon objection by Secretary Belknap's counsel that the Senate lacked jurisdiction because Belknap was now a private citizen, the Senate voted 37-29 in favor of jurisdiction.[11] A majority of Senators voted to convict Secretary Belknap, but no article mustered a two-thirds majority, resulting in acquittal. A number of Senators voting to acquit indicated that they did so because the Senate did not have jurisdiction over an individual no longer in office.[12] Notably, although bribery is explicitly included as an impeachable offense in the Constitution, the impeachment articles brought against Secretary Belknap instead charged his behavior as constituting high crimes and misdemeanors.[13] Bribery was mentioned at the Senate trial, but it was not specifically referenced in the impeachment articles themselves.[14]

ArtII.S4.4.6 Early Twentieth Century Jurisprudence on Impeachable Offenses

Article II, Section 4:

> *The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.*

The twentieth century saw further development of the scope of conduct considered by Congress to be impeachable, including the extent to which non-criminal conduct can constitute impeachable behavior and the proper role of a federal judge. Further, the question of judicial review of impeachments received its first treatment in the federal courts.

The question of whether Congress can designate particular behavior as a "high crime or misdemeanor" via statute arose in the impeachment of Charles Swayne, a federal district judge for the Northern District of Florida, during the first decade of the twentieth century. A federal statute provided that federal district judges live in their districts and that anyone

[5] 3 Hinds, *supra* note 1, at §§ 2506–08.

[6] *Id.*

[7] *Id.* at § 2509. For a defense of Judge Durell's actions in the matters in question, see Charles Lane, *Edward Henry Durell: A Study in Reputation*, 13 Green Bag 2D 153, 153–68 (2010).

[8] 3 Hinds, *supra* note 1, at §§ 2444–68; *see* H. Comm. on the Judiciary, 93d Cong., Constitutional Grounds for Presidential Impeachment 20 (Comm. Print 1974).

[9] Eleanore Bushnell, Crimes, Follies, and Misfortunes: The Federal Impeachment Trials 165 (1992).

[10] 3 Hinds, *supra* note 1, at §§ 2444–68.

[11] 3 Hinds, *supra* note 1, at §§ 2459–60. Two of the thirty-seven voting "guilty" and twenty-two of the twenty-five voting "not guilty" stated that they believed the Senate lacked jurisdiction in the case. 3 Hinds, *supra* note 1, § 2467.

[12] Bushnell, *supra* note 9, at 186.

[13] U.S. Const. art. II, § 4.

[14] Bushnell, *supra* note 9, at 170.

violating this requirement was "guilty of a high misdemeanor."[1] Judge Swayne's impeachment originated from a resolution passed by the Florida legislature requesting the state's congressional delegation to recommend an investigation into his behavior.[2] The procedures followed by the House in impeaching Judge Swayne were somewhat unique. First, the House referred the impeachment request to the Judiciary Committee for investigation. Following this investigation, the House voted to impeach Judge Swayne based on the report prepared by the Committee.[3] The Committee was then tasked with preparing articles of impeachment to present to the Senate.[4] The House then voted again on these individual articles, each of which received less support than the single prior impeachment vote had received.[5] The impeachment articles accused Judge Swayne of a variety of offenses, including misusing the office, abusing the contempt power, and living outside his judicial district. At the trial in the Senate, Judge Swayne essentially admitted to certain accused behavior, although his attorneys did dispute the residency charge, and Swayne instead argued that his actions were not impeachable.[6] The Senate vote failed to convict Judge Swayne on any of the charges brought by the House.[7]

The impeachability of certain non-criminal behavior for federal judges was firmly established by the impeachment of Judge Robert W. Archbald in 1912. Judge Archbald served as a federal district judge before being appointed to the short-lived U.S. Commerce Court, which was created to review decisions of the Interstate Commerce Commission.[8] He was impeached by the House for behavior occurring both as a federal district judge and as a judge on the Commerce Court.[9] The impeachment articles accused Judge Archbald of, among other things, using his position as a judge to generate profitable business deals with potential future litigants in his court.[10] This behavior did not violate any criminal statute and did not appear to violate any laws regulating judges.[11] Judge Archbald argued at trial that non-criminal conduct was not impeachable. The Senate voted to convict him on five articles and also voted to disqualify him from holding office in the future.[12] Four of those articles centered on behavior that occurred while Judge Archbald sat on the Commerce Court, the fifth described his conduct over the course of his career.[13]

In the 1920s, a series of corruption scandals swirled around the administration of President Warren G. Harding. Most prominently, the Teapot Dome Scandal, which involved the noncompetitive lease of government land to oil companies, implicated numerous government officials and led to resignations and the criminal conviction and incarceration of a cabinet-level official.[14] The Secretary of the Navy, at the time Edwin Denby, was entrusted with overseeing the development of oil reserves that had recently been located. The Secretary of the Interior,

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[1] Revised Statutes of the United States, 2d Edition, Title XIII, Ch. 2 § 551 (1878); Emily F.V. Tassel & Paul Finkelman, Impeachable Offenses: A Documentary History from 1787 to the Present 123–24 (1999).

[2] Eleanore Bushnell, Crimes, Follies, and Misfortunes: The Federal Impeachment Trials 191 (1992).

[3] 39 Cong. Rec. 248 (1905).

[4] Bushnell, *supra* note 2, at 191–92.

[5] *Id.* at 191–93.

[6] Tassel & Finkelman, *supra* note 1, at 123–25.

[7] 39 Cong. Rec. 3467–72 (1905).

[8] Tassel & Finkelman, *supra* note 1, at 132.

[9] 48 Cong. Rec. 8904–34 (1912).

[10] Tassel & Finkelman, *supra* note 1, at 133.

[11] *Id.* at 134.

[12] 49 Cong. Rec. 1438–48 (1913).

[13] Bushnell, *supra* note 2, at 221.

[14] *See The Teapot Dome Scandal, 1922–24*, *in* Congress Investigates: A Critical and Documentary History 460–74 (Roger A. Bruns, David L. Hostetter, Raymond W. Smock, eds., 2011).

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Albert Fall, convinced Denby that the Interior Department should assume responsibility for two of the reserve locations, including in Teapot Dome, Wyoming. Secretary Fall then leased the reserves to two of his friends, Harry F. Sinclair and Edward L. Doheny. Revelations of the lease without competitive bidding launched a lengthy congressional investigation which sparked the eventual criminal conviction of Fall for bribery and conspiracy and Sinclair for jury tampering. President Harding, however, died in 1923, before congressional hearings began. The affair also generated significant judicial decisions examining the scope of Congress's investigatory powers.[15]

One aspect of the controversy included an impeachment investigation into the decisions of then-Attorney General Harry M. Daugherty.[16] In 1922 the House of Representatives referred a resolution to impeach Daugherty for a variety of activities, including his failure to prosecute those involved in the Teapot Dome Scandal, to the House Judiciary Committee.[17] The House Judiciary Committee eventually found there was not sufficient evidence to impeach Daugherty. However, in 1924, a Senate special committee was formed to investigate similar matters.[18] That investigation spawned allegations of a variety of improper activities in the Justice Department. Daugherty resigned on March 28, 1924.[19]

In 1926, federal district judge George W. English was impeached for a variety of alleged offenses, including (1) directing a U.S. marshal to gather a number of state and local officials into court in an imaginary case where Judge English proceeded to denounce them; (2) threatening two members of the press with imprisonment without sufficient cause; and (3) showing favoritism to certain litigants before his court.[20] Judge English resigned before a trial in the Senate occurred and the Senate dismissed the charges without conducting a trial in his absence.[21]

Federal district judge Harold Louderback was impeached in 1933 for showing favoritism in the appointment of bankruptcy receivers, which were coveted positions following the stock market crash of 1929 and the ensuing Depression.[22] The House authorized a subcommittee to investigate, which held hearings and recommended to the Judiciary Committee that Judge Louderback be impeached.[23] The Judiciary Committee actually voted against recommending impeachment, urging censure of Judge Louderback instead, but permitted the minority report

[15] *See* McGrain v. Daugherty, 273 U.S. 135, 174–75 (1927) ("We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."); Sinclair v. United States, 279 U.S. 263, 295 (1929) (observing that Congress has authority to require disclosures in aid of its constitutional powers).

[16] 6 Clarence Cannon, Cannon's Precedents of the House of Representatives of the United States § 536–38 (1936), https://www.govinfo.gov/content/pkg/GPO-HPREC-CANNONS-V6/pdf/GPO-HPREC-CANNONS-V6.pdf [hereinafter Cannon].

[17] *See* 62 Cong. Rec. 12,381 (1922); Charges of Hon. Oscar E. Keller Against the Attorney General and the Attorney General's Answers Thereto Before the Committee on the Judiciary, House of Representatives, 67th Cong., 3d Sess., on H. Res. 425 (1922).

[18] S. Res. 157, 68th Cong., 1st Sess. (1924); *Hearings Before the Select Committee on Investigation of the Attorney General, United States Senate, Investigation of Hon. Harry M. Daugherty, Formerly Attorney General of the United States*, 68th Cong., 1st Sess. (1924).

[19] *See The Teapot Dome Scandal, 1922–24*, *in* Congress Investigates: A Critical and Documentary History 460–74 (Roger A. Bruns, David L. Hostetter, Raymond W. Smock, eds., 2011).

[20] 67 Cong. Rec. 6705–55 (1926); 6 Cannon, *supra* note 16, at §§ 544–47.

[21] Tassel & Finkelman, *supra* note 1, at 144–46.

[22] 76 Cong. Rec. 4913–26 (1933); 6 Cannon, *supra* note 16, at §§ 514–24.

[23] Bushnell, *supra* note 2, at 191.

that favored impeachment to be reported to the House together with the majority report.[24] The full House voted to impeach anyway,[25] but the Senate failed to convict him.[26]

Shortly thereafter, the House impeached federal district judge Halsted L. Ritter for showing favoritism in and profiting from appointing receivers in bankruptcy proceedings; practicing law while a judge; and failing to fully report his income on his tax returns.[27] The Senate acquitted Judge Ritter on each individual count alleging specific behavior, but convicted him on the final count which referenced the previous articles, and charged him with bringing his court into disrepute and undermining the public's confidence in the judiciary.[28]

Congress's impeachment of Judge Ritter was the first to be challenged in court.[29] Judge Ritter brought a suit in the Federal Court of Claims seeking back pay, arguing that the charges brought against him were not impeachable under the Constitution and that the Senate improperly voted to acquit on six specific articles but to convict on a single omnibus article.[30] In rejecting Judge Ritter's suit, the court held that the Senate has exclusive jurisdiction over impeachments and courts lack authority to review the Senate's verdict.[31]

ArtII.S4.4.7 President Richard Nixon and Impeachable Offenses

Article II, Section 4:

> *The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.*

The impeachment investigation and ensuing resignation of President Richard Nixon stands out as a profoundly important experience informing the standard for the impeachment of presidents.[1] Although President Nixon was never impeached by the House or subjected to a trial in the Senate, his conduct exemplifies for many authorities, scholars, and the general public the paradigmatic case of impeachable behavior in a President.

Less than two years after a landslide reelection as President, Richard Nixon resigned following the House Judiciary Committee's adoption of three articles of impeachment against him.[2] The circumstances surrounding the impeachment of President Nixon were sparked on June 17, 1972, by the arrest of five men for breaking into the Democratic National Headquarters at the Watergate Hotel and Office Building. The arrested men were employed by the Committee to Re-Elect the President (CRP), a campaign organization formed to support President Nixon's reelection.[3]

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[24] *Id.* at 246.

[25] *Id.* at 245.

[26] 77 Cong. Rec. 4064–88 (1933).

[27] 80 Cong. Rec. 3066–92 (1936); Tassel & Finkelman, *supra* note 1, at 157.

[28] 80 Cong. Rec. 5602–08 (1936); Proceedings of the U.S. Senate in the Trial of Impeachment of Halsted L. Ritter, United States District Judge for the Southern District of Florida, 74th Cong., 2d Sess., S. Doc. No. 74–200, at 637–38 (1936); Tassel & Finkelman, *supra* note 1, at 158–59.

[29] Ritter v. United States, 84 Ct. Cl. 293, 296 (1936), *cert. denied*, 300 U.S. 668 (1937).

[30] Bushnell, *supra* note 2, at 286–87.

[31] Ritter v. United States, 84 Ct. Cl. 293, 296 (1936), *cert. denied*, 300 U.S. 668 (1937).

[1] For a more detailed account of the Watergate Scandal, see Stanley I. Kutler, The Wars of Watergate (1990).

[2] Carroll Kilpatrick, *Nixon Resigns*, Wash. Post (Aug. 9, 1974), https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/080974-3.htm.

[3] Kutler, *supra* note 1, at 187–211.

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In the early summer of 1973, Attorney General Elliot Richardson appointed Archibald Cox as a special prosecutor to investigate the connection between the five burglars and CRP. Likewise, the Senate Select Committee on Presidential Campaign Activities initiated its own investigation.[4] After President Nixon fired various staffers allegedly involved in covering up the incident, he spoke on national television disclaiming knowledge of the cover up. However, the investigations uncovered evidence that President Nixon was involved, that he illegally harassed his enemies through, among other things, the use of tax audits, and that the men arrested for the Watergate break-in—the "plumbers unit," because they were used to "plug leaks" considered damaging to the Nixon Administration—had committed burglaries before.[5] Eventually a White House aide revealed that the President had a tape recording system in his office, raising the possibility that many of Nixon's conversations about the Watergate incident were recorded.[6]

The President refused to hand over such tapes to the special prosecutor or Congress. In his capacity as special prosecutor, Cox then subpoenaed tapes of conversations in the Oval Office on Saturday, October 20, 1973. This sparked the sequence of events commonly known as the Saturday Night Massacre.[7] In response to the subpoena, President Nixon ordered Attorney General Elliot Richardson to fire Special Prosecutor Cox. Richardson refused and resigned. Nixon ordered Deputy Attorney General William D. Ruckelshaus to fire the special prosecutor, but Ruckelshaus also refused to do so and resigned. Solicitor General Robert Bork, in his capacity as Acting Attorney General, then fired the special prosecutor.[8] Nixon eventually agreed to deliver some of the subpoenaed tapes to the judge supervising the grand jury. The Justice Department appointed Leon Jaworski to replace Cox as special prosecutor.

The House Judiciary Committee began an official investigation of the Watergate issue and commenced impeachment hearings in April 1974.[9] On March 1, 1974, a grand jury indicted seven individuals connected to the larger Watergate investigation and named the President as an unindicted coconspirator.[10] On April 18, a subpoena was issued, upon the motion of the special prosecutor, by the United States District Court for the District of Columbia requiring the production of tapes and various items relating to meetings between the President and other individuals. Following a challenge to the subpoena in district court, the Supreme Court reviewed the case. On July 24, 1974, the Supreme Court affirmed the district court's order.[11]

In late July, following its investigation and hearings, the House Judiciary Committee voted to adopt three articles of impeachment against President Nixon.[12] The first impeachment article alleged that the President obstructed justice by attempting to impede the investigation into the Watergate break-in.[13] The second charged the President with abuse of power for using federal agencies to harass his political enemies and authorizing burglaries of private citizens

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[4] Kutler, *supra* note 1, at 323–49; Emily F.V. Tassel & Paul Finkelman, Impeachable Offenses: A Documentary History from 1787 to the Present 255–56 (1999) .

[5] Tassel & Finkelman, *supra* note 4, at 255–56; Kutler, *supra* note 1, at 111–16, 351–72.

[6] Tassel & Finkelman, *supra* note 4, at 256–57.

[7] Jerry Zeifman, Without Honor: Crimes of Camelot and the Impeachment of President Nixon 59 (1995).

[8] Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, Wash. Post (Oct. 21, 1973), https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm.

[9] Tassel & Finkelman, *supra* note 4, at 258–59.

[10] United States v. Nixon, 418 U.S. 683, 686–87 (1974).

[11] *Id.* at 713–14 (1974).

[12] H. Comm. on the Judiciary, Impeachment of Richard M. Nixon, President of the United States, 93d Cong., 2d Sess., H.R. Rep. No. 93-1305, at 6–11 (1974).

[13] *Id.* at 1–2.

who opposed the President.[14] The third article accused the President of refusing to cooperate with the Judiciary Committee's investigation.[15]

The Committee considered but rejected two proposed articles of impeachment. The first rejected article concerned receiving compensation in the form of government expenditures at his private properties in California and Florida—which allegedly constituted an emolument from the United States in violation of Article II, Section, 1, Clause 7 of the Constitution—and tax evasion.[16] Those Members opposed to the portion of the charge alleging receipt of federal funds argued that most of the President's expenditures were made pursuant to a request from the Secret Service; that there was no direct evidence the President knew at the time that the source of these funds was public, rather than private; and that this conduct failed to rise to the level of an impeachable offense.[17] Some Members opposed to the tax evasion charge argued that the evidence was insufficient to impeach; others that tax fraud is not the type of behavior "at which the remedy of impeachment is directed."[18]

The second rejected article accused the President of concealing from Congress the bombing operations in Cambodia during the Vietnam conflict.[19] This article was rejected for two primary reasons: some Members thought (1) the President was performing his constitutional duty as Commander in Chief and (2) Congress was given sufficient notice of these operations.[20]

President Nixon resigned on August 9, 1974, before the full House voted on the articles.[21] The lessons and standards established by the Nixon impeachment investigation and resignation are disputed. On the one hand, the behavior alleged in the *approved* articles against President Nixon is arguably a "paradigmatic" case of impeachment, constituting actions that are almost certainly impeachable conduct for the President.[22]

On the other hand, the significance of the House Judiciary Committee's rejection of certain impeachment articles is unclear. In particular, whether conduct considered unrelated to the performance of official duties, such as the rejected article alleging tax evasion, can constitute an impeachable offense for the President is disputed. During the subsequent impeachment of President Bill Clinton, for example, the majority and minority reports of the House Judiciary Committee concerning the Committee's impeachment recommendation took different views on when conduct that might traditionally be viewed as private or unrelated to the functions of the presidency constituted an impeachable offense.[23] The House Judiciary Committee report that recommended articles of impeachment argued that perjury by the President was an impeachable offense, even if committed with regard to matters outside his official duties.[24] In contrast, the minority views contained in the report argued that impeachment was reserved for "conduct that constitutes an egregious abuse or subversion of the powers of the executive office."[25] The minority noted that the Judiciary Committee had rejected an article of

[14] *Id.* at 3–4.

[15] *Id.* at 4.

[16] *Id.* at 217–19.

[17] *Id.* at 221.

[18] *Id.* at 223.

[19] *Id.* at 220–26.

[20] *Id.* at 219.

[21] Kilpatrick, *Nixon Resigns*, *supra* note 2.

[22] Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 Geo. Wash. L. Rev. 603, 604 (1999).

[23] *Compare* H.R. Rep. No. 105-830, at 110–18 (1998), *with id.* at 204–07 (minority views).

[24] *See* H.R. Rep. No. 105-830, at 108.

[25] *Id.*

impeachment against President Nixon alleging that he committed tax fraud, primarily because that "related to the President's private conduct, not to an abuse of his authority as President."[26]

ArtII.S4.4.8 President Bill Clinton and Impeachable Offenses

Article II, Section 4:

> *The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.*

The impeachment of President Bill Clinton stemmed from an investigation that originally centered on financial transactions occurring many years prior to President Clinton taking federal office.[1] Attorney General Janet Reno appointed Robert Fiske, Jr. as a special prosecutor in January 1994 to investigate the dealings of President Clinton and his wife with the "Whitewater" real estate development during the President's tenure as attorney general and then governor of Arkansas.[2]

Following the reauthorization of the Independent Counsel Act in June, the Special Division of the United States Court of Appeals for the District of Columbia Circuit replaced Fiske in August with Independent Counsel Kenneth W. Starr, a former Solicitor General in the George H.W. Bush Administration and federal appellate judge.[3]

During the Whitewater investigation, Paula Jones, an Arkansas state employee, filed a civil suit against President Clinton in May 1994 alleging that he sexually harassed her in 1991 while governor of Arkansas.[4] Lawyers for Jones took depositions of President Clinton at the White House and asked questions about the President's relationship with staffers, including an intern named Monica Lewinsky.[5] Independent Counsel Starr received information alleging that Lewinsky had attempted to influence the testimony of a witness in the Jones litigation,[6] along with tapes of recordings between Monica Lewinsky and former White House employee Linda Tripp.[7] Tripp had recorded conversations between herself and Lewinsky concerning Lewinsky's relationship with the President and hope of obtaining a job outside the White House. Starr presented this information to Attorney General Reno. Reno petitioned the Special Division of the United States Court of Appeals for the District of Columbia Circuit to expand the independent counsel's jurisdiction, and the Special Division issued an order on January 16, 1998, permitting the expansion of Starr's investigation into President Clinton's response to the Paula Jones case.[8] Over the course of the spring and summer a grand jury investigated

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[26] *Id.*

[1] *See* Ken Gormley, Death of American Virtue: Clinton vs. Starr 33–114 (2010).

[2] Emily F.V. Tassel & Paul Finkelman, Impeachable Offenses: A Documentary History from 1787 to the Present 267 (1999); *see generally Whitewater: Timeline*, Wash. Post, http://www.washingtonpost.com/wp-srv/politics/special/whitewater/timeline.htm (1998) (last visited Jan. 24, 2018).

[3] Gormley, *supra* note 1, at 143–69. A previous version of the statute under which the independent counsel was appointed was challenged as unconstitutional in *Morrison v. Olson*. 487 U.S. 654 (1998). The Supreme Court upheld the statute as constitutional. *Id.* at 685–96.

[4] In *Clinton v. Jones,* 520 U.S. 681, 684 (1997), the Supreme Court held that the President was subject to civil suits in his individual capacity while in office. *Id.* at 684.

[5] Tassel & Finkelman, *supra* note 2, at 268.

[6] *The Starr Report: Introduction*, Wash. Post (1998), http://www.washingtonpost.com/wp-srv/politics/special/clinton/icreport/5intro.htm.

[7] *See* Gormley, *supra* note 1, at 304–06.

[8] *Id.*

whether President Clinton committed perjury in his response to the Jones suit and whether he obstructed justice by encouraging others to lie about his relationship with Lewinsky.[9] President Clinton appeared by video before the grand jury and testified concerning the Lewinsky relationship.[10]

Independent Counsel Starr referred his report to the House of Representatives on September 9, 1998, noting that under the independent counsel statute, his office was required to do so because President Clinton engaged in behavior that might constitute grounds for impeachment.[11] The House then voted to open an impeachment investigation into President Clinton's behavior, released the Starr report publicly, and the House Judiciary Committee voted to release the tape of the President's grand jury testimony.[12]

Although the House Judiciary Committee already had conducted several hearings regarding the possibility of impeachment,[13] the Committee did not engage in an independent fact-finding investigation or call any live witnesses to testify about the President's conduct.[14] Instead, the Judiciary Committee largely relied on the Starr report to inform the Committee's own report recommending impeachment, which was released December 16, 1998.[15] The Committee report recommended impeachment of President Clinton on four counts.[16] The first article alleged that President Clinton perjured himself when testifying to a criminal grand jury regarding his response to the Jones lawsuit and relationship with Lewinsky.[17] The second alleged that the President committed perjury during a deposition in the civil suit brought against him by Paula Jones.[18] The third alleged that President Clinton obstructed justice in the suit brought against him by Jones and in the investigation by Independent Counsel Starr.[19] The fourth alleged that the President abused his office by refusing to respond to certain requests for admission from Congress and making untruthful responses to Congress during the investigation into his behavior.[20]

On December 19, 1998, in a lame-duck session, the House voted to approve the first and third articles.[21] After trial in the Senate, the President was acquitted on February 12, 1999.[22] Statements of the Senators entered into the record regarding the impeachment indicate disagreement about what constitutes an impeachable offense for the President and whether Clinton's behavior rose to this level.[23] For instance, Republican Senator Richard G. Luger

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[9] Tassel & Finkelman, *supra* note 2, at 269.

[10] H.R. Rep. No. 105-830, at 28 (1998); *The Starr Report: Grounds For Impeachment, No. II*, Wash. Post (1998), http://www.washingtonpost.com/wp-srv/politics/special/clinton/icreport/7groundsii.htm.

[11] *The Starr Report: Introduction*, Wash. Post (1998), http://www.washingtonpost.com/wp-srv/politics/special/clinton/icreport/5intro.htm; *see* 28 U.S.C. § 595(c).

[12] Tassel & Finkelman, *supra* note 2, at 271.

[13] *Background and History of Impeachment, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong., 2d Sess. (1998); *Impeachment Inquiry: William Jefferson Clinton, President of the United States, Hearing Before the H. Comm. on the Judiciary*, 105th Cong., 2d Sess. (1998).

[14] Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 176–77 (2000).

[15] *See* H.R. Rep. No. 105-830, at 200–02 (1998) (minority views).

[16] H.R. Rep. No. 105-830, at 28.

[17] *Id.* at 2.

[18] *Id.* at 2–3.

[19] *Id.* at 3–4.

[20] *Id.* at 4–5.

[21] 144 Cong. Rec. 28,035–113 (1998).

[22] 145 Cong. Rec. 2375–78 (1999); Alison Mitchell, *Clinton is Acquitted Decisively by Senate on Both Charges*, N.Y. Times (Feb. 13, 1999), http://www.nytimes.com/learning/general/featured_articles/990216tuesday.html.

[23] *See* Published Closed Door Statements, 145 Cong. Rec. S1471–1637 (daily ed. Feb. 12, 1999); Gerhardt, *supra* note 14, at 175.

voted to convict on both articles, noting in his statement the gravity of the "presidential misconduct at issue" and arguing that the case was "not about adultery."[24] Instead, it centered on the obstruction of justice that occurred when the President "lied to a federal grand jury and worked to induce others to give false testimony."[25] For Senator Lugar, the President ultimately "betrayed [the] trust" of the nation through his actions and should be removed from office.[26] In contrast, Republican Senator Olympia Snowe voted to acquit on both articles. In her statement, she admonished the President's "lowly conduct," but concluded there was "insufficient evidence of the requisite untruth and the requisite intent" to establish perjury with regard to the concealment of his relationship with a subordinate; and the perjury charges regarding his relationship with a subordinate concerned statements that were largely "ruled irrelevant and inadmissible in the underlying civil case" which "undermine[d] [their] materiality."[27] She also stated that she thought one of the allegations in the second impeachment article had been proven—the President's attempt to influence the testimony of his personal assistant—but that the proper remedy for this was a criminal prosecution.[28] Indeed, a number of Senators indicated that they did not consider the President's behavior to constitute an impeachable offense because the President's conduct was not of a distinctly public nature.[29] For instance, Democratic Senator Byron L. Dorgan voted to acquit on both articles.[30] He described Clinton's behavior as "reprehensible," but concluded that it did not constitute "a grave danger to the nation."[31]

The significance of the Clinton impeachment experience to informing the understanding of what constitutes an impeachable offense is thus open to debate. One might point to the impeachment articles recommended by the House Judiciary Committee, but not adopted by the full House, as concerning conduct insufficient to establish an impeachable offense. Specifically, the House declined to impeach President Clinton for his alleged perjury in a civil suit against him as well as for alleged untruthful statements made in response to congressional requests.[32] Likewise, some scholars have pointed to the acquittal in the Senate of both impeachment articles that were brought by the House as evidence that the Clinton impeachment articles lacked merit or were adopted on purely partisan grounds.[33] The statements of some of the Senators just mentioned, reasoning that Clinton's conduct did not qualify as an impeachable offense, may provide support for arguments that impeachment is not an appropriate tool to address at least some sphere of conduct by a President not directly

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[24] Proceedings of the United States Senate in the Impeachment Trial of President William Jefferson Clinton, Volume IV: Statements of Senators Regarding the Impeachment Trial, 106th Cong., 1st Sess., S. Doc. No. 106-4, at 2571–72 (1999).

[25] *Id.*

[26] *Id.* at 2573.

[27] *Id.* at 3002.

[28] *Id.* at 3004.

[29] *See* 145 Cong. Rec. S1471–1637 (daily ed. Feb. 12, 1999); Gerhardt, *supra* note 14, at 175.

[30] Clinton Proceedings, *supra* note 24, at 2942.

[31] *Id.*

[32] 144 Cong. Rec. 28,110–12 (1998).

[33] Randall K. Miller, *Presidential Sanctuaries After the Clinton Sex Scandals*, 22 Harv. J.L. & Pub. Pol'y 647, 728 (1999) ("President Clinton's acquittal, a constitutional law decision by the Senate—the final arbiter of the impeachment law—will reaffirm Congress's prior 'holdings' that impeachment carries a 'substantiality' requirement. Impeachable offenses are offenses seriously incompatible with the institutions of government or those that substantially impair a president's ability to perform his constitutional duties. President Clinton's conduct falls short of this extraordinarily high threshold."). *But see* Charles J. Cooper, *A Perjurer in the White House?: The Constitutional Case for Perjury and Obstruction of Justice As High Crimes and Misdemeanors*, 22 Harv. J.L. & Pub. Pol'y 619, 621 (1999) ("[T]he crimes alleged against the President . . . plainly do involve the derelict violation of executive duties. Those crimes are plainly impeachable offenses.").

tied to his official duties.[34] However, the failure to convict President Clinton might instead simply reflect the failure of the House managers to prove their case,[35] or simply bare political calculation by some Senators.[36] Ultimately, the lessons of the Clinton impeachment experience will be revealed in the future practice of Congress when assessing whether similar conduct if committed by future Presidents is impeachable.

More broadly, the results of the Clinton impeachment revealed perceived problems with the Independent Counsel Act (ICA), the statute that authorized the investigation which sparked the impeachment proceedings.[37] Dating back at least to the 1988 Supreme Court case of *Morrison v. Olson*, some expressed concerned that the scope of an independent counsel's authority under the ICA, combined with a lack of accountability to the political branches, posed considerable risk of abuse.[38] The statute was permitted to lapse in 1999 amidst bipartisan congressional agreement that the law posed significant problems.[39]

ArtII.S4.4.9 President Donald Trump and Impeachable Offenses

Article II, Section 4:

> *The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.*

President Donald Trump was impeached twice during his single term in office. In each case, he was acquitted on all counts by the Senate.

The first impeachment trial stemmed from a call President Trump had with the President Volodymyr Zelenskyy of Ukraine in which President Trump asked the Ukrainian President to announce two investigations: one involving his potential opponent in the upcoming 2020 presidential election and a second into unsubstantiated allegations that entities within Ukraine had interfered in the 2016 presidential election.[1] At the time of the call, the Office of Management and Budget had frozen $400 million in military aid to Ukraine at the direction of the President.[2] The contents of the call initially came to light through an intelligence community whistleblower report, but a summary of the call was later made public by President Trump.[3]

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[34] Michael J. Gerhardt, *The Perils of Presidential Impeachment*, 67 U. Chi. L. Rev. 293, 300 (2000) [hereinafter Gerhardt, *Perils of Presidential Impeachment*].

[35] *See* 145 Cong. Rec. S1577 (daily ed. Feb. 12, 1999).

[36] Gerhardt, *supra* note 14, at 175–76.

[37] Akhil Reed Amar, America's Unwritten Constitution 296 (2012); Gerhardt, *supra* note 14, at 189–91.

[38] Morrison v. Olson, 487 U.S. 654, 699–734 (1988) (Scalia, J., dissenting) (asserting that the independent counsel statute created improper incentives for investigations and prevented the President from holding prosecutors accountable) (quoting Brief for Edward H. Levi et. al, as Amici Curiae in Support of Appellees at 11, Morrison v. Olson, No. 87-1279 (Apr. 8, 1988)).

[39] *See* Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521, 525–26 (2005) ("In the wake of Kenneth Starr's investigation of several Clinton-era scandals, a bipartisan consensus emerged against the use of independent counsels."); Gerhardt, *supra* note 14, at 189–91; *see, e.g.*, Future of the Independent Counsel Act, Senate Governmental Affairs Committee, 106th Cong. 248 (1999) (statement of Janet Reno, Attorney General) ("However, after working with the Act, I have come to believe—after much reflection and with great reluctance—that the Independent Counsel Act is structurally flawed and that those flaws cannot be corrected within our constitutional framework."); *id.* at 425 (testimony of Kenneth Starr, Independent Counsel) (describing the independent counsel statute as creating a "fourth branch of government" with results that are "structurally unsound [and] constitutionally dubious").

[1] H.R. Rep. No. 116-346, at 81–83 (2019).

[2] *Id.* at 82.

[3] *Id.* at 126.

ArtII.S4.4.9
President Donald Trump and Impeachable Offenses

The House investigation proceeded in two phases. The fact-finding portion of the investigation was primarily handled by the House Intelligence Committee, in cooperation with the Committee on Oversight and Reform and the Committee on Foreign Affairs.[4] The early stage of this phase of the investigation saw some controversy over whether the House must explicitly authorize the initiation of an impeachment investigation. Although the Speaker of the House had announced that the committee investigations constituted an "official impeachment inquiry," the White House counsel objected to the investigations on the ground that the investigation lacked "the necessary authorization for a valid impeachment proceeding" and violated the Due Process Clause.[5] As a result, the President instructed members of his administration not to cooperate with the House's "unconstitutional inquiry."[6]

The House later took action to explicitly approve the impeachment investigation by adopting a resolution authorizing the House committees "to continue their ongoing investigations as part of the existing House of Representatives inquiry into whether sufficient grounds exist . . . to impeach Donald John Trump."[7] Nevertheless, the White House and other Executive Branch offices generally refused to comply with the House investigators requests for information, including subpoenas. Some Executive Branch officials, however, made the individual determination to cooperate with the impeachment inquiry and, as a result, the Intelligence Committee was able to hold a number of investigative hearings and issue a report outlining their findings. The record established in the fact finding phase was then provided to the Judiciary Committee.

Phase two of the impeachment investigation was conducted by the Judiciary Committee. This phase focused on whether the President's conduct, as uncovered in the fact finding phase of the inquiry, constituted an impeachable offense.[8] Following a series of hearings, the Committee recommended two articles of impeachment against the President, both of which were ultimately approved by the House. The first charged the President with abuse of power, alleging that he had used the powers of his office to solicit Ukraine's interference in the 2020 election and had conditioned official acts, such as the release of military aid to Ukraine and a White House visit, on President Zelenskyy agreeing to announce the investigations.[9] "President Trump," the article alleged, "engaged in this scheme or course of conduct for corrupt purposes in pursuit of personal political benefit."[10] The second article charged the President with obstruction of the House impeachment investigation by directing the "unprecedented, categorical, and indiscriminate defiance of subpoenas issued by the House of Representatives."[11] "This abuse of office," the article alleged, was "subversive of constitutional government" and "nullif[ied] a vital constitutional safeguard vested solely in the House of Representatives."[12]

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[4] *See* Staff of H. Perm. Select Comm. on Intelligence, H. Comm. on Oversight and Reform, & H. Comm. on Foreign Affairs, 116th Cong., The Trump-Ukraine Impeachment Inquiry Report: Report for the H. Perm. Select Comm. on Intelligence Pursuant to H. Res. 660 in Consultation with the H. Comm. on Oversight and Reform and the H. Comm. on Foreign Affairs (Comm. Print 2019).

[5] Press Release, Nancy Pelosi, Speaker of the House, Pelosi Remarks Announcing Impeachment Inquiry (Sept. 24, 2019), https://www.speaker.gov/newsroom/92419-0.

[6] *See* Letter from Pat Cipollone, White House Counsel, to Nancy Pelosi, Speaker of the House of Representatives, et al. (Oct. 8, 2019) https://s3.documentcloud.org/documents/6459967/PAC-Letter-10-08-2019.pdf.

[7] H.R. Res. 660, 116th Cong. (2019).

[8] *See* H.R. Rep. No. 116-346; Report by the Majority Staff of the H. Comm. on the Judiciary, 116th Cong., Constitutional Grounds for Presidential Impeachment (Comm. Print 2019).

[9] H.R. Res. 755, 116th Cong. (2019).

[10] *Id.*

[11] *Id.*

[12] *Id.*

Although the impeachment articles were adopted by the House on December 18, 2019, the managers were not appointed and the articles not delivered to the Senate until January 15, 2020.[13]

The Senate trial was characterized by deep partisan divides and complicated disagreements over questions of law and fact, including presidential motive. But one clear constitutional conflict that arose during the trial involved the proper relationship between impeachment and criminal law. Trial briefs and debate made clear that the House managers and President Trump's attorneys reached very different conclusions on the question of whether "high crimes and misdemeanors" require evidence of a criminal act or other legal violation.[14] The House, consistent with past impeachment practice, asserted that for purposes of Article II "high Crimes and Misdemeanors" "need not be indictable criminal offenses."[15] In response, however, the President's attorneys asserted that an "impeachable offense must be a violation of established law," and that the articles "fail[ed] to allege any crime or violation of law whatsoever, let alone 'high Crimes and Misdemeanors,' as required by the Constitution."[16] The acquittal provided no clear resolution to these conflicting positions, but the debate over a link between illegal acts and impeachable acts appears to have had some impact on individual Senators. Indeed, the House's managers' failure to allege an explicit criminal act appears, along with criticism of the House investigation and failure of the House to prove its case, to have been among the primary reasons given for acquittal.[17]

As the Senate trial proceeded, it became apparent that a major point of contention would be whether the Senate would call its own witnesses. The House managers asked that the Senate authorize subpoenas for relevant Executive Branch documents and for testimony from various White House officials including former National Security Advisor John Bolton.[18] With only forty-nine Senators voting in favor, the Senate chose not to approve that request, and the record was limited to the evidence provided by the House.[19]

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[13] H.R. Res. 798, 116th Cong. (2020).

[14] U.S. Const. art. II, § 4.

[15] Proceedings of the United States Senate in the Impeachment Trial of President Donald John Trump, Vol. I: Preliminary Proceedings, 116th Cong., S. Doc. No. 116-18, at 416 (2020).

[16] *Id.* at 471.

[17] *See, e.g.*, Proceedings of the United States Senate in the Impeachment Trial of President Donald John Trump, Vol. IV: Statements of Senators, 116th Cong., S. Doc. No. 116-18, at 1914 (2020) (statement of Senator James M. Inhofe) ("Each of the past impeachment cases in the House of Representatives accused Presidents Johnson, Nixon, and Clinton of committing a crime. This President didn't commit a crime."); *id.* at 1984 (statement of Senator Ted Cruz) ("Indeed, in the Articles of Impeachment they sent over here, they don't allege any crime whatsoever. They don't even allege a single Federal law that the President violated."); *id.* at 1990 (statement of Senator David Perdue) ("President Trump is the first President ever to face impeachment who was never accused of any crime in these proceedings, whatsoever. These two Articles of Impeachment simply do not qualify as reasons to impeach any President"); *id.* at 2034 (statement of Senator John Cornyn) ("But they failed to bring forward compelling and unassailable evidence of any crime—again, the Constitution talks about treason, bribery, or other high crimes and misdemeanors; clearly, a criminal standard . . . ."). Other Senators identified the non-existence of a crime as an important factor in their vote, but nevertheless made clear their belief that a crime is not constitutionally required. *See, e.g.*, *id.* at 1937 (statement of Senator Mitch McConnell) ("Now, I do not subscribe to the legal theory that impeachment requires a violation of a criminal statute, but there are powerful reasons why, for 230 years, every Presidential impeachment did in fact allege a criminal violation."); *id.* at 2016 (statement of Senator Rob Portman) ("In this case, no crime is alleged. Let me repeat. In the two Articles of Impeachment that came over to us from the House, there is no criminal law violation alleged. Although I don't think that that is always necessary—there could be circumstances where a crime isn't necessary in an impeachment . . . . ").

[18] *See* Proceedings of the United States Senate in the Impeachment Trial of President Donald John Trump, Vol. II: Floor and Trial Proceedings, 116th Cong., S. Doc. No. 116-18, at 1498–99 (2020).

[19] *Id.* at 1499.

Ultimately, the Senate acquitted President Trump on both counts. Article I failed by a vote of 48-52 while Article II failed by a vote of 47-53.[20]

The second Trump impeachment occurred a year later in the waning days of the Trump presidency following the events on January 6, 2021, at the U.S. Capitol in which some supporters of President Trump attempted to disrupt the congressional certification of the 2020 presidential election as having been won by Joseph Biden. The House moved quickly following those events. Passing on an investigation, the Judiciary Committee staff compiled publicly available evidence relating to the President's actions on January 6 and within one week had introduced and approved a single article of impeachment charging the President with "incitement to insurrection."[21] Specifically, the article alleged that in the months running up to January 6th the President had consistently "issued false statements asserting that the Presidential election results were the product of widespread fraud and should not be accepted by the American people."[22] He then repeated those claims when addressing a crowd on January 6, and "willfully made statements that, in context, encouraged—and foreseeably resulted in—lawless action at the Capitol. . . ."[23] Notably, although the House ultimately impeached President Trump prior to the expiration of his term, the Senate did not commence a trial until after President Trump had left office.[24]

The Senate trial saw the chamber make two important threshold determinations regarding trials of former Presidents. First, although the Constitution clearly requires the Chief Justice to preside over presidential impeachment trials, the Senate implicitly determined that that requirement does not extend to the trial of a former President. At the opening of the trial, Senator Patrick Leahy, President pro tempore of the United States Senate, was sworn in as presiding officer without objection.[25]

The Senate also made the threshold determination of whether it had the constitutional authority to try a former President. After briefing and debate on the question of whether the Senate had jurisdiction over a former President for acts that occurred during his tenure in office, the Senate explicitly determined by a vote of 56-44 that it did.[26] Thus a majority of Senators, as they have on previous occasions, determined that former officials may be tried by the Senate and, though not removable, remain subject to disqualification from holding future office if convicted.[27]

With respect to whether the President had committed an impeachable offense, the main substantive question during the trial arguably revolved around the proper application of the First Amendment. The former President's attorneys invoked the First Amendment as a defense to the impeachment charge, asserting that free speech protections apply and limit the

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[20] 166 Cong. Rec. S937 (daily ed. Feb. 5, 2020) (acquitting President Trump on Article I by a vote of 48-52); *id.* at S938 (acquitting President Trump on Article II by a vote of 47-53).

[21] *See* Staff of H. Comm. on the Judiciary, 116th Cong., Materials in Support of H. Res. 24 Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors (Comm. Print Jan. 12, 2021); H.R. Res. 24, 117th Cong. (2021).

[22] H.R. Res. 24, 117th Cong. (2021).

[23] *Id.*

[24] *See* Proceedings of the United States Senate in the Impeachment Trial of Donald John Trump, Vol. I: Preliminary and Floor Trial Proceedings, 117th Cong., S. Doc. No. 117-3, at 23 (2021).

[25] 167 Cong. Rec. S142 (daily ed. Jan. 26, 2021) (swearing in Patrick Leahy (D-VT), President pro tempore of the United States Senate, as presiding officer).

[26] 167 Cong. Rec. S609 (daily ed. Feb. 9, 2021) (determining that "Donald John Trump is subject to the jurisdiction of a Court of Impeachment for acts committed while President of the United States, notwithstanding the expiration of his term in that office").

[27] *See* Jared P. Cole & Todd Garvey, Cong. Rsch. Serv., R46013, Impeachment and the Constitution 47–48 (2019), https://crsreports.congress.gov/product/pdf/R/R46013

conduct that can be considered an impeachable offense.[28] The President's political statements at the rally, his attorneys argued, constituted "core free speech under the First Amendment" and thus not an impeachable offense.[29] The House managers disagreed, arguing that "The First Amendment has no application in an impeachment proceeding" because impeachment "does not seek to punish unlawful speech, but instead to protect the Nation from a President who violated his oath of office and abused the public trust."[30] Moreover, even if the First Amendment did restrict the impeachment power, "it still would not protect President Trump's calls to violence," which the managers asserted fell within the well-established category of unprotected speech "directed to inciting or producing imminent lawless action."[31] In the end, the First Amendment arguments made by the former President's attorneys do not appear to have had an impact on Senators, as only one Senator who voted to acquit the former President mentioned the First Amendment in the formal explanation of his vote.[32]

Although a majority of Senators voted to convict, former President Trump was ultimately acquitted by a vote of 57-43.[33]

ArtII.S4.4.10 Judicial Impeachments

Article II, Section 4:

> *The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.*

Congress has impeached federal judges with comparatively greater frequency in recent decades, and some of these impeachments appear to augur important consequences for the practice in the future. In particular, within three years in the 1980s the House voted to impeach three federal judges, each occurring after a criminal trial of the judge. One impeached federal judge was not barred from future office and subsequently was elected to serve in the House of Representatives, the body that earlier had impeached him.[1] Another judge challenged the adequacy of his impeachment trial in a case that ultimately reached the Supreme Court, which ruled that the case was non-justiciable.[2]

The House of Representatives impeached federal district judge Harry E. Claiborne in 1986, following his criminal conviction and subsequent imprisonment for providing false statements on his tax returns.[3] Despite his incarceration, Judge Claiborne did not resign his

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[28] Proceedings of the United States Senate in the Impeachment Trial of Donald John Trump, Part II, 117th Cong., S. Doc. No. 117-2, at 146–75 (2021).

[29] *Id.* at 156.

[30] Proceedings of the United States Senate in the Impeachment Trial of Donald John Trump, Part III, 117th Cong., S. Doc. No. 117-2, at 208 (2021).

[31] *Id.* at 209 (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[32] *See* Proceedings of the United States Senate in the Impeachment Trial of Donald John Trump, Vol. II: Visual Aids from the Trial and Statements of Senators, 117th Cong., S. Doc. No. 117-3, at 875 (2021) (statement of Senator Dan Sullivan) ("[T]he House managers claimed, in arguing their incitement charge, that First Amendment political speech protections do not apply to elected officials in impeachment proceedings. A conviction based on this breathtaking precedent has the potential to significantly further undermine core constitutional protections for Americans and their ability to undertake political speech in the future.") *But see id.* at 791 (statement of Senator Charles E. Schumer) ("The First Amendment right to free speech protects Americans from jail, not Presidents from impeachment.").

[33] 167 Cong. Rec. S733 (daily ed. Feb. 13, 2021) (acquitting former President Trump by a vote of 57-43).

[1] *See* H. Res. 499 (Aug. 9, 1988); H.R. Rep. No. 100-810, at 8 (1988).

[2] Nixon v. United States, 506 U.S. 224, 237–38 (1993).

[3] United States v. Claiborne, 727 F.2d 842 (9th Cir. 1984).

seat and continued to collect his judicial salary.[4] The House unanimously voted in favor of four articles of impeachment against him.[5] The first two articles against Judge Claiborne simply laid out the underlying behavior that had given rise to his criminal prosecution.[6] The third article "rest[ed] entirely on the conviction itself" and stood for the principle that "by conviction alone he is guilty of 'high crimes' in office."[7] The fourth alleged that Judge Claiborne's actions brought the "judiciary into disrepute, thereby undermining public confidence in the integrity and impartiality of the administration of justice" which amounted to a "misdemeanor."[8]

The Senate impeachment trial of Judge Claiborne was the first in which that body used a committee to take evidence. Rather than conducting a full trial with the entire Senate, the committee took testimony, received evidence, and voted on pretrial motions regarding evidence and discovery.[9] The committee then reported a transcript of the proceedings to the full Senate, without recommending whether impeachment was warranted.[10] The Senate voted to convict Judge Claiborne on the first, second, and fourth articles.[11]

In 1988, the House impeached a federal district judge who had been indicted for a criminal offense but acquitted. Judge Alcee L. Hastings was acquitted in a criminal trial where he was accused of conspiracy and obstruction of justice for soliciting a bribe in return for reducing the sentences of two convicted felons.[12] After his acquittal, a judicial committee investigated the case and concluded that Judge Hasting's behavior might merit impeachment. The Judicial Conference (a national entity composed of federal judges that reviews investigations of judges and is authorized to refer recommendations to Congress) eventually referred the matter to the House of Representatives, noting that impeachment might be warranted.[13] The House of Representatives approved seventeen impeachment articles against Judge Hastings, including for perjury, bribery, and conspiracy.[14]

Judge Hastings objected to the impeachment proceedings as "double jeopardy" because he had already been acquitted in a previous criminal proceeding.[15] The Senate, however, rejected his motion to dismiss the articles against him.[16] The Senate again used a trial committee to

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[4] Emily F.V. Tassel & Paul Finkelman, Impeachable Offenses: A Documentary History from 1787 to the Present 168 (1999).

[5] 132 Cong. Rec. H4710–22 (daily ed. July 22, 1986).

[6] H. Comm. on the Judiciary, Impeachment of Judge Harry E. Claiborne, Report to Accompany H. Res. 461, 99th Cong., 2d Sess., H.R. Rep. No. 99-688, at 1–2 (1986).

[7] *Id.* at 12.

[8] *Id.* at 23.

[9] Staff from the S. Impeachment Trial Comm., On the Impeachment of Harry E. Claiborne, 99th Cong., 2d Sess., S. Rep. No. 99-511, at 1–4 (1986).

[10] *Id.* at 1.

[11] 132 Cong. Rec. 29,870–72 (1986).

[12] H.R. Rep. No. 100-810, at 8 (1988).

[13] *Id.* The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 authorizes the Judicial Conference to forward a certification to the House that impeachment of a federal judge may be warranted. 28 U.S.C. § 355.

[14] H. Res. 499 (Aug. 9, 1988); H.R. Rep. No. 100-810, at 8 (1988).

[15] Impeachment of Judge Alcee L. Hastings, Motions of Judge Alee L. Hastings to Dismiss Articles I-XV and XVII of the Articles of Impeachment Against Him and Supporting and Opposing Memoranda S. Doc. 101–4, at 48–65 (1989).

[16] *The Impeachment Trial of Alcee Hastings*, U.S. Senate, https://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Hastings.htm (last visited Jan. 24, 2018).

receive evidence. That body voted to convict and remove Judge Hastings on eight articles, but did not vote to disqualify him from holding future office.[17] Judge Hastings was later elected to the House of Representatives.[18]

Before the trial of Judge Hastings even began in the Senate, the House impeached Judge Walter L. Nixon. Judge Nixon was convicted in a criminal trial of perjury to a grand jury and imprisoned.[19] Following an investigation by the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights, the Judiciary Committee reported a resolution to the full House recommending impeachment on three articles.[20] The full House approved three articles of impeachment, the first two involving lying to a grand jury and the last for undermining the integrity of and bringing disrepute on the federal judicial system.[21] The Senate convicted Judge Nixon on the first two articles but acquitted him on the third.[22]

Judge Nixon challenged the Senate's use of a committee to receive evidence and conduct hearings. He brought a suit in federal court arguing that the use of a committee, rather than the full Senate, to take evidence violated the Constitution's provision that the Senate "try" all impeachments.[23] The Supreme Court ultimately rejected his challenge in *Nixon v. United States*, ruling that the issue was a non-justiciable political question because the Constitution grants the power to try impeachments "in the Senate and nowhere else"; and the word "try" "lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions."[24] As a result of this decision, impeachment proceedings appear largely immune from judicial review.[25]

Two judges have been impeached in the twenty-first century. As with the three impeachments of judges in the 1980s, the first followed a criminal indictment. District Judge Samuel B. Kent pled guilty to obstruction of justice for lying to a judicial investigation into alleged sexual misconduct and was sentenced to 33 months in prison.[26] The House impeached Judge Kent for sexually assaulting two court employees, obstructing the judicial investigation of his behavior, and making false and misleading statements to agents of the Federal Bureau of Investigation (FBI) about the activity.[27] Judge Kent resigned his office before a Senate trial.[28] The Senate declined to conduct a trial following his resignation.

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[17] 135 Cong. Rec. S13,783–87 (daily ed. Oct. 20, 1989).

[18] Tassel & Finkelman, *supra* note 4, at 173.

[19] H. Comm. on the Judiciary, Impeachment of Walter L. Nixon, Jr., Report to Accompany H. Res. 87, 101st Cong., 1st Sess., H.R. Rep. No. 101-36, at 12–13 (1989).

[20] *Id.* at 14–16.

[21] 135 Cong. Rec. H1802–11 (daily ed. May 10, 1989).

[22] 135 Cong. Rec. S14,633–39 (daily ed. Nov. 3, 1989).

[23] *Nixon*, 506 U.S. at 226.

[24] *Id.* at 229.

[25] The U.S. District Court for the District of Columbia initially threw out Judge Hastings' Senate impeachment conviction, because the Senate had tried his impeachment before a committee rather than the full Senate. Hastings v. United States, 802 F. Supp. 490, 505 (D.D.C. 1992). The decision was vacated on appeal and remanded for reconsideration in light of *Nixon v. United States*. Hastings v. United States, 988 F.2d 1280 (D.C. Cir. 1993). The district court then dismissed the suit because it presented a nonjusticiable political question. Hastings v. United States, 837 F. Supp. 3, 5–6 (D.D.C. 1993).

[26] H. Comm. on the Judiciary, Impeachment of Judge Samuel B. Kent, Report to Accompany H. Res. 520, 11th Cong., 1st Sess. H.R. Rep. No. 111-159, at 6–13 (2009) [hereinafter Kent Impeachment].

[27] 155 Cong. Rec. H7053–67 (daily ed. June 19, 2009); Kent Impeachment, *supra* note 26, at 2–3.

[28] Charles W. Johnson, John V. Sullivan, and Thomas J. Wickham, Jr., House Practice: A Guide to the Rules, Precedents and Procedures of the House 608–13 (2017).

Although the four previous impeachments of federal judges followed criminal proceedings, the most recent impeachment did not.[29] In 2010, Judge G. Thomas Porteous Jr. was impeached for participating in a corrupt financial relationship with attorneys in a case before him, and engaging in a corrupt relationship with bail bondsmen whereby he received things of value in return for helping the bondsmen develop corrupt relationships with state court judges.[30] Judge Porteous was the first individual impeached by the House[31] and convicted by the Senate based in part upon conduct occurring before he began his tenure in federal office. The first and second articles of impeachment each alleged misconduct by Judge Porteous during both his state and federal judgeships.[32] The fourth alleged that Judge Porteous made false statements to the Senate and FBI in connection with his nomination and confirmation to the U.S. District Court for the Eastern District of Louisiana.[33]

Judge Porteous's filings in answer to the articles of impeachment argued that conduct occurring before he was appointed to the federal bench cannot constitute impeachable behavior.[34] The House Managers' replication, or reply to this argument, argued that Porteous's contention had no basis in the Constitution.[35] On December 8, 2010, he was convicted on all four articles, removed from office, and disqualified from holding future federal offices.[36] The first article, which included conduct occurring before he was a federal judge, was affirmed 96-0.[37] The second article, approved 90-6, alleged that he lied to the Senate in his confirmation hearing to be a federal judge.[38] A number of Senators explicitly adopted the reasoning supplied by expert witness testimony before the House that the crucial issue regarding the appropriateness of impeachment was not the timing of the misconduct, but "whether Judge Porteous committed such misconduct and whether such misconduct demonstrates the lack of integrity and judgment that are required in order for him to continue to function" in office.[39]

Senator Claire McCaskill explained in her statement entered in the *Congressional Record* that Judge Porteous's argument for an "absolute, categorical rule that would preclude impeachment and removal for any pre-federal conduct" should be rejected.[40] "That should not be the rule," she noted, "any more than allowing impeachment for any pre-federal conduct that

[29] The FBI investigated judicial corruption in Louisiana's 24th Judicial District, the court on which Judge Porteous served before being appointed to the District Court for the Eastern District of Louisiana. The Department of Justice declined to seek criminal charges but did submit a complaint of judicial misconduct to the Fifth Circuit Court of Appeals. Report of the Impeachment Trial Comm. on the Articles Against Judge G. Thomas Porteous, Jr., 111th Cong., 2d Sess., S. Rep. No. 111-347, at 5 (2010) [hereinafter Porteous Impeachment].

[30] Porteous Impeachment, *supra* note 29, at 1–2.

[31] 156 Cong. Rec. 3155–57 (2010).

[32] Porteous Impeachment, *supra* note 29, at 1–2.

[33] Porteous Impeachment, *supra* note 29, at 2.

[34] 156 Cong. Rec. S2183–84 (daily ed. Apr. 12, 2010). *See also* Judge G. Thomas Porteous, Jr.'s Post-Trial Brief (Oct. 29, 2010), *in* Proceedings of the United States Senate in the Impeachment Trial of G. Thomas Porteous, Jr., A Judge of the United States District Court for the Eastern District of Louisiana, 111th Cong., 2d Sess., S. Doc. No. 111-20, at 61–76 (2010) [hereinafter Porteous Proceedings].

[35] 156 Cong. Rec. S2358 (daily ed. Apr. 15, 2010). *See also* Post-Trial Memorandum of the House of Representatives (Oct. 29, 2010), *in* Porteous Proceedings, *supra* note 29, at 304–15.

[36] 156 Cong. Rec. 19,134–36 (2010).

[37] 156 Cong. Rec. 8609 (2010).

[38] 156 Cong. Rec. 8610 (2010).

[39] *To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr. (Part IV), Hearing Before the Task Force on Judicial Impeachment of the H. Comm. on the Judiciary*, 111th Cong., 1st Sess., H. Hrg. 111–46, at 30 (Dec. 15, 2009) (statement of Michael J. Gerhardt, Professor of Law, University of North Carolina, Chapel Hill School of Law); *see, e.g.*, 156 Cong. Rec. S10,285 (daily ed. Dec. 15, 2010) (statement of Senator Tom Udall); *id.* at S10,284 (statement of Senator Patrick Leahy).

[40] 156 Cong. Rec. S10,282 (daily ed. Dec 15, 2010).

is entirely unrelated to the federal office."[41] Senator Patrick Leahy agreed, noting that he "reject[ed] any notion of impeachment immunity [for pre-federal behavior] if misconduct was hidden, or otherwise went undiscovered during the confirmation process, and it is relevant to a judge's ability to serve as an impartial arbiter."[42]

[41] *Id.*

[42] 156 Cong. Rec. S10, 284. *See also id.* at S10,286 (statement of Senator Jeanne Shaheen) ("I was totally unpersuaded by the defense team's argument that Judge Porteous's 'pre-Federal' conduct should be outside the scope of our deliberation—I do not believe the act of being confirmed to a Federal judgeship by the Senate erases or excuses an individual's conduct up to the point of confirmation."); *id.* at S10,405 (statement of Senator Jeff Sessions) ("The Constitution does not require that all conduct be committed post Federal appointment nor does it stipulate at all when the conduct must occur.").

ARTICLE III
JUDICIAL BRANCH

ARTICLE III
JUDICIAL BRANCH

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ARTICLE III—JUDICIAL BRANCH

ArtIII.1 Overview of Article III, Judicial Branch

Article III of the U.S. Constitution establishes the Judicial Branch of the federal government. Section 1 of Article III, known as the Judicial Vesting Clause, confers the federal judicial power on "one supreme Court" and "such inferior Courts as the Congress may from time to time ordain and establish."[1] Through that language, the Constitution's Framers ensured the existence of a federal Supreme Court but left to Congress the decision of whether to establish lower federal courts.[2] The first Congress established lower federal courts in the first legislation related to the Federal Judiciary.[3] As the Nation expanded, Congress legislated to expand and restructure the Article III Judiciary[4] and also periodically created other tribunals known as "Article I courts" or "legislative courts."[5]

While Article III grants Congress significant authority to establish and structure federal courts, it also imposes key limitations designed to ensure the independence of the Judiciary. Article III, Section 1 provides that federal judges "shall hold their Offices during good Behaviour," which the Supreme Court has interpreted to grant federal judges life tenure, unless they voluntarily resign or are impeached and removed from the bench.[6] Section 1 also provides that federal judges shall receive compensation for their work, "which shall not be diminished during their Continuance in Office."[7] That provision prevents Congress from punishing unpopular judicial decisions by docking judges' pay.[8]

Article III, Section 2, Clause 1 authorizes the creation of federal courts with limited jurisdiction, providing that the "judicial Power shall extend" to certain enumerated categories of "Cases" and "Controversies."[9] Among other things, the Clause provides for federal court jurisdiction over cases "arising under" the Constitution or the laws or treaties of the United States (sometimes called "federal question jurisdiction")[10] and controversies between citizens of different states (known as "diversity jurisdiction").[11] Article III, Section 2, Clause 2 grants the Supreme Court original jurisdiction over a subset of federal cases, meaning that litigants may commence those cases in the Supreme Court rather than beginning the cases in a state court or a lower federal court and reaching the Supreme Court on appeal, if at all.[12] The Constitution's grant of Supreme Court original jurisdiction is self-executing, meaning that

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[1] U.S. Const. art. III, § 1.

[2] The Framers generally accepted that state courts would play a significant role in interpreting and applying federal law, but they debated whether to leave that role entirely to state courts, subject to review by the federal Supreme Court, or whether lower federal court were more likely to apply federal law correctly, uniformly, and without bias. *See* ArtIII.S1.6.2 Historical Background on Relationship Between Federal and State Courts.

[3] 1 Stat. 73.

[4] *See* ArtIII.S1.8.1 Overview of Establishment of Article III Courts.

[5] *See* ArtIII.S1.9.1 Overview of Congressional Power to Establish Non-Article III Courts.

[6] U.S. Const. art. III, § 1; *see also* ArtIII.S1.10.2.1 Overview of Good Behavior Clause.

[7] U.S. Const. art. III, § 1.

[8] *See* ArtIII.S1.10.3.1 Historical Background on Compensation Clause. Article III's protections for federal judges do not apply to judges on Article I tribunals. *See* ArtIII.S1.9.2 Congressional Power to Structure Legislative Courts.

[9] U.S. Const. art. III, § 2, cl. 1.

[10] *See* ArtIII.S2.C1.11.1 Overview of Federal Question Jurisdiction.

[11] *See* ArtIII.S2.C1.16.1 Overview of Diversity Jurisdiction. Other examples of matters subject to federal court jurisdiction include admiralty and maritime cases, cases to which the United States is a Party, and controversies between states. *See generally* ArtIII.S2.C1.1 Overview of Cases or Controversies.

[12] U.S. Const. art. III, § 2, cl. 2; *see also* ArtIII.S2.C2.2 Supreme Court Original Jurisdiction. Under current law, parties in most cases must seek Supreme Court review through a petition for a writ of certiorari, which the Court has discretion to grant or deny. *See* ArtIII.S2.C2.4 Supreme Court Appellate Jurisdiction.

Congress need not enact legislation to implement it.[13] None of the other grants of federal court jurisdiction are self-executing, however, so the lower federal courts can only hear cases to the extent Congress enacts legislation authorizing them to do so.[14] The Supreme Court has interpreted Article III as setting the outer bounds of federal court jurisdiction: Congress cannot grant jurisdiction beyond what Article III authorizes, but is not required to grant the federal courts the full authority it might choose to confer consistent with the constitutional authorization.[15]

The Supreme Court has also construed Article III to impose certain "justiciability" requirements that may limit federal courts' ability to hear cases that would otherwise fall within their jurisdiction.[16] Among other limitations, federal courts may not issue advisory opinions.[17] Relatedly, every federal court plaintiff must demonstrate standing to sue, which requires that the plaintiff possess a concrete and personal stake in the outcome of the case.[18] Federal courts may not hear cases that are not "ripe" for decision because the dispute has not developed enough for a court to decide the issues presented effectively[19] or those that have become "moot" and no longer present a live controversy.[20] The courts also cannot hear "political questions" best entrusted to the other branches of government[21] and generally avoid deciding constitutional questions when a case can be resolved on other grounds.[22]

The remainder of Article III governs specific judicial proceedings. Article III, Section 2, Clause 3 governs criminal trials, requiring a jury trial for the "Trial of all Crimes, except in Cases of Impeachment."[23] Article III, Section 3 governs trial and punishment for treason. Section 3, Clause 1 defines treason as "only . . . levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort" and provides that conviction for treason requires the testimony of two witnesses "to the same overt Act" or "Confession in open Court."[24] Section 3, Clause 2 prohibits punishing treason by "Corruption of Blood."[25]

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[13] Relatedly, Congress may not enact legislation limiting the Court's original jurisdiction. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cr.) 137, 174 (1803).

[14] *See, e.g.*, Romero v. International Terminal Operating Co., 358 U.S. 354, 364 (1959) (describing "enumerated classes of cases to which 'judicial power' was extended by the Constitution and which thereby authorized grants by Congress of 'judicial Power' to the 'inferior' federal courts"). Likewise, Article III provides that the Supreme Court's appellate jurisdiction is subject to "such Exceptions, and under such Regulations as the Congress shall make." U.S. Const. art. III, § 2, cl. 2; *see also* ArtIII.S2.C2.6 Exceptions Clause and Congressional Control over Appellate Jurisdiction.

[15] *See, e.g.*, 28 U.S.C. § 1332 (bestowing less than the maximum amount of diversity jurisdiction by granting federal courts jurisdiction in civil actions between citizens of different states and between a citizen of a state and a subject of a foreign state if the amount in controversy exceeds $75,000).

[16] *See* ArtIII.S2.C1.3.1 Overview of Rules of Justiciability and Cases or Controversies Requirement.

[17] An advisory opinion is a non-binding interpretation of the law by a court, essentially the court providing advice on an abstract or hypothetical legal question. *See* ArtIII.S2.C1.4.1 Overview of Advisory Opinions.

[18] *See* ArtIII.S2.C1.6.1 Overview of Standing.

[19] *See* ArtIII.S2.C1.7.1 Overview of Ripeness Doctrine.

[20] *See* ArtIII.S2.C1.8.1 Overview of Mootness Doctrine.

[21] *See* ArtIII.S2.C1.9.1 Overview of Political Question Doctrine.

[22] *See* ArtIII.S2.C1.10.1 Overview of Constitutional Avoidance Doctrine.

[23] U.S. Const. art. III, § 2, cl. 3; *see also* ArtIII.S2.C3.1 Jury Trials.

[24] U.S. Const. art. III, § 3, cl. 1; *see also* ArtIII.S3.C1.1 Historical Background on Treason.

[25] U.S. Const. art. III, § 3, cl. 2; *see also* ArtIII.S3.C2.1 Punishment of Treason Clause. "Corruption of blood" refers to "perpetual forfeiture of the estate of the person attainted [for treason], to the disinherison of his heirs, or of those who would otherwise be his heirs." Wallach v. Van Riswick, 92 U.S. 202, 210 (1876).

Section 1—Vesting Clause

ArtIII.S1.1 Overview of Judicial Vesting Clause

Article III, Section 1:

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

Article III, Section 1 of the Constitution vests the "judicial Power of the United States" in the federal courts.[1] Associate Justice Samuel Miller described judicial power as "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."[2] The Supreme Court has explained that judicial power is "the right to determine actual controversies arising between diverse litigants, duly instituted in courts of proper jurisdiction."[3] Judicial power thus confers on federal courts the power to decide cases and to render a judgment that conclusively resolves each case.

While the Constitution provides that the judicial power "shall be vested" in the federal courts, the vesting of most of the judicial power is neither automatic nor mandatory. The Supreme Court exercises original jurisdiction over a limited class of cases, meaning that such cases may be filed directly in the Supreme Court rather than reaching the Court on appeal.[4] That original jurisdiction has been deemed to arise directly from the Constitution.[5] Outside the limited category of cases subject to original jurisdiction, the federal courts' authority to hear cases depends on both constitutional text and implementing statutes. Two prerequisites must be present before the federal courts may hear a case: first, the Constitution must have given the courts the capacity to receive jurisdiction, and, second, an act of Congress must have conferred it.[6] Congress has never vested in the federal courts all the jurisdiction that the Constitution would allow it to grant,[7] and the Supreme Court has not interpreted the Constitution to require that Congress confer the entire jurisdiction it might.[8]

One key feature of the federal judicial power is the power of judicial review, the authority of the federal courts to declare that federal or state government actions violate the Constitution.

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[1] U.S. Const. art. III, § 1.

[2] Justice Samuel Miller, On the Constitution 314 (1891).

[3] Muskrat v. United States, 219 U.S. 346, 361 (1911).

[4] U.S. Const. art. III, § 2, cl. 2.

[5] *See* ArtIII.S2.C2.2 Supreme Court Original Jurisdiction.

[6] The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1868); Cary v. Curtis, 44 U.S. (3 How.) 236 (1845); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32, 33 (1812); Kline v. Burke Constr. Co., 260 U.S. 226 (1922). Some judges have expressed the opinion that Congress's authority is limited by provisions of the Constitution such as the Due Process Clause, so that a limitation on jurisdiction that denied a litigant access to any remedy might be unconstitutional. *Cf.* Eisentrager v. Forrestal, 174 F.2d 961, 965–966 (D.C. Cir. 1949), *rev'd on other grounds sub nom*, Johnson v. Eisentrager, 339 U.S. 763 (1950); Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948), cert. denied, 335 U.S. 887 (1948); Petersen v. Clark, 285 F. Supp. 700, 703 n.5 (N.D. Calif. 1968); Murray v. Vaughn, 300 F. Supp. 688, 694–695 (D.R.I. 1969). The Supreme Court has had no occasion to consider the question.

[7] For discussion of constitutional and statutory grants of federal court jurisdiction in two key areas, see ArtIII.S2.C1.11.1 Overview of Federal Question Jurisdiction and ArtIII.S2.C1.16.1 Overview of Diversity Jurisdiction.

[8] *See, e.g.*, Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 10 (1799) (Justice Chase). *But see* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328–331 (1816); 3 J. Story, Commentaries on the Constitution of the United States (1833) 1584–1590; Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205 (1985).

ArtIII.S1.1
Overview of Judicial Vesting Clause

The two essays that follow discuss the historical background of judicial review and Supreme Court doctrine related to judicial review, particularly the seminal case *Marbury v. Madison*.[9]

The general judicial power also includes certain ancillary powers of courts such as the authority to punish for contempt of their authority,[10] to issue writs in aid of jurisdiction when authorized by statute,[11] to make rules governing their process in the absence of statutory authorizations or prohibitions,[12] to order their own process so as to prevent abuse, oppression, and injustice, and to protect their own jurisdiction and officers in the protection of property in custody of law,[13] to appoint masters in chancery, referees, auditors, and other investigators,[14] and to admit and disbar attorneys.[15] The inherent powers of the federal courts are discussed in more detail in later essays.[16]

ArtIII.S1.2 Historical Background on Judicial Review

Article III, Section 1:

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

One key feature of the federal judicial power is the power of judicial review, the authority of federal courts to declare that federal or state government actions violate the Constitution. While judicial review is now one of the distinctive features of United States constitutional law, the Constitution does not expressly grant federal courts power to declare government actions unconstitutional. However, the historical record from the Founding and the early years of the Republic suggests that those who framed and ratified the Constitution were aware of judicial review, and that some favored granting courts that power.

The concept of judicial review was already established at the time of the Founding. The Privy Council had employed a limited form of judicial review to review colonial legislation and its validity under the colonial charters.[1] There were several instances known to the Framers of state court invalidation of state legislation as inconsistent with state constitutions.[2] Practically all of the Framers who expressed an opinion on the issue in the Convention appear to have assumed and welcomed the existence of court review of the constitutionality of legislation.[3] Alexander Hamilton argued in favor of the doctrine in the *Federalist Papers*.[4] In

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[9] 5 U.S. (1 Cr.) 137 (1803). *See* ArtIII.S1.2 Historical Background on Judicial Review and ArtIII.S1.3 Marbury v. Madison and Judicial Review.

[10] Michaelson v. United States, 266 U.S. 42 (1924).

[11] McIntire v. Wood, 11 U.S. (7 Cr.) 504 (1813); *Ex parte* Bollman, 8 U.S. (4 Cr.) 75 (1807).

[12] Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825).

[13] Gumbel v. Pitkin, 124 U.S. 131 (1888).

[14] *Ex parte* Peterson, 253 U.S. 300 (1920).

[15] *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 378 (1867).

[16] *See* ArtIII.S1.4.1 Overview of Inherent Powers of Federal Courts.

[1] Julius Goebel, Antecedents and Beginnings to 1801, History of the Supreme Court of the United States 60–95 (1971).

[2] *Id.* at 96–142.

[3] 1 Max Farrand, The Framing of the Constitution of the United States 97–98 (1913) (Gerry), 109 (King); 2 Max Farrand, The Framing of the Constitution of the United States 28 (1913) (Morris and perhaps Sherman), 73 (Wilson), 75 (Strong, but the remark is ambiguous), 76 (Martin), 78 (Mason), 79 (Gorham, but ambiguous), 80 (Rutledge), 92–93 (Madison), 248 (Pinckney), 299 (Morris), 376 (Williamson), 391 (Wilson), 428 (Rutledge), 430 (Madison), 440 (Madison),

enacting the Judiciary Act of 1789, Congress explicitly provided for the exercise of the power,[5] and in other legislative debates questions of constitutionality and of judicial review were prominent.[6] Early Supreme Court Justices seem to have assumed the existence of judicial review.[7]

The Supreme Court first formally embraced the doctrine of judicial review in the 1803 case *Marbury v. Madison*.[8] Since *Marbury*, judicial review has become a core feature of American

589 (Madison); 3 Max Farrand, The Framing of the Constitution of the United States 220 (1913) (Martin). The only expressed opposition to judicial review came from Mercer with a weak seconding from Dickinson. "Mr. Mercer . . . disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontroulable." 2 Max Farrand, The Framing of the Constitution of the United States 298 (1913). "Mr. Dickinson was strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute." *Id.* at 299. Of course, the debates in the Convention were not available when the state ratifying conventions acted, so that the delegates could not have known these views about judicial review in order to have acted knowingly about them. Views, were, however, expressed in the ratifying conventions recognizing judicial review, some of them being uttered by Framers. 2 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 131 (1836) (Samuel Adams, Massachusetts), 196–97 (Ellsworth, Connecticut), 348, 362 (Hamilton, New York): 445–46. 478 (Wilson, Pennsylvania); 3 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 324–25, 539 , 541 (1836) (Henry, Virginia), 480 (Mason, Virginia), 532 (Madison, Virginia), 570 (Randolph, Virginia); 4 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 71 (1836) (Steele, North Carolina), 156–57 (Davie, North Carolina). In the Virginia convention, Chief Justice John Marshall observed if Congress "were to make a law not warranted by any of the powers enumerated, it would be considered by the judge as an infringement of the Constitution which they are to guard . . . They would declare it void . . . . To what quarter will you look for protection from an infringement on the constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection." 3 *id.* at 553–54. Both Madison and Hamilton similarly asserted the power of judicial review in their campaign for ratification. The Federalist No. 39 (James Madison); *id.* Nos. 78, 81 (Alexander Hamilton). The persons supporting or at least indicating they thought judicial review existed did not constitute a majority of the Framers, but the absence of controverting statements, with the exception of the Mercer-Dickinson comments, indicates at least acquiescence if not agreements by the other Framers.

[4] The Federalist No. 78 (Alexander Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts. A constitution, is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.").

[5] In enacting the Judiciary Act of 1789, 1 Stat. 73, Congress chose not to vest "federal question" jurisdiction in the federal courts but to leave to the state courts the enforcement of claims under the Constitution and federal laws. In Section 25 of the Judiciary Act (1 Stat. 85), Congress provided for review by the Supreme Court of final judgments in state courts (1) "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity;" (2) "where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity;" or (3) "where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed" thereunder. *Id.* § 25, 1 Stat. 73, 85–86.

[6] *See* in particular the debate on the President's removal powers, discussed in ArtII.S2.C2.3.15.1 Overview of Removal of Executive Branch Officers with statements excerpted in R. Berger, Congress v. The Supreme Court 144–150 (1969). Debates on the Alien and Sedition Acts and on the power of Congress to repeal the Judiciary Act of 1801 similarly saw recognition of judicial review of acts of Congress. C. Warren, *supra* at 107–124.

[7] Thus, the Justices on circuit refused to administer a pension act on the grounds of its unconstitutionally, *see Hayburn's Case,* 2 U.S. (2 Dall.) 409 (1792) , and ArtIII.S1.4.4 Inherent Power to Issue Judgments. Chief Justice Jay and other Justices wrote that the imposition of circuit duty on Justices was unconstitutional, although they never mailed the letter in *Hylton v. United States,* 3 U.S. (3 Dall.) 171 (1796), a feigned suit, the constitutionality of a federal law was argued before the Justices and upheld on the merits, in *Ware v. Hylton,* 3 U.S. (3 Dall.) 199 (1796), a state law was overturned, and dicta in several opinions asserted the principle. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) (Justice Iredell), and several Justices on circuit, quoted in Julius Goebel, *supra* note 1, at 589–592.

[8] 5 U.S. (1 Cr.) 137 (1803).

constitutional law.[9] While the doctrine is well established, some legal commentators have criticized judicial review, and some who support it debate its doctrinal basis or how it should be applied.[10]

ArtIII.S1.3 Marbury v. Madison and Judicial Review

Article III, Section 1:

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

Judicial review is one of the distinctive features of United States constitutional law. However, the Constitution does not expressly grant the federal courts the power to declare government actions unconstitutional. Instead, the Supreme Court established the doctrine in the 1803 case *Marbury v. Madison*.[1]

Marbury arose from a dispute over a government commission. Plaintiff William Marbury and others were appointed as justices of the peace while President John Adams was in office, and their commissions were signed but not delivered. When President Thomas Jefferson took office, the commissions were withheld on Jefferson's express instruction. Marbury sued Secretary of State James Madison in the Supreme Court, seeking a writ of mandamus compelling delivery of the commission. He invoked the Supreme Court's original jurisdiction under Section 13 of the Judiciary Act of 1789.[2] The Supreme Court, in an opinion by Chief Justice John Marshall, agreed with Marbury that Section 13 authorized the Court to issue writs of mandamus in suits in its original jurisdiction. However, the Court declined to issue the writ, concluding instead that the Section 13 authorization was an attempt by Congress to expand the Court's original jurisdiction beyond its constitutional limits and was therefore void.[3]

Chief Justice Marshall began his discussion of judicial review by opining, "The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest."[4] In answering the question in the affirmative, Chief Justice Marshall first recognized certain fundamental principles. The people had come together to establish a government. They provided for its organization, assigned powers to its various departments, and established certain limits not to be transgressed by those departments. The limits were

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[9] *See* ArtIII.S1.3 Marbury v. Madison and Judicial Review.

[10] *See, e.g.*, G. Gunther, Constitutional Law 1–38 (12th ed. 1991); For expositions on the legitimacy of judicial review, see L. Hand, The Bill of Rights (1958); H. Wechsler, Principles, Politics, and Fundamental Law: Selected Essays 1–15 (1961); A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 1–33 (1962); R. Berger, Congress v. The Supreme Court (1969). For an extensive historical attack on judicial review, see 2 W. Crosskey, Politics and the Constitution in the History of the United States chs. 27–29 (1953), with which compare Hart, *Book Review*, 67 Harv. L. Rev. 1456 (1954). A brief review of the ongoing debate on the subject, in a work that now is a classic attack on judicial review, is Westin, Introduction: Charles Beard and American Debate Over Judicial Review, 1790–1961, in C. Beard, The Supreme Court and the Constitution 1–34 (1962 reissue of 1938 ed.), and bibliography at 133–149. While much of the debate focuses on judicial review of acts of Congress, the similar review of state acts has occasioned much controversy as well.

[1] 5 U.S. (1 Cr.) 137 (1803).

[2] 1 Stat. 73, 80.

[3] 5 U.S. (1 Cr.) at 173–80.

[4] *Id.* at 176.

expressed in a written constitution, which would serve no purpose "if these limits may, at any time, be passed by those intended to be restrained[.]"[5] Because the Constitution is "a superior paramount law, unchangeable by ordinary means, . . . a legislative act contrary to the constitution is not law."[6]

The Chief Justice then asked, "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?"[7] The answer, thought the Chief Justice, was clear: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."[8] If a statute and the Constitution both apply to a single case, and conflict with one another, "the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."[9] Because "the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply."[10] To declare otherwise, Chief Justice Marshall said, would be to permit the legislature to "pass[ ] at pleasure the limits imposed on its powers by the Constitution."[11]

The Chief Justice then turned from the philosophical justification for judicial review as arising from the very concept of a written constitution, to specific clauses of the Constitution. The judicial power, he observed, was extended to "all cases arising under the constitution."[12] It was "too extravagant to be maintained that the Framers had intended that a case arising under the constitution should be decided without examining the instrument under which it arises."[13] Suppose, he said, that Congress laid a duty on an article exported from a state or passed a bill of attainder or an ex post facto law or provided that treason should be proved by the testimony of one witness. Would the courts enforce such a law in the face of an express constitutional provision? They would not, he continued, because their oath required by the Constitution obligated them to support the Constitution and to enforce such laws would violate the oath.[14] Finally, the Chief Justice noted that the Supremacy Clause[15] gave the Constitution precedence over laws and treaties, providing that only laws "which shall be made in *pursuance* of the constitution shall be the supreme law of the land."[16]

Marbury v. Madison involved federal court review of a federal statute. Since the decision in *Marbury*, the Supreme Court has exercised its power of judicial review to examine the constitutionality of state statutes and federal and state executive actions.[17] State courts also

[5] *Id.*

[6] *Id.* at 177.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 178.

[10] *Id.* at 177–78.

[11] *Id.* at 178.

[12] *Id.* at 178 (citing U.S. Const. art. III, § 2, cl. 1).

[13] *Id.* at 179.

[14] *Id.* at 179–80.

[15] U.S. Const. art. VI, cl. 2.

[16] 5 U.S. (1 Cr.) at 180.

[17] *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cr.) 87 (1810); Little v. Barreme, 6 U.S. (2 Cr.) 170 (1804); Cooper v. Aaron, 358 U.S. 1 (1958).

have the authority to hear federal constitutional claims,[18] and may consider the validity of state action under the federal Constitution, subject to discretionary review by the U.S. Supreme Court.[19]

As *Marbury*'s doctrine of judicial review became settled law in federal court, state courts also embraced the doctrine, with state court judicial review under state constitutions established in all states by 1850.[20] The decision in *Marbury v. Madison* has never been disturbed. Although commentators have debated the merits and scope of judicial review throughout the Nation's history,[21] the Supreme Court continues to review the constitutionality of statutes and other government actions.[22]

ArtIII.S1.4 Inherent Powers of Federal Courts

ArtIII.S1.4.1 Overview of Inherent Powers of Federal Courts

Article III, Section 1:

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

Since the early years of the Republic, the Supreme Court has held that the federal courts possess certain inherent powers that are necessary for the courts to conduct their business and serve their constitutional function. In the 1812 case *United States v. Hudson*, the Court described inherent judicial powers as "certain implied powers [that] must necessarily result to our Courts of justice from the nature of their institution . . . which cannot be dispensed with in a Court, because they are necessary to the exercise of all others."[1] These powers are not expressly enumerated in the Constitution, nor are they "immediately derived from statute."[2] In 1821, in *Anderson v. Dunn*, the Court explained, "Courts of justice are universally

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[18] *See* ArtIII.S1.6.4 State Court Jurisdiction to Enforce Federal Law.

[19] *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964) (U.S. Supreme Court case involving a First Amendment challenge to a state law libel claim that was originally litigated in the Alabama courts); Lawrence v. Texas, 539 U.S. 558 (2003) (challenge to a state law banning consensual sexual activity between people of the same sex before the U.S. Supreme Court on appeal from a state criminal conviction).

[20] E. Corwin, The Doctrine of Judicial Review 75–78 (1914); Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitution Theory in the State, 1790–1860*, 120 U. Pa. L. Rev. 1166 (1972).

[21] *See, e.g.*, G. Gunther, Constitutional Law 1–38 (12th ed. 1991); For expositions on the legitimacy of judicial review, see L. Hand, The Bill of Rights (1958); H. Wechsler, Principles, Politics, and Fundamental Law: Selected Essays 1–15 (1961); A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 1–33 (1962); R. Berger, Congress v. The Supreme Court (1969). For an extensive historical attack on judicial review, see 2 W. Crosskey, Politics and the Constitution in the History of the United States chs. 27–29 (1953), with which compare Hart, *Book Review*, 67 Harv. L. Rev. 1456 (1954). A brief review of the ongoing debate on the subject, in a work that now is a classic attack on judicial review, is Westin, Introduction: Charles Beard and American Debate Over Judicial Review, 1790–1961, in C. Beard, The Supreme Court and the Constitution 1–34 (1962 reissue of 1938 ed.), and bibliography at 133–149. While much of the debate focuses on judicial review of acts of Congress, the similar review of state acts has occasioned much controversy as well.

[22] *See, e.g.*, Iancu v. Brunetti, 139 S. Ct. 2294, 588 U.S. ___ (2019); Matal v. Tam, 137 S. Ct. 1744, 582 U.S. ___ (2017).

[1] 11 U.S. 32, 34 (1812).

[2] *Id. See also* Link v. Wabash R. Co., 370 U.S. 626, 630–631 (1962) (Inherent powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.").

acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."[3]

Multiple Supreme Court cases have recognized inherent powers of the federal courts,[4] including the power to manage court proceedings,[5] to issue sanctions or hold parties in contempt for failure to comply with court orders,[6] and to issue and vacate judgments.[7] The following essays discuss each of those inherent powers in more detail.

ArtIII.S1.4.2 Inherent Powers Over Judicial Procedure

Article III, Section 1:

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

The Constitution divides the authority to set court procedures between the legislative and Judicial Branches. Congress enjoys substantial authority to make procedural rules for the courts. That authority is not expressly granted in the Constitution. Instead, the Supreme Court has explained that the power arises from Congress's authority to structure the federal court system, supplemented by the Necessary and Proper Clause.[1] In the 1825 case *Wayman v. Southard*, the Court held it to be "completely self-evident" that Congress has the authority to establish procedural rules for the federal courts.[2] The Court has approved procedural statutes that left some discretion to the federal courts, but has held that the courts do not have the inherent authority to expand their jurisdiction or to issue or execute judgments beyond what Congress has authorized.[3]

In 1934, recognizing the limited competence of the legislature to regulate court procedure and acknowledging the inherent power of courts to regulate the conduct of their business, Congress enacted the Rules Enabling Act.[4] The Act authorizes the Supreme Court to "prescribe general rules of practice and procedure and rules of evidence" for cases in the federal courts.[5] Such rules may not "abridge, enlarge or modify any substantive right."[6] Procedural rules also

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[3] 19 U.S. 204, 227 (1821)

[4] *See* Chambers v. NASCO, Inc., 501 U.S. 32, 43–44 (1991) (collecting cases and surveying inherent powers).

[5] *See* ArtIII.S1.4.2 Inherent Powers Over Judicial Procedure.

[6] *See* ArtIII.S1.4.3 Inherent Powers Over Contempt and Sanctions.

[7] *See* ArtIII.S1.4.4 Inherent Power to Issue Judgments.

[1] Hanna v. Plumer, 380 U.S. 460, 472 (1965).

[2] 23 U.S. (10 Wheat.) 1, 4 (1825).

[3] Fink v. O'Neil, 106 U.S. 272, 278, 280 (1882).

[4] 28 U.S.C. §§ 2071–2077.

[5] *Id.* § 2072(a).

[6] *Id.* § 2072(b). The Rules Enabling Act requires the Court to notify Congress of proposed amendments to procedural rules for the lower federal courts, but amendments take effect automatically unless Congress enacts legislation to reject or modify a proposed change. *Id.* §§ 2073, 2074. The Act also empowers the Supreme Court to create its own procedural rules, which need not be submitted to Congress before they take effect. *Id.* § 2071(a).

may not alter the jurisdiction or venue of federal courts.[7] Subject to those limitations, the Court has rejected constitutional challenges to rules promulgated under the Rules Enabling Act.[8]

In addition to the legislative power to regulate court procedures, some of which Congress has delegated to the Judicial Branch, the courts themselves possess inherent equitable powers over their procedures. This inherent power serves to prevent abuse, oppression, and injustice, and to protect the courts' jurisdiction and officers.[9] The Supreme Court has explained that such power is essential to and inherent in the organization of courts of justice.[10]

While the Court has not precisely delineated the outer boundaries of the federal courts' inherent powers to manage their own internal affairs, the Court has recognized two limits on the exercise of such authority.[11] First, a court, in exercising its inherent powers over its own processes, must act reasonably in response to a specific problem or issue confronting the court's fair administration of justice.[12] Second, any exercise of an inherent power cannot conflict with any express grant of or limitation on the district court's power as contained in a statute or rule, such as the Federal Rules of Civil Procedure.[13] Thus, as with rules promulgated under the Rules Enabling Act, no court-made rule can enlarge or restrict jurisdiction or abrogate or modify the substantive law. This limit applies equally to courts of law, equity, and admiralty, to rules prescribed by the Supreme Court for the guidance of lower courts, and to rules that lower courts make for their own guidance.[14]

Applying the foregoing standards, the Supreme Court has recognized that a federal district court, as an exercise of its inherent powers, can, in limited circumstances, rescind an order to discharge a jury and recall that jury in a civil case.[15] The Court has also acknowledged that federal courts possess the inherent power to control other aspects of regulating internal court proceedings, hearing a motion in limine;[16] dismissing a case for the convenience of the parties or witnesses because of the availability of an alternative forum;[17] and staying proceedings pending the resolution of parallel actions in other courts.[18] The federal courts also possess inherent power to amend their records, correct the errors of the clerk or other court

[7] United States v. Sherwood, 312 U.S. 584, 589–590 (1941); Mississippi Pub. Corp. v. Murphree, 326 U.S. 438 (1946).

[8] *E.g.*, Sibbach v. Wilson, 312 U.S. 1, 14 (1941).

[9] Gumbel v. Pitkin, 124 U.S. 131 (1888); Covell v. Heyman, 111 U.S. 176 (1884); Buck v. Colbath, 70 U.S. (3 Wall.) 334 (1866).

[10] Eberly v. Moore, 65 U.S. (24 How.) 147 (1861); Arkadelphia Co. v. St. Louis S.W. Ry., 249 U.S. 134 (1919).

[11] *See* Dietz v. Bouldin, 579 U.S. ___, No. 15–458, slip op. at 4 (2016).

[12] *Id.* at 4–5.

[13] *Id.* at 4.

[14] Washington-Southern Nav. Co. v. Baltimore & P.S.B.C. Co., 263 U.S. 629, 635, 636 (1924). The Supreme Court does not prescribe how Courts of Appeals should exercise discretion vested in them. As long as a lower court keeps within the bounds of judicial discretion, its action is not reviewable. *In re* Burwell, 350 U.S. 521 (1956).

[15] Dietz v. Bouldin, No. 15–458, slip op. at 5–7 (acknowledging that while it is reasonable to allow a jury to reconvene after a formal discharge to correct an error and while such an exercise of authority does not conflict with a rule or statute, the exercise of the inherent power to rescind a discharge order needs to be carefully circumscribed to guarantee the existence of an impartial jury). The rule provided in *Dietz* extends only to civil cases, as additional constitutional concerns—namely, the attachment of the double jeopardy bar—might arise if a court were to recall a jury after discharge in a criminal case. *See id.* at 10.

[16] *See* Luce v. United States, 469 U.S. 38, 41 n.4 (1984). A motion *in limine* is a preliminary motion resolved by a court prior to trial and generally regards the admissibility of evidence. *See* Black's Law Dictionary 1171 (10th ed. 2014).

[17] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507–08 (1947). This doctrine is called *forum non conveniens*. *See* Black's Law Dictionary 770 (10th ed. 2014).

[18] *See* Landis v. N. Am. Co., 299 U.S. 248, 254 (1936).

officers, and rectify defects or omissions in their records.[19] The exercise of an inherent power can, at times, allow for departures from even long-established, judicially crafted common law rules; however, courts are not generally free to discover new inherent powers that are contrary to civil practice as recognized in the common law.[20]

Incident to the judicial power, federal courts possess inherent authority to supervise the conduct of their officers, parties, witnesses, counsel, and jurors by imposing rules to protect the rights of litigants and the orderly administration of justice.[21] Such supervision may be accomplished through a number of different means, including promulgation of general procedural rules as discussed in this essay, oversight of admission to the bar, imposition of contempt or sanctions for parties or attorney who disobey court orders or engage in misconduct, or case-by-case decisions to exclude individuals from the courtroom.[22]

ArtIII.S1.4.3 Inherent Powers Over Contempt and Sanctions

Article III, Section 1:

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

The Supreme Court has repeatedly held that federal courts possess inherent authority to punish contempt—i.e., disobedience of a court order or obstruction of justice—and to impose other sanctions on parties or attorneys who engage in misconduct.

The Court's contempt decisions have often distinguished between criminal and civil contempt.[1] Whether a contempt is civil or criminal can be of great importance. For instance, criminal contempt implicates procedural rights attendant to prosecutions, while civil contempt does not.[2] In *Ex parte Grossman*, while holding that the President may pardon a criminal contempt, Chief Justice William Howard Taft noted in dicta that the pardon power did not

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[19] Gagnon v. United States, 193 U.S. 451, 456–59 (1904). The power to amend records conveys no power to create a record or recreate one of which no evidence exists. *Id.*

[20] *See Dietz*, slip op. at 12.

[21] McDonald v. Pless, 238 U.S. 264, 266 (1915); Griffin v. Thompson, 43 U.S. (2 How.) 244, 257 (1844). *See* Thomas v. Arn, 474 U.S. 140 (1985) (appeals court rule conditioning appeal on having filed with the district court timely objections to a master's report). In *Rea v. United States,* 350 U.S. 214, 218 (1956), the Court, citing *McNabb v. United States,* 318 U.S. 332 (1943), asserted that this supervisory power extends to policing the requirements of the Court's rules with respect to the law enforcement practices of federal agents. *But compare* United States v. Payner, 447 U.S. 727 (1980).

[22] *See* Chambers v. NASCO, Inc., 501 U.S. 32, 43–44 (1991) (collecting cases and surveying inherent powers). For further discussion of the contempt and sanctions powers, see ArtIII.S1.4.3 Inherent Powers Over Contempt and Sanctions.

[1] *But see* United States v. United Mine Workers, 330 U.S. 258 (1947). A civil contempt has been traditionally viewed as the refusal of a person in a civil case to obey a mandatory order. It is incomplete in nature, may be purged by obedience to the court order, and does not involve a sentence for a definite period. The classic criminal contempt is one where the act of contempt has been completed, punishment is imposed to vindicate the authority of the court, and a person cannot by subsequent action purge himself of such contempt. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441–443 (1911); *Ex parte* Grossman, 267 U.S. 87 (1925). *See also* Bessette v. W.B. Conkey Co., 194 U.S. 324, 327–328 (1904).

[2] International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821 (1994); Shillitani v. United States, 384 U.S. 364 (1966).

extend to civil contempt.[3] In *Turner v. Rogers*, the Court held that the Due Process Clause does not grant an indigent defendant a right to state-appointed counsel at a civil contempt proceeding.[4] Notwithstanding the importance of distinguishing between the two types of contempt, there have been instances where defendants have been charged with both civil and criminal contempt for the same act.[5]

The history of the contempt powers of the American Judiciary is marked by two trends: a shrinking of the courts' power to punish a person summarily and a multiplying of the due process requirements that must be met when finding an individual to be in contempt.[6] The power of the courts of the United States to punish contempts of their authority had its origin in the law and practice of England where disobedience of court orders was regarded as contempt of the King himself and attachment was a prerogative process derived from presumed contempt of the sovereign.[7] By the latter part of the eighteenth century, summary power to punish was extended to all contempts whether committed in or out of court.[8] In the United States, the Judiciary Act of 1789 broadly conferred power on all courts of the United States "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."[9] The abuse of this extensive power led to the passage of the Act of 1831, which limited the power of the federal courts to punish contempts to misbehavior in the presence of the courts "or so near thereto as to obstruct the administration of justice," misbehavior of officers of courts in their official capacity, and disobedience or resistance to any lawful writ, process or order of the court.[10]

Writing for the Court to sustain the Act of 1831 in *Ex parte Robinson*, Justice Stephen Field described the nature of the contempt power as follows:

> The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.[11]

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[3] 267 U.S. 87, 119–120 (1925). In an analogous case, the Court was emphatic in a dictum that Congress cannot require a jury trial where the contemnor has failed to perform a positive act for the relief of private parties. Michaelson v. United States *ex rel.* Chicago, S.P., M. & Ry., 266 U.S. 42, 65–66 (1924). *But see* Bloom v. Illinois, 391 U.S. 194, 202 (1968).

[4] 564 U.S. 431 (2011); *cf.* Hicks v. Feiock, 485 U.S. 624 (1988) (holding that a state may place the burden of proving inability to pay child support on a defendant faced with civil contempt).

[5] *See* United States v. United Mine Workers, 330 U.S. 258, 299 (1947).

[6] Many of the limitations placed on the inferior federal courts have been issued on the basis of the Supreme Court's supervisory power over them rather than upon a constitutional foundation, while, of course, the limitations imposed on state courts necessarily are on constitutional dimensions. Indeed, it is often the case that a limitation that is applied to an inferior federal court as a superintending measure is then transformed into a constitutional limitation and applied to state courts. *Compare* Cheff v. Schnackenberg, 384 U.S. 373 (1966), *with* Bloom v. Illinois, 391 U.S. 194 (1968). The limitations then bind both federal and state courts alike. Therefore, in this section, Supreme Court constitutional limitations on state court contempt powers are cited without restriction for equal application to federal courts.

[7] Fox, *The King v. Almon*, 24 L.Q. Rev. 184, 194–195 (1908).

[8] Fox, *The Summary Power to Punish Contempt*, 25 L.Q. Rev. 238, 252 (1909).

[9] 1 Stat. 83, § 17 (1789).

[10] 18 U.S.C. § 401. Judge James H. Peck of the Federal District Court of Missouri was impeached for abuse of the contempt power, but was acquitted by the Senate. For a summary of the Peck impeachment and the background of the Act of 1831, see Felix Frankfurter & James Landis, *Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts: A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1024–1028 (1924).

[11] 86 U.S. (19 Wall.) 505, 510 (1874).

While he expressed doubts concerning the validity of the 1831 Act as applied to the Supreme Court, Justice Field declared that there could be no question of its validity as applied to the lower courts because they are created by Congress and their "powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction."[12] With the passage of time, later adjudications, especially after 1890, came to place more emphasis on the inherent power of courts to punish contempts than upon the power of Congress to regulate summary attachment.

By 1911, the Court was saying that the contempt power must be exercised by a court without referring the issues of fact or law to another tribunal or to a jury in the same tribunal.[13] In *Michaelson v. United States*, the Court narrowly interpreted sections of the Clayton Act relating to punishment for contempt of court by disobedience of injunctions in labor disputes.[14] The sections in question provided for a jury upon the demand of the accused in contempt cases where the acts committed in violation of district court orders also constituted a crime. Although Justice George Sutherland reaffirmed earlier rulings establishing the authority of Congress to regulate the contempt power, he went on to qualify this authority and declared that "the attributes which inhere in the power [to punish contempt] and are inseparable from it can neither be abrogated nor rendered practically inoperative."[15] The Court mentioned specifically "the power to deal summarily with contempt committed in the presence of the courts or so near thereto as to obstruct the administration of justice," and the power to enforce mandatory decrees by coercive means.[16] The Court has held that this latter power to enforce includes the authority to appoint private counsel to prosecute a criminal contempt.[17]

Although the contempt power may be inherent, it is not unlimited. In *Spallone v. United States*, the Court held that a district court had abused its discretion by imposing contempt sanctions on individual members of a city council for refusing to vote to implement a consent decree remedying housing discrimination by the city.[18] The Court held that, "in view of the 'extraordinary' nature of the imposition of sanctions against the individual councilmembers," the proper remedy was to proceed first with contempt sanctions against the city, and only if that course failed should it proceed against the council members individually.[19]

In addition to the contempt power discussed above, the federal courts possess other inherent authorities to deter and punish misconduct.[20] The Supreme Court has explained that courts are elements of an independent and coequal branch of government, so once they are

[12] *Id.* at 511.

[13] Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911). *See also In re* Debs, 158 U.S. 564, 595 (1895).

[14] 266 U.S. 42 (1924).

[15] *Id.* at 66.

[16] *Id.* at 65–66.

[17] Young v. United States *ex rel.* Vuitton, 481 U.S. 787, 793–801 (1987). However, the Court, invoking its supervisory power, instructed the lower federal courts first to request the United States Attorney to prosecute a criminal contempt and only if refused should they appoint a private lawyer. *Id.* at 801–802. Still using its supervisory power, the Court held that the district court had erred in appointing counsel for a party that was the beneficiary of the court order; disinterested counsel had to be appointed. *Id.* at 802–08. Justice Antonin Scalia contended that the power to prosecute is not comprehended within Article III judicial power and that federal judges had no power, inherent or otherwise, to initiate a prosecution for contempt or to appoint counsel to pursue it. *Id.* at 815. *See also* United States v. Providence Journal Co., 485 U.S. 693 (1988), which involved the appointment of a disinterested private attorney. The Supreme Court dismissed the writ of certiorari after granting it, however, holding that only the Solicitor General representing the United States could bring the petition to the Court. *See* 28 U.S.C. § 518.

[18] 493 U.S. 265 (1990).

[19] *Id.* at 280.

[20] United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32, 34 (1812) ("Certain implied powers must necessarily result to our courts of justice, from the nature of their institution. . . . To fine for contempt, imprison for contumacy,

created and their jurisdiction established, they have the authority to do what courts have traditionally done in order to accomplish their assigned tasks.[21] Those inherent powers may be limited by statutes and by rules.[22] Nonetheless, the Court has asserted the power to act in areas not covered by statutes and rules and has held that Congress may regulate the courts' inherent sanctions power only by unmistakably enunciating its intention to limit the courts' inherent powers.[23]

Thus, in *Chambers v. NASCO, Inc.*, the Court upheld the imposition of monetary sanctions against a litigant and his attorney for bad-faith litigation conduct in a diversity case.[24] Some of the conduct was covered by a federal statute and several sanction provisions of the Federal Rules of Civil Procedure, but some was not. The Court held that, absent a showing that Congress had intended to limit the courts, they could use their inherent powers to impose sanctions for the entire course of conduct, including shifting attorneys' fees, which is ordinarily against the common-law American rule.[25] In another case, a party failed to comply with discovery orders and a court order concerning a schedule for filing briefs. The Supreme Court held that the attorneys' fees statute did not allow assessment of such fees in that situation, but it remanded for consideration of sanctions under both a Federal Rule of Civil Procedure and the trial court's inherent powers, subject to a finding of bad faith.[26] However, bad faith is not always required for the exercise of some inherent powers. For instance, courts may dismiss an action for an unexplained failure of the moving party to prosecute it.[27]

ArtIII.S1.4.4 Inherent Power to Issue Judgments

Article III, Section 1:

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

Since 1792, the federal courts have emphasized finality of judgment as an essential attribute of judicial power. In that year, Congress authorized Revolutionary War veterans to file pension claims in circuit courts of the United States, directed the judges to certify to the Secretary of War the degree of a claimant's disability and their opinion with regard to the proper percentage of monthly pay to be awarded, but empowered the Secretary to withhold

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enforce the observance of order, &c., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others: and so far our courts, no doubt, possess powers not immediately derived from statute.").

[21] *See* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821); *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1874); Link v. Wabash R.R., 370 U.S. 626, 630–631 (1962); Chambers v. NASCO, Inc., 501 U.S. 32, 43–46 (1991); *id.* at 58 (Scalia, J., dissenting); *id.* at 60, 62–67 (Kennedy, J., dissenting).

[22] *Chambers*, 501 U.S. at 47.

[23] *Id.* at 46–51.

[24] *Id.* at 35.

[25] *Id.* at 49–51. Nonetheless, the Court has clarified that because a court's order directing a sanctioned litigant to reimburse the legal fees and costs incurred by the wronged party as a result of bad faith conduct is compensatory, rather than punitive, in nature, a fee award may go no further than to redress the wronged party for losses sustained. *See* Goodyear Tire & Rubber Co. v. Haeger, 581 U.S. ___, No. 15–1406, slip op. at 5–6 (2017) (holding that a court, "when using its inherent sanctioning authority," must "establish a causal link—between the litigant's misbehavior and legal fees paid by the opposing party").

[26] Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980).

[27] Link v. Wabash R.R., 370 U.S. 626 (1962).

judicially certified claimants from the pension list if he suspected "imposition or mistake."[1] The Justices then on circuit almost immediately forwarded objections to the President, contending that the statute was unconstitutional because the judicial power was constitutionally committed to the Judicial department, the duties imposed by the act were not judicial, and the subjection of a court's opinions to revision or control by an officer of the Executive or the Legislature was not authorized by the Constitution.[2]

In addition to the power to issue judgments, each federal court also possesses an inherent power to "to vacate its own judgment upon proof that a fraud has been perpetrated upon the court" or enforcement of the judgment would otherwise create inequity, and to "conduct an independent investigation in order to determine whether it has been the victim of fraud."[3] By contrast, the Court has held that Congress may not enact legislation that directs courts to reopen a final judgment.[4]

Federal courts also have authority to issue writs, though it is not clear whether the courts have any inherent power in this area absent statutory authorization by Congress. Since the Founding, Congress has assumed—under its power to establish inferior courts, its power to regulate the jurisdiction of federal courts, and the Necessary and Proper Clause—the power to regulate the issuance of writs.[5] Section 13 of the Judiciary Act of 1789 authorized the Supreme Court "to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."[6] Section 14 provided that all "courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[7]

Although the Act of 1789 left the power to issues writs subject largely to the common law, it is significant as a reflection of the belief, in which the courts have generally concurred, that an act of Congress is necessary to confer judicial power to issue writs.[8] Whether Article III itself is an independent source of the power of federal courts to fashion equitable remedies for

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[1] Act of March 23, 1792, 1 Stat. 243.

[2] 1 American State Papers: Miscellaneous Documents, Legislative and Executive, of the Congress of the United States 49, 51, 52 (1832). President Washington transmitted the remonstrances to Congress. 1 Messages and Papers of the Presidents 123, 133 (J. Richardson comp., 1897). The objections are also appended to the order of the Court in *Hayburn's Case,* 2 U.S. (2 Dall.) 409, 410 (1792). Note that some of the Justices declared their willingness to perform under the Act as commissioners rather than as judges. *Cf.* United States v. Ferreira, 54 U.S. (13 How.) 40, 52–53 (1852). The assumption by judges that they could act in some positions as individuals while remaining judges, an assumption many times acted upon, was approved in *Mistretta v. United States,* 488 U.S. 361, 397–408 (1989).

[3] Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (citing Hazel–Atlas Glass Co. v. Hartford–Empire Co., 322 U.S. 238 (1944); Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580 (1946)); *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 234 (1995).

[4] *Plaut*, 514 U.S. 211; *see also* ArtIII.S1.5.2 Reopening Final Judicial Decisions.

[5] Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1016–1023 (1924).

[6] 1 Stat. 73, 81. "Section 13 was a provision unique to the Court, granting the power of prohibition as to district courts in admiralty and maritime cases." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4005, p. 98 (1996). *See also* R. Fallon, et al., Hart and Wechsler's The Federal Courts and the Federal System (6th ed. 2009), Ch. III, p. 268. In *Marbury v. Madison*, the Supreme Court limited the authority of Congress to empower the Court to issue writs, striking down Section 13. *See* 5 U.S. (1 Cr.) 137 (1803) (holding that Section 13 was an attempt by Congress to expand the Court's original jurisdiction beyond its constitutional limits and was therefore void).

[7] 1 Stat. 73, 81–82. *See also* United States v. Morgan, 346 U.S. 502 (1954) (holding that the All Writs section of the Judicial Code, 28 U.S.C. § 1651(a), gives federal courts the power to employ the ancient writ of *coram nobis*).

[8] *See, e.g.*, Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34 (1985) (holding that a federal district court lacked authority to order U.S. marshals to transport state prisoners, such authority not being

constitutional violations or whether such remedies must fit within congressionally authorized writs or procedures is often left unexplored. In *Missouri v. Jenkins*, for example, the Court, rejecting a claim that a federal court exceeded judicial power under Article III by ordering local authorities to increase taxes to pay for desegregation remedies, declared that a court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court.[9] In the same case, the Court refused to rule on the difficult constitutional issues presented by the state's claim that the district court had exceeded its constitutional powers in a prior order directly raising taxes, instead ruling that the order had violated principles of comity.[10]

ArtIII.S1.5 Congressional Control Over Judicial Power

ArtIII.S1.5.1 Overview of Congressional Control Over Judicial Power

Article III, Section 1:

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

The Framers structured the Constitution to promote the separation of powers and, in particular, to protect the Judiciary from undue influence by Congress and the Executive Branch.[1] Nonetheless, the Constitution does not impose complete separation between the Judiciary and the political branches. Congress possesses substantial authority to regulate how the federal courts exercise judicial power, albeit subject to certain constitutional limitations.

For instance, the Supreme Court rejected a separation of powers challenge to legislation establishing the U.S. Sentencing Commission as an independent agency within the Judicial Branch.[2] On the other hand, while Congress can change the substantive law courts must apply and alter the jurisdiction of the federal courts, sometimes even with respect to pending cases,[3] it cannot direct the courts to reopen final judicial decisions.[4] The following essays discuss those two issues. Other issues related to congressional control over the Federal Judiciary, including

granted by the relevant statutes). While the Court has held that statutory authorization to issue writs is necessary, it has also held that such authorizing legislation is not effective if it exceeds constitutional limits on the federal courts' jurisdiction. *See Marbury*, 5 U.S. (1 Cr.) 137 (1803).

[9] 495 U.S. 33, 55 (1990) (citing Griffin v. Prince Edward County School Bd., 377 U.S. 218, 233–34 (1964)) (An order that local officials "exercise the power that is theirs" to levy taxes in order to open and operate a desegregated school system is "within the court's power if required to assure . . . petitioners that their constitutional rights will no longer be denied them.").

[10] *Id.* at 50–52.

[1] *See, e.g.*, 1 The Records of the Federal Convention of 1787, at 44 (Max Farrand ed., 1911) (discussion of how salary protection for judges could support judicial independence); *id.* at 429 (statement of Mr. Wilson in discussion of the Good Behavior Clause that "Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Govt."); *cf.* The Federalist No. 78 (Alexander Hamilton).

[2] *See* ArtIII.S1.5.3 Imposing Non-Adjudicatory Functions on Courts.

[3] *See* ArtIII.S2.C2.6 Exceptions Clause and Congressional Control over Appellate Jurisdiction.

[4] *See* ArtIII.S1.5.2 Reopening Final Judicial Decisions.

Congress's power to establish federal courts,[5] create court procedural rules,[6] set federal court jurisdiction,[7] and alter federal judges' tenure in office,[8] are discussed elsewhere in this volume.

ArtIII.S1.5.2 Reopening Final Judicial Decisions

Article III, Section 1:

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

The core of the judicial power is the authority to render dispositive judgments. Accordingly, the Supreme Court has held that Congress violates the separation of powers when it purports to alter, or allow the Executive Branch to alter, final judgments of Article III courts.[1]

In 1792, in *Hayburn's Case*, the Supreme Court considered a petition for a writ of mandamus to direct a federal circuit court to proceed on a claim seeking a federal pension.[2] The petitioner argued that the courts had failed to give effect to an act of Congress. The Court noted, however, that "the reasons assigned by the judges," including Supreme Court Justices sitting on the circuit courts, "for declining to execute the . . . act of Congress, involve a great constitutional question."[3] Specifically, those judges contended that pension decisions under the Act were not judicial duties that Congress could constitutionally assign to the courts because the act rendered such decisions subject to review by the political branches.[4] The Court heard argument on the mandamus petition but postponed its decision until the next term. While the case remained pending, Congress enacted legislation providing an alternative means of relief for the pensioners; the Court then dismissed the mandamus petition without deciding the underlying constitutional question.[5]

Although the Court in *Hayburn's Case* did not decide the constitutionality of legislation subjecting court judgments to review by the political branches, the Court has since cited that decision to reject efforts to give federal courts jurisdiction over cases in which judgment would be subject to Executive or Legislative revision.[6] For example, in the 1948 case *Chicago &*

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[5] *See* ArtIII.S1.8.1 Overview of Establishment of Article III Courts.

[6] *See* ArtIII.S1.4.1 Overview of Inherent Powers of Federal Courts

[7] *See, e.g.,* ArtIII.S2.C1.11.1 Overview of Federal Question Jurisdiction; ArtIII.S2.C2.1 Overview of Supreme Court Jurisdiction; ArtIII.S2.C2.2 Supreme Court Original Jurisdiction; ArtIII.S2.C2.6 Exceptions Clause and Congressional Control over Appellate Jurisdiction.

[8] *See* ArtIII.S1.10.2.1 Overview of Good Behavior Clause.

[1] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995). Congress also cannot legislate to "prescribe a rule for the decision of a cause in a particular way." United States v. Klein, 80 U.S. 128 (1871); *see also* Bank Markazi v. Peterson, 578 U.S. 212, 231 (2016) (Congress may not enact legislation "that directs, in 'Smith v. Jones,' 'Smith wins.'"). However, Congress possesses substantial authority to amend substantive laws or alter federal court jurisdiction in ways that affect pending litigation. *See, e.g.*, Robertson v. Seattle Audubon Soc., 503 U.S. 429, 441 (1992); Patchak v. Zinke, 138 S. Ct. 897 (2018); *see also* ArtIII.S2.C2.6 Exceptions Clause and Congressional Control over Appellate Jurisdiction.

[2] 2 U.S. (2 Dall.) 409 (1792).

[3] *Id.* at 410, footnote.

[4] *Id.* (noting objections that the statute "subjects the decisions of these courts . . . first to the consideration and suspension of the secretary at war, and then to the revision of the legislature").

[5] *Id.*

[6] *See* United States v. Ferreira, 54 U.S. (13 How.) 40 (1852); Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865); *In re* Sanborn, 148 U.S. 222 (1893); *cf.* McGrath v. Kritensen, 340 U.S. 162, 167–168 (1950).

Southern Air Lines v. Waterman S.S. Corp., the Court held that an order of the Civil Aeronautics Board denying a certificate of convenience and necessity was not reviewable by the courts, despite statutory language to the contrary.[7] Congress had also rendered such an order subject to discretionary review and revision by the President, but the Supreme Court agreed with a lower federal court that the Judiciary did not have the authority to review the President's decision.[8] While the lower court had attempted to reconcile the statutory scheme by permitting presidential review of the order *after* judicial review, the Supreme Court rejected that interpretation, stating: "[I]f the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government."[9]

In the 1995 case *Plaut v. Spendthrift Farm, Inc.*, the Court held that legislation that directs courts to reopen a final judgment unconstitutionally intrudes on the Judiciary.[10] *Plaut* involved an amendment to the Securities Exchange Act of 1934 that Congress enacted after a pair of Supreme Court opinions announced a time limit for bringing certain civil actions seeking damages under the Act.[11] The amended statute, Section 27A of the Securities Exchange Act, directed courts (upon a timely filed petition) to reinstate cases that had been dismissed because of the Court's rulings but that would have been timely under the governing statute of limitations when initially filed.[12] In *Plaut*, the Supreme Court held that Section 27A's reopening provision violated the doctrine of separation of powers.[13] The Court explained that, by applying retroactively to final decisions, Section 27A "reverses a determination once made, in a particular case."[14] The Court distinguished the command in Section 27A from other retroactive laws that mandate "an appellate court [to] apply [the new] law in reviewing judgments still on appeal that were rendered before the law was enacted."[15] The Court emphasized the difference between attempting to alter a final judgment—one rendered by a court and either not appealed or affirmed on appeal—and legislatively amending a statute as applied to a decision that was on appeal or otherwise not final at the time a federal court reviewed the determination below. A court must apply the law as revised when it considers a case on appeal. However, the Court reasoned that "[h]aving achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was."[16] Thus, in directing courts to reopen nonpending, previously decided cases, Congress violates the separation of powers by "depriving judicial judgments of the conclusive effect that they had when they were announced."[17]

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[7] 333 U.S. 103 (1948).

[8] *Id.* at 111.

[9] *Id.* at 113.

[10] 514 U.S. 211 (1995).

[11] Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 364 (1991); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 544 (1991).

[12] *See* Federal Deposit Insurance Improvement Act of 1991, § 476, P.L. 102–242, 105. Stat. 2236.

[13] 514 U.S. at 240.

[14] *Id.* at 225.

[15] *Id.* at 226.

[16] *Id.* at 227.

[17] *Id.* at 227–28.

While Congress cannot require courts to reopen final judgments, it can "alter[ ] the prospective effect of injunctions entered by Article III courts."[18] Thus, in *Miller v. French*, the Court upheld a provision of the Prison Litigation Reform Act of 1995 that requires courts to stay a court-ordered injunction automatically for a specified period upon receiving a motion to terminate the injunction.[19] The Court ruled that the automatic stay provision did not amount to an unconstitutional legislative revision of a final judgment.[20] Rather, it merely altered the prospective effect of injunctions, and it is well established that such prospective relief "remains subject to alteration due to changes in the underlying law."[21]

ArtIII.S1.5.3 Imposing Non-Adjudicatory Functions on Courts

Article III, Section 1:

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

The Supreme Court has struck down congressional attempts to reassign constitutional functions from one branch of government to another branch, but has "upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment."[1] In *Mistretta v. United States*, the Supreme Court rejected a separation of powers challenge to legislation establishing the U.S. Sentencing Commission.[2] Through the Sentencing Reform Act of 1984, Congress created the Sentencing Commission as an independent agency in the Judicial Branch tasked with promulgating sentencing guidelines for federal judges to use when sentencing convicted offenders.[3] Under the Act, three Sentencing Commission members must be Article III judges. The President appoints all seven Commission members and can remove any member for cause.[4] In *Mistretta*, a criminal defendant sought to have the Sentencing Guidelines the Commission promulgated ruled unconstitutional, arguing in part that the Commission was constituted in violation of the doctrine of separation of powers.[5]

Upholding the constitutionality of establishing the Sentencing Commission as an independent body in the Judicial Branch, the Court acknowledged that the Commission is not a court and does not exercise judicial power.[6] Rather, its membership includes both judges and nonjudges, and its work has a "significantly political nature."[7] However, the Court held that the question of the Commission's constitutionality turns not on formal distinctions between

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[18] *Id.* at 222 (citing State of Pennsylvania v. The Wheeling & Belmont Bridge Co., 59 U.S. 421 (1855)).

[19] 530 U.S. 327 (2000); *see also* 18 U.S.C. § 3626(e)(2).

[20] 530 U.S. at 342.

[21] *Id.* at 344.

[1] Mistretta v. United States, 488 U.S. 361, 383 (1989).

[2] 488 U.S. 361.

[3] The Sentencing Reform Act was enacted as chapter II of the Comprehensive Crime Control Act, Title II of P.L. 98–473, 98 Stat. 1976 (1984).

[4] 28 U.S.C. § 991.

[5] 488 U.S. at 370. The challenger also asserted that Congress delegated excessive authority to the Commission to structure the Guidelines. *See id.* For additional discussion of *Mistretta*, see ArtI.S1.3.2 Functional and Formalist Approaches to Separation of Powers; ArtI.S1.6.1 Criminal Statutes and Nondelegation Doctrine.

[6] *Id.* at 384–85.

[7] *Id.* at 393.

"political" and "judicial" functions, but rather on a practical inquiry whether the agency's structure "undermin[es] the integrity of the Judicial Branch" or "expand[s] the powers of the Judiciary beyond constitutional bounds."[8] The Court held that "the placement of the Sentencing Commission in the Judicial Branch has not increased the Branch's authority" because, "[p]rior to the passage of the Act, the Judicial Branch . . . decided precisely the questions assigned to the Commission: what sentence is appropriate to what criminal conduct under what circumstances."[9] The Court also rejected the challenger's contention that participating in policymaking would inevitably weaken the Judiciary. The Court noted that "Congress placed the Commission in the Judicial Branch precisely because of the Judiciary's special knowledge and expertise" with respect to sentencing, and concluded that this arrangement could not "possibly be construed as preventing the Judicial Branch 'from accomplishing its constitutionally assigned functions.'"[10] The Court further held that "the principle of separation of powers does not absolutely prohibit Article III judges from serving on [non-judicial] commissions" such as the Sentencing Commission or from sharing power on the Commission with members who are not judges.[11]

ArtIII.S1.6 Federal and State Courts

ArtIII.S1.6.1 Overview of Relationship Between Federal and State Courts

Article III, Section 1:

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

The Constitution's Supremacy Clause provides that the Constitution, federal statutes, and treaties "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[1] The Supremacy Clause thus presumes that state courts will interpret—and be bound by—federal law.[2]

Under modern practice, both state and federal courts play an important role in interpreting and applying the Constitution and federal law.[3] However, at the time of the Founding it was not initially clear how that power would be divided between federal and state courts.[4]

In the years since the Founding, Supreme Court decisions have established that federal courts, particularly the Supreme Court, are the final authority on interpreting federal law, and federal courts possess the constitutional authority to review state court decisions that allegedly conflict with the Constitution or federal law.[5] Various statutory and court-made rules

[8] *Id.* at 393.

[9] *Id.* at 395.

[10] *Id.* at 395–96 (quoting Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977)).

[11] *Id.* at 404, 408.

[1] U.S. Const. art. VI, cl. 2.

[2] *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. 304, 342 (1816).

[3] *See* ArtIII.S1.6.3 Doctrine on Federal and State Courts.

[4] *See* ArtIII.S1.6.2 Historical Background on Relationship Between Federal and State Courts.

[5] *See id.*; *see also* ArtIII.S1.6.4 State Court Jurisdiction to Enforce Federal Law; ArtIII.S1.6.9 Habeas Review.

govern when such review is available, however. In some circumstances, a complainant bringing a claim under federal law is required to exhaust available state legislative or administrative remedies before seeking relief in federal court; by contrast, exhaustion of state judicial remedies—for example, by first bringing related state law claims in state court—is not generally required.[6] There are also circumstances in which the federal courts have the power to assert jurisdiction over a case but decline to do so out of respect for the sovereign authority of state courts.[7]

As for state courts, they are generally authorized to hear claims involving federal law, except in areas where the federal courts possess exclusive jurisdiction.[8] Moreover, subject to limited exceptions, state courts are usually *required* to hear cases arising under federal law over which they have jurisdiction.[9] State courts generally lack the authority to enjoin proceedings in federal court or prevent the enforcement of federal court judgments.[10]

ArtIII.S1.6.2 Historical Background on Relationship Between Federal and State Courts

Article III, Section 1:

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

At the time of the Founding, each state had its own system of courts, while the Articles of Confederation did not provide for an independent Federal Judiciary.[1] The delegates to the Constitutional Convention agreed early on that the new Constitution should establish a federal Judicial Branch including a Supreme Court; however, they debated other questions about how to balance federal and state judicial power.

The Framers generally accepted that state courts would play a significant role in interpreting and applying federal law.[2] However, some of the Framers also entertained concerns about whether state courts would apply federal law correctly, uniformly, and without bias. Then, as now, the specific structure of state courts varied significantly from state to state. State court judges often did not enjoy the safeguards that were afforded federal judges, such as

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[6] *See* ArtIII.S1.6.8 Exhaustion Doctrine and State Law Remedies; *but see* ArtIII.S1.6.9 Habeas Review (exhaustion of state judicial remedies is required before filing a federal habeas corpus petition).

[7] *See* ArtIII.S1.6.7 Federal Non-Interference with State Jurisdiction and Abstention.

[8] *See* ArtIII.S1.6.4 State Court Jurisdiction to Enforce Federal Law.

[9] *See* ArtIII.S1.6.4 State Court Jurisdiction to Enforce Federal Law.

[10] *See* ArtIII.S1.6.4 State Court Jurisdiction to Enforce Federal Law.

[1] Article IX of the Articles of Confederation authorized Congress to "appoint[ ] courts for the trial of piracies and felonies committed on the high seas; and establish[ ] courts; for receiving and determining finally appeals in all cases of captures." The same Article further provided that Congress would be "the last resort on appeal, in all disputes and differences now subsisting, or that hereafter may arise between two or more states" and could appoint commissioners or judges to constitute a court to resolve such disputes.

[2] *See, e.g.*, 1 The Records of the Federal Convention of 1787, at 243 (Max Farrand ed., 1911) [hereinafter, Convention Records]. For example, the Convention considered proposals that would require federal questions to be decided first in state court, but with a right of appeal to federal courts. *See id.* at 243, 424. Likewise, during the debate over ratification, Alexander Hamilton wrote that "the State courts will RETAIN the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes. . . . [Thus,] the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited." The Federalist No. 83 (Alexander Hamilton).

life tenure during good behavior and salary protection. Certain delegates to the Constitutional Convention expressed concerns as to whether state court judges might therefore be subject to political pressures that could affect their decision-making.[3] Others raised the prospect of disputes between states, noting that a state court might issue decisions that were biased in favor of its home state.[4] Some Founders worried that the multiple state courts could interpret federal law differently, undermining the interest in having uniform federal laws.[5]

To mitigate those concerns, the Framers provided for a federal Supreme Court with the power to review state judicial decisions involving issues of federal statutory or constitutional law.[6] Debate arose, however, on the question of whether lower federal courts were also necessary. Some delegates argued that establishing lower federal courts would encroach on the power of the states.[7] Some argued that a right of appeal from state court to a federal appellate court would suffice to ensure uniformity and prevent bias.[8] Other delegates countered that a right to appeal would provide less effective protection of federal rights than the right to consideration by an impartial tribunal in the first instance.[9] The Convention discussed whether creating lower federal courts would lessen the burden on the Supreme Court and prevent it from being overwhelmed by numerous appeals.[10] Some delegates voiced an interest in flexibility, contending that lower federal courts might be needed in the future even if they were not immediately necessary.[11]

Ultimately, the Framers left the decision of whether to create lower federal courts to Congress. Article III of the Constitution provides for "one supreme Court, and . . . such inferior

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[3] James Madison expressed concern at the Convention about "improper Verdicts in State tribunals obtained under the biassed directions of a dependent Judge," and "disliked the election of the Judges by the Legislature or any numerous body" due to "the danger of intrigue and partiality" and the fact that legislators lacked the "requisite qualifications" to select suitable judges. Convention Records, *supra* note 2, at 120, 124. *See also* The Federalist No. 81 (Alexander Hamilton) ("State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.").

[4] *E.g.*, Convention Records, *supra* note 2, at 124 (statement of Madison expressing concern about "the local prejudices of an undirected jury"); The Federalist No. 80 (Alexander Hamilton) ("[T]he most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes.").

[5] As Hamilton wrote, "The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." The Federalist No. 80 (Alexander Hamilton).

[6] U.S. Const. art. III; 1 Stat. 73, 85; Martin v. Hunter's Lessee, 14 U.S. 304 (1816). *Cf.* Oliver Wendell Holmes, Collected Legal Papers 295–296 (1921) ("I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as the laws of the several States.").

[7] *See, e.g.*, Convention Records, *supra* note 2, at 124–25.

[8] For example, John Rutledge argued that "State Tribunals might and ought to be left in all cases to decide in the first instance" and that lower federal courts would be "an unnecessary encroachment on the jurisdiction of the States, and creating unnecessary obstacles to their adoption of the new system." *Id.* at 124.

[9] *See, e.g.*, *id.* at 124–125 (statements of Madison, Wilson, & Dickinson); *see also* 25 The Papers of Alexander Hamilton 486 (Harold C. Syrett et al. ed 1977) ("The right of appeal is by no means equal to the right of applying, in the first instance, to a Tribunal agreeable to the suitor.").

[10] Madison observed at the Convention that without federal trial courts, appeals from state court "would be multiplied to a most oppressive degree." Convention Records, *supra* note 2, at 124. Even if a federal appeals court ordered a new trial, he asked, how could that provide an effective remedy when the case would be retried "under the biassed directions of a dependent Judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose." *Id.* In a similar vein, another delegate argued that "the establishment of inferior tribunals [would] cost infinitely less than the appeals that would be prevented by them." *Id.* at 125; *but see id.* (statement of Sherman focused on "the supposed expensiveness of having a new set of Courts, when the existing State Courts would answer the same purpose").

[11] *See, e.g.*, *id.* at 125 (statement of Dickinson).

Courts as the Congress may from time to time ordain and establish."[12] The first Congress exercised its authority promptly, creating lower federal courts in the Judiciary Act of 1798, the first legislation related to the Federal Judiciary.[13]

ArtIII.S1.6.3 Doctrine on Federal and State Courts

Article III, Section 1:

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

By specifying the extent of the "judicial Power," the Constitution authorized the creation of federal courts with limited subject matter jurisdiction. Article III identifies several categories of cases over which the Supreme Court possesses original jurisdiction.[1] In addition, the Constitution generally authorizes federal courts to hear "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority," as well as admiralty cases, cases between citizens of different states, and cases between citizens of a state and a foreign state or its citizens.[2]

Within those broad categories, Congress has traditionally been understood to exercise significant discretion to decide which cases particular federal courts have jurisdiction to hear. The Constitution sets the maximum possible extent of federal court jurisdiction. Congress cannot expand such jurisdiction beyond the applicable constitutional limits, but is free to grant the federal courts authority over only a subset of constitutionally permissible cases. In practice, Congress has always granted the federal courts less expansive jurisdiction than the Constitution authorizes.[3] The first Judiciary Act granted the federal courts exclusive jurisdiction over matters including federal criminal cases, admiralty cases, and certain cases involving seizures of property under federal law.[4] The Act also granted the federal and state courts concurrent jurisdiction over other classes of cases, including certain tort suits brought by foreign nationals and common law suits brought by the United States government.[5] Since that time, Congress has periodically expanded the scope of federal court jurisdiction,[6] but has never provided for federal court jurisdiction in all possible cases that would be authorized under the Constitution's jurisdictional limits.[7]

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[12] U.S. Const. art. III, § 1; *cf.* Convention Records, *supra* note 2, at 125 ("Mr. Wilson & Mr. Madison then moved . . . to add . . . the words following 'that the National Legislature be empowered to institute inferior tribunals'. They observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them.").

[13] 1 Stat. 73.

[1] U.S. Const. art. III, § 2, cl. 1.

[2] *Id.*

[3] *See, e.g.*, Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 807 (1986) ("Although the constitutional meaning of 'arising under' may extend to all cases in which a federal question is 'an ingredient' of the action, . . . we have long construed the statutory grant of federal-question jurisdiction as conferring a more limited power.") (internal citation omitted).

[4] 1 Stat. 73, 77.

[5] *Id.*

[6] For example, Congress amended the current federal question statute, 28 U.S.C § 1331, in 1976 and 1980 to eliminate the jurisdictional amount requirement. Pub. L. No. 94-574, 90 Stat. 2721; Pub. L. No. 96-486, 94 Stat. 2369.

ArtIII.S1.6.3
Doctrine on Federal and State Courts

In contrast to the federal system, the states operate courts of general jurisdiction, which are not subject to the constitutional jurisdictional limits placed on federal courts.[8] As part of such general jurisdiction, state courts have concurrent jurisdiction to hear most cases that raise issues under the Constitution or federal law.[9] Congress may enact legislation providing that certain claims arising under federal law may only be heard in federal court.[10] However, unless Congress provides for exclusive federal court jurisdiction, a case raising federal law claims may proceed in either state or federal court.[11]

If a plaintiff files in state court a case over which the federal courts could exercise jurisdiction, the defendant may elect to remove the case to federal court pursuant to federal statute.[12] In addition, a party may seek Supreme Court review of a decision of a state's highest court in cases where a state law, executive action, or judicial interpretation allegedly conflicts with the Constitution or a federal law or treaty.[13]

As the following sections discuss in more detail, other interactions between federal and state courts may occur as cases move through the judicial system. For example, because the federal Constitution, statutes, and treaties are the "the supreme Law of the Land," and federal courts are the final authority on the interpretation of federal law, state courts applying federal law are bound by controlling decisions of the federal courts.[14] Relatedly, federal courts may sometimes enjoin proceedings in state court,[15] and federal courts can hear challenges to state criminal convictions pursuant to petitions for a writ of *habeas corpus*.[16] By contrast, state courts have much more limited power to enjoin or otherwise affect federal proceedings.[17] Nonetheless, as a matter of federal-state comity,[18] federal courts will sometimes abstain from

On the other hand, Congress has also *limited* federal court jurisdiction by periodically raising the amount in controversy requirement for diversity suits. *See, e.g.*, Pub. L. 104-317 (104th Cong. 1996) (raising amount in controversy requirement from $50,000 to $75,000).

[7] For further discussion of the jurisdiction of the federal courts, see ArtIII.S2.C1.16.1 Overview of Diversity Jurisdiction.

[8] Court of General Jurisdiction, Black's Law Dictionary (11th ed. 2019) ("A court having unlimited or nearly unlimited trial jurisdiction in both civil and criminal cases."). States may also establish specialty courts with limited jurisdiction, such as family courts or land courts, but each state also has courts of general jurisdiction.

[9] *E.g.*, Claflin v. Houseman. 93 US 130, 136 (1876) ("[I]f exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it."); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507 (1962) ("We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law.").

[10] *See, e.g.*, 18 U.S.C. § 3231 (granting the federal district courts "original jurisdiction, exclusive of the courts of the States," over federal criminal proceedings); 28 U.S.C. § 1334 (granting district courts jurisdiction over bankruptcy cases); *id.* § 1337 (granting district courts jurisdiction over antitrust cases).

[11] *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477–84 (1981); Tafflin v. Levitt, 493 U.S. 455 (1990); Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990). Federal courts have exclusive jurisdiction over the federal antitrust laws, even though Congress has not spoken expressly or impliedly. *See* General Investment Co. v. Lake Shore & Michigan Southern Ry., 260 U.S. 261, 287 (1922). For discussion of when state courts must hear federal claims, see ArtIII.S1.6.4 State Court Jurisdiction to Enforce Federal Law.

[12] 28 U.S.C. § 1441. *See also* ArtIII.S2.C1.11.5 Removal from State Court to Federal Court.

[13] 28 U.S.C. § 1257.

[14] *See* ArtIII.S1.6.4 State Court Jurisdiction to Enforce Federal Law.

[15] *See* ArtIII.S1.6.7 Federal Non-Interference with State Jurisdiction and Abstention.

[16] *See* ArtIII.S1.6.9 Habeas Review.

[17] *See* ArtIII.S1.6.6 Limits on State Court Control of Federal Proceedings.

[18] Comity is a self-imposed rule of judicial restraint whereby independent tribunals of concurrent or coordinate jurisdiction act to moderate the stresses of coexistence and to avoid collisions of authority. The Supreme Court has explained that comity is not a binding rule of law but "one of practice, convenience, and expediency," which persuades but does not command. Mast, Foos & Co. v. Stover Manufacturing Co., 177 U.S. 458, 488 (1900).

hearing cases raising novel questions of state law, and in some cases may require litigants to exhaust available remedies under state law before filing suit in federal court.[19]

ArtIII.S1.6.4 State Court Jurisdiction to Enforce Federal Law

Article III, Section 1:

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

Unless the federal courts possess exclusive jurisdiction over a matter, state courts may hear cases over which federal courts would have also had jurisdiction.[1] However, it does not necessarily follow from the fact that state courts are *authorized* to hear claims arising under federal law that the state courts *must* agree to hear federal claims. In deciding multiple cases on this issue, the Supreme Court has ruled that state courts generally must hear federal law claims unless state law bars a state court from hearing a federal claim through a "neutral rule of judicial administration" that does not improperly burden claims arising under federal law.[2]

In the 1876 case *Claflin v. Houseman*, the Supreme Court held that state courts could hear cases arising under federal bankruptcy law.[3] The Court reasoned:

> The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty.[4]

The Court thus held that "the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it."[5] While *Claflin* concerned when state courts may exercise jurisdiction over federal claims, a number of subsequent cases have cited *Claflin* when considering when state courts may validly *decline* jurisdiction over federal claims.

In several cases, the Supreme Court has upheld state courts' refusal to hear federal claims, finding that state law provided a "valid excuse" to decline jurisdiction. For instance, in *Douglas v. New York, N.H. & H.R. Co.*, the Court upheld a state law that allowed state courts to decline jurisdiction over both state and federal law claims when neither party was a resident of the State.[6] The Supreme Court noted that there was nothing in the federal statute at issue "that

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[19] *See* ArtIII.S1.6.7 Federal Non-Interference with State Jurisdiction and Abstention; ArtIII.S1.6.8 Exhaustion Doctrine and State Law Remedies; ArtIII.S1.6.9 Habeas Review.

[1] *See, e.g.*, Claflin v. Houseman. 93 U.S. 130, 136 (1876); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507 (1962); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477–84 (1981).

[2] Howlett v. Rose, 496 U.S. 356, 374 (1990).

[3] 93 U.S. 130 (1876). Currently, federal law grants the federal courts exclusive jurisdiction over bankruptcy cases, 28 U.S.C. § 1334, but that was not true at the time of the events at issue in *Claflin*.

[4] 93 U.S. at 136.

[5] *Id.*

[6] 279 U.S. 377 (1929). *See also* Herb v. Pitcairn, 324 U.S. 117 (1945) (upholding state court's application of state venue laws to dismiss for want of jurisdiction of an action brought under federal law because the cause of action arose outside the city court's territorial jurisdiction); Missouri *ex rel.* Southern R. Co. v. Mayfield, 340 U.S. 1 (1950) (holding that a state's application of the forum non conveniens doctrine to bar adjudication of a federal claim brought by nonresidents was constitutional as long as the policy was enforced impartially); Johnson v. Fankell, 520 U.S. 911 (1997) (holding that a state rule limiting interlocutory jurisdiction did not discriminate against federal claims). A related question is whether federal procedural rules apply in state courts when they hear federal claims. The Supreme Court

purports to force a duty" to hear cases on state courts "as against an otherwise valid excuse."[7] In *Howlett v. Rose*, the Court summarized cases like *Douglas*, where states had validly declined to hear federal claims, as involving "neutral rule[s] of judicial administration."[8]

By contrast, in *Mondou v. New York, N.H. & H.R. Co.*, a Connecticut court declined to hear a case arising under federal law, in part because the state court held it was "at liberty to decline cognizance of actions to enforce rights arising under [the federal] act, because . . . the policy manifested by it is not in accord with the policy of the state."[9] The Supreme Court rejected that proposition and held that the state court must hear the case. In so holding, the Court emphasized that the case did not involve "any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure," but only a question of when state courts must hear federal claims that fall within their "ordinary jurisdiction, as prescribed by local laws."[10]

Similarly, in *Testa v. Katt*, the Rhode Island Supreme Court declined to enforce a federal statute containing a punitive damages provision, finding that the law was penal in nature and the "state need not enforce the penal laws of a government which is 'foreign in the international sense.'"[11] The U.S. Supreme Court reversed, holding that the Rhode Island court must enforce the federal statute, and that a state policy of not enforcing penal statutes of other sovereigns was not a "valid excuse" under *Douglas*.[12] Among other things, the Court explained that "[i]t cannot be assumed, the supremacy clause considered, that the responsibilities of a state to enforce the laws of a sister state are identical with its responsibilities to enforce federal laws."[13]

In the 2009 case *Haywood v. Drown*, the Supreme Court considered a state statute that divested New York state courts of jurisdiction over suits under 42 U.S.C. § 1983 seeking money damages from corrections officers, as well as similar state law claims against corrections officers.[14] The Court held that the New York law violated the Supremacy Clause. Writing for the majority, Justice John Paul Stevens explained, "we have emphasized that only a neutral jurisdictional rule will be deemed a 'valid excuse' for departing from the default assumption" that state courts will hear federal claims.[15] Although the New York statute removed jurisdiction over both state and federal claims, the Court held, "equality of treatment" between state and federal claims "does not ensure that a state law will be deemed . . . a valid excuse for refusing to entertain a federal cause of action."[16] Rather, by distinguishing between Section 1983 claims against corrections officers and all other Section 1983 suits, New York undermined the federal policy of making relief under Section 1983 broadly available. The Court held that this was impermissible: "having made the decision to create courts of general jurisdiction that

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rejected that proposition in *Minneapolis & St. L. R. Co. v. Bombolis*, in which it declined to apply the Seventh Amendment's jury trial requirement to state courts enforcing a federal statute. 241 U.S. 211. The rule that state courts must entertain federal claims, the Court explained, did not imply that "for the purpose of enforcing the right, the state court was to be treated as a Federal court." *Id.* at 222.

[7] 279 U.S. at 388.

[8] 496 U.S. 356, 374 (1990).

[9] 223 U.S. 1, 55 (1912).

[10] *Id.* at 56–57. *See also* McKnett v. St. Louis & S.F. Ry., 292 U.S. 230, 233–34 (1934) ("[T]he Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a federal law.").

[11] 330 U.S. 386, 388 (1947).

[12] *Id.* at 393.

[13] *Id.* at 389.

[14] 556 U.S. 729 (2009).

[15] *Id.* at 735.

[16] *Id.* at 738.

regularly sit to entertain analogous suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy."[17]

The question of state court enforcement of federal law is related to, but distinct from, the anti-commandeering doctrine.[18] In *Printz v. United States*, the Supreme Court distinguished between federal control over state courts and commandeering of the political branches of state government. Justice Antonin Scalia's majority opinion surveyed federal legislation from early Congresses that required state courts to take certain actions, such as recording applications for citizenship, but noted that state courts are bound by the Supremacy Clause, which expressly requires them to apply federal law. The Court thus concluded, "we do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service."[19]

ArtIII.S1.6.5 Supreme Court Review of State Court Interpretations of Federal Law

Article III, Section 1:

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

As a substantive matter, state courts interpreting federal law are bound by applicable federal court precedents and subject to review by the Supreme Court. This rule dates back to Section 25 of Judiciary Act of 1789, which authorized the U.S. Supreme Court to review certain decisions of the states' highest courts involving the construction of the Constitution, a treaty, or federal law.[1]

The Supreme Court considered a constitutional challenge to Section 25 in the 1816 case *Martin v. Hunter's Lessee*.[2] In that case, litigation involving title to land in Virginia was appealed to the U.S. Supreme Court, which held that a treaty between the United States and Britain controlled the dispute. On remand, the Virginia state court of appeals refused to honor the Supreme Court's judgment, opining that "the appellate power of the supreme court of the United States does not extend to this court under a sound construction of the constitution of the United States," and that Section 25 was unconstitutional in that it "extends the appellate jurisdiction of the supreme court to this court."[3] The case returned to the U.S. Supreme Court, which upheld Section 25. Justice Joseph Story's majority opinion emphasized that the Constitution vests in the Supreme Court the authority to hear all cases subject to the federal

[17] *Id.* at 740.

[18] For further discussion of the anti-commandeering doctrine, see Amdt10.4.2 Anti-Commandeering Doctrine.

[19] 521 U.S. 898, 907 (1997).

[1] 1 Stat. 73, 85. The current statute authorizing Supreme Court review of "[f]inal judgments or decrees rendered by the highest court of a State" in cases arising under the Constitution or federal laws or treaties is 28 U.S.C. § 1257.

[2] 14 U.S. 304 (1816).

[3] *Id.* at 323–24.

judicial power, explaining that "the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals."[4]

Similarly, in *Cohens v. Virginia*, individuals convicted under Virginia state criminal law for selling lottery tickets argued that their convictions violated federal law. On appeal to the Supreme Court, the state argued that while the Virginia courts were constitutionally obliged to prefer federal law over conflicting state laws, the state courts, as courts of a separate sovereign, were bound only by their own interpretation of the supreme law.[5] The state further contended that the judicial power of the United States extended only to cases brought in the first instance in federal court. Chief Justice John Marshall's majority opinion rejected this narrow interpretation, holding that the words of the Constitution "give to the Supreme Court appellate jurisdiction in all cases arising under the constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever Court they may be decided."[6]

ArtIII.S1.6.6 Limits on State Court Control of Federal Proceedings

Article III, Section 1:

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

State courts have limited authority to issue orders that would affect the federal courts.[1] For instance, state courts cannot prevent the effectuation of federal court judgments.[2] Nor do state courts have the power to issue writs of habeas corpus ordering the release of persons in federal custody or writs of mandamus requiring action by federal officials.[3]

In addition, state courts generally lack the power to enjoin federal court proceedings.[4] One exception to that rule occurs in cases in which a state court has custody of property subject to proceedings in rem or *quasi in rem*:[5] in such cases, where the state court has exclusive jurisdiction to proceed, it may enjoin the parties from further action in federal court.[6]

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[4] *Id.* at 342. *See also id.* at 351 ("[T]he appellate power of the United States does extend to cases pending in the state courts; and . . . the 25th section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the constitution.").

[5] 19 U.S. 264 (1821).

[6] *Id.* at 416. *See also* Ableman v. Booth, 62 U.S. 506 (1859); Williams v. Bruffy, 102 U.S. 248 (1880).

[1] By contrast, federal courts may under certain circumstances enjoin actions in state courts. *See* ArtIII.S1.6.7 Federal Non-Interference with State Jurisdiction and Abstention.

[2] McKim v. Voorhies, 11 U.S. 279, 281 (1812) ("the State Court had no jurisdiction to enjoin a judgment of the Circuit Court of the United States"). *Cf.* Riggs v. Johnson County, 73 U.S. 166, 195–96 (1868).

[3] Ableman v. Booth, 62 U.S. 506, 523 (1859) (when a prisoner is in federal custody, "neither the writ of habeas corpus, nor any other process issued under State authority, can pass over the line of division between the two sovereignties"); Tarble's Case, 80 U.S. 397 (1872); McClung v. Sillman, 19 U.S. 598 (1821) (holding that a state court could not issue a writ of mandamus to an officer of the United States).

[4] Donovan v. City of Dallas, 377 U.S. 408 (1964); General Atomic Co. v. Felter, 434 U.S. 12 (1977) (per curiam).

[5] In rem and quasi in rem proceedings involve the determination of property rights with respect to a thing within the court's jurisdiction. *See In Rem*, Black's Law Dictionary (11th ed. 2019).

[6] Princess Lida v. Thompson, 305 U.S. 456 (1939).

ArtIII.S1.6.7 Federal Non-Interference with State Jurisdiction and Abstention

Article III, Section 1:

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

Perhaps the fullest expression of the concept of comity may be found in the abstention doctrine.[1] The abstention doctrine instructs federal courts to abstain from exercising jurisdiction if applicable state law, which would be dispositive to the controversy, is unclear and a state court's interpretation of the state law might make resolving a federal constitutional issue unnecessary.[2] Abstention is not proper, however, where the relevant state law is settled,[3] or where it is clear that the state statute or action challenged is unconstitutional no matter how the state court construes state law.[4] Federal jurisdiction is not ousted by abstention; rather it is postponed.[5] The Supreme Court has said that abstention can serve interests of federal-state comity by avoiding "a result in 'needless friction with state policies,'"[6] and can spare "the federal courts of unnecessary constitutional adjudication."[7]

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[1] For a definition and discussion of comity, see ArtIII.S2.C1.18.2 Suits Involving Foreign States.

[2] C. Wright, Handbook of the Law of Federal Courts 13 (4th ed. 1983). The basic doctrine was formulated by Justice Felix Frankfurter for the Court in *Railroad Comm'n v. Pullman Co.,* 312 U.S. 496 (1941). Another feature of the doctrine is that a federal court should refrain from exercising jurisdiction in order to avoid needless conflict with a state's administration of its own affairs, Burford v. Sun Oil Co., 319 U.S. 315 (1943); Alabama Public Service Comm'n v. Southern Ry., 341 U.S. 341 (1951); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943); Martin v. Creasy, 360 U.S. 219 (1959); Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989) (carefully reviewing the scope of the doctrine), especially where state law is unsettled. Meredith v. City of Winter Haven, 320 U.S. 228 (1943); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). *See also* Clay v. Sun Insurance Office Ltd., 363 U.S. 207 (1960). Also, although the sole fact that an action is pending in state court will not ordinarily cause a federal court to abstain, there are "exceptional" circumstances in which it should. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978); Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983). But, in *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706 (1996), an exercise in *Burford* abstention, the Court held that federal courts have power to dismiss or remand cases based on abstention principles only where relief being sought is equitable or otherwise discretionary but may not do so in common-law actions for damages.

[3] City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958); Zwickler v. Koota, 389 U.S. 241, 249–51 (1967). *See* Babbitt v. United Farm Workers Nat'l. Union, 442 U.S. 289, 306 (1979) (quoting Harman v. Forssenius, 380 U.S. 528, 534–35 (1965)).

[4] Harman v. Forssenius, 380 U.S. 528, 534–35 (1965); Babbitt v. United Farm Workers Nat'l., 442 U.S. 289, 305–12 (1979). Abstention is not proper simply to afford a state court the opportunity to hold that a state law violates the federal Constitution. Wisconsin v. Constantineau, 400 U.S. 433 (1971); Zablocki v. Redhail, 434 U.S. 374, 379 n.5 (1978); Douglas v. Seacoast Products, Inc., 431 U.S. 265, 271 n.4 (1977); City of Houston v. Hill, 482 U.S. 451 (1987) ("A federal court may not properly ask a state court if it would care in effect to rewrite a statute"). But if the statute is clear and there is a reasonable possibility that the state court would find it in violation of a distinct or specialized state constitutional provision, abstention may be proper, Harris County Comm'rs Court v. Moore, 420 U.S. 77 (1975); Reetz v. Bozanich, 397 U.S. 82 (1970), although not if the state and federal constitutional provisions are alike. Examining Bd. v. Flores de Otero, 426 U.S. 572, 598 (1976).

[5] American Trial Lawyers Ass'n v. New Jersey Supreme Court, 409 U.S. 467, 469 (1973); Harrison v. NAACP, 360 U.S. 167 (1959). Dismissal may be necessary if the state court will not accept jurisdiction while the case is pending in federal court. Harris County Comm'rs v. Moore, 420 U.S. 77, 88 n.14 (1975).

[6] La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 33 (1959) (quoting R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941)).

[7] Harrison v. NAACP, 360 U.S. 167, 177 (1959).

During the 1960s, the Supreme Court disfavored the abstention doctrine, rejecting it in numerous cases, most of which concerned civil rights and civil liberties.[8] The Court cited time-consuming delays[9] and piecemeal resolution of important questions[10] as too-costly consequences of the doctrine. In addition to actions brought under civil rights statutes,[11] the Court, for a while, appeared to shelter cases involving First Amendment expression guarantees from the abstention doctrine, but this is no longer the rule.[12] *Younger v. Harris*[13] and its progeny signaled a trend toward the Court applying the absention doctrine more robustly.

As an alternative to abstention, the Supreme Court has sometimes encouraged or required lower federal courts to use certification procedures where they are available.[14] While this process is not grounded in the federal constitution, certification may allow federal courts to avoid relying on the abstention doctrine. Most states have adopted rules that allow federal courts to "certify," or refer, unsettled questions of state law to state courts.[15] The Court has sometimes required lower federal courts to certify to state courts questions which concern "novel issues of state law peculiarly calling for the exercise of judgment by the state courts," and involve construing a state law that is being challenged as unconstitutional.[16] The Court has also noted that certification may be appropriate where abstention would lead to undue "delay and expense"—although such concerns may not be sufficient to *require* a federal court to employ certification rather than abstention.[17]

ArtIII.S1.6.8 Exhaustion Doctrine and State Law Remedies

Article III, Section 1:

> *The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and*

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[8] McNeese v. Cahokia Bd. of Educ., 373 U.S. 668 (1963); Griffin v. School Board, 377 U.S. 218 (1964); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964); Baggett v. Bullitt, 377 U.S. 360 (1964); Davis v. Mann, 377 U.S. 678 (1964); Dombrowski v. Pfister, 380 U.S. 479 (1965); Harman v. Forssenius, 380 U.S. 528 (1965); Zwickler v. Koota, 389 U.S. 241 (1967); Wisconsin v. Constanineau, 400 U.S. 433 (1971).

[9] England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411, 426 (1964) (Douglas, J., concurring). *See* C. Wright, Handbook of the Law of Federal Courts 305 (4th ed. 1983).

[10] Baggett v. Bullitt, 377 U.S. 360, 378–379 (1964).

[11] *Compare* Harrison v. NAACP, 360 U.S. 167 (1959), *with* McNeese v. Cahokia Bd. of Educ., 373 U.S. 668 (1963).

[12] *Compare* Baggett v. Bullitt, 377 U.S. 360 (1964), *and* Dombrowski v. Pfister, 380 U.S. 479 (1965), *with* Younger v. Harris, 401 U.S. 37 (1971), and Samuels v. Mackell, 401 U.S. 66 (1971). *See* Babbitt v. United Farm Workers, 442 U.S. 289, 305–312 (1979).

[13] 401 U.S. 37 (1971). There is room to argue whether the *Younger* line of cases represents the abstention doctrine at all, but the Court continues to refer to it in those terms. *E.g.*, Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992); Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. ___, No. 12-815, slip op. (2013).

[14] *E.g.*, Mckesson v. Doe, No. 19-1108, slip op. at 5 (U.S. Nov. 2, 2020); Bellotti v. Baird, 428 U.S. 132, 151 (1976); Lehman Brothers v. Schein, 416 U.S. 386, 390–91 (1974); Clay v. Sun Insurance Office Ltd., 363 U.S. 207, 212 (1960).

[15] *See, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43, 79 (1997) (describing certification and concluding that a federal appeals court erred when it "blend[ed]" the abstention inquiry with the certification inquiry).

[16] *Mckesson*, slip op. at 4–5; *see also Arizonans for Official English*, 520 U.S. at 79.

[17] Houston v. Hill, 482 U.S. 451, 470–71 (1987). *Cf., e.g.*, Expressions Hair Design v. Schneiderman, No. 15-1391, slip op. at 6–10 (U.S. Mar. 29, 2017) (Sotomayor, J., concurring) (comparing abstention with certification, and concluding that the lower court abused its discretion when it decided not to certify and instead "chose a convoluted course" by abstaining in part and deciding the question in part).

shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

In some circumstances, when a person seeking to bring a claim under federal law also has a remedy available under state law, that person will be required to exhaust state law remedies before proceeding in federal court. For instance, as discussed further in the next section, prisoners challenging their detention by state authorities must generally exhaust state law remedies before seeking a writ of habeas corpus in federal court.[1]

As another example, a person seeking to challenge state legislative action must await completion of the state legislative process before suing in federal court.[2] In *Prentis v. Atlantic Coast Line Co.*, the Supreme Court declined to hear a claim that certain railroad rates that a state agency planned to promulgate were confiscatory in violation of the Fourteenth Amendment.[3] Writing for the majority, Justice Oliver Wendell Holmes noted that the Virginia state constitution allowed the railroads to challenge the new rates before the state Supreme Court of Appeals before they went into effect and explained that determination of rates, including review by the state court, amounted to a legislative process rather than a judicial one. Because completion of that legislative process might result in different rates and obviate the constitutional challenge, the Court concluded, the challengers "should make sure that the State in its final legislative action would not respect what they think their rights to be, before resorting to the courts of the United States."[4] Justice Holmes also emphasized that the Court's decision was grounded not in mandatory jurisdictional limits but rather in prudential considerations such as comity and efficiency.[5]

While complainants must generally exhaust available state legislative and administrative remedies before proceeding in federal court, they are not ordinarily required to seek a *judicial* remedy in state court before filing a claim in federal court.[6] Thus, in *Bacon v. Rutland R.R.*, the Supreme Court held that the federal courts could hear a Fourteenth Amendment challenge to an order of the Public Service Commission of Vermont concerning a passenger railway station.[7] Justice Holmes, again writing for the majority, distinguished the Virginia system in *Prentis*, where "the [state] court was given legislative powers," and the Vermont system, which did "not attempt to confer legislative powers upon the court" but instead created a remedy that was "purely judicial."[8] Likewise, in *Lane v. Wilson*, the court held that a Black man denied voter registration in Oklahoma could challenge the denial in federal court without first pursuing a state law challenge that "has all the indicia of a conventional judicial proceeding and does not confer upon the Oklahoma courts any of the discretionary or initiatory functions that are characteristic of administrative agencies."[9]

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[1] *See* ArtIII.S1.6.9 Habeas Review.

[2] *See, e.g.*, Porter v. Investors Syndicate, 286 U.S. 461 (1932).

[3] 211 U.S. 210 (1908).

[4] *Id.* at 230.

[5] *Id.* at 232 ("[O]ur decision does not go upon a denial of power to entertain the bills at the present stage but upon our views as to what is the most proper and orderly course in cases of this sort when practicable."). Comity is a self-imposed rule of judicial restraint whereby independent tribunals of concurrent or coordinate jurisdiction act to moderate the stresses of coexistence and to avoid collisions of authority. The Court has elsewhere explained that it is not a rule of law but "one of practice, convenience, and expediency," which persuades but does not command. Mast, Foos & Co. v. Stover Manufacturing Co., 177 U.S. 458, 488 (1900).

[6] An exception occurs when a state prisoner petitions in federal court for a writ of habeas corpus. *See* ArtIII.S1.6.9 Habeas Review.

[7] 232 U.S. 134 (1914).

[8] *Id.* at 137–38. *See also* City Bank Farmers' Trust Co. v. Schnader, 291 U.S. 24 (1934).

[9] 307 U.S. 268, 274 (1939).

ArtIII.S1.6.8
Exhaustion Doctrine and State Law Remedies

Subject to limited exceptions, exhaustion of state remedies is not required before a person may seek relief under federal civil rights statutes such as 42 U.S.C. § 1983.[10] In *Monroe v. Pape*, the Supreme Court held that plaintiffs need not exhaust state judicial remedies before seeking relief in federal court under Section 1983.[11] In *McNeese v. Board of Education*, the Court extended that holding to state administrative remedies, holding that plaintiffs who sought to challenge school segregation need not first seek relief through a state administrative process.[12] In *Patsy v. Florida Board of Regents*, the Court reaffirmed that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983."[13]

ArtIII.S1.6.9 Habeas Review

Article III, Section 1:

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Federal courts can hear challenges to state criminal convictions pursuant to petitions for a writ of habeas corpus. While early Supreme Court cases interpreted that authority narrowly, subsequent cases allowed for broader federal review of state court convictions. More recently, however, the Court has adopted a more limited approach to habeas review, and Congress has also enacted legislation limiting federal habeas review of state convictions.

At English common law, the writ of habeas corpus was available to attack pretrial detention and confinement by executive order; it could not be used to question the conviction of a person pursuant to the judgment of a court with jurisdiction over the person. In early cases, the Supreme Court applied the common law understanding of the writ.[1] After the Civil War, the Court adopted a broader view of when a court lacked jurisdiction over a petitioner. Thus, in the 1874 case, *Ex Parte Lange*, a person who had already completed one sentence on a conviction was released from custody on a second sentence on the ground that the court had lost jurisdiction upon completion of the first sentence.[2] In the 1880s, the Court held that the constitutionality of the statute upon which a charge was based could be examined on habeas,

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[10] Courts may require exhaustion of state administrative remedies before filing a Section 1983 suit when there are pending state administrative proceedings in which an important state interest is involved. *See* Ohio Civil Rights Comm'n v. Dayton Christian School, Inc., 477 U.S. 619, 627 n.2 (1986). Under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on racial and other specified grounds, the Equal Employment Opportunity Commission may not consider a claim until a state agency having jurisdiction over employment discrimination complaints has had at least sixty days to resolve the matter. 42 U.S.C. § 2000e–5(c); *see* Love v. Pullman Co., 404 U.S. 522 (1972). The Civil Rights of Institutionalized Persons Act contains a specific, limited exhaustion requirement for adult prisoners bringing actions pursuant to § 1983. Patsy v. Florida Board of Regents, 457 U.S. 496, 508 (1982).

[11] 365 U.S. 167, 183 (1961) (reversed on other grounds).

[12] 373 U.S. 668 (1963).

[13] 457 U.S. 496, 516 (1982). *See also, e.g.*, King v. Smith, 392 U.S. 309 (1968); Houghton v. Shafer, 392 U.S. 639 (1968); Damico v. California, 389 U.S. 416 (1967).

[1] *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830) (Marshall, C.J.); *cf. Ex parte* Parks, 93 U.S. 18 (1876). *But see* Fay v. Noia, 372 U.S. 391, 404–415 (1963). The expansive language used when Congress in 1867 extended the habeas power of federal courts to state prisoners "restrained of . . . liberty in violation of the constitution, or of any treaty or law of the United States . . .," 14 Stat. 385, could have encouraged an expansion of the writ to persons convicted after trial.

[2] *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1874).

because an unconstitutional statute was said to deprive the trial court of its jurisdiction.[3] Other cases expanded the want-of-jurisdiction rationale.[4]

The Court started developing its modern approach to the writ of habeas corpus in the 1915 case *Frank v. Mangum*,[5] in which the Court reviewed on habeas a murder conviction in a trial in which there was substantial evidence of mob domination of the judicial process. This issue had been considered and rejected by the state appeals court. The Supreme Court indicated that, though it might initially have had jurisdiction, the trial court could have lost it if mob domination rendered the proceedings lacking in due process. The Court further held that, in order to determine if there had been a denial of due process, a habeas court should examine the totality of the process, including the appellate proceedings. Because the state appellate court had reviewed fully and rejected Frank's claim of mob domination, the Court held he had been afforded an adequate corrective process for any denial of rights, and his custody did not violate the Constitution.[6] Eight years later, in *Moore v. Dempsey*,[7] a case involving another conviction in a trial in which the court was alleged to have been influenced by a mob and in which the state appellate court had heard and rejected Moore's contentions, the Court directed that the federal district judge himself determine the merits of the petitioner's allegations.

In later cases, the Court abandoned its emphasis upon want of jurisdiction and held that the writ was available to consider constitutional claims as well as questions of jurisdiction.[8] The landmark case was *Brown v. Allen*,[9] in which the Court laid down several principles of statutory construction of the habeas statute. First, all federal constitutional questions raised by state prisoners are cognizable in federal habeas. Second, a federal court is not bound by state court judgments on federal questions, even though the state courts may have fully and fairly considered the issues. Third, a federal habeas court may inquire into issues of fact as well as of law, although the federal court may defer to the state court if the prisoner received an adequate hearing. Fourth, new evidentiary hearings must be held when there are unusual circumstances, when there is a "vital flaw" in the state proceedings, or when the state court record is incomplete or otherwise inadequate.

The Supreme Court authorized almost plenary federal habeas review of state court convictions in its famous "1963 trilogy."[10] First, in *Townsend v. Sain*, the Court dealt with the

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[3] *Ex parte* Siebold, 100 U.S. 371 (1880); *Ex parte* Royall, 117 U.S. 241 (1886); Crowley v. Christensen, 137 U.S. 86 (1890); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[4] *Ex parte* Wilson, 114 U.S. 417 (1885); *In re* Nielsen, 131 U.S. 176 (1889); *In re* Snow, 120 U.S. 274 (1887); *but see Ex parte* Parks, 93 U.S. 18 (1876); *Ex parte* Bigelow, 113 U.S. 328 (1885). It is possible that the Court expanded the office of the writ because its reviewing power over federal convictions was closely limited. Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1016–1023 (1924). Once such review was granted, the Court began to restrict the use of the writ. *E.g.*, Glasgow v. Moyer, 225 U.S. 420 (1912); *In re* Lincoln, 202 U.S. 178 (1906); *In re* Morgan, 203 U.S. 96 (1906).

[5] 237 U.S. 309 (1915).

[6] *Id.*

[7] 261 U.S. 86 (1923).

[8] Walker v. Johnston, 312 U.S. 275 (1941). *See also* Johnson v. Zerbst, 304 U.S. 458 (1938).

[9] 344 U.S. 443 (1953). *Brown* coincided with the extension of most of the Bill of Rights to the states by way of incorporation and expansive interpretation of federal constitutional rights; previously, there was not a substantial corpus of federal rights to protect through habeas. *See* Wright v. West, 505 U.S. 277, 297–99 (1992) (O'Connor, J., concurring). In *Fay v. Noia,* 372 U.S. 391 (1963), Justice William Brennan, for the Court, and Justice John Harlan, in dissent, engaged in a lengthy, informed historical debate about the legitimacy of *Brown* and its premises. *Compare id.* at 401–24, *with id.* at 450–61. *See* the material gathered and cited in L. Hand, The Bill of Rights (1958); H. Wechsler, Principles, Politics, and Fundamental Law: Selected Essays 1220–1248 (1961).

[10] Sanders v. United States, 373 U.S. 1 (1963); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963). These cases dealt, respectively, with the treatment to be accorded a habeas petition in the three principal categories in which they come to the federal court: when a state court has rejected petitioner's claims on the merits, when a state court has refused to hear petitioner's claims on the merits because she has failed properly or timely to

established principle that a federal habeas court is empowered, where a prisoner alleges facts which if proved would entitle him to relief, to relitigate facts, to receive evidence and try the facts anew, and sought to lay down broad guidelines as to when district courts must hold a hearing and find facts.[11] The Court stated: "Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding."[12] To "particularize" this general test, the Court further held that an evidentiary hearing must take place when (1) the state hearing did not resolve the merits of the factual dispute; (2) the record as a whole does not fairly support the state factual determination; (3) the state court's fact finding procedure did not afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state hearing; or (6) the state trier of fact did not appear to afford the habeas applicant a full and fair fact hearing.[13]

Second, *Sanders v. United States*[14] dealt with two interrelated questions: how to address successive petitions for the writ, when the second or subsequent application presented grounds previously asserted or not previously raised. Emphasizing that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged,"[15] the Court established generous standards for considering successive claims. As to previously asserted grounds, the Court held that courts may give controlling weight to a prior denial of relief if (1) the court had previously found against the applicant on the applicant's ground for relief, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by revisiting the determination,[16] so that the habeas court might but was not obligated to deny relief without considering the claim on the merits.[17] With respect to grounds not previously asserted, a federal court considering a successive petition could refuse to hear the new claim if it decided the petitioner had

present them, or when the petition is a second or later petition raising either old or new, or mixed, claims. Of course, as will be demonstrated *infra*, these cases have now been largely drained of their force.

[11] Townsend v. Sain, 372 U.S. 293, 310–12 (1963). If the district judge concluded that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, the Court said, he may, and ordinarily should, defer to the state factfinding. *Id.* at 318. Under the 1966 statutory revision, a habeas court must generally presume correct a state court's written findings of fact from a hearing to which the petitioner was a party. A state finding cannot be set aside merely on a preponderance of the evidence and the federal court granting the writ must include in its opinion the reason it found the state findings not fairly supported by the record or the existence of one or more listed factors justifying disregard of the factfinding. Pub. L. No. 89-711, 80 Stat. 1105, 28 U.S.C. § 2254(d). *See* Sumner v. Mata, 449 U.S. 539 (1981); Sumner v. Mata, 455 U.S. 591 (1982); Marshall v. Lonberger, 459 U.S. 422 (1983); Patton v. Yount, 467 U.S. 1025 (1984); Parker v. Dugger, 498 U.S. 308 (1991); Burden v. Zant, 498 U.S. 433 (1991). The presumption of correctness does not apply to questions of law or to mixed questions of law and fact. Miller v. Fenton, 474 U.S. 104, 110–16 (1985). However, in *Wright v. West,* 505 U.S. 277 (1992), the Justices argued inconclusively whether deferential review of questions of law or especially of law and fact should be adopted.

[12] Townsend v. Sain, 372 U.S. 293, 312 (1963). The Court was unanimous on the statement, but it divided 5-4 on application.

[13] 372 U.S. at 313–18. Keeney v. Tamayo-Reyes, 504 U.S. 1, 5 (1992). *Keeney* formally overruled part of *Townsend*.

[14] 373 U.S. 1 (1963). *Sanders* was a § 2255 case, a federal prisoner petitioning for postconviction relief. The Court applied the same liberal rules with respect to federal prisoners as it did for states. *See* Kaufman v. United States, 394 U.S. 217 (1969). *But see* Davis v. United States, 411 U.S. 233 (1973); United States v. Frady, 456 U.S. 152 (1982).

[15] 373 U.S. at 8. The statement accorded with the established view that principles of res judicata were not applicable in habeas. *E.g.*, Price v. Johnston, 334 U.S. 266 (1948); Wong Doo v. United States, 265 U.S. 239 (1924); Salinger v. Loisel, 265 U.S. 224 (1924). In 1948, Congress had appeared to adopt some limited version of res judicata for federal prisoners but not for state prisoners, Act of June 25, 1948, 62 Stat. 965, 967, 28 U.S.C. §§ 2244, 2255, but the Court in *Sanders* held the same standards applicable and denied the statute changed existing case law. 373 U.S. at 11–14. *But see id.* at 27–28 (Harlan, J., dissenting).

[16] 373 U.S. at 15. In codifying the *Sanders* standards in 1966, Pub. L. No. 89-711, 80 Stat. 1104, 28 U.S.C. § 2244(b), Congress omitted the "ends of justice" language. Although it was long thought that the omission probably had no substantive effect, this may not be the case. Kuhlmann v. Wilson, 477 U.S. 436 (1986).

[17] *Id.*

deliberately not raised it in the prior proceeding; if not, the Court noted, "[n]o matter how many prior applications for federal collateral relief a prisoner has made," the court must consider the merits of the new claim.[18]

Third, in *Fay v. Noia*,[19] the Court considered the issue of state defaults—that is, the effect on habeas when a defendant in a state criminal trial has failed to raise, in accordance with state procedure, a claim that he subsequently wants to raise on habeas. If, for example, a defendant fails to object to the admission of certain evidence on federal constitutional grounds in accordance with state procedure and within state time constraints, the state courts may therefore simply refuse to address the merits of the claim, and the state's "independent and adequate state ground" bars direct federal review of the claim.[20] Whether a similar result was required in habeas proceedings divided the Court in *Brown v. Allen*,[21] in which the majority held that a prisoner, whose appeal a state court had refused to hear because his papers had been filed a day late, could not be heard on habeas because of his state procedural default. The Court reached a different result in *Fay v. Noia*, holding that the adequate and independent state ground doctrine limited the Court's appellate review, but not its habeas review. A federal court has power to consider any claim that has been procedurally defaulted in state courts.[22] Still, the Court recognized that the states had legitimate interests that were served by their procedural rules, and that it was important that state courts have the opportunity to afford a claimant relief to which he might be entitled. Thus, a federal court had discretion to deny a habeas petitioner relief if it found that he had deliberately bypassed state procedure and intentionally waived his right to pursue his state remedy.[23]

Liberalization of the writ thus made it possible for convicted persons who had fully litigated their claims at state trials and on appeal, who had lacked the opportunity to have their claims reviewed due to procedural default, or who had been heard at least once on federal habeas, to have the chance to present their grounds for relief to a federal habeas judge. In addition to opportunities to relitigate the facts and the law relating to their convictions, prisoners could also take advantage of new constitutional decisions that were retroactive. The filings in federal courts increased year by year, but the numbers of prisoners who in fact obtained either release or retrial remained quite small. However, expansion of the writ generated opposition from state judges and state law enforcement officials and stimulated many efforts in Congress to enact restrictive habeas amendments.[24] The efforts were unsuccessful and, following changes in the composition of the Supreme Court, the Court adopted a more limited view of when habeas relief should be available.

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[18] 373 U.S. at 17–19.

[19] 372 U.S. 391 (1963). *Fay* was largely obliterated over the years, beginning with *Davis v. United States,* 411 U.S. 233 (1973), a federal-prisoner post-conviction relief case, and *Wainwright v. Sykes,* 433 U.S. 72 (1977), but it was not formally overruled until *Coleman v. Thompson,* 501 U.S. 722, 744–51 (1991).

[20] *E.g.*, Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875); Herb v. Pitcairn, 324 U.S. 117 (1945). In the habeas context, the procedural-bar rules are ultimately a function of the requirement that petitioners first exhaust state avenues of relief before coming to federal court.

[21] 344 U.S. 443 (1953).

[22] Fay v. Noia, 372 U.S. 391, 424–34 (1963).

[23] 372 U.S. at 438–40.

[24] In 1961, state prisoner habeas filings totaled 1,020; in 1965, 4,845; in 1970, a high (to date) of 9,063; in 1975, 7,843; in 1980, 8,534; in 1985, 9,045; in 1986. On relief afforded, no reliable figures are available, but estimates indicate that at most 4% of the filings result in either release or retrial. C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure (1988 & supps.), § 4261, at 284–91.

In the 1977 case *Wainwright v. Sykes*, then-Justice William Rehnquist emphasized that the Court has significant discretion whether to award habeas relief.[25] After reviewing the case law on the 1867 statute, Justice Rehnquist remarked that the history "illustrates this Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged."[26] From early on, the Court has emphasized the equitable nature of the habeas remedy and the Judiciary's responsibility to guide the exercise of that remedy in accordance with equitable principles; thus, time and again, the Court has underscored that the federal courts have plenary *power* under the statute to implement it to the fullest while the Court's decisions may deny them discretion to exercise the power.[27]

Supreme Court cases since the 1970s have made several changes to the law related to habeas corpus relief. These cases generally reflect a departure from the 1963 trilogy and a narrowing view of when federal courts should undertake habeas review of state law criminal convictions.

First, the Court in search and seizure cases has returned to the standard of *Frank v. Mangum*, holding that where the state courts afford a criminal defendant the opportunity for a full and adequate hearing on his Fourth Amendment claim, his only avenue of relief in the federal courts is to petition the Supreme Court for review and that he cannot raise those claims again in a habeas petition.[28] Grounded as it is in the Court's dissatisfaction with the exclusionary rule, the case has not been extended to other constitutional grounds,[29] but the rationale of the opinion suggests the likelihood of reaching other exclusion questions.[30]

Second, the Court has formulated a "new rule" exception to habeas cognizance. That is, subject to two exceptions,[31] a case decided after a petitioner's conviction and sentence became final may not be the predicate for federal habeas relief if the case announces or applies a "new

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[25] Wainwright v. Sykes, 433 U.S. 72, 81 (1977). Differing from the Court in the 1963 trilogy, the *Wainwright* Court favored decisions in habeas cases that promote finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum. Keeney v. Tamayo-Reyes, 504 U.S. 1, 8–10 (1992). Overall, federalism concerns are critical. *See* Coleman v. Thompson, 501 U.S. 722, 726 (1991) ("This is a case about federalism." First sentence of opinion). Subsequent cases have drawn on Justice Powell's concurrence in *Schneckloth v. Bustamonte,* 412 U.S. 218, 250 (1973). He suggested that habeas courts should entertain only those claims that go to the integrity of the fact-finding process, thus raising questions of the value of a guilty verdict, or that only those prisoners able to make a credible showing of "factual innocence" could be heard on habeas. *Id.* at 256–58, 274–75. As will be evident *infra*, some form of innocence standard appears in much of the Court's habeas jurisprudence.

[26] *Wainwright*, 433 U.S. at 81.

[27] 433 U.S. at 83; Stone v. Powell, 428 U.S. 465, 495 n.37 (1976); Francis v. Henderson, 425 U.S. 536, 538 (1976); Fay v. Noia, 372 U.S. 391, 438 (1963). The dichotomy between power and discretion goes all the way back to the case imposing the rule of exhaustion of state remedies. *Ex parte* Royall, 117 U.S. 241, 251 (1886).

[28] Stone v. Powell, 428 U.S. 465 (1976). The decision is based as much on the Court's dissatisfaction with the exclusionary rule as with its desire to curb habeas. Holding that the purpose of the exclusionary rule is to deter unconstitutional searches and seizures rather than to redress individual injuries, the Court reasoned that no deterrent purpose was advanced by applying the rule on habeas, except to encourage state courts to give claimants a full and fair hearing. *Id.* at 493–95.

[29] *Stone* does not apply to a Sixth Amendment claim of ineffective assistance of counsel in litigating a search and seizure claim. Kimmelman v. Morrison, 477 U.S. 365, 382–383 (1986). *See also* Rose v. Mitchell, 443 U.S. 545 (1979) (racial discrimination in selection of grand jury foreman); Jackson v. Virginia, 443 U.S. 307 (1979) (insufficient evidence to satisfy reasonable doubt standard).

[30] *See, e.g.*, Duckworth v. Eagan, 492 U.S. 195, 205 (1989) (O'Connor, J., concurring); Brewer v. Williams, 430 U.S. 387, 413–14 (1977) (Powell, J., concurring), and *id.* at 415 (Burger, C.J, dissenting); Wainwright v. Sykes, 433 U.S. 72, 87 n.11 (1977) (reserving *Miranda*).

[31] The first exception permits the retroactive application on habeas of a new rule if the rule places a class of private conduct beyond the power of the state to proscribe or addresses a substantive categorical guarantee accorded by the Constitution. The rule must, to say it differently, either decriminalize a class of conduct or prohibit the imposition of a particular punishment on a particular class of persons. The second exception would permit the

rule."[32] A decision announces a new rule "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[33] Explaining this the court noted that if a rule "was susceptible to debate among reasonable minds," it could not have been dictated by precedent, and therefore it must be classified as a "new rule."[34]

Third, the Court has largely maintained the standards of *Townsend v. Sain*, as embodied in somewhat modified form in statute, with respect to when federal judges must conduct an evidentiary hearing. However, the Court has overturned one *Townsend* factor, not expressly set out in the statute, in order to bring the case law into line with other decisions. *Townsend* had held that a hearing was required if the material facts were not adequately developed at the state-court hearing. If the defendant had failed to develop the material facts in the state court, however, the Court held that, unless he had "deliberately bypass[ed]" that procedural outlet, he was still entitled to the hearing.[35] In *Keeney v. Tamayo-Reyes*, the Court overruled that point and substituted a much stricter "cause-and-prejudice" standard.[36]

Fourth, the Court has significantly stiffened the standards governing when a federal habeas court should entertain a second or successive petition filed by a state prisoner—a question at issue in *Sanders v. United States*.[37] A successive petition may be dismissed if the same ground was determined adversely to petitioner previously, the prior determination was on the merits, and "the ends of justice" would not be served by reconsideration. It is with the latter element that the Court has become more restrictive. A plurality in *Kuhlmann v. Wilson*[38] argued that the "ends of justice" standard would be met only if a petitioner supplemented her constitutional claim with a colorable showing of factual innocence. While the Court has not expressly adopted this standard, a later capital case utilized it, holding that a petitioner sentenced to death could escape the bar on successive petitions by demonstrating "actual innocence" of the death penalty by showing by clear and convincing evidence that no reasonable juror would have found the prisoner eligible for the death penalty under applicable state law.[39]

Even if the subsequent petition alleges new and different grounds, a habeas court may dismiss the petition if the prisoner's failure to assert those grounds in the prior, or first, petition constitutes "an abuse of the writ."[40] Following the 1963 trilogy and especially *Sanders*, the federal courts had generally followed a rule excusing the failure to raise claims in earlier

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application of "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding. Saffle v. Parks, 494 U.S. 484, 494–95 (1990) (citing cases); Sawyer v. Smith, 497 U.S. 227, 241–45 (1990).

[32] Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion); Penry v. Lynaugh, 492 U.S. 302, 313–19 (1989).

[33] Butler v. McKellar, 494 U.S. 407, 412 (1990) (quoting Penry v. Lynaugh, 492 U.S. 302, 314 (1989), which was quoting Teague v. Lane, 489 U.S. 288, 314 (1989). This sentence was quoted again in *Whorton v. Bockting,* 549 U.S. 406, 416 (2007)).

[34] 494 U.S. at 415. *See also* Stringer v. Black, 503 U.S. 222, 228–29 (1992). This latter case found that two decisions relied on by petitioner merely drew on existing precedent and so did not establish a new rule. *See also* O'Dell v. Netherland, 521 U.S. 151 (1997); Lambrix v. Singletary, 520 U.S. 518 (1997); Gray v. Netherland, 518 U.S. 152 (1996). *But compare* Bousley v. Brooks, 523 U.S. 614 (1998).

[35] Townsend v. Sain, 372 U.S. 293, 313, 317 (1963), imported the "deliberate bypass" standard from Fay v. Noia, 372 U.S. 391, 438 (1963).

[36] Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). This standard is imported from the cases abandoning *Fay v. Noia* and is discussed *infra*.

[37] 373 U.S. 1, 15–18 (1963). The standards are embodied in 28 U.S.C. § 2244(b).

[38] 477 U.S. 436 (1986).

[39] Sawyer v. Whitley, 505 U.S. 333 (1992). Language in the opinion suggests that the standard is not limited to capital cases. *Id.* at 339.

[40] The standard is in 28 U.S.C. § 2244(b), along with the standard that, if a petitioner "deliberately withheld" a claim, the petition can be dismissed. *See also* 28 U.S.C. § 2254 Rule 9(b) (judge may dismiss successive petition raising new claims if failure to assert them previously was an abuse of the writ).

petitions unless the failure was a result of "inexcusable neglect" or of deliberate relinquishment. In *McClesky v. Zant*,[41] the Court construed the "abuse of the writ" language to require a showing of both "cause and prejudice" before a petitioner may allege in a second or later petition a ground or grounds not alleged in the first. In other words, to avoid subsequent dismissal, a petitioner must allege in his first application all the grounds he may have, unless he can show cause, some external impediment, for his failure and some actual prejudice from the error alleged. If he cannot show cause and prejudice, the petitioner may be heard only if she shows that a "fundamental miscarriage of justice" will occur, which means she must make a "colorable showing of factual innocence."[42]

Fifth, the Court abandoned the rules of *Fay v. Noia*, although it was not until 1991 that it expressly overruled the case.[43] *Fay* raised the question of when a petitioner may present a claim in federal habeas proceedings that was not properly raised during state proceedings. The answer in *Fay* was that the federal court always had power to review the claim but that it had discretion to deny relief to a habeas claimant if it found that the prisoner had intentionally waived his right to pursue his state remedy through a "deliberate bypass" of state procedure.

That is no longer the law. Instead the Court has now held,

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules.[44]

The "miscarriage-of-justice" element is probably limited to cases in which actual innocence or actual impairment of a guilty verdict can be shown.[45] The concept of "cause" excusing failure to observe a state rule is extremely narrow; "the existence of cause for procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[46] As for the "prejudice" factor, it is an undeveloped concept, but the Court's only case establishes a high barrier.[47]

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[41] 499 U.S. 467 (1991).

[42] 499 U.S. at 489–97. The "actual innocence" element runs through the cases under all the headings.

[43] Coleman v. Thompson, 501 U.S. 722, 744–51 (1991).

[44] Coleman v. Thompson, 501 U.S. 722, 750 (1991). The standard has been developed in a long line of cases. Davis v. United States, 411 U.S. 233 (1973) (under federal rules); Francis v. Henderson, 425 U.S. 536 (1976); Engle v. Isaac, 456 U.S. 107 (1982); Murray v. Carrier, 477 U.S. 478 (1986); Harris v. Reed, 489 U.S. 255 (1989). *Coleman* arose because the defendant's attorney had filed his appeal in state court three days late. *Wainwright v. Sykes* involved the failure of defendant to object to the admission of inculpatory statements at the time of trial. *Engle v. Isaac* involved a failure to object at trial to jury instructions.

[45] *E.g.*, Smith v. Murray, 477 U.S. 527, 538–39 (1986); Murray v. Carrier, 477 U.S. 478, 496 (1986). In *Bousley v. Brooks,* 523 U.S. 614 (1998), a federal post-conviction relief case, petitioner had pled guilty to a federal firearms offense. Subsequently, the Supreme Court interpreted the elements of the offense more narrowly than had the trial court in Bousley's case. The Court held that Bousley by his plea had defaulted, but that he might be able to demonstrate "actual innocence" so as to excuse the default if he could show on remand that it was more likely than not that no reasonable juror would have convicted him of the offense, properly defined.

[46] Murray v. Carrier, 477 U.S. at 488. This case held that ineffective assistance of counsel is not "cause" unless it rises to the level of a Sixth Amendment violation. *See also* Coleman v. Thompson, 501 U.S. 722, 752–57 (1991) (because petitioner had no right to counsel in state postconviction proceeding where error occurred, he could not claim constitutionally ineffective assistance of counsel). The actual novelty of a constitutional claim at the time of the state

The Court continues, with some modest exceptions, to construe habeas jurisdiction restrictively; Congress has also enacted legislation restricting the availability of habeas relief. In *Herrera v. Collins*,[48] the Court appeared to take the position that, although a showing of actual innocence is required to permit a claimant to bring a successive or abusive petition, a claim of innocence alone is not sufficient to enable a claimant to obtain review of his conviction on habeas. Petitioners are entitled in federal habeas courts to show that they are imprisoned in violation of the Constitution, not to seek to correct errors of fact. But a claim of innocence does not bear on the constitutionality of a person's conviction or detention, and the execution of a person claiming actual innocence would not, by this reasoning, violate the Constitution.[49] In a subsequent part of the opinion, however, the Court assumed for the sake of argument that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional," and it imposed a high standard for making this showing.[50]

In *Schlup v. Delo*,[51] the Court adopted the plurality opinion of *Kuhlmann v. Wilson* and held that, absent a sufficient showing of "cause and prejudice," a claimant filing a successive or abusive petition must, as an initial matter, make a showing of "actual innocence" so as to fall within the narrow class of cases implicating a fundamental miscarriage of justice. The Court divided, however, with respect to the showing a claimant must make. The dissenters argued for one standard, which would require that "to show 'actual innocence' one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty."[52] The Court adopted a second standard, under which the petitioner must demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." To meet this burden, a claimant "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."[53]

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[54] Congress imposed tight new restrictions on successive or abusive petitions, including making the circuit courts "gate keepers" in permitting or denying the filing of such petitions, with bars to appellate review of these decisions. The Supreme Court rejected a constitutional challenge to

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court proceeding is "cause" excusing the petitioner's failure to raise it then, *Reed v. Ross,* 468 U.S. 1 (1984), although the failure of counsel to anticipate a line of constitutional argument then foreshadowed in Supreme Court precedent is insufficient "cause." Engle v. Isaac, 456 U.S. 107 (1982).

[47] United States v. Frady, 456 U.S. 152, 169 (1982) (under federal rules) (with respect to erroneous jury instruction, inquiring whether the error "so infected the entire trial that the resulting conviction violates due process").

[48] 506 U.S. 390 (1993).

[49] 506 U.S. at 398–417.

[50] 506 U.S. at 417–419. Justices Antonin Scalia and Clarence Thomas would have unequivocally held that "[t]here is no basis in text, tradition, or even in contemporary practice . . . for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction." *Id.* at 427–28 (concurring). However, it is not at all clear that all the Justices joining the Court believe innocence to be nondispositive on habeas. *Id.* at 419 (O'Connor and Kennedy, JJ., concurring), 429 (White, J., concurring). In *House v. Bell,* 547 U.S. 518, 554–55 (2006), the Court declined to resolve the issue that in *Herrera* it had assumed without deciding: that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional."

[51] 513 U.S. 298 (1995).

[52] 513 U.S. at 334 (Rehnquist, C.J., dissenting, joined by Kennedy and Thomas, JJ.), 342 (Scalia, J., dissenting, joined by Thomas, J.). This standard was drawn from *Sawyer v. Whitley,* 505 U.S. 333 (1992).

[53] 513 U.S. at 327. This standard was drawn from *Murray v. Carrier,* 477 U.S. 478 (1986).

[54] Pub. L. No. 104-132, Title I, 110 Stat. 1217–21, amending 28 U.S.C. §§ 2244, 2253, 2254, and Rule 22 of the Federal Rules of Appellate Procedure.

portions of AEDPA in *Felker v. Turpin*.[55] One important restriction in AEDPA bars a federal habeas court from granting a writ to any person in custody under a judgment of a state court "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, *clearly established Federal law, as determined by the Supreme Court of the United States*."[56] The Court has made the significance of this restriction plain: Instead of assessing whether federal law was correctly applied de novo, as would be the course under direct review of a federal district court decision, the proper approach for federal habeas relief under AEDPA is the more deferential one of determining whether the Court has established clear precedent on the issue contested and, if so, whether the state's application of the precedent was reasonable, i.e., whether a fairminded jurist could find that the state acted in accord with the Court's established precedent.[57]

ArtIII.S1.7 Supreme Court Rulings

ArtIII.S1.7.1 Overview of Supreme Court Rulings

Article III, Section 1:

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

Along with the Constitution and federal statutes, rulings of the Supreme Court are a key source of the law of the United States. In the view of many judges and commentators, Supreme Court decisions do not make law, which is the province of the Legislative Branch, but instead interpret and apply the Constitution and statutes.[1] Chief Justice John Marshall famously stated in the 1803 case *Marbury v. Madison*, "It is emphatically the province and duty of the judicial department to say what the law is."[2] Over two centuries later, when nominated to be Chief Justice, then-Judge John Roberts likened the role of a Justice to the role of a baseball umpire who does not make the rules or play the game but instead simply applies the rules "to call balls and strikes."[3]

Nonetheless, as a practical matter, Supreme Court decisions may change the legal landscape by resolving open legal questions, striking down unconstitutional laws or government actions, or overruling prior judicial decisions. Court-created legal doctrines

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[55] 518 U.S. 651 (1996).

[56] 28 U.S.C. § 2254(d) (emphasis added). The provision was applied in *Bell v. Cone,* 535 U.S. 685 (2002). *See also* Renico v. Lett, 559 U.S. ___, No. 09-338, slip op. 9–12 (2010). For analysis of its constitutionality, see the various opinions in *Lindh v. Murphy,* 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997); Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996), *cert. denied*, 520 U.S. 1107 (1997); Hall v. Washington, 106 F.3d 742 (7th Cir. 1997); O'Brien v. Dubois, 145 F.3d 16 (1st Cir. 1998); Green v. French, 143 F.3d 865 (4th Cir. 1998), *cert. denied*, 525 U.S. 1090 (1999).

[57] Harrington v. Richter, 562 U.S. 86, 102 (2011) (overturning Ninth Circuit's grant of relief, which was based on ineffective assistance of counsel); *accord* Premo v. Moore, 562 U.S. ___, No. 09-658, slip op. (2011) (same) and Cullen v. Pinholster, No. 09-1088, slip op. (2011) (same).

[1] *See, e.g.*, Linkletter v. Walker, 381 U.S. 618, 622–23 (1965) (quoting 1 W. Blackstone, Commentaries 69) (stating that, at common law, "the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one'"); *but see, e.g.*, Geoffrey C. Hazard Jr., *The Supreme Court as a Legislature*, 64 Cornell L. Rev. 1 (1978).

[2] 5 U.S. 137, 177 (1803).

[3] Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Hearings before the Committee on the Judiciary, United States Senate, 109th Cong. 2005.

determine the scope and effect of those changes. For instance, the doctrine of stare decisis counsels against the Court overruling its past decisions absent special justification to depart from precedent.[4] In addition, a number of Supreme Court cases have addressed the extent to which Court decisions announcing new rules of law apply retroactively.[5]

ArtIII.S1.7.2 Stare Decisis

ArtIII.S1.7.2.1 Historical Background on Stare Decisis Doctrine

Article III, Section 1:

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

Stare decisis, Latin for "to stand by things decided,"[1] is a judicial doctrine under which a court follows the principles, rules, or standards of its prior decisions (or decisions of higher tribunals) when deciding a case with arguably similar facts.[2] The doctrine of stare decisis has "horizontal" and "vertical" aspects. A court adhering to the principle of *horizontal* stare decisis will follow its own prior decisions absent exceptional circumstances (e.g., the Supreme Court follows a precedent unless it has become too difficult for lower courts to apply).[3] By contrast, *vertical* stare decisis binds lower courts to follow strictly the decisions of higher courts within the same jurisdiction (e.g., a federal court of appeals must follow the decisions of the U.S. Supreme Court, the federal court of last resort).[4]

The doctrine of stare decisis in American jurisprudence has its roots in eighteenth-century English common law. In 1765, the English jurist William Blackstone described the doctrine of English common law precedent as establishing a strong presumption that judges, to promote stability in the law, would "abide by former precedents, where the same points come again in litigation" unless such precedents were "flatly absurd or unjust."[5] At least some of the Constitution's Framers favored judges' adherence to judicial precedent because it limited judges' discretion to interpret ambiguously worded provisions of law. For example, writing in the *Federalist No. 78* during the debates over adoption of the Constitution in an essay

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[4] *See* ArtIII.S1.7.2.2 Stare Decisis Doctrine Generally.

[5] *See* ArtIII.S1.7.3.1 Overview of Retroactivity of Supreme Court Decisions.

[1] The full Latin phrase is "*stare decisis et non quieta movere*—stand by the thing decided and do not disturb the calm." *See* James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, The Constitution, and the Supreme Court*, 66 B.U. L. Rev. 345, 347 (1986).

[2] *Stare Decisis*, Black's Law Dictionary 1626 (10th ed. 2014) (defining "stare decisis" as "the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation"); *id.* at 1366 (defining "precedent" as "a decided case that furnishes a basis for determining later cases involving similar facts or issues"). This essay does not examine the Supreme Court's reliance on the precedents of state court or foreign tribunals. It also does not examine how the Court determines whether a particular sentence in an opinion is a binding holding necessary to the decision for purposes of stare decisis or, rather, non-binding obiter dictum. *See generally Obiter dictum*, Black's Law Dictionary 1177 (9th ed. 2009) (defining "obiter dictum" as a "judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)").

[3] *Horizontal stare decisis*, Black's Law Dictionary 1537 (10th ed. 2014) (defining "horizontal stare decisis" as "the doctrine that a court . . . must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself").

[4] *See id.* (defining "vertical stare decisis" as "the doctrine that a court must strictly follow the decisions handed down by higher courts within the same jurisdiction").

[5] 1 William Blackstone Commentaries on the Laws of England 69–70 (describing precedent as "a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments").

addressing concerns about judicial power, Alexander Hamilton argued that courts should apply precedent to prevent judges from having unbounded discretion to interpret ambiguous legal texts.[6]

During Chief Justice John Marshall's tenure in the early 1800s, the newly created Supreme Court combined a strong preference for adhering to precedent with a "limited notion of error correction" when precedents had been eroded by subsequent decisions[7] or were "premised on an incomplete factual record."[8] The early Court was reluctant to overrule prior decisions when doing so would upset commercial reliance interests (e.g., precedents concerning matters of property or contract law).[9]

ArtIII.S1.7.2.2 Stare Decisis Doctrine Generally

Article III, Section 1:

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

In the modern era, the Supreme Court has applied the doctrine of stare decisis by following the rules of its prior decisions unless there is a "special justification"—or, at least, "strong grounds"—to overrule precedent.[1] This justification must amount to more than a

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[6] Federalist No. 78, at 439 (Clinton Rossiter ed., 1999) ("To avoid an arbitrary discretion in the courts, it is indispensable that [judges] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . ."). Historical sources provide only limited insight into the Founders' views on stare decisis, and it is unclear whether Alexander Hamilton was referring to the presumption that a court should adhere to its own prior decisions or, rather, those of higher tribunals. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand. L. Rev. 647, 664 (1999). Other Founders held similar views on the benefits of precedent. *See, e.g.*, 1 Diary and Autobiography of John Adams 167–68 (L.H. Butterfield, ed., 1961) (draft of Nov. 5, 1760) ("[E]very possible Case being thus preserved in Writing, and settled in a Precedent, leaves nothing, or but little to the arbitrary Will or uninformed Reason of Prince or Judge."). *See also* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1, 9 (2001) ("[C]oncern about such discretion was a common theme throughout the antebellum period; in one form or another, it shaped most antebellum explanations of the need for stare decisis."). *But see* Letter from James Madison to C.E. Haynes (Feb. 25, 1831), *reprinted in* 9 The Writings of James Madison 443 (Gaillard Hunt ed., 1910) ("That cases may occur which transcend all authority of precedents must be admitted, but they form exceptions which will speak for themselves and must justify themselves.").

[7] *See, e.g.*, Gordon v. Ogden, 28 U.S. (3 Pet.) 33, 34 (1830) (involving statutory construction).

[8] Lee, *supra* note 6, at 681–87, 734. *See, e.g.*, United States v. Percheman, 32 U.S. (7 Pet.) 51, 88–89 (1833).

[9] *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819) ("[A]n exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded."). *See also* Lee, *supra* note 6, at 691.

[1] *See* Janus v. Am. Fed. of State, Cnty., & Mun. Emps., No. 16-1466, slip op. at 34 (2018) ("We will not overturn a past decision unless there are strong grounds for doing so."); Arizona v. Rumsey, 467 U.S. 203, 212 (1984) ("Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification."). For a list of Supreme Court decisions on constitutional law questions that the Court has overruled during its more than 225-year history, see *Table of Supreme Court Decisions Overruled by Subsequent Decisions*, https://constitution.congress.gov/resources/decisions-overruled/.

Legal scholars continue to debate questions surrounding the doctrine of stare decisis that are beyond the scope of this essay, such as whether the Constitution requires (or even allows) the Supreme Court to follow precedent, and whether Congress could abolish stare decisis in constitutional cases. *See, e.g.*, Richard H. Fallon, Jr., Stare Decisis and the Constitution: An Essay on Constitutional Methodology, 76 N.Y.U. L. Rev. 570, 571 (2001); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 Yale L.J. 1535, 1548 (2000).

disagreement with a prior decision's reasoning.[2] In adopting this approach, the Court has rejected a strict view of stare decisis that would require it to adhere to its prior decisions regardless of those decisions' merits or the practical implications of retaining or discarding precedent.[3] Instead, while the Court has stated that its precedents are entitled to respect and deference,[4] the Court considers the principle of stare decisis to be a discretionary "principle of policy" to be weighed and balanced along with the Court's views about a prior decision's merits, along with several pragmatic considerations, when determining whether to retain precedent in interpreting the Constitution[5] or deciding whether to hear a case.[6] Notably, the Court may avoid having to decide whether to overrule precedent if it can distinguish the law or facts of a prior decision from the case before it, or limit the prior decision's holding so it is inapplicable to the instant case.[7]

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[2] Kimble v. Marvel Entm't, LLC, 576 U.S. 446, 455 (2015) ("[A]n argument that [the Court] got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent.").

[3] *Cf. Super stare decisis*, Black's Law Dictionary 1537 (9th ed. 2009) (defining "super stare decisis" as "the theory that courts must follow earlier court decisions without considering whether those decisions were correct"). A court following a prior decision because it was correctly decided is not adhering to stare decisis; it is merely reaffirming precedent. *See* Fallon, *supra* note 1, at 570 ("If a court believes a prior decision to be correct, it can reaffirm that decision on the merits without reference to stare decisis.").

[4] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 362 (2010) ("Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.").

[5] Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 Geo. Wash. L. Rev. 68, 73, 134–35 (1991) [hereinafter Gerhardt, *The Role of Precedent*] (describing the Court's review of its precedents as a "process in which the Justices individually try to balance their respective views on how the Constitution should be interpreted *and* certain social or institutional values such as the need for stability and consistency in constitutional law"). Sometimes a Justice's judicial philosophy may conflict with precedent, potentially requiring a Justice to choose between following his or her philosophy, or making a pragmatic exception to it in order to maintain stability in the law. For example, some proponents of textualism and original meaning as methods of constitutional interpretation object to the use of judicial precedent that conflicts with the Constitution's text and its original meaning. In their view, this approach to precedent favors the Supreme Court's views over the views of those who ratified the Constitution, thereby allowing mistaken constitutional interpretations to persist. *See* Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 769–70 (1988). Nevertheless, textualists and originalists may adhere to precedent for pragmatic reasons, such as when doing so would promote stability in the law. For example, Justice Antonin Scalia, a textualist and originalist, followed long-standing precedent allowing for the Supreme Court to incorporate rights specifically enumerated in the Bill of Rights against state governments, even though he harbored significant doubts that such incorporation comported with the Constitution's original meaning. *See, e.g.*, McDonald v. City of Chi., 561 U.S. 742, 791 (2010) (Scalia, J., concurring) ("Despite my misgivings about substantive due process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights 'because it is both long established and narrowly limited.'" (citing Albright v. Oliver, 510 U.S. 266, 275 (1994) (Scalia, J., concurring)).

[6] *See Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring) ("Stare decisis is . . . a 'principle of policy.' When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*." (citing Helvering v. Hallock, 309 U.S. 106, 119 (1940))); Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("Stare decisis is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" (citation omitted)); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–06 (1932) (Brandeis, J., dissenting) ("The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided. Stare decisis is usually the wise policy, because, in most matters it is more important that the applicable rule of law be settled than that it be settled right." (citations and internal quotation marks omitted)).

[7] The Justices have latitude in how broadly or narrowly they construe their prior decisions. *See* Gerhardt, *The Role of Precedent*, *supra* note 7, at 98 ("The Supreme Court can overturn or otherwise weaken precedents through explicit overrulings, overrulings sub silentio, or subsequent decisionmaking that narrows or distinguishes precedents to the point of practical nullification."). For more on the use of judicial precedent as a method of constitutional interpretation, see Intro.8.4 Judicial Precedent and Constitutional Interpretation. The Court has other means of avoiding a decision on whether to overrule precedent, which include the Court's "discretionary jurisdiction" to deny certiorari, the four votes required to grant certiorari, and the Court's rule generally limiting review to the questions presented or "fairly included" in the petition. Amy Coney Barrett, Symposium, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1731–33 (2013).

ArtIII.S1.7.2.2
Stare Decisis Doctrine Generally

The Supreme Court has established special rules for applying stare decisis in constitutional cases. During the twentieth century,[8] the Court adopted a weaker form of stare decisis when deciding cases that implicated a prior constitutional interpretation, rather than a previous interpretation of a federal statute.[9] The Court has sought to justify this approach on the grounds that Congress may amend federal laws to address what it deems to be erroneous judicial statutory interpretations, whereas amending the Constitution to overturn a Supreme Court precedent is much more difficult.[10] In fact, in the history of the United States, only five Supreme Court precedents have been overturned through constitutional amendment.[11] Despite the Court's assertion that it applies a weaker form of stare decisis in constitutional cases, the Court still requires a "special justification" or at least "strong grounds" for overruling constitutional precedents.[12]

[8] One study determined that the "notion that the constitutional or statutory nature of a precedent affects its susceptibility to reversal was largely rejected in the founding era and did not gain majority support until well into the twentieth century."). Lee, *supra* note 6, at 735.

John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008) ("[*S*]*tare decisis* in respect to statutory interpretation has special force, for Congress remains free to alter what we have done." (citations and internal quotation marks omitted)); Smith v. Allwright, 321 U.S. 649, 665 (1944) ("In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) ("[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions."). The Supreme Court has suggested that stare decisis is at is weakest in cases involving rules of criminal procedure "that implicate fundamental constitutional protections." Alleyne v. United States, 570 U.S. 99, 116 n.5 (2013).

[9] The Supreme Court's belief in Congress's ability to correct the Court's errors through legislation has sometimes motivated the Court to retain precedent in cases in which Congress could enact corrective legislation. These cases encompass some disputes that implicate questions of tribal sovereign immunity, judicially created causes of action, or constraints on state action under the Commerce Clause. *See* South Dakota v. Wayfair, Inc., No. 17-494, slip op. at 2 (2018) (Roberts, C.J., dissenting) ("The bar [for departing from stare decisis and overturning precedent] is even higher in fields in which Congress 'exercises primary authority' and can, if it wishes, override this Court's decisions with contrary legislation." (citations omitted)).

[10] *See supra* note 8. Professor Michael Gerhardt notes that the political branches have other options for reversing or constraining constitutional precedents outside of amending the Constitution, such as "congressional modifications of the Court's jurisdiction, the President's power to nominate Justices who might agree with her criticisms of certain precedents, the Senate's power to advise and consent to judicial nominations, and impeachment." Gerhardt, *The Role of Precedent*, *supra* note 7, at 72 n.16.

[11] These former precedents are *Oregon v. Mitchell,* 400 U.S. 112, 117–18 (1970) (holding that Congress could not establish a voting age of eighteen for state and local elections, but could do so for national elections), *superseded by constitutional amendment*, U.S. Const. amend. XXVI ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."); Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 637 (1895) (holding that a federal income tax violated the Constitution because it was not apportioned among the states based on congressional representation), *superseded by constitutional amendment*, U.S. Const. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874) (upholding as constitutional a state law that limited the right of suffrage to men), *superseded by constitutional amendment*, U.S. Const. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 452–54 (1857) (holding that former slaves lacked standing to sue in federal court because they were not citizens, and that the federal government lacked the authority to regulate slavery in the territories), *superseded by constitutional amendment*, U.S. Const. amends. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."), and XIV ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 452 (1793) (holding that federal courts had jurisdiction over civil suits by private citizens against states) *superseded by constitutional amendment*, U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign state.").

[12] *See supra* note 1.

ArtIII.S1.7.2.3 Stare Decisis Factors

Article III, Section 1:

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

There are several factors the Supreme Court weighs when determining whether to reaffirm or overrule a prior decision interpreting the Constitution.[1] First, the Supreme Court may consider the quality of the decision's reasoning.[2] Another factor that the Supreme Court has considered when determining whether to overrule a precedent is whether a rule or standard that the prior case establishes for determining the constitutionality of a government action is too difficult for lower federal courts or other interpreters to apply and is thus "unworkable."[3] A third factor the Supreme Court may consider is whether the precedent departs from the Court's other decisions on similar constitutional questions, either because the precedent's reasoning has been eroded by later decisions,[4] or because the precedent is a recent outlier when compared to other decisions.[5]

The Supreme Court has also indicated that changes in how the Justices and society understand a decision's underlying facts may undermine a precedent's authoritativeness,

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[1] Some Justices have argued that the Supreme Court's current stare decisis factors are confusing and should be revised to provide a better roadmap for decisionmaking. *See, e.g.*, Ramos v. Louisiana, No. 18-5924, slip op. at 7–8 (2020) (Kavanaugh, J., concurring in part) (describing the Supreme Court's jurisprudence on the stare decisis factors as a "muddle" and identifying three stare decisis factors: the merits of the decision, the precedent's practical consequences, and reliance interests).

[2] *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 636–42 (1943) (overruling the Supreme Court's 3-year-old decision in Minersville School District v. Gobitis, 310 U.S. 586 (1940), which had upheld a state law compelling students to salute the American flag, because of significant disagreements with the *Gobitis* Court's analysis of the First Amendment, the importance of national unity, and other issues).

[3] *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985) (overruling Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), because *Usery*'s rule for when state activities qualified for immunity from congressional regulation under the Commerce Clause had become unworkable, and the lower courts could not apply it consistently). *See also* Montejo v. Louisiana, 556 U.S. 778, 792 (2009) ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it.").

[4] United States v. Gaudin, 515 U.S. 506, 521 (1995) ("And we think stare decisis cannot possibly be controlling when . . . the decision in question has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court.").

[5] *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 233–34 (1995) (overruling Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990), because it departed from a long line of precedents holding that the Fifth Amendment does not impose a lesser duty on the federal government than the Fourteenth Amendment's Equal Protection Clause imposes on state governments). *See also* Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. Rev. 1165, 1189 (2008) ("[A]ny fair discussion of the remnant-of-abandoned-doctrine factor of the Court's current stare decisis analysis must reckon with the seemingly equal but opposite restoration-of-departed-from doctrine counter-factor."). Occasionally, the Justices disagree over which line of precedent the Court should retain, and which line of precedent it should overrule or ignore. *Compare* Lawrence v. Texas, 539 U.S. 558, 577–78 (2003) (Kennedy, J., for the majority) (striking down a Texas law that banned private, consensual same-sex sexual activity as violating the Fourteenth Amendment's Due Process Clause and overruling Bowers v. Hardwick, 478 U.S. 186 (1986), in part because *Bowers* was inconsistent with subsequent Supreme Court precedents that protected personal autonomy to make decisions related to the family and intimate conduct), *with Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting) (characterizing the precedents that the majority relied upon as outliers whose legal foundations had been eroded by a 1997 case holding that only "fundamental rights" that are "deeply rooted in [the] Nation's history and tradition" qualified for enhanced protection under the Due Process Clause) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (internal quotation marks omitted)).

leading the Court to overrule it.[6] Finally, the Supreme Court may consider whether it should *retain* a precedent, even if flawed, because overruling the decision would result in hardship to individuals, companies, or organizations;[7] society as a whole;[8] or Legislative,[9] Executive,[10] or Judicial Branch officers,[11] who relied on the decision's guidance as to which actions and practices comport with the Constitution.[12]

It is difficult to predict when the Supreme Court will overrule precedent because the Court has not provided an exhaustive list of the factors it uses to determine whether a decision should be overruled, or explained how it weighs them. Although much about how the Supreme Court views precedent remains unclear, the Court's factors for determining whether to retain or overrule precedent provides the Justices with significant discretion.[13] If the Court is unable to distinguish a precedent from the case before it, the Justices generally attempt to strike a

[6] *Casey*, 505 U.S. at 855 (plurality opinion) (discussing the inquiry into whether "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification"). *See also, e.g.*, South Dakota v. Wayfair, No. 17-494, slip op. at 18–19, 23–24 (2018) (overturning two precedents and determining that the Commerce Clause does not restrict states from requiring retailers that lack a physical presence in the state, such as internet retailers, to collect and remit taxes on sales made to state residents). The *Wayfair* Court noted that the U.S. economy had changed drastically, with a marked increase in the prevalence and power of internet access and concomitant increases in retailers selling goods remotely to consumers. *Id. See also* West Coast Hotel v. Parrish, 300 U.S. 379, 390, 400 (1937) (overruling Adkins v. Children's Hosp., 261 U.S. 525 (1923), and stating that "the economic conditions which have supervened" during the Great Depression required reconsideration of the "exercise of the protective power of the state" to institute minimum wage laws).

[7] *See, e.g.,* Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved . . . the opposite is true in cases such as the present one involving procedural and evidentiary rules." (citations omitted)); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819) ("[A]n exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded."); Lee, *supra* note 6, at 691–703, 734.

[8] *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 431–32, 443 (2000) (declining to overrule the Court's 1966 decision in *Miranda v. Arizona* because the *Miranda* decision had "become embedded in routine police practice to the point where the warnings have become part of our national culture").

[9] Some Justices have argued that legislators may rely on the Supreme Court's decisions about the constitutionality of certain types of laws. *See, e.g.*, *Lawrence*, 539 U.S. at 589–90 (Scalia, J., dissenting) (arguing that numerous legislators had relied on the Court's decision in *Bowers v. Hardwick* when enacting laws regulating certain sexual behaviors deemed immoral by the governing majority).

[10] *See, e.g.*, Arizona v. Gant, 556 U.S. 332, 358–59 (2009) (Alito, J., dissenting) (arguing that the majority had effectively overruled New York v. Belton, 453 U.S. 454 (1981), and thereby upset law enforcement officers' reliance on a precedent addressing the permissibility under the Fourth Amendment of searching a vehicle's occupant after arrest).

[11] Judges often rely on precedent, both explicitly by citing to precedent in their opinions, and implicitly, by accepting principles established by precedent, such as the power of judicial review. *See, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 805 (2015) (relying on three cases from the early twentieth century in holding that Arizona voters could remove from the state legislature the authority to redraw the boundaries for legislative districts and vest that authority in an independent commission). *See also, e.g.*, Johnson v. United States, 576 U.S. 591, 606 (2015) (striking down part of a federal law as unconstitutional without citing *Marbury v. Madison*).

[12] *See, e.g.*, Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part) (stating that stare decisis "protects the legitimate expectations of those who live under the law"); Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991) (stating that stare decisis "has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response") *See also* Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 Wash. & Lee L. Rev. 411, 452 (2010) ("The universe of reliance interests can be usefully (if roughly) divided into four categories: reliance by specific individuals, groups, and organizations; reliance by governments; reliance by courts; and reliance by society at large.").

[13] *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 399 (2006) (statement of then-Judge Alito) ("They have said there has to be a special justification for overruling a precedent. There is a presumption that precedents will be followed. But it is not—the rule of stare decisis is not an inexorable command, and I don't think anybody would want a rule in the area of constitutional law that . . . said that a constitutional decision, once handed down, can never be overruled.").

delicate balance between maintaining a stable jurisprudence on which parties can rely,[14] while preserving sufficient flexibility to correct errors.[15]

ArtIII.S1.7.3 Retroactivity of Supreme Court Decisions

ArtIII.S1.7.3.1 Overview of Retroactivity of Supreme Court Decisions

Article III, Section 1:

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

Under English common law, from which much of the American judicial system is derived, judicial decisions applied retroactively. The Supreme Court has explained that the common law approach was motivated by the belief that "the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.'"[1] Applying judicial decisions retroactively can create practical difficulties, however: regulated parties must rely on the law as they understand it in making decisions and shaping their conduct, but court decisions may change the legal landscape by resolving open legal questions, striking down unconstitutional laws or government actions, or overruling prior judicial decisions. Early American cases generally followed the common law approach and held that Supreme Court decisions applied retroactively.[2] By contrast, starting in the 1960s, the Court has at times limited the retroactive application of judicial decisions announcing new rules of law in light of regulated entities' reliance on the prior rule.[3]

The Court's retroactivity jurisprudence distinguishes between criminal and civil cases. The following essays discuss the extent to which the Court has applied its decisions retroactively in criminal[4] and civil[5] litigation.

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[14] *See, e.g.*, *Hilton*, 502 U.S. at 202 ("Adherence to precedent promotes stability, predictability, and respect for judicial authority."); Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."); Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986) ("[T]he important doctrine of stare decisis [is] the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.").

[15] *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) ("Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established."); Smith v. Allwright, 321 U.S. 649, 665 (1944) ("[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.").

[1] Linkletter v. Walker, 381 U.S. 618, 622–23 (1965) (quoting 1 W. Blackstone, Commentaries 69).

[2] *E.g.*, Robinson v. Neil, 409 U.S. 505, 507 (1973) (Prior to 1965, "both the common law and our own decisions recognized a general rule of retrospective effect for the constitutional decisions of this Court . . . subject to limited exceptions.").

[3] *See, e.g.*, Lemon v. Kurtzman, 411 U.S. 192, 198–99 (1973).

[4] *See* ArtIII.S1.7.3.2 Retroactivity of Criminal Decisions.

[5] *See* ArtIII.S1.7.3.3 Retroactivity of Civil Decisions.

ArtIII.S1.7.3.2 Retroactivity of Criminal Decisions

Article III, Section 1:

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

The Supreme Court's retroactivity jurisprudence distinguishes between criminal and civil cases.[1] On the criminal side, there may be further distinctions based on whether a criminal defendant has allegedly engaged in criminal conduct but has not yet been tried, has been convicted at trial and is pursuing a direct appeal, or has exhausted all direct appeals but can still seek collateral relief via a petition for a writ of habeas corpus. The general rule prior to 1965 was that the Court's constitutional decisions involving criminal law applied retroactively, subject to limited exceptions.[2] The Court changed its approach in the 1965 case *Linkletter v. Walker*, in which it held that, with respect to new constitutional interpretations involving criminal rights, "the Constitution neither prohibits nor requires retrospective effect."[3]

In *Linkletter* and a case from the following year, the Court held that its decisions applied retroactively to all cases in which judgments of conviction were not yet final.[4] Later, however, the Court adopted a balancing process that resulted in different degrees of retroactivity in different cases.[5] Generally, in cases where the Court declared a rule that was "a clear break with the past," it denied retroactivity to all defendants, sometimes with the exception of the challenger before the Court.[6] By contrast, in certain cases where a new rule was intended to overcome an impairment of the truth-finding function of a criminal trial[7] or cases where the Court found that a constitutional doctrine barred the conviction or punishment of someone,[8] the Court granted its decisions full retroactivity, even for habeas claimants.

The Court's retroactivity jurisprudence later distinguished between criminal cases pending on direct review and cases pending on collateral review. For cases on direct review, the Court held, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."[9] A plurality of the Court first endorsed a new standard for collateral review in *Teague v. Lane*,[10] and a majority of the Court adopted it in *Penry v. Lynaugh*.[11] In contrast to cases on direct appeal, for collateral review in

[1] For discussion of civil cases, see ArtIII.S1.7.3.3 Retroactivity of Civil Decisions.

[2] Robinson v. Neil, 409 U.S. 505, 507 (1973).

[3] 381 U.S. 618, 629 (1965).

[4] *Linkletter*, 381 U.S. 618; Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966).

[5] Johnson v. New Jersey, 384 U.S. 719 (1966); Stovall v. Denno, 388 U.S. 293 (1967); Adams v. Illinois, 405 U.S. 278 (1972).

[6] Desist v. United States, 394 U.S. 244, 248 (1969); United States v. Peltier, 422 U.S. 531 (1975); Brown v. Louisiana, 447 U.S. 323, 335–36 (1980) (plurality opinion); Michigan v. Payne, 412 U.S. 47, 55 (1973); United States v. Johnson, 457 U.S. 537, 549–50, 551–52 (1982).

[7] Williams v. United States, 401 U.S. 646, 653 (1971) (plurality opinion); Brown v. Louisiana, 447 U.S. 323, 328–30 (1980) (plurality opinion); Hankerson v. North Carolina, 432 U.S. 233, 243 (1977).

[8] United States v. United States Coin & Currency, 401 U.S. 715, 724 (1971); Moore v. Illinois, 408 U.S. 786, 800 (1972); Robinson v. Neil, 409 U.S. 505, 509 (1973).

[9] Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (cited with approval in Whorton v. Bockting, 549 U.S. 406, 416 (2007)).

[10] 489 U.S. 288 (1989).

[11] 492 U.S. 302 (1989).

federal courts of state court criminal convictions, the Court held that it generally will not give retroactive effect to "new rules" of constitutional interpretation—that is, rules "not '*dictated* by precedent existing at the time the defendant's conviction became final.'"[12] The Court held that a new rule may apply retroactively in a collateral proceeding "only if (1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[13] As the *Teague* plurality explained, the Court will apply a new rule in a collateral proceeding only if it places certain kinds of conduct "beyond the power of the criminal law-making authority to prescribe" or constitutes a "new procedure[ ] without which the likelihood of an accurate conviction is seriously diminished."[14]

Since *Teague*, the Court has consistently held that new substantive constitutional rules apply retroactively. The Court has described a substantive rule as one that alters the range of conduct that the law punishes, or that prohibits "a certain category of punishment for a class of defendants because of their status or offense."[15] Thus, the Court has held that the first *Teague* exception is constitutionally based, as substantive rules set forth categorical guarantees that place certain laws and punishments beyond a state's power, making "the resulting conviction or sentence . . . by definition . . . unlawful."[16] In *Montgomery v. Louisiana*, the Court extended the holding of *Teague* beyond the context of federal habeas review, holding that when a new substantive rule of constitutional law controls the outcome of a case, state collateral review courts must give retroactive effect to that rule in the same manner as federal courts engaging in habeas review.[17]

In contrast, the Court has never invoked the second *Teague* exception for "watershed" procedural rules to hold that a new rule of criminal procedure must apply retroactively. The Court has explained that procedural rules simply regulate the manner of determining the defendant's guilt, so if a defendant does not receive the benefit of a new procedural rule, the underlying conviction or sentence may "still be accurate" and the "defendant's continued confinement may still be lawful" under the Constitution.[18] The court has explained that, under the second *Teague* exception, it is not enough "to say that a new rule is aimed at improving the accuracy of a trial. . . . A rule that qualifies under this exception must not only improve accuracy, but also alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding."[19] In the 2021 case *Edwards v. Vannoy*, the Court noted that the *Teague* Court itself had stated it was "unlikely" that new watershed rules would emerge and, "in the 32 years since *Teague*, . . . the Court has *never* found that any new procedural rule

[12] Whorton v. Bockting, 549 U.S. 406, 416 (2007). Put another way, it is not enough that a decision is "within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision." A decision announces a "new rule" if its result "was susceptible to debate among reasonable minds" and if it was not "an illogical or even a grudging application" of the prior decision. Butler v. McKellar, 494 U.S. 407, 412–415 (1990). For additional elaboration on "new law," see O'Dell v. Netherland, 521 U.S. 151 (1997); Lambrix v. Singletary, 520 U.S. 518 (1997); Gray v. Netherland, 518 U.S. 152 (1996). *But compare* Bousley v. Brooks, 523 U.S. 614 (1998).

[13] Whorton v. Bockting, 549 U.S. 406, 416 (2007).

[14] 489 U.S. at 307, 311–313; *see also Butler*, 494 U.S. at 415–416.

[15] Welch v. United States, 578 U.S. 120, 132 (2016) (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990); *see also* Schriro v. Summerlin, 542 U.S. 348, 353 (2004); Penry v. Lynaugh, 492 U.S. 302, 330 (1989).

[16] Montgomery v. Louisiana, 577 U.S. 190 (2016)

[17] 577 U.S. 190.

[18] *Id.* at 201.

[19] Sawyer v. Smith, 497 U.S. 227, 242 (1990) (internal quotations and citations omitted).

actually satisfies that purported exception."[20] The Court thus concluded, "New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund."[21]

ArtIII.S1.7.3.3 Retroactivity of Civil Decisions

Article III, Section 1:

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

As in criminal cases,[1] a civil case announcing a new legal rule might in theory apply retroactively in all instances, might apply purely prospectively, or might apply with "selective prospectivity" such that the prevailing party in the case obtains the retroactive benefit of a new rule but no one else does. In some civil cases, the Court has declined to apply new rules retroactively, sometimes even with respect to the prevailing party in the case.[2] In *Chevron Oil Co. v. Huson*, the Court held that the question of retroactivity was to be determined by balancing the equities, considering whether a decision announced a new principle of law, whether retroactive application would advance or hinder the purpose of the rule in question, and whether retroactive application would cause injustice or hardship that could be avoided through purely prospective application.[3]

In two cases from the 1990s, the Court revealed itself to be deeply divided on whether judicial decisions should, or must, apply retroactively. First, in *American Trucking Assn's, Inc. v. Smith*, the Court considered whether to give retroactive effect to a prior case holding unconstitutional the state's application of a highway tax.[4] The Court held that the decision did not apply retroactively. A four-Justice plurality applied the *Chevron Oil* test to reach that conclusion. Justice Antonin Scalia concurred in the judgment but disagreed with the plurality's reasoning.[5] The following year, in *James B. Beam Distilling Co. v. Georgia*, the Court considered whether a company could claim a tax refund under an earlier ruling holding unconstitutional the imposition of certain taxes upon its products.[6] A fractured Court held that the company could seek a refund.[7]

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[20] 141 S.Ct. 1547, 1557, 1555 (2021). *See* also *id.* at 1557 ("The Court has identified only one pre-*Teague* procedural rule as watershed: the right to counsel recognized in the Court's landmark decision in Gideon v. Wainwright, 372 U.S. 335, 344–345 (1963).").

[21] *Id.* at 1560.

[1] For discussion of criminal cases, see ArtIII.S1.7.3.2 Retroactivity of Criminal Decisions.

[2] *E.g.*, Cipriano v. City of Houma, 395 U.S. 701 (1969); Allen v. State Board of Elections, 393 U.S. 544 (1969); *but see* Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).

[3] 404 U.S. 97 (1971).

[4] 496 U.S. 167 (1990).

[5] *Id.* at 200. Four dissenting Justices would have applied the prior case "only where, under state law, the time for challenging the tax has not expired," or in timely-filed challenges to the tax where "the decisions are not yet final." *Id.* at 224–25.

[6] 501 U.S. 529 (1991).

[7] Two Justices objected to the possibility of "selective prospectivity" noting that, in the earlier decision, the Court had applied the holding to the contesting company, and concluding that once a new rule has been applied retroactively to the litigants in a civil case, considerations of equality and stare decisis compel application to all. *Id.* at 532–44. Justice Byron White wrote separately to emphasize that it was permissible for the Court to apply its decisions purely prospectively. *Id.* at 544–47. By contrast, three concurring Justices argued that limiting the retroactive application of

In the 1993 case *Harper v. Virginia Dep't of Taxation*, a bare majority of the Court departed from the *Chevron Oil* balancing test and announced a new rule to determine the retroactive effect of civil cases.[8] The Court held: "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[9]

ArtIII.S1.8 Congressional Power to Establish Article III Courts

ArtIII.S1.8.1 Overview of Establishment of Article III Courts

Article III, Section 1:

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

The Constitution established one federal court: the U.S. Supreme Court.[1] In lieu of mandating the creation other adjudicative bodies through the nation's founding document, the Framers vested the federal judicial power in the Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish,"[2] and authorized Congress, in its discretion, to "constitute Tribunals inferior to the [S]upreme Court."[3] In the years following the ratification of the Constitution, Congress has regularly exercised its power to create different federal tribunals that adjudicate a variety of legal disputes.

As authorized by the Constitution, Congress has established federal district and appellate courts and structured the Supreme Court. Congress has also periodically created courts under Article III to exercise specialized jurisdiction over specific categories of cases.[4] All of these courts, sometimes called "Article III courts" or "constitutional courts," share three key attributes.[5] First, they exercise the "judicial power of the United States" to resolve "cases" and "controversies" falling within the constitutional grant of federal court jurisdiction.[6] Second,

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judicial decisions, whether through partial or total prospectivity, violates Article III by expanding the jurisdiction of the federal courts beyond true cases and controversies. *Id.* at 547–49

[8] 509 U.S. 86 (1993).

[9] *Id.* at 97; *see also* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) (setting aside a state court refusal to give retroactive effect to a U.S. Supreme Court invalidation of that state's statute of limitations in certain suits); Ryder v. United States, 515 U.S. 177, 184–85 (1995).

[1] U.S. Const. art. III, § 1.

[2] *Id.*

[3] U.S. Const. art. I, § 8, cl. 9. For additional discussion of the Framers' views on legislative power to establish federal courts, see ArtIII.S1.8.2 Historical Background on Establishment of Article III Courts.

[4] In addition, Congress has created non-Article III tribunals, sometimes called "Article I courts" or "legislative courts," staffed by personnel such as administrative law judges, military judges, and federal magistrates. *See* ArtIII.S1.9.1 Overview of Congressional Power to Establish Non-Article III Courts.

[5] When determining whether a court is a constitutional court, the Supreme Court has looked at how Congress structures the court and whether the structure of the court adheres to basic requirements of Article III, rather than relying on how Congress labels the court. *See* Glidden v. Zdanok, 370 U.S. 530 (1962) (Harlan, J.) (plurality opinion).

[6] U.S. Const. art. III, § 1. The Supreme Court has interpreted the "case or controversy" requirement of Article III to impose certain rules of justiciability, such as a prohibition on advisory opinions, requirements of standing and ripeness, and limitations on the ability of federal courts to decide "political questions." *See generally* Allen v. Wright, 468 U.S. 737, 750 (1984); *see also* ArtIII.S2.C1.2 Historical Background on Cases or Controversies Requirement.

they are staffed by judges who hold their offices "during good Behaviour,"[7] which the Supreme Court has interpreted to guarantee life tenure "subject only to removal by impeachment."[8] Third, Article III judges' compensation cannot be "diminished during their Continuance in Office."[9]

The following essays discuss Congress's power to establish and abolish[10] Article III courts, including the lower courts[11] and courts of special jurisdiction,[12] and Congress's power to structure the Supreme Court.[13] Other essays explore Congress's authority to establish non-Article III courts[14] and Congress's authority to regulate the existing federal courts.[15]

ArtIII.S1.8.2 Historical Background on Establishment of Article III Courts

Article III, Section 1:

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

Before the Founding, each state had its own system of courts, while the Articles of Confederation did not provide for an independent Federal Judiciary.[1] At the Constitutional Convention, the delegates agreed early on to depart from existing practice and establish an independent federal Judicial Branch including a Supreme Court.[2] The Framers generally accepted that state courts would play a significant role in interpreting and applying federal law.[3] But, in light of concerns about whether state courts would apply federal law correctly,

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[7] U.S. Const. art. III, § 1.

[8] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59 (1982) (plurality opinion); United States ex rel. Toth v. Quarles, 350 U.S. 11, 16 (1955) (stating that Article III "courts are presided over by judges appointed for life, subject only to removal by impeachment"); *see also* ArtIII.S1.10.2.1 Overview of Good Behavior Clause.

[9] U.S. Const. art. III, § 1; *see also* ArtIII.S1.10.3.1 Historical Background on Compensation Clause.

[10] *See* ArtIII.S1.8.5 Congressional Power to Abolish Federal Courts.

[11] *See* ArtIII.S1.8.4 Establishment of Inferior Federal Courts.

[12] *See* ArtIII.S1.8.6 Courts of Specialized Jurisdiction and Congress.

[13] *See* ArtIII.S1.8.3 Supreme Court and Congress.

[14] *See* ArtIII.S1.9.1 Overview of Congressional Power to Establish Non-Article III Courts.

[15] *See* ArtIII.S1.5.1 Overview of Congressional Control Over Judicial Power; ArtIII.S1.10.2.1 Overview of Good Behavior Clause; ArtIII.S2.C2.6 Exceptions Clause and Congressional Control over Appellate Jurisdiction.

[1] Article IX of the Articles of Confederation authorized Congress to "appoint[ ] courts for the trial of piracies and felonies committed on the high seas; and establish[ ] courts; for receiving and determining finally appeals in all cases of captures." The same Article further provided that Congress would be "the last resort on appeal, in all disputes and differences now subsisting, or that hereafter may arise between two or more states" and could appoint commissioners or judges to constitute a court to resolve such disputes.

[2] *See, e.g.*, Max Farrand, The Framing of the Constitution of the United States 79 (1913) ("That there should be a national judiciary was readily accepted by all.").

[3] *See, e.g.*, 1 The Records of the Federal Convention of 1787, at 243 (Max Farrand ed., 1911) [hereinafter, Convention Records]. For example, the Convention considered proposals that would require federal questions to be decided first in state court, but with a right of appeal to federal courts. *See id.* at 243, 424. Likewise, during the debate over ratification, Alexander Hamilton wrote that "the State courts will RETAIN the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes. . . . [Thus,] the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited." The Federalist No. 83 (Alexander Hamilton). For additional discussion of the relationship between federal and state courts, see ArtIII.S1.6.1 Overview of Relationship Between Federal and State Courts.

uniformly, and without bias,[4] the Framers provided for a federal Supreme Court with the power to review state judicial decisions involving issues of federal statutory or constitutional law.[5]

However, the Framers debated whether the Constitution should also provide for the existence of lower federal courts.[6] James Madison's proposal for the new government, known as the Virginia Plan, provided for a "National Judiciary [to] be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature."[7] In the Committee of the Whole, the proposal to establish a national Judiciary was adopted unanimously.[8] A clause providing that the Judicial Branch would "consist of One supreme tribunal, and of one or more inferior tribunals" was initially agreed to, but later reconsidered.[9] Critics of the provision argued that state courts could adequately adjudicate all necessary matters in the first instance, while appellate review the supreme tribunal would protect national interests and assure uniformity, and the provision for inferior tribunals was ultimately stricken out.[10]

Madison and James Wilson then moved to authorize Congress to "appoint inferior tribunals."[11] That proposal, sometimes called the Madisonian Compromise,[12] carried the implication that Congress could, in its discretion, either designate the state courts to hear federal cases or create federal courts.[13] Over the course of the Convention, the phrasing of the provision evolved into its present form, which vests federal judicial power in the "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and

[4] Madison expressed concern at the Convention about "improper Verdicts in State tribunals obtained under the biassed directions of a dependent Judge," and "disliked the election of the Judges by the Legislature or any numerous body" due to "the danger of intrigue and partiality" and the fact that legislators lacked the "requisite qualifications" to select suitable judges. 1 Convention Records, *supra* note 3, at 120, 124. *See also* The Federalist No. 81 (Alexander Hamilton) ("State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws."); 1 Convention Records, *supra* note 3, at 124 (statement of Madison expressing concern about "the local prejudices of an undirected jury"); The Federalist No. 80 (Alexander Hamilton) ("[T]he most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes."); *id.* ("The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.").

[5] U.S. Const. art. III; 1 Stat. 73, 85; Martin v. Hunter's Lessee, 14 U.S. 304 (1816). *Cf.* Oliver Wendell Holmes, Collected Legal Papers 295–96 (1921) ("I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as the laws of the several States.").

[6] For additional discussion of the Convention's consideration of the judiciary, see 1 Julius Goebel, Antecedents and Beginnings to 1801, History of the Supreme Court of the United States (1971).

[7] 1 Convention Records, *supra* note 3, at 21–22. It is possible that this version may not be an accurate copy. *See* 3 Convention Records*id.* at 593–94.

[8] 1 Convention Records, *supra* note 3, at 95, 104.

[9] *Id.* at 95, 105. The words "one or more" were deleted the following day without recorded debate. *Id.* at 116, 119.

[10] *Id.* at 124–25.

[11] *Id.* at 125.

[12] *See* Richard H. Fallon, Jr. et al, Hart & Wechsler's The Federal Courts and the Federal System 8 (7th ed. 2015).

[13] On offering their motion, Wilson and Madison "observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them." 1 Convention Records, *supra* note 3, at 125.

establish."[14] Beyond that provision, the Constitution imposes few specific requirements related to the organization of the federal Judiciary.[15]

The first Congress exercised its discretion to create lower federal courts promptly in the Judiciary Act of 1789, the first legislation related to the Federal Judiciary.[16] Since that time, the Federal Judiciary has always consisted of one Supreme Court and multiple inferior federal courts, though Congress has periodically enacted legislation to change the size of the Supreme Court and the size and structure of the lower courts.[17]

ArtIII.S1.8.3 Supreme Court and Congress

Article III, Section 1:

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

The Constitution provides for a Judicial Branch including "one supreme Court."[1] It also appears to assume that the Supreme Court will include a Chief Justice, stipulating that "the Chief Justice shall preside" over any Presidential impeachment trial in the Senate.[2] However, the Constitution is silent on other matters such as the size and composition of the Supreme Court, the time and place for sitting, and the Court's internal organization, leaving those questions to Congress.

Congress first enacted legislation to structure the Supreme Court in the Judiciary Act of 1789.[3] Under the 1789 act, the Court comprised one Chief Justice and five Associate Justices.[4] Congress enacted legislation to change the size of the Court multiple times during the nineteenth century. In 1801, Congress reduced the size of the Court to five Justices. The 1801

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[14] The Committee on Detail provided for the vesting of judicial power in one Supreme Court "and in such inferior Courts as shall, when necessary, from time to time, be constituted by the legislature of the United States." 2 *id.* at 186. Its draft also authorized Congress "[t]o constitute tribunals inferior to the Supreme Court." *Id.* at 182. No debate is recorded when the Convention approved these two clauses. *Id.* at 315, 422–23, 428–30. The Committee of Style left the clause empowering Congress to "constitute" inferior tribunals, but it deleted "as shall, when necessary" from the Judiciary article, so that the judicial power was vested "in such inferior courts as Congress may from time to time"—and here deleted "constitute" and substituted "ordain and establish." *Id.* at 600.

[15] Article I appears to assume the existence of a Chief Justice of the United States, providing that "[w]hen the President of the United States is tried, the Chief Justice shall preside." U.S. Const. art. I, § 3, cl. 6. Other provisions govern federal judges' tenure and compensation and set the bounds of federal court jurisdiction. *See* ArtIII.S1.5.1 Overview of Congressional Control Over Judicial Power; ArtIII.S1.10.2.1 Overview of Good Behavior Clause; ArtIII.S2.C2.6 Exceptions Clause and Congressional Control over Appellate Jurisdiction. However, the Constitution does not specify the size of the Supreme Court or the number or size of the lower courts.

[16] 1 Stat. 73.

[17] *See, e.g.*, Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73; Judiciary Act of 1801, ch. 4, § 3, 2 Stat. 89; Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132; Act of Feb. 24, 1807, ch. 16, § 5, 2 Stat. 420; Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176; Circuit Judges Act of 1869, ch. 22, 16 Stat. 44; Act of March 3, 1891, ch. 517, 26 Stat. 826. *See also* ArtIII.S1.8.3 Supreme Court and Congress; ArtIII.S1.8.4 Establishment of Inferior Federal Courts; ArtIII.S1.8.5 Congressional Power to Abolish Federal Courts.

[1] U.S. Const. art. III, § 1.

[2] U.S. Const. art. I, § 3, cl. 6.

[3] Act of September 24, 1789, 1 Stat. 73. For additional discussion of the Act and its working and amendments, see Frankfurter & Landis, The Business of the Supreme Court (1928); Charles Warren, *New Light on the History of the Federal Judicial Act of 1789*, 37 Harv. L. Rev. 49 (1923); *see also* Julius Goebel, Antecedents and Beginnings to 1801, History of the Supreme Court of the United States (1971).

[4] Act of September 24, 1789, 1 Stat. 73, § 1.

statute did not eliminate an occupied seat on the Court; instead, it provided that the change would take effect "after the next vacancy."[5] Congress repealed the 1801 law before any vacancy occurred, leaving the size of the Court at six Justices.[6]

In the early years of the Republic, Supreme Court Justices were required to "ride circuit," spending part of their time hearing Supreme Court cases in the capital and part of each year traveling to hear cases in the lower federal circuit courts.[7] For a time during the 1800s, the number of Supreme Court Justices tracked the number of judicial circuits, facilitating the division of circuit-riding duties.[8] At its largest, during the Civil War, the Court had ten Justices, with the addition of the tenth seat on the Court coinciding with the establishment of the Tenth Circuit.[9] In 1866, Congress reduced the size of the Court to seven Justices, a change widely viewed as one of the Reconstruction Congress's restrictions on President Andrew Johnson.[10] In 1869, under a new presidential administration, Congress expanded the Court to include nine Justices.[11] The 1869 legislation was the last time Congress changed the size of the Supreme Court.

A notable unsuccessful attempt to enlarge the Court occurred in 1937, when President Franklin Delano Roosevelt's Administration proposed court expansion legislation that many regarded as an effort to make the Court more favorable to President Roosevelt's New Deal policies.[12] Congress declined to act on the proposal, with the Senate Judiciary Committee expressing concerns that it impermissibly infringed on the principle of judicial independence enshrined in Article III of the Constitution.[13] Proposals related to Supreme Court expansion also emerged following the death of Justice Ruth Bader Ginsburg and the confirmation of Justice Amy Coney Barrett in the weeks leading up to the 2020 presidential election.[14] While no provision of the Constitution expressly prohibits legislative changes to the size of the Supreme Court, and Congress has changed the size of the Court multiple times in the past, some commentators debated whether the proposals were inconsistent with constitutional norms. The proposals were not enacted, and the Supreme Court has had no occasion to consider their constitutionality.

Proposals have been made at various times to organize the Court into sections or divisions. No authoritative judicial analysis of those proposals is available, but Chief Justice Charles

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[5] Judiciary Act of 1801, ch. 4, § 3, 2 Stat. 89, 89.

[6] Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132.

[7] The Supreme Court rejected a constitutional challenge to circuit riding in *Stuart v. Laird,* 5 U.S. (1 Cr.) 299 (1803). A party challenging the practice argued that Supreme Court justices "have no right to sit as circuit judges, not being appointed as such, or in other words, that they ought to have distinct commissions for that purpose." The Court noted that the objection was "of recent date," and could not overcome "practice and acquiescence . . . for a period of several years, commencing with the organization of the judicial system," which yielded an "irresistible answer" that circuit riding was constitutional. *Id.* at 309.

[8] *See, e.g.*, Act of Feb. 24, 1807, ch. 16, § 5, 2 Stat. 420 (creating the Seventh Circuit and adding a seventh seat to the Supreme Court); Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176 (creating the Eighth and Ninth Circuits and increasing the size of the Supreme Court to nine Justices).

[9] Act of Mar. 3, 1863, ch. 100, 12 Stat. 794.

[10] Act of July 23, 1866, ch. 210, 14 Stat. 209. Like the 1801 legislation, the 1866 law provided that the Court would decrease in size as vacancies arose rather than eliminating any occupied seats on the bench. The number of Justices did not fall below eight before the end of Johnson's term. The 1866 legislation decoupled the number of judicial circuits from the number of Supreme Court Justices, and since that time there have usually been fewer seats on the Court than judicial circuits.

[11] Act of April 10, 1869, ch. 22, 16 Stat. 44.

[12] Judicial Procedures Reform Bill of 1937, S. 1392 (75th Cong. 1937).

[13] Reorganization of the Federal Judiciary, S. Rep. No. 75–711, at 20–23 (1937). The Roosevelt Administration eventually abandoned the plan after the Supreme Court began to vote to uphold New Deal legislation. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[14] *See, e.g.*, Judiciary Act of 2021, S. 1141, H.R. 2584 (117th Cong. 2021).

Evans Hughes, in a letter to Senator Burton Wheeler in 1937, expressed doubts concerning the validity of such a device and stated that "the Constitution does not appear to authorize two or more Supreme Courts functioning in effect as separate courts."[15] Other proposals would alter the size of the Court while also changing the Court's structure or composition, for example by seeking to impose partisan balance on the Court.[16] As with the foregoing proposals, the Supreme Court has not considered the constitutionality of these proposals.

In addition to setting the size of the Supreme Court, Congress also determines the time and place of the Court's sessions. Congress once exercised that power to change the Court's term to forestall a constitutional attack on the repeal of the Judiciary Act of 1801, with the result that the Court did not convene for fourteen months.[17] Congress also has significant authority to determine what cases the Court has jurisdiction to hear. The Constitution grants the Supreme Court original jurisdiction over the relatively narrow categories of "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party,"[18] and the Court has held that its jurisdiction over such cases flows directly from the Constitution.[19] In "all the other Cases" subject to federal jurisdiction, Article III grants the Court "appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make."[20] Supreme Court decisions establish that the Exceptions Clause grants Congress broad power to regulate the Court's appellate jurisdiction.[21]

ArtIII.S1.8.4 Establishment of Inferior Federal Courts

Article III, Section 1:

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

By vesting judicial power in "such inferior Courts as the Congress may from time to time ordain and establish," the Framers allowed Congress to decide whether to establish lower federal courts.[1] Because Congress has the authority to decide whether the lower federal courts should exist, the legislature is also understood to enjoy broad power to structure the lower courts, make procedural rules for them, and regulate their jurisdiction.[2]

From the beginning, Congress has answered the question of whether there should be inferior federal courts in the affirmative. The first Congress exercised its discretion to create

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[15] Reorganization of the Judiciary: Hearings on S. 1392 Before the Senate Judiciary Committee, 75th Cong., 1st Sess. (1937), pt. 3, 491. For earlier proposals to have the Court sit in divisions, *see* Frankfurter & Landis, *supra* note 3, at 74–85.

[16] *See* Eric J. Segall, *Eight Justices Are Enough: A Proposal To Improve The United States Supreme Court*, 45 Pepp. L. Rev. 547 (2018); Ganesh Sitaraman and Daniel Epps, *How to Save the Supreme Court*, 129 Yale L. J. 148 (2019).

[17] 1 Charles Warren, The Supreme Court in United States History 222–224 (rev. ed. 1926).

[18] U.S. Const. art III, § 2, cl. 2.

[19] *See* ArtIII.S2.C2.2 Supreme Court Original Jurisdiction.

[20] U.S. Const. art III, § 2, cl. 2.

[21] *See* ArtIII.S2.C2.6 Exceptions Clause and Congressional Control over Appellate Jurisdiction.

[1] U.S. Const. art. III, § 1; *see also* U.S. Const. art. I, § 8, cl. 9 (authorizing Congress, in its discretion, to "constitute Tribunals inferior to the [S]upreme Court."); 1 The Records of the Federal Convention of 1787, at 125 (Max Farrand ed., 1911) (observation of James Wilson and James Madison "that there was a distinction between establishing such [inferior] tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them").

[2] *See, e.g.*, ArtIII.S1.4.2 Inherent Powers Over Judicial Procedure; ArtIII.S2.C2.6 Exceptions Clause and Congressional Control over Appellate Jurisdiction.

lower federal courts in the Judiciary Act of 1789, the first legislation related to the Federal Judiciary.[3] The 1789 Act created thirteen judicial districts, each of which had one district judge.[4] Single judge, trial-level district courts were to hold four sessions per year in each district. The Act further divided the country into three judicial circuits. It established "circuit courts," which were three-judge panels comprised of one district judge and two Supreme Court Justices. One noteworthy feature of the new Judiciary was that Supreme Court Justices were required to "ride circuit" and travel to the districts within their assigned circuits to hear cases—a burdensome requirement, given the transportation technology of the eighteenth and nineteenth centuries, particularly for Justices who were old or unhealthy or were assigned to outlying circuits.[5]

As the Nation grew, the Federal Judiciary also expanded, with each new state receiving a judicial district.[6] Congress reorganized the Federal Judiciary into six judicial circuits in 1801,[7] and thereafter periodically added new circuits to encompass new states.[8] In 1869, Congress enacted legislation creating circuit court judgeships.[9] The new circuit court judges presided over cases within their circuits, limiting the need for Supreme Court Justices to ride circuit. Then, in 1891, Congress created intermediate appellate courts, known as the United States Courts of Appeals, abolishing the circuit courts and removing any requirement the Supreme Court Justices ride circuit.[10] Since then, the federal judicial system has consisted of trial-level district courts with original jurisdiction over most federal cases, intermediate appellate courts, and the Supreme Court.

ArtIII.S1.8.5 Congressional Power to Abolish Federal Courts

Article III, Section 1:

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

The Constitution provides that the judicial power shall be vested, at least in part, in "one supreme Court."[1] Thus, although Congress possesses substantial authority to structure the Supreme Court,[2] Congress cannot abolish the high court.

With respect to the lower federal courts, the constitutional authorization for Congress to "from time to time ordain and establish" inferior courts may imply that Congress can alter the

[3] 1 Stat. 73.

[4] The thirteen districts included one for each state that had ratified the Constitution at the time the Judiciary Act of 1789 was enacted, plus districts for Maine and Kentucky, which were then parts of Massachusetts and Virginia, respectively. *Id.*

[5] *See, e.g.*, Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 Cardozo L. Rev. 1753 (2003).

[6] Some states were eventually divided into multiple judicial districts, and some districts were given more than one district judge. *See, e.g.*, 6 Cong. Ch. 4 (Feb. 13, 1801); 12 Cong. Ch. 71 (Apr. 29, 1812).

[7] Judiciary Act of 1801, ch. 4, § 3, 2 Stat. 89. The Judiciary Act of 1801 was repealed in 1802, Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, and soon thereafter Congress reorganized the judiciary into six different circuits, Act of Apr. 29, 1802, ch. 31, §§ 4, 5, 2 Stat. 156, 157–58.

[8] *See, e.g.*, Act of Feb. 24, 1807, ch. 16, § 5, 2 Stat. 420; Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176.

[9] Circuit Judges Act of 1869, ch. 22, 16 Stat. 44.

[10] Act of March 3, 1891, 26 Stat. 826.

[1] U.S. Const. art. III, § 1.

[2] *See* ArtIII.S1.8.3 Supreme Court and Congress.

system it establishes, including by eliminating exiting federal courts.[3] Moreover, having left to Congress the decision whether to establish lower federal courts,[4] it would be anomalous for the Constitution to provide that, once a court was established, Congress could never eliminate it. Historical practice suggests that Congress may abolish lower federal courts, though the Constitution may limit its ability to unseat current federal judges in doing so.

The Constitution provides that federal judges "shall hold their Offices during good Behaviour" and shall not have their compensation decreased while in office.[5] The Supreme Court has interpreted the Good Behavior Clause to grant Article III judges life tenure, unless they resign voluntarily or are impeached.[6] Thus, if Congress elects to eliminate an existing Article III court, it may raise the question of what should happen to the judges on that court.[7]

The first instance of Congress eliminating lower federal courts did not provide a clear answer to that question. The Judiciary Act of February 13, 1801, passed in the closing weeks of John Adams's presidency, made major structural changes to the federal courts.[8] Among other things, the act reorganized the existing three judicial circuits into six circuits and established six circuit courts consisting of three circuit judges each. President Adams appointed judges to many of the newly created seats, and those so-called "Midnight Judges" were confirmed by the Senate. However, in 1802, following a change in control of both the Executive and Legislative Branches, Congress repealed the Judiciary Act of 1801.[9] No provision was made for the displaced judges, apparently under the theory that if there were no courts there could be no judges to sit on them.[10]

Congress enacted legislation to change the Court's term to forestall a constitutional attack on the repeal of the Judiciary Act of 1801, with the result that the Court did not convene for fourteen months.[11] Once the Court reconvened, it rejected a challenge to the repeal in the 1803 case *Stuart v. Laird*.[12] That case involved a judgment of the U.S. court for the fourth circuit in the eastern district of Virginia, which was created by the 1801 Act and then abolished by the 1802 Act. A challenger argued that the judgment was void because the court that had issued it no longer existed. The Supreme Court disagreed, holding that Congress has "constitutional authority to establish from time to time such inferior tribunals as they may think proper; and to transfer a cause from one such tribunal to another," and that the present case involved "nothing more than the removal of the suit" from the defunct court to a new one.[13] The *Stuart* Court did not directly address the issue of the displaced judges.[14]

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[3] U.S. Const. art. III, § 1.

[4] *See* ArtIII.S1.8.2 Historical Background on Establishment of Article III Courts.

[5] U.S. Const. art. III, § 1.

[6] For additional discussion of the Good Behavior Clause, see ArtIII.S1.10.2.1 Overview of Good Behavior Clause.

[7] In contrast to Article III judges, judges on Article I courts do not enjoy constitutionally mandated life tenure, so the elimination an Article I court does not raise this issue. *See* ArtIII.S1.9.1 Overview of Congressional Power to Establish Non-Article III Courts.

[8] Judiciary Act of 1801, ch. 4, § 3, 2 Stat. 89.

[9] Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132.

[10] This was the theory of John Taylor of Caroline, upon whom the Jeffersonians in Congress relied. W. Carpenter, Judicial Tenure in the United States 63–64 (1918). For full discussion of the controversy, see *id.* at 58–78.

[11] 1 Charles Warren, The Supreme Court in United States History 222–224 (rev. ed. 1926).

[12] 5 U.S. (1 Cr.) 299 (1803).

[13] *Id.* at 309.

[14] Chief Justice John Marshall recused himself from the case and later expressed skepticism about the decision, noting ironically in one letter "the memorable distinction as to tenure of office, between removing the Judge from the office, and removing the office from the Judge." Letter from Chief Justice Marshall to Henry Clay (Dec. 22, 1823), *reprinted in* Ruth Wedgwood, *Cousin Humphrey*, 14 Const. Comment 247, 267–69 (1997). For another early example of

On subsequent occasions when Congress eliminated Article III courts, the legislation provided for judges from the abolished courts to continue to serve on other Article III courts. In 1891, Congress enacted legislation creating new intermediate appellate courts and eliminating the then-existing federal circuit courts.[15] The 1891 Act authorized sitting circuit judges, who had previously heard cases on the circuit courts, to hear cases on the new appellate courts.[16] Congress again exercised its power to abolish a federal court in 1913, eliminating the short-lived Commerce Court.[17] The 1913 legislation provided for redistribution of the Commerce Court judges among the federal appeals courts.[18] In 1982, Congress enacted legislation abolishing the Article III Court of Claims and U.S. Court of Customs and Patent Appeals, instead establishing the Article I Court of Federal Claims and the Article III U.S. Court of Appeals for the Federal Circuit.[19] The statute provided for judges from the eliminated courts to serve instead on the Federal Circuit.[20]

ArtIII.S1.8.6 Courts of Specialized Jurisdiction and Congress

Article III, Section 1:

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

Pursuant to its power to "ordain and establish" inferior federal courts, Congress has periodically created courts under Article III to exercise specialized jurisdiction over limited categories of cases. Those tribunals are like other Article III courts in that they exercise "the judicial power of the United States," and only that power.[1] In addition, judges on such courts must be appointed by the President and confirmed by the Senate, must hold office during good behavior subject to removal only by impeachment, and may not have their compensation diminished during their continuance in office.[2] While judges on specialized courts must enjoy life tenure on the federal bench during good behavior, like all Article III judges, judges holding lifetime appointments to the U.S. district courts or courts of appeals may serve for limited terms on courts of specialized jurisdiction.[3]

Several Article III courts of specialized jurisdiction are no longer in operation, either because they were established for a limited time or because they were deemed not to have

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legislation abolishing federal courts, see Act of March 3, 1863, 12 Stat. 762 (eliminating the then-existing circuit court, district court, and criminal court of the District of Columbia without providing for continued service by the sitting judges).

[15] Act of March 3, 1891, 26 Stat. 826.

[16] *Id.* § 3.

[17] The Court was created by the Act of June 18, 1910, 36 Stat. 539, and repealed by the Act of October 22, 1913, 38 Stat. 208, 219.

[18] 38 Stat. 208, 219.

[19] *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97–164, Section 105(a), §§171–77, 96 Stat. 25, 27–28; *see also* 28 U.S.C. § 171(a) ("The court [of Federal Claims] is declared to be a court established under article I of the Constitution of the United States.").

[20] 96 Stat. 50.

[1] U.S. CONST. art. III, § 1

[2] *Id.*; *see also* ArtIII.S1.10.2.1 Overview of Good Behavior Clause.

[3] *See, e.g.*, Pub. L. No. 95–511, 92 Stat. 1788, 50 U.S.C. § 1803 (allowing for designation of district court judges to serve nonrenewable seven-year terms on the Foreign Intelligence Surveillance Act Court); 8 U.S.C. §1532(a) (allowing for designation of district court judges to serve five-year terms on the U.S. Alien Terrorist Removal Court).

fulfilled their purposes. An example of the latter was the Commerce Court created by the Mann-Elkins Act of 1910,[4] which was given exclusive jurisdiction to enforce certain orders of the Interstate Commerce Commission.[5] Another court of specialized jurisdiction was the Emergency Court of Appeals established by the Emergency Price Control Act of January 30, 1942.[6] The Emergency Court of Appeals was established during World War II and was designed to operate temporarily to adjudicate matters related to wage and price controls. Composed of selected sitting judges of the United States district courts and circuit courts of appeal, the court was vested with the powers of a district court and granted "exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding."[7] Congress created another specialized court through the Ethics in Government Act.[8] That court, a "Special Division" of the U.S. Court of Appeals for the District of Columbia, was charged with appointing an independent counsel to investigate and prosecute charges of illegality in the Executive Branch, upon the request of the Attorney General. It also had certain supervisory powers over the independent counsel.[9]

Perhaps the most prominent modern example of a specialized Article III court is the U.S. Court of Appeals for the Federal Circuit, established in 1982.[10] In many respects, the Federal Circuit resembles the geographic circuit courts of appeals; however, rather than hearing appeals from district courts in a certain area of the country, it has exclusive jurisdiction to hear appeals from the United States Court of Federal Claims, the Federal Merit System Protection Board, the Court of International Trade, the Patent Office in patent and trademark cases, and in various contract and tort cases. One of those bodies, the Court of International Trade, is also an Article III specialty court.[11] The Judicial Panel on Multidistrict Litigation, staffed by federal judges from other courts, is another Article III court of specialized jurisdiction authorized to transfer related civil actions pending in different judicial districts to a single district for trial.[12]

To facilitate the gathering of foreign intelligence information through electronic surveillance, search and seizure and other means, Congress authorized a specialized court in

[4] Ch. 309, 36 Stat. 539.

[5] The Commerce Court operated for less than three years before Congress abolished it in 1913. *See* ArtIII.S1.8.5 Congressional Power to Abolish Federal Courts.

[6] 56 Stat. 23, §§ 31–33.

[7] 56 Stat. 31. The Supreme Court upheld the exclusive grant of jurisdiction to the court in Lockerty v. Philips, 319 U.S. 182 (1943). A similar court was created to be used in the enforcement of the economic controls imposed by President Richard Nixon in 1971. Pub. L. No. 92–210, 85 Stat. 743, 211(b). Although the controls ended in 1974, 12 U.S.C. § 1904 note, Congress continued the Temporary Emergency Court of Appeals and gave it new jurisdiction. Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93–159, 87 Stat. 633, 15 U.S.C. § 754 (incorporating judicial review provisions of the Economic Stabilization Act). The Court was abolished, effective March 29, 1993, by Pub. L. No. 102–572, 106 Stat. 4506. Another similar specialized court was created by Section 209 of the Regional Rail Reorganization Act, Pub. L. No. 93–226, 87 Stat. 999, 45 U.S.C. § 719, to review the final system plan under the Act. Regional Rail Reorganization Act Cases (Blanchette v. Connecticut Gen. Ins. Corp.), 419 U.S. 102 (1974).

[8] Ethics in Government Act, Title VI, Pub. L. No. 95–521, 92 Stat. 1867 (codified as amended at 28 U.S.C. §§ 591–599). The Chief Justice designated three regular federal judges to comprise the court. Only one of the judges could be from the D.C. Circuit. 28 U.S.C. § 49.

[9] The constitutionality of the Special Division was upheld in Morrison v. Olson, 487 U.S. 654, 670–85 (1988). Authority for the court expired in 1999 under a sunset provision. Pub. L. No. 103–270, § 2, 108 Stat. 732 (1994).

[10] Federal Courts Improvement Act of 1982, Pub. L. No. 97–164, 96 Stat. 37, 28 U.S.C. § 1295. Among other things, the Federal Circuit assumed the appellate jurisdiction of the Court of Claims and the Court of Customs and Patent Appeals. *See* ArtIII.S1.8.5 Congressional Power to Abolish Federal Courts.

[11] The Court of International Trade began life as the Board of General Appraisers, became the United States Customs Court in 1926, was declared an Article III court in 1956, and came to its present form and name in 1980. Pub. L. No. 96–417, 94 Stat. 1727.

[12] 28 U.S.C. § 1407.

the Foreign Intelligence Surveillance Act of 1978.[13] Known as the FISA Court, this tribunal is composed of seven regular federal judges appointed by the Chief Justice for limited terms and receives applications from the United States and to issue warrants for intelligence activities. Another specialized court, the Alien Terrorist Removal Court, was established to review ex parte applications from the Department of Justice to order removal of certain aliens from the United States based on classified information.[14]

ArtIII.S1.9 Congressional Power to Establish Non-Article III Courts

ArtIII.S1.9.1 Overview of Congressional Power to Establish Non-Article III Courts

Article III, Section 1:

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

Article III of the Constitution provides that "the judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[1] A literal interpretation of that language might require that every case that falls within the "judicial Power of the United States" must be adjudicated, if at all, in Article III courts staffed by judges with constitutional protections.[2] Notwithstanding the foregoing text, however, Congress has assigned the authority to adjudicate a large swath of cases that would seemingly fall within the federal judicial power to non-Article III tribunals—forums with judicial officers who do not enjoy Article III protections. Those tribunals are often called "Article I courts" or "legislative courts," because they are created by Congress pursuant to its general legislative powers. They include specialized stand-alone courts, administrative agencies, and magistrate judges who serve under Article III judges.

Congress has periodically created Article I courts since the early years of the Republic.[3] Over the years, the Supreme Court has recognized certain limits on which matters may be heard by Article I courts instead of Article III courts. The case law in this area can be difficult to parse,[4] but generally identifies four key circumstances in which Congress may authorize

[13] Pub. L. No. 95–511, 92 Stat. 1788, 50 U.S.C. § 1803. The Foreign Intelligence Surveillance Act of 1978 also established an appellate court called the Foreign Intelligence Surveillance Court of Review, which reviews certain FISA Court orders. *See id.* § 1803(b).

[14] 8 U.S.C. §1532(a). The U.S. Alien Terrorist Removal Court has yet to conduct any proceedings.

[1] U.S. CONST. art III, § 1.

[2] Article III judges hold their jobs during good behavior, a provision that has been interpreted to grant judges life tenure unless they resign voluntarily or are impeached. *See* ArtIII.S1.10.2.1 Overview of Good Behavior Clause. Article III judges also may not have their compensation reduced while on the bench. *See* ArtIII.S1.10.3.1 Historical Background on Compensation Clause. In addition, Article III judges must be appointed by the President with the advice and consent of the Senate. *See* ArtII.S2.C2.3.5 Appointments of Justices to the Supreme Court. For discussion of Congress's authority to establish Article III courts, see ArtIII.S1.8.1 Overview of Establishment of Article III Courts.

[3] *See, e.g.*, Act of September 29, 1789, ch. 24, 1 Stat. 95 (authorizing the executive branch to resolve disputes concerning military pensions); Act of September 1, 1789, ch. 11, 1 Stat. 55 (same for federal customs laws); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828) (upholding grant of admiralty jurisdiction to Florida territorial court).

[4] *See, e.g.*, Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring) (suggesting that another member of the panel believed the Court's cases on Article I courts to be "landmarks on a judicial 'darkling plain' where ignorant armies have clashed by night").

non-Article III courts to hear cases: (1) District of Columbia and territorial courts,[5] (2) military courts,[6] (3) courts hearing cases involving "public rights," which often arise between the government and private parties,[7] and (4) adjuncts to Article III courts.[8] Additionally, in some instances, non-Article III courts can hear certain matters based on the consent of the litigants.[9] The following essays first discuss Congress's authority to structure non-Article III courts and the Supreme Court's power to review such courts' decisions.[10] They then survey Supreme Court case law considering the different types of cases that may proceed in Article I courts.

ArtIII.S1.9.2 Congressional Power to Structure Legislative Courts

Article III, Section 1:

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

The issue of what matters Congress can entrust to Article I courts may raise important constitutional questions. The Supreme Court first distinguished between constitutional courts and legislative courts in its 1828 decision in *American Ins. Co. v. Canter*.[1] Justice Byron White later read *Canter* as raising the "simple" proposition that "[c]onstitutional courts exercise the judicial power described in Art. III of the Constitution; legislative courts do not and cannot."[2] A two-fold difficulty attended that proposition, however. First, the territorial court in *Canter* had issued a decision in admiralty, a subject specifically included within the grant of federal judicial power in Article III, raising the question of how a non-Article III court could receive and exercise that power.[3] Second, if territorial courts could not exercise Article III power, how could their decisions be subject to appellate review in the Supreme Court, or in any Article III court, which could exercise only Article III judicial power? Subsequent Supreme Court cases have clarified that Congress may in some cases allow non-Article III tribunals to hear matters that would fall within the scope of the federal judicial power, subject to appellate review by Article III courts.[4]

While Article I courts' jurisdiction may raise vexing legal questions, in other ways Congress enjoys ample authority to structure those courts. First, in creating legislative courts,

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[5] *See* ArtIII.S1.9.4 District of Columbia and Territorial Courts.

[6] *See* ArtIII.S1.9.5 Non-Article III Military Courts.

[7] *See* ArtIII.S1.9.6 Legislative Courts Adjudicating Public Rights.

[8] *See* ArtIII.S1.9.7 Article I Adjuncts to Article III Courts.

[9] *See* ArtIII.S1.9.9 Consent to Article I Court Jurisdiction.

[10] *See* ArtIII.S1.9.2 Congressional Power to Structure Legislative Courts.

[1] 26 U.S. (1 Pet.) 511 (1828).

[2] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 106 (1982) (White, J., dissenting).

[3] U.S. Const. art III, § 2.

[4] Years after *Canter*, in *Glidden Co. v. Zdanok*, Justice John Harlan asserted that Chief Justice John Marshall in *Canter* "did not mean to imply that the case heard by the Key West court was not one of admiralty jurisdiction otherwise properly justiciable in a Federal District Court sitting in one of the States. . . . All the Chief Justice meant . . . is that in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article." 370 U.S. 530, 544–45 (1962). For further discussion of when Congress can confer certain matters on Article I courts, see ArtIII.S1.9.4 District of Columbia and Territorial Courts; ArtIII.S1.9.5 Non-Article III Military Courts; ArtIII.S1.9.6 Legislative Courts Adjudicating Public Rights; ArtIII.S1.9.7 Article I Adjuncts to Article III Courts; ArtIII.S1.9.8 Bankruptcy Courts as Adjuncts to Article III Courts; ArtIII.S1.9.9 Consent to Article I Court Jurisdiction.

Congress is not limited by the provisions of Article III requiring that federal judges hold their offices during good behavior and prohibiting Congress from reducing their compensation.[5] Congress may limit tenure on an Article I tribunal to a term of years, as it has done in acts creating magistrate judgeships and the Tax Court.[6] It may also subject the judges of legislative courts to removal by the President[7] or reduce judges' salaries during their terms.[8]

In addition, Congress can vest in Article I courts nonjudicial functions of a legislative or advisory nature, meaning those courts may make rules or issue non-binding decisions.[9] And, while Congress cannot disturb final judgment of Article III courts, it can deprive legislative court judgments of finality.[10] Thus, in *Gordon v. United States*, the Court did not object to the power of the Secretary of the Treasury and Congress to revise or suspend the early judgments of the Court of Claims.[11] Likewise, in *United States v. Ferreira*, the Court sustained an act conferring on the Florida territorial court the non-judicial power to examine claims arising under the treaty with Spain and report its findings to the Secretary of the Treasury for subsequent action.[12]

ArtIII.S1.9.3 Supreme Court Review of Legislative Court Decisions

Article III, Section 1:

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

In *American Ins. Co. v. Canter*, the Supreme Court suggested that constitutional courts exercise the judicial power described in Article III of the Constitution, while legislative courts do not and cannot.[1] That proposition might be understood to mean that the judgments of legislative courts could never be reviewed by the Supreme Court or another Article III court.[2] However, the Court tacitly rejected that view in *De Groot v. United States*, taking jurisdiction to review a final judgment of the Court of Claims.[3]

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[5] *See* U.S. Const. art III, § 1; ArtIII.S1.10.2.1 Overview of Good Behavior Clause; ArtIII.S1.10.3.1 Historical Background on Compensation Clause.

[6] 28 U.S.C. § 631(e) ("The appointment of any individual as a full-time magistrate judge shall be for a term of eight years, and the appointment of any individuals as a part-time magistrate judge shall be for a term of four years[.]"); 26 U.S.C. § 7443 ("The term of office of any judge of the Tax Court shall expire 15 years after he takes office.").

[7] McAllister v. United States, 141 U.S. 174 (1891).

[8] United States v. Fisher, 109 U.S. 143 (1883); Williams v. United States, 289 U.S. 553 (1933).

[9] For discussion of the prohibition on Article III courts issuing advisory opinions, see ArtIII.S2.C1.4.1 Overview of Advisory Opinions.

[10] For discussion of the finality of judgments of Article III courts, see ArtIII.S1.5.2 Reopening Final Judicial Decisions.

[11] 69 U.S. (2 Wall.) 561 (1865).

[12] 54 U.S. (13 How.) 40 (1852).

[1] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 106 (1982) (White, J., dissenting) (discussing *Canter*, 26 U.S. (1 Pet.) 511 (1828)).

[2] Indeed, Chief Justice Roger B. Taney planned to express this view in *Gordon v. United States,* 69 U.S. (2 Wall.) 561 (1865). The opinion in *Gordon* was originally prepared by Chief Justice Roger B. Taney, but, following his death and reargument of the case, the Court issued the cited opinion. The Court later directed the publishing of Chief Justice Roger B. Taney's original opinion at 117 U.S. 697. *See also* United States v. Jones, 119 U.S. 477, 478 (1886) (noting that the official report of Chief Justice Samuel Chase's *Gordon* opinion and the Court's own record showed differences).

[3] 72 U.S. (5 Wall.) 419 (1867). *See also* United States v. Jones, 119 U.S. 477 (1886).

Since the decision in *De Groot*, the authority of the Court to exercise appellate jurisdiction over legislative courts has turned not upon the nature or status of such courts but rather upon the nature of the proceeding before the lower court and the finality of its judgment. The Supreme Court has declined to review the administrative proceedings of legislative courts or entertain appeals from the advisory or interlocutory decrees of such a body.[4] But, in proceedings before a legislative court that are judicial in nature, subject to final judgment, and involve the performance of judicial functions and therefore the exercise of judicial power, the Court has accepted appellate jurisdiction.[5]

ArtIII.S1.9.4 District of Columbia and Territorial Courts

Article III, Section 1:

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

Article IV of the Constitution empowers Congress to "make all needful Rules and Regulations respecting the territory or other Property belonging to the United States."[1] Congress has periodically invoked that authority to establish courts in U.S. territories. The Supreme Court's first opportunity to address the use of territorial courts came in the 1828 case *Florida in American Insurance Co. v. Canter*.[2] In *Canter*, the Court assessed the constitutionality of courts established in the territory of Florida. Challengers to the territorial court's jurisdiction argued that it could not properly hear cases arising under admiralty law, which instead must be heard in Article III courts.[3] Chief Justice John Marshall, writing for the Court, disagreed, explaining that territorial courts "are not constitutional courts, in which the judicial power conferred by the constitution on the general government, can be deposited. They are incapable of receiving it." Instead, the Florida courts were "created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States." Thus, he held, the courts' jurisdiction "is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States."[4] The Court noted that while, in the states, admiralty jurisdiction can be exercised only in courts established pursuant to Article III, the same limitation does not apply to the territorial courts, for "[i]n legislating for them Congress exercises the combined powers of the general, and of a state government."[5] Florida's territorial courts were abolished when the

[4] *E.g.*, Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693 (1927); Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930); D. C. Court of Appeals v. Feldman, 460 U.S. 462 (1983). *See* Glidden Co. v. Zdanok, 370 U.S. 530, 576, 577–579 (1962).

[5] Pope v. United States, 323 U.S. 1, 14 (1944); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983); Ortiz v. United States, 138 S. Ct. 2165 (2018).

[1] U.S. Const. art. IV, § 3, cl. 2.

[2] 26 U.S. (1 Pet.) 511 (1828).

[3] Judges of these courts did not enjoy life tenure, but instead sat for four-year terms. *Id.* at 512.

[4] *Id.* at 546.

[5] *Id.*

territory became a state. Currently, the district courts in the federal territories of Guam,[6] the Virgin Islands,[7] and the Northern Mariana Islands[8] are legislative courts.[9]

A similar constitutional authority allows Congress to establish courts in the District of Columbia. Under Article I, Congress has the authority to "exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia.[10] A series of early Supreme Court decisions treated the District of Columbia courts as legislative courts upon which Congress could impose nonjudicial functions. In *Butterworth v. United States ex rel. Hoe*, the Court sustained an act of Congress that conferred revisory powers upon the Supreme Court of the District of Columbia in patent appeals and made its decisions binding upon the Commissioner of Patents.[11] The Court later sustained the authority of Congress to vest revisory powers in the same court over rates fixed by a public utilities commission[12] and orders of the *Federal Radio Commission*.[13] Those rulings were based on the assumption, express or implied, that the courts of the District were legislative courts, created by Congress pursuant to its plenary power to govern the District of Columbia. Similarly, in dictum in *Ex parte Bakelite Corp.*, while reviewing the history and analyzing the nature of the legislative courts, the Court stated that the courts of the District were legislative courts.[14]

In the 1933 case *O'Donoghue v. United States*, the Court departed from its prior statements on the subject and held that the courts of the District of Columbia were constitutional courts exercising the judicial power of the United States.[15] Thus, the Court concluded, a federal law seeking to reduce judicial salaries could not apply to judges on the Supreme Court of the District of Columbia and the District of Columbia Court of Appeals. Having decided that the D.C. courts were Article III courts, the Supreme Court had to reconcile the fact that such courts performed nonjudicial functions with the rule that constitutional courts can exercise only the judicial power of the United States. The Court did so by holding that, in establishing courts for the District, Congress performs dual functions pursuant to two distinct powers: its power to constitute tribunals inferior to the Supreme Court, and its plenary and exclusive power to legislate for the District of Columbia. The Court held that Article III, Section 1, limits the latter power with respect to tenure and compensation but not with respect to vesting legislative and administrative powers in such courts. Subject to the guarantees of personal liberty in the Constitution, the Court concluded, "Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a state legislature has in conferring jurisdiction on its courts."[16]

At the time the Court decided *O'Donoghue*, the D.C. courts had both local jurisdiction over District matters, similar to that of state courts, and also federal jurisdiction equivalent to that of other inferior federal courts. In 1970, Congress replaced the previous D.C. court system with two sets of courts: federal courts created pursuant to Article III (the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia), and local

[6] 48 U.S.C. § 1424, 1424b.

[7] 48 U.S.C. § 1611, 1614.

[8] 48 U.S.C. § 1821.

[9] The federal district court in Puerto Rico is an Article III court. *See* 28 U.SC. § 119.

[10] U.S. Const. art. I, § 8, cl. 17.

[11] 112 U.S. 50 (1884).

[12] Keller v. Potomac Elec. Co., 261 U.S. 428 (1923).

[13] Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930).

[14] 279 U.S. 438, 450–455 (1929).

[15] 289 U.S. 516, 551 (1933).

[16] *Id.* at 545.

courts similar to state and territorial courts, created pursuant to Article I (including the District of Columbia Court of Appeals).[17] In *Palmore v. United States*, a criminal defendant challenged the constitutionality of the District's Article I courts, arguing that charges under the D.C. criminal code amounted to a prosecution under federal law, and he was therefore entitled to consideration before an Article III court.[18] The Supreme Court rejected the argument, explaining that it was not necessary that every proceeding involving an act of Congress or a law made under its authority be conducted in an Article III court. State courts, after all, could hear cases involving federal law, as could territorial and military courts. Thus, "the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment."[19]

ArtIII.S1.9.5 Non-Article III Military Courts

Article III, Section 1:

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

Article I grants Congress the authority "[t]o make Rules for the Government and Regulation of the land and naval forces."[1] In the 1858 case *Dynes v. Hoover*, the Supreme Court upheld the use of this authority to create military courts.[2] In that case, the Court observed that "Congress has the power to provide for the trial and punishment of the military and naval offences," and that power "is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, . . . the two powers are entirely independent of each other."[3]

Although Congress has broad authority to create and implement military courts, the Supreme Court has set some substantive limits on those courts' jurisdiction. For instance, military courts cannot be used to try civilians,[4] including the spouses of military members.[5] Additionally, the Court has held that military courts have jurisdiction over members of the military only when they are still in service.[6] However, military courts are able to try non-service related crimes while the defendant is still in the service.[7] Currently, the U.S. Court of Appeals for the Armed Forces, an Article I court, sits at the apex of the military justice system.[8] Judges of that court sit for fifteen-year terms and can be removed by the President for

[17] Pub. L. No. 91–358, 84 Stat. 475, D.C. Code § 11–101.

[18] 411 U.S. 389 (1973).

[19] *Id.* at 407–08.

[1] U.S. CONST. art. I, § 8, cl. 14.

[2] 61 U.S. (20 How.) 65, 79 (1857).

[3] *Id.*

[4] *Ex parte* Milligan, 71 U.S. 2, 121–22 (1867).

[5] Reid v. Covert, 354 U.S. 1, 30 (1957); *see also* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 249 (1960).

[6] United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 14–15 (1955). *But see* 10 U.S.C. § 802(a).

[7] Solorio v. United States, 483 U.S. 435, 450–51 (1987).

[8] 10 U.S.C. § 941.

neglect of duty, misconduct, or mental or physical disability. Another example of military courts are the military tribunals established by President George W. Bush by Executive Order shortly after the September 11, 2001, attacks.[9]

ArtIII.S1.9.6 Legislative Courts Adjudicating Public Rights

Article III, Section 1:

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

The Supreme Court has held that Article I courts can adjudicate cases involving "public rights"—cases that arise between a private actor and the government. The public rights theory can be traced back to the Court's 1855 ruling in *Murray's Lessee v. Hoboken Land & Improvement Co.*[1] In that case, Justice Joseph Story explained that, although Congress cannot withdraw from federal courts the jurisdiction to hear suits at common law, equity, or admiralty, "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."[2] In essence, the Court distinguished between matters that historically had been decided by courts and matters that arose between the government and others and had been historically resolved by executive or legislative acts. Thus, under *Murray's Lessee*, certain matters arising between the government and others that might be susceptible to judicial determination may also be referred to Article I courts. Congress does not have sole discretion to determine what matters fall within that class. In subsequent cases, the Court has held that matters susceptible of judicial determination, but not requiring it, include claims against the United States;[3] the disposal of public lands and claims arising therefrom;[4] questions concerning membership in Indian tribes;[5] and questions arising out of the administration of the customs and internal revenue laws.[6] Courts such as consular courts and military courts martial may be justified on similar grounds.[7]

The Supreme Court has offered several rationales for why public rights cases can be handled in Article I courts. The first is based on the doctrine of sovereign immunity and postulates that, because Congress need not allow suits against the government at all, the

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[9] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 13, 2001).

[1] 59 U.S. (18 How.) 272 (1855).

[2] *Id.* at 284.

[3] Gordon v. United States, 117 U.S. 697 (1865) (published 1885); McElrath v. United States, 102 U.S. 426 (1880); Williams v. United States, 289 U.S. 553 (1933). On the status of the then-existing Court of Claims, see Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

[4] United States v. Coe, 155 U.S. 76 (1894) (Court of Private Land Claims).

[5] Wallace v. Adams, 204 U.S. 415 (1907); Stephens v. Cherokee Nation, 174 U.S. 445 (1899) (Choctaw and Chickasaw Citizenship Court).

[6] Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929); *Ex parte* Bakelite Corp., 279 U.S. 438 (1929).

[7] *See In re* Ross, 140 U.S. 453 (1891) (consular courts in foreign countries). Military courts may, on the other hand, be a separate entity of the military having no connection to Article III. Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1858). *But cf.* Ortiz v. United States, 138 S. Ct. 2165, 2168 (2018) (noting that the essential character of the military justice system is, "in a word, judicial"). For additional discussion of military courts, see ArtIII.S1.9.5 Non-Article III Military Courts.

legislature is free to attach conditions to the federal government being sued, including what type of forum the claims can be brought in.[8] The second major rationale is that, historically, these cases were conclusively determined by the Executive and Legislative Branches, "and that as a result there can be no constitutional objection to Congress's employing the less drastic expedient of committing their determination to a legislative court or an administrative agency."[9]

As a general matter, the Court has broadly defined public rights cases as those that arise "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[10] At the core of the public rights doctrine are cases involving claims for benefits against the government.[11] Private rights cases, by contrast, pertain to the "liability of one individual to another under the law as defined."[12] Beyond these general definitions, the Supreme Court has not articulated the exact parameters of the public rights doctrine. As Chief Justice John Roberts has noted, "our discussion of the public rights exception . . . has not been entirely consistent, and the exception has been the subject of some debate."[13] However, a series of Supreme Court cases have attempted to draw the line between public and private rights.

In 1932, in *Crowell v. Benson*, the Court approved an administrative scheme for evaluating maritime employee compensation claims, subject to judicial review, although the case involved a matter of private right.[14] The scheme was permissible, the Court said, because in cases arising out of congressional statutes, an administrative tribunal could make findings of fact and render an initial decision on legal and constitutional questions, as long as there was adequate review in a constitutional court.[15] The "essential attributes" of decisions must remain in an Article III court, but so long as they do, Congress may use administrative decisionmakers in those private rights cases that arise in the context of a comprehensive federal statutory scheme.[16]

In the 1982 case *Northern Pipeline Const. Co. v. Marathon Pipeline Co.*, the Court addressed whether Article I bankruptcy courts could adjudicate common law contract and tort claims.[17] Acknowledging that the "distinction between public and private rights has not been definitely explained" in the Court's precedents, Justice William J. Brennan, writing for a plurality of the Court, traced three historical exceptions to the literal command of Article III: territorial courts, military courts, and courts and agencies that adjudicate public rights.[18]

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[8] Northern Pipeline Constr. Co v. Marathon Pipe Line Co., 458 U.S. 50, 67 (1981)

[9] *Ex Parte* Bakelite, 279 U.S. 438, 451 (1929) ("The mode of determining [public rights cases] . . . is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals."). Although Congress has generally employed some level of judicial review for public rights cases, it is generally accepted that this is not constitutionally required. *See id.* at 451; *Northern Pipeline*, 458 U.S. at 68 n.20; Crowell v. Benson, 285 U.S. 22, 50–51 (1932).

[10] *Crowell*, 285 U.S. at 50.

[11] For example, the U.S. Tax Court is an Article I court that resolves disputes between taxpayers and the government. Although judges of the Tax Court exercise the "judicial power" of the United States, its judges do not enjoy life tenure, but rather sit for fifteen-year terms. And, unlike Article III judges who are subject to removal only through impeachment, Tax Court judges can be removed by the President for "inefficiency, neglect of duty, or malfeasance in office[.]" 26 U.S.C. §§ 7441–7443.

[12] *Crowell*, 285 U.S. at 51.

[13] Stern v. Marshall, 131 S. Ct. 2594, 2611 (2011).

[14] 285 U.S. 22.

[15] *Id.* at 51–65.

[16] *Id.* at 50, 51, 58–63. For additional discussion of *Crowell*, see ArtIII.S1.9.7 Article I Adjuncts to Article III Courts.

[17] 458 U.S. 50 (1981).

[18] *Id.* at 69–70.

Disposing of the first two categories as clearly inapplicable, the plurality also rejected the public rights argument as the underlying case did not arise between government and a private party, but involved a state-created claim between two private parties.[19]

In two cases following *Northern Pipeline*, the Court rejected a bright line test for the distinction between public and private rights. It instead focused on substance—that is, on the extent to which a particular grant of jurisdiction to an Article I court threatened judicial integrity and separation of powers principles. First, in *Thomas v. Union Carbide Agricultural Products Co.*, the Court adopted a functional approach for determining when Congress may use non-Article III forums.[20] The statute in question created a system of binding arbitration, subject to limited judicial review, for determining the amount of compensation due to pesticide manufacturers whose data had been used by other manufacturers to register their products.[21] Justice Sandra Day O'Connor, writing for the majority, asserted that "substance rather than doctrinaire reliance on formal categories should inform application of Article III."[22] Because the arbitration scheme (1) was created by federal statute, (2) was a "pragmatic solution to the difficult problem of spreading [ ] costs," and (3) did not "preclude review of the arbitration proceeding by an Article III court," the Court found that it "did not threaten the independent role the Judiciary in our constitutional scheme."[23] Two years later, in *Commodity Futures Trading Commission (CFTC) v. Schor*, the Court reaffirmed *Thomas's* functional approach and held that the CFTC was empowered to hear common law counterclaims related to violations of the Commodities Exchange Act or CFTC regulations.[24]

In a subsequent case, *Granfinanciera, S.A. v. Nordberg*, the Court held that the distinction between public and private rights determined both whether a matter could be referred to a non-Article III tribunal and whether Congress could dispense with a civil jury trial.[25] *Granfinanciera* suggests that seemingly private causes of action between private parties will also be deemed public rights when Congress, acting for a valid legislative purpose pursuant to its Article I powers, fashions a cause of action that is analogous to a common law claim and integrates it so closely into a public regulatory scheme that it becomes a matter appropriate for agency resolution with limited involvement by the Article III Judiciary.[26]

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[19] *Id.* at 71

[20] 473 U.S. 568 (1984).

[21] *Id.* at 573–74.

[22] *Id.* at 587.

[23] *Id.* at 590.

[24] 478 U.S. 833, 857 (1986). In *Schor*, the Court described several non-determinative factors for assessing whether the adjudication of traditional Article III cases in a non-Article III forum threatens the institutional integrity of the judicial branch: (1) the "extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts," (2) "the origins and importance of the right to be adjudicated"; and (3) "the concerns that drove Congress to depart from the requirements of Article III." *Id.* at 851.

[25] 492 U.S. 33, 51–55 (1989). While *Granfinanciera* was a Seventh Amendment jury-trial case, the decision is relevant to the Article III issue as well because, as the Court made clear, whether Congress can submit a legal issue to an Article I tribunal and whether it can dispense with a civil jury on that legal issue must be answered by the same analysis. *Id.* at 52–53 ("[T]he question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal.") *See also* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1379 (2018) ("This Court's precedents establish that, when Congress properly assigns a matter to adjudication in a non-Article III tribunal, 'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.'" (quoting *Granfinanciera*, 492 U.S. at 53–54)).

[26] 492 U.S. at 52–54. The Court reiterated that the government need not be a party as a prerequisite to a matter being of public right. *Id.* at 54. Concurring, Justice Antonin Scalia argued that public rights historically were and

In the 2011 case *Stern v. Marshall*, the Court shifted away from the functionalism of *Thomas* and *Schor* and back towards the formalism of *Northern Pipeline*.[27] In *Stern*, the issue was whether a bankruptcy court could adjudicate a common law claim for fraudulent interference with a gift. In a 5-4 decision authored by Chief Justice John Roberts, the Court held that Article III prohibited the bankruptcy court's exercise of jurisdiction because the common law claim did not fall under the public rights exception. The Court acknowledged that *Thomas* and *Schor* had declined to limit the public rights exception to actions involving the government as a party, but it concluded that the Court had continued to limit the exception to claims deriving from a "federal regulatory scheme" or in which "an expert Government agency is deemed essential to a limited regulatory objective."[28] In rejecting applying the public rights exception to the fraudulent interference counterclaim, the Court observed that the claim was not one that could be "pursued only by grace of the other branches" or could have been "determined exclusively" by the Executive or Legislative Branches.[29] Additionally, the underlying claim did not "flow from a federal regulatory scheme" and was not limited to a "particularized area of law."[30] Because the counterclaim involved the "most prototypical exercise of judicial power," adjudication of a common law cause of action not created by federal law, the Court rejected the bankruptcy courts' exercise of jurisdiction over the counterclaim as a breach of Article III.[31]

Subsequently, in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, the Court noted that it has not "definitively explained" the distinction between public and private rights, and its precedents applying the public-rights doctrine have "not been entirely consistent."[32] The Court observed, however, that its "precedents have given Congress significant latitude to assign adjudication of public rights to entities other than Article III courts."[33] In *Oil States*, the Court addressed whether inter partes review, a type of patent validity proceeding conducted by the U.S. Patent and Trademark Office (PTO), violates Article III. The Court held that such proceedings "fall[ ] squarely within the public-rights doctrine" and therefore could constitutionally be conducted by a non-Article III tribunal.[34] In so holding, the Court described the public-rights doctrine as "cover[ing] matters 'which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.'"[35]

ArtIII.S1.9.7 Article I Adjuncts to Article III Courts

Article III, Section 1:

> *The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and*

should remain only those matters to which the Federal Government is a party. *Id.* at 65. *See also* Stern v. Marshall, 564 U.S. 462, 490–91 (2011) ("[W]hat makes a right 'public' rather than private is that the right is integrally related to particular Federal Government action").

[27] 564 U.S. 462.

[28] *Id.* at 490.

[29] *Id.* at 493.

[30] *Id.*

[31] *Id.* at 494.

[32] 138 S. Ct. 1365, 1373 (2018) (additional citations omitted).

[33] *Id.*

[34] *Id.*

[35] *Id.*

shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The Supreme Court has held that Congress may create non-Article III forums where "adjuncts" to Article III courts adjudicate federal questions.[1] An "adjunct" is an adjudicator—most commonly an administrative agency or a magistrate judge—that does not function as an independent court but instead acts as a subordinate to the federal courts. Adjuncts have become highly important in the modern era, handling many cases involving public benefits and assisting Article III judges with their heavy caseload.

Support for the adjunct theory can be traced to the 1932 case *Crowell v. Benson*.[2] *Crowell* involved a challenge to the Longshoreman's and Harbor Workers' Compensation Act, which required that claims for injuries sustained while working on the navigable waters of the United States be filed with the U.S. Employees' Compensation Commission.[3] That agency was to conduct fact-finding and make initial findings of law.[4] An employer appealed an award of damages by the Commission, claiming that the grant of jurisdiction to the Commission violated Article III. In upholding the act, the Supreme Court delineated the proper role of the use of adjuncts in relation to Article III courts. The Court observed that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges."[5] Instead, an adjunct may make findings of fact and initial legal determinations, but questions of law must be subject to de novo review in an Article III court.[6] Questions of jurisdictional fact—that is, facts that pertain to the jurisdiction of the agency itself—and constitutional fact are also subject to a more searching review by a constitutional court.[7] In sum, *Crowell* instructs that for Article III courts to retain the "essential attributes of the judicial power," adjuncts must act as subordinates to the Article III courts and not as independent adjudicators.

The framework established in *Crowell* provided the blueprint for the modern administrative state, starting with the New Deal and expanding throughout the twentieth and twenty-first centuries.[8] Administrative agencies perform a host of functions including making policy, promulgating rules, and adjudicating questions arising under federal law.[9] Many disputes that come before federal agencies concern public rights cases, with a large share of cases concerning the right to various government entitlements. For instance, the Social Security Administration (SSA), a federal agency that administers various government benefits including old age and disability benefits, has a complex adjudication process for determining who is entitled to these benefits, including several tiers of administrative review and review by both a federal district court and a circuit court of appeal.[10] Judicial review of SSA decisions

[1] Subject to the limitations discussed below, Congress may assign matters to adjuncts even when one of the three historical exceptions allowing assignment of a matter to a non-Article III tribunal is not applicable.

[2] 285 U.S. 22 (1932).

[3] *Id.* at 36–37.

[4] *Id.* at 54.

[5] *Id.* at 51.

[6] *Id.*

[7] *Id.* at 54–57.

[8] *See* Richard H. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 925 (1988).

[9] *See* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L. J. 233, 264 (1990).

[10] 42 U.S.C. § 405(g) ("Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action . . . brought in [a] district court of the United States. . . . The judgment of the court shall be final except that it shall be subject to review in the

closely follows the *Crowell* model: while factual findings made by an administrative law judge are subject to the highly deferential "substantial evidence" standard,[11] legal determinations "receive no deference" from either the district court or court of appeals.[12] While administrative law judges do not receive constitutionally protected life tenure or salary protection, there are statutory protections regarding their appointment, tenure, and compensation.

The second major subcategory of adjuncts is federal magistrate judges. In 1968, Congress enacted the Federal Magistrates Act, seeking to "reform the first echelon of the Federal Judiciary into an effective component of a modern scheme of justice by establishing a system of U.S. magistrates."[13] Magistrate judges are not appointed and confirmed like Article III judges and do not enjoy life tenure and salary protection. Instead, they are selected by district court judges and can be removed for good cause or if the Judicial Conference "determines that the services performed by his office are no longer needed."[14] Initially, magistrate judges were assigned a somewhat circumscribed role but, over the last several decades, Congress has expanded the role of magistrate judges to include the power to decide various motions, hear evidence, and try both criminal and civil cases. With the ever-burgeoning federal docket, magistrate judges have been deemed "nothing less than indispensable" in the federal judicial process.[15]

The Supreme Court's first occasion to consider the Magistrates Act came in *Wingo v. Wedding*.[16] In that case, the Court addressed whether the act permitted magistrate judges to hold evidentiary hearings in habeas corpus proceedings without the defendant's consent. The Court construed the statute to avoid potential Article III problems by interpreting the term "additional duties" in the act to not include the authority of a magistrate to hold evidentiary hearings, but instead allowing the magistrate simply to propose to the district court judge whether such a hearing should be held.[17] Two years later in *Mathews v. Weber*, the Court was tasked with interpreting whether "additional duties" could be read to permit referral of Social Security benefit cases to magistrate judges for preliminary review of the administrative record and preparation of a recommended ruling.[18] While the Court again avoided the potential Article III issues, it echoed the adjunct theory by observing that a district judge is free to follow or wholly reject a magistrate's recommendation and that the "authority—and the responsibility—to make informed, final determination . . . remains with the judge."[19] As a statutory matter, because the district judge was still free to follow or wholly ignore the magistrate's recommendation, the Court upheld the magistrate's "preliminary-review function" as one of the "additional duties" permitted under the act.[20]

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same manner as a judgment in other civil actions."); 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States.").

[11] 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive.").

[12] *See, e.g.*, Hickman v. Bowman, 803 F.2d 1377, 1380 (5th Cir. 1986); Foster v. Astrue, 548 F. Supp. 2d 667, 668 (E.D. Wis. 2008).

[13] Federal Magistrates Act, P.L. 90–578, 82 Stat. 1107; Mathews v. Weber, 423 U.S. 261 (quoting S. Rpt. 371, 90th Cong., 1st Sess., 8 (1967)).

[14] 28 U.S.C. § 631.

[15] Government of Virgin Islands v. Williams, 892 F.2d 305, 308 (3d Cir. 1989).

[16] 418 U.S. 461 (1974).

[17] *Id.* at 472.

[18] 423 U.S. 261, 271 (1975).

[19] *Id.* at 271.

[20] *Id.* at 271–72.

In the 1980 case *United States v. Raddatz*, the Court finally addressed head-on the unresolved constitutional questions surrounding the Magistrates Act.[21] In *Raddatz*, a defendant challenged magistrates' statutory and constitutional authority to hear motions to suppress evidence in a criminal proceeding. Under the Act, magistrate judges could "hear and determine" any pretrial matter before the court, except for certain motions including motions to suppress evidence in criminal cases.[22] For those excluded motions, the district court judge could "designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition" of the motions.[23] If either party objected to the proposed findings or recommendations, the district court judge was then required to make a "de novo determination" of the issues and could "accept, reject, or modify, in whole or in part, the findings or recommendations of the magistrate."[24] The defendant in *Raddatz* contended that these provisions required the district court judge to rehear the testimony on which the magistrate based his findings. The Court rejected that argument, holding that the district court need only make a de novo determination of the disputed findings and recommendations and not hold a de novo hearing.[25] With respect to the Article III challenge, the Court upheld the act, observing that the "ultimate decision" is reserved for the district court judge and that magistrates "are constantly subject to the court's control."[26]

Congress amended the Magistrates Act in 1979, further enlarging and clarifying magistrates' authority.[27] Under the new statute, upon designation by the district court judge and with consent of the parties, magistrate judges were authorized to preside over and enter final judgments in civil trials, including jury trials and misdemeanor criminal prosecutions.[28]

In *Gomez v. United States*, the Court addressed whether overseeing the selection of jurors in a felony criminal prosecution was among the "additional duties" envisioned in the Act.[29] The defendant in that case objected to the assignment of a magistrate judge both the before and after the magistrate judge selected the jury.[30] The Court agreed, and held that the Magistrates Act did not permit such an assignment. Applying the constitutional avoidance doctrine,[31] the Court focused on the statutory question of whether Congress would have intended magistrates to oversee this "critical stage of the criminal proceeding."[32] Speaking for a unanimous Court, Justice John Paul Stevens noted that, while a literal reading of the additional duties provision would allow magistrates to oversee felony trials, the "carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial."[33] Ultimately, the Court held that the

[21] 447 U.S. 667 (1980).

[22] *See* 28 U.S.C. § 636(b)(1)(A).

[23] *Id.* § 636(b)(1)(B).

[24] *Id.*

[25] *Raddatz*, 447 U.S. at 676.

[26] *Id.* at 682–83.

[27] Federal Magistrate Act of 1979, P.L. 96–82, 93 Stat. 643.

[28] 93 Stat. 643, 643–46. For discussion of the role of party consent to non-Article III courts' jurisdiction, see ArtIII.S1.9.9 Consent to Article I Court Jurisdiction.

[29] 490 U.S. 858 (1989).

[30] *Id.* at 860–61.

[31] For additional discussion of the constitutional avoidance doctrine, see ArtIII.S2.C1.10.1 Overview of Constitutional Avoidance Doctrine.

[32] *Gomez*, 490 U.S. at 873.

[33] *Id.* at 872.

"absence of a specific reference to jury selection in the statute, or, indeed, in the legislative history, persuades us that Congress did not intend the additional duties clause to embrace this function."[34]

ArtIII.S1.9.8 Bankruptcy Courts as Adjuncts to Article III Courts

Article III, Section 1:

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

In 1978, Congress revised the Bankruptcy Act and created bankruptcy courts as adjuncts of the district courts.[1] The courts were composed of judges vested with practically all the judicial power of the United States; however, the judges served for fourteen-year terms, subject to removal for cause by the judicial councils of the circuits, and with salaries subject to statutory change. The bankruptcy courts were given jurisdiction over not only civil proceedings arising under the bankruptcy code, but also all other proceedings arising in or related to bankruptcy cases. Review was available in Article III courts, but decisions could be reversed only if clearly erroneous.

This broad grant of jurisdiction brought into question what kinds of cases could be heard by an Article I court. In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, a plurality of the Supreme Court held that the conferral of jurisdiction upon Article I judges to hear state claims regarding traditional common law actions was unconstitutional.[2] In a narrow holding, a plurality of the Court sought to rationalize and limit the Court's jurisprudence on Article I courts. According to the plurality, a fundamental principle of separation of powers requires the judicial power of the United States to be exercised by courts having the attributes prescribed in Article III. Congress may not evade the constitutional order by allocating judicial power to courts whose judges lack security of tenure and compensation. Only in three narrowly circumscribed instances may judicial power be distributed outside the Article III framework: in territories and the District of Columbia; courts-martial; and the adjudication of public rights.[3] In bankruptcy litigation not involving any of these exceptions, the plurality concluded, the judicial power cases could not be assigned to the tribunals created by the Act.[4]

The lack of a majority in *Northern Pipeline* left unclear the degree of discretion left in Congress to restructure the bankruptcy courts and placed in question the constitutionality of other legislative efforts to establish non-Article III tribunals. Congress responded to *Northern Pipeline* by enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984.[5] Under

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[34] *Id.* at 875–76. Importantly, in *Gomez*, the defendant had not given consent to the magistrate to select the jury, illustrating the limits of the adjunct theory when consent is withheld.

[1] Bankruptcy Act of 1978, Pub. L. No. 95–598, 92 Stat. 2549, *codified in* titles 11, 28. The bankruptcy courts were made adjuncts of the district courts by § 201(a), 28 U.S.C. § 151(a).

[2] 458 U.S. 50 (1982) (plurality opinion).

[3] *Id.* at 63–76.

[4] The plurality also rejected an alternative contention that, as adjuncts of the district courts, the bankruptcy courts were like United States magistrates or the agencies approved in *Crowell v. Benson,* 285 U.S. 22 (1932), to which could be assigned fact-finding functions subject to review in Article III courts. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76–86 (1982). According to the plurality, the act vested too much judicial power in the bankruptcy courts to treat them like agencies, and it limited review by Article III courts too much.

[5] Pub. L. No. 98–353, 98 Stat. 333; 28 U.S.C. §§ 151 *et seq*.

the Act, bankruptcy courts remained as Article I entities, and overall their powers as courts were not notably diminished. However, Congress established a division between core proceedings, which could be heard and determined by bankruptcy courts, subject to lenient review, and other proceedings, which, though initially heard and decided by bankruptcy courts, could be reviewed de novo in the district court at the behest of any party, unless the parties consented to bankruptcy court jurisdiction. A safety valve was included, permitting the district court to withdraw any proceeding from the bankruptcy court on cause shown.[6]

In *Granfinanciera, S.A. v. Nordberg*, the Court considered whether a jury trial was required under the Seventh Amendment for a claim by a Chapter 11 bankruptcy trustee to void an allegedly fraudulent money transfer.[7] The Court found that the cause of action was founded on state law and, although denominated a core proceeding by Congress, was actually a private right.[8] Similarly, the Court in *Stern v. Marshall* held that a counterclaim of tortious interference with a gift, although made during a bankruptcy proceeding and statutorily deemed a core proceeding, was a state common law claim that did not fall under any of the public rights exceptions.[9] By contrast, in *Executive Benefits Ins. Agency v. Arkison*, the Court held that when the Constitution does not permit a bankruptcy court to enter final judgment on a bankruptcy-related claim, both the statute and the Constitution are satisfied if the bankruptcy court treats the matter as a non-core claim and issues proposed findings of fact and conclusions of law to be reviewed de novo by the district court.[10] And, as the Court later held in *Wellness International v. Sharif*, a bankruptcy court may adjudicate with finality a so-called *Stern* claim—that is, a core claim that does not fall within the public rights exception—if the parties have provided knowing and voluntary consent.[11]

ArtIII.S1.9.9 Consent to Article I Court Jurisdiction

Article III, Section 1:

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

Congress has from time to time enacted legislation allowing non-Article III courts to adjudicate matters that would ordinarily proceed in Article III court based on the parties' consent.[1] The Supreme Court has upheld some such arrangements, but at times has invalidated them on separation of powers grounds.

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[6] *See* 28 U.S.C. § 157.

[7] 492 U.S. 33 (1989).

[8] *Id.* at 55.

[9] 564 U.S. 462 (2011).

[10] 573 U.S. 25 (2014).

[11] 575 U.S. 665 (2015). For additional discussion of the role of consent in determining which claims legislative courts can hear, see ArtIII.S1.9.9 Consent to Article I Court Jurisdiction.

[1] For example, under the Federal Magistrates Act, upon the consent of the parties, a magistrate judge "may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case." *See* 28 U.S.C. § 636(c)(1). Pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984, a district court, with the "consent of all parties to the proceeding," is permitted to refer a "proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments." *See* 28 U.S.C. § 157(c)(2). Other federal laws may provide for arbitration over discrete legal issues to occur based on the consent of the parties involved. *See, e.g.*, 42 U.S.C. § 4083(a).

The Supreme Court has identified two distinct rationales for the constitutional limitations on the creation of non-Article III tribunals. First, the Court has noted that Article III provides a personal right to individual litigants, preserving "their interest in an impartial and independent federal adjudication of claims."[2] Second, the Court has held that Article III safeguards structural principles, preserving the "role of the Judicial Branch" in our system of government by preventing Congress from transferring jurisdiction to non-Article III tribunals en-masse.[3] The Court has explained that, while individual rights can be waived, "notions of consent and waiver cannot be dispositive" with respect to Article III's structural protections because those "limitations serve institutional interests that the parties cannot be expected to protect"—separation of powers principles protecting the Judicial Branch from encroachment by the political branches.[4] When examining the structural component of Article III protections in consent cases, the Court has assessed the constitutionality of different judicial schemes using ad hoc balancing tests that rely on seemingly disparate principles, leaving open questions about when Congress can provide an alternative forum to an Article III court in which consenting parties can resolve their disputes.[5]

For example, in *Commodities Futures Trading Commission (CFTC) v. Schor*, the Supreme Court, in assessing the structural component of Article III's constitutional protections, rested its decision primarily on the breadth of matters adjudicated by the non-Article III tribunal at issue in that case.[6] Specifically, the Court upheld a law that allowed the CFTC to adjudicate common law claims that were "incidental to" and "completely dependent upon adjudication by the Commission of [public rights] claims created by federal law" and arose "out of the same transaction or occurrence" as the federal law claim.[7] For the Court, allowing an administrative agency to adjudicate such a "narrow class of common law claims" amounted to only a de minimis intrusion on the Judicial Branch.[8] Nonetheless, in noting the narrow nature of its holding, the *Schor* Court emphasized that Congress could not "create[ ] a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control and without evidence of valid and specific legislative necessities," even if parties consented to adjudicate before such a forum.[9]

Five years later, in *Peretz v. United States*, the Court approached the issue of Article III's structural protections in a slightly different manner.[10] In *Peretz*, a criminal defendant who had failed to demand the presence of an Article III judge during the selection of his jury argued that having a magistrate judge oversee voir dire proceedings implicated the structural protections provided by Article III.[11] As in *Schor*, the Court rejected the idea that a judicial scheme granting a legislative court responsibilities traditionally exercised by a constitutional court ran counter to the institutional interests preserved by Article III.[12] But, while the Court in *Schor* focused on the narrow nature of the claims adjudicated by administrative agency in that

[2] Commodities Future Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986).

[3] *Id.* (quoting National Insurance Co. v. Tidewater Co., 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)).

[4] *Id.* at 851. Indeed, the Supreme Court has likened the structural protections provided by Article III, §1 to the limits on the subject-matter jurisdiction of a federal court imposed by Section 2 of Article III, which cannot be waived through consent. *Id.* at 850–51

[5] *Id.* at 848–49; *see also* Peretz v. United States, 501 U.S. at 930 (1991).

[6] 478 U.S. 833.

[7] *Id.* at 856.

[8] *Id.*

[9] *Id.* at 855.

[10] 501 U.S. at 930.

[11] *Id.* at 937.

[12] *Id.*

case, the Court in *Peretz* focused on the degree of control exercised by a constitutional court over the non-Article III court's work. The Court held that, "[b]ecause 'the entire [jury selection] process takes place under the district court's total control and jurisdiction,' there is no danger that use of the magistrate involves a 'congressional attempt'" to undermine the power of constitutional courts.[13]

In *Stern v, Marshall*, the Supreme Court held that the Bankruptcy Court lacked authority to enter judgment on a common law tort counterclaim.[14] The Court held that the parties had consented to having the Bankruptcy Court hear the counterclaim, but while such consent satisfied the requirements of the relevant statute, it could not overcome applicable constitutional limits.[15] In the wake of *Stern*, questions arose about the constitutionality of allowing consenting parties to proceed before a non-Article III court. In the 2015 case *Wellness International v. Sharif*, the Court held that Article III permits bankruptcy courts to adjudicate with finality *Stern* claims—claims designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter—if the parties have provided knowing and voluntary consent.[16] In so holding, the Court used the ad hoc balancing test from *Schor* and *Peretz* to conclude that allowing bankruptcy courts to decide *Stern* claims by consent would not "impermissibly threaten the institutional integrity of the Judicial Branch."[17] Following *Wellness International*, questions remain about the exact scope of Congress's power to authorize non-Article III adjudication by litigant consent, but it appears that legislation that allows a relatively narrow class of claims to be adjudicated before a non-Article III tribunal with the parties' consent and provides Article III courts with some oversight of the legislative court's activities is likely to pass constitutional muster.

ArtIII.S1.10 Federal Judiciary Protections

ArtIII.S1.10.1 Overview of Federal Judiciary Protections

Article III, Section 1:

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

The Framers of the Constitution established the Federal Judiciary as an independent branch of government, alongside the Executive and Legislative Branches. While the Framers generally sought to structure the Constitution to ensure the separation of powers, they expressed particular concern about potential interference with the Judiciary by the political branches. James Wilson remarked at the Constitutional Convention that judges "would be in a bad situation if made to depend on every gust of faction which might prevail" in the political branches.[1] Likewise, in the *Federalist Papers*, Alexander Hamilton famously opined that, of the

[13] *Id.*

[14] 564 U.S. 462 (2011).

[15] *Id.* at 481–82.

[16] 575 U.S. 665 (2015).

[17] *Id.* at 678–79 (alterations omitted).

[1] 2 The Records of the Federal Convention of 1787, at 429 (Max Farrand ed., 1911).

three branches, the Judiciary "will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."[2]

Two key mechanisms that the Framers adopted to protect the Judiciary from political influence are the Good Behavior Clause and the Compensation Clause. The Good Behavior Clause provides that Supreme Court Justices and other federal judges "shall hold their Offices during good Behaviour."[3] The Supreme Court has interpreted the Clause to grant federal judges life tenure, unless they resign voluntarily or are impeached.[4] The Compensation Clause provides that federal judges shall be compensated for their service, and that such compensation "shall not be diminished during their Continuance in Office."[5] Together, the two provisions prevent the political branches from seeking to influence the Judiciary by retaliating against disfavored court decisions by removing the judges responsible or docking their pay.[6] The following essays briefly outline the history of the Good Behavior Clause and the Compensation Clause, then survey the Supreme Court's decisions applying the two provisions.[7]

ArtIII.S1.10.2 Good Behavior

ArtIII.S1.10.2.1 Overview of Good Behavior Clause

Article III, Section 1:

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

Article III, Section 1 provides that federal judges hold their offices "during good behavior."[1] This standard, borrowed from English law, ensures that federal judges hold their seats for life,

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[2] The Federalist No. 78 (Alexander Hamilton).

[3] U.S. Const. art. III, § 1.

[4] *See, e.g.*, United States ex rel. Toth v. Quarles, 350 U.S. 11, 16 (1955) (explaining that Article III courts "are presided over by judges appointed for life, subject only to removal by impeachment"); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59 (1982) (plurality opinion of Brennan, J.) ("The 'good Behaviour' Clause guarantees that Art[icle] III judges shall enjoy life tenure, subject only to removal by impeachment."); United States v. Hatter, 532 U.S. 557, 567 (2001) (explaining that the Good Behavior Clause grants federal judges "the practical equivalent of life tenure").

[5] U.S. Const. art. III, § 1.

[6] Other aspects of the constitutional system also seek to safeguard the independence of the judiciary. For instance, the Supreme Court has construed Article III to limit Congress's ability to vest judicial functions in non-Article III tribunals on separation of powers grounds. *See, e.g.*, Commodities Future Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986); *see also* ArtIII.S1.9.1 Overview of Congressional Power to Establish Non-Article III Courts.

[7] *See* ArtIII.S1.10.2.1 Overview of Good Behavior Clause; ArtIII.S1.10.3.1 Historical Background on Compensation Clause.

[1] The Constitution contains a number of provisions that are relevant to the impeachment of federal officials. Article I, Section 2, Clause 5 grants the sole power of impeachment to the House of Representatives; Article I, Section 3, Clause 6 assigns the Senate sole responsibility to try impeachments; Article I, Section 3, Clause 7 provides that the sanctions for an impeached and convicted individual are limited to removal from office and potentially a bar from holding future office, but an impeachment proceeding does not preclude criminal liability; Article II, Section 2, Clause 1 provides that the President enjoys the pardon power, but it does not extend to cases of impeachment; and Article II, Section 4 defines which officials are subject to impeachment and what kinds of misconduct constitute impeachable behavior. Article III does not mention impeachment expressly, but Section 1, which establishes that federal judges shall hold their seats during good behavior, is widely understood to provide the unique nature of judicial tenure. And Article III, Section 2, Clause 3 provides that trials, "except in Cases of Impeachment, shall be by jury."

rather than set terms or at the will of a superior.[2] The applicability of the Good Behavior Clause to the removal of federal judges has been the subject of debate; in particular, whether the phrase elucidates a distinct standard for removal apart from the "high crimes and misdemeanors" standard applicable to the impeachment of other federal officers.[3] While this question has not been definitively resolved, historical practice indicates an understanding that the Good Behavior Clause protects federal judges from removal for congressional disagreement with legal or political opinions.[4]

ArtIII.S1.10.2.2 Historical Background on Good Behavior Clause

Article III, Section 1:

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

Just as the phrase "high crimes and misdemeanors" for impeachments was borrowed from English practice,[1] so too was the term "good behavior" borrowed from English law concerning the duration of a judge's tenure.[2] Prior to 1701, the tenure of judges in England was established by the Crown, which often reserved the right to remove them.[3] In 1701 Parliament passed legislation barring the Crown from removing judges, providing that they served "*Quamdiu se bene gesserint*,"[4] and reserved for itself the authority to remove judges.[5] The standard of good behavior and insulation from removal by the Crown was mirrored in the constitutions of many American colonies[6] and was advanced by various proposals at the Constitutional Convention.[7]

The Framers considered the provision that federal judges maintain their seats during good behavior an "excellent barrier" against the risk of a legislature seeking to expand its power.[8] Rather than serving at the pleasure of the President or Congress, the protection of judges' seats and salary for life ensured an independent Judiciary that would not be unduly pressured

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[2] *See* Hon. Ruth Bader Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges the John R. Coen Lecture Series University of Colorado School of Law*, 55 U. Colo. L. Rev. 1, 3 (1983).

[3] *See generally* Nixon v. United States, 506 U.S. 224, 237–38 (1993).

[4] *See* ArtIII.S1.10.2.3 Good Behavior Clause Doctrine. Article III, Section 1, also serves the essential purpose of protecting the independence of the judiciary and protecting litigants' rights to have claims adjudicated by an impartial judge free from the influence of another branch of government. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 849 (1986). Further, the clause bars congressional attempts to eliminate the role of constitutional courts by transferring jurisdiction to non-Article III courts, which guards against the aggrandizement of power by one branch of government over another. *Id.*

[1] For more on the historical background of the impeachment clauses, see The Power of Impeachment: Historical Background; The Power to Try Impeachments: Historical Background; Impeachable Offenses: Historical Background.

[2] Hon. Ruth Bader Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges the John R. Coen Lecture Series University of Colorado School of Law*, 55 U. Colo. L. Rev. 1, 3 (1983). ("The phrase 'good Behaviour' was copied by the framers of our Constitution from English law.").

[3] Note, *Judicial Disability and the Good Behavior Clause*, 85 Yale L.J. 706, 720 (1976).

[4] The Latin phrase is sometimes translated as "so long as they conduct themselves well," Ginsburg, *supra* note 2, at 3 n.10, or "during good behavior." *See Judicial Disability and the Good Behavior Clause*, *supra* note 3, at 709.

[5] Act of Settlement, 12 & 13 Will. 3, ch. 2, § 3 (1700).

[6] *See, e. g.*, 2 Benjamin P. Poore, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 1910 (2d ed. 1878).

[7] 1 Records of the Federal Convention of 1787 21 (Max Farrand ed., 1966) (Virginia Plan); *id.* at 244 (New Jersey Plan); 3 *id.* at 600 (draft attributed to Charles Pinckney); *id.* at 621, 625 (Alexander Hamilton).

[8] *See* The Federalist No. 78 (Alexander Hamilton).

by the political branches.[9] Insulating federal judges from removal was crucial because the Judiciary lacks the "sword" of the Executive power and the "purse" of the Legislature.[10] Rather, the judicial power consists of the reasoning and "judgements" of its officers.[11] As the Federal Judiciary is in some ways the least powerful branch of the government, ensuring judges' "permanency in office" was deemed essential to establishing an independent Judiciary.[12]

Further, this independence armed the Judiciary with the ability to defend and preserve a "limited constitution against legislative encroachments" against the rights of citizens.[13] In the *Federalist Papers*, Alexander Hamilton argued that federal judges must "guard the constitution and the rights of individuals" against the possibility of laws that oppress political minorities.[14] Likewise, federal judges must ensure that the law is applied justly and evenly to all citizens. If judges could be removed at will or were appointed for specified periods, judges would be tempted to consider popular opinion in their rulings to the detriment of the Constitution and the rights of political minorities.[15]

ArtIII.S1.10.2.3 Good Behavior Clause Doctrine

Article III, Section 1:

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

The meaning of the Good Behavior Clause has been the subject of long-standing debate. Some have argued that the phrase denotes an alternative standard of removal for federal judges beyond "high crimes and misdemeanors" that normally may give rise to the impeachment of federal officers.[1] Others have rejected this notion,[2] reading the "good behavior" phrase simply to make clear that federal judges retain their office for life unless they are removed via a proper constitutional mechanism. However, while one might find some support in early twentieth-century practice for the idea that the Clause constitutes an additional ground for removal of a federal judge,[3] the modern view of Congress appears to be

[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*

[1] Raoul Berger, Impeachment: The Constitutional Problems 122–80 (1973) (arguing that the good behavior standard is distinct from "high crimes and misdemeanors" and Congress may remove judges whose "misbehavior" does not constitute a high crime or misdemeanor); Saikrishna Prakash, Steven D. Smith, *How to Remove A Federal Judge*, 116 Yale L.J. 72, 78 (2006) ("Congress . . . may establish any number of mechanisms for determining whether a judge has forfeited her office through misbehavior. . . . Congress can pass statutes that help implement the federal government's authority to remove federal judges who have misbehaved."); *see* 3 Lewis Deschler, Precedents of the United States of the House of Representatives, H.R. Doc. No. 94-661, at Ch. 14 § 3.9 (1974), https://www.govinfo.gov/content/pkg/GPO-HPREC-DESCHLERS-V3/pdf/GPO-HPREC-DESCHLERS-V3.pdf.

[2] Judith Rosenbaum et al., *A Constitutional Perspective on Judicial Tenure*, 61 Judicature 465, 474 (1978) (claiming that the terms were interchangeable for the Framers).

[3] *See* Staff of H. Comm. on the Judiciary, 93d Cong., Impeachment, Selected Materials 666 (Comm. Print 1973).

that "good behavior" does not establish an independent standard for impeachable conduct.[4] In other words, the Good Behavior Clause simply indicates that judges are not appointed to their seats for set terms and cannot be removed at will; removing a federal judge requires impeachment and conviction for a high crime or misdemeanor.

Nevertheless, even if the Good Behavior Clause does not delineate a standard for impeachment and removal for federal judges, as a practical matter, the history of impeachments in the United States might indicate that the range of conduct meriting removal differs between judges and Executive Branch officials due to the distinct nature of each office. The Senate has never voted to remove the President or an Executive Branch official, but has done so to eight federal judges.[5] The conduct meriting impeachment and removal for federal judges has ranged from intoxication on the bench,[6] to abandoning the office and joining the Confederacy,[7] to various types of corruption. Congress has also impeached and removed federal judges for perjury and income tax evasion,[8] although it is unclear whether such behavior would necessarily be considered impeachable behavior for an Executive Branch official.[9]

Further, leaving aside whether the Good Behavior Clause establishes a separate standard for removal independent from high crimes and misdemeanors, historical conflicts between Congress and the Judiciary may inform the outer limits of what the Good Behavior Clause entails. For instance, in 1804 Jeffersonian Republicans attempted to remove Supreme Court Chief Justice Samuel Chase, who they viewed as openly partisan and biased against their party.[10] The allegations against Chief Justice Chase included that he acted in an "arbitrary, oppressive, and unjust manner" at trial, misapplied the law, and expressed partisan political views to a grand jury.[11] The attempt failed, and Congress has never removed a federal judge for disagreement with the law's application or because of difference in political views. Based on this historical practice, the good behavior standard arguably guards against the removal of a federal judge for disagreement with the law's interpretation or political disagreements.

That said, the Good Behavior Clause and the attendant clauses expressly dealing with impeachment do not insulate federal judges from criminal prosecutions.[12] For instance, Judge Harry E. Claiborne, before being impeached and removed from office as a federal judge,

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[4] *See* Charles W. Johnson, John V. Sullivan, and Thomas J. Wickham, Jr., House Practice: A Guide to the Rules, Precedents and Procedures of the House 608–13 (2017); Impeachment, Selected Materials, *supra* note 3, at 666; Staff of H. Comm. on the Judiciary, 93d Cong., Constitutional Grounds for Presidential Impeachment 17 (Comm. Print 1974); H.R. Rep. No. 105-830, at 110–18.

[5] *See* ArtI.S3.C6.3 Impeachment Trial Practices and ArtII.S4.4.1 Overview of Impeachable Offenses et seq.

[6] *See* 12 Annals of Cong. 642 (1803); 13 Annals of Cong. 380 (1803); 13 Annals of Cong. 368 (1804).

[7] 2 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States §§ 2385–97 (1907), https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V2/pdf/GPO-HPREC-HINDS-V2.pdf.

[8] 135 Cong. Rec. S14,633–39 (daily ed. Nov. 3, 1989) (removing Judge Walter L. Nixon for lying to a grand jury); 132 Cong. Rec. 29,870–72 (1986) (removing Judge Harry E. Claiborne for providing false statements on his income tax returns).

[9] President Clinton was impeached, but not convicted, for perjury to a grand jury. See discussion in ArtII.S4.4.8 President Bill Clinton and Impeachable Offenses. In the effort to impeach President Nixon, one of the articles of impeachment rejected by the House Judiciary Committee concerned tax evasion. See discussion in ArtII.S4.4.7 President Richard Nixon and Impeachable Offenses.

[10] 13 Annals of Cong. 1180 (1804).

[11] Impeachment, Selected Materials, *supra* note 3, at 133–35.

[12] *See generally* Chandler v. Judicial Council of Tenth Circuit of U.S., 398 U.S. 74, 140 (1970) (Douglas, J., dissenting) ("Federal judges are entitled, like other people, to the full freedom of the First Amendment. If they break a law, they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by Congress.").

challenged his indictment and prosecution as unconstitutional.[13] Specifically, he argued that the Constitution's vesting of the impeachment power in Congress precludes the criminal prosecution of an Article III judge unless he is first impeached and removed from office.[14] The U.S. Court of Appeals for the Ninth Circuit rejected this argument, concluding that the Constitution's distinction between impeachment and criminal liability was meant to ensure that no individual who had been impeached and removed could claim double jeopardy as a shield against subsequent criminal prosecution.[15] Further, a criminal conviction does not "remove" an individual from office; Congress retains exclusive power to do so through the constitutional mechanism of impeachment.[16] Likewise, the Ninth Circuit rejected Claiborne's argument that it violates separation of powers for the Executive Branch to possess authority to bring criminal prosecutions against sitting Article III judges.[17] The court noted that potential defendants receive the same protections that ordinary citizens do, and criminal behavior is not part of a government official's duties.[18] Further, insulating federal judges from criminal liability would elevate them above the requirements of the very law they are entrusted with adjudicating fairly.[19]

ArtIII.S1.10.3 Compensation

ArtIII.S1.10.3.1 Historical Background on Compensation Clause

Article III, Section 1:

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

The Supreme Court has stated, "The Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary. A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government."[1] Before the Revolutionary War, American colonists recognized the role of judicial compensation in maintaining the independence of the Judiciary. Among other things, the Declaration of Independence objected to the fact that the King had "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."[2]

From the beginning of the Constitutional Convention, the Framers embraced salary protection as one means of bolstering judicial independence. The first resolution on the Judiciary introduced at the Convention provided that judges would "receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be

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[13] United States v. Claiborne, 727 F.2d 842, 849 (9th Cir. 1984). *See also* United States v. Hastings, 681 F.2d 706, 709–11 (11th Cir. 1982) (rejecting similar claims), stay denied, 459 U.S. 1203 (1982); United States v. Isaacs, 493 F.2d 1124, 1141–44 (7th Cir. 1974) (same), *cert. denied sub nom.*, 417 U.S. 976 (1974).

[14] *Claiborne*, 727 F.2d at 845–46.

[15] *Id.* at 846.

[16] *Id.*

[17] *Id.* at 849.

[18] *Id.* at 848.

[19] *Id.* at 849.

[1] United States v. Will, 449 U.S. 200, 217–18 (1980).

[2] The Declaration of Independence para. 11 (U.S. 1776).

made so as to affect the persons actually in office at the time of such increase or diminution."[3] Following debate, the prohibition on judicial salary increases was removed to allow Congress to adapt judicial pay to changing circumstances, but the prohibition on decreasing judicial salaries remained.[4] Alexander Hamilton highlighted the Compensation Clause in the *Federalist Papers*, asserting that, "next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support," because, "[i]n the general course of human nature, a power over a man's subsistence amounts to a power over his will."[5] Chief Justice John Marshall later asserted that judges must have the independence to protect the poor and unpopular, and that the "greatest scourge" was an "ignorant, a corrupt, or a dependent Judiciary."[6]

ArtIII.S1.10.3.2 Compensation Clause Doctrine

Article III, Section 1:

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

The Compensation Clause allows Congress to increase judicial salaries, but not to decrease them. During the Great Depression, Congress enacted appropriations legislation reducing "the salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office)" by a fixed amount.[1] The statute avoided constitutional issues by expressly incorporating the limits of the Compensation Clause, but it sparked Supreme Court litigation to determine which federal judges were subject to the salary reduction. Ultimately, the Court held that judges of the District of Columbia courts were Article III judges who enjoyed constitutional salary protection and could not be subject to the statute.[2] On the other hand, the Court held that judges of the Court of Claims, a legislative court, could have their salaries reduced.[3]

Once a judicial salary increase has gone into effect, the Compensation Clause bars Congress from reducing or rescinding any part of the increase. However, Congress may alter a promised future increase before it becomes effective. Thus, in *United States v. Will*, the Court held that Congress could repeal or modify a statutorily defined formula for annual cost-of-living increases to the compensation of federal judges, but must act with respect to any particular increase before the increase takes effect.[4] To illustrate, in one of the years at issue in

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[3] 1 The Records of the Federal Convention of 1787, at 244 (Max Farrand ed., 1911).

[4] 2 *id.* at 45. *See also, e.g.*, *id* (statement of Gouverner Morris that "[t]he value of money may not only alter but the State of Society may alter. In this event the same quantity of wheat, the same value would not be the same compensation. The Amount of salaries must always be regulated by the manners & the style of living in a Country").

[5] The Federalist No. 79 (Alexander Hamilton).

[6] United States v. Hatter, 532 U.S. 557 (2001) (quoting Proceedings and Debates of the Virginia State Convention, of 1829–1830, p. 619 (1830)).

[1] Legislative Appropriation Act of June 30, 1932, ch. 314, 47 Stat. 382, 401.

[2] O'Donoghue v. United States, 289 U.S. 516 (1933). Congress later established two sets of courts in the District: federal courts, created pursuant to Article III, and local courts equivalent to state and territorial courts, created pursuant to Article I. For further discussion of the constitutional status of the District of Columbia Courts, *see* ArtIII.S1.9.4 District of Columbia and Territorial Courts.

[3] Williams v. United States, 289 U.S. 553 (1933). *But see* Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

[4] 449 U.S. 200 (1980).

Will, a planned salary increase took effect on October 1, but the President signed a bill reducing the amount that same day. The Court held that the increase had gone into effect by the time the reduction was signed, rendering the reduction invalid.[5] Moreover, although the salary reductions in *Will* applied to various officials in all three branches of government, the Court further held that even a general, nondiscriminatory salary reduction, affecting judges but not aimed solely at them, is covered by the Compensation Clause.[6]

A separate question that has sparked Supreme Court litigation is whether the Compensation Clause limits Congress's power to increase the amount of federal income tax Article III judges pay. In *Evans v. Gore*, the Court invalidated the application of a 1919 income tax law to a sitting federal judge.[7] The Court extended that ruling in *Miles v. Graham* to exempt the salary of a judge of the Court of Claims appointed after the enactment of the relevant tax law.[8] In the 1939 case *O'Malley v. Woodrough*, the court disapproved of *Evans* and effectively overruled *Miles*, upholding a provision of the Revenue Act of 1932 that extended application of the income tax to salaries of judges taking office after June 6, 1932.[9] The Court regarded the tax neither as an unconstitutional diminution of the compensation of judges nor as an encroachment on the independence of the Judiciary.[10] To subject judges who take office after a stipulated date to a nondiscriminatory income tax, said the Court, "is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering."[11]

The Court formally overruled *Evans* in the 2001 case *United States v. Hatter*.[12] The *Hatter* Court reaffirmed the principle that judges should "share the tax burdens borne by all citizens,"[13] holding that "the potential threats to judicial independence that underlie [the Compensation Clause] cannot justify a special judicial exemption from a commonly shared tax."[14] The Court held that the Medicare tax, which was extended to all federal employees in 1982, was a non-discriminatory tax that could be applied to federal judges.[15] By contrast, the Court ruled that the 1983 extension of a Social Security tax to then-sitting judges violated the Compensation Clause, because judges were required to participate while almost all other federal employees were given a choice about participation.[16] Nor had Congress cured the constitutional violation by a subsequent enactment that raised judges' salaries by an amount greater than the amount of Social Security taxes that they were required to pay.[17]

[5] *Id.* at 224–25.
[6] *Id.* at 226.
[7] 253 U.S. 245 (1920).
[8] 268 U.S. 501 (1925).
[9] 307 U.S. 277 (1939).
[10] *Id.* at 278–82.
[11] *Id.* at 282.
[12] 532 U.S. 557 (2001).
[13] *Id.* at 571.
[14] *Id.*
[15] *Id.* at 572.
[16] *Id.*
[17] *Id.* at 578–81.

Section 2—Justiciability

Clause 1—Cases or Controversies

ArtIII.S2.C1.1 Overview of Cases or Controversies

Article III, Section 2, Clause 1:

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

Article III, Section 2, Clause 1 identifies the circumstances and parties to which the judicial power of the National Government applies.[1] As provided by the Constitution, the judicial power extends to nine classes of cases and controversies which fall into two general groups depending on the "character of the cause" and the "character of the parties."[2] As to the "character of the cause," the judicial power extends to cases arising under the "Constitution, the Laws of the United States and Treaties made under . . . their Authority"; to all cases "affecting Ambassadors, or other public Ministers and Consuls"; and to all cases of "admiralty and maritime Jurisdiction."[3] As to the "character of the parties," the judicial power extends to controversies where the "United States shall be a Party"; and controversies "between two or more States; between a State and Citizens of another State; between Citizens of different States;-between Citizens of the same State claiming Land under Grants of different States, or the Citizens thereof, and foreign States, Citizens or Subjects."[4] In *Cohens v. Virginia*, Chief Justice John Marshall explained these principles, stating:

> In the first, jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends 'all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.' This cause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied, against the express words of the article. In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more states, between a state and citizens of another state,' and 'between a state and foreign states, citizens or subjects' if these be the parties, it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.[5]

The Supreme Court has further noted that judicial power is "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a

[1] U.S. Const. art. III, § 2, cl. 1.

[2] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821).

[3] U.S. Const. art. III § 2, cl. 1.

[4] U.S. Const. art. III § 2, cl. 1.

[5] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821).

case before it for decision."[6] The meaning attached to the terms "cases" and "controversies"[7] determines therefore the extent of the judicial power as well as the capacity of the federal courts to receive jurisdiction. According to Chief Justice Marshall in *Osborn v. Bank of the United States*, judicial power is capable of acting only when the subject is submitted in a case and a case arises only when a party asserts his rights "in a form prescribed by law."[8]

Justiciable "cases" and "controversies" not only require that disputes be of the types specified in Article III, Section 2, Clause 1, but also that the disputes be, in fact, actual "cases" and "controversies." Consequently, the parties must truly be adverse to each, the dispute must be concrete, not hypothetical, and the dispute must be capable of being resolved through an award of specific relief. In *Aetna Life Insurance Company v. Haworth*, Chief Justice Charles Evans Hughes explained this aspect of the "cases" and "controversies" requirement stating:

> A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.[9]

Chief Justice Earl Warren also advised on the nature of "cases" and "controversies," noting:

> Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the Judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case and controversy doctrine.[10]

Factors which determine whether a dispute qualifies as a "case" or "controversy" under the Constitution include adversity, the existence of a real interest, and standing. Adversity requires that the parties be truly adverse to each other with real interests in contention.[11] As such, suits that are collusive or feigned by two friendly parties to resolve a question of interest to them are not justiciable.[12] A real interest requires that a *real* issue be presented, as contrasted with speculative, abstract, hypothetical, or moot issues or cases that are not yet ripe for review.[13] Standing concerns *who* may bring a suit and requires that the party seeking relief

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[6] Muskrat v. United States, 219 U.S. 346, 356 (1911).

[7] The two terms may be used interchangeably, inasmuch as a "controversy," if distinguishable from a "case" at all, is so only because it is a less comprehensive word and includes only suits of a civil nature. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239 (1937).

[8] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

[9] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240–41 (1937). *Cf.* Public Service Comm'n v. Wycoff Co., 344 U.S. 237, 242 (1952).

[10] Flast v. Cohen, 392 U.S. 83, 94–95 (1968).

[11] Muskrat v. United States, 219 U.S. 346 (1911).

[12] Lord v. Veazie, 49 U.S. (8 How.) 251 (1850).

[13] Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1945) (stating that it is the Court's "considered practice not to decide abstract, hypothetical or contingent questions."); Giles v. Harris, 189 U.S. 475, 486 (1903) (stating that a party cannot maintain a suit "for a mere declaration in the air"); Texas v. ICC, 258 U.S. 158 (1922) ("It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially

has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpes the presentation of issues upon which the court so largely depends of illumination of difficult constitutional questions."[14] The constitutional requirements for standing under Article III require that the plaintiff has personally (1) suffered some actual or threatened injury; (2) that injury can fairly be traced to the challenged action of the defendant; and (3) that the injury is likely to be redressed by a favorable decision.[15] Persons do not have standing to sue in federal court when they can only claim that they have an interest or have suffered an injury that is shared by all members of the public.[16] These factors are discussed at greater length in other *Constitution Annotated* essays.

ArtIII.S2.C1.2 Historical Background on Cases or Controversies Requirement

Article III, Section 2, Clause 1:

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

Article III of the Constitution provides that "the judicial Power" of the United States "shall extend to" certain enumerated categories of "Cases" and "Controversies."[1] As later essays in this treatise discuss, the Supreme Court has interpreted this "Case or Controversy" language to impose significant restrictions on the federal courts' power to adjudicate disputes,[2] such as the Article III standing doctrine,[3] which forbids the Federal Judiciary from hearing cases in which the plaintiff lacks a personal stake in the outcome.[4] In light of the importance of those limitations on the federal courts' jurisdiction, this essay surveys available historical evidence illuminating what the Framers might have understood those words to mean.[5] The essay thus

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by the application or enforcement of a statute that its validty may be called in question by a suitor and determined by an exertion of the judicial power."); Ashwander v. TVA, 297 U.S. 288, 324 (1936) ("The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the person complaining."

[14] Baker v. Carr, 369 U.S. 186, 204 (1962). That persons or organizations have a personal, ideological interest sufficiently strong to create adverseness is not alone enough to confer standing; rather the adverseness is the consequence of one being able to satisfy the Article III requisite of injury in fact. Valley Forge Christian College v. Americans United, 454 U.S. 464, 482–486 (1982); Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208, 225–226 (1974). Nor is the fact that, if plaintiffs have no standing to sue, no one would have standing, a sufficient basis for finding standing. *Id.* at 227.

[15] Valley Forge Christian College v. Americans United, 452 U.S. 464, 472 (1982); Allen v. Wright, 468 U.S. 737, 751 (1984); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992); Monsanto C. v. Geerston Seed Farms, 561 U.S. ___, No. 09–475, slip op. (2010). But see United States v. Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).

[16] Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208 (1974).

[1] U.S. Const. art. III § 2.

[2] *See* ArtIII.S2.C1.4.1 Overview of Advisory Opinions.

[3] *See* ArtIII.S2.C1.6.1 Overview of Standing.

[4] *See, e.g.*, Gill v. Whitford, 138 S. Ct. 1916, 1923 (2018) ("[A] plaintiff seeking relief in federal court must first demonstrate that he has standing to do so, including that he has 'a personal stake in the outcome[.]'") (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

[5] This essay focuses on whether the Framers intended Article III's "Case or Controversy" language to limit the justiciability of disputes in federal court. For analysis of the separate issue of whether and how the definition of "Case"

discusses pre-Convention English judicial practice before recounting relevant exchanges during the Constitutional Convention and the ratification debates.[6]

Because the Framers drew upon their knowledge of English practice when designing the Constitution, the legal principles prevailing in England at the time of the Founding provide the starting point for understanding the "Case or Controversy" language's historical origins.[7] Some evidence suggests that English courts entertained a fairly broad array of disputes before the Founding, including certain cases intended to vindicate the public interest rather than merely the personal interests of the plaintiff himself. For example, a prominent English treatise from the seventeenth Century discusses a particular form of judicial relief that English courts could award at the behest of a "stranger"—i.e., one who was not a "party" to the action challenged in the case.[8] Similarly, a case from 1741 suggests that some litigants could pursue certain lawsuits in English courts even if they possessed only a "remote" interest in the subject of the litigation.[9] Other evidence, however, suggests that in certain contexts English courts demanded that litigants possess a direct personal stake in the subject matter of the litigation. For instance, in its discussion of a form of judicial relief known as the "writ of prohibition," an English treatise from 1736 states that "no Man is [e]ntitled to a Prohibition unless he is in Danger of being injured by some Suit actually depending."[10] Similarly, in his Commentaries on the Laws of England, Sir William Blackstone wrote that no private person could sue a defendant for a public or common nuisance unless the nuisance caused that private person "some extraordinary damage."[11]

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may differ from the definition of "Controversy," *compare, e.g.*, Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 244 n.128 (1985) (suggesting that "Cases" and "Controversies" are "legally synonymous"), *with, e.g.*, Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 Notre Dame L. Rev. 447, 448–49, 531 (1994) (concluding "that the Framers used 'cases' and 'controversy' as distinct terms to convey different meanings"); *See also* ArtIII.S2.C1.11.1 Overview of Federal Question Jurisdiction (discussing the classes of "cases" and "controversies" established by Article III).

[6] Scholars have debated whether the historical evidence discussed in this essay supports the prevailing judicial interpretation of Article III. *Compare, e.g.*, Bruce J. Terris, *Ex Nihilo—The Supreme Court's Invention of Constitutional Standing*, 45 Envtl. L. 849, 849 (2015) (concluding that there is no historical evidence "that the Framers meant [Article III's 'case or controversy' language] to require a showing of injury"), *with, e.g.*, James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, The Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 Rutgers L. Rev. 1, 2 (2001) ("[G]iven the historical context, the contemporary injury-in-fact rule is an acceptable interpretation of Article III because it reflects not only the Framers' likely concept of what the courts did, but also their view of the judicial role in maintaining the separation of powers."), *and* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 691 (2004) ("We do not claim that history compels acceptance of the modern Supreme Court's vision of standing, or that the constitutional nature of standing doctrine was crystal clear from the moment of the Founding on. . . . We do, however, argue that history does not defeat standing doctrine; the notion of standing is not an innovation, and its constitutionalization does not contradict a settled historical consensus about the Constitution's meaning.").

[7] *See* Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J.) ("[T]he framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union."); Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 Yale L.J. 816, 816 (1969) ("[I]t is hardly to be doubted that the Framers contemplated resort to English practice for elucidation, and so the Supreme Court has often held.").

[8] *See, e.g.*, Edward Coke, The Second Part of the Institutes of the Lawes of England 602 (1642) ("[T]he [K]ings [C]ourts that may award prohibitions, being informed either by the parties themselves, or by any stranger, that any [C]ourt [T]emporall or [E]cclesiasticall doth hold plea of that (whereof they have not jurisdiction) may lawfully prohibit the same.") (emphasis added).

[9] Att'y Gen. v. Bucknall [1741] 26 Eng. Rep. 600, 600 ("Any persons, tho' the most remote in the contemplation of the charity, may be relators in an information. . . . It is not absolutely necessary that relators in an information for a charity, should be the persons principally interested.").

[10] 4 Matthew Bacon, A New Abridgement of the Law 244 (1736).

[11] *See* 3 William Blackstone, Commentaries on the Law of England 219–20 (William Carey Jones ed., 1916) ("[T]he law gives no private remedy for anything but a private wrong. Therefore, no action lies for a public or common nuisance, but an indictment only: because the damage being common to all the king's subjects, no one can assign his particular proportion of it: or if he could, it would be extremely hard, if every subject in the kingdom were allowed to

Although the Convention records do not explicitly discuss why the Framers used the terms "Cases" and "Controversies" in Article III,[12] at least three events during the Convention suggest that the Framers did not intend Article III to empower federal judges to adjudicate every type of dispute that came before them. For one, the Framers explicitly rejected proposals to authorize federal judges to review statutes before they became effective. On May 29, 1787, Edmund Randolph proposed that the President, along with "a convenient number of the National Judiciary," would "compose a council of revision with authority to examine every act of the National Legislature before it shall operate."[13] The Framers ultimately voted to reject this proposal (or variations on it) three times during the Convention.[14]

The Framers also took no action[15] on an August 20, 1787 proposal that would have granted "[e]ach branch of the Legislature, as well as the Supreme Executive," the "authority to require the opinions of the supreme Judicial Court upon important questions of law, and upon solemn occasions."[16] As a result of this proposal's failure, the Constitution as ratified contains no provision authorizing the federal courts to issue advisory opinions.[17]

Perhaps the most illuminating exchange between the Framers about the justiciability of disputes occurred on August 27, 1787,[18] when Dr. William Samuel Johnson proposed to extend the judicial power of the United States not just to cases arising under federal statutes, but also to cases arising under the Constitution itself.[19] James Madison expressed concern that this proposal could grant the Judiciary too much power, and insisted that the federal courts' jurisdiction should instead "be limited to cases of a Judiciary Nature" only.[20] Dr. Johnson's proposal nevertheless passed unanimously.[21] The Convention records reflect that the Framers

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harass the offender with separate actions. For this reason, no person, natural or corporate, can have an action for a public nuisance, or punish it; but only the king in his public capacity of supreme governor, and pater-familias of the kingdom. . . . Yet this rule admits of one exception; where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance; in which case he shall have a private satisfaction by action."). *See also* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1551–52 (2016) (Thomas, J., concurring) (analyzing this excerpt from Blackstone's Commentaries in a modern Article III standing case).

[12] *See, e.g.*, Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 Nw. U. L. Rev. 169, 232 (2012) ("There is scant evidence in the constitutional record regarding the drafting of what became the cases or language of Article III . . . the wording of 'cases' or 'controversies' seemed almost an afterthought."); James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, The Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 Rutgers L. Rev. 1, 38 (2001) ("[T]he Framers . . . said next to nothing about the meaning of the case and controversy language in Article III."); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 173 (1992) ("There is relatively little explicit material on the Framers' conception of 'case or controversy.'").

[13] 1 The Records of the Federal Convention of 1787, at 21 (Max Farrand ed., 1911) [Farrand's Records].

[14] *Id.* at 140; 2 , *id.*, at 298.

[15] *See* Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court, 1973* Sup. Ct. Rev. 123, 129 ("[T]he Constitutional Convention did not reject [this] motion, as is often assumed. The motion simply did not emerge from the Committee of Detail, to which he submitted it.") (footnote omitted); Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 Yale L.J. 816, 830 n.72 (1969) (stating that the advisory opinion proposal "was referred to the Committee o[f] Detail and was heard of no more").

[16] 2 Farrand's Records, *supra* note 13, at 341.

[17] *Compare* U.S. Const. art. II, § 2 (authorizing the President to "require the [o]pinion, in writing, of the principal [o]fficer in each of the executive [d]epartments") *with* U.S. Const. art. III (containing no analogous provision authorizing the President to require the federal courts to issue advisory opinions). *See also* ArtIII.S2.C1.4.1 Overview of Advisory Opinions (defining "advisory opinions" and explaining that the Supreme Court has interpreted Article III to forbid federal courts from issuing them).

[18] *See* 2 Farrand's Records, *supra* note 13, at 430.

[19] *Id.* ("Docr. Johnson moved to insert the words 'this Constitution and the' before the word 'laws.'").

[20] *Id.* ("Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.").

[21] *Id.* ("The motion of Docr. Johnson was agreed to nem: con:[.]").

discounted Madison's misgivings about granting the Federal Judiciary power over constitutional cases because the Framers "generally supposed" that the federal courts' jurisdiction would be "constructively limited to cases of a Judiciary nature."[22] This exchange therefore suggests that there are some disputes that arise under federal law, yet are still outside the federal courts' authority to adjudicate because they are not of "a Judiciary Nature."[23] The records of the Convention do not specify, however, what Madison and the other Framers understood "Judiciary Nature" to mean.[24]

Although the ratification debates that followed the Convention cast little light on the meaning of Article III's "Case or Controversy" language, they do at least reveal a consensus that federal judges would operate within a limited sphere.[25] Faced with Anti-Federalist criticisms that the Constitution would empower federal judges to "enlarge the sphere of their power beyond all bounds,"[26] supporters of the Constitution argued in the *Federalist Papers* that "the judicial authority" would have "precise limits beyond which the federal courts cannot extend their jurisdiction."[27]

ArtIII.S2.C1.3 Rules of Justiciability

ArtIII.S2.C1.3.1 Overview of Rules of Justiciability and Cases or Controversies Requirement

Article III, Section 2, Clause 1:

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

The judicial power extends to nine classes of cases and controversies, which fall into two general groups. In the words of Chief Justice John Marshall in *Cohens v. Virginia*:[1] "In the first, jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends 'all cases in law and equity arising under this constitution, the laws of the United

[22] *Id.*

[23] Leonard & Brant, *supra* note 6, at 39 (arguing that "the reference to 'Judiciary Nature'" in the Convention records reflects "that the Framers believed that there were constitutional restrictions on the sort of cases that the federal courts could hear").

[24] *See* 2 Farrand's Records, *supra* note 13, at 430. *See also* Leonard & Brant, *supra* note 6, at 39 ("[T]he reference to 'Judiciary Nature' is somewhat cryptic.").

[25] *See, e.g.*, Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 Va. L. Rev. 1753, 1761–63 (2004) (explaining that the Federalists and Anti-Federalists both agreed that "judicial intrusions into the political realm" should be "limited").

[26] Brutus No. XII pt. 1. *See also* Brutus No. XI (expressing concern that the federal courts would exceed their jurisdiction); Brutus No. XV (warning "that the supreme court under this constitution would be exalted above all other power in the government, and subject to no control").

[27] The Federalist No. 83 (Alexander Hamilton). *See also* The Federalist No. 48 (James Madison) (stating that federal judges would have their powers limited by "landmarks, still less uncertain" than the restrictions limiting the political branches); The Federalist No. 78 (Alexander Hamilton) (arguing that the federal judiciary would be "the weakest of the three departments of power" in part because it would exercise "neither force nor will, but merely judgment"); The Federalist No. 81 (Alexander Hamilton) (emphasizing the "comparative weakness" of the Judicial Branch).

[1] 19 U.S. (6 Wheat.) 264 (1821).

States, and treaties made, or which shall be made, under their authority.' This cause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied, against the express words of the article. In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more states, between a state and citizens of another state,' and 'between a state and foreign states, citizens or subjects.' If these be the parties, it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."[2]

Judicial power is "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."[3] The meaning attached to the terms "cases" and "controversies"[4] determines therefore the extent of the judicial power as well as the capacity of the federal courts to receive jurisdiction. According to Chief Justice Marshall, judicial power is capable of acting only when the subject is submitted in a case and a case arises only when a party asserts his rights "in a form prescribed by law."[5] "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the Court for adjudication."[6]

Chief Justice Charles Evans Hughes once essayed a definition, which, however, presents a substantial problem of labels. "A 'controversy' in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."[7] Of the "case" and "controversy" requirement, Chief Justice Earl Warren admitted that "those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the Judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case and

[2] 19 U.S. at 378.

[3] Muskrat v. United States, 219 U.S. 346, 356 (1911).

[4] The two terms may be used interchangeably, inasmuch as a "controversy," if distinguishable from a "case" at all, is so only because it is a less comprehensive word and includes only suits of a civil nature. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239 (1937).

[5] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

[6] *In re* Pacific Ry. Comm'n, 32 F. 241, 255 (C.C. Calif. 1887) (Justice Field). *See also* Smith v. Adams, 130 U.S. 167, 173–174 (1889).

[7] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240–241 (1937). *Cf.* Public Service Comm'n v. Wycoff Co., 344 U.S. 237, 242 (1952).

controversy doctrine."[8] Justice Felix Frankfurter perhaps best captured the flavor of the "case" and "controversy" requirement by noting that it takes the "expert feel of lawyers" often to note it.[9]

From these quotations may be isolated several factors which, in one degree or another, go to make up a "case" and "controversy."

Almost inseparable from the requirements of adverse parties and substantial enough interests to confer standing is the requirement that a *real* issue be presented, as contrasted with speculative, abstract, hypothetical, or moot issues. It has long been the Court's "considered practice not to decide abstract, hypothetical or contingent questions."[10] A party cannot maintain a suit "for a mere declaration in the air."[11] In *Texas v. ICC*,[12] the State attempted to enjoin the enforcement of the Transportation Act of 1920 on the ground that it invaded the reserved rights of the State. The Court dismissed the complaint as presenting no case or controversy, declaring: "It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exertion of the judicial power."[13] And in *Ashwander v. TVA*,[14] the Court refused to decide any issue save that of the validity of the contracts between the Authority and the Company. "The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the person complaining."[15]

Concepts of real interest and abstract questions appeared prominently in *United Public Workers v. Mitchell*,[16] an omnibus attack on the constitutionality of the Hatch Act prohibitions on political activities by governmental employees. With one exception, none of the plaintiffs had violated the Act, though they stated they desired to engage in forbidden political actions. The Court found no justiciable controversy except in regard to the one, calling for "concrete legal issues, presented in actual cases, not abstractions," and seeing the suit as really an attack on the political expediency of the Act.[17]

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[8] Flast v. Cohen, 392 U.S. 83, 94–95 (1968).

[9] "The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a 'case or controversy.'" Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149, 150 (1951).

[10] Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1945).

[11] Giles v. Harris, 189 U.S. 475, 486 (1903).

[12] 258 U.S. 158 (1922).

[13] 258 U.S. at 162.

[14] 297 U.S. 288 (1936).

[15] 297 U.S. at 324. Chief Justice Charles Evans Hughes cited *New York v. Illinois,* 274 U.S. 488 (1927), in which the Court dismissed as presenting abstract questions a suit about the possible effects of the diversion of water from Lake Michigan upon hypothetical water power developments in the indefinite future, and *Arizona v. California,* 283 U.S. 423 (1931), in which it was held that claims based merely upon assumed potential invasions of rights were insufficient to warrant judicial intervention. *See also* Massachusetts v. Mellon, 262 U.S. 447, 484–485 (1923); New Jersey v. Sargent, 269 U.S. 328, 338–340 (1926); Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 76 (1868).

[16] 330 U.S. 75 (1947).

[17] 330 U.S. at 89–91. Justices Hugo Black and William Douglas dissented, contending that the controversy was justiciable. Justice William Douglas could not agree that the plaintiffs should have to violate the act and lose their jobs in order to test their rights. In *CSC v. National Ass'n of Letter Carriers,* 413 U.S. 548 (1973), the concerns expressed in *Mitchell* were largely ignored as the Court reached the merits in an anticipatory attack on the Act. *Compare* Epperson v. Arkansas, 393 U.S. 97 (1968).

ArtIII.S2.C1.3.2 Historical Background on Justiciability and Cases or Controversies Requirement

Article III, Section 2, Clause 1:

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

The potential for abuse of judicial power was of concern to the Founding Fathers, leading them to establish limits on the circumstances in which the courts could consider cases. When, late in the Convention, a delegate proposed to extend the judicial power beyond the consideration of laws and treaties to include cases arising under the Constitution, James Madison's notes captured these concerns. "Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution, and whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department." Consequently, "[t]he motion of Docr. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature—."[1]

This passage, and the language of Article III, Section 2, makes clear that the Framers did not intend for federal judges to roam at large in construing the Constitution and laws of the United States, but rather preferred and provided for resolution of disputes arising in a "judicial" manner. This interpretation is reinforced by the refusal of the Convention to assign the judges the extra-judicial functions that some members of the Convention—Madison and James Wilson notably—conceived for them. Thus, for instance, the Convention four times voted down proposals for judges, along with Executive Branch officials, to sit on a council of revision with the power to veto laws passed by Congress.[2] A similar fate befell suggestions that the Chief Justice be a member of a privy council to assist the President[3] and that the President or either House of Congress be able to request advisory opinions of the Supreme Court.[4] The intent of the Framers in rejecting the latter proposal was early effectuated when the Justices declined a request of President Washington to tender him advice respecting legal issues growing out of United States neutrality between England and France in 1793.[5] Moreover, the refusal of the Justices to participate in a congressional plan for awarding veterans' pensions[6] bespoke a similar adherence to the restricted role of courts. These restrictions have been encapsulated in a series of principles or doctrines, the application of which determines whether

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[1] 2 Records of the Federal Convention of 1787, at 430 (Max Farrand ed., 1911).

[2] The proposal was contained in the Virginia Plan. 1 Records of the Federal Convention of 1787, at 21 (Max Farrand ed., 1911). For the four rejections, *see id.* at 97–104, 108–10, 138–40; 2 Records of the Federal Convention of 1787, at 73–80, 298 (Max Farrand ed., 1911).

[3] *Id.* at 328–29, 342–44. Although a truncated version of the proposal was reported by the Committee on Detail, *id.* at 367, the Convention never took it up.

[4] *Id.* at 340–41. The proposal was referred to the Committee on Detail and never heard of again.

[5] 1 C. Warren, *supra* at 108–111; 3 Correspondence and Public Papers of John Jay 633–635 (H. Johnston ed., 1893); H. Wechsler, Principles, Politics, and Fundamental Law: Selected Essays 50–52 (1961).

[6] Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) (discussed in ArtIII.S1.4.4 Inherent Power to Issue Judgments).

an issue is met for judicial resolution and whether the parties raising it are entitled to have it judicially resolved. Constitutional restrictions are intertwined with prudential considerations in the expression of these principles and doctrines, and it is seldom easy to separate the two strands.[7]

ArtIII.S2.C1.4 Advisory Opinions

ArtIII.S2.C1.4.1 Overview of Advisory Opinions

Article III, Section 2, Clause 1:

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

An advisory opinion is a non-binding interpretation of the law by a court,[1] essentially the court providing advice on an abstract or hypothetical legal question. The Supreme Court has defined an "advisory opinion" as an "advance expression[ ] of legal judgment upon issues" that are not before a court in the form of litigation involving concrete claims by adverse litigants.[2] The Court has long held that the language in Article III authorizing federal court jurisdiction over certain "Cases" and "Controversies" prohibits federal courts from issuing advisory opinions.[3] The Court has explained that cases seeking advisory opinions are not justiciable, meaning that the federal courts lack jurisdiction to decide such cases.[4]

The Supreme Court has recognized two primary reasons for the limitation on advisory opinions. First, the Court has explained that the "implicit policies in Article III" and separation of powers principles confine federal courts to assessing the validity of actions by the other branches of government only in the context of a case or controversy.[5] Second, the advisory opinion limitation promotes the prudential consideration that federal courts should decide legal questions in the context of an active, adversarial dispute. The Supreme Court has

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[7] *See, e.g.*, Justice Louis Brandeis dissenting in *Ashwander v. TVA,* 297 U.S. 288, 341, 345–348 (1936). *Cf.* Flast v. Cohen, 392 U.S. 83, 97 (1968); Rescue Army v. Municipal Court, 331 U.S. 549, 568–575 (1947).

[1] *Advisory Opinion* Black's Law Dictionary (11th ed. 2019).

[2] United States v. Fruehauf, 365 U.S. 146, 157 (1961).

[3] *E.g.*, Chi. & S. Air Lines v. Waterman S. S. Corp., 333 U.S. 103, 113–14 (1948) ("It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action.") (citing Hayburn's Case, 2 Dall. 409; United States v. Ferreira, 13 How. 40 (1852); Gordon v. United States, 117 U.S 697; *In re* Sanborn, 148 U.S. 222; Interstate Commerce Comm'n v. Brimson, 154 U.S. 447; La Abra Silver Mining Co. v. United States, 175 U.S. 423; Muskrat v. United States, 219 U.S. 346 (1911); United States v. Jefferson Electric Mfg. Co., 291 U.S. 386)).

[4] *See, e.g.*, Muskrat v. United States, 219 U.S. 346, 361–63 (1911). For discussion of other constitutional requirements related to justiciability, see generally Justiciability .

[5] Flast v. Cohen, 392 U.S. 83, 96 (1968). *See also* Muskrat v. United States, 219 U.S. 346, 357 (1911) ("[T]he right to declare an act of Congress unconstitutional [can] only be exercised when a proper case between opposing parties was submitted for judicial determination . . . there [is] no general veto power in the court upon the legislation of Congress.") (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–80 (1803)); Osborn v. Bank of United States, 22 U.S. 738, 819 (1824) ("[The Judicial Power] is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law.").

concluded that courts operate best when confronted with disputes that involve "a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests."[6]

The ban on advisory opinions has been recognized as being at the "core of Article III," and one commentator has noted that "other justiciability doctrines exist largely to ensure that federal courts will not issue advisory opinions."[7] Despite the importance of the rule against advisory opinions, the Supreme Court has at times lacked precision in explaining when a legal opinion becomes "advisory" in nature.[8] In particular, cases from the 1920s and 1930s grappled with the question of whether the prohibition on advisory opinions also banned federal courts from issuing declaratory judgments—binding decisions that establish the legal rights of the parties without awarding other relief.[9] The following essays provide an overview of the prohibition against advisory opinions,[10] then discuss the relationship between advisory opinions and declaratory judgments.[11]

ArtIII.S2.C1.4.2 Advisory Opinion Doctrine

Article III, Section 2, Clause 1:

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

At the time of the Founding, both English law[1] and existing state constitutions[2] allowed courts to issue advisory opinions. Nonetheless, the Framers declined to include explicit

[6] *Flast*, 392 U.S. at 96–97 (1968) (quoting United States v. Fruehauf, 365 U.S. 146, 157 (1961)). *See also* Golden v. Zwickler, 394 U.S. 103, 108 (1969) ("[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. . . . '[C]oncrete legal issues, presented in actual cases, not abstractions,' are requisite.").

[7] Erwin Chemerinsky, Federal Jurisdiction § 2.2 (6th ed. 2012). *See also* California v. Texas, 141 S. Ct. 2104, 2116 (2021) ("To find standing here to attack an unenforceable statutory provision would allow a federal court to issue what would amount to an advisory opinion without the possibility of any judicial relief." (internal quotes and citation omitted)); Carney v. Adams, 141 S. Ct. 493, 498 (2020).

[8] Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harv. L. Rev. 603, 648 (1992) (arguing that the Supreme Court has been "extremely sloppy" in the use of the phrase "advisory opinions").

[9] *See* ArtIII.S2.C1.4.3 Advisory Opinions and Declaratory Judgments.

[10] *See* ArtIII.S2.C1.4.2 Advisory Opinion Doctrine.

[11] *See* ArtIII.S2.C1.4.3 Advisory Opinions and Declaratory Judgments.

[1] Flast v. Cohen, 392 U.S. 83, 96 (1968) ("[T]he power of English judges to delivery advisory opinions was well established [at the Founding].") (citing 3 K. Davis, Administrative Law Treatise 127–128 (1958)). *See also* 1 William Blackstone, Commentaries 162 (1765) (noting that Members of the House of Lords "have a right to be attended, and constantly are, by the judges of the court of king's bench and commonpleas, and such of the barons of the exchequer as are of the degree of the coif, or have been made serjeants at law; as likewise by the masters of the court of chancery; for their advice in point of law, and for the greater dignity of their proceedings."). *But see* Sackville's Case (1760), 28 Eng. Rep. 940, 2 Eden, 371 (issuing a formal, written extrajudicial opinion to the King as to whether an army officer could be tried by court martial, but noting that, according to Lord Mansfield, the judges are "very averse to giving extra-judicial opinions, especially where they affect a particular case").

[2] Mass. Const. ch. III, art. II. ("Each branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions."). *See also* N.H. Const. art. 74 ("Each branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of the supreme court upon important questions of law and upon solemn occasions.").

language in the Constitution that would have imposed an advisory role for the Supreme Court or other federal courts.[3] The final version of Article III states only that the "judicial power shall extend to" certain categories of "Cases" and "Controversies."[4] Although that language does not conclusively resolve the question of whether courts have the power to issue advisory opinions,[5] the Supreme Court resolved the issue early in the nation's history in two key cases.

The Supreme Court first issued a decision related to advisory opinions (albeit without using the term) in 1792, in *Hayburn's Case*.[6] In that case, the Supreme Court considered a petition for a writ of mandamus to direct a federal circuit court to proceed on a claim seeking a federal pension. The petitioner argued that the courts had failed to give effect to an act of Congress. The Court noted, however, that "the reasons assigned by the judges," including Supreme Court Justices sitting on the circuit courts, "for declining to execute the . . . act of Congress, involve a great constitutional question."[7] Specifically, those judges contended that pension decisions under the Act were not judicial duties that Congress could constitutionally assign to the courts because the Act subjected such decisions to "revision and control" by the legislature and an officer in the Executive department.[8] They determined that such control was "radically inconsistent with the independence of that judicial power which is vested in the courts" by the Constitution.[9] While *Hayburn's Case* remained pending, Congress enacted legislation providing an alternative means of relief for the pensioners; the Court then dismissed the mandamus petition without deciding the underlying constitutional question.[10] However, the circuit court opinions declining to issue non-final pension decisions have become an accepted part of the Court's justiciability jurisprudence. The Court has since confirmed that it has no jurisdiction where an opinion would be subject to later review and revision, as such a ruling can amount to no more than advice.[11]

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[3] *See* James Madison, James Madison's Notes of the Constitutional Convention, Max Farrand, 1 The Records of the Federal Convention of 1787 17–23 (1911) (providing for "a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate"); Virginia (Randolph) Plan as Amended (providing that "the jurisdiction of the national Judiciary shall extend to . . . questions which involve the national peace and harmony."); James Madison, James Madison's Notes of the Constitutional Convention, Max Farrand, 2 The Records of the Federal Convention of 1787, at 334 ("Each branch of the Legislature, as well as the Supreme Executive shall have authority to require the opinions of the supreme Judicial Court upon important questions of law, and upon solemn occasions."). *See also* James Madison, James Madison's Notes of the Constitutional Convention, Max Farrand, 1 The Records of the Federal Convention of 1787 96–105 (1911) ("It was quite foreign from the nature of [the judicial] office to make them judges of the policy of public measures.") (quoting Elbridge Gerry, a delegate from Massachusetts).

[4] U.S. Const. art. III, § 2.

[5] *Compare with* U.S. Const. art. II, § 2 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the *executive* Departments.") (emphasis added).

[6] 2 U.S. (2 Dall.) 409 (1792).

[7] *Id.* at 410, footnote.

[8] *Id.*.

[9] *Id. See also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995) (holding that congressional statute that "retroactively command[ed] the federal courts" to reopen final judgments was unconstitutional). *But see* Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) (plurality) ("The separation of powers, among other things, prevents Congress from exercising the judicial power . . . At the same time, the legislative power is the power to make law, and Congress can make laws that apply retroactively to pending lawsuits, even when it effectively ensures that one side wins."); Bank Markazi v. Peterson, 136 S. Ct. 1310, 1325 (2016) ("Congress may indeed direct courts to apply new enacted, outcome-altering legislation in pending civil cases."). *See also Constitution Annotated* III.3.2.2.3.

[10] *Id.*

[11] *See, e.g.*, Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (citing *Hayburn's Case* for the proposition that "the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions"). *See also* Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp. 333 U.S. 103, 113–14 (1948) ("To revise or review an administrative decision which has only the force of a recommendation . . . would be to render an advisory opinion in its most obnoxious form."); United States v. Ferreira, 54 U.S. (13 How.)

The Supreme Court produced the second early precedent against advisory opinions in 1793. In that year, President George Washington, seeking to determine the United States' legal rights and obligations in relation to ongoing conflicts between the European powers of France and Britain, sent a letter through his Secretary of State, Thomas Jefferson, to the Justices of the Supreme Court.[12] The letter asked if the Justices would be willing to render opinions on a number of legal questions of "considerable difficulty" that "do not give a cognizance of them to the tribunals of the country."[13] The Justices declined to provide an answer. Chief Justice John Jay drafted a response to the President explaining that "[t]he lines of separation drawn by the Constitution between the three departments of government . . . and our being judges of a court in the last resort . . . are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to."[14] Although the letter was not an official opinion of the Court, the Court has since cited it as a major source of the rule against advisory opinions.[15]

Subsequent precedents and practice have reaffirmed the prohibition on advisory opinions but raised some questions about its scope. In the 1948 case *Chicago & Southern Air Lines v. Waterman S. S. Corp.*, the Court refused a private party's request for review of an order of the Civil Aeronautics Board that was, in effect, merely a recommendation to the President for his final action.[16] The Court explained that a judicial decision on the matter would be "an advisory opinion in its most obnoxious form—advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control."[17] While the Court's refusal to act was based in part on the risk of intruding on the President's authority, the Court also made clear that was not the sole relevant factor, as the Judiciary had "early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive."[18]

The majority opinion in *Chicago & Southern Air Lines* stated that it has been "the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action."[19] However, while the Court has declined to issue advisory opinions via formal judicial decisions, Supreme Court Justices have at times offered their thoughts on the law in an informal capacity. For instance, in response to a letter calling for suggestions to improve in the operation of the courts, Supreme Court Justices drafted a letter suggesting that the requirement that Justices ride circuit was unconstitutional, though apparently they never

40, 48 (1852) (noting that the powers of a commissioner to "adjust claims to lands or money" is not "judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States").

[12] Letter from Thomas Jefferson, Sec. of State, to Chief Justice Jay and Associate Justices (July 18, 1793), *reprinted in* Richard H. Fallon, Jr., et al., Hart and Wechsler's The Federal Courts and the Federal System 50–51 (7th ed. 2015).

[13] *Id.*

[14] Letter from Chief Justice Jay and Associate Justices to President George Washington (August 8, 1793) *reprinted in* Richard H. Fallon, Jr., et al., Hart and Wechsler's The Federal Courts and the Federal System 52 (7th ed. 2015).

[15] Vieth v. Jubelirer, 541 U.S. 267, 302 (2004) (plurality) (noting that 1793 correspondence involved "categorical" statement by the Court that the "giving of advisory opinions" was beyond the judiciary's power); Flast v. Cohen, 392 U.S. 83, 96 n.14 (1968) (noting that "[t]he rule against advisory opinions was established as early as 1793 . . . and the rule has been adhered to without deviation."). *See also* Muskrat v. United States, 219 U.S. 346, 354 (1911) (citing the 1793 correspondence in refusing to take jurisdiction over a case brought under a statute creating a lawsuit devised to test the constitutionality of a different statute).

[16] 333 U.S. 103 (1948).

[17] *Id.* at 113.

[18] *Id.*

[19] *Id.*

sent it.[20] Justice William Johnson communicated to President James Monroe, apparently with the knowledge and approval of the other Justices, the views of the Justices on the constitutionality of internal improvements legislation.[21] In addition, Chief Justice Charles Evans Hughes sent a letter to Senator Burton K. Wheeler questioning the constitutionality of a proposal from President Franklin Delano Roosevelt's administration to increase the membership of the Supreme Court and have the Court sit in divisions.[22] Other Justices have individually served as advisers and confidants of Presidents to one degree or another.[23]

Some commentators also contend that the precise meaning of the ban on advisory opinions became blurred in the twentieth century, as the Court has used the phrase to refer to a number of different distinct limitations on federal courts.[24] Primarily, the Court has used the term in reference to the Article III justiciability limitations on federal courts' jurisdiction, such as mootness or standing.[25] However, the Court has also linked the ban on advisory opinions to modern prudential doctrines, such as the Supreme Court's practice of not deciding questions in state court cases that have been resolved on a separate and independent state law ground,[26] and the practices of courts to avoid reaching constitutional issues or questions not necessary to the determination of the case.[27] These varying uses of the term "advisory opinion," combined

[20] 2 The Documentary History of the Supreme Court of the United States, 1789–1800: The Justices on Circuit: 1790–1794, at 89–91 (Maeva Marcus ed., 1985).

[21] 1 C. Warren, The Supreme Court in United States History 595–597 (1926).

[22] *Reorganization of the Judiciary: Hearings on S. 1392 Before the Senate Judiciary Committee*, 75th Congress, 1st Sess. (1937), pt. 3, 491. *See also* Chief Justice Roger B. Taney's private advisory opinion to the Secretary of the Treasury that a tax levied on the salaries of federal judges violated the Constitution. S. Tyler, Memoirs of Roger B. Taney 432–435 (1876).

[23] *E.g.*, Acheson, *Removing the Shadow Cast on the Courts*, 55 A.B.A.J. 919 (1969); Jaffe, *Professors and Judges as Advisors to Government: Reflections on the Roosevelt-Frankfurter Relationship*, 83 Harv. L. Rev. 366 (1969). The issue earned the attention of the Supreme Court when it upheld the congressionally authorized service of federal judges on the Sentencing Commission. Mistretta v. United States, 488 U.S. 361, 397–408 (1989) (citing examples and detailed secondary sources).

[24] *See* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harv. L. Rev. 603, 648 (1992); *see also* Wright, Miller, & Cooper, 13 Fed. Prac. & Proc. Juris. § 3529.1 (3d ed.) (discussing different uses of the term).

[25] *See, e.g.*, Preiser v. Newkirk, 422 U.S. 395, 401 (1975) (noting that "[t]he exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy" and that this is tied to the lack of power to issue advisory opinions); North Carolina v. Rice, 404 U.S. 244, 246 (1971) (dismissing case on grounds of mootness, noting that "this Court [has] no power to issue advisory opinions"); Hall v. Beals, 396 U.S. 45, 48 (1969) (in holding that recent amendment by Colorado Legislature rendered case moot, observing that "The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law"); Pub. Workers v. Mitchell, 330 U.S. 75, 89 (1947) (in finding that plaintiffs' claims not a justiciable "case or controversy" under Article III, noting that "[a]s is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions"); St. Pierre v. United States, 319 U.S. 41, 42 (1943) ("A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it.").

[26] *See* Herb v. Pitcairn, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."). *See also* Lambrix v. Singletary, 520 U.S. 518, 522–23 (1997) ("We in fact lack jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory.").

[27] *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (noting that the federal courts "have no power to give advisory opinions" and discussing rules by which the Court has "avoiding passing upon a large part of all the constitutional questions pressed upon it for decision"). *See also* Lee, *supra* note 24, at 648–49 (discussing application of "advisory opinion" label to dicta).

with the fact that the Court has referenced it less frequently than any other justiciability rule,[28] have created confusion among scholars or practitioners about the precise meaning of the prohibition.

Beyond its constitutional role, the Court's rule against advisory opinions has repeatedly been recognized or applied in other, non-constitutional contexts. For instance, as noted, the Court has invoked the ban on advisory opinions to justify its practice of not deciding questions in state court cases that have been decided on a separate and independent state law ground.[29] The Court has also suggested that the advisory opinion ban might be relevant to other legal questions, such as whether the Court should issue purely prospective decisions,[30] whether a federal court should render alternative holdings or issue dicta,[31] and whether individual Justices should "engage[ ] in extrajudicial expression of their legal views."[32] As these references show, although the ban on advisory opinions is only rarely invoked by the Supreme Court, its implications are felt throughout the Court's jurisprudence and throughout the law.[33]

ArtIII.S2.C1.4.3 Advisory Opinions and Declaratory Judgments

Article III, Section 2, Clause 1:

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

In contrast to a non-binding advisory opinion, a declaratory judgment is a "binding adjudication that establishes the rights and other legal relations of the parties without

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[28] Erwin Chemerinsky, Federal Jurisdiction § 2.2 (6th ed. 2012) (noting that "the Supreme Court expressly refers to the ban on advisory opinions less frequently than the other justiciability doctrines").

[29] *See Herb*, 324 U.S. at 126 ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."). *See also Lambrix*, 520 U.S. at 522–23 ("We in fact lack jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory."). *But see* 16B Charles A. Wright, Arthur R. Miller, et al., Federal Practice and Procedure § 4021 (3d ed. 2018) (explanation that adequate-state-ground rule rests on prohibition against rendering advisory opinions is "circular"; in addition, "advisory opinion doctrine is [ ] inadequate to describe the full range of practice with respect to state law questions.").

[30] Stovall v. Denno, 388 U.S. 293, 301 (1967) (refusing to make a criminal procedure rule generally retroactive, holding it applied only to future cases plus the case announcing the rule, despite the resulting inequality to other pending cases, noting that the rule could not be purely prospective because of "[s]ound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies"). *See also* Richard H. Fallon, Jr., et al., Hart and Wechsler's The Federal Courts and the Federal System 54 (7th ed. 2015) (evaluating arguments about whether purely prospective decision would constitute an advisory opinion forbidden by Article III).

[31] *See, e.g.*, Fallon, *supra* note 30, at 55 (asking whether "[w]hen a Court renders alternative holdings, has it violated constitutional norms?").

[32] *Id.* at 56 (citing examples of extrajudicial expressions of Justices' views).

[33] In a few other areas, courts issue opinions that might be considered "advisory," insofar as they do not directly affect the parties before the court. *See* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. Rev. 847 (2005) (considering the Court's examination of "unnecessary" constitutional issues in four contexts, qualified immunity, habeas corpus, harmless error, and Fourth Amendment good faith, and considering whether and when this practice can be consistent with the ban on advisory opinions). However, the Supreme Court has not addressed whether this practice can be reconciled with the ban on advisory opinions.

providing for or ordering enforcement."[1] While the two types of decisions are distinct, they share some similarities—for instance, neither directly yields an enforceable judgment. Thus, some Supreme Court cases from the 1920s and 1930s held that requests for declaratory relief were functionally requests for advisory opinions and thus outside the jurisdiction of the federal courts.[2] By contrast, other roughly contemporaneous decisions suggested that federal courts could issue declaratory judgments.[3]

Congress took up the issue in the Federal Declaratory Judgment Act of 1934.[4] The 1934 Act provided that "[i]n cases of actual controversy" federal courts could "declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed."[5] The Senate report on the Act stated:

> The declaratory judgment differs in no essential respect from any other judgment except that it is not followed by a decree for damages, injunction, specific performance, or other immediately coercive decree. It declares conclusively and finally the rights of parties in litigations over a contested issue, a form of relief which often suffices to settle controversies and fully administer justice.[6]

The Supreme Court unanimously upheld the Act against a constitutional challenge in *Aetna Life Ins. Co. v. Haworth*.[7] In *Aetna Life*, the plaintiff, an insurance company, brought suit under the Act seeking a judicial declaration of its obligations to the insured defendant.[8] The Court noted that the 1934 Act, "in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense."[9] In concluding that the case before it was not a request for an advisory opinion, the Court described advisory opinions as opinions on a "hypothetical basis," in contrast with "adjudication[s] of present right upon established fact."[10] The Court concluded that justiciable controversies under the Constitution must be concrete, as "distinguished from a difference or dispute of a hypothetical or abstract character," and must be "admitting of specific relief through a decree of conclusive character."[11] In *Aetna Life*, those requirements were met because the parties' dispute of fact on the insured's disability or lack thereof was "essentially the same whether it [was] presented by the insured or the insurer"

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[1] Declaratory Judgment, Black's Law Dictionary (11th ed. 2019).

[2] *See* Piedmont & Northern Ry. v. United States, 280 U.S. 469, 477 (1930) ("What plaintiffs are seeking is, therefore, in substance, a declaratory judgment that the Railway is within the exemption contained in paragraph 22 of the Act. Such a remedy is not within either the statutory or the equity jurisdiction of federal courts."); Willing v. Chi. Auditorium Ass'n, 277 U.S. 274, 289 (1928) ("What the plaintiff seeks is simply a declaratory judgment. To grant that relief is beyond the power conferred upon the federal judiciary.").

[3] Fidelity Nat'l Bank & Tr. Co. v. Swope, 274 U.S. 123 (1927); Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933). *Wallace* was cited with approval inMedimmune, Inc. v. Genentech, Inc., 549 U.S. 118, 120 (2007) ("Article III's limitation of federal courts' jurisdiction to "Cases' and "Controversies,' reflected in the "actual controversy' requirement of the Declaratory Judgment Act, 28 U.S.C. § 2201(a), [does not] require[ ] a patent licensee to terminate or be in breach of its license agreement before it can seek a declaratory judgment that the underlying patent is invalid, unenforceable, or not infringed.").

[4] 48 Stat. 955, as amended, 28 U.S.C. §§ 2201–2202 .

[5] 48 Stat. 955. The language remains quite similar. 28 U.S.C. § 2201.

[6] S. Rep. No. 1005, 73d Congress, 2d Sess. (1934), 2. *See also* H. Rep. No. 1264, 73d Congress, 2d Sess. (1934), 2 (stating the intent "to confer upon the courts the power to exercise in some instances preventive relief; a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts").

[7] 300 U.S. 227 (1937).

[8] *Id.* at 237–39.

[9] *Id.* at 239–40.

[10] *Id.* at 242.

[11] *Id.* at 240–41.

and could be cleanly resolved by a court.[12] As the Court explained, "[i]t is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative."[13]

The holding in *Aetna Life* does not dictate that requests for a declaratory judgment brought under the Declaratory Judgment Act should always be regarded as a "case or controversy." In contrast with *Aetna Life*, in the 1998 case *Calderon v. Ashmus*,[14] the Court held there was no case or controversy presented when a California inmate brought a class action lawsuit on behalf of all California death row inmates under the Declaratory Judgment Act. The inmates had sought a declaration that California death row inmates fell under certain provisions of the Antiterrorism and Effective Death Penalty Act of 1996, which would have affected the statute of limitations that applied to the inmates' federal habeas proceedings challenging their convictions or their sentences.[15] In a ruling that relied on the doctrine of standing, the Court cited the lack of an imminent need for the resolution of the issues presented and noted that even a favorable resolution for the plaintiff would only resolve the "single issue" of the statute of limitations, leaving the remainder of the dispute to other lawsuits.[16] In light of those facts, the Court concluded that the question presented was not "concrete enough" to justify Article III jurisdiction.[17]

As a general matter, the Court has insisted that "the requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit,"[18] but has declined to adopt a bright-line test for when courts may issue declaratory judgments. As one decision explained: "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy."[19] Rather, the Court must consider in each case "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[20] Even if a declaratory judgment case presents a potentially justiciable case or controversy, the Court is not required to exercise its jurisdiction.[21]

Parties commonly seek declaratory judgments to settle disputes and identify rights in private areas, including insurance and patents in particular but extending into all areas of civil litigation. By statute, declaratory judgments are not available in tax cases.[22] Moreover, the Court has demonstrated reluctance to issue declaratory judgments resolving important

[12] *Id.* at 244.

[13] *Id.*

[14] 523 U.S. 740 (1998).

[15] *Id.* at 742–43.

[16] *Id.* at 748–49.

[17] *Id.* at 749.

[18] Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1945).

[19] Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

[20] *Id.*

[21] Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 494 (1942); Pub. Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 243 (1952); Pub. Affairs Assocs. v. Rickover, 369 U.S. 111, 112 (1962). *See also* Wilton v. Seven Falls Co., 515 U.S. 277 (1995).

[22] Congress added an exception to the Declaratory Judgment Act with respect to federal taxes in 1935. 49 Stat. 1027. The Tax Injunction Act of 1937, 50 Stat. 738, 28 U.S.C. § 1341, prohibited federal injunctive relief directed at state taxes but said nothing about declaratory relief. It was held to apply, however, in *California v. Grace Brethren Church,* 457 U.S. 393 (1982). Earlier, in *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293 (1943), the Court had reserved the issue but held that considerations of comity should preclude federal courts from giving declaratory relief in such cases. *Cf.* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981).

questions of public law, especially regarding the validity of legislation.[23] In such cases, the Court has strictly insisted that the controversy presented meet justiciability requirements such as concreteness and ripeness.[24] Notwithstanding those restrictions, several noteworthy constitutional decisions have been rendered in declaratory judgment actions.[25]

ArtIII.S2.C1.5 Adversity

ArtIII.S2.C1.5.1 Overview of Adversity Requirement

Article III, Section 2, Clause 1:

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

The requirement that a case involve litigants who are genuinely adverse to each other imposes another limitation on the justiciability of disputes in federal court.[1] The Supreme Court has interpreted Article III of the Constitution to forbid federal courts from issuing binding judgments in cases that do not present "an honest and actual antagonistic assertion of rights by one party against another."[2] According to the Court, this adversity requirement helps ensure that the parties provide the Judiciary the factual information and legal advocacy it needs to resolve issues correctly.[3] Thus, where all the parties in a case seek the same result, there is generally no "Case" or "Controversy" under Article III, and the Court lacks jurisdiction to issue a ruling.[4] To the extent this limitation on federal jurisdiction derives from Article III of the Constitution, the courts may not modify it, and Congress cannot alter it without amending the Constitution.[5]

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[23] *E.g.*, Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936); Electric Bond Co. v. SEC, 303 U.S. 419 (1938); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947); Eccles v. Peoples Bank, 333 U.S. 426 (1948); Rescue Army v. Municipal Court, 331 U.S. 549, 572–73 (1947).

[24] *United Pub. Workers*, 330 U.S. 75; Poe v. Ullman, 367 U.S. 497 (1961); Altvater v. Freeman, 319 U.S. 359 (1943); International Longshoremen's Union v. Boyd, 347 U.S. 222 (1954); Pub. Serv. Comm'n v. Wycoff Co., 344 U.S. 237 (1952).

[25] *E.g.*, Currin v. Wallace, 306 U.S. 1 (1939); Perkins v. Elg, 307 U.S. 325 (1939); Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936); Evers v. Dwyer, 358 U.S. 202 (1958).

[1] *See, e.g.*, GTE Sylvania, Inc. v. Consumers Union of United States, Inc., 445 U.S. 375, 382 (1980) (holding that Article III limits "the business of federal courts to questions presented in an adversary context") (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968)).

[2] *See* United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 446 (1993) (quoting Muskrat v. United States, 219 U.S. 346, 359 (1911)) (brackets omitted). *See also* Ayestas v. Davis, 138 S. Ct. 1080, 1090 (2018) ("[C]ases and controversies in our legal system are adversarial in nature.").

[3] *See, e.g.*, *GTE Sylvania*, 445 U.S. at 382–83 (stating that "[t]he clash of adverse parties" in a lawsuit "sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions") (quoting O'Shea v. Littleton, 414 U.S. 488, 494 (1974)) (ellipses omitted).

[4] Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47, 48 (1971) (per curiam). *See also*, *e.g.*, *GTE Sylvania*, 445 U.S. at 383.

[5] *See*, *e.g.*, *Muskrat*, 219 U.S. at 362 (holding that Congress "exceeded the limitations of legislative authority" by purporting to authorize federal courts to adjudicate disputes between non-adverse parties); *id*. at 361 (holding that Article III limits the federal judicial power to "determin[ing] actual controversies arising between adverse litigants").

The adversity requirement is closely related to other constitutional justiciability doctrines, especially Article III standing[6] and the bar against advisory opinions.[7] As explained in greater detail below, however, the adversity requirement has diminished in importance at the same time as the Supreme Court has applied other Article III justiciability doctrines—particularly Article III standing—more stringently over time.[8]

ArtIII.S2.C1.5.2 Early Adversity Doctrine

Article III, Section 2, Clause 1:

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

The Supreme Court's 1850 opinion in *Lord v. Veazie* is the seminal Supreme Court case establishing the adversity requirement.[1] The defendant in *Lord*, John W. Veazie, wanted the legal right to use the Penobscot River in Maine for transportation and navigation.[2] A gentleman named Moor, however, claimed to possess the sole right to navigate the river.[3] Veazie therefore tried to obtain a judicial declaration that he, not Moor, had the right to use the river.[4] Thus, Veazie and his brother-in-law,[5] Nathaniel Lord, entered into a contract warranting that Veazie held "the right to use the waters of the Penobscot River."[6] Lord then sued Veazie and asked the court to decide whether Veazie or Moor held the rights to the river.[7]

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[6] *See, e.g.*, *Flast*, 392 U.S. at 100 ("[T]he standing requirement is closely related to, although more general than, the rule that federal courts will not entertain friendly suits or those which are feigned or collusive in nature.") (internal citations omitted); Baker v. Carr, 369 U.S. 186, 204 (1962) ("Have the appellants alleged such a personal stake in the outcome of the controversy as to *assure that concrete adverseness* which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? *This is the gist of the question of standing*.") (emphases added).

[7] *See*, *e.g.*, Princeton Univ. v. Schmid, 455 U.S. 100, 102 (1982) (per curiam) ("We do not sit to decide hypothetical issues or to give *advisory opinions* about issues as to which *there are not adverse parties* before us.") (emphases added); *Flast*, 392 U.S. at 96–97 ("[T]he *rule against advisory opinions* also recognizes that such suits often 'are not pressed before the Court with that clear concreteness provided . . . from a *clash of adversary argument*[.]'") (quoting United States v. Fruehauf, 365 U.S. 146, 157 (1961)) (emphases added); *Muskrat*, 219 U.S. at 362 ("If such actions . . . are sustained, the result will be that this court, instead of keeping within the limits of judicial power, and deciding cases or controversies *arising between opposing parties* . . . will be required to give *opinions in the nature of advice* concerning legislative action[.]") (emphases added). *See generally* ArtIII.S2.C1.4.1 Overview of Advisory Opinions (analyzing the bar on advisory opinions).

[8] *See, e.g.*, United States v. Windsor, 570 U.S. 744, 755–63 (2013) (rejecting argument that defendant's nondefense of statute challenged by plaintiff rendered the parties insufficiently adverse partly because the parties had satisfied Article III's standing requirements).

[1] 49 U.S. (8 How.) 251 (1850).

[2] *Id*. at 252.

[3] *Id*. at 251.

[4] *See id*. at 252.

[5] *Id*. at 253 ("[T]he plaintiff in error is the son-in-law, and the defendant in error is the son, of said Samuel Veazie.").

[6] *Id*. at 252.

[7] *Id*.

ArtIII.S2.C1.5.2
Early Adversity Doctrine

The *Lord* Court determined that the federal courts could not—and should not—adjudicate the case.[8] The Court first explained that federal courts exist to resolve disputes between adverse parties.[9] Manufacturing a lawsuit between non-adverse parties solely to obtain a judicial opinion deciding a legal question, according to the Court, was an abuse of the judicial system.[10] Applying that principle to the facts of *Lord*, the Court observed that there was no true dispute between Lord and Veazie, as they entered into their contract solely to obtain a judicial determination regarding which person held the rights to use the Penobscot River.[11] The Court further protested that Lord had not named the true adverse party to that controversy—namely, Moor—as a defendant in the case, and had not even informed Moor of the lawsuit.[12] Thus, the case was a collusive suit between two friendly parties that offered Moor no opportunity to defend his interests.[13]

On various occasions during the remainder of the nineteenth century, the Supreme Court invoked the principles it applied in *Lord* to evaluate whether litigants were sufficiently adverse.[14] It was not until its 1911 opinion in *Muskrat v. United States*,[15] however, that the Court held that the rule against deciding cases between non-adverse parties had a constitutional dimension.[16] The plaintiffs in *Muskrat* sought to invalidate certain federal statutes affecting the allotment of Indian lands.[17] Congress passed a law purporting to authorize the plaintiffs—and only those plaintiffs—to challenge those statutes in federal court.[18] The plaintiffs, invoking that law, sued the United States to determine whether the allotment statutes were constitutional.[19] Even though Congress purported to authorize the

[8] *See id*. at 256 (holding that the judgment issued by the lower court was "a nullity and void").

[9] *See id*. at 255 ("It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves,—and to do this upon the full hearing of both parties.").

[10] *See id*. ("[A]ny attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court.").

[11] *See id*. at 254 ("The court is satisfied . . . that the contract set out in the pleadings was made for the purpose of instituting this suit, and that there is no real dispute between the plaintiff and defendant. On the contrary, it is evident that their interest in the question brought here for decision is one and the same, and not adverse; and that in these proceedings the plaintiff and defendant are attempting to procure the opinion of this court upon a question of law.").

[12] *See id.* ("[T]he plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest as opposed to that of other persons, who are not parties to this suit, who had no knowledge of it while it was pending in the Circuit Court, and no opportunity of being heard there in defence of their rights.").

[13] *See id*. ("[T]heir conduct is the more objectionable, because they have brought up the question upon a statement of facts agreed on between themselves, without the knowledge of the parties with whom they were in truth in dispute.").

[14] *Compare, e.g.*, Chicago & G. T. Ry. v. Wellman, 143 U.S. 339, 345 (1892) ("It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of [a] legislative act."); Cleveland v. Chamberlain, 66 U.S. 419, 425–26 (1861) ("This appeal must be dismissed. Selah Chamberlain is, in fact, both appellant and appellee. . . . There is no material difference between this case and that of Lord vs. Veazie[.] . . . It is plain that this is no adversary proceeding, no controversy between the appellant and the nominal appellee."), *with*, *e.g.*, Pollock v. Farmers' Loan & Tr. Co., 15 S. Ct. 673, 674–75, 679 (1895) (determining that a particular lawsuit between a company and its stockholders "was not a collusive one"), *vacated*, 158 U.S. 601 (1895).

[15] 219 U.S. 346 (1911).

[16] *See* Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, The Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. Chi. L. Rev. 545, 567 (2006) (describing *Muskrat* as "[t]he leading decision" for the proposition "that the case-or-controversy language of Article III mandates litigant adverseness").

[17] 219 U.S. at 348–49.

[18] *Id*. at 350–51, 361–62.

[19] *Id*. at 348–50.

plaintiffs to file their lawsuit in federal court,[20] the *Muskrat* Court still concluded that the Judiciary lacked jurisdiction to decide the case.[21] The Court, invoking Article III, stated that the judicial power conferred by the Constitution only authorizes the federal courts to decide "cases" and "controversies"[22] between adverse parties.[23] The Court determined that the plaintiffs in *Muskrat* were not asking the courts to determine a controversy between adverse litigants as the Constitution contemplated.[24] Although the plaintiffs had named the United States as the defendant in their case, the Court determined that the United States did not have any interest adverse to the plaintiffs.[25] According to the Court, the plaintiffs were not trying to assert property rights against the government or obtain compensation for governmental wrongdoing;[26] instead, the plaintiffs merely sought a judicial declaration that a federal law was invalid.[27] The Supreme Court thus decided that Article III prohibited the federal courts from adjudicating the plaintiffs' constitutional challenge.[28] The Court further determined that the federal law purporting to authorize the plaintiffs to bring their lawsuit in federal court was invalid because it would require the courts to take a nonjudicial action:[29] resolving legal issues without an "actual controvers[y] arising between adverse litigants."[30] The Court therefore ruled that Article III forbade the federal courts from deciding the constitutional issues in *Muskrat* until they arose in the context of a suit between true adversaries.[31]

The Supreme Court continued to insist on an adversarial controversy between litigants as a prerequisite to federal jurisdiction on various occasions throughout the mid-twentieth century.[32] For instance, in the 1943 case of *United States v. Johnson*, the Court ruled that the district court should have dismissed a lawsuit as collusive because the plaintiff had "instituted [the proceeding] as a 'friendly suit' at [the] appellee's request" in order to test a statute's validity.[33] The Court ruled in its 1937 opinion in *Aetna Life Insurance Co. of Hartford,*

[20] *Id*. at 360.

[21] *Id*. at 363.

[22] *Id*. at 351, 361 (quoting U.S. Const. art. III, § 2).

[23] *Id*. at 361.

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] *See id*. at 361–62 (explaining that the plaintiffs sought "to determine the constitutional validity of [a] class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question").

[28] *Id*.

[29] *Id*. at 362.

[30] *Id*. at 361.

[31] *Id*. at 362 ("The questions involved in this proceeding as to the validity of the legislation may arise in suits between individuals, and when they do and are properly brought before this [C]ourt for consideration they, of course, must be determined in the exercise of its judicial functions."). That is not to say, however, that Article III categorically precludes plaintiffs from filing lawsuits to challenge a statute's constitutionality. *See, e.g.*, MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 129 (2007) (explaining that Article III does not forbid plaintiffs from "seek[ing] a declaratory judgment regarding the constitutionality of a . . . statute") (citing Steffel v. Thompson, 415 U.S. 452, 458–60 (1974)). *See also* Judgment, Black's Law Dictionary (11th ed. 2019) (defining a "declaratory judgment" as "a binding adjudication that establishes the rights and other legal relations of the parties").

[32] *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 100 (1968) (noting "the rule that federal courts will not entertain friendly suits or those which are feigned or collusive in nature") (internal citation omitted); Poe v. Ullman, 367 U.S. 497, 505 (1961) (Frankfurter, J.) (discussing "the Court's refusal to entertain cases which disclosed a want of a truly adversary contest, of a collision of actively asserted and differing claims").

[33] 319 U.S. 302, 303–05 (1943).

Connecticut v. Haworth, by contrast, that a particular insurance dispute was justiciable because the insurer and the insured had genuinely adverse interests.[34]

ArtIII.S2.C1.5.3 Intra-Branch Litigation and Adversity Doctrine

Article III, Section 3, Clause 1:

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

Even though the Court continued to enforce the adversity requirement into the mid-to-late twentieth century,[1] it gradually started to apply the doctrine more flexibly. In the 1949 case of *United States v. Interstate Commerce Commission*, for example, the Court ruled that despite the adversity doctrine, a governmental entity acting in one capacity may sometimes sue itself or another agency of the same government.[2] In that case, the United States, acting as a shipper performing wharfage services, filed a complaint with a now-defunct[3] federal agency called the Interstate Commerce Commission (ICC) against certain railroads.[4] The ICC ruled for the railroads and against the United States.[5] The United States then filed a federal lawsuit to set the ICC's order aside.[6] To comply with a statute requiring any plaintiff challenging an ICC order to sue the United States, the United States—as the plaintiff challenging the ICC's order—named itself as one of the defendants.[7] Although the Court acknowledged that, under normal circumstances, the adversity requirement bars a litigant from suing itself in federal court,[8] it decided that the adversity doctrine did not render the case nonjusticiable.[9] The real

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[34] *See* 300 U.S. 227, 242 (1937) ("There is here a dispute between parties who face each other in an adversary proceeding. The dispute relates to legal rights and obligations arising from the contracts of insurance. . . . Prior to this suit, the parties had taken adverse positions with respect to their existing obligations. Their contentions concerned the disability benefits which were to be payable upon prescribed conditions. On the one side, the insured claimed that he had become totally and permanently disabled and hence was relieved of the obligation to continue the payment of premiums and was entitled to the stipulated disability benefits. . . . On the other side, the company made an equally definite claim that the alleged basic fact did not exist, that the insured was not totally and permanently disabled and had not been relieved of the duty to continue the payment of premiums[.] . . . Such a dispute is manifestly susceptible of judicial determination."). *See also* ArtIII.S2.C1.4.1 Overview of Advisory Opinions (discussing other aspects of *Aetna*'s holding).

[1] *See, e.g.*, Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47, 48 (1971) (per curiam) (holding that case presented "no case or controversy within the meaning of Art[icle] III" because "both litigants desire[d] precisely the same result"); *Flast*, 392 U.S. at 100 (noting "the rule that federal courts will not entertain friendly suits or those which are feigned or collusive in nature") (internal citation omitted); *Poe*, 367 U.S. at 505 (Frankfurter, J.) (discussing "the Court's refusal to entertain cases which disclosed a want of a truly adversary contest" or the lack of "a collision of actively asserted and differing claims").

[2] 337 U.S. 426, 429–31 (1949).

[3] *See* ICC Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 803 (1995) ("The Interstate Commerce Commission is abolished.").

[4] 337 U.S. at 428.

[5] *Id*. at 429.

[6] *Id*.

[7] *Id*. (quoting 28 U.S.C. § 46 (1949)).

[8] *See id*. at 430 ("There is much argument with citation of many cases to establish the long-recognized general principle that no person may sue himself. Properly understood the general principle is sound, for courts only adjudicate justiciable controversies. They do not engage in the academic pastime of rendering judgments in favor of persons against themselves. Thus a suit filed by John Smith against John Smith might present no case or controversy which courts could determine.").

[9] *Id*. at 431.

controversy in *ICC*, the Court explained, was not between the United States and itself, but between the United States and the railroads.[10] Thus, the court reasoned, the case presented a justiciable dispute between adverse parties.[11]

Similarly, in the 1974 case of *United States v. Nixon*, the Court determined that an intra-branch dispute between two Executive officers was justiciable.[12] In *Nixon*, a federal district court, at the request of a Special Prosecutor investigating an alleged conspiracy to defraud the United States and obstruct justice, had issued a subpoena *duces tecum*[13] directing President Richard Nixon to produce certain tape recordings and documents.[14] President Nixon argued that the district court could not issue the subpoena[15] because the dispute was an intra-branch controversy between two Executive officers.[16] The Court rejected President Nixon's argument, reasoning that he and the Special Prosecutor were adverse enough to create a justiciable controversy.[17] Because the Special Prosecutor's interests conflicted with those of President Nixon, and because the dispute over the subpoena arose in a criminal case that fell comfortably within the federal Judiciary's traditional powers, the Court held that *Nixon* presented an adversarial dispute despite the Executive Branch's presence on both sides of the controversy.[18] As a result of cases like *Nixon* and *ICC*, federal courts seldom dismiss intergovernmental disputes on adversity grounds alone[19]—at least when the relevant agencies are acting in different capacities.[20]

ArtIII.S2.C1.5.4 Executive Branch Determinations on Statute Constitutionality

Article III, Section 3, Clause 2:

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

Further demonstrating the Court's more flexible application of the adversity doctrine in the past few decades are the 1983 case of *Immigration and Naturalization Service v. Chadha*,[1] the 2013 case of *United States v. Windsor*,[2] and the 2020 case of *Seila Law LLC v. Consumer*

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[10] *See id*. at 430 ("This suit . . . is a step in proceedings to settle who is legally entitled to sums of money, the Government or the railroads.").

[11] *See id*. ("While this case is United States v. United States, et al., it involves controversies of a type which are traditionally justiciable.").

[12] 418 U.S. 683, 692 (1974).

[13] A subpoena is "a writ or order commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply." Subpoena, Black's Law Dictionary (11th ed. 2019). A subpoena duces tecum is "a subpoena ordering the witness to appear in court and to bring specified documents, records, or things." *Id*. *See also* Fed. R. Crim. P. 17(c) (governing subpoenas duces tecum in federal criminal cases).

[14] 418 U.S. at 686–88.

[15] *Id*. at 692.

[16] *Id*. at 697.

[17] *See id*. at 696–97.

[18] *Id*. at 697.

[19] Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 Wm. & Mary L. Rev. 893, 895 (1991). *See also, e.g.*, Joseph W. Mead, *Interagency Litigation and Article III*, 47 Ga. L. Rev. 1217, 1219 (2013) (claiming that it is "surprisingly common" for courts to adjudicate "litigation between federal agencies").

[20] *See* Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 128 (1995) (analyzing *ICC* and emphasizing that "the status of the Government as a statutory beneficiary or market participant must be sharply distinguished from the status of the Government as regulator or administrator").

[1] *See* 462 U.S. 919, 930 n.5, 939–40 (1983).

[2] *See* 570 U.S. 744, 756–63 (2013).

Financial Protection Bureau.[3] Each of those cases involved constitutional challenges to federal statutes.[4] In each case, the United States agreed with the challenger that the challenged law was unconstitutional, raising questions about whether the parties were genuinely adverse.[5] In all three cases, the Court suggested that certain aspects of the adversity doctrine are not *constitutional* mandates, but are instead merely *prudential* constraints that do not categorically deprive the federal courts of jurisdiction.[6] Prudential restrictions on the justiciability of disputes are judicially self-imposed limitations on federal jurisdiction that do not stem from Article III of the Constitution.[7] While constitutional limitations on justiciability often impose insuperable barriers to the jurisdiction of the federal courts that neither Congress, nor the parties, nor the Judiciary itself can abrogate without an amendment to Article III, litigants may overcome prudential barriers to justiciability by showing that it would be prudent for the court to adjudicate the case in question.[8] These cases therefore suggest that federal courts may sometimes adjudicate cases even if the plaintiff and the defendant desire the same ultimate result.[9]

In *Chadha*, the Court considered a constitutional challenge to a statute purporting to authorize a single house of Congress to pass a resolution overruling Executive Branch decisions not to deport certain otherwise deportable aliens.[10] The appellant (the *Immigration and Naturalization Service* (INS)) and the appellee (an immigrant named Jagdish Rai Chadha) both agreed that the provision was unconstitutional,[11] which created concerns that the case was not an adversarial controversy.[12] The Supreme Court still concluded, however, that the parties were sufficiently adverse[13] because the INS still intended to deport Chadha if the federal courts ultimately rejected his constitutional challenge.[14] The *Chadha* Court acknowledged potential concerns about ruling on the provision's constitutionality when neither of the named parties argued that the law was valid.[15] Even so, the Court characterized those misgivings as purely prudential concerns, rather than insuperable constitutional obstacles to resolving the case.[16] The Court ultimately determined that these prudential

[3] *See* 140 S. Ct. 2183, 2196–97 (2020).

[4] *See id.* at 2194–95; *Windsor*, 570 U.S. at 752; *Chadha*, 462 U.S. at 923.

[5] *See Seila Law*, 140 S. Ct. at 2195, 2196–97; *Windsor*, 570 U.S. at 754; *Chadha*, 462 U.S. at 928.

[6] *See Seila Law*, 140 S. Ct. at 2196–97; *Windsor*, 570 U.S. at 756–63; Chadha, 462 U.S. at 930 n.5, 939–40.

[7] *Cf*. *Windsor*, 570 U.S. at 757 (discussing the prudential standing doctrine) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

[8] *See id*. at 760 ("Unlike Article III requirements—which must be satisfied by the parties before judicial consideration is appropriate—the relevant prudential factors that counsel against hearing this case are subject to 'countervailing considerations [that] may outweigh the concerns underlying the usual reluctance to exert judicial power.'") (quoting ,422 U.S. 490, 500–01 (1975)).

[9] *See, e.g.*, *Seila Law*, 140 S. Ct. at 2196 ("[*A*]*micus* contends that we should dismiss the case because the parties agree on the merits of the constitutional question and the case therefore lacks 'adverseness.' That contention, however, is foreclosed by *United States v. Windsor*.") (internal citation omitted).

[10] 462 U.S. at 923 (explaining that *Chadha* presented "a challenge to the constitutionality of the provision in § 244(c)(2) of the Immigration and Nationality Act . . . authorizing one House of Congress, by resolution, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General of the United States, to allow a particular deportable alien to remain in the United States").

[11] *Id*. at 928.

[12] *Id*. at 939 (quoting Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)).

[13] *Id*.

[14] *Id*. at 940 n.12. *See also id*. at 939 ("INS's agreement with Chadha's position does not alter the fact that the INS would have deported Chadha absent the Court of Appeals' judgment.").

[15] *Id*. at 940.

[16] *Id*.

concerns did not bar the Court from deciding the issue because Congress had intervened in the case to defend the statute's constitutionality, thus supplying the requisite adversity between the litigants.[17]

The Court again suggested that the adversity requirement has a non-constitutional, purely prudential component several decades later in *Windsor*.[18] *Windsor* involved a constitutional challenge to a federal statute that defined "marriage" to include "only a legal union between one man and one woman as husband and wife."[19] The statute thus precluded persons in same-sex marriages from claiming federal estate tax exemptions for surviving spouses.[20] The respondent, Edith Schlain Windsor, sued the United States to invalidate the provision and obtain a refund of certain federal taxes she paid when she inherited her same-sex spouse's estate.[21] The United States, however, agreed with Windsor that the provision was unconstitutional.[22] Still, the United States continued to enforce the statute by denying refunds and assessing deficiencies against surviving spouses in same-sex marriages,[23] including Windsor herself.[24]

The *Windsor* Court determined that the parties were adverse even though the United States and Windsor agreed that the provision was unconstitutional.[25] The Court, citing *Chadha*, explained that "even where the Government largely agrees with the opposing party on the merits of the controversy, there is sufficient adverseness and an adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party."[26] Because invalidating the challenged provision would require the United States to pay money it would not otherwise pay, the Court determined that the United States retained a sufficient stake in the lawsuit to render the case justiciable.[27] The Court also suggested, however, that it might have found the case nonjusticiable if the Executive simply paid Windsor the requested refund rather than enforcing the challenged law.[28]

The *Windsor* Court acknowledged concerns that the parties might not be fully adverse to each other.[29] As in *Chadha*, however, the Court characterized this risk as a remediable prudential issue, not an incurable jurisdictional defect.[30] Once the Attorney General

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[17] *Id*. at 930 n.5, 939–40. *See also* Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1954 n.5 (2019) (discussing *Chadha*'s adversity holding).

[18] 570 U.S. 744 (2013).

[19] *Id*. at 752 (citing 1 U.S.C. § 7). *See also* ArtVII.1 Historical Background on Ratification Clause (analyzing the Supreme Court's jurisprudence on sexual orientation).

[20] 570 U.S. at 750–51.

[21] *See id*. at 749–52, 753.

[22] *Id*. at 754.

[23] *Id*. at 756.

[24] *See id*. at 755 ("The United States has not complied with the [district court's ruling that the provision is unconstitutional]. Windsor has not received her refund, and the Executive Branch continues to enforce [the challenged provision]."). As the Supreme Court observed, the United States chose to continue enforcing the statute even though it believed the law was unconstitutional to maintain adversity between the parties and thereby allow the federal courts to adjudicate Windsor's constitutional challenge. *See id*. at 754.

[25] *See id*. at 759 ("[T]his case presents a justiciable controversy under Article III.").

[26] *Id*. (quoting INS v. Chadha, 462 U.S. 919, 940 n.12 (1983)) (internal quotation marks and brackets omitted).

[27] *Id*. at 757–59.

[28] *Id*. at 758.

[29] *Id*. at 759 (quoting Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)) (internal quotation marks omitted).

[30] *Id*. *See also id*. at 756 (concluding that dismissing the case as nonjusticiable would improperly "elide[ ] the distinction between two principles: the jurisdictional requirements of Article III and the prudential limits on its exercise"); *id*. at 760 ("Unlike Article III requirements—which must be satisfied by the parties before judicial consideration is appropriate—the relevant prudential factors that counsel against hearing this case are subject to

announced that it would not defend the challenged provision, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives intervened in the case to defend the law's constitutionality.[31] The Court therefore determined that "BLAG's sharp adversarial presentation of the issues satisfie[d] the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree."[32]

The Supreme Court reaffirmed *Windsor*'s adversity holding in its 2020 decision in *Seila Law LLC v. Consumer Financial Protection Bureau*.[33] In that case, the Consumer Financial Protection Bureau (CFPB) issued a civil investigative demand to a law firm.[34] The law firm argued that the demand was invalid because the CFPB's structure violated the constitutional separation of powers.[35] Because the federal government, as the respondent in the case, agreed that the CFPB's structure contravened the separation of powers,[36] the Court appointed an amicus curiae to defend the CFPB's constitutionality.[37]

Although the court-appointed amicus urged the Court to consider whether the parties' agreement that the CFPB's structure was unconstitutional rendered the litigants insufficiently adverse to create a justiciable controversy, the Court ultimately ruled that the case was justiciable.[38] Citing *Windsor*, the Court explained that "a lower court order that presents real-world consequences for the Government and its adversary suffices to support Article III jurisdiction—even if 'the Executive may welcome' an adverse order that 'is accompanied by the constitutional ruling it wants.'"[39] Because the United States had not agreed to withdraw the civil investigative demand against the law firm, a judicial decision upholding or invalidating the CFPB would still have significant consequences for the parties despite their overlapping legal positions.[40] The Court thus determined that it had jurisdiction under Article III to issue such a decision.[41] The Court further ruled that its appointment of an

'countervailing considerations [that] may outweigh the concerns underlying the usual reluctance to exert judicial power.'") (quoting Warth v. Seldin, 422 U.S. 490, 500–01 (1975)).

[31] *Id*. at 754.

[32] *Id*. at 761.

[33] *See* 140 S. Ct. 2183, 2196–97 (2020).

[34] *See id.* at 2194.

[35] *See id*. at 2191 ("Congress provided that the CFPB would be led by a single Director, who serves for a longer term than the President and cannot be removed by the President except for inefficiency, neglect, or malfeasance. . . . The question before us is whether this arrangement violates the Constitution's separation of powers."); *id*. at 2194 (describing the law firm's argument "that the demand was invalid and must be set aside because the CFPB's structure violated the Constitution").

[36] *See id*. at 2195 ("[T]he Government agrees with petitioner on the merits of the constitutional question."). *See also id*. (noting that the Director of the CFPB "agree[d] with the Solicitor General's position . . . that her for-cause removal protection [wa]s unconstitutional").

[37] *Id.* An "amicus curiae" is "[s]omeone who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action." Amicus Curiae, Black's Law Dictionary (11th ed. 2019).

[38] *See* 140 S. Ct. at 2196.

[39] *See id*. (quoting United States v. Windsor, 570 U.S. 744, 758 (2013)).

[40] *See id*. at 2196–97 ("Here, petitioner and the Government disagree about whether petitioner must comply with the civil investigative demand. The lower courts sided with the Government, and the Government has not volunteered to relinquish that victory and withdraw the demand. To the contrary, while the Government agrees that the agency is unconstitutionally structured, it believes it may nevertheless enforce the demand on remand. Accordingly, our 'decision will have real meaning' for the parties.") (quoting INS v. Chadha, 462 U.S. 919, 939 (1983)) (internal citation omitted).

[41] *See id*. at 2195–97.

amicus curiae to defend the CFPB's constitutionality adequately addressed any non-constitutional, prudential concerns about the parties' adverseness.[42]

Chadha, *Windsor*, and *Seila Law* thus hold that the adversity requirement does not always bar federal courts from deciding cases in which the defendant agrees that the plaintiff is entitled to the relief he seeks. Those cases also suggest, however, that even though a defendant's agreement with the plaintiff's legal arguments will not necessarily vitiate the court's Article III jurisdiction, prudential concerns may counsel against resolving a case in which the parties have taken identical legal positions. As all three cases show, however, those concerns may lose force when a third party, such as a house of Congress or a court-appointed amicus curiae, appears in the litigation to supply the missing adversarial presentation of the pertinent legal issues.

ArtIII.S2.C1.6 Standing

ArtIII.S2.C1.6.1 Overview of Standing

Article III, Section 2, Clause 1:

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

The concept of "standing" broadly refers to a litigant's right to have a court rule upon the merits of particular claims for which he seeks judicial relief.[1] The Supreme Court has held that, as a threshold procedural matter,[2] a litigant must have standing in order to invoke the jurisdiction of a federal court so that the court may exercise its "remedial powers on his behalf."[3] In general, for a party to establish Article III standing, he must allege (and ultimately prove) that he has a genuine stake in the outcome of the case because he has personally

[42] *See id.* at 2197 ("[A]s in *Windsor*, any prudential concerns with deciding an important legal question in this posture can be addressed by 'the practice of entertaining arguments made an *amicus* when the Solicitor General confesses error with respect to a judgment below,' which we have done.") (quoting *Windsor*, 570 U.S. at 760).

[1] Warth v. Seldin, 422 U.S. 490, 498 (1975) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."); Black's Law Dictionary 1536 (9th ed. 2009) (defining "standing" as "a party's right to make a legal claim or seek judicial enforcement of a duty or right").

[2] Federal courts must necessarily resolve standing inquiries before proceeding to the merits of a lawsuit. *See, e.g.*, Davis v. FEC, 554 U.S. 724, 732 (2008). In fact, a court may raise the issue of standing sua sponte (i.e., of its own accord) in order to ensure that it has jurisdiction, even if no party to the lawsuit contests standing. *See, e.g.*, Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 110 (2001) (per curiam). Although the Supreme Court must examine a litigant's standing when the lower court has erroneously assumed that standing exists, it will not investigate standing sua sponte in order to rule upon an issue that a lower court denied the litigant standing to bring before the court. *Id.*

[3] Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) (quoting *Warth*, 422 U.S. at 498–99). *See also Davis*, 554 U.S. at 732; *Simon*, 426 U.S. at 37 ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. The concept of standing is part of this limitation.") (citation omitted); *Warth*, 422 U.S. at 498–99 ("In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III."). The Court has occasionally invoked the English common law tradition as supporting its inquiry into a litigant's standing. *See, e.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 132 (2011) ("In the English legal tradition, the need to redress an injury resulting from a specific dispute taught the efficacy of judicial resolution and gave legitimacy to judicial decrees. . . . The Framers paid heed to these lessons.").

suffered (or will imminently suffer): (1) a concrete and particularized injury; (2) that is traceable to the allegedly unlawful actions of the opposing party; and (3) that is redressable by a favorable judicial decision.[4] These requirements seek to ensure that federal courts do not exceed their Article III power to decide actual "cases" or "controversies." [5]

The Court has held that the burden of establishing standing falls upon each party who seeks a distinct form of judicial relief,[6] including a party initiating a lawsuit,[7] intervening in a lawsuit,[8] or appealing a lower court decision.[9] Each of these parties must make an appropriate showing during each stage of the litigation[10] that the elements of injury, causation, and redressability existed at the outset of the lawsuit, and continue to exist,[11] for each claim[12] and

[4] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (listing the elements of standing). For further discussion on the elements of Article III standing, see ArtIII.S2.C1.6.4.1 Overview of Lujan Test.

[5] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998) ("Article III, § 2, of the Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies.' We have always taken this to mean cases and controversies of the sort traditionally amenable to and resolved by the judicial process.").

[6] The Supreme Court has indicated that if one party to a lawsuit has standing, other entities can join as parties without having to satisfy independently the demands of Article III, provided those parties do not seek a distinct form of relief from the party with standing. *E.g.*, Horne v. Flores, 557 U.S. 433, 446 (2009) (determining that, because a school superintendent had standing to challenge lower court decisions in which he was named a defendant, the Court did not need to consider whether interveners, who were state legislators, had standing); *Davis*, 554 U.S. at 724 (requiring a litigant to have standing for each form of relief sought); Rumsfeld v. Forum for Acad. & Instit. Rights, Inc., 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."); Director v. Perini N. River Assocs., 459 U.S. 297, 305 (1983) (stating that a justiciable controversy existed because an injured employee who sought coverage under the Longshoremen's and Harbor Workers' Compensation Act was a party respondent before the court and had standing, and thus there was no need to determine whether the Director of the Office of Workers' Compensation Programs, as the official responsible for administration and enforcement of the Act, had standing).

[7] FW/PBS Inc. v. Dallas, 493 U.S. 215, 231 (1990) ("[P]etitioners in this case must allege . . . facts essential to show jurisdiction. If they fail to make the necessary allegations, they have no standing.") (citations and internal quotation marks omitted).

[8] A party seeking to intervene in a lawsuit (i.e., seeking to join a lawsuit already in progress) as a matter of right must have Article III standing to seek judicial relief that differs from that sought by the other litigants with standing. Town of Chester v. Laroe Estates, Inc., No. 16-605, slip op. at 6 (U.S. June 5, 2017); Wittman v. Personhuballah, 578 U.S. 539, 543 (2016).

[9] Diamond v. Charles, 476 U.S. 54, 56 (1986).

The Supreme Court also addressed standing on appeal in a 2011 case in which government employees that had obtained a favorable judgment on the basis of qualified immunity sought to appeal a lower court's ruling that their conduct had violated the Constitution. The Court held that these officials had Article III standing because they had a personal stake in seeing the ruling overturned, as its mere existence could lead to the risk of future liability for them. Camreta v. Greene, 563 U.S. 692, 703 (2011) ("If the official regularly engages in that conduct as part of his job . . . he suffers injury caused by the adverse constitutional ruling. So long as it continues in effect, he must either change the way he performs his duties or risk a meritorious damages action.").

Standing on appeal may also be based on an alleged injury arising from the decision below—for example, where the lower court had ordered the appealing party to comply with a government demand that would injure that party, and overturning the lower court's decision would redress the injury by absolving the appealing party of an obligation to comply with the demand. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, No. 19-7 slip op. at 9 (U.S. June 29, 2020) (stating that a petitioner had "appellate standing" where the petitioner suffered a "concrete injury" that was "traceable to the decision below" and could be redressed by the Court). *See also* West Virginia v. Env't Prot. Agency, No. 20-1530, slip op. at 14 (U.S. June 30, 2022).

[10] Hollingsworth v. Perry, 570 U.S. 693 (2013); *Davis*, 554 U.S. at 734 ("[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief sought. . . . While the proof to establish standing increases as the suit proceeds, the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed.") (citations and internal quotation marks omitted). *See also* Nat'l Org. for Women v. Scheidler, 510 U.S. 249, 255–56 (1994) (observing that, at the pleading stage, the plaintiff may have standing sufficient to withstand a motion to dismiss if he sets forth "general factual allegations of injury resulting from the defendant's conduct") (citation omitted); Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (noting that the plaintiff's burden of proof on the standing issue differs depending on whether the case is at the pleading stage, the plaintiff is responding to a motion for summary judgment, or the case has gone to trial).

[11] *Davis*, 554 U.S. at 732–33 ("[I]t is not enough that the requisite interest exist at the outset. 'To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time

for each form of relief sought.[13] A litigant's failure to establish standing to sue may result in dismissal of his distinct claims for relief without a decision on the merits of those claims.[14]

Since the 1920s, the Supreme Court has offered various justifications for these somewhat amorphous[15] constitutional limitations on the categories of litigants who can maintain a claim for judicial relief in an Article III federal court.[16] Perhaps the most frequently cited rationale derives from the Constitution's separation of powers among the branches of government.[17] Issues of standing often arise when a private plaintiff sues the government, seeking to have it act in accordance with the Constitution or other law.[18] But, as the Court has frequently noted, the Constitution makes the political branches—and not the courts—responsible for "vindicating the public interest."[19] As a result, unelected judges lack the authority to render advisory opinions as to whether Congress or the Executive has followed the law; they may only decide a specific case brought before the court by a party that has suffered a particularized

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complaint is filed.'" (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997)). If an injury no longer exists as the litigation progresses, the court may also lack jurisdiction under the related doctrine of mootness. *See* ArtIII.S2.C1.8.1 Overview of Mootness Doctrine to ArtIII.S2.C1.8.9 Class Action Litigation and Mootness.

[12] *Davis*, 554 U.S. at 734 ("[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief sought.") (internal quotation marks omitted).

[13] *See, e.g.*, Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) ("Lyons fares no better if it be assumed that his pending damages suit affords him Art. III standing to seek an injunction as a remedy for the claim arising out of the October 1976 events. The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again . . . ").

[14] *E.g.*, Warth v. Seldin, 422 U.S. 490, 502 (1975) (stating that if "the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed"). *But see* Gill v. Whitford, No. 16-1161, slip op. at 21 (U.S. June 18, 2018) (declining to direct dismissal of a partisan gerrymandering case that involved "an unsettled kind of claim . . . the contours and justiciability of which are unresolved" and, therefore, remanding the case for further proceedings).

[15] As discussed below, the Court's standing jurisprudence has been inconsistent in approach over the years. *See* ArtIII.S2.C1.6.3 Standing Doctrine from 1940s to 1970s.

[16] Although the Supreme Court has often stated that the standing inquiry focuses on whether the plaintiff is a proper party to maintain a claim for a particular form of judicial relief in federal court and not on the "issues he wishes to have adjudicated," the Court has acknowledged the difficulty in separating the plaintiff's status from the nature of his claims when applying principles of standing. *Compare* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) ("[S]tanding focuses on the party seeking to get his complaint before a federal court and not on the issues he wished to have adjudicated." (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968) (internal quotation marks omitted)), *with* Allen v. Wright, 468 U.S. 737, 752 (1984) ("Typically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.").

[17] *E.g.*, *Lujan*, 504 U.S. at 576.

[18] *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U. S. 208, 221223 (1974) (holding that an association of officers and enlisted members of the military reserves, as well as individual members, lacked standing to sue as taxpayers in a case arguing that the Incompatibility Clause of Article I forbid certain Members of Congress from holding commissions in the Armed Forces Reserve). Issues of standing may also arise in cases in which a litigant sues a private party under a law providing for a private right of action against a private defendant. *E.g.*, Spokeo Inc., v. Robins 578 U.S. 330, 342 (2016).

[19] *Lujan*, 504 U.S. at 576 ("Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive."); Frothingham v. Mellon, 262 U.S. 447, 488 (1923) ("We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803). When reviewing administrative action or inaction of federal agencies, courts must be wary of intruding upon the President's duty under Article II, Section 3 of the Constitution to "take Care that the Laws be faithfully executed" by ordering the Executive to follow the law. *Lujan*, 504 U.S. at 577 (citing U.S. Const. art. II, § 3).

The Court has adhered to the standing doctrine even in cases in which no party exists who would have standing to challenge government action or inaction in the courts, noting that the political process is available to those seeking to vindicate generalized grievances. United States v. Richardson, 418 U.S. 166, 179 (1974).

injury as a result of the government's actions.[20] Such deference to the political branches, particularly in cases raising questions about the separation of powers,[21] reflects the Court's understanding of the "limited . . . role of the courts in a democratic society,"[22] as well as its determination that federal courts should hear only those types of cases that the English judicial system would historically have considered suitable for judicial resolution.[23] And separation of powers concerns have also motivated the Court's conclusion that Article III limits Congress's ability to confer standing on plaintiffs to sue the government by enacting statutes containing "citizen-suit" provisions.[24] Such case law has reasoned that permitting plaintiffs who do not have a personal and direct stake in the outcome of a case to sue under one of these provisions would effectively allow the Legislative Branch to intrude upon the Executive Branch's duty to enforce the law.[25]

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[20] *See supra* note 19. *See also* Hollingsworth v. Perry, 570 U.S. 693, 693–94 (2013) (characterizing the standing requirement as "an essential limit on [the Court's] power: It ensures that we act *as judges*, and do not engage in policymaking properly left to elected representatives."). For more on Article III's bar on advisory opinions and its relationship to standing doctrine, see ArtIII.S2.C1.4.1 Overview of Advisory Opinions.

[21] Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408–09 (2013) ("The law of Article III standing, which is built on separation of powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982) ("The judicial power of the United States defined by Art. III is not an unconditional authority to determine the constitutionality of legislative or executive acts."); *id.* at 474 ("Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury."). Thus, the Court applies the standing requirements most stringently when litigants challenge the constitutionality of an action or omission by one or both of the political branches of government. Raines v. Byrd, 521 U.S. 811, 819–20 (1997) ("[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."); Flast v. Cohen, 392 U.S. 83, 100, 101 (1968) ("The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated."). The Court later stated that "*Flast* failed to recognize that [standing] doctrine has a separation of powers component, which keeps courts within certain traditional bounds vis-a-vis the other branches . . . " Lewis v. Casey, 518 U.S. 343, 353 n.3 (1996). In the Court's early years, Chief Justice John Marshall noted that if federal courts could hear "every *question* under the Constitution," rather than traditional "cases" or "controversies," then federal courts would have jurisdiction over many issues that should be the subject of legislative discussion and decision. 4 Papers of John Marshall 95 (Charles Cullen ed., 1984) ("If the judicial power extended to every *question* under the Constitution it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power [among the branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary."). The French sociologist and political theorist Alexis de Tocqueville once noted the benefits of the U.S. federal judiciary's requirement that a litigant have a direct stake in the outcome of legal proceedings to maintain a lawsuit, stating that: "It will be seen, also, that by leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis of a prosecution." 1 Alexis de Tocqueville, Democracy in America 102 (Philips Bradley, ed., 1945).

[22] Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 133 (2011) ("Continued adherence to the case-or-controversy requirement of Article III maintains the public's confidence in an unelected but restrained Federal Judiciary.").

[23] *Spokeo*, 578 U.S. at 337 ("Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy."); Summers v. Earth Island Inst., 555 U.S. 488, 492 (2009) ("In limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law.")

[24] *Lujan*, 504 U.S. at 577.

[25] *Id.* ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'") (quoting U.S. Const. art. II, § 3).

Although standing doctrine is grounded primarily in constitutional separation of powers concerns, the Supreme Court has also cited other rationales for its existence that may not be constitutional in nature. Requiring the litigant to have a personal stake in the outcome of his lawsuit ensures that a court will decide complex legal and factual issues in the context of a specific factual situation involving adverse parties who can more clearly illuminate for judges the issues in dispute.[26] Even in cases in which adversity between the parties exists, standing doctrine seeks to ensure that federal courts will not exercise the judicial power, which can significantly affect the lives, liberty, and property of others, to resolve generalized grievances brought primarily for the benefit of "concerned bystanders" who seek to vindicate abstract ideological interests (for example, a general interest in the protection of the environment is insufficient to confer standing).[27] More practical reasons for the standing requirements include a need to reserve the limited resources of the federal courts for concrete disputes;[28] the sweeping precedential effects of the Court's holdings on the merits in constitutional litigation, which can be difficult, if not impossible, for Congress to alter without amending the Constitution;[29] and a need for the court to fashion relief no more broadly than the litigant's situation requires.[30]

The Supreme Court has also previously recognized certain *prudential* limitations on the exercise of federal courts' jurisdiction, which, although lacking constitutional status, may nonetheless result in a court's refusal to hear a case: (1) when the litigant seeks to assert the rights of third parties not before the court; (2) when the litigant seeks redress for a generalized grievance widely shared by a large number of citizens; and (3) when the litigant challenges government action or inaction and its asserted interests do not fall within the zone of interests arguably protected or regulated by the statute or constitutional provision underlying its claims.[31] In recent years, however, the Court has questioned the basis of the doctrine of prudential standing.[32] The Court has suggested that the bar on generalized grievances is a constitutional (and not prudential) requirement.[33] Moreover, the Court likewise has determined that a court applying the "zone of interests" test should examine whether the

[26] Baker v. Carr, 369 U.S. 186, 204 (1962) (stating that the parties invoking the court's jurisdiction must have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.").

[27] United States v. SCRAP, 412 U.S. 669, 687 (1973) (stating that the injury-in-fact requirement of standing "prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders"). *See also* Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009) ("While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice."); Diamond v. Charles, 476 U.S. 54, 62 (1986); *Valley Forge Christian Coll.*, 454 U.S. at 472–73 ("[The standing requirement] tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. . . . The [Article III] aspect of standing also reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order.").

[28] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 191 (2000) ("Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake.").

[29] Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 146 (2011) ("Making the Article III standing inquiry all the more necessary are the significant implications of constitutional litigation, which can result in rules of wide applicability that are beyond Congress's power to change.").

[30] Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974).

[31] United States v. Windsor, 570 U.S. 744, 760 (2013) ("Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" (quoting *Baker*, 369 U.S. at 204); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (listing the three types of prudential restraints); Gladstone v. Village of Bellwood, 441 U.S. 91, 99–100 (1979).

[32] Lexmark Int'l Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 n.3 (2014).

[33] *Id.*

plaintiff's claim falls within the scope of a statutory provision creating a cause of action.[34] Furthermore, Congress, through express legislation, may abrogate these prudential standing requirements, to the extent that they remain viable and are not mandated by the Constitution.[35]

The following essays trace the development of Article III standing doctrine in Supreme Court jurisprudence from its origins in the 1920s to the development of the modern doctrine and its key elements of injury, causation, and redressability. They then examine select topics that implicate the doctrine, including cases in which a plaintiff seeks to maintain standing to challenge government action or inaction by relying solely upon his status as a taxpayer, as well as the various forms of representational standing that a litigant who has not himself sustained injury may rely upon when asserting the rights of people not before the court. Finally, they conclude with an overview of standing for Members of Congress, congressional control of standing, and what remains of the concept of prudential standing.[36]

ArtIII.S2.C1.6.2 Early Standing Doctrine

Article III, Section 2, Clause 1:

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

Prior to the 1970s, a litigant had standing only if he could show that his injury stemmed directly from the "violation of a legal right"[1] such as one recognized at common law or in statute.[2] The next section discusses how a significant increase in the power of federal administrative agencies to regulate businesses and individuals contributed to the Supreme Court's decision to discard this "legal injury" test in favor of the more familiar "injury-in-fact"

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[34] *Id.*

[35] Warth v. Seldin, 422 U.S. 490, 501 (1975) ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.").

[36] Federal rules for standing do not apply in state courts, which may have their own rules not addressed in this essay. Asarco, Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or . . . a federal statute."). However, when a state court enters a judgment in a case in which the plaintiffs would not have had standing had they brought the case in federal court, a party may have standing to appeal that judgment in federal court if the judgment rests upon an allegedly incorrect interpretation of federal law and causes the appellant direct injury. *Id.* at 623–24 ("When a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met.") (citations omitted).

[1] Ala. Power Co. v. Ickes, 302 U.S. 464, 479 (1938).

[2] Tenn. Elec. Power Co. v. TVA, 306 U.S. 118, 137–38 (1939). *See also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 140–41 (1951) ("The touchstone to justiciability is injury to a legally protected right"); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 170 (1992) (noting that, prior to the 1970s, litigants "with a concrete interest could not bring suit unless the common law, or some other source of law, said so. But if a source of law conferred a right to sue, 'standing' existed, entirely independently of 'concrete interest' or 'injury in fact.'").

standing requirement in 1970.[3] The Court, however, had already begun to develop some of the other basic principles of modern standing doctrine, such as the requirement that the litigant has suffered a particularized injury, decades earlier.[4]

While the Supreme Court had long recognized that its role under Article III is limited to "decid[ing] the rights of individuals" in particular cases rather than answering abstract questions about the constitutional authority of the political branches,[5] the Court decided two cases in the 1920s that established the foundation for modern standing doctrine. Although the Court's opinions in *Fairchild v. Hughes*[6] and *Frothingham v. Mellon*[7] do not employ the term "standing," these decisions embody the fundamental principle underlying the modern concept of standing that a litigant must allege an individualized injury in order to establish a justiciable "case or controversy" under Article III of the Constitution and invoke the jurisdiction of a federal court.

The Supreme Court's first foundational decision concerning Article III standing was the 1922 *Fairchild* case.[8] In that case, the Court held that the federal courts lacked jurisdiction to rule upon a taxpayer's challenge to the procedures by which the Nineteenth Amendment was ratified.[9] In affirming the lower court's dismissal of the case, the Court held that the plaintiff could not establish standing solely by relying upon his status as a citizen with nothing more than a general interest in ensuring that the federal government followed the law.[10] Although Justice Louis Brandeis's majority opinion alluded to Article III of the Constitution as the basis for the Court's ruling on the issue of standing, the Court did not explain the reasoning behind its holding in detail.[11]

A year later, in *Frothingham v. Mellon*, the Court elaborated on its rationale for the standing requirement.[12] In *Frothingham*, the Court considered various constitutional challenges to the Maternity Act, a federal statute that created a grant program to distribute taxpayer funds to states that agreed to cooperate with the federal government to protect the health of mothers and infants.[13] The Court declined to reach the merits of the individual

[3] Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970) ("The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."). *See also* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 320 n.3 (1977) (applying the injury-in-fact and zone of interest tests and finding that an out-of-state stock exchange had standing to bring a Commerce Clause challenge to a New York statute imposing a higher transfer tax on securities transactions involving an out-of-state sale). For more background on the decline of the "legal injury" test, see ArtIII.S2.C1.6.3 Standing Doctrine from 1940s to 1970s.

[4] Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1375–76 (1988) (including both *Fairchild* and *Frothingham* in a discussion of the Court's earliest standing cases).

[5] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals . . . "). *See also* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 340 (2006) ("Chief Justice Marshall, in *Marbury v. Madison* . . . grounded the Federal Judiciary's authority to exercise judicial review and interpret the Constitution on the necessity to do so in the course of carrying out the judicial function of deciding cases.").

[6] 258 U.S. 126 (1922).

[7] 262 U.S. 478 (1923).

[8] *Fairchild*, 258 U.S. at 129–30.

[9] *Id.* at 127–30. The plaintiff had sought an injunction to prevent the Secretary of State from proclaiming the ratification of the amendment and the U.S. Attorney General from enforcing it. *Id.*

[10] *Fairchild*, 258 U.S. at 129–30.

[11] *Id.* at 127–30 ("Plaintiff's alleged interest in the question submitted is not such as to afford a basis for this proceeding. . . . [I]t is not a case within the meaning of § 2 of Article III of the Constitution, which confers judicial power on the federal courts . . . ").

[12] *Frothingham* was consolidated with *Massachusetts v. Mellon*, another case in which the State of Massachusetts challenged the same statute. *Frothingham*, 262 U.S. at 478–79. The Court also held that Massachusetts lacked standing to bring suit on its own or on behalf of its citizens to challenge the statute. *Id.* at 480–86. For more on *Massachusetts v. Mellon*, see ArtIII.S2.C1.6.5 Taxpayer Standing.

[13] *Frothingham*, 262 U.S. at 479.

federal taxpayer's constitutional claims, determining that the plaintiff lacked Article III standing.[14] In support of its holding that the plaintiff lacked a sufficient stake in the outcome of the case, the Court noted that the taxpayer's interest in preventing increased tax liability was a "minute and indeterminable" interest widely shared with millions of other U.S. taxpayers, and that a court order enjoining the use of taxpayer funds for the grant program might not actually redress the plaintiff's injury because it might not actually decrease the plaintiff's tax liability.[15] Building on its decision in *Fairchild*, the Court in *Frothingham* specifically grounded the standing requirement in the Constitution's structural separation of powers among the branches of government, as well as the Founders' concerns with the proper role of the Judiciary in a democratic society.[16] The Court wrote that deciding the case on the merits would "be not to decide a judicial controversy" but would rather force the Court to "assume a position of authority over the governmental acts of another and co-equal department, an authority which we plainly do not possess."[17] Consequently, the Court declined to hear the case, partly in order to avoid resolving abstract questions of policy best suited for resolution by the political branches.[18]

Although the Court's decisions in *Fairchild* and *Frothingham* laid the groundwork for the standing doctrine, the Court's opinions from this early time period failed to clarify whether this limitation on the power of the Federal Judiciary was an unavoidable constitutional barrier to litigation or, rather, a prudential constraint on jurisdiction subject to waiver at a judge's discretion for compelling policy reasons.[19] Such fundamental questions about the standing doctrine would remain unanswered until later in the twentieth century.

ArtIII.S2.C1.6.3 Standing Doctrine from 1940s to 1970s

Article III, Section 2, Clause 1:

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

The Supreme Court's development of the standing doctrine from the 1940s to 1970s accompanied a significant increase in the power of federal administrative agencies to regulate businesses and individuals.[1] The rise of the administrative state raised the question of who could challenge various agency actions in federal court. During the first several decades of the administrative state, the Court's standing test considered whether a litigant had suffered a violation of an explicit legal right. For example, in the 1939 case *Tennessee Electric Power Co. v.*

[14] *Id.* at 486–87.

[15] *Id.*

[16] *Id.* at 488–89.

[17] *Id.*

[18] *Id.*

[19] *See* Flast v. Cohen, 392 U.S. 83, 92 (1968) ("[C]ommentators have tried to determine whether *Frothingham* establishes a constitutional bar to taxpayer suits or whether the Court was simply imposing a rule of self-restraint which was not constitutionally compelled.").

[1] Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 Colum. L. Rev. 1432, 1437–43 (1988).

Tennessee Valley Authority, the Court determined that a proprietor of a business lacked standing to object to the government helping businesses compete with the proprietor's business.[2] The Court held that the proprietor had failed to identify any explicit legal right that the government had allegedly violated that was "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."[3] A year later in *FCC v. Sanders Bros. Radio Station*, the Court held that an existing radio station had "standing" to appeal the Federal Communication Commission's grant of a license to a rival radio station.[4] The Court determined that the existing station's allegations of economic injury from increased competition qualified as a legal "injury" under the Communications Act of 1934, which authorized appeals of Commission orders by a "person aggrieved" or "whose interests [were] adversely affected" by grant or denial of a license.[5] Thus, it appears that the Court's constrained approach to standing during these early years resulted from its focus on whether the litigant had suffered injury to a specific legal right recognized by a federal statute or other source of law.[6] Prior to the enactment of the Administrative Procedure Act[7] and other federal statutes providing for judicial review of agency actions, litigants did not possess as many legal rights that could serve as a basis for standing.[8]

Although it is difficult to discern significant trends in the Court's standing jurisprudence during this era, the Court generally adopted an even more permissive approach to standing in the 1960s and 1970s to facilitate challenges to actions by federal agencies. The Administrative Procedure Act, enacted in 1945, provided for judicial review of agency actions, for example, under federal consumer and environmental laws.[9] The Court relaxed the legal injury requirement and allowed the private beneficiaries of those public interest protections to challenge federal agency action based on harms that were not specifically recognized by statute or at common law,[10] including noneconomic harms to private individuals' aesthetic or

[2] 306 U.S. 118, 144 (1939).

[3] *Id.* at 137, 147.

[4] 309 U.S. 470, 472, 477 (1940).

[5] *Id.* at 472–73, 476–77.

[6] Sunstein, *What's Standing After Lujan?*, *supra* note 1, at 180–81.

[7] 5 U.S.C. § 702 (stating that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof").

[8] *See* Sunstein, *What's Standing After Lujan?*, *supra* note 1, at 180–81.

[9] *Id.* at 183–84 ("[C]ourts interpreted the 'legal wrong' test to allow many people affected by government decisions—including beneficiaries of regulatory programs—to bring suit to challenge government action. For example, courts concluded that displaced urban residents, listeners of radio stations, and users of the environment could proceed against the government to redress an agency's legally insufficient regulatory protection."). For additional examples of the Court's more permissive approach, see Duke Power Co. v. Carolina Envtl. Study Group Inc., 438 U.S. 59, 72, 74–78 (1978) (finding that individuals who lived near the site of a proposed nuclear plant had established standing to challenge a statute that would support the construction of the plant); *Flast*, 392 U.S. at 105–06 ("[W]e hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power."); Hardin v. Ky. Utils. Co., 390 U.S. 1, 6–7 (1968) (determining that a competing utility company had standing to challenge the Tennessee Valley Authority (TVA)'s supply of power. *See also* Inv. Co. Inst. v. Camp, 401 U.S. 617, 621 (1971) ("Congress did legislate against the competition that the petitioners challenge.").

[10] *See, e.g.*, *Hardin*, 390 U.S. at 6–7.

recreational interests.[11] However, as discussed below, this permissiveness declined after the late 1970s, as the Court began to adopt a stricter approach to standing, characterizing it as a core Article III concern.[12]

In the early 1970s, the Supreme Court recognized that a litigant needed standing to maintain a lawsuit but adopted a flexible approach toward the standing inquiry. For example, in *Sierra Club v. Morton*, an environmental group sought an injunction prohibiting federal officials from approving the construction of a ski resort in the Mineral King Valley adjacent to Sequoia National Park.[13] The Court found that the plaintiffs lacked standing, concluding that their abstract interest in environmental protection was insufficient to confer standing.[14] However, the Court's opinion allowed for the possibility that future litigants who claimed injury to their noneconomic interests (e.g., "recreational" injuries impacting their ability to use a park) might be able to establish standing, even if such injuries were widely shared among the public.[15]

The high-water mark for the Supreme Court's permissive approach to standing came in *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP).[16] In that case, the Court held that a group of Georgetown law students, together with the Environmental Defense Fund and the Izaak Walton League, had standing to challenge the Interstate Commerce Commission's (ICC's) approval of an increase to nationwide railroad freight rates on the grounds that it would ultimately result in "economic, recreational and aesthetic harm" to the groups' members.[17] The Court permitted the plaintiffs to establish standing at the pleading stage by combining a series of inferences about how they would suffer injury as persons "aggrieved" by the new rates.[18] The Court found it sufficient for standing that the plaintiffs had alleged that higher rail rates would discourage the use of recyclable materials because used materials were often transported by rail to be recycled.[19] As a result, the plaintiffs alleged that the ICC's rate increase would cause companies to extract more raw materials, such as lumber, from parks in the Washington Metropolitan Area, resulting in

[11] *See, e.g.*, United States v. SCRAP, 412 U.S. 669, 686–87 (1973) ("[N]either the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use those resources suffered the same harm, deprives them of standing.").

[12] *See, e.g.*, Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976) ("[T]he 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.").

[13] 405 U.S. 727, 734–35 (1972).

[14] *Id.*

[15] *Id.* Under the Court's current standing doctrine, such recreational or aesthetic injuries may serve as the basis for standing. *See, e.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009) ("While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice.").

[16] 412 U.S. 669 (1973). The Court later characterized the broad holding of the *SCRAP* case as extending standing "to the very outer limit of the law." Whitmore v. Arkansas, 495 U.S. 149, 159 (1990). And the Court's 2013 decision in *Clapper v. Amnesty International*, in which the Court rejected standing based on chains of attenuated causal inferences, suggests that *SCRAP* is no longer good law. *See* 568 U.S. 398, 414 (2013).

[17] *Id.* at 675–76.

[18] *Id.* at 688–89 ("Here, the Court was asked to follow a far more attenuated line of causation to the eventual injury of which the appellees complained—a general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recycled goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area.").

[19] *Id.* at 688–89.

people dumping more trash in the area's parks.[20] Consequently, the plaintiffs alleged, the new rates would cause environmental damage to parks in the area that they frequented.[21]

The Court found this attenuated causal chain of inferences to be sufficient for standing purposes, determining that the plaintiffs would suffer "specific and perceptible" recreational and aesthetic harms,[22] even if a large number of other people throughout the United States might claim similar harms from the agency's approval of the rate increase.[23] The Court's decision in *SCRAP* thus exemplifies the Court's broader view at that time of the types of injuries that could support a litigant's standing at the pleading stage in challenges to government action (e.g., noneconomic injuries, such as recreational injuries), as well as the types of inferences that a plaintiff could allege to connect such injuries to the defendant's actions to satisfy the standing requirement.

Although the Supreme Court demonstrated some flexibility in applying rules of standing during the 1970s, the Court did not wholly reject a more stringent standing requirement. For example, two years after its decision in *SCRAP*, it considered *Warth v. Seldin*, a case in which residents of Rochester, New York, sued the adjacent town of Penfield and members of its local government boards, claiming that a Penfield town ordinance and its enforcement "excluded persons of low and moderate income from living in the town" in violation of various provisions of the Constitution and federal law.[24] In explaining its decision on the issue of standing, the Court adopted a more stringent definition of "injury in fact" than it had in *SCRAP*, determining that the plaintiffs failed to show a "distinct and palpable" injury to themselves from the ordinance.[25] The Court further determined that the plaintiffs lacked standing because they had failed to demonstrate a "substantial probability" that their alleged inability to obtain affordable housing resulted from the enforcement of the town's ordinance instead of other factors, such as the independent decisions of real estate developers not to build housing for low-income individuals in the town.[26]

The Supreme Court followed its decision in *Warth* a year later with *Simon v. Eastern Kentucky Welfare Rights Organization*, a case that introduced the concept of standing as a core Article III requirement.[27] In *Simon*, a group of indigent plaintiffs challenged an Internal Revenue Service ruling that allowed nonprofit hospitals to reduce the availability of free services and still retain their charitable organization status. The Court held that the plaintiffs lacked standing to sue because their injury depended on the independent actions of parties not before the Court—i.e., the hospitals.[28] Cases such as *Warth* and *Simon* began to rein in the

[20] *Id.*

[21] *Id.*

[22] *Id.* at 686–89 ("[N]either the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use those resources suffered the same harm, deprives them of standing.").

[23] *Id.* at 687 ("To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.").

[24] 422 U.S. 490, 493 (1975).

[25] *Id.* at 501.

[26] *Id.* at 504–07.

[27] 426 U.S. 26, 41–42 (1976) ("[T]he 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.").

[28] *Id.* at 28.

more flexible standing test of the early 1970s[29] but left unresolved some questions about the legal basis for the standing inquiry and how rigidly courts should apply standing requirements. Nonetheless, these cases became the building blocks for later decisions that would usher in an era of stricter standing requirements,[30] ultimately culminating in the Court's watershed decision in *Lujan v. Defenders of Wildlife* in the early 1990s.[31]

ArtIII.S2.C1.6.4 Lujan v. Defenders of Wildlife Test

ArtIII.S2.C1.6.4.1 Overview of Lujan Test

Article III, Section 2, Clause 1:

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

Although the Supreme Court had broadly outlined the basic elements of modern standing doctrine during the 1970s, the Court did not clearly articulate the now-classic three-part test that federal courts must apply when inquiring into a litigant's Article III standing until its 1992 decision in *Lujan v. Defenders of Wildlife*.[1] In that case, which involved an environmental group's challenge under a citizen-suit provision to the Department of Interior's decision not to apply the consultation rules of the Endangered Species Act to federal agency actions outside of the United States and high seas, Justice Antonin Scalia synthesized several of the Court's standing cases from 1970s and 1980s to produce a three-part test.[2] Writing for the Court, he stated that a litigant seeking to invoke the jurisdiction of a federal court must demonstrate that:

- He has suffered an "injury in fact" that is "concrete," "particularized," and "actual or imminent, not conjectural or hypothetical";
- That a causal connection exists between the injury and the challenged conduct of the defendant, such that the injury is "fairly traceable" to the defendant's conduct and not the result of action by third parties not before the court; and
- That it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[3]

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[29] *See also, e.g.*, Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 260–64 (1977) (adopting a broad view of the standing requirement as encompassing both "constitutional limitations and prudential considerations").

[30] *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485 (1982).

[31] 504 U.S. 555, 560 (1992).

[1] 504 U.S. 555 (1992).

[2] *Id.* at 560–61.

[3] *Id.* (internal quotation marks omitted). Although the Court has characterized all three standing elements as constitutionally required, it has at times suggested that Congress may, to an extent, relax the causation and redressability requirements when it creates procedural rights for private citizens to exercise. For example, a plaintiff that is harmed by an agency decision, and alleges a procedural defect in that decision, "can assert that right . . . even though he cannot establish with any certainty" that the correct procedure would have resulted in a different decision. *E.g.*, *id.* at 572 n.7. *See also* Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009) (suggesting in dicta that Congress

This section explores the modern doctrine of Article III standing by examining cases in which the Supreme Court has interpreted and applied the three elements of the *Lujan* test in specific factual situations. Notably, although each standing element imposes an independent requirement on litigants, the three basic elements are interrelated.[4]

The first prong of the *Lujan* test requires a litigant to allege (and ultimately prove) that he has suffered an injury-in-fact. According to the Supreme Court, this key requirement has three components, obligating the litigant to demonstrate that he has suffered an injury that is (1) "concrete," (2) "particularized," and (3) "actual or imminent."[5] The meaning of each of these three components is best illustrated by a discussion of specific factual situations in which the Court has interpreted and applied it. The *Lujan* test also requires that a plaintiff be able to show causation and redressability.

ArtIII.S2.C1.6.4.2 Concrete Injury

Article III, Section 2, Clause 1:

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

First, to have an injury-in-fact, a litigant must establish that he has suffered or is imminently threatened with a "concrete" injury—that is, an injury that is "real" and not "abstract."[1] Although the Supreme Court has not clearly articulated what makes a particular harm sufficiently concrete for standing purposes, it has provided some broad guidance. Over the years, the Court has decided several cases that explain the general types of injuries that qualify as concrete.[2] Many of these cases required the Justices to determine whether an

may, by according a procedural right to private parties, "loosen the strictures of the redressability prong of [the] standing inquiry" so that standing exists even if the Court's enforcement of a procedural right would not necessarily result in the redress of the plaintiff's concrete injury). Despite this, a plaintiff must always show injury from an agency decision, even to claim a procedural error. *See id.* at 496 ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing.").

[4] *See* Allen v. Wright, 468 U.S. 737, 753 n.19 (1984) ("To the extent there is a difference [between the causation and redressability requirements of standing], it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested."). *See also* Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 288 (2008) ("[T]he general 'personal stake' requirement and the more specific standing requirements (injury in fact, redressability, and causation) are flip sides of the same coin. They are simply different descriptions of the same judicial effort to ensure, in every case or controversy, 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'") (citations and internal quotation marks omitted).

[5] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

[1] Spokeo, Inc. v. Robins, 578 U.S. 330, 340 (2016).

[2] *See, e.g.*, Food Mktg. Inst. v. Argus Leader Media, No. 18-481, slip op. at 4–5 (U.S. June 24, 2019) (holding that the U.S. Department of Agriculture's disclosure of annual store-level data regarding redemption of Supplemental Nutrition Assistance Program benefits under the Freedom of Information Act would constitute a cognizable competitive and financial injury to grocery retailers); Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 324–26 (2008) (holding that a tribal court's exercise of jurisdiction over a discrimination claim against a non-Indian bank is a sufficiently concrete injury); Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 331 (1999) (determining that a voter's loss of a Representative to the United States Congress is a sufficiently concrete harm); GMC v. Tracy, 519 U.S. 278, 286 (1997) (stating that liability for payment of a tax that allegedly discriminated

intangible injury sufficed for standing. The Court has identified several arguably noneconomic harms to be concrete injuries, including aesthetic injuries (e.g., harm to a plaintiff's ability to observe an animal species);[3] recreational injuries (e.g., injury to a plaintiff's enjoyment of natural resources such as a park);[4] certain procedural injuries (e.g., injury to a litigant's right to have an agency prepare an environmental impact statement for a federal agency action that affects his or her interests);[5] injuries to constitutional rights;[6] dilution of the effectiveness of a citizen's vote in a federal election;[7] and stigmatic injuries from racial discrimination.[8] By contrast, the Court has held that concrete injuries would not include, for example, psychological harm from observing the federal government's use of taxpayer money to provide financial assistance to a religious institution[9] or harms to the plaintiff's general interest in advancing abstract interests (e.g., an interest in having low-income people access health services).[10] Notably, the fact that an injury is "particularized"—or, in other words, that it affects the plaintiff individually[11]—does not necessarily make that injury a concrete harm.

Congress, by statute, can influence a court's standing analysis, but Congress cannot itself create standing in the absence of the constitutional prerequisites. When determining whether the defendant's alleged violation of a right created by Congress is sufficient by itself to

against out-of-state interests in violation of the Commerce Clause amounts to a concrete harm); Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 77 (1991) (holding that a litigants' loss of a right to sue in the forum of their choosing is a concrete harm); Franchise Tax Bd. v. Alcan Aluminum, 493 U.S. 331, 336 (1990) (determining that shareholders' reduced returns on their investments from an accounting method employed by California in calculating taxable income of companies in which they had invested is a concrete harm); Meese v. Keene, 481 U.S. 465, 476 (1987) (finding the government's designation of film exhibitor's film as "political propaganda" is a sufficiently concrete harm for standing purposes).

[3] *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562–63 (1992).

[4] United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 686–87 (1973).

[5] *See, e.g.*, *Lujan*, 504 U.S. at 572 n.7. *See also* FEC v. Akins, 524 U.S. 11, 21 (1998) (holding that a litigant's failure to obtain information that federal law requires to be disclosed can constitute a sufficiently concrete injury of his procedural statutory right for Article III standing purposes).

[6] *See, e.g.*, *Spokeo*, 578 U.S. at 341 (noting that injuries to First Amendment rights to free speech and free exercise of religion may amount to concrete injuries). *But see* Laird v. Tatum, 408 U.S. 1, 13–16 (1972) (finding that civilians lacked standing to challenge the Department of the Army's alleged surveillance of peaceful political activity because they failed to allege a specific harm, beyond speculation, that it had a chilling effect on the exercise of their First Amendment rights).

[7] Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 331–32 (1999) (stating that "voters have standing to challenge an apportionment statute because they are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes.") (citations and internal quotation marks omitted).

[8] Allen v. Wright, 468 U.S. 737, 755 (1984) ("There can be no doubt that [the stigmatizing injury caused by racial discrimination] is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing."). The Court has also held that a litigant may have standing when it alleges injury from the federal government's disregard of the basic structure of government established in the Constitution.

[9] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485 (1982) (indicating that psychological injuries stemming from the plaintiffs witnessing "conduct with which [they] disagree[d]" was an insufficient injury for standing).

[10] Summers v. Earth Island Inst., 555 U.S. 488, 497–98 (2009) (rejecting environmental organizations' argument that they had suffered a concrete injury because there was a "statistical probability" that at least some of their hundreds of thousands of members nationwide were threatened with concrete harm from Forest Service regulations); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 39–40 (1976) ("We note at the outset that the five respondent organizations, which described themselves as dedicated to promoting access of the poor to health services, could not establish their standing on the basis of that goal. Our decisions make clear that an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by [Article III]."). *But see* Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) ("If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income home-seekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests.").

[11] For more on the Article III requirement that the plaintiff have suffered a particularized injury, see ArtIII.S2.C1.6.4.3 Particularized Injury.

constitute a concrete harm to a litigant for standing purposes, the Court has stated that federal courts should examine whether the injury is similar to a harm that "has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[12] But in doing so, courts must also give at least some weight to Congress's judgments about which intangible harms amount to concrete Article III injuries.[13] Thus, although Congress may, through enactment of legislation, elevate certain harms to the status of concrete injuries for standing purposes,[14] Congress cannot create standing for litigants who do not face at least a material risk of injury from a defendant's violation of the litigant's statutory rights.[15]

ArtIII.S2.C1.6.4.3 Particularized Injury

Article III, Section 2, Clause 1:

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

In addition to showing that he suffers a material risk of harm from an actual, concrete injury, the litigant must demonstrate that the injury is "particularized"—or, in other words, that it affects him in a "personal and individual way."[1] The "particularized injury" requirement has long served as a component of the Supreme Court's standing analysis,[2] barring plaintiffs from seeking judicial redress for generalized grievances undifferentiated from those that a large number of people could claim.[3] Nonetheless, the Court has generally been careful to distinguish "generalized grievances" that fail the particularity requirement from widespread injuries, such as mass torts, that are suffered by a large number of people but qualify as particularized because each person has sustained an individualized harm that is distinct from

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[12] Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016).

[13] *Id.* at 343.

[14] Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992) ("As we said in *Sierra Club*, statutory 'broadening of the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.'").

[15] *Spokeo*, 578 U.S. at 343; Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009). *See also* Thole v. U.S. Bank N.A., No. 17-1712, slip op. at 4 (U.S. June 1, 2020) (rejecting the argument that the existence of a general cause of action for participants in a defined-benefit plan in the Employee Retirement Income Security Act of 1974 sufficed to provide Article III standing).

[1] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992).

[2] *See* ArtIII.S2.C1.6.4.3 Particularized Injury.

[3] *Lujan*, 504 U.S. at 573–74 ("We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy."); *accord* Gill v. Whitford, No. 16-1161, slip op. at 21 (U.S. June 18, 2018) (holding that voters who, at trial, alleged statewide injury to Wisconsin Democrats as a result of vote dilution from the state legislature's partisan gerrymandering lacked standing to challenge the constitutionality of that practice because they did not demonstrate individual and personal injury to their interests as voters in a particular district). *But see* United States v. Hays, 515 U.S. 737, 744 (1995) (noting that "[d]emonstrating the individualized harm our standing doctrine requires may not be easy in the racial gerrymandering context, as it will frequently be difficult to discern why a particular citizen was put in one district or another" but concluding that where a plaintiff resides in a "gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action").

that suffered by the others.[4] In this vein, the Court has held that a litigant's failure to obtain information that federal law requires to be disclosed can constitute a sufficiently particularized injury of a procedural statutory right for Article III standing purposes, even if many individuals may suffer such an injury.[5]

However, even if a citizen has suffered a "particularized" injury of a statutory right, he must still demonstrate that such an injury is "concrete." The Supreme Court distinguished between the concepts of "concrete" and "particularized" injury in its 2016 decision in *Spokeo, Inc. v. Robins*.[6] In *Spokeo*, the plaintiff, Thomas Robins, sued Spokeo, Inc., a company that operated a "people search engine," for alleged violations of the Fair Credit Reporting Act of 1970 (FCRA).[7] The FCRA is a consumer protection statute that was enacted to ensure fairness, accuracy, and privacy in consumer credit reporting by imposing a number of requirements on consumer reporting agencies.[8] The plaintiff sought to pursue a class action lawsuit alleging that Spokeo had willfully reported incorrect information about him and other class members in search results on its website.[9]

The court of appeals had held that Spokeo had inflicted a concrete (albeit, intangible) Article III injury on Robins because they violated his statutory rights, causing him individualized injury and entitling him to statutory damages.[10] The Supreme Court reversed, holding that Spokeo's alleged procedural violations of the FCRA, even if they affected the plaintiff individually and were therefore "particularized," might not amount to "concrete" injuries, because "not all inaccuracies cause harm or present any material risk of harm."[11] Therefore, the Court remanded the case to the Ninth Circuit to decide whether such a risk could result from the defendant's purported procedural violations of the FCRA.[12] The Court's decision in *Spokeo* indicates that a defendant's actions, even if contrary to a procedural duty established by a federal statute providing a damages remedy and sufficient for a "particularized" injury, might not amount to a concrete injury sufficient for Article III standing if such injuries do not actually present a material risk of harm to the litigant.[13] Federal courts will judge whether the defendant's alleged violation of a right created by Congress is sufficient by itself to constitute a concrete harm to a litigant for standing purposes by considering whether the injury is similar to a harm that "has traditionally been regarded as providing a

[4] Spokeo, Inc. v. Robins, 578 U.S. 330, 340 n.7 (2016).

[5] FEC v. Akins, 524 U.S. 11, 21 (1998).

[6] 578 U.S. at 334.

[7] *Id.* at 334–36.

[8] Fair Credit Reporting Act §§ 607, 616, 15 U.S.C. §§ 1681e, 1681n.

[9] *Spokeo*, 578 U.S. at 334–36. The plaintiff had alleged that Spokeo had reported incorrect information concerning, among other things, his marital status and occupation, and thereby committed a technical violation of the FCRA that could damage his career prospects when he sought employment in the future. *Id.*

[10] *Id.* at 11.

[11] *Id*. *See also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992).

[12] *Spokeo*, 578 U.S. at 343.

[13] *Id.* For further discussion of *Spokeo* and its limits on Congress's ability to create new private rights of action, see ArtIII.S2.C1.6.4.3 Particularized Injury. *See also* TransUnion LLC v. Ramirez, No. 20-297, slip op. at 2 (U.S. June 25, 2021) (holding that certain members of a class action lawsuit against a credit reporting agency brought under the Fair Credit Reporting Act had not suffered a concrete injury because misleading information in their credit files had not been provided to third parties); Thole v. U.S. Bank N.A., No. 17-1712 slip op. at 2, 5–6 (U.S. June 1, 2020) (holding that participants in a defined-benefit plan lacked a concrete stake in a lawsuit seeking monetary and injunctive relief to remedy alleged mismanagement of the plan where the plaintiffs' monthly payments were fixed and not tied to plan performance).

basis for a lawsuit in English or American courts."[14] But in doing so, courts must give at least some weight to Congress's judgments about which intangible harms amount to concrete Article III injuries.[15]

In addition, the extent to which widespread *environmental* harms may constitute particularized injuries is an emerging issue in the Court's standing jurisprudence.[16] In a 2007 case in which the State of Massachusetts alleged particularized injury from climate change, the Court determined that the widely shared risks posed by rising sea levels constituted an individualized injury to the State in its capacity as owner of coastal property.[17] However, in that case, the Court did not address whether allegations of widespread harm from climate change would constitute particularized injury in a case brought by an individual plaintiff rather than a state.

ArtIII.S2.C1.6.4.4 Actual or Imminent Injury

Article III, Section 2, Clause 1:

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

To satisfy the demands of Article III, a litigant must have suffered an "actual or imminent" injury or, in other words, have "sustained or [be] immediately in danger of sustaining some direct injury as the result of the challenged . . . conduct."[1] To satisfy this test, a litigant's injury must either have already occurred, be presently occurring, or will imminently occur (i.e., be "certainly impending").[2] The "actual or imminent" injury prong of the *Lujan* test is related to the "redressability" prong. If the alleged injury is an imminent (i.e., future) harm, the litigant may demonstrate redressability only if the plaintiff has requested equitable relief (i.e., injunctive or declaratory relief).[3] On the other hand, if the injury occurred wholly in the past, the litigant may demonstrate redressability if it seeks monetary damages.[4]

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[14] *Spokeo*, 578 U.S. at 341.

[15] *Id.* at 11.

[16] Massachusetts v. EPA, 549 U.S. 497, 522 (2007) ("That these climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation.").

[17] *Id.* at 522–23.

[1] Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (citations omitted). The "actual or imminent" injury prong of the *Lujan* test is related to the "redressability" prong. If the alleged injury is an imminent (i.e., future) harm, the litigant may demonstrate redressability only if the plaintiff has requested equitable relief (i.e., injunctive or declaratory relief). *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 105–09 (1998). On the other hand, if the injury occurred wholly in the past, the litigant may demonstrate redressability only if it seeks monetary damages. *See id.* A litigant cannot demonstrate "actual or imminent injury" from a legal requirement that has "no means of enforcement." California v. Texas, No. 19-840, slip op. at 5 (U.S. June 17, 2021)

[2] *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401 (2013).

[3] *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 105–09 (1998).

[4] *See id.*

ArtIII.S2.C1.6.4.4
Actual or Imminent Injury

The requirement that a litigant establish an "actual" (i.e., past or present) injury is largely synonymous with the requirement for a concrete and particularized injury.[5] For example, in *Lewis v. Casey*, the Court defined an "actual injury" to an inmate's constitutional right of access to the courts and counsel as requiring an inmate to "demonstrate that the alleged shortcomings in [a prison's] library or legal assistance program hindered his efforts to pursue a legal claim."[6] This evidentiary burden simply required a showing that the inmate had suffered an injury in the past that went beyond harm to "an abstract, freestanding right to a law library or legal assistance" and involved more than an allegation that a "prison's law library or legal assistance program [was] subpar in some theoretical sense."[7] The Court cited as an example of actual injury in this context that an inmate's legal complaint "was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known."[8]

The major questions that have arisen concerning the "actual or imminent" prong of the standing inquiry largely involve cases in which a litigant alleges future (i.e., "imminent") injury and seeks injunctive relief to prevent it.[9] The Supreme Court has decided several cases addressing when a litigant's alleged future injures are sufficiently imminent to confer standing to seek a court order aimed at redressing them.

For example, the Court has indicated that it may be difficult for a litigant to establish an "actual or imminent" injury when he seeks injunctive relief against government officials for allegedly illegal and unconstitutional *systemic* practices in their administration or enforcement of the law.[10] In *O'Shea v. Littleton*,[11] several residents of Cairo, Illinois, sued state and local officials for allegedly administering the criminal justice system in a discriminatory and unconstitutional manner through a pattern of illegal bondsetting, sentencing, and jury-fee practices.[12] The Court determined that the plaintiffs lacked standing to seek an injunction against these practices because they did not allege they had actually suffered (or would immediately suffer) injuries from the conduct of these officials.[13] Although some of the plaintiffs were defendants in past criminal cases, at the time that they brought their lawsuit, none of the plaintiffs were serving sentences, on trial, or awaiting trial, and they did not allege an intent to engage in illegal conduct in the future.[14] The plaintiffs thus failed to demonstrate

[5] The distinction between past and present injuries sometimes becomes blurred in practice. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 43031 (1998) (allowing the State of New York to challenge the President's authority to exercise a line-item veto, based on a subsequent exercise of that veto that would result in a "substantial contingent liability" of billions of dollars on the state).

[6] 518 U.S. 343, 351 (1996).

[7] *See id.*

[8] *Id.*

[9] A litigant that seeks damages for an asserted risk of future harm has not demonstrated a concrete harm sufficient for Article III standing unless "the exposure to the risk of future harm itself causes a separate concrete harm." TransUnion LLC v. Ramirez, No. 20-297, slip op. at 20, 26 (U.S. June 25, 2021).

[10] *E.g.*, Rizzo v. Goode, 423 U.S. 362, 372 (1976) (determining that litigants could not show "real and immediate injury" because their allegations concerned "what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures.").

[11] 414 U.S. 488 (1974).

[12] *Id.* at 490–92.

[13] *Id.* at 494 ("Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct.").

[14] *Id.* at 494–95 ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects. Neither the complaint nor respondents' counsel suggested that any of the named plaintiffs at the time the complaint was filed were themselves serving an allegedly illegal sentence or were on trial or awaiting trial before petitioners."). Notably, the *O'Shea* plaintiffs alleged that they would likely have a future challenge to the government's practices. If they had alleged that their past challenges to the government's conduct had evaded judicial review because the unconstitutional conduct

more than mere speculation that they would be subject to the challenged law enforcement practices and suffer injuries as a result of being arrested, charged with crimes under laws they did not challenge as unconstitutional, and subject to proceedings before the criminal justice system.[15]

A decade later, the Court held that past illegal conduct by the government does not imply that the government will again violate the law in the future. For purposes of standing, this holding means that a litigant cannot use that past conduct to demonstrate imminent harm when seeking a declaration from the court that the agency's past action was illegal (i.e., a declaratory judgment) or an order preventing the agency from engaging in illegal conduct in the future (i.e., an injunction). In *Los Angeles v. Lyons*, the plaintiff sought damages for having allegedly suffered a chokehold at the hands of the city police department but also asked for injunctive relief prohibiting the city from using chokeholds in the future.[16] However, the Court found the plaintiff's allegations of future injury to be too speculative to support standing for the requested prospective injunctive relief because, although the plaintiff had been choked once, he could not realistically allege that there was a threat that he would again be arrested and illegally choked by the police as a result of the city's policy.[17]

In a 2013 case implicating national security issues, the Court addressed how likely the threat of future harm to the plaintiff must be in order for that harm to qualify as an imminent injury. In *Clapper v. Amnesty International USA*, attorneys, human rights, labor, legal, and media organizations brought constitutional challenges alleging prospective injury from surreptitious federal government surveillance practices conducted by the Executive Branch pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978 (FISA).[18] The plaintiffs alleged that these practices presented an "objectively reasonable likelihood" that the government would intercept their communications with individuals outside of the United States.[19] Although they could not definitively show that they or their clients or sources would be subject to these practices, the plaintiffs alleged threatened injury to their ability to "locate witnesses, cultivate sources, obtain information, and communicate confidential information to their clients."[20] Moreover, the plaintiffs alleged that they had sustained actual, present injury because the risk of surveillance was "so substantial that they ha[d] been forced to take costly and burdensome measures to protect the confidentiality of their international communications."[21]

The Court, in a 5-4 ruling written by Justice Samuel Alito, found that the plaintiffs lacked standing because they could not show that the FISA provision threatened them with "certainly

ceased before the litigants could bring a lawsuit, then the Court may have addressed the doctrine of mootness. *See* ArtIII.S2.C1.8.7 Capable of Repetition, Yet Evading Review (discussing circumstances in which the Court has made an exception to the mootness doctrine because conduct is "capable of repetition, yet evading review").

[15] *O'Shea*, 414 U.S. 488 at 496 ("Of course, past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury. But here the prospect of future injury rests on the likelihood that respondents will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing before petitioners."); *id.* at 498 ("[W]here respondents do not claim any constitutional right to engage in conduct proscribed by therefore presumably permissible state laws, or indicate that it is otherwise their intention to so conduct themselves, the threat of injury from the alleged course of conduct they attack is simply too remote to satisfy the case-or-controversy requirement and permit adjudication by a federal court."). *See also* Rizzo v. Goode, 423 U.S. 362, 372 (1976).

[16] 461 U.S. 95, 105 (1983).

[17] *Id.* ("That Lyons may have been illegally choked by the police [in the past] . . . does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer . . . who would illegally choke him into unconsciousness without any provocation or resistance on his part.").

[18] 568 U.S. 398, 401–02, 406–07 (2013). *See also* 50 U.S.C. § 1881a.

[19] *Clapper*, 568 U.S. at 401–02, 406–07.

[20] *Id.*

[21] *Id.* at 407.

impending" harm[22] or, at the very least, a substantial risk of harm from the government surveillance program.[23] Moreover, the plaintiffs could not, in the Court's view, "manufacture standing" by alleging *present* injury from the costs that they had incurred in order to avoid the hypothetical harm of government surveillance (e.g., travel expenses to conduct in-person conversations abroad).[24] It is important to note that *Clapper* arose in the sensitive areas of national security and foreign affairs, areas where the Court has "often found a lack of standing in cases" because of concerns about the Judiciary interfering with the political branches' activities.[25]

The following year, in a case not arising in the national security context, the Supreme Court appeared to adopt a broader view of the concept of "imminent harm." In *Susan B. Anthony List v. Driehaus*, the Court addressed imminent harm in the context of a state government's threatened enforcement of an allegedly unconstitutional law against an individual.[26] The Court held that a potentially targeted person may mount a constitutional challenge to the law when enforcement is "sufficiently imminent." As a result, the plaintiff does not have to be arrested or prosecuted before challenging the law.[27] Instead, in order to have standing, the plaintiff must demonstrate "an intention to engage in a course of conduct arguably affected with a constitutional interest" that is "arguably proscribed by the statute challenged," as well as a credible threat of enforcement of the law against him or her.[28] Accordingly, the Court's decision in *Susan B. Anthony List* suggests that there are still circumstances in which a substantial risk of harm to a litigant (rather than "certainly impending" harm) will suffice for standing purposes.[29]

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[22] In adopting a "certainly impending" standard, the five-Justice majority conceded that the Court's prior cases had not uniformly required literal certainty. *Id.* at 414 n.5.

[23] *Id.* at 401–02, 414 n.5. *See also* Trump v. New York, No. 20-366, slip op. at 1–2, 5–7 (U.S. Dec. 18, 2020) (per curiam) (rejecting plaintiffs' argument that they had standing to challenge a presidential memorandum directing the Secretary of Commerce to exclude from the federal census apportionment base "aliens who are not in lawful immigration status" because of a "substantial risk" that Commerce's implementation of the memorandum would lead to a reduction in congressional representation or federal funding).

[24] *Clapper*, 568 U.S. at 402, 407.

[25] *Id.* at 409. The Court noted that it had previously applied the standing requirements more strictly in cases concerning national security or foreign affairs, including challenges to "the constitutionality of a statute permitting the Central Intelligence Agency to account for its expenditures solely on the certificate of the CIA Director," United States v. Richardson, 418 U.S. 166, 167–70 (1974); "the Armed Forces Reserve membership of Members of Congress," Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 209–11 (1974); and "an Army intelligence-gathering program," *Laird*, 408 U.S. at 11–16.

[26] 573 U.S. 682 (2014).

[27] *Id.* at 689–90, 695 (quoting Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979)).

[28] *Id.* at 692–98. *See also* Dep't of Commerce v. New York, No. 18-966, slip op. at 8–10 (U.S. June 27, 2019) (deferring to the factual finding of the lower court that the Department of Commerce's reinstatement of a citizenship question on the federal census could cause concrete and imminent injury to states with large numbers of noncitizens by depriving them of federal funds distributed on the basis of state population because it would "depress the census response rate" among noncitizen households); Pennell v. San Jose, 485 U.S. 1 (1988) (holding that a landlord and association of owners and lessors of real property had standing to challenge a city rent control ordinance because of the probability that, as a result of the enforcement of the ordinance, "a landlord's rent will be reduced below what he or she would otherwise be able to obtain in the absence of the Ordinance"); Doe v. Bolton, 410 U.S. 179, 188–89 (1973) (concluding that doctors had standing to challenge a Georgia statute restricting the performance of abortions "despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes" because they "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"). The Court relied on *Doe v. Bolton* to reach the same result in *Planned Parenthood v. Danforth,* 428 U.S. 52, 62 (1976).

[29] *See Susan B. Anthony List*, 573 U.S. at 692–98 (referring several times to the threat of enforcement of the law against the litigants as "substantial"). *See also* Thole v. U.S. Bank N.A., No. 17-1712, slip op. at 5 (U.S. June 1, 2020) (concluding that participants in a defined-benefit plan lacked standing because they failed to adequately plead that the plan managers had "substantially increased the risk that the plan and the employer would fail and be unable to pay the participants' future pension benefits"). In the past, the Court has also described the standard for "imminent

The Supreme Court also found imminent harm in a 2008 lawsuit in which a candidate for Congress, who declared that he would "self-finance" his campaign, challenged provisions of federal election law that would have allowed his opponent to receive campaign contributions on more favorable terms.[30] The Court determined that the self-financing candidate faced the threat of immediate injury.[31] Although the opponent had not yet qualified for the campaign contribution benefit, the plaintiff had challenged the law after declaring his candidacy, as well as indicating his intent to spend enough of his personal funds during the campaign to trigger the benefit for his opponent.[32] With the election in the near future, and finding no indication that the plaintiff's opponent would relinquish the opportunity to receive expanded contributions, the Court determined that injury to the plaintiff was imminent and that the plaintiff had standing to sue.[33]

ArtIII.S2.C1.6.4.5 Causation

Article III, Section 2, Clause 1:

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

The second prong of the *Lujan* test for Article III standing requires the litigant to demonstrate that the injury-in-fact that he or she has suffered is "fairly traceable" to the challenged actions of the defendant.[1] Under Supreme Court jurisprudence, this requirement

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harm" as requiring the plaintiffs to show a "reasonable probability" of harm or a "threat of specific future harm." *See, e.g.*, Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 153–55 (2010) (finding that conventional alfalfa farmers and environmental groups had demonstrated an imminent injury for standing purposes when they alleged that the Department of Agriculture's partial deregulation of genetically engineered alfalfa crops would pose a "reasonable probability" of infecting organic conventional alfalfa crops with an engineered gene); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 184 (2000) ("[W]e see nothing 'improbable' about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms."); Laird v. Tatum, 408 U.S. 1, 13–14 (1972) ("Allegations of a subjective 'chill' [of First Amendment rights based on speculation] are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; 'the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.'") (internal quotation marks and citations omitted).

[30] Davis v. FEC, 554 U.S. 724, 728, 734–35 (2008).

[31] *Id.*

[32] *Id.*

[33] *Id. See also* Whole Woman's Health v. Jackson, No. 21-463, slip op. at 14 (U.S. Dec. 10, 2021) (determining that healthcare providers and other opponents of the Texas Heartbeat Act, which allowed private citizens to sue parties who perform or abet abortions after a fetal heartbeat is detected, lacked standing to sue a private defendant who had attested in sworn declarations that he would not bring a private right of action against the plaintiffs). Carney v. Adams, No. 19-309, slip op. at 1, 5–6, 12 (U.S. Dec. 10, 2020) (holding that an attorney lacked standing to challenge the constitutionality of a provision in Delaware's state constitution that required appointments to Delaware's major courts to "reflect a partisan balance" when the attorney failed to demonstrate that he was "'able and ready' to apply" for a judicial vacancy).

[1] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (internal quotation marks omitted). The Court has stated that plaintiffs challenging a law's constitutionality may have Article III even if they cannot trace their injuries to the challenged law, so long as their injuries are traceable to the conduct of the defendant. Collins v. Yellen, No. 19-422, slip op. at 17–19 (U.S. June 23, 2021) (determining that shareholders had Article III standing when their

may not be met when the litigant's injury results at least in part from the actions of a third party not before the court or, more broadly, when "the line of causation between the illegal conduct and injury [is] too attenuated."[2]

For example, in *Simon v. Eastern Kentucky Welfare Rights Org.*, the Supreme Court found that the plaintiffs lacked standing because they failed to show that the *defendants' actions* had caused them harm, rather than the actions of absent third parties.[3] In that case, a group of indigent plaintiffs challenged an Internal Revenue Service (IRS) ruling that allowed nonprofit hospitals to reduce the availability of free services and still retain their charitable organization status.[4] The plaintiffs alleged that the Revenue Ruling made such hospitals less likely to grant free services to indigents.[5] However, the Court held that the plaintiffs lacked standing to sue because their injury was the result of independent action of parties not before the Court—i.e., the hospitals.[6] In other words, the hospitals' denial of services to the indigents, even if likely to injure them, was not fairly traceable to the federal government's issuance of the Revenue Ruling.[7] Instead, the Court determined that it was too speculative to conclude that the denial of service was caused by the Revenue Ruling or that the plaintiffs would receive free hospital services if the IRS revoked its rule, as hospitals could establish their own policies with respect to providing services to indigents without regard to the tax implications.[8] Thus, the plaintiffs lacked standing because they alleged future injuries that depended at least in part on the actions of third parties not before the court, and they could not show more than mere speculation that those third parties would establish policies that would injure them.[9]

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economic injuries were traceable to the Federal Housing Finance Agency's adoption of a new policy, even though the shareholders specifically challenged the constitutionality of the law that created the agency and defined its structure). In *FEC v. Ted Cruz for Senate*, the Court determined that a U.S. Senator and his campaign committee had standing to challenge the constitutionality of a provision in a federal campaign finance statute. The government argued that the Federal Election Commission's threatened enforcement of the statutory provision did not cause the litigants' Article III injuries; rather, the litigants' injuries stemmed from the agency's threatened enforcement of an implementing regulation that imposed loan-repayment limitations. Nonetheless, the Court held that the litigants had standing to challenge the statutory provision because "an agency's regulation cannot operate independently of the statute that authorized it." No. 21–12, slip op. at 22 (U.S. May 16, 2022) (citation and internal quotation marks omitted). Moreover, the litigants' injuries were traceable to the agency's threatened enforcement of the statute and implementing regulations despite the fact that the litigants had "knowingly triggered" the provisions' application. *See id.* at 4–5.

[2] Allen v. Wright, 468 U.S. 737, 752 (1984).

[3] 426 U.S. 26, 42–44 (1976).

[4] *Id.* at 28.

[5] *Id.*

[6] *Id.* at 42.

[7] *Id.* at 41–42.

[8] *Id.* at 42–43 ("It is purely speculative whether the denials of service . . . fairly can be traced to [federal officials'] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications."). Although the Court's decision in *Simon* signaled that the Court would take a less permissive approach to the standing doctrine than it had in prior years, the Court had reached a similar result a year earlier. *See* Warth v. Seldin, 422 U.S. 490, 502, 506–07 (1975) (finding that low- and moderate-income residents of Rochester, New York, who sued the adjacent town of Penfield for allegedly excluding them from living in Penfield, lacked standing because the plaintiffs failed to demonstrate that their alleged inability to obtain affordable housing was fairly traceable to the town's zoning practices instead of other factors, such as the independent decisions of companies not to build housing for lower-income individuals in the town). For an example of a case from this era in which the Court found that a litigant had satisfied the causation requirement because the plaintiff's injury did not depend on the actions of absent third parties, see Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 (1977) (determining that a low-income person had shown a "substantial probability" that judicial relief addressing an allegedly racially discriminatory zoning practices would redress his inability to locate housing near his employer by permitting a specific housing project to move forward because the project's success did not depend on the actions of third parties not before the court).

[9] *Simon*, 426 U.S. at 42–43. *But see* Dep't of Commerce v. New York, No. 18-966, slip op. at 10–11 (U.S. June 27, 2019) (holding that states' alleged injuries stemming from the prospective loss of federal funds were fairly traceable to the Department of Commerce's inclusion of a citizenship question on the federal census questionnaire because a depressed census response rate, even if the result of unlawful third-party conduct, would be the "predictable outcome" of government action on third parties).

A further example of how the interplay between the decisions of absent third parties and the litigant's injury has affected the causation prong of the standing analysis is *Allen v. Wright*.[10] In that case, parents of African-American children who attended public schools alleged that the IRS had caused them injury by allowing racially discriminatory private schools to qualify for federal tax exemptions, preventing the desegregation of their children's schools.[11] The Court found these allegations did not establish sufficient causation for standing purposes.[12] Relying on its earlier decision in *Simon*, the Court determined that it was not clear that racial segregation in the public schools was linked to the IRS policies because private school officials might not change racially discriminatory school policies in response to a withdrawal of tax benefits, and, even if they did, parents of children attending private schools might not transfer their children to public school as a result of such changes.[13] Thus, the plaintiffs' allegations that the IRS policy had caused them injury rested on speculation about the actions of multiple third parties, and such speculation was insufficient to establish a causal connection between the defendant's actions and the plaintiffs' alleged injuries for standing purposes.[14]

As in the case of standing for procedural injuries, discussed above, certain kinds of equal protection injuries may be accepted as sufficient for standing even if the possibility of ultimate relief from that injury remains somewhat speculative. When a litigant challenges a governmental entity's alleged discriminatory practices on equal protection grounds, arguing that those practices have deprived it of a benefit granted to another favored class of individuals, the litigant may have standing even if it cannot demonstrate that it would have received the benefit in the absence of the government's conduct—or that a judicial order would result in its receipt of the benefit if it prevailed. Rather, the litigant must simply show that it would secure equal treatment under the law if it obtained judicial relief. Thus, for example, in *Adarand Constructors v. Peña*, the Court allowed a company's challenge to subcontractor compensation clauses in federal procurement contracts that allegedly favored small businesses controlled by racial minorities.[15] The Court held that, even if the company could not demonstrate that it would be the low bidder on any particular subcontract, it had alleged a sufficient injury from its inability to compete on an equal footing with other companies.[16] Similarly, the Court determined that a male plaintiff had standing to challenge Alabama laws that authorized courts to impose alimony obligations on husbands but not wives.[17] The Court permitted the challenge even though it was possible that prevailing in the suit would "not

[10] 468 U.S. 737 (1984).

[11] *Id.* at 739–40, 757–59.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] 515 U.S. 200, 211 (1995).

[16] *Id. See also* Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing."); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280 n.14 (1978) ("The trial court found [an injury] in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. Hence the constitutional requirements of Art. III were met. The question of Bakke's admission [or nonadmission] is merely one of relief.") (internal citation omitted).

[17] Orr v. Orr, 440 U.S. 268, 271–73 (1979).

ultimately bring [the plaintiff] relief from the judgment [for alimony] outstanding against him, as the State could respond to a reversal by neutrally extending alimony rights to needy husbands as well as wives."[18]

ArtIII.S2.C1.6.4.6 Redressability

Article III, Section 2, Clause 1:

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

The third and final prong of *Lujan*'s test for Article III standing, which is closely related to the "causation" test,[1] requires the litigant to demonstrate that the injury he has purportedly suffered would likely be redressed if the court granted the relief that he has requested.[2] When analyzing the redressability element of standing, the Supreme Court has focused on the specific relief requested by the plaintiff in its complaint and considered whether granting that relief would redress the injury alleged. For example, in *Duke Power Co. v. Carolina Environmental Study Group*, the Court found a "substantial likelihood" that a proposed nuclear power plant would not be constructed in the absence of a limitation of liability provided under the Price-Anderson Act. As a result, the neighbors of the proposed nuclear plant had standing to challenge the constitutionality of the Price-Anderson Act because the environmental and health injuries they would allegedly suffer from the operation of the plant would be redressed if the Court struck down the contested provisions of the Act.[3]

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[18] *Id. See also* Heckler v. Mathews, 465 U.S. 728, 737–39 (1984) ("[W]e have frequently entertained attacks on discriminatory statutes or practices even when the government could deprive a successful plaintiff of any monetary relief by withdrawing the statute's benefits from both the favored and the excluded class."). The Court employed similar reasoning when holding that a general interest newspaper had standing to bring a First Amendment challenge to an allegedly discriminatory Arkansas sales tax exemption for special interest journals. Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 227 (1987) (stating that to hold otherwise would "effectively insulate underinclusive statutes from constitutional challenge").

[1] Allen v. Wright, 468 U.S. 737, 753 n.19 (1984).

[2] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."). *See also* Utah v. Evans, 536 U.S. 452, 459–64 (2002) (holding that the State of Utah had demonstrated redressability for standing purposes because of its reasonable belief that if it prevailed, an injunction directing the Secretary of Commerce to recalculate and recertify an official census count would likely lead to a reapportionment of congressional representatives in its favor—a result permitted by the statutes that set forth the census process); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

[3] 438 U.S. 59, 74–81 (1978). *See also* Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 264–65 (1991) (holding that individuals living under airplane flight paths could bring a constitutional challenge to a congressionally created "Board of Review" that had power to veto airport authority development plans because invalidation of the veto power could prevent the enactment of plans for further development and could thus redress the individuals' alleged prospective injuries of increased air traffic, accident risks, noise, and pollution). Similarly, in a case where a creditor challenged a bankruptcy court's structured dismissal of a corporate reorganization under Chapter 11 of the Bankruptcy Code that denied the creditor the opportunity to obtain a settlement or assert a claim with "litigation value," the Court held that a decision in the creditor's favor was likely to redress the loss. *See* Food Mktg. Inst. v. Argus Leader Media, No. 18-481, slip op. at 4–5 (U.S. June 24, 2019) (holding that a grocery retailers' association had standing to appeal a lower court's judgment directing the U.S. Department of Agriculture to disclose commercial information that could injure the retailers financially, even though the agency

In contrast, in *Steel Co. v. Citizens for a Better Environment*, an environmental group sued a manufacturer for its past violations of the Emergency Planning and Community Right-to-Know Act (EPCRA).[4] A citizen-suit provision of EPCRA authorizes suits against a company for its failure to submit information timely about the storage of hazardous chemicals, as well as toxic releases, at the company's facilities.[5] Although the company-defendant had later filed the overdue forms to address its violations of EPCRA,[6] the plaintiffs asked the court to declare that the company had violated EPCRA and order various forms of injunctive and compensatory relief.[7] The Court, noting that none of the requested forms of relief would reimburse the plaintiffs for losses caused by the company's late reporting of its chemical information, found that it lacked jurisdiction to adjudicate the merits of the plaintiff's claims.[8] In other words, because the plaintiff's requested relief, even if granted, could not remedy the plaintiffs' alleged past injuries, the plaintiff's injuries were not redressable, and they therefore lacked standing to sue. Furthermore, to the extent that the plaintiffs requested prospective relief in the form of an injunction preventing future harm, they lacked standing because they failed to allege continuing or threatened injury from an ongoing violation of EPCRA by the defendant that could be redressed by a court order granting such relief.[9]

Nonetheless, when a litigant faces the threat of future injury as a result of *ongoing* violations of federal law, its injuries may be redressable by injunctive relief or a civil penalty payable to the U.S. Treasury. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, the Court considered whether a plaintiff who brought a citizen suit (i.e., a private action to enforce the law) under the Clean Water Act[10] could demonstrate standing to sue a company in order to compel its compliance with the terms of a permit to reduce water pollution. The plaintiff argued that its injuries would be redressed by a civil penalty payable to the U.S. Treasury because those penalties, like injunctions, deter future violations.[11] The Court agreed, holding that civil penalties, even if payable to the U.S. Treasury rather than the plaintiff, could prevent the threat of future injury rather than solely to serve as compensation for past injuries.[12]

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would retain discretion under the Freedom of Information Act to disclose the information if the Court reversed the lower court's ruling, because the government had represented "unequivocally" that it would maintain the confidentiality of the contested data unless a court directed disclosure); Czyzewski v. Jevic Holding Corp., No. 15-649, slip op. at 11 (U.S. Mar. 22, 2017) (holding that the "mere possibility" that a plaintiff's injury will not be remedied by a favorable decision is insufficient to conclude the plaintiff lacks standing because of want of redressability). For other cases in which the Court accepted relatively tenuous connections between the litigant's requested judicial relief and its alleged injury, see Watt v. Energy Action Educ. Found., 454 U.S. 151, 160–62 (1981) and Bryant v. Yellen, 447 U.S. 352, 366–68 (1980).

[4] 523 U.S. 83, 88 (1998).

[5] *See id.* at 86–88.

[6] *Id.* at 88.

[7] *Id.* at 105.

[8] *Id.* at 105–06, 109. Among other relief, the plaintiffs had requested a declaratory judgment that the company had violated EPCRA and various civil penalties. Although the requested civil penalties could be viewed as compensation to the plaintiffs, the Court noted that they were payable to the U.S. Treasury rather than the plaintiffs, and therefore could not remedy the plaintiff's injury from the company's late filing. *Id.* at 106. Instead, civil penalties paid to the government would vindicate only "the 'undifferentiated public interest' in faithful execution of EPCRA. This does not suffice." *Id*.

[9] *Id.* at 108–09. The Court also held that a plaintiff seeking to maintain standing solely to recover the costs of bringing suit cannot show redressability. *Id.* at 107.

[10] The relevant Clean Water Act provision authorizes suit by "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(a), (g).

[11] Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 173 (2000).

[12] *Id.* at 174, 185–86 ("It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description. To the extent that they encourage

ArtIII.S2.C1.6.4.6
Redressability

A litigant may have more difficulty establishing redressability when it alleges an indirect injury from government action or inaction, and when redress would require actions by an independent third party not before the court. For instance, in *Linda R.S. v. Richard D.*, the Supreme Court considered a Texas law imposing criminal sanctions on parents who failed to meet their child support obligations.[13] Texas state courts had construed the law as imposing no duty of support on the parents of children born to unmarried parents, and the mother of an out-of-wedlock child challenged Texas's refusal to enforce the law against her child's absentee father.[14] The Court held that the plaintiff had failed to allege facts sufficient to support judicial intervention because she did not show that her failure to obtain child support resulted from Texas's decision.[15] The Court noted that even in the unlikely event that the Court ordered the district attorney to enforce the law against the child's father, the father would simply go to jail without being compelled to pay child support in order to get out of jail.[16] Therefore, the plaintiff-mother's injury was not redressable, as her requested injunctive relief against state officials could not compel the father (a third party) to redress her monetary injury through payment of child support.[17]

The Supreme Court has also held, however, that redressability may exist even when the litigant's requested judicial relief would not completely redress its injury.[18] In the 2007 case *Massachusetts v. EPA*, the Court held that the State of Massachusetts had standing to challenge the Environmental Protection Agency (EPA)'s refusal to regulate greenhouse gas emissions from new motor vehicles under the Clean Air Act (CAA).[19] The Court determined that directing EPA to reexamine its refusal to regulate such emissions would redress the alleged risk of injury to plaintiffs' interests from rising sea levels, even if judicial relief resulted in only incremental steps to slow or reduce global warming.[20] In so holding, the Court rejected the argument that an EPA rule would fail to redress the state's injury because (1) it would not affect emissions by the existing automobile fleet, and (2) other countries would continue to increase greenhouse gas emissions.[21] Thus, the Court suggested that a litigant may establish that its injury is redressable even if it cannot show that a favorable judicial decision will *completely* redress the harm.[22]

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defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.").

[13] 410 U.S. 614, 614–16 (1973).

[14] *Id.*

[15] *Id.* at 618.

[16] *Id.* at 618–19.

[17] *Id.*

[18] Massachusetts v. EPA, 549 U.S. 497, 525–26 (2007).

[19] *Id.* at 505–06.

[20] *Id.* at 525–26 ("While it may be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it."). *See also* Larson v. Valente, 456 U.S. 228, 242–43 (1982) (holding that a church and its followers alleged a redressable injury from a state law requiring a church to register with, and report certain information to, the state if more than 50% of its contributions came from nonmembers, even though the Court's declaration that the "50 percent rule" was unconstitutional would not necessarily exempt the church from the requirements of that law).

[21] *See Massachusetts*, 549 U.S. at 525–26.

[22] *See id. See also* Uzuegbunam v. Preczewski, No. 19-1968, slip op. at 12 (U.S. Mar. 8, 2021) (holding that plaintiffs who requested nominal damages for a past violation of their First Amendment rights had established redressability for standing purposes).

ArtIII.S2.C1.6.5 Taxpayer Standing

Article III, Section 2, Clause 1:

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

In general, a litigant may not rely solely upon his status as a federal taxpayer to maintain Article III standing to challenge government policy or spending decisions.[1] Such taxpayer lawsuits, which are distinguishable from cases in which a litigant challenges the *assessment* of a tax as unconstitutional,[2] often ask a court to decide abstract legal questions regarding the authority of the political branches of government—a task that potentially raises concerns regarding the proper role of the Judiciary.[3] And as a practical matter, litigants arguing that their taxes have been spent unlawfully may simply fail to satisfy the elements of Article III standing, as their complaints may amount to generalized grievances about government spending or policy decisions shared with millions of other taxpayers.[4] Moreover, it may be difficult for a taxpayer-litigant to demonstrate that his or her increased tax liability is traceable to the government spending or policy decision challenged and that judicial relief would effectively reduce the litigant's tax liability.[5] These concerns have led the Supreme Court to permit taxpayer lawsuits only in narrow circumstances.

One of the Supreme Court's earliest decisions on Article III standing involved a taxpayer lawsuit. In the 1923 case *Frothingham v. Mellon*, the Court declined to reach the merits of an individual federal taxpayer's Tenth Amendment and Due Process challenges to the disbursement of federal funds to states under a federal appropriations law, determining that the plaintiff lacked Article III standing.[6] The Court wrote that deciding the case on the merits would not decide a judicial controversy but would rather "assume a position of authority over the governmental acts of another and co-equal department, an authority which we plainly do not possess."[7]

The Supreme Court further explained its justification for rejecting taxpayer lawsuits in the 1970s. In a case in which a federal taxpayer-plaintiff challenged a federal law allowing the Central Intelligence Agency (CIA) to withhold from the public detailed information about the Agency's expenditures, alleging that it violated the Statement and Account Clause of the

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[1] *E.g.*, Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 599 (2007) (plurality opinion) ("As a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable 'personal injury' required for Article III standing.").

[2] *Id.*

[3] *See, e.g.*, Frothingham v. Mellon, 262 U.S. 447, 486–87 (1923).

[4] *Id.* ("[A U.S. federal taxpayer's] interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.").

[5] *E.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 129, 136–38 (2011) ("To find injury, a court must speculate that elected officials will increase a taxpayer-plaintiff's bill to make up a deficit.") (citation and internal quotation marks omitted).

[6] *Frothingham*, 262 U.S. at 486–87. *See also* ArtIII.S2.C1.6.4.3 Particularized Injury.

[7] *Id.* at 489.

Constitution,[8] the Supreme Court refused to reach the merits of the case.[9] It determined that the plaintiff's claims raised a generalized grievance, not about Congress's exercise of its taxing and spending power, but rather Congress's exercise of power to regulate the CIA through a statute governing disclosure of information.[10] In another case, an association of officers and enlisted members of the military reserves, as well as individual members, argued that the Incompatibility Clause of Article I[11] forbid certain Members of Congress from holding commissions in the Armed Forces Reserve. The Court held that they lacked standing to sue as taxpayers because they had brought generalized grievances against Executive Branch actions permitting Members of Congress to retain their status as members of the Reserves, and thus lacked the individualized injuries that might provide standing to challenge Congress's exercise of its power under the Taxing and Spending Clause.[12]

For nearly a century since *Frothingham*, the Supreme Court has generally barred federal courts from entertaining cases in which a plaintiff relies solely upon his status as a taxpayer to establish standing.[13] The principal exception to this rule, albeit a narrow exception,[14] arises in the context of the First Amendment. The Court carved out a narrow exception to its general rule in the 1968 case *Flast v. Cohen*.[15] In *Flast*, the taxpayer-plaintiff challenged federal spending under a federal statute, the Elementary and Secondary Education Act of 1965, on the grounds that it violated specific guarantees in the First Amendment's Establishment Clause[16] by subsidizing teaching at religious schools.[17] In a departure from its earlier standing cases, the Court held that the plaintiffs possessed a genuine stake in the outcome of the case sufficient for standing.[18] The Court applied a two-factor test that considered whether there was (1) a "logical link" between the plaintiff's taxpayer status and "the type of legislative enactment attacked"; and (2) "a nexus" between the status of the taxpayer-plaintiff and "the

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[8] Article I, Section 9, Clause 7 of the Constitution, known as the Statement and Account Clause, provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

[9] United States v. Richardson, 418 U.S. 166, 166–68, 175 (1974).

[10] *Richardson*, 418 U.S. at 166–68 ("Although the status [the plaintiff] rests on is that he is a taxpayer, his challenge is not addressed to the taxing or spending power, but to the statutes regulating the CIA."). *See also* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 337–39, 343–47 (holding that Ohio taxpayers lacked standing to challenge state and local tax credits and exemptions for a vehicle manufacturer as violations of the Commerce Clause because they sought to advance a generalized grievance and failed to meet the standing requirements of causation and redressability). *But see* FEC v. Akins, 524 U.S. 11, 21 (1998) (holding that a litigant's failure to obtain information that federal law requires to be disclosed can constitute a sufficiently concrete injury for Article III standing purposes).

[11] The Incompatibility Clause in Article I, Section 6, Clause 2 of the Constitution, provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." For more on the Incompatibility Clause, see ArtI.S6.C2.3 Incompatibility Clause and Congress.

[12] Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 209–11, 228 (1974). *See also* Lance v. Coffman, 549 U.S. 437, 441–42 (2007) (per curiam) ("The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past."); *Ex parte* Levitt, 302 U.S. 633, 633 (1937) (per curiam) ("It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.").

[13] *See* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 609 (2007) (plurality opinion).

[14] *See id.* ("It is significant that, in the four decades since its creation, the *Flast* exception has largely been confined to its facts. We have declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause.").

[15] 392 U.S. 83 (1968).

[16] The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion . . . " U.S. Const. amend. I.

[17] *Flast*, 392 U.S. at 85.

[18] *Id.* at 102–06.

precise nature of the constitutional infringement alleged."[19] The Court determined that, in contrast to the plaintiffs in *Frothingham*, the *Flast* plaintiffs had not alleged that Congress had exceeded its powers under the Taxing and Spending Clause in Article I, Section 8 of the Constitution, but rather that Congress, by exercising its taxing and spending powers under that Clause in authorizing the challenged federal expenditures, had exceeded a specific constitutional limitation on its taxing and spending power (i.e., the First Amendment's Establishment Clause).[20] The Court noted Establishment Clause drafter James Madison's specific interest in preventing the federal government from collecting taxpayer money and spending it in favor of religion.[21] Consequently, the Court found that the plaintiffs had standing to sue by distinguishing *Flast* from *Frothingham* on the grounds that the *Flast* plaintiffs sought to uphold a specific limit set forth in the Establishment Clause on how federal taxpayer money is used.[22]

Since *Flast*, the issue of taxpayer standing has periodically arisen in the context of Establishment Clause challenges to federal financial assistance for religious organizations.[23] In subsequent cases, the Court has construed *Flast*'s exception to the general rule barring taxpayer standing quite narrowly.[24] Thus, when a federal agency disposed of surplus federal real property by conveying it to a private religious college without requiring the school to pay for it, the Court found that plaintiffs seeking to bring an Establishment Clause challenge to the transfer lacked standing to sue as taxpayers.[25] The Court distinguished the case from *Flast* for two major reasons. First, unlike in *Flast*, the plaintiffs had challenged a federal agency's decision to transfer property rather than Congress's enactment of the law authorizing the transfer.[26] Second, the property transfer implicated Congress's power under the Property Clause[27] rather than the Taxing and Spending Clause.[28] By drawing these distinctions, the Court construed its precedent in *Flast* narrowly, determining that *Flast*'s exception to the general bar on taxpayer standing was limited to congressional acts that relied upon the Taxing and Spending Clause.

The Court again refused to recognize taxpayer standing in a 2007 Establishment Clause challenge. In *Hein v. Freedom From Religion Foundation*, taxpayer plaintiffs challenged the Executive Branch's funding of its officials' religiously themed speeches promoting federal

[19] *Id.* at 102. In so holding the Court distinguished *Doremus v. Board of Education,* 342 U.S. 429 (1952). In *Doremus*, the Court held that a parent and student lacked standing to sue as state taxpayers to challenge a New Jersey statute providing for the reading of Bible verses at the beginning of each day of public school as a violation of the First Amendment Establishment Clause. *Id.* at 430. The Court characterized the plaintiffs' alleged injury as a "religious difference" rather than a direct financial injury that resulted from the expenditure of taxpayer funds for a religious purpose. *Id.* at 433–35. In *Flast*, the Court distinguished *Doremus* on the grounds that the reading of Bible verses involved no ostensible expenditure of public funds, and thus the *Doremus* plaintiffs failed to establish a logical link between their taxpayer status and the challenged state law. *See Flast*, 392 U.S. at 102.

[20] *Flast*, 392 U.S. at 102–06.

[21] *Id.* at 103–04.

[22] *Id.*.

[23] For further discussion on challenges to federal financial assistance to private religious organizations, see Amdt1.3.4.1 Overview of Financial Assistance to Religion.

[24] Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 593 (2007) (plurality opinion) ("In [*Flast*], we recognized a narrow exception to the general rule against federal taxpayer standing.").

[25] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 482 (1982).

[26] *Id.* at 479–80.

[27] *Id.* Article IV, Section 3, Clause 2 of the Constitution vests Congress with the "Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States . . ." U.S. CONST. art. IV, § 3, cl. 2. For more on the Property Clause, see ArtIV.S3.C2.1 Property Clause Generally.

[28] *Valley Forge*, 454 U.S. at 468, 479–80.

assistance to religious organizations and community groups.[29] A three-Justice plurality suggested that taxpayer-plaintiffs lack standing to challenge Executive Branch funding of religious activities out of general Executive Branch appropriations because such cases do not involve Congress specifically authorizing, appropriating, or mandating the use of federal funds for religious purposes.[30] Continuing to adhere to its narrow interpretation of the *Flast* exception, the Court held four years later that taxpayers lacked standing to challenge Arizona's provision of tax credits to individuals who contributed to scholarship organizations that funded students' attendance at private religious schools.[31] Because the tax credits did not compel individual taxpayers to support sectarian activities in the way that government spending could, the Court held that no aid flowed directly from the government to religious organizations, and therefore the plaintiffs could not surmount the general bar on taxpayer standing.[32]

ArtIII.S2.C1.6.6 Representational Standing

ArtIII.S2.C1.6.6.1 Overview of Representational Standing

Article III, Section 2, Clause 1:

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

Federal courts must sometimes decide whether a litigant who has not suffered an injury-in-fact may request judicial relief on behalf of an injured third party who has not appeared before the court. The presumption is that an uninjured litigant lacks standing to sue and cannot raise claims on behalf of a third party.[1] The Supreme Court, however, has at times

[29] *Hein*, 551 U.S. at 592–96 (plurality opinion). Article I, Section 8, Clause 1 of the Constitution contains language that is known as the Taxing and Spending Clause, providing, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . " U.S. Const. art. I, § 8, cl. 1. For more on the Taxing and Spending Clause, see ArtI.S8.C1.1.1 Overview of Taxing Clause and ArtI.S8.C1.2.1 Overview of Spending Clause.

[30] *Hein*, 551 U.S. at 592–96. Justices Antonin Scalia and Clarence Thomas concurred in the judgment but would have overruled *Flast v. Cohen*.

[31] Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 129 (2011).

[32] *Id.* at 142 ("[T]ax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. A dissenter whose tax dollars are 'extracted and spent' knows that he has in some small measure been made to contribute to an establishment in violation of conscience. . . . When the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment.") (internal citations omitted). The Court also stated that the plaintiffs could not show causation and redressability because the alleged subsidization of religious activity was the result of private third-party action and not solely the result of government action. *Id.* at 143. *But see* Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 380 n.5 (1985) (stating that the Court has found standing to sue in "numerous cases" involving "Establishment Clause challenges by state taxpayers to programs for aiding nonpublic schools").

[1] United Food & Commercial Workers Union Local 571 v. Brown Grp., Inc., 517 U.S. 544, 557 (1996). The foundational case for the general bar on third-party standing is *Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co.,* 226 U.S. 217, 219–20 (1912) (holding that a railway company could not assert the rights of hypothetical third parties in a challenge to a Mississippi statute providing a penalty for lost or damaged freight). *See also* Sec'y of State of Md. v. Munson Co., 467 U.S. 947, 947 n.5 (1984) (noting that third-party standing is disfavored in part due to "Art. III's requirement that a plaintiff have a 'sufficiently concrete interest in the outcome of the suit to make it a case or

permitted this form of "representational standing," allowing certain relationships between an uninjured litigant and an injured third party to overcome that presumption.[2] Thus, for example, courts may permit representational standing when a formal association seeks to bring suit on behalf of its members;[3] a state sues on behalf of its citizens;[4] a plaintiff asserts a claim assigned to it by another party (e.g., a claim assigned to it by the government under a qui tam[5] provision);[6] or an agent brings suit on behalf of its principal.[7] Such issues may also arise when a party brings a facial challenge to a law on First Amendment grounds, arguing that although the party itself is not subject to the law, it would be unconstitutional for the government to apply it to third parties with which the litigant has some form of close relationship (e.g., a business relationship).[8]

ArtIII.S2.C1.6.6.2 Associational Standing

Article III, Section 2, Clause 1:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and*

controversy,'" and in part due to the prudential concern that "if the claim is brought by someone other than one at whom the constitutional protection is aimed," it may be "an abstract, generalized grievance that the courts are neither well equipped nor well advised to adjudicate" (citations omitted)).

[2] *United Food & Commercial Workers Union Local 571*, 517 U.S. at 557 ("[T]he entire doctrine of 'representational standing' . . . rests on the premise that in certain circumstances, particular relationships (recognized either by common-law tradition or by statute) are sufficient to rebut the background presumption (in the statutory context, about Congress's intent) that litigants may not assert the rights of absent third parties.") (internal citations omitted). Notably, the concept of representational standing, which involves a litigant who has not suffered an injury-in-fact bringing suit on behalf of an injured third party, differs from the issue of "third-party" or jus tertii standing. The latter concept, which is discussed in more detail below, is a prudential doctrine that refers to a situation in which an *injured* party asserts the rights of someone who is not before the court as part of the legal theory underlying its claim or defense. An example of a case concerning third-party standing is *Eisenstadt v. Baird*, in which the Court held that a person convicted for distributing a contraceptive device to an unmarried woman had standing to assert the constitutional rights of unmarried persons denied access to contraception when challenging the Massachusetts law under which he was convicted on equal protection grounds. *E.g.*, 405 U.S. 438, 445–46 (1972) (holding that an advocate of contraception convicted for giving a contraceptive device to an unmarried woman had standing to assert the rights of unmarried persons denied access to contraception, as such persons were not themselves subject to prosecution and would unlikely be able to assert their constitutional right to use it). For more on third-party standing, see ArtIII.S2.C1.6.9.3 Third Party Standing.

[3] *E.g.*, Int'l Union v. Brock, 477 U.S. 274, 290 (1986).

[4] *E.g.*, Massachusetts v. EPA, 549 U.S. 497, 520 (2007).

[5] "*Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro ipso in hac parte sequitur*, which means 'who pursues this action on our Lord the King's behalf as well as his own.'" Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (2000). Qui tam lawsuits allow a private party to enforce a law by acting as a "private attorney general." John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 Md. L. Rev. 215, 215–16 (1983) (providing an overview of the concept of private attorneys general).

[6] *E.g.*, *Vt. Agency of Nat. Res.*, 529 U.S. at 778.

[7] *E.g.*, Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 271 (2008).

[8] *E.g.*, Sec'y of State of Md. v. Munson Co., 467 U.S. 947, 958 (1984). Issues of representational standing may also arise in the context of class action lawsuits (i.e., lawsuits by representative parties on behalf of all members of a class of similar plaintiffs that have aggregated their claims in one case). *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 803–06 (1985) (determining that class action defendant had standing to challenge a Kansas Supreme Court judgment rendered against it on the grounds that the judgment would bind the oil and gas company that would not bind all potential plaintiffs because the company "had a distinct and personal interest in seeing the entire plaintiff class bound by *res judicata* just as [it] is bound"); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 403–04 (1980) (holding that a proposed class representative retained a personal stake sufficient for the representative to appeal a court's ruling denying his class certification motion even though the named plaintiff's substantive claim had expired); Sosna v. Iowa, 419 U.S. 393, 402 (1975) (determining that a "live controversy" existed for purposes of Article III standing "between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff ha[d] become moot").

Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Perhaps the most obvious context in which the Supreme Court confronts issues of representational standing is when a formal association sues to redress injury to its members. In the past, associations seeking relief in federal court have included environmental groups,[1] unions (i.e., associations of workers),[2] and trade associations (i.e., associations of businesses).[3] While an organization may have standing to sue on its own behalf when it sustains an injury as an organization (e.g., a loss of membership),[4] the Supreme Court held in *Hunt v. Washington State Apple Advertising Commission*, that an association has standing to sue to redress its members' injuries, even when the association has not itself suffered injury, when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[5]

In subsequent decisions, the Supreme Court has elaborated on the three prongs of the *Hunt* test. The first two prongs of this three-part test reflect *Lujan*'s constitutional minimum requirements, assuring that the association possesses a genuine stake in the controversy and that the lawsuit involves a contest between adversarial parties.[6] Therefore, Congress may not waive these requirements through the enactment of legislation. However, the third requirement for associational standing is a prudential limitation, focusing on "administrative convenience and efficiency," that Congress may modify or eliminate in certain contexts.[7] Applying the third prong, the Court has found that associations lack standing when, for example, it would be too difficult to establish individualized proof of injury for each member of an association that seeks monetary damages on behalf of its members[8] or when resolving an association's claims would require the Court to ascertain each member's individual views on a

[1] *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992); Sierra Club v. Morton, 405 U.S. 727, 731 (1972).

[2] *E.g.*, Int'l Union v. Brock, 477 U.S. 274, 276 (1986).

[3] *E.g.*, Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 344–45 (1977) (determining that a state agency that represents an industry of the state and acts like a trade association but with compelled membership may have standing to sue for its members' injuries).

[4] Warth v. Seldin, 422 U.S. 490, 511 (1975).

[5] United Food & Commercial Workers Union Local 571 v. Brown Grp., Inc., 517 U.S. 544, 553 (1996) (quoting *Hunt*, 432 U.S. at 343). *See also Brock*, 477 U.S. at 282–90 (applying the three-part test and determining that an automobile workers union had associational standing to challenge a Department of Labor policy directive interpreting the trade readjustment allowance (TRA) benefit eligibility provisions of the Trade Act of 1974). Some argue that an association is able to more effectively advance the shared interests of its members by pooling financial resources and expertise. *Id.* at 290 ("[T]he primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others.").

[6] *United Food & Commercial Workers*, 517 U.S. at 554–57.

[7] *Id.*

[8] *See Brock*, 477 U.S. at 287 ("Neither these claims nor the relief sought required the District Court to consider the individual circumstances of any aggrieved UAW member. The suit raises a pure question of law: whether the Secretary properly interpreted the Trade Act's TRA eligibility provisions. And the relief requested, and granted by the District Court, leaves any questions regarding the eligibility of individual TRA claimants to the state authorities given jurisdiction over such questions by [the Trade Act of 1974].") (citations omitted). *But see Warth*, 422 U.S. at 515–16 (finding that an association of construction firms lacked standing to seek damages for lost profits and business because "whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof").

particular matter.[9] Nonetheless, Congress may override judicial concerns about the difficulty in establishing individualized proof for each member of an association if the association satisfies the first two elements of the *Hunt* test.[10]

ArtIII.S2.C1.6.6.3 States and Parens Patriae

Article III, Section 2, Clause 1:

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

A state has standing to sue in its sovereign capacity for injuries to its own interests.[1] For example, the Supreme Court upheld standing for: (1) Wyoming to sue Oklahoma for an injury to its ability to collect a specific tax that allegedly resulted from Oklahoma requiring its coal-fired electric utilities to burn at least 10% Oklahoma-mined coal;[2] (2) California to sue the Secretary of the Interior for injury to its financial interests from the Secretary of Interior choosing one form of bidding system over another in awarding leases for oil and gas exploration development of Outer Continental Shelf lands;[3] and (3) several states from increased natural gas costs resulting from a Louisiana tax on natural gas imported into the state.[4]

However, a distinct issue of representational standing arises when a state seeks to sue on behalf of its citizens in federal court. The Supreme Court has long recognized that a state may sue as parens patriae—literally, "parent of his or her country"[5]—but only when it has a

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[9] Harris v. McRae, 448 U.S. 297, 321 (1980) (finding that the women's division of a religious organization lacked standing to assert the rights of its members under the Free Exercise Clause because the Court needed to ascertain each member's individual views as to the "permissibility, advisability, and/or necessity of abortion" in order to rule upon the organization's constitutional claims). Because individuals in the organization could have diverse views on the issue of abortion, inquiring into each member's individual views was "necessary in a free exercise case [in order] to show the coercive effect of the enactment as it operates against [an individual] in the practice of his religion." *Id.*

[10] *United Food & Commercial Workers*, 517 U.S. at 554–57.

[1] Massachusetts v. EPA, 549 U.S. 497, 516–20 (2007). *See also* West Virginia v. Env't Prot. Agency, No. 20-1530, slip op. at 14 (U.S. June 30, 2022) (noting that states had been injured for Article III standing purposes when a federal appeals court decision had purported to revive an Environmental Protection Agency rule that required the states to "more stringently regulate power plant emissions within their borders").

[2] Wyoming v. Oklahoma, 502 U.S. 437, 440, 451 (1992).

[3] Watt v. Energy Action Educ. Found., 454 U.S. 151, 153 160–61 (1981).

[4] Maryland v. Louisiana, 451 U.S. 725, 736 (1981).

[5] Black's Law Dictionary 1221 (9th ed. 2009) (defining "parens patriae" as "a doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen" but stating that the "state ordinarily has no standing to sue on behalf of its citizens, unless a separate, sovereign interest will be served by the suit"). For a historical discussion of parens patriae suits, see New York v. New Jersey, 256 U.S. 296, 301–02 (1921) ("The health, comfort and prosperity of the people of the State and the value of their property being gravely menaced, as it is averred that they are by the proposed action of the defendants [in executing a sewer project that would allegedly discharge polluted water into New York Harbor], the State is the proper party to represent and defend such rights by resort to the remedy of an original suit in this court under the provisions of the Constitution of the United States."); Missouri v. Illinois, 180 U.S. 208, 241 (1901) ("[I]f the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them."). Since deciding these cases, the Court has taken a narrower view of the parens patriae

separate "sovereign interest" at stake in the outcome of the controversy.[6] And while a state may sue to assert its rights *under* federal law, it may not sue to protect its citizens *from* federal law on the grounds that Congress has intruded upon an area of traditional state authority.[7]

For instance, in *Massachusetts v. Mellon* the State of Massachusetts sought to maintain a lawsuit against the federal government challenging the Maternity Act, a federal statute that created a grant program to distribute taxpayer funds to states that agreed to cooperate with the federal government to protect the health of mothers and infants.[8] Massachusetts argued that Congress had usurped state powers over traditionally local matters in violation of the Tenth Amendment.[9] The Supreme Court first found that the state lacked standing to sue on its own behalf because it had no separate sovereign interest that would be affected by the statute (e.g., a property interest).[10] The Court then determined that Massachusetts lacked standing to sue as a representative of its citizens because it was the role of the federal government to act as representative, or parens patriae, of Massachusetts citizens with respect to federal laws.[11] As a result, the Court reasoned that Massachusetts lacked standing to pursue its Tenth Amendment claim, which sought to protect its citizens from a federal statute.[12]

Several decades later, the Supreme Court discussed a state's standing to sue protect its sovereign interests in a major environmental case. In the 2007 case *Massachusetts v. EPA*, the Court held that the State of Massachusetts had standing to challenge the Environmental Protection Agency (EPA)'s denial of a petition asking the agency to regulate greenhouse gas emissions from new motor vehicles under the Clean Air Act (CAA).[13] The Court determined that Massachusetts had standing for two major reasons. First, the Court held that the because the dispute involved the proper construction of the CAA, and because Congress had granted a specific procedural right in the Act to protect the state's concrete interests in EPA's regulatory actions, the state had a personal stake in the outcome and could assert that procedural right without meeting the normal standards for immediacy and redressability.[14] Second, the Court deemed Massachusetts' alleged injury—its loss of shore land from global-warming induced sea level rise—an independent *quasi*-sovereign interest in preserving its territory separate from its citizens' interests and thus sufficient for standing.[15]

The Supreme Court's reasoning in *Massachusetts v. EPA* did not endorse the concept of parens patriae standing generally, but it did recognize that the states "are not normal litigants for the purposes of invoking federal jurisdiction."[16] The court thus allowed Massachusetts's

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doctrine. In particular, the Court now requires that the state have a "separate sovereign interest" at stake apart from litigating the "personal claims of its citizens." Pennsylvania v. New Jersey, 426 U.S. 660, 665 (1976).

[6] *Id.* ("It has . . . become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens.").

[7] Massachusetts v. Mellon, 262 U.S. 447, 520 n.17 (1923).

[8] *Id.* at 479. The Court consolidated the case with the above-discussed case of *Frothingham v. Mellon*.

[9] *Massachusetts*, 262 U.S. at 479.

[10] *Id*. at 482–85 ("It follows that in so far as the case depends upon the assertion of a right on the part of the State to sue in its own behalf we are without jurisdiction. . . . [W]e are called upon to adjudicate, not rights of persons or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government.").

[11] *Id.* at 486.

[12] *Id.*

[13] 549 U.S. 497, 505–06 (2007).

[14] *Id.* at 516–18 ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.").

[15] *Id.* at 518–20 (citing Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907)).

[16] *Massachusetts*, 262 U.S. at 518.

suit as one that involved its rights under federal law (i.e., the CAA's citizen-suit provision), and not solely an action (as in *Mellon*) involving a state seeking to protect its citizens *from* the operation of a federal statute.[17] Although the Court also determined that Massachusetts had standing to sue for injury to its "quasi-sovereign" interest in protecting its territory, it is unclear whether the Court established a new precedent on a state's standing to sue as parens patriae. The Court's decision in *Massachusetts v. EPA* could be characterized as resting on principles of federalism and a state's sovereign prerogative to regulate in-state motor vehicle emissions.

ArtIII.S2.C1.6.6.4 Assignees of a Claim

Article III, Section 2, Clause 1:

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

An assignment of a legal claim occurs when one party (the "assignor") transfers its rights in a cause of action to another party (the "assignee").[1] The Supreme Court has held that a private litigant may have standing to sue to redress an injury to another party when the injured party has assigned at least a portion of its claim for damages from that injury to the litigant. The Supreme Court in the 2000 case *Vermont Agency of Natural Resources v. United States ex rel. Stevens* held that private individuals may have Article III standing to bring a qui tam civil action in federal court under the federal False Claims Act (FCA) on behalf of the federal government if authorized to do so.[2] The FCA imposes civil liability upon "any person" who, among other things, knowingly presents to the federal government a false or fraudulent claim for payment.[3] To encourage citizens to enforce the Act, in certain circumstances, a private individual, known as a "relator," may bring a civil action for violations of the Act. Such plaintiffs sue under the name of the United States and may receive a share of any recovered proceeds from the action.[4] Under the FCA, the relator is not merely the agent of the United States but an individual with an interest in the lawsuit itself.[5]

Ordinarily, if the relator's financial interest in the outcome of the case were merely a byproduct of the suit itself, there would be no injury sufficient for standing.[6] In *Stevens*,

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[17] *Id.* at 520 n.17 ("[T]here is a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do).") (citations omitted).

[1] Black's Law Dictionary 136 (9th ed. 2009) (defining "assignment" as "the transfer of rights or property").

[2] 529 U.S. 765, 768, 778 (2000).

[3] 31 U.S.C. § 3729(a).

[4] *Id.* § 3730(d)(1)–(2).

[5] *Vt. Agency of Natural Res.*, 529 U.S. at 772 ("For the portion of the recovery retained by the relator . . . some explanation of standing other than agency for the Government must be identified.") (citing 31 U.S.C. § 3730).

[6] *Id.* at 772–73 ("An interest unrelated to injury in fact is insufficient to give a plaintiff standing. . . . A *qui tam* relator has suffered no [invasion of a legally protected right]—indeed, the 'right' he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails.") (citations omitted). The Supreme Court has held that a litigant's interest in recovering attorneys' fees or the costs of bringing suit by itself normally does not

however, the Supreme Court recognized a distinction that confers standing upon qui tam plaintiffs in FCA cases. Justice Antonin Scalia, writing for the Court, determined that assignments of claims are distinguishable from cases in which a litigant has a mere financial interest in the outcome of the suit because the assignee-plaintiff actually owns a stake in the dispute as a legal matter.[7] Justice Scalia drew support for this distinction from the long-standing historical practice of the government assigning a portion of its damages claim to a private party and allowing that party to assert the injury suffered by the federal government as a representative of the United States.[8] The Court noted the "long tradition of *qui tam* actions in England and the American colonies,"[9] concluding that "Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'"[10]

Eight years after deciding *Stevens*, the Supreme Court again found that an assignee of a claim had standing, even when the assignee had promised to remit all of the money it recovered in the proceedings to the assignor.[11] In *Sprint Communications Co. v. APCC Services, Inc.*, payphone operators had assigned their legal claims for money owed to them by long-distance communications carriers to third-party collection agencies.[12] The agencies were authorized to bring suit on behalf of the payphone operators and promised to pay all of the proceeds of the litigation to the payphone operators for a fee.[13] The Court held that these collection agencies had standing to pursue the operators' claims because of the long history of courts' acceptance of such claims.[14] Assignment was sufficient to transfer the injury to the collections agencies, and the injury to the operators that had been transferred to the collection agencies would be redressed by a favorable judicial decision, even if the agencies would subsequently pay all of the proceeds to the operators.[15]

The *Stevens* and *Sprint* cases could have broader implications for Article III standing doctrine, as they suggest a way in which the constitutional limitations on standing may be bypassed through the assignment of rights to a third party.[16] For instance, if Congress enacts a federal statute recognizing an injury to the federal government that otherwise satisfies Article III's requirements, it may assign a portion of its claim to a private party, thereby potentially giving that plaintiff standing to sue as a representative of the United States.[17] This is

confer standing to sue. *E.g.* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998) ("The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself."); Diamond v. Charles, 476 U.S. 54, 70–71 (1986) ("[T]he mere fact that continued adjudication would provide a remedy for an injury that is only a byproduct of the suit itself does not mean that the injury is cognizable under Art. III.").

[7] *Vt. Agency of Natural Res.*, 529 U.S. at 773.

[8] *Id.* at 774, 778

[9] *Id.*

[10] *Id.* Although the Court held that the relator had standing to sue under the qui tam provision, it ultimately determined that the plaintiff could not maintain the action against a state agency for allegedly submitting false grant claims to the EPA because states were not "persons" subject to liability under the False Claims Act. *Id.* at 787.

[11] Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 271 (2008).

[12] *Id.* at 271–72.

[13] *Id.* at 272.

[14] *Id.* at 273–75. The Court noted that "federal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit. Trustees bring suits to benefit their trusts; guardians ad litem bring suits to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; executors bring suit to benefit testator estates; and so forth." *Id.* at 287–88.

[15] *Id.* at 286–87 ("[I]f the [collection agencies] prevail in this litigation, the long-distance carriers would write a check to [them] for the amount of dial-around compensation owed. What does it matter what the [agencies] do with the money afterward?").

[16] *See also* ArtIII.S2.C1.6.4.3 Particularized Injury.

[17] *See Vt. Agency of Natural Res.*, 529 U.S. at 773.

essentially the operation of the False Claims Act.[18] However, it is unclear whether every such statute would necessarily resolve all Article III standing concerns. In *Stevens* and *Sprint*, the Court gave significant weight to the lengthy history of courts recognizing the types of assignments at issue when determining that the litigants in those cases had standing to sue.[19] Moreover, there may be a number of concerns about the constitutionality and practicality of using assignments to delegate core government functions (e.g., criminal prosecutions) to private parties when courts have not historically recognized claims based on such assignments, including concerns about interference with the Executive Branch's Article II powers and prosecutorial discretion.[20]

ArtIII.S2.C1.6.6.5 Agency and Standing

Article III, Section 2, Clause 1:

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

Broadly speaking, an agency relationship may arise when one person (a "principal") and another person (an "agent") agree that the agent will perform certain actions on behalf of the principal, subject to the principal's control.[1] Such a relationship may also arise when the law authorizes one person to represent another person's interests.[2] Agency relationships may raise questions of representational standing when an uninjured litigant acts as the authorized agent for another individual who has suffered an injury-in-fact by seeking relief in federal court on behalf of that individual. For example, if authorized by law, a parent might sue on behalf of an injured minor child. In order for such a litigant to seek relief for another party he must be officially authorized to do so (either by consent or as a matter of law), and the advocate's relationship with the third party must exhibit some of the "most basic features of an agency relationship," such as the right to control the agent's actions.[3]

One form of "agency standing" is the common-law concept of "next friend standing," which involves an uninjured third party pursuing legal claims for the benefit of an injured party who

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[18] 31 U.S.C. §§ 3729–3733.

[19] *See id.* at 774, 778; *Sprint Commc'ns Co.*, 554 U.S. at 273–75.

[20] *See* Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. Rev. 159, 195–204 (2011) (questioning whether Congress's assignment of claims to citizen suitors in order to confer standing would be constitutional or practical).

[1] Restatement (Third) of Agency § 1.01 ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

[2] *See generally* Black's Law Dictionary 1142 (9th ed. 2009) (defining a "next friend" as "a person who appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff; but who is not a party to the lawsuit and is not appointed as a guardian").

[3] Hollingsworth v. Perry, 570 U.S. 693, 702 (2013). *See also, e.g.*, Thole v. U.S. Bank N.A., No. 17-1712, slip op. at 4 (U.S. June 1, 2020) (rejecting the argument that uninjured participants in a defined-benefit plan could sue as the plan's representatives because, unlike "guardians, receivers, and executors," the plaintiffs had not been "legally or contractually appointed to represent the plan").

cannot appear in court on his own behalf.[4] This form of representational standing is often implicated in the context of habeas corpus proceedings, in which a litigant seeks a judicial determination that a prisoner should receive a new trial, new sentence, or be released.[5] For instance, in *Whitmore v. Arkansas*, a death row inmate challenged the constitutional validity of a death sentence imposed on a fellow capital defendant as a "next friend" of the defendant when the defendant decided not to appeal his sentence to the Arkansas Supreme Court.[6] The U.S. Supreme Court determined that the third-party inmate lacked standing to bring an Eighth Amendment objection as the "next friend" of the capital defendant.[7] The Court stated that the two-part test for "next friend" standing that the proposed next friend must meet in order to invoke federal court jurisdiction requires: (1) the real party in interest to be unable to "appear on his own behalf to prosecute the action" because of inaccessibility, mental incompetence, or other disability; and (2) the "next friend" to "be truly dedicated to the best interests of the person on whose behalf he seeks to litigate" and to have a significant relationship with the real party in interest so that the next friend's claims are not generalized grievances.[8] In *Whitmore*, the proposed "next friend" failed to satisfy the first prong—and therefore lacked standing to sue—because he had not demonstrated that the real party in interest (i.e., the capital defendant) was unable to litigate the case due to disability after the defendant had voluntarily waived his right to appeal his sentence.[9]

The Supreme Court more recently discussed the limits of standing based on an agency theory in a case in which private parties sought to act as agents of the California government in a federal lawsuit. In *Hollingsworth v. Perry*, the Court considered a Fourteenth Amendment Equal Protection and Due Process Clause challenge to Proposition 8, a law that amended the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California.[10] A federal district court had invalidated Proposition 8, but state and local officials declined to defend that ruling on appeal, so the official "proponents" of the proposition, who were private parties, sought to defend the law. The Court held that it lacked the authority to address the validity of Proposition 8 on the merits because the proponents did not have standing to invoke the jurisdiction of the federal courts to defend the proposition.[11] The Court first held that the proponents lacked a "direct stake" in the outcome of their appeal and "their only interest in having the District Court order reversed was to vindicate the

[4] Whitmore v. Arkansas, 495 U.S. 149, 162 (1990) ("Most frequently, 'next friends' appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves."). *See also* Black's Law Dictionary 1142 (9th ed. 2009) (defining a "next friend" as "a person who appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff; but who is not a party to the lawsuit and is not appointed as a guardian").

[5] Other contexts in which it may be relevant include actions on behalf of infants, other minors, and adult mental incompetents. *Whitmore*, 495 U.S. at 162 n.4. The Court has held that a parent-child relationship "easily satisfies" the "close relationship" requirement for "next friend" standing. *See* Sessions v. Morales-Santana, No. 15-1191, slip. op. at 7 (U.S. June 12, 2017).

[6] *Whitmore*, 495 U.S. at 151. The Court had rejected the litigant's argument that he had standing in his individual capacity. *Id.* at 161–62

[7] *Id.* at 165.

[8] *Id.* at 163–64.

[9] *Id.* at 165. *See also* Sessions v. Morales-Santana, slip. op. at 7 (holding that the death of the real party in interest meets the "hindrance" requirement for "next friend" standing); Gilmore v. Utah, 429 U.S. 1012, 1016 (1976) (Burger, C.J., concurring) (suggesting that a competent defendant's "knowing and intelligent" waiver of his right to seek appellate review of his sentence deprives the Court of jurisdiction to hear a "next friend" application for a stay of execution); *id.* at 1017 (Stevens, J., concurring) ("In my judgment the record not only supports the conclusion that Gilmore was competent to waive his right to appeal, but also makes it clear that his access to the courts is entirely unimpeded and therefore a third party has no standing to litigate an Eighth Amendment claim—or indeed any other claim—on his behalf.").

[10] Hollingsworth v. Perry, 570 U.S. 693, 688–90 (2013).

[11] *Id.* at 689.

constitutional validity of a generally applicable California law."[12] The Court then rejected the argument that the referendum proponents had standing because they were formally authorized to litigate on behalf of the State of California, as the litigants were private individuals rather than state officials or authorized agents of the state.[13] In rejecting what the Court viewed as a "generalized grievance," the Court emphasized that the proponents had no official role in enforcing California law distinguishable from the general interest of every citizen of California.[14]

Similarly, in *Virginia House of Delegates v. Bethune-Hill*, discussed below,[15] the Supreme Court concluded that one chamber of the Virginia legislature lacked standing to represent the Commonwealth's interests in appeal of a federal district court order requiring the redrawing of a 2011 legislative redistricting map for two reasons: (1) Virginia law designated the Virginia Attorney General as the commonwealth's exclusive representative in litigation; and (2) the chamber claimed earlier in the litigation that it was vindicating its own interests, as opposed to those of Virginia.[16]

ArtIII.S2.C1.6.6.6 Overbreadth Doctrine

Article III, Section 2, Clause 1:

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

Generally, a litigant challenging a law as unconstitutional may not assert the rights of a third party, and thus he must show that the law is either unconstitutional as applied to him (i.e., an "applied challenge")[1] or that there are no circumstances in which the law would be constitutional (i.e., a "facial challenge").[2] However, there is an exception to this general rule known as the doctrine of overbreadth, which generally arises in the context of First

[12] *Id.* at 649.

[13] *Id.* at 696–99. The Court noted that an essential feature of agency is the principal's right to control the agent's actions. Here, the proponents decided "what arguments to make and how to make them." *Id.* at 15. The Court also noted that the proponents were not elected to their position, took no oath, had no fiduciary duty to the people of California, and were not subject to removal. *Id. See also* Arizonans for Official English v. Ariz., 520 U.S. 43, 67–70 (1997) (determining that a former state employee lacked standing to defend an appeal of a lower court decision in her favor after she had left state employment); Karcher v. May, 484 U.S. 72, 74 (1987) (holding that public officials who had previously participated in a lawsuit as interveners solely in their official capacities as state legislators lacked standing to appeal an adverse judgment after they had left office).

[14] *Hollingsworth*, 570 U.S. 693, 672. *See also* Brnovich v. Democratic Nat'l Comm., No. 19-1257, slip op. at 12 (U.S. July 1, 2021) (holding that the Arizona Attorney General, whom state law authorized to represent the state in any federal court action, had standing to prosecute the appeal of a Ninth Circuit decision that an Arizona voting restriction violated the Voting Rights Act of 1965).

[15] *See* ArtIII.S2.C1.6.7 Federal and State Legislators and Standing.

[16] *See* No. 18-281, slip op. at 4–5 (U.S. June 17, 2019).

[1] Clements v. Fashing, 457 U.S. 957, 966 n.3 (1982) ("A litigant has standing to challenge the constitutionality of a statute only insofar as it adversely affects his own rights.").

[2] United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

Amendment challenges.[3] The Supreme Court has held that prudential and constitutional limitations on third-party standing might not apply in cases in which the litigant brings a facial First Amendment challenge to a law as being substantially too broad and therefore chilling third parties' rights protected by the First Amendment.[4] The Court has permitted standing for such litigants when the law interferes with a potential or currently existing relationship (e.g., a business relationship) with a third party whose First Amendment rights could be hindered by the law.[5]

ArtIII.S2.C1.6.7 Federal and State Legislators and Standing

Article III, Section 2, Clause 1:

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

The Supreme Court has also created specific standing rules for federal courts to apply when members of a legislative body seek to uphold the effectiveness of their votes or vindicate their institution's powers and prerogatives by suing (or defending) another unit of the same government in federal court.[1] The Court has held that legislators may have standing to sue in order to maintain the effectiveness of votes that they have cast in their capacity as legislators if their votes ultimately did not prevail. In *Coleman v. Miller*, twenty-four members of the Kansas state legislature sought a writ of mandamus compelling state officials to recognize that Kansas had not ratified an amendment to the Federal Constitution, the Child Labor Amendment,[2] challenging the way that the vote had been taken.[3] Twenty of the members, who were senators, had voted to reject the amendment, but the measure ratifying the amendment

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[3] For a more detailed explanation of this First Amendment doctrine, see Amdt1.7.2.1 The Overbreadth Doctrine, Statutory Language, and Free Speech.

[4] Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) ("[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."). *See also Munson Co.*, 467 U.S. at 958 ("Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court."); Black's Law Dictionary 1213 (9th ed. 2009) (defining "overbreadth doctrine" as the "doctrine holding that if a statute is so broadly written that it deters free expression, then it can be struck down on its face because of its chilling effect—even if it also prohibits acts that may legitimately be forbidden.").

[5] *Munson Co.*, 467 U.S. at 958. *See also, e.g.*, U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 720–21 (1990) ("When, however, enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement), third-party standing has been held to exist.") (citation omitted); Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 392–93 (1988) (allowing standing, based on the overbreadth exception, to book sellers to assert the First Amendment rights of potential book buyers); City of Houston v. Hill, 482 U.S. 451, 459 n.7 (1987) (stating that a gay rights activist had standing to bring a First Amendment overbreadth challenge a local ordinance making it an offense to verbally interrupt a policeman because he had shown "a genuine threat of enforcement" of the ordinance against him in the future (quoting Steffel v. Thompson, 415 U.S. 452, 475 (1974))).

[1] *E.g.*, Raines v. Byrd, 521 U.S. 811, 826 (1997).

[2] The proposed Amendment provided in part that "Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age." Coleman v. Miller, 307 U.S. 433, 435 n.1 (1939) (internal quotation marks omitted).

[3] *Id.* at 436–37.

nevertheless passed the state senate.[4] The plaintiffs alleged that an illegal tie-breaking vote for ratification by the Lieutenant Governor had deprived their votes of effectiveness.[5] Relying on several precedents, the Court held that the petitioners had "claimed a right and privilege under the Constitution . . . to have their votes given effect and the state court has denied that right and privilege."[6] Because the state legislators alleged that their votes had been voided by the improper procedure that led to the approval of the amendment, and those votes would have been sufficient to defeat the proposal, the legislators had a sufficient stake in the outcome that supported their standing to sue.[7]

Decades later, the Supreme Court took a more narrow view of individual legislator standing in *Raines v. Byrd.*[8] In that 1997 case, six Members of Congress challenged the Line Item Veto Act of 1996 (LIVA), a statute that authorized the President to cancel certain spending and tax benefit measures after signing them into law, as contrary to the bicameralism and presentment requirements of the Constitution.[9] The Members argued that they had suffered injury because LIVA altered the effect of the votes they would cast in the future and divested them of their constitutional role in the repeal of legislation.[10]

The Supreme Court, in an opinion written by Chief Justice William Rehnquist, found that the Members lacked standing to challenge LIVA because they had not suffered an injury different from that suffered by Congress as a whole.[11] Citing separation of powers concerns about resolving a dispute implicating the constitutional authority of Congress and the Executive in a lawsuit brought by legislators, the Court, in refusing to proceed to the merits, noted that the Member-plaintiffs had not suffered the concrete deprivation of a private right, like the loss of their seats in Congress, but instead alleged a general diminution of their political power.[12] The Court thus distinguished *Raines* from its earlier decision in *Coleman* on the grounds that the latter case had involved legislators who alleged that their votes had been nullified, whereas the LIVA challenged in *Raines* did not significantly impact the power of the Members' votes because they could vote to exempt future appropriations bills from LIVA or repeal LIVA if necessary.[13] Although the Court determined that it lacked jurisdiction over the Members' claims, it left open the possibility that one or both houses of Congress—or perhaps a

[4] *Id.* at 435–36.

[5] *Id.* at 435–38.

[6] *Id.* at 438, 446 ("We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes."). *See also* Raines v. Byrd, 521 U.S. 811, 822 (1997) (discussing the votes that comprised a majority of the Court for this rule).

[7] *Coleman*, 307 U.S. at 438, 446.

[8] 521 U.S. 811 (1997).

[9] *Id.* at 814, 816. For more on the bicameralism and presentment requirements, see ArtI.S1.2.2 Origin of a Bicameral Congress and Amdt20.S3.1 Presidential Succession.

[10] *Raines*, 521 U.S. at 816.

[11] *Id.* at 820–21 (citing Powell v. McCormack, 395 U.S. 486, 496, 512–14 (1969)).

[12] *Raines*, 521 U.S. at 820–21 ("The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds . . . as trustee for his constituents, not as a prerogative of personal power."). The Court distinguished this type of grievance from *Powell v. McCormack,* 395 U.S. 486, 512–17 (1969), in which the Court allowed a Member of Congress to challenge his exclusion from the House of Representatives. In *Raines*, the Court wrote that the Member of Congress in *Powell* had standing to sue because he alleged injury to a personal, private right (i.e., his right to his congressional seat and federal salary) rather than injury to Congress as an institution. *Raines*, 521 U.S. at 820–21.

[13] *Id.* at 824 ("In the vote on the [LIVA], their votes were given full effect. They simply lost that vote."). The Court also found a lack of historical practice involving suits maintained to redress injury to institutional power. *Id.* at 826–28.

committee—would have standing to sue for redress of alleged institutional injuries to Congress if authorized by at least one of the Houses, provided that another legislative remedy was not available to them.[14]

In two state legislator standing cases that did not raise similar separation of powers concerns, the Supreme Court rested its standing analysis on the specific features of the state governments at issue. In the first case, *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, the Court considered a state ballot initiative that would vest the authority to draw legislative districts in an independent commission. The Arizona State Legislature, acting pursuant to an authorizing resolution, challenged that ballot initiative, claiming that it had suffered injured by a diminution in its legislative authority.[15] Noting that the case did not raise separation of powers concerns that might arise if Congress sued the President, the Court held that the Arizona legislature was a proper party to sue because, like the plaintiffs in *Coleman*, it had lost the opportunity to adopt a redistricting plan (i.e., its members' votes were nullified).[16] Moreover, such an institutional injury to the legislature could serve as the basis for a lawsuit, at least when the legislature authorized suit by enacting a resolution in each chamber.[17]

By contrast, in *Virginia House of Delegates v. Bethune-Hill*, the Supreme Court held that a *single house* of the bicameral Virginia state legislature lacked standing to appeal a federal district court order requiring the redrawing of a 2011 legislative redistricting map.[18] The Virginia House of Delegates (House) had previously intervened to defend the constitutionality of the legislative redistricting plan against a voter-led Fourteenth Amendment Equal Protection Clause challenge, but the Virginia Attorney General, who was the primary defending party, had decided not to appeal an unfavorable ruling.[19] As discussed, in determining that the House lacked standing to appeal on behalf of the state, the Court noted that Virginia law assigned the Virginia Attorney General the task of representing the state in appeals like the one before the Court.[20] Moreover, the Attorney General had not delegated such litigation authority to the House of Delegates.[21] Unlike in *Arizona State Legislature*, the House lacked standing to appeal *in its own right* because it was a single component of the bicameral state legislature responsible for redistricting and could thus not assert the interests of the legislature as a whole.[22] Moreover, the House's alleged injury (i.e., invalidation of a state redistricting law) was not cognizable for standing purposes as it did not permanently deprive the House of its role in redistricting and the House did not suffer a cognizable injury merely because its composition (and, therefore, the content of legislation) could be altered by the electorate as a result of a redrawn redistricting map.[23] In this regard, the Court noted that the

[14] *Id.* at 829.

[15] 576 U.S. 787, 788 (2015).

[16] *Id.* at 795–99 & n.12.

[17] *Id.* The Court did not specifically state that the legislature was required to enact an authorizing resolution in order to establish standing.

[18] No. 18-281, slip op. at 1–2 (U.S. June 17, 2019). The district court had held that the redistricting plan unconstitutionally sorted voters based on race in several districts. *Id.*

[19] *Id.* at 1–4. As the Court noted, "[b]ecause [the House of Delegate's participation in prior proceedings did not entail] invoking a court's jurisdiction, it was not previously incumbent on the House to demonstrate its standing." In *Bethune-Hill*, the House sought to appeal the district court's ruling when the Virginia Attorney General had decided not to appeal on behalf of the state defendants; therefore, the House had to establish standing independently. *Id.*

[20] *Id.*

[21] *Id.* at 4–5.

[22] *Id.* at 7–8.

[23] *Id.* at 8–12. The House had pursued the appeal based solely on its role in the legislative process.

invalidation of the redistricting law did not infringe upon the unique legislative powers of the Virginia House by altering the manner in which it conducted its day-to-day-operation (e.g., by altering its committee structure).[24]

ArtIII.S2.C1.6.8 Congressional Control of Standing

Article III, Section 2, Clause 1:

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

In addition to interpreting Article III as a limit on the categories of litigants who may maintain a lawsuit in federal court, the Supreme Court has also held that the Constitution constrains Congress's ability to confer standing on private individuals through the enactment of "citizen-suit" provisions that authorize private individuals to enforce federal laws against the government or private parties.[1] Congress may elevate certain categories of harm to the status of cognizable Article III injuries, such as economic injury that results from lawful competition[2] or social and professional injury resulting from living in a racially segregated community.[3] It may not, however, abrogate Article III constraints on federal court jurisdiction by conferring standing on private parties in the absence of a material risk of particularized injury to them from the defendant's violations of their statutory rights.[4]

A major case addressing the constitutional limits on the scope of Congress's authority to create statutory rights for private citizens (or a class of citizens) to sue is *Lujan v. Defenders of Wildlife*.[5] In *Lujan*, Justice Antonin Scalia, writing for the majority, stated that Article III generally limits Congress's ability to create standing by allowing a plaintiff to sue for procedural injuries even where the defendant's violation of the plaintiff's statutory rights would not cause the plaintiff any other concrete injury.[6] Although Congress may relax the

[24] *Id.* at 10–11.

[1] Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992).

[2] Hardin v. Ky. Utils. Co., 390 U.S. 1, 6–7 (1968) (determining that a utility company had standing to challenge the TVA's supply of power in competition with certain utility companies because, as a competitor of TVA, the Kentucky Utilities Company fell within the zone of interests that Congress sought to protect in a federal statute from competitive injury even when the statute did not specifically confer standing and the plaintiff's alleged competitive injuries would not have sufficed by themselves for standing).

[3] Havens Realty Corp. v. Coleman, 455 U.S. 363, 368–69, 374 (1982) (holding that a "tester plaintiff" who pretended to be interested in renting apartments for the purpose of obtaining evidence of racially discriminatory practices had standing based on Congress's creation of a statutory right to truthful information concerning the availability of housing); Gladstone v. Village of Bellwood, 441 U.S. 91, 114–15 (1979) (holding that homeowners in a neighborhood affected by allegedly racially discriminatory housing practices that manipulated the racial composition of the neighborhood had suffered a cognizable Article III injury for purposes of suing under the Fair Housing Act). *See also Lujan*, 504 U.S. at 578; *cf.* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972) (concluding that tenants of an apartment complex who had been deprived of the benefits of interracial association as a result of discriminatory rental practices had standing to sue their landlord under the Fair Housing Act).

[4] *Gladstone*, 441 U.S. at 100.

[5] 504 U.S. 555 (1992).

[6] *Id.* at 572. The Court distinguished this situation from one in which "plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs," such as "a hearing

Article III standards for immediacy and redressability of the injury in such provisions,[7] Congress cannot create standing for redress of generalized grievances about government by providing litigants with an "abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law."[8] To allow Congress to do so through enactment of provisions providing private rights of action would "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed'" and make the courts the continuing monitors of Executive action.[9]

Justice Anthony Kennedy wrote a separate concurrence in *Lujan* in which he suggested that Congress has broad authority to confer standing on private parties in citizen-suit provisions, so long as it explicitly creates procedural rights and concrete interests for citizens to sue upon.[10] Noting that government policies had become more "far-reaching" and that "we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition,"[11] Justice Kennedy wrote that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . . In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."[12] Determining that the citizen-suit provision at issue in *Lujan* did not specifically provide that "any person" would suffer a cognizable injury as a result of any statutory violation, Justice Kennedy agreed that the plaintiff environmental group lacked standing to sue.[13]

The Court decided *FEC v. Akins*, a 1998 case, consistently with Justice Kennedy's views, holding that Congress may confer standing by providing a general procedural right of access to information to "any party," and that deprivation of this right is a sufficiently concrete injury for standing purposes and not a generalized grievance.[14] More than a decade later, in *Massachusetts v. EPA*, a majority of the Court formally adopted Justice Kennedy's view that Congress may create standing to sue by identifying cognizable injuries and creating procedural rights for citizens to sue upon to redress those injuries.[15] In *Summers v. Earth Island Institute*, the Supreme Court reaffirmed that the deprivation of a litigant's procedural

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prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them." *Id.*

[7] *Id.* at 572 n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

[8] *Id.* at 573–74. Justice Antonin Scalia later referred to this type of procedural right as a "procedural right *in vacuo*" that was insufficient for Article III standing. Summers v. Earth Island Institute, 555 U.S. 488, 496 (2009).

[9] *Lujan*, 504 U.S. at 577 (citing U.S. CONST. art. II, § 3). Justice Antonin Scalia's opinion for the Court acknowledged that Congress may be able to elevate injuries that were "previously inadequate in law" to the status of concrete Article III injuries. *Lujan*, 504 U.S. at 578.

[10] *Id.* at 580–81 (Kennedy, J., concurring in part and concurring in the judgment) ("While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way.").

[11] *Id.* at 580.

[12] *Id.*

[13] *Id.*

[14] FEC v. Akins, 524 U.S. 11, 21 (1998) (holding that a litigant's failure to obtain information that federal law requires to be disclosed can constitute a sufficiently concrete injury for Article III standing purposes); Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 449–50 (1989) (same).

[15] Massachusetts v. EPA, 549 U.S. 497, 516 (2007) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)).

right—the right to use a federal administrative appeals process to challenge certain actions of the U.S. Forest Service—without injury to any separate concrete interest cannot support Article III standing to sue.[16] But, in a concurrence, Justice Kennedy again suggested that the result would have been different—and *Massachusetts v. EPA* would have applied—if Congress had specifically identified a separate concrete interest that would have been affected by the deprivation of the procedural right.[17]

As the Court held more recently in *Spokeo v. Robins*, federal courts will judge whether the defendant's alleged violation of a right created by Congress is sufficient by itself to constitute a concrete harm to a litigant for standing purposes by considering whether it is similar to a harm that "has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[18] But in doing so, courts must give at least some weight to Congress's judgments about which intangible harms amount to concrete Article III injuries.[19]

The principle emerging from these cases is that Congress has some ability to expand standing beyond the Court's traditional conception by granting a litigant a separate concrete interest, apart from a bare procedural right, that could serve as the basis for an injury-in-fact if violated.[20] At the same time, Congress must respect the limits that Article III establishes, and it cannot elevate certain categories of harm to the status of concrete injuries. For example, Congress likely cannot elevate a trivial injury, such as a company reporting an incorrect zip code for an individual, to the status of an Article III injury.[21] The Court has not articulated a clear rule for distinguishing between the types of intangible harms Congress may elevate to injuries-in-fact for standing purposes and those harms that are simply too trivial to serve as Article III injuries.[22] However, the Court has confirmed that it will independently review whether such harms are in fact "concrete injuries" sufficient for standing purposes.[23]

ArtIII.S2.C1.6.9 Prudential Standing

ArtIII.S2.C1.6.9.1 Overview of Prudential Standing

Article III, Section 2, Clause 1:

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

Even when a litigant satisfies Article III's constitutional standing requirements, a federal court may refuse to adjudicate its claims for relief "under the prudential principles by which

[16] 555 U.S. 488, 496 (2009).

[17] *Id.* at 501 (Kennedy, J., concurring).

[18] Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016). As noted, in *Spokeo v. Robins*, the Court clarified that Congress cannot confer standing on plaintiffs who do not face at least a material risk of injury from the defendant's violation of statutory rights. *Id*. at 343. For further discussion of *Spokeo*, see ArtIII.S2.C1.6.4.3 Particularized Injury.

[19] *Spokeo*, 578 U.S. at 43.

[20] Massachusetts, 549 U.S. at 516.

[21] *Spokeo*, 578 U.S. at 343.

[22] *See generally id.*

[23] TransUnion LLC v. Ramirez, No. 20-297, slip op. at 10 (U.S. June 25, 2021).

the Judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim."[1] The Supreme Court has applied these prudential principles to standing doctrine[2] in several circumstances. A court may refuse to hear a case as a matter of self-restraint in at least three situations: (1) when the litigant seeks to assert the rights of third parties not before the court; (2) when the litigant seeks redress for a generalized grievance widely shared by a large number of citizens that is better addressed legislatively; and (3) when the litigant's asserted interests do not fall within the zone of interests arguably protected or regulated by the statute or constitutional provision underlying its claims.[3]

At least the first two of these situations also implicate the concerns of constitutional standing in some cases, while the third appears to be purely prudential. Thus, more recently, the Court has questioned whether the doctrine of prudential standing should even exist, indicating that the bar on generalized grievances is a constitutional (and not prudential) requirement and rejecting a prudential application of the "zone of interests" test in favor of one aimed at determining whether the plaintiff's claim falls within the scope of a statutory provision conferring a right of action.[4] Regardless of the uncertain state of the law in this area, Congress may abrogate prudential standing requirements through the enactment of legislation containing express language to that effect.[5] As discussed, while Congress may eliminate or modify prudential standing limits, it cannot supersede the Article III minimum requirements of injury, causation, and redressability.[6]

ArtIII.S2.C1.6.9.2 Zone of Interests Test

Article III, Section 2, Clause 1:

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

One type of prudential standing limitation that may counsel against the exercise of jurisdiction over a dispute involves the application of the "zone of interests" test, which asks

[1] Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99–100 (1979).

[2] This section discusses only the prudential *standing* doctrine. However, it is important to note that other "prudential" doctrines that have a basis in Article III of the Constitution may be relevant to the question of whether a federal court may exercise jurisdiction over a litigant's claims for relief. *See, e.g.*, ArtIII.S2.C1.5.1 Overview of Adversity Requirement (discussing the adversity requirement); ArtIII.S2.C1.9.1 Overview of Political Question Doctrine to ArtIII.S2.C1.9.11 Nonjusticiability of Partisan Gerrymandering Claims (discussing the political question doctrine).

[3] United States v. Windsor, 570 U.S. 744, 760 (2013) ("Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (listing the three types of prudential restraints).

[4] Lexmark Int'l Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 n.3 (2014).

[5] Warth v. Seldin, 422 U.S. 490, 501 (1975) ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.").

[6] Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.").

whether the litigant's grievance arguably[1] falls within the scope of the statute or constitutional provision in question.[2] This test is "not meant to be especially demanding,"[3] and the Supreme Court has sometimes applied it liberally, finding it to be satisfied even when Congress has not specifically intended to protect a particular litigant's interests.[4] For example, the Court determined that irrigation districts and operators of ranches had prudential standing to sue under a citizen-suit provision of the Endangered Species Act—a statute directed primarily at furthering environmental protection—to challenge the Fish and Wildlife Service (FWS)'s enforcement of the Act.[5] The Court found that the litigants had standing even though they alleged that the FWS's actions would cause them economic (and not environmental) harm by reducing the amount of water they would receive from a federal water-management project for their activities.[6] And the Court also concluded that tenants of an apartment complex had prudential standing to sue their landlord under the Fair Housing Act for allegedly discriminatory rental practices.[7] The Court reached this result even though the tenants themselves were not directly subject to such practices because Congress intended to confer standing on "all in the same housing unit who are injured by racial discrimination," such that depriving the residents of the benefits of interracial association qualified as a cognizable injury under the Act.[8]

Although the Supreme Court has often categorized the "zone of interests" test as a prudential limitation on the Court's exercise of its jurisdiction, in the recently decided case *Lexmark, International, Inc. v. Static Control Components, Inc.*, Justice Antonin Scalia, writing for the Court, stated that "it does not belong there" and that a court applying the test should use traditional tools of statutory interpretation to ascertain whether a plaintiff has a right to sue under a particular provision creating a substantive cause of action.[9] Thus, the Court may

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[1] Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 488–99 (1998) ("Our prior cases, therefore, have consistently held that for a plaintiff's interests to be arguably within the 'zone of interests' to be protected by a statute, there does not have to be an 'indication of congressional purpose to benefit the would-be plaintiff.'") (citation omitted).

[2] Bennett v. Spear, 520 U.S. 154, 162 (1997) ("[A] plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.") (citation omitted).

[3] Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 225 (2012).

[4] *See* Thompson v. N. Am. Stainless, 562 U.S. 170, 178 (2011) (concluding that a man who alleged that he had been fired in retaliation for his fiance (and coworker)'s sex discrimination charge had standing to sue under Title VII of the Civil Rights Act as his claim fell within the zone of interests that Congress sought to protect in the Act because the "purpose of Title VII is to protect employees from their employers' unlawful actions"); FEC v. Akins, 524 U.S. 11, 19 (1998) ("History associates the word 'aggrieved' [in a citizen-suit provision] with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested."); Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987) ("In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."). *But see* Air Courier Conference of Am. v. Am. Postal Workers Union, 498 U.S. 517, 524–25 (1991) (finding that postal workers could not challenge a Postal Service regulation employing the use of private couriers in certain situations based on their interest in job opportunities)); Block v. Cmty. Nutrition Inst., 467 U.S. 340, 347 (1984) (examining a statutory scheme in its entirety to determine that Congress intended to preclude ultimate consumers of dairy products from obtaining judicial review of milk market orders issued by the Secretary of Agriculture under the authority of the Agricultural Marketing Agreement Act of 1937).

[5] *Bennett*, 520 U.S. at 166.

[6] *Id.*

[7] Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972).

[8] *Id.*

[9] 572 U.S. 118, 127 (2014). *See also, e.g.*, Bank of Am. Corp. v. City of Miami, No. 15-1111, slip op. at 5 (U.S. May 1, 2017) (confirming that the "zone of interests" test amounts to an inquiry into whether a statutory provision conferring a cause of action encompasses the litigant's claim).

have ceased to regard the zone-of-interests test as an aspect of prudential standing, although it is unclear how this change to the doctrine will practically affect the Court's application of the "zone of interests" test in future cases.

ArtIII.S2.C1.6.9.3 Third Party Standing

Article III, Section 2, Clause 1:

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

Second, as discussed above, the Supreme Court has stated that courts may refuse to allow litigants who have suffered an injury-in-fact to rest their claims for relief on third parties' rights.[1] The Court has characterized such prudential restraints as "not constitutionally mandated" and "designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative."[2] Although the Court has found prudential standing to be present in several cases,[3] it has shown a reluctance to allow litigants to assert the rights of third parties because those parties may not need or wish to assert those rights, and courts prefer to avoid unnecessary decisions on constitutional issues.[4] Furthermore, a litigant may be a less effective advocate for the third parties' rights than the third parties themselves.[5]

Barrows v. Jackson illustrates the prudential application of "third-party standing."[6] In that case, homeowners sued a neighbor for the alleged breach of a private covenant forbidding the use and occupancy of homes in the neighborhood by "non-Caucasians."[7] The Court had previously held that the Fourteenth Amendment forbade a state court from enforcing such

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[1] Warth v. Seldin, 422 U.S. 490, 499–500 (1975) ("Second, even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.").

[2] Renne v. Geary, 501 U.S. 312, 314, 320 (1991) (holding that a political party could not assert the rights of candidates for nonpartisan political office where "no obvious barrier exist[ed] that would prevent a candidate from asserting his or her own rights").

[3] June Med. Servs. LLC v. Russo, No. 18-1323 slip op.at 4–5 (U.S. June 29, 2020) (plurality opinion) (observing that the Court has "long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations" and has "generally permitted plaintiffs to assert third-party rights in cases where the 'enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights'" (quoting Kowalski v. Tesmer, 543 U.S. 125, 130 (2004))); Caplin & Drysdale v. United States, 491 U.S. 617, 623–24 n.3 (1989) (holding that a law firm had standing to assert a criminal defendant's Sixth Amendment rights because it would receive a portion of defendant's forfeited assets if its Sixth Amendment claim were successful and the *Singleton* test for third-party standing was met); Carey v. Population Servs. Int'l, 431 U.S. 678, 682–84 (1977) (permitting a contraceptive vendor to challenge a law limiting distribution); Craig v. Boren, 429 U.S. 190, 192–97 (1976) (allowing a licensed beer vendor to assert an Equal Protection Clause challenge to alcohol laws that established different ages for sale of beer to men and women).

[4] Singleton v. Wulff, 428 U.S. 106, 113–14 (1976) (noting courts' reluctance to allow litigants to assert the rights of third parties but concluding that physicians had standing to assert their patients' rights in a challenge to a state statute limiting the circumstances in which the physicians could receive Medicaid reimbursement for abortions).

[5] *Id.*

[6] 346 U.S. 249, 258 (1953).

[7] *Id.*

racially restrictive covenants against African-American *purchasers* of real estate through the award of damages.[8] However, in *Barrows*, no African-Americans had appeared before the court to assert their constitutional rights, and, indeed, the Court found that it would have been difficult for them to do so because they were not property owners subject to the covenant.[9] But the Court waived the normal prudential standing rule against third-party standing and determined that the defendant property owner could rely upon the state court's interference with third-party rights in her defense because: (1) she would suffer injury if she lost by having to pay damages for breach of the covenant; and (2) the African-Americans (i.e., the third parties) who would be injured by the enforcement of the covenant were unlikely to be able to assert their constitutional rights themselves.[10]

Thus, although a litigant may not generally challenge government action on the grounds that it infringes another's rights,[11] it may do so in certain narrowly defined contexts. As this section has discussed, standing may be found when a litigant challenges a statute as unconstitutionally overbroad on its face in violation of the First Amendment[12] or when the litigant suffers some injury and third parties whose rights the litigant relies upon face an obstacle to protecting their own interests.[13] The Supreme Court has also permitted criminal defendants to challenge their convictions by asserting the rights of persons not before the Court whose rights would be negatively affected by enforcement of the law in question.[14] These circumstances are relevant to a prudential standing inquiry as well as to constitutional standing.

[8] *Id.* at 254–59 (citing Shelley v. Kraemer, 334 U.S. 1, 18–23 (1948)).

[9] *Id.*

[10] *Id.* ("The relation between the coercion exerted on [the respondent property owner] and her possible pecuniary loss thereby is so close to the purpose of the restrictive covenant, to violate the constitutional rights of those discriminated against, that respondent is the only effective adversary of the unworthy covenant in its last stand.").

[11] *E.g.*, Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 544 (1986) (determining that an individual school board member lacked standing to appeal a lower court decision on behalf of the full school board because he could not "step into the shoes of the Board and invoke its right to appeal"); United States v. Raines, 362 U.S. 17, 21–23 (1960) ("[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."); Tileston v. Ullman, 318 U.S. 44, 46 (1943) (holding that a doctor who wished to give his patients advice about birth control lacked standing to represent the interests of his patients in a Fourteenth Amendment challenge to Connecticut statutory provisions).

[12] *See* ArtIII.S2.C1.6.6.6 Overbreadth Doctrine.

[13] *E.g.*, *Barrows*, 346 U.S. at 255–59. *See also* Campbell v. Louisiana, 523 U.S. 392, 394 (1998) (holding that a White criminal defendant had standing to raise equal protection and due process claims when challenging alleged discrimination against African Americans in the selection of grand jurors); Powers v. Ohio, 499 U.S. 400, 403–04, 411 (1991) (finding that a White man had standing to bring a Fourteenth Amendment Equal Protection Clause challenge to a jury-selection process during which the prosecutor exercised peremptory challenges to exclude seven African Americans from the jury because a criminal defendant may raise the equal protection rights of a juror excluded from service); Holland v. Illinois, 493 U.S. 474, 476–77 (1990) (holding that a White criminal defendant had standing to raise a Sixth Amendment challenge to the exclusion of African Americans from his jury). The Supreme Court has also held that *Powers* applies in the context of civil litigation. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 629 (1991).

[14] *E.g.*, Eisenstadt v. Baird, 405 U.S. 438, 445–46 (1972) (holding that an advocate of contraception convicted for giving a contraceptive device to an unmarried woman had standing to assert the rights of unmarried persons denied access to contraception, as such persons were not themselves subject to prosecution and would unlikely be able to assert their constitutional right to use it). *But see* Rakas v. Illinois, 439 U.S. 128, 133 (1978) (affirming that "Fourth Amendment rights are personal rights that may not be asserted vicariously"). When a criminal defendant challenges a federal criminal statute as exceeding the federal government's powers and interfering with traditional state powers in violation of the Tenth Amendment, then the prudential bar on third-party standing does not apply. The defendant has an individual interest in the court's resolution of the federalism question and is not improperly asserting rights that belong to the states. Bond v. United States, 564 U.S. 211, 220–26 (2011).

ArtIII.S2.C1.6.9.4 Generalized Grievances

Article III, Section 2, Clause 1:

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

Finally, federal courts may refuse on prudential grounds to entertain "generalized grievances," which are "abstract questions of wide public significance . . . pervasively shared and most appropriately addressed in the representative branches."[1] Although the Court has at times characterized the bar on generalized grievances as prudential,[2] in dicta in the 2014 case *Lexmark International, Inc. v. Static Control Components, Inc.* the Court stated that cases raising generalized grievances "are barred for constitutional reasons, not 'prudential' ones."[3] The Court's opinion in *Lexmark* thus casts doubt on the continued viability of the prudential standing doctrine—both because of the Court's determination that the bar on generalized grievances is a constitutional (and not prudential) requirement and its rejection of the "zone of interests" test in favor of one aimed at determining whether the plaintiff's claim falls within the scope of a statutory provision conferring a right of action.[4]

Despite uncertainty regarding the continuing viability of the *prudential* standing doctrine, the *constitutional* minimum requirements of standing remain one of the most important justiciability doctrines. The courts have consistently applied that doctrine to implement Article III's limits on federal judicial power. Those limits require courts to decide actual "cases" or "controversies" rather than to render opinions on abstract questions better suited for resolution by the political branches of government.[5]

ArtIII.S2.C1.7 Ripeness

ArtIII.S2.C1.7.1 Overview of Ripeness Doctrine

Article III, Section 2, Clause 1:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens*

[1] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474–75 (1982) (citation and internal quotation marks omitted). *See also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220–21 (1974); United States v. Richardson, 418 U.S. 166, 175 (1974).

[2] *E.g.*, Warth v. Seldin, 422 U.S. 490, 499 (1975) ("[T]he Court has held that when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.").

[3] 572 U.S. 118, 127 n.3 (2014).

[4] *Id.*

[5] Allen v. Wright, 468 U.S. 737, 750 (1984) ("The [Article III] doctrine that requires a litigant to have 'standing' to invoke the power of a federal court is perhaps the most important of [the justiciability] doctrines.").

of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Like the other justiciability doctrines, the ripeness doctrine defines the limits of a federal court's jurisdiction to adjudicate certain disputes.[1] Ripeness concerns "the timing of judicial intervention," and prevents federal courts "from entangling themselves in abstract disagreements" by adjudicating disputes too early.[2] Any party to the litigation—as well as the judge—may challenge a case as unripe at any stage in the litigation, including for the first time on appeal.[3] To determine whether a particular dispute is ripe for judicial resolution, courts employ the *Abbott Laboratories* test, named after the Supreme Court's decision in *Abbott Laboratories v. Gardner*.[4] The *Abbott Laboratories* standard requires courts to evaluate two factors to determine whether a dispute is ripe: "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration" until a later time.[5] A claim may be unripe if it is based upon future events that may not occur as predicted or at all.[6] If waiting to decide a case would put the court in a better position to resolve the dispute, such as when further factual development would help the court adjudicate the case, the case may be unripe and therefore nonjusticiable.[7] As discussed below, ripeness issues arise in a wide variety of contexts, including challenges to administrative agencies' actions or policies and pre-enforcement challenges to criminal statutes.[8]

The ripeness doctrine stems partly from Article III's constitutional command that the federal courts only hear "Cases" and "Controversies."[9] To the extent that ripeness derives from

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[1] *See, e.g.*, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 670 n.2 (2010) ("Ripeness reflects constitutional considerations that implicate 'Article III limitations on judicial power,' as well as 'prudential reasons for refusing to exercise jurisdiction.'") (quoting Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993)).

[2] Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580 (1985) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977)). *See also* Renne v. Geary, 501 U.S. 312, 320 (1991) ("Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention."); Anderson v. Green, 513 U.S. 557, 559 (1995) (per curiam) ("[R]ipeness is peculiarly a question of timing.") (quoting Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 140 (1974)); Buckley v. Valeo, 424 U.S. 1, 114 (1976) (per curiam) (same). Statutory and other non-constitutional restrictions may limit the appropriate timing of judicial intervention as well. *See, e.g.*, Woodford v. Ngo, 548 U.S. 81, 88–89 (2006) ("[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.") (quoting McKart v. United States, 395 U.S. 185, 193 (1969)); Dalton v. Specter, 511 U.S. 462, 469 (1994) (holding that, as a general matter, only "final agency action[s]" are subject to judicial review under the Administrative Procedure Act) (quoting 5 U.S.C. § 704).

[3] *E.g.*, DBSI/TRI IV Ltd. P'ship v. United States, 465 F.3d 1031, 1038 (9th Cir. 2006) ("[R]ipeness [is a] jurisdictional issue[ ] that may be raised at any time, even for the first time on appeal."); Utah v. U.S. Dep't of Interior, 210 F.3d 1193, 1196 n.1 (10th Cir. 2000) (similar). *See also* Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003) ("[T]he question of ripeness may be considered on a court's own motion.").

[4] 387 U.S. 136.

[5] *Nat'l Park Hosp. Ass'n*, 538 U.S. at 808. *See also, e.g.*, *Stolt-Nielsen S.A.*, 559 U.S. at 670 n.2 (same); Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998) (same); Texas v. United States, 523 U.S. 296, 300–01 (1998); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 201 (1983) (same).

[6] *See Texas*, 523 U.S. at 300 ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'") (quoting *Thomas*, 473 U.S. at 580–81). *See also* Trump v. New York, No. 20-366, slip op. at 4 (U.S. Dec. 18, 2020) (applying this rule).

[7] *See, e.g.*, *Nat'l Park Hosp. Ass'n*, 538 U.S. at 812 ("[F]urther factual development would 'significantly advance our ability to deal with the legal issues presented.'") (quoting Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 82 (1978)); *Ohio Forestry Ass'n*, 523 U.S. at 737 (same); Webster v. Reprod. Health Servs., 492 U.S. 490, 506 (1989) ("It will be time enough for federal courts to address the meaning of the preamble [to the challenged statute] should it be applied to restrict the activities of appellees in some concrete way.").

[8] *See* ArtIII.S2.C1.7.1 Overview of Ripeness Doctrine through ArtIII.S2.C1.7.10 Continuing Vitality of Ripeness Doctrine.

[9] *See* U.S. Const. art. III, § 2, cl. 1. *See also, e.g.*, *Trump*, No. 20-366, slip op. at 3–4 (explaining that the ripeness doctrine "originat[es] in the case-or-controversy requirement of Article III"); *Stolt-Nielsen S.A.*, 559 U.S. at 670 n.2

ArtIII.S2.C1.7.1
Overview of Ripeness Doctrine

Article III of the Constitution, it overlaps with other justiciability doctrines that are also derived from the "Case" or "Controversy" requirement, especially the standing doctrine.[10] Thus, in recent years, the Supreme Court has increasingly recognized that because standing and ripeness are based on the same constitutional limitations on the federal courts' jurisdiction, they frequently "boil down to the same question."[11] In particular, the Supreme Court has observed that the standing doctrine's temporal inquiry into whether the plaintiff has suffered an imminent injury overlaps substantially with the ripeness doctrine's inquiry into whether withholding judicial consideration of a dispute would cause "the parties a sufficient 'hardship.'"[12]

In addition to its constitutional dimension, the ripeness doctrine is also partly based on prudential considerations that do not directly derive from the Constitution.[13] The Supreme Court has recognized that, even when Article III of the U.S. Constitution does not forbid a court from deciding an issue, it may nonetheless be appropriate for courts to postpone adjudicating that issue because subsequent events may make it easier or unnecessary to resolve that dispute.[14] Thus, to determine whether a case is ripe for adjudication, the court must assess not only whether the case is presently justiciable within the meaning of Article III's case or controversy requirement, but also whether it would be prudent to decide the case at the present time.[15] The Supreme Court, however, has not squarely articulated which aspects of the ripeness doctrine are mandated by the Constitution and which are instead based solely on prudential concerns.[16] Moreover, as explained in greater detail below, the Supreme Court has recently questioned the continuing vitality of the ripeness doctrine's prudential dimension.[17] As a result, presently it is unclear whether—and, if so, when—federal courts should dismiss a case as prudentially unripe.

("Ripeness reflects constitutional considerations that implicate 'Article III limitations on judicial power.'") (quoting Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993)); Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 138 (1974) ("Issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy.'").

[10] *See* Warth v. Seldin, 422 U.S. 490, 499 n.10 (1975) ("The standing question thus bears close affinity to questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial intervention."); *Trump*, No. 20-366, slip op. at 3–4 (describing standing and ripeness as "related doctrines"); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) ("The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does."). *See generally* ArtIII.S2.C1.6.1 Overview of Standing through ArtIII.S2.C1.11.6 Supplemental Jurisdiction (analyzing the various justiciability doctrines).

[11] MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128 n.8 (2007) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)); Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157 n.5 (2014) (similar); *Trump*, No. 20-366, slip op. at 7 (dismissing case on both standing and ripeness grounds).

[12] *MedImmune*, 549 U.S. at 128 n.8 (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977)).*See* ArtIII.S2.C1.6.1 Overview of Standing (discussing the standing doctrine's imminent injury requirement); *Lujan*, 504 U.S. at 560 (applying that requirement).

[13] Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 82 (1978). *See also, e.g.*, Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003) ("The ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'") (quoting *Reno*, 509 U.S. at 57 n.18).

[14] *See, e.g.*, Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 733 n.7 (1997) ("The agency does not question that Suitum properly presents a genuine 'case or controversy' sufficient to satisfy Article III, but maintains only that Suitum's action fails to satisfy our prudential ripeness requirements."); Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 735 (1998) ("The ripeness doctrine reflects a judgment that the disadvantages of premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of . . . postimplementation litigation.").

[15] *See, e.g.*, *Duke Power*, 438 U.S. at 81 (concluding that the case presented a ripe "Case or Controversy" as a constitutional matter, and that "[t]he prudential considerations embodied in the ripeness doctrine also argue[d] strongly for a prompt resolution of the claims presented").

[16] *See, e.g.*, Armstrong World Indus., Inc. *ex rel.* Wolfson v. Adams, 961 F.2d 405, 411 n.12 (3d Cir. 1992) (observing that "[t]he Supreme Court itself has not been consistent" with respect to the constitutional and prudential aspects of ripeness).

[17] ArtIII.S2.C1.6.1 Overview of Standing through ArtIII.S2.C1.11.6 Supplemental Jurisdiction.

ArtIII.S2.C1.7.2 United Public Workers and Ripeness

Article III, Section 2, Clause 1:

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

The Supreme Court's decision in *United Public Workers of America (C.I.O.) v. Mitchell*, is the starting point for discussing the ripeness doctrine.[1] The plaintiffs in *United Public Workers* attempted to challenge the constitutionality of a statute that prohibited certain Executive Branch employees from engaging in specified political activities.[2] The Court declined to resolve the claims of several challengers who had not yet taken part in such political acts, and who merely sought a judicial declaration that the statute was unconstitutional.[3] Because the Court could "only speculate" about the political activities those challengers wanted to conduct, the Court ruled that they failed to present a justiciable case or controversy under Article III.[4] The Court reasoned that the Judiciary may only review a statute's constitutionality when litigants face actual—rather than legal—violations of their constitutional rights.[5]

ArtIII.S2.C1.7.3 Abbott Laboratories Trilogy and Ripeness

Article III, Section 2, Clause 1:

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

The Supreme Court refined the ripeness doctrine in three opinions known as the "*Abbott Laboratories* trilogy."[1] Each of these three cases involved pre-enforcement challenges to

[1] 330 U.S. 75 (1947).

[2] *Id.* at 81–82.

[3] *Id.* at 82–84. One of the challengers had in fact engaged in political activity and consequently faced "removal from his position." *Id.* at 91–92. The Supreme Court concluded that although that single employee's challenge to the statute was "appropriate for [immediate] judicial determination," the other employees' challenges were not. *Id.* at 91.

[4] *Id.* at 89–90. The Court also based its reasoning on Article III's prohibition against advisory opinions. *See id.* For further discussion of the rule against advisory opinions, *see* ArtIII.S2.C1.4.1 Overview of Advisory Opinions.

[5] 330 U.S. at 89–90 ("The power of courts, and ultimately of this Court to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough.").

[1] *See* Abbott Labs. v. Gardner, 387 U.S. 136 (1967), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977); Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967); Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158 (1967).

regulations promulgated by the Commissioner of Food and Drugs.[2] The Supreme Court concluded that some of those pre-enforcement challenges were ripe for adjudication, but others were not.[3]

The Court first explained that the ripeness doctrine serves two purposes.[4] First, the doctrine mitigates the risk that courts will "entangl[e] themselves in abstract disagreements over administrative policies" by adjudicating claims prematurely.[5] Second, the doctrine shields administrative agencies from judicial interference until they finalize their decision.[6]

The Court then articulated a two-factor test for determining whether a particular controversy is ripe: the court must evaluate both (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration."[7] Under the first factor, cases that present purely legal issues are particularly likely to be fit for judicial resolution.[8] By contrast, where it would be easier to resolve a challenge to an administrative action in the context of a specific attempt to enforce the agency's regulations than in the context of a pre-enforcement challenge, the challenge is less likely to be ripe.[9] As to the "hardship" factor, the Court explained that, where an administrative regulation threatens noncompliant parties with "an immediate and substantial impact"[10]—such as the "seizure of goods, heavy fines, adverse publicity, [or] possible criminal liability"[11]—a pre-enforcement challenge to that regulation is especially likely to be ripe. The Court, opined that courts ordinarily must entertain challenges to regulations that threaten regulated entities with serious penalties if they fail to modify their behavior.[12]

ArtIII.S2.C1.7.4 Modern Ripeness Doctrine Generally

Article III, Section 2, Clause 1:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens*

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[2] *Abbott Labs.*, 387 U.S. at 138, 153–54; *Gardner*, 387 U.S. at 168; *Toilet Goods Ass'n*, 387 U.S. at 159–60.

[3] *Compare Gardner*, 387 U.S. at 170 ("[R]espondents' challenge to these regulations is ripe for judicial review."), *with Toilet Goods Ass'n*, 387 U.S. at 161 ("[T]he controversy is not presently ripe for adjudication.").

[4] *Abbott Labs.*, 387 U.S. at 148.

[5] *Id.*

[6] *Id.* at 148–49 (explaining that the ripeness doctrine "protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties").

[7] *Id.* at 149.

[8] *Id.*

[9] *See* Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 171 (1967) (assessing whether "consideration of the underlying legal issues would necessarily be facilitated if they were raised in the context of a specific attempt to enforce the regulations").

[10] *Id. See also Abbott Labs.*, 387 U.S. at 152 ("This is also a case in which the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage.").

[11] Toilet Goods Ass'n, Inc. v. Gardner, , 387 U.S. 158, 165 (1967).

[12] *Abbott Labs.*, 387 U.S. at 153 ("[W]here a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts . . . must be permitted, absent a statutory bar or some other unusual circumstance . . . .").

of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Supreme Court has invoked *Abbott Laboratories*' two-part "fitness" and "hardship" test on numerous occasions since 1967,[1] deeming a variety of controversies unripe under that standard.[2] A discussion of post-1967 Supreme Court cases that have refined and developed the *Abbott Laboratories* standard follows.

ArtIII.S2.C1.7.5 Fitness and Ripeness

Article III, Section 2, Clause 1:

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

The Supreme Court has considered several factors when determining whether an issue is "fit" for judicial review under *Abbott Laboratories v. Gardner*. First, the Court has inquired whether further factual development would make it easier to resolve the parties' dispute.[1] For instance, in *National Park Hospitality Ass'n v. Department of Interior*, a nonprofit trade association challenged a National Park Service regulation that purported to render the Contract Disputes Act of 1978 (CDA) inapplicable to certain government contracts.[2] Noting that the CDA's applicability could vary from contract to contract, the Court determined that awaiting further factual development in the form of a dispute over a particular contract would facilitate the Court's review of the regulation.[3] The Court therefore deemed the challenge unripe.[4]

By contrast, cases presenting purely legal rather than factual questions are more likely to be fit for immediate adjudication.[5] For example, in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, the Supreme Court held that whether federal law preempted a state statute was primarily a legal question and therefore ripe for judicial review.[6]

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[1] *See, e.g.*, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 670 n.2 (2010); Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003); Texas v. United States, 523 U.S. 296, 300–01 (1998); Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 201 (1983).

[2] *See Nat'l Park Hosp. Ass'n*, 538 U.S. at 808; *Texas*, 523 U.S. at 301–02; *Ohio Forestry Ass'n, Inc.*, 523 U.S. at 732–33.

[1] *See, e.g.*, Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 812; *Ohio Forestry Ass'n, Inc.*, 523 U.S. at 737; Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 82 (1978).

[2] 538 U.S. at 804–05.

[3] *See id.* ("[F]urther factual development would 'significantly advance our ability to deal with the legal issues presented' . . . [J]udicial resolution of the question presented here should await a concrete dispute about a particular concession contract.") (quoting *Duke Power*, 438 U.S. at 82).

[4] *Id.* at 805.

[5] *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 479 (2001); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 581 (1985).

[6] *See* 461 U.S. 190, 201 (1983).

ArtIII.S2.C1.7.5
Fitness and Ripeness

A claim may not be fit for adjudication if it is based on "contingent future events that may not occur as anticipated, or indeed may not occur at all."[7] For instance, in *Texas v. United States*, the State of Texas asked a federal district court to determine the validity of certain provisions of the Texas Education Code that permitted the state to sanction local school districts if they failed to meet state-mandated educational achievement levels.[8] Because the Supreme Court did not know whether or when the State would ever issue such a sanction, the Court unanimously concluded that the validity of the Texas statute was not yet ripe for adjudication.[9]

Similarly, when a party challenges the constitutionality of a state law, but that state's courts have not yet had an opportunity to delimit the scope and applicability of that law, the claim may be unfit for adjudication.[10] As the Supreme Court has noted, waiting until state courts have had a chance to interpret a challenged law may sharpen the issues for judicial review.[11]

ArtIII.S2.C1.7.6 Hardship and Ripeness

Article III, Section 2, Clause 1:

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

When considering *Abbott Laboratories v. Gardner*'s "hardship" prong, the Supreme Court has often considered whether one or more of the parties face adverse legal consequences as a result of the challenged action.[1] For instance, in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, the Ohio Civil Rights Commission initiated administrative proceedings against a nonprofit religious education provider, alleging that the nonprofit had discriminated

[7] Texas v. United States, 523 U.S. 296, 300 (1998) (quoting *Thomas*, 473 U.S. at 580–81). *See also* Trump v. New York, No. 20-366, slip op. at 4 (U.S. Dec. 18, 2020) (applying this rule); Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 736 (1998) ("[D]epending upon the agency's future actions to revise the Plan or modify the expected methods of implementation, review now may turn out to have been unnecessary.").

[8] 523 U.S. at 297, 299.

[9] *Id.* at 300 (quoting Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158, 163 (1967)).

[10] *See id.* at 301; Renne v. Geary, 501 U.S. 312, 323 (1991).

[11] *Renne*, 501 U.S. at 323. ("Postponing consideration of the questions presented, until a more concrete controversy arises, also has the advantage of permitting the state courts further opportunity to construe [the challenged law], and perhaps in the process to 'materially alter the question to be decided.'") (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 306 (1979)); *Texas*, 523 U.S. at 301. In this respect, ripeness dovetails with the various abstention doctrines that federal courts utilize to avoid interfering with the states. For an overview of those doctrines, see generally ArtIII.S1.6.7 Federal Non-Interference with State Jurisdiction and Abstention.

[1] AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 386 (1999) ("When . . . there is no immediate effect on the plaintiff's primary conduct, federal courts normally do not entertain pre-enforcement challenges to agency rules and policy statements."); Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 58 (1993) (holding that a challenge to a regulation that "impose[d] no penalties for violating any newly imposed restriction" would "not be ripe before the regulation's application to the plaintiffs in some more acute fashion"); Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 809 (2003) (explaining that "a hardship showing" requires "adverse effects of a strictly legal kind") (quoting Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998)).

against one of its teachers on the basis of sex.[2] The nonprofit asserted that it terminated the teacher based on its religious views that mothers should stay home with school-aged children and that the Commission's actions consequently violated the First Amendment's Religion Clauses.[3] The nonprofit thus filed a federal lawsuit to enjoin the administrative proceedings. The Supreme Court ruled that the Commission's administrative action threatened the nonprofit with sanctions for allegedly constitutionally protected conduct and thus that the nonprofit's challenge to those proceedings was ripe.[4]

ArtIII.S2.C1.7.7 Administrative Law and Ripeness

Article III, Section 2, Clause 1:

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

Challenges to federal administrative agencies' actions, decisions, and policies often implicate the ripeness doctrine.[1] In such cases, courts consider "whether judicial intervention would inappropriately interfere with further administrative action."[2] The ripeness doctrine thereby not only "protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties," but also "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies."[3] For example, in *Ohio Forestry Association, Inc. v. Sierra Club*, an environmental organization challenged the United States Forest Service's interim federal land and resource management plan on the ground that

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[2] 477 U.S. 619, 623–24 (1986).

[3] *Id.* at 623–25. *See also* Amdt1.2.1 Overview of the Religion Clauses (Establishment and Free Expression Clauses) through Amdt1.2.3.4 Church Leadership and the Ministerial Exception (analyzing the First Amendment's Religion Clauses).

[4] *Id.* at 625 n.1. However, the Court ultimately ruled that the district court should have abstained from deciding the case on other grounds. *See id.* at 625.

[1] *See, e.g.*, Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003) ("Absent a statutory provision providing for immediate judicial review, a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review . . . until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him.") (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990)) (brackets omitted). *See also* E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 128 n.19 (1977) (concluding that "consideration of whether EPA's variance provision has the proper scope would be premature"). Several non-constitutional doctrines, including the "exhaustion" doctrine and the "final agency action" doctrine, may also influence the appropriate timing of challenges to administrative actions. *See, e.g.*, Woodford v. Ngo, 548 U.S. 81, 88–89 (2006) ("[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.") (quoting McKart v. United States, 395 U.S. 185, 193 (1969)); Dalton v. Specter, 511 U.S. 462, 469 (1994) (holding that, as a general matter, only "*final* agency action[s]" are subject to judicial review under the Administrative Procedure Act) (quoting 5 U.S.C. § 704).

[2] Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733; Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 479 (2001). *See also Lujan*, 497 U.S. at 894 ("[W]e intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect. . . . Until confided to us, however, more sweeping actions are for the other branches [of the federal government].").

[3] *Ohio Forestry Ass'n, Inc.*, 523 U.S. at 732–33 (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977)). *See also Nat'l Park Hosp. Ass'n*, 538 U.S. at 807–08 (same); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 200 (1983) (same).

it permitted too much logging and clearcutting of trees.[4] The Supreme Court concluded that the organization's challenge was unripe,[5] in part because reviewing the plan immediately could obstruct the Forest Service from refining its policies by either revising the plan or applying it to specific sites.[6]

ArtIII.S2.C1.7.8 Criminal Statutes and Ripeness

Article III, Section 2, Clause 1:

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

The Supreme Court has frequently scrutinized the ripeness of pre-enforcement challenges to criminal statutes.[1] The Court has explained that, when challenging a criminal statute, the plaintiff need not "first expose himself to actual arrest or prosecution."[2] Rather, it is sufficient for the plaintiff to allege that he (1) intends to engage in constitutionally protected activity prohibited by the statute and (2) faces a "credible threat of prosecution."[3] For example, an abortion provider who faces "a sufficiently direct threat" that a state will prosecute him for violating a statute that criminalizes abortion need not necessarily await prosecution before challenging that statute's constitutionality.[4]

Conversely, a challenger who cannot claim that he has "ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible" cannot "allege a dispute susceptible to resolution by a federal court."[5] For example, in *Poe v. Ullman*, the plaintiffs challenged the constitutionality of a state statute that criminalized the use of contraceptive devices.[6] Even though the statute had been on the books for more than eight decades, the state had only attempted to enforce it on a single occasion, and drugstores in the state commonly and openly sold such devices without any apparent fear of prosecution.[7] Thus,

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[4] *Ohio Forestry Ass'n, Inc.*, 523 U.S. at 728.

[5] *Id.* at 732.

[6] *Id.* at 735 ("[F]rom the agency's perspective, immediate judicial review directed at the lawfulness of logging and clearcutting could hinder agency efforts to refine its policies: (a) through revision of the Plan, *e.g.*, in response to an appropriate proposed site-specific action that is inconsistent with the Plan, or (b) through application of the Plan in practice, *e.g.*, in the form of site-specific proposals, which are subject to review by a court applying purely legal criteria.").

[1] *See, e.g.*, Susan B. Anthony List v. Driehaus, 573 U.S. 149, 167–68 (2014); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 297–302 (1979); Doe v. Bolton, 410 U.S. 179, 188–89 (1973); Epperson v. Arkansas, 393 U.S. 97, 101–02 (1968); Poe v. Ullman, 367 U.S. 497, 498–509 (1961).

[2] *Babbitt*, 442 U.S. at 298 (quoting Steffel v. Thompson, 415 U.S. 452, 459 (1974)) (brackets omitted).

[3] *Id.* (quoting Doe v. Bolton, 410 U.S. 179, 188 (1973)).

[4] *See Doe*, 410 U.S. at 188.

[5] *Babbitt*, 442 U.S. at 298–99 (quoting Younger v. Harris, 401 U.S. 37, 42 (1971)).

[6] 367 U.S. at 498.

[7] *See id.* at 501–02.

the plaintiffs faced no reasonable fear of prosecution, and the Court accordingly held that the constitutionality of the statute was not ripe for decision.[8]

One might argue, however, that the Court has not always applied these principles consistently. In *Epperson v. Arkansas*, for example, the plaintiff challenged the constitutionality of an Arkansas statute that made it a misdemeanor to teach the theory of evolution in public schools and universities.[9] No teacher had ever been prosecuted under the challenged statute.[10] Even though the plaintiff did not appear to face a reasonable threat of prosecution, the Court concluded—with minimal discussion—that the plaintiff had nonetheless presented a justiciable controversy.[11] *Epperson* is therefore arguably inconsistent with the Court's other ripeness cases. The Court has attempted to reconcile *Epperson* by focusing on the age of the statute being challenged; a challenge to a criminal statute that has been on the books for decades yet has almost never been enforced will likely not be ripe for immediate review, whereas a pre-enforcement challenge to a statute that is "recent and not moribund" may be justiciable.[12] That distinction, however, may not be altogether satisfying; the anti-evolution statute in *Epperson* had been on the books for four decades, yet the Supreme Court nonetheless deemed the plaintiff's challenge ripe for immediate adjudication.[13] Thus, as the Court itself has intimated, it is not always easy to predict whether any given pre-enforcement challenge to a criminal statute will be justiciable.[14]

ArtIII.S2.C1.7.9 Takings and Ripeness

Article III, Section 2, Clause 1:

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

Until very recently, the Supreme Court applied special ripeness rules in regulatory takings cases in which a litigant alleges that a governmental entity has "taken" his property without paying "just compensation" as the Fifth Amendment requires.[1] Under the doctrine established

[8] *See id.* at 508. *Cf.* Griswold v. Connecticut, 381 U.S. 479, 480–81 (1965) (deeming a challenge to an anti-contraceptive statute justiciable where appellants had been arrested for violating the statute, found guilty, and fined).

[9] *See* 393 U.S. 97, 98–99 (1968).

[10] *Id.* at 101–02.

[11] *See id.* at 102.

[12] *See* Doe v. Bolton, 410 U.S. 179, 188–89 (1973).

[13] *See Epperson*, 393 U.S. at 98, 101–02.

[14] *See* Poe v. Ullman, 367 U.S. 497, 508 (1961) (remarking, in the course of dismissing as unripe a pre-enforcement challenge to a criminal statute, that "[j]usticiability is . . . not a legal concept with fixed content or susceptible of scientific verification").

[1] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). *See* Horne v. Dep't of Agric., 569 U.S. 513, 524–28 (2013); Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 729 & n.10 (2010); Palazzolo v. Rhode Island, 533 U.S. 606, 618, 620–22 (2001); Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 733–34 (1997); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1010–14 (1992); Yee v. City of Escondido, 503 U.S. 519, 533–34 (1992); Preseault v. ICC, 494 U.S. 1, 11–17 (1990); First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles, 482 U.S. 304, 312 n.6 (1987); MacDonald, Sommer & Frates v. Yolo

in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,[2] a plaintiff could not pursue a takings claim against a state entity in federal court until the plaintiff had (1) received a final decision from the state government regarding the challenged regulation's application to his property; and (2) sought compensation through state-provided procedures.[3] *Williamson County*'s context-specific ripeness rule created potentially significant obstacles for takings plaintiffs. As the Court later held in *San Remo Hotel, L.P. v. City & County of San Francisco*, when a plaintiff first litigates a takings claim in state court as mandated by *Williamson County*, the federal full faith and credit statute bars the plaintiff from relitigating the Takings Clause issues in a subsequent federal lawsuit.[4] Thus, under *Williamson County* and *San Remo*, a plaintiff could not file a takings lawsuit in federal court before pursuing his claim in state court, yet if he lost in state court, his subsequent federal lawsuit would fail as well.[5] The Court ultimately concluded that this special ripeness rule imposed "an unjustifiable burden on takings plaintiffs" and conflicted with the Court's Takings Clause jurisprudence.[6] The Court therefore overruled *Williamson County* in *Knick v. Township of Scott*.[7] After *Knick*, a property owner may bring a takings claim in a federal court without first seeking compensation in state court.[8]

ArtIII.S2.C1.7.10 Continuing Vitality of Ripeness Doctrine

Article III, Section 2, Clause 1:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens*

Cty., 477 U.S. 340, 348–53 (1986); Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 190–91, 195, 200 (1985), *overruled by* Knick v. Twp. of Scott, No. 17-647 (U.S. June 21, 2019). *See also, e.g.*, *Knick*, No. 17-647, slip op. at 22 (characterizing the aforementioned cases as articulating "a 'prudential' ripeness rule"); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 339 (2002) ("[I]t is the interest in informed decisionmaking that underlies our decisions imposing a strict ripeness requirement on landowners asserting regulatory takings claims."); Pennell v. City of San Jose, 485 U.S. 1, 8–10 (1988) (holding that "it would be premature" to consider challenger's claim that local ordinance violated the Takings Clause). *See generally* Amdt5.9.6 Regulatory Takings and Penn Central Framework (defining and discussing regulatory takings).

[2] 473 U.S. at 186, 190–91, 195, 200.

[3] *Suitum*, 520 U.S. at 734 (quoting *Williamson Cty.*, 473 U.S. at 186, 194) (brackets omitted). *See also, e.g.*, *Palazzolo*, 533 U.S. at 618, 620–22.

[4] 545 U.S. 323, 326–48 (2005). *See also* 28 U.S.C. § 1738 (Full Faith and Credit Act); ArtIV.S1.1 Overview of Full Faith and Credit Clause through ArtIV.S1.5.2 Specifically Applicable Federal Law on Full Faith and Credit Clause (analyzing the Full Faith and Credit Act).

[5] *Knick*, No. 17-647, slip op. at 1–2 ("The takings plaintiff thus finds himself in a Catch-22: He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court. The federal claim dies aborning.").

[6] *Id.* at 2.

[7] *Id.* at 23.

[8] *Id.* at 2, 23.

of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Even though the Supreme Court has applied the *Abbott Laboratories* standard on numerous occasions since 1967,[1] the Court has signaled that it may be willing to modify the standard, or perhaps even abrogate the ripeness doctrine entirely.

For example, recent Supreme Court decisions have questioned the ripeness doctrine's prudential underpinnings. Before 2014, the Court had held repeatedly that the ripeness doctrine had both constitutional and prudential dimensions.[2] However, in *Susan B. Anthony List v. Driehaus*, the Court, quoting its earlier holding that "'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging,'" questioned whether it is proper to deem a claim "nonjusticiable on grounds that are prudential, rather than constitutional."[3] And in its 2020 ripeness opinion, the Court deemed a case unripe without mentioning the doctrine's prudential component or discussing *Abbott Laboratories*' fitness and hardship factors.[4] It is therefore possible that the Supreme Court may someday unmoor the ripeness doctrine from its prudential foundations and replace the two-pronged *Abbott Laboratories* test with a new legal standard predicated solely on Article III's Case or Controversy requirement.

The ripeness doctrine has also arguably diminished in importance as the Supreme Court has developed and refined other justiciability doctrines, especially the doctrine of Article III standing. In *MedImmune, Inc. v. Genentech, Inc.* and *Susan B. Anthony List*, the Court observed that because standing and ripeness both derive from the provisions of Article III limiting the federal courts' jurisdiction to "Cases" and "Controversies," the two doctrines often " boil down to the same question."[5] Thus, the Court ruled in *Trump v. New York* that a challenge to an Executive Branch policy was premature under the standing and ripeness doctrines alike.[6] Consequently, under *MedImmune*, *Susan B. Anthony List*, and *Trump*, the degree to which the ripeness doctrine imposes any limitation on the justiciability of disputes that the Article III standing doctrine does not already impose is uncertain. Future Supreme Court decisions may clarify the extent to which the ripeness doctrine continues to play a role in the application of Article III's case or controversy requirement.

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[1] *See, e.g.*, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 670 n.2 (2010); Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003); Texas v. United States, 523 U.S. 296, 300–01 (1998); Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 201 (1983).

[2] *Nat'l Park Hosp. Ass'n*, 538 U.S. at 808 (quoting Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993)). *See also Stolt-Nielsen*, 559 U.S. at 670 n.2; Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 733 n.7 (1997).

[3] 573 U.S. 149, 167 (2014) (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125–26 (2014)) (internal quotation marks omitted). *But see id.* ("[W]e need not resolve the continuing vitality of the prudential ripeness doctrine in this case because the 'fitness' and 'hardship' factors are easily satisfied here.").

[4] Trump v. New York, No. 20-366, slip op. at 1–7 (Dec. 18, 2020).

[5] Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157 n.5 (2014). *See also* MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128 n.8 (2007) ("The justiciability problem . . . can be described in terms of standing (whether plaintiff is threatened with 'imminent' injury in fact 'fairly . . . trace[able] to the challenged action of the defendant,') or in terms of ripeness (whether there is sufficient 'hardship to the parties [in] withholding court consideration' until there is enforcement action).") (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992); Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977)).

[6] *See* No. 20-366, slip op. at 6–7 ("[T]he standing and ripeness inquiries both lead to the conclusion that judicial resolution of this dispute is premature.").

ArtIII.S2.C1.8 Mootness

ArtIII.S2.C1.8.1 Overview of Mootness Doctrine

Article III, Section 2, Clause 1:

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

In addition to the other justiciability doctrines discussed above, the Supreme Court's doctrine on mootness imposes another limitation on justiciability derived from Article III's case-or-controversy requirement[1] on the federal courts' jurisdiction to resolve disputes.[2] "It has long been settled that a federal court has no authority 'to give opinions upon moot questions;'"[3] that is, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."[4] "[A]n actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation."[5] Thus, "if an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit[ ]' at any point during litigation, the action can no longer proceed and must be dismissed as moot."[6] The Supreme Court has justified the mootness doctrine on the ground that it "ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved."[7]

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[1] *See* U.S. Const. art. III, § 2 (stating that "[t]he judicial Power" of the federal courts shall only extend to certain categories of "Cases" and "Controversies").

[2] *E.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180 (2000) ("The Constitution's case-or-controversy limitation on federal judicial authority . . . underpins . . . our mootness jurisprudence."); Franks v. Bowman Transp. Co., 424 U.S. 747, 754 (1976) ("Insofar as the concept of mootness defines constitutionally minimal conditions for the invocation of federal judicial power, its meaning and scope, as with all concepts of justiciability, must be derived from the fundamental policies informing the 'cases or controversies' limitation imposed by Art[icle] III."); DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (per curiam) ("The inability of the federal judiciary 'to review moot cases derives from the requirement of Art[icle] III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'") (quoting Liner v. Jafco, Inc., 374 U.S. 301, 306 n.3 (1964)); SEC v. Med. Comm. for Human Rights, 404 U.S. 403, 407 (1972) (same); North Carolina v. Rice, 404 U.S. 244, 246 (1971) (per curiam) (same).

[3] Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (quoting Mills v. Green, 159 U.S. 651, 653 (1895)). *See also, e.g.*, Calderon v. Moore, 518 U.S. 149, 150 (1996) (same).

[4] Cty. of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (quoting Powell v. McCormack, 395 U.S. 486, 498 (1969)). *See also, e.g.*, Chafin v. Chafin, 568 U.S. 165, 172 (2013) (same); City of Erie v. Pap's A.M., 529 U.S. 277, 287 (2000) (same).

[5] Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1975 (2016) (quoting Already, LLC v. Nike, Inc., 568 U.S. 85, 90–91 (2013)). *See also, e.g.*, Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 609 (2013) ("It is a basic principle of Article III that a justiciable case or controversy must remain extant at all stages of review, not merely at the time the complaint is filed.") (quoting United States v. Juvenile Male, 564 U.S. 932, 936 (2011) (per curiam)); Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477–78 (1990) ("To sustain our jurisdiction . . . it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals."); Honig v. Doe, 484 U.S. 305, 317 (1988) ("That the dispute between parties was very much alive when suit was filed . . . cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires."); Burke v. Barnes, 479 U.S. 361, 363 (1987) ("Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case; it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing.").

[6] Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 161 (2016) (quoting Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 72 (2013)).

[7] *Genesis Healthcare*, 569 U.S. at 71.

According to the Supreme Court, "[a] case that becomes moot at any point during the proceedings is "no longer a "Case" or "Controversy" for purposes of Article III," and is outside the jurisdiction of the federal courts."[8] Because mootness is a jurisdictional limitation, a federal court can—and indeed must—dismiss a moot case even if none of the parties ask the court to do so.[9] A question about mootness may, in other words, arise at any time during the lifespan of a case, even on appeal.[10] In this respect, mootness "bears close affinity to" the other justiciability doctrines derived from Article III of the Constitution,[11] including standing[12] and the prohibition against advisory opinions.[13] To the extent that the mootness doctrine regulates "the appropriate timing of judicial intervention,"[14] mootness serves as the converse of the ripeness doctrine,[15] which restrains the Judiciary from adjudicating a case before it develops into a live dispute.

The Supreme Court has steadily developed the substantive and procedural aspects of the mootness doctrine over the course of nearly a century and a half. The Court has ultimately settled on the following formulation of the doctrine: "If an intervening circumstance deprives

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[8] United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1537 (2018) (quoting *Already*, 568 U.S. at 91). *See also, e.g.*, Iron Arrow Honor Soc'y v. Heckler, 464 U.S. 67, 70 (1983) (per curiam) ("Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies."); St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 537 (1978) ("[M]ootness . . . implicates our jurisdiction."); Richardson v. Ramirez, 418 U.S. 24, 36 (1974) ("[P]urely practical considerations have never been thought to be controlling by themselves on the issue of mootness in this Court . . . [W]e are limited by the case-or-controversy requirement of Art[icle] III to adjudication of actual disputes between adverse parties."); North Carolina v. Rice, 404 U.S. 244, 246 (1971) (per curiam) ("Mootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions.'") (quoting United States v. Alaska S.S. Co., 253 U.S. 113, 116 (1920)).

[9] *See, e.g.*, *Juvenile Male*, 564 U.S. at 933–34 (deeming case moot even though "[n]o party had raised any issue of mootness in the [court below], and the Court of Appeals did not address the issue *sua sponte*"); *St. Paul*, 438 U.S. at 537 ("At the threshold, we confront a question of mootness. Although not raised by the parties, this issue implicates our jurisdiction."); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 7–8 (1978) ("There is, at the outset, a question of mootness. Although the parties have not addressed this question in their briefs, 'they may not by stipulation invoke the judicial power of the United States in litigation which does not present an actual case or controversy.'") (quoting Sosna v. Iowa, 419 U.S. 393, 398 (1975)); *Rice*, 404 U.S. at 246 ("Although neither party has urged that this case is moot, resolution of the question is essential if federal courts are to function within their constitutional sphere of authority.").

[10] *See, e.g.*, *Lewis*, 494 U.S. at 477–78 ("To sustain our jurisdiction . . . it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals.").

[11] *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 499 n.10 (1975) ("The standing question . . . bears close affinity to questions of . . . mootness—whether the occasion for judicial intervention persists.").

[12] DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) ("The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does."); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180 (2000) ("The Constitution's case-or-controversy limitation on federal judicial authority . . . underpins both our standing and our mootness jurisprudence.")

[13] *See* City of Erie v. Pap's A.M., 529 U.S. 277, 287 (2000) (explaining that, if a case becomes moot, then "any *opinion* as to the legality of the challenged action would be *advisory*") (emphasis added); *See generally* ArtIII.S2.C1.4.1 Overview of Advisory Opinions (discussing the bar on advisory opinions).

The Court has emphasized, however, that mootness is conceptually distinct from the other Article III justiciability doctrines. *See, e.g.*, *Friends of the Earth*, 528 U.S. at 190–91 (emphasizing "the distinction between mootness and standing" and explaining that mootness is more than "simply 'standing set in a time frame'") (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.22 (1997)); Burke v. Barnes, 479 U.S. 361, 364 n.* (1987) ("We reject respondents' argument that the questions of mootness and standing are necessarily intertwined."). Whereas "[s]tanding doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake[,] . . . by the time mootness is an issue, the case has been brought and litigated, often . . . for years." *Friends of the Earth*, 528 U.S. at 191. Moreover, as explained in greater detail below, the mootness doctrine is subject to exceptions that do not exist in the standing context. *See, e.g.*, *id.* at 190–91 ("[I]f mootness were simply 'standing set in a time frame,' the exception to mootness that arises when the defendant's allegedly unlawful activity is 'capable of repetition, yet evading review,' could not exist. . . . Standing admits of no similar exception; if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum.").

[14] *E.g.*, Renne v. Geary, 501 U.S. 312, 320 (1991).

[15] *See, e.g.*, Note, *Standing to Sue for Members of Congress*, 83 Yale L.J. 1665, 1674 n.38 (1974) (describing "[r]ipeness" as "the converse of mootness").

the plaintiff of a 'personal stake in the outcome of the lawsuit[ ]' at any point during litigation," then—subject to certain exceptions analyzed below—"the action can no longer proceed and must be dismissed as moot."[16]

ArtIII.S2.C1.8.2 Early Mootness Doctrine

Article III, Section 2, Clause 1:

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

The Supreme Court's 1895 decision in *Mills v. Green*[1] was the first Supreme Court opinion that directly addressed the mootness doctrine.[2] *Mills* involved the election of delegates to a convention to revise South Carolina's constitution.[3] A South Carolina citizen filed suit, claiming that the state's voter registration statutes unconstitutionally "abridg[ed], imped[ed], and destroy[ed] the suffrage of citizens of the state and of the United States."[4] While the case was pending on appeal, the date of the delegate election for the convention passed, the delegates were selected, and the constitutional convention had assembled.[5] The Supreme Court therefore concluded that there was no longer any "actual controversy involving real and substantial rights between the parties" and dismissed the appeal accordingly.[6] The Court explained that the Federal Judiciary's "duty" under the Constitution was only "to decide actual controversies," not "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."[7] Applying that principle to the facts of the case before it, the Court emphasized that "the whole object of the [plaintiff's lawsuit] was to secure a right to vote at the election."[8] Because the Court could not retroactively make the plaintiff eligible to vote in an election that had already occurred, the Court concluded it was unable to grant the plaintiff the relief that he sought.[9] *Mills* therefore firmly established the legal principle that otherwise justiciable cases may become nonjusticiable with the passage of time.[10]

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[16] Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 160–61 (2016) (quoting Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 72 (2013)).

[1] 159 U.S. 651 (1895).

[2] *See* Honig v. Doe, 484 U.S. 305, 331 (1988) (Rehnquist, C.J., concurring) (describing *Mills* as "the case originally enunciating the mootness doctrine").

[3] 159 U.S. at 652.

[4] *Id.* at 651–52.

[5] *Id.* at 657.

[6] *Id.* at 653.

[7] *Id.*

[8] *Id.* at 657.

[9] *Id.* at 658 ("It is obvious, therefore, that, even if the bill could properly be held to present a case within the jurisdiction of the circuit court, no relief within the scope of the bill could now be granted.").

[10] *Mills* does not hold, however, that an election dispute invariably becomes moot after the election occurs. *See* Norman v. Reed, 502 U.S. 279, 287–88 (1992) ("We start with Reed's contention that we should treat the controversy as moot because the election is over. We should not."); Meyer v. Grant, 486 U.S. 414, 417 n.2 (1988) ("Although the

Notably, the *Mills* Court did not expressly base its holding on Article III's "case or controversy" requirement; nothing in *Mills* squarely suggested that the mootness doctrine was a constitutionally mandated limitation on the federal courts' jurisdiction, as opposed to a self-imposed prudential restriction on the justiciability of disputes.[11] Thus, the Court applied the mootness doctrine articulated in *Mills* on various occasions throughout the early- to mid-twentieth century without explicitly suggesting that federal courts lacked the constitutional authority to adjudicate moot cases.[12] It was not until the Court's 1964 decision in *Liner v. Jafco, Inc.*[13] that the Court first explicitly acknowledged mootness's constitutional dimension.[14] The respondents in *Liner* had successfully convinced a state court to enter an injunction[15] to prohibit picketing at a construction site.[16] The petitioners thereafter appealed to the U.S. Supreme Court, contending that the state court lacked the authority to issue the injunction.[17] While the case was pending, however, "construction at the site had been completed."[18] The Court therefore had to determine whether the completion of the construction project rendered the case moot.[19]

The Court answered that question in the negative.[20] The Court observed that the respondents had "filed a bond providing that, if the injunction action failed," the respondents would have to pay the petitioners "all such costs, damages, interest, and other sums as may be awarded and recovered against the [respondents] in any suit or suits which may be hereafter bro[u]ght for wrongfully suing out said Injunction."[21] Because the petitioners could therefore

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November 1984 election in which appellees had first hoped to present their proposal to the citizens of Colorado is long past, we note that this action is not moot."); Storer v. Brown, 415 U.S. 724, 737 n.8 (1974) ("The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot."); Rosario v. Rockefeller, 410 U.S. 752, 756 n.5 (1973) ("Although the June primary election has been completed and the petitioners will be eligible to vote in the next scheduled New York primary, this case is not moot."). As explained in greater detail below, see Exceptions to Mootness: Capable of Repetition, Yet Evading Review (discussing the "capable of repetition, yet evading review" exception to the mootness doctrine), if a case involving an election dispute implicates legal issues that may recur in the future, that case does not necessarily become moot once the challenged election ends. *See Norman*, 502 U.S. at 288 ("Even if the issue before us were limited to petitioners' eligibility to use the Party name on the 1990 ballot, that issue would be worthy of resolution as 'capable of repetition, yet evading review.'" (quoting Moore v. Ogilvie, 394 U.S. 814, 816 (1969))); *Meyer*, 486 U.S. at 417 n.2 ("It is reasonable to expect that the same controversy will recur between these two parties, yet evade meaningful judicial review."); *Storer*, 415 U.S. at 737 n.8 ("[T]he issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is 'capable of repetition, yet evading review.'"); *Rosario*, 410 U.S. at 756 n.5 ("Although the June primary election has been completed and the petitioners will be eligible to vote in the next scheduled New York primary, this case is not moot, since the question the petitioners raise is 'capable of repetition, yet evading review.'").

[11] *See* 159 U.S. at 651–58.

[12] *See, e.g.*, United States v. W.T. Grant Co., 345 U.S. 629, 632–33, 635 (1953) (analyzing mootness without mentioning Article III's case-or-controversy requirement).

[13] 375 U.S. 301 (1964).

[14] *See, e.g.*, Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239, 1242 (10th Cir. 2011) (describing *Liner* as "the first occasion in which the Supreme Court expressly derived its lack of jurisdiction to review moot cases from Article III"); N.J. Tpk. Auth. v. Jersey Cent. Power & Light, 772 F.2d 25, 31 n.11 (3d Cir. 1985) (explaining that "[t]he Supreme Court first explicitly relied on Article III" as the basis for the mootness doctrine in *Liner*, thereby "elevat[ing] . . . mootness doctrine to constitutional status").

[15] An injunction is "a court order commanding or preventing an action." *Injunction*, Black's Law Dictionary (10th ed. 2014).

[16] 375 U.S. at 302.

[17] *Id.* at 303–04.

[18] *Id.* at 303.

[19] *Id.* at 304.

[20] *See id.* at 304–09.

[21] *Id.* at 302–03.

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potentially recover damages if "the injunction was wrongfully sued out,"[22] the Court determined that *Liner* was "not a case where th[e] Court's decision on the merits" would not "affect the rights of the litigants."[23] The Court accordingly concluded that the case was not moot because the petitioners retained "a substantial stake in the judgment" that existed "apart from and [wa]s unaffected by the completion of construction."[24]

In reaching this holding, the *Liner* Court expressly stated that the mootness doctrine "derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy."[25] The Court's decision to characterize mootness as a constitutional doctrine had significant practical and doctrinal implications. As the Court would explain in other opinions following *Liner*, a federal court lacks jurisdiction to adjudicate a moot case even if all parties consent because moot cases do not constitute justiciable "cases or controversies" within the meaning of Article III.[26] Thus, the Constitution requires the federal courts to raise and decide issues of mootness even if the parties have not raised the issue themselves.[27] Likewise, because mootness is a constitutional limitation on the federal courts' jurisdiction, a court must also "address the question of mootness before reaching the merits" of the parties' claims.[28] Moreover, the constitutional status of the mootness doctrine entails that Congress may not statutorily authorize federal courts to adjudicate moot cases.[29]

ArtIII.S2.C1.8.3 Modern Mootness Doctrine

Article III, Section 2, Clause 1:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens*

[22] *Id.* at 305.

[23] *Id.* at 306.

[24] *Id.* at 305.

[25] *Id.* at 306 n.3.

[26] *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 397 (1975) ("While the parties may be permitted to waive nonjurisdictional defects, they may not by stipulation invoke the judicial power of the United States in litigation which does not present an actual 'case or controversy.'").

[27] *See, e.g.*, United States v. Juvenile Male, 564 U.S. 932, 933–34 (2011) (per curiam) (deeming case moot even though "[n]o party had raised any issue of mootness in the [court below], and the Court of Appeals did not address the issue *sua sponte*"); St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 537 (1978) ("At the threshold, we confront a question of mootness. Although not raised by the parties, this issue implicates our jurisdiction."); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 7–8 (1978) ("There is, at the outset, a question of mootness. Although the parties have not addressed this question in their briefs, 'they may not by stipulation invoke the judicial power of the United States in litigation which does not present an actual case or controversy.'") (quoting *Sosna*, 419 U.S. at 398); North Carolina v. Rice, 404 U.S. 244, 246 (1971) (per curiam) ("Although neither party has urged that this case is moot, resolution of the question is essential if federal courts are to function within their constitutional sphere of authority.").

[28] *E.g.*, *Sosna*, 419 U.S. at 397.

[29] *See, e.g.*, Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1342 (11th Cir. 2013) ("Congress . . . may not bypass the Constitution's 'Case or Controversy' requirement."); Wilcox Elec., Inc. v. Fed. Aviation Admin., 119 F.3d 724, 727 (8th Cir. 1997) ("Congress may not, of course, change or undermine Article III.").

of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Supreme Court has decided mootness issues in a wide array of contexts since the Supreme Court decided *Liner* in 1964.[1] As a result, the Court has developed a robust body of precedent governing when a case should (or should not) be dismissed as moot, as well as what procedures a federal court should follow after a case becomes moot.

ArtIII.S2.C1.8.4 General Criteria of Mootness

Article III, Section 2, Clause 1:

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

Under current law, "a case is moot when the issues presented are no longer 'live' or the parties lack a cognizable interest in the outcome."[1] "[A]n actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation."[2] Thus, "[i]f an

[1] *See, e.g.*, North Carolina v. Covington, 138 S. Ct. 2548, 2552–53 (2018) (per curiam) (electoral redistricting case); Kernan v. Cuero, 138 S. Ct. 4, 7 (2017) (habeas corpus case); FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 224 n.3 (2013) (antitrust case); Lozman v. City of Riviera Beach, Fla., 568 U.S. 115, 120 (2013) (admiralty case); Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 446 (2009) (antitrust case); Lopez v. Gonzales, 549 U.S. 47, 52 n.2 (2006) (immigration case); Tory v. Cochran, 544 U.S. 734, 736–37 (2005) (defamation case); Washington v. Harper, 494 U.S. 210, 218–19 (1990) (civil rights case); FDIC v. Mallen, 486 U.S. 230, 236 n.7 (1988) (banking law case); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 66 (1987) (environmental law case); INS v. Cardoza-Fonseca, 480 U.S. 421, 426 n.3 (1987) (immigration case); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 n.* (1986) (free speech case); Lockhart v. McCree, 476 U.S. 162, 168 n.2 (1986) (habeas corpus case); Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 613 n.3 (1986) (labor law case); Ohio v. Kovacs, 469 U.S. 274, 277–78 (1985) (bankruptcy case); U.S. Dep't of Justice v. Provenzano, 469 U.S. 14, 14–16 (1984) (privacy law case); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 568–72 (1984) (employment law case); Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen & Packers v. Crowley, 467 U.S. 526, 535 n.11 (1984) (labor law case); Consol. Rail Corp. v. Darrone, 465 U.S. 624, 630–31 (1984) (discrimination case); INS v. Phinpathya, 464 U.S. 183, 188 n.6 (1984) (immigration case); City of Los Angeles v. Lyons, 461 U.S. 96, 101 (1983) (civil rights case); Johnson v. Bd. of Educ. of City of Chi., 457 U.S. 52, 52–54 (1982) (per curiam) (discrimination case); Havens Realty Corp. v. Coleman, 455 U.S. 363, 370–71 (1982) (housing law case); Univ. of Tex. v. Camenisch, 451 U.S. 390, 391–98 (1981) (discrimination case); Vitek v. Jones, 445 U.S. 480, 486–87 (1980) (prison law case); Quern v. Mandley, 436 U.S. 725, 733 n.7 (1978) (public assistance law case); Stanton v. Stanton, 421 U.S. 7, 11 (1975) (family law case); Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9–10 (1974) (zoning law case); Mancusi v. Stubbs, 408 U.S. 204, 205–07 (1972) (habeas corpus case); Socialist Labor Party v. Gilligan, 406 U.S. 583, 584, 589 (1972) (election law case); Roudebush v. Hartke, 405 U.S. 15, 18–19 (1972) (election law case); Whitcomb v. Chavis, 403 U.S. 124, 140–41 (1971) (legislative apportionment case).

[1] Cty. of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (quoting Powell v. McCormack, 395 U.S. 486, 498 (1969)). *See also, e.g.*, Chafin v. Chafin, 568 U.S. 165, 172 (2013) (same); City of Erie v. Pap's A.M., 529 U.S. 277, 287 (2000) (same).

[2] Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1975 (2016) (quoting Already, LLC v. Nike, Inc., 568 U.S. 85, 90–91 (2013)). *See also, e.g.*, Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 609 (2013) ("It is a basic principle of Article III that a justiciable case or controversy must remain extant at all stages of review, not merely at the time the complaint is filed.") (quoting United States v. Juvenile Male, 564 U.S. 932, 936 (2011) (per curiam)); Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477–78 (1990) ("To sustain our jurisdiction . . . it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals."); Honig v. Doe, 484 U.S. 305, 317 (1988) ("That the dispute between parties was very much alive when suit was filed . . . cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires."); Burke v. Barnes, 479 U.S. 361, 363 (1987) ("Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case; it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing.").

intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit[ ]' at any point during litigation, the action can no longer proceed and must be dismissed as moot."[3] "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party."[4] When (1) "it can be said with assurance that there is no reasonable expectation that the alleged violation will recur;" and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation," then "the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law."[5]

Significantly, however, a case does not necessarily become moot simply because intervening events make it impossible for a federal court to issue the *exact* form of relief that the plaintiff requests.[6] As long as the court retains the ability to "fashion *some* form of meaningful relief, "then that" is sufficient to prevent th[e] case from being moot."[7] To illustrate, "[i]f there is any chance of money changing hands" as a result of the lawsuit, then the "suit remains live."[8] Similarly, even if it is uncertain that the relief granted by the court will ultimately have any meaningful practical impact on the plaintiff, that does not itself render the case moot.[9]

Intervening circumstances that may render a case moot can result either from actions attributable to the litigants or from outside forces. For example, in the *City News & Novelty, Inc. v. City of Waukesha* case discussed in greater detail below, the Court ruled that an adult business's challenge to a municipality's decision to deny the business's license became moot after the business chose to cease operations while the case was pending on appeal.[10] A lawsuit predicated upon a federal statute may also become moot if Congress amends the statute while the suit remains pending.[11] A case may also become moot merely through the passage of time; for instance, the Court ruled in *Camreta v. Greene* that a child's constitutional challenge to an elementary school's methods of interviewing its students became moot after "the child [grew]

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[3] Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 161 (2016) (quoting Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 72 (2013)). *See also* Calderon v. Moore, 518 U.S. 149, 150 (1996) (per curiam) ("[M]ootness can arise at any stage of litigation.").

[4] Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 307 (2012) (quoting *City of Erie*, 529 U.S. at 287) (internal quotation marks omitted). *See also, e.g.*, Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1660 (2019) (same); *Campbell-Ewald*, 577 U.S. at 161 (same); *Decker*, 568 U.S. at 609 (same); *Chafin*, 568 U.S. at 172 (same).

[5] *Cty. of Los Angeles*, 440 U.S. at 631. *See also, e.g.*, *City of Erie*, 529 U.S. at 287 (holding that a case becomes moot "when the challenged conduct ceases such that 'there is no reasonable expectation that the wrong will be repeated'") (quoting United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)).

[6] *See Chafin*, 568 U.S. at 177 ("Such relief would of course not be fully satisfactory, but with respect to the case as a whole, even the availability of a partial remedy is sufficient to prevent a case from being moot.") (quoting *Calderon*, 518 U.S. at 150) (brackets and internal quotation marks omitted); Church of Scientology of Cal. v. United States, 506 U.S. 9, 12–13 (1992) ("While a court may not be able to return the parties to the status quo ante . . . a court can fashion some form of meaningful relief in circumstances such as these . . . The availability of this possible remedy is sufficient to prevent this case from being moot.").

[7] *Church of Scientology*, 506 U.S. at 12–13. *See also, e.g.*, *Chafin*, 568 U.S. at 177 ("[E]ven the availability of a partial remedy is sufficient to prevent a case from being moot.") (quoting *Calderon*, 518 U.S. at 150) (brackets and internal quotation marks omitted).

[8] *Mission Prod. Holdings*, 139 S. Ct. at 1660.

[9] *See Chafin*, 568 U.S. at 175 ("Enforcement of the order may be uncertain if Ms. Chafin chooses to defy it, but such uncertainty does not typically render cases moot. Courts often adjudicate disputes where the practical impact of any decision is not assured.").

[10] *See* 531 U.S. 278, 281–84 (2001).

[11] Lewis v. Cont'l Bank Corp., 494 U.S. 472, 474 (1990) ("We conclude that the case has been rendered moot by 1987 amendments to the Bank Holding Company Act.").

up and moved across the country" and thus would "never again be subject to the . . . in-school interviewing practices whose constitutionality [wa]s at issue."[12]

The Court's 1974 opinion in *DeFunis v. Odegaard* illustrates how the aforementioned legal principles apply in practice.[13] The petitioner in *DeFunis* applied for admission at a public law school.[14] After the school rejected his application, the petitioner filed suit, "contending that the procedures and criteria employed by the Law School Admissions Committee invidiously discriminated against him on account of his race."[15] The trial court agreed and ordered the law school to admit the petitioner.[16] The petitioner accordingly started taking classes at the law school while the case was on appeal.[17] By the time the case reached the Supreme Court, the petitioner had almost completed his law degree,[18] such that the petitioner stood to "receive his diploma regardless of any decision th[e] Court might reach on the merits of [h]is case."[19] Because the petitioner would "complete his law school studies at the end of the term . . . regardless of any decision th[e] Court might reach on the merits," the Court concluded that the case was moot.[20]

Because federal courts lack jurisdiction to adjudicate moot cases, a federal court can—and indeed must—dismiss a moot case even if none of the parties ask the court to do so.[21] Moreover, because mootness deprives the courts of jurisdiction to hear a case, the Supreme Court has stated that litigants have "a 'continuing duty to inform the Court'" of intervening events that could potentially render a case moot.[22] "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated."[23] As a result, a party may raise a mootness challenge at any time during the litigation, including for the first time on appeal.[24] "[A]n appeal should therefore be dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant 'any

[12] 563 U.S. 692, 698 (2011).

[13] 416 U.S. 312 (1974) (per curiam).

[14] *Id.* at 314.

[15] *Id. See also* Amdt14.S1.8.4.1 Early Doctrine on Appropriate Scrutiny and Amdt14.S1.8.4.2 Modern Doctrine on Appropriate Scrutiny (discussing constitutional challenges to educational admissions practices that allegedly discriminate on the basis of race).

[16] *Id.* at 314–15.

[17] *Id.* at 315.

[18] *See id.*

[19] *Id.* at 317.

[20] *Id.* at 319–20.

[21] *See, e.g.*, United States v. Juvenile Male, 564 U.S. 932, 933–34 (2011) (per curiam) (deeming case moot even though "[n]o party had raised any issue of mootness in the [court below], and the Court of Appeals did not address the issue *sua sponte*"); St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 537 (1978) ("At the threshold, we confront a question of mootness. Although not raised by the parties, this issue implicates our jurisdiction."); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 7–8 (1978) ("There is, at the outset, a question of mootness. Although the parties have not addressed this question in their briefs, 'they may not by stipulation invoke the judicial power of the United States in litigation which does not present an actual case or controversy.'") (quoting Sosna v. Iowa, 419 U.S. 393, 398 (1975)); North Carolina v. Rice, 404 U.S. 244, 246 (1971) (per curiam) ("Although neither party has urged that this case is moot, resolution of the question is essential if federal courts are to function within their constitutional sphere of authority.").

[22] Bd. of License Comm'rs of Town of Tiverton v. Pastore, 469 U.S. 238, 240 (1985) (per curiam) (quoting Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)). *See also* City of Erie v. Pap's A.M., 529 U.S. 277, 288 (2000) (chastising litigant for its "failure, despite its obligation to the Court, to mention a word about the potential mootness issue in its brief in opposition to the petition for writ of certiorari").

[23] *E.g.*, Roe v. Wade, 410 U.S. 113, 125 (1973).

[24] *E.g.*, DBSI/TRI IV Ltd. P'ship v. United States, 465 F.3d 1031, 1038 (9th Cir. 2006) (explaining that mootness is a "jurisdictional issue[ ] that may be raised at any time, even for the first time on appeal"); Cont'l Cas. Co. v. Anderson Excavating & Wrecking Co., 189 F.3d 512, 518 (7th Cir. 1999) ("A case can become moot at any time, and destroy the court's jurisdiction."); Smith v. United States, 921 F.2d 136, 138 (8th Cir. 1990) ("Mootness goes to the very heart of Article III jurisdiction, and any party can raise it at any time.").

effectual relief whatever' in favor of the appellant."[25] "If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with subsequent events that have produced that alleged result."[26]

The Supreme Court has developed several doctrines that govern how courts should dispose of cases that become moot during the pendency of an appeal.[27] When reviewing a lower court's judgment, an appellate court has several potential options for resolving the case: it may affirm—that is, approve—the judgment;[28] it may reverse—that is, overturn—the judgment;[29] it may vacate the judgment—that is, nullify the judgment[30] and thereby "strip[ ] the decision below of its binding effect;"[31] or it may remand the case to the lower court for further proceedings.[32] As the Court explained in its 1950 opinion in *United States v. Munsingwear, Inc.*, "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot" on appeal or before the Court has issued its "decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."[33] Disposing of a moot case in this manner thereby "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance."[34] Put another way, the *Munsingwear* procedure for disposing of cases that become moot on appeal "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences," and thereby ensures that the federal appellate courts, rather than individual litigants, have the last word on the answers to legal questions.[35]

The Supreme Court has noted, however, "the decision whether to vacate" a moot case pursuant to *Munsingwear* "turns on 'the conditions and circumstances of the particular case.'"[36] To that end, the Supreme Court has crafted several exceptions to the *Munsingwear*

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[25] Calderon v. Moore, 518 U.S. 149, 150 (1996) (per curiam) (quoting Mills v. Green, 159 U.S. 651, 653 (1895)). *See also, e.g.*, Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) ("[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed.") (quoting *Mills*, 159 U.S. at 653).

[26] Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 98 (1993).

[27] *See, e.g.*, Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 314 (1999) ("Generally, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter. We have dismissed appeals in such circumstances.").

[28] Black's Law Dictionary (10th ed. 2014).

[29] *Id.*

[30] *Id.*

[31] Deakins v. Monaghan, 484 U.S. 193, 200 (1988).

[32] Black's Law Dictionary (10th ed. 2014).

[33] United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950). *See also, e.g.*, Azar v. Garza, 138 S. Ct. 1790, 1793 (2018) (per curiam) (vacating and remanding a moot case for dismissal in the manner contemplated by *Munsingwear*); United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1542 (2018) (same); United States v. Microsoft Corp., 138 S. Ct. 1186, 1188 (2018) (per curiam) (same); Camreta v. Greene, 563 U.S. 692, 712–14 (2011) (same); Arizonans for Official English v. Arizona, 520 U.S. 43, 80 (1997) (same); Frank v. Minn. Newspaper Ass'n, Inc., 490 U.S. 225, 227 (1989) (per curiam) (same); Burke v. Barnes, 479 U.S. 361, 363 (1987) (same); Iron Arrow Honor Soc'y v. Heckler, 464 U.S. 67, 73 (1983) (per curiam) (same); Great W. Sugar Co. v. Nelson, 442 U.S. 92, 92–94 & n.* (1979) (per curiam) (same); Cty. of Los Angeles v. Davis, 440 U.S. 625, 634 (1979) (same); Weinstein v. Bradford, 423 U.S. 147, 148–49 (1975) (per curiam) (same); Preiser v. Newkirk, 422 U.S. 395, 403–04 (1975) (same); Bd. of Sch. Comm'rs of City of Indianapolis v. Jacobs, 420 U.S. 128, 130 (1975) (per curiam) (same). *See also, e.g.*, Alvarez v. Smith, 558 U.S. 87, 94–97 (2009) (analyzing the *Munsingwear* rule); U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 22 (1994) (describing Munsingwear as "[t]he leading case on vacatur"); Great W. Sugar Co. v. Nelson, 442 U.S. 92, 93 n.* (1979) (per curiam) ("*United States v. Munsingwear, Inc.*, is perhaps the leading case on the proper disposition of cases that become moot on appeal.").

[34] *Munsingwear*, 340 U.S. at 40.

[35] *See id.* at 41.

[36] *Azar*, 138 S. Ct. at 1792 (quoting United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, 239 U.S. 466, 478 (1916)).

rule.[37] For one, the Supreme Court has specified that "vacatur is in order" under *Munsingwear* only when mootness occurs through "happenstance"—that is, "circumstances not attributable to the parties"—or "the 'unilateral action of the party who prevailed in the lower court.'"[38] Thus, if a case becomes moot as a result of the parties' mutual agreement to settle the case, the Court has held that federal courts should generally not vacate the judgment.[39] The Court has justified this exception by explaining that "where mootness results from settlement . . . the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the . . . remedy of vacatur."[40] Such cases are therefore "not unreviewable, but simply unreviewed" as a result of the losing party's "own choice."[41] Likewise, the Court has ruled that it is inappropriate to "clear[ ] the path for future relitigation of the issues between the parties"[42] when the plaintiff renders the case moot by voluntarily agreeing to permanently withdraw its claims against the defendant.[43] In such instances, rather than wiping the slate clean in the manner contemplated by *Munsingwear*, the Court has ordered that the case be dismissed with prejudice to refiling so that "it cannot be resumed in this or any subsequent action."[44] Dismissing the case with prejudice thereby "prevent[s] the regeneration of the controversy" if the plaintiff later changes its mind and attempts to relitigate the dismissed claims in federal court.[45]

Nor does the Court follow its usual practice of vacating the judgment with directions to dismiss when a case has become moot due to an intervening change in the governing law.[46] Instead, the Court ordinarily "remand[s] for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully" to respond to the intervening change in law.[47] For instance, in *Diffenderfer v. Central Baptist Church of Miami,*

[37] *See, e.g.*, *Camreta*, 563 U.S. at 712 (explaining that, although the *Munsingwear* rule provides the "established" practice for resolving a civil case that "becomes moot pending appeal," the *Munsingwear* doctrine is "not exceptionless").

[38] *Arizonans for Official English*, 520 U.S. at 71–72 (quoting *U.S. Bancorp*, 513 U.S. at 23). *See also Azar*, 138 S. Ct. at 1792 ("One clear example where vacatur is in order is when mootness occurs through the unilateral action of the party who prevailed in the lower court.") (brackets and internal citations quotation marks omitted); Karcher v. May, 484 U.S. 72, 83 (1987) ("Th[e] controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party . . . declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case.").

[39] *U.S. Bancorp*, 513 U.S. at 29. *See also, e.g.*, Alvarez v. Smith, 558 U.S. 87, 94–97 (2009) (analyzing the interplay between *Munsingwear* and *U.S. Bancorp*).

[40] *U.S. Bancorp*, 513 U.S. at 25.

[41] *Id.*

[42] *See Munsingwear*, 340 U.S. at 40.

[43] *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 513 (1989); Deakins v. Monaghan, 484 U.S. 193, 199–200 (1988).

[44] *Deakins*, 484 U.S. at 200 n.4. *See also Webster*, 492 U.S. at 513 ("Because this dispute was rendered moot in part by appellees' willingness permanently to withdraw their equitable claims from their federal action, a dismissal with prejudice is indicated.") (quoting *Deakins*, 484 U.S. at 200) (brackets omitted).

[45] *Deakins*, 484 U.S. at 200.

[46] *E.g.*, Lewis v. Cont'l Bank Corp., 494 U.S. 472, 482 (1990) ("Our ordinary practice in disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss. However, in instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully.") (internal citations omitted).

[47] *Id. See also* U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto, 477 U.S. 556, 559–60 (1986) (remanding case for further proceedings following amendment of statutory provision at issue); Crowell v. Mader, 444 U.S. 505, 505–06 (1980) ("Appellees may still wish to attack the newly enacted legislation . . . [W]e direct that the judgment of the District Court be vacated without prejudice to such further proceedings in the District Court as may be appropriate.").

Florida, Inc., the plaintiff challenged a Florida statute as unconstitutional.[48] While the litigation was pending, however, the Florida legislature repealed the challenged statute and enacted a new statute in its place.[49] "[R]ather than remanding the case to the District Court for dismissal" in the manner contemplated by *Munsingwear*, the Supreme Court "remand[ed] the case to the District Court with leave to the appellants to amend their pleadings."[50] Resolving the case in this way thereby afforded the appellants an opportunity "to demonstrate that the repealed statute retain[ed] some continuing force or to attack the newly enacted legislation."[51]

Finally, "[t]he Court's treatment of cases that become moot on review from the lower federal courts" differs from its treatment of moot cases arising from state courts.[52] The Court's "regular practice in the latter situation has been to dismiss the case and leave the judgment of the state court undisturbed," rather than to vacate the judgment in the manner contemplated by *Munsingwear*.[53] According to the Court, allowing state court judgments in moot cases to stand "evinces a proper recognition that in the absence of any live case or controversy, [the Court] lack[s] jurisdiction and thus also the power to disturb the state court's judgment."[54]

ArtIII.S2.C1.8.5 Exceptions to Mootness Generally

Article III, Section 2, Clause 1:

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

Significantly, the Court has recognized several exceptions to the general mootness principles discussed above. These exceptions are known as the "voluntary cessation" doctrine[1] and the "capable of repetition, yet evading review" exception.[2] The Court has also developed special mootness principles that govern criminal cases[3] and class action cases.[4]

ArtIII.S2.C1.8.6 Voluntary Cessation Doctrine

Article III, Section 2, Clause 1:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and*

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[48] 404 U.S. 412, 412–14 (1972) (per curiam).

[49] *Id.* at 414.

[50] *Id.* at 415.

[51] *Id.*

[52] ASARCO Inc. v. Kadish, 490 U.S. 605, 621 n.1 (1989).

[53] *Id.* (citing Kan. Gas & Elec. Co. v. State Corp. Comm'n of Kan., 481 U.S. 1044 (1987); Times-Picayune Publ'g Corp. v. Schulingkamp, 420 U.S. 985 (1975)).

[54] *Id.*

[1] *See* ArtIII.S2.C1.8.6 Voluntary Cessation Doctrine.

[2] *See* ArtIII.S2.C1.8.7 Capable of Repetition, Yet Evading Review.

[3] *See* ArtIII.S2.C1.8.8 Criminal Cases and Mootness.

[4] *See* ArtIII.S2.C1.8.9 Class Action Litigation and Mootness.

Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

First, the Supreme Court has held that a party's voluntary cessation of an unlawful practice will usually not moot its opponent's challenge to that practice.[1] Thus, "a defendant cannot automatically moot a case by simply ending its unlawful conduct once sued."[2] This exception to the mootness doctrine exists because if a litigant could defeat a lawsuit simply by temporarily ceasing its unlawful activities, there would be nothing to stop that litigant from engaging in that unlawful behavior again after the court dismissed the case[3]; the litigant would effectively "be free to return to [its] old ways."[4]

The 1982 case of *City of Mesquite v. Aladdin's Castle, Inc.* illustrates how this "voluntary cessation" doctrine applies in practice.[5] The plaintiff in *City of Mesquite* challenged the constitutionality of a municipal ordinance.[6] While the case was pending, however, the city repealed the offending provisions of the ordinance.[7] The Court, explaining that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice," concluded that the city's revision of the ordinance did not render the plaintiff's challenge moot.[8] Because "the city's repeal of the objectionable language" in the ordinance "would not preclude it from reenacting precisely the same provision" if the case were dismissed on mootness grounds, the Court concluded that it needed to "confront the merits of the" plaintiff's constitutional challenge.[9]

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[1] *See, e.g.*, United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1537 n.* (2018); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 n.1 (2017); Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 307 (2012); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 609 (2001); City of Erie v. Pap's A.M., 529 U.S. 277, 287–89 (2000); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000); Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 662 (1993); Chi. Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson, 475 U.S. 292, 305 n.14 (1986); United States v. Generix Drug Corp., 460 U.S. 453, 456 n.6 (1983); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982); Cty. of Los Angeles v. Davis, 440 U.S. 625, 631 (1979); Allee v. Medrano, 416 U.S. 802, 810 (1974).

[2] Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013).

[3] *See id.* (explaining that, in the absence of the voluntary cessation doctrine, "a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends"); *Knox*, 567 U.S. at 307 ("[A] dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed."); City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278, 284 n.1 (2001) ("[A] party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior."); *City of Mesquite*, 455 U.S. at 289 ("In this case the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated."); United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 309 (1897) ("If the mere dissolution of the association worked an abatement of the suit as to all the defendants . . . it is plain that they have thus discovered an effectual means to prevent the judgment of this court being given upon the question really involved in the case. The defendants having succeeded in the court below, it would only be necessary thereafter to dissolve their association and instantly form another of a similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken. This result does not and ought not to follow.").

[4] *Allee*, 416 U.S. at 811 (quoting Gray v. Sanders, 372 U.S. 368, 376 (1963)). *See also, e.g.*, *Friends of the Earth*, 528 U.S. at 189 (same).

[5] 455 U.S. 283.

[6] *Id.* at 284–86.

[7] *Id.* at 288.

[8] *Id.* at 288–89.

[9] *Id.* at 289. The Court subsequently elaborated that "*City of Mesquite* does not stand for the proposition that it is only the possibility that the *selfsame* statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect." Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656,

ArtIII.S2.C1.8.6
Voluntary Cessation Doctrine

The *DeFunis v. Odegaard* case discussed above, by contrast, exemplifies when the voluntary cessation doctrine will *not* save a case from dismissal.[10] To reiterate, the petitioner in *DeFunis* claimed that certain law school admissions practices and criteria discriminated against him on the basis of race.[11] While the case was pending, however, the petitioner began taking classes at the law school, and had almost completed his law degree by the time the case reached the Supreme Court.[12] The Court rejected the petitioner's argument that the voluntary cessation doctrine rendered the case justiciable because the case's mootness had "partially stem[med] from a policy decision on the part of the respondent Law School authorities" to allow the petitioner to complete his law school studies and receive his diploma.[13] The Court emphasized that the respondents had not voluntarily ceased the allegedly discriminatory admissions practices that the petitioner challenged as unconstitutional; instead, the case became moot because the petitioner was just a few credits shy of completing his degree.[14] In other words, the case was moot not because the school stopped engaging in allegedly unlawful activity, but rather because the petitioner would "receive his diploma regardless of any decision th[e] Court might reach on the merits of th[e] case."[15]

The Court has clarified several other aspects of the voluntary cessation doctrine. For one, if it is "absolutely clear" that the allegedly wrongful behavior will not recur after the court dismisses the case, then a case can become moot notwithstanding a party's voluntary cessation of that unlawful behavior.[16] "The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness."[17] To illustrate, in *Preiser v. Newkirk*, a prisoner claimed that prison officials had unlawfully transferred him from a medium security institution to a more restrictive maximum security institution, and asked the court to order his return to the medium security prison.[18] While the case was pending, however, officials transferred the prisoner back to the medium security institution, and then subsequently transferred him to an even less restrictive minimum security institution.[19] According to the Court, these subsequent developments made it "clear that correction authorities harbor[ed] no animosity toward" the plaintiff, such that there was "no reasonable expectation that the wrong" challenged by the prisoner would "be

662 (1993). *But see* Princeton Univ. v. Schmid, 455 U.S. 100, 103 (1982) (per curiam) (deeming case moot, without explicitly mentioning the voluntary cessation doctrine, where intervening party "substantially amended its regulations" "while the case was pending on appeal").

[10] *See* 416 U.S. 312, 318 (1974) (per curiam).

[11] *Id.* at 314–15.

[12] *Id.* at 315–17.

[13] *Id.* at 317.

[14] *See id.* at 318.

[15] *Id.* at 317.

[16] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 n.1 (2017) (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000)). *See also, e.g.*, Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 222 (2000) (per curiam) ("Voluntary cessation of challenged conduct moots a case, however, only if it is '*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur.'") (quoting United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968)).

[17] *Friends of the Earth*, 528 U.S. at 189 (quoting Concentrated Phosphate Export Ass'n, 393 U.S. at 203). *See also, e.g.*, *Trinity Lutheran Church*, 137 S. Ct. at 2019 n.1; *Adarand Constructors*, 528 U.S. at 222. *See also* Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013) (explaining that a party's burden to avoid the voluntary cessation doctrine is "formidable").

[18] 422 U.S. 395, 396–98 (1975).

[19] *Id.* at 401.

repeated.'"[20] The Court therefore deemed the case nonjusticiable even though the prison officials themselves had rendered the case moot by transferring the prisoner to a less restrictive institution.[21]

Additionally, the voluntary cessation doctrine typically applies only when a *party to the case* voluntarily discontinues an allegedly unlawful action. If, instead, a case becomes moot because "of the voluntary acts of a *third party non-defendant,*" the voluntary cessation doctrine will usually not save that case from dismissal.[22] For instance, in *Iron Arrow Honor Society v. Heckler*, the Secretary of the Department of Health, Education, and Welfare (Secretary) promulgated a regulation barring recipients of federal funding from "providing significant assistance to any . . . organization . . . which discriminates on the basis of sex."[23] The petitioner, an all-male honorary organization at a public university, commenced a lawsuit seeking to prevent the Secretary from interpreting that regulation in a manner that would require the university to ban the organization from conducting activities on campus so long as it continued to exclude women.[24] While the lawsuit was pending, however, the university determined that no matter whether the Secretary's regulation required the university to ban the organization, the university's own non-discrimination code independently barred the organization from operating on campus until it discontinued its male-only membership policy.[25] Because no judicial ruling with respect to the *Secretary's* interpretation of the *regulation* would have any effect on the *university's* independent decision to ban the organization pursuant to its own *non-discrimination policy*, the Court concluded that "the dispute as to how the [r]egulation should be interpreted" was "classically 'moot.'"[26] The Court concluded that the voluntary cessation doctrine did not save the case from dismissal, as it was "the voluntary acts of a third party non-defendant"—namely, the university—that rendered the case moot, rather than the voluntary acts of the Secretary herself.[27]

Similarly, the voluntary cessation doctrine will not save a case from dismissal when it is the *losing* party, rather than the prevailing party, whose voluntary actions render the case moot during the pendency of an appeal.[28] Thus, in *City News & Novelty, Inc. v. City of Waukesha*, a retailer of sexually explicit materials challenged a municipality's decision to deny its adult business license.[29] After the lower courts ruled *against* the retailer, the retailer asked the Supreme Court to review the judgment in the municipality's favor.[30] While the appeal was pending, however, the retailer opted to close its business.[31] The Court determined that the retailer's decision to cease operations had rendered the case moot because the retailer no

[20] *Id.* at 402 (quoting Concentrated Phosphate Export Ass'n, 393 U.S. at 203); United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953)).

[21] *Id.* ("We have before us more than a mere voluntary cessation of allegedly illegal conduct, where we would leave the defendant free to return to his old ways.") (ellipses, brackets, and internal quotation marks omitted).

[22] Iron Arrow Honor Soc'y v. Heckler, 464 U.S. 67, 72 (1983) (per curiam) (emphasis added). *See also* Deakins v. Monaghan, 484 U.S. 193, 200 n.4 (1988) ("The Court's ability to prevent respondents from renewing their claims after they are dismissed as moot distinguishes this case from one in which a *defendant* attempts to avoid appellate review by voluntarily ceasing the challenged conduct without losing the ability to reinitiate the conduct once the mooted case is dismissed.").

[23] *Iron Arrow*, 464 U.S. at 68 (quoting 45 C.F.R. § 86.31(b)(7) (1975)) (emphasis omitted).

[24] *Id.* at 69.

[25] *Id.* at 69–70.

[26] *Id.* at 70–71.

[27] *Id.* at 72.

[28] City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278, 284 (2001).

[29] *Id.* at 281–82.

[30] *Id.* at 282.

[31] *Id.* at 282–83.

longer had any cognizable interest in the outcome of the case.[32] Even though the circumstance rendering the case moot was the retailer's voluntary decision to close its business, the Court nonetheless concluded that the voluntary cessation doctrine did not render the case justiciable.[33] The Court emphasized that because the lower courts had ruled against the retailer, the retailer "left the fray as a loser, not a winner."[34] The Court reasoned that the retailer's voluntary cessation of its business therefore did "not keep [its opponent] under the weight of an adverse judgment" or "reward an arguable manipulation of [the Court's] jurisdiction."[35]

ArtIII.S2.C1.8.7 Capable of Repetition, Yet Evading Review

Article III, Section 2, Clause 1:

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

The Supreme Court has generally declined to deem cases moot that present issues or disputes that are "capable of repetition, yet evading review."[1] This exception to the mootness doctrine applies "only in exceptional situations"[2] in which (1) "the challenged action is in its duration too short to be fully litigated prior to cessation or expiration;" and (2) "there is a reasonable expectation that the same complaining party will be subject to the same action

[32] *Id.* at 283–85.

[33] *Id.* at 283–84.

[34] *Id.* at 284.

[35] *Id.*

[1] *See, e.g.*, Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1976 (2016); Turner v. Rogers, 564 U.S. 431, 439–41 (2011); Davis v. FEC, 554 U.S. 724, 735–36 (2008); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 462 (2007); Norman v. Reed, 502 U.S. 279, 287–88 (1992); Int'l Org. of Masters, Mates & Pilots v. Brown, 498 U.S. 466, 473 (1991); Meyer v. Grant, 486 U.S. 414, 417 n.2 (1988); Honig v. Doe, 484 U.S. 305, 317–23 (1988); Burlington N. R.R. v. Bhd. of Maint. of Way Emps., 481 U.S. 429, 436 n.4 (1987); Brock v. Roadway Express, Inc., 481 U.S. 252, 257–58 (1987); Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 577–78 (1987); Press-Enter. Co. v. Super. Ct. of Cal. for Cty. of Riverside, 478 U.S. 1, 6 (1986); Globe Newspaper Co. v. Super. Ct. for Cty. of Norfolk, 457 U.S. 596, 603 (1982); Democratic Party of U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 115 n.13 (1981); Gannett Co. v. DePasquale, 443 U.S. 368, 377 (1979); Bell v. Wolfish, 441 U.S. 520, 526 n.5 (1979); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 774 (1978); United States v. N.Y. Tel. Co., 434 U.S. 159, 165 n.6 (1977); Neb. Press Ass'n v. Stuart, 427 U.S. 539, 546–47 (1976); Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975); Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115, 125–27 (1974); Storer v. Brown, 415 U.S. 724, 737 n.8 (1974); Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972); S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 514–16 (1911). *But see, e.g.*, United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1540–42 (2018) (rejecting litigants' argument that defendants' allegedly unlawful practice was capable of repetition yet evading review); Alvarez v. Smith, 558 U.S. 87, 93–94 (2009) (same); Spencer v. Kemna, 523 U.S. 1, 17–18 (1998) (same); Lewis v. Cont'l Bank Corp., 494 U.S. 472, 481–82 (1990) (same); Lane v. Williams, 455 U.S. 624, 633–34 (1982) (same); Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 187 (1979) (same); Kremens v. Bartley, 431 U.S. 119, 133 (1977) (same); Weinstein v. Bradford, 423 U.S. 147, 148–49 (1975) (per curiam) (same); Preiser v. Newkirk, 422 U.S. 395, 403 (1975) (same); Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc., 404 U.S. 412, 414 (1972) (per curiam) (same).

[2] *Kingdomware Techs.*, 136 S. Ct. at 1976 (quoting *Spencer*, 523 U.S. at 17).

again."[3] According to the Court, if this exception to mootness did not exist, then certain types of time-sensitive controversies would become effectively unreviewable by the courts.[4]

The classic example of a dispute that is "capable of repetition, yet evading review" is a pregnant woman's constitutional challenge to an abortion regulation.[5] Once a woman gives birth, abortion is no longer an option for terminating that particular pregnancy. However, litigation of national political significance can rarely be fully resolved in a mere nine months; "the normal 266-day human gestation period is so short that [a] pregnancy will come to term before" the parties and the court could realistically litigate a constitutional challenge to an abortion statute to its conclusion.[6] Thus, if a challenge to an abortion regulation became moot as soon as the challenger gave birth, "pregnancy litigation seldom w[ould] survive much beyond the trial stage, and appellate review w[ould] be effectively denied."[7] Because the Supreme Court has decided that "[o]ur law should not be that rigid," the Court ruled in its 1973 opinion in *Roe v. Wade* that "[p]regnancy provides a classic justification for a conclusion of nonmootness."[8] The *Roe* Court reasoned that, because "[p]regnancy often comes more than once to the same woman, and . . . if man is to survive, it will always be with us," challenges to the constitutionality of abortion statutes usually will not become moot at the conclusion of an individual challenger's pregnancy.[9]

The Court has deemed certain controversies "capable of repetition, yet evading review" outside the abortion context as well.[10] For example, in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, an advocacy organization claimed that restrictions on "electioneering communications" established by the Bipartisan Campaign Reform Act of 2002 unconstitutionally prohibited the organization from broadcasting certain political advertisements shortly before the 2004 election.[11] Even though the case did not reach the Supreme Court until long after the 2004 election had passed, the Court nonetheless concluded that the case was not moot.[12] The Court reasoned that the organization "credibly claimed that it planned on running 'materially similar' future targeted broadcast ads" in advance of future

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[3] United States v. Juvenile Male, 564 U.S. 932, 938 (2011) (per curiam) (quoting *Spencer*, 523 U.S. at 17). *See also, e.g.*, *Sanchez-Gomez*, 138 S. Ct. at 1540 (same); *Kingdomware Techs.*, 136 S. Ct. at 1976 (same); *Turner*, 564 U.S. at 439–40 (quoting *Weinstein*, 423 U.S. at 149) (same); *Wis. Right to Life*, 551 U.S. at 462 (same); *Lewis*, 494 U.S. at 482 (same); *Meyer*, 486 U.S. at 417 n.2 (quoting Murphy v. Hunt, 455 U.S. 478, 482 (1982)) (per curiam) (same); Reeves, Inc. v. Stake, 447 U.S. 429, 434 n.5 (1980) (same); *Gannett*, 443 U.S. at 377 (same); *Ill. State Bd. of Elections*, 440 U.S. at 187 (same); SEC v. Sloan, 436 U.S. 103, 109 (1978) (same); *Bellotti*, 435 U.S. at 774 (same). The Court has explained, however, that the "capable of repetition yet evading review" doctrine "will not revive a dispute which became moot before the action commenced." Renne v. Geary, 501 U.S. 312, 320 (1991).

[4] *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 400 (1975) ("[T]he case before us is one in which state officials will undoubtedly continue to enforce the challenged statute and yet, because of the passage of time, no single challenger will remain subject to its restrictions for the period necessary to see such a lawsuit to its conclusion.").

[5] *See* Roe v. Wade, 410 U.S. 113, 125 (1973) (quoting S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)).

See generally Amdt14.S1.6.4.1 Abortion, Roe v. Wade, and Pre-Dobbs Doctrine (analyzing Supreme Court jurisprudence regarding abortion).*But see* Azar v. Garza, 138 S. Ct. 1790, 1791–93 (2018) (dismissing abortion case as moot without applying, analyzing, or mentioning the "capable of repetition yet evading review" doctrine).

[6] *See Roe*, 410 U.S. at 125.

[7] *See id.*

[8] *Id.*

[9] *Id.* (quoting *S. Pac. Terminal Co.*, 219 U.S. at 515). *See also* Singleton v. Wulff, 428 U.S. 106, 117 (1976) ("A woman who is no longer pregnant may nonetheless retain the right to litigate the point because it is 'capable of repetition yet evading review.'") (quoting *Roe*, 410 U.S. at 124–25).

[10] *See supra* note 1.

[11] FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 457–60 (2007).

[12] *Id.* at 462–64.

elections,[13] and the period between elections was too short to allow the organization sufficient time to fully litigate its constitutional challenges sufficiently in advance of the election date.[14]

By contrast, the Court determined that the constitutional challenge in the *DeFunis* case mentioned above was not "capable of repetition, yet evading review."[15] To reiterate, the petitioner in *DeFunis* claimed that certain law school admissions practices and criteria unconstitutionally discriminated against him on the basis of race.[16] While the case was pending, however, the petitioner began taking classes at the law school, and was just about to receive his diploma.[17] Unlike the challenger to the abortion statute in *Roe*, who could very well have become pregnant again in the future,[18] the petitioner in *DeFunis* would "never again be required to run the gantlet of the Law School's admissions process" once he received his juris doctorate.[19] The *DeFunis* Court therefore concluded that the petitioner's constitutional challenges were "not 'capable of repetition' so far as [the petitioner was] concerned."[20] The Court further opined that challenges raised by other disappointed applicants would not evade future review either, as the Court had "no reason to suppose that a subsequent case attacking [the law school's admission] procedures w[ould] not come with relative speed to th[e] Court."[21]

ArtIII.S2.C1.8.8 Criminal Cases and Mootness

Article III, Section 2, Clause 1:

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

The Supreme Court has also articulated special mootness principles that apply in criminal cases.[1] Because criminal sentences are generally limited in duration, courts will sometimes be unable to rule on the merits of a criminal defendant's appeal before that defendant's sentence expires.[2] Thus, the Court has ruled that a criminal defendant who "wish[es] to continue his appeals after the expiration of his sentence must suffer some 'continuing injury' or 'collateral

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[13] *Id.* at 463.

[14] *See id.* at 462–63. *See also* Davis v. FEC, 554 U.S. 724, 735–36 (2008) (rejecting mootness challenge in case whose facts "closely resemble[d]" those at issue in *Wisconsin Right to Life*).

[15] 416 U.S. at 318–19.

[16] *Id.* at 314–15.

[17] *Id.* at 315–17.

[18] *See* Roe v. Wade, 410 U.S. 113, 125 (1973).

[19] 416 U.S. at 319.

[20] *Id.*

[21] *Id.*

[1] *See, e.g.*, United States v. Juvenile Male, 564 U.S. 932, 936 (2011) (per curiam); Turner v. Rogers, 564 U.S. 431, 439 (2011); Spencer v. Kemna, 523 U.S. 1, 3–16 (1998); Minnesota v. Dickerson, 508 U.S. 366, 371 n.2 (1993); Evitts v. Lucey, 469 U.S. 387, 391 n.4 (1985); Lane v. Williams, 455 U.S. 624, 630–34 (1982); Pennsylvania v. Mimms, 434 U.S. 106, 108 n.3 (1977) (per curiam); Sibron v. New York, 392 U.S. 40, 50–58 (1968); Carafas v. LaVallee, 391 U.S. 234, 236–38 (1968).

[2] *See, e.g.*, *Sibron*, 392 U.S. at 50, 52 ("It is asserted that because Sibron has completed service of the six-month sentence imposed upon him as a result of his conviction, the case has become moot . . . We have concluded that the case is not moot . . . There was no way for Sibron to bring his case here before his six-month sentence expired.").

consequence' sufficient to satisfy Article III."[3] Put another way, if the defendant can point to some "disabilities or burdens (which) . . . flow from" his conviction even after his release from prison, then he retains "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him" and therefore presents a justiciable controversy.[4] If, by contrast, the defendant cannot make such a showing, then the expiration of the defendant's criminal sentence will render the defendant's appeal moot.[5] Thus, in *Carafas v. LaVallee*, the petitioner faced lingering legal "disabilities or burdens" as a result of his conviction even though he had already "been unconditionally released from custody."[6] Specifically, the laws of the state in which the petitioner resided prohibited convicted felons from "engag[ing] in certain businesses," "serv[ing] as an official of a labor union," "vot[ing] in any election held in" his state of residence, and "serv[ing] as a juror."[7] The petitioner therefore retained "a substantial stake" in challenging the validity of his conviction so that he could engage in activities that his criminal record would otherwise prohibit.[8] The Supreme Court thus determined that, "[o]n account of these 'collateral consequences'" of his conviction, the petitioner's case was "not moot."[9] "When the defendant challenges his underlying *conviction*," the Supreme Court generally "presume[s] the existence of collateral consequences" sufficient to save the defendant's appeal from dismissal on mootness grounds.[10] The Court has justified this presumption on the ground that "most criminal convictions do in fact entail adverse collateral legal consequences."[11] The Court has generally declined to presume, however, that collateral consequences will result from other types of criminal sanctions, such as a revocation of parole.[12]

ArtIII.S2.C1.8.9 Class Action Litigation and Mootness

Article III, Section 2, Clause 1:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens*

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[3] *Juvenile Male*, 564 U.S. at 936. *See also, e.g.*, *Dickerson*, 508 U.S. at 371 n.2 ("We have often observed . . . that 'the possibility of a criminal defendant's suffering" collateral legal consequences "from a sentence already served' precludes a finding of mootness.") (quoting *Mimms*, 434 U.S. at 108 n.3).

[4] 391 U.S. at 237 (quoting Fiswick v. United States, 329 U.S. 211, 222 (1946)).

[5] *E.g.*, *Juvenile Male*, 564 U.S. at 936.

[6] *Carafas*, 391 U.S. at 236–37.

[7] *Id.* at 237.

[8] *Id.* (quoting *Fiswick*, 329 U.S. at 222).

[9] *Id.* at 237–38 (quoting Ginsberg v. New York, 390 U.S. 629, 633–34 & n.2 (1968)).

[10] *Juvenile Male*, 564 U.S. at 936. *See also, e.g.*, Evitts v. Lucey, 469 U.S. 387, 391 n.4 (1985) (deeming case "not moot" where "some collateral consequences of [the party's] conviction remain[ed]").

[11] Sibron v. New York, 392 U.S. 40, 55 (1968).

[12] Spencer v. Kemna, 523 U.S. 1, 14 (1998) ("declin[ing] to presume that collateral consequences adequate to meet Article III's injury-in-fact requirement" would result from a "petitioner's parole revocation"). *See also, e.g.*, *Juvenile Male*, 564 U.S. at 936–37 ("[W]hen a defendant challenges only an expired *sentence*, no such presumption [of non-mootness] applies, and the defendant must bear the burden of identifying some ongoing 'collateral consequence' that is 'traceable' to the challenged portion of the sentence and is 'likely to be redressed by a favorable judicial decision.'") (quoting *Spencer*, 523 U.S. at 7) (brackets omitted).

of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Supreme Court has also developed special mootness rules that apply in class action cases.[1] In a class action, the plaintiff[2] (known as the "class representative" or the "named plaintiff") represents not only his own interests, but also the interests of other injured persons (the "class members") who are similarly situated to the class representative but are not named as formal parties to the suit.[3] Intervening events may sometimes render the controversy moot as to the named plaintiff but not as to the class members.[4] For example, in the 1979 case of *Bell v. Wolfish*, several pretrial detainees initiated a class action lawsuit challenging the conditions of confinement at a custodial facility not only on their own behalf, but also on behalf of other detainees as well.[5] However, the named plaintiffs were transferred or released from the facility while the case was pending, and therefore were no longer being subjected to the allegedly unlawful conditions of confinement by the time the Supreme Court took up the case.[6] Although the named plaintiffs no longer had any *personal* stake in the outcome of the litigation, the class members who remain confined in that facility still potentially had live claims against the defendant.[7] To address cases of this sort, the Court has ruled that a justiciable controversy may potentially exist "between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot."[8] Put another way, "the termination of a class representative's claim does not" necessarily "moot the claims of the unnamed members of the class."[9] The Court, applying that principle, has occasionally

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[1] *See* Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 161 (2016); Cty. of Riverside v. McLaughlin, 500 U.S. 44, 51–52 (1991); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 395–409 (1980); Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 339–40 (1980); Bell v. Wolfish, 441 U.S. 520, 526 n.5 (1979); Swisher v. Brady, 438 U.S. 204, 213 n.11 (1978); Kremens v. Bartley, 431 U.S. 119, 127–36 (1977); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 430 (1976); Franks v. Bowman Transp. Co., 424 U.S. 747, 752–57 (1976); Bd. of Sch. Comm'rs of City of Indianapolis v. Jacobs, 420 U.S. 128, 128–30 (1975) (per curiam); Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975); Sosna v. Iowa, 419 U.S. 393, 397–403 (1975). The Court has emphasized, however, that the legal principles pertaining to mootness and class actions have little to no application outside the class action context. *See* United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1539 (2018) (explaining that the holdings in the cases listed above are "tied . . . to the class action setting from which [they] emerged"); Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 73–74 (2013) (holding that, because class "actions are fundamentally different from collective actions under the" Fair Labor Standards Act (FLSA), "the mere presence of collective-action allegations in [an FLSA] complaint cannot save the suit from mootness once the individual claim is satisfied").

[2] While it is also possible to bring a class action in federal court against a class of *defendants*, class actions on behalf of classes of *plaintiffs* are more common. *See* Fed. R. Civ. P. 23(a) ("One or more members of a class may sue *or be sued*.") (emphasis added).

[3] *See, e.g.*, Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 155–56 (1982) ("The class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only' . . . We have repeatedly held that 'a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.'") (quoting Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979); E. Tex. Motor Freight Sys. Inc. v. Rodriguez, 431 U.S. 395, 403 (1977)). *See generally* Fed. R. Civ. P. 23.

[4] *See, e.g.*, *Sosna*, 419 U.S. at 401 ("Although the controversy is no longer alive as to appellant Sosna, it remains very much alive for the class of persons she has been certified to represent.").

[5] *See Bell*, 441 U.S. at 523.

[6] *See id.* at 526 n.5.

[7] *See id.*

[8] *Sosna*, 419 U.S. at 402. *See also* Nielsen v. Preap, 139 S. Ct. 954, 962–63 (2019) (opinion of Alito, J., for three Justices) (concluding that class action case was not moot where "there was at least one named plaintiff with a live claim when the class was certified").

[9] *Bell*, 441 U.S. at 526 n.5 (quoting Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975)). *See also, e.g.*, Cty. of Riverside v. McLaughlin, 500 U.S. 44, 51 (1991) (same); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980) (holding that an "appeal of the denial of [a] class certification motion" "does not become moot upon expiration of the named plaintiff's substantive claim"). *But see* Azar v. Garza, 138 S. Ct. 1790, 1791–93 (2018) (per curiam) (dismissing a putative class action as moot without applying, analyzing, or mentioning this principle); Kremens v. Bartley, 431 U.S. 119, 132 (1977)

resisted efforts by defendants to moot a class action case by offering to pay the class representative's entire individual claim over the class representative's objection.[10] According to the Court, allowing a class action case to become moot "simply because the defendant has sought to 'buy off' the individual private claims of the named plaintiffs" would "frustrate the objectives of class actions" because it would "requir[e] multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment."[11] The Court has explicitly declined to decide, however, whether other methods of mooting a class action could be permissible, such as by "deposit[ing] the full amount of the plaintiff's individual claim in an account payable to the plaintiff" and then successfully convincing the court to "enter[ ] judgment for the plaintiff in that amount."[12] The lower courts have therefore "split on whether actual payment of full relief moots an individual's claim."[13] "The Supreme Court has not yet resolved the split, and commentators disagree on how the Court will ultimately decide the unresolved . . . question."[14]

ArtIII.S2.C1.9 Political Questions

ArtIII.S2.C1.9.1 Overview of Political Question Doctrine

Article III, Section 2, Clause 1:

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

The political question doctrine limits the ability of the federal courts to hear constitutional questions even where other justiciability requirements, such as standing, ripeness, and mootness, would otherwise be met.[1] The Supreme Court has stated that, for purposes of Article III of the Constitution,[2] "no justiciable 'controversy' exists when parties seek adjudication of a political question."[3] But the term "political question" is a legal term of art that on its face gives little indication of what sorts of cases the doctrine bars federal courts from deciding. The

(holding that a class action may be unable to proceed where an intervening event moots "not only the claims of the named plaintiffs but also the claims of a large number of unnamed plaintiffs").

[10] *See* Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 156 (2016) (holding that "an unaccepted offer to satisfy the named plaintiff's individual claim" does not "render a case moot when the complaint seeks relief on behalf of the plaintiff and a class of persons similarly situated"); Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 339 (1980) ("To deny the right to appeal simply because the defendant has sought to 'buy off' the individual private claims of the named plaintiffs would be contrary to sound judicial administration.").

[11] *Roper*, 445 U.S. at 339.

[12] *Campbell-Ewald*, 577 U.S. at 166 ("That question is appropriately reserved for a case in which it is not hypothetical.").

[13] Kuntze v. Josh Enters., Inc., 365 F. Supp. 3d 630, 640 (E.D. Va. 2019) (citing numerous cases).

[14] *Id.* at 641 (citing scholarly articles and treatises).

[1] Baker v. Carr, 369 U.S. 186, 198–99 (1962) (discussing difference between jurisdiction and "appropriateness of the subject matter for judicial consideration," known as "justiciability").

[2] U.S. Const. art. III, § 2.

[3] Massachusetts v. EPA, 549 U.S. 497, 516 (2007). *See also* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2005) ("The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does."); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974) ("[T]he presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party.").

ArtIII.S2.C1.9.1
Overview of Political Question Doctrine

phrase, which has its origins in Chief Justice John Marshall's landmark opinion in *Marbury v. Madison*,[4] is potentially misleading, as federal courts deal with political issues, in the sense of controversial and government-related issues, all the time.[5] Rather than referring generally to any such political issue, the term "political question" expresses the principle that some issues are either entrusted solely to another branch of government or are beyond the competence of the Judiciary to review. Finding that a matter qualifies as a political question divests federal courts of jurisdiction, meaning they lack the power to rule on the matter.[6]

The Supreme Court identified six factors relevant to the political question doctrine in the 1962 case *Baker v. Carr*:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[7]

The variation among the criteria emphasizes the diverse purposes that the doctrine is said to serve, embodying both separation of powers principles[8] and prudential concerns such as the competency of courts.[9] These six criteria appear in recent Supreme Court opinions applying the political question doctrine.[10] However, Justices of the Supreme Court have recognized confusion around the political question doctrine, both when *Baker* was decided and

[4] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–66 (1803) ("By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.").

[5] *See, e.g.*, Erwin Chemerinsky, Federal Jurisdiction § 2.6.1 (6th ed. 2012). *Cf.* Nixon v. Herndon, 273 U.S. 536, 540 (1927) (sustaining claim against judges of elections in Texas for refusing to allow a citizen to vote in violation of the Fifteenth Amendment and noting that "[t]he objection that the subject-matter of the suit is political is little more than a play upon words").

[6] Zivotofsky v. Clinton, 566 U.S. 189, 195 (2012) (holding that courts lack authority to decide political questions when there is a commitment of the issue to another department or where there is a lack of judicially discoverable and manageable standards for resolving them) (citing *Baker*, 369 U.S. at 217).

[7] *Baker*, 369 U.S. at 217.

[8] *Id.* (describing political questions as including cases involving "a textually demonstrable constitutional commitment of the issue to a coordinate political department" or "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government").

[9] *Id.* (describing political questions as including cases involving "a lack of judicially discoverable and manageable standards for resolving it").

[10] *See, e.g.*, *Zivotofsky*, 566 U.S. at 195–97. Despite the frequency with which courts cite the *Baker* criteria, a notable commentator has dismissed them as "useless in identifying what constitutes a political question." Chemerinsky, *supra* note 5, at § 2.6. *See also id.* ("The Constitution does not mention judicial review, much less limit it by creating 'textually demonstrable commitments' to other branches. Similarly, the most important constitutional provision . . . certainly do not include 'judicially discoverable and manageable standards.'"). That commentator is hardly alone in this sentiment. One treatise on justiciability notes that "application of the political-question tests of *Baker v. Carr* is so highly individualized as to suggest that there is no political question doctrine at all, but only a number of discrete questions that have been characterized as political." 13C Charles Alan Wright & Arthur R. Miller et al., Federal Practice and Procedure § 3534 (3d ed. Oct. 2020 Update). The same treatise concludes that "there is no workable definition of characteristics that might be found to distinguish political questions from judicial questions." *Id.*

subsequently.[11] Among other things, judges have disagreed on how to identify a political question, as well as on fundamental matters such as whether the political question doctrine originates in constitutional or prudential principles or what purpose the doctrine allegedly serves.[12]

So far, the Supreme Court has elected not to resolve these disputes in a comprehensive fashion. Despite these uncertainties, the doctrine remains alive and well today,[13] even if, as one treatise has stated, "the category of political questions 'is more amenable to description by infinite itemization than by generalization.'"[14] Following that pattern of itemization, the Court has applied the political question doctrine in some areas of foreign policy, Congress's internal governance, impeachment, and in cases involving partisan gerrymandering.[15] This essay explores all of these issues, tracing the development of the political question doctrine from its foundations in *Marbury* to its refinement in *Baker* to its modern applications.

ArtIII.S2.C1.9.2 Marbury v. Madison and Political Question Doctrine

Article III, Section 2, Clause 1:

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

The political question doctrine has its origins in the foundational case for judicial review, *Marbury v. Madison*.[1] *Marbury* involved a suit to force Secretary of State James Madison to deliver a signed commission to a newly appointed official, William Marbury.[2] The commission had been signed by the previous administration but not delivered; following the change in

[11] *See, e.g.*, *Baker*, 369 U.S. at 210 (stating that the political question doctrine has caused "[m]uch confusion."); *Zivotofsky*, 566 U.S. at 202 (Sotomayor, J., concurring in part and concurring in the judgment) (noting that "the proper application of *Baker*'s six factors has generated substantial confusion in the lower courts").

[12] *See* Martin H. Redish, *Judicial Review and the "Political Question"*, 79 Nw. U. L. Rev. 1031, 1039–43 (1985) (comparing "classical" interpretation of the political question doctrine, in which jurisdiction is withheld because the Constitution has textually committed the issue to another agency, and the "prudential" interpretation of the doctrine, in which rationales other than the text of the Constitution are used to justify judicial abdication). *Compare Schlesinger*, 418 U.S. at 215 ("[T]he concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Art[icle] III, embodies both the standing and political question doctrines upon which petitioners in part rely."); *Baker*, 369 U.S. at 198–99 (court's determination that the case presented no political question "settles the only possible doubt that it is a case or controversy"); *Id.* at 210 ("The nonjusticiability of a political question is primarily a function of the separation of powers."), *with id.* at 217 (noting that political questions may involve prudential concerns such as a "lack of judicially discoverable and manageable standards" or "the potentiality of embarrassment from multifarious pronouncements by various departments on one question").

[13] *See, e.g.*, *Zivotofsky*, 566 U.S. at 201 (reversing the lower court's conclusion that the case presented a political question and remanding to decide case on the merits).

[14] Wright & Miller, *supra* note 10, at § 3534.

[15] *See* ArtIII.S2.C1.9.5 Modern Political Question Doctrine, ArtIII.S2.C1.9.6 Foreign Affairs as a Political Question, and ArtIII.S2.C1.9.7 Congressional Governance as a Political Question.

[1] 5 U.S. (1 Cranch) 137, 165–66 (1803).

[2] *Id.* at 153–57.

presidential administrations, Madison refused to deliver it.[3] Among the issues presented in that case, the Court examined whether it even had the authority to adjudicate the legality of Madison's refusal to deliver the commission.[4] That question, according to Chief Justice John Marshall's opinion for the Court, turned on "the nature" of the government action in question. As the Court explained, "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[5] Thus, if the act of an official is one in which the "executive possesses a constitutional or legal discretion, nothing can be more perfectly clear that their acts are only politically examinable."[6] However, if a "specific duty is assigned by law, and individual rights depend on the performance of that duty," then injured individuals have a right to resort to the courts.[7] According to the Chief Justice, "[t]he power of nominating to the senate, and the power of appointing the person nominated" were political questions, and fundamentally unreviewable.[8] By contrast, "if, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defense had depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority."[9] Ultimately, the Court concluded that the question of whether to deliver Marbury's commission was not a political one, as Marbury had a legal right in the appointment.[10]

Although the Court in *Marbury* opined that it could not decide "[q]uestions[ ] in their nature political," that case did not articulate the political question doctrine as the concept is understood today—a rule that deprives the federal courts of jurisdiction to hear certain cases, including cases involving claims of constitutional rights.[11] Rather, *Marbury* indicated only that some decisions are inherently discretionary and are therefore immune from judicial scrutiny because there is no enforceable legal right at stake.

In the years following *Marbury*, the Court invoked the political question doctrine when deferring to the factual or policy determinations of the other branches in certain categories of cases.[12] For example, the Court held in the 1827 case *Martin v. Mott*,[13] that the legality of the President's decision to call out the militia in response to a supposed national emergency was beyond judicial scrutiny.[14] Similarly, in *Williams v. Suffolk Insurance Co.*,[15] an 1839 case raising the question of who ruled the Falkland Islands, the Court concluded that the Executive

[3] *Id.*

[4] *Id.* at 165.

[5] *Id.* at 170.

[6] *Id.* at 166.

[7] *Id.*

[8] *Id.* at 167. *See also* Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 112–13 (1948) ("[A]dministrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship . . . [t]o revise or review an administrative decision, which has only the force of a recommendation . . . would be to render an advisory opinion.").

[9] *Marbury*, 5 U.S. (1 Cranch) at 167.

[10] *Id.*

[11] *See* ArtIII.S2.C1.9.5 Modern Political Question Doctrine, ArtIII.S2.C1.9.6 Foreign Affairs as a Political Question, and ArtIII.S2.C1.9.7 Congressional Governance as a Political Question.

[12] Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. Rev. 1908, 1911–12 (2015) (arguing that nineteenth century "political-question doctrine" was simply an application of deference by the judicial branch to the factual determinations made by the other branches).

[13] 25 U.S. (12 Wheat.) 19 (1827).

[14] *Id.* at 32–33.

[15] 38 U.S. (13 Pet.) 415 (1839).

had the final word on questions of foreign sovereignty.[16] The Court also concluded that this deference in the realm of foreign affairs applied to the President's authority to enter into treaties.[17] In several cases from the nineteenth and early twentieth centuries, the Court also expressed a willingness to defer to Congress with respect to certain legal questions. For example, the Court concluded that the Judiciary was required to defer absolutely to congressional recognition of Indian tribes,[18] as well as congressional determinations of when wars begin and when they conclude.[19]

ArtIII.S2.C1.9.3 Luther v. Borden and Guarantee Clause

Article III, Section 2, Clause 1:

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

In 1849, in the case *Luther v. Borden*,[1] the Court expanded the political question doctrine and took another step toward the modern judicial approach to political questions. *Luther* arose out of a rebellion against the government of Rhode Island due to the state constitution, which

[16] *Id.* at 420 ("[W]hen the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department."). *See also* Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) (holding that courts could not reexamine the validity of a levy by a Mexican commanding general during a Mexican civil war); Jones v. United States, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political[ ] question, the determination of which by the legislative and executive departments of any government conclusively binds the judges."); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 308–09 (1829) ("A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the legislature.").

[17] Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1854) (holding that the duty of courts with respect to a treaty is "to interpret it and administer it according to its terms," not to evaluate whether "the person who ratified the treaty on behalf of a foreign nation had the power" to enter it). *See also* Clark v. Allen, 331 U.S. 503, 514 (1947) (holding that the question of whether a treaty survived the war with Germany is "essentially a political question" and "[w]e find no evidence that the political departments have considered the collapse and surrender of Germany as putting an end" to treaty obligations); Terlinden v. Ames, 184 U.S. 270, 289–90 (1902) (concluding that the validity of extradition treaty between Kingdom of Prussia and United States was a political question, observing that both governments acted as though the treaty was still valid and the Court had no authority to say otherwise).

[18] United States v. Sandoval, 231 U.S. 28, 45–46 (1913) ("Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage."); United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1866) ("In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.").

[19] Commercial Tr. Co. v. Miller, 262 U.S. 51, 57 (1923). *See also* The Protector, 79 U.S. (12 Wall.) 700, 701 02 (1871) ("Acts of hostility by the insurgents occurred at periods so various, and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and the close of the late civil war, that it would be difficult, if not impossible, to say on what precise day it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates.").

[1] 48 U.S. (7 How.) 1 (1849).

significantly limited the right to vote.[2] Rhode Island citizens who had become dissatisfied with the existing regime held a constitutional convention, called elections, and declared the winners the valid government of Rhode Island.[3] When the existing "charter government" opposed these efforts and declared the conduct illegal, the newly elected governor of the rebel government, Thomas Dorr, gathered an armed force to assert the legitimacy of his government and its constitution.[4] In response, the charter government called the militia and declared martial law.[5] In the course of events, charter government agents broke into plaintiff Luther's house in order to arrest him for his support of Dorr.[6] Luther then sued for trespass.[7] The question of the legitimacy of the home break-in necessarily gave rise to the question of which government—the charter government or the rebel government—was the legitimate government of the state at the time of the break-in.

Luther alleged that the charter government that authorized the break-in was unconstitutional, in part because the voting restrictions in the Rhode Island constitution violated the U.S. Constitution's Guarantee Clause,[8] which states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[9] The Supreme Court refused to reach the question, instead concluding that the question of which government was lawful, and whether a government was a "republican" one, was a political question for Congress to decide and entirely outside the purview of the Judiciary.[10] In an opinion by Chief Justice Roger Taney, the Court held that courts were not institutionally competent to judge republicanism or governmental legitimacy because judicial standards were lacking.[11] Further, an attempt to judge whether a government was legitimate could undermine other branches and ultimately cast all the acts of the questioned government into doubt: as the Court explained, "[i]f the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, not of order."[12] The Court concluded that while a court should "always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action."[13] In the years following *Luther* to the present, the Court has routinely held that cases involving the Guarantee Clause present nonjusticiable political questions.[14]

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[2] William M. Wiecek, The Guarantee Clause of the U.S. Constitution 86–97 (1972); *see also Luther*, 48 U.S. (7 How.) at 35–36 ("For some years previous to the disturbances of which we are now speaking, many of the citizens became dissatisfied with the charter government, and particularly with the restriction upon the right of suffrage.").

[3] *Luther*, 48 U.S. (7 How.) at 35–36.

[4] *Id.*

[5] *Id.* at 36–37.

[6] *Id.* at 37.

[7] *Id.* at 34.

[8] The Supreme Court's opinion seems to assume that *Luther* had argued that the charter government was unconstitutional, at least in part, because of the Guarantee Clause. *See id.* at 35–36 (discussing the Guarantee clause). However, scholars have argued that *Luther* never raised the Guarantee Clause issue and that the Court's discussion on this issue was dicta. *See e.g.*, Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. Rev. 1908, 1927–29 & n.108 (2015) (noting that "review of the record indicates that the plaintiff did not raise [a Guarantee Clause] claim" and suggesting that Chief Justice Roger B. Taney may have chosen to mention the Guarantee Clause to influence debates over slavery).

[9] U.S. Const. art. IV, § 4.

[10] *Luther*, 48 U.S. (7 How.) at 35–36 ("Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. . . . Yet the right to decide is placed there, and not in the courts.").

[11] *Id.*

[12] *Id.* at 36.

[13] *Id.* at 39.

[14] *See, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S 787, 795 n.3 (2015) (noting that the question of whether the Guarantee Clause was violated by way of referendum process was a nonjusticiable

ArtIII.S2.C1.9.4 From Coleman v. Miller to Baker v. Carr

Article III, Section 2, Clause 1:

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

The Supreme Court also applied the political question doctrine in the 1939 case *Coleman v. Miller*.[1] In *Coleman*, the Court addressed the Kansas legislature's recent approval of the proposed Child Labor Amendment to the Constitution, which had been submitted to the states for ratification thirteen years prior.[2] Members of the Kansas legislature who had voted against the amendment petitioned for a writ of mandamus, seeking to revoke the approval.[3] They raised certain procedural challenges to the ratification and argued that the passage of time had rendered Kansas's approval of the amendment invalid.[4] The opinion of the Court, authored by Chief Justice Charles Evans Hughes, affirmed an opinion from the Supreme Court of Kansas denying the plaintiffs' petition.[5] Chief Justice Hughes's opinion explained that the "efficacy of ratifications by state legislature . . . should be regarded as a political question pertaining to the political departments."[6] The Court further clarified, citing to *Luther*, that it was a question solely for Congress, and not for the courts, whether an amendment had been adopted within a "reasonable time."[7]

It was against this background that the Court decided *Colegrove v. Green*,[8] in 1946. By that time, movement of populations from rural to urban areas had led to severe

political question); City of Rome v. United States, 446 U.S. 156, 182 n.17 (1980) (refusing to reach merits of Guarantee Clause challenge to preclearance requirements of Voting Rights Act, as such challenge was nonjusticiable); Baker v. Carr, 369 U.S. 186, 223–24 (1962) (citing many cases holding Guarantee Clause challenges nonjusticiable, but holding that this had no effect on Equal Protection challenge to malapportionment in Tennessee); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 133–36, 151 (1912) (concluding that the question of whether amendment to Oregon constitution adding initiative and referendum procedures was nonjusticiable political question; concluding that "[a]s the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not, therefore, within the reach of judicial power"); Taylor v. Beckham, 178 U.S. 548, 578–80 (1900) (holding that court had no jurisdiction over challenge to gubernatorial election in Kentucky based on Guarantee Clause; "enforcement of this guaranty belong[s] to the political department"). *But see* New York v. United States, 505 U.S. 144, 184–85 (1992) (noting that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions").

[1] 307 U.S. 433 (1939).

[2] *Id.* at 435–36.

[3] *Id.* at 436.

[4] *Id*.

[5] The splintered opinions in *Coleman* make it difficult to determine the Court's holding. Although Justice Charles Evans Hughes's opinion was styled "the opinion of the Court," it was joined by only two other justices. Four other justices concurred in the judgment, in twin opinions by Justices Felix Frankfurter and Hugo Black arguing that the petitioners lacked standing. *Id.* at 456–59. Two other justices, Justices Pierce Butler and James McReynolds, dissented. But, as the Supreme Court later explained in analyzing the multiple opinions in *Coleman*, "even though there were only two Justices who joined Chief Justice Charles Evans Hughes' opinion on the merits, it is apparent that the two dissenting Justices joined his opinion as to the standing discussion. Otherwise, Justice Felix Frankfurter's opinion denying standing would have been the controlling opinion." Raines v. Byrd, 521 U.S. 811, 822 n.5 (1997) (discussing the various opinions in *Coleman*).

[6] *Coleman*, 307 U.S. at 450.

[7] *Id.* at 454.

[8] 328 U.S. 549 (1946).

"malapportionment" in state legislatures.[9] Throughout the country, state legislative districts were drawn such that voters in rural areas had disproportionate power compared to their urban counterparts. State governments, made up of the representatives of those rural voters, were unwilling to fix this problem.[10] As a result, voters in underrepresented districts turned to the courts and the Constitution for a remedy. In *Colegrove*, a seven-member Court was presented with a constitutional challenge to an Illinois districting arrangement where plaintiffs were members of districts with much larger populations than other districts.[11] The challenge was based, in part, on the Guarantee Clause, as well as on the Fourteenth Amendment. A plurality[12] of three Justices joined an opinion by Justice Felix Frankfurter, concluding that the Court lacked jurisdiction in light of the "peculiarly political nature" of the case.[13] The plurality noted that under Article I, Section 4 of the Constitution, "The Times, Places and Manner of holding Elections for . . . Representative, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."[14] Citing that provision, the plurality concluded that the authority to regulate state districting rested "exclusively" with Congress, and courts had no authority to "enter this political thicket."[15] The *Colegrove* plurality's view of the political question doctrine, as the Supreme Court later recognized, "left pervasive malapportionment unchecked."[16]

Sixteen years later, the Court confronted malapportionment again in *Baker v. Carr*.[17] Rejecting *Colegrove*, the *Baker* Court set forth the modern rule on political questions and justiciability.[18] In *Baker*, the Court addressed an equal protection challenge to malapportioned

[9] Erwin Chemerinsky, Federal Jurisdiction § 2.6.3 (6th ed. 2012).

[10] *Id*. *See also* Reynolds v. Sims, 377 U.S. 533, 567 (1964) ("The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated.") (footnote omitted).

[11] *Colegrove*, 328 U.S. at 550.

[12] When no majority of the Supreme Court agrees on an opinion in a case, the Court may issue a plurality opinion articulating the reasoning that received the most votes. The Supreme Court has stated, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)). For discussion of the precedential value of plurality decisions, see Kevin M. Lewis, *What Happens When Five Supreme Court Justices Can't Agree?*, Cong. Research Serv. (June 4, 2018), https://crsreports.congress.gov/product/pdf/LSB/LSB10113.

[13] *Colegrove*, 328 U.S. at 552 (holding that a complaint alleging that "great mass of the white population intends to keep the blacks from voting" had no judicial remedy, "[u]nless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all the plaintiff could get from equity would be an empty form") (citing Giles v. Harris, 189 U.S. 475, 487–88 (1903)). Justice Wiley Rutledge concurred in the result in *Colegrove*, getting the Court to a majority of four votes. *Id.* at 564 (Rutledge, J., concurring in the result). However, Justice Wiley Rutledge would have dismissed for want of equitable power to grant relief, rather than a want of jurisdiction because of the presence of a political question. *Id.* at 565.

[14] U.S. Const. art. I, § 4, cl. 1.

[15] *Colegrove*, 328 U.S. at 556.

[16] Evenwel v. Abbott, No. 14-940, slip op. at 2 (U.S. Apr. 4, 2016).

[17] 369 U.S. 186, 217 (1962).

[18] One year prior to *Baker*, the Court ruled, in the 1960 case Gomillion v. Lightfoot, 364 U.S. 339 (1960), in an opinion by Justice Felix Frankfurter, that *Colegrove* did not form an obstacle to a challenge to an election district allegedly drawn to remove Black voters from the district. *Id.* at 346–48. *See also* Shaw v. Hunt, 517 U.S. 899, 904–05 (1996) (concluding that standing existed in an equal protection challenge to North Carolina districting based on race); Miller v. Johnson, 515 U.S. 900, 922 (1995) (holding that an allegation that race was the legislature's rationale in drawing district lines could go forward, even though Department of Justice concluded that racial districting is necessary under the Voting Rights Act).

districts in the State of Tennessee[19] and concluded that, notwithstanding the political question doctrine, the plaintiffs' challenge to the state legislative map could proceed.[20] The Court in *Baker* identified the six criteria for "political question" cases listed above, reviewed areas where the Court had previously applied the political question doctrine, and concluded that past challenges brought under the Guarantee Clause had failed largely due to a lack of "judicially manageable standards."[21] By contrast, the Court reasoned, "[j]udicial standards under the Equal Protection Clause are well developed and familiar."[22] Shortly after *Baker*, the Supreme Court found the "judicially manageable standard" it was looking for, and articulated the so-called "one-person-one-vote" rule to overturn malapportioned districts.[23] Since *Baker*, courts have consistently determined that challenges to state legislative apportionment are justiciable.[24]

ArtIII.S2.C1.9.5 Modern Political Question Doctrine

Article III, Section 2, Clause 1:

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

The *Baker* criteria are quoted in virtually every case involving the political question doctrine. However, since *Baker*, the Court has applied the doctrine on relatively few occasions and has taken a fairly narrow view of its reach. As a result, it remains the case that the "political question doctrine can only be understood by examining the specific areas where the Supreme Court has invoked it."[1] Since *Baker*, those areas include cases involving some aspects of foreign policy, congressional internal regulation, impeachment, and partisan gerrymandering.[2]

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[19] In *Baker*, unlike *Gomillion*, the plaintiffs did not allege any discrimination in drawing of the districts, but rather that their equal protection rights under the Fourteenth Amendment were violated by the "debasement" of their votes, insofar as their votes counted "less" than voters in other districts. *Baker*, 369 U.S. at 187–88.

[20] *Id.* at 237.

[21] *Id.* at 223 ("[T]he only significance that *Luther* could have for our immediate purposes is in its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government.").

[22] *Id.* at 226.

[23] *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964). *See also* Wesberry v. Sanders, 376 U.S. 1, 18 (1964) ("While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal[.]").

[24] *See also* U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 456–59 (1992) (concluding that congressional apportionment of congressional districts among states did not involve nonjusticiable political question).

[1] Erwin Chemerinsky, Federal Jurisdiction § 2.6.1 (6th ed. 2012).

[2] In other areas, the Court has declined to invoke the political-question doctrine. Some cases in this category are discussed below. *See also, e.g.*, Cty. of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 248–50 (1985) (holding that damages claims for tribal land use brought by certain Indian nations was justiciable even though case involved Congress's authority over Indian affairs); Elrod v. Burns, 427 U.S. 347, 351–53 (1976) (holding that dismissal of state public employees because of partisan affiliation did not involve political questions because the political question doctrine was only implicated in cases involving separation of powers).

ArtIII.S2.C1.9.6 Foreign Affairs as a Political Question

Article III, Section 2, Clause 1:

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

One area where the political question doctrine has significant importance is in foreign affairs. In 1918, the Court wrote that "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative'—the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."[1] However, despite that sweeping statement, as the Court recognized in *Baker*, not "every case or controversy which touches foreign relations lies beyond judicial cognizance;" rather, the Court analyzes each question on a case-by-case basis.[2] For example, many pre-*Baker* cases concluded that the Judiciary was bound to defer to the political department on certain questions involving the validity of treaties[3] or the recognition of foreign governments.[4] The *Baker* Court characterized those cases as ones in which "resolution of such issues frequently turn on standards that defy judicial application, . . . involve the exercise of a discretion demonstrably committed to the executive or legislature . . . [or] uniquely demand single-voiced statement of the Government's views."[5]

The first major post-*Baker* case to consider these principles was the 1973 case *Gilligan v. Morgan*.[6] In *Gilligan*, the Supreme Court determined that the political question doctrine was one reason to bar a suit for broad equitable relief against the Governor of Ohio that alleged that the training of the Ohio National Guard was defective, leading to the violence that occurred at Kent State University three years earlier.[7] The plaintiffs sought a "judicial evaluation of the appropriateness of the 'training, weaponry and orders' of the Ohio National Guard" and "continuing judicial surveillance" over the Guard to ensure compliance with any court-approved requirements.[8] Although the case did not involve foreign policy, it raised related considerations. Recognizing that the case involved "[t]he complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force,"[9] the Court gave two reasons why the political question doctrine applied. First, Article I, Section 8 of the Constitution gives the authority for "organizing, arming, and disciplining the Militia" to Congress.[10] Second, in concert with the explicit textual commitment of military

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[1] Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) (holding that courts could not reexamine the validity of a levy by a Mexican commanding general during a Mexican civil war).

[2] Baker v. Carr, 369 U.S. 186, 211–12 (1962)

[3] *See* Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

[4] *See* Commercial Tr. Co. v. Miller, 262 U.S. 51, 57 (1923). *See also* The Protector, 79 U.S. (12 Wall.) 700, 701–02 (1871).

[5] *Baker*, 369 U.S. at 211.

[6] 413 U.S. 1 (1973).

[7] *Id.* at 5–6.

[8] *Id.* at 6.

[9] *Id.* at 10.

[10] *Id.* at 6–7 (citing U.S. Const. art. I, § 8).

supervision to a branch outside the Judiciary, the Court recognized that the Judicial Branch was uniquely poorly suited to supervise this activity: "[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence."[11] Following what *Baker* called the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion,"[12] the Court concluded that the case involved a political question.

The Court next considered whether it could hear a case involving a foreign policy question in 1979, in *Goldwater v. Carter*.[13] *Goldwater* involved the question of whether courts could entertain a lawsuit by Members of Congress over the President's unilateral termination of a joint defense treaty with Taiwan. The plaintiff Members argued that this unilateral action deprived them of their constitutional role with respect to a change in the supreme law of the land.[14] The Court voted to dismiss the case without hearing oral argument. Although six Justices voted to dismiss for want of jurisdiction, no opinion received five votes. Justice William Rehnquist, writing for a plurality of four Justices, argued that the question presented was nonjusticiable "because it involve[d] the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President."[15] The plurality made three main points in support of the lack of justiciability. First, the question involved separation of powers between two branches, each with resources "available to protect and assert its interests."[16] Second, the question involved foreign affairs. Finally, the Constitution was silent on the question presented, providing no standards to evaluate the question of the role of Congress in the termination of treaties.[17] The fifth vote was provided by Justice Lewis Powell, who agreed that the complaint should be dismissed, but for the lack of a ripe dispute, rather than on political question grounds.[18] Justice Thurgood Marshall also concurred in the dismissal, but provided no reasoning to support his decision.[19]

In other cases, however, the Supreme Court has explicitly rejected the application of the political question doctrine, notwithstanding a foreign affairs or foreign treaty dimension to the case. For example, in *Japan Whaling Ass'n v. American Cetacean Society*,[20] the Court found that the political question doctrine did not prevent federal courts from adjudicating a question involving the interpretation of the International Convention for the Regulation of Whaling.[21] Citing *Baker*, the Court noted that not every matter that touches foreign relations or foreign treaties was nonjusticiable; rather, the question was whether the case "revolve[d] around policy choices and value determinations constitutionally committed for resolution" to the other branches.[22] In *Japan Whaling*, the question presented was whether the Secretary of

[11] *Id.* at 10.

[12] *Baker*, 369 U.S. at 217).

[13] 444 U.S. 996 (1979).

[14] *Id.* at 997–98 (Powell, J., concurring in the judgment).

[15] *Id.* at 1002 (Rehnquist, J., concurring in the judgment).

[16] *Id.* at 1004.

[17] *Id.*

[18] *Id.* at 998 (Powell, J., concurring in the judgment).

[19] *Id.* at 996. The other three Justices were split on the case. Justices White and Harry Blackmun agreed that the case should have been granted certiorari, but did not express an opinion on the merits or on the justiciability question and argued that the Court should not have passed on these questions without oral argument. *Id.* at 1006 (Blackmun, J., dissenting in part). Justice William Brennan argued that the Court should not have dismissed the case and would have affirmed the lower court's opinion on the merits. *Id.* at 1006 (Brennan, J., dissenting).

[20] 478 U.S. 221 (1986).

[21] *Id.* at 229–30.

[22] *Id.* at 230. *See also* Bond v. United States, 572 U.S. 844, 856–58 (2014) (reviewing case involving a criminal statute enacting the International Convention on Chemical Weapons, but not finding it necessary to "interpret the

Commerce should have certified Japan as "diminishing the effectiveness" of the International Whaling Commission's quotas under statutes that purportedly required the Secretary to do so.[23] According to the Court, this question involved "applying no more than the traditional rules of statutory construction" in interpreting the Convention and the statutes at issue, and as such, did not present a political question.[24]

The Court again found it had authority to make limited constitutional determinations in the foreign policy context in *Boumediene v. Bush*.[25] There, the Court considered whether it could entertain habeas petitions from prisoners designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba.[26] The United States argued that, because Guantanamo Bay was not a part of the United States, the United States had no sovereignty over it, and as such, the writ of habeas could not extend to prisoners held there.[27] The Court agreed that, because the question of who held sovereignty over the location was a political question, it would "not question the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay."[28] However, the Court went on to hold that nothing barred it from considering the "practical sovereignty" or "objective degree of control" the United States had over Guantanamo Bay.[29] Previous cases designating sovereignty as a political question, the Court asserted, had referred to sovereignty in the "narrow, legal sense of the term," rather than the "colloquial sense."[30] Further, as it was this colloquial sense that was relevant to the habeas writ, the Court reasoned that it had jurisdiction to evaluate the prisoners' claims.[31]

The Court's embrace of a narrow conception of the political question doctrine continued in the most recent case to consider the political question limits to federal court jurisdiction in foreign affairs, *Zivotofsky v. Clinton*.[32] In *Zivotofsky*, the Court concluded that the political question doctrine could not justify refusing to hear cases involving the constitutionality of a federal statute. There, the Court addressed a statute that provided that Americans born in Jerusalem may elect to have "Israel" listed as the place of birth on their passports.[33] When the State Department refused to follow that law under a long-standing policy of not taking a position on the political status of Jerusalem, plaintiff Zivotofsky sued to enforce the statute.[34] The Supreme Court concluded that the political question doctrine did not bar it from hearing the case; as the Court noted, the courts were "not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United

scope of the Convention"); Missouri v. Holland, 252 U.S. 416, 434 (1920) (concluding that statute enacting the Migratory Bird Treaty between the United States and Great Britain was valid).

[23] *Japan Whaling*, 478 U.S. at 227–29.

[24] *Id.* at 230.

[25] 553 U.S. 723 (2008).

[26] *Id.* at 732–33.

[27] *Id.* at 753.

[28] *Id.* at 753–54 ("[D]etermination of sovereignty over an area is for the legislative and executive departments.") (citing Vermilya-Brown Co. v. Connell, 335 U.S. 377, 380 (1948)).

[29] *Id.* at 754.

[30] *Id.*

[31] *Id.* at 754–55 ("Accordingly, for purposes of our analysis, we accept the Government's position that Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay. . . . [H]owever, we take notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory.").

[32] 566 U.S. 189 (2012).

[33] *Id.* at 191.

[34] *Id.*

States policy toward Jerusalem should be."[35] Instead, the court was being asked to engage in the "familiar" exercise of determining what the statute meant, and whether it was constitutional.[36] The Court concluded that this exercise would require careful examination of the "textual, structural, and historical evidence" but that this was "what courts do," and the difficulty of the problem was no justification for avoiding it.[37]

ArtIII.S2.C1.9.7 Congressional Governance as a Political Question

Article III, Section 2, Clause 1:

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

The Supreme Court has also applied the political question doctrine to cases involving the internal governance of the Congress, though recent decisions have construed the doctrine narrowly in this context. In the pre-*Baker* case *Marshall Field & Co. v. Clark*,[1] plaintiffs challenging a tariff law contended that the law was invalid because a section of the bill passed by Congress was omitted from the final version of the law signed by the President.[2] The Court concluded that it could not adjudicate this issue; because of the "respect due to a co-ordinate branch of the government," the Court had to take as "conclusive" the fact that the act was attested by the signatures of the presiding officers of the houses of Congress and approved by the President.[3] *Baker* explained that *Clark* signified the need for "respect" to coequal branches and for "finality and certainty" about statutes.[4] A few cases since *Baker* have added color to the concept of "respect" in this context.

For example, in *Powell v. McCormack*,[5] an individual elected to the House of Representatives challenged a House resolution excluding him from his seat in Congress. Although the Member-elect met the age and citizenship requirements in Article I, Section 2, the House found that he had misrepresented travel expenses and made illegal salary payments to his wife.[6] The defendants—Members and officers of the House—argued that the text of the Constitution, specifically Article I, Section 5, gave Congress exclusive authority to judge the qualifications of its own Members, so Congress could determine that the Member

[35] *Id.* at 196.

[36] *Id.*

[37] *Id.* at 201.

[1] 143 U.S. 649 (1892).

[2] *Id.* at 668–69, 672.

[3] *Id.* at 673. *Cf.* United States v. Ballin, 144 U.S. 1, 4 (1892) (holding that where Senate journal speaks on whether a quorum was present, "it must be assumed to speak the truth").

[4] Baker v. Carr, 369 U.S. 186, 214 (1962).

[5] 395 U.S. 486 (1969).

[6] U.S. Const. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.").

was unqualified.[7] The Supreme Court held that the case could go forward and that the Member-elect was entitled to relief.[8] On the question of justiciability, the Court explained that, despite the text the defendants cited from Article I, Section 5, there was no "textually demonstrable commitment" of this constitutional question to another branch.[9] At most, the Constitution gave Congress the power to judge the "qualifications expressly set forth in the Constitution," not the power to set new qualifications.[10] Nor did the Court conclude that "lack of the respect due co-ordinate branches" barred hearing the case, notwithstanding that it was interpreting the Constitution "in a manner at variance with the construction given the document by another branch." [11] In the view of the *Powell* Court, constitutional conflicts with other branches were inevitable under the constitutional system and were no excuse for avoiding a case where there existed "judicially manageable standards" sufficient to judge the question.[12]

Similar principles animated the Court's decision in *INS v. Chadha*.[13] There, the Court considered the constitutionality of a provision of the Immigration and Nationality Act authorizing one House of Congress, by resolution, to invalidate a decision of the Executive Branch to suspend the deportation of an alien.[14] The United States argued that *Chadha* presented a nonjusticiable political question, because Article I granted Congress the power to "establish a uniform Rule of Naturalization," providing it with unreviewable authority over the regulation of aliens.[15] As in *Powell*, the Court rejected the application of the political question doctrine.[16] The Court, in an opinion by Chief Justice Warren Burger, observed that what was at issue was not Congress's plenary authority over aliens, but rather whether it had chosen "a constitutionally permissible means of implementing that power."[17] Because that latter question was squarely within the Judiciary's purview, the political question doctrine did not bar consideration of the case, regardless of the fact that judicial review limited Congress's authority as a practical matter.[18]

Respect for the coordinate branches also did not prevent the Court from reaching the merits of the dispute in *United States v. Munoz-Flores*,[19] which concerned whether a federal statute violated the Origination Clause of the Constitution, a provision that requires revenue-raising legislation to originate in the House of Representatives.[20] In that case, Munoz-Flores was ordered to pay a special assessment under the Victims of Crime Act of 1984

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[7] 395 U.S. at 519 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members[.]") (citing U.S. Const. art. I, § 5, cl. 1).

[8] *Id.* at 489.

[9] *Id.* at 548.

[10] *Id.*

[11] *Id.* at 549. *But see* Roudebush v. Hartke, 405 U.S. 15, 18–19 (1972) (noting that "[w]hich candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question" with respect to which of two candidates is entitled to be seated in a close election); Reed v. Cty. Comm'rs, 277 U.S. 376, 388 (1928) (The Senate "is the judge of the elections[.] . . . It is fully empowered, and may determine such matters without the aid of the House of Representatives or the executive or judicial department.").

[12] 395 U.S. at 549.

[13] 462 U.S. 919, 940 (1983).

[14] *Id.* at 923.

[15] *Id.* at 940 (citing U.S. Const. art. I, § 8.).

[16] *Id.* at 942–93.

[17] *Id.* at 941.

[18] *Id.* at 941–42 ("No policy underlying the political question doctrine suggests that Congress or the Executive . . . can decide the constitutionality of a statute; that is a decision for the courts.").

[19] 495 U.S. 385 (1990).

[20] U.S. Const. art. I, § 7, cl. 1 ("All bills for raising Revenue shall originate in the House of Representatives[.]").

and challenged the statute as unconstitutional because the bill was "for raising revenue" and did not originate in the House of Representatives.[21] The Government objected that hearing the case expressed a "lack of respect" for the House: in the Government's view, the House made an unreviewable determination that the Act was not for the purpose of raising revenue when it passed the legislation.[22] The Court rejected that argument, holding that Munoz-Flores's challenge was no different than any other constitutional challenge to a law involving separation of powers, and judicial review did not evidence a "lack of respect."[23]

ArtIII.S2.C1.9.8 Impeachment and Political Question Doctrine

Article III, Section 2, Clause 1:

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

In 1993, the Court applied the political question doctrine to a judicial challenge to impeachment proceedings. In *Nixon v. United States*, a former federal judge challenged his removal by the Senate.[1] He argued that the Senate proceedings used to convict him, which allowed a committee of Senators, rather than the whole Senate, to hear evidence against him after he was impeached by the House, violated the constitutional requirement that the Senate "try all Impeachments."[2] In an opinion by Chief Justice William Rehnquist, the Court held that *Nixon* presented a nonjusticiable political question.[3] A few primary considerations motivated the Court's conclusion. First, the Court noted that the text of the Constitution gives the Senate "sole" authority to try impeachments, which, according to the Court, amounted to a sufficient "textual commitment" of the question as to what "try" meant to a coordinate department.[4] Second, the Court noted that the existence of a firm textual commitment was strengthened by a lack of "judicially manageable standards" in the vagueness of the word "try"; the Court contrasted that vague term with the concrete requirement that convictions require a two-thirds vote, concluding that the Senate was intended to have discretion over the precise procedures for impeachments.[5] The Court distinguished the alleged "textual commitment" that was insufficient in *Powell v. McCormack*, maintaining that the textual commitment to the Senate of defining "try" did not undermine any other provision to the Constitution, such as the enumerated qualifications set forth in Article I, Section 5 that were at stake in *Powell*.[6] Altogether, the Court concluded that without a judicially manageable standard to limit the

[21] 495 U.S. at 387–88.

[22] *Id.* at 391–92.

[23] *Id.* at 393. The Court ultimately rejected Munoz-Flores's challenge on the merits and held that the Victims of Crime Act was not a bill "for raising revenue." *Id.* at 400.

[1] 506 U.S. 224 (1993).

[2] *Id.* at 229 ("The Senate shall have the sole Power to try all Impeachments") (citing U.S. Const. art. I, § 3, cl. 6).

[3] *Id.* at 238.

[4] *Id.* at 235–36.

[5] *Id.* at 228–29.

[6] *Id.* at 237–38 (citing Powell v. McCormack, 395 U.S. 486, 519 (1969)).

Senate's authority, such as the specific textual rules on qualifications that were present in *Powell*, it could not overturn the Senate's judgment.[7]

ArtIII.S2.C1.9.9 Political Process, Elections, and Gerrymandering

Article III, Section 2, Clause 1:

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

Finally, the Court in the modern era has applied the political question doctrine to some aspects of legislative regulation of elections,[1] particularly in the area of partisan gerrymandering. Partisan gerrymandering is "the practice of dividing a geographic area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength."[2] Government officials seeking to draw legislative districts to affect election results may adopt several different tactics. For instance, they may create districts containing different numbers of voters, effectively diluting the votes of individuals in more populous districts.[3] In the alternative, legislators may create districts that contain equal numbers of voters, but where boundaries are drawn to manipulate the concentration of voters in each district based on characteristics such as voters' race or their political affiliation. The Supreme Court has held that Equal Protection challenges to race-based gerrymandering and one-person-one-vote claims based on unequal districts are justiciable.[4] However, for decades the Court was unable to agree on an approach to challenges to *partisan* gerrymandering.

Unlike one-person-one-vote cases, a partisan gerrymandering case typically involves a voter in a district that is not malapportioned based on population, but rather has been drawn to disadvantage one political party. In the words of the Supreme Court, in a political gerrymander, voters affiliated with a disfavored party are either (1) "packed" into a few districts—in effect conceding those districts by large margins and "wasting" votes that could help the disfavored party compete in other areas—or (2) "cracked" into small groups and

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[7] *Id.*

[1] The Court appears to have applied the political-question doctrine, without explicitly identifying the doctrine, in the election context but outside the gerrymandering context in O'Brien v. Brown, 409 U.S. 1 (1972) (per curiam). In *O'Brien*, the Court addressed an application to stay an order of the U.S. Court of Appeals for the District of Columbia, which had held that the action of the Democratic Party's National Convention's Credentials Committee in refusing to seat certain delegates was unconstitutional. *Id.* at 2. The Court granted the stay, noting that "[w]e must also consider the absence of authority supporting the action of the Court of Appeals in intervening in the internal determinations of a national political party, on the eve of its convention, regarding the seating of delegates. . . . Judicial intervention in this area has traditionally been approached with great caution and restraint." *Id.* at 4 (citing Luther v. Borden, 48 U.S. (7 How.) 1 (1849)).

[2] Black's Law Dictionary 696 (7th ed. 1999). *See also* Rucho v. Common Cause, No. 18-422, slip op. at 8 (U.S. June 27, 2019) ("In 1812, Governor of Massachusetts and future Vice President Elbridge Gerry notoriously approved congressional districts that the legislature had drawn to aid the Democratic-Republican Party. The moniker 'gerrymander' was born when an outraged Federalist newspaper observed that one of the misshapen districts resembled a salamander.").

[3] Unequal districting, also known as malapportionment, was at issue in *Baker v. Carr*. *See* ArtIII.S2.C1.9.1 Overview of Political Question Doctrine.

[4] Shaw v. Reno, 509 U.S. 630 (1993).

spread across multiple districts so that they cannot achieve a majority in any one district.[5] In these circumstances, plaintiffs cannot argue that their votes are inherently worth less than that of any other voter; rather, they must argue that the creation of a district that disfavors a particular political party violates the Constitution for other reasons.[6]

ArtIII.S2.C1.9.10 Evolving Doctrine on Partisan Gerrymandering

Article III, Section 2, Clause 1:

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

Supreme Court jurisprudence related to partisan gerrymandering has evolved over time. In fractured opinions in the 1986 case *Davis v. Bandemer*, six Justices of the Court concluded that political gerrymandering claims were justiciable.[1] However, subsequent Supreme Court decisions cast doubt on *Bandemer's* holding. Justice Sandra Day O'Connor concurred in the judgment in *Bandemer*, but disputed that the issue presented was justiciable. She argued that "[t]he Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims,"[2] and that the case before the Court required "precisely the sort of 'initial policy determination of a kind clearly for nonjudicial discretion' that *Baker v. Carr* recognized as characteristic of political questions."[3] Justice O'Connor concluded that "the legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out . . . present a political question in the truest sense of the term."[4]

In the years following *Bandemer*, multiple Justices of the Supreme Court concluded in non-binding opinions that challenges to partisan gerrymandering are nonjusticiable.[5] Like Justice O'Connor in *Bandemer*, those Justices focused primarily on the second and third *Baker* factors: the "lack of judicially discoverable and manageable standards for resolving" these cases and "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."[6] For instance, in 2004, in *Vieth v. Jubelirer*,[7] a plurality of

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[5] *See Rucho*, No. 18-422, slip op. at 4.

[6] *See* Vieth v. Jubelirer, 541 U.S. 267, 305 (2004) (explaining potential theories for how gerrymandering could represent a constitutional violation).

[1] 478 U.S. 109 (1986). Although six Justices found the claim in *Bandemer* to be justiciable, they were unable to agree on a standard for evaluating political gerrymandering claims. *Compare id.* at 132 (in opinion for four Justices, concluding that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole") (White, J.), *with id.* at 173–75 (in opinion for two Justices, considering number of factors a court should look at concerning the fairness and constitutionality of a redistricting plan) (Powell, J., concurring in part and dissenting in part).

[2] *Id.* at 147 (O'Connor, J., concurring in the judgment).

[3] *Id.* at 155

[4] *Id.* at 145.

[5] *See infra*.

[6] Baker v. Carr, 369 U.S. 186, 217 (1962).

[7] 541 U.S. 267 (2004).

ArtIII.S2.C1.9.10
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four Justices voted to overturn *Bandemer* and concluded that political gerrymandering claims were not justiciable due to the lack of such standards.[8] Justice Anthony Kennedy, concurring in the judgment, wrote separately to express his view that, while no standards existed at the time, they might "emerge in the future."[9] Thus, five Justices concluded that the specific political gerrymandering claims at issue in *Vieth* were nonjusticiable, but a majority of the Court left open the possibility of exercising jurisdiction over some future partisan gerrymandering claims. In other cases, the Court divided on or otherwise declined to reach the merits of cases involving partisan gerrymandering.[10]

ArtIII.S2.C1.9.11 Nonjusticiability of Partisan Gerrymandering Claims

Article III, Section 2, Clause 1:

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

A majority of the Court addressed the justiciability of partisan gerrymandering claims in the 2019 case *Rucho v. Common Cause*. In that case, voters in North Carolina and Maryland challenged the partisan gerrymandering of their districts under the First Amendment, the Equal Protection Clause, the Elections Clause, and Article I, Section 2 of the Constitution.[1] The Supreme Court, in a 5-4 decision, held that partisan gerrymandering claims are not justiciable. Chief Justice John Roberts's majority opinion described districting as an inherently political process, which the Constitution entrusts to state legislatures and Congress.[2] The Court further explained that the Constitution imposes no absolute right to proportionate political representation.[3] Absent a right to strict proportional representation, the Court opined, courts deciding partisan gerrymandering cases would inevitably need to "make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end."[4] Thus, unlike claims alleging racial gerrymandering (which is always unconstitutional) or

[8] *Id.* at 305–06.

[9] *Id.* at 311–12 (Kennedy, J., concurring in the judgment).

[10] *See, e.g.*, League of United Latin Am. Citizens v. Perry (LULAC), 548 U.S. 399, 447 (2006) (although unable to agree on a full opinion, agreeing that constitutional challenge to partisan gerrymandering claim should be dismissed); Gill v. Whitford, No. 16-1161, slip op. at 13 (U.S. June 18, 2018) ("Our considerable efforts in *Gaffney*, *Bandemer*, *Vieth*, and *LULAC* leave unresolved whether such claims may be brought in cases involving allegations of partisan gerrymandering. In particular, two threshold questions remain: what is necessary to show standing in a case of this sort, and whether those claims are justiciable. Here we do not decide the latter question because the plaintiffs in this case have not shown standing under the theory upon which they based their claims for relief.").

[1] Rucho v. Common Cause, No. 18-422, slip op. at 1 (U.S. June 27, 2019). *See also* U.S. Const. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States.").

[2] *Rucho*, No. 18-422, slip op. at 8–9.

[3] *Id.* at 16 ("Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.") (quoting Davis v. Bandemer, 478 U.S. 109, 130 (1986)).

[4] *Id.* at 17.

malapportionment (which is "relatively easy to administer as a matter of math"), the *Rucho* Court recognized that the inherently political nature of redistricting would require courts adjudicating partisan gerrymandering claims to adjudicate when partisanship has gone "too far" in influencing the redistricting process.[5]

Quoting Justice Anthony Kennedy's concurrence in *Vieth*, the Court stated that any appropriate standard for resolving partisan gerrymandering claims "must be grounded in a 'limited and precise rationale' and be 'clear, manageable, and politically neutral.'"[6] However, after looking to the text of the Constitution and to various tests proposed by the parties, the *Rucho* Court concluded that it could identify no "limited and precise standard that is judicially discernable and manageable" for evaluating when partisan activity goes too far.[7] Explaining that "federal courts are not equipped to apportion political power as a matter of fairness,"[8] the Court emphasized that, by intervening in disputes over partisan redistricting, federal courts would "inject [themselves] into the most heated partisan issues,"[9] and "would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust."[10] The Court thus concluded that "partisan gerrymandering claims present political questions beyond the reach of the federal courts" because "[f]ederal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions."[11] While acknowledging that "[e]xcessive partisanship in districting leads to results that reasonably seem unjust," the *Rucho* majority rejected the notion that "this Court *can* address the problem of partisan gerrymandering because it *must*."[12] Rather, the Court asserted, state courts, state legislatures, and Congress all have authority to address partisan gerrymandering.[13]

ArtIII.S2.C1.10 Constitutional Avoidance Doctrine

ArtIII.S2.C1.10.1 Overview of Constitutional Avoidance Doctrine

Article III, Section 2, Clause 1:

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

The Constitutional Avoidance Doctrine is a set of rules the Supreme Court has developed over time that guide a federal court's disposition of cases that raise constitutional questions. Summarized by Justice Louis Brandeis in his concurring opinion in *Ashwander v. Tennessee*

[5] *Id.* at 20.

[6] *Id.* at 15 (quoting Vieth v. Jubelirer, 541 U.S. 267, 306–08 (2004) (Kennedy, J., concurring in the judgment)).

[7] *Id.* at 22.

[8] *Id.* at 17.

[9] *Id.* at 15 (quoting *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring in the judgment)) (brackets in original).

[10] *Id.* (quoting *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment)).

[11] *Id.* at 30.

[12] *Id.* at 30–31 (quoting Gill v. Whitford, No. 16-1161, slip op. at 12–13 (U.S. June 18, 2018)).

[13] *Id.* at 31–33.

ArtIII.S2.C1.10.1
Overview of Constitutional Avoidance Doctrine

Valley Authority, the Constitutional Avoidance Doctrine consists of seven rules generally known as: (1) the Rule Against Feigned or Collusive Lawsuits; (2) Ripeness; (3) Judicial Minimalism; (4) the Last Resort Rule; (5) Standing and Mootness; (6) Constitutional Estoppel; and (7) the Constitutional-Doubt Canon.[1] Rules 1, 2, 5, and 6—the Rule Against Feigned or Collusive Lawsuits, Ripeness, Standing and Mootness, and Constitutional Estoppel—inform whether a federal court should hear a case that has met the minimum Article III case-or-controversy requirements for a federal court to have jurisdiction.[2] As such, these four rules provide a further threshold that a case must clear for a federal court to hear it. By comparison, Rules 3, 4, and 7—Judicial Minimalism, the Last Resort Rule, and the Constitutional-Doubt Canon—address how a federal court should approach a constitutional question in a case before it.

The fundamental principle of the Constitutional Avoidance Doctrine is a federal court should interpret the Constitution only when it is a "strict necessity."[3] The reason for this is threefold: first, because the Constitution is the supreme law of the land, its interpretation has broad implications; second, an unelected Supreme Court exercising judicial review to countermand actions by an elected Congress or Executive or state governments is in tension with principles of democracy; and third, because the Supreme Court's authority depends, as a practical matter, on the Executive enforcing and the people accepting its rulings the Court must be careful not to squander public goodwill by issuing ill-considered opinions.

The Constitutional Avoidance Doctrine provides federal courts procedural and substantive guidance on how to address cases involving constitutional questions. Rules 1, 2, and 5—the Rule Against Feigned or Collusive Lawsuits,[4] Ripeness,[5] and Standing[6] and Mootness[7]—are procedural in nature and ensure that the Court only hears cases that are concrete, rather than speculative, and argued by parties genuinely and personally vested in the outcome such that they are the best advocates for their respective positions. Constitutional Estoppel bars a party from challenging a law's constitutionality when he or she is enjoying the benefits of such law.[8]

Rules 3, 4, and 7—Judicial Minimalism, the Last Resort Rule, and the Constitutional-Doubt Canon—inform how federal courts should resolve constitutional questions in cases before them. Rule 3, Judicial Minimalism, instructs federal courts to answer constitutional questions narrowly and with reference to the specific circumstances at hand. Rule 4, the Last Resort Rule, advises that Justices should resolve cases on non-constitutional

[1] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring). The Constitutional-Doubt Canon is sometimes referred to as the Avoidance Canon. For further discussion on the Constitutional Avoidance Doctrine, see Andrew Nolan, Cong. Rsch. Serv., R43706, The Doctrine of Constitutional Avoidance: A Legal Overview (2014), https://crsreports.congress.gov/product/pdf/R/R43706.

[2] U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects".).

[3] Rescue Army v. Mun. Ct. of L.A., 331 U.S. 549, 568 (1947).

[4] The Rule Against Feigned or Collusive Lawsuits corresponds to the adversity requirement discussed in ArtIII.S2.C1.5.1 Overview of Adversity Requirement.

[5] For discussion on Ripeness, see ArtIII.S2.C1.7.1 Overview of Ripeness Doctrine.

[6] For discussion on Standing, see ArtIII.S2.C1.6.1 Overview of Standing.

[7] For discussion on Mootness, see ArtIII.S2.C1.8.1 Overview of Mootness Doctrine.

[8] Fahey v. Mallonee, 332 U.S. 245, 255 (1947) ("[I]t is an elementary rule of constitutional law that one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions.'"). *See also* Buck v. Kuykendall, 267 U.S. 307, 316 (1925) ("[O]ne cannot in the same proceeding both assail a statute and rely upon it. Nor can one who avails himself of the benefits conferred by a statute deny its validity." (citations omitted)).

grounds, if possible, before resolving them on constitutional grounds. And Rule 7, the Constitutional-Doubt Canon, provides that courts should construe a statute to be constitutional if such a construction is plausible.

ArtIII.S2.C1.10.2 Judiciary in the Constitutional Framework

Article III, Section 2, Clause 1:

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

The Supreme Court developed the Constitutional Avoidance Doctrine to minimize concerns about unelected federal judges setting aside Congress's laws on constitutional grounds. Underlying the Constitution is the principle that government legitimacy depends on the consent of the people. Noting that "Governments are instituted among Men, deriving their just powers from the consent of the governed," the Declaration of Independence justified the colonies' separation from the British Crown, because it had, through "repeated injuries and usurpations," deprived the colonists of government that represented and protected their interests.[1]

Contemplating that popular sovereignty would guard against tyranny, the Framers provided for the people to elect the House of Representatives directly and the Senate and the Executive indirectly. Popular sovereignty, which the Framers viewed as necessary for a free and republican government, meant government by the majority.[2] The Framers, however, feared that conflicting opinions and rivalries among factions of citizens might cause political instability or, if a faction gained a political majority, harm "the public good and the rights of other citizens."[3] To avoid this, the Framers crafted a Constitution that disbursed the limited powers of the new American government across three departments: the Legislative, the Executive, and the Judiciary, each with a unique role in securing for the Republic "a steady, upright, and impartial administration of laws."[4]

The Framers were also concerned that different branches might attempt to expand their powers beyond those granted by the Constitution and upset the balance the Framers designed to "secure the blessings of liberty."[5] Consequently, the Framers provided each branch some

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[1] The Declaration of Independence (1776).

[2] John Locke, Second Treatise § 97 (1689) ("And thus every Man, by consenting with others to make one Body Politick under one Government, puts himself under an Obligation to every one of that Society, to submit to the determination of the *majority*, and to be concluded by it; or else this *original Compact,* whereby he with others incorporates into *one Society*, would signifie nothing and be no Compact, if he be left free, and under no other ties, than he was in before in the state of Nature.").

[3] The Federalist No. 10 (James Madison). *See also* The Federalist No. 51 (James Madison) ("It is of great importance in a republic not only to guard one part of the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.").

[4] *Id.* No. 50 (James Madison).

[5] U.S. Const. pmbl.

ability to offset the power of the other two.[6] Describing the division of federal power among the three branches in the *Federalist No. 78*, Alexander Hamilton identified the Judicial Branch as posing the least danger to the constitutional framework. He stated:

> Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the Judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The Judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[7]

Although Hamilton viewed the Judicial Branch as the weakest of the branches, the Framers saw it as critical to preserving the rights of individuals and ensuring that the Legislative and Executive Branches did not exceed their constitutionally-granted powers.[8] Hamilton recognized the Constitution as superior to acts passed by Congress because the Constitution, by virtue of its ratification process,[9] manifests the intentions of the people, whereas acts of Congress merely manifest the intention of the people's agents.[10] He wrote: "[W]henever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former."[11]

Hamilton further described the Judiciary as the "bulwarks of a limited Constitution against legislative encroachments," stating: "[E]very act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void."[12] Hamilton also viewed the Judiciary as protecting minority interests from potential oppression by the majority, stating:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing

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[6] The Federalist No. 78 (Alexander Hamilton).

[7] *Id.*

[8] *Id.* ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specific exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way then through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.").

[9] *Id.* No. 40 (James Madison) (describing the Constitution as being submitted to "the people themselves" for ratification). Delegates to state ratifying conventions were selected by popular vote. John Hart Ely, Democracy and Distrust, A Theory of Judicial Review 5 (1980).

[10] The Federalist No. 78 (Alexander Hamilton) ("If there should be an irreconcilable variance between the [Constitution and a statute], that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."). *See* The Federalist No. 49 (James Madison) ("As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power is derived."); *see also* M'Culloch v. Maryland, 17 U.S. 316, 404–05 (1819) (Marshall, C.J.) ("The government of the Union, then . . . is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be directly exercised on them, and for their benefit.").

[11] The Federalist No. 78 (Alexander Hamilton) ("If there should be an irreconcilable variance between the [Constitution and a statute], that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.").

[12] *Id.*

> men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.[13]

Whether the Framers intended to authorize the Judiciary to set aside laws passed by the elected legislature, as Hamilton envisioned, has been the subject of debate from the Nation's earliest days. The Constitution does not expressly provide for judicial review. And while it is clear from the *Federalist Papers* that many Framers contemplated judicial review as including the power to invalidate acts that violated the Constitution, it is less clear whether delegates to the state ratification conventions agreed as to what judicial review might entail.[14]

Chief Justice John Marshall's opinion in his seminal 1803 decision, *Marbury v. Madison* firmly entrenched judicial review as a tenet of the new Republic.[15] Chief Justice Marshall saw judicial review as implicit in the Constitution because, among other reasons, written constitutions are the paramount law; legislative acts contrary to the Constitution are thereby void; and the Constitution provides for the judicial department to interpret the law. In *Marbury*, Chief Justice Marshall wrote:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. . . . This original and supreme will organizes the government, and assigns, to different departments, their respective powers. . . . Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution is void. . . . It is emphatically the province and duty of the judicial department to say what the law is. . . . [I]n declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank. Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle . . . that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.[16]

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[13] *Id.*

[14] There was not always consensus that the federal courts had the power to strike down laws as unconstitutional. President Andrew Jackson once opined: "[T]he opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both." Andrew Jackson, *Veto Message* (July 10, 1832), http://avalon.law.yale.edu/19th_century/ajveto01.asp. After identifying the twenty-five delegates with the greatest impact on the Constitutional Convention, historian Charles Beard identified those who either directly or indirectly supported "judicial control"—John Blair of Virginia, John Dickinson of Delaware, Oliver Ellsworth of Connecticut, Elbridge Gerry of Massachusetts, Alexander Hamilton of New York, William Johnson of Connecticut, Rufus King of Massachusetts, James Madison of Virginia, Luther Martin of Maryland, George Mason of Virginia, Gouverneur Morris of Pennsylvania, Robert Morris of Pennsylvania, William Paterson of New Jersey, Edmund Randolph of Virginia, George Washington of Virginia, Hugh Williamson of North Carolina, and James Wilson of Pennsylvania—either directly or indirectly supported "judicial control." Charles Beard, The Supreme Court and the Constitution 47 (Dover ed. 2006).

[15] Marbury v. Madison, 5 U.S. 137 (1803). For an earlier case recognizing judicial review, see *Hylton v. United States,* 3 U.S. (3 Dall.) 171 (1796). *See also* Herbert Wechsler, Principles, Politics & Fundamental Law (1961) ("The courts have both the title and the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices . . . ."); William Michael Treanor, *Judicial Review Before Marbury*, 58 Stan. L. Rev. 455 (2005); Robert P. Frankel, Jr., *Before Marbury: Hylton v. United States and the Origins of Judicial Review*, 28 J. Sup. Ct Hist. 1 (2003).

[16] *Marbury*, 5 U.S. 137 at 176–80 (emphasis retained). *See also* Trop v. Dulles, 356 U.S. 86, 103 (1958) ("The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights.").

Lending support to the notion that the Constitution contemplates judicial review, the Framers distinguished the Judicial Branch from the Legislative and Executive Branches by freeing it from most forms of political accountability.[17] Unlike the Legislative and Executive Branches, the Federal Judiciary is not subject to elections or term limits. Instead, the President nominates and the Senate approves Justices to the Supreme Court.[18] The Constitution further secures the Judiciary's independence from public pressure and Legislative and Executive Branch influence by providing Justices life tenure during Good Behavior[19] and preventing Congress from reducing the Justices' compensation.[20]

Congress, however, has some checks on the Judiciary. Justices can be impeached,[21] and the Exceptions Clause in Article III grants Congress the power to make "exceptions" and "regulations" to the Supreme Court's appellate jurisdiction.[22] In addition, Congress can dilute the influence of individual Justices by increasing the number of Justices on the Court.[23] Finally, the Judiciary's reliance on the other branches to give effect to its rulings provides a further check: If the Judicial Branch's rulings are not enforced, the Judiciary becomes, in practical effect, a nullity, incapable of meaningfully performing its duty of preserving the Constitution.[24] Consequently, while the Judicial Branch is largely insulated from political pressure, it is not completely insulated.

ArtIII.S2.C1.10.3 Counter-Majoritarian Difficulty

Article III, Section 2, Clause 1:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a*

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[17] The Federalist No. 49 (James Madison) ("The [Judiciary], by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossessions."). *See also id.* No. 78 (Alexander Hamilton) ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specific exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way then through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.").

[18] U.S. Const. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . . .").

[19] The Good Behavior Clause created a "permanent tenure of judicial offices" to ensure an "independent spirit in judges." The Federalist No. 78 (Alexander Hamilton). *See* ArtIII.S1.10.2.3 Good Behavior Clause Doctrine.

[20] The Compensation Clause created a "fixed provision for [the judiciary's] support" to prevent the political branches from having power over a Justice's pecuniary remuneration and, with that, "power over his will." The Federalist No. 79 (Alexander Hamilton). *See* ArtIII.S1.10.3.1 Historical Background on Compensation Clause.

[21] Jared P. Cole & Todd Garvey, Cong. Rsch. Serv., R46013, Impeachment and the Constitution (2019), https://crsreports.congress.gov/product/pdf/R/R46013.

[22] *See* Kevin Lewis, Cong. Rsch. Serv., R44967, Congress's Power over Courts: Jurisdiction Stripping and the Rule of Klein (2018), https://crsreports.congress.gov/product/pdf/R/R44967.

[23] Joanna Lampe, Cong. Rsch. Serv., LSB10562, "Court Packing": Legislative Control Over the Size of the Supreme Court (2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10562.

[24] Chief Justice John Marshall recognized this problem in *Marbury v. Madison*, ruling that while Marbury was entitled to his commission, the Court could not effectuate its delivery because the Judiciary Act of 1793's writs of mandamus provision was unconstitutional. 5 U.S. 137, 176 (1803) ("The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised.").

State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Constitutional Avoidance Doctrine posits that unelected jurists should exercise caution in striking down laws on constitutional grounds. While Congress can amend statutes when it disagrees with the Supreme Court's statutory interpretations, Congress has no recourse when it disagrees with the Court's constitutional interpretations other than to amend the Constitution.[1] Consequently, judicial review may frustrate the public "by foreclosing all democratic outlet for the deep passions [an] issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, [and] by continuing the imposition of a rigid national rule instead of allowing for regional differences."[2] The problem posed by an unelected Supreme Court holding Congress's laws to be unconstitutional and void has been described as the "counter-majoritarian difficulty."[3]

Because the Court relies on public goodwill to ensure its rulings have practical effect, the Court's opinions must be principled so that the public respects the Court's judgments, even when it disagrees with its conclusions. In short, the Supreme Court's authority depends on political majorities being willing to abide by rulings counter to their interests. As the Court observed in *Planned Parenthood v. Casey*: "the Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."[4] Consequently, the Supreme Court must ensure the "peaceful coexistence of the counter-majoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests."[5] In part to minimize this perceived counter-majoritarian difficulty, the Court developed the Constitutional Avoidance Doctrine to instruct federal courts on how to approach constitutional questions.

ArtIII.S2.C1.10.4 Ashwander and Rules of Constitutional Avoidance

Article III, Section 2, Clause 1:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a

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[1] John Hart Ely, Democracy and Distrust, A Theory of Judicial Review 4–5 (1980) ("[I]n non-constitutional contexts, the court's decisions are subject to overrule or alteration by ordinary statute. The court is standing in for the legislature, and if it has done so in a way the legislature does not approve, it can soon be corrected. When a court invalidates an act of the political branches on constitutional grounds, however, it is overruling their judgment, and normally doing so in a way that is not subject to 'correction' by the ordinary lawmaking process. Thus the central function, and it is at the same time the central problem of judicial review: a body that is not elected or otherwise politically responsibly in any significant way is telling the people's elected representatives that they cannot govern as they'd like.").

[2] *See* Planned Parenthood v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting).

[3] Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16–23 (1962). Bickel noted: W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it. . . . "[I]t is the reason the charge can be made that judicial review is undemocratic." *Id.* at 16–17.

[4] *Casey*, 505 U.S. at 865 (plurality opinion).

[5] United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

From early on, the Supreme Court viewed setting aside Congress's laws on constitutional grounds as problematic and has avoided doing so "unless such adjudication is unavoidable."[1] For example, in the 1798 *Calder v. Bull* decision, Justice James Iredell stated: "If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority, but in a clear and urgent case."[2] Similarly, in the 1819 *Trustees of Dartmouth College v. Woodward* decision, Chief Justice John Marshall wrote: "On more than one occasion, this court has expressed the cautious circumspection with which it approaches the consideration of [whether a law is constitutional]; and has declared, that in no doubtful case, would it pronounce a legislative act to be contrary to the constitution."[3] And, in the 1827 *Ogden v. Saunders* decision, Justice Bushrod Washington noted that judicial deference to the Legislative Branch means that laws should be presumed constitutional unless "proved beyond all reasonable doubt."[4] Later in the nineteenth century, Chief Justice Morrison Waite stated in the *Union Pacific Railroad v. United States (The Sinking Fund Cases)*: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger."[5]

Over five decades later, Justice Louis Brandeis, in his influential concurrence in *Ashwander v. Tennessee Valley Authority*, described the Constitutional Avoidance Doctrine as "a series of rules under which [the Court] has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."[6] The *Ashwander* Rules[7] include:

- Rule 1) The Rule against Feigned or Collusive Lawsuits. Parties to a case must be adverse to each other. Justice Brandeis stated: "The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining

[1] Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944).

[2] Calder v. Bull, 3 U.S. 386, 399 (1798) (Iredell, J.). Justice James Iredell further noted that the inverse was also true: "If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject . . . ." *Id.*

[3] Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 625 (1819) (Marshall, C.J.).

[4] Ogden v. Saunders, 25 U.S. 213, 270 (1827) (Washington, J.) ("But if I could rest my opinion in favour of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt.").

[5] Union Pacific Railroad v. United States (The Sinking Fund Cases), 99 U.S. 700, 718 (1878).

[6] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J. concurring). In *Ashwander*, Chief Justice Charles Evans Hughes in a plurality opinion upheld Congress's constitutional authority to construct the Wilson Dam and dispose of the resulting electric energy. *Id.* at 326–30. Justice Brandeis argued that the Court should not have addressed the constitutional questions involved in the case, because Ashwander had not suffered an injury sufficient to bring the suit. *Id.* at 341–44. The Constitutional Avoidance Canon guides all federal courts. American Foreign Serv. Ass'n v. Garfinkel, 490 U.S. 153, 161 (1989).

[7] *Ashwander*, 297 U.S. at 346–48 (Brandeis, J. concurring). The Constitutional-Doubt Canon is sometimes referred to as the Avoidance Canon.

because to decide such questions 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals.'"[8]

- Rule 2) Ripeness. The court should not resolve constitutional questions prematurely. As Justice Brandeis wrote: "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'"[9] and "'[i]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'"[10]
- Rule 3) Judicial Minimalism. The court should decide questions of constitutional law narrowly. Justice Brandeis stated: "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"[11]
- Rule 4) The Last Resort Rule. If possible, a court should resolve a case on non-constitutional grounds instead of resolving it on constitutional grounds. Explaining this rule, Justice Brandeis stated: "The Court will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed . . . . [I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."[12] He further added: "Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground."[13]
- Rule 5) Standing and Mootness. The complainant should suffer an actual injury; as Justice Brandeis noted: "The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation."[14]
- Rule 6) Constitutional Estoppel. A party cannot challenge a law's constitutionality when he or she enjoys the benefits of such law.[15] Justice Brandeis stated: "The Court

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[8] *Id.* at 346 (quoting Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345 (1892)). The Rule Against Feigned or Collusive Lawsuits corresponds to the adversity requirement discussed in ArtIII.S2.C1.5.1 Overview of Adversity Requirement.

[9] *Id.* at 346–47 (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885) and citing Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. (11 Pet.) 420, 553 (1837); Trademark Cases, 100 U.S. 82, 96 (1879); Arizona v. California, 283 U.S. 423, 462–64 (1931); Abrams v. Van Schaick, 293 U.S. 188 (1934); and Wilshire Oil Co. v. United States, 295 U.S. 100 (1935)). The ripeness requirement is discussed, in ArtIII.S2.C1.7.1 Overview of Ripeness Doctrine.

[10] *Ashwander*, 297 U.S. at 347 (quoting Burton v. United States, 196 U.S. 283, 295 (1905)).

[11] *Id.* (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Emigration Comm'rs, 113 U.S. 33, 39 (1885)).

[12] *Id.* (quoting Siler v. Louisville & Nashville R.R., 213 U.S. 175, 191 (1909); Light v. United States, 220 U.S. 523, 538 (1911)).

[13] *Id.* (citing Berea Coll. v. Ky., 211 U.S. 45, 53 (1908)).

[14] *Id.* at 347–48 (citing Columbus & Greenville Railway v. Miller, 283 U.S. 96, 99–100 (1939); Concordia Fire Institute Co. v. Illinois, 292 U.S. 535, 547 (1934); Corp. Comm'n of Okla. v. Lowe, 281 U.S. 431, 438 (1930); Sprout v. South Bend, 277 U.S. 163, 167 (1928); Massachusetts v. Mellon, 262 U.S. 447 (1923); Fairchild v. Hughes, 258 U.S. 126 (1922); Heald v. District of Columbia, 259 U.S. 114, 123 (1922); Hendrick v. Maryland, 235 U.S. 610, 621 (1915); Hatch v. Reardon, 204 U.S. 152, 160–61 (1907); Tyler v. The Judges, 179 U.S. 405 (1900)). Standing and mootness are discussed, in ArtIII.S2.C1.6.1 Overview of Standing and ArtIII.S2.C1.8.1 Overview of Mootness Doctrine, respectively.

[15] Fahey v. Mallonee, 332 U.S. 245, 255 (1947) ("[I]t is an elementary rule of constitutional law that one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions.'" (citations omitted)). *See also* Buck v. Kuykendall, 267 U.S. 307, 316 (1925) ("[O]ne cannot in the same proceeding both assail a statute and rely upon it. Nor can one who avails himself of the benefits conferred by a statute deny its validity." (citations omitted)).

will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."[16]

- Rule 7) The Constitutional-Doubt Canon. Courts should construe statutes to be constitutional if such a construction is plausible. Explaining this requirement, Justice Brandeis noted: "'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"[17]

ArtIII.S2.C1.10.5 Judicial Minimalism

Article III, Section 2, Clause 1:

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

Providing substantive guidance on how courts should address constitutional questions, judicial minimalism instructs that courts should not issue rulings "[in] broader [terms] than [are] required by the precise facts to which [the ruling] is to be applied"[1] or "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[2] Instead, courts should limit their rulings to the facts of the instant case and avoid establishing broad precedents. Courts can use judicial minimalism to forestall ruling on politically sensitive issues, thereby allowing the elected legislature to craft a political resolution of the question.[3] In addition, by drafting opinions narrowly, Justices may find it easier to build consensus in the Court by reducing the scope of issues to which they must agree.

When employing judicial minimalism, courts frequently pass over questions of constitutional import to focus more narrowly on issues specific to the case. For instance, in *Liverpool, N.Y. & Philadelphia Steamship Co. v. Commissioners on Emigration*,[4] the Court was asked whether Congress could (1) ratify state laws that were previously struck down as unconstitutional state regulation of foreign commerce, or (2) bar claims for damages that the

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[16] *Ashwander*, 297 U.S. at 348 (citing St. Louis Malleable Casting Co. v. Prendergast Construction Co., 260 U.S. 469 (1923); Wall v. Parrot Silver & Copper Co. 244 U.S. 407, 411–12 (1917); Great Falls Manufacturing Co. v. Garland, 124 U.S. 581 (1888)).

[17] *Id.* (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932) and citing Interstate Com. Comm'n v. Or.-Wash. R.R. & Navigation Co., 288 U.S. 14, 40 (1933); Lucas v. Alexander, 279 U.S. 573, 577 (1929); Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 346 (1928); Blodgett v. Holden, 275 U.S. 142, 148 (1928); Mo. Pac. R.R. v. Boone, 270 U.S. 466, 471–72 (1926); Panama R.R. v. Johnson, 264 U.S. 375, 390 (1924); Linder v. United States, 268 U.S. 5, 17–18 (1922); Texas v. E. Tex. R.R., 258 U.S. 204, 217 (1922); Baender v. Barnett, 255 U.S. 224 (1921); United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916); United States v. Del. & Hudson Co., 213 U.S. 366, 407–08 (1909)).

[1] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)).

[2] *Liverpool, N.Y. & Phila. S.S. Co.*, 113 U.S. at 39.

[3] *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (limiting ruling to Voting Rights Act (VRA) Section 4 and suggesting that Congress revisit related VRA Section 5).

[4] *Liverpool*, 113 U.S. 33.

unconstitutional state laws caused.[5] Noting that the case presented questions as to "the constitutionality of the act of congress" that were "of very grave importance,"[6] the Court held it was "constrained to reverse the judgment, without deciding any of them."[7] In making this decision, the Court observed it was bound by two rules: "one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is applied."[8] Focusing on the case's record, the Court found it incomplete and remanded the case for a new trial to determine the missing facts.[9]

Later, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Court passed over complex constitutional issues to resolve the case on grounds specific to its facts. In *Masterpiece Cakeshop*, the question before the Supreme Court was whether a Colorado civil rights statute, which protected gay persons from being discriminated against when they were trying to procure goods and services, violated the First Amendment by requiring a baker to create a wedding cake for a same-sex couple. The baker viewed creating the cake to be an expressive artistic statement, and the civil rights statute as compelling him to use his artistry to express a message endorsing same-sex marriage despite his "sincere religious beliefs and convictions" to the contrary.[10] Recognizing the conundrum presented by the case, the Court commented that while "religious and philosophical objections [to same-sex marriage] are protected, it is a general rule that such objections do not allow business owners . . . to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[11] The Court, however, also took note of the baker's view that requiring him to create the cake amounted to forcing him to make an artistic expressive statement contrary to his religious beliefs.

In a decision written by Justice Anthony Kennedy, the Court adopted a judicial minimalist approach. Instead of addressing the constitutional questions raised by the interplay of the Colorado civil rights statute and the baker's First Amendment free exercise and free speech rights, the Court found that, during hearings before the Colorado Civil Rights Commission, several commissioners denigrated the baker's religious beliefs, thereby violating his free exercise rights. Finding that "the Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion," the Court ruled in favor of the baker.[12] The Court emphasized, however, the limited application of *Masterpiece Cakeshop* to other cases, stating:

> The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with

[5] *Id.* at 36.

[6] *Id.*

[7] *Id.*

[8] *Id.* Justice Stanley Matthews also cited ripeness as a reason to remand the case. *Id.* at 39.

[9] *Id.*

[10] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, No. 16-111, slip op. at 1–2 (U.S. June 4, 2018).

[11] *Id.* at 9.

[12] *Id.* at 18. Discussing the actions of the commissioners, the Court stated: "The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires." *Id.* The Court also noted that the Commission's treatment of the baker differed from its treatment of other bakers who had refused to prepare cakes with messages that they found offensive. The Court stated: "The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same." *Id.*

> tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.[13]

A variation on the judicial minimalist approach is the practice of "assuming but not deciding" a constitutional issue. In these decisions, the Court foregoes resolving an underlying constitutional question, in favor of treating the constitutional question as resolved for the limited purpose of deciding the instant case. Such an approach enables the Court to resolve the dispute at issue without determining the underlying constitutional question. For instance, in *National Aeronautics & Space Administration (NASA) v. Nelson*, the Court chose to "assume, without deciding," that the Constitution protects informational privacy.[14] Based on this assumption, the Court found that NASA's background checks did not violate the "assumed" constitutionally protected right to informational privacy. While "assuming but not deciding" allows the Court to resolve time-sensitive disputes while deferring resolution of thorny or politically sensitive constitutional questions, some have characterized the approach as disingenuous. Arguing that the *NASA* decision "makes no sense," Justice Antonin Scalia, while concurring in the judgment, wrote: "The Court decides that the Government did not violate the right to informational privacy without deciding whether there *is* a right to informational privacy . . . ."[15]

In summary, judicial minimalism enables the Court to develop binding precedent on a legal issue slowly, thereby providing opportunity for the government's Legislative and Executive Branches to resolve contested constitutional issues through the political process. Judicial minimalism further alleviates the counter-majoritarian difficulty because the resulting decisions are unlikely to have far-reaching precedential impacts, while still resolving the case before the court. Judicial minimalism, however, may lead to decisions that provide limited guidance to future courts, to the Legislative and Executive Branches, and to the public as to what the Constitution permits.

ArtIII.S2.C1.10.6 Last Resort Rule

Article III, Section 2, Clause 1:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens*

[13] *Id.* The Court further emphasized the ruling's narrowness, stating: "Given all these considerations, it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commissioners' actions here violated the Free Exercise Clause; and its order must be set aside." *Id.* at 3. *See also* Scheutte v. Coal. to Defend Affirmative Action, 572 U.S 291, 314 (2014) (ruling on Michigan referendum, rather than broader racial issues); Harris v. Quinn, 573 U.S. 616, 656 (2014) (refusing to extend Abood v. Detroit Board of Education, 431 U.S. 209 (1977)).

[14] National Aeronautics & Space Admin. v. Nelson, 562 U.S, 134, 138 (2011) (Alito, J.) ("We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*. We hold, however, that the challenged portions of the Government's background check do not violate this right in the present case.").

[15] *Id.* at 165 (Scalia, J., concurring) (emphasis retained). Justice Antonin Scalia further noted: "I fail to see the minimalist virtues in delivering a lengthy opinon analyzing that right while coyly noting that the right is 'assumed' rather than 'decided.'" *Id.*

of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Under the Last Resort Rule, a court should "not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed."[1] Accordingly, if a court can resolve a case on both constitutional and non-constitutional grounds, the court should do so on non-constitutional grounds.[2] By doing so, the court avoids creating constitutional precedent unnecessarily, while giving the political process time to resolve contentious constitutional issues. Because the Last Resort Rule informs the order in which the Court should address constitutional and non-constitutional questions in a case, it is sometimes described as a "rule of judicial procedure."[3]

An example of the Court's use of the Last Resort Rule is its decision in *Bond v. United States*.[4] In *Bond*, federal prosecutors charged Carol Bond with violating Section 229 of the Chemical Weapons Convention Implementation Act (CWCIA) when she caused "a minor thumb burn readily treated by rinsing with water" to her husband's lover by applying toxic chemicals to the paramour's car, mailbox, and door knob.[5] Bond argued that Section 229 (1) "exceeded Congress's enumerated powers and invaded powers reserved to the States by the Tenth Amendment"[6] and (2) did not apply to her because "her conduct, though reprehensible, was not at all 'warlike.'"[7] Faced with resolving *Bond* on either statutory or constitutional grounds, the Court, relying on the Last Resort Rule, considered first whether it could resolve the case based on Bond's argument that Section 229 did not apply to her actions.[8] After analyzing the CWCIA, the Court concluded that Congress did not intend for Section 229 to apply to Bond's circumstance.[9]

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[1] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). *See also* Eustis v. Bolles, 150 U.S. 361, 366 (1893) ("[W]here the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the constitution or laws of the United States, another question, not federal has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment.").

[2] Berea Coll. v. Kentucky, 211 U.S. 45, 53 (1908) ("[W]hen a state court decides a case upon two grounds, one Federal and the other non-Federal, this court will not disturb the judgment if the non-Federal ground, fairly construed, sustains the decision."); Allen v. Arguimbau, 198 U.S. 149, 154–55 (1905) ("[I]f the judgment rested on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, this court will not take jurisdiction."); Murdock v. Memphis, 87 U.S. 590, 636 (1874) ("If [the judgment] was erroneously decided against plaintiff in error, then this court must further inquire, whether there is any other matter or issue adjudged by the State court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.").

[3] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 251 (2012).

[4] Bond v. United States, 572 U.S. 844 (2014).

[5] *Id.* at 852.

[6] *Id.* at 853. Discussing Bond's constitutional claim, the Court noted that, under the Constitution, the states retained "broad authority to enact legislation for the public good-what we have often called a 'police power.'" *Id.* at 854 (citing United States v. Lopez, 514 U.S. 549, 567 (1995)). As a consequence, the Court explained, "[a] criminal act committed wholly within a State 'cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiciton of the United States.'" *Id.* (quoting United States v. Fox, 95 U.S. 670, 672 (1878)).

[7] *Id.* at 853.

[8] *Id.* at 855.

[9] *Id.* at 866 ("[I]f section 229 reached Bond's conduct, it would mark a dramatic departure from that constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States. Absent a clear statement of that purpose, we will not presume Congress to have authoried such a stark intrusion into traditional state authority.").

ArtIII.S2.C1.10.6
Last Resort Rule

Based on the Last Resort Rule, the Supreme Court has remanded cases involving constitutional questions to lower courts to see if the case can be resolved on statutory grounds. For example, in *Escambia County v. McMillan*, the Supreme Court remanded a case affirmed by the appellate court on constitutional grounds because the district court also found a statutory violation.[10] The Supreme Court instructed the appellate court to determine if it could affirm the district court's decision based on the statutory rather than the constitutional ruling.[11] In other cases, the Court has avoided ruling on a constitutional question by deciding a case based on statutory reasons not considered by the lower court.[12] For instance, the Court resolved *Siler v. Louisville & Nashville Railroad* by ruling that the Railroad Commission violated a Kentucky statute—an issue the Kentucky state court had not considered.[13] By reaching this conclusion, the Court avoided addressing *Siler*'s constitutional questions.[14]

Siler concerned questions of federal and state law. While the Supreme Court interpreted the Kentucky statute in *Siler*, the Court often remands cases involving constitutional and state law issues to state courts so they can first resolve state law questions. Consistent with this approach, the Supreme Court has dismissed state court appeals based on constitutional questions if state law can sustain the judgment.[15] Besides avoiding constitutional questions, remanding state law questions to state courts has other advantages: First, the Court avoids using its resources to decide questions where its decisions would be advisory.[16] Second, the Court acknowledges state expertise and autonomy to interpret state laws.[17] Declining to rule on a constitutional question when a ruling on either of two state laws could resolve the case,[18] the Court observed:

> The doctrine that the Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it" . . . is a well-settled doctrine of this Court

[10] Escambia Cnty. v. McMillan, 466 U.S. 48, 51 (1984).

[11] *Id.*

[12] Siler v. Louisville & Nashville R.R., 213 U.S. 175, 191 (1909) ("This court . . . can, if it deem it proper, decide the local questions only, and omit to decide the federal questions."). *See also* Jean v. Nelson, 472 U.S. 846 (1985); United States v. Locke, 471 U.S. 84 (1985); Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981). *But see* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) (holding Eleventh Amendment bars federal courts from hearing state law cases when the state is the defendant).

[13] *Siler*, 213 U.S. at 194

[14] *Id.* at 193.

[15] Berea Coll. v. Kentucky, 211 U.S. 45, 53 (1908) ("[W]hen a state court decides a case upon two grounds, one Federal and the other non-Federal, this court will not disturb the judgment if the non-Federal ground, fairly construed, sustains the decision." (citations omitted)). *See also* Allen v. Arguimbau, 198 U. S. 149, 154–55 (1905).

[16] Michigan v. Long, 463 U.S. 1032, 1040–41 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions."). *See also* Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938) ("[Federal] [s]upervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.").

[17] Giles v. Teasley, 193 U.S. 146, 160 (1904) ("[I]f the decision of a state court rests on an independent ground—one which does not necessarily include a determination of the Federal right claimed—or upon a ground broad enough to sustain it without deciding the Federal question raised, this court has no jurisdiction to review the judgment of the state court." (citations omitted)). *See also* Wade v. Lawder, 165 U.S. 624, 628 (1897) ("The decree rested on grounds broad enough to sustain it without reference to any federal question."); Dower v. Richards, 151 U.S. 658, 666 (1894) ("[A] writ of error can be sustained only when the decision of the state court is against a right claimed under the constitution and laws of the United States. And if the decision of the state court rests on an independent ground of law, not involving any federal question, this court has no jurisdiction." (citations omitted)).

[18] Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960).

> which, because it carries a special weight in maintaining proper harmony in federal-state relations, must not yield to the claim of the relatively minor inconvenience of postponement of decision.[19]

Third, the Court avoids having to rule on unfamiliar state law. In *Spector Motor Service v. McLaughlin*, the Court ruled that federal litigation should be held pending state court resolution of "intertwined" local law.[20] Justice Felix Frankfurter stated:

> [W]e have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. Avoidance of such guesswork, by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication.[21]

The Court has used the Last Resort Rule to avoid politically contentious issues. For example, in *Railroad Commission of Texas v. Pullman Co.*, the Court directed the parties to litigate their state law questions in state court and ordered the lower federal court to hold the federal case in abeyance pending the state litigation. By doing this, the Court avoided ruling on the politically charged issue of whether the Railroad Commission of Texas violated the Constitution by requiring white Pullman conductors, and not black Pullman porters, to operate sleeping cars. Reasoning that "[s]uch constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy," Justice Frankfurter stated: "[The equal protection issue] touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."[22]

ArtIII.S2.C1.10.7 Constitutional-Doubt Canon

Article III, Section 2, Clause 1:

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

Posited on the premise that Congress "legislates in the light of constitutional limitations,"[1] the Constitutional-Doubt Canon provides that federal courts should construe statutes so that

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[19] *Id.* at 211–12 (citations omitted).

[20] Spector Motor Serv. v. McLaughlin, 323 U.S. 101, 105 (1944).

[21] *Id. See also* Burford v. Sun Oil Co., 319 U.S. 315, 333 (1943); City of Chicago v. Fieldcrest Dairies, 316 U.S. 168, 173 (1942).

[22] R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 498 (1941). *See also* Harris Cnty. Comm'r v. Moore, 420 U.S. 77, 88–89 (1975) (holding federal court to abstain until Texas court resolves state constitutional questions); Reetz v. Bozanich, 397 U.S. 82, 87 (1970) ("[T]he federal court should have stayed its hand while the parties repaired to the state courts for a resolution of their state constitutional questions.").

[1] Rust v. Sullivan, 500 U.S. 173, 191 (1991). *See also* Rostker v. Goldberg, 453 U.S. 57, 64 (1981) ("The Congress is a coequal branch of government whose Members take the same oath as [the judiciary] to uphold the Constitution of the United States.").

they do not violate the Constitution.[2] Describing the Constitutional-Doubt Canon, Justice Louis Brandeis stated: "When the validity of an act . . . is drawn in question, and even if a serious doubt of constitutionality is raised . . . [the Court] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[3] Consequently, if a statute is susceptible to two plausible interpretations, one of which violates the Constitution, the Constitutional-Doubt Canon instructs courts to choose the interpretation consistent with the Constitution.[4] If the statute is not susceptible to a plausible constitutional interpretation, the Constitutional-Doubt Canon is inapplicable.[5] The Constitutional-Doubt Canon cannot be construed to make a statute broader[6] or be applied to Executive actions.[7]

[2] McFadden v. United States, 576 U.S. 186, 197 (2015) ("[T]his canon 'is a tool for choosing between competing plausible interpretations of a provision.'" (citations omitted)); Warger v. Shauers, 574 U.S. 40, 50 (2014) ("[The canon] 'has no application in the absence of . . . ambiguity.'" (citations omitted)); Scales v. United States, 367 U.S. 203, 211 (2009) ("Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute."); Aptheker v. Sec'y of State, 378 U.S. 500, 515 (1964) ("[T]his Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects."). *See also* Clark v. Martinez, 543 U.S. 371, 381 (2005); United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 494 (2001).

[3] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). *See* United States v. Palomar-Santiago, No. 20-437, slip op. at 7 (U.S. May 24, 2021) ("Courts should indeed construe statutes 'to avoid not only the conclusion that [they are] unconstitutional, but also grave doubts upon that score.'" (citations omitted)); Nielsen v. Preap, No. 16-1363, slip op. at 25 (U.S. Mar. 19, 2019) ("This canon provides that '[w]hen a serious doubt is raised about the constitutionality of an act of Congress, . . . this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" (citations omitted)); Crowell v. Benson, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."); Blodgett v. Holden, 275 U.S. 142, 148 (1927) ("[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same."); United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.").

[4] Jennings v. Rodriguez, No. 15-1204, slip op. at 12 (U.S. Feb. 27, 2018) ("When 'a serious doubt' is raised about the constitutionality of an act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" (citations omitted)); Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998) (construction of statute that avoids invalidation best reflects congressional will); United States v. Harris, 347 U.S. 612, 618 (1954) ("[I]f this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction."); United States v. Rumely, 345 U.S. 41, 45 (1953) (noting canon is controlling "in the choice of fair alternatives" (citations omitted)); Michaelson v. United States, 266 U.S. 42 (1924) (construing Clayton Act narrowly to avoid constitutional questions); United States *ex rel.* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 407 (1909) ("[W]hen the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity."). *See also* Bond v. United States, 572 U.S. 844 (2014); Skilling v. United States, 561 U.S. 358, 405–06 & n.40 (2010); Gonzales v. Carhart, 550 U.S. 124, 153–54 (2007); Zadvydas v. Davis, 533 U.S. 678 (2001); United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994); Peretz v. United States, 501 U.S. 923, 929–30 (1991); Gomez v. United States, 490 U.S. 858, 864 (1989); Public Citizen v. Dep't of Just., 491 U.S. 440, 465–67 (1989); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); Boos v. Barry, 485 U.S. 312, 330–331 (1988); Lowe v. Sec. & Exch. Comm'n, 472 U.S. 181, 227 (1985) (White, J., concurring); Schneider v. Smith, 390 U.S. 17, 26 (1968); Crowell v. Benson, 285 U.S. 22, 62 (1932); United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916); Hooper v. California, 155 U.S. 648, 657 (1895).

[5] *Jennings*, No. 15-1204, slip op. at 12 ("In the absence of more than one plausible construction, the canon simply 'has no application.'" (citations omitted)); Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933) ("But avoidance of a difficulty will not be pressed to the point of disingenuous evasion. Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced and answered.").

[6] United States v. Davis, No. 18-431, slip op. at 17 (U.S. June 24, 2019) ("[W]hen presented with two "fair alternatives," this Court has sometimes adopted the *narrower* construction of a criminal statute to avoid having to hold it unconstitutional if it were construed more broadly. But no one before us has identified a case in which this Court has invoked the canon to *expand* the reach of a criminal statute in order to save it. Yet that is exactly what the government seeks here.").

The Constitutional-Doubt Canon provides a way for the Court to avoid ruling on constitutional questions that are contentious or where the Court's interpretation would meet with general, public disfavor. By choosing to interpret a statute to conform with constitutional requirements, the Court communicates to Congress, in effect, what the Court believes the Constitution requires. As Congress has the power to amend law, if Congress disagrees with how the Court has interpreted a statute, Congress can revise the statute. While this leaves open the possibility that the Court will have to revisit the constitutional question in the context of the revised statute, the Constitutional-Doubt Canon has allowed the issue to be publicly vetted further and possibly resolved through the political process. If Congress does not amend the statute, the Court's constitutionally compliant interpretation of the statute governs despite another interpretation having possibly been a more natural reading of the statute.

The Court has stressed that the Constitutional-Doubt Canon does not give courts leeway to interpret a statute in a manner that effectively rewrites the statute to conform to the Constitution.[8] In *United States v. Locke*, the Court stated: "[w]e cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question."[9] Instead, applying conventional tools of statutory interpretation, the Court must find the statute to be subject to two valid interpretations. In *Jennings v. Rodriguez*, the Court stated: "The canon of constitutional avoidance 'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction.'"[10]

The Constitutional-Doubt Canon has been criticized as incentivizing the Court to interpret statutes in ways that appear to defy the statute's express language in order to avoid resolving contentious constitutional questions.[11] However, the Court may believe that a political, rather than judicial, resolution to certain issues would be preferable for the Nation. For instance, in *United States v. Seeger*[12] and *Welsh v. United States*,[13] the Court was confronted with whether the conscientious objector provisions of Section 6(j) of the Universal Military Training and Service Act violated the Constitution's Establishment and Free Exercise Clauses. Among other things, Section 6(j) specified "belief in a relation to a Supreme Being involving duties superior

[7] Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502 (2009) ("The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts. We know of no precedent for applying it to limit the scope of authorized executive action.").

[8] Seila Law LLC v. Consumer Fin. Prot. Bureau, No. 19-7, slip op. at 29 (U.S. June 19, 2020) ("Constitutional avoidance is not a license to rewrite Congress's work to say whatever the Constitution needs it to say in a given situation. Without a proffered interpretation that is rooted in the statutory text and structure, and would avoid the constitutional violation we have identified, we take Congress at its word . . . ."); Jennings v. Rodriguez, No. 15-1204, slip op. at 14 (U.S. Feb. 27, 2018) ("Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases. Instead, the canon permits a court to 'choos[e] between competing *plausible* interpretations of a statutory text.'" (citations omitted)); McFadden v. United States, 576 U.S. 186, 197 (2015); Warger v. Shauers, 574 U.S. 40, 50 (2014); Yu Cong Eng v. Trinidad, 271 U.S. 500, 518 (1926) ("[A]mendment may not be substituted for construction, and . . . a court may not exercise legislative functions to save the law from conflict with constitutional limitation.").

[9] United States v. Locke, 471 U.S. 84, 96 (1984) (quoting *Moore Ice Cream Co.*, 289 U.S. at 379).

[10] Jennings v. Rodriguez, No. 15-1204, slip op. at (842) (U.S. Feb. 27, 2018) (citations omitted). *See also* Bartlett v. Strickland, 556 U.S. 1 (2009).

[11] *See, e.g.*, Ullman v. United States, 350 U.S. 422, 43 (1956); Bond v. United States, 572 U.S. 844, 867–68 (2014) (Scalia, J., dissenting) (commenting that Court applied the Constitutional-Doubt Canon incorrectly when it interpreted the Chemical Weapons Convention Implementation Act).

[12] United States v. Seeger, 380 U.S. 163 (1965).

[13] Welsh v. United States, 398 U.S. 333 (1970).

to those arising from any human relation, *but does not include essentially political, sociological, or philosophical views or a merely personal moral code*" for conscientious-objector status.[14]

Using the Constitutional-Doubt Canon, the Court avoided ruling on what the Establishment and Free Exercise Clauses consider "religion" in *Seeger* and *Welsh*, allowing more time for public consensus to form on the issue. In *Seeger*, the draft board denied conscientious-objector status to Daniel Seeger because he did not meet the Section 6(j) requirement of having beliefs based on a Supreme Being. Despite Section 6(j) expressly precluding beliefs based on "philosophical views" or a "personal moral code," the Court interpreted Section 6(j)'s "belief in a relation to a Supreme Being" requirement to cover Seeger's "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."[15] By finding the draft board to have misread Section 6(j), the Court avoided addressing the implications of the case for the Establishment and Free Exercise Clauses, while finding Seeger entitled to conscientious-objector status. Hinting at how the Court might have resolved the case on constitutional grounds, the Court noted that "[t]his construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets."[16]

The Supreme Court's Section 6(j) interpretation in *Seeger*, however, provided limited guidance to draft boards on how to distinguish persons with "essentially political, sociological, or philosophical views"[17] who did not qualify for conscientious-objector status from those with "[a] sincere and meaningful belief . . . parallel to that filled by the God of those admittedly qualifying for exemption"[18] who did. The result was that several years later the Court was confronted with a near replica of *Seeger*. In *Welsh*, Elliott Ashton Welsh II challenged the draft board's denial of conscientious objector status under *Seeger*.[19] Welsh, however, characterized his beliefs as not religious.[20] Revisiting Section 6(j), the Court construed it to cover individuals, like Welsh, "whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war"[21] notwithstanding Section 6(j)'s express language that "essentially political,

[14] *Seeger*, 380 U.S. at 165 (emphasis added); *see also* Act of June 24, 1948, ch. 625, tit. I, § 6(j), 62 Stat. 609, 612–13 (amended by the Military Selective Service Act of 1967, Pub. L. No. 90-40, § 5, 81 Stat. 100, 104 (codified at 50 U.S.C. § 3806(j))).

[15] *Seeger*, 380 U.S. at 176.

[16] *Id.*

[17] Act of June 24, 1948, ch. 625, tit. I, § 6(j), 62 Stat. 609, 612–13 (amended by the Military Selective Service Act of 1967, Pub. L. No. 90-40, § 5, 81 Stat. 100, 104 (codified at 50 U.S.C. § 3806(j))).

[18] *Seeger*, 380 U.S. at 176.

[19] Welsh v. United States, 398 U.S. 333 (1970). Mr. Welsh had been sentenced to prison for three years for "refusing to submit to induction into the Armed Forces" on June 1, 1966. *Welsh*, 398 U.S. at 335. In 1967, Congress revised the conscientious objector exclusion provision, deleting language providing that "[r]eligious training and belief" means "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation" so that the statute provided that "'religious training and belief' does not include essentially political, sociological, or philosophical views or a merely personal code." Military Selective Service Act of 1967, Pub. L. No. 90-40, § 7, 81 Stat. 100, 104 (codified at 50 U.S.C. § 3806(j)). On September 23, 1968, the Ninth Circuit denied Mr. Welsh's appeal of his conviction. Welsh v. United States, 404 F.2d 1078 (9th Cir. 1968). In its *Welsh* decision, the Supreme Court referenced Section 6(j) of the Universal Military Training and Service Act "as it read during the period relevant to this case," which was the pre-1967 language of Section 6(j).

[20] *Welsh*, 398 U.S. at 341. The opinion notes that while Welsh "originally characterized his beliefs as nonreligious, he later upon reflection . . . declared that his beliefs were 'certainly religious in the ethical sense of the word.'" *Id.*

[21] *Id.* at 344.

sociological, or philosophical views or a merely personal moral code"[22] did not qualify for conscientious-objector status. In short, the *Seeger* and *Welsh* Courts essentially interpreted Section 6(j)'s definition of religious belief to encompass theistic and non-theistic worldviews depending on "whether the beliefs professed by a registrant are sincerely held and whether they are, *in* [the conscientious objector applicant's] *own scheme of things*, religious"[23] despite Congress's express language in Section 6(j) excluding "political, sociological, or philosophical views, or a merely personal moral code."[24]

One criticism of the Constitutional-Doubt Canon is that it can result in tenuous statutory interpretations that undermine the Court's credibility and defeat the purpose of judicial review to "declare all acts contrary to the manifest tenor of the Constitution void."[25] For instance, in his concurring opinion in *Welsh*, Justice John Marshall Harlan II expressed dismay with the Court's use of statutory construction in *Seeger* and *Welsh*,[26] stating: "[T]he liberties taken with the statute both in *Seeger* and today's decision cannot be justified in the name of the familiar doctrine of construing federal statutes in a manner that will avoid all possible constitutional infirmities in them."[27] Justice Harlan observed that the natural reading of Section 6(j) and its legislative history clearly indicated Congress's intent that conscientious-objector status be limited to those whose beliefs were theistic. The result of the Court's interpretations, in Justice Harlan's view, deprived Section 6(j) of "all meaning in order to avert the collision between its plainly intended purpose and the commands of the Constitution."[28] Nevertheless, the Constitutional-Doubt Canon provided a way for the Court to return the contentious issue to the political branches for further debate and consideration.

ArtIII.S2.C1.11 Federal Question Jurisdiction

ArtIII.S2.C1.11.1 Overview of Federal Question Jurisdiction

Article III, Section 2, Clause 1:

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

The Constitution authorizes the federal courts to exercise jurisdiction over all cases "arising under" the Constitution or the laws or treaties of the United States. The federal courts' power to hear such cases is often referred to as "arising under" jurisdiction or "federal

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[22] Act of June 24, 1948, ch. 625, tit. I, § 6(j), 62 Stat. 609, 612–13 (amended by the Military Selective Service Act of 1967, Pub. L. No. 90-40, § 5, 81 Stat. 100, 104 (codified at 50 U.S.C. § 3806(j))).

[23] *Seeger*, 380 U.S. at 185; *Welsh*, 398 U.S. at 339.

[24] Act of June 24, 1948, ch. 625, tit. I, § 6(j), 62 Stat. 609, 612–13 (amended by the Military Selective Service Act of 1967, Pub. L. No. 90-40, § 5, 81 Stat. 100, 104 (codified at 50 U.S.C. § 3806(j))).

[25] The Federalist No. 78 (Alexander Hamilton).

[26] *Welsh*, 398 U.S. at 344 (Harlan, J., concurring) ("Candor requires me to say that I joined the Court's opinion in [*Seeger*] only with the gravest misgiving as to whether it was a legitimate exercise in statutory construction, and today's decision convinces me that in doing so I made a mistake which I should now acknowledge.").

[27] *Id.* at 345.

[28] *Id.* at 354.

ArtIII.S2.C1.11.1
Overview of Federal Question Jurisdiction

question" jurisdiction.[1] The Supreme Court has explained that a case arises under the Constitution or laws of the United States "whenever its correct decision depends on the construction of either."[2]

ArtIII.S2.C1.11.2 Historical Background on Federal Question Jurisdiction

Article III, Section 2, Clause 1:

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

Near the beginning of the Constitutional Convention, the delegates expressed an intent to create a Federal Judiciary with jurisdiction to hear cases arising under federal statutory law.[1] Federal jurisdiction over cases involving the Constitution and treaties was added to drafts of Article III later in the Convention.[2] Even as the Framers planned to vest federal question jurisdiction in the federal courts, they generally accepted that state courts would play a significant role in interpreting and applying federal law and did not make the constitutional grant of jurisdiction over cases arising under federal law exclusive to the federal courts.[3] On the other hand, the Framers entertained concerns about whether state courts would apply federal law correctly, uniformly, and without bias.[4] To mitigate those concerns, the Constitution allowed for Supreme Court appellate review of state judicial decisions involving issues related to federal treaties, statutes, or constitutional law.[5] The Constitution also granted Congress

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[1] Cases arising under the Constitution or federal law are just one of several categories of cases that the Constitution authorizes the federal courts to hear. *See also, e.g.*, ArtIII.S2.C1.16.1 Overview of Diversity Jurisdiction to ArtIII.S2.C1.16.7 Conflicts-of-Law and Procedural Rules in Diversity Cases; ArtIII.S2.C1.18.1 Controversies Between a State or its Citizens and Foreign States or Citizens to ArtIII.S2.C1.17 Land Grants by Different States; ArtIII.S2.C2.1 Overview of Supreme Court Jurisdiction; ArtIII.S2.C2.2 Supreme Court Original Jurisdiction to ArtIII.S2.C2.5 Supreme Court Review of State Court Decisions; ArtIII.S2.C2.6 Exceptions Clause and Congressional Control over Appellate Jurisdiction; ArtIII.S2.C2.6 Exceptions Clause and Congressional Control over Appellate Jurisdiction; ArtIII.S2.C1.12.2 Historical Background on Admiralty and Maritime Jurisdiction; to ArtIII.S2.C1.12.8 Exclusivity of Federal Admiralty and Maritime Jurisdiction.

[2] Cohens v. Virginia, 19 U.S. 264, 379 (1821).

[1] 1 The Records of the Federal Convention of 1787, at 22, 211–12, 220, 244 (Max Farrand ed., 1911) [hereinafter Convention Records]; 2 The Records of the Federal Convention of 1787, at 146–47, 186–87 (Max Farrand ed., 1911).

[2] Convention Records, *supra* note 1, at 423–24, 430, 431.

[3] *See, e.g.*, Convention Records, *supra* note 1, at 243, 424; *see also* The Federalist No. 65 (Alexander Hamilton).

[4] For instance, James Madison expressed concern about "improper Verdicts in State tribunals obtained under the biassed directions of a dependent Judge" and "the local prejudices of an undirected jury." Convention Records, *supra* note 1, at 124. In The Federalist Alexander Hamilton stated that "the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes," and argued in favor of uniformity that "[t]hirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." The Federalist No. 80 (Alexander Hamilton). Hamilton also raised the possibility that "State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws." The Federalist No. 80 (Alexander Hamilton).

[5] U.S. Const. art. III, § 2 ("In all the other Cases before mentioned [including cases arising under the Constitution and federal law or treaties], the supreme Court shall have appellate Jurisdiction[.]"); *cf.* 1 Stat. 73, 85; Martin v. Hunter's Lessee, 14 U.S. 304 (1816).

discretion to establish lower federal courts, which could consider questions arising under the Constitution or federal law or treaties in the first instance.[6]

In the *Federalist Papers*, Alexander Hamilton explained that the grant of federal question jurisdiction in Article III was based on the "obvious consideration that there ought always to be a constitutional method of giving efficacy to constitutional provisions."[7] Specifically, he argued, "restrictions on the authority of the state legislations" must rest upon either "a direct negative on the state laws, or an authority in the federal courts, to overrule such as might be in manifest contravention of the articles of union."[8] Hamilton noted that the Framers had adopted the latter approach of authorizing enforcement by the federal courts, which he "presume[d] will be most agreeable to the states."[9]

The Constitution vests federal judicial power in "one supreme Court" and any lower federal courts that Congress creates.[10] The Constitutional provisions authorizing the establishment of lower federal courts and the grant of federal question jurisdiction to those courts are not self-executing, but instead had to be implemented (if at all) through federal legislation.[11] In the Judiciary Act of 1789, Congress created lower federal courts but did not grant them general federal question jurisdiction.[12] This meant that litigants could sue in state court to enforce rights under the Constitution or a federal law or treaty, then appeal to the U.S. Supreme Court if the state courts rejected a federal constitutional challenge to a state law or held invalid a federal law or treaty.[13] In the late eighteenth century, Congress enacted statutes granting the lower federal courts jurisdiction over selected cases arising under federal law, such as suits relating to patents.[14]

Broader statutory grants of federal question jurisdiction were enacted in the nineteenth century. Following the Civil War, Congress granted the federal courts jurisdiction over civil rights cases, seeking to protect newly created federal civil rights.[15] The current statutory grant of federal jurisdiction over civil rights cases is codified at 28 U.S.C. § 1343, which authorizes the district courts to hear civil actions including suits to redress the deprivation "under color of any State law," of any "right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States," and suits "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."[16] Plaintiffs frequently rely on Section 1343 to bring suits in federal court under

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[6] U.S. Const.art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *cf.* Convention Records, *supra* note 1, at 125.

[7] The Federalist No. 80 (Alexander Hamilton).

[8] *Id.*

[9] *Id.* at 475.

[10] U.S. Const. art. III, § 1.

[11] *See, e.g.*, Romero v. International Terminal Operating Co., 358 U.S. 354, 364 (1959) (describing "enumerated classes of cases to which 'judicial power' was extended by the Constitution and which thereby authorized grants by Congress of 'judicial Power' to the 'inferior' federal courts"); *cf.* Convention Records, *supra* note 1, at 125 ("Mr. Wilson & Mr. Madison then moved . . . to add . . . the words following 'that the National Legislature be empowered to institute inferior tribunals'. They observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them.").

[12] 1 Stat. 73, 77.

[13] 1 Stat. 73, 85.

[14] Act of April 10, 1790, § 5, 1 Stat. 111, as amended, Act of February 21, 1793, § 6, 1 Stat. 322.

[15] Act of April 9, 1866, § 3, 14 Stat, 27; Act of May 31, 1870, § 8, 16 Stat. 142; Act of February 28, 1871, § 15, 16 Stat. 438; Act of April 20, 1871, §§ 2, 6, 17 Stat. 14, 15.

[16] 28 U.S.C. § 1343(a)(3), (4).

42 U.S.C. § 1983, challenging state and local governmental practices including racial discrimination, electoral malapportionment and suffrage restrictions, unconstitutional police practices, and state restrictions on access to welfare and other public assistance.[17]

In 1875, Congress enacted legislation conferring general federal question jurisdiction on the lower federal courts.[18] The 1875 statute included an amount in controversy requirement, creating federal court jurisdiction over federal question suits only if the plaintiff sought money damages of more than five hundred dollars. Since that time, Congress has expanded the availability of general federal question jurisdiction by repealing the amount in controversy requirement.[19] Additional statutory provisions grant the federal courts subject matter jurisdiction to enforce federal law in specific areas.[20]

ArtIII.S2.C1.11.3 Constitutional and Statutory Grants of Federal Question Jurisdiction

Article III, Section 2, Clause 1:

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

The federal courts' authority to hear federal question cases is rooted in both constitutional text and a number of implementing statutes.[1] The Constitution authorizes the Federal Judiciary to hear "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[2] The Supreme Court held in the 1821 case *Cohens v. Virginia* that a case "arises under" the Constitution or laws of the United States "whenever its correct decision depends on the construction of either," and that cases arising under federal law include all cases that "grow

[17] Section 1983 authorizes private civil suits for the "deprivation of any rights, privileges, or immunities secured by the Constitution" and federal laws. In these suits, Section 1983 provides the substantive cause of action and Section 1343 grants the federal courts jurisdiction. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954); Baker v. Carr, 369 U.S. 186 (1962). Section 1343's grant of federal court jurisdiction is not exclusive, meaning that plaintiffs may also elect to bring claims under Section 1983 in state court. *See, e.g.*, Maine v. Thiboutot, 448 U.S. 1 (1980).

[18] Act of March 3, 1875, § 1, 18 Stat. 470 (codified at 28 U.S.C. § 1331(a)). The 1875 act also allowed either party to remove a federal question case from state court to federal court.

[19] Congress amended the current federal question statute, 28 U.S.C § 1331, in 1976 and 1980 to eliminate the jurisdictional amount requirement. Pub. L. No. 94-574, 90 Stat. 2721; Pub. L. No. 96-486, 94 Stat. 2369.

[20] *See, e.g.*, 18 U.S.C. § 3231 (granting the federal district courts "original jurisdiction, exclusive of the courts of the States," over federal criminal proceedings); 28 U.S.C. § 1257 (granting the Supreme Court appellate jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State" in cases arising under the Constitution or federal laws or treaties); *id.* § 1334 (granting district courts jurisdiction over bankruptcy cases); *id.* § 1337 (granting district courts jurisdiction over antitrust cases).

[1] This essay focuses on constitutional text and procedural statutes that authorize the federal courts to hear federal question cases. For discussion of the types of substantive legal issues that may give rise to federal question jurisdiction, see ArtIII.S2.C1.11.4 Substantive Claims and Defenses in Federal Question Cases.

[2] U.S. Const. art. III, § 2, cl. 1.

out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted."[3]

Congress also plays a role in conferring federal question jurisdiction. The Constitution vests federal judicial power in "one supreme Court" and any lower federal courts that Congress creates.[4] When Congress creates lower federal courts, it generally also specifies (either then or in a separate statute) what portions of the federal judicial power those courts may exercise.[5] In *Osborn v. Bank of the United States*, decided three years after *Cohens*, the Court explained that the "arising under" clause in Article III "enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it."[6] Writing for the Court, Chief Justice John Marshall opined, "when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the [lower federal courts] jurisdiction of that cause, although other questions of fact or of law may be involved in it."[7] Thus, although the Constitution grants the Judiciary as a whole the power to adjudicate federal questions, it generally leaves to Congress the authority to confer that jurisdiction on specific federal courts.[8]

Within that constitutional framework, the current general federal question statute, 28 U.S.C § 1331, grants the federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[9] Additional statutes grant the federal courts jurisdiction over certain specific categories of cases arising under the Constitution and federal law.[10] Although the language of Section 1331 is similar to the constitutional text authorizing the grant of federal question jurisdiction, the Supreme Court has held that the statutory grant of jurisdiction in Section 1331 is narrower than the full authority Congress might choose to confer consistent with the constitutional authorization.[11] In a 2016 case, the Court explained that it

> has long read the words "arising under" in Article III to extend quite broadly, "to all cases in which a federal question is 'an ingredient' of the action." . . . In the statutory

[3] 19 U.S. 264, 379 (1821). *Cf.* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1983) (quoting T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964)) ("[A] case may 'arise under' a law of the United States if the complaint discloses a need for determining the meaning or application of such a law.").

[4] U.S. Const. art. III, § 1.

[5] *See, e.g.*, Romero v. International Terminal Operating Co., 358 U.S. 354, 364 (1959) (describing "enumerated classes of cases to which 'judicial power' was extended by the Constitution and which thereby authorized grants by Congress of 'judicial Power' to the 'inferior' federal courts").

[6] 22 U.S. 738, 818 (1824).

[7] *Id.* at 823.

[8] *Cf.* U.S. Const. art. III, § 2, cl. 2 (granting the Supreme Court original jurisdiction over "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party" but providing that the Court's appellate jurisdiction shall be subject to "such Exceptions, and under such Regulations as the Congress shall make"); *see also* ArtIII.S2.C2.2 Supreme Court Original Jurisdiction.

[9] 28 U.S.C. § 1331.

[10] *See, e.g.*, 18 U.S.C. § 3231 (granting the federal district courts "original jurisdiction, exclusive of the courts of the States," over federal criminal proceedings); 28 U.S.C. § 1257 (granting the Supreme Court appellate jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State" in cases arising under the Constitution or federal laws or treaties); *id.* § 1334 (granting district courts jurisdiction over bankruptcy cases); *id.* § 1337 (granting district courts jurisdiction over antitrust cases).

[11] *See. e.g.*, Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 495 (1983); Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900).

> context, however, we opted to give those same words a narrower scope "in the light of [§ 1331's] history[,] the demands of reason and coherence, and the dictates of sound judicial policy."[12]

Because cases that fall within the narrower statutory grant of federal question jurisdiction also fall within the broader constitutional grant, most court cases considering the scope of federal question jurisdiction focus on application of the relevant jurisdictional statute and do not reach constitutional questions.[13]

In determining whether a case satisfies the general federal question statute, courts ask whether a federal question appears in the plaintiff's "well-pleaded complaint."[14] This means that, as a statutory matter, the existence of a federal question depends on the actual claims that the plaintiff raises, and the existence of an actual or potential *defense* to liability based on federal law is not sufficient to establish federal question jurisdiction.[15] This is an example of when statutory federal question jurisdiction is less than the constitutional maximum, which can include cases involving only a federal defense.[16]

The Supreme Court has explained that most cases subject to arising under jurisdiction "are covered by Justice [Oliver Wendell] Holmes' statement that a 'suit arises under the law that creates the cause of action,'" meaning that "the vast majority" of federal question cases raise claims based directly on federal law.[17] Less often, a case may arise under the laws of the United States "if a well-pleaded complaint establishe[s] that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties."[18] For instance, in *Smith v. Kansas City Title & Trust Co.*, the Court held that federal question jurisdiction existed in a state law suit by a shareholder claiming that a corporation could not lawfully buy certain federal bonds because the issuance of the bonds was unconstitutional.[19]

As a matter of both constitutional scope and statutory authority, federal question jurisdiction is not limited to suits originally filed in federal court. Beginning with the enactment Section 25 the Judiciary Act of 1789, Congress has granted the Supreme Court jurisdiction to review decisions of the states' highest courts when those decisions involve

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[12] Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 578 U.S. 374, 385 (2016) (quoting Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 807 (1986); Romero v. International Terminal Operating Co., 358 U.S. 354, 379 (1959)) (alterations in original).

[13] *See, e.g.*, *Romero*, 358 U.S. at 379. Congress first enacted a statute granting the federal courts general federal question jurisdiction in 1875. Act of March 3, 1875, § 1, 18 Stat. 470 (codified at 28 U.S.C. § 1331(a)). The 1875 statute, like the current federal question statute, used language similar to that of the Constitution. Early cases interpreting the statutory language relied heavily on Chief Justice John Marshall's construction of the constitutional grant of jurisdiction. *See, e.g.*, Pacific R.R. Removal Cases, 115 U.S. 1 (1885). More recent cases have favored a more limited interpretation. *See infra* notes 14–16 and accompanying text.

[14] *See, e.g.*, *Franchise Tax Bd.*, 463 U.S. at 9–10. If the complaint states a case arising under the Constitution or federal law, then federal jurisdiction exists even if the federal claim ultimately fails on the merits. In such a case, the proper course for the court is to dismiss for failure to state a claim on which relief can be granted rather than for lack of jurisdiction. Bell v. Hood, 327 U.S. 678 (1946).

[15] Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908) ("Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution."); *see also* State of Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894).

[16] *See, e.g.*, Cohens v. Virginia, 19 U.S. 264, 379 (1821).

[17] Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 808 (1986) (internal citations omitted).

[18] *Franchise Tax Bd.*, 463 U.S. at 13.

[19] 255 U.S. 180 (1921). By contrast, the Court found no federal question jurisdiction in a case concerning whether the Employment Retirement Income Security Act of 1974 preempted a state law allowing for garnishment of unpaid taxes from an ERISA-covered vacation benefit plan, *Franchise Tax Bd.*, 463 U.S. 1, and in a case where plaintiffs raised state law negligence claims based in part on allegations that a defendant produced a drug that was misbranded in violation of the Federal Food, Drug, and Cosmetic Act, *Merrell Dow*, 478 U.S. 804.

certain issues arising under the Constitution, treaties, or federal law.[20] The Supreme Court upheld Section 25 against a constitutional challenge in *Martin v. Hunter's Lessee*.[21] In addition, as explained in more detail in a later section, if a plaintiff files a case subject to federal court jurisdiction in state court, the defendant may elect to remove the case to federal court.[22] Once the federal courts have jurisdiction over a case, they have the authority to decide any issue necessary to the disposition of the case, including questions of law or fact that do not arise under federal law.[23]

ArtIII.S2.C1.11.4 Substantive Claims and Defenses in Federal Question Cases

Article III, Section 2, Clause 1:

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

Federal question jurisdiction is the basis for many of the Supreme Court's high-profile cases. In particular, federal question cases may involve claims of an actual or threatened invasion of the plaintiff's constitutional rights by some act of public authority. The "arising under" clause thus provides the main textual basis for the implied power for federal courts to review the constitutionality of legislation and other government actions.[1]

There are multiple types of legal claims that may give rise to federal question jurisdiction.[2] Congress often creates federal question jurisdiction by enacting legislation creating substantive legal rights or obligations and explicitly granting the courts jurisdiction to enforce them.[3] Sometimes this jurisdiction is exclusive. For instance, the federal courts have exclusive jurisdiction over federal criminal cases and cases arising under bankruptcy, antitrust, or

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[20] 1 Stat. 73, 85; *see also* 28 U.S.C. § 1257.

[21] 14 U.S. 304 (1816). *See also* Cohens v. Virginia, 19 U.S. 264 (1821).

[22] *See, e.g.,* 28 U.S.C. § 1441; *see also* ArtIII.S2.C1.11.5 Removal from State Court to Federal Court.

[23] *See, e.g.,* 28 U.S.C. § 1367(a); *see also* ArtIII.S2.C1.11.6 Supplemental Jurisdiction.

[1] While federal question jurisdiction is often the basis for constitutional claims brought in federal court, cases arising under the Constitution or federal law are just one of several categories of cases that the Constitution authorizes the federal courts to hear. *See also, e.g.*, ArtIII.S2.C1.16.1 Overview of Diversity Jurisdiction to ArtIII.S2.C1.16.7 Conflicts-of-Law and Procedural Rules in Diversity Cases; ArtIII.S2.C1.18.1 Controversies Between a State or its Citizens and Foreign States or Citizens to ArtIII.S2.C1.17 Land Grants by Different States; ArtIII.S2.C2.1 Overview of Supreme Court Jurisdiction; ArtIII.S2.C2.2 Supreme Court Original Jurisdiction to ArtIII.S2.C2.5 Supreme Court Review of State Court Decisions; ArtIII.S2.C2.6 Exceptions Clause and Congressional Control over Appellate Jurisdiction; ArtIII.S2.C2.6 Exceptions Clause and Congressional Control over Appellate Jurisdiction; ArtIII.S2.C1.12.2 Historical Background on Admiralty and Maritime Jurisdiction; to ArtIII.S2.C1.12.8 Exclusivity of Federal Admiralty and Maritime Jurisdiction.

[2] This essay focuses on substantive legal issues that may give rise to federal question jurisdiction. For discussion of the constitutional text and procedural statutes that authorize the federal courts to hear federal question cases, see ArtIII.S2.C1.11.3 Constitutional and Statutory Grants of Federal Question Jurisdiction.

[3] Congress also sometimes enacts federal statutes that create new legal duties but do not explicitly allow individuals to sue to enforce the law. While the Supreme Court has in the past recognized "implied" rights of action in limited circumstances, more recent case law has instructed courts to "interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

copyright law.[4] In other areas, Congress allows both state and federal courts to hear cases based on federal statutes.[5] For example, 28 U.S.C. § 1343 grants the federal courts jurisdiction over civil rights claims arising under the Constitution or federal law, including claims under 42 U.S.C. § 1983,[6] but state courts may also hear such claims.[7]

Federal question cases may also arise under treaties to which the United States is a party. The Supreme Court has held that some treaties are "self-executing" and thus "directly enforceable as domestic law in our courts," while others are not.[8] If a treaty is not self-executing, Congress must enact legislation to implement the treaty before it can be enforced in U.S. court.[9]

In addition, the constitutional judicial power of federal courts extends to cases arising under judge-made legal doctrines. One example of this is cases involving federal common law. "Common law" refers to legal rules drawn from judicial decisions, rather than a statute or constitution.[10] Although the Supreme Court famously announced in *Erie Railroad v. Tompkins* that "[t]here is no federal general common law,"[11] it is well settled that there are some areas where courts apply federal common law, and the Supreme Court has held that the federal courts have the power to hear federal common law claims.[12] Federal courts primarily create and apply federal common law in two circumstances: where a federal rule of decision is necessary to protect uniquely federal interests, or where Congress has given the courts the power to develop substantive law.[13]

A related example of judge-made law that raises constitutional issues subject to federal question jurisdiction is the doctrine articulated in *Bivens v. Six Unknown Named Agents*.[14]

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[4] *See* 18 U.S.C. § 3231 (federal criminal proceedings); 28 U.S.C. § 1334 (bankruptcy cases); *id.* § 1337 (antitrust cases); *id.* § 1337 (patent and copyright cases).

[5] State courts presumptively enjoy concurrent jurisdiction to enforce federal law, and Congress must explicitly or implicitly confine jurisdiction to the federal courts to oust the state courts. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477–84 (1981); Tafflin v. Levitt, 493 U.S. 455 (1990); Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990).

[6] Section 1983 authorizes private civil suits for the "deprivation of any rights, privileges, or immunities secured by the Constitution" and federal laws. In these suits, Section 1983 provides the substantive cause of action and Section 1343 grants the federal courts jurisdiction. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954); Baker v. Carr, 369 U.S. 186 (1962).

[7] *See, e.g.*, Maine v. Thiboutot, 448 U.S. 1 (1980).

[8] Medellin v. Texas, 552 U.S. 491, 519 (2008).

[9] *Id.* at 505.

[10] *Common Law*, Black's Law Dictionary (11th ed. 2019).

[11] 304 U.S. 64, 78 (1938). Under the Rules of Decision Act, there is a presumption against the creation of federal common law, and federal courts apply state common law when possible. 28 U.S.C. § 1652; *see also* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640–41 (1981) ("The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law.").

[12] *Tex. Indus.*, 451 U.S. at 640.

[13] *Id*. In determining whether to create federal common law, the Court's inquiry focuses on whether a judge-made rule would effectuate the intent of Congress. *See, e.g.*, Cannon v. Univ. of Chicago, 441 U.S. 677, 688 (1979). Congress can enact legislation to displace the judicially created law. City of Milwaukee v. Illinois, 451 U.S. 304 (1981).

[14] 403 U.S. 388 (1971). Some have likened the holding in *Bivens* to the creation of federal common law. *See, e.g.*, Hernandez v. Mesa, 140 S. Ct. 735, 742 (2020) (discussing the petitioners' arguments "[a]nalogizing *Bivens* to the work of a common-law court"); Correctional Services Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (stating that "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action"). Justice John Harlan's concurrence in *Bivens* suggested that liability in that case was not based on common law. 403 U.S. at 403 (Harlan, J., concurring) ("I do not think that the fact that the interest is protected by the Constitution rather than statute or common law justifies the assertion that federal courts are powerless to grant damages in the absence of explicit congressional action authorizing the remedy.").

Bivens and its progeny allowed individuals to sue federal agents directly under the Constitution without a federal statute authorizing relief.[15] More recent Supreme Court cases have construed *Bivens* narrowly.[16]

Other times, federal question jurisdiction exists even though the case, as originally filed, includes only state law civil claims or criminal charges. For instance, a state law civil claim may be filed in federal court, or removed from state to federal court before trial, if a "right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties."[17] In other cases, litigation based on state law questions may proceed through the state courts before receiving federal court review. This often occurs in cases where a civil or criminal defendant invokes the Constitution or a federal statute as a defense to liability. Under the general federal question statute, the federal district courts do not have statutory jurisdiction to hear those cases in the first instance.[18] However, they fall within the constitutional bounds of federal question jurisdiction,[19] and Congress has granted the Supreme Court statutory jurisdiction to hear such cases on appeal from a decision of a state's highest court.[20] A number of high-profile cases have come to the Supreme Court in this way. For instance, the First Amendment case *New York Times v. Sullivan* involved a state law libel claim that was originally litigated in the Alabama courts.[21] Likewise, *Lawrence v. Texas*, in which the Court struck down a state law banning consensual sexual activity between people of the same sex, was an appeal to the U.S. Supreme Court from a state criminal conviction.[22]

Both constitutional and statutory federal question jurisdiction may also exist based on the identity of a party, particularly when a party has sufficiently close ties to the federal government.[23] The Constitution specifically grants federal courts jurisdiction over "Controversies to which the United States shall be a Party," but those cases may also be understood to fall within federal question jurisdiction.[24] The federal courts have statutory jurisdiction over suits where the United States itself is either a plaintiff or a defendant.[25] Similarly, federal statutes authorize the removal to federal court of certain state law civil and criminal claims against federal officers or other persons acting pursuant to federal authority.[26] The Supreme Court rejected a constitutional challenge to the removal of claims against federal revenue officers in *Tennessee v. Davis*, explaining that federal court jurisdiction over such cases

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[15] *See also* Davis v. Passman, 442 U.S. 228 (1979), Carlson v. Green, 446 U.S. 14 (1980).

[16] *See, e.g.*, Egbert v. Boule, 2022 WL 2056291 (June 8, 2022).

[17] Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 13 (1983). *See also* ArtIII.S2.C1.11.3 Constitutional and Statutory Grants of Federal Question Jurisdiction; ArtIII.S2.C1.11.5 Removal from State Court to Federal Court.

[18] 28 U.S.C § 1331; *see also* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908).

[19] *See, e.g.,* Osborn v. Bank of the United States, 22 U.S. 738, 818 (1824).

[20] 28 U.S.C. § 1257.

[21] 376 U.S. 254 (1964).

[22] 539 U.S. 558 (2003). Federal courts may also review state law criminal proceedings via a petition for a writ of habeas corpus. While habeas proceedings may relate to state court proceedings, a habeas petition begins a new federal case. For discussion of federal habeas review of state criminal proceedings, see ArtIII.S1.6.9 Habeas Review.

[23] Federal court jurisdiction also depends on the identities of the parties when jurisdiction is based on diversity of citizenship. Diversity jurisdiction is distinct from federal question jurisdiction. *See* ArtIII.S2.C1.16.1 Overview of Diversity Jurisdiction to ArtIII.S2.C1.16.7 Conflicts-of-Law and Procedural Rules in Diversity Cases; ArtIII.S2.C1.18.1 Controversies Between a State or its Citizens and Foreign States or Citizens to ArtIII.S2.C1.17 Land Grants by Different States.

[24] *See* Lynch v. Household Finance Corp., 405 U.S. 538, 549 n.17 (1972) (listing 28 U.S.C. §§ 1345 and 1346 among other "particular statutes [that] grant jurisdiction, without regard to the amount in controversy, in virtually all areas that otherwise would fall under the general federal-question statute").

[25] 28 U.S.C. §§ 1345, 1346.

[26] 28 U.S.C. §§ 1442(a)(1), 2679(d).

implicated the federal government's fundamental interest in "preserving its own existence" against state proceedings that might undermine federal authority.[27]

Article III also allows Congress to grant federal court jurisdiction in cases involving federally chartered corporations, such as banks or railroads. In *Osborn v. Bank of the United States*, Chief Justice John Marshall held that Congress's authorization for the Bank of the United States to sue and be sued also granted the federal courts jurisdiction over all cases to which the bank was a party.[28] Similarly, in the *Pacific Railroad Removal Cases*, the Court held that tort actions against railroads with federal charters could be removed to federal courts solely based on federal incorporation.[29] In a 1992 case, *American National Red Cross v. S. G.*, the Court held that when a federal statutory charter expressly mentions the federal courts in a provision allowing an entity to sue and be sued, the charter creates federal question jurisdiction over such suits.[30] Congress has enacted legislation limiting the extent to which some federally chartered corporations can sue or be sued in federal court based solely on federal incorporation.[31]

Federal question cases usually involve the application of federal substantive law, whether as the direct basis for a claim or defense or as a substantial legal question that may determine rights under state law. Some scholars and advocates take an expansive view of constitutional federal question jurisdiction under a theory known as "protective jurisdiction," arguing that Congress has the constitutional power to confer federal jurisdiction over claims based entirely on state law.[32] They posit that in areas where Congress has the authority to legislate pursuant to one of its enumerated powers,[33] it could enact a jurisdictional statute that creates no new substantive federal legal rights or obligations.[34] The jurisdictional statute would itself be the law of the United States within the meaning of Article III, and would validly create federal question jurisdiction, even though Congress enacted no substantive rule of decision. The Supreme Court has declined to adopt the doctrine, instead finding other bases for federal court jurisdiction in cases where it might apply.[35]

ArtIII.S2.C1.11.5 Removal from State Court to Federal Court

Article III, Section 2, Clause 1:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and*

[27] 100 U.S. 257, 262 (1880). For additional discussion of *Davis*, see ArtIII.S2.C1.11.5 Removal from State Court to Federal Court.

[28] 22 U.S. 738 (1824).

[29] 115 U.S. 1 (1885).

[30] 505 U.S. 247 (1992). The Court has held, however, that a general authorization to sue and be sued that does not expressly mention suits in federal courts does not confer jurisdiction.

[31] *See, e.g.*, 28 U.S.C. § 1349 ("The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock.").

[32] *See generally, e.g.*, Paul Mishkin. *The Federal "Question" Jurisdiction of the District Courts*, 53 Col. L. Rev. 157, 184–196 (1953); Scott A. Rosenberg, Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. Rev. 933 (1982); Loretta Shaw, Comment, *A Comprehensive Theory of Protective Jurisdiction: The Missing "Ingredient" of "Arising Under" Jurisdiction*, 61 Fordham L. Rev. 1235 (1993).

[33] *See generally* ArtI.S1.3.3 Enumerated, Implied, Resulting, and Inherent Powers.

[34] Rosenberg, *supra* note 32, at 937.

[35] *See, e.g.*, Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 491 n.17 (1983); Mesa v. California, 489 U.S. 121, 137 (1989).

Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;— to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Constitution's grant of federal question jurisdiction over cases "arising under" the Constitution, laws, and treaties of the United States extends to some cases filed in state court. Congress has provided that a state court defendant may remove a case to federal court if the case could originally have been brought in federal court.[1] The current general removal statute is codified at 28 U.S.C. § 1441, and additional statutes authorize removal in specific circumstances.[2]

In *Martin v. Hunter's Lessee*, the Supreme Court likened removal before trial to federal appellate review of state court judgments, asserting that both served the purposes of promoting fairness and ensuring the uniform interpretation of federal law.[3] Decades later, in *Chicago & N.W. Railway v. Whitton's Administrator*, the Court upheld a removal statute against a constitutional challenge.[4] The Court expressed "doubt" as to whether removal before trial "can properly be called an exercise of appellate jurisdiction," stating that removal might "more properly be regarded as an indirect mode by which the Federal court acquires original jurisdiction of the causes."[5] However, noting that both state and federal courts had frequently recognized the constitutionality of removal statutes, the Court concluded that, except where the Constitution expressly specifies original or appellate jurisdiction, Congress has discretion to legislate "the manner and conditions upon which [the federal judicial power] shall be exercised."[6]

In *Tennessee v. Davis*, the Court considered the constitutionality of a statute that allowed removal to federal court of state court civil or criminal proceedings against any federal revenue officer "on account of any act done under color of his office or of any [federal revenue] law."[7] The Court explained that federal court jurisdiction over such cases implicated the federal

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[1] 28 U.S.C. § 1441. The removal statute applies not only to federal question cases but also to cases where the federal courts possess diversity jurisdiction because the parties are from different states. For discussion of diversity jurisdiction, see ArtIII.S2.C1.16.1 Overview of Diversity Jurisdiction to ArtIII.S2.C1.16.7 Conflicts-of-Law and Procedural Rules in Diversity Cases; ArtIII.S2.C1.18.1 Controversies Between a State or its Citizens and Foreign States or Citizens to ArtIII.S2.C1.17 Land Grants by Different States.

[2] *See* 28 U.S.C. § 1442 (suits or prosecutions against federal officers and agencies); *id.* § 1442a suits or prosecutions against members of the armed forces); *id.* § 1443 (civil rights cases); *id.* § 1444 (foreclosure actions against the United States); *id.* § 1452 (claims related to bankruptcy cases); *id.* § 1453 (class actions); *id.* § 1454 (patent, plant variety protection, and copyright cases).

[3] 14 U.S. 304, 347–51 (1816). In upholding a statute that allowed the Supreme Court to review state court judgments, the Court explained, "The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power . . . was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum. [If] the plaintiff may always elect the state court, the defendant may be deprived of all the security which the constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights." *Id.* at 348–49.

[4] 80 U.S. 270 (1872). This case arose under state law, and removal was based on diversity of citizenship. *See* ArtIII.S2.C1.16.1 Overview of Diversity Jurisdiction to ArtIII.S2.C1.16.7 Conflicts-of-Law and Procedural Rules in Diversity Cases; ArtIII.S2.C1.18.1 Controversies Between a State or its Citizens and Foreign States or Citizens to ArtIII.S2.C1.17 Land Grants by Different States.

[5] *Id.* at 287.

[6] *Id.* at 288–89; *see also* The Moses Taylor, 71 U.S. 411, 429–430 (1867); Mayor and Aldermen of City of Nashville v. Cooper, 73 U.S. 247, 251–54 (1868).

[7] 100 U.S. 257, 261 (1880). The case involved a state prosecution of a federal internal revenue agent who had killed a man while seeking to seize an illicit distilling apparatus and claimed that he had acted in self-defense. *See id.* at 260.

government's fundamental interest in "preserving its own existence," preventing states from undermining federal policies by prosecuting federal agents.[8] The Court stated, "Cases arising under the laws of the United States are such as grow out of the legislation of Congress, [whether] they constitute th[e] right or privilege, or claim or protection, or defence of the party, in whole or in part."[9] It held that the Constitution's grant of federal question jurisdiction extended to the protection of federal agents performing their official duties, and that the removal statute was a valid grant of federal question jurisdiction under the Necessary and Proper Clause.[10]

The modern analog to the federal officer removal statute at issue in *Davis* is codified in 28 U.S.C. § 1442.[11] The Supreme Court has construed that statute broadly to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law.[12] The Court has interpreted other removal statutes, such as the civil rights removal statute, more narrowly.[13]

ArtIII.S2.C1.11.6 Supplemental Jurisdiction

Article III, Section 2, Clause 1:

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

A single case may simultaneously involve claims that give rise to federal court jurisdiction and claims that, standing alone, would not. The federal courts may often consider both sets of claims together under the doctrine of *supplemental jurisdiction*. The doctrine is grounded in the broad interpretation of Article III jurisdiction articulated in *Osborn v. Bank of the United States*, where Chief Justice John Marshall explained that the Constitution grants the federal courts jurisdiction when a federal question "forms an *ingredient* of the original cause, . . . although other questions of fact or of law may be involved in it."[1] Supreme Court cases and

[8] *Id.* at 262.

[9] *Id.* at 264.

[10] *Id.* at 263–71.

[11] 28 U.S.C. § 1442(a)(1) (authorizing removal of any "civil action or criminal prosecution that is commenced in a State court and that is against or directed to . . . [t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue").

[12] Willingham v. Morgan, 395 U.S. 402, 406–07 (1969); *see also* Maryland v. Soper, 270 U.S. 9 (1926). Removal by a federal officer or agency must be predicated on the allegation of a colorable federal defense. Mesa v. California, 489 U.S. 121 (1989). In 1991, the Supreme Court held that a federal agency was not permitted to remove a case under the statute's plain meaning. International Primate Protection League v. Tulane Educ. Fund, 500 U.S. 72 (1991). Congress amended the statute in 1996 to specify that actions against agencies were removable. Pub. L. 104-317, § 206(a)(1).

[13] *See, e.g.*, Johnson v. Mississippi, 421 U.S. 213 (1975) (to warrant removal under 28 U.S.C. § 1443(1), it must appear that (1) "the right allegedly denied the removal petitioner arises under a federal law 'providing for specific civil rights stated in terms of racial equality'" and (2) "the removal petitioner is denied or cannot enforce the specified federal rights in the courts of (the) State.") (quoting Georgia v. Rachel, 384 U.S. 780, 792, 808 (1966)) (additional quotes removed); *see also*; City of Greenwood v. Peacock, 384 U.S. 808 (1966).

[1] 22 U.S. 738, 823 (1824).

federal legislation identify circumstances in which federal courts may exercise supplemental jurisdiction to hear claims over which they would not otherwise have jurisdiction, including state law claims between non-diverse parties.[2]

One form of supplemental jurisdiction, also called *ancillary jurisdiction*, *pendent jurisdiction*, or *pendent claim jurisdiction*, exists when a claim that would not otherwise be subject to federal court jurisdiction arises from the same set of facts as a claim that is subject to federal court jurisdiction.[3] Some sources use the term *pendent jurisdiction* to refer to cases where related federal and non-federal claims appear in a plaintiff's complaint.[4] By contrast, *ancillary jurisdiction* may refer to cases where a complaint raises one or more claims subject to federal court jurisdiction, then a defendant responds by raising compulsory *counterclaims* that would not independently meet the jurisdictional requirements.[5]

The doctrine of ancillary jurisdiction has its roots in the 1861 case *Freeman v. Howe*.[6] *Freeman* involved federal court proceedings related to the seizure of rail cars. The original parties were from different states, and the case proceeded in federal court pursuant to diversity jurisdiction. Other parties who did not satisfy the requirements for diversity jurisdiction then sought to intervene and assert rights to the seized property. The Supreme Court held that the federal courts could hear claims from the non-diverse parties, stating that an equitable claim like those at issue "is not an original suit, but ancillary and dependent, supplementary merely to the original suit, . . . and is maintained without reference to the citizenship or residence of the parties."[7]

By contrast, in *Kokkonen v. Guardian Life Ins. Co.*, the Court held that the federal courts lacked ancillary jurisdiction to hear state law breach of contract claims related to a settlement agreement that resolved earlier federal court litigation.[8] Justice Antonin Scalia's majority opinion identified two purposes of ancillary jurisdiction: "to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent," or "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."[9] The Court held that federal jurisdiction over the breach of contract claims would not serve those purposes.

With respect to pendent jurisdiction over state and federal claims contained in a single complaint, the Supreme Court in *Siler v. Louisville & Nashville R.R.* considered whether federal courts could exercise jurisdiction over a case involving federal constitutional claims

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[2] Supplemental jurisdiction may exist in cases where federal court jurisdiction is based on either the existence of a federal question or diversity of citizenship. For discussion of diversity jurisdiction, where the federal courts possess jurisdiction over a case because the parties are from different states, see ArtIII.S2.C1.16.1 Overview of Diversity Jurisdiction to ArtIII.S2.C1.16.7 Conflicts-of-Law and Procedural Rules in Diversity Cases; ArtIII.S2.C1.18.1 Controversies Between a State or its Citizens and Foreign States or Citizens to ArtIII.S2.C1.17 Land Grants by Different States.

[3] *See, e.g.*, Romero v. International Terminal Operating Co., 358 U.S. 354, 380–81 (1959); Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963); Rosado v. Wyman, 397 U.S. 397, 402–05 (1970). While some courts and commentators consider pendent jurisdiction to be one type of ancillary jurisdiction, others use the two terms to refer to distinct but related categories of cases *See, e.g.*, Erwin Chemerinsky, Federal Jurisdiction 343 (5th ed. 2007); *see also infra* notes 4–5 and accompanying text.

[4] For example, plaintiffs suing for civil rights violations often raise claims under the federal statute 42 U.S.C. § 1983 as well analogous state law claims.

[5] Moore v. New York Cotton Exchange, 270 U.S. 593 (1926).

[6] 65 U.S. 450 (1861).

[7] *Id.* at 460.

[8] 511 U.S. 375 (1994). *See also* Peacock v. Thomas, 516 U.S. 349 (1996) (holding that federal courts do not possess ancillary jurisdiction over new actions in which a federal judgment creditor seeks to impose liability for a money judgment on a person not otherwise liable for the judgment).

[9] *Kokkonen*, 511 U.S. at 379–80.

and claims under state law.[10] The court explained that the constitutional claims gave rise to federal court jurisdiction, and thereafter the federal court could "decide all the question[s] in the case, even though it decided the Federal questions adversely to the party raising them," and even if it declined to decide the federal questions and instead resolved the case on state law grounds.[11]

The Supreme Court articulated a test for when courts should exercise pendent jurisdiction in the 1933 case *Hurn v. Oursler*.[12] In that case, the Court distinguished between "a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question"—which was subject to ancillary jurisdiction—and "a case where two separate and distinct causes of action are alleged, one only of which is federal in character" —which was not.[13]

Lower federal courts had difficulty applying the rule in *Hurn*, and several decades later the Court articulated a new test in *United Mine Workers v. Gibbs*.[14] Stating that courts applying *Hurn* had been "unnecessarily grudging" in hearing pendent claims, the Court explained:

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is [a federal question claim], and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case."[15]

To warrant the exercise of pendent jurisdiction, "[t]he state and federal claims must derive from a common nucleus of operative fact."[16] But if the federal issues are substantial and plaintiff's federal and state claims "are such that he would ordinarily be expected to try them all in one judicial proceeding, then . . . there is power in federal courts to hear the whole."[17] Although the *Gibbs* Court held that the "judicial power" under the Constitution allowed for pendent jurisdiction in a large class of cases, the Court also emphasized that federal courts could properly decline to exercise that power over state claims based on "considerations of judicial economy, convenience and fairness to litigants," as well to foster comity between federal and state courts.[18]

Pendent jurisdiction does not exist if a plaintiff's federal claim is insubstantial or patently without merit.[19] The Supreme Court has also held that when the Eleventh Amendment bars a federal claim against state officials, federal courts may not exercise jurisdiction over pendent state law claims.[20] If a federal claim is substantial enough to confer jurisdiction but is dismissed before trial, or if a pendent state law claim substantially predominates, a federal court may be justified in dismissing the state claim.[21] However, there is no requirement that federal courts resolve cases involving both federal and state law claims on federal grounds

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[10] 213 U.S. 175 (1909).

[11] *Id.* at 191.

[12] 289 U.S. 238 (1933).

[13] *Id.* at 246.

[14] 383 U.S. 715 (1966).

[15] *Id.* at 725.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 726

[19] Hagans v. Lavine, 415 U.S. 528, 537–38 (1974); *see also Gibbs*, 383 U.S. at 725.

[20] Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 120 (1984). For further discussion of the Eleventh Amendment, see Amdt11.5.1 General Scope of State Sovereign Immunity.

[21] *Gibbs*, 383 U.S. at 726–27.

when possible.[22] On the contrary, the doctrine of constitutional avoidance counsels that federal courts should not decide federal constitutional claims if they can avoid doing so, meaning that it may be an abuse of discretion for a federal court to reach a federal constitutional question when it could decide a case on state law grounds.[23]

The foregoing cases considered when federal courts may exercise supplemental jurisdiction over *claims* over which they would not otherwise have jurisdiction. A related doctrine, sometimes called *pendent party jurisdiction*, allows the federal courts to hear claims involving *parties* who might not otherwise be subject to federal subject matter jurisdiction.[24]

In 1978, in *Owen Equipment & Erection Co. v. Kroger*, the Supreme Court announced a limit on pendent party jurisdiction, holding that a plaintiff could not amend her complaint to add a claim against a third-party defendant that was a resident of the plaintiff's home state.[25] The Court again limited pendent party jurisdiction in the 1989 case *Finley v. United States*.[26] Justice Antonin Scalia's majority opinion in *Finley* declined to disturb the doctrine of pendent claim jurisdiction laid out in *Gibbs*, and explicitly acknowledged that pendent party jurisdiction also fell within the *constitutional* grant of federal judicial power. However, the Court declined to "read jurisdictional statutes broadly" in support of pendent party jurisdiction.[27] The majority emphasized that its holding, based on application of the jurisdictional statutes, "can of course be changed by Congress."[28]

The following year, Congress enacted legislation that expressly granted the federal courts pendent party jurisdiction.[29] Codified at 28 U.S.C. § 1367, the statute provides that, subject to certain limitations, once the federal district courts have jurisdiction over a case, they "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution," including "claims that involve the joinder or intervention of additional parties."[30] Section 1367(b) codified the holding in *Owen Equipment* imposing limits on the federal courts' ability to exercise supplemental jurisdiction over certain claims by plaintiffs against non-diverse defendants.[31] More generally, the Supreme Court has

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[22] *See, e.g.*, Greene v. Louisville & Interurban R.R., 244 U.S. 499, 508 (1917) (holding that, once federal court jurisdiction is established, it extends "to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the Federal question, or whether it be found necessary to decide it at all").

[23] *Hagans*, 415 U.S. at 549–50; Schmidt v. Oakland Unified School Dist., 457 U.S. 594 (1982) (per curiam); Siler v. Louisville & Nashville R.R., 213 U.S. 175, 191 (1909). For discussion of the constitutional avoidance doctrine, *see* ArtIII.S2.C1.10.1 Overview of Constitutional Avoidance Doctrine.

[24] In addition to subject matter jurisdiction, there is a separate constitutional requirement that any court hearing a claim against a party must also possess personal jurisdiction over that party. *See generally* Amdt14.S1.7.1.1 Overview of Personal Jurisdiction and Due Process.

[25] 437 U.S. 365 (1978).

[26] 490 U.S. 545 (1989).

[27] *Id.* at 556.

[28] *Id.*

[29] Act of Dec. 1, 1990, Pub. L. No. 101-650, 104 Stat. 5089, § 310 (codified at 28 U.S.C. § 1367).

[30] 28 U.S.C. § 1367(a); *see also* 28 U.S.C. § 1441(c) (allowing for removal to federal court of any civil action that includes "(A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and (B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute").

[31] 28 U.S.C. § 1367(b) ("In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with

explained that Section 1367 "codified [the] principles" of *Gibbs* and related cases in a supplemental jurisdiction statute that "combines the doctrines of pendent and ancillary jurisdiction under a common heading."[32]

ArtIII.S2.C1.12 Admiralty and Maritime Jurisdiction

ArtIII.S2.C1.12.1 Overview of Admiralty and Maritime Jurisdiction

Article III, Section 2, Clause 1:

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

The federal courts' jurisdiction over admiralty and maritime cases derives from the Constitution and federal statutes. Article III of the Constitution extends the federal judicial power to "all Cases of admiralty and maritime Jurisdiction."[1] By giving the Federal Judiciary jurisdiction over admiralty cases—and authorizing Congress to regulate that jurisdiction[2]—the Framers sought to ensure that federal courts would resolve cases that might implicate the Nation's foreign policy.[3] The Framers also recognized that uniform federal admiralty jurisdiction could protect maritime commerce from the diverse and unpredictable procedural rules that state admiralty courts had applied under the Articles of Confederation.[4]

Beginning with the Judiciary Act of 1789, Congress established the federal district courts and granted them "exclusive" and "original"[5] subject matter jurisdiction over any "civil case of admiralty or maritime jurisdiction."[6] Congress also allowed state courts to exercise concurrent

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the jurisdictional requirements of section 1332."). *See also* Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 573 (Stevens, J., dissenting) (quoting House Report on Section 1367, which was also adopted by the Senate).

[32] City of Chicago v. Int'l College of Surgeons, 522 U.S. 156 (1998).

[1] U.S. Const. art. III, § 2, cl. 1. Federal courts have treated the "admiralty" and "maritime" aspects of such jurisdiction as functionally synonymous. This essay sometimes refers to "admiralty and maritime jurisdiction" as "admiralty jurisdiction." Jurisdiction generally refers to a court's power to decide a case. *Jurisdiction*, Black's Law Dictionary 980 (10th ed. 2014).

[2] *See* U.S. Const. art. III, § 1; *id.* § 2, cl. 1; United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32, 33 (1812).

[3] 3 Joseph Story, Commentaries on the Constitution of the United States, § 1666 (1833).

[4] *Id.*; Waring v. Clarke, 46 U.S. (5 How.) 441, 456–57 (1847).

[5] If a court has "original jurisdiction" over a particular subject matter, then it may hear and decide a case concerning that matter before any other tribunal does. *Original Jurisdiction,* Black's Law Dictionary 982 (10th ed. 2014).

[6] The current version of this statutory grant of admiralty jurisdiction is located at 28 U.S.C. § 1333(1). Congress also granted the federal district courts exclusive jurisdiction over prize cases, which have historically involved property (e.g., a ship) used by an enemy, captured during wartime, and brought into the United States. *Id.* § 1333(2). Under federal law, the district courts have jurisdiction over cases involving the seizure and forfeiture of a vessel for violating federal law. *Id.* §§ 1333(1), 1356. Congress also granted district courts in U.S. territories jurisdiction over admiralty and maritime cases. *See* The City of Panama, 101 U.S. 453, 458 (1880).

In general, district courts have discretion as to whether to retain admiralty jurisdiction over suits between foreign parties. Charter Shipping Co. v. Bowring, Jones & Tidy, Ltd., 281 U.S. 515, 517 (1930); The Maggie Hammond, 76 U.S. (9 Wall.) 435, 450, 457 (1869).

jurisdiction over admiralty cases in which plaintiffs seek traditional common law remedies.[7] Under the "saving to suitors clause" in Section 9 of the Judiciary Act, courts retain concurrent jurisdiction over most contract and tort claims that fall within federal admiralty jurisdiction because a plaintiff may bring a personal action against an individual defendant seeking common law remedies (e.g., payment of money damages).[8] However, in general, plaintiffs must pursue actions in federal court when they seek remedies that lie against property in rem, such as the seizure of a vessel to enforce a maritime lien.[9]

Much of the Supreme Court's jurisprudence on admiralty jurisdiction has examined the territorial extent of such jurisdiction and which types of cases fall within this limited grant of jurisdiction. Generally, courts consider the location in which a tort or crime occurs to be a major factor when determining whether the tort or crime falls within admiralty jurisdiction.[10] The Court has held that, under the Constitution, admiralty jurisdiction extends to all navigable public waters, regardless of whether they are saltwater or freshwater, or subject to the ebb and flow of the tide.[11] Admiralty jurisdiction also extends to contracts, regardless of where they are entered into or to be performed, provided that their subject matter is "essentially maritime."[12]

When a federal court exercises admiralty jurisdiction over a case,[13] it follows a special set of procedural rules. Notably, jury trials are unavailable in civil admiralty proceedings[14] unless Congress provides otherwise.[15] Thus, in federal admiralty proceedings, the judge typically decides issues of both law and fact. When a federal or state court exercises admiralty jurisdiction over a case, the judge must apply the substantive rules of federal maritime law,[16]

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[7] 28 U.S.C. § 1333(1) ("The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled*.") (emphasis added). *See also, e.g.*, Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 454 (2001); Schoonmaker v. Gilmore, 102 U.S. 118, 119 (1880); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 337 (1816). Lawsuits brought under the savings clause in state court may not be removed to federal court unless independent grounds exist, other than admiralty, for the federal court's exercise of jurisdiction. Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 371–72 (1959).

[8] For more on the relationship between federal and state court jurisdiction in admiralty cases, see ArtIII.S2.C1.12.8 Exclusivity of Federal Admiralty and Maritime Jurisdiction.

[9] *See id.* In in rem admiralty proceedings, the court takes custody of the *res* or property. The property itself is made the defendant in the case, and parties who have an interest in it "may appear" and each "propound independently his interest." Taylor v. Carryl, 61 U.S. (20 How.) 583, 599 (1858).

[10] Exec. Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 268 (1972).

[11] *See, e.g.*, Southern S.S. Co. v. NLRB, 316 U.S. 31, 41 (1942); The Montello, 87 U.S. (20 Wall.) 430, 441–45 (1874); The Daniel Ball, 77 U.S. (10 Wall.) 557, 563–64 (1870). Congress has some power to extend the territorial scope of admiralty jurisdiction. For example, in the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 30101, Congress augmented admiralty jurisdiction so that it encompasses claims that involve injury or damage to persons or property "caused by a vessel on navigable waters," even if such injury or damage is "done or consummated on land" (e.g., collision of a ship with a bridge).

[12] *Ex parte* Easton, 95 U.S. 68, 72 (1877).

[13] A federal court exercising admiralty jurisdiction is sometimes said to be "sitting in admiralty."

[14] *E.g.,* The Whelan, 11 U.S. (7 Cr.) 112, 112 (1812); The Schooner Betsey, 8 U.S. (4 Cr.) 443, 452 (1807); The Schooner Sally, 6 U.S. (2 Cr.) 406, 406 (1805); La Vengeance, 3 U.S. (3 Dall.) 297, 301 (1796).

[15] Congress may, consistent with the Constitution, provide for jury trials in admiralty cases. *See* Fitzgerald v. United States Lines Co., 374 U.S. 16, 20 (1963) (noting that the Seventh Amendment does not require jury trials in admiralty cases but "neither that Amendment nor any other provision of the Constitution forbids them"); The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 460 (1852). The Great Lakes Statute, 28 U.S.C. § 1873, provides that parties to a lawsuit involving maritime contracts or torts may demand a jury trial in admiralty cases that arise upon the Great Lakes, provided that the vessels involved meet certain conditions.

[16] Federal maritime law incorporates common principles that commercial nations have recognized. The United States has adopted this maritime law through its "laws and usages" with some modifications to account for local conditions. *See* The Lottawanna, 88 U.S. (21 Wall.) 558, 572–73 (1875) ("In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such.").

which is a type of federal common law[17] that Congress may revise.[18] In the absence of controlling federal maritime law, federal courts have sometimes applied substantive state law in admiralty cases when it would not interfere with the uniformity of federal maritime law.[19] In some cases, such as those involving maritime torts in a state's territorial waters, the Court has held that state law may supplement federal maritime law with additional remedies.[20]

This group of essays examines the Constitution's grant of federal judicial power over cases of admiralty and maritime jurisdiction. The first essay provides an overview of the historical development of admiralty and maritime jurisdiction in the United States. Subsequent essays examine Supreme Court decisions that interpret the territorial and conceptual scope of this jurisdiction. The essays conclude by discussing when concurrent federal and state jurisdiction exists over maritime claims and, alternatively, when such claims fall within the exclusive admiralty jurisdiction of the federal courts.

ArtIII.S2.C1.12.2 Historical Background on Admiralty and Maritime Jurisdiction

Article III, Section 2, Clause 1:

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

The Constitution's Framers were familiar with the concept of a separate and specialized admiralty jurisdiction. Prior to the Founding, the British Crown commissioned vice-admiralty courts in the American colonies.[1] These courts, which were subordinate to the English admiralty courts, exercised jurisdiction over maritime cases that arose in the colonies independently of the colonial courts of common law and equity.[2]

In the years leading up to the American Revolution, the jurisdiction of the independent vice-admiralty courts led to disputes between the colonists and the British Crown. For

[17] Federal courts have explained the content of the general maritime law. *See generally* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 628 (1959); Carlisle Packing Co. v. Sandanger, 259 U.S. 255, 259 (1922); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 381–82 (1918); United States v. Ames, 99 U.S. 35, 35–36 (1879).

[18] Congress may, consistent with the Constitution, revise federal maritime law. *See* Crowell v. Benson, 285 U.S. 22, 55 (1932); *In re* Garnett, 141 U.S. 1, 14 (1891). Congress might also rely, to an extent, on its power to regulate maritime commerce when revising general maritime law. *The Lottawanna*, 88 U.S. (21 Wall.) at 577. *See also, e.g.*, U.S. Const. art. I, § 8, cl. 10 (granting Congress power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations"); *id.* § 8, cl. 11 (giving Congress power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water").

[19] Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 158–59 (1920). *See also* Goett v. Union Carbide Corp., 361 U.S. 340, 342 (1960) (holding that, in a wrongful death case, a state law may supply the standard for liability in a maritime tort that arises within the state's territorial jurisdiction); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 320–21 (1955) (holding that state law governed the effect of marine insurance warranties when Congress had left regulation of marine insurance to the states).

[20] *E.g.*, Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 202, 215 (1996) (holding that state remedies for the wrongful death of a nonseafarer in state territorial waters were not preempted by federal law, where federal law provided no other remedy).

[1] *Waring*, 46 U.S. at 454; 3 William Blackstone, Commentaries on the Laws of England 68–70 (Philadelphia 1893) (1768). *See also* Story, *supra* note 3, at § 1659.

[2] *See supra* note 1.

example, the colonists objected to the Crown's prosecution of colonists in the vice-admiralty courts, without trial by jury, for allegedly violating a British tax law, the 1765 Stamp Act.[3] In 1774, the First Continental Congress's delegates cited this extension of British admiralty courts' jurisdiction "beyond their ancient limits" as one of the major grievances against Great Britain.[4] Denial to the colonists of trial by jury in the vice-admiralty courts helped to motivate the colonists' 1776 Declaration of Independence, which cited the British King depriving the colonists "in many cases, of the benefits of Trial by Jury" as a justification for separating from Great Britain.[5]

After declaring independence, each state established its own admiralty courts.[6] State admiralty courts adopted a wide variety of procedural practices, particularly with respect to the availability of jury trials.[7] Although the Articles of Confederation authorized Congress to establish a tribunal to hear appeals from state admiralty courts in prize cases, this appeal mechanism failed to resolve many conflicts among state admiralty court decisions.[8]

Records of the Federal Convention of 1787 do not provide much insight into the Framers' reasons for conferring admiralty jurisdiction on the Federal Judiciary.[9] Delegate Charles Pinckney's plan for the federal government, which he had submitted to the Convention, would have authorized Congress to establish separate admiralty courts in each of the states.[10] In addition, the issue of admiralty jurisdiction received a brief mention in a Convention debate over whether the Constitution should specifically create lower federal courts.[11] Delegate James Wilson argued that the "national Government" should have jurisdiction over admiralty cases because they would often implicate controversies with foreign parties that should remain outside of state court jurisdiction.[12]

Toward the end of the Convention, the Committee of Detail, which was responsible for drafting the Constitution, included the clause granting the Federal Judiciary admiralty and maritime jurisdiction in one of its drafts.[13] This clause would establish uniform federal jurisdiction to resolve conflicts among the states with respect to prize cases, and the Convention delegates appear to have accepted it without controversy.[14]

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[3] The Avalon Project at Yale Law School, *Declaration and Resolves of the First Continental Congress*, https://avalon.law.yale.edu/18th_century/resolves.asp. *See also* C.J. Hendry Co. v. Moore, 318 U.S. 133, 141 (1943) (noting that the "rise of the vice-admiralty courts" was "prompted in part by the [British] Crown's desire to have access to a forum not controlled by the obstinate resistance of American juries").

[4] *See supra* note 3. The colonial vice-admiralty courts had long exercised a more expansive jurisdiction than that of the English admiralty courts. *See* Atkins v. Disintegrating Co., 85 U.S. (18 Wall.) 272, 304 (1874); *Waring*, 46 U.S. (5 How.) at 454.

[5] Nat'l Archives, *Declaration of Independence: A Transcription*.

[6] Harrington Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 Cornell L.Q. 460, 461–63 (1925). For example, Virginia established a court to hear cases related to "vessels and their cargoes," which had jurisdiction over prize cases. *Id.*

[7] The Federalist No. 83 (Alexander Hamilton).

[8] Putnam, *supra* note 6, at 463–64. *See also* Articles of Confederation and Perpetual Union of 1781, art. IX.

[9] Putnam, *supra* note 6, at 460 (noting that the subject of admiralty courts "received but scant attention in the deliberations of the Federal Constitutional Convention").

[10] *Id.* at 460, 465–66. *See also, e.g.*, 2 Records of the Federal Convention of 1787, at 159 (Max Farrand ed., 1911) (reproducing one version of the Pinckney Plan in a Committee of Detail draft).

[11] 1 Records of the Federal Convention of 1787, at 124 (Max Farrand ed., 1911).

[12] *Id.*

[13] 2 Records of the Federal Convention of 1787, *supra* note 11, at 186–87. This draft granted the "Supreme Court" jurisdiction over admiralty cases but vested the federal "Judicial Power" in the Supreme Court and lower federal courts. *See id.* The Constitution's final text specifically extended the federal "judicial Power" to admiralty cases. U.S. Const. art. III, § 2, cl. 1.

[14] Putnam, *supra* note 6, at 469 ("[T]he experience of prize appeals, and the conflicts in the separate State courts, had prepared the Convention to accept a uniform Federal system, as essential to maritime commerce."). *See also* 3

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Writing in the *Federalist Papers* in support of the Constitution's ratification, Alexander Hamilton maintained that even the most adamant opponents of a strong central government had acknowledged that the Federal Judiciary should take cognizance of admiralty cases.[15] Such cases, he wrote, "depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace."[16] The Founders believed that admiralty jurisdiction should extend to the adjudication of prize cases involving the capture of foreign ships[17] and torts involving foreign ships,[18] both of which could implicate foreign affairs.[19] Hamilton also argued that federal courts should have exclusive jurisdiction in admiralty cases in order to provide uniform practices with respect to jury trials, which varied widely in state courts.[20]

By giving the Federal Judiciary jurisdiction over admiralty cases—and authorizing Congress to regulate that jurisdiction[21]—the Framers sought to ensure that federal courts would resolve cases that might implicate the nation's foreign policy.[22] The Framers also recognized that uniform federal admiralty jurisdiction could protect maritime commerce from the diverse and unpredictable procedural rules that state admiralty courts had applied under the Articles of Confederation.[23] After the Constitution's ratification, commercial maritime activity continued to expand throughout the United States. The importance of uniform admiralty jurisdiction grew as the Nation acquired new territories with inland waters and new inventions like the steamboat increased commerce on U.S. waterways.[24]

ArtIII.S2.C1.12.3 Federal Admiralty and Maritime Jurisdiction Generally

Article III, Section 2, Clause 1:

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

Since the Founding, the Supreme Court has grappled with the scope of federal courts' "admiralty and maritime" jurisdiction under Article III of the Constitution and federal

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Joseph Story, Commentaries on the Constitution of the United States, § 1658 (1833) ("The propriety of this delegation of power seems to have been little questioned at the time of adopting the constitution.").

[15] The Federalist No. 80 (Alexander Hamilton).

[16] *Id. See also* Story, *supra* note 14, at §§ 1664–1667.

[17] Story, *supra* note 14, at § 1662.

[18] *Id.* § 1664.

[19] *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 475 (1793) (noting that "as the seas are the joint property of nations, whose right and privileges relative thereto, are regulated by the law of nations and treaties, [admiralty and maritime] cases necessarily belong to national jurisdiction.").

[20] The Federalist No. 83 (Alexander Hamilton).

[21] *See* U.S. Const. art. III, § 1; *id.* § 2, cl. 1; United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32, 33 (1812).

[22] Waring v. Clarke, 46 U.S. (5 How.) 441, 456–57 (1847); Story, *supra* note 14, at § 1666.

[23] *Id.*; *Waring*, 46 U.S. (5 How.) at 456–57.

[24] The Hine v. Trevor, 71 U.S. (4 Wall.) 555, 562 (1867) ("[W]ith the vast increase of inland navigation consequent upon the use of steamboats, and the development of wealth on the borders of the rivers, which thus became the great water highways of an immense commerce, the necessity for an admiralty court, and the value of admiralty principles in settling controversies growing out of this system of transportation, began to be felt.").

statutes.[1] The Supreme Court has held that "all suits involving maritime claims, regardless of the remedy sought, are cases of admiralty and maritime jurisdiction within the meaning of Article III whether they are asserted in the federal courts or, under the saving clause, in the state courts."[2] Generally, the Court's cases analyzing admiralty jurisdiction have addressed when particular claims qualify as "maritime." Such cases have examined: (1) the territorial extent of such jurisdiction; (2) its subject matter scope; and (3) the availability of concurrent state court jurisdiction over maritime claims.

The Supreme Court has held that neither Congress, the states, nor U.S. courts can enlarge admiralty jurisdiction beyond its constitutional limits.[3] Congress has successfully enlarged the Judiciary Act's initial *statutory* grant of admiralty jurisdiction to the lower federal courts on several occasions,[4] which suggests that it has not granted the courts admiralty jurisdiction to the full extent that the Constitution allows.[5] However, the precise boundaries that the Constitution establishes for this jurisdiction remain unclear.[6] The Court has suggested that various historical and policy-based considerations may delineate the jurisdiction's boundaries, including the types of maritime cases that state admiralty courts could adjudicate at the time of the Constitution's adoption;[7] the Framers' reasons for conferring admiralty jurisdiction on the Federal Judiciary (for example, to establish more uniformity in admiralty proceedings);[8] and Congress's practical need to address new "maritime concerns."[9]

The extent to which Congress may *reduce* the scope of admiralty jurisdiction is also unclear. In one case, the Supreme Court suggested that "grave" constitutional questions would arise if the Court interpreted the Jones Act to prohibit federal courts from exercising admiralty jurisdiction over a seaman's personal injury claims against his employer while allowing such suits at common law.[10] The Court avoided ruling on whether the statute would encroach on the Constitution's grant of admiralty jurisdiction by construing the Jones Act to allow the seaman to sue either on the "admiralty side" of a federal court with trial by judge or the "law side" of the

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[1] Neither the Constitution nor federal law specifically defines the phrase "admiralty and maritime." In one early case, Chief Justice Roger B. Taney noted the difficulties in ascertaining the extent of such jurisdiction. The Steamer St. Lawrence, 66 U.S. (1 Black) 522, 526–27 (1862). *See also* The Lottawanna, 88 U.S. (21 Wall.) 558, 574–77 (1874).

[2] Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 367 n.23 (1959).

[3] *The Steamer St. Lawrence*, 66 U.S. (1 Black) at 527.

[4] *See, e.g.*, Death on the High Seas Act, 46 U.S.C. §§ 30301–30308; Extension of Admiralty Jurisdiction Act, *id.* § 30101; Ship Mortgage Act, *id.* §§ 31301–31309; Shipowner's Limitation of Liability Act, *id.* §§ 30501–30512.

[5] *See, e.g.*, Gutierrez v. Waterman Steamship Co., 373 U.S. 206, 209 (1963) (implicitly upholding Congress's expansion of admiralty jurisdiction to encompass some claims arising from injury or damage to property caused by a vessel on navigable waters that the Court had previously held not to fall within admiralty jurisdiction when the injury or damage was consummated on land).

[6] *The Steamer St. Lawrence*, 66 U.S. (1 Black) at 526–27. *See also* The Belfast, 74 U.S. 624, 636 (1869) (stating that the federal power to hear admiralty cases extends to "all such cases of a maritime character as were cognizable in the admiralty courts of the States at the time the Constitution was adopted").

[7] *Id.*

[8] *The Steamer St. Lawrence*, 66 U.S. (1 Black) at 526–27.

[9] Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 52 (1934). Because the Supreme Court often evaluates the scope of both constitutional and statutory admiralty jursidiction based on historical or common law factors, it can be difficult to ascertain whether some of the Court's rulings are grounded in its interpretation of the Constitution or, rather, federal statutory law. *See, e.g.*, T. Smith & Son, Inc. v. Taylor, 276 U.S. 179, 182 (1928) (holding that admiralty had no jurisdiction over a wrongful death suit arising from an incident in which a sling knocked a longshoreman working on a wharf to unload a vessel into the water without specifying whether Congress could confer admiralty jurisdiction over such suits by subsequently enacting a statute).

[10] Panama R. Co. v. Johnson, 264 U.S. 375, 386, 389–90 (1924) ("[T]here are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without."). The Court also indicated that, generally, Congress's enactments modifying admiralty jurisdiction "must be coextensive with and operate uniformly in the whole of the United States." *Id.* at 387.

court with a right to a jury trial.[11] The Court's decision suggests that the Constitution may impose some limits on Congress's ability to withdraw certain maritime-related claims from admiralty jursidiction, at least when those claims remain cognizable in common law courts.

ArtIII.S2.C1.12.4 Territorial Extent of Admiralty Jurisdiction

Article III, Section 2, Clause 1:

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

Generally, courts consider the location in which a tort or crime occurs to be a major factor when determining whether the tort or crime falls within admiralty jurisdiction.[1] Early in U.S. history, the Supreme Court interpreted the territorial extent of federal admiralty jurisdiction in accordance with the rules of the English admiralty courts.[2] As a result, the Court construed that jurisdiction narrowly, limiting it to causes of action that arose on the high seas and rivers subject to the ebb and flow of the tide.[3]

The law changed significantly in the mid-nineteenth century when the Court held that the English rules on jurisidiction at the time of the U.S. Constitution's adoption could not limit the territorial extent of federal admiralty jursidiction.[4] In *The Propeller Genesee Chief v. Fitzhugh*,[5] the Court reviewed a federal law that extended admiralty jursidiction over certain claims that arose on the Great Lakes and connecting waters.[6] The Court upheld the law, determining that the Constitution's initial grant of admiralty jurisdiction embraced such waters, even if they were beyond the ebb and flow of the tide.[7] A couple of decades later, the Court specifically held that admiralty jurisdiction, as conferred by the Constitution and federal statutes, extended to claims arising on all navigable waters of the United States.[8]

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[11] *Id.* at 389–90.

[1] Exec. Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 268 (1972).

[2] The Thomas Jefferson, 23 U.S. (10 Wheat.) 428, 429–30 (1825). *See also* The Steamboat Orleans v. Phoebus, 36 U.S. (11 Pet.) 175, 183 (1837); Peyroux v. Howard, 32 U.S. (7 Pet.) 324, 343 (1833).

[3] *See supra* note 2.

[4] Jackson v. S.B. Magnolia, 61 U.S. (20 How.) 296, 299 (1858); The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 455–57 (1851). *See also* Waring v. Clarke, 46 U.S. (5 How.) 441, 459 (1847); De Lovio v. Boit, 7 F. Cas. 418, 443–44 (C.C.D. Mass. 1815) (Story, Cir. J.).

[5] *The Propeller Genesee Chief*, 53 U.S. (12 How.) at 455–57.

[6] 5 Stat. 726, 726–27 (1845). *See also The Propeller Genesee Chief*, 53 U.S. (12 How.) at 451–52.

[7] *Id.* at 457.

[8] The Hine v. Trevor, 71 U.S. (4 Wall.) 555, 569 (1866).

Thus, according to modern understanding, admiralty jurisdiction extends to all public waters that are navigable in fact,[9] regardless of whether they are saltwater or freshwater, or subject to the ebb and flow of the tide.[10]

ArtIII.S2.C1.12.5 Jurisdiction Over Categories of Admiralty Cases

Article III, Section 2, Clause 1:

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

In the modern era, most cases that fall within admiralty jurisdiction involve one of two subjects: torts committed on the high seas or other navigable waters; or maritime contracts or services, which often relate to shipping on navigable waters.[1] State courts may have concurrent jurisdiction over maritime contract or tort claims that fall within federal admiralty jurisdiction when the defendant brings a personal action against a defendant, but generally only federal admiralty courts may exercise jurisdiction over cases in which the plaintiff seeks remedies against property in rem.[2]

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[9] The Daniel Ball, 77 U.S. (10 Wall.) 557, 563–64 (1870) (defining "navigable in fact" as waters that are "used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water").

[10] *See, e.g.*, Southern S.S. Co. v. NLRB, 316 U.S. 31, 41 (1942): The Montello, 87 U.S. (20 Wall.) 430, 441–45 (1874); The Eagle, 75 U.S. (8 Wall.) 15, 20–21 (1869); The Magnolia, 61 U.S. (20 How.) 296, 301–02 (1858); Fretz v. Bull, 53 U.S. (23 How.) 466, 468 (1852). Claims that arise on artificial bodies of navigable water may be subject to admiralty jurisdiction. The Robert W. Parsons, 191 U.S. 17, 26–27 (1903) (intrastate waters of Erie canal); *Ex parte* Boyer, 109 U.S. 629, 632 (1884) (Illinois and Michigan canal); Escanaba Co. v. Chi., 107 U.S. 678, 682–83 (1883) (Chicago River and its branches). The jurisdiction also extends to waters that can be made navigable with "reasonable improvement." United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407–09 (1940).

Some earlier Supreme Court cases appeared to limit admiralty jurisdiction's territorial extent to navigable waters with a nexus to interstate or international commerce. *See, e.g.*, The Daniel Ball, 77 U.S. (10 Wall.) at 564–65; Nelson v. Leland, 63 U.S. (22 How.) 48, 56 (1860). However, these cases may have rested on the obsolete notion that congressional conferral of admiralty jurisdiction depended on Congress's commerce power. *See* London Guar. & Accident Co. v. Indus. Accident Comm'n, 279 U.S. 109, 124 (1929); The Belfast, 74 U.S. (7 Wall.) 624, 641 (1869). Because the Constitution explicitly includes admiralty jurisdiction within the federal judicial power, no separate nexus to commerce is required for that jurisdiction.

[1] Early in U.S. history, some federal courts of appeals held that federal admiralty jurisdiction encompassed a broader variety of contracts and torts than the jurisdiction that admiralty courts in England or its North American colonies exercised. These early courts looked to customary international maritime law for the extent of jurisdiction. *E.g.,* The Seneca, 21 F. Cas. 1081, 1082–84 (C.C.E.D. Pa. 1829) (holding that a dispute among a vessel's owners over where it would be employed fell within federal admiralty jurisdiction); DeLovio v. Boit, 7 F. Cas. 418, 444 (C.C.D. Mass. 1815) (determining that claims stemming from an insurance policy were within the nonexclusive federal admiralty jurisdiction). The Court later held that admiralty jurisdiction in federal courts is broader than that sustained in England. *E.g.*, N.J. Steam Navigation Co. v. Merch. Bank of Boston, 47 U.S. (6 How.) 344, 386, 389 (1848). *See also* Atkins v. Disintegrating Co., 85 U.S. (18 Wall.) 272, 304 (1874) ("The Constitution, in the grant of the admiralty jurisdiction, refers to it as it existed in this and other maritime countries at the time of the adoption of that instrument. It was then greatly larger here than in England. The hostility of the common-law courts there had wrought the reduction.").

[2] *See* Waring v. Clarke, 46 U.S. (5 How.) 441, 460–61 (1847). In in rem admiralty proceedings, the court takes custody of the *res* or property. The property itself is made the defendant in the case, and parties who have an interest in it "may appear" and each "propound independently his interest." Taylor v. Carryl, 61 U.S. (20 How.) 583, 599 (1858).

Congress has also granted federal district courts sitting in admiralty exclusive and original jurisdiction over prize and seizure cases.[3] Historically, prize cases have involved property (e.g., a ship) used by an enemy, captured during wartime, and brought into the United States.[4] The court's jurisidiction extends to proceedings in which a party seeks to acquire title legally to property taken as a prize.[5]

Cases involving the seizure and forfeiture of vessels for violating federal law or another nation's laws also fall within the exclusive admiralty jurisdiction of federal courts.[6] Vessels may be seized for engaging in activities such as conducting prohibited trade[7] or violating the revenue laws.[8] Federal courts also have exclusive jurisdiction over criminal cases against U.S. persons or vessels that arise within the special maritime and territorial jurisdiction of the United States, which generally encompasses navigable waters within U.S. territory but outside of any particular state's jurisdiction.[9]

ArtIII.S2.C1.12.6 Torts Committed on Navigable Waters

Article III, Section 2, Clause 1:

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

Maritime torts include injuries to persons,[1] damages to property arising out of collisions or other negligent acts,[2] product liability suits,[3] and violent dispossession of property.[4] Cases

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[3] 28 U.S.C. §§ 1333, 1356. *See also* 10 U.S.C. ch. 883; The Admiral, 70 U.S. (3 Wall.) 603, 612 (1866); The Amiable Nancy, 16 U.S. (3 Wheat.) 546, 557–58 (1818); Bingham v. Cabbot, 3 (3 Dall.) U.S. 19, 41 (1795).

[4] The Sally, 12 U.S. (8 Cr.) 382, 384 (1814); The Rapid, 12 U.S. (8 Cr.) 155, 162 (1814). *See also* United States v. Ames, 99 U.S. 35, 43 (1879); Jennings v. Carson, 8 U.S. (4 Cr.) 2, 20 (1807).

[5] *Supra* notes 2, 3, 4 and accompanying text.

[6] *See* 28 U.S.C. §§ 1333, 1356. United States v. La Vengeance, 3 U.S. (3 Dall.) 297, 301 (1796) (holding that an in rem proceeding involving seizure and forfeiture of a vessel for exporting arms and ammunition in violation of federal law was within the exclusive admiralty jurisdiction of the federal courts). *Accord* United States v. The Schooner Betsey and Charlotte, 8 U.S. (4 Cr.) 443, 452 (1808) (determining that Congress intended for federal admiralty courts to exercise exclusive jurisdiction over seizures of ships for violating federal law on navigable waters).

[7] *E.g.,* The Samuel, 14 U.S. (1 Wheat.) 9, 14 (1816) (engaging in prohibited trade in violation of federal law); Hudson v. Guestier, 8 U.S. (4 Cr.) 293, 294 (1808) (violating French law by trading at a certain port); United States v. Schooner Sally of Norfolk, 6 U.S. (2 Cr.) 406, 406 (1805) (engaging in the slave trade); *La Vengeance*, 3 U.S. (3 Dall.) at 301 (exporting prohibited weapons).

[8] *E.g.*, Maul v. United States, 274 U.S. 501, 511–12 (1927); The Brig Ann, 13 U.S. (9 Cr.) 289, 289–90 (1815); The Sarah, 21 U.S. (8 Wheat.) 391, 394–96 (1823). At least some cases involving the seizure and forfeiture of vessels on state navigable waters for violations of state law may be heard in state courts. C.J. Hendry Co. v. Moore, 318 U.S. 133, 153 (1943).

[9] 18 U.S.C. § 7. *See also* United States v. Flores, 289 U.S. 137, 150 (1933) (noting that admiralty courts had long exercised jurisdiction over criminal cases that arose on navigable waters); United States v. Rodgers, 150 U.S. 249, 266 (1893) (holding that federal courts had jurisdiction under federal law "to try a person for an assault, with a dangerous weapon, committed on a vessel belonging to a citizen of the United States, when such vessel is in the Detroit River, out of the jurisdiction of any particular State, and within the territorial limits of the Dominion of Canada").

[1] *E.g.,* Brady v. Roosevelt S.S. Co., 317 U.S. 575, 576–77 (1943); Atl. Transp. Co. v. Imbrovek, 234 U.S. 52, 62–63 (1914); Leathers v. Blessing, 105 U.S. 626, 630 (1882); The S.B. New World v. King, 57 U.S. (16 How.) 469, 472–73 (1854).

involving tort claims fall within admiralty jurisdiction when two requirements are met: (1) the commission or consummation of the act that gives rise to the claim occurs on navigable waters;[5] and (2) the tort bears a significant relationship to traditional maritime activity.[6]

The first requirement for admiralty jurisdiction, which is based on the location of the incident, is satisfied if the tort arises on the high seas or on other navigable waters of the United States.[7] Prior to Congress's enactment of the Extension of Admiralty Jurisdiction Act of 1948, the Supreme Court had held that some claims arising from injury or damage to property caused by a vessel on navigable waters did not fall within admiralty jurisdiction when they were consummated on land (e.g., collision of a ship with a bridge).[8] In the Extension Act,[9] Congress enlarged admiralty jurisdiction to encompass many of these claims. The Court implicitly upheld that expansion of admiralty jurisdiction as within constitutional limits[10] when determining that the jurisdiction ecompassed a tort that arose when a longshoreman slipped on loose beans that spilled from negligently packed cargo on a dock during a vessel's unloading.[11] In addition to Congress's expansion of admiralty jurisdiction, the Court has

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The Supreme Court has held that plaintiffs may recover under general maritime law for the wrongful death of a seaman. Moragne v. States Marine Lines, 398 U.S. 375, 409 (1970), *overruling* The Harrisburg, 119 U.S. 199 (1886). *See also* Miles v. Apex Marine Corp., 498 U.S. 19, 37 (1990).

The federal Death on the High Seas Act, 46 U.S.C. §§ 30301–30308, permits recovery of damages for deaths of seamen and other persons that occur more than three miles from shore.

[2] *E.g.*, The Raithmoor, 241 U.S. 166, 177 (1916); Erie R.R. v. Erie & W. Transp. Co., 204 U.S. 220, 223–25 (1907); The Propeller Commerce, 66 U.S. (1 Black) 574, 579 (1862).

[3] Air & Liquid Sys. Corp. v. DeVries, No. 17-1104, slip op. at 5 (2019); E. River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 865 (1986). In a maritime product liability action, a federal court "acts as a common law court" and may derive federal maritime law from various sources, including "judicial opinions, legislation, treatises, and scholarly writings." Air & Liquid Sys. Corp., slip op. at 4.

[4] *See* L'Invincible, 14 U.S. (1 Wheat.) 238, 257 (1816).

[5] Exec. Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 268 (1972). Admiralty courts may decline to exercise jurisdiction over maritime tort lawsuits between foreign parties. Canada Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413, 418 (1932).

[6] *Exec. Jet Aviation*, 409 U.S. at 268. A federal court sitting in admiralty may proceed against defendants in personam in a maritime tort case. The Rock Island Bridge, 73 U.S. (6 Wall.) 213, 215 (1867). When the "cause of the injury" is subject to a maritime lien, such as a vessel involved in a collision, the court may also proceed against the subject property in rem. *Id.*

[7] Victory Carriers, Inc. v. Law, 404 U.S. 202, 205 (1971). *See also* Gonsalves v. Morse Dry Dock & Repair Co., 266 U.S. 171, 172 (1924); Phila. v. Phila. & Havre De Grace Steam Towboat Co., 64 U.S. (23 How.) 209, 215 (1859).

[8] *See, e.g.*, T. Smith & Son, Inc. v. Taylor, 276 U.S. 179, 182 (1928) (holding that admiralty had no jurisdiction over a wrongful death suit arising from an incident in which a sling knocked a longshoreman working on a wharf to unload a vessel into the water); The Panoil, 266 U.S. 433, 435 (1925) (determining that a case brought against a vessel for damaging a federally constructed dike did not fall within the admiralty jurisdiction because the dike was part of the land). *Cf.* The Admiral Peoples, 295 U.S. 649, 651–52 (1935) (holding that admiralty jurisdiction existed over a tort claim that arose when an injured passenger fell from a gangplank onto a dock because the gangplank was part of the vessel); Minnie v. Port Huron Terminal Co., 295 U.S. 647, 648 (1935) (determining that a longshoreman's tort claims fell within the admiralty jurisdiction when he had sustained injuries unloading cargo from a vessel in navigable waters after a swinging hoist knocked him off of the vessel and on to the deck of a wharf); Doullut & Williams Co. v. United States, 268 U.S. 33, 33–35 (1925) (determining that admiralty jurisdiction extended over a case seeking recovery for damages to clusters of pilings driven into navigable waters and used exclusively as aids-in-navigation); The Blackheath, 195 U.S. 361, 367–68 (1904) (claims against vessel for damage to government aid-in-navigation beacon fell within admiralty jurisdiction).

[9] 46 U.S.C. § 13101.

[10] *See* Gutierrez v. Waterman Steamship Co., 373 U.S. 206, 209 (1963).

[11] *Id.* at 207–10. In the Jones Act, 46 U.S.C. § 30104, Congress provided seamen or their personal representatives a private right of action against employers, with the right of trial by jury, to seek compensation for injuries or death that occur within the course of employment. This right exists even if the injury occurred on land. Swanson v. Marra Bros., Inc., 328 U.S. 1, 4 (1946); O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 43 (1943). *See also* Sw. Marine, Inc. v. Gizoni, 502 U.S. 81, 86–89 (1991) (addressing which workers qualify as seamen for Jones Act purposes);

maintained a few historical exceptions to a strict situs test for maritime jurisdiction.[12] However, even with such congressional and judicial guidance, it may occasionally be difficult to distinguish maritime torts from land-based torts. For example, the Court held that admiralty jurisdiction did not extend to an injury caused by defective pier-based equipment that a dock worker suffered when unloading a vessel; thus, the worker had to resort to state law for a remedy.[13]

The Supreme Court's jurisprudence on the second factor, which asks whether the tort bears a significant relationship to a traditional maritime activity, may also raise complex interpretive questions. For example, in *Executive Jet Aviation v. City of Cleveland*, a jet aircraft departing a Cleveland airport collided with seagulls, crashed, and sank into the navigable state territorial waters of Lake Erie.[14] The owners of the aircraft sued a federal air traffic controller and others for negligence, seeking to invoke the admiralty jurisdiction of the federal courts.[15] The Court held that, in addition to establishing that the commission or consummation of the wrongful act took place on navigable waters,[16] the plaintiffs had to show that the tort bore a "significant relationship to traditional maritime activity."[17] Because a land-based aircraft's flight between two locations within the United States's continental boundaries did not possess such a relationship, the Court held that federal courts could not exercise admiralty jurisdiction.[18] However, the Court's opinion in *Executive Jet* suggests that Congress may have some flexibility to expand admiralty jurisdiction to encompass claims like those at issue in the case by enacting laws that, for example, enlarge the concept of a "traditional maritime activity."[19]

In other cases, the Supreme Court has determined that admiralty jurisdiction exists because a case involves a traditional maritime activity. For example, the Court upheld the exercise of admiralty jursidiction over a collision between two private pleasure boats on navigable waters—even though pleasure boating was not exclusively a commercial activity—because such a collision could impact maritime commerce.[20] For similar reasons, the

McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 356–57 (1991) (same). State and federal courts have concurrent jurisdiction over Jones Act claims, which are personal actions. Am. Dredging Co. v. Miller, 510 U.S. 443, 455 (1994). *See also* Engel v. Davenport, 271 U.S. 33, 37–38 (1926).

[12] *See, e.g.*, Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90 (1946) (determining that a stevedore's employee could bring unseaworthiness claims for injuries that occurred on board a docked vessel); Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944); O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 41–42 (1943) (recognizing that a seaman may claim maintenance and cure, which generally refers to living expenses and medical care, for injuries that occur on land because "from its dawn, the maritime law has recognized the seaman's right to maintenance and cure for injuries suffered in the course of his service to his vessel, whether occurring on sea or on land").

[13] *Victory Carriers, Inc.*, 404 U.S. at 204, 212.

[14] Exec. Jet Aviation v. City of Cleveland, 409 U.S. 249, 250 (1972).

[15] *Id.* at 250–51.

[16] *Id.* at 253.

[17] *Id.* at 268.

[18] *Id.* at 274.

[19] *Id.*

[20] Foremost Ins. Co. v. Richardson, 457 U.S. 668, 674–76 (1982) ("[T]he smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities."). *See also* Sisson v. Ruby, 497 U.S. 358, 359, 362 (1990) (holding that admiralty jurisdiction existed in a limitation of liability suit involving a fire on a pleasure boat docked at a marina on a navigable waterway that damaged several other vessels because the incident could potentially disrupt maritime commerce); Leathers v. Blessing, 105 U.S. 626, 629 (1881) (determining that a federal court could exercise jurisdiction over a tort claim involving a fully loaded vessel that had recently completed its voyage and was docked at a wharf at the time of plaintiff's alleged injury).

Court held that a dredging company's vessel was engaged in a traditional maritime activity when it damaged an underwater freight tunnel while performing maintenance work.[21]

ArtIII.S2.C1.12.7 Maritime Contracts or Services

Article III, Section 2, Clause 1:

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

In contract cases, the subject matter of the contract, claim, or service controls whether a claim falls within admiralty jurisdiction.[1] Contracts "purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty."[2] The Supreme Court has not established a clear test for when a transaction is a maritime contract. Instead, the Court has declared that the "boundaries of admiralty jurisdiction over contracts" are "conceptual rather than spatial" and "have always been difficult to draw."[3] The Court has examined "precedent and usage" when determining whether a contract is essentially maritime.[4]

Contract cases that fall within federal admiralty jurisdiction[5] include actions for pilotage charges[6] or towage;[7] actions for repair of a vessel already used in navigation;[8] actions on

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[21] Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 539–40 (1995) (determining that a tort claim fell within admiralty jurisdiction when it arose from damage to a freight tunnel and other buildings allegedly caused when a barge negligently drove piles into the riverbed). *See also* Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U.S. 479, 480–81 (1923) (holding that repair of a vessel was a traditional maritime activity in a case in which an employee drowned when one of his employer's tugs knocked him off a scaffold on a float near a vessel he was repairing).

[1] *Ex parte* Easton, 95 U.S. 68, 72 (1877) (stating that admiralty jurisdiction "extends to all contracts, claims, and services essentially maritime"); Waring v. Clarke, 46 U.S. (5 How.) 441, 459 (1847). *Accor*d Exxon Corp. v. Cent. Gulf Lines, Inc., 500 U.S. 603, 611 (1991).

Congress may authorize courts to refer disputes over maritime contracts to arbitration when the parties have agreed to arbitrate. Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 277 (1932); Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 124 (1924) (determining that the New York legislature could grant New York state courts the authority to compel specific performance of an arbitration agreement pertaining to a contract made and performed in the state because it was valid under state law and the general maritime law). Agency contracts, which establish a fiduciary relationship between a principal and an agent, may fall within the admiralty jurisdiction if their subject matter is maritime. *Exxon Corp.*, 500 U.S. at 612, *overruling* Minturn v. Maynard, 58 U.S. (17 How.) 477 (1855).

[2] The Belfast, 74 U.S. (7 Wall.) 624, 637 (1869).

[3] Kossick v. United Fruit Co., 365 U.S. 731, 735 (1961).

[4] *Id. See also* Norfolk Southern Ry. v. James N. Kirby, Pty. Ltd., 543 U.S. 14, 25 (2004) (stating that the court must examine "whether the principal objective of a contract is maritime commerce"); Grant v. Poillon, 61 U.S. (20 How.) 162, 168 (1858).

[5] Because of the Judiciary Act's "saving to suitors" clause, the contract cases in this paragraph do not necessarily fall within the *exclusive* admiralty jurisdiction of the federal courts. Most contract actions may be brought in either federal or state court. *See, e.g.*, Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 359–60 (1962) ("[An in personam] suit for breach of a maritime contract, while it may be brought in admiralty, may also be pursued in an ordinary civil action."). For more on the exclusivity of federal court jurisdiction over admiralty cases, see "Exclusivity of Federal Admiralty and Maritime Jurisdiction."

[6] *Ex parte* McNiel, 80 U.S. (13 Wall.) 236, 243 (1872). Pilotage charges are fees owed to an individual who pilots a vessel in territorial waters. *See id.* at 237. *See also* Hobart v. Drogan, 35 U.S. (10 Pet.) 108, 119–20 (1836).

bottomry or respondentia bonds;[9] agreements of consortship between the masters of two vessels engaged in wrecking;[10] cases arising under marine insurance policies;[11] charter parties;[12] compensation for temporary wharfage;[13] contracts for loading or unloading vessels;[14] contracts for transportation of passengers or merchandise by ship,[15] which includes contracts of affreighment;[16] contracts with materialmen for the repair or supply of a foreign ship;[17] salvage services;[18] suits by seamen for wages;[19] and surveys of damaged vessels.[20]

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[7] *See* Knapp, Stout & Co. v. McCaffrey, 177 U.S. 328, 642–43 (1900). Towage charges are fees owed to an individual who tows property for another person. *Id.* at 644–45. In several cases, the Supreme Court has examined clauses in towage contracts that relieve a party from liability for damage to the property towed. *E.g.*, Boston Metals Co. v. The Winding Gulf, 349 U.S. 122, 122–23 (1955) (holding invalid a "contract designed to shift responsibility for a towboat's negligence from the towboat to its innocent tow"); Bisso v. Inland Waterways Corp., 349 U.S. 85, 85, 95 (1955) (determining that a towboat cannot "contract against all liability for its own negligent towage"); Sun Oil v. Dalzell Towing Co., 287 U.S. 291, 292–93 (1932).

[8] New Bedford Dry Dock Co. v. Purdy, 258 U.S. 96, 99 (1922); The General Smith, 17 U.S. (4 Wheat.) 438, 443 (1819). Admiralty jurisdiction extends to such actions even though the repairs are made in dry dock rather than on navigable waters. North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co., 249 U.S. 119, 128–29 (1919). However, contracts and agreements that relate to a vessel's original construction do not fall within admiralty jurisdiction. *Id.* at 126–27. *See also* Grant Smith-Porter Ship Co. v. Rhode, 257 U.S. 469, 475–76 (1922); Thames Towboat Co. v. The Schooner Francis McDonald, 254 U.S. 242, 244 (1920); Edwards v. Elliott, 88 U.S. (21 Wall.) 532, 555 (1874); Roach & Long v. Chapman, 63 U.S. (22 How.) 129, 132 (1860); People's Ferry Co. v. Beers, 61 U.S. (20 How.) 393, 402 (1858).

[9] *See* O'Brien v. Miller, 168 U.S. 287, 297 (1897); Ins. Co. v. Gossler, 96 U.S. 645, 648 (1877); The Grapeshot, 76 U.S. (9 Wall.) 129, 135 (1870). Historically, bottomry and respondentia bonds were a form of debt incurred to supply a ship during a voyage, enforceable in admiralty as a lien on the ship or cargo. *The Grapeshot*, 76 U.S. at 135; *O'Brien*, 168 U.S. at 288–89.

The Supreme Court Court initially held that ordinary mortgages on ships were not maritime contracts, even though secured by a vessel, its gear, or its cargo, because they were not entered into with reference to "navigation or perils of the sea." *See* Bogart v. The Steamboat John Jay, 58 U.S. (17 How.) 399, 401–02 (1855). However, Congress extended admiralty jurisdiction to encompass such mortgages in the Ship Mortgage Act, 46 U.S.C. §§ 31301–31309. *See also* Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 52 (1934).

[10] Andrews v. Wall, 44 U.S. (3 How.) 568, 572 (1845). In one type of consortship agreement, shipowners or salvors agree to cooperate in salvaging a wreck and split the proceeds. *See id.* at 571.

However, admiralty jurisdiction does not extend to contracts of partnership in the earnings of a single ship. Ward v. Thompson, 63 U.S. (22 How.) 330, 333 (1859), *see also* Vandewater v. Mills, 60 U.S. (19 How.) 82, 92 (1857); or most actions for accounting (i.e., a determination of how much one litigant owes another). Swift & Co. Packers v. Compania Colombiana del Caribe, 339 U.S. 684, 692–93 (1950).

[11] Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 313–14 (1955); Ins. Co. v. Dunham, 78 U.S. (11 Wall.) 1, 31, 35 (1871). Although cases arising under marine insurance policies are within admiralty jurisdiction, state law may determine the outcome. *See id.* at 320–21 (holding that state law governs the effect of marine insurance warranties when Congress has not enacted conflicting federal legislation regulating marine insurance or occupied the field of regulation).

[12] In a charter party, an entity hires a ship or its officers. *See, e.g.*, Armour & Co. v. Fort Morgan S.S. Co., 270 U.S. 253, 259 (1926).

[13] *Ex parte* Easton, 95 U.S. 68, 77 (1877). Wharfage refers to a "contract for the use of a wharf by the master or owner of a ship or vessel." *Id.*

[14] Am. Stevedores, Inc. v. Porello, 330 U.S. 446, 456 (1947) (holding that jurisdiction extended to a stevedoring contract's indemnity provision because "although admiralty jurisdiction over contracts partly maritime and partly non-maritime in nature is doubtful . . . [t]o sever a contract provision for indemnity for damages arising out of the performance of wholly maritime activities would only needlessly multiply litigation. Such a provision is a normal clause in contracts to act for others and no more determines the nature of a contract than do conditions on the time and place of payment.").

[15] The Moses Taylor, 71 U.S. (4 Wall.) 411, 427 (1867). *See also* Norfolk Southern Ry. v. James N. Kirby, Pty. Ltd., 543 U.S. 14, 24 (2004) (holding that contracts for transportation of goods were maritime contracts even though the final leg of the journey took place on land by rail).

[16] N.J. Steam Navigation Co. v. Merch. Bank of Boston, 47 U.S. (6 How.) 344, 385–87 (1848). *See also* The Eddy, 72 U.S. (5 Wall.) 481, 494 (1867); Morewood v. Enequist, 64 U.S. (23 How.) 491, 493–94 (1860). A contract of affreightment involves hiring a vessel to transport merchandise or passengers. *Id.* at 492. *See also* Archawski v. Hanioti, 350 U.S. 532, 536 (1956) (holding that admiralty jurisdiction extends to claims arising from the alleged violation of an affreightment

ArtIII.S2.C1.12.8 Exclusivity of Federal Admiralty and Maritime Jurisdiction

Article III, Section 2, Clause 1:

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

In Article III of the Constitution, the Framers granted the Federal Judiciary jurisdiction over "admiralty and maritime" cases to ensure that courts would apply uniform rules in deciding cases that could affect domestic commerce and might implicate foreign affairs.[1] In the Judiciary Act of 1789, Congress conferred exclusive admiralty jurisdiction on the federal district courts[2] while preserving concurrent state court jurisdiction over common law remedies so that the states could supplement the administration of federal maritime law.[3]

In practice, state courts retain concurrent jurisdiction over most contract and tort cases that fall within federal admiralty jurisdiction because a plaintiff may bring a personal action

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contract for transportation of passengers); Krauss Bros. Lumber Co. v. Dimon S.S. Corp., 290 U.S. 117, 122 (1933) (determining that admiralty jurisdiction extended to a contract of affreightment provision that provided a lower freight rate in certain circumstances).

At one time, the Supreme Court held that admiralty jurisdiction did not extend to contracts of affreightment for the transportation of goods within the boundaries of one state. Maguire v. Card, 62 U.S. (21 How.) 248, 251 (1859) ("So in respect to the completely internal commerce of the States, which is the subject of regulation by their municipal laws; contracts growing out of it should be left to be dealt with by its own tribunals."). *See also* Allen v. Newberry, 62 U.S. (21 How.) 244, 245 (1859); Vandewater v. Mills, 60 U.S. (19 How.) 82, 92 (1857) ("This is nothing more than an agreement for a special and limited partnership in the business of transporting freight and passengers between New York and San Francisco, and the mere fact that the transportation is by sea, and not by land, will not be sufficient to give the court admiralty jurisdiction of an action for a breach of the contract."). The Court later held that admiralty jursidiction extended to such cases. *See generally* The Belfast, 74 U.S. (7 Wall.) 624, 642 (1869).

[17] The St. Jago de Cuba, 22 U.S. (9 Wheat.) 409, 416 (1824); The General Smith, 17 U.S. (4 Wheat.) 438, 443 (1819); The Aurora, 14 U.S. (1 Wheat.) 96, 105 (1816).

[18] The S.S. Jefferson, 215 U.S. 130, 143 (1909) (holding that claims for compensation for salvage services provided to a ship in dry dock fell within the admiralty jurisdiction); Cope v. Vallette Dry Dock Co., 119 U.S. 625, 626–27 (1887) (determining that salvage of a floating dry dock was not within the admiralty jurisdiction because it was used to lift ships out of the water and not as an aid-in-navigation).

[19] Sheppard v. Taylor, 30 U.S. (5 Pet.) 675, 711 (1831) (stating that admiralty jurisdiction extends to a seaman's action for wages, whether in rem or in personam).

[20] Janney v. Columbian Ins. Co., 23 U.S. (10 Wheat.) 411, 418 (1825). Surveying a ship generally refers to inspecting it. *See id.* at 417.

[1] The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874). *See also* Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 381–82 (1918).

[2] State courts may also lack jurisdiction over maritime cases as a result of federal preemption. *See, e.g.*, Maryland Casualty Co. v. Cushing, 347 U.S. 409, 415 (1954) (holding that federal law limiting a shipowner's liability preempted a state statute authorizing direct suit against an insurance company).

[3] 28 U.S.C. § 1333(1). If the Judiciary Act's "saving to suitors" clause authorizes a litigant to bring suit in state court, the plaintiff may also choose to bring its claims on the "law side" of a federal court and obtain a jury if an independent basis for jurisdiction exists (e.g., diversity of citizenship) and the amount-in-controversy requirement is satisfied. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 88–89 (1946). *See also, e.g.*, Fitzgerald v. United States Lines Co., 374 U.S. 16, 20–21 (1963) (holding that admiralty claims joined with a Jones Act claim must be submitted to a jury "when both arise out of one set of facts"); Panama R.R. v. Johnson, 264 U.S. 375, 388 (1924) (upholding suit on a federal court's "law side" for a Jones Act claim as consistent with Congress's power to "alter, qualify or supplement the maritime rules"). *See also* 46 U.S.C. § 30104. Jones Act claims may also be brought in state court. *Panama R.R.*, 271 U.S. at 561.

seeking common law remedies against an individual defendant in most of these cases.[4] In an in personam case[5] under the common law, liability attaches to property only to the extent of the individual defendant's title in that property.[6] When bringing such maritime actions against defendants, the plaintiff may choose either federal or state court.

By contrast, the Supreme Court has held that, as a matter of statute, federal courts have *exclusive* admiralty jurisdiction over cases in which the plaintiff seeks remedies for maritime torts or contracts that lie against property in rem (e.g., the seizure of a vessel to enforce a maritime lien).[7] For example, the Court held invalid a California court's application of a statute that allowed the state's courts to subject vessels to condemnation and sale in lawsuits brought directly against the vessels for breaches of maritime contracts.[8] The Court determined that the federal courts traditionally had exclusive jurisdiction under the Judiciary Act over such in rem admiralty proceedings.[9] Such actions were not saved by the Judiciary Act's savings clause because they were based on civil (i.e., statutory) law rather than common law.[10]

Other in rem cases that are subject to the federal courts' exclusive jurisdiction include cases involving limitation of a shipowner's liability;[11] prize, capture, and seizure cases;[12] and suits against the United States.[13] Only a federal court sitting in admiralty may enforce a

[4] Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 359–60 (1962) ("[An in personam] suit for breach of a maritime contract, while it may be brought in admiralty, may also be pursued in an ordinary civil action."); Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 123 (1924) ("By reason of the saving clause, state courts have jurisdiction *in personam*, concurrent with the admiralty courts, of all causes of action maritime in their nature arising under charter parties."); Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638, 643, 648 (1900) (holding that a state court could enforce a lien on a vessel for towage charges because the plaintiff had brought suit in personam against individual defendants rather than in rem against the vessel, placing the claims within the savings clause).

The Supreme Court has held that, in general, federal admiralty courts cannot issue some forms of equitable relief (e.g., ordering specific performance of a contract). *In re* The Steamer Eclipse, 135 U.S. 599, 608 (1890). *But see* Swift & Co. Packers v. Compania Colombiana del Caribe, 339 U.S. 684, 690–93 (1950).

[5] Generally, in personam jurisdiction refers to a court's power over a person (or entity) who is a party to, or involved in, a case or controversy before the court, including its power to render judgments affecting that person's rights. Black's Law Dictionary 982 (10th ed. 2014).

[6] A case does not fall within federal courts' exclusive admiralty jurisdiction merely because it involves the issuance of an "auxiliary attachment" against the vessel. Rounds v. Cloverport Foundry & Machine Co., 237 U.S. 303, 306 (1915). In exercising in personam jurisdiction, a state court may "adopt such remedies, and . . . attach to them such incidents, as it sees fit so long as it does not attempt to make changes in the substantive maritime law." Am. Dredging Co. v. Miller, 510 U.S. 443, 447 (1994) (internal quotation marks omitted). *See also* Madruga v. Superior Court, 346 U.S. 556, 561–63 (1954) (upholding state court jurisdiction over a lawsuit seeking a judicial order directing the sale of a vessel and the partition of its proceeds, in part, because the Court could not foresee any "possible injury to commerce or navigation if states continue to be free to follow their own customary partition procedures" and "the state court in this proceeding acts only upon the interests of the parties over whom it has jurisdiction *in personam*").

[7] *Am. Dredging Co.*, 510 U.S. at 446; The Robert W. Parsons, 191 U.S. 17, 37 (1903); The Hine v. Trevor, 71 U.S. 555, 569 (1866); The Moses Taylor, 71 U.S. (4 Wall.) 411, 427 (1866). In in rem admiralty proceedings, the court takes custody of the *res* or property. The property itself is made the defendant in the case, and parties who have an interest in it "may appear" and each "propound independently his interest." Taylor v. Carryl, 61 U.S. (20 How.) 583, 599 (1858) (vessel as a res). *See also* United States v. Freights, 274 U.S. 466, 470 (1927) (debt as a res).

[8] *The Moses Taylor*, 71 U.S. (4 Wall.) at 424–25, 431.

[9] *Id.* at 427.

[10] *Id.* at 431.

[11] *Ex parte* Green, 286 U.S. 437, 439–40 (1932) ("[T]he state court has no jurisdiction to determine the question of the owner's right to a limited liability, and [if] the value of the vessel be not accepted as the limit of the owner's liability, the federal court is authorized to resume jurisdiction and dispose of the whole case.").

[12] 28 U.S.C. §§ 1333, 1356. *See also* 10 U.S.C. ch. 883.

[13] *In rem* proceedings cannot successfully be maintained against a vessel that is U.S. government property without the federal government's consent. *See* The Siren, 74 U.S. (7 Wall.) 152, 154 (1869). Suits against the federal government for injury caused by a U.S.-owned vessel's negligence may be brought under the Suits in Admiralty Act. *See generally* 46 U.S.C. ch. 309. For further discussion of the United States' immunity from suit, see Amdt11.6.3 Officer Suits and State Sovereign Immunity.

maritime lien, which may arise, for example, out of a maritime contract or tort.[14] State legislatures may enact laws providing for state court jurisdiction over in rem maritime actions only in certain, narrowly defined circumstances.[15]

In the absence of controlling federal maritime law, courts have sometimes applied substantive state law in admiralty cases when it would not interfere with the uniformity of federal maritime law.[16] For example, in *Southern Pacific Co v. Jensen*, the Supreme Court held that a state could not apply its workers' compensation law to stevedores injured when unloading a ship at a wharf in navigable waters under a maritime contract.[17] The Court reasoned that workers' compensation was not a common law remedy preserved for the state courts under the Judiciary Act, and that its application would interfere with the general maritime law's uniformity in violation of the Constitution.[18] In *Knickerbocker Ice Co. v. Stewart*, the Court held that Congress could not authorize the states to establish their own workers' compensation laws for maritime employees.[19] Although the Constitution permits Congress to legislate on maritime rights, obligations, and remedies, it forbids Congress from delegating its power to the states to create new rights by permitting the states to modify the maritime law in a manner that would "work material injury" to the "characteristic features" of the law or interfere with its uniformity.[20]

Other provisions of the Constitution may also influence federal admiralty jurisdiction. For example, the Eleventh Amendment prohibits federal courts sitting in admiralty from entertaining jurisdiction over lawsuits brought in rem against state-chartered vessels without

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[14] Federal admiralty jurisdiction is exclusive when litigants seek to enforce a lien created on a vessel or its cargo under general maritime law. *See* Cutler v. Rae, 48 U.S. (7 How.) 729, 731 (1849). States cannot enforce maritime liens *in rem*. The Glide, 167 U.S. 606, 623–24 (1897). *See also* Moran v. Sturges, 154 U.S. 256, 283 (1894); Edwards v. Elliott, 88 U.S. (21 Wall.) 532, 557 (1874); Leon v. Galceran, 78 U.S. (11 Wall.) 185, 190 (1871). However, when a tort is not maritime, a litigant may pursue the lien's enforcement in state court when state law provides a lien on the vessel. Johnson v. Chi. & Pac. Elevator Co., 119 U.S. 388, 399–400 (1886).

[15] C. J. Hendry Co. v. Moore, 318 U.S. 133, 134, 153 (1943) (upholding a California law authorizing state courts to exercise jurisdiction in a forfeiture proceeding involving a purse net seized from a fishing boat in navigable waters for violating state law because in rem forfeiture proceedings for violations of state law had long been recognized as a common law remedy not within federal courts' *exclusive* admiralty jurisdiction).

[16] Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 158–59 (1920). *See also* Goett v. Union Carbide Corp., 361 U.S. 340, 342 (1960) (holding that, in a wrongful death case, state law may supply the standard for liability in a maritime tort that arises within the state's territorial jurisdiction); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 320–21 (1955) (holding that state law governed the effect of marine insurance warranties when Congress had left regulation of marine insurance to the states).

In other cases, such as those involving maritime torts in a state's territorial waters, state law may supplement federal maritime law with additional remedies if not preempted under federal law. For example, states may supplement federal maritime law with additional remedies for maritime torts in some circumstances. *E.g.,* Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 202, 215 (1996) (upholding against a preemption challenge state remedies for the wrongful death of a non-seafarer in state territorial waters in the absence of federal remedies).

[17] S. Pac. Co. v. Jensen, 244 U.S. 205, 217–18 (1917).

[18] *Id. See also* N. Coal & Dock Co. v. Strand, 278 U.S. 142, 145 (1928); Clyde S.S. Co. v. Walker, 244 U.S. 255, 257 (1917). The Supreme Court had previously allowed the states to regulate some aspects of maritime workers' compensation. Sultan R. & T. Co. v. Dep't of Labor & Indus., 277 U.S. 135, 136–37 (1928) (upholding state law requiring companies to report number and wages of men employed and pay premiums into the state's workers' compensation fund); Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 477 (1922) ("[A]s to certain local matters regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by state statutes.").

[19] *See Knickerbocker Ice Co.*, 253 U.S. at 160, 163–64.

[20] *Id.* at 158–60, 164. *See also* Wash. v. W. C. Dawson & Co., 264 U.S. 219, 227–28 (1924). In 1927, Congress responded to decisions such as *Knickerbocker* and *Jensen* by enacting the Longshore and Harbor Workers' Compensation Act, a federal framework that provides for the payment of compensation to certain maritime workers for job-related injuries. 33 U.S.C. §§ 901–950.

the state's consent.[21] However, the Eleventh Amendment does not bar admiralty courts from hearing lawsuits in rem in which litigants seek to recover state property, like a shipwreck, that the state does not actually possess.[22]

ArtIII.S2.C1.13 Cases to Which the United States Is a Party

ArtIII.S2.C1.13.1 Overview of Cases to Which the United States Is a Party

Article III, Section 2, Clause 1:

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

Article III authorizes federal courts to exercise jurisdiction over "Controversies to which the United States shall be a Party."[1] While the Constitution does not explicitly authorize the federal government to bring suits, since the early years of the Republic, the Supreme Court and Congress have accepted that the United States can both sue and be sued, subject to certain legal limits.[2] The following essays discuss constitutional issues that may arise when the United States files suit as a plaintiff,[3] including suits by the federal government against the states.[4] The essays then briefly explore legal questions related to suits where the United States or a federal entity is a defendant.[5]

ArtIII.S2.C1.13.2 Right of the United States to Sue

Article III, Section 2, Clause 1:

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

Although the Constitution does not explicitly authorize the federal government to bring suits, the Supreme Court, Congress, and legal commentators have long accepted the federal

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[21] *Ex parte* New York, 256 U.S. 490, 494, 497 (1921). *See also Ex parte* New York, 256 U.S. 503, 510–11 (1921) (determining that a claimant could not maintain suit against a state-owned vessel in rem when the state employed the vessel solely for its use); Workman v. New York City, 179 U.S. 552, 565 (1900) (holding that a municipal corporation like New York City is subject to admiralty jurisdiction in an in personam maritime tort action because the city may sue and be sued).

[22] Cal. v. Deep Sea Research, 523 U.S. 491, 506–07 (1998).

[1] U.S. Const. art. III, § 2, cl. 1.

[2] *See, e.g.*, Judiciary Act of 1789, 1 Stat. 73; Dugan v. United States, 16 U.S. (3 Wheat.) 172 (1818).

[3] *See* ArtIII.S2.C1.13.2 Right of the United States to Sue.

[4] *See* ArtIII.S2.C1.13.3 Suits Against States.

[5] *See* ArtIII.S2.C1.13.4 Suits Against the United States and Sovereign Immunity.

government's ability to do so. In his 1833 *Commentaries on the Constitution of the United States*, Justice Joseph Story noted that while "an express power is no where given in the constitution, the right of the United States to sue in its own courts is clearly implied in that part respecting the judicial power."[1] Justice Story reasoned, "all the usual incidents appertaining to a *personal* sovereign, in relation to contracts, and suing, and enforcing rights, so far as they are within the scope of the powers of the government, belong to the United States, as they do to other sovereigns."[2] Through the Judiciary Act of 1789 and subsequent amendments to the Act, Congress has granted federal district courts jurisdiction to hear civil suits brought by the United States as party plaintiff in law or equity.[3]

In 1818, the Supreme Court ruled that the United States could sue in its own name in all contract cases without congressional authorization for such suits.[4] The Court later extended this rule to other types of actions in which the government seeks to vindicate its own interests.[5]

The Court has also upheld statutes granting the federal government authority to sue to vindicate certain interests of the general public. For instance, in *United Steelworkers v. United States*, the Court upheld a provision of the Labor Management Relations Act of 1949 that authorized the Attorney General to sue for an injunction against strikes that imperil national health or safety.[6] The Court held that the statue could require courts to "exercis[e] powers of a legislative or executive nature."[7] It further held that the statute properly "recognize[s] certain rights in the public to have unimpeded for a time production in industries vital to the national health or safety" and "makes the United States the guardian of these rights in litigation."[8] In the 1960 case *United States v. Raines*, the Court upheld a provision of the Civil Rights Act of 1957 that authorized the Attorney General to sue for injunctive relief against interference with voting rights.[9] In response to the challengers' argument that it was "beyond the power of Congress to authorize the United States to bring [an] action in support of private constitutional rights," the Court held that "there is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights, and we think it perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief."[10]

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[1] 3 J. Story, Commentaries on the Constitution of the United States § 1274 (1833).

[2] *Id.*

[3] 1 Stat. 73. The provision is now codified at 28 U.S.C. § 1345. Because the Supreme Court's original jurisdiction extends only to cases enumerated in the Constitution, the United States must bring suits against persons or corporations in the lower federal courts. The United States may bring suits against a state in the Supreme Court pursuant to the Court's original jurisdiction, 28 U.S.C. § 1251(b)(2), or the United States may bring such suits in the district courts. Case v. Bowles, 327 U.S. 92, 97 (1946). As in other judicial proceedings, the United States, like any party plaintiff, must have an interest in the subject matter and a legal right to the remedy sought. United States v. San Jacinto Tin Co., 125 U.S. 273 (1888).

[4] Dugan v. United States, 16 U.S. (3 Wheat.) 172 (1818).

[5] *See, e.g.*, Cotton v. United States, 52 U.S. 229 (1850) (United States could bring suit for trespass); United States v. Gear, 44 U.S. 120 (1945) (United States could sue for injunction against mining on public lands).

[6] 361 U.S. 39 (1960).

[7] *Id.* at 43.

[8] *Id.*

[9] 362 U.S. 17 (1960).

[10] *Id.* at 27. *See also Oregon v. Mitchell*, in which two of the four cases considered were actions by the United States to enjoin state compliance with the Voting Rights Act Amendments of 1970. 400 U.S. 112 (1970).

ArtIII.S2.C1.13.2
Right of the United States to Sue

In the absence of a statutory provision to the contrary, the Attorney General initiates suits by the federal government in the name of the United States.[11] To date, the Supreme Court has declined to address whether the United States may sue to protect the constitutional rights of its citizens without statutory authorization.[12]

ArtIII.S2.C1.13.3 Suits Against States

Article III, Section 2, Clause 1:

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

Controversies to which the United States is a party include suits brought by the federal government as plaintiff against states as party defendants.[1] The first Supreme Court case involving the federal government suing a state arose from a late-nineteenth Century action by the United States to recover on bonds issued by North Carolina.[2] While the parties did not raise the question of federal court jurisdiction over the suit, the Court, in deciding the case on its merits in favor of the state, tacitly assumed that it had jurisdiction to hear such cases.

Two years later, the State of Texas directly challenged the federal courts' jurisdiction over it in response to a bill in equity the United States brought to determine the boundary between Texas and the Territory of Oklahoma.[3] Texas, among other things, contended that the United States could not sue a state without the state's consent. The Supreme Court held that it had jurisdiction over the suit. Emphasizing that under Article III federal jurisdiction encompasses cases to which the United States and a state are parties, Justice John Marshall Harlan noted that the Constitution made no exception for suits brought by the United States.[4] With respect to the state's argument that it had not consented to the suit, the Court concluded that Texas had given consent to be sued by the United States "when [it was] admitted to the Union upon an equal footing in all respects with the other States."[5]

The Supreme Court routinely accepted jurisdiction over suits by the federal government against states in subsequent cases. In 1926, the Court decided a dispute between the United States and Minnesota over land patents that the United States had issued to Minnesota in

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[11] United States v. San Jacinto Tin Co., 125 U.S. 273 (1888); United States v. Beebe, 127 U.S. 338 (1888); United States v. Bell Telephone Co., 128 U.S. 315 (1888).

[12] This question came before the Supreme Court in the 2021 case *United States v. Texas*, but the Court dismissed that case without a substantive decision. 142 S. Ct. 522 (Mem.) (2021).

[1] The Eleventh Amendment and the common law doctrine of sovereign immunity bar suits against states by private individuals and by other states; however, those authorities do not bar suits against states by the federal government. *See* U.S. CONST. amend. XI; *see also* Amdt11.1 Overview of Eleventh Amendment, Suits Against States to Amdt11.6.4 Tort Actions Against State Officials.

[2] United States v. North Carolina, 136 U.S. 211 (1890).

[3] United States v. Texas, 143 U.S. 621 (1892).

[4] *Id.* at 644. For additional discussion of the Supreme Court's original jurisdiction, see ArtIII.S2.C2.2 Supreme Court Original Jurisdiction.

[5] *Id.* at 642–46. This suit was specifically authorized by the Act of Congress of May 2, 1890, providing for a temporary government for the Oklahoma territory to determine ownership of Greer County. 26 Stat. 81, 92, § 25. *See also* United States v. Louisiana, 339 U.S. 699, 701–02 (1950).

breach of U.S. trust obligations to the Chippewa tribe.[6] Similarly, in a 1931 case, the Court took jurisdiction of a suit by the United States against Utah to quiet title to land forming the beds of certain sections of the Colorado River and its tributaries with the states.[7] In 1947, the Court exercised jurisdiction over a suit the United States brought against California to determine ownership of and paramount rights over submerged land and the oil and gas thereunder off the coast of California between the low-water mark and the three-mile limit.[8] The Court decided like suits against Louisiana and Texas in 1950.[9]

In contrast to the foregoing cases, in the 1935 case *United States v. West Virginia*, the Court dismissed a suit in equity brought by the United States to determine the navigability of the New and Kanawha Rivers.[10] While the Court stated that it "can no longer be doubted" that the Supreme Court's original jurisdiction "includes cases brought by the United States against a state,"[11] it concluded that the case before it was not justiciable because it presented "no actual or threatened interference with the authority of the United States."[12] *West Virginia* thus does not appear to cast doubt on the authority of the United States to sue a state in federal court. Instead, it instructs that such suits remain subject to generally applicable justiciability requirements.[13]

In addition to allowing the United States to initiate suits against the states, the Court has also, at times, allowed the federal government to intervene in suits between states.[14]

ArtIII.S2.C1.13.4 Suits Against the United States and Sovereign Immunity

Article III, Section 2, Clause 1:

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

In addition to suits brought by the federal government as a plaintiff, "Controversies to which the United States shall be a Party" may include cases brought against the United States

[6] United States v. Minnesota, 270 U.S. 181 (1926). For an earlier suit against a state by the United States, see United States v. Michigan, 190 U.S. 379 (1903).

[7] United States v. Utah, 283 U.S. 64 (1931).

[8] United States v. California, 332 U.S. 19 (1947).

[9] United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950). *See also* United States v. Maine, 420 U.S. 515 (1975).

[10] 295 U.S. 463 (1935).

[11] *Id.* at 470.

[12] *Id.* at 473.

[13] For discussion of the various constitutional requirements related to justiciability, see generally Article III.

[14] *See* Oklahoma v. Texas, 252 U.S. 372 (1920); *Id.* 258 U.S. 574, 581 (1922); Florida v. Georgia, 58 U.S. 478, 495 (1854).

as a defendant.[1] Those cases fall within Article III's grant of federal court jurisdiction;[2] however, the doctrine of sovereign immunity may limit such suits.

While state sovereign immunity is rooted in part in the Eleventh Amendment,[3] no provision of the Constitution expressly grants the federal government immunity from suit. Instead, most judges and commentators agree that federal sovereign immunity is a common law doctrine drawn from pre-Founding English law.[4] Since the early years of the Republic, the Supreme Court has repeatedly adopted the position that the United States may not be sued unless it consents.[5] The Court has applied the doctrine of sovereign immunity to bar suits from proceeding without consent against the federal government for actions of its agents or employees[6] and against federal agencies[7] and government corporations.[8] The Court has further held that any waiver of sovereign immunity must come from an act of Congress; Executive officials are powerless either to waive such immunity or to confer jurisdiction on a federal court.[9] In the 2019 case *Thacker v. Tennessee Valley Authority*, the Court rejected a separation of powers challenge to a statute that waived the immunity of a government-owned corporation.[10]

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[1] U.S. Const. art III, § 2, cl. 1.

[2] In addition to falling within federal court jurisdiction as cases to which the United States is a party, these cases may also fall within federal court jurisdiction as cases arising under the Constitution or the laws or treaties of the United States. *See* ArtIII.S2.C1.11.1 Overview of Federal Question Jurisdiction.

[3] *See* U.S. Const. amend. XI; *see also* Amdt11.1 Overview of Eleventh Amendment, Suits Against States to Amdt11.6.4 Tort Actions Against State Officials.

[4] *See, e.g.*, Erwin Chemerinsky, Federal Jurisdiction § 9.2 (5th ed. 2007). *Compare* The Siren, 74 U.S. (7 Wall.) 152, 153–54 (1869) ("It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent."); *with* Kennecott Copper Corp. v. State Tax Com'n, 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting) ("Though this immunity from suit without consent is embodied in the Constitution, it is an anachronistic survival of monarchical privilege, and runs counter to democratic notions of the moral responsibility of the State.").

[5] This rule first appeared in embryonic form in an obiter dictum by Chief Justice Jay in *Chisholm v. Georgia*, where he indicated that a suit would not lie against the United States because "there is no power which the courts can call to their aid." 2 U.S. (2 Dall.) 419, 478 (1793). In *Cohens v. Virginia*, also in dictum, Chief Justice John Marshall noted, "the universally received opinion is that no suit can be commenced or prosecuted against the United States." 19 U.S. (6 Wheat.) 264, 412 (1821). The issue was more directly in question in *United States v. Clarke*, where Chief Justice John Marshall stated that, as the United States is "not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it." 33 U.S. (8 Pet.) 436, 444 (1834). *See also* United States v. McLemore, 45 U.S. (4 How.) 286 (1846); Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850); De Groot v. United States, 72 U.S. (5 Wall.) 419, 431 (1867); United States v. Eckford, 73 U.S. (6 Wall.) 484, 488 (1868); The Siren, 74 U.S. (7 Wall.) 152, 154 (1869); Nichols v. United States, 74 U.S. (7 Wall.) 122, 126 (1869); The Davis, 77 U.S. (10 Wall.) 15, 20 (1870); Carr v. United States, 98 U.S. 433, 437–39 (1879).

[6] Gibbons v. United States, 75 U.S. (8 Wall.) 269, 275 (1869); Peabody v. United States, 231 U.S. 530, 539 (1913); Koekuk & Hamilton Bridge Co. v. United States, 260 U.S. 125, 127 (1922); Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) ("there can be no legal right as against the authority that makes the law on which the right depends"). *See also* The Western Maid, 257 U.S. 419, 433 (1922); Sloan Shipyards v. United States Fleet Corp., 258 U.S. 549, 570 (1922); *cf.* 39 Ops. Atty. Gen. 559, 562 (1938).

[7] Federal Housing Administration, Region No. 4 v. Burr, 309 U.S. 242, 244 (1940) ("[T]here can be no doubt that Congress has full power to endow the Federal Housing Administration with the government's immunity from suit or to determine the extent to which it may be subjected to the judicial process.").

[8] Federal Land Bank v. Priddy, 295 U.S. 229, 231 (1935). The Court has also held that Indian nations are exempt from suit without further congressional authorization. United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940).

[9] United States v. New York Rayon Co., 329 U.S. 654 (1947). Congress may also grant or withhold immunity from suit on behalf of government corporations. Brady v. Roosevelt S.S. Co., 317 U.S. 575 (1943).

[10] 139 S.Ct. 1435 (2019). Specifically, the Court rejected an argument that allowing suits against the corporation "would conflict with the 'constitutional scheme'—more precisely, with 'separation-of-powers principles'—by subjecting the TVA's discretionary conduct to 'judicial second-guessing.'" *Id.* at 1441 (quoting Resp. Br.).

Congress has waived federal sovereign immunity through statutes such as the Administrative Procedure Act,[11] the Federal Tort Claims Act,[12] and the Tucker Act.[13] In the absence of a waiver of sovereign immunity authorizing suits against the government itself, the Supreme Court has at times allowed suits to go forward against federal officials sued in their individual capacity.[14] For instance, in *Bivens v. Six Unknown Named Agents*[15] and its progeny, the Court allowed individuals to sue federal agents directly under the Constitution without a federal statute authorizing relief.[16] More recent Supreme Court cases have construed *Bivens* narrowly.[17]

ArtIII.S2.C1.14 Controversies Between Two or More States

ArtIII.S2.C1.14.1 Historical Background on Controversies Between Two or More States

Article III, Section 2, Clause 1:

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

The extension of federal judicial power to controversies between states and the vesting of original jurisdiction in the Supreme Court of suits to which a state is a party had its origin in experience. Prior to independence, disputes between colonies claiming charter rights to territory were settled by the Privy Council. Under Article IX of the Articles of Confederation, Congress was made "the last resort on appeal" to resolve "all disputes and differences . . . between two or more States concerning boundary, jurisdiction, or any other cause whatever," and to constitute what in effect were ad hoc arbitral courts for determining such disputes and rendering a final judgment therein. When the Philadelphia Convention met in 1787, serious

[11] 5 U.S.C. § 702.

[12] 28 U.S.C. § 2674.

[13] 28 U.S.C. §§ 1346(a), 1491(a)(1).

[14] In addition to the *Bivens* line of cases discussed *infra*, see, e.g., United States v. Lee, 106 U.S. 196 (1882).

[15] 403 U.S. 388 (1971). Some have likened the holding in *Bivens* to the creation of federal common law. *See, e.g.*, Hernandez v. Mesa, 140 S. Ct. 735, 742 (2020) ("Analogizing *Bivens* to the work of a common-law court, petitioners and some of their *amici* make much of the fact that common-law claims against federal officers for intentional torts were once available. . . . With the demise of federal general common law, a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress, . . . and no statute expressly creates a *Bivens* remedy."); Correctional Services Corp. v. Malesko, 534 U.S. 61, (2001) (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition."). Justice John Harlan's concurrence in *Bivens* suggested that liability in that case was not based on common law. 403 U.S. at 403 (Harlan, J., concurring) ("I do not think that the fact that the interest is protected by the Constitution rather than statute or common law justifies the assertion that federal courts are powerless to grant damages in the absence of explicit congressional action authorizing the remedy.").

[16] *See also* Davis v. Passman, 442 U.S. 228 (1979), Carlson v. Green, 446 U.S. 14 (1980).

[17] *See, e.g.*, Egbert v. Boule, 2022 WL 2056291 (June 8, 2022).

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disputes over boundaries, lands, and river rights involved ten states.[1] It is hardly surprising, therefore, that during its first sixty years the only state disputes coming to the Supreme Court were boundary disputes[2] or that such disputes constitute the largest single number of suits between states. Since 1900, however, as the result of the increasing mobility of population and wealth and the effects of technology and industrialization, other types of cases have occurred with increasing frequency.

ArtIII.S2.C1.14.2 Boundary Disputes Between States

Article III, Section 2, Clause 1:

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

Among the earlier suits between states, the suit between New Jersey and New York[1] is significant for applying a rule laid down earlier in *Chisholm v. Georgia* (i.e., that the Supreme Court may proceed ex parte if a state refuses to appear when duly summoned). The long drawn out litigation between Rhode Island and Massachusetts is also significant for its rulings: that, although the Constitution does not extend the judicial power to all controversies between states, it does not exclude any;[2] that a boundary dispute is a justiciable and not a political question;[3] and that a prescribed rule of decision is unnecessary in such cases. On the last point, Justice Henry Baldwin stated:

> The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case (11 Ves. 294); which depends on the subject-matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission, the question ceases to be a political one, to be decided by the *sic volo, sic jubeo*, of political power; it comes to the court, to be decided by its judgment, legal discretion and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires.[4]

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[1] C. Warren, *The Supreme Court and Disputes Between States*, 34 Bull. of William and Mary, No. 4 (1940), 7–11. For a more comprehensive treatment of background as well as the general subject, *see* C. Warren, The Supreme Court and the Sovereign States (1924).

[2] Warren, *supra* note 1, at 13. However, only three such suits were brought in this period, 1789–1849. During the next ninety years, 1849–1939, at least twenty-nine such suits were brought. *Id.* at 13, 14.

[1] New Jersey v. New York, 30 U.S. (5 Pet.) 284 (1831).

[2] Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838)

[3] 37 U.S. at 736–37.

[4] *Id.* at 737. Chief Justice Roger B. Taney dissented because of his belief that the issue was not one of property in the soil, but of sovereignty and jurisdiction, and hence political. *Id.* at 752–53. For different reasons, it should be noted, a suit between private parties respecting soil or jurisdiction of two states, to which neither state is a party, does not come within the original jurisdiction of the Supreme Court. Fowler v. Lindsey, 3 U.S. (3 Dall.) 411 (1799). For recent boundary cases, *see* United States v. Maine (Rhode Island and New York Boundary Case), 469 U.S. 504 (1985); United

ArtIII.S2.C1.14.3 Modern Suits Between States

Article III, Section 2, Clause 1:

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

Beginning with *Missouri v. Illinois & Chicago District*,[1] which sustained jurisdiction to entertain an injunction suit to restrain the discharge of sewage into the Mississippi River, water rights, the use of water resources, and the like, have been a source of suits between states. Such suits have been especially frequent in the western states,[2] where water is in short supply, but they have not been confined to any one region.[3] In *Kansas v. Colorado*,[4] the Court established the principle of the equitable division of river or water resources between conflicting state interests.[5]

In the 1931 case, *New Jersey v. New York*,[6] New Jersey sought to enjoin New York for diverting water into the Hudson River watershed for New York's use in such a way as to diminish the flow of the Delaware River in New Jersey, injure its shad fisheries, and harm the saline contents of the Delaware River. Justice Oliver Wendell Holmes, writing for the majority, explained:

> A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may.[7]

States v. Louisiana (Alabama and Mississippi Boundary Case), 470 U.S. 93 (1985); United States v. Maine, 475 U.S. 89 (1986); Georgia v. South Carolina, 497 U.S. 336 (1990); Mississippi v. Louisiana, 506 U.S. 73 (1992).

[1] 180 U.S. 208 (1901).

[2] *E.g.* Montana v. Wyoming, 563 U.S. 368 (2011); Texas v. New Mexico and Colorado, No. 141, Orig., slip op. at 1 (U.S. Mar. 5, 2018); Texas v. New Mexico, No. 65, Orig., slip op. at 1 (U.S. Dec. 14, 2020).

[3] *See, e.g.*, Florida v. Georgia (2018 Florida), No. 142, Orig., slip op. at 1 (U.S. June 27, 2018) ("This case concerns the proper apportionment of the water of an interstate river basin. Florida, a downstream State, brought this lawsuit against Georgia, an upstream State, claiming that Georgia has denied it an equitable share of the basin's waters.").

[4] 206 U.S. 46 (1907). *See also* Idaho *ex rel.* Evans v. Oregon and Washington, 444 U.S. 380 (1980).

[5] *See also 2018 Florida*, slip op. at 10 ("Where, as here, the Court is asked to resolve an interstate water dispute raising questions beyond the interpretation of specific language of an interstate compact, the doctrine of equitable apportionment governs our inquiry." (citing Colorado v. New Mexico, 459 U.S. 176, 183 (1982)); Virginia v. Maryland, 540 U.S. 56, 74 n.9 (2003) ("Federal common law governs interstate bodies of water, ensuring that the water is equitably apportioned between the States and bodies of water, ensuring that the water is equitably apportioned between the States and that neither State harms the other's interest in the river.").

[6] 283 U.S. 336 (1931).

[7] *Id.* at 342. *See also* Nebraska v. Wyoming, 325 U.S. 589 (1945); Idaho *ex rel.* Evans v. Oregon, 462 U.S. 1017 (1983). In *Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493 (1971), the Court held it had jurisdiction of a suit by a state against citizens of other states to abate a nuisance allegedly caused by the dumping of mercury into streams that

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In *Florida v. Georgia*, the Supreme Court issued two opinions concerning how to apportion water from an interstate river basin known as the Apalachicola-Chattahoochee-Flint (ACF) River basin.[8] Florida, the downstream state, alleged that Georgia overconsumed the ACF basin's waters, leading to the collapse of its local oyster industry and harming Florida's river ecosystems.[9] After agreeing to exercise original jurisdiction, the Supreme Court appointed a Special Master to take evidence and issue a report with recommendations on how to resolve the dispute.[10] The Court explained that "given the complexity of many water-division cases, the need to secure equitable solutions, the need to respect the sovereign status of the States, and the importance of finding flexible solutions to multi-factor problems, we typically appoint a Special Master and benefit from detailed factual findings."[11]

The Special Master in *Florida v. Georgia* recommended that the Court dismiss the case because the relief Florida sought—a limitation on Georgia's consumptive use of ACF Basin waters—would not redress the alleged injury without also joining the Army Corps of Engineers (Corps) as party to the case.[12] Although the Corps operated a dam that controlled the amount of water flowing southward into Florida, it was not a defendant in the suit because it was protected by sovereign immunity.[13] The Special Master recommended dismissing the case based on the "*single*, discrete" conclusion that Florida's injury could not be redressed without a judicial decree that was binding on both Georgia and the Corps as defendants.[14] Florida lodged exceptions to the Special Master's report, and, in a 5-4 opinion issued in 2018, the Supreme Court declined to adopt the Special Master's recommendation of dismissal.[15]

At the outset of its 2018 opinion, the Supreme Court summarized "several related but more specific sets of principles" that govern the doctrine of equitable apportionment in interstate disputes between two states.[16] The Court remanded the case to the Special Master assigned to the dispute, concluding that he had applied too strict a standard on the issue of redressability.[17] The Court advised the Special Master that, "[c]onsistent with the principles that guide our inquiry in this context, answers need not be 'mathematically precise or based on definite present and future conditions.' Approximation and reasonable estimates may prove 'necessary to protect the equitable rights of a State.' . . . Flexibility and approximation are

ultimately run into Lake Erie, but it declined to permit the filing because the presence of complex scientific issues made the case more appropriate for first resolution in a district court. *See also* Texas v. New Mexico, 462 U.S. 554 (1983); Nevada v. United States, 463 U.S. 110 (1983)

[8] *2018 Florida*, slip op. at 1; Florida v. Georgia (2021 Florida), No. 142, Orig., slip op. at 1 (U.S. Apr. 1, 2021).

[9] *2021 Florida*, slip op. at 5.

[10] *See 2018 Florida*, slip op. at 6.

[11] *Id.* at 14.

[12] *Id.* at 7.

[13] *Id.* at 2–3, 6.

[14] *Id.* at 7 (emphasis in original).

[15] *Id.* at 15.

[16] *2018 Florida*, slip op. at 10. Specifically, when asked to resolve such a dispute under the doctrine of equitable apportionment, the Court should consider the following principles: (1) that the two states "possess an equal right to make a reasonable use of the waters of the stream"; (2) that "the Court's 'effort always is to secure an equitable apportionment without quibbling over formulas' . . . [and w]here '[b]oth States have real and substantial interests in the River,' those interests 'must be reconciled as best they may be'"; (3) that, "in light of the sovereign status and 'equal dignity' of States, . . . the complaining State must demonstrate that it has suffered a 'threatened invasion of rights' that is 'of serious magnitude'"; and (4) that "where a complaining State meets its 'initial burden of showing 'real or substantial injury,' this Court, recalling that equitable apportionment is 'flexible,' not 'formulaic,' will seek to 'arrive at a just and equitable apportionment of an interstate stream' by 'consider[ing] 'all relevant factors.'" *Id.* at 11–14 (citations omitted).

[17] *Id.* at 15.

often the keys to success in our efforts to resolve water disputes between sovereign States that neither Congress 'nor the legislature of either State' has been able to resolve."[18]

On remand, a newly appointed Special Master recommended that the Supreme Court dismiss Florida's request for equitable apportionment, and the Court agreed.[19] In a unanimous opinion issued in 2021, the Supreme Court held that Florida did not meet its evidentiary burden to show that Georgia's consumption of ACF Basin waters caused Florida's alleged harm.[20] Rather, the evidence suggested Florida's mismanagement of its own fisheries contributed to its oyster industry's collapse, and Florida did not show any "actual" or "real-world" damage to its ecosystems.[21]

Other types of interstate disputes of which the Court has taken jurisdiction include suits by a state as the donee of the holders of bonds issued by another state, and the ability to collect thereon;[22] by Virginia against West Virginia to determine the proportion of the public debt of the original State of Virginia that the latter owed the former;[23] and by Arkansas to enjoin Texas from interfering with the performance of a contract by a Texas foundation to contribute to the construction of a new hospital in the medical center of the University of Arkansas.[24] Other examples include a suit brought by one state against another to enforce a contract between the two,[25] a suit in equity between states for the determination of a decedent's domicile for inheritance tax purposes,[26] and a suit by two states to restrain a third from enforcing a natural gas measure that purported to restrict the interstate flow of natural gas from the state in the event of a shortage.[27]

In *Texas v. New Jersey*,[28] the Court adjudicated a multistate dispute about which state should be allowed to escheat intangible property consisting of uncollected small debts held by a corporation. Emphasizing that the states could not constitutionally provide a rule of settlement and that no federal statute governed the matter, the Court evaluated the possible rules and chose the one easiest to apply and least likely to lead to continuing disputes.[29]

In general, in taking jurisdiction of these suits, along with those involving boundaries and the diversion or pollution of water resources, the Supreme Court relied on the liberal construction of the term "controversies between two or more States" that the Court enunciated

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[18] *Id.* at 37 (quoting Idaho *ex rel.* Evans v. Oregon, 462 U.S. 1017, 1026 (1983)); Virginia v. West Virginia, 220 U.S. 1, 27 (1911).

[19] *See 2021 Florida*, slip op. at 1.

[20] *Id.* at 5.

[21] *See id.* at 5–10.

[22] South Dakota v. North Carolina, 192 U.S. 286 (1904).

[23] Virginia v. West Virginia, 220 U.S. 1 (1911).

[24] Arkansas v. Texas, 346 U.S. 368 (1953).

[25] Kentucky v. Indiana, 281 U.S. 163 (1930).

[26] Texas v. Florida, 306 U.S. 398 (1939). In *California v. Texas,* 437 U.S. 601 (1978), the Court denied a state leave to file an original action against another state to determine the contested domicile of a decedent for death tax purposes, with several Justices of the view that *Texas v. Florida* had either been wrongly decided or was questionable. But, after determining that an interpleader action by the administrator of the estate for a determination of domicile was barred by the Eleventh Amendment, Cory v. White, 457 U.S. 85 (1982), the Court over dissent permitted filing of the original action. California v. Texas, 457 U.S. 164 (1982).

[27] Pennsylvania v. West Virginia, 262 U.S. 553 (1923). The Court, in *Maryland v. Louisiana,* 451 U.S. 725 (1981), over dissent, relied on this case in permitting a suit contesting a tax imposed on natural gas, the incidence of which fell on the suing state's consuming citizens. And, in *Wyoming v. Oklahoma,* 502 U.S. 437 (1992), the Court permitted a state to sue another to contest a law requiring that all in-state utilities burn a mixture containing at least 10% in-state coal, the plaintiff state having previously supplied 100% of the coal to those utilities and thus suffering a loss of coal-severance tax revenues.

[28] 379 U.S. 674 (1965). *See also* Pennsylvania v. New York, 407 U.S. 206 (1972).

[29] *Id.* at 683.

in *Rhode Island v. Massachusetts*,[30] and Chief Justice John Marshall fortified in dictum in *Cohens v. Virginia*[31] that "it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union."[32]

ArtIII.S2.C1.14.4 Cases Where the Court Has Declined Jurisdiction

Article III, Section 2, Clause 1:

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

Centering its attention upon the elements of a case or controversy, the Court has declined jurisdiction in certain circumstances. For example, in *Alabama v. Arizona*,[1] where Alabama sought to enjoin nineteen states from regulating or prohibiting the sale of convict-made goods, the Court stated that jurisdiction of suits between states will be exercised only when absolutely necessary.[2] The Court explained that the equity requirements in a suit between states are more exacting than in a suit between private persons, and that a plaintiff state asking leave to sue another state must show the threatened injury to be of great magnitude and imminent.[3] The Court further explained that the burden on the plaintiff state to establish all the elements of a case is greater than the burden generally required by a plaintiff seeking an injunction in cases between private parties.[4]

Pursuing a similar line of reasoning, the Court declined to take jurisdiction of a suit brought by Massachusetts against Missouri and certain of its citizens to prevent Missouri from levying inheritance taxes upon intangibles held in trust in Missouri by resident trustees.[5] In holding that the complaint presented no justiciable controversy, the Court declared that, to constitute such a controversy, the complainant state must show that it "has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to . . . the common law or equity systems of jurisprudence."[6] The fact that the trust property was sufficient to satisfy the claims of both states and that recovery by either would not impair any

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[30] 37 U.S. (12 Pet.) 657 (1838).

[31] 19 U.S. (6 Wheat.) 264 (1821).

[32] *Id.* at 378. *See* Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71, 79–80 (1961); Texas v. New Jersey, 379 U.S. 674, 677 (1965); Pennsylvania v. New York, 407 U.S. 206 (1972).

[1] 291 U.S. 286 (1934). The Court has been loath to permit filings of original actions where the parties might be able to resolve their disputes in other courts, even in cases in which the jurisdiction over the particular dispute is exclusively original. Arizona v. New Mexico, 425 U.S. 794 (1976) (dispute subject of state court case brought by private parties); California v. West Virginia, 454 U.S. 1027 (1981). But in *Mississippi v. Louisiana,* 506 U.S. 73 (1992), the Court's reluctance to exercise original jurisdiction ran afoul of the "uncompromising language" of 28 U.S.C. § 1251(a) giving the Court "original and *exclusive* jurisdiction" of these kinds of suits.

[2] Alabama v. Arizona, 291 U.S. 286, 291 (1934).

[3] *Id.* at 292.

[4] *Id.*

[5] Massachusetts v. Missouri, 308 U.S. 1, 20 (1939).

[6] *Id.* at 15–16 (citing Florida v. Mellon, 273 U.S. 12 (1927)).

rights of the other distinguished the case from *Texas v. Florida*,[7] where the Court held the contrary. Furthermore, the Missouri statute providing for reciprocal privileges in levying inheritance taxes did not confer upon Massachusetts any contractual right.[8] The Court then proceeded to reiterate its earlier rule that a state may not invoke the original jurisdiction of the Supreme Court for the benefit of its residents or to enforce the individual rights of its citizens.[9] Moreover, the Court held that Massachusetts could not invoke the original jurisdiction of the Court by making citizens of Missouri parties to a suit that was not otherwise maintainable.[10] Accordingly, Massachusetts was held to have an adequate remedy in Missouri's courts or in a federal district court in Missouri.[11]

In 2020, the Supreme Court declined to allow Texas to file a bill of complaint in which Texas alleged that four states allowed "material illegality"[12] in the 2020 general elections held in their states.[13] Texas argued that alleged flaws in voting processes in Pennsylvania, Georgia, Michigan, and Wisconsin affected an "outcome determinative" number of votes in the 2020 presidential election.[14] The Supreme Court denied Texas's motion under the rationale that Texas lacked standing because it did not have a "judicially cognizable interest in the manner in which another State conducts its elections."[15]

ArtIII.S2.C1.14.5 Enforcement Authority

Article III, Section 2, Clause 1:

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

In 2015, the Court, noting that proceedings under its original jurisdiction are "basically equitable,"[1] took the view that its enforcement authority encompasses ordering disgorgement of part of one state's gain from its breach of an interstate compact, as well as reforming certain agreements adopted by the states.[2] In so doing, the Court emphasized that its enforcement

[7] 306 U.S. 398 (1939).

[8] *See id.* at 16–17.

[9] *Massachusetts*, 308 U.S. at 17 (citing Oklahoma v. Atchison, T. & S.F. Ry., 220 U.S. 277, 286 (1911) and Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387, 394 (1938)). *See also New Hampshire v. Louisiana and New York v. Louisiana,* 108 U.S. 76 (1883), which held that a state cannot bring a suit on behalf of its citizens to collect on bonds issued by another state, and *Louisiana v. Texas,* 176 U.S. 1 (1900), which held that a state cannot sue another to prevent maladministration of quarantine laws.

[10] *Massachusetts*, 308 U.S. at 17, 19.

[11] *See id.* at 19–20.

[12] Mot. for Leave to File Bill of Complaint, Texas v. Pennsylvania at 2, No. 155, Orig. (U.S. Dec. 11, 2020).

[13] Order, Texas v. Pennsylvania, No. 155, Orig. (U.S. Dec. 11, 2020).

[14] Mot. for Leave, *supra* note 12, at 2.

[15] Order, *supra* note 13.

[1] Kansas v. Nebraska, 574 U.S. 445, 451 (2015).

[2] *Kansas*, 574 U.S. at 461–64 Equity is "the system of law or body of principles originating in the English Court of Chancery." *Equity*, Black's Law Dictionary 656 (10th ed. 2014). Persons who sought equitable relief "sought to do justice in cases for which there was no adequate remedy at common law," A.H. Manchester, Modern Legal History of England

authority derives both from its "inherent authority" to apportion interstate streams between states equitably and from Congress's approval of interstate compacts.[3] As to its inherent authority, the Court noted that states bargain for water rights "in the shadow of" the Court's broad power to apportion them equitably and it is "difficult to conceive" that a state would agree to enter an agreement as to water rights if the Court lacked the power to enforce the agreement.[4] The Court similarly reasoned that its remedial authority "gains still greater force" because a compact between the states, "having received Congress's blessing, counts as federal law."[5] The Court stated, however, that an interstate compact's "legal status" as federal law could also limit the Court's enforcement power because the Court cannot order relief that is inconsistent with a compact's express terms.[6]

ArtIII.S2.C1.15 States and Citizens of Other States

ArtIII.S2.C1.15.1 Historical Background on Controversies Between a State and Citizens of Other States

Article III, Section 2, Clause 1:

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

The Supreme Court's decision in *Chisholm v. Georgia*[1] that cases "between a state and citizens of another state" included those where a state was a party defendant provoked the proposal and ratification of the Eleventh Amendment. Since then, controversies between a state and citizens of another state include only those cases where the state has been a party plaintiff or has consented to be sued.[2] As a party plaintiff, a state may bring actions against citizens of other states to protect its legal rights or in some instances as parens patriae to protect the health and welfare of its citizens. In general, the Court has tended to construe strictly this grant of judicial power, which simultaneously comes within its original jurisdiction, by applying the concepts of cases and controversies more rigorously than in cases between private parties.[3] Specifically, in these circumstances, the Court holds rigorously to the

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AND WALES, 1750–1950, at 135–36 (1980), i.e., cases in which the English courts of law could afford no relief to a plaintiff. While eventually courts of law and courts providing equitable relief merged into a single court in most jurisdictions, an equitable remedy refers to a remedy that equity courts would have historically granted. *See* 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES - EQUITY - RESTITUTION § 2.1(2), at 59–61 (2d ed. 1993). Compensatory damages are a classic "legal" remedy, whereas an injunction is a classic "equitable" remedy. *See* RICHARD L. HASEN, REMEDIES 141 (2d ed. 2010).

[3] *Id.* at 454–55.

[4] *See Kansas*, 574 U.S. at 455 (quoting Texas v. New Mexico, 462 U.S. 554, 569 (1983)).

[5] *Id.*

[6] *Id.*

[1] 2 U.S. (2 Dall.) 419 (1793).

[2] *See* the discussion under the Eleventh Amendment.

[3] Massachusetts v. Mellon, 262 U.S. 447 (1923); Florida v. Mellon, 273 U.S. 12 (1927); New Jersey v. Sargent, 269 U.S. 328 (1926).

rule that all the party defendants are citizens of other states[4] and adheres to congressional distribution of its original jurisdiction concurrently with that of other federal courts.[5]

ArtIII.S2.C1.15.2 Jurisdiction Confined to Civil Cases

Article III, Section 2, Clause 1:

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

Cohens v. Virginia[1] includes dicta about whether the Supreme Court's original jurisdiction encompasses suits between a state and its own citizens. Long afterwards, the Supreme Court dismissed an action for want of jurisdiction because the record did not show that the corporation against which the suit was brought was chartered in another state.[2] Subsequently, the Court has ruled that it will not entertain an action by a state to which its citizens are either parties of record or would have to be joined because of the effect of a judgment upon them.[3] In dictum, Chief Justice John Marshall also indicated in *Cohens* that perhaps no jurisdiction existed over suits by states to enforce their penal laws.[4] Sixty-seven years later, the Court wrote this dictum into law in *Wisconsin v. Pelican Ins. Co.*[5] In *Pelican*, Wisconsin sued a Louisiana corporation to recover a judgment rendered in its favor by one of its own courts. Relying partly on the rule of international law that the courts of no country execute the penal laws of another; partly upon the Section 13 of the Judiciary Act of 1789, which vested the Supreme Court with exclusive jurisdiction of controversies of a civil nature where a state is a party; and partly on Justice James Iredell's dissent in *Chisholm v. Georgia*,[6] where he confined the term "controversies" to civil suits, Justice Horace Gray ruled for the Court that, for purposes of original jurisdiction, "controversies between a State and citizens of another State" are confined to civil suits.[7]

ArtIII.S2.C1.15.3 The State's Real Interest

Article III, Section 2, Clause 1:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a*

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[4] Pennsylvania v. Quicksilver Co., 77 U.S. (10 Wall.) 553 (1871); California v. Southern Pacific Co., 157 U.S. 229 (1895); Minnesota v. Northern Securities Co., 184 U.S. 199 (1902).

[5] Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).

[1] 19 U.S. (6 Wheat.) 264, 398–99 (1821).

[2] Pennsylvania v. Quicksilver Mining Co., 77 U.S. (10 Wall.) 553 (1871).

[3] California v. Southern Pacific Co., 157 U.S. 229 (1895); Minnesota v. Northern Securities Co., 184 U.S. 199 (1902).

[4] *Cohens*, 19 U.S. (6 Wheat.) at 398–99.

[5] 127 U.S. 265 (1888).

[6] 2 U.S. (2 Dall.) 419, 431–32 (1793).

[7] *Wisconsin*, 127 U.S. at 289–300.

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The State's Real Interest

State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Ordinarily, a state may not sue in its name unless it is the real party in interest with real interests. It can sue to protect its own property interests,[1] and, if it sues for its own interest as owner of another state's bonds, rather than as an assignee for collection, jurisdiction exists.[2] The Court refused to allow a state to sue when, to avoid Eleventh Amendment restrictions on suing states, the state had passed a statute to collect on another state's bonds held by one of its citizens.[3] Nor can a state sue citizens of other states on behalf of its own citizens to collect claims.[4]

ArtIII.S2.C1.16 Diversity Jurisdiction

ArtIII.S2.C1.16.1 Overview of Diversity Jurisdiction

Article III, Section 2, Clause 1:

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

Article III, Section 2, Clause 1, as interpreted by the Supreme Court, authorizes Congress to grant federal courts subject matter jurisdiction over controversies between citizens of different states—commonly known as "diversity jurisdiction."[1] Although Justice Joseph Story concluded in the early case *Martin v. Hunter's Lessee* that "the language of [Article III]. . . . is manifestly designed to be mandatory upon the legislature," such that "Congress could not, without a violation of its duty, have refused to carry it into operation,"[2] numerous subsequent Supreme Court decisions repudiated this stance, recognizing instead that Article III's grant of subject matter jurisdiction is permissive and subject to congressional discretion.[3]

Congress has invoked this authority and enacted legislation granting federal courts diversity jurisdiction since the Judiciary Act of 1789.[4] That statute conferred diversity jurisdiction only when a suit was between a citizen of the state in which the suit was brought

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[1] Pennsylvania v. Wheeling & B. Bridge Co., 54 U.S. (13 How.) 518, 559 (1852); Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387 (1938); Georgia v. Evans, 316 U.S. 159 (1942).

[2] South Dakota v. North Carolina, 192 U.S. 286 (1904).

[3] New Hampshire v. Louisiana, 108 U.S. 76 (1883).

[4] Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387 (1938).

[1] *See* Kline v. Burke Constr. Co., 260 U.S. 226, 233–34 (1922); Mayor v. Cooper, 6 Wall. 247, 252 (U.S. 1968). For more information about Congress's power to establish Article III courts and their jurisdiction, see ArtIII.S1.8.1 Overview of Establishment of Article III Courts.

[2] 14 U.S. 304, 328 (1816).

[3] *See supra* note 1; *see also, e.g.*, *Hertz Corp. v. Friend,* 559 U.S. 77, 82–83 (2010); Kentucky v. Powers, 201 U.S. 1, 24–25 (1906); Stevenson v. Fain, 195 U.S. 165, 167 (1902); Holmes v. Goldsmith, 147 U.S. 150, 157–59 (1893); *In re* Sewing Mach. Co. 85 U.S. 553, 563 (1873); Sheldon v. Sill, 49 U.S. 441, 449 (1850).

[4] *See* Act of Sept. 24, 1789, § 11, 1 Stat. 73. The statute also granted federal courts jurisdiction over suits between a citizen of a state and an alien. *See id.*

and a citizen of another state.[5] The Judiciary Act of 1789 further limited diversity jurisdiction to cases where the amount in controversy—that is, the value of the relief sought—was at least $5,000.[6] The Judiciary Act of 1875 eliminated the requirement that one of the parties be a citizen of the forum state, requiring only diverse citizenship and a minimum jurisdictional amount in controversy.[7] The current diversity jurisdiction provision is codified at 28 U.S.C. § 1332, and grants federal court jurisdiction in all civil actions between citizens of different states and between a citizen of a state and a subject of a foreign state if the amount in controversy exceeds $75,000.

Although the broad strokes of these requirements have remained the same since 1875, the statute has grown increasingly complex over the years. For instance, Congress amended the statutory provision via the Class Action Fairness Act of 2005 (CAFA).[8] Among other changes, CAFA expanded federal courts' jurisdiction over class actions by substituting in these cases a minimal diversity-of-citizenship requirement in place of the usual complete diversity requirement, which requires each plaintiff be a citizen of a different state from each defendant. Under the minimal diversity requirement, federal courts possess diversity jurisdiction over a class action when any one of the plaintiffs is a citizen of a different state from any defendant.[9] CAFA also imposed an amount-in-controversy threshold of $5,000,000 in class actions, and allowed plaintiffs to aggregate their monetary claims to calculate the statutory amount in controversy.[10]

The following essays do not cover the extensive case law interpreting the various statutory requirements for diversity jurisdiction.[11] They instead provide an overview of the constitutional parameters of diversity jurisdiction, including a historical perspective on the purpose of diversity jurisdiction; the Supreme Court's interpretations of the meaning of "citizens of different states" under Article III; and related federalism principles implicated by diversity jurisdiction.

ArtIII.S2.C1.16.2 Historical Background on Diversity Jurisdiction

Article III, Section 2, Clause 1:

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

The records of the Constitutional Convention do not shed substantial light on why the Framers included diversity jurisdiction among the judicial powers of the federal courts.[1] The

[5] *See Id.*

[6] *See id.*

[7] Act of Mar. 3, 1875, § 1, 18 Stat. 470.

[8] Pub. L. No. 109–2, § 4(a), 119 Stat. 9 (2005).

[9] *See* 28 U.S.C. § 1332(d).

[10] *Id.*

[11] *See, e.g.*, Hertz Corp. v. Friend, 559 U.S. 77, 91 (2010) (interpreting the meaning of "principal place of business" under 28 U.S.C. § 1332(c)(2)).

[1] *See* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 484 (1928).

traditional explanation most often cited by judges and legal scholars is that the Framers provided diversity jurisdiction to address the concern that state courts would be prejudiced against out-of-state litigants, particularly if one party was an in-state resident.[2]

Writings and statements of several Framers support this traditional explanation. For instance, at the Virginia Convention, James Madison stated his belief that the diversity jurisdiction clause was "salutary," citing the possibility that "a strong prejudice may arise in some states, against the citizens of others, who may have claims against them."[3] In the *Federalist Papers*, Alexander Hamilton similarly argued that a national Judiciary "ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens" to ensure "the inviolable maintenance of [the] equality of privileges and immunities to which the citizens of the Union will be entitled."[4] Hamilton contended that a federal court, "having no local attachments, will be likely to be impartial between the different States and their citizens."[5] Chief Justice John Marshall likewise explained in an early case that, while it might be true that state courts would "administer justice as impartially" as federal courts, "it is not less true that the [C]onstitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors" as to warrant the establishment of diversity jurisdiction in the federal courts.[6]

Historians have proffered other explanations for the Constitution's diversity-jurisdiction provision.[7] As the volume of diversity litigation in federal court has grown over the years, commentators continue to debate the purpose of diversity jurisdiction.[8] Given that contemporary society has evolved significantly from the conditions that existed in 1789, questions have arisen periodically concerning the continued need for diversity jurisdiction, including whether to retain, abolish, or curtail to some degree the statutory grant of this form of federal subject matter jurisdiction.[9]

ArtIII.S2.C1.16.3 Citizens of Different States and Diversity Jurisdiction

Article III, Section 2, Clause 1:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens*

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[2] *See, e.g.*, Burgess v. Seligman, 107 U.S. 20, 34 (1883); Barrow S.S. Co. v. Kane, 170 U.S. 100, 111 (1898). *See also* Friendly, *supra* note 1, at 492–93; Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 82 (1923).

[3] *Reprinted in* 3 Elliot's Debates, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533 (1836).

[4] *See* The Federalist No. 80 (Alexander Hamilton).

[5] *Id.*

[6] Bank of U.S. v. Deveaux, 9 U.S. 61, 87 (1809).

[7] *See, e.g.*, Friendly, *supra* note 1, at 496 (suggesting that "the desire to protect creditors against [state] legislation favorable to debtors was a principal reason for the grant of diversity jurisdiction"); 13 Wright & Miller, Federal Practice and Procedure: Jurisdiction and Related Matters § 3601 (3d. ed. Apr. 2021) (describing some commentators' views that the grant of diversity jurisdiction stemmed from "a desire to protect commical interests from class bias").

[8] *See, e.g.*, Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring) (commenting on "the mounting mischief inflicted on the federal judicial system by the unjustifiable continuance of diversity jurisdiction").

[9] *See* Wright & Miller, *supra* note 7.

of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The constitutional grant of diversity jurisdiction extends to controversies between "Citizens of different States." Since Congress first exercised its constitutional prerogative to vest diversity jurisdiction in the federal courts in the Judiciary Act of 1789, the Supreme Court has considered the meaning of "Citizens of different States," and the constitutional reach of diversity jurisdiction, on numerous occasions.

In *Hepburn v. Ellzey*,[1] Chief Justice John Marshall confined the meaning of the word "state" as used in the Constitution to "the members of the American confederacy," ruling that a citizen of the District of Columbia thus could not maintain a suit against a citizen of Virginia in federal court on the basis of diversity jurisdiction. Chief Justice Marshall noted that it was "extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon [citizens of the District of Columbia].—But this is a subject for legislative not for judicial consideration."[2] The Court subsequently applied the same rule to citizens of the U.S. territories.[3]

Whether the Chief Justice had in mind a constitutional amendment or a statute when he spoke of legislative consideration remains unclear. Congress addressed the issue in 1940 by statutorily conferring on federal district courts jurisdiction over civil actions, not involving federal questions, "between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska and any State or Territory."[4] In *National Mutual Ins. Co. v. Tidewater Transfer Co.*,[5] the Court upheld that amendment in a 5-4 decision, but a majority of Justices could not agree on the reasoning. Two Justices thought that Chief Justice Marshall's 1804 decision should be overruled, but the other seven Justices disagreed. Three of the seven Justices thought the statute could be sustained under Congress's power to enact legislation for District of Columbia inhabitants, but the remaining four plus the other two rejected this theory. The statute was upheld because a total of five Justices voted to sustain it, although of the two theories relied upon, seven Justices rejected one and six the other. The result, attributable to "conflicting minorities in combination,"[6] means that *Hepburn v. Ellzey* is still good law insofar as it holds that the District of Columbia is not a state for purposes of Article III, but is overruled insofar as it holds that District citizens may not invoke federal diversity jurisdiction.[7]

In a typical two-party case, "diversity" exists if a citizen of one state sues a citizen of another state. In a multiparty case, Chief Justice Marshall established in an early case, *Strawbridge v. Curtiss*, that there must be complete diversity—that is, no party on one side could be a citizen of any state of which any party on the other side was a citizen.[8] In *State Farm Fire & Casualty Co. v. Tashire*, the Court clarified that this complete diversity requirement flows from the diversity jurisdiction statute, rather than from the constitutional grant of

[1] 6 U.S. (2 Cr.) 445 (1805).

[2] *Id.* at 453.

[3] City of New Orleans v. Winter, 14 U.S. (1 Wheat.) 91 (1816).

[4] Pub. L. No. 76–463, 54 Stat. 143 (1940). The relevant provision was later revised to read "The word 'States,' as used in this section, includes the Territories and the District of Columbia." *See* 28 U.S.C. § 1332(b) (1948).

[5] 337 U.S. 582 (1949).

[6] *Id.* at 655 (Frankfurter, J., dissenting).

[7] *See id.* The statute's provision allowing citizens of Puerto Rico to sue in diversity was sustained in Americana of Puerto Rico, Inc. v. Kaplus, 368 F.2d 431 (3d Cir. 1966), *cert. denied*, 386 U.S. 943 (1967), under Congress's power to make rules and regulations for U.S. territories. *Cf.* Examining Bd. v. Flores de Otero, 426 U.S. 572, 580–97 (1976) (discussing congressional acts with respect to Puerto Rico).

[8] 7 U.S. (3 Cr.) 267 (1806).

authority,[9] noting that Chief Justice Marshall, in *Strawbridge*, "purported to construe only '[t]he words of the act of congress.'"[10] Article III's diversity requirement, the Court held in *Tashire*, requires only that "any two adverse parties are not co-citizens" and thus "poses no obstacle to the legislative extension of federal jurisdiction" by requiring only minimal diversity.[11]

ArtIII.S2.C1.16.4 Citizenship of Natural Persons and Corporations

Article III, Section 2, Clause 1:

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

For purposes of diversity jurisdiction, state citizenship of an individual is determined by the concept of domicile[1] rather than residence.[2] While the Supreme Court's definition has varied across cases,[3] this generally means that a person is a citizen of the state that is his or her true, fixed, and permanent home and principal establishment, and to which he or she intends to return whenever he or she is absent from it.[4] Actions may disclose this intention more clearly and decisively than statements.[5] A person may change his or her domicile in an instant by taking up residence in a new place with the intention of remaining there indefinitely; he or she may obtain the benefit of diversity jurisdiction by making this change alone,[6] provided the change is more than a temporary expedient.[7]

Whether corporations, which are not explicitly referenced in Article III, should be treated as citizens of a certain state or states for purposes of diversity jurisdiction is a question with which the Supreme Court has long wrestled. The Court first directly addressed the issue in *Bank of the United States v. Deveaux*,[8] in which Chief Justice John Marshall declared: "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and consequently cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name." Nevertheless, the Court upheld diversity jurisdiction in that case because the members of the bank as a corporation were citizens of one state and the opposing party was a citizen of

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[9] 386 U.S. 523, 530 (1967).

[10] *Id.* at 530.

[11] *Id.* When Congress enacted the Class Action Fairness Act of 2005 (CAFA), for instance, it expanded federal courts' jurisdiction over class actions by requiring only minimal diversity between plaintiffs and defendants. *See* 28 U.S.C. § 1332(d); *see also* ArtIII.S2.C1.16.1 Overview of Diversity Jurisdiction.

[1] Chicago & N.W.R.R. v. Ohle, 117 U.S. 123 (1886).

[2] Sun Printing & Pub. Ass'n v. Edwards, 194 U.S. 377 (1904).

[3] Knox v. Greenleaf, 4 U.S. (4 Dall.) 360 (1802); Shelton v. Tiffin, 47 U.S. (6 How.) 163 (1848); Williamson v. Osenton, 232 U.S. 619 (1914).

[4] Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954).

[5] *Tiffin*, 47 U.S. (6 How.) at 163.

[6] *Williamson*, 232 U.S. 619.

[7] Jones v. League, 59 U.S. (18 How.) 76 (1855).

[8] 9 U.S. (5 Cr.) 61, 86 (1809).

another. The holding that corporations were citizens of the states where their stockholders lived was reaffirmed a generation later,[9] but pressures were building for change. While corporations were assuming an ever more prominent economic role, the *Strawbridge* rule, which required complete diversity between each plaintiff and each defendant,[10] operated to close the doors of the federal courts to corporations with stockholders in many states.

The Supreme Court overruled *Deveaux* in 1844, when a divided Court held that "a corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state . . . capable of being treated as a citizen of that state, as much as a natural person."[11] Ten years later, the Court abandoned that rationale, but it achieved the same result by "indulg[ing] in the fiction that, although a corporation was not itself a citizen for diversity purposes, its shareholders would be conclusively presumed citizens of the incorporating State."[12] "State of incorporation" remained the guiding rule for determining the place of corporate citizenship until Congress amended the jurisdictional statute in 1958.[13] Concern over growing dockets and companies incorporating in states of convenience led to a "dual citizenship" rule, whereby "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."[14] The right of foreign corporations to invoke diversity jurisdiction is not one that a state may require corporations to waive as a condition of doing business in that state.[15]

Unincorporated associations, such as partnerships, joint stock companies, labor unions, governing boards of institutions, and the like, do not enjoy the same status as corporations. The actual citizenship of each of its members must be considered in determining whether diversity exists.[16]

ArtIII.S2.C1.16.5 Insufficient or Manufactured Diversity

Article III, Section 2, Clause 1:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made,*

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[9] Com. & R.R. Bank v. Slocomb, 39 U.S. (14 Pet.) 60 (1840).

[10] Strawbridge v. Curtiss, 7 U.S. (3 Cr.) 267 (1806).

[11] Louisville, C. & C.R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1844).

[12] United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 148 (1965) (citing Marshall v. Balt. & Ohio R.R., 57 U.S. (16 How.) 314 (1854)). *See* Muller v. Dows, 94 U.S. 444 (1877); St. Louis & S.F. Ry. v. James, 161 U.S. 545 (1896); Carden v. Arkoma Assocs., 494 U.S. 185, 189 (1990).

[13] *See* Pub. L. No. 85-552, 72 Stat. 415 (1958).

[14] 28 U.S.C. § 1332(c)(1). In *Hertz Corp. v. Friend,* 559 U.S. 77, 84–86 (2010), the Court recounted the development of the rules on corporate jurisdictional citizenship in deciding that a corporation's "principal place of business" under the statute is its "nerve center," the place where the corporation's officers direct, control, and coordinate the corporation's activities. The Court concluded in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer,* 276 U.S. 518, 522–25 (1928), that diversity jurisdiction existed even though the plaintiff-corporation, a Kentucky corporation, created diversity by dissolving itself and obtaining a charter as a Tennessee corporation; the only change being the state of incorporation, while the name, officers, shareholders, and location of the business remained the same. In *Hertz*, the Court observed that, as a result of *Black & White*, a corporation could "manipulate federal-court jurisdiction" through its choice of the state of incorporation. *Hertz*, 559 U.S. at 85.

[15] In *Terral v. Burke Constr. Co.,* 257 U.S. 529 (1922), the Court resolved two conflicting lines of cases and voided a state statute that required the cancellation of a foreign corporation's license to do business in the state upon notice that the corporation had removed a case to a federal court.

[16] Chapman v. Barney, 129 U.S. 677 (1889); Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449 (1900); Thomas v. Bd. of Trs., 195 U.S. 207 (1904); United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145 (1965); Carden v. Arkoma Assocs., 494 U.S. 185 (1990). *Compare* People of P.R. v. Russell & Co., 288 U.S. 476 (1933), *with Carden*, 494 U.S. at 189–190, *and* Navarro Sav. Ass'n v. Lee, 446 U.S. 458 (1980).

under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Historically, regardless of the parties' diverse citizenship, the Supreme Court has recognized two substantive exceptions to diversity jurisdiction: the domestic relations exception[1]—which precludes federal courts from issuing divorce, alimony, or child custody decrees—and the probate exception—which precludes federal courts from probating a will or administering an estate.[2] In *Ankenbrandt v. Richards*, the Court clarified that the domestic relations exception exists as a matter of statutory interpretation, and that Article III, Section 2 "does not mandate the exclusion of domestic relations from federal-court jurisdiction."[3] In *Marshall v. Marshall*, the Court similarly interpreted the probate exception as a matter of statutory construction, confirming its narrow scope as "reser[ving] to state probate courts the probate or annulment of a will and the administration of a decedent's estate," and "preclud[ing] federal courts from endeavoring to dispose of property that is in the custody of a state probate court."[4]

A litigant who, because of diversity of citizenship, has the option to sue in state or federal court, will generally consider the relative advantages and disadvantages of each forum in deciding where to pursue litigation. Where diversity is lacking, a litigant who perceives an advantage in the federal forum will sometimes attempt to create diversity. In the Judiciary Act of 1789, Congress exempted from diversity jurisdiction suits on choses of action in favor of an assignee unless the suit could have been brought in federal court if no assignment had been made.[5] Nevertheless, a person could create diversity by a bona fide change of domicile even if that is the sole motive of creating domicile.[6]

Similarly, one could create diversity, or defeat it, by choosing a personal representative of the requisite citizenship.[7] Most attempts to manufacture or create diversity have involved corporations. A corporation cannot get into federal court by transferring its claim to a subsidiary incorporated in another state.[8] For a time, the Supreme Court tended to look disapprovingly at collusory incorporations and the creation of dummy corporations for purposes of creating diversity.[9] As discussed further in the next essay, however, the Court, in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,[10] upheld diversity in a case in which the plaintiff-corporation, a Kentucky corporation, dissolved itself

[1] *See* Barber v. Barber, 62 U.S. (21 How.) 582 (1858); *Ex parte* Burrus, 136 U.S. 586 (1890); Ankenbrandt v. Richards, 504 U.S. 689, 695–97 (1992).

[2] *See In re* Broderick's Will, 88 U.S. (21 Wall.) 503 (1875); Marshall v. Marshall, 547 U.S. 293, 299–31 (2006).

[3] *Ankenbrandt*, 504 U.S. at 695–97.

[4] *Marshall*, 547 U.S. at 331.

[5] Judiciary Act of 1789, ch. XIX, § 11, 1 Stat. 73, 78; *see also* Turner v. Bank of N. Am., 4 U.S. (4 Dall.) 8 (1799); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). The present statute, 28 U.S.C. § 1359, provides that no jurisdiction exists in a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke such court's jurisdiction of. *See* Kramer v. Caribbean Mills, 394 U.S. 823 (1969).

[6] Williamson v. Osenton, 232 U.S. 619 (1914); Morris v. Gilmer, 129 U.S. 315 (1889).

[7] Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183 (1931).

[8] Miller & Lux v. E. Side Canal & Irrigation Co., 211 U.S. 293 (1908).

[9] *E.g.*, S. Realty Co. v. Walker, 211 U.S. 603 (1909).

[10] 276 U.S. 518 (1928).

and obtained a charter as a Tennessee corporation in order to file the action in federal court. At the time, federal courts applied federal common law rules that, compared to relevant state laws, were more favorable to the plaintiff.[11]

ArtIII.S2.C1.16.6 State Law in Diversity Cases and the Erie Doctrine

Article III, Section 2, Clause 1:

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

Because a federal court's subject matter jurisdiction in diversity cases is predicated upon the fact that the opposing litigants are from different states, rather than upon questions of federal law, a foundational question in these cases is which law—federal or state—should apply. In the 1938 decision *Erie Railroad v. Tompkins*,[1] the Supreme Court set forth what is now commonly known as the *Erie* doctrine, which generally requires a federal court to apply state substantive law, unless the matter before it is governed by federal law. In so holding, *Erie* repudiated a prior body of jurisprudence based upon the Court's 1842 decision in *Swift v. Tyson*.[2] As legal commentators have noted, "[p]robably no Supreme Court decision rendered during the twentieth century has had as significant an impact on the distribution of judicial power between the federal government and the states as has [*Erie*]."[3]

In both *Swift* and *Erie*, the Supreme Court considered Section 34 of the Judiciary Act of 1789, which provided that "[t]he laws of the several states" should generally apply in federal courts unless applicable federal laws require otherwise.[4] In *Swift*, Justice Joseph Story ruled for the Court that state court decisions were not "laws" within the meaning of Section 34.[5] Thus, while such state decisions were entitled to respect, they were generally not binding on federal judges except with regard to matters of a "local nature," such as statutory interpretations pertaining to real estate and other things of permanent locality.[6] For nearly a

[11] *Id.* at 528–29.

[1] 304 U.S. 64, 80 (1938).

[2] 41 U.S. (16 Pet.) 1 (1842).

[3] 19 Wright & Miller, Federal Practice and Procedure: jurisdiction and Related Matters § 4503 (3d. ed. Apr. 2021).

[4] Section 34 of the Judiciary Act provided that "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." 1 Stat. 92. With some minor changes, the section now appears as 28 U.S.C. § 1652.

[5] 41 U.S. (16 Pet.) 1, 19 (1842). The issue in the case was whether a pre-existing debt was good consideration for an indorsement of a bill of exchange so that the endorsee would be a holder in due course.

[6] *Id.* Justice Joseph Story concluded: "The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde, 2 Burr. R. 883, 887, to be in great measure, not the law of a single country only, but of the commercial world." *Id.* The idea that the same law should prevail in Rome as in Athens was also used by Justice Joseph Story in DeLovio v. Boit, 7 F. Cas. 418, 443 (No. 3776) (C.C.D. Mass. 1815). For a more recent use, *see* United States v. Jefferson Cnty. Bd. of Educ., 380 F.2d 385, 398 (5th Cir. 1967) (dissenting opinion).

century after *Swift*, the Court issued a series of decisions that expanded the areas in which federal judges were free to construct a federal common law, while restricting the definition of "local" laws.[7]

Although there was some dissatisfaction with *Swift*,[8] it was the Supreme Court's decision in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*[9] that brought disagreement on these choice-of-law issues to its apex. In *Black & White*, a Kentucky corporation that sought the application of more favorable federal common law was permitted to create diversity jurisdiction by reincorporating in another state, even though the only change made to the corporation was its state of incorporation; the corporation's name, officers, shareholders, and location of the business all remained the same.[10] A Court majority, over a strong dissent by Justice Oliver Wendell Holmes,[11] found no collusion and upheld diversity jurisdiction. The resulting application of federal common law allowed the corporation to prevail on its claims when it would have otherwise lost under state law had it sued in state court.[12] Perhaps more than any other decision, *Black & White* precipitated *Erie*'s overruling of *Swift*.[13]

[7] The expansions included: Lane v. Vick, 44 U.S. (3 How.) 464 (1845) (wills); Chicago City v. Robbins, 67 U.S. (2 Bl.) 418 (1862) and Baltimore & Ohio R.R. v. Baugh, 149 U.S. 368 (1893) (torts); Yates v. City of Milwaukee, 77 U.S. (10 Wall.) 497 (1870) (real estate titles and riparian rights); Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910) (mineral conveyances); Rowan v. Runnels, 46 U.S. (5 How.) 134 (1847) (contracts); Lake Shore & M.S. Ry. v. Prentice, 147 U.S. 101 (1893). It was suggested that uniformity, the goal of Justice Joseph Story's formulation, was not being achieved, in great part because state courts followed their own rules of decision even when prior federal decisions were contrary. Felix Frankfurter, *Distribution of Judicial Power Between Federal and State Courts*, 13 Cornell L.Q. 499, 529 n.150 (1928). Moreover, the Court held that, although state court interpretations of state statutes or constitutions were to be followed, federal courts could ignore them if they conflicted with earlier federal constructions of the same statute or constitutional provision, Rowan v. Runnels, 46 U.S. (5 How.) 134 (1847), or if they were issued after the case had been tried in federal court, Burgess v. Seligman, 107 U.S. 20 (1883), thus promoting lack of uniformity. *See also* Gelpcke v. City of Debuque, 68 U.S. (1 Wall.) 175 (1865); Williamson v. Berry, 49 U.S. (8 How.) 495 (1850); Pease v. Peck, 59 U.S. (18 How.) 595 (1856); Watson v. Tarpley, 59 U.S. (18 How.) 517 (1856).

[8] Extensions of *Swift*'s scope were frequently rendered by a divided Court over dissents. *E.g.*, Gelpcke v. City of Debuque, 68 U.S. (1 Wall.) 175 (1865); Lane v. Vick, 44 U.S. (3 How.) 464 (1845); Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910). In *Baltimore & Ohio R. Co. v. Baugh,* 149 U.S. 368, 401–04 (1893), Justice Stephen Johnson Field dissented in an opinion in which he expressed the view that the Supreme Court's disregard of state court decisions was unconstitutional, a view endorsed by Justice Oliver Wendell Holmes in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.,* 76 U.S. 518, 533 (1928) (dissenting opinion), and adopted by the Court in *Erie Railroad v. Tompkins,* 304 U.S. 64 (1938). Numerous proposals were introduced in Congress to change the rule.

[9] In *Black & White Taxicab & Transfer Co.*, 276 U.S. 518, Black & White contracted with a railroad to provide exclusive taxi service at the railroad station. Brown & Yellow began operating taxis at the same station, and Black & White wanted to enjoin that operation. It was a settled rule in Kentucky courts that such exclusive contracts were contrary to public policy and were unenforceable in court. Therefore, Black & White dissolved itself in Kentucky and reincorporated in Tennessee, solely to create diversity of citizenship and enable the company to sue in federal court. Black & White's effort was successful, and the Supreme Court ruled that diversity was present and an injunction should issue. In *McNabb v. United States,* 318 U.S. 332 (1943) *Mutual Life Ins. Co. v. Johnson,* 293 U.S. 335 (1934), the Court, in an opinion by Justice Benjamin N. Cardozo, appeared to retreat somewhat from its extensions of *Swift*, holding that state law should be applied, through a "benign and prudent comity," in a case "balanced with doubt," a concept first used by Justice Joseph P. Bradley in *Burgess v. Seligman,* 107 U.S. 20 (1883).

[10] *Black & White Taxicab & Transfer Co.*, 276 U.S. at 523.

[11] *Id.* at 532 (joined by Brandeis and Stone, JJ.). Justice Oliver Wendell Holmes presented his view that *Swift* had been wrongly decided, but he preferred not to overrule it but instead to "not allow it to spread . . . into new fields." *Id.* at 535.

[12] *Id.* at 523.

[13] Judge Henry Friendly wrote: "Having served as [Justice Louis Brandeis's] law clerk the year *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.* came before the Court, I have little doubt he was waiting for an opportunity to give *Swift v. Tyson* the happy dispatch he thought it deserved." H. Friendly, Benchmarks 20 (1967).

In *Erie*, a citizen of Pennsylvania sued a railroad incorporated in New York for injuries caused by the defendant's train while the plaintiff was walking along the tracks.[14] Relevant Pennsylvania law, according to the defendant, would have limited the railroad's liability because the plaintiff was a trespasser, while applicable federal common law would permit him to recover for negligence as a licensee who was allowed on the premise.[15] After the plaintiff sued and recovered in a New York federal court, the railroad appealed, eventually presenting the issue to the Supreme Court as to whether the matter concerned a question of "local" law under *Swift*.[16]

Writing for the Court in *Erie*, Justice Louis Brandeis overruled *Swift*. He explained that the *Swift* rule failed to bring about uniformity of decisions as intended.[17] Moreover, its application prompted those seeking to avail themselves to more favorable federal rules to create diversity jurisdiction, resulting in discrimination against citizens of a state by noncitizens.[18] Justice Brandeis further concluded the *Swift* rule was also unconstitutional because "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts," and "[n]o clause in the Constitution purports to confer such a power upon the federal courts."[19] Justice Brandeis also clarified that the unconstitutional assumption of power was made not by Congress, but by the Court itself: "[W]e do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States."[20]

As legal commentators have observed:

> It is impossible to overstate the importance of the *Erie* decision. It announces no technical doctrine of procedure or jurisdiction, but goes to the heart of the relations between the Federal Government and the states, and returns to the states a power that had for nearly a century been exercised by the federal government.[21]

Erie was remarkable in a number of ways aside from the doctrine it announced. It reversed a 96-year-old precedent, which counsel had specifically not questioned; it reached a constitutional decision when a statutory interpretation was available, though perhaps less desirable; and it marked the only time in United States constitutional history when the Court has held that it had undertaken an unconstitutional action.

The precise constitutional basis of *Erie* has been the subject of debate, however, with the Court at times seemingly distancing itself from *Erie*'s constitutional holding.[22] Nonetheless, in the years since the decision, the Court has reaffirmed the constitutional basis of *Erie* under which "neither Congress nor the federal courts can, under the guise of formulating rules of decisions for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state

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[14] Erie R.R. v. Tompkins, 304 U.S. 64, 69 (1938).

[15] *Id.* at 69–70.

[16] *See id.* 70–71.

[17] *Id.* at 74–75.

[18] *Id.* at 71–77.

[19] *Id.* at 78.

[20] *Id.* at 79–80.

[21] Wright & Miller, *supra* note 3, § 4503. *See also In Praise of* Erie—*And of the New Federal Common Law*, *in* H. Friendly, Benchmarks 155 (1967)

[22] *See* Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 109 (1945) (referring to the "policy" embodied in *Erie* as opposed to its constitutional imperative).

law must govern because there can be no other law."[23] *Erie* ultimately appears to derive from the federalism principles embodied in the Tenth Amendment, which limits the federal government, including Congress and the federal courts, to the authority delegated to it by the Constitution and reserves those powers not so delegated to the states or to the people.[24]

Since the Supreme Court's landmark 1938 decision, *Erie Railroad v. Tompkins*,[25] the Court's jurisprudence on federal courts' application of state law in diversity cases has evolved. At first, the Supreme Court indicated that federal courts sitting in diversity were bound by state court decisions even when such decisions were not binding on other state judges. That is, federal courts sitting in diversity must follow not only the decisions of the highest court of a state, but also decisions of intermediate appellate courts[26] and courts of first instance.[27] The Court subsequently concluded that federal judges are to give careful consideration to lower state court decisions, but they generally must construe the state law themselves if the state's highest court has not spoken definitively on the question.[28] In the event of a state supreme court reversal of an earlier decision, the federal courts are, of course, bound by the later decision, and a judgment of a federal district court, correct when rendered, must be reversed on appeal if the state's highest court subsequently changed the applicable law.[29]

ArtIII.S2.C1.16.7 Conflicts-of-Law and Procedural Rules in Diversity Cases

Article III, Section 2, Clause 1:

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

In diversity jurisdiction cases that present conflicts-of-law issues—that is, in cases in which the laws of two or more states could apply to the dispute—the Court has reiterated that the district court is to apply the conflict-of-law rules of the state in which it sits. In other words, in a federal court case in State A in which the law of State B applies under State A's conflict-of-law rules, perhaps because a contract was made in State B or a tort was committed there, the federal court is to apply State A's conception of State B's law.[1]

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[23] Hanna v. Plumer, 380 U.S. 460, 471–72 (1965).

[24] *See* Intro.7.3 Federalism and the Constitution.

[25] 304 U.S. 64, 80 (1938).

[26] *See* West v. Am. Tel. & Tel. Co., 311 U.S. 223 (1940); Six Cos. of Cal. v. Joint Highway Dist., 311 U.S. 180 (1940); Stonerv. N.Y. Life Ins. Co., 311 U.S. 464 (1940).

[27] *See* Fid. Union Tr. Co. v. Field, 311 U.S. 169 (1940).

[28] King v. Ord. of Com. Travelers of Am., 333 U.S. 153 (1948); Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 205 (1956) (1910 decision must be followed in absence of confusion in state decisions because there were "no developing line of authorities that cast a shadow over established ones, no dicta, doubts or ambiguities . . . , no legislative development that promises to undermine the judicial rule"). *See also* Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967).

[29] Vanderbark v. Owens-Ill. Glass Co., 311 U.S. 538 (1941); Huddleston v. Dwyer, 322 U.S. 232 (1944); Nolan v. Transocean Air Lines, 365 U.S. 293 (1961).

[1] Klaxon Co. v. Stentor Mfg. Co., 313 U.S. 487 (1941); Griffin v. McCoach, 313 U.S. 498 (1941); Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953); Nolan v. Transocean Air Lines, 365 U.S. 293 (1961).

The greatest difficulty in applying the *Erie* doctrine, which generally directs federal courts sitting in diversity to apply state substantive law but federal procedural law, has been in cases in which the distinction between substantive and procedural rules is blurred.[2] In 1945, in *Guaranty Trust Co. of New York v. York*, the Court held that a state statute of limitations, which was at times deemed a matter of "procedure" but would have barred suit in state court, applied to bar the case in federal court.[3] The Court regarded the substance-procedure distinction as immaterial. Instead, "since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State."[4] This outcome-determinative standard, the Court explained, was compelled by *Erie*'s "intent," which was to ensure that, in all cases where a federal court is exercising jurisdiction solely because of the parties' diverse citizenship, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."[5]

The Supreme Court's application of the outcome-determinative standard created substantial doubt that the Federal Rules of Civil Procedure were valid in diversity jurisdiction cases.[6] In 1965, however, the Court, in *Hanna v. Plumer*, limited the standard's application in matters governed by the Federal Rules.[7] Under *Hanna* and its progeny, the outcome-determinative standard is not the proper test when the question is the application of one of the Federal Rules of Civil Procedure. Instead, if the rule is valid under the Rules Enabling Act—which authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for the federal courts—and the Constitution, it is to be applied regardless of state law to the contrary.[8]

Some uncertainty remains as to which law to apply—state or federal—in the absence of a federal statute or a Federal Rule of Civil Procedure. In *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, the Supreme Court said that "outcome" was no longer the sole determinant, and that countervailing considerations expressed in federal policy on the conduct of federal trials should be considered.[9] Under this balancing standard, the Court held that a state rule that requires a judge (rather than a jury) to decide whether a particular defense applied in a tort action had to yield to a federal policy favoring juries, as reflected by the Seventh Amendment.[10]

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[2] Notably, courts in diversity actions were free to formulate a federal common law, but were required by the Conformity Act, § 5, 17 Stat. 196 (1872), to conform their procedure to that of the state in which the court sat. *Erie* then ruled that state substantive law was to control in federal court diversity actions, while by implication matters of procedure in federal court were subject to congressional governance. Congress authorized the Court to promulgate rules of civil procedure, 48 Stat. 1064 (1934), which it did in 1938, a few months after *Erie* was decided. 302 U.S. 783.

[3] 326 U.S. 99 (1945).

[4] *Id.* at 108–09.

[5] *Id.* at 109.

[6] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (state rule making unsuccessful plaintiffs liable for all expenses and requiring security for such expenses as a condition of proceeding in federal court); Woods v. Interstate Realty Co., 337 U.S. 535 (1949) (state statute barring foreign corporation not qualified to do business in the state applies in federal court); Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530 (1949) (state rule determinative when an action is begun for purposes of statute of limitations applicable in federal court although a Federal Rule of Civil Procedure states a different rule).

[7] Hanna v. Plumer, 380 U.S. 460 (1965).

[8] *See* Burlington N. R. Co. v. Woods, 480 U.S 1, 5–8 (1987); Bus. Guides, Inc. v. Chromatic Comm'ns Enterps., Inc., 498 U.S. 533, 551–52 (1991); Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 398–401 (2010).

[9] 356 U.S. 525 (1958).

[10] *Id.* at 537–38.

Later, in *Gasperini v. Center for Humanities, Inc.*, the Supreme Court considered whether to apply a state statute—which gave state appellate courts the authority to determine if a damages award is excessive or inadequate if it *deviates materially* from what would be reasonable compensation—or a federal court-created practice of reviewing awards to determine whether they were so exorbitant that it shocked the conscience of the court.[11] The Court first determined that the state statute was both substantive and procedural, and that substantial variation in damage awards would result depending on whether the state or the federal approach was applied.[12] It then followed the mode of analysis under *York*, emphasizing the importance of federal courts reaching the same outcome as would the state courts,[13] rather than what had been the prevailing standard under *Byrd*, in which the Court balanced state and federal interests to determine which law to apply.[14] The Court's evolving approach to deciding whether state or federal law applies in these cases reflects a continuing difficulty of accommodating "the constitutional power of the states to regulate the relations among their citizens" on the one hand, and "the constitutional power of the federal government to determine how its courts are to be operated" on the other hand.[15]

Although it seems clear that *Erie* applies in non-diversity cases in which the source of the right sued upon is state law,[16] it is also evident that *Erie* is not always applicable in diversity cases, regardless of whether the issue is substantive or procedural. For instance, it may be that there is an overriding federal interest that compels national uniformity of rules, such as a case involving the appropriate rule for determining a bank's liability for guaranteeing a forged federal check;[17] whether a tortfeasor is liable to the United States for hospitalization of a soldier and loss of his services;[18] or the validity of a defense raised by a federal officer sued for allegedly committing libel in the course of his official duties.[19] In such cases, when the issue is controlled by federal law, common or otherwise, the result is binding on state as well as on federal courts.[20] As a result, notwithstanding Justice Louis Brandeis's oft-quoted statement that there is "no federal general common law,"[21] there are areas of law where "federal judges may appropriately craft the rule of decision."[22] Nonetheless, because legislative power is

[11] 518 U.S. 415 (1996).

[12] *Id.* at 428–31.

[13] *E.g.*, Guar. Tr. Co. v. York, 326 U.S. 99,108–09 (1945).

[14] *E.g.*, Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

[15] 19 Wright & Miller, Federal Practice and Procedure: jurisdiction and Related Matters § 4511 (3d. ed. Apr. 2021).

[16] *See* Maternally Yours v. Your Maternity Shop, 234 F.2d 538, 540 n.1 (2d Cir. 1956) (noting, in a case in which the court exercises supplemental jurisdiction over a state law unfair competition claim, that "the *Erie* doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law"). The contrary view was implied in *Levinson v. Deupree,* 345 U.S. 648, 651 (1953), and by Justice Robert Jackson in *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, 466–67, 471–72 (1942) (concurring opinion). *See* Wichita Royalty Co. v. City Nat'l Bank, 306 U.S. 103 (1939).

[17] Clearfield Tr. Co. v. United States, 318 U.S. 363 (1943). *See also* Nat'l Metro. Bank v. United States, 323 U.S. 454 (1945); *D'Oench, Duhme & Co.*, 315 U.S. 447; United States v. Standard Rice Co., 323 U.S. 106 (1944); United States v. Acri, 348 U.S. 211 (1955); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958); Bank of Am. Nat'l Tr. & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956). *But see* United States v. Yazell, 382 U.S. 341 (1966); O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994).

[18] United States v. Standard Oil Co., 332 U.S. 301 (1947). Federal law applies in maritime tort cases brought on the "law side" of the federal courts in diversity cases. Pope & Talbot v. Hawn, 346 U.S. 406 (1953).

[19] Howard v. Lyons, 360 U.S. 593 (1959). Matters concerned with foreign relations also are governed by federal law in diversity. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). Federal common law also governs a government contractor defense in certain cases. Boyle v. United Techs. Corp., 487 U.S. 500 (1988).

[20] Free v. Bland, 369 U.S. 663 (1962); Yiatchos v. Yiatchos, 376 U.S. 306 (1964).

[21] *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

[22] *See* Rodriguez v. FDIC, No. 18-1269, slip op. at 4 (U.S. Feb. 25, 2020).

vested in Congress, federal common law plays a "necessarily modest role"[23] under the Constitution; such common lawmaking must be "necessary to protect uniquely federal interests."[24]

ArtIII.S2.C1.17 Land Grants by Different States

Article III, Section 2, Clause 1:

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

The Constitution allows federal courts to exercise jurisdiction over controversies "between Citizens of the same State claiming Lands under Grants of different States."[1] The provision has its roots in the Articles of Confederation. The Articles of Confederation did not create an independent federal Judiciary, but provided that Congress would be "the last resort on appeal" in "controversies concerning the private right of soil claimed under different grants of two or more states" and could appoint commissioners or judges to constitute a court to resolve such disputes.[2] An initial proposal from the Constitutional Convention's Committee of Detail would have adopted a similar approach and granted the Senate the authority to resolve certain disputes, including "Controversies concerning Lands claimed under different Grants of two or more States."[3] That proposal was defeated in the Convention.[4] The delegates later added the current clause to the jurisdiction of the Federal Judiciary without reported debate.[5]

Congress has implemented the clause via legislation, vesting jurisdiction in the federal district courts.[6] The provision has produced few Supreme Court cases, and none since the early twentieth century. The Court has explained that the constitutional provision and its implementing statute apply only to disputes between citizens of the same state.[7] With respect to the reference to land grants "of different States," the Court has held that the provision applies even if one of the states at issue was previously part of the other.[8]

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[23] *Id.*

[24] Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (quoting *Banco Nacional de Cuba*, 376 U.S. at 426) (internal quotation marks omitted); *see also, e.g.*, *Rodriguez*, 140 S. Ct. at 717–18 (concluding that a federal common law rule inappropriately developed by the lower courts concerning allocation of a refund to an affiliated group of corporations did not implicate any significant federal interests and did not necessitate discarding the application of state law with respect to the tax dispute).

[1] U.S. Const. art III, § 2, cl. 1.

[2] Articles of Confederation, art. IX.

[3] 2 Records of the Federal Convention of 1787, at 162–63, 171, 184–85 (Max Farrand ed., 1911).

[4] *Id.* at 400–01.

[5] *Id.* at 431–32.

[6] 28 U.S.C. § 1354. Earlier versions of the statute vested jurisdiction in the now-defunct federal circuit courts. *See* U.S. v. Sayward, 160 U.S. 493 (1895).

[7] Stevenson v. Fain, 195 U.S. 165 (1904). Disputes between citizens of different states may instead fall within the federal courts' diversity jurisdiction. *See* ArtIII.S2.C1.16.1 Overview of Diversity Jurisdiction.

[8] Town of Pawlet v. Clark, 13 U.S. 292 (1815); Colson v. Lewis, 15 U.S. 377 (1817).

ArtIII.S2.C1.18 Foreign States or Citizens

ArtIII.S2.C1.18.1 Controversies Between a State or its Citizens and Foreign States or Citizens

Article III, Section 2, Clause 1:

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

Article III allows federal courts to exercise jurisdiction over controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[1] However, two post-ratification developments have limited the scope of federal court jurisdiction under this provision. First, the Supreme Court has applied the law of nations to hold that foreign states are generally immune from suit in U.S. federal courts without their consent.[2] That immunity extends to suits brought by American states against foreign nations.[3] Second, the Court has construed the Eleventh Amendment to bar suits by foreign states against a state of the United States.[4]

In addition to the foregoing limits, the grants of jurisdiction in Article III, Section 2, Clause 1 are not self-executing. Instead, the constitutional text sets the maximum extent of federal court jurisdiction and leaves Congress discretion to determine how much of that jurisdiction to grant.[5] Congress has always granted the federal courts less expansive jurisdiction than the Constitution authorizes, including with respect to cases involving foreign states or citizens. In 28 U.S.C. § 1332, Congress granted federal courts jurisdiction over disputes where "the matter in controversy" exceeds $75,000 between "citizens of a State and citizens or subjects of a foreign state" (except claims between citizens of a state and lawful permanent residents of the same state) or "a foreign state . . . as plaintiff and citizens of a State or of different States."[6]

Article III does not provide for federal court jurisdiction over disputes between one or more foreign states or their subjects to which no U.S. state or citizen is a party. However, suits that fall outside the scope of the constitutional and statutory grants of jurisdiction over suits

[1] U.S. Const. art. III, § 2, cl. 1.

[2] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cr.) 116 (1812); Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926); Compania Espanola v. The Navemar, 303 U.S. 68 (1938); Guaranty Trust Co. v. United States, 304 U.S. 126, 134 (1938).

[3] Principality of Monaco v. Mississippi, 292 U.S. 313, 330 (1934).

[4] *Id.*

[5] This is true of all constitutional grants of federal court jurisdiction except for the limited grant of original jurisdiction to the Supreme Court. *Compare* ArtIII.S2.C1.11.3 Constitutional and Statutory Grants of Federal Question Jurisdiction *with* ArtIII.S2.C2.2 Supreme Court Original Jurisdiction; *see generally* ArtIII.S1.6.1 Overview of Relationship Between Federal and State Courts.

[6] 28 U.S.C. §§ 1332(a)(2), 1332(a)(4). Another provision of the statute, 28 U.S.C. § 1332(a)(1), empowers the federal courts to hear "diversity" cases between citizens of different states. *See* ArtIII.S2.C1.16.1 Overview of Diversity Jurisdiction.

between a state or its citizens and foreign states or citizens may proceed in federal court if they fall within another grant of Article III jurisdiction, for example because they involve questions arising under a federal law or treaty.[7]

ArtIII.S2.C1.18.2 Suits Involving Foreign States

Article III, Section 2, Clause 1:

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

The Constitution authorizes federal courts to hear certain cases involving foreign states, but does not expressly provide foreign states a right of access to U.S. federal courts. Nonetheless, the Supreme Court has held that "[a] foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts."[1] The Court based that holding in part on general international law principles of comity[2] and in part on the fact that "[t]he Constitution expressly extends the judicial power to controversies between a State, or citizens thereof, and *foreign States*, citizens, or subjects, without reference to the subject-matter of the controversy."[3]

While foreign states may sue in U.S. court, the Supreme Court has repeatedly applied the doctrine of sovereign immunity to hold that a foreign state cannot be sued in federal court unless it consents to the suit.[4] The doctrine of foreign sovereign immunity is not rooted in the text of the Constitution, but instead derives from "the principle of comity."[5] Foreign sovereign immunity is not absolute. For instance, the Court has held that once a foreign government avails itself of the privilege of suing in the courts of the United States, it subjects itself to the procedures and rules of decision governing those courts and accepts whatever liabilities the court may decide to be a reasonable incident of bringing the suit.[6] Thus, the Court has held that a foreign nation instituting a suit in federal court cannot invoke sovereign immunity as a defense to a counterclaim arising from of the same transaction.[7] The Court has extended that holding to deny a defense of sovereign immunity on a counterclaim that was not related to the

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[7] Romero v. International Terminal Operating Co., 358 U.S. 354 (1959). The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94–538, 90 Stat. 2891, provides for jurisdiction over suits by and against foreign states and also appears to comprehend suits by an alien against a foreign state that would be beyond the constitutional grant discussed in this essay. However, the Court has construed the Act as creating a species of federal question jurisdiction. Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).

[1] The Sapphire, 78 U.S. (11 Wall.) 164, 167 (1871); *see also* Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978).

[2] *Id.* (explaining that to deny a sovereign the privilege of access to court "would manifest a want of comity and friendly feeling").

[3] *Id.*

[4] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cr.) 116 (1812); Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926); Principality of Monaco v. Mississippi, 292 U.S. 313, 330 (1934); Compania Espanola v. The Navemar, 303 U.S. 68 (1938); Guaranty Trust Co. v. United States, 304 U.S. 126, 134 (1938).

[5] *Guaranty Trust Co.*, 304 U.S. at 134.

[6] *Id.*

[7] *Id.*

sovereign's initial claim but that was limited to the amount of the sovereign's claim, so it functioned as a setoff to the non-sovereign defendant's liability.[8]

The political branches of the federal government, rather than the courts, are primarily responsible for determining when a foreign state may sue in federal court or claim sovereign immunity.[9] Only a government that has been recognized by the political branches as the authorized government of the foreign state may maintain a suit on behalf of a national sovereign in the courts of the United States.[10] Likewise, as the responsible agency for the conduct of foreign affairs, the State Department is generally responsible for suggesting to the courts that a sovereign be granted immunity from a particular suit.[11]

ArtIII.S2.C1.18.3 Limits on Jurisdiction

Article III, Section 2, Clause 1:

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

The Supreme Court has narrowly construed the grant of jurisdiction over suits between a state or its citizens and foreign states or citizens. As in cases involving diversity jurisdiction,[1] suits brought in federal court under this provision must clearly state in the record the citizenship of the parties. In 1809, the Supreme Court ruled that a federal court could not take jurisdiction of a case where the record described the plaintiffs as aliens and subjects of the United Kingdom, while the defendants were described as "late of the district of Maryland" but were not designated as citizens of Maryland.[2] Twenty years later, the Court narrowly construed Section 11 of the Judiciary Act of 1789, which granted the federal courts jurisdiction over cases where an alien was a party, in order to keep it within the limits of this clause.[3] The Court held that the judicial power did not apply to private suits in which an alien is a party, unless a citizen is the adverse party.[4] The Court extended this interpretation in 1870, holding that if there is more than one plaintiff or defendant in a case, each plaintiff must be competent

[8] National Bank v. Republic of China, 348 U.S. 356, 361 (1955). In addition, certain of the benefits extending to a domestic sovereign do not extend to a foreign sovereign suing in the courts of the United States. For instance, while the United States and its member states are exempt from the operation of the statute of limitations, a foreign sovereign is not. Nor is a foreign sovereign exempt from costs or from giving discovery. *Guaranty Trust Co.,* 304 U.S. at 135, 137.

[9] Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1 (2015).

[10] *Guaranty Trust Co.,* 304 U.S. at 137 (citing Jones v. United States, 137 U.S. 202, 212 (1890)); Matter of Lehigh Valley R.R., 265 U.S. 573 (1924). Whether a government is to be regarded as the legal representative of a foreign state a political question. *See* ArtIII.S2.C1.9.6 Foreign Affairs as a Political Question.

[11] *Ex parte* Peru, 318 U.S. 578, 589 (1943) (distinguishing Compania Espanola v. The Navemar, 303 U.S. 68 (1938), which held that where the Executive Department neither recognizes nor disallows the claim of immunity, the court is free to examine that question for itself).

[1] Federal diversity cases involve disputes between citizens of different states. *See* ArtIII.S2.C1.16.1 Overview of Diversity Jurisdiction.

[2] Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cr.) 303 (1809).

[3] Jackson v. Twentyman, 27 U.S. (2 Pet.) 136 (1829).

[4] Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

to sue and each defendant must be liable to suit.[5] However, the Court has held that these rules do not preclude a suit between citizens of the same state if the plaintiffs are merely nominal parties and are suing on behalf of an alien.[6]

The constitutional grant of jurisdiction over suits between a state or its citizens and foreign states or citizens does not apply to suits involving Indian tribes. In *Cherokee Nation v. Georgia*, Chief Justice John Marshall concluded that the Cherokee Nation was "a state" in the sense that it was "a distinct political society, separated from others, capable of managing its own affairs and governing itself."[7] However, he concluded, the tribe was not "a state of the union"; nor was it a "foreign state" within the meaning of Article III's text, since it was a part of the United States and dependent upon it.[8]

Clause 2—Supreme Court Jurisdiction

ArtIII.S2.C2.1 Overview of Supreme Court Jurisdiction

Article III, Section 2, Clause 2:

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

Article III, Section 2, Clause 2 of the Constitution defines the Supreme Court's jurisdiction. The clause creates two types of Supreme Court jurisdiction that apply to different categories of cases. First, the clause grants the Court original jurisdiction over "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."[1] The constitutional grant of original jurisdiction over such cases means that they may be filed directly in the Supreme Court rather than reaching the Court on appeal from another court. The Supreme Court has held that its original jurisdiction flows directly from the Constitution and is therefore self-executing without further action by Congress.[2]

Article III, Section 2, Clause 2 also provides for Supreme Court appellate jurisdiction over all other cases subject to federal court jurisdiction, "with such Exceptions, and under such Regulations as the Congress shall make."[3] Known as the "Exceptions Clause," this provision allows the Court to review both decisions of the inferior federal courts and final judgments of state courts, if authorized by Congress.[4] The Supreme Court has generally indicated that the constitutional grant of appellate jurisdiction is not self-executing—meaning that Congress must enact legislation to empower the Court to hear cases on appeal—and Congress has exercised its power to implement the provision by granting the Supreme Court appellate jurisdiction over a subset of the cases included in the constitutional grant. Congress and the

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[5] Coal Co. v. Blatchford, 78 U.S. (11 Wall.) 172 (1871). *But see* Lacassagne v. Chapuis, 144 U.S. 119 (1892) (holding that a lower federal court had jurisdiction over a proceeding to impeach its former decree, although the parties challenging the prior judgment were both aliens).

[6] Browne v. Strode, 9 U.S. (5 Cr.) 303 (1809).

[7] 30 U.S. (5 Pet.) 1, 16 (1831).

[8] *Id.* at 16–20.

[1] U.S. Const. art. III, § 2, cl. 2.

[2] *See* ArtIII.S2.C2.2 Supreme Court Original Jurisdiction; ArtIII.S2.C2.3 Original Cases Affecting Ambassadors, Public Ministers, and Consuls.

[3] U.S. Const. art. III, § 2, cl. 2.

[4] *See* ArtIII.S2.C2.4 Supreme Court Appellate Jurisdiction; ArtIII.S2.C2.5 Supreme Court Review of State Court Decisions; ArtIII.S2.C2.6 Exceptions Clause and Congressional Control over Appellate Jurisdiction.

Court have also construed the Exceptions Clause to provide Congress significant control over the Court's appellate jurisdiction and proceedings.[5]

ArtIII.S2.C2.2 Supreme Court Original Jurisdiction

Article III, Section 2, Clause 2:

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

Article III, Section 2, Clause 2 of the Constitution grants the Supreme Court "original Jurisdiction" over "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."[1] When the Court has original jurisdiction over a case, it means that a party may commence litigation in the Supreme Court in the first instance rather than reaching the high court on appeal from a state court or an inferior federal court.

From the beginning, the Supreme Court has indicated that its original jurisdiction flows directly from the Constitution and is therefore self-executing without further action by Congress.[2] In *Chisholm v. Georgia*, the Court considered an action of assumpsit against the State of Georgia by a citizen of another state.[3] Congress in Section 3 of the Judiciary Act of 1789 had granted the Court original jurisdiction in suits between a state and citizens of another state, but had not authorized actions of assumpsit in such cases or prescribed forms of process for the exercise of original jurisdiction.[4] The Court sustained its jurisdiction and its power to provide forms of process and rules of procedure in the absence of congressional enactments.[5] In 1861, Chief Justice Roger Taney reviewed applicable precedents and stated that, in all cases where the Constitution grants the Supreme Court original jurisdiction, the Court has authority "to exercise it without further act of Congress to regulate its powers or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice."[6]

Under Supreme Court doctrine and long-standing congressional practice, the Court's original jurisdiction is not necessarily exclusive. In some cases, Congress has granted the lower federal courts concurrent jurisdiction, meaning that cases subject to original Supreme Court jurisdiction may either be filed directly in the Supreme Court or in one of the lower federal courts. Chief Justice John Marshall appears to have assumed in *Marbury v. Madison* that the Court had exclusive jurisdiction of cases within its original jurisdiction.[7] However, beginning

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[5] *See* ArtIII.S2.C2.6 Exceptions Clause and Congressional Control over Appellate Jurisdiction.

[1] U.S. CONST. art. III, § 2, cl. 2.

[2] But, in Section 13 of the Judiciary Act of 1789, 1 Stat. 80, Congress purported to grant the Court original jurisdiction. The statutory conveyance still exists today but does not encompass all cases included in the Constitutional grant of original jurisdiction. 28 U.S.C. § 1251.

[3] 2 U.S. (2 Dall.) 419 (1793). In an earlier case, the question of jurisdiction was not raised. Georgia v. Brailsford, 2 U.S. (2 Dall.) 402 (1792).

[4] 1 Stat. 80.

[5] The backlash of state sovereignty sentiment resulted in the proposal and ratification of the Eleventh Amendment. The Amendment did not affect the direct flow of original jurisdiction to the Court, although cases to which states were parties were now limited to states as party plaintiffs, to two or more states disputing, or to United States suits against states.

[6] Kentucky v. Dennison, 65 U.S. (24 How.) 66, 98 (1861).

[7] Marbury v. Madison, 5 U.S. (1 Cr.) 137, 174 (1803).

with the Judiciary Act of 1789, Congress gave the inferior federal courts concurrent jurisdiction in some such cases.[8] The federal circuit courts sustained the grant of jurisdiction in early cases,[9] and the Supreme Court upheld concurrent jurisdiction in the nineteenth century.[10] In another case from the late nineteenth century, the Court relied on the first Congress's interpretation of Article III in declining original jurisdiction of an action by a state to enforce a judgment for a pecuniary penalty awarded by one of its own courts.[11] Noting that Section 13 of the Judiciary Act referred to "controversies of a civil nature," Justice Horace Gray declared that it "was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning."[12]

Although Congress may allow the lower federal courts to hear cases subject to Supreme Court original jurisdiction, the legislature can neither expand nor contract the constitutional grant of original jurisdiction to the Court. Thus, in *Marbury*, Chief Justice Marshall invalidated a provision of Section 13 of the 1789 Act because he interpreted the statute to give the Court power to issue a writ of mandamus in an original proceeding, which the Constitution did not authorize.[13] In so holding, the Chief Justice did not defer to the constitutional judgment of the Congress that enacted the 1789 Act.

Although the Supreme Court has held that Congress lacks the power to expand or contract the Court's original jurisdiction, the Court has assumed significant latitude to interpret the jurisdictional grant itself. In some cases, such as *Missouri v. Holland*,[14] the Court has adopted a liberal construction of its original jurisdiction, but the more usual view is that "our original jurisdiction should be invoked sparingly."[15] The Court has thus held that original jurisdiction "is limited and manifestly to be sparingly exercised, and should not be expanded by construction."[16] The Court has emphasized that its exercise of original jurisdiction is not obligatory but discretionary, to be determined on a case-by-case basis on grounds of practical necessity.[17] The Court has explained that it will exercise original jurisdiction "only in appropriate cases."[18] It has further stated that "the question of what is appropriate concerns of

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[8] In Section 3 of the 1789 Act. The present division is in 28 U.S.C. § 1251.

[9] United States v. Ravara, 2 U.S. (2 Dall.) 297 (C.C. Pa. 1793).

[10] Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838); Bors v. Preston, 111 U.S. 252 (1884); Ames v. Kansas *ex rel.* Johnston, 111 U.S. 449 (1884). Such suits could be brought and maintained in state courts as well. Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898); Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379 (1930).

[11] Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).

[12] 127 U.S. at 297. *See also* the dictum in *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 398–99 (1821); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 431–32 (1793).

[13] Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803). The Chief Justice declared that "a negative or exclusive sense" had to be given to the affirmative enunciation of the cases to which original jurisdiction extends. *Id.* at 174. Other cases have since followed this exclusive interpretation. *Ex parte* Bollman, 8 U.S. (4 Cr.) 75 (1807); New Jersey v. New York, 30 U.S. (5 Pet.) 284 (1831); *Ex parte* Barry, 43 U.S. (2 How.) 65 (1844); *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 252 (1864); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 98 (1869). In *Ex parte Levitt*, 302 U.S. 633 (1937), the Court was asked to unseat Justice Black on the ground that his appointment violated Article I. § 6, cl. 2. Although the Court rejected the application, the Court did not point out that it was being asked to assume original jurisdiction in violation of *Marbury v. Madison*.

[14] 252 U.S. 416 (1920). *See also* South Carolina v. Katzenbach, 383 U.S. 301 (1966), and Oregon v. Mitchell, 400 U.S. 112 (1970).

[15] Utah v. United States, 394 U.S. 89, 95 (1968).

[16] California v. Southern Pacific Co., 157 U.S. 229, 261 (1895). The Court has frequently used the word "sparingly" in this context. *E.g.*, Wyoming v. Oklahoma, 502 U.S. 437, 450 (1992); Maryland v. Louisiana, 451 U.S. 725, 739 (1981); United States v. Nevada, 412 U.S. 534, 538 (1973).

[17] Texas v. New Mexico, 462 U.S. 554, 570 (1983).

[18] Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972). In this case, and in *Washington v. General Motors Corp.,* 406 U.S. 109 (1972), and *Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493 (1971), the Court declined to permit adjudication

course the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had."[19] Although the Court has exercised its original jurisdiction sparingly, where claims are of sufficient "seriousness and dignity" and resolution by the Judiciary is of substantial concern, the Court will hear them.[20] In cases subject to concurrent original and appellate jurisdiction, the Supreme Court has discretion to decline to exercise original jurisdiction and instead require that a case first proceed through the lower federal courts.[21]

ArtIII.S2.C2.3 Original Cases Affecting Ambassadors, Public Ministers, and Consuls

Article III, Section 2, Clause 2:

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

The Supreme Court's original jurisdiction extends in part to cases affecting ambassadors and consuls. In addition to the general legal considerations relation to original jurisdiction discussed in the preceding essay, the Court has considered several legal questions specific to this grant of jurisdiction.[1] One question is whether the Court possesses original jurisdiction over cases where an ambassador or consul merely possesses an indirect interest in the outcome of the proceeding or whether such a person must be a party in interest. In *United States v. Ortega*, the Court ruled that a prosecution for violating international law and the laws of the United States by "offering violence" to a foreign minister was not a suit "affecting" the minister but rather a public prosecution for vindication of the law of nations and the laws of the United States.[2]

Another question is whether the Supreme Court can determine the official status of a person claiming to be an ambassador or consul. The Court has refused to review the decision of

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of environmental pollution cases within its original jurisdiction because the nature of the cases required the resolution of complex, novel, and technical factual questions not suitable for resolution by the Supreme Court in the first instance, but which could be brought in the lower federal courts. The Court has not barred all such cases, however. Vermont v. New York, 406 U.S. 186 (1972) (granting leave to file complaint). In other instances, notably involving "political questions," *cf.* Massachusetts v. Mellon, 262 U.S. 447 (1923), the Court has simply refused permission for parties to file bills of complaint without hearing them on the issue or producing an opinion. *E.g.*, Massachusetts v. Laird, 400 U.S. 886 (1970) (constitutionality of United States action in Indochina); Delaware v. New York, 385 U.S. 895 (1966) (constitutionality of electoral college under one-man, one-vote rule).

[19] *Id.* at 93–94.

[20] Wyoming v. Oklahoma, 502 U.S. 437, 451 (1982). The principles are the same whether the Court's jurisdiction is exclusive or concurrent. Texas v. New Mexico, 462 U.S. 554 (1983); California v. West Virginia, 454 U.S. 1027 (1981); Arizona v. New Mexico, 425 U.S. 794 (1976). *Cf.* Florida v. Georgia, 138 S. Ct. 2502, 2509 (2018) ("'This Court has recognized for more than a century its inherent authority, as part of the Constitution's grant of original jurisdiction, to equitably apportion interstate streams between States.' But we have long noted our 'preference' that States 'settle their controversies by mutual accommodation and agreement.'" (quoting Kansas v. Nebraska, 135 S. Ct. 1042, 1052 (2015); Arizona v. California, 373 U.S. 546, 564 (1963))).

[21] *See, e.g.*, Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971); Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945); Massachusetts v. Missouri, 308 U.S. 1 (1939).

[1] For discussion of other issues related to original jurisdiction, including the question whether Congress can vest concurrent jurisdiction in the Supreme Court and lower federal courts, see ArtIII.S2.C2.2 Supreme Court Original Jurisdiction.

[2] 24 U.S. (11 Wheat.) 467 (1826).

the Executive Branch with respect to the public character of a person claiming to be a public minister and has laid down the rule that it has the right to accept a certificate from the Department of State on such a question.[3]

A third question is whether the grant of original jurisdiction extends to cases affecting ambassadors and consuls accredited by the United States to foreign governments. The Court has answered that question in the negative, holding that the clause applies only to persons accredited to the United States by foreign governments.[4]

In matters of particular delicacy, such as suits under the law of nations against ambassadors and public ministers or their servants, Congress until recently made the original jurisdiction of the Supreme Court exclusive of that of other courts.[5] By accepting Congress's distribution of exclusive and concurrent original jurisdiction,[6] the Court has tacitly sanctioned the legislature's power to make such jurisdiction exclusive or concurrent as it may choose.

ArtIII.S2.C2.4 Supreme Court Appellate Jurisdiction

Article III, Section 2, Clause 2:

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

Most Supreme Court cases fall within the Court's appellate jurisdiction rather than its original jurisdiction.[1] Congress has authorized Supreme Court review of decisions of the state courts and lower federal courts through two procedural mechanisms: appeals and petitions for a writ of certiorari.[2] The Court has discretion to grant or deny review via a petition for a writ of certiorari; by contrast, the Court is required to exercise jurisdiction over cases properly before it on direct appeal. Over time, Congress has limited the types of cases subject to direct appeal to the Supreme Court, rendering more cases subject to discretionary review via certiorari.[3] The Court has also issued rulings that limit the scope of direct appellate review and thus reduce the attendant burden on the Court.

For the first century of the Court's existence, most of its cases were direct appeals. Early decisions of the Supreme Court emphasized the mandatory nature of appellate review. Chief Justice John Marshall first implied that the Court is obligated to take and decide cases meeting jurisdictional standards in *Marbury v. Madison*.[4] The Chief Justice explained in greater detail in *Cohens v. Virginia*:

> The Judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it,

[3] *In re* Baiz, 135 U.S. 403, 432 (1890).

[4] *Ex parte* Gruber, 269 U.S. 302 (1925).

[5] 1 Stat. 80–81 (1789). Since 1978, the Court's jurisdiction has been original but not exclusive. Pub. L. No. 95-393, § 8(b), 92 Stat. 810, 28 U.S.C. § 1251(b)(1).

[6] *See* ArtIII.S2.C2.2 Supreme Court Original Jurisdiction.

[1] For discussion of the Court's original jurisdiction, see ArtIII.S2.C2.2 Supreme Court Original Jurisdiction; ArtIII.S2.C2.3 Original Cases Affecting Ambassadors, Public Ministers, and Consuls.

[2] 28 U.S.C. §§ 1253–1257.

[3] *See, e.g.*, Act of June 27, 1988, Pub. L. No. 100-352, § 3, 102 Stat. 662.

[4] 5 U.S. (1 Cr.) 137 (1803).

> if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.[5]

The Supreme Court has repeatedly stated that courts only declare what the law is in specific cases[6] and are without will or discretion to make or change the law.[7] The early Court's statements that it could not decline to hear cases that fell within its jurisdiction rest on similar grounds as other Court holdings that embraced mandatory limitations of the judicial process, such as justiciability requirements that limit the federal courts' jurisdiction to certain cases and controversies.[8]

The broad grant of appellate jurisdiction in the 1789 Act and the Supreme Court's determination that the exercise of such jurisdiction was mandatory eventually caused overcrowding on the Supreme Court's docket. In 1891, among other reforms, Congress enacted legislation replacing mandatory Supreme Court direct review with the option to petition for a writ of certiorari in many types of cases.[9] In addition, while some modern cases echo Chief Justice Marshall's earlier rulings discussed above,[10] the Court has also adopted several discretionary rules that limit its exercise of judicial review.[11] The Court has applied prudential theorems limiting the scope of its review more or less strictly on a case-by-case basis.[12]

ArtIII.S2.C2.5 Supreme Court Review of State Court Decisions

Article III, Section 2, Clause 2:

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

The Supreme Court's appellate jurisdiction includes the authority to review decisions of both lower federal courts and state courts.[1] The current statute authorizing Supreme Court

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[5] 19 U.S. (6 Wheat.) 264, 404, (1821).

[6] *See, e.g.*, Justice George Sutherland in *Adkins v. Children's Hospital,* 261 U.S. 525, 544 (1923), and Justice Owen Roberts in *United States v. Butler,* 297 U.S. 1, 62 (1936).

[7] "Judicial power, as contradistinguished from the powers of the law, has no existence. Courts are the mere instruments of the law, and can will nothing." Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824) (Marshall, C.J.). *See also* Justice Roberts in *United States v. Butler,* 297 U.S. 1, 62–63 (1936).

[8] The political question doctrine is another limitation arising in part out of inherent restrictions and in part from prudential considerations. For a discussion of limitations utilizing both stands, *see* Ashwander v. TVA, 297 U.S. 288, 346–56 (1936) (Brandeis, J., concurring). *See generally*, ArtIII.S2.C1.2 Historical Background on Cases or Controversies Requirement.

[9] Act of March 3, 1891, ch. 517, 26 Stat. 826. In 1988, Congress enacted legislation that replaced direct appeals with discretionary certiorari petitions in almost all remaining circumstances. Act of June 27, 1988, Pub. L. No. 100-352, § 3, 102 Stat. 662. *But see*, *e.g.*, 28 U.S.C. § 1253 (authorizing direct appeal to the Supreme Court of decisions of a three-judge district court).

[10] Powell v. McCormack, 395 U.S. 486, 548–49 (1969); Baker v. Carr, 369 U.S. 186, 211 (1962); Zwickler v. Koota, 389 U.S. 241, 248 (1967).

[11] *See*, *e.g.*, Zucht v. King, 260 U.S. 174 (1922) (holding that the Court may decline to hear an appeal that does not present a substantial federal question).

[12] *See* Justice Louis Brandeis' concurring opinion in *Ashwander v. TVA,* 297 U.S. 288, 346 (1936). *And contrast* A. Bickel, *supra* note 3, at 111–198, *with* Gunther, *The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964).

[1] For additional discussion of the relationship between state and federal courts, see ArtIII.S1.6.1 Overview of Relationship Between Federal and State Courts.

review of state court decisions allows the Court to review the judgments of "the highest court of a State in which a decision could be had."[2] This is often the state's court of last resort, but it may be an intermediate appellate court or a trial court, if its judgment is final under state law and cannot be reviewed by any state appellate court.[3] The Court has held that it may only review final state court judgments. Such a judgment "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."[4] The object of this rule is to avoid piecemeal interference with state court proceedings; it promotes harmony by preventing federal intervention until the state court efforts are finally resolved.[5] For similar reasons, the Court requires that a party seeking to litigate a federal constitutional issue on appeal from a state court judgment must have raised the issue in state court at an appropriate time and with sufficient precision to allow the state court to consider it.[6]

When the judgment of a state court rests on an adequate, independent ground based on state law, the Court will not review any federal question presented, even if the state court decided the federal question incorrectly.[7] The Court has stated that the reason for this rule is "obvious" and "is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction."[8] The Court further explained, "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. . . . We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion."[9] Thus, when deciding whether to review a state court judgment, the Court faces two interrelated decisions: (1) whether the state court judgment is based upon a nonfederal ground and (2) whether the nonfederal ground is adequate to support the state court judgment. It is the responsibility of the Court to determine for itself the answer to both questions.[10]

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[2] 28 U.S.C. § 1257(a). *See* R. Stern & E. Gressman, Supreme Court Practice ch. 3 (6th ed. 1986).

[3] Grovey v. Townsend, 295 U.S. 45, 47 (1935); Talley v. California, 362 U.S. 60, 62 (1960); Thompson v. City of Louisville, 362 U.S. 199, 202 (1960); Metlakatla Indian Community v. Egan, 363 U.S. 555 (1960); Powell v. Texas, 392 U.S. 514, 516, 517 (1968); Koon v. Aiken, 480 U.S. 943 (1987). In *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264 (1821), the judgment reviewed was that of the Quarterly Session Court for the Borough of Norfolk, Virginia.

[4] Market Street Ry. v. Railroad Comm'n, 324 U.S. 548, 551 (1945). *See also* San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Flynt v. Ohio, 451 U.S. 619 (1981); Minnick v. California Dep't of Corrections, 452 U.S. 105 (1981); Florida v. Thomas, 532 U.S. 774 (2001). The Court has developed a series of exceptions permitting review when the federal issue in the case has been finally determined but there are still proceedings to come in the lower state courts. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476–487 (1975). *See also* Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989); Duquesne Light Co. v. Barasch, 488 U.S. 299, 304 (1989); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 n.42 (1982).

[5] Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 67–69 (1948); Radio Station WOW v. Johnson, 326 U.S. 120, 123–24 (1945).

[6] New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); *See also* Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 77 (1988); Webb v. Webb, 451 U.S. 493, 501 (1981). The same rule applies on habeas corpus petitions. *E.g.*, Picard v. Connor, 404 U.S. 270 (1972).

[7] Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875); Black v. Cutter Laboratories, 351 U.S. 292 (1956); Wilson v. Loew's, Inc., 355 U.S. 597 (1958).

[8] Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945). Whereas declining to review judgments of state courts that rest on an adequate and independent determination of *state* law protects the sovereignty of states, the Court has emphasized that review of state court decisions that invalidate state laws based on interpretations of *federal* law, "far from *undermining* state autonomy, is the only way to *vindicate* it" because a correction of a state court's federal errors necessarily returns power to the state government. Kansas v. Carr, 136 S. Ct. 633, 641 (2016) (quoting Kansas v. Marsh, 548 U.S. 163, 184 (2006) (Scalia, J., concurring)).

[9] *Id.* For additional discussion of advisory opinions, see ArtIII.S2.C1.4.1 Overview of Advisory Opinions.

[10] *E.g.*, Howlett v. Rose, 496 U.S. 356, 366 (1990); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 455 (1958).

ArtIII.S2.C2.5
Supreme Court Review of State Court Decisions

The first question, whether a state court judgment is based on a nonfederal ground, may arise in several factual situations. A state court may have based its decision on two grounds, one federal and one nonfederal.[11] Alternatively, a state court may have based its decision solely on a nonfederal ground, but the federal ground may have been clearly raised.[12] In other cases, both federal and nonfederal grounds may have been raised but the state court judgment is ambiguous or is without a written opinion stating the ground relied on.[13] Or the state court may have decided the federal question although it could have based its ruling on an adequate, independent nonfederal ground.[14] For the Supreme Court to review a state court decision, it is necessary that it appear from the record that a federal question was presented, that the disposition of that question was necessary to the determination of the case, and that the federal question was actually decided or that the judgment could not have been rendered without deciding it.[15]

Several factors affect the answer to the second question, whether the nonfederal ground is adequate to support the decision. In order to preclude Supreme Court review, the nonfederal ground must be broad enough, without reference to the federal question, to sustain the state court judgment;[16] it must be independent of the federal question;[17] and it must be tenable.[18] Rejection of a litigant's federal claim by the state court on state procedural grounds, such as failure to tender the issue at the appropriate time, will ordinarily preclude Supreme Court review as an adequate independent state ground,[19] so long as the local procedure does not discriminate against raising federal claims and has not been used to stifle a federal claim or to evade vindication of federal rights.[20]

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[11] Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961).

[12] Wood v. Chesborough, 228 U.S. 672, 676–80 (1913).

[13] Lynch v. New York *ex rel.* Pierson, 293 U.S. 52, 54–55 (1934); Williams v. Kaiser, 323 U.S. 471, 477 (1945); Durley v. Mayo, 351 U.S. 277, 281 (1956); Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1872); *cf.* Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965).

[14] Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 375–376 (1968).

[15] Southwestern Bell Tel. Co. v. Oklahoma, 303 U.S. 206 (1938); Raley v. Ohio, 360 U.S. 423, 434–437 (1959). When there is uncertainty about what the state court did, the previous practice was to remand for clarification. Minnesota v. National Tea Co., 309 U.S. 551 (1940); California v. Krivda, 409 U.S. 33 (1972). *See* California Dept. of Motor Vehicles v. Rios, 410 U.S. 425 (1973). The Court has adopted a presumption that when a state court decision fairly appears to rest on federal law or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, the Court will accept as the most reasonable explanation that the state court decided the case as it did because it believed that federal law required it to do so. If the state court wishes to avoid the presumption it must make clear by a plain statement in its judgment or opinion that discussed federal law did not compel the result, that state law was dispositive. Michigan v. Long, 463 U.S. 1032 (1983). *See* Harris v. Reed, 489 U.S. 255, 261 n.7 (1989) (collecting cases); Coleman v. Thompson, 501 U.S. 722 (1991) (applying the rule in a habeas case).

[16] Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 636 (1875). A new state rule cannot be invented for the occasion in order to defeat the federal claim. *E.g.*, Ford v. Georgia, 498 U.S. 411, 420–425 (1991).

[17] Enterprise Irrigation Dist. v. Farmers' Mutual Canal Co., 243 U.S. 157, 164 (1917); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 290 (1958).

[18] Enterprise Irrigation Dist. v. Farmers' Mutual Canal Co., 243 U.S. 157, 164 (1917); Ward v. Love County, 253 U.S. 17, 22 (1920); Staub v. City of Baxley, 355 U.S. 313 (1958).

[19] Beard v. Kindler, 558 U.S. 53 (2009) (firmly established procedural rule adequate state ground even though rule is discretionary). *Accord*, Walker v. Martin, 562 U.S. 307 (2011). *See also* Nickel v. Cole, 256 U.S. 222, 225 (1921); Wolfe v. North Carolina, 364 U.S. 177, 195 (1960). *But see* Davis v. Wechsler, 263 U.S. 22 (1923); Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949).

[20] Davis v. Wechsler, 263 U.S. 22, 24–25 (1923); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 455–458 (1958); Barr v. City of Columbia, 378 U.S. 146, 149 (1964). This rationale probably explains Henry v. Mississippi, 379 U.S. 443 (1965). *See also* in the criminal area, Edelman v. California, 344 U.S. 357, 362 (1953) (dissenting opinion); Brown v. Allen, 344 U.S. 443, 554 (1953) (dissenting opinion); Williams v. Georgia, 349 U.S. 375, 383 (1955); Monger v. Florida, 405 U.S. 958 (1972) (dissenting opinion).

ArtIII.S2.C2.6 Exceptions Clause and Congressional Control over Appellate Jurisdiction

Article III, Section 2, Clause 2:

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

Unlike the Supreme Court's original jurisdiction,[1] Article III provides that the Court's appellate jurisdiction is subject to "Exceptions" and "Regulations" prescribed by Congress.[2] Congress and the Court have construed this provision, sometimes called the "Exceptions Clause," to grant Congress significant control over the Court's appellate jurisdiction and proceedings. In addition, Congress possesses extensive authority to regulate the jurisdiction of the lower federal courts, and may limit the cases the Supreme Court can hear on appeal by generally stripping the federal courts of jurisdiction over certain cases.

Article III, Section 2, Clause 2 provides that the Supreme Court "shall have" appellate jurisdiction over certain matters, subject to regulation by Congress.[3] Since Congress first enacted legislation to structure the Federal Judiciary in the Judiciary Act of 1789, the legislature has often exercised this power by granting the Supreme Court appellate jurisdiction over a subset of the cases included in the constitutional grant.[4] Several decisions of the Court from the 1700s and 1800s considered the extent to which the Court could exercise appellate jurisdiction absent express authorization from Congress. In the 1796 case *Wiscart v. D'Auchy*, the Court considered whether it could review admiralty cases.[5] A majority of the Court held that it had jurisdiction to review admiralty cases because such cases fell within the scope of a statute authorizing review of federal circuit court decisions in "civil actions." In so holding, the majority stated that congressional authorization was necessary to create jurisdiction and that, if Congress provided for jurisdiction, the Court must accept it: "If Congress had provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it."[6] By contrast, in the 1810 case *Durousseau v. United States*, Chief Justice John Marshall accepted the validity of legislation limiting the Court's jurisdiction but suggested that, in the absence of such congressional action, the Court's appellate jurisdiction would have been measured by the

[1] For discussion of the Court's original jurisdiction, see ArtIII.S2.C2.2 Supreme Court Original Jurisdiction.

[2] U.S. Const. art. III, § 2, cl. 2.

[3] *Id.*

[4] *See, e.g.*, Judiciary Act of 1789, 1 Stat. 80.

[5] 3 U.S. (3 Dall.) 321 (1796).

[6] *Id.* at 327.

constitutional grant.[7] However, later cases have generally taken the view that "the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress."[8]

Congress has on occasion used its power to regulate Supreme Court jurisdiction to forestall a possible adverse decision from the Court. In *Ex parte McCardle*, the Court granted certiorari to review the denial of a petition for a writ of habeas corpus from a civilian convicted of acts obstructing Reconstruction.[9] Anticipating that the Court might void, or at least undermine, congressional reconstruction of the Confederate States, Congress overrode the President's veto to enact a provision repealing the statute that authorized the appeal.[10] Although the Court had already heard argument in the case, it dismissed the action for want of jurisdiction. The Court stated, "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."[11] Since its decision in *McCardle*, the Supreme Court has upheld numerous legislative limits on its jurisdiction.[12]

Congress also possesses significant power to prevent Supreme Court appellate review by limiting the federal courts' jurisdiction over certain classes of cases, or even specific cases, a practice sometimes called "jurisdiction stripping."[13] The Constitution provides for the existence of a Supreme Court, but leaves to Congress the decision whether to establish inferior federal courts.[14] That broad grant of discretion has been interpreted also to grant Congress

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[7] 10 U.S. (6 Cr.) 307, 313–14 (1810) ("Had the judicial act created the supreme court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. . . . [I]n omitting to exercise the right of excepting from its constitutional powers, [Congress] would have necessarily left those powers undiminished. The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject."). *See also Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 512–13 (1869) ("It is quite true . . . that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred 'with such exceptions and under such regulations as Congress shall make.'"); United States v. More, 7 U.S. (3 Cr.) 159 (1805); *but cf. Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 93 (1807) (Marshall, C.J.) ("Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.")

[8] Barry v. Mercein, 46 U.S. (5 How.) 103, 119 (1847); *see also* Daniels v. Railroad, 70 U.S. (3 Wall.) 250, 254 (1865); Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 10 (1799).

[9] 74 U.S. (7 Wall.) 506 (1869).

[10] By the Act of February 5, 1867, § 1, 14 Stat. 386, Congress had authorized appeals to the Supreme Court from circuit court decisions denying a petition for a writ of habeas corpus. Previously, the Court's jurisdiction to review habeas corpus decisions, based in Section 14 of the Judiciary Act of 1789, 1 Stat. 81, was somewhat unclear. *Compare* United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795), *and Ex parte* Burford, 7 U.S. (3 Cr.) 448 (1806), *with Ex parte* Bollman, 8 U.S. (4 Cr.) 75 (1807). The repealing statute was the Act of March 27, 1868, 15 Stat. 44. The repealed act was reenacted March 3, 1885. 23 Stat. 437.

[11] 74 U.S. (7 Wall.) at 513. A few years after *McCardle*, in *Ex parte Yerger*, the Court held that the Judiciary Act of 1789 gave it the authority to review on certiorari a circuit court's denial of a habeas petition from of a person held by the military in the South, suggesting that the repeal at issue in *McCardle* did not deprive the Court of all jurisdiction over the matter but simply eliminated one possible statutory grant. 75 U.S. (8 Wall.) 85 (1869). *See also* Felker v. Turpin, 518 U.S. 651 (1996).

[12] *See* The Francis Wright, 105 U.S. 381, 385–386 (1882); Luckenbuch S. S. Co. v. United States, 272 U.S. 533, 537 (1926); American Construction Co. v. Jacksonville, T. & K.W. Ry., 148 U.S. 372, 378 (1893); United States v. Bitty, 208 U.S. 393 (1908); United States v. Young, 94 U.S. 258 (1876); Insurance Co. v. Ritchie, 72 U.S. (5 Wall.) 541 (1866); Railroad v. Grant, 98 U.S. 398 (1878); Bruner v. United States, 343 U.S. 112 (1952); District of Columbia v. Eslin, 183 U.S. 62 (1901); Patchak v. Zinke, 138 S. Ct. 897 (2018); *see also* Walker v. Taylor, 46 U.S. (5 How.) 64 (1847).

[13] For additional discussion of jurisdiction stripping, see generally Kevin Lewis, Cong. Rsch. Serv., R44967, Congress's Power over Courts: Jurisdiction Stripping and the Rule of Klein (2018), https://crsreports.congress.gov/product/pdf/R/R44967.

[14] U.S. Const. art III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); U.S. Const. art I, § 8, cl. 9 (allowing Congress "[t]o constitute Tribunals inferior to the supreme Court").

expansive authority to regulate the structure and jurisdiction of the lower federal courts.[15] Separation of powers considerations bar Congress from requiring courts to reopen final judicial decisions[16] or dictating a certain substantive outcome in pending litigation.[17] However, the Court has upheld legislation that deprives the federal courts of jurisdiction over certain matters, including legislation that removed jurisdiction over a specific pending case.[18] Jurisdiction stripping statutes may limit the Court's appellate jurisdiction; by contrast, Congress cannot enact legislation to limit the Supreme Court's original jurisdiction.[19]

In addition to regulating the federal courts' jurisdiction, since the early years of the Republic Congress has enacted legislation regulating court proceedings, for instance by setting the times and places for holding court, even of the Supreme Court, and limiting the courts' power to issue injunctions.[20] One striking example of regulating when the Court sits occurred following the repeal of the Judiciary Act of 1801. Congress enacted legislation changing the Court's term to forestall a constitutional attack on the repeal, with the result that the Court did not convene for fourteen months.[21] Examples of restrictions on injunctions include limitations on injunctions related to taxes[22] and the Norris-La Guardia Act, which limits the issuance of injunctions in labor disputes.[23]

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[15] *See, e.g.*, United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32, 33 (1812); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721–722 (1838); Cary v. Curtis, 44 U.S. (3 How.) 236 (1845); Kline v. Burke Constr. Co., 260 U.S. 226, 233–234 (1922); Ladew v. Tennessee Copper Co., 218 U.S. 357, 358 (1910); Venner v. Great Northern R. Co., 209 U.S. 24, 35 (1908); Kentucky v. Powers, 201 U.S. 1, 24 (1906); Stevenson v. Fain, 195 U.S. 165, 167 (1904); Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 513–521 (1898); The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 251–252 (1868); South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966); Palmore v. United States, 411 U.S. 389, 400–02 (1973); Swain v. Pressley, 430 U.S. 372 (1977). A minority view, articulated by Justice Joseph Story in *Martin v. Hunter's Lessee*, argues that the Constitution requires Congress to create inferior federal courts and vest them with all the jurisdiction they are capable of receiving. 14 U.S. (1 Wheat.) 304, 329–336 (1816); *see also, e.g.*, Amar, *A Neo-Federalist View of Article III: Separating the Two-Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205 (1985); Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499 (1990).

[16] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

[17] United States v. Klein, 80 U.S. 128 (1871); *see also* Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) (plurality opinion) (Congress cannot usurp the judiciary's power by saying "in *Smith v. Jones*, Smith wins.").

[18] Patchak v. Zinke, 138 S. Ct. 897 (2018); *cf.* United States v. Sioux Nation of Indians, 448 U.S. 371, 374 (1980).

[19] *See* ArtIII.S2.C2.2 Supreme Court Original Jurisdiction.

[20] Supreme Court Justices have, at times, opposed legislation that might regulate the Court or its procedures. *See, e.g.*, John G. Roberts, Jr., 2021 Year-End Report on the Federal Judiciary (2021); Letter from Charles Evans Hughes, C.J., to Burton K. Wheeler, U.S. Sen. (Mar. 21, 1937), reprinted in S. Rep. No. 75–711, app. c at 40 (1937). In addition, even absent clearly established constitutional limits on Congress's authority to regulate court proceedings, the legislature has often deferred to the courts, and especially the Supreme Court, to regulate their own procedures. For instance, the Rules Enabling Act, 28 U.S.C. § 2071–2077, authorizes the Supreme Court to make procedural rules for the inferior federal courts, subject to approval by Congress, and further allows the Court to make its own procedural rules without legislative oversight.

[21] 1 Charles Warren, The Supreme Court in United States History 222–224 (rev. ed. 1926).

[22] Act of March 2, 1867, 10, 14 Stat. 475, as amended, now 26 U.S.C. § 7421 (federal taxes): Act of August 21, 1937, 50 Stat. 738, 28 U.S.C. § 1341 (state taxes). See also Act of May 14, 1934, 48 Stat. 775, 28 U.S.C. § 1342 (state rate-making).

[23] 47 Stat. 70 (1932), 29 U.S.C. §§ 101–115. The Court has upheld the Act and applied it liberally through the years. *See* Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938); New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938); Brotherhood of Railroad Trainmen v. Chicago River & I. R.R., 353 U.S. 30 (1957); Boys Markets v. Retail Clerks Union, 398 U.S. 235 (1970).

Clause 3—Trials

ArtIII.S2.C3.1 Jury Trials

Article III, Section 2, Clause 3:

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

Article III, Section 2, Clause 3 is one of two constitutional provisions—the other being the Sixth Amendment—that provide a right to jury trial in federal criminal cases.[1] In addition to providing such a right generally in all criminal cases except impeachment cases,[2] this Clause also specifies the venue in which a trial must take place: in the state where the crime was committed, or at a place directed by Congress if the crime was not committed within any states.[3] The Sixth Amendment later further imposed other requirements related to the right, including that the trial be speedy and public, and that the trial take place before a jury summoned from the state and district in which the crime was committed.[4]

Section 3—Treason

Clause 1—Meaning

ArtIII.S3.C1.1 Historical Background on Treason

Article III, Section 3, Clause 1:

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

The Treason Clause is a product of the Framer's awareness of the "numerous and dangerous excrescences" which had distorted the English law of treason. The Clause was therefore intended to put "extend[ing] the crime and punishment of treason" beyond Congress's power.[1] Debate in the Constitutional Convention, remarks in the ratifying conventions, and contemporaneous public comments make clear that the Framers

[1] The Supreme Court has held that the Sixth Amendment's right to jury, including the requirement that a jury verdict be unanimous, applies to states through the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145 (1968); *see also* Ramos v. Louisiana, No. 18-5924, slip op. at 7 (U.S. 2020) (holding that the Sixth Amendment's requirement of a unanimous verdict applies to states through the Fourteenth Amendment).

[2] The Supreme Court, however, has long held that the guarantees of jury trial under Article III, Section 2, Clause 3 and the Sixth Amendment do not apply to petty offenses because at the time of the Constitution's adoption, such offenses were tried summarily without a jury under common law. *See* Cheff v. Schnackenberg, 384 U.S. 373, 378–79 (1966).

[3] U.S. Const. art. III, § 2, cl.3.

[4] U.S. Const. amend. VI; *see generally* Amdt6.1 Overview of Sixth Amendment, Rights in Criminal Prosecutions.

[1] 2 Debates in the Several State Conventions on Adoption of the Constitution 469 (Jonathan Elliott ed., 1836) (James Wilson). James Wilson apparently drafted the clause as a member of the Committee of Detail and had some firsthand knowledge of how treason charges could be abused. See Cramer v. United States, 325 U.S. 1, 23 & note 32 (1944); J. Hurst, The Law of Treason in the United States: Selected Essays 90–91, 129–136 (1971).

contemplated a restrictive concept of the crime of treason that would prevent the politically powerful from escalating ordinary partisan disputes into capital charges of treason, as so often had happened in England.[2]

Thus, the Framers adopted two of the three formulations and the phraseology of the English Statute of Treason enacted in 1350,[3] but they conspicuously omitted the phrase defining as treason the "compass[ing] or imagin[ing] the death of our lord the King,"[4] under which most of the English law of "constructive treason" had been developed.[5] Beyond limiting Congress's power to define treason,[6] the Clause also limits Congress's ability to make proof of the offense of treason easy to establish[7] and to define the punishment for treason.[8]

ArtIII.S3.C1.2 Levying War as Treason

Article III, Section 3, Clause 1:

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

Early judicial interpretation of the Treason Clause and the term "levying war" arose in the context of the partisan struggles of the early nineteenth century and the treason trials of Aaron Burr and his associates. In *Ex parte Bollman*,[1] which involved two of Burr's confederates, Chief Justice John Marshall, speaking for himself and three other Justices, confined the meaning of levying war to the actual waging of war. Chief Justice Marshall distinguished the offence of conspiring to levy war and the offence of actually levying war. In his view, "[t]he first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed."[2] This "enlistment of men to serve against the government," according to him, "does not amount to levying war."[3]

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[2] 2 Records of the Federal Convention of 1787, at 345–50 (Max Farrand ed., 1911); 3 Records of the Federal Convention of 1787, at 102–03 (Max Farrand ed., 1911); *id.* at 447, 451, 466; 3 Records of the Federal Convention of 1787, at 209, 219, 220 (Max Farrand ed., 1911) ; The Federalist No. 43 (James Madison); *id.* No. 84 (Alexander Hamilton); The Works of James Wilson 663–69 (R. McCloskey ed. 1967). The matter is comprehensively discussed in J. Hurst *supra* note 1, at chs. 3, 4.

[3] 25 Edward III, Stat. 5, ch. 2. *See* J. Hurst, *supra* note 1, at ch. 2.

[4] J. Hurst *supra* note 1, at 15, 31–37, 41–49, 51–55.

[5] *Id.*; see also *id.* at 152–53 ("[T]he record does suggest that the clause was intended to guarantee nonviolent political processes against prosecution under any theory or charge, the burden of which was the allegedly seditious character of the conduct in question. The most obviously restrictive feature of the constitutional definition is its omission of any provision analogous to that branch of the Statute of Edward III which punished treason by compassing the death of the king. In a narrow sense, this provision perhaps had no proper analogue in a republic. However, to interpret the silence of the Treason Clause in this way alone does justice neither to the technical proficiency of the Philadelphia draftsmen nor to the practical statecraft and knowledge of English political history among the Framers and proponents of the Constitution. The charge of compassing the king's death had been the principal instrument by which 'treason' had been used to suppress a wide range of political opposition, from acts obviously dangerous to order and likely in fact to lead to the king's death to the mere speaking or writing of views restrictive of the royal authority.").

[6] The clause does not, however, prevent Congress from specifying other crimes of a subversive nature and prescribing punishment, so long as Congress is not merely attempting to evade the restrictions of the Treason Clause. *E.g.*, *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 126 (1807); Wimmer v. United States, 264 Fd. 11, 12–13 (6th Cir. 1920), *cert. denied*, 253 U.S. 494 (1920).

[7] By the requirement of two witnesses to the same overt act or a Confession in open Court.

[8] Cl. 2, "Corruption of the Blood and Forfeiture."

[1] 8 U.S. (4 Cr.) 75 (1807).

[2] *Id.* at 126.

[3] *Id.*

Chief Justice Marshall was careful, however, to state that the Court did not mean that no person could be guilty of this crime who had not appeared in arms against the country. He stated: "On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."[4] But, Chief Justice Marshall emphasized, "there must be an actual assembling of men, for the treasonable purpose, to constitute a levying of war."[5]

Based on these considerations and because no part of the crime charged had been committed in the District of Columbia, the Court held that Bollman and Swartwout could not be tried in the District, and ordered their discharge. Chief Justice Marshall continued by saying that "the crime of treason should not be extended by construction to doubtful cases"[6] and concluded that no conspiracy for overturning the Government and "no enlisting of men to effect it, would be an actual levying of war."[7]

ArtIII.S3.C1.3 Trial of Aaron Burr

Article III, Section 3, Clause 1:

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

After authoring the Supreme Court's decision in *Ex Parte Bollman*,[1] in which the Court ordered the discharge of two of Aaron Burr's associates, Chief Justice John Marshall presided over the treason trial of Burr. His ruling[2] denying a motion to introduce certain collateral evidence bearing on Burr's activities is significant both for rendering the latter's acquittal inevitable and for the qualifications and exceptions made to the *Bollman* decision. In brief, Chief Justice Marshall's ruling held that Burr, who had not been present at the assemblage on Blennerhassett's Island, could be convicted of advising or procuring a levying of war only upon the testimony of two witnesses to his having procured the assemblage. Because the operation had been covert, such testimony was naturally unobtainable. The net effect of Marshall's pronouncements was to make it extremely difficult to convict one of levying war against the United States short of the conduct of or personal participation in actual hostilities.[3]

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[4] *Id.*

[5] *Id.*

[6] *Id.* at 127.

[7] *Id*.

[1] 8 U.S. (4 Cr.) 75 (1807).

[2] United States v. Burr, 8 U.S. (4 Cr.) 469, Appx. (1807).

[3] There have been lower court cases in which the Government obtained convictions of treason. Following the Whiskey Rebellion, the Government obtained convictions of treason based on a ruling that forcible resistance to the Government enforcing revenue laws was a constructive levying of war. United States v. Vigol, 29 F. Cas. 376 (No. 16621) (C.C.D. Pa. 1795); United States v. Mitchell, 26 F. Cas. 1277 (No. 15788) (C.C.D. Pa. 1795). After conviction, the defendants were pardoned. *See also* for the same ruling in a different situation the Case of Fries, 9 F. Cas. 826, 924 (Nos. 5126, 5127) (C.C.D. Pa. 1799, 1800). The defendant was again pardoned after conviction. About a half century later, a court held that participating in forcible resistance to the Fugitive Slave Law was not a constructive levying of war. United States v. Hanway, 26 F. Cas. 105 (No. 15299) (C.C.E.D. Pa. 1851). Although the United States Government regarded the activities of the Confederate States as a levying of war, the President by Amnesty Proclamation of December 25, 1868, pardoned all those who had participated on the Southern side in the Civil War. In applying the Captured and Abandoned Property Act of 1863 (12 Stat. 820) in a civil proceeding, the Court declared that the

ArtIII.S3.C1.4 Aid and Comfort to the Enemy as Treason

Article III, Section 3, Clause 1:

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

Since *Ex Parte Bollman*, the few treason cases that have reached the Supreme Court arose in the context of World War II and involved defendants charged with adhering to enemies of the United States and giving them aid and comfort. In the first of these cases, *Cramer v. United States*,[1] the Court considered whether the "overt act" at issue must itself manifest a treacherous intention or if it was enough that other proper evidence support such an intention.[2] The Court, in a 5-4 opinion by Justice Robert Jackson, in effect took the former view, holding that the Treason Clause's "two-witness principle" prohibited "imputation of *incriminating acts* to the accused by circumstantial evidence or by the testimony of a single witness,"[3] even though the single witness in question was the accused himself. "Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses,"[4] Justice Jackson asserted. Justice William Douglas in a dissent, joined by Chief Justice Harlan Stone and Justices Hugo Black and Stanley Reed, contended that Cramer's treasonable intention was sufficiently shown by overt acts as attested to by two witnesses each, plus statements Cramer made on the witness stand.

In the second case, *Haupt v. United States*,[5] the Supreme Court sustained a treason conviction for the first time in its history. Although the overt acts that supported the treason charge—including defendant's harboring and sheltering of his son who was an enemy spy and saboteur, and assisting his son in purchasing an automobile and obtaining employment in a defense plant—were all acts that a father might naturally perform for a son, the Court held that this fact did not necessarily relieve such acts of the treasonable purpose of giving aid and comfort to the enemy. Speaking for the Court, Justice Jackson said: "No matter whether young Haupt's mission was benign or traitorous, known or unknown to the defendant, these acts were aid and comfort to him."[6] These acts, Justice Jackson continued, "were more than casually useful; they were aids in steps essential to his design for treason."[7] Thus, "[i]f proof be added that the defendant knew of his son's instruction, preparation and plans, the purpose to aid and comfort the enemy becomes clear."[8] The Court further held that conversation and occurrences

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foundation of the Confederacy was treason against the United States. Sprott v. United States, 87 U.S. (20 Wall.) 459 (1875). *See also* Hanauer v. Doane, 79 U.S. (12 Wall.) 342 (1871); Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1869); Young v. United States, 97 U.S. 39 (1878). While *Sprott*, *Hanauer*, *Thorington*, and *Young* discussed concepts concerning adhering to the United States' enemies and giving enemies of the United States Aid and Comfort, these are not criminal cases. Instead, they dealt with attempts to recover property under the Captured and Abandoned Property Act by persons who claimed that they had given no aid or comfort to the enemy. These cases did not, therefore, interpret the Constitution.

[1] 325 U.S. 1 (1945).

[2] *Id.*

[3] *Id.* at 35.

[4] *Id.* at 34–35. Earlier, Justice Jackson had declared that this phase of treason consists of two elements: "adherence to the enemy; and rendering him aid and comfort." *Id.* at 29. A citizen, it was said, may take actions "which do aid and comfort the enemy . . . but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason." *Id.*

[5] 330 U.S. 631 (1947).

[6] *Id.* at 635.

[7] *Id.*

[8] *Id.* at 635–36.

long prior to the indictment were admissible evidence on the question of defendant's intent. And more important, it held that the constitutional requirement of two witnesses to the same overt act or confession in open court does not operate to exclude confessions or admissions made out of court if such evidence is merely corroborative and where a legal basis for the conviction has been laid by the testimony of two witnesses.

This relaxation of restrictions surrounding the definition of treason evoked obvious satisfaction from Justice Douglas, who saw in *Haupt* a vindication of his position in *Cramer*. In Justice Douglas's view, *Cramer* was wrongly decided because it departed from the rules that "the overt act and the intent with which it is done are separate and distinct elements of the crime"[9] and that "[i]ntent need not be proved by two witnesses but may be inferred from all the circumstances surrounding the overt act."[10] In Justice Douglas's view, "proof of treasonable intent in the doing of the overt act necessarily involves proof that the accused committed the overt act with the knowledge or understanding of its treasonable character."[11] He further opined that the *Haupt* decision was "truer to the constitutional definition of treason" by holding that "an act, quite innocent on its face, does not need two witnesses to be transformed into a incriminating one." [12]

In a third case, *Kawakita v. United* States,[13] the Supreme Court sustained a treason conviction against a defense that the defendant, a dual citizen of Japan and United States, had renounced his American citizenship. In that case, the defendant, who was a native-born citizen of the United States and also a national of Japan by reason of Japanese parentage and law, served during the war as a civilian interpreter of a private corporation producing war materials for Japan and was accused of brutally abusing American prisoners of war who were forced to work for the corporation. Upon his return to the United States following Japan's surrender, the defendant was charged with treason for his conduct toward American prisoners of war. In affirming the conviction, the Court concluded that the question regarding whether the defendant had intended to renounce American citizenship was peculiarly one for the jury and their verdict that he had not so intended was based on sufficient evidence. An American citizen, the Court continued, owes allegiance to the United States wherever he may reside, and dual nationality does not alter the situation.[14]

The vacillation of Chief Justice John Marshall between the *Bollman*[15] and *Burr*[16] cases and the vacillation of the Court in the *Cramer*[17] and *Haupt*[18] cases leave the law of treason in a somewhat uncertain condition. The difficulties created by *Burr*, however, have been largely

[9] *Id.* at 645.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 645–46. Justice William Douglas cites no cases for these propositions. Justice Frank Murphy in a solitary dissent stated: "But the act of providing shelter was of the type that might naturally arise out of petitioner's relationship to his son, as the Court recognizes. By its very nature, therefore, it is a non- treasonous act. That is true even when the act is viewed in light of all the surrounding circumstances. All that can be said is that the problem of whether it was motivated by treasonous or non-treasonous factors is left in doubt. It is therefore not an overt act of treason, regardless of how unlawful it might otherwise be." *Id.* at 649.

[13] 343 U.S. 717 (1952).

[14] 343 U.S. at 732. For citations in the subject of dual nationality, *see id.* at 723 n.2. Three dissenters asserted that Kawakita's conduct in Japan clearly showed he was consistently demonstrating his allegiance to Japan. *Id.* at 746 ("As a matter of law, he expatriated himself as well as that can be done.").

[15] *Ex parte* Bollman, 8 U.S. (4 Cr.) 75 (1807).

[16] United States v. Burr, 8 U.S. (4 Cr.) 469 (1807).

[17] Cramer v. United States, 325 U.S. 1 (1945).

[18] Haupt v. United States, 330 U.S. 631 (1947).

obviated by punishing acts ordinarily treasonable in nature under a different label,[19] within a formula provided by Chief Justice Marshall himself in *Bollman*. There, Chief Justice Marshall opined that "Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment, because they have not ripened into treason."[20] In his view, "[t]he wisdom of the legislature is competent to provide for the case,"[21] and Framers must have intended this legislative approach in the punishment of such cases because such general laws would be "formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate."[22]

Clause 2—Punishment

ArtIII.S3.C2.1 Punishment of Treason Clause

Article III, Section 3, Clause 2:

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

Among other measures, the Confiscation Act of 1862 "to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels" authorized the President to confiscate certain Confederate property through court action.[1] Because of President Abraham Lincoln's concern that such authority raised concerns under the Punishment of Treason Clause, the act was accompanied by an explanatory joint resolution which stipulated that only a life estate terminating with the death of the offender could be sold and that at his death his children could take the fee simple by descent as his heirs without deriving any title from the United States.[2] In applying this act, passed pursuant to the war power and not the power to punish treason,[3] the Supreme Court in one case[4] quoted with approval the English distinction between a disability absolute and perpetual and a disability personal or temporary. Corruption of blood as a result of attainder of treason was cited as an example of the former and was defined as the disability of any of the posterity of the attained person "to claim any inheritance in fee simple, either as heir to him, or to any ancestor above him."[5]

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[19] *Cf.* United States v. Rosenberg, 195 F.2d 583 (2d. Cir. 1952), *cert denied*, 344 U.S. 889 (1952), holding that in a prosecution under the Espionage Act for giving aid to a country, not an enemy, an offense distinct from treason, neither the two-witness rule nor the requirement as to the overt act is applicable.

[20] *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 126 (1807).

[21] *Id.*

[22] *Id.* at 127. Justice Felix Frankfurter appended to his opinion in *Cramer v. United States,* 325 U.S. 1, 25 n.38 (1945), a list taken from the government's brief of all the cases prior to *Cramer* in which the Treason Clause was construed.

[1] 12 Stat. 589, § 5. This act incidentally did not designate rebellion as treason.

[2] 12 Stat. 627.

[3] Miller v. United States, 78 U.S. (11 Wall.) 268, 305 (1871).

[4] Wallach v. Van Riswick, 92 U.S. 202, 213 (1876).

[5] Lord de la Warre's Case, 11 Coke Rept. 1a, 77 Eng. Rept. 1145 (1597). A number of cases dealt with the effect of a full pardon by the President of owners of property confiscated under this Act. They held that a full pardon relieved the owner of forfeiture as far as the government was concerned but did not divide the interest acquired by third persons from the government during the lifetime of the offender. Illinois Cent. R.R. v. Bosworth, 133 U.S. 92, 101 (1890); Knote v. United States, 95 U.S. 149 (1877); Wallach v. Van Riswick, 92 U.S. 202, 203 (1876); Armstrong's Foundry, 73 U.S. (6 Wall.) 766, 769 (1868). There is no direct ruling on the question of whether only citizens can commit treason. In *Carlisle v. United States,* 83 U.S. (16 Wall.) 147, 154–155 (1873), the Court declared that aliens while domiciled in this country owe a temporary allegiance to it and may be punished for treason equally with a native-born citizen in the absence of a treaty stipulation to the contrary. This case involved the attempt of certain British subjects

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Punishment of Treason Clause

to recover claims for property seized under the Captured and Abandoned Property Act, 12 Stat. 820 (1863), which provided for the recovery of property or its value in suits in the Court of Claims by persons who had not rendered aid and comfort to the enemy. Earlier, in *United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76, 97 (1820), which involved a conviction for manslaughter under an Act punishing manslaughter and treason on the high seas, Chief Justice John Marshall going beyond the necessities of the case stated that treason "is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary." However, *see In re* Shinohara, Court Martial Orders, No. 19, September 8, 1949, p. 4, Office of the Judge Advocate General of the Navy, reported in 17 Geo. Wash. L. Rev. 283 (1949). In this case, an enemy alien resident in United States territory (Guam) was found guilty of treason for acts done while the enemy nation of which he was a citizen occupied such territory. Under English precedents, an alien residing in British territory is open to conviction for high treason on the theory that his allegiance to the Crown is not suspended by foreign occupation of the territory. DeJager v. Attorney General of Natal (1907), A.C., 96 L.T.R. 857. *See also* 18 U.S.C. § 2381.

ARTICLE IV
RELATIONSHIPS BETWEEN THE STATES

ARTICLE IV
RELATIONSHIPS BETWEEN THE STATES

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ARTICLE IV—RELATIONSHIPS BETWEEN THE STATES

ArtIV.1 Overview of Article IV, Relationships Between the States

Article IV of the U.S. Constitution is sometimes called the "States' Relations Article."[1] It contains several provisions concerning the federalist structure of government established by the Constitution, which divides sovereignty between the states and the National Government.[2]

Sections 1 and 2 concern the states' relationships with each other. Section 1 is referred to as the Full Faith and Credit Clause, and requires states to recognize the public acts, records, and judicial proceedings of other states;[3] for example, states must generally give effect to judgments issued by an out-of-state court.[4] Section 2 addresses interstate comity, that is, harmony and cooperation among the states. Its first clause grants the citizens of each state the privileges and immunities of the citizens of other states, preventing states from discriminating against non-residents in favor of their own citizens.[5] Its second clause addresses when a person accused of a crime flees from one state to another, requiring the state where the fugitive is found to return him to the state where he has been charged with a crime, upon proper demand.[6]

Sections 3 and 4 concern the states' relationships to the National Government. Section 3 grants Congress two important powers: to admit new states into the union,[7] and to govern federal territories and property.[8] Through Section 4, known as the Guarantee Clause, the United States promises to protect the states against foreign invasion and domestic insurrection, and to ensure that each state has "a Republican Form of Government."[9]

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[1] Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 379 (1978).

[2] *See generally* Gregory v. Ashcroft, 501 U.S. 452, 457–60 (1991) (describing the "federalist structure of joint sovereigns" established under the Constitution).

[3] U.S. Const. art. IV, § 1.

[4] *See* ArtIV.S1.1 Overview of Full Faith and Credit Clause.

[5] *See* ArtIV.S1.1 Overview of Full Faith and Credit Clause.

[6] *See* ArtIV.S2.C2.1 Overview of Extradition (Interstate Rendition) Clause. The third clause of Section 2 envisioned an analogous process for enslaved persons who escaped to another state, but it was nullified in 1865 by the Thirteenth Amendment.

[7] *See* ArtIV.S3.C1.1 Overview of Admissions (New States) Clause.

[8] *See* ArtIV.S3.C2.1 Property Clause Generally.

[9] U.S. Const. art. IV, § 4, cl. 1. The Supreme Court has generally refused to hear cases on the Guarantee Clause based on the political question doctrine. ArtIII.S2.C1.9.1 Overview of Political Question Doctrine; ArtIV.S4.2 Guarantee Clause Generally.

Section 1—Full Faith and Credit Clause

ArtIV.S1.1 Overview of Full Faith and Credit Clause

Article IV, Section 1:

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

The Constitution's federalist structure allows each state to maintain its own government.[1] This structure creates a risk that multiple states will exercise their powers over the same issue or dispute, leading to confusion and uncertainty.[2] The Constitution's Full Faith and Credit Clause mitigates that risk by adjusting the states' interrelationships.[3] The Clause requires each state to give "Full Faith and Credit" to "the public Acts" of "every other State," such as other states' statutes.[4] The Clause also requires states to give "Full Faith and Credit" to the "Records[ ] and judicial Proceedings of every other State."[5]

The Supreme Court's interpretation of the Clause has shifted over time.[6] The Court has settled on a doctrinal framework that treats out-of-state court judgments differently from out-of-state laws.[7] Whereas the modern Court generally requires states to give out-of-state judgments conclusive effect, states have more freedom to apply their own laws in their own courts, so long as they do not close their courts completely to claims based on other states' laws.[8]

The Clause also authorizes Congress to enact "general Laws" that "prescribe the Manner in which [states'] Acts, Records and Proceedings shall be proved, and the Effect thereof."[9] Congress has invoked this authority several times, such as to require federal and territorial

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[1] *See* Intro.7.3 Federalism and the Constitution. *See also, e.g.*, Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 703–04 (1982) ("Ours is a union of States, each having its own judicial system capable of adjudicating the rights and responsibilities of the parties brought before it.").

[2] *See, e.g.*, *Underwriters Nat'l Assurance*, 455 U.S. at 704 ("[T]here is always a risk that two or more States will exercise their power over the same case or controversy, with the uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue.").

[3] *See, e.g.*, V.L. v. E.L., 577 U.S. 404, 407 (2016) (per curiam) (explaining that the Full Faith and Credit Clause "alter[s] the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation") (quoting Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268, 277 (1935)).

[4] U.S. Const. art. IV, § 1. *See also, e.g.*, Franchise Tax Bd. v. Hyatt, No. 14-1175, slip op. at 4 (U.S. Apr. 19, 2016) ("A statute is a 'public Act' within the meaning of the Full Faith and Credit Clause.").

[5] U.S. Const. art. IV, § 1.

[6] *See generally* ArtIV.S1.3.2 Modern Doctrine on Full Faith and Credit Clause.

[7] *See, e.g.*, Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 494 (2003) ("[O]ur precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments.") (quoting Baker v. Gen. Motors Corp., 522 U.S. 222, 232 (1998)).

[8] *See, e.g.*, *id.* ("Whereas the full faith and credit command 'is exacting' with respect to '[a] final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment,' it is less demanding with respect to choice of laws. We have held that the Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'") (internal citations omitted; alterations in original). *Compare* ArtIV.S1.3.1 Early Precedent on Full Faith and Credit Clause *and* ArtIV.S1.3.2 Modern Doctrine on Full Faith and Credit Clause, *with* ArtIV.S1.4.1 Early Doctrine on State Law on Full Faith and Credit Clause *and* ArtIV.S1.4.2 Modern Doctrine on State Law on Full Faith and Credit Clause.

[9] U.S. Const. art. IV, § 1.

courts to apply the same full faith and credit principles as state courts.[10] However, the Supreme Court has not yet considered where the outer boundaries of that power lie.[11]

Litigants frequently ask state judges to enforce judgments entered by other states' courts, such as judgments for monetary damages.[12] Those judges must decide whether to honor that judgment—and, if so, what legal effect the judgment will have. In addition, the Full Faith and Credit Clause requires states to recognize other states' "public Acts," such as statutes.[13] This language has raised questions regarding how state courts must treat other states' laws. Besides the question of *which* state's laws a court must apply when two statutes conflict, the Court has also considered *whether* a state court must entertain causes of action based on other states' laws. The Court has interpreted the Clause to require states to open their courts to claims based on other states' laws under various circumstances.[14]

Whereas the Full Faith and Credit Clause's first sentence mandates that "Full Faith and Credit . . . be given in each State to the public Acts, Records, and judicial Proceedings of every other State," its second sentence authorizes Congress to "prescribe . . . the Effect" of "such Acts, Records, and Proceedings."[15] The relationship between these two sentences raises interpretive questions. Because the first sentence already requires states to give out-of-state acts and proceedings full faith and credit, the Framers' reasons for authorizing Congress to specify the effect of those acts and proceedings are unclear.[16] Nor is it clear whether the Clause's second sentence empowers Congress to enact legislation allowing states to *refuse* to give effect to particular categories of acts, records, and proceedings.[17] Congress has seldom invoked its legislative authority under the Clause and thus has rarely tested that power's potential limits.[18] As a result, the scope of Congress's powers under the Clause remains unsettled.[19]

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[10] *See generally* ArtIV.S1.5.1 Generally Applicable Federal Law on Full Faith and Credit Clause to ArtIV.S1.5.2 Specifically Applicable Federal Law on Full Faith and Credit Clause.

[11] *See generally* ArtIV.S1.5.1 Generally Applicable Federal Law on Full Faith and Credit Clause to ArtIV.S1.5.2 Specifically Applicable Federal Law on Full Faith and Credit Clause.

[12] *See, e.g.*, 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4467 (5th ed. 2019) (describing "enforcement of money judgments" as "[t]he most familiar application" of full faith and credit principles).

[13] U.S. Const. art. IV, § 1. *See also* Franchise Tax Bd. v. Hyatt, No. 14-1175, slip op. at 4 (U.S. Apr. 19, 2016) ("A statute is a 'public Act' within the meaning of the Full Faith and Credit Clause.").

[14] *See* ArtIV.S1.4.2 Modern Doctrine on State Law on Full Faith and Credit Clause.

[15] U.S. Const. art. IV, § 1.

[16] *See, e.g.*, Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 Geo. Mason L. Rev. 485, 485 (2013) ("The Constitution commands that 'Full Faith and Credit shall be given' to state acts, records, and judgments. Although this clause appears to create a self-executing constitutional directive, the very next sentence provides that Congress 'may' prescribe the manner in which state acts and judgments 'shall be proved, and the Effect thereof.' Paradoxically, the Full Faith and Credit Clause thus arguably seems to give Congress the power to nullify the command that full faith and credit be given. Any plausible interpretation of the Clause must reconcile this apparent conflict.") (footnotes omitted).

[17] *See, e.g.*, Charles M. Yablon, *Madison's Full Faith and Credit Clause: A Historical Analysis*, 33 Cardozo L. Rev. 125, 126 (2011) ("The apparent inconsistency in the language of the Full Faith and Credit Clause becomes a concrete legal issue . . . if Congress chooses to pass a law that appears to violate the mandate of the first sentence of the Clause.").

[18] *See* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L.J. 1965, 2005 (1997) (describing Congress's power under the Clause's second sentence as "untested and practically unexercised").

[19] *See, e.g.*, Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 Geo. Mason L. Rev. 485, 485 (2013) ("[T]he Court has not yet ruled on the second portion of the Clause—that is, it has not addressed the contours of Congress's full faith and credit power.").

ArtIV.S1.2 Historical Background on Full Faith and Credit Clause

Article IV, Section 1:

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

Before the Constitution's ratification, English and colonial courts struggled with how to treat judgments from other sovereigns' courts.[1] While some courts held that judgments from other jurisdictions should have *conclusive* effect in other courts, others held that such judgments were only *presumptively* binding.[2] The Articles of Confederation attempted to address this uncertainty by providing that "[f]ull faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other state."[3] Nevertheless, it remained unclear whether the Articles of Confederation merely required courts to accept other states' records as *evidence*, or if it instead required courts to afford such records conclusive *effect*.[4]

When the Framers decided to include a full faith and credit provision in the Constitution, they debated whether and how it should differ from the Articles of Confederation. For instance, whereas the Articles only granted full faith and credit to the "records, acts, and judicial proceedings" of "*courts and magistrates*,"[5] the Framers decided to extend full faith and credit to *legislative* acts as well.[6]

The Framers also debated whether to empower Congress to pass legislation governing the authentication, execution, and effect of out-of-state acts.[7] While some Framers advocated

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[1] *See, e.g.*, Thompson v. Whitman, 85 U.S. (8 Wall.) 457, 465 (1873) (describing "the uncertainty and confusion that prevailed in England and this country as to the credit and effect which should be given to foreign judgments, some courts holding that they should be [c]onclusive of the matters adjudged, and others that they should be regarded as only *prima facie* binding"); M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 325 (1839) ("[W]e need not doubt what the framers of the Constitution intended to accomplish by [the Full Faith and Credit Clause], if we reflect how unsettled the doctrine was upon the effect of foreign judgments, or the effect, *rei judicatae*, throughout Europe, in England, and in these States, when our first confederation was formed.").

[2] *Thompson*, 85 U.S. (8 Wall.) at 465.

[3] Articles of Confederation, art. IV, § 3.

[4] *See, e.g.*, Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 Va. L. Rev. 1201, 1224–25 (2009) ("The divergence between 'authentication' and 'effect' interpretations of the [Articles of] Confederation's [Full Faith and Credit] Clause soon appeared in contemporary state court decisions."); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 Creighton L. Rev. 255, 282–88 (1998) (analyzing the "five reported decisions interpreting the Full Faith and Credit Clause of the Articles of Confederation" and concluding that "[t]he debate in the cases interpreting the Articles of Confederation Clause concerned whether the language of the Clause should be given an evidentiary meaning or should be understood as elevating state judgments to the status of domestic judgments in other states"). *See also* The Federalist No. 42 (James Madison) (describing the Articles of Confederation's full faith and credit provision as "extremely indeterminate"); Charles M. Yablon, *Madison's Full Faith and Credit Clause: A Historical Analysis*, 33 Cardozo L. Rev. 125, 140 (2011) (maintaining that "the faith and credit clause in the Articles of Confederation had no clear and determinate meaning").

[5] Articles of Confederation, art. IV, § 3 (emphasis added).

[6] *Compare* 2 The Records of the Federal Convention of 1787, at 188 (Max Farrand ed., 1911) [hereinafter Farrand's Records] (Committee of Detail draft proposing that "[f]ull faith shall be given in each State to the acts of the *Legislatures*, and to the records and judicial proceedings of the Courts and Magistrates of every other State") (emphasis added), *with id.* at 447 (reflecting that Hugh Williamson "moved to substitute in place of" the Committee of Detail's full faith and credit provision "the words of the Articles of Confederation on the same subject" because "[h]e did (not) understand precisely the meaning of the article"). *See also id.* (noting that James Wilson and William Samuel Johnson "supposed the meaning" of the Committee of Detail's provision "to be that Judgments in one State should be the ground of actions in other States, [and] that acts of the Legislatures should be included, for the sake of Acts of insolvency"). *See also* U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the *public Acts*, Records, and judicial Proceedings of every other State.") (emphasis added).

[7] *See* 2 Farrand's Records, *supra* note 6, at 448.

giving such acts, records, and proceedings binding effect as an unalterable constitutional command,[8] others supported letting Congress prescribe the effect that acts, records, and proceedings would have in other states.[9] The Framers ultimately chose the latter option.[10] The Framers also debated the scope of Congress's power to pass such laws. Some Framers proposed to authorize Congress to determine the effect of out-of-state *judgments* only, fearing that allowing Congress to prescribe the effect of out-of-state *statutes* would usurp states' authority.[11] Others argued that unless Congress could prescribe the effect of other states' nonjudicial acts, the Full Faith and Credit Clause would have no meaningful effect.[12] Over several dissenting votes, the Framers authorized Congress to prescribe the effect of states' legislative acts as well as states' judgments.[13]

The Framers also considered whether to *require* Congress to legislate regarding the authentication and effect of states' acts, records, and proceedings, or whether to merely *allow* Congress to pass such laws.[14] The Framers ultimately selected the latter option, though the Convention records do not explicitly specify why the Framers did so.[15]

Finally, the Framers deliberated whether to *require* states to give full faith and credit to other states' acts, records, and proceedings versus *encouraging* states to do so.[16] The Framers

[8] *See* 2 Farrand's Records, *supra* note 6, at 448 ("Mr. Randolph said there was no instance of one nation executing judgments of the Courts of another nation. He moved the following proposition. 'Whenever the Act of any State, whether Legislative Executive or Judiciary shall be attested & exemplified under the seal thereof, such attestation and exemplification, shall be deemed in other States as full proof of the existence of that act—and its operation shall be binding in every other State, in all cases to which it may relate, and which are within the cognizance and jurisdiction of the State, wherein the said act was done.'").

[9] *See* 2 Farrand's Records, *supra* note 6, at 448 (noting that James Madison "wished the [federal] Legislature might be authorized to provide for the execution of Judgments in other States, under such regulations as might be expedient"); 2 Farrand's Records, *supra* note 6, at 448 (Gouverneur Morris's proposal to require Congress to "determine the proof and effect" of out-of-state "acts, records, and proceedings").

[10] *See* 2 Farrand's Records, *supra* note 6, at 601; U.S. Const. art. IV, § 1 ("[T]he Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.").

[11] *See* 2 Farrand's Records, *supra* note 6, at 485 (September 1, 1787 draft providing that "the Legislature shall by general laws prescribe the manner in which such acts, Records, & proceedings shall be proved, and the effect which *Judgments* obtained in one State, shall have in another") (emphasis added); 2 Farrand's Records, *supra* note 6, at 488–89 ("Mr. Randolph considered it as strengthening the general objection agst. the plan, that its definition of the powers of the Government was so loose as to give it opportunities of usurping all the State powers. He was for not going farther than the Report, which enables the Legislature to provide for the effect of *Judgments*.").

[12] *See* 2 Farrand's Records, *supra* note 6, at 488 ("Mr. Wilson remarked, that if the Legislature were not allowed to *declare the effect* the provision would amount to nothing more than what now takes place among all Independent Nations.").

[13] *See* 2 Farrand's Records, *supra* note 6, at 488 ("Mr. Govr. Morris moved to amend the Report concerning the respect to be paid to Acts Records &c of one State, in other States (see Sepr. 1.) by striking out 'judgments obtained in one State shall have in another' and to insert the word 'thereof' after the word 'effect[.]'"); 2 Farrand's Records, *supra* note 6, at 489 ("On the amendment as moved by Mr[.] Govr. Morris[:] Mas. ay. Ct ay. N. J. ay. Pa. ay. Md. no. Va no. N. C. ay. S. C. ay. Geo. no. [Ayes—6; noes—3.]"). *See also* 2 Farrand's Records, *supra* note 6, at 488 ("Docr. Johnson thought the amendment as worded would authorize the Genl. Legislature to declare the effect of Legislative acts of one State, in another State.").

[14] *Compare* 2 Farrand's Records, *supra* note 6, at 485 ("[T]he Legislature *shall* by general laws prescribe the manner in which such acts, Records, & proceedings shall be proved . . .") (emphasis added), *with* 2 Farrand's Records, *supra* note 6, at 489 (James Madison's motion to replace "shall" with "may.").

[15] *See* 2 Farrand's Records, *supra* note 6, at 489 ("On motion of Mr. Madison . . . 'shall' between 'Legislature' & 'by general laws' [was] struck out, and 'may' inserted. . . ."); U.S. Const. art. IV, § 1 ("[T]he Congress *may* by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.") (emphasis added). *But see* David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 Yale L.J. 1584, 1626–27 (2009) (suggesting that James Madison proposed this change to address Edmund Randolph's concern that the Full Faith and Credit Clause gave Congress too much power).

[16] *Compare* 2 Farrand's Records, *supra* note 6, at 485 (draft providing that "Full faith and credit *ought to* be given in each State to the public acts, records, and Judicial proceedings of every other State. . . .") (emphasis added), *with* 2 Farrand's Records, *supra* note 6, at 489 (James Madison's motion to replace "ought to" with "shall").

ultimately selected the former option.[17] The Convention records do not reveal why the Framers made that choice, and scholars have debated whether the Framers intended that choice to have any substantive effect.[18]

The Full Faith and Credit Clause provoked little to no opposition or discussion during the ratification debates.[19] In the *Federalist Papers*, James Madison described the Clause's grant of congressional authority to legislate regarding out-of-state acts, records, and judicial proceedings' authentication and effect as "an evident and valuable improvement on" the Articles of Confederation's full faith and credit provision.[20] Madison thus maintained that Congress's authority under the Clause would amount to "a very convenient instrument of justice" that would "be particularly beneficial on the borders of contiguous States."[21]

ArtIV.S1.3 Judicial Proceedings

ArtIV.S1.3.1 Early Precedent on Full Faith and Credit Clause

Article IV, Section 1:

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

After the Full Faith and Credit Clause's ratification, jurists debated whether states only needed to accept out-of-state judgments as *evidence* in judicial proceedings, or if they needed to give out-of-state judgments *conclusive effect* instead.[1] The Supreme Court reached the latter conclusion in *Mills v. Duryee*, holding that states ordinarily cannot reexamine an out-of-state judgment's merits.[2] The Court reasoned that if "judgments of the state Courts" were "considered *prima facie* evidence only," the Full Faith and Credit Clause "would be utterly unimportant and illusory," as "[t]he common law would give such judgments precisely the same effect."[3]

The legal basis for the *Mills* Court's ruling was not self-evident. As another chapter of this treatise explains, the First Congress passed a statute requiring "every court within the United

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[17] *See* 2 Farrand's Records, *supra* note 6, at 489 ("On motion of Mr. Madison, 'ought to' was struck out, and 'shall' inserted. . . ."); U.S. Const. art. IV, § 1 ("Full Faith and Credit *shall* be given in each State to the public Acts, Records, and judicial Proceedings of every other State.") (emphasis added).

[18] *See* 2 Farrand's Records, *supra* note 6, at 489.

[19] *See, e.g.*, James D. Sumner, Jr., *The Full-Faith-and-Credit Clause—Its History and Purpose*, 34 Or. L. Rev. 224, 235 (1955) ("Little attention was given the full-faith-and-credit provision before and during ratification . . . It is interesting to note that not a single debate arose on this provision of the Constitution in the ratifying conventions of the various states."); Max Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 Ill. L. Rev. 1, 9 (1944) ("There is almost no reference to [the Full Faith and Credit Clause] in the debates in the various states on adopting the Constitution.").

[20] The Federalist No. 42 (James Madison).

[21] *Id.*

[1] *See* Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 Va. L. Rev. 1201, 1232 (2009).

[2] 11 U.S. (7 Cranch) 481, 484 (1813) ("Congress ha[s] therefore declared the *effect* of the record by declaring what faith and credit shall be given to it."); *id.* ("[I]t is beyond all doubt that the judgment of the Supreme Court of New York was conclusive upon the parties in that state. It must, therefore, be conclusive here also."). *See also* Christmas v. Russell, 72 U.S. (5 Wall.) 290, 302–03 & n.14 (1866) (interpreting *Mills* as holding that a judicial record, "when duly authenticated, shall have in every other court of the United States the same faith and credit as it has in the State court from whence it was taken," and that "it is not competent for any other State to authorize its courts to open the merits and review the cause").

[3] 11 U.S. (7 Cranch) at 485. *See also* Hampton v. M'Connel, 16 U.S. (3 Wheat.) 234, 235 (1818) (explaining that *Mills* held "that the judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced").

States" to give "faith and credit" to properly authenticated judicial records and proceedings.[4] It is unclear whether the *Mills* Court meant that the *Constitution itself* requires state courts to give conclusive effect to out-of-state judgments, or that the full faith and credit *statute* mandated that result instead.[5] The answer to that question has significant practical consequences: If the Constitution *itself* requires states to give out-of-state judgments conclusive effect, then Congress may lack the power to modify that rule legislatively.[6] Although *Mills* contains language supporting either interpretation,[7] the Court apparently construed *Mills* as an interpretation of the full faith and credit *statute* from 1813 to 1887.[8]

The early Court nonetheless recognized limited circumstances in which states could disregard out-of-state judgments. In *M'Elmoyle v. Cohen*, the Court held that a state need not enforce another state's judgment if the first state's statute of limitations has expired.[9] In *D'Arcy v. Ketchum*, the Court ruled that if a state court renders a judgment against a defendant whom the plaintiff did not properly serve with process, other states need not give that judgment full faith and credit.[10] And in *Thompson v. Whitman*, the Court held that a state need not honor an out-of-state judgment from a court that lacked jurisdiction to issue it.[11]

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[4] *See* Act of May 26, 1790, ch. 11, 1 Stat. 122. *See also* ArtIV.S1.5.1 Generally Applicable Federal Law on Full Faith and Credit Clause.

[5] *See* Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 Geo. Mason L. Rev. 485, 521 (2013) ("While *Mills* holds that conclusive effect must be given to state judgments, it is unclear whether this holding was derived from the 1790 Act, the Constitution, or both.") (footnotes omitted).

[6] *See* David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 Yale L.J. 1584, 1590 (2009) (arguing that the Supreme Court's later decision to cast *Mills*'s holding "as constitutional rather than statutory in origin entirely changed the perceived allocation of power between the legislative and judicial branches"). *See also* ArtIV.S1.3.2 Modern Doctrine on Full Faith and Credit Clause and ArtIV.S1.5.2 Specifically Applicable Federal Law on Full Faith and Credit Clause.

[7] *Compare* 11 U.S. (7 Cranch) at 484 ("The *act* declares that the record duly authenticated shall have such faith and credit as it has in the state Court from whence it is taken . . . *Congress* ha[s] therefore declared the *effect* of the record by declaring what faith and credit shall be given to it.") (first and second emphases added), *and id.* at 485 ("[T]he [C]onstitution contemplated *a power in* [*C*]*ongress* to give a conclusive effect to such judgments. And we can perceive no rational interpretation *of the* [A]ct *of* [*C*]*ongress*, unless it declares a judgment conclusive when a Court of the particular state where it is rendered would pronounce the same decision.") (emphases added), *with id.* ("Were the construction contended for by the Plaintiff in error to prevail, . . . *this clause in the constitution* would be utterly unimportant and illusory.") (emphasis added), *and* Schmitt, *supra* note 5, at 512 n.155 ("[I]f Justice Story were referring only to the 1790 Act [in *Mills*], he would have said that such a construction would render the Act, rather than the Constitution, illusory.").

[8] *See, e.g.*, D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 175–76 (1850) (suggesting that *Mills* involved the "construction of *the act of 1790*") (emphasis added); *Christmas*, 72 U.S. (5 Wall.) at 302 (stating that *Mills* involved "the construction of th[e] *act of Congress*") (emphasis added); Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 462 (1873) ("The court in [*Mills*] held that the *act* gave to the judgments of each State the same conclusive effect, as records, in all the States, as they had at home . . .") (emphasis added). *But see* ArtIV.S1.3.2 Modern Doctrine on Full Faith and Credit Clause (explaining how the Court's interpretation of *Mills* shifted in 1887).

[9] *See* 38 U.S. (13 Pet.) 312, 328 (1839) ("[T]he statute of limitations of Georgia can be pleaded to an action in that state, founded upon a judgment rendered in the state of South Carolina.").

[10] 52 U.S. at 165–68, 172–76. *See also* Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 406 (1855) ("[W]henever an action is brought in one State on a judgment recovered in another, it is not enough to show it to be valid in the State where it was rendered; it must also appear that the defendant was either personally within the jurisdiction of the State, or had legal notice of the suit . . .").

[11] 85 U.S. (18 Wall.) at 469 (holding that "the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the" Full Faith and Credit Clause).

ArtIV.S1.3.2 Modern Doctrine on Full Faith and Credit Clause

Article IV, Section 1:

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

The Supreme Court reinterpreted the Full Faith and Credit Clause in *Chicago & Alton Railroad v. Wiggins Ferry Co.*, in which the Court indicated that the *Clause itself*, not just the statute Congress passed to implement the Clause, compelled its holding in *Mills* requiring states to give out-of-state judgments conclusive effect.[1] Cases following *Chicago & Alton Railroad* similarly characterized the Clause itself as imposing this requirement, often without mentioning the full faith and credit statute.[2] The Court did not explain why it reconceptualized *Mills*'s holding as a constitutional command rather than a legislative mandate.[3]

Thus, under the Court's current interpretation of the Clause, courts ordinarily must give an out-of-state judgment the same effect it would have in the state that issued it.[4] A court may not disregard an out-of-state judgment merely "because it disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits"; the Clause "precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based."[5] Nor may state courts decline to enforce other states' judgments for public policy reasons.[6]

Still, the modern Court recognizes limited circumstances in which a state may refuse to enforce an out-of-state judgment.[7] For example, a state need not honor a judgment if the

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[1] *See* 119 U.S. 615, 622 (1887) ("Without doubt the *constitutional requirement* (article 4, § 1) that 'full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state,' implies that the public acts of every state shall be given the same *effect* by the courts of another state that they have by law and usage at home. *This is clearly the logical result of the principles announced as early as 1813, in* Mills v. Duryee, . . . and steadily adhered to ever since.") (emphasis added).

[2] *See, e.g.*, Harris v. Balk, 198 U.S. 215, 221 (1905) ("The state court of North Carolina has refused to give any effect in this action to the Maryland judgment; and the Federal question is whether it did not thereby refuse the full faith and credit to such judgment which is *required by the Federal Constitution*. If the Maryland court had jurisdiction to award it, the judgment is valid and entitled to the same full faith and credit in North Carolina that it has in Maryland as a valid domestic judgment.") (emphasis added); Clarke v. Clarke, 178 U.S. 186, 195 (1900) (discussing "the *constitutional requirement* that full faith and credit must be given in one state to the judgments and decrees of the courts of another state") (emphasis added). *See also* Ann Woolhandler & Michael G. Collins, *Jurisdictional Discrimination and Full Faith and Credit*, 63 Emory L.J. 1023, 1034 (2014) ("It was only in the late nineteenth and early twentieth century that the Court began to indicate that the Constitution on its own might require the enforcement of sister-state judgments.").

[3] *See* Woolhandler & Collins, *supra* note 2, at 1034 ("The Court provided no explanation for its move . . ."). *See also Chi. & A. R.*, 119 U.S. at 622; *Clarke*, 178 U.S. at 195; *Harris*, 198 U.S. at 221.

[4] *See, e.g.*, Thompson v. Thompson, 484 U.S. 174, 180 (1988) (holding that the Clause requires states "to accord the same force to judgments as would be accorded by the courts of the State in which the judgment was entered"); V.L. v. E.L., 577 U.S. 404, 407 (2016) (per curiam) ("With respect to judgments, 'the full faith and credit obligation is exacting.' . . . 'A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.'") (quoting Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998)); Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 704 (1982) ("[T]he judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced.") (citation omitted).

[5] *V.L.*, 577 U.S. at 407 (quoting Milliken v. Meyer, 311 U.S. 457, 462 (1940)).

[6] *See, e.g.*, *Baker*, 522 U.S. at 233 ("[O]ur decisions support no roving 'public policy exception' to the full faith and credit due judgments.") (emphasis omitted); Estin v. Estin, 334 U.S. 541, 546 (1948) (explaining that the Full Faith and Credit Clause "order[s] submission by one State even to hostile policies reflected in the judgment of another State").

[7] *See, e.g.*, Nelson v. George, 399 U.S. 224, 229 (1970) ("[T]he Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment . . ."); Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268, 276 (1935) (suggesting that courts need not honor a judgment "procured by fraud").

rendering court lacked jurisdiction to enter it.[8] A court's power to scrutinize another court's jurisdiction is limited, however.[9] The court must ordinarily presume that the issuing court had jurisdiction unless the judicial record or other evidence reveals a jurisdictional defect.[10] If the parties in the first action litigated whether the rendering court had jurisdiction, and the first court answered that question affirmatively, the second court must accept that conclusion.[11]

Because the Full Faith and Credit Clause ordinarily requires states to give out-of-state judgments the same effect as the states that issued them,[12] whether a judgment has conclusive effect depends on whether the issuing court would regard the judgment as "final." While some states hold that a judgment is final for full faith and credit purposes even when it is pending on appeal, other states hold that a judgment is not final until the appellate process has concluded.[13]

ArtIV.S1.4 State Public Acts and Records

ArtIV.S1.4.1 Early Doctrine on State Law on Full Faith and Credit Clause

Article IV, Section 1:

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

While the Supreme Court considered the Full Faith and Credit Clause's applicability to public acts several times during the early twentieth century,[1] its opinion in *Bradford Electric Light Co. v. Clapper* proved especially significant.[2] In *Clapper*, a Vermont resident who worked

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[8] *See, e.g.*, *V.L.*, 577 U.S. at 407 ("A State is not required, however, to afford full faith and credit to a judgment rendered by a court that 'did not have jurisdiction over the subject matter or the relevant parties.'") (quoting *Underwriters Nat'l Assurance*, 455 U.S. at 705); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 805 (1985) ("[A] judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere . . .").

[9] *See, e.g.*, *V.L.*, 577 U.S. at 407 ("That jurisdictional inquiry, however, is a limited one.").

[10] *Id.* ("[I]f the judgment on its face appears to be a 'record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself.'") (quoting *Milliken*, 311 U.S. at 462).

[11] *See Underwriters Nat'l Assurance*, 455 U.S. at 706 ("[A] judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.") (quoting Durfee v. Duke, 375 U.S. 106, 111 (1963)).

[12] *See supra* note 4 and accompanying text.

[13] *Compare, e.g.*, Brinker v. Superior Ct., 1 Cal. Rptr. 2d 358, 360 (Cal. Ct. App. 1991) ("Under New Jersey law, a judgment is 'final' for res judicata purposes, even though it is pending on appeal. Accordingly, the New Jersey judgment . . . was entitled to full faith and credit.") (internal citations omitted), *with, e.g.*, Andre v. Morrow, 680 P.2d 1355, 1362 (Idaho 1984) ("The second main element for recognition under principles of full faith and credit is a final judgment. Under the law of California, 'a judgment does not become final so long as the action in which it is rendered is pending . . . and an action is deemed pending until it is finally determined on appeal or until the time for an appeal has passed.'") (ellipses in original) (quoting Pac. Gas & Elec. Co. v. Nakano, 87 P.2d 700, 702 (Cal. 1939)).

[1] *See, e.g.*, Supreme Council of the Royal Arcanum v. Green, 237 U.S. 531, 544 (1915) (concluding that a New York court violated the Full Faith and Credit Clause by failing to give Massachusetts law "controlling effect"); N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914) (asserting that a "foundation[al]" principle of the Full Faith and Credit Clause is that one state may not enact statutes that "operate beyond the jurisdiction of that State" to "destroy freedom of contract" in another state); Converse v. Hamilton, 224 U.S. 243, 261 (1912) (holding that "the laws of Minnesota . . . were not accorded that faith and credit to which they were entitled under the Constitution and laws of the United States"); Olmsted v. Olmsted, 216 U.S. 386, 395 (1910) (concluding that the Full Faith and Credit Clause did not "requir[e] the courts of the state of New York to give force and effect to the statute of the state of Michigan, so as to control the devolution of title to lands in New York").

[2] *See* 286 U.S. 145 (1932), *overruled in part by* Crider v. Zurich Ins. Co., 380 U.S. 39 (1965).

for a Vermont company died while working in New Hampshire.[3] His widow sued his employer in a New Hampshire court under New Hampshire's employers' liability statute.[4] The employer argued that the Full Faith and Credit Clause required the New Hampshire court to apply Vermont's worker's compensation law.[5] The Supreme Court explained that the Clause leaves "room for some play of conflicting policies," and "does not require the enforcement of every right conferred by a statute of another state."[6] The Court thus indicated that courts should balance each state's interests when determining which of two competing state statutes to apply.[7] Because Vermont had stronger interests in the dispute than New Hampshire, the Court ruled that Vermont law applied.[8]

The Supreme Court refined *Clapper*'s balancing approach in *Alaska Packers Ass'n v. Industrial Accident Commission of California*.[9] In that case, a California company executed an employment contract in California with a nonresident alien from Mexico.[10] The contract provided that the company would transport the worker to Alaska to perform seasonal work, and then return him to California to be paid.[11] The parties agreed in their contract to be bound by Alaska's worker's compensation law in the event the worker was injured.[12] After the worker was injured in Alaska, California's Industrial Accident Commission awarded him compensation under California's worker's compensation statute.[13] The employer argued that, by applying California law, the Commission had denied Alaska law full faith and credit.[14] Noting that requiring courts to apply other states' statutes whenever they conflict with the home state's laws would produce the "absurd result" that no state could apply its own laws in its own courts, the *Alaska Packers* Court rejected the employer's argument.[15] Although the Court reaffirmed *Clapper*'s holding that courts should balance states' competing interests when deciding which of two states' laws to apply, it added a new presumption in favor of states

[3] *Id.* at 151.

[4] *Id.* at 150.

[5] *See id.* at 151, 159.

[6] *See id.* at 160.

[7] *See id.* at 159–62. *See also* Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 495 (2003) (explaining that *Clapper* held that courts should "appraise[ ] and balance[ ] state interests when invoking the Full Faith and Credit Clause to resolve conflicts between overlapping laws of coordinate States").

[8] *See* 286 U.S. at 161–63 ("[T]he mere fact that the Vermont legislation does not conform to that of New Hampshire does not establish that it would be obnoxious to the latter's public policy to give effect to the Vermont statute in cases involving only the rights of residents of that state incident to the relation of employer and employee created there. . . . The interest of New Hampshire was only casual. Leon Clapper was not a resident there. He was not continuously employed there. So far as it appears, he had no dependent there. It is difficult to see how the state's interest would be subserved, under such circumstances, by burdening its courts with this litigation. . . . [T]he rights as between the company and Leon Clapper or his representative are to be determined according to the Vermont act.").

[9] 294 U.S. 532 (1935).

[10] *Id.* at 538, 542.

[11] *Id.* at 538.

[12] *Id.*

[13] *See id.* at 537–39.

[14] *Id.* at 539. Alaska was a territory rather than a state at this time, but the court assumed—and the parties conceded—that the federal full faith and credit statute made full faith and credit principles equally applicable to territorial laws. *See id.* at 546. *See also* ArtIV.S1.5.1 Generally Applicable Federal Law on Full Faith and Credit Clause (discussing this statute).

[15] *See* 294 U.S. at 547 ("A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own. Unless by force of that clause a greater effect is thus to be given to a state statute abroad than the clause permits it to have at home, it is unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another.").

applying their own laws.[16] Reasoning that California had a strong interest in providing a remedy for injured workers within its borders,[17] the Court let California apply its own laws to the dispute.[18]

That same year, the Court considered whether the Clause required states to entertain causes of action based on other states' laws. In *Broderick v. Rosner*, New York's Superintendent of Banks sued various stockholders in New Jersey under New York's shareholder liability statute.[19] The New Jersey courts ruled that the Superintendent could not maintain a lawsuit in New Jersey based on another state's shareholder liability laws.[20] The Supreme Court held that the Full Faith and Credit Clause required the New Jersey courts to entertain the suit.[21] The Court reasoned that permitting states to deny jurisdiction to hear cases based on other states' laws would allow states to "escape [their] constitutional obligations" to give other states' public acts full faith and credit.[22]

The Court again considered the Clause's application to out-of-state statutes in *John Hancock Mutual Life Insurance Co. v. Yates*.[23] In *Yates*, a man bought a life insurance contract in New York, where he resided with his wife.[24] After he died, his widow moved to Georgia and sued to enforce the insurance policy in a Georgia court.[25] The Georgia courts refused to apply a New York law that gave the insurance company a meritorious defense to the widow's claim.[26] The Supreme Court ruled that the Georgia courts needed to give the New York law full faith and credit.[27] Notably, the Court did not mention or apply *Alaska Packers*' holding that courts must balance states' competing interests when deciding whether to apply another state's

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[16] *See id.* at 547–48 ("[T]he conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight. . . . Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum."). *See also* J. Stephen Clark, *Conflicts Originalism: The "Original Content" of the Full Faith and Credit Clause and the Compulsory Choice of Marriage Law*, 118 W. Va. L. Rev. 547, 553 (2015) (opining that *Alaska Packers* "weakened [*Clapper*'s] balancing approach by adding a strong presumption that a forum state's choice to disregard sibling law and apply its own law is constitutional"); Crider v. Zurich Ins. Co., 380 U.S. 39, 40 (1965) (describing *Alaska Packers* as "mark[ing] a break with the *Clapper* philosophy").

[17] *See* 294 U.S. at 542–43 ("The probability is slight that injured workmen, once returned to California, would be able to retrace their steps to Alaska, and there successfully prosecute their claims for compensation. Without a remedy in California, they would be remediless, and there was a danger that they might become public charges, both matters of grave public concern to the state. California, therefore, had a legitimate public interest in . . . providing a remedy available to [the injured worker] in California.").

[18] *See id.* at 549–50 ("[California's] interest is sufficient to justify its legislation and is greater than that of Alaska, of which the employee was never a resident and to which he may never return. Nor should the fact that the employment was wholly to be performed in Alaska, although temporary in character, lead to any different result.").

[19] 294 U.S. 629, 637–38 (1935).

[20] *See id.* at 638–39.

[21] *Id*. at 647.

[22] *See id.* at 642–43 ("The power of a state to determine the limits of the jurisdiction of its courts and the character of controversies which shall be heard therein is subject to the limitations imposed by the Federal Constitution. . . . A 'State cannot escape its constitutional obligations (under the full faith and credit clause) by the simple device of denying jurisdiction in such cases to Courts otherwise competent.'") (quoting Kenney v. Supreme Lodge of the World, 252 U.S. 411, 415 (1920)); *id.* at 643 (holding that a state "may not . . . deny the enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject-matter and the parties").

[23] 299 U.S. 178 (1936).

[24] *Id.* at 179.

[25] *Id.*

[26] *See id.* at 179–82.

[27] *Id.* at 183.

statute.[28] Instead, the Court reasoned that the case presented "no occurrence, nothing done, to which the law of Georgia could apply" because "[t]he contract of insurance was made, and the death of the insured occurred in," New York.[29]

ArtIV.S1.4.2 Modern Doctrine on State Law on Full Faith and Credit Clause

Article IV, Section 1:

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

The Court reinterpreted the Full Faith and Credit Clause in *Pacific Employers Insurance Co. v. Industrial Accident Commission*.[1] In that case, a Massachusetts resident was injured while working for a Massachusetts company in California.[2] The California Industrial Accident Commission awarded the employee compensation under California's worker's compensation law.[3] The employer's insurer challenged the award, claiming that California violated the Clause by applying its own law instead of Massachusetts'.[4] The *Pacific Employers* Court opined that "the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."[5] Quoting *Alaska Packers*, the Court explained that rigidly requiring states to apply other states' statutes in the event of a conflict would create "the absurd result" that a state's laws would apply in *other* states' courts, but not its *own* courts.[6] However, unlike in *Clapper* and *Alaska Packers*, the Court did not balance the states' competing interests to determine which law applied.[7] Instead, the Court declared that the Full Faith and Credit Clause does not "enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it."[8] The Court thus upheld the California award.[9]

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[28] *See id.* at 179–83.

[29] *See id.* at 182. *See also* Allstate Ins. Co. v. Hague, 449 U.S. 302, 310–11 (1981) (plurality opinion) (interpreting *Yates* to "stand for the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional," and that "a postoccurrence change of residence to the forum State—standing alone—was insufficient to justify application of forum law").

[1] 306 U.S. 493 (1939).

[2] *Id.* at 497–98.

[3] *Id.*

[4] *Id.* at 497.

[5] *Id.* at 501.

[6] *Id.* ("A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.") (quoting Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 547 (1935)). *See also id.* at 501–02 ("[I]n cases like the present[, a rigid interpretation of the Full Faith and Credit Clause] would create an impasse which would often leave the employee remediless. Full faith and credit would deny to California the right to apply its own remedy, and its administrative machinery may well not be adapted to giving the remedy afforded by Massachusetts. Similarly, the full faith and credit demanded for the California Act would deny to Massachusetts the right to apply its own remedy, and its Department of Industrial Accidents may well be without statutory authority to afford the remedy provided by the California statute.").

[7] *See id.* at 497–505. *See also* Crider v. Zurich Ins. Co., 380 U.S. 39 (1965) (describing *Pacific Employers* as "mark[ing] a break with the *Clapper* philosophy"); Carroll v. Lanza, 349 U.S. 408, 412 (1955) (stating that *Pacific Employers* "departed . . . from the *Clapper* decision"); J. Stephen Clark, *Conflicts Originalism: The "Original Content" of the Full Faith and Credit Clause and the Compulsory Choice of Marriage Law*, 118 W. VA. L. REV. 547, 553 (2015) (observing that "in *Pacific Employers* . . . the Court abandoned the balancing method altogether").

[8] 306 U.S. at 504–05.

Since *Pacific Employers*, the Court has repeatedly reaffirmed that courts should no longer balance states' interests when evaluating whether to apply another state's laws.[10] The Court has stated that it abandoned the interest-balancing approach because there are no clear standards for assessing which state's interest is weightier in a particular case.[11] Thus, subject to the exceptions discussed below, "a State need not 'substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'"[12] For instance, the Court ruled in *Sun Oil Co. v. Wortman* that a state may apply its own statute of limitations to claims governed by another state's laws, because states are "competent to legislate" procedural rules to govern suits in their own courts.[13]

Nonetheless, the Court has recognized limits on a state's discretion to apply its own law. For example, in *Franchise Tax Board v. Hyatt (Franchise Tax Board II)*, a Nevada court awarded damages against a California agency that exceeded the damages Nevada would award in a similar suit against its own agencies.[14] The Court explained that the Full Faith and Credit Clause forbids states from applying "a special rule of law that evinces a 'policy of hostility'" towards other states.[15] Because the Nevada court did not "appl[y] the principles of Nevada law ordinarily applicable to suits against Nevada's own agencies," but instead "applied a special rule of law applicable only in lawsuits against its sister States, such as California," the Supreme Court held that the Nevada court's decision "reflect[ed] a constitutionally impermissible 'policy of hostility'" toward other states and thus violated the Clause.[16] While the Court suggested that policy considerations might "justify the application of a special rule of Nevada law that discriminate[d] against its sister States" in a different case, Nevada had not offered "sufficient policy considerations" in *Franchise Tax Board II*.[17]

Nor may states close their courts to claims based on other states' laws. For instance, in *Hughes v. Fetter*, a Wisconsin resident died in an automobile collision with another Wisconsin resident that occurred in Illinois.[18] The decedent's administrator—who was also a Wisconsin resident—sued the other driver and his insurer in a Wisconsin state court, asserting claims

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[9] *See id.* at 497, 505.

[10] *See, e.g.*, Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 496 (2003) [hereinafter *Franchise Tax Bd. I*] (explaining that the Court has "abandoned the balancing-of-interests approach to conflicts of law under the Full Faith and Credit Clause"); Franchise Tax Bd. v. Hyatt, No. 14-1175, slip op. at 7–8 (U.S. Apr. 19, 2016) [hereinafter *Franchise Tax Bd. II*] (similar).

[11] *See, e.g.*, *Franchise Tax Bd. I*, 538 U.S. at 498 ("[T]he question of which sovereign interest should be deemed more weighty is not one that can be easily answered."); *id.* at 496 ("As Justice Robert H. Jackson . . . aptly observed, 'it [is] difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution.'") (quoting Justice Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 16 (1945)); *Franchise Tax Bd. II*, slip op. at 8 (conceding that the interest-balancing approach "led to results that seemed to differ depending, for example, upon whether the case involved commercial law, a shareholders' action, insurance claims, or workman's compensation statutes").

[12] *Franchise Tax Bd. I*, 538 U.S. at 496 (quoting *Pac. Emp'rs Ins.*, 306 U.S. at 501). *See also, e.g.*, Pink v. A.A.A. Highway Express, Inc., 314 U.S. 201, 210 (1941) (holding that the Full Faith and Credit Clause "is not an inexorable and unqualified command," but rather "leaves some scope for state control within its borders of affairs which are peculiarly its own"); Nevada v. Hall, 440 U.S. 410, 422 (1979) ("[T]he Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."), *overruled on other grounds by* Franchise Tax Bd. v. Hyatt, No. 17-1299, slip op. at 1–18 (U.S. May 13, 2019).

[13] *See* 486 U.S. 717, 722 (1988).

[14] *Franchise Tax Bd. II*, slip op. at 3–4.

[15] *Id.* at 4 (quoting *Franchise Tax Bd. I*, 538 U.S. at 499).

[16] *Id.* at 6–7.

[17] *See id.* at 7 (quoting *Carroll*, 349 U.S. at 413).

[18] 341 U.S. 609, 610, 613 (1951).

based on Illinois' wrongful death statute.[19] The Wisconsin court ruled that Wisconsin's wrongful death statute—which only provided a cause of action for deaths occurring in Wisconsin—established a public policy barring Wisconsin courts from hearing lawsuits based on other states' wrongful death laws.[20] Building on its earlier decision in *Broderick v. Rosner*,[21] the Supreme Court reversed, holding that Wisconsin violated the Full Faith and Credit Clause by refusing to hear the administrator's claim.[22] The Court emphasized that Wisconsin had not merely opted to apply its own wrongful death statute to the plaintiff's claims, which likely would be permissible.[23] Rather, Wisconsin had wholly "close[d] the doors of its courts to the cause of action created by the Illinois wrongful death act."[24] By doing so, Wisconsin contravened "the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states."[25]

ArtIV.S1.5 Congressional Enforcement

ArtIV.S1.5.1 Generally Applicable Federal Law on Full Faith and Credit Clause

Article IV, Section 1:

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

Congress first invoked the Clause in 1790 to pass legislation establishing methods for authenticating other states' acts, records, and proceedings.[1] The 1790 Act provided that if a litigant duly authenticated a judicial record or proceeding, then "every court within the United States" would have to grant that record or proceeding the same "faith and credit" as it would "have by law or usage in the courts of the state from whence the said records" were taken.[2] By applying this command to "*every* court within the United States," Congress required *federal* courts to give state judgments full faith and credit, even though the Full Faith and Credit

[19] *See id.*

[20] *See id.* at 610 & n.2.

[21] 294 U.S. 629 (1935). *See also supra* ArtIV.S1.4.1 Early Doctrine on State Law on Full Faith and Credit Clause (discussing *Broderick*).

[22] *See* 341 U.S. at 613–14.

[23] *See id.* at 612 n.10 ("The present case is not one where Wisconsin, having entertained appellant's lawsuit, chose to apply its own instead of Illinois' statute to measure the substantive rights involved. This distinguishes the present case from those where we have said that 'Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted.'") (quoting Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 547 (1935)).

[24] *Id.* at 611.

[25] *Id.* at 612. *See also Carroll*, 349 U.S. at 413 (explaining that *Hughes* "held that Wisconsin could not refuse to entertain a wrongful death action under an Illinois statute for an injury occurring in Illinois, since [the Court] found no sufficient policy considerations to warrant such refusal"); Wells v. Simonds Abrasive Co., 345 U.S. 514, 518 (1953) (stating that "[t]he crucial factor" in *Hughes* "was that the forum laid an uneven hand on causes of action arising within and without the forum state"); Howlett *ex rel.* Howlett v. Rose, 496 U.S. 356, 381 (1990) (citing *Hughes* for the proposition "that a court of otherwise competent jurisdiction may not avoid its parallel obligation under the Full Faith and Credit Clause to entertain another State's cause of action by invocation of the term 'jurisdiction'").

[1] *See* Act of May 26, 1790, ch. 11, 1 Stat. 122 ("[T]he acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto . . ."); *id.* ("[T]he records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form."). *See also* San Remo Hotel, L.P. v. City & Cnty. of S.F., 545 U.S. 323, 336 (2005) ("In 1790, Congress responded to the Constitution's invitation by enacting the first version of the full faith and credit statute.").

[2] Act of May 26, 1790, ch. 11, 1 Stat. 122.

Clause only applies to states.[3] The 1790 Act, however, only purported to grant "faith and credit" to "records and *judicial* proceedings;" it did not list *legislative* acts among the legal documents entitled to full faith and credit.[4]

Congress amended the 1790 Act in 1804.[5] The 1804 Act added provisions governing the authentication and effect of "records and exemplifications of office books, which are or may be kept in any public office of any state, not appertaining to a court."[6] Additionally, whereas the 1790 Act only applied to *state* acts, records, and proceedings, the 1804 Act expanded the statute to also apply to *U.S. territories*' acts, records, and proceedings.[7] However, like the 1790 Act, the 1804 Act did not explicitly require states to give faith and credit to other states' *legislative* acts.[8]

The full faith and credit statute remained essentially unchanged until 1948, when Congress enacted the current Full Faith and Credit Act.[9] Like its predecessors, the Full Faith and Credit Act prescribes methods by which one may authenticate an act, record, or proceeding of a state, territory, or possession.[10] But unlike its predecessors, the Full Faith and Credit Act requires state and territorial courts to give "full faith and credit" not only to other jurisdictions' *judicial* records and proceedings, but also to *legislative* acts.[11] The Act's legislative history suggests that Congress did not intend that change to alter the Supreme Court's prevailing rule

[3] *Compare id.* (emphasis added), *with* U.S. Const. art. IV, § 1 (providing that "Full Faith and Credit shall be given *in each State* to the public Acts, Records, and judicial Proceedings of every other State") (emphasis added). *See also* Univ. of Tenn. v. Elliott, 478 U.S. 788, 799 (1986) ("The Full Faith and Credit Clause is of course not binding on federal courts . . ."); Kremer v. Chem. Constr. Corp., 456 U.S. 461, 462–63 (1982) (explaining that the 1790 Act "directed that all United States courts afford the same full faith and credit to state court judgments that would apply in the State's own courts").

[4] *See* Act of May 26, 1790, ch. 11, 1 Stat. 122 (emphasis added).

[5] *See* Act of Mar. 27, 1804, ch. 56, 2 Stat. 298.

[6] *See id*.

[7] *Compare* Act of May 26, 1790, ch. 11, 1 Stat. 122 ("[T]he acts of the legislatures *of the several states* shall be authenticated . . .") (emphasis added), *and id*. ("[T]he records and judicial proceedings of the courts *of any state*, shall be proved or admitted . . .") (emphasis added), *with* Act of Mar. 27, 1804, ch. 56, § 2, 2 Stat. 299 ("[A]ll the provisions of this act, and the act to which this is a supplement, shall apply as well to the public acts, records, office books, judicial proceedings, courts and offices *of the respective territories of the United States, and countries subject to the jurisdiction of the United States*, as to the public acts, records, office books, judicial proceedings, courts and offices of the several states.") (emphasis added). *See also* Atchison, Topeka, & Santa Fe Ry. v. Sowers, 213 U.S. 55, 64 (1909) (explaining that while the 1790 Act "did not include the territories," the 1804 Act "extend[ed] the provisions of the former statute to the public acts, records, judicial proceedings, etc., of the territories").

[8] *See* Act of Mar. 27, 1804, ch. 56, 2 Stat. 298. *See also* David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 Yale L.J. 1584, 1633 (2009) (stating that the 1804 Act contained "no mention of any effect that 'public acts' must be given").

[9] Act of June 25, 1948, ch. 646, § 1738, 62 Stat. 947 (codified at 28 U.S.C. § 1738). *See also* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 373 (1996) (referring to the 1948 Act as the "Full Faith and Credit Act"). *But see* Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 Mich. L. Rev. 33, 81 (1957) (noting that Congress made minor, non-substantive changes to the statute in 1875 and 1926).

[10] *See* 28 U.S.C. § 1738 ("The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory, or Possession thereto."); *id.* ("The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.").

[11] *See id.* ("*Such Acts*, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . .") (emphasis added). *See also* Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 Creighton L. Rev. 465, 471 (2005) ("In the 1948 revision of the Judicial Code, the wording of the first implementing statute was amended to include state statutes . . .").

that states generally may apply their own laws in their own courts.[12] Read literally, however, the Act's text suggests that courts must give other states' laws conclusive effect, which would modify that rule substantially.[13] The Supreme Court has not adopted that literal interpretation of the Act, however.[14]

Congress has not amended the Full Faith and Credit Act since 1948.[15] Thus, under current law, "all courts" in the United States—including federal courts—must "treat a state court judgment with the same respect that it would receive in the courts of the rendering state."[16] Thus, the Act ordinarily precludes parties from relitigating issues that other courts have adjudicated.[17]

ArtIV.S1.5.2 Specifically Applicable Federal Law on Full Faith and Credit Clause

Article IV, Section 1:

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

Congress has also passed full faith and credit statutes governing specific categories of acts, records, and proceedings.[1] For example, the Parental Kidnaping Prevention Act (PKPA)

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[12] *See* H.R. Rep. No. 80-308, at A150 (1947) (stating that the revisers changed the statutory language merely to "follow[ ] the language of Article IV, Section 1 of the Constitution"). *See also* ArtIV.S1.4.2 Modern Doctrine on State Law on Full Faith and Credit Clause (analyzing how the modern Court treats out-of-state public acts).

[13] *See* Willis L.M. Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. CHI. L. REV. 339, 343 (1952) ("As part of the 1948 revision to the Judicial Code, the implementing statute was amended so as to provide that both statutes and judgments alike should be accorded the 'same full faith and credit' throughout the country 'as they have . . . in the courts of such State . . . from which they are taken.' What, if anything, was intended to be accomplished by this amendment is by no means clear, since, so far as it appears, it was enacted by Congress without discussion and the Revisers' Notes state simply that it 'follows the language' of the full faith and credit clause itself. Taken literally, however, the amendment would seem to constitute a clear mandate that the Supreme Court should henceforth interject itself more forcibly into the field of choice of law."); Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEM. ST. U. L. REV. 1, 60–61 (1981) (surmising that the drafters of the 1948 amendment may not have appreciated or intended the consequences of affording full faith and credit to other states' legislative acts).

[14] *See, e.g.*, Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 494 (2003) (reaffirming "that the Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate'") (quoting Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988)). *See generally* ArtIV.S1.4.2 Modern Doctrine on State Law on Full Faith and Credit Clause. *See also* David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1620 (2009)(opining that the Supreme Court "has declined to take the 1948 Code's nominal prescription to replicate the effect of sister-state legislative acts seriously").

[15] *Compare* Act of June 25, 1948, ch. 646, § 1738, 62 Stat. 947, *with* 28 U.S.C. § 1738.

[16] Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 373 (1996). *See also* Kremer v. Chem. Constr. Corp., 456 U.S. 461, 466 (1982) ("Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged."); Allen v. McCurry, 449 U.S. 90, 96 (1980) (same).

[17] *See* San Remo Hotel, L.P. v. City & Cnty. of S.F., 545 U.S. 323, 336 (2005) (explaining that the Full Faith and Credit Act implements "[t]he general rule . . . that parties should not be permitted to relitigate issues that have been resolved by courts of competent jurisdiction").

[1] *See, e.g.*, 22 U.S.C. § 9003(g) ("Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the [Hague] Convention, in an action brought under [the International Child Abduction Remedies Act]."); 25 U.S.C. § 1911(d) ("The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.").

extends full faith and credit to child custody determinations.[2] Section 40221(a) of the Violent Crime Control and Law Enforcement Act of 1994 requires states to give certain out-of-state protection orders full faith and credit.[3] And the Full Faith and Credit for Child Support Orders Act governs the enforcement of out-of-state child support orders.[4]

Notably, each of these statutes *requires* states to give full faith and credit to particular acts, records, or proceedings. Congress has rarely enacted legislation purporting to allow states to *not* honor out-of-state acts or judgments.[5] For instance, Section 2(a) of the Defense of Marriage Act provided that "no State, territory, or possession of the United States, or Indian tribe" would "be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."[6] Scholars debated whether the Full Faith and Credit Clause authorized Congress to allow states to disregard out-of-state marriages in this fashion.[7] The Supreme Court mooted this debate when it held in *Obergefell v. Hodges* "that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character."[8] Because the *Obergefell* Court based its ruling on the Fourteenth Amendment, the Court left questions regarding Congress's power under the Full Faith and Credit Clause unanswered.[9] Thus, the boundaries of Congress's authority to prescribe the effect of state acts, records, and proceedings under the Clause remain unsettled.[10]

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[2] Pub. L. No. 96-611, §§ 6–10, 94 Stat. 3566 (1980) (codified as amended at 28 U.S.C. § 1738A). *See also* Thompson v. Thompson, 484 U.S. 174, 180 (1988) ("At the time Congress passed the PKPA, custody orders held a peculiar status under the full faith and credit doctrine . . . The anomaly traces to the fact that custody orders characteristically are subject to modification as required by the best interests of the child. As a consequence, some courts doubted whether custody orders were sufficiently 'final' to trigger full faith and credit requirements, and this Court had declined expressly to settle the question. Even if custody orders were subject to full faith and credit requirements, the Full Faith and Credit Clause obliges States only to accord the same force to judgments as would be accorded by the courts of the State in which the judgment was entered. Because courts entering custody orders generally retain the power to modify them, courts in other States were no less entitled to change the terms of custody according to their own views of the child's best interest.") (internal citations omitted).

[3] Pub. L. No. 103-322, § 40221(a), 108 Stat. 1796, 1926 (1994) (codified as amended at 18 U.S.C. § 2265).

[4] Pub. L. No. 103-383, 108 Stat. 4063 (1994) (codified as amended at 28 U.S.C. § 1738B).

[5] *See, e.g.*, Charles M. Yablon, *Madison's Full Faith and Credit Clause: A Historical Analysis*, 33 Cardozo L. Rev. 125, 135–36 (2011) (observing that "[t]he republic had been in existence for over 200 years before Congress" passed legislation purporting to "abrogate[ ] the full faith and credit mandate").

[6] *See* Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C).

[7] *Compare, e.g.*, Ralph U. Whitten, *Original Understanding*, 32 Creighton L. Rev. 255, 391 (1998) (arguing that Congress has "broad power to create statutes like DOMA under the Effects Clause"), *with, e.g.*, 142 Cong. Rec. S5932 (daily ed. June 6, 1996) (letter from Professor Laurence H. Tribe to Sen. Edward M. Kennedy) (arguing that DOMA § 2(a) was "plainly unconstitutional" because "the congressional power to 'prescribe . . . the effect' of sister-state acts, records, and proceedings, within the context of the Full Faith and Credit Clause, includes no congressional power to prescribe that some acts, records and proceedings that would otherwise be entitled to full faith and credit . . . shall instead . . . be entitled to no faith or credit at all") (first ellipses in original).

[8] 576 U.S. 644, 681 (2015). *See generally* Amdt14.S1.8.13.1 Overview of Fundamental Rights (analyzing *Obergefell*).

[9] *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey*, 64 Am. J. Comp. L. 221, 294 (2016).

[10] *See* Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 Geo. Mason L. Rev. 485, 485 (2013) ("[T]he Court has not yet ruled on the second portion of the Clause—that is, it has not addressed the contours of Congress's full faith and credit power."); Mark D. Rosen, *Congress's Primary Role in Determining What Full Faith and Credit Requires: An Additional Argument*, 41 Cal. W. Int'l L.J. 7, 11 (2010) ("As to precedent regarding congressional power to reduce the credit that . . . must be given to another state's laws or judgments, all we have are equivocal and somewhat contradictory statements by less than a majority of the Court."). *Compare* Thomas v. Wash. Gas Light Co., 448 U.S. 261, 272 n.18 (1980) (plurality opinion) ("[T]here is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court."), *with* Yarborough v. Yarborough, 290 U.S. 202, 215

Section 2—Interstate Comity

Clause 1—Privileges and Immunities

ArtIV.S2.C1.1 Overview of Privileges and Immunities Clause

Article IV, Section 2, Clause 1:

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

The first section of Article IV, Section 2 provides that the citizens of each state shall be "entitled to all Privileges and Immunities" of the citizens of other states. The provision is often called the "Privileges and Immunities Clause" or the "Comity Clause."[1] This Clause, which is textually tied to state citizenship, should not be confused with the distinct provision in the Fourteenth Amendment—the "Privileges *or* Immunities Clause"—which protects the privileges or immunities of citizens of the *United States* against state invasion.[2]

The key purpose of the Privileges and Immunities Clause "was to help fuse into one Nation a collection of independent sovereign States."[3] Under the prevailing view of the Clause, its central requirement is that "in any state every citizen of any other state is to have the same privileges and immunities which the citizens of that state enjoy."[4] In other words, the Clause "prevents a state from discriminating against citizens of other states in favor of its own."[5] The Clause's concerns implicate not only individual rights to nondiscriminatory treatment, but also "the structural balance essential to the concept of federalism."[6]

Most cases under the Privilege and Immunities Clause concern discriminatory state residency requirements or other preferences for state residents versus nonresidents. (For purposes of the Privileges and Immunities Clause, "the terms 'citizen' and 'resident' are 'essentially interchangeable.'"[7]) The Clause's prohibitions reach not only facial classifications based on state residency or citizenship, but also state or municipal laws[8] whose "practical

n.2 (1933) (Stone, J., dissenting) (arguing that "[t]he mandatory force of the full faith and credit clause as defined by this Court may be, in some degree not yet fully defined, . . . contracted by Congress.").

[1] *See* Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 Ga. L. Rev. 1117, 1122 (2009).

[2] U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of *the United States*; . . . " (emphasis added)).

[3] Toomer v. Witsell, 334 U.S. 385, 395 (1948). While the Privileges and Immunities Clause was "intended to create a national economic union," the Court "has never held that [the Clause] protects only economic interests." Supreme Ct. of N.H. v. Piper, 470 U.S. 274, 280, 281 n.11 (1985) (citations omitted).

[4] Hague v. Comm. for Indus. Org., 307 U.S. 496, 511 (1939); *see also* Slaughter-House Cases, 83 U.S. 36, 77 (1872) (stating the "sole purpose" of the Privileges and Immunities Clause is "to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens . . . the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction").

[5] *Hague*, 307 U.S. at 511; *accord* United States v. Harris, 106 U.S. 629, 643 (1883) ("[The Privileges and Immunities Clause's] object is to place the citizens of each state upon the same footing with citizens of other states, and inhibit discriminative legislation against them by other states.").

[6] Austin v. New Hampshire, 420 U.S. 656, 662 (1975).

[7] Hicklin v. Orbeck, 437 U.S. 518, 524 n.8 (1978) (quoting *Austin*, 420 U.S. at 662 n.8).

[8] United Bldg. & Const. Trades Council of Camden Cnty. & Vicinity v. Mayor of Camden, 465 U.S. 208, 214 (1984) ("The fact that the ordinance in question is a municipal, rather than a state, law does not somehow place it outside the scope of the Privileges and Immunities Clause."). In applying the Privileges and Immunities Clause to municipal and local laws, *United Building* reasoned that the Clause should not permit states to exclude out-of-state residents from benefits through the simple expedient of delegating authority to political subdivisions. *Id.* at 217.

effect" is discriminatory against out-of-state residents.[9] Controversies between a state and its *own* citizens are not covered by the provision.[10]

Not all distinctions between state residents and nonresidents violate the Privileges and Immunities Clause.[11] States may, for example, limit voting rights to state residents or make state residency a qualification for elective office.[12] Nor must a state "always apply all its laws or all its services equally to anyone, resident or nonresident."[13] Rather, discrimination only implicates the Clause when it relates to a right or activity that is sufficiently "fundamental."[14] (Whether a right or activity is fundamental under the Privileges and Immunities Clause is doctrinally distinct from whether a right is fundamental under the Fourteenth Amendment's Due Process or Equal Protection Clauses.[15]) For example, the right of nonresidents to "ply their trade, practice their occupation, or pursue a common calling" on substantially equal terms as state citizens is protected as fundamental under the Privileges and Immunities Clause.[16]

Even if a state law discriminates against nonresidents as to a fundamental right or activity, it may still be constitutional if the state can justify its action under a two-step test developed by the Supreme Court. First, the state must show there is "a substantial reason for the difference in treatment."[17] Second, the discrimination must bear a "substantial relationship to the State's objective."[18] Under this form of intermediate scrutiny,[19] the Court has struck down, for example, state preferences for hiring in-state residents to work on oil and gas pipelines[20] and residency requirements for admission to a state bar.[21]

Beyond state discrimination against nonresidents[22] and the right to travel,[23] the Privileges and Immunities Clause's significance has waned with the incorporation of most of the Bill of Rights against state invasion via the Fourteenth Amendment's Due Process

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[9] Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 67 (2003) (citing Chalker v. Birmingham & N.W. Ry., 249 U.S. 522, 527 (1919)).

[10] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 138 (1873); Cove v. Cunningham, 133 U.S. 107 (1890). *But see* Zobel v. Williams, 457 U.S. 55, 75 (1982) (O'Connor, J., concurring).

[11] Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 383 (1978).

[12] *Id*.

[13] McBurney v. Young, 569 U.S. 221, 226 (2013) (quoting *Baldwin*, 436 U.S. at 383).

[14] *United Bldg.*, 465 U.S. at 218 (citing *Baldwin*, 436 U.S. at 388); *see also* Corfield v. Coryell, 6 F. Cas. 546, 551–52 (Washington, Circuit Justice, C.C.E.D. Pa. 1823).

[15] *See* Amdt14.S1.8.13.1 Overview of Fundamental Rights.

[16] Hicklin v. Orbeck, 437 U.S. 518, 524 (1978); *accord* Supreme Ct. of N.H. v. Piper, 470 U.S. 274, 280 (1985); Toomer v. Witsell, 334 U.S. 385, 396 (1948).

[17] *Piper*, 470 U.S. at 284.

[18] *Id.*; *accord Toomer*, 334 U.S. at 396.

[19] *See* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 454 (1982) (likening the Privileges and Immunities Clause test to "intermediate scrutiny under contemporary equal protection jurisprudence"); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1992) (same).

[20] *Hicklin*, 437 U.S. at 526–28.

[21] Barnard v. Thorstenn, 489 U.S. 546 (1989); Supreme Ct. of Va. v. Friedman, 487 U.S. 59 (1988); *Piper*, 470 U.S. at 288.

[22] State protectionism and discrimination against nonresidents may also implicate the Equal Protection Clause or the Dormant Commerce Clause. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 569 n.4 (1997) (challenge to discriminatory state tax exemption made under Dormant Commerce Clause, the Equal Protection Clause, and the Privileges and Immunities Clause).

[23] *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 501–02 (1999); Doe v. Bolton, 410 U.S. 179, 200 (1973), *abrogated on other grounds by* Dobbs v. Jackson Women's Health Org., No. 19-1393 (U.S. June 24, 2022); New York v. O'Neill, 359 U.S. 1, 569 (1959).

Clause.[24] Challenges to a state's abridgement of enumerated constitutional rights are thus more often asserted under those constitutional amendments (as incorporated via the Fourteenth Amendment), instead of the Privileges and Immunities Clause.

ArtIV.S2.C1.2 Historical Background on Privileges and Immunities Clause

Article IV, Section 2, Clause 1:

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

The notion of "privileges and immunities"—that is, particular legal benefits or exemptions—derives from concepts developed by English medieval law.[1] The Articles of Confederation contained a lengthier provision[2] that provided the direct precedent for the Privileges and Immunities Clause:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.[3]

Charles Pinckney of South Carolina claimed to have introduced the Privileges and Immunities Clause at the Constitutional Convention.[4] The Committee of Detail drafted and reported language identical to the final Clause, which passed the Convention without substantial debate.[5] Perhaps because the Privileges and Immunities Clause was drawn from the Articles of Confederation, it also "drew virtually no attention" in the ratification debates.[6] The Clause is discussed in the *Federalist* papers only as a means of support for other arguments.[7]

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[24] *See* Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 379 (1978) ("Historically, [the Privileges and Immunities Clause] has been overshadowed by the appearance in 1868 of similar language in § 1 of the Fourteenth Amendment, and by the continuing controversy and consequent litigation that attended that Amendment's enactment and its meaning and application.").

[1] For sources discussing the historical origins of privileges and immunities under English and colonial law, see, for example, Thomas H. Burrell, *A Story of Privileges and Immunities: From Medieval Concept to the Colonies and United States Constitution*, 34 Campbell L. Rev. 7 (2011); Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 Ga. L. Rev. 1117 (2009).

[2] James Madison also thought in the Articles' longer version was somewhat unclear. The Federalist No. 42 (James Madison) ("There is a confusion of language [in the Articles' Privileges and Immunities Clause], which is remarkable.").

[3] Articles of Confederation of 1781 art. IV, § 1.

[4] 2 The Records of the Federal Convention of 1787, at 173–74 (Max Farrand ed., 1911).

[5] *Id.* at 187, 443. Ironically, the only noted objection came from Pinckney himself, who thought "some provision should be included in favor of property in slaves." *Id.* at 443. (The South Carolinians—the only delegation to vote "no" on the Privileges and Immunities Clause—subsequently obtained a provision to that effect in the form of the Fugitive Slave Clause. *Id.* at 443, 446; U.S. Const. art. IV, § 2, cl. 3.).

[6] David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 Case W. Res. L. Rev. 794, 840 (1986).

[7] *See* The Federalist No. 42 (James Madison); The Federalist No. 80 (Alexander Hamilton).

Despite the textual differences between the Privileges and Immunities Clause and its predecessor in the Articles of Confederation, the Supreme Court has concluded that the Constitution's briefer phrasing was intended to have the same meaning.[8] The privileges and immunities protected are thus the same under both the Articles and the Constitution.[9] Accordingly, the specific examples listed in the Articles' version (for example, "free ingress and regress to and from any other State," "all the privileges of trade and commerce") may be used to "give some general idea of the class of civil rights meant by the phrase" in the Constitution.[10]

ArtIV.S2.C1.3 Purpose of Privileges and Immunities Clause

Article IV, Section 2, Clause 1:

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

At least four theories have been proffered as to the purpose of the Privileges and Immunities Clause. First, the Clause could be read as a guarantee to the citizens of the different states of equal treatment by Congress, as a kind of equal protection clause binding on the federal government. Though this view received some recognition in Justice John Catron's opinion in *Dred Scott v. Sandford*,[1] it has long been viewed as obsolete.[2]

Second, the Clause could be read to guarantee to the citizens of each state certain natural, fundamental rights inherent in the citizenship of people in a free society, which no state could deny to citizens of other states (and without regard to how it treats its own citizens). This theory found some expression in a few early state cases,[3] and best accords Justice Bushrod Washington's famous dicta on the Clause in *Corfield v. Coryell*.[4] This theory might have endowed the Supreme Court with authority to review state legislation similar to that which it later came to exercise under the Fourteenth Amendment's Due Process and Equal Protection Clauses, but it was firmly rejected by the Court.[5]

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[8] Austin v. New Hampshire, 420 U.S. 656, 661 (1975) ("[Protection for privileges and immunities] was carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the clause in fashioning a single nation.").

[9] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 75 (1873).

[10] *Id.*

[1] 60 U.S. (19 How.) 393, 518, 527–29 (1857) (Catron, J., concurring), *superseded by constitutional amendment,* U.S. Const. amend. XIV, § 1.

[2] Instead, the Court read the Fifth Amendment's Due Process Clause to impose equal protection standards on the federal government. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954); Schneider v. Rusk, 377 U.S. 163, 168 (1964); Shapiro v. Thompson, 394 U.S. 618, 641–42 (1969).

[3] Campbell v. Morris, 3 H. & McH. 288 (Md. 1797); Murray v. McCarty, 2 Munf. 373 (Va. 1811); Livingston v. Van Ingen, 9 Johns. 507 (N.Y. 1812); Douglas v. Stephens, 1 Del. Ch. 465 (1821); Smith v. Moody, 26 Ind. 299 (1866).

[4] 6 F. Cas. 546, 550 (Washington, Circuit Justice, C.C.E.D. Pa. 1823); *see also* Hague v. Comm. of Indus. Org., 307 U.S. 496, 511 (1939) ("At one time it was thought that [the Privileges and Immunities Clause] recognized a group of [natural] rights . . . and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State. Such was the view of Justice Washington.").

Other notable proponents of the natural-rights view include Justices Stephen Johnson Field, Joseph Bradley, and Benjamin Robbins Curtis. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 97–98 (1973) (Field, J., dissenting); *id.* at 117–18 (Bradley, J., dissenting); *Dred Scott*, 60 U.S. at 580 (Curtis, J., dissenting). The natural rights concept of privileges and immunities was also strongly held by abolitionists and their congressional allies, who drafted the Privileges or Immunities Clause of the Fourteenth Amendment. Howard Jay Graham, *Our 'Declaratory' Fourteenth Amendment*, *reprinted in* Howard Jay Graham, Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism 295 (1968).

[5] *See, e.g.*, McKane v. Durston, 153 U.S. 684, 687 (1894).

Third, the Clause could be read to guarantee the citizen of any state the same rights that he enjoys at home, even when he is in another state. On this view, the Clause would enable a citizen to carry his rights of state citizenship with him throughout the United States, unaffected by state lines. The Court has also rejected this theory.[6]

The fourth theory—and the one the Court ultimately accepted—is that the Clause forbids any state to discriminate against citizens of other states in favor of its own. It is this narrow interpretation that has become the settled one. As the Court explained in the 1869 case *Paul v. Virginia*:

> It was undoubtedly the object of [the Privileges and Immunities Clause] to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws.[7]

ArtIV.S2.C1.4 Self-Executing Nature of Privileges and Immunities Clause

Article IV, Section 2, Clause 1:

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

In the nineteenth century, the Supreme Court held that the Privileges and Immunities Clause is self-executing. That is, Congress generally lacks power to enact enforcement legislation under the Clause, which is instead left to the states and the judicial process.[1] The Supreme Court has also held that, like the Fourteenth Amendment's protections, the Privileges and Immunities Clause protects only against state action, and not private conduct.[2] Federal statutes prohibiting private conspiracies to deprive any person of equal privileges and immunities secured by state laws,[3] or punishing the denial of the right of citizens to reside peacefully in the several states and to have free ingress into and egress from such states by non-state actors,[4] have been held unconstitutional for these reasons.

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[6] *See, e.g.*, City of Detroit v. Osborne, 135 U.S. 492, 498 (1890).

[7] 75 U.S. (8 Wall.) 168, 180 (1869); *see also Slaughter-House Cases*, 83 U.S. (16 Wall.) at 77; Chambers v. Balt. & Ohio R.R., 207 U.S. 142 (1907); Whitfield v. Ohio, 297 U.S. 431 (1936).

[1] United States v. Harris, 106 U.S. 629, 643–44 (1883); *see also* Slaughter-House Cases, 83 U.S. 36, 77 (1872) ("[T]he entire domain of the privileges and immunities of citizens of the States . . . lay within the constitutional and legislative power of the States, and without that of the Federal government."); *accord* The Federalist No. 80 (Alexander Hamilton).

[2] United States v. Wheeler, 254 U.S. 281, 298 (1920), *disapproved of on other grounds*, United States v. Guest, 383 U.S. 745, 759 n.16 (1966). *See also* Amdt14.2 State Action Doctrine.

[3] *Harris*, 106 U.S. at 643. *See also* Baldwin v. Franks, 120 U.S. 678, 689–90 (1887).

[4] *Wheeler*, 254 U.S. at 298.

ArtIV.S2.C1.5 Citizenship Under Privileges and Immunities Clause

Article IV, Section 2, Clause 1:

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

Whether free Black Americans were protected as citizens under the Privileges and Immunities Clause (and other constitutional protections) was a contentious issue before the Civil War.[1] The unamended Constitution grants Congress power to "establish a uniform rule of naturalization" as to foreigners,[2] but did not otherwise speak directly to who is a "citizen" of a state or of the United States.[3] A common view at the time was that national citizenship was derivative of state citizenship, and that the latter could be conferred by birth within a jurisdiction, as under the English common law.[4]

Nonetheless, in the notorious *Dred Scott* case, the Supreme Court held that Black Americans, whether free or enslaved, could not be "citizens" under the Constitution.[5] "Citizens of each State," Chief Justice Roger Taney concluded, meant citizens of the United States as understood when the Constitution was adopted; descendants of African slaves were not then regarded as capable of citizenship in Taney's view.[6] Citing the Privileges and Immunities Clause, Chief Justice Taney argued that if free Black Americans could be made citizens of one state, the Constitution would grant them

> the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, . . . and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.[7]

Such an outcome, Chief Justice Taney maintained, "the great men of the slaveholding States, who took so large a share in framing the Constitution" would not have permitted.[8] Because Dred Scott was not a "citizen" under this reasoning, the Court held that federal courts lacked jurisdiction over his suit for freedom because there was no diversity of state citizenship under Article III, Section 2.[9]

In dissent, Justice Benjamin Robbins Curtis denied the Chief Justice's historically dubious assertion that there were no free Black Americans who were state citizens when the

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[1] *See* Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 Va. L. Rev. 493, 505–20 (2013) (summarizing the debates over the citizenship status of free Black Americans prior to the *Dred Scott* decision).

[2] U.S. Const. art. I, § 8, cl. 4; *see also* ArtI.S8.C4.1.1 Overview of Naturalization Clause.

[3] The Constitution uses the phrase "citizen of the United States" in several places, including the qualifications for Members of Congress, *see* U.S. Const. art. I, § 2, cl. 2; § 3, cl. 3, and for the Presidency (which additionally requires the person to be a "natural born" citizen), *see* U.S. Const. art. II, § 1, cl. 5. State citizenship is referenced in the Privileges and Immunities Clause and Article III's provisions for federal jurisdiction, *see* U.S. Const. art. III, § 2, cl. 1.

[4] Williams, *supra* note 1, at 507 (citing James H. Kettner, The Development of American Citizenship, 1608–1870, at 287 (1978)).

[5] Scott v. Sandford, 60 U.S. (19 How.) 393, 403–27 (1857) (Taney, C.J.), *superseded by constitutional amendment*, U.S. Const. amend. XIV, § 1.

[6] *Id.* at 402–05.

[7] *Id.* at 417.

[8] *Id.*

[9] *Id.* at 427.

Constitution was ratified.[10] Justice Curtis further argued that the states retained the right to extend citizenship to classes of persons born within their borders, and that a person upon whom state citizenship was conferred became a citizen of that state *and* the United States under the Constitution.[11]

Dred Scott's holding was superseded by the first section of the Fourteenth Amendment, which declares: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[12] Thus, after 1868, the "citizens of each State" under the Privileges and Immunities Clause include at least all persons born in the United States, or naturalized U.S. citizens, who reside in that state.

ArtIV.S2.C1.6 Corporations and Privileges and Immunities Clause

Article IV, Section 2, Clause 1:

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

A long line of Supreme Court cases has found the Privileges and Immunities Clause to be "inapplicable" to corporations (as opposed to natural persons).[1] As early as 1839, the Court reasoned that a corporation, as a discretionary creation of state law, could not claim "the rights which belong to its members as citizens of a state."[2] The Court reached a similar conclusion in 1869 in *Paul v. Virginia*.[3] By 1898, the Court declared it "well settled" that "a corporation is not a citizen within the meaning of the [Privileges and Immunities Clause]."[4] The Court has extended this rule to state law trusts because of their similarity to the corporate form.[5]

The Court has continued to adhere to its settled view that the Privileges and Immunities Clause does not protect corporations,[6] despite later holdings that other constitutional protections—such as the Equal Protection Clause,[7] First Amendment,[8] and Fourth Amendment[9]—apply to corporations. As a result, challenges to state protectionism and discrimination against out-of-state corporations are typically brought under the "dormant" Commerce Clause,[10] and not the Privileges and Immunities Clause.[11]

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[10] *Id.* at 573–76 (Curtis, J., dissenting). On the contrary, Justice Curtis asserted that there was "no doubt" that free native-born Black residents were citizens of states such as New Hampshire, Massachusetts, New York, North Carolina, and New Jersey, and had the right to vote in some of them. *Id.*

[11] *Id.* at 576–90.

[12] U.S. Const. amend. XIV, § 1.

[1] W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 656 (1981) (citing Hemphill v. Orloff, 277 U.S. 537, 548–50 (1928)).

[2] Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 586–87 (1839) (Taney, C.J.).

[3] 75 U.S. (8 Wall.) 168, 180–81 (1869) (Field, J.).

[4] Blake v. McClung, 172 U.S. 239, 259 (1898). *See also, e.g.*, Anglo-Am. Provision Co. v. Davis Provision Co., 191 U.S. 373, 374 (1903) (Holmes, J.); Waters-Pierce Oil Co. v. Texas, 177 U.S. 28, 45 (1900).

[5] *Hemphill*, 277 U.S. at 548–50.

[6] *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, No. 18-96, slip op. at 8 (U.S. June 26, 2019); Asbury Hosp. v. Cass Cnty., N.D., 326 U.S. 207, 211 (1945).

[7] Santa Clara Cnty. v. S. Pac. R. Co., 118 U.S. 394 (1886).

[8] *See generally* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342 (2010) (collecting cases).

[9] *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978).

[10] *See, e.g.*, *Tenn. Wine & Spirits*, No. 18-96, slip op. at 10; *see generally* ArtI.S8.C3.7.1 Overview of Dormant Commerce Clause; ArtI.S8.C3.7.5 General Prohibition on Facial Discrimination.

ArtIV.S2.C1.7 Privileges and Immunities of Citizens Defined

Article IV, Section 2, Clause 1:

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

The classical judicial exposition of the meaning of "privileges and immunities" is that of Justice Bushrod Washington in 1823 in *Corfield v. Coryell*.[1] The question at issue was the validity of a New Jersey statute that prohibited "any person who is not, at the time, an actual inhabitant and resident in this State" from raking or gathering clams, oysters, or shells in any of the state's waters on board any vessel not owned by state residents.[2] In *Corfield*, Justice Washington described the privileges and immunities under the Clause as "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union."[3] Although a full list would be "tedious," Justice Washington opined that they include:

> Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state . . . .[4]

After so defining the private and personal rights that were protected, Justice Washington distinguished them from a right to share in a state's public property. In particular, *Corfield* held that the right of a state to the clams and oysters within its waters to be in the nature of a property right, held by the state "for the use of the citizens thereof."[5] The statute at issue was thus upheld because New Jersey need not grant "cotenancy in the common property of the State, to the citizens of all the other States."[6]

Following *Corfield*, the Court has held that for an activity to be protected by the Privileges and Immunities Clause as "fundamental," it must be so "basic and essential" that "interference

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[11] *But see* Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 264–65 (1987) (Scalia, J., concurring in part and dissenting in part) (criticizing Dormant Commerce Clause doctrine as textually and historically unjustified and noting that "discrimination against citizens of other States" is more properly regulated by the Privileges and Immunities Clause).

[1] 6 F. Cas. 546 (Washington, Circuit Justice, C.C.E.D. Pa. 1823); Austin v. New Hampshire, 420 U.S. 656, 661 (1975) (characterizing *Corfield* as "the first, and long the leading, explication of the [Privileges and Immunities] Clause").

[2] *Corfield*, 6 F. Cas. at 550.

[3] *Id.* at 551.

[4] *Id.* at 551–52.

[5] *Id.* at 552.

[6] *Id.*

with [it] would frustrate the purposes of the formation of the Union."[7] Activities such as the pursuit of occupations or common callings within the state[8] (including the right to practice law[9]), the right to seek employment on public contracts,[10] the ownership and disposition of property within the state,[11] and access to state courts,[12] have all been recognized as fundamental and protected under the Privileges and Immunities Clause. In contrast, recreational fishing and hunting (that is, not tied to one's commercial livelihood[13]) has been held not a fundamental activity.[14] Accessing public records through a state freedom of information act has also been held not to be a fundamental activity; a state may therefore limit such access to its own citizens.[15]

ArtIV.S2.C1.8 Valid Residency Distinctions under Privileges and Immunities Clause

Article IV, Section 2, Clause 1:

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

Universal practice has established a political exception to the Privilege and Immunities Clause. A state may thus "require residence within its limits for a given time before a citizen of another State who becomes a resident thereof shall exercise the right of suffrage or become eligible to office."[1]

In addition, purely private and personal rights are not in all cases beyond the reach of state legislation that differentiates between citizens and noncitizens. Broadly speaking, these rights may be reasonably regulated by a state under its police power. The Court has recognized cases in which a state may reasonably resort to discrimination against nonresidents in aid of its own public health, safety, and welfare. For example, a state may reserve the right to sell insurance to persons who have resided within the state for a prescribed period.[2] A state may also require a nonresident who does business within the state[3] or who uses the state's highways[4] to consent, expressly or by implication, to service of process on an agent within the state. A state

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[7] Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 387 (1978).

[8] *See, e.g.*, Hicklin v. Orbeck, 437 U.S. 518, 524 (1978); Toomer v. Witsell, 334 U.S. 385, 403 (1948); Ward v. Maryland, 79 U.S. 418, 430 (1870).

[9] *See, e.g.*, Supreme Ct. of N.H. v. Piper, 470 U.S. 274 (1985).

[10] *See* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984).

[11] *See, e.g.*, Blake v. McClung, 172 U.S. 239, 258 (1898); *see* also Williams v. Bruffy, 96 U.S. 176, 184 (1878).

[12] *See, e.g.*, Can. N. Ry. v. Eggen, 252 U.S. 553, 560 (1920).

[13] *See*, *e.g.*, *Toomer*, 334 U.S. at 403; Mullaney v. Anderson, 342 U.S. 415, 418 (1952).

[14] Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 388 (1978); McCready v. Virginia, 94 U.S. 391, 395 (1876).

[15] McBurney v. Young, 569 U.S. 221, 228–29 (2013). The Court further found that any incidental burden on a nonresident's ability to earn a living, own property, or exercise another fundamental activity could largely be ameliorated by using other available authorities, emphasizing that the primary purpose of the state freedom of information act was to provide state citizens with a means to obtain an accounting of their public officials. *Id.*

[1] Blake v. McClung, 172 U.S. 239, 256 (1898). As to voting rights, *see* Dunn v. Blumstein, 405 U.S. 330 (1972), but not as to candidacy, this exception is qualified by the Fourteenth Amendment's Equal Protection Clause. Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 383 (1978) (citing Kanapaux v. Ellisor, 419 U.S. 891 (1974); Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973), aff'd, 414 U.S. 802 (1973)).

[2] La Tourette v. McMaster, 248 U.S. 465 (1919).

[3] Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

[4] Hess v. Pawloski, 274 U.S. 352, 356 (1927).

may also limit a nonresident's dower rights[5] or may treat the community property rights of nonresident married persons as governed by the laws of their domicile, rather than by the laws it promulgates for its own residents.[6]

ArtIV.S2.C1.9 State Natural Resources and Privileges and Immunities Clause

Article IV, Section 2, Clause 1:

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

In *Corfield v. Coryell*,[1] Justice Bushrod Washington (while riding circuit) held that a state could discriminate against nonresidents who sought to harvest oysters and clams in state waters, despite the Privileges and Immunities Clause.[2] The precise holding of *Corfield* was confirmed by the Supreme Court fifty years later in the 1877 case *McCready v. Virginia*, which upheld a Virginia law permitting only Virginians to catch or plant oysters in state rivers.[3] In cases blending Commerce Clause and Privileges and Immunities challenges, *Geer v. Connecticut* extended the same rule to wild game,[4] while *Hudson Water Co. v. McCarter* applied it to water rights.[5]

The virtual demise of the state ownership theory of animals and natural resources in the Commerce Clause context[6] compelled the Court to review its precedents on distinctions between residents and nonresidents related to natural resources. In *Baldwin v. Fish & Game Commission of Montana*, the Court addressed a challenge to Montana's laws for elk-hunting licenses, which charged nonresidents higher fees than residents.[7] The Court was asked to overrule the Privileges and Immunities Clause holdings of *Corfield*, *Geer*, and *McCready* as having "no remaining vitality."[8] *Baldwin* declined to do so, holding that while state control over wildlife is "not exclusive and absolute," *recreational* hunting was not a fundamental right under the Privileges and Immunities Clause.[9] Because recreational activity—in contrast to "common callings"[10]—was not "a means to the nonresident's livelihood," the state could distinguish between residents and nonresidents consistently with the Privileges and Immunities Clause.[11]

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[5] Ferry v. Spokane, P. & S. Ry., 258 U.S. 314 (1922); *accord* Ferry v. Corbett, 258 U.S. 609 (1922).

[6] Conner v. Elliott, 59 U.S. (18 How.) 591, 593 (1856).

[1] *See* ArtIV.S2.C1.7 Privileges and Immunities of Citizens Defined.

[2] Corfield v. Coryell, 6 F. Cas. 546, 552 (Washington, Circuit Justice, C.C.E.D. Pa. 1823).

[3] 94 U.S. 391, 395–96 (1877).

[4] 161 U.S. 519 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979).

[5] 209 U.S. 349, 357 (1908), *overruled by* Sporhase v. Nebraska *ex rel*. Douglas, 458 U.S. 941 (1982).

[6] *See* Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 284 (1977) ("The 'ownership' language of cases such as [*Geer* and *McCready*] must be understood as no more than a 19th-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'" (citing Toomer v. Witsell, 344 U.S. 385, 402 (1948)).

[7] 436 U.S. 371, 372–74 (1978).

[8] *Id.* at 386.

[9] *Id.* at 386–88.

[10] *See* ArtIV.S2.C1.10 Occupations and Privileges and Immunities Clause.

[11] *Baldwin*, 436 U.S. at 388; *cf.* Toomer v. Witsell, 334 U.S. 385, 403 (1948) (holding that commercial shrimping "like other common callings, is within the purview of the privileges and immunities clause").

ArtIV.S2.C1.10 Occupations and Privileges and Immunities Clause

Article IV, Section 2, Clause 1:

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

The Supreme Court has long held that the right of nonresidents "to ply their trade, practice their occupation, or pursue a common calling" is a fundamental right protected by the Privileges and Immunities Clause.[1] Indeed, "privileges of trade and commerce" were explicitly included among the privileges and immunities listed in the Articles of Confederation.[2] The Clause therefore "guarantees to citizens of State A" the right of "doing business in State B on terms of substantial equality with the citizens of that State."[3]

In *Toomer v. Witsell*, the Court held that "commercial shrimping . . . like other common callings, is within the purview of the privileges and immunities clause."[4] Discriminatory fees exacted from nonresidents for a license to shrimp were thus unconstitutional.[5] The Court has similarly struck down discrimination against nonresidents in licenses for commercial fishing[6] and in hiring for work on oil and gas pipelines.[7]

The Court held in *Supreme Court of New Hampshire v. Piper* that the right to practice law, like the right to pursue other occupations, is protected under the Privileges and Immunities Clause.[8] As a result, although a state may generally regulate the practice of law in its jurisdiction, it may not exclude nonresidents from state bar admission without a substantial reason.[9] Nor may a federal court, without substantial reason, require an attorney to have an office within the state as a condition of admission to practice.[10]

ArtIV.S2.C1.11 Access to Courts and Privileges and Immunities Clause

Article IV, Section 2, Clause 1:

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

The right to sue and defend in the courts is one of the highest and most essential privileges of citizenship and must be allowed by each state to the citizens of all other states to the same extent that it is allowed to its own citizens.[1] The constitutional requirement is satisfied if nonresidents are given access to the state's courts upon terms that, in themselves, are

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[1] *See, e.g.*, Hicklin v. Orbeck, 437 U.S. 518, 524 (1978).

[2] Articles of Confederation of 1781 art. IV, § 1. The Supreme Court has interpreted the constitutional provision to have "no change of substance or intent" from the Articles' version. Austin v. New Hampshire, 420 U.S. 656, 661 (1975).

[3] Toomer v. Witsell, 334 U.S. 385, 396 (1948).

[4] *Id.* at 403.

[5] *Id.*

[6] Mullaney v. Anderson, 342 U.S. 415, 418 (1952).

[7] Hicklin v. Orbeck, 437 U.S. 518, 531 (1978).

[8] 470 U.S. 274, 283 (1985).

[9] *Id.* at 288; *accord* Supreme Ct. of Va. v. Friedman, 487 U.S. 59, 61 (1988); Barnard v. Thorstenn, 489 U.S. 546, 558–59 (1989).

[10] Frazier v. Heebe, 482 U.S. 641, 649 (1987). Although it drew upon *Piper*, *Frazier* was decided under the Court's inherent supervisory authority, rather than on constitutional grounds. *Id.* at 645.

[1] Chambers v. Balt. & Ohio R.R., 207 U.S. 142, 148 (1907); McKnett v. St. Louis & S.F. Ry., 292 U.S. 230, 233 (1934); *see also* Christopher v. Harbury, 536 U.S. 403, 415 n.12 (2002) (noting that the Supreme Court has at various times grounded "the right of access to courts" in the Privileges and Immunities Clause, the First Amendment, the Fifth Amendment, and the Fourteenth Amendment).

reasonable and adequate for enforcing any rights they may have, even though they may not be precisely the same as those accorded to resident citizens.[2]

On this basis, the Supreme Court upheld a state statute of limitations that prevented a nonresident from suing in the state's courts after expiration of the time for suit in the place where the cause of action arose.[3] The Court also upheld a statute that suspended its operation as to resident plaintiffs, but not as to nonresidents, during the defendant's absence from the state.[4] A state law making it discretionary for courts to entertain an action by a nonresident of the state against a foreign corporation doing business in the state was sustained because it applied equally to citizens and noncitizens residing out of the state.[5] A statute permitting a suit in the state's courts for wrongful death occurring outside the state, only if the decedent was a resident of the state, was sustained because it operated equally upon representatives of the deceased whether citizens or noncitizens.[6] Being nondiscriminatory, a Uniform Reciprocal State Law to secure the attendance of witnesses from within or without a state in criminal proceedings does not violate this Clause.[7]

ArtIV.S2.C1.12 Taxation and Privileges and Immunities Clause

Article IV, Section 2, Clause 1:

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

In the exercise of its taxing power, a state may not discriminate substantially between residents and nonresidents without violating the Privileges and Immunities Clause.[1] In the 1871 case *Ward v. Maryland*, the Court invalidated a state law that imposed taxes only upon nonresidents who sold within the state goods that were produced in other states.[2] The Court similarly held unconstitutional a Tennessee license tax that varied based on whether the person taxed had his chief office within the state or outside it.[3] In *Travis v. Yale & Towne Mfg. Co.*,[4] the Court, while sustaining a state's right to tax income accruing within its borders to nonresidents, held the particular tax void because it denied to nonresidents exemptions that were allowed to residents.[5] In contrast, because it did not discriminate between citizens and noncitizens, the Court sustained a state statute taxing businesses hiring persons within the state for labor outside the state.[6]

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[2] Can. N. Ry. v. Eggen, 252 U.S. 553 (1920).

[3] *Id.* at 563.

[4] Chemung Canal Bank v. Lowery, 93 U.S. 72, 76 (1876).

[5] Douglas v. N.Y., New Haven & Hartford R.R., 279 U.S. 377 (1929).

[6] *Chambers*, 207 U.S. 142.

[7] New York v. O'Neill, 359 U.S. 1 (1959).

[1] A *territorial* government, if authorized by Congress, may impose a discriminatory license tax on nonresident fishermen operating within its waters consistent with the Privileges and Immunities Clause. *See* Haavik v. Alaska Packers Ass'n, 263 U.S. 510 (1924). The Court in *Haavik* reasoned that "citizens of every state are treated alike" under the tax because "[o]nly residents of the territory are preferred." *Id.*

[2] 79 U.S. (12 Wall.) 418, 424 (1871); *see also* Downham v. Alexandria Council, 77 U.S. (10 Wall.) 173, 175 (1870).

[3] Chalker v. Birmingham & N.W. Ry., 249 U.S. 522 (1919).

[4] 252 U.S. 60 (1920).

[5] *Id.* at 62–64; *see also* Shaffer v. Carter, 252 U.S. 37 (1920). In *Austin v. New Hampshire,* 420 U.S. 656 (1975), the Court held void a state commuter income tax because the State imposed no income tax on its own residents; thus, the tax fell exclusively on nonresidents' income and was not offset even approximately by other taxes imposed upon residents alone. *Id.* at 665–66.

[6] Williams v. Fears, 179 U.S. 270, 274 (1900).

In *Lunding v. New York Tax Appeals Tribunal*, the Court addressed a New York law denying nonresidents any deduction from taxable income for alimony payments, although it permitted residents to deduct such payments.[7] Although the Court observed that "the Privileges and Immunities Clause affords no assurance of precise equality in taxation between residents and nonresidents,"[8] the state must show a "substantial reason" for the disparity, and the discrimination must bear a "substantial relationship" to that reason.[9] Under this analysis, the Court read its precedents to prohibit a state from denying nonresidents a general tax exemption provided to residents, but permitting limits on "nonresidents' deductions of business expenses and nonbusiness deductions based on the relationship between those expenses and in-state property or income."[10] In *Lunding*, as the state flatly denied the deduction to nonresidents, the Court found that New York had "not presented a substantial justification for the categorical denial of alimony deductions to nonresidents."[11]

What at first glance may appear to be a discrimination may turn out not to be when a state's entire system of taxation is considered. On the basis of overall fairness, the Court has sustained a Connecticut statute that required nonresident stockholders to pay a state tax measured by the full market value of their stock while resident stockholders were subject to local taxation on the market value of that stock reduced by the value of the real estate owned by the corporation.[12] Moreover, occasional or accidental inequality to a nonresident taxpayer is not sufficient to defeat a scheme of taxation whose operation is generally equitable.[13] In an early case the Court dismissed the contention that a state violated the Privileges and Immunities Clause by subjecting its own citizens to a property tax on a debt due from a nonresident secured by real estate situated where the debtor resided.[14]

ArtIV.S2.C1.13 Right to Travel and Privileges and Immunities Clause

Article IV, Section 2, Clause 1:

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

The Supreme Court has long recognized the right to travel from one state to another under the Privileges and Immunities Clause,[1] as well as other constitutional provisions.[2] For

[7] 522 U.S. 287 (1998).

[8] *Id.* at 297.

[9] *Id.* at 298.

[10] *Id.* at 302.

[11] *Id.* at 315.

[12] Travellers' Ins. Co. v. Connecticut, 185 U.S. 364, 371 (1902).

[13] Maxwell v. Bugbee, 250 U.S. 525 (1919).

[14] Kirtland v. Hotchkiss, 100 U.S. 491, 499 (1879).

[1] *See, e.g.*, Ward v. Maryland, 79 U.S. 418, 430 (1870) ("[The Privileges and Immunities] clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union . . . ."); Paul v. Virginia, 75 U.S. 168, 180 (1868) (stating that the Privileges and Immunities Clause includes "the right of free ingress into other States, and egress from them"), *overruled on other grounds by* United States v. S.-E. Underwriters Ass'n, 322 U.S. 533 (1944); *see generally* United States v. Guest, 383 U.S. 745, 762–67 (1966) (Harlan, J., concurring in part and dissenting in part) (surveying cases).

[2] *See Guest*, 383 U.S. at 759 ("Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists.").

example, the Court held that a state could not constitutionally limit access to medical care to its own residents, and deny access to nonresidents, without interfering with the right to travel.[3]

In *Saenz v. Roe*, the Court characterized the constitutional "right to travel" as having "at least three different components":

> It protects [1] the right of a citizen of one State to enter and to leave another State, [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, [3] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.[4]

While the Court did not expressly identify the constitutional basis of the first component, it noted that the Articles of Confederation's privileges and immunities clause explicitly protected the "free ingress and regress to and from any other State."[5] As for the second component of the right to travel, the Court found it to be "expressly protected by the text of the Constitution" through the Privileges and Immunities Clause.[6] *Saenz* connected the third component of the right to travel to the Fourteenth Amendment's Privileges *or* Immunities Clause.[7]

Clause 2—Interstate Extradition

ArtIV.S2.C2.1 Overview of Extradition (Interstate Rendition) Clause

Article IV, Section 2, Clause 2:

> *A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.*

The Extradition Clause,[1] which is also referred to as the Interstate Rendition Clause,[2] applies to a person accused of a crime in one state who flees to another state. The Extradition Clause "preclude[s] any state from becoming a sanctuary for fugitives from justice" and "enable[s] each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed."[3] To fulfill those ends, the Extradition Clause contemplates that the Governor of the state from which the accused has fled (the demanding state) may seek his return from the state to which the accused has fled (the asylum state). Interstate rendition was "intended to be a summary and mandatory executive proceeding derived from" the

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[3] Doe v. Bolton, 410 U.S. 179, 200 (1973), *abrogated on other grounds by* Dobbs v. Jackson Women's Health Org., No. 19-1393 (U.S. June 24, 2022).

[4] 526 U.S. 489, 500 (1999) (numbering added).

[5] *Id.* at 501 (citing Articles of Confederation of 1781 art. IV, § 1).

[6] *Id.* at 501–502.

[7] *Id.* at 502–03 (citing U.S. Const. amend. XIV, § 1). The Commerce Clause is another potential textual basis for the right to travel. *See Guest*, 383 U.S. at 758 (citing Edwards v. California, 314 U.S. 160, 173 (1941)).

[1] *See, e.g.*, Pierce v. Creecy, 210 U.S. 387, 393 (1908); Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 379 (1978).

[2] *See, e.g.*, Pollack v. Duff, 793 F.3d 34, 44 (D.C. Cir. 2015).

[3] Michigan v. Doran, 439 U.S. 282, 287 (1978).

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Extradition Clause.[4] The Extradition Clause is nearly unchanged in substance from the analogous provision in the Articles of Confederation[5] and was approved unanimously at the Constitutional Convention with little debate.[6]

The Extradition Clause is not self-executing, and the Constitution provides Congress no express grant of power to implement it. Yet the Second Congress passed a law, the current iteration of which is known as the Extradition Act, requiring the governor of each state to deliver up fugitives from justice found in their state, upon lawful demand from another state.[7] The Supreme Court accepted this "contemporaneous construction" as establishing the constitutional validity of the legislation.[8] In *Kentucky v. Dennison*,[9] however, the Court held that this statute was merely "declaratory" of a *moral* duty of state and that the federal government "has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it."[10] Because of *Dennison*, a federal court could not issue a writ of mandamus to compel the Governor of one state to surrender a fugitive to another state.[11] Long considered a constitutional derelict, *Dennison* was finally formally overruled by the Court in 1987.[12]

Currently, states and territories may invoke the power of federal courts to enforce the Extradition Act against asylum state officers, including seeking equitable relief to compel performance of federally imposed duties.[13] The duty of one state to surrender a fugitive to another is not absolute and unqualified, however—if the fugitive is imprisoned in the asylum state, for example, the asylum state may satisfy its own laws before returning the fugitive to the demanding state.[14]

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[4] *Id.* at 288 (citing Biddinger v. Comm'r of Police, 245 U.S. 128, 132 (1917)).

[5] Articles of Confederation of 1781, art. IV, para. 2, ("If any Person guilty of, or charged with, treason, felony, or other high misdemeanor in any state, shall flee from Justice, and be found in any of the united states, he shall upon demand of the Governor or executive power of the state from which he fled, be delivered up, and removed to the state having jurisdiction of his offence.").

[6] *See* 2 Max Farrand, The Records of the Federal Convention of 1787, at 443 (Max Farrand ed., 1911). The Convention replaced the term "high misdemeanor" with "other Crime" because "high misdemeanor" (which was used in the Articles of Confederation's version) had a technical meaning thought to be "too limited." *Id.*

[7] 1 Stat. 302 (1793). The current interstate Extradition Act is codified at 18 U.S.C. § 3182. The Act requires rendition of fugitives at the request of a demanding territory, as well as of a state, thus extending beyond the terms of the Extradition Clause. In New York *ex rel* Kopel v. Bingham, 211 U.S. 468 (1909), the Court held that this legislative extension was permissible. *See* Puerto Rico v. Branstad, 483 U.S. 219, 229–30 (1987).

[8] Roberts v. Reilly, 116 U.S. 80, 94 (1885); *see also* Innes v. Tobin, 240 U.S. 127 (1916). As Justice Story wrote in *Prigg v. Pennsylvania*: "[T]he natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution . . . . [I]t has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined thereby." 41 U.S. (16 Pet.) 539, 616, 619–20 (1842).

[9] 65 U.S. (24 How.) 66 (1861). *Cf. Prigg*, 41 U.S. (16 Pet.) at 612.

[10] *Dennison*, 65 U.S. (24 How.) at 107.

[11] *Id.* at 109–10. In 1934, Congress plugged the loophole created by *Dennison* by making it a federal crime for any person to flee from one state to another to avoid prosecution in certain cases. 48 Stat. 782 (1934); 18 U.S.C. § 1073.

[12] Puerto Rico v. Branstad, 483 U.S. 219, 230 (1987) ("*Kentucky v. Dennison* is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development."); *accord* New Mexico *ex rel*. Ortiz v. Reed, 524 U.S. 151, 155 (1998).

[13] *Branstad*, 483 U.S. at 230.

[14] Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1873).

ArtIV.S2.C2.2 Meaning of Fugitive from Justice

Article IV, Section 2, Clause 2:

> *A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.*

Although a person must be charged with a crime to be a fugitive from justice under the Extradition Clause, the Extradition Clause does not require the state demanding extradition (the "demanding state") to have charged the fugitive *before* he left the state. Instead, the Extradition Clause only requires the accused to be located in a state different from the one in which he is charged.[1] Moreover, the accused may have left the state for reasons other than avoiding justice because the reason the accused departed is immaterial.[2]

A demanding state that has received a fugitive from another state may be required to surrender him to a third state upon an extradition warrant.[3] A person indicted a second time for the same offense is still considered a fugitive under the Extradition Clause, even if, after dismissal of the first indictment, he left the demanding state with the knowledge of and without objection by state authorities.[4] But a defendant cannot be extradited if he was only constructively present in the demanding state when the crime with which he is charged was alleged to have been committed.[5]

The words "treason, felony or other crime," as used in the Extradition Clause, embrace every criminal offense forbidden and made punishable by state law,[6] including misdemeanors.[7]

ArtIV.S2.C2.3 Extradition (Interstate Rendition) Procedures

Article IV, Section 2, Clause 2:

> *A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.*

A person must be charged with a crime in the regular course of judicial proceedings before the state's Governor may demand his return from another state.[1] The accused has no constitutional right to a hearing before the Governor of the asylum state (the state where the fugitive is located) on whether he has been substantially charged with a crime and is a fugitive from justice.[2] Nor may courts inquire into the motives of the Governors of the demanding and surrendering states.[3]

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[1] Roberts v. Reilly, 116 U.S. 80, 95 (1885); *see also* Strassheim v. Daily, 221 U.S. 280 (1911); Appleyard v. Massachusetts, 203 U.S. 222 (1906); Ex parte Reggel, 114 U.S. 642, 650 (1885).

[2] Drew v. Thaw, 235 U.S. 432, 439 (1914).

[3] Innes v. Tobin, 240 U.S. 127 (1916).

[4] Bassing v. Cady, 208 U.S. 386 (1908).

[5] Hyatt v. People *ex rel*. Corkran, 188 U.S. 691 (1903).

[6] Kentucky v. Dennison, 65 U.S. (24 How.) 66, 103 (1861).

[7] Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 375 (1873).

[1] Kentucky v. Dennison, 65 U.S. (24 How.) 66, 104 (1861); Pierce v. Creecy, 210 U.S. 387 (1908); *see also In re* of Strauss, 197 U.S. 324, 325 (1905); Marbles v. Creecy, 215 U.S. 63 (1909); Strassheim v. Daily, 221 U.S. 280 (1911).

[2] Munsey v. Clough, 196 U.S. 364, 372 (1905); Pettibone v. Nichols, 203 U.S. 192 (1906).

[3] *Pettibone*, 203 U.S. at 203.

The asylum state's courts cannot use habeas corpus to refuse to surrender the accused based on speculations about the accused's trial in the demanding state.[4] Likewise the asylum state's courts cannot hear the accused's arguments that the statute of limitations has expired,[5] or that confinement in the demanding state's prison would constitute cruel and unjust punishment,[6] although the accused may make such arguments in the demanding state's courts. An accused will, however, be discharged on habeas corpus if he shows by clear and satisfactory evidence that he was outside the demanding state when the crime occurred.[7] If, however, the evidence is conflicting, habeas corpus is not the proper proceeding to try the question of alibi.[8]

The role of habeas corpus in interstate rendition cases is, therefore, very limited.[9] Once the asylum state's governor grants extradition, a court considering releasing the accused on habeas grounds can only decide: "(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive."[10]

Nothing in the Constitution exempts an offender from trial and punishment following extradition, even though he was brought from another state by unlawful violence,[11] or by abuse of legal process.[12] A fugitive lawfully extradited from another state may be tried for an offense other than that for which he was surrendered.[13] The rule is different, however, for fugitives surrendered by a foreign government, pursuant to treaty. In that case, the fugitive may only be tried "for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings."[14]

Clause 3—Slavery

ArtIV.S2.C3.1 Fugitive Slave Clause

Article IV, Section 2, Clause 3:

> *No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.*

This Clause, effectively nullified by the Thirteenth Amendment's abolition of slavery,[1] contemplated the existence of a right on the part of a slaveholder to reclaim an enslaved person

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[4] Drew v. Thaw, 235 U.S. 432, 440 (1914).

[5] Biddinger v. Commissioner of Police, 245 U.S. 128, 135 (1917); *see also* Rodman v. Pothier, 264 U.S. 399 (1924).

[6] Sweeney v. Woodall, 344 U.S. 86, 89–90 (1952).

[7] Hyatt v. People *ex rel*. Corkran, 188 U.S. 691 (1903); *see also* South Carolina v. Bailey, 289 U.S. 412 (1933).

[8] Munsey v. Clough, 196 U.S. 364, 375 (1905).

[9] Michigan v. Doran, 439 U.S. 282, 289 (1978). In *California v. Superior Court,* 482 U.S. 400, 407 (1987), the Court reiterated that extradition is a "summary procedure."

[10] *Doran*, 439 U.S. at 289.

[11] Ker v. Illinois, 119 U.S. 436, 444 (1886); Mahon v. Justice, 127 U.S. 700, 707, 712, 714 (1888).

[12] Cook v. Hart, 146 U.S. 183, 193 (1892); Pettibone v. Nichols, 203 U.S. 192, 215 (1906).

[13] Lascelles v. Georgia, 148 U.S. 537, 543 (1893).

[14] United States v. Rauscher, 119 U.S. 407, 430 (1886).

[1] U.S. Const. amend. XIII.

who had escaped to another state.[2] Following the debate on the constitutional provision requiring states to return felons who had fled from one state to another,[3] Pierce Butler and Charles Pinckney of South Carolina moved "to require fugitive slaves and servants to be delivered up like criminals."[4] Although James Wilson and Roger Sherman objected that this "would oblige the executive of the State to [seize fugitive slaves], at the public expense," the provision was approved by the Convention unanimously without further debate.[5]

Congress had the power to enact legislation enforcing the Clause,[6] which it first did in 1793.[7] Under the Supreme Court's interpretation of the Fugitive Slave Clause, the owner of an enslaved person had the same right to seize and repossess him in another state as the local laws of his own state granted to him, and state laws that penalized such a seizure were unconstitutional.[8] Moreover, states had no concurrent power to legislate on the subject.[9] However, a state statute providing a penalty for harboring an escaped slave was held not to conflict with the Clause because it did not affect the right or remedy of the slaveholder, but rather a rule of conduct for its own citizens in the exercise of states' police power.[10]

Section 3—New States and Federal Property

Clause 1—Admissions

ArtIV.S3.C1.1 Overview of Admissions (New States) Clause

Article IV, Section 3, Clause 1:

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

The first clause of Article IV, Section 3 authorizes Congress to admit new states into the union. It is sometimes called the Admissions Clause, the Admission Clause, or the New States Clause.[1]

The Admissions Clause contains two main limitations on congressional power to admit new states. The first limitation is based on the constitutional text: when a proposed new state

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[2] *See* 3 Joseph Story, Commentaries on the Constitution of the United States §§ 1804–1805 (1833).

[3] U.S. Const. art. IV, § 2, cl. 2.

[4] 2 Max Farrand, Records of the Federal Convention of 1787, at 443 (Max Farrand, ed. 1911).

[5] *Id.* at 446. Although the Articles of Confederation lacked an analogous provision, *see* 3 Story's Commentaries, *supra* note 2, at § 1805, the Northwest Ordinance of 1787, even as it abolished slavery in the Territory, provided for the return of fugitive slaves who escaped there. *See* Ordinance of 1787 art. VI ("*Provided, always*, That any person escaping into the [territory], from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.").

[6] Jones v. Van Zandt, 46 U.S. (5 How.) 215, 229 (1847).

[7] 1 Stat. 302 (1793). The enforcement provisions of Fugitive Slave Act of 1793 were strengthened as part of the Compromise of 1850. *See* 9 Stat. 462 (1850).

[8] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 612 (1842); Ableman v. Booth, 62 U.S. (21 How.) 506 (1859).

[9] *Prigg*, 41 U.S. at 625.

[10] Moore v. Illinois, 55 U.S. (14 How.) 13, 17 (1853).

[1] *See, e.g.*, Ralph H. Brock, *The Ultimate Gerrymander: Dividing Texas into Four New States*, 6 Cardozo Pub. L. Pol'y & Ethics J. 651, 662 (2008) (using the term "Admissions Clause" to refer to this provision); Robert Barrett, *History on an Equal Footing: Ownership of the Western Federal Lands*, 68 U. Colo. L. Rev. 761, 767 (1997) (using the term "New States Clause" to refer to this provision); Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 Geo. Wash. L. Rev. 160, 167 (1991) (using the term "Admission Clause" to refer to this provision).

is formed from territory in the jurisdiction of an existing state or states, the consent of the affected state legislatures is required (in addition to congressional approval).[2] For example, Virginia's consent was given to the admission of the state of Kentucky, formed out of Virginia's western regions in 1792.[3]

Because the Clause uses a semicolon instead of a comma after the phrase "no new State shall be formed or erected within the Jurisdiction of any other State," a literal reading of the text might incorrectly suggest that the Constitution categorically forbids forming a new state out of the territory of an existing state.[4] The drafting history of the Admissions Clause shows, however, that the Framers contemplated that new states could be formed from the territory of an existing state, if that state consented.[5] In practice, Congress—beginning with the First Congress[6]—has several times admitted new states formed out of the territory of a consenting existing state without constitutional controversy.[7]

The second limitation, known as the "equal footing doctrine"[8] is rooted in long-standing congressional practice[9] and judicial interpretations of the Admissions Clause. Under the equal footing doctrine, new states must be admitted on equal terms "with all of the powers of sovereignty and jurisdiction which pertain to the original states."[10] In particular, Congress may not impose conditions on a state's admission that would diminish the equal sovereignty of the states.[11]

Thirty-seven states have been admitted to the United States under the Admissions Clause. Vermont was the first in 1791,[12] and Hawaii the most recent in 1959.[13] Beyond requiring at least one act of Congress for admission (and, if applicable, the consent of affected state legislatures), the Admissions Clause leaves the details of the admission process to congressional determination. Most states were first organized by Congress as federal

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[2] U.S. Const. art IV, § 3, cl. 2.

[3] 1 Stat. 189 (1791). The circumstances surrounding the admission of Vermont, the first new state following the Constitution's ratification, are somewhat ambiguous. Although New York claimed Vermont as part of its territory, Vermont declared independence from New York in 1777 and functioned as an independent republic until its admission in 1791. *See generally* Vasan Kesavan and Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 Cal. L. Rev. 291, 371–75 (2002). Although the New York legislature did consent to the admission of Vermont, it is not clear whether consent was constitutionally required, because Vermont was (arguably) not within New York's jurisdiction. *Id.* In fact, records from the Convention show that the Framers carefully worded the Admissions Clause to allow Vermont's admission as a state without "a dependence on the consent of N[ew] York." *See* 2 Records of the Federal Convention of 1787, at 463 (Max Farrand, ed. 1911) [hereinafter Farrand's Records].

[4] *See* Kesavan & Paulsen, *supra* note 3, at 332–82 (examining this so-called "semicolon problem" at length). Sources as authoritative as the Supreme Court and Justice Story have misquoted the Admissions Clause with the ambiguous second semicolon replaced by a comma. *See* Pollard's Lessee v. Hagan, 44 U.S. 212, 223 (1845); 3 Joseph Story, Commentaries on the Constitution of the United States § 1308 (1833).

[5] *See* 2 Farrand's Records, *supra* note 3, at 455, 464. This intended meaning is clear from earlier drafts of the Clause; the ambiguous semicolon was added only by the Committee of Style late in the Convention. *Id.* at 602.

[6] *See* Marsh v. Chambers, 463 U.S. 783, 790 (1983) (actions of the First Congress provide "contemporaneous and weighty evidence" of Constitution's meaning) (quotations and citations omitted).

[7] *See, e.g.*, 1 Stat. 189 (1791) (admission of Kentucky, with the consent of Virginia); 3 Stat. 544 (1820) (admission of Maine, with the consent of Massachusetts).

[8] *See* ArtIV.S3.C1.3 Equal Footing Doctrine Generally.

[9] In its acts of admission (or in enabling acts setting out a process for state admission), Congress has consistently specified that the new state is admitted "on an equal footing with the original states, in all respects whatever." *See, e.g.*, 1 Stat. 491–92 (1796) (Tennessee); 2 Stat. 173 (1802) (Ohio); 5 Stat. 144 (1837) (Michigan); 9 Stat. 452 (1850) (California); 36 Stat. 557 (1910) (New Mexico and Arizona).

[10] Coyle v. Smith, 221 U.S. 559, 573 (1911).

[11] *Id.* at 567–68, 573.

[12] 1 Stat. 191 (1791).

[13] 73 Stat. 4 (1959).

territories before their admission as states,[14] but that is not constitutionally required. Texas, for example, was an independent republic before it was annexed by the United States and admitted as state in 1845.[15]

ArtIV.S3.C1.2 Historical Background on Admissions Clause

Article IV, Section 3, Clause 1:

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

The Articles of Confederation did not provide for any general process to admit new states.[1] Instead, the Articles stated that Canada (referring to what was then the British Province of Quebec) could join the Confederation as of right, but "no other colony shall be admitted" without the consent of nine states.[2] Despite this deficiency, the Confederation Congress enacted laws—most notably the Northwest Ordinance of 1787—which organized the territories of the United States, establishing a system of territorial government and a process for admitting new states from federal territory.[3]

At the Constitutional Convention, a provision for congressional authority to admit new states was one of the original resolutions in the Virginia Plan presented by Edmund Randolph.[4] The Convention rejected a proposal by Elbridge Gerry to limit the number of western states so that they should "never be able to outnumber the Atlantic states."[5] The Committee of Detail's early draft of the Clause required a supermajority (two-thirds) of Congress to admit a new state and explicitly required that admission be "on the same terms with the original States."[6] Gouverneur Morris, however, successfully moved to remove the "same terms" language, over James Madison's objection,[7] arguing that Congress should be able

[14] *See* U.S. Const. art. IV, § 3, cl. 2; ArtIV.S3.C2.3 Power of Congress over Territories.

[15] 5 Stat. 797 (1845); *see also* United States v. Texas, 143 U.S. 621, 634 (1892).

[1] *See* The Federalist No. 43 (James Madison).

[2] Articles of confederation of 1781, art. XI. ("Canada acceding to this confederation, and joining in the measures of the united states, shall be admitted into, and entitled to all the advantages of this union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.").

[3] *See* Northwest Ordinance of 1787, art. V. The Ordinance followed Virginia's 1784 cessation to the United States of its territory northwest of the Ohio river (and similar cessations by other states claiming the territory), upon the condition that new states should be formed from the territory and admitted to the union on an equal footing with the original states. *See* Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 221–22 (1845). The First Congress reenacted the Northwest Ordinance after the Constitution's ratification. 1 Stat. 50 (1789).

[4] *See* 1 Records of the Federal Convention of 1787, at 22 (Max Farrand, ed. 1911) [hereinafter Farrand's Records] ("Resolvd. that provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a 'voluntary junction of Government & Territory or otherwise, with the consent of a number of voices in the National legislature less than the whole.") & 121 (approval of the resolution).

[5] 2 Farrand's Records, *supra* note 4, at 3.

[6] *Id.* at 188. This language echoed the Northwest Ordinance's provision that new states from the territory would be admitted "on an equal footing with the original States in all respects whatever." Northwest Ordinance of 1787, art. V.

[7] 2 Farrand's Records, *supra* note 4, at 454 (Madison argued that "the Western States neither would nor ought to submit to a Union which degraded them from an equal rank with the other States.").

to set the terms for state admission to limit the power of new western states.[8] Morris, joined by Luther Martin, also successfully moved to strike out the congressional supermajority requirement for admission.[9]

The remaining debates focused on whether the consent of an affected state should be required when a new state is formed from its territory. Luther Martin repeatedly argued that a consent requirement would give "large States claiming the Western lands" (such as Virginia and North Carolina) an effective veto over the admission of new states.[10] The prevailing view at the Convention, however, was that Congress should not have the power to "dismember a State without its consent."[11] After some minor changes intended to facilitate the admission of Vermont,[12] Gouverneur Morris and John Dickinson proposed language substantially similar to the final Admissions Clause, which passed the Convention.[13]

ArtIV.S3.C1.3 Equal Footing Doctrine Generally

Article IV, Section 3, Clause 1:

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

Despite the Constitutional Convention's rejection of explicit language guaranteeing the equality of newly admitted states, Congress has provided in state admission acts that the new state enters the union "on an equal footing with the original States in all respects whatever."[1] With the admission of Louisiana in 1812, the principle of equality was extended to states created out of territory not possessed by the United States at the time of the Constitution's ratification.[2]

The equal footing doctrine is a constitutional requirement and not merely a statutory interpretation of Congress's acts of admission.[3] The Supreme Court has held the sovereign equality of states to be an inherent attribute of the "Union" envisioned in the Constitution.[4] The constitutional basis for the doctrine was clear at least by the 1845 decision in *Pollard's Lessee v. Hagan*, if not before.[5]

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[8] *Id.*

[9] *Id.* at 454.

[10] *Id.* at 455; *see also id.* at 463–64.

[11] *Id.* at 455 (statement of Roger Sherman); *see also id.* at 462.

[12] *Id.* at 463.

[13] *See id.* at 464 ("New States may be admitted by the Legislature into the Union: but no new State shall be hereafter formed or erected within the jurisdiction of any of the present States without the consent of the Legislature of such State as well as of the General Legislature.") & 465 ("Nor shall any State be formed by the junction of two or more States or parts thereof, without the consent of the Legislatures of such States, as well as of the Legislature of the U. States."). The Committee of Style merged these two clauses and edited this language into its final form. *Id.* at 578, 602.

[1] *See, e.g.*, 1 Stat. 491 (1796) (Tennessee); *see generally* Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 221 (1845). Vermont and Kentucky were admitted using somewhat different terminology. 1 Stat. 191 (1791); 1 Stat. 189 (1791).

[2] 2 Stat. 701, 703 (1812).

[3] Coyle v. Smith, 221 U.S. 559, 567 (1911).

[4] *Id.*; *accord* McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1914); Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 434 (1892); Knight v. U.S. Land Ass'n, 142 U.S. 161, 183 (1891); Weber v. Harbor Commissioners, 85 U.S. (18 Wall.) 57, 65 (1873).

[5] 44 U.S. (3 How.) 212 (1845); *see also* Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836); Permoli v. Municipality No. 1 of New Orleans, 44 U.S. (3 How.) 589 (1845).

Pollard's Lessee involved conflicting claims to certain partially inundated lands covered by the Mobile River in the city of Mobile, Alabama.[6] The enabling act for the admission of Alabama had contained both a declaration of equal footing and an explicit reservation to the United States of these lands, as covered by "navigable waters."[7] The plaintiff in *Pollard's Lessee* derived his claim from a grant by the United States after Alabama's admission as state.[8] The key question in the case was thus whether the United States could convey valid title to the property. Because the original states had sovereignty and jurisdiction over their navigable waters and the soil beneath them, the Court reasoned that retention by the United States of title to such lands, as a condition of statehood, would put Alabama on an unequal footing with the original states.[9] Thus, at its admission, Alabama acquired sovereignty over its "navigable waters and soils under them . . . and no compact that might be made between her and the United States could diminish or enlarge these rights."[10]

In the 1911 decision *Coyle v. Smith*, the Court invalidated a restriction imposed by Congress in the enabling act for the admission of Oklahoma, which purported to require that the new state's capital be located at Guthrie until 1913.[11] The Court held that Congress could not use conditions on admission to "restrict the powers of such new state in respect of matters which would otherwise be exclusively within the sphere of state power."[12] To diminish state sovereignty in this way would violate the Constitution by creating "a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission."[13]

Broadly speaking, every new state may exercise all the powers of government which belong to the original thirteen states.[14] It acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property throughout its territory, except on lands the United States has reserved as its property.[15] Conditions of territorial government, such as the Northwest Ordinance of 1787 and similar acts, are no longer operative once a state is admitted, except when adopted by state law.[16] It also follows from the equal footing doctrine that the citizens of a territory, upon admission, "became citizens of the United States and of the [admitted] state."[17]

Historically, the equal footing doctrine has been applied almost exclusively in the context of conditions on the admission of new states.[18] More recently, the Supreme Court in the 2000s

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[6] *Pollard's Lessee*, 44 U.S. at 219–20.

[7] 3 Stat. 489, 492 (1819).

[8] *Pollard's Lessee*, 44 U.S. at 219.

[9] *Id.* at 228–29.

[10] *Id.*; *see also id.* at 222–23.

[11] Coyle v. Smith, 221 U.S. 559, 579 (1911); 34 Stat, 267, 269 (1906).

[12] *Coyle*, 221 U.S. at 568.

[13] *Id.* at 567.

[14] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 223 (1845); McCabe v. Atchison T. & S.F. Ry., 235 U.S. 151 (1914).

[15] Van Brocklin v. Tennessee, 117 U.S. 151, 167 (1886).

[16] *Permoli v. Municipality No. 1*, 44 U.S. (3 How.) 589, 609 (1845); Escanaba & Lake Mich. Transp. Co. v. City of Chicago, 107 U.S. 678, 689 (1883); Sands v. Manistee River Imp. Co., 123 U.S. 288, 296 (1887); *see also* Withers v. Buckley, 61 U.S. (20 How.) 84, 92 (1858); Huse v. Glover, 119 U.S. 543 (1886); Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 9 (1888); Cincinnati v. Louisville & Nashville R.R., 223 U.S. 390 (1912).

[17] Boyd v. Nebraska *ex rel*. Thayer, 143 U.S. 135, 176 (1892).

[18] *See* South Carolina v. Katzenbach, 383 U.S. 301, 328–29 (1966) ("The doctrine of the equality of States . . . applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared." (citations omitted)).

and 2010s has relied on the general principle of equality sovereignty among the states to strike down both federal and state laws outside the state admission context.[19]

ArtIV.S3.C1.4 Permissible Conditions on State Admissions

Article IV, Section 3, Clause 1:

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

The equal footing doctrine does not mean that Congress may not place any conditions in legislation admitting new states. Rather, Congress has broad power to impose conditions under its authority over federal territories,[1] its enumerated powers,[2] and the Admissions Clause itself. The equal footing doctrine only prohibits conditions which limit state sovereignty after admission, in areas that are "exclusively within the sphere of state power."[3] It follows that at least two broad categories of admission conditions are constitutional notwithstanding the equal footing doctrine.

First, Congress may impose "provisions which are fulfilled by the admission of the state."[4] For example, Congress may require the population of a territory to have a certain number of inhabitants before it seeks admission[5] or that proposed state laws or constitutions meet congressional standards (and be ratified by the people of the state) to qualify for admission.[6] As the Supreme Court has stated, the Admissions Clause "is not a mandate, but a power to be exercised with discretion."[7] Congressional prerequisites for admission do not violate the equal footing doctrine because they do not bind the newly sovereign state after admission.[8]

Second, Congress may impose post-statehood requirements in state admission acts that would be a valid exercise of congressional power if they were subject of federal legislation after admission.[9] Thus, Congress may include in an admission or enabling act regulations of interstate commerce or commerce with Indian Tribes, or regulations of federal lands within a state.[10] Such provisions derive force not from their acceptance as a term of admission but from the Supremacy Clause[11] and "the power of Congress extended to the subject."[12] Because

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[19] *See, e.g.*, Franchise Tax Bd. v. Hyatt, 136 S. Ct. 1277, 1282 (2016); Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (citing Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)); *see also* Amdt10.4.3 Equal Sovereignty Doctrine.

[1] *See* ArtIV.S3.C2.3 Power of Congress over Territories.

[2] *See* U.S. Const. art. I, § 8.

[3] Coyle v. Smith, 221 U.S. 559, 568 (1911).

[4] *See id.*

[5] *See, e.g.*, 1 Stat. 50, 53 (1798).

[6] *See, e.g.*, 13 Stat. 30, 31 (1864) (conditions for Nevada's constitution); 2 Stat. 173, 174 (1802) (conditions for Ohio's constitution); *see generally* Permoli v. Municipality No. 1 of City of New Orleans, 44 U.S. 589 (1845).

[7] *Coyle*, 221 U.S. at 568.

[8] *See* Bolln v. Nebraska, 176 U.S. 83, 89 (1900).

[9] *Coyle*, 221 U.S. at 573–74.

[10] *See, e.g.*, Stearns v. Minnesota, 179 U.S. 223 (1900) (regulation of federal lands); United States v. Sandoval, 231 U.S. 28 (1913) (regulating commerce with Indian tribes); United States v. Chavez, 290 U.S. 357 (1933) (same); Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 9–10 (1888) (prevention of interference with navigability of waterways under the interstate Commerce Clause).

[11] U.S. Const. art. VI, cl. 2; *see* ArtVI.C2.1 Overview of Supremacy Clause.

[12] *Coyle*, 221 U.S. at 574.

Congress's power in these areas extends equally to the original states, such legislation is not invalid under the equal footing doctrine just because it is part of an act of state admission.

ArtIV.S3.C1.5 Equal Footing and Property Rights in Submerged Lands

Article IV, Section 3, Clause 1:

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

The equal footing doctrine has great significance for the property rights to land under navigable waters[1] and tidally influenced waters.[2] In *Pollard's Lessee v. Hagan*, the Supreme Court held that the equal footing doctrine requires that the title to lands beneath navigable waters generally passes to a new state upon its admission.[3] The principle of this case supplies the rule of decision for many property disputes decided by the Court.[4] The Court has summarized title consequences of the equal footing doctrine as follows:

> Upon statehood, the State gains title within its borders to the beds of waters then navigable (or tidally influenced). It may allocate and govern those lands according to state law subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce. The United States retains any title vested in it before statehood to any land beneath waters not then navigable (and not tidally influenced), to be transferred or licensed if and as it chooses.[5]

Beginning with the 1894 case *Shively v. Bowlby*, the Court has recognized the authority of the United States, while territorial status continues, to transfer title to land below navigable waters when necessary for "public purposes appropriate to the objects for which the United States hold the territory."[6] Thus, despite the rule of *Pollard's Lessee*, the United States may "defeat a prospective State's title to land under navigable waters by a prestatehood conveyance of the land to a private party for a public purpose appropriate to the Territory."[7] The United

[1] "Navigable waters," for equal footing purposes, are those waters used, or susceptible to use, for trade and travel at the time of statehood. PPL Montana, LLC v. Montana, 565 U.S. 576, 590–92 (2012). Navigability of rivers is determined on a segment-by-segment basis, and lands under portions of a stream that were impassable at statehood were not conveyed by force of the doctrine. *Id.* at 594–60; *see also* United States v. Utah, 283 U.S. 64 (1931).

[2] *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476 (1988); Knight v. U.S. Land Ass'n, 142 U.S. 161, 183 (1891).

[3] 44 U.S. (3 How.) 212, 223 (1845); *see also* Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842).

[4] *See, e.g.*, *PPL Montana, LLC*, 565 U.S. 576; *Phillips Petroleum Co.*, 484 U.S. 469; Utah Div. of State Lands v. United States, 482 U.S. 193 (1987); Oregon *ex rel*. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977); Texas v. Louisiana, 410 U.S. 702 (1973); Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973), *overruled by* Corvallis Sand & Gravel Co., 429 U.S. 363 (1977); Utah v. United States, 403 U.S. 9 (1971); Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892); Hallett v. Beebe, 54 U.S. (13 How.) 25 (1851); Pollard v. Kibbe, 50 U.S. (9 How.) 471 (1850).

[5] *PPL Montana LLC*, 565 U.S. at 591 (citations and quotations omitted).

[6] Shively v. Bowlby, 152 U.S. 1, 48 (1894); *see also* Joy v. St. Louis, 201 U.S. 332 (1906). *Shively* explained that the United States might make such transfers "whenever it becomes necessary to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states" or "in case of some international duty or public exigency." 152 U.S. at 48, 50.

[7] *Utah Div. of State Lands*, 482 U.S. at 197; Choctaw Nation v. Oklahoma, 397 U.S. 620, 634–35 (1970).

States may also defeat a prospective state's title through a clear intention to reserve submerged lands to itself as part of a federal reservation, such as a wildlife refuge, or an Indian reservation.[8]

That said, because control over property underlying navigable waters is so closely tied to state sovereignty,[9] states enjoy a strong "presumption of title" to submerged lands beneath inland navigable waters within their boundaries.[10] To determine whether that presumption is overcome, courts apply a two-step test: (1) "whether the United States clearly intended to include submerged lands within the reservation"; and (2) "whether the United States expressed its intent to retain federal title to [the] submerged lands."[11] Intent by the United States to defeat state title must be "'definitely declared or otherwise made very plain.'"[12]

In 1947, the Court in *United States v. California* refused to extend *Pollard's Lessee's* rule for land under inland navigable waters to submerged lands in the three-mile marginal belt under the ocean along a state's coast.[13] Whether the states or the federal government had rights to these lands "became of great potential importance at the beginning of [the twentieth] century when oil was discovered there."[14] Examining the historical evidence, the Court held that, unlike inland navigable waters, the thirteen original colonies did not acquire ownership of the land under their marginal seas upon independence and that therefore "national rights are paramount."[15]

Indeed, the Court applied the *Pollard's Lessee* principle in reverse for lands under marginal seas in *United States v. Texas*.[16] Although Texas was an independent republic with conceded sovereignty over the submerged lands of its marginal sea before its annexation to the United States, Texas was held to have implicitly surrendered its sovereignty over these submerged lands upon admission.[17] Congress responded to the *California* and *Texas* decisions in 1953 through the Submerged Lands Act[18] and Outer Continental Shelf Lands Act.[19] These laws divided jurisdiction over the continental shelf, with Congress generally ceding to the coastal states title to submerged lands at a specified distance from their coasts (generally three geographical miles).[20] For its part, the United States confirmed its exclusive control over the outer continental shelf, meaning all submerged lands beyond those reserved to states and up the edge of the United States' jurisdiction and control.[21] The result of these laws is that,

[8] *See, e.g.*, Alaska v. United States, 545 U.S. 75, 100 (2005) (United States reserved title to submerged lands under Glacier Bay); Idaho v. United States, 533 U.S. 262, 280–81 (2001) (United States reserved title to submerged lands under Lake Coeur d'Alene, in trust for the Coeur d'Alene Tribe); United States v. Alaska, 521 U.S. 1, 62 (1997) (United States reserved title to submerged lands beneath tidally influenced waters within the Arctic National Wildlife Refuge).

[9] Montana v. United States, 450 U.S. 544, 552 (1981).

[10] *Alaska*, 545 U.S. at 78–79.

[11] *Id.* at 100.

[12] *Alaska*, 521 U.S. at 34 (quoting United States v. Holt State Bank, 270 U.S. 49, 55 (1926)).

[13] United States v. California, 332 U.S. 19, 38 (1947); *accord* United States v. Louisiana, 339 U.S. 699 (1950).

[14] *California*, 332 U.S. at 38.

[15] *Id.* at 31, 36.

[16] 339 U.S. 707, 716 (1950); *see also* United States v. Maine, 420 U.S. 515 (1975) (reaffirming the *California*, *Louisiana*, and *Texas* cases).

[17] *Texas*, 339 U.S. at 718.

[18] 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. §§ 1301–1315). The Court upheld the constitutionality of the Submerged Lands Act in *Alabama v. Texas,* 347 U.S. 272 (1954).

[19] 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§ 1331–1356b).

[20] 43 U.S.C. §§ 1301(a)(1), 1311; *see generally* United States v. Alaska, 521 U.S. 1, 5–6 (1997); United States v. Louisiana, 363 U.S. 1, 6–10 (1960).

[21] 43 U.S.C. §§ 1331–32; *see generally* Parker Drilling Mgmt. Servs. v. Newton, No. 18-389, slip op. at 3–4 (U.S. June 10, 2019).

despite the Court's decision in *California*, state claims to submerged lands beneath waters within three nautical miles of their coasts are analyzed under the *Pollard's Lessee* framework.[22]

ArtIV.S3.C1.6 Equal Footing and Rights of Indian Tribes

Article IV, Section 3, Clause 1:

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

The constitutional authority of Congress to regulate commerce with Indian Tribes,[1] and of the United States to make treaties with them,[2] are not inconsistent with the equality of new states.[3] Congress may therefore impose conditions in an enabling act that regulate commerce with Indian Tribes, such as a condition forbidding the introduction of liquor into Indian territory, and those conditions remain valid after statehood.[4]

Similarly, treaties entered into between the United States Indian Tribes during a territorial period—which may, for example, grant the Tribe rights to fish in designated waters, or hunt and gather on lands ceded by a tribe to the United States—are not automatically extinguished by statehood.[5] Such treaty rights are valid unless Congress clearly indicates its intent to abrogate them in its act of admission, or the treaty itself makes clear that the parties intended the rights to terminate at statehood.[6] The United States may also transfer title in territorial lands to Indian Tribes by treaty, which is not extinguished by statehood; but title to property underlying navigable waters must be reserved or conveyed by a clear statement or it will pass to the state upon admission under the rule of *Pollard's Lessee v. Hagan*.[7]

Under the 1882 decision *United States v. McBratney*, when a state admission or enabling act contains no clear provision excluding state jurisdiction, state courts are vested with jurisdiction over crimes committed on Indian reservations by non-Indians against non-Indians upon statehood.[8] However, Congress may explicitly preempt state jurisdiction in Indian

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[22] *See* Alaska v. United States, 545 U.S. 75, 78–79 (2005).

[1] U.S. Const. art. I, § 8, cl. 3; *see* ArtI.S8.C3.9.1 Scope of Commerce Clause Authority and Indian Tribes.

[2] U.S. Const. art. II, §2, cl. 2; *see* ArtII.S2.C2.1.3 Scope of Treaty-Making Power.

[3] *See* Dick v. United States, 208 U.S. 340. 405–06 (1908); *accord* Johnson v. Gearlds, 234 U.S. 422, 439 (1914); United States v. Sandoval, 231 U.S. 28, 47 (1913); *Ex parte* Webb, 225 U.S. 663 (1912).

[4] *Sandoval*, 231 U.S. at 49.

[5] *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999); United States v. Winans, 198 U.S. 371, 378 (1905). The Supreme Court formerly held to the contrary in *Ward v. Race Horse*, which had applied the equal footing doctrine to find that a treaty granting hunting rights to certain tribes was implicitly extinguished by Wyoming's admission as a state. 163 U.S. 504, 515–16 (1896), *overruled by* Herrera v. Wyoming, No. 17-532 (U.S. May 20, 2019). The Court later explained that *Race Horse* "rested on a false premise" that state sovereignty over natural resources was an area of exclusive state jurisdiction. *Mille Lacs*, 526 U.S. at 204. Rather, "[a]lthough States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making." *Id.* In *Herrera v. Wyoming*, the Court definitively overruled the equal footing holding of *Race Horse*. *See Herrera*, slip op. at 11.

[6] *Herrera*, slip op. at 13–14; *see also Mille Lacs*, 526 U.S. at 206–07.

[7] *See* Idaho v. United States, 533 U.S. 262, 272–74 (2001); Montana v. United States, 450 U.S. 544, 551–52 (1981); *see also* United States v. State of Oregon, 295 U.S. 1, 14 (1935); United States v. Holt State Bank, 270 U.S. 49, 54–55 (1926).

[8] United States v. McBratney, 104 U. S. 621, 623–24 (1882); *accord* Draper v. United States, 164 U.S. 240, 245–247 (1896).

country by federal law, and state jurisdiction is implicitly preempted "when the exercise of state jurisdiction would unlawfully infringe on tribal self-government."[9] In *Oklahoma v. Castro-Huerta*, the Court extended *McBratney's* presumption of state criminal jurisdiction to crimes committed by non-Indians against Indians on Indian reservations, absent congressional preemption.[10] Because divesting a state of jurisdiction over crimes within its territory affects its sovereignty under the equal footing doctrine, the Court required "clear statutory language" in a state enabling act or another act of Congress to preclude state criminal jurisdiction over crimes by non-Indians.[11]

ArtIV.S3.C1.7 Effect of State Admission on Pending Judicial Proceedings

Article IV, Section 3, Clause 1:

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

In its acts of admission, Congress may explicitly provide for the transfer and disposition of civil and criminal cases pending in the territorial courts following statehood, consistently with the Constitution.[1] Territorial courts are generally "legislative courts" not subject to Article III.[2] Because the federal government has plenary authority in a territory, there is no distinction between federal and state jurisdiction while the territory exists.[3]

After statehood, cases pending in the territorial courts of exclusive federal cognizance are generally transferred to the federal court having jurisdiction over the area.[4] Cases not cognizable in the federal courts are transferred to the tribunals of the new state, and those over which federal and state courts have concurrent jurisdiction may be transferred either to the state or federal courts by the party possessing the option under existing law.[5] When a formerly territorial case is transferred to a state court under the operation of the enabling act and the state constitution, the appellate procedure is governed by the state law.[6]

Without action from Congress, the Supreme Court may not directly review the decision of a territorial court of appeals after that court has ceased to exist following statehood.[7] But Congress may by law provide for Supreme Court appellate review of such cases or for their transfer to an appropriate federal court.[8] When Congress neglected to make provision for

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[9] Oklahoma v. Castro-Huerta, No. 21-429, slip op. at 7 (U.S. June 29, 2022).

[10] *Id*. at 6–7, 25.

[11] *Id.* at 23 (citing *Draper*, 164 U.S. at 242–43).

[1] *See, e.g.*, 36 Stat. 557, 565–65 (1910) (treatment of cases pending in New Mexican territorial courts after state admission).

[2] *See* ArtIV.S3.C2.3 Power of Congress over Territories. The federal courts of the District of Columbia and territory of Puerto Rico, however, are Article III courts. *See* ArtIII.S1.9.4 District of Columbia and Territorial Courts.

[3] Benner v. Porter, 50 U.S. 235, 242 (1850); *see generally* ArtIII.S1.6.1 Overview of Relationship Between Federal and State Courts; ArtIII.S1.6.3 Doctrine on Federal and State Courts.

[4] Baker v. Morton, 79 U.S. (12 Wall.) 150, 153 (1871).

[5] *Id*.

[6] John v. Paullin, 231 U.S. 583 (1913).

[7] Hunt v. Palao, 45 U.S. (4 How.) 589 (1846).

[8] *Benner*, 50 U.S. (9 How.) at 245–46.

disposition of certain pending cases in an enabling act for the admission of a state, a subsequent act addressing the omission was held valid.[9]

Clause 2—Territory and Other Property

ArtIV.S3.C2.1 Property Clause Generally

Article IV, Section 3, Clause 2:

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

Section 3, Clause 2 of Article IV empowers Congress to dispose of and regulate constitutionally acquired federal property.[1] The Supreme Court has explained that "[t]he occasion for the grant was the obvious necessity of making provision for the government of the vast territory acquired by the United States."[2] The Supreme Court continued "[t]he grant was made in broad terms, and the power of regulation and disposition was not confined to territory, but extended to 'other property belonging to the United States,' so that the power may be applied . . . 'to the due regulation of all other personal and real property rightfully belonging to the United States.'"[3]

The Constitution does not address how the government may exercise this power, but the Supreme Court historically has described Congress's authority under the Property Clause as "plenary"[4] and "without limitations."[5] The Court has summarized Congress's authority, stating:

> With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it . . . .[6]

Consequently, the Court has generally been deferential to congressional uses of Property Clause authority. In the 1840 decision *United States v. Gratiot*,[7] for instance, the Supreme Court interpreted the Property Clause as applying to a lease of a lead mine on government land. The defendants in that case argued that the phrase "dispose of" should be interpreted narrowly to apply to the *sale* but not the *leasing* of property, and that, therefore, Congress lacks

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[9] Freeborn v. Smith, 69 U.S. (2 Wall.) 160 (1865).

[1] Kleppe v. New Mexico, 426 U.S. 529, 537–38 (1976); Kansas v. Colorado, 206 U.S. 46, 89 (1907); *see* Camfield v. United States, 167 U.S. 518, 524 (1897) (holding that "the government has, with respect to its own lands, the rights of an ordinary proprietor").

[2] Ashwander v. TVA, 297 U.S. 288, 331 (1936).

[3] *Id.* (quoting Joseph Story, Commentaries on the Constitution of the United States §§ 1325–26 (1833)).

[4] Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 594 (1987).

[5] *Id.* (quoting United States v. City of San Francisco, 310 U.S. 16, 29–30 (1940)). *See also* Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 294–95 (1958); Alabama v. Texas, 347 U.S. 272, 273 (1954); FPC v. Idaho Power Co., 344 U.S. 17, 21 (1952); United States v. California, 332 U.S. 19, 27 (1947); Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99 (1872); United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840).

[6] *Gibson*, 80 U.S. (13 Wall.) at 99.

[7] 39 U.S. (14 Pet.) 526 (1840).

the power "to give or authorize leases of the public lands."[8] In upholding the lease, the Court rejected such a narrow interpretation, stating that "disposal must be left to the discretion of Congress."[9] Nearly a century later, the Court similarly rejected a narrow interpretation of the Property Clause in a challenge over a statutorily authorized contract through which the federal agency, the Tennessee Valley Authority, agreed to purchase power lines and real property for the construction of a dam. In that case, the Court held that the Clause extended to the disposal of potential electrical energy made available by the construction of a dam, as well as the transmission lines and other equipment necessary to generate the energy.[10]

ArtIV.S3.C2.2 Federal and State Power Over Public Lands

Article IV, Section 3, Clause 2:

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

The Property Clause provides that public lands may only be disposed of with congressional authorization.[1] The Supreme Court has held "that the power of Congress is exclusive, and that only through its exercise in some form can rights in lands belonging to the United States be acquired."[2] However, the Court held that, by being aware of and doing nothing to halt the long-time practice of presidents withdrawing land from the public domain by Executive Orders, Congress had acquiesced to the practice.[3] In 1976, Congress reversed course by passing legislation establishing procedures for land withdrawals and explicitly repealing congressional acquiescence to the practice, as well as any implicit executive withdrawal authority.[4]

Congress may dispose of public property in a manner that furthers public policy, as determined exclusively by Congress.[5] The Court has likened congressional authority over federal land within states to that of states' police power.[6] The Court has explained that "[t]he general government doubtless has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case."[7] In its 1976 *Kleppe v. New Mexico* decision, the Court restated the applicable principles governing Congress's power under the Property

[8] *Id.* at 533.

[9] *Id.* at 538. *See also* Kleppe v. New Mexico, 426 U.S. 529, 541 (1976) ("In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain.") (citing Alabama v. Texas, 347 U.S. at 273; Sinclair v. United States, 279 U.S. 263, 297 (1929) (repudiated on other grounds by United States v. Gaudin, 515 U.S. 506, 519–20 (1995)); United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915)).

[10] Ashwander v. TVA, 297 U.S. 288, 335–40 (1936). *See also* Ala. Power Co. v. Ickes, 302 U.S. 464 (1938).

[1] United States v. Fitzgerald, 40 U.S. (15 Pet.) 407, 421 (1841). *See also* Utah Power & Light Co. v. United States, 243 U.S. 389, 403–04 (1917).

[2] *Utah Power & Light Co.*, 243 U.S. at 404.

[3] Sioux Tribe v. United States, 316 U.S. 317, 324–25 (1942); United States v. Midwest Oil Co., 236 U.S. 459, 469 (1915).

[4] Pub. L. No. 94–579, § 704(a), 90 Stat. 2792 (1976).

[5] United States v. City of San Francisco, 310 U.S. 16, 30 (1940) ("The power over the public land thus entrusted to Congress is without limitations. And it is not for the courts to say how that trust shall be administered. That it for Congress. Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy." (internal citations omitted)). *See also* Light v. United States, 220 U.S. 523, 535–36 (1911).

[6] Camfield v. United States, 167 U.S. 518, 525 (1897).

[7] *Id.*

Clause unanimously upholding a federal law to protect wild-roaming horses and burros on federal lands.[8] The Court explained that the Property Clause, in broad terms, gives Congress the power to determine what are "'needful' rules 'respecting' the public lands."[9] The Court continued that, while the outer limits of this authority is unsettled, "we have repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'"[10]

Over the course of the Nation's history, the Court has held that Congress's authority over public land includes: the right "to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made"[11]; "to declare the dignity and effect of titles emanating from the United States"[12]; to determine the validity of grants which precede the government's acquisition of the property[13]; to exempt lands privately acquired under the homestead laws from previously contracted debts[14]; to withdraw land from settlement and to prohibit grazing thereon[15]; to restrict the construction of fencing on private land that abuts public land to prevent the unlawful occupation of public property[16]; to limit destruction of federal property[17]; to define and abate nuisances that affect the property[18]; to prohibit the introduction of liquor on lands purchased by the federal government for an Indian reservation[19]; and to protect wildlife located on public land.[20]

In *Kleppe*, the Court recognized that Congress's power over federal lands includes power to regulate the lands, stating "Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant the Property Clause."[21] No state may tax federal property pursuant to state authority,[22] nor may state legislation interfere with the power of Congress under the Property Clause or embarrass its exercise.[23] Moreover, when Congress acts with respect to lands covered by the Clause, its legislation preempts conflicting state

[8] Kleppe v. New Mexico, 426 U.S. 529, 539 (1976).

[9] *Id.*

[10] *Id.* (quoting *City of San Francisco*, 310 U.S. at 29–30). *See also* Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 294–295 (1958); Alabama v. Texas, 347 U.S. 272, 273 (1954); FPC v. Idaho Power Co., 344 U.S. 17, 21 (1952); United States v. California, 332 U.S. 19, 27 (1947); Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99 (1872); United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840).

[11] *Gibson*, 80 U.S. (13 Wall.) at 99. *See also* Emblem v. Lincoln Land Co., 184 U.S. 660, 664 (1902); Irvine v. Marshall, 61 U.S. (20 How.) 558, 566–67 (1858).

[12] Bagnell v. Broderick, 38 U.S. (13 Pet.) 436, 450 (1839). *See also* Field v. Seabury, 60 U.S. (19 How.) 323, 332 (1857).

[13] Tameling v. U.S. Freehold & Immigr. Co., 93 U.S. 644, 663 (1877). See also Maxwell Land-Grant Case, 121 U.S. 325, 365–66 (1887).

[14] Ruddy v. Rossi, 248 U.S. 104, 107 (1918).

[15] Light v. United States, 220 U.S. 523, 535–36 (1911). *See also* The Yosemite Valley Case, 82 U.S. (15 Wall.) 77, 93–94 (1873).

[16] *Id. See also* United States v. Waddell, 112 U.S. 76, 79–80 (1884); Jourdan v. Barrett, 45 U.S. (4 How.) 169 (1846).

[17] Hunt v. United States, 278 U.S. 96, 101 (1928).

[18] Camfield v. United States, 167 U.S. 518, 525 (1897).

[19] United States v. McGowan, 302 U.S. 535, 539 (1938).

[20] Kleppe v. New Mexico, 426 U.S. 529, 539 (1976); McKelvey v. United States, 260 U.S. 353, 359 (1922).

[21] *Kleppe*, 426 U.S. at 543 (citing Mason Co. v. Tax Comm'n of Wash., 302 U.S. 186, 197 (1937); Utah Power & Light Co. v. United States, 243 U.S. 389, 403–405 (1917); Ohio v. Thomas, 173 U.S. 276, 283 (1899)). *See also* Wilson v. Cook, 327 U.S. 474, 487–88 (1946); Surplus Trading Co. v. Cook, 281 U.S. 647, 650 (1930).

[22] Van Brocklin v. Tennessee, 117 U.S. 151 (1886).

[23] Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99 (1872). *See also* Emblem v. Lincoln Land Co., 184 U.S. 660, 664 (1902); Irvine v. Marshall, 61 U.S. (20 How.) 558 (1858).

laws.[24] Thus, by virtue of the Treaty of 1868 through which the federal government agreed to allow an Indian tribe living on a reservation in Arizona to engage in self-governance, the tribal court, rather than Arizona state courts, had jurisdiction over a suit for a debt owed by a tribal resident to a non-Indian operating a federally licensed store on the reservation.[25]

Federal law resolves questions of whether title to land formerly owned by the United States has been conveyed to another.[26] After title has passed from the United States, however, "that property, like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."[27] Courts also will look to state law to address questions of precisely what property the federal government conveyed to a grantee.[28] However, a state statute enacted after a federal grant of property cannot operate to vest in the state rights that either remained in the United States or passed to its grantee.[29]

ArtIV.S3.C2.3 Power of Congress over Territories

Article IV, Section 3, Clause 2:

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

Congress holds broad authority over territories of the United States.[1] The Court has held that, with regard to territories, "Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state."[2] Congress may legislate directly with respect to the local affairs of a territory, or it may delegate that power to the territories,[3] except as limited by the Constitution.[4] Pursuant to this authority, for example, Congress has

[24] *Kleppe*, 426 U.S. 529; Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 593–94 (1987) (applying traditional preemption analysis to a question of whether state environmental laws apply to a private company utilizing an unpatented mining permit on federal land).

[25] Williams v. Lee, 358 U.S. 217, 223 (1959).

[26] United States v. Oregon, 295 U.S. 1, 28 (1935) ("The laws of the United States alone control the disposition of title to its lands. The states are powerless to place any limitation or restriction on that control.").

[27] Wilcox v. McConnel, 38 U.S. (13 Pet.) 498, 517 (1839).

[28] Oklahoma v. Texas, 258 U.S. 574, 595 (1922) ("if its [i.e., a federal treaty or statute conveying federal property] intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the state in which the land lies.").

[29] United States v. Oregon, 295 U.S. at 29 ("In construing a conveyance by the United States of land within a state, the settled and reasonable rule of construction of the state affords a guide in determining what impliedly passes to the grantee as an incident to land expressly granted.").

[1] Hooven & Allison Co. v. Evatt, 324 U.S. 652, 673–74 (1945); Balzac v. Porto Rico, 258 U.S. 298, 305 (1922); Dorr v. United States, 195 U.S. 138, 149 (1904); United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840); Sere & Laralde v. Pitot, 10 U.S. (6 Cranch) 332, 336–37 (1810). *See also* Vermilya-Brown Co. v. Connell, 335 U.S. 377, 381 (1948); United States v. Vaello Madero, No. 20-303, slip op. at 2 (U.S. Apr. 21, 2022) (explaining that the Territory Clause "affords Congress broad authority to legislate with respect to the U.S. Territories" and that, in "[e]xercising that authority, Congress sometimes legislates differently with respect to the Territories . . . that it does with respect to the States.").

[2] Simms v. Simms, 175 U.S. 162, 168 (1899). *See also* El Paso & Ne. Ry. v. Gutierrez, 215 U.S. 87 (1909); United States v. McMillan, 165 U.S. 504, 510 (1897); The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42 (1890); First Nat'l Bank v. County of Yankton, 101 U.S. 129, 133 (1880).

[3] Binns v. United States, 194 U.S. 486, 491 (1904). *See also* Murphy v. Ramsey, 114 U.S. 15, 44 (1885); *Sere & Laralde*, 10 U.S. (6 Cr.) at 336.

[4] *Simms*, 175 U.S. at 163; Wagoner v. Evans, 170 U.S. 588, 591 (1898); Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593, 604 (1897)

prohibited territorial legislatures from enacting local or special laws on enumerated subjects.[5] Further, Congress has extended the full range of constitutional protections enjoyed by United States residents in territories that have been incorporated as a part of the country by congressional action,[6] but has not done so in "unincorporated" territories (that is, those territories not clearly on the pathway to U.S. statehood).[7] Congress may establish, either directly or indirectly through authorization to a territorial legislature, "legislative courts" pursuant to the Property Clause rather than "constitutional courts" established by Article III.[8] These legislative courts also may exercise admiralty jurisdiction despite the fact that admiralty jurisdiction may be exercised in the states only by Article III courts.[9] Congress also may establish non-judicial territorial offices,[10] and if the powers and duties assigned to these offices are "primarily local" in nature, then the manner of appointment for officials to these offices does not have to comply with Article II's Appointments Clause.[11]

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[5] *Binns*, 194 U.S. at 491. *See also Murphy*, 114 U.S. at 44; *Sere & Laralde*, 10 U.S. (6 Cranch) at 336.

[6] *Simms*, 175 U.S. at 163; *Wagoner*, 170 U.S. at 591; *Walker*, 165 U.S. at 604.

[7] Balzac v. Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904); Downes v. Bidwell, 182 U.S. 244 (1901) (collectively, the *Insular Cases*). The Court stated: "The guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law," apply to persons in Puerto Rico. *Balzac*, 258 U.S. at 312. However, the full scope of constitutional provisions that are applicable in Puerto Rico and the other territories is unsettled. *Id.* ("The Constitution, however, contains grants of power, and limitations which in the nature of things are not always and everywhere applicable and the real issue in the Insular Cases was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which ones of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements."). *See also* Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 331 n.1 (1986) (equality of voting rights applicable in Puerto Rico); Rodriguez v. Popular Democratic Party, 457 U.S. 1, 7–8 (1982) (First Amendment speech applicable in Puerto Rico); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (procedural due process applicable in Puerto Rico); Torres v. Puerto Rico, 442 U.S. 465 (1979) (search and seizure applicable in Puerto Rico); Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) (equal protection principles applicable in Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914) (Sixth Amendment jury trial applicable in Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (grand jury indictment and trial by jury applicable in Hawaii). *See also* Califano v. Torres, 435 U.S. 1, 4 n.6 (1978) (right to travel assumed). The vitality of the *Insular Cases* has been questioned by some Justices (*see, e.g.,* Harris v. Rosario, 446 U.S. 651, 652–53 (1980); Torres v. Puerto Rico, 442 U.S. 465, 474, 475 (1979) (concurring opinion of four justices)) Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion)), but the Court adheres to it (United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990)). *See also* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1655 (2020) (describing the *Insular Cases* as "much-criticized," but declining to overrule them "whatever their continued validity.").

[8] Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828). *See also* Romeu v. Todd, 206 U.S. 358, 368–69 (1907); United States v. McMillan, 165 U.S. 504, 510 (1897); McAllister v. United States, 141 U.S. 174, 180 (1891); The City of Panama, 101 U.S. 453, 460 (1880); Reynolds v. United States, 98 U.S. 145, 154 (1879); Hornbuckle v. Toombs, 85 U.S. (18 Wall.) 648, 655 (1874); Clinton v. Englebrecht, 80 U.S. (13 Wall.) 434, 447 (1872); Benner v. Porter 9 (How.) 235, 236 (1850).

[9] *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) at 545 ("Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the 3d article of the Constitution; the same limitation does not extend to the territories."); *The City of Panama*, 101 U.S. at 460.

[10] *Fin. Oversight & Mgmt. Bd. for P.R.*, 140 S. Ct. at 1654–55.

[11] *Id.* at 1665. *See* ArtII.S2.C2.3.4 Ambassadors, Ministers, and Consuls Appointments.

Section 4—Republican Form of Government

ArtIV.S4.1 Historical Background on Guarantee of Republican Form of Government

Article IV, Section 4:

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

Article IV, Section 4 is generally known as the "Guarantee Clause."[1] Through its terms, the United States makes three related assurances to the states: (1) a guarantee of a republican form of government; (2) protection against foreign invasion; and (3) upon request by the state, protection against internal insurrection or rebellion.[2]

An early version of the Guarantee Clause was among the resolutions of the Virginia Plan introduced at the Constitutional Convention by Edmund Randolph and attributed to James Madison.[3] The resolution went through several formulations during the debates at the Convention.[4] During a key debate, Gouverneur Morris objected to the resolution because "[h]e should be very unwilling that such laws as exist in R[hode] Island ought to be guarantied."[5] Randolph explained that, rather than cementing the existing laws of the states, the resolution had two objects: "1. to secure Republican Government[;] 2. to suppress domestic commotions."[6] Along with concerns about rebellions, delegates expressed fears that a monarchy might arise in a particular state and "establish a tyranny over the whole [United States]."[7]

Answering Morris's objection, Madison moved to substitute language that "the Constitutional authority of the States shall be guarant[eed] to them respectively [against] domestic as well as foreign violence,"[8] with Randolph then moving to add language that "no State shall be at liberty to form any other than a Republican [Government]."[9] James Wilson

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[1] *See, e.g.*, New York v. United States, 505 U.S. 144, 183 (1992); Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 379 (1978). At times, particularly in older cases, the term is spelled "Guaranty Clause." *See, e.g.*, Baker v. Carr, 369 U.S. 186, 209 (1962); Texas v. White, 74 U.S. 700, 729 (1868).

[2] U.S. Const. art. IV, § 4. The Clause uses the term "domestic violence" in the now-archaic sense of "[i]nsurrection or unlawful force fomented from within a country," and not the modern usage meaning violence between romantic partners or within a household. *See Domestic Violence*, Black's Law Dictionary (11th ed. 2022); The Federalist No. 21 (Alexander Hamilton) .

[3] *See* 1 Max Farrand, The Records of the Federal Convention of 1787, at 22 (Max Farrand, ed. 1911) [hereinafter Farrand's Records] ("Resd. that a Republican government & the territory of each State . . . ought to be guaranteed by the United States to each State."). In an April 1787 letter to Randolph, Madison suggested that "an article ought to be inserted expressly guaranteeing the tranquility of the states against internal as well as external danger. . . . Unless the Union be organized efficiently on republican principles innovations of a much more objectionable form may be obtruded." 2 Writings of James Madison 336 (G. Hunt ed., 1900). For background on the origins of the Guarantee Clause, see W. Wiecek, The Guaranteeadmit a new state Clause of the U.S. Constitution ch. 1 (1972).

[4] On June 11, 1787, the original resolution was amended to read "Resolved that a republican constitution and its existing laws ought to be guaranteed to each state by the United States." 1 Farrand's Records, *supra* note 3, at 193–94.

[5] *See* 2 *id.* at 47; *see also* 2 *id.* at 48 (delegates expressing worry about "perpetuating the existing Constitutions of states" and the difficulty of having the federal government decide between competing state governments).

[6] *Id.* This statement echoed Randolph's earlier argument that "a republican government must be the basis of our national union; and no state in it ought to have it in their power to change its government into a monarchy." *See* 1 *id.* at 206.

[7] 2 *id.* at 48.

[8] 2 *id.* at 47–48

[9] 2 *id.* at 48.

then introduced, as a "better expression of the idea," language substantially similar to the final form of the Guarantee Clause, which the Convention approved unanimously.[10]

In light of its text and framing, the Guarantee Clause was intended to be more than an authorization for the federal government to protect states against foreign invasion or internal insurrection,[11] a power already conferred elsewhere in the Constitution.[12] While the precise contours of what constitutes a "republican form of government" are debatable,[13] an additional object of the Guarantee Clause was to prevent states from establishing monarchical or despotic governments.[14]

Except for a brief period during Reconstruction, the authority granted by the Guarantee Clause has been largely unexplored.[15] The Supreme Court and other federal courts have largely declined to hear legal challenges based on the Guarantee Clause because they present nonjusticiable political questions.[16]

ArtIV.S4.2 Guarantee Clause Generally

Article IV, Section 4:

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

In *Luther v. Borden*,[1] the Supreme Court in 1849 held that questions arising under the Guarantee Clause are generally political, and not judicial, in character.[2] *Luther* was formally an action for damages for trespass, but under the rather "unusual" circumstances of Dorr's Rebellion, a pro-suffrage revolt that led to two competing claimants for Rhode Island's lawful government.[3] The defendants in *Luther* justified their breaking and entering into the plaintiff's home under a declaration of martial law and based on the plaintiff's alleged

[10] 2 *id.* at 48–49 (resolving "that a Republican [form of Government shall] be guarantied to each State & that each State shall be protected agst. foreign & domestic violence"). The Committee of Detail added the language providing that state legislatures must first ask for protection against domestic violence. 2 *id.* at 144, 148, 159, 174. Later motions to strike that proviso failed, 2 *id.* at 466–67, and during that debate the word "foreign" before "invasion" was deleted as superfluous. *Id.*

[11] *See generally* The Federalist No. 21 (Alexander Hamilton); The Federalist No. 43 (James Madison).

[12] *See* U.S. Const. art. I, § 8, cl. 15 (granting Congress power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"); *see generally* ArtI.S8.C15.1 Congress's Power to Call Militias.

[13] *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 23 (1988) ("Even today, the outer boundaries of the guarantee clause remain murky; no single scholarly work can capture the full meaning of 'republican government.'"); ArtIV.S4.3 Meaning of a Republican Form of Government.

[14] *See* 3 Story's Commentaries § 1808 ("The want of a [Guarantee Clause] was felt, as a capital defect in the plan of the confederation . . . . If a despotic or monarchical government were established in one state, it would bring on the ruin of the whole republic."); The Federalist No. 21 (Alexander Hamilton).

[15] *See generally* Wiecek, *supra* note 3, at chs. 5–7; Texas v. White, 74 U.S. 700, 728–29 (1868) (Chase, C.J.) (grounding the establishment of Reconstruction governments in the former Confederate states as an "exercise of the power conferred by the guaranty clause" to the United States).

[16] *See, e.g.*, Baker v. Carr, 369 U.S. 186, 223–28 (1962) (reviewing cases); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 148–51 (1912); Luther v. Borden, 48 U.S. 1, 42–47 (1849). *But see* New York v. United States, 505 U.S. 144, 185 (1992) ("More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." (citing Reynolds v. Sims, 377 U.S. 533, 582 (1964))).

[1] 48 U.S. (7 How.) 1 (1849); *see also* ArtIII.S2.C1.9.3 Luther v. Borden and Guarantee Clause.

[2] *Id.* at 42.

[3] *Id.* at 29–30; *see also* Baker v. Carr, 369 U.S. 186, 218–219 (1962) (summarizing facts and holding of *Luther*).

participation in insurrection. The plaintiff questioned the authority and republican character of the state government, alleging the defendants to be the insurrectionists.[4] Thus, to adjudicate the trespass claim in *Luther* was in effect to decide "which of two rival governments was the legitimate government of Rhode Island."[5]

Chief Justice Roger Taney held that the political branches of government, and not the federal courts, should decide such questions: "it rests with Congress to decide what government is the established one in a State . . . as well as its republican character."[6]

Luther further held that it rested with Congress to determine the proper means to fulfill the guarantee of protection to the states against insurrection.[7] Although the Court suggested that Congress might have empowered the Judiciary to decide whether the federal government should intervene, Congress had instead authorized the President to call out the militia in the case of insurrection against a state's government.[8] It followed, reasoned Chief Justice Taney, that the President "must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress"; this political determination is not subject to judicial review.[9]

During Reconstruction, the Court in *Texas v. White* posited that the President's actions in establishing temporary state governments in the defeated Confederate states at the end of the Civil War was justified as an exercise of his powers as Commander in Chief.[10] Because "the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress," however, those arrangements were necessarily provisional.[11] It was generally up to Congress to organize and recognize new republican governments in these states.[12]

The next major controversies under the Guarantee Clause arose in the Progressive Era, where various state popular democratic reforms were alleged to destroy the republican form of government ensured by the Clause. In *Pacific States Telephone & Telegraph Co. v. Oregon*, the Supreme Court in 1912 declined to address a claim that the popular initiative and referendum provisions of Oregon's Constitution violated the Guarantee Clause.[13] Relying on *Luther v. Borden*, the Court dismissed the case for lack of jurisdiction as a political question "conferred upon Congress and not, therefore, within the reach of judicial power."[14]

In later cases summarily dismissing similar challenges, *Pacific States* and *Luther* came to stand for the proposition that Guarantee Clause questions are never justiciable.[15] *Baker v.*

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[4] *Luther*, 48 U.S. at 34–35.

[5] New York v. United States, 505 U.S. 144, 184 (1992).

[6] *Luther*, 48 U.S. at 42.

[7] *Id.* at 42–43.

[8] 1 Stat. 424 (1795); 10 U.S.C. § 251.

[9] *Luther*, 48 U.S. at 43.

[10] 74 U.S. (7 Wall.) 700, 729–30 (1869) (Chase, C.J.).

[11] *Id.* at 730–31.

[12] *Id.* Similarly, in *Georgia v. Stanton*, when the state challenged Reconstruction legislation on the premise that Georgia already had a republican form of government (and thus Congress could not act), the Court viewed the act of Congress as determinative and declined to address the question as a political matter. 73 U.S. 50, 76–77 (1867); *see also* Taylor v. Beckham, 178 U.S. 548, 578–79 (1900).

[13] 223 U.S. 118, 133–34, 140 (1912).

[14] *Id.* at 151.

[15] *See* Kiernan v. City of Portland, 223 U.S. 151 (1912); Marshall v. Dye, 231 U.S. 250, 256–57 (1913); City of Denver v. N.Y. Tr. Co., 229 U.S. 123, 141 (1913); Davis v. Ohio, 241 U.S. 565 (1916); O'Neill v. Leamer, 239 U.S. 244, 247–48 (1915); Ohio *ex rel*. Davis v. Hildebrant, 241 U.S. 565, 569–70 (1916); Mountain Timber Co. v. Washington, 243 U.S. 219, 234 (1917); Ohio *ex rel.* Bryant v. Akron Metro. Park Dist., 281 U.S. 74, 79–80 (1930); Cochran v. La. State Bd. of Educ., 281 U.S. 370, 374 (1930); Highland Farms Dairy v. Agnew, 300 U.S. 608, 612 (1937); Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion).

Carr, despite its general curbing of the political-question doctrine, left these Guarantee Clause precedents intact.[16] The Supreme Court continued to follow them through the 1980s.[17]

In the 1990s, however, the Court in dicta raised the possibility that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions."[18] In *Gregory v. Ashcroft*, the Court suggested that the Guarantee Clause might operate as a constraint upon Congress's power to regulate the activities of the states.[19] More recently, however, the Court has continued to find Guarantee Clause questions nonjusticiable despite opportunities to revive the Clause.[20]

ArtIV.S4.3 Meaning of a Republican Form of Government

Article IV, Section 4:

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

Although the Supreme Court has generally avoided addressing Guarantee Clause questions because of their political character,[1] it has occasionally ruled on the merits of such challenges. These decisions, as well as contemporaneous sources, shed some light on the meaning of the "Republican Form of Government" guaranteed by the Clause.[2] For example, in the *Federalist No. 39*, James Madison emphasizes popular sovereignty and majoritarian control as among "the distinctive characters of the republican form":

In a few nineteenth century cases, however, the Court disposed of Guarantee Clause questions on the merits, despite *Luther*. *See* Forsyth v. City of Hammond, 166 U.S. 506, 519 (1897); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175–78 (1874).

[16] 369 U.S. 186, 218–32 (1962). *Baker* found that Guarantee Clause questions were nonjusticiable not because they involved matters of state governmental structure but because they lacked "judicially manageable standards which a court could utilize independently in order to identify a State's lawful government." *Id.* at 218, 222–23. *Baker* therefore held that the Guarantee Clause precedents "have no bearing" of the justiciability of a challenge to state legislative apportionment based on the Equal Protection Clause. *Id.* at 228.

[17] *See* City of Rome v. United States, 446 U.S. 156, 182 n.17 (1980); Quinn v. Millsap, 491 U.S. 95, 102 (1989).

[18] New York v. United States, 505 U.S. 144, 185 (1992) (citing *Reynolds v. Sims*, 377, 533, 582 (1964)).

[19] 501 U.S. 452, 463 (1991) ("[T]he authority of the people of the States to determine the qualifications of their most important government officials . . . is a power reserved to the States under the Tenth Amendment and guaranteed them by [the Guarantee Clause]." (citations omitted)). Both *New York* and *Gregory* cite the argument set out in Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1 (1988).

[20] *See* Rucho v. Common Cause, No. 18–422, slip op. at 30 (U.S. June 27, 2019) ("This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim."); Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 795 n.3 (2015) ("The people's sovereign right to incorporate themselves into a State's lawmaking apparatus . . . is one this Court has ranked a nonjusticiable political matter." (citing Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912)).

[1] *See* ArtIV.S4.2 Guarantee Clause Generally.

[2] For scholarly examinations of this issue, see, for example, W. Wiecek, The Guarantee Clause of the U.S. Constitution ch. 1 (1972); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 22–25 (1988) (finding "widespread agreement" among scholars that the "core" of republican government is "one in which the people control their rulers"); Akhil Reed Amar, *The Central Meaning of a Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. Colo. L. Rev. 749, 786 (1994) (concluding that the "central meaning" of the republican government in the Founding Era was "popular sovereignty, majority rule, and the people's right to alter or abolish [the government]"); Robert G. Natelson, *A Republic, Not a Democracy—Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 Tex. L. Rev. 807, 814–15 (2002) (surveying historical sources to conclude that "republican form of government," as used in the Guarantee Clause, had three core features: majority rule, the absence of monarchy, and the rule of law).

ArtIV.S4.3
Meaning of a Republican Form of Government

> [W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is ESSENTIAL to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; . . . It is SUFFICIENT for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified[.][3]

The 1874 case of *Minor v. Happersett* represents a rare instance of the Supreme Court directly deciding a Guarantee Clause issue. In *Minor*, the Court addressed whether Missouri's denial of the right to vote to women complied with the Constitution.[4] The Court stated that the Guarantee Clause leaves room for states to structure their governments in various ways yet remain "republican."[5] Relying on historical practice as dispositive of the matter, the Court held that the Guarantee Clause did not require women's suffrage because at the time of ratification, women "were excluded from suffrage in nearly all the States," with the franchise "only bestowed upon men and not upon all of them."[6] Later, the Court held in *Forsyth v. City of Hammond* that the Guarantee Clause did not prevent a state from determining municipal boundaries through its courts instead of the state legislature.[7]

In other cases, the Court found occasions to opine on the nature of a republican government guaranteed by the Clause in dicta. For example, *In re Duncan* observes:

> By the constitution, a republican form of government is guarant[eed] to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves . . . .[8]

Similarly, the Court in *United States v. Cruikshank*, while adopting a narrow construction of the rights secured by the Fourteenth Amendment's Privileges or Immunities Clause,[9] stated that a republican form of government includes "a right on the part of its citizens to meet

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[3] *See, e.g.*, The Federalist No. 39 (James Madison); *see also* The Federalist No. 22 (Alexander Hamilton) "[T]he fundamental maxim of republican government . . . requires that the sense of the majority should prevail."); The Federalist No. 57 (James Madison) ("The elective mode of obtaining rulers is the characteristic policy of republican government.").

[4] 88 U.S. 162 (1874), *superseded by constitutional amendment*, U.S. Const. amend. XIX. *See also* Amdt19.1 Overview of Nineteenth Amendment, Women's Voting Rights. The primary constitutional basis for the claim in *Minor* was the Fourteenth Amendment's Privileges or Immunities Clause. *Minor*, 88 U.S. at 165.

[5] *Minor*, 88 U.S. at 175 ("No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated.").

[6] *Id.* Continuing in this vein, the Court reasoned that the Guarantee Clause could not secure women the right to vote because "[n]o new State has ever been admitted to the Union which has conferred the right of suffrage upon women, and this has never been considered a valid objection to her admission" and "the right of suffrage was withdrawn from women as early as 1807 in the State of New Jersey, without any attempt to obtain the interference of the United States to prevent it." *Id.* at 177–78.

[7] 166 U.S. 506, 519 (1897) ("[L]egislative control in such matters is not one of the essential elements of a republican form of government [under the Guarantee Clause].").

[8] 139 U.S. 449, 461 (1891). The Court paraphrased Daniel Webster's "masterly statement of the American system of government" as one where "the people are the source of all political power, but that, as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people; that the basis of representation is suffrage." *Id.* at 461–62.

[9] United States v. Cruikshank, 92 U.S. 542, 551–57 (1875) (holding that First and Second Amendment rights were not a privilege of U.S. citizenship secured against state invasion by the Fourteenth Amendment); *see also* Slaughter-House Cases, 83 U.S. 36 (1872); Amdt14.S1.2.1 Privileges or Immunities of Citizens and the

peaceably for consultation in respect to public affairs and to petition for a redress of grievances" as well as the "equality of the rights of citizens."[10]

Slaughter-House Cases. The Court later held those rights were incorporated against the states through the Due Process Clause. *See* McDonald v. City of Chicago, 561 U.S. 742 (2010); De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

[10] *Cruikshank*, 92 U.S. at 552, 555.

ARTICLE V
AMENDING THE CONSTITUTION

ARTICLE V
AMENDING THE CONSTITUTION

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ARTICLE V—AMENDING THE CONSTITUTION

ArtV.1 Overview of Article V, Amending the Constitution

Article V:

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

Article V sets forth procedures for amending the Constitution.[1] Most of the Article's text addresses the proposal and ratification of amendments.[2] Two sentences at the end of the Article make certain subjects unamendable.[3] Since the Founding, Congress has used Article V's procedures to propose thirty-three constitutional amendments.[4] The states have ratified twenty-seven of these proposed amendments, which include the first ten amendments, known as the Bill of Rights,[5] thereby making them part of the Constitution.

Article V establishes two methods for proposing amendments to the Constitution.[6] The first method requires both the House and Senate to propose a constitutional amendment by a vote of two-thirds of the Members present.[7] This is the only method for proposing amendments that has been used thus far. Alternatively, Article V provides that Congress "shall" call a convention for proposing amendments upon the request of two-thirds of the state legislatures.[8] This method of proposing amendments, which scholars have debated at length, has never been used.[9]

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[1] U.S. Const. art. V. This essay does not examine whether Article V provides the exclusive procedures for amending the Constitution. *See generally, e.g.*, Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457, 458–59 (1994) (arguing that the people of the United States may amend the Constitution using methods not specifically outlined in Article V).

[2] U.S. Const. art. V.

[3] *Id.* ("Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

[4] For a list of the twenty-seven amendments the states ratified, see Intro.3.1 Ratification of Amendments to the Constitution Generally. For a list of the six constitutional amendments that Congress proposed but the states have not ratified, see Intro.3.7 Proposed Amendments Not Ratified by the States.

[5] The Bill of Rights safeguards certain individual rights from government interference. For a discussion of the proposal and ratification of the Bill of Rights, see Intro.3.2 Bill of Rights (First Through Tenth Amendments).

[6] U.S. Const. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments. . . .").

[7] *Id.*; *Nat'l Prohibition Cases*, 253 U.S. 350, 386 (1920) ("The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent.").

[8] U.S. Const. art. V.

[9] *See* ArtV.3.3 Proposals of Amendments by Convention.

Article V also sets forth two methods for states to ratify amendments to the Constitution.[10] Congress determines which method the states must follow in order for proposed amendments to become effective.[11] The first method of ratification requires three-fourths of the state legislatures to ratify an amendment to the Constitution.[12] Alternatively, Congress may require that three-fourths of state ratifying conventions approve a proposed amendment.[13] Congress has specified this second mode of amendment only once, for the Twenty-First Amendment, which repealed the Eighteenth Amendment establishing Prohibition.[14]

The last two sentences of Article V make certain subjects unamendable.[15] The first of these sentences prohibited amendments prior to 1808 that would have affected the Constitution's limitations on Congress's power to (1) restrict the slave trade, or (2) levy certain taxes on land or slaves.[16] This sentence's limitations on amendments have expired. The second sentence of Article V, which remains in effect, prohibits amendments that would deprive states, without their consent, from having equal suffrage in the Senate.[17] Scholars have debated whether the last two sentences of Article V effectively prohibit (or formerly prohibited) amendments on these subjects.[18]

This essay examines Article V's procedures for amending the Constitution. It begins with an overview of the historical background of Article V. The Essay then examines relevant Supreme Court decisions, historical practices, and academic debates related to the methods that Article V establishes for proposing and ratifying constitutional amendments.

ArtV.2 Historical Background on Amending the Constitution

Article V:

> *The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight*

[10] U.S. Const. art. V (stating that amendments to the Constitution may be ratified "by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress").

[11] United States v. Sprague, 282 U.S. 716, 730 (1931) ("The choice . . . of the mode of ratification lies in the sole discretion of Congress.").

[12] U.S. Const. art. V.

[13] *Id.*

[14] *See* ArtV.4.3 Ratification by Conventions. The Eighteenth Amendment prohibited "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes." U.S. Const. amend. XVIII, *repealed by id.* amend. XXI.

[15] *Id.* art. V ("Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

[16] *See id. See also* Hylton v. United States, 3 U.S. (3 Dall.) 171, 177 (1796) (Paterson, J., concurring) (recounting Founding-era debates over these limitations on amendments).

[17] U.S. Const. art. V.

[18] *See generally, e.g.*, Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 Ariz. L. Rev. 717, 733 (1981). *See also* ArtV.5 Unamendable Subjects.

shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Prior to the Founding, the people of the United States experienced difficulties in attempting to amend the Nation's first charter, the Articles of Confederation.[1] Under the Articles, Congress and all of the states had to approve amendments before they would become effective.[2] Perhaps unsurprisingly, attempts to amend the Articles to address perceived shortcomings, such as Congress's lack of authority to raise revenues by levying import duties, were unsuccessful.[3] Nonetheless, several state constitutions in existence at the time of the Founding provided for amendments.[4] Moreover, at least one state, Vermont, successfully modified its charter by following the specific amendment procedures in its constitution.[5] These early provisions for amendments in the Articles and state charters informed the Founder's deliberations at the Convention.

During early debates over the Federal Constitution, the delegates agreed to consider language that would permit the states to amend the Nation's charter without Congress's approval.[6] Proponents of including specific procedures for amending the Constitution maintained that such a mechanism would provide stability to the new government.[7] For example, George Mason stated it was "better to provide for [amendments] in an easy, regular and Constitutional way than to trust [alterations] to chance and violence."[8] He argued that states should have the power to amend the Constitution without Congress's approval because the national legislature would inevitably abuse its power and ignore states' calls for necessary changes.[9] Other delegates viewed the inclusion of a provision for amending the Constitution as unnecessary or improper.[10]

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[1] *See, e.g.*, 2 The Records of the Federal Convention of 1787, at 558 (Max Farrand ed., 1911) [hereinafter Farrand's Records] (Madison's notes, Sept. 10, 1787) (statement of Alexander Hamilton).

[2] Articles of Confederation and Perpetual Union of 1781, art. XIII ("And the Articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.").

[3] Charles Pinckney, *Observations on the Plan of Government Submitted to the Federal Convention of May 28, 1787*, *reprinted in* 3 Farrand's Records, *supra* note 1, at 120–21 ("[I]t is to this unanimous consent, the depressed situation of the Union is undoubtedly owing. Had the measures recommended by Congress and assented to, some of them by eleven and others by twelve of the States, been carried into execution, how different would have been the complexion of Public Affairs? To this weak, this absurd part of the Government, may all our distresses be fairly attributed."). *See also* 1 Constitutional Documents and Records, 1776–1787, at 140–41 (Merrill Jensen ed., 1976) (discussing a proposal to grant Congress the power to collect import duties).

[4] *See, e.g.*, Mass Const. of 1780, pt. 2, ch. 6, art. X (setting forth procedures for amending the Massachusetts Constitution that included two-thirds of eligible voters calling a convention for that purpose); Md. Const. of 1776, The Constitution, or Form of Government, cl. LIX (authorizing the state legislature to amend the Constitution by an affirmative vote before and after a new election, but requiring a higher vote threshold for approval of amendments affecting the government of the eastern shore); Vt. Const. of 1777, ch. 2, § XLIV (establishing a council empowered to call a convention for amending the Constitution).

[5] Vt. Sec. of State, *The Amendment Process*, https://sos.vermont.gov/vsara/learn/constitution/amending-the-constitution/process/.

[6] 1 Farrand's Records, *supra* note 1, at 22 (Madison's notes, May 29, 1787) ("Resd. that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.").

[7] 1 Farrand's Records, *supra* note 1, at 121–22, 202–03 (Madison's notes, June 5, 11, 1787).

[8] 1 Farrand's Records, *supra* note 1, at 121–22, 202–03 (Madison's notes, June 5, 11, 1787).

[9] 1 Farrand's Records, *supra* note 1, at 121–22, 202–03 (Madison's notes, June 5, 11, 1787).

[10] 1 Farrand's Records, *supra* note 1, at 121–22, 202–03 (Madison's notes, June 5, 11, 1787).

ArtV.2
Historical Background on Amending the Constitution

The delegates did not consider the draft Article V language until a month before the end of the Federal Convention.[11] At that time, the draft text required Congress to call a convention for proposing amendments to the Constitution upon the request of two-thirds of the states.[12] Some delegates believed that this text made amendments too difficult and advocated for Congress to play a greater role in proposing amendments. For instance, Alexander Hamilton, who noted the difficulties in amending the Articles of Confederation,[13] suggested that Congress, acting on its own initiative, should have the power to call a convention to propose amendments.[14] In his view, Congress would perceive the need for amendments before the states.[15] Roger Sherman took Hamilton's proposal a step further, moving that Congress itself be authorized to propose amendments that would become part of the Constitution upon ratification by all of the states.[16] James Wilson moved to modify Sherman's proposal to require three-fourths of the states for ratification of an amendment.[17] James Madison offered substitute language that permitted two-thirds of both houses of Congress to propose amendments, and required Congress to propose an amendment after two-thirds of the states had applied for one.[18] This language passed unanimously.[19]

The delegates also debated whether Article V should prohibit amendments on certain subjects. Some delegates from the southern states, including John Rutledge of South Carolina, opposed allowing amendments to existing provisions of the draft Constitution that already limited Congress's power to (1) restrict the importation of slaves, or (2) levy taxes on land or slaves.[20] Fervent disagreement between northern and southern states over slavery prompted inclusion of these provisions.[21] To preserve the compromise on the issue of slavery, the delegates added a sentence to the draft of Article V prohibiting amendments on these subjects before 1808.[22] At a later meeting of the convention, Roger Sherman and Gouverneur Morris proposed that no state should, without its consent, be deprived of equal suffrage in the Senate.[23] This proposal, which sought to safeguard state sovereignty and the delegates'

[11] 2 Farrand's Records, *supra* note 1, at 461 (Journal, Aug. 30, 1787).

[12] 2 Farrand's Records, *supra* note 1, at 557 (Madison's notes, Sept. 10, 1787).

[13] 2 Farrand's Records, *supra* note 1, at 558. As noted, the Articles of Confederation required Congress and all of the states to approve an amendment before it would become effective. Articles of Confederation and Perpetual Union of 1781, art. XIII ("And the Articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.").

[14] 2 Farrand's Records, *supra* note 1, at 558 (Madison's notes, Sept. 10, 1787). In contrast to Hamilton's views, some delegates expressed concerns that the draft Article V language made the amendment process too easy. For instance, Elbridge Gerry raised concerns that a majority of states at a convention could ratify amendments that would subvert state constitutions. 2 Farrand's Records, *supra* note 1, at 557–58. *See also* Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 Ariz. L. Rev. 717, 720 (1981).

[15] 2 Farrand's Records, *supra* note 1, at 558 (Madison's notes, Sept. 10, 1787).

[16] 2 Farrand's Records, *supra* note 1, at 558 (Madison's notes, Sept. 10, 1787).

[17] 2 Farrand's Records, *supra* note 1, at 559.

[18] 2 Farrand's Records, *supra* note 1, at 559.

[19] 2 Farrand's Records, *supra* note 1, at 559.

[20] 2 Farrand's Records, *supra* note 1, at 559.

[21] Linder, *supra* note 14, at 721. Some of the delegates were apparently concerned that amendments removing the limitation on Congress's power to levy direct taxes without apportionment could result in federal taxes on slaves, who were considered property at the time. The Federalist No. 43 (James Madison) (stating that both exceptions in the first sentence on unamendable subjects "must have been admitted on the same considerations which produced the privilege defended by it").

[22] 2 Farrand's Records, *supra* note 1, at 559 (Madison's notes, Sept. 10, 1787).

[23] 2 Farrand's Records, *supra* note 1, at 630–31 (Madison's notes, Sept. 15, 1787).

delicate compromise on the structure of the national legislature,[24] was agreed to without debate and appended to the end of the draft text.[25]

Finally, as the Convention drew to a close, the delegates agreed to include a means for the states to propose constitutional amendments. George Mason expressed concerns that, as drafted, Article V would permit Congress to block constitutional amendments favored by the states.[26] Gouverneur Morris and Elbridge Gerry proposed to remedy this perceived problem by requiring Congress to call a convention of the states for proposing amendments upon the application of two-thirds of the states.[27] James Madison did not see the need for this convention mechanism.[28] He argued that Congress would be bound to propose amendments legislatively upon the request of two-thirds of the states.[29] Nevertheless, Madison did not oppose including a provision allowing for a constitutional convention.[30] The motion passed unanimously.[31]

Following the Convention, the debates over ratifying the Constitution briefly touched upon Article V's procedures for amending the Nation's charter. Federalists, who generally supported a strong central government, argued that Article V's high vote thresholds for proposing and ratifying amendments would protect the Constitution from destructive changes, while permitting amendments to address significant shortcomings in the document.[32] Anti-Federalists, on the other hand, expressed concerns that Article V would make amending the Constitution too difficult once it was ratified.[33] Consequently, they advocated for "amendments" to certain subjects prior to submitting the Constitution to the states.[34] Federalists opposed such amendments as premature.[35]

After the states ratified the Constitution, debates continued over amendments, including the adoption of a Bill of Rights.[36] In his 1789 Inaugural Address, President George Washington

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[24] Linder, *supra* note 14, at 722.

[25] 2 Farrand's Records, *supra* note 1, at 630–31 (Madison's notes, Sept. 15, 1787).

[26] 2 Farrand's Records, *supra* note 1, at 629.

[27] 2 Farrand's Records, *supra* note 1, at 629.

[28] 2 Farrand's Records, *supra* note 1, at 629–30.

[29] 2 Farrand's Records, *supra* note 1, at 629–30.

[30] 2 Farrand's Records, *supra* note 1, at 629–30. In remarks that presaged later scholarly debates over the proposal of amendments by a convention of the states, Madison questioned how such a Convention would be formed and conduct itself. 2 Farrand's Records, *supra* note 1, at 630. After the Convention, James Madison wrote in the *Federalist Papers* that Article V with the state convention mechanism "equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other." The Federalist No. 43 (James Madison).

[31] 2 Farrand's Records, *supra* note 1, at 630 (Madison's notes, Sept. 15, 1787).

[32] The Federalist No. 43 (James Madison) ("The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."). *See also* The Federalist No. 22 (Alexander Hamilton) ("When the concurrence of a large number is required by the constitution to the doing of any national act, we are apt to rest satisfied that all is safe, because nothing improper will be likely *to be done*; but we forget how much good may be prevented, and how much ill may be produced, by the power of hindering the doing what may be necessary, and of keeping affairs in the same unfavorable posture in which they may happen to stand at particular periods.").

[33] For insight into the Anti-Federalist position on this issue, see *Centinel II*, Freeman's J. (Phila.), Oct. 24, 1787, *reprinted in* 2 The Complete Anti-Federalist (Herbert L. Storing ed., 1981).

[34] *See id.*

[35] *See generally* The Federalist No. 85 (Alexander Hamilton) (providing a broad overview of the debate).

[36] *See* President George Washington, First Inaugural Address (Apr. 30, 1789).

alluded to these ongoing debates, stating that the people of the United States would ultimately judge when it was appropriate to exercise "the occasional power delegated by the fifth article of the Constitution."[37]

ArtV.3 Proposals

ArtV.3.1 Overview of Proposing Amendments

Article V:

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

Article V establishes two methods for proposing amendments to the Constitution.[1] The first method requires both the House and Senate to propose a constitutional amendment by a vote of two-thirds of the Members present.[2] Since the Founding, Congress has followed this procedure to propose thirty-three constitutional amendments, which were sent to the states for potential ratification.[3] The states ratified twenty-seven of these amendments.[4]

Alternatively, Article V provides that Congress "shall" call a convention for proposing amendments upon the request of two-thirds of the states.[5] This method of proposing amendments has never been used.[6] Scholars continue to debate issues surrounding these Article V conventions, including: (1) whether Congress must call a convention upon receiving the requisite number of state applications; (2) whether the convention can be limited in any way (the "runaway convention" debate); and (3) Congress's control over other aspects of a convention (e.g., rules of procedure).[7]

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[37] *See id.*

[1] U.S. Const. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments. . . .").

[2] *Id.*; Nat'l Prohibition Cases, 253 U.S. 350, 386 (1920) ("The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent.").

[3] For a list of constitutional amendments that Congress proposed but the states did not ratify, see Intro.3.7 Proposed Amendments Not Ratified by the States. At least 11,000 proposals to amend the Constitution have been introduced in Congress, but were not approved by the two-thirds majority in each house required for submission to the states for ratification. *U.S. Senate: Measures Proposed to Amend the Constitution*, https://www.senate.gov/legislative/MeasuresProposedToAmendTheConstitution.htm.

[4] *See* Intro.3.1 Ratification of Amendments to the Constitution Generally.

[5] U.S. Const. art. V.

[6] *See* ArtV.3.3 Proposals of Amendments by Convention.

[7] *See* ArtV.3.3 Proposals of Amendments by Convention.

ArtV.3.2 Congressional Proposals of Amendments

Article V:

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

The first method for proposing amendments permits two-thirds of the Members of the House and Senate to propose a constitutional amendment when they "shall deem it necessary."[1] This is the only method that has thus far been used to propose amendments to the Constitution.

The Supreme Court addressed Article V's procedures for congressionally proposed constitutional amendments in the *National Prohibition Cases*, which challenged the validity of the Eighteenth Amendment.[2] In these cases, the Supreme Court held that both the House and Senate must propose a constitutional amendment by a vote of two-thirds of the Members present (rather than two-thirds of the entire membership present and absent), assuming the presence of a quorum.[3] The Court also held that Congress's successful proposal of an amendment indicates that Congress considers the amendment "necessary."[4] Thus, it appears that the Court will not require Congress to state that an amendment is necessary specifically or second-guess Congress's judgment on the issue of necessity.[5]

Although Members of Congress have introduced more than 11,000 proposed amendments to the Constitution since the Founding,[6] Congress has approved only thirty-three proposed amendments by the requisite two-thirds vote.[7] Congress has historically proposed constitutional amendments by enacting a joint resolution.[8] Following historical practice involving proposing amendments, which included the Bill of Rights, Members of Congress have

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[1] U.S. Const. art. V.

[2] 253 U.S. 350 (1920).

[3] *Id.* at 386 ("The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum and not a vote of two-thirds of the entire membership, present and absent.").

[4] *Id.*

[5] *See id.*

[6] *U.S. Senate: Measures Proposed to Amend the Constitution*, https://www.senate.gov/legislative/MeasuresProposedToAmendTheConstitution.htm.

[7] For a list of constitutional amendments that Congress proposed but the states did not ratify, see Intro.3.7 Proposed Amendments Not Ratified by the States.

[8] 1 Annals of Cong. 735 (1789).

proposed amendments as codicils (i.e., supplementary articles), rather than line-by-line revisions to the Constitution's text.[9] After congressional approval, proposed amendments are sent to the states for potential ratification.[10]

ArtV.3.3 Proposals of Amendments by Convention

Article V:

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

Article V establishes an alternative method for amending the Constitution by a convention of the states.[1] It provides that Congress "shall call a Convention for proposing Amendments" upon the request of two-thirds of the state legislatures.[2] This method of proposing amendments, which scholars have debated at length, has never been used.[3] This essay surveys a few of the most prominent debates surrounding an Article V convention of the states.

One ongoing debate concerns whether Congress *must* call a convention upon the request of two-thirds of the states. Article V states that Congress "shall call a Convention" when enough states have applied for one. Some of the Constitution's Framers, concerned that Congress would block amendments favorable to the states,[4] argued that this language would obligate Congress to call for a convention after receiving the requisite number of state requests.[5] Furthermore, some of the earliest Members of Congress argued that Congress had no power to deliberate on whether to call an Article V convention once it received the requisite number of applications.[6]

However, more recently, some modern scholars have theorized that Congress may be able to block a convention by exercising its apparent role in reviewing state applications and

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[9] *Id.* at 733–44 (1789).

[10] Under current federal law, the Archivist of the United States is responsible for certifying a state's ratification of a constitutional amendment. *See* National Archives and Records Administration Act of 1984, 98 Stat. 2291, 1 U.S.C. § 106b.

[1] U.S. Const. art. V.

[2] *Id.*

[3] Although the convention method for proposing amendments has never been used, some scholars have speculated that the states may "prod" Congress into proposing an amendment on a particular matter by applying for an Article V convention on that issue. *See, e.g.*, Dwight W. Connely, *Amending the Constitution: Is This Any Way to Call for a Constitutional Convention?*, 22 Ariz. L. Rev. 1011, 1015, 1016 n.49 (1980).

[4] 2 The Records of the Federal Convention of 1787, at 629–31 (Max Farrand ed., 1911) [hereinafter Farrand's Records] (Madison's notes, Sept. 15, 1787).

[5] For example, writing in the *Federalist Papers*, Alexander Hamilton stated that Congress would be "obliged" to call a convention "on the application of the legislatures of two thirds of the States." The Federalist No. 85 (Alexander Hamilton).

[6] 1 Annals of Cong. 260–61 (1789).

deciding whether the requisite number of states has applied for a convention.[7] In addition, Congress might refuse to submit amendments that result from an Article V convention to the states for ratification.[8] Because it seems unlikely that the Supreme Court would order Congress to call a convention or submit a proposed amendment to the states,[9] such arguments raise questions about whether Article V effectively *obligates* Congress to call for a convention.

Another ongoing debate revolves around whether a state convention, once called, may be limited to addressing certain topics. Concerns with a so-called "runaway convention" that proposes amendments on subjects beyond the scope of the initial call have prompted many of these debates. Some commentators have argued that states may (or must) determine the scope of an Article V convention by applying for a convention on a specific subject or group of subjects.[10] Congress would then be obliged to call a convention only on the issues in the state applications.[11] Other scholars have argued that the text of the Constitution provides only for a general convention, one not limited in scope to considering amendments on a particular matter.[12]

A third prominent debate concerns Congress's control over other aspects of a convention. During debates over the Constitution, James Madison questioned how an Article V convention would be formed and conduct its proceedings.[13] In the modern era, scholars have debated various issues, including: (1) how delegates to the convention should be chosen; (2) whether Congress, state legislatures, or the delegates should set rules of procedure for the convention; (3) the vote threshold would be required to propose an amendment in convention; and (4) how voting rights on a proposed amendment should be apportioned among the states.[14] Beginning at least as early as the 1960s, Members of Congress have introduced various pieces of legislation that would seek to establish some procedures for an Article V convention.[15]

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[7] *See* Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 Va. L. Rev. 1509, 1527 (2010) ("If different states apply for limited conventions covering marginally different subjects, then it is quite possible that Congress will use its discretion to determine that the requisite number of states have not agreed on a single subject to apply for a convention. Similarly, even if two-thirds of the states applied for the same limited convention, Congress might use its discretion to determine that limited conventions are not allowed."). *But see* Morris D. Forkosch, *The Alternative Amending Clause in Article V: Reflections and Suggestions*, 51 Minn. L. Rev. 1053, 1079 (1967) ("Congress has its own independent machinery to propose amendments in the first alternative, and to give Congress the power to review the proposals necessarily deprives the [state convention method] of its independence.").

[8] *See* Michael Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 Tenn. L. Rev. 765, 777–78 (2011). *But see* Gerland Gunther, *The Convention Method of Amending the United States Constitution*, 14 Ga. L. Rev. 1, 23 (1979) (acknowledging that Congress may review applications for a convention for conformity with Article V, but adopting the view that Congress cannot refuse to submit a proposed amendment to the states).

[9] One scholar has suggested that, even if the Supreme Court exercised jurisdiction over the case, it appears unlikely the Court would "issue an order compelling Congress to carry out a duty which can hardly be called a simple ministerial duty or would, in the alternative, take it upon itself to prescribe the procedures for a convention." *See* Paul G. Kauper, *The Alternative Amendment Process: Some Observations*, 66 Mich. L. Rev. 903, 905–06 (1968) ("Whether any legal procedure would be available to compel [Congress] to perform its duty is another question.").

[10] Rappaport, *supra* note 7, at 1518 (surveying scholarly debates on the issue). Some scholars have argued that Article V permits states to apply for a convention on particular amendment text. *E.g.*, Rappaport, *supra* note 7, at 1518.

[11] Limited convention proposals could call for an Article V convention to consider an amendment establishing congressional term limits or requiring a balanced federal buget, for example. Rappaport, *supra* note 7, at 1513.

[12] *See* Rappaport, *supra* note 7, at 1518.

[13] 2 Farrand's Records, *supra* note 4, at 630 (Madison's notes, Sept. 15, 1787).

[14] *See, e.g.*, Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 Mich. L. Rev. 875, 892–94 (1968) (discussing federal legislation seeking to address these questions).

[15] *See, e.g.*, *id.*

ArtV.3.3
Proposals of Amendments by Convention

Since 1960, the states have submitted more than 180 applications for Article V conventions on various subjects.[16] However, Congress has never deemed Article V's threshold for calling a convention to be met. Many unresolved questions surround the state application process, including how to determine whether state applications address the same subject matter and whether the applications expire after a certain amount of time.[17] In the past several decades, the states have come closest to satisfying the threshold for calling a convention of the states on the issues of apportionment in state legislatures[18] and requiring a balanced federal budget.[19]

ArtV.3.4 Role of the President in Proposing an Amendment

Article V:

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

The Constitution does not specifically establish a role for the President in amending the Constitution.[1] Nonetheless, some Presidents have played a ministerial role in transmitting Congress's proposed amendments to the states for potential ratification. For example, President George Washington sent the first twelve proposed amendments, including the ten proposals that later became the Bill of Rights, to the states for ratification after Congress approved them.[2] In addition, President Abraham Lincoln signed the joint resolution proposing the Thirteenth Amendment abolishing slavery even though his signature was not necessary for proposal or ratification of the amendment.[3]

Despite these examples of Presidents playing an informal, ministerial role in the amendment process, the Supreme Court has articulated the Judicial Branch's understanding

[16] *Clerk of the United States House of Representatives, Selected Memorials*, https://clerk.house.gov/SelectedMemorial.

[17] *Is There a Constitutional Convention in America's Future?: Hearing Before the H. Comm. on the Judiciary,* 103d Cong. 6–10 (1993).

[18] Some states sought an Article V convention to consider a constitutional amendment that would overturn the Supreme Court's decision in *Reynolds v. Sims,* 377 U.S. 533 (1964). In that case, the Supreme Court held that the Fourteenth Amendment's Equal Protection Clause requires that state legislative houses be apportioned "substantially" on the basis of population. *Id.* at 568–76.

[19] *See* Clerk of the United States House of Representatives, Selected Memorials, https://clerk.house.gov/SelectedMemorial; Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 764–89 (1993) (cataloguing state applications for conventions on different subjects). This essay not examine whether a state may amend, rescind, or place conditions on an application for a convention.

[1] *See* U.S. CONST. art. V. This essay does not examine whether the President has any role in an Article V convention of the states.

[2] Letter from President George Washington to Governor Charles Pinckney (Oct. 2, 1789), https://digital.scetv.org/teachingAmerhistory/lessons/GWashingtonLetter.htm. Under modern federal law, the Archivist of the United States is responsible for certifying a state's ratification of a constitutional amendment. *See* National Archives and Records Administration Act of 1984, 98 Stat. 2291, 1 U.S.C. § 106b.

[3] The House Joint Resolution Proposing the Thirteenth Amendment to the Constitution, 38th Cong. (1865), https://www.ourdocuments.gov/document_data/pdf/doc_040.pdf.

that the President has no formal constitutional role in that process. In a brief opinion in the 1798 case *Hollingsworth v. Virginia*, the Court held that the Eleventh Amendment had been "constitutionally adopted."[4] The Supreme Court reporter recorded Justice Samuel Chase's statement during oral argument that the President "has nothing to do with the proposition, or adoption, of amendments to the Constitution."[5]

Later, in the 1920 case *Hawke v. Smith*, the Supreme Court characterized the Court's decision in *Hollingsworth* as having "settled" that "submission of a constitutional amendment did not require the action of the President."[6] Therefore, the Court appears to have adopted the view that the President cannot veto a proposed amendment.

ArtV.4 Ratification

ArtV.4.1 Overview of Ratification of a Proposed Amendment

Article V:

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

Article V sets forth two methods by which states may ratify amendments to the Constitution.[1] Congress determines which of the two methods the states must use in order to ratify a particular proposed amendment.[2] The first method of ratification requires three-fourths of the state legislatures to ratify an amendment to the Constitution.[3] Alternatively, Congress may require that three-fourths of state ratifying conventions approve a proposed amendment.[4] Congress has specified this second mode of amendment only once, for the Twenty-First Amendment, which repealed the Eighteenth Amendment establishing Prohibition.[5]

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[4] 3 U.S. (3 Dall.) 378, 382 (1798).

[5] *Id.* at 381 n.2. *See also* Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided, and Why INS v. Chadha Was Wrongly Reasoned*, 83 Tex. L. Rev. 1265, 1275 (2005) (recounting how the Supreme Court reporter recorded Justice Chase's statement during oral argument).

[6] Hawke v. Smith, 253 U.S. 221, 229 (1920). President Jimmy Carter signed a joint resolution purporting to extend the deadline for ratification of the Equal Rights Amendment despite being advised that his signature was unnecessary. Ratification of the Equal Rts. Amend., 44 Op. O.L.C. 1, 8–9 (2020).

[1] U.S. Const. art. V (stating that amendments to the Constitution may be ratified "by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress").

[2] United States v. Sprague, 282 U.S. 716, 730 (1931) ("The choice . . . of the mode of ratification. . .lies in the sole discretion of Congress.").

[3] U.S. Const. art. V.

[4] *Id.*

[5] *See* Intro.3.1 Ratification of Amendments to the Constitution Generally. The Eighteenth Amendment prohibited "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes." U.S. Const. amend. XVIII, *repealed by id.* amend. XXI.

ArtV.4.2 State Legislatures

ArtV.4.2.1 Congressional Deadlines for Ratification of an Amendment

Article V:

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

The first method of ratification requires three-fourths of the state legislatures to ratify a proposed amendment to the Constitution.[1] Although this method has been used to ratify twenty-six of the Constitution's twenty-seven successful amendments,[2] many questions concerning this mode of ratification remain unresolved.

One prominent question is whether Congress may place a deadline on the states' ratification of a proposed amendment, either in the text of the proposed amendment or the accompanying joint resolution. The text of Article V does not specifically address the issue. In *Dillon v. Gloss*, the Supreme Court held that the Constitution implictly authorizes Congress to "fix a definite period" for ratification of an amendment.[3] In that case, the Court upheld Congress's specification of a seven-year time limit on the ratification of the Eighteenth Amendment establishing Prohibition.[4]

The *Dillon* Court determined that Congress's specific power to determine the mode of ratification (i.e., by state legislatures or state ratifying conventions) implied an incidental authority to specify a deadline for ratification.[5] Furthermore, as a practical matter, a definite period for ratification would ensure that states understood how much time they had to ratify the amendment.[6] Although the Court also opined that, regardless of whether Congress specifies a deadline, the time period for ratification must be "reasonable," it appears this language was subsequently regarded as nonbinding dicta in *Coleman v. Miller*.[7] Beginning with its 1917 proposal of what would become the Eighteenth Amendment, Congress has specified a deadline of seven years for the ratification of every proposed amendment except for the proposal that became the Nineteenth Amendment recognizing women's suffrage.[8]

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[1] U.S. Const. art. V.

[2] Intro.3.1 Ratification of Amendments to the Constitution Generally.

[3] 256 U.S. 368, 375–76 (1921).

[4] *Id.*

[5] *Id.* at 376.

[6] *Id.*

[7] 307 U.S. 433, 453 (1939) (discussing *Dillon*, 256 U.S. at 375–76). In *Coleman*, Chief Justice Charles Evans Hughes suggested, in an opinion titled "Opinion of the Court," that Congress is responsible for "promulgating" the "adoption" of a constitutional amendment and, consequently, Congress had the power to determine whether ratification of a proposed amendment occurred within a "reasonable time." *Coleman*, 307 U.S. at 453–56. However, subsequent commentators have argued that this dicta in *Coleman* is incorrect because the Constitution gives Congress no such role. *See, e.g.*, Ratification of the Equal Rts. Amend., 44 Op. O.L.C. 1, 30–31 (2020).

[8] *See* Ratification of the Equal Rts. Amend., 44 Op. O.L.C. at 15.

Limited historical practice suggests that if Congress does not specify a deadline for ratification, the amendment remains pending before the states until the requisite number of states have ratified it. In 1992, the Twenty-Seventh Amendment, which addressed the effective date of congressional pay raises, became part of the Constitution more than 202 years after it was proposed.[9] At the time, the Department of Justice's Office of Legal Counsel (OLC) advised that the amendment became part of the Constitution once the Archivist of the United States certified that the requisite number of states had ratified the amendment.[10] Rejecting dicta to the contrary in *Dillon*, the OLC stated that, in the absence of a congressionally proposed deadline, an amendment remains pending before the states.[11]

ArtV.4.2.2 Effect of Prior Rejection of an Amendment or Rescission of Ratification

Article V:

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

Additional unresolved questions are whether a state may (1) ratify an amendment after rejecting it, or (2) rescind its ratification of a constitutional amendment before that amendment becomes part of the Constitution. The Supreme Court addressed these issues in *Coleman v. Miller*.[1] In *Coleman*, twenty-four members of the Kansas state legislature sought a writ of mandamus compelling state officials to recognize that Kansas had not ratified an amendment to the Federal Constitution, the Child Labor Amendment,[2] challenging the way the vote was taken.[3] One of the plaintiffs' arguments was that the ratification was invalid because the Kansas state legislature previously rejected the amendment.[4]

The Supreme Court indicated that whether a state could ratify an amendment after rejecting it—or rescind an amendment already ratified—were political questions for Congress

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[9] For more on the Twenty-Seventh Amendment's ratification and authentication, see Intro.3.6 Post-War Amendments (Twenty-Third Through Twenty-Seventh Amendments) and Amdt27.1 Overview of Twenty-Seventh Amendment, Congressional Compensation.

[10] Cong. Pay Amend., 16 Op. O.L.C. 85, 87 (1992).

[11] *Id.* at 90, 97. Otherwise, in the OLC's view, the Article V process would become unworkable because states would not know whether they could still ratify an amendment. *Id.* at 97 ("The implicit time limit thesis is thus deeply implausible, because it introduces hopeless uncertainty into that part of the Constitution that must function with a maximum of formal clarity if it is to function."). In 2020, the OLC advised that Congress lacks the authority to: (1) extend the ratification deadline for an amendment pending before the states; or (2) revive an amendment after the initial deadline has expired, without restarting the Article V process. Ratification of the Equal Rts. Amend., 44 Op. O.L.C. at 3.

[1] 307 U.S. 433 (1939).

[2] The proposed Amendment provided in part that "Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age." *Id.* at 435 n.1 (internal quotation marks omitted).

[3] *Id.* at 436–37.

[4] *Id.* at 447.

to resolve.[5] As support for this theory, the Court cited Congress's 1868 adoption of a concurrent resolution declaring that the Fourteenth Amendment had been ratified.[6] Congress adopted this resolution despite the fact that three states had previously rejected the amendment before later ratifying it, and two states attempted to rescind their prior ratifications.[7]

However, it is unclear whether this historical practice remains relevant. The adoption of the Fourteenth Amendment presented special circumstances. The three southern states that previously rejected the Amendment had constituted new governments at Congress's direction as a result of Reconstruction by the time they ratified it.[8] Thus, the Court's ruling would not appear to have definitively resolved questions about the effect of a prior ratification or rejection.[9] Furthermore, since *Coleman*, some commentators have expressed doubts that Congress has any constitutional role in determining whether a state has properly ratified a proposed constitutional amendment.[10]

ArtV.4.2.3 Authentication of an Amendment's Ratification

Article V:

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

Another prominent debate surrounds the method by which the states' ratification of an amendment is authenticated. Article V provides that an amendment becomes part of the Constitution "when ratified" by three-fourths of state legislatures or state ratifying conventions.[1] In *Dillon v. Gloss*, the Supreme Court held that an amendment becomes part of the Constitution on the day that the number of state ratifications meets the three-fourths

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[5] *Id.* at 449–50.

[6] *Id.* at 448–50.

[7] *Id.* ("[T]he political departments of the Government dealt with the effect both of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification."). The three states that rejected the Amendment before later ratifying it were Georgia, North Carolina, and South Carolina. The two states that ratified the Amendment and later sought to rescind their ratifications were New Jersey and Ohio. *Id.*

[8] *Id.*

[9] *See, e.g.,* Idaho v. Freeman, 529 F. Supp. 1107, 1150 (D. Idaho 1981) ("Until the technical three-fourths has been reached, a rescission of a prior ratification is clearly a proper exercise of a state's power granted by the article V phrase 'when ratified' especially when that act would give a truer picture of local sentiment regarding the proposed amendment."), *vacated as moot*, NOW, Inc. v. Idaho, 459 U.S. 809 (1982).

[10] *See* Ratification of the Equal Rts. Amend., 44 Op. O.L.C. 1, 30 (2020) (expressing the view that a congressional role in "promulgating" a constitutional amendment ratified by three-fourths of the states lacks a basis in the Constitution's text); Cong. Pay Amend., 16 Op. O.L.C. 85. 98–99 (1992) ("[C]ongressional promulgation is neither required by Article V nor consistent with constitutional practice.").

[1] U.S. CONST. art. V. The Supreme Court has held that state legislatures perform a federal constitutional function when ratifying proposed constitutional amendments. Consequently, the people of a state cannot limit the legislature's performance of this function through a popular referendum, the enactment of state constitutional provisions, or other means. *See* Leser v. Garnett, 258 U.S. 130, 136–37 (1922) (rejecting the argument that the people of a state could deprive the state legislature of the power to ratify the Nineteenth Amendment establishing women's suffrage by

threshold.[2] Consequently, the date on which an Executive Branch official proclaims the amendment has been ratified is not controlling.[3]

Under current federal law, the Archivist of the United States is responsible for certifying that a proposed constitutional amendment has been ratified after receiving "official notice" from three-fourths of the states that they have adopted the amendment in accordance with the Constitution.[4] The Archivist publishes the amendment's text along with a certificate listing the states that have adopted the amendment.[5] The Department of Justice's Office of Legal Counsel has adopted the view that, in order to perform this duty, the Archivist must determine whether "he has received official notice that an amendment has been adopted according to the provisions of the Constitution."[6] The Archivist may consult the Attorney General on this legal question, as he did with respect to the states' ratification of the Twenty-Seventh Amendment.[7]

ArtV.4.3 Ratification by Conventions

Article V:

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

Alternatively, Congress may require that state ratifying conventions approve a proposed amendment.[1] Congress has specified this second mode of amendment only once, for the Twenty-First Amendment, which repealed the Eighteenth Amendment establishing Prohibition.[2] In the joint resolution proposing the Twenty-First Amendment, Congress specified that "conventions in three-fourths of the several States" must ratify the Amendment for it to become operative.[3]

At the time Congress proposed the Twenty-First Amendment in 1933, many politicans believed that only state ratifying conventions should ratify constitutional amendments that

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enacting state constitutional provisions); Hawke v. Smith, 253 U.S. 221, 231 (1920) (holding that a state lacked the power to require submission of the state's ratification of the Eighteenth Amendment to a popular referendum).

[2] 256 U.S. 368, 376 (1921).

[3] *Id.*

[4] *See* National Archives and Records Administration Act of 1984, 98 Stat. 2291, 1 U.S.C. § 106b.

[5] *Id.* Since the early days of the United States, various Executive Branch officials have performed the ministerial duty of certifying the ratification of a constitutional amendment. In 1818, Congress enacted a law providing that the Secretary of State would perform this role. Act of Apr. 20, 1818, ch. 80, § 2, 3 Stat. 439. Congress later transferred this role to the Administrator of General Services and then to the Archivist of the United States. *See* Cong. Pay Amend., 16 Op. O.L.C. 85, 98 (1992) (discussing the history of the Executive Branch's ministerial duty).

[6] Cong. Pay Amend., 16 Op. O.L.C. at 99.

[7] *Id.*

[1] U.S. Const. art. V.

[2] *See* Intro.3.1 Ratification of Amendments to the Constitution Generally.

[3] *The House Joint Resolution Proposing the Twenty-First Amendment to the Constitution*, 72nd Cong. (1933), https://www.docsteach.org/documents/document/21st-amendment.

implicated individual rights and morals.[4] In addition to seeking a ratification method deemed to better reflect the popular will, Congress may have also wished to bypass the Temperance lobby, which remained powerful in state legislatures.[5] According to this view, by specifying that specially elected state delegates would ratify the Amendment, rather than state legislators, Congress increased the Amendment's chances of successful ratification.[6]

Neither the Constitution nor Supreme Court precedent specifically provides guidance as to how the states should convene ratifying conventions, select delegates, or conduct the proceedings. The thirty-eight state conventions that considered the ratification of the Twenty-First Amendment in 1933 followed a variety of procedures.[7] In general, the delegates at the state conventions, most of whom were pledged to vote for the repeal of the Eighteenth Amendment, did not engage in significant deliberation on an issue that already received strong popular support at the polls.[8]

ArtV.4.4 Choosing a Mode of Ratification

Article V:

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

The Supreme Court has held that Congress determines whether state legislatures or state ratifying conventions should consider the ratification of a proposed constitutional amendment.[1] In *United States v. Sprague*, the federal government indicted defendants under the National Prohibition Act (NPA) for unlawfully transporting and possessing intoxicating liquors.[2] The lower courts quashed the indictment, determining that Congress lacked the authority to enact the NPA.[3] These courts held that the Eighteenth Amendment, which granted Congress the authority to enact laws like the NPA, was invalid because state legislatures had ratified it rather than state ratifying conventions.[4]

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[4] Everett S. Brown, Ratification of the Twenty First Amendment to the Constitution of the United States: State Convention Records and Laws 3 (2003).

[5] Robert P. George & David A. J. Richards, *The Twenty-First Amendment*, Nat'l Const. Ctr., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxi/interps/151 ("[P]olitical prudence pointed in the direction of ratifying conventions as a way of leaving gun-shy legislators with their eyes on re-election out of the process and 'off the hook.'").

[6] *See id.*

[7] Brown, *supra* note 4, at 8–9.

[8] Brown, *supra* note 4, at 5–7.

[1] United States v. Sprague, 282 U.S. 716, 730 (1931) ("The choice . . . of the mode of ratification lies in the sole discretion of Congress."). Presumably, Congress could also choose the mode of ratification for amendments proposed by an Article V convention of the states. *See* U.S. Const. art. V.

[2] *Sprague*, 282 U.S. at 729.

[3] *Id.*

[4] *See id.* at 729–30.

On appeal, the Supreme Court considered whether state conventions should have ratified the Eighteenth Amendment because it conferred new powers on Congress to abridge individual rights by enacting laws to enforce Prohibition.[5] The Court rejected this argument, determining that "the choice . . . of the mode of ratification lies in the sole discretion of Congress."[6]

State legislatures have ratified twenty-six of the twenty-seven amendments that have become part of the Constitution.[7] As noted, Congress has chosen the convention method of ratification only once.[8] In the joint resolution proposing the Twenty-First Amendment repealing Prohibition, Congress specified that "conventions in three-fourths of the several States" must ratify the Amendment for it to become operative.[9]

ArtV.5 Unamendable Subjects

Article V:

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

The last two sentences of Article V made certain subjects unamendable.[1] The first of these sentences prohibited amendments prior to 1808 that would have affected either of two subjects addressed in Article I, Section 9 of the Constitution: (1) limitations on Congress's power to prohibit or restrict the importation of slaves before 1808; and (2) limitations on Congress's power to enact an unapportioned direct tax.[2] As noted, during the convention in Philadelphia, some delegates from the southern states opposed allowing amendments to provisions of the Constitution that limited Congress's power to restrict or tax the slave trade.[3] To mitigate these

[5] *Id.*

[6] *Id.* at 730.

[7] For information about the ratification of amendments to the Constitution and the text of the amendments, see Intro.3.1 Ratification of Amendments to the Constitution Generally.

[8] *See* Intro.3.1 Ratification of Amendments to the Constitution Generally.

[9] *The House Joint Resolution Proposing the Twenty-First Amendment to the Constitution*, 72nd Cong. (1933), https://www.ourdocuments.gov/document_data/pdf/doc_040.pdf.

[1] U.S. Const. art. V ("Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

[2] *Id.*

[3] 2 The Records of the Federal Convention of 1787, at 559 (Max Farrand ed., 1911) [hereinafter Farrand's Records] (Madison's notes, Sept. 10, 1787). The latter provision was apparently motivated in part by concerns over federal taxes on slaves, who were considered property at the time. The Federalist No. 43 (James Madison) (stating that both exceptions in the first sentence on unamendable subjects "must have been admitted on the same considerations which produced the privilege defended by it"). *See also* Hylton v. United States, 3 U.S. (3 Dall.) 171, 177 (1796) (Paterson, J., concurring) (recounting debates over these limitations on amendments).

concerns, the delegates added a sentence prohibiting amendments on these subjects before 1808.[4] This sentence's restrictions on amendments have expired.

The second sentence of Article V, which remains in effect, provides "that no State, without its Consent, shall be deprived of its equal suffrage in the Senate."[5] This provision was introduced by Roger Sherman, one of the architects of the Connecticut Compromise, out of concern that three-quarters of the States might use Article V to abolish or deprive smaller states of their representation in the Senate.[6] Writing in the *Federalist Papers* after the Federal Convention, James Madison suggested that this exception would assuage concerns that large states would use the amendment process to infringe upon the sovereignty of the smaller states by reducing their voting power in the Senate.[7] He wrote, "The exception in favor of the equality of suffrage in the Senate, was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the legislature; and was probably insisted on by the States particularly attached to that equality."[8]

By expressly prohibiting amendments that would deprive a state of equal suffrage in the Senate without its consent, Article V enshrines the "partly federal, and partly national" structure of the bicameral Congress, which was at the heart of the Connecticut Compromise.[9] In vesting the legislative power in a bicameral Congress, the Framers of the Constitution purposefully divided and dispersed legislative power between two Chambers—the House of Representatives with representation based on a state's population and the Senate with equal state representation.[10] The Framers recognized that the division of legislative power between two distinct Chambers of elected members was needed "to protect liberty" and address the states' fear of an imbalance of power in Congress.[11] As later explained by Chief Justice Warren

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[4] 2 Farrand's Records, *supra* note 3, at 559 (Madison's notes, Sept. 10, 1787).

[5] 2 Farrand's Records, *supra* note 3, at 559. The Supreme Court has indicated that the equal suffrage provision does not prohibit Congress from refusing to seat a Senator while it investigates his election or qualifications. Barry v. United States, 279 U.S. 597, 615–16 (1929).

[6] 2 Farrand's Records, *supra* note 3, at 629 (Madison's notes, Sept. 15, 1787) ("Mr. Sherman expressed his fears that three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate."). Sherman's proposal also would have prohibited amendments that affected a state "in its internal police." 2 Farrand's Records, *supra* note 3, at 629. After Sherman's amendment to the draft Article V was voted down, he moved to strike Article V altogether. 2 Farrand's Records, *supra* note 3, at 630. Gouverneur Morris proposed the final provision, which lacked the language that Madison had opposed limiting amendments that would affect a state in its "internal police." 2 Farrand's Records, *supra* note 3, at 631. The motion "being dictated by the circulating murmurs of the small States was agreed to without debate." 2 Farrand's Records, *supra* note 3, at 630–31.

[7] The Federalist No. 43 (James Madison).

[8] *Id.* During the Federal Convention, Madison had argued against equality of suffrage for the states in the Senate—an unpopular notion in the larger states. *See, e.g.,* 1 Farrand's Records, *supra* note 3, at 551 (Madison's notes, July 7, 1787) (statement of James Madison).

[9] *See* INS v. Chadha, 462 U.S. 919, 950 (1983). Roger Sherman and other delegates from Connecticut repeatedly advanced a legislative structure early in the Convention debates that eventually was proposed as the Great Compromise. *See* 1 Farrand's Records, *supra* note 3, at 196. Historians often credit Sherman and the Connecticut delegates as the architects of the Great Compromise. Mark David Hall, Roger Sherman and the Creation of the American Republic 96–98 (2013) (discussing Sherman's proposal during the Convention debates that led to the "Connecticut Compromise"); Max Farrand, The Framing of the Constitution of the United States 106 (1913). *See also* Wesberry v. Sanders, 376 U.S. 1, 12–13 (1964) (discussing Sherman's role in the Connecticut Compromise).

[10] U.S. Const. art. I, § 7. cl. 2. *See* The Federalist No. 39 (James Madison) ("The house of representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in the Legislature of a particular State. So far the Government is national not federal. The Senate on the other hand will derive its powers from the States, as political and co-equal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is federal, not national.").

[11] *See* INS v. Chadha, 462 U.S. 919, 950 (1983) ("[T]he Framers were. . .concerned, although not of one mind, over the apprehensions of the smaller states. Those states feared a commonality of interest among the larger states would work to their disadvantage; representatives of the larger states, on the other hand, were skeptical of a legislature that

Burger, "the Great Compromise, under which one House was viewed as representing the people and the other the states, allayed the fears of both the large and small states."[12] By diffusing legislative power between two Chambers of Congress, including a Senate in which the states had equal suffrage, the Framers of the Constitution also sought to promote the separation of powers, federalism, and individual rights.[13] They designed the bicameral Congress so that "legislative power would be exercised only after opportunity for full study and debate in separate settings."[14]

Controversial since its inception because it protects small state interests against those of larger states, Article V's prohibition on amending the Constitution so as to deprive states of equal suffrage has been a subject of scholarly interest. In discussions on whether the Article V prohibition should be given full legal force,[15] some commentators have noted that the Constitution's text and the Framers' intent require the provision to have legal effect.[16] Commentators have also argued that the people of the United States have accepted other limitations on the amending power (e.g., the high vote threshold for proposal and ratification of amendments).[17] Thus, in their view, it is unclear why the limitation on depriving states of equal suffrage in the Senate should not also have legal effect.[18]

Academic debates over the legal force of Article V's clause on unamendable subjects echo broader discussions of other possible external, textual, or implicit limitations on the amendment of the Constitution.[19] For example, scholars have debated whether it is possible to

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could pass laws favoring a minority of the people." *See also* The Federalist No. 51 (James Madison) ("In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit."); Farrand, The Framing of the Constitution of the United States, *supra* note 9, at 99–112 (describing the debate among the states regarding the structure of Congress).

[12] *Chadha*, 462 U.S. at 950 (1983). *See also* Farrand, The Framing of the Constitution of the United States, *supra* note 9, at 105–06 (explaining the structure of Congress as achieved under the "Great Compromise").

[13] *See* The Federalist No. 62 (James Madison) ("[A] senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient."). *See also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Columbia L. Rev. 673, 708–09 (1997) (describing how the legislative procedures "promote caution and deliberation; by mandating that each piece of legislation clear an intricate process involving distinct constitutional actors, bicameralism and presentment reduce the incidence of hasty and ill-considered legislation").

[14] *Chadha*, 462 U.S. at 951.

[15] *See generally, e.g.*, Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 Ariz. L. Rev. 717, 717 (1981).

[16] *Id.* at 733.

[17] John R. Vile, *Limitations on the Constitutional Amending Process*, 2 Const. Comment. 373, 379 (1985).

[18] *Id.* ("It is unclear why the United States should be bound by one such restraint, the super-majorities required for most amendments, and not another, the unanimous state consent required for altering a state's equal suffrage in the Senate."). Commentators who oppose the disproportionate influence of less populated states in the Senate and electoral college have argued that the Article V prohibition should not have full legal force. These arguments, however, are not reconcilable with Article V's express language or the intent of the Framers in adopting it. For instance, some scholars have argued that the provision is "merely declaratory" by reasoning that sovereignty resides in the people of the United States, and past actors cannot bind "the will of the people" in the future. *See* Linder, *supra* note 15, at 722–23. Article V, however, provides that a state's body politic may consent to no longer having equal suffrage, but the "will of the people" as expressed by the political entities whose agreement is necessary to amend the Constitution cannot deprive an unconsenting state of equal suffrage. Scholars have also debated whether the equal suffrage requirement could be removed in two steps by: (1) amending the Constitution to repeal the limitation; and (2) amending the document to alter equal suffrage. *See generally* George Mader, *Binding Authority: Unamendability in the United States Constitution—A Textual and Historical Analysis*, 99 Marq. L. Rev. 841, 852–53 (2016); Richard Albert, *Amending Constitutional Amendment Rules*, 13 Int'l J. Const. L. 655, 663 (2015). A two-step process to such an end, however, would still violate Article V's plain language providing that a state cannot be deprived of equal suffrage without its consent.

[19] Mader, *supra* note 18, at 845–46 (surveying relevant scholarship).

amend those provisions of the Nation's charter that embody fundamental norms or characteristics of the U.S. Government (e.g., provisions that establish a republican form of government).[20] Other debates have focused on whether Article V's procedures for amendment can themselves be amended.[21] Such debates, many of which have been part of the national conversation since the Founding,[22] raise critical questions about how the Nation may alter its fundamental law.

[20] *See* Mader, *supra* note 18, at 845–46.

[21] Mader, *supra* note 18, at 848 ("It is generally accepted that constitutional amending provisions can be used to amend themselves."). *But see* Linder, *supra* note 15, at 733 ("Article five itself cannot be amended so as to create any new limitations on the amending power.").

[22] President George Washington, First Inaugural Address (Apr. 30, 1789).

ARTICLE VI
SUPREME LAW

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ARTICLE VI—SUPREME LAW

ArtVI.1 Overview of Article VI, Supreme Law

Article VI establishes that the Constitution, U.S. laws, and treaties made under the authority of the United States are the Nation's supreme law and are binding on state judges notwithstanding any state constitution or law. Article VI also expressly provides that the new U.S. government established under the Constitution remained bound by the obligations of the predecessor governments established under the Articles of Confederation and Continental Congresses. In addition, Article VI provides that federal and state executive and judicial officers as well as members of federal and state legislatures shall take an oath to support the Constitution. Finally, Article VI expressly bars using religious tests as a qualification to hold "any Office or public Trust under the United States." [1]

Clause 1—Obligations of New Federal Government

ArtVI.C1.1 Debts and Engagements Clause

Article VI, Clause 1:

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

This provision, variously called the "Debts Clause," "Engagements Clause," or "Debts and Engagements Clause,"[1] provides that the United States will recognize the debts and engagements of its predecessor governments—namely, the Continental Congresses and the federal government under the Articles of Confederation.[2] This "declaratory proposition" served to assure the United States' foreign creditors, in particular, that the adoption of the Constitution did not have "the magical effect of dissolving [the United States'] moral obligations."[3]

To finance the American Revolutionary War, the Continental Congress borrowed money from foreign and domestic sources.[4] To assure creditors that the new government would honor these obligations, the Articles of Confederation provided:

> All bills of credit emitted, monies borrowed, and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the

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[1] U.S. Const. art. VI.

[1] *See, e.g.*, David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932, 1066 n.282 (2010) (referring to this provision as the "Debts Clause"); Vasan Kesavan, *When Did the Articles of Confederation Cease to Be Law?*, 78 Notre Dame L. Rev. 35, 51 (2002) (referring to this provision as the "Engagements Clause"); Stephen E. Sachs, *Constitutional Backdrops*, 80 Geo. Wash. L. Rev. 1813, 1827 (2012) (referring to this provision as the "Debts and Engagements Clause").

[2] U.S. Const. art. VI, cl. 1.

[3] The Federalist No. 43 (James Madison); *accord* 3 Joseph Story, Commentaries on the Constitution of the United States §§ 1826–28 (1833); The Federalist No. 84 (Alexander Hamilton); Lunaas v. United States, 936 F.2d 1277, 1278 (Fed. Cir. 1991) ("[Through the Debts and Engagements Clause] the nation undertook to assure creditors that the adoption of the Constitution would not erase existing obligations recognized under the Articles of Confederation.").

[4] *See generally* David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. Chi. L. Rev. 775, 802 (1994) ("The Revolution had been fought in substantial part on credit, and many creditors had not been paid.").

present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.[5]

The question of whether the new constitution should include a similar provision arose at the Constitutional Convention. As originally proposed, the Debts Clause provided that "The Legislature of the U.S. shall have power to fulfil the engagements which have been entered into by Congress, and to discharge as well the debts of the U.S.: as the debts incurred by the several States during the late war, for the common defence and general welfare."[6] There followed some debate over whether the Debts Clause should provide that the new Congress "*shall* discharge the debts," or merely that it has the power to do so.[7]

Eventually, Edmund Randolph proposed a version stating prior debts "shall be as valid against the United States under this constitution as under the Confederation," which the Convention approved.[8] The second part of the original proposal, concerning Congress's power to *pay* debts, was separated from the Debts Clause and became part of Congress's Article I spending power.[9] Both of these provisions were quickly put to use by the First Congress, which in 1790 enacted Secretary of the Treasury Alexander Hamilton's plan to settle the Confederation's debts (and, more controversially, those of the states).[10]

After the federal government satisfied the financial obligations inherited from the Confederation, the Debts and Engagements Clause has rarely been a topic of debate.[11] The few Supreme Court cases that discuss the Clause concern the question of whether the Northwest Ordinance of 1787—particulary its prohibition on slavery in what was then the Northwest Territory—was among the "engagements entered into" by the Articles of Confederation, which the new federal government was obliged to respect.[12]

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[5] Articles of Confederation of 1781, art. XII.

[6] 2 The Records of the Federal Convention of 1787, at 355–56 (Max Farrand ed., 1911).

[7] *See id.* at 377 (Gouverneur Morris introduces version stating the legislature "*shall* discharge the debts"), 412 (objection of George Mason to the "shall" language as "too strong").

[8] *Id.* at 414. Randolph's version is substantially the same as the final constitutional clause, save that the Committee of Style changed the description of the debts as contracted "by or under the authority of Congress" to "before the adoption of this Constitution." *Compare id.* at 414, *with id.* at 693 (Committee of Style draft).

[9] *See id.* at 497; U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

[10] *See* Act of Aug. 4, 1790, 1 Stat. 138.

[11] *See* Jeffrey Sikkenga, *Debt Assumption*, *in* The Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/articles/6/essays/132/debt-assumption ("After some political struggles in the early 1790s, the new federal government made good on the bond obligations inherited from the Articles of Confederation, thus vitiating the possibility for serious constitutional controversy.").

[12] *Compare* Strader v. Graham, 51 U.S. 82, 97 (1850) (Chief Justice Roger Taney) (expressing view that the Northwest Ordinance "ceased to be in force upon the adoption of the Constitution"), *with* Pollard's Heirs v. Kibbe, 39 U.S. 353, 417 (1840) (Baldwin, J., concurring) (relying on the Engagements Clause to argue that the Northwest Ordinance, "the most solemn of all engagements, has become a part of the Constitution, and [remains] valid"), *and Strader*, 51 U.S. at 98 (Catron, J., dissenting) (similar). *See generally* Downes v. Bidwell, 182 U.S. 244, 320–21 (1901) (White, J., concurring) (summarizing this debate).

Chief Justice Roger Taney's view prevailed for a time, infamously, in *Dred Scott v. Sanford,* 60 U.S. 393, 438 (1857) (holding that the Northwest Ordinance "had become inoperative and a nullity upon the adoption of the Constitution"), *superseded by constitutional amendment*, U.S. Const. amend XIV. This issue was rendered moot by the passage of the Thirteenth Amendment, whose language parallels the Ordinance and prohibits slavery throughout the United States. *Compare* Ordinance of 1787 art. VI ("There shall be neither slavery nor involuntary servitude in the said [Northwest] territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted . . . .") *with* U.S. Const. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."). *See generally* Amdt13.1 Overview of Thirteenth Amendment, Abolition of Slavery.

Clause 2—Supremacy Clause

ArtVI.C2.1 Overview of Supremacy Clause

Article VI, Clause 2:

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

The Supremacy Clause was a response to problems with the Articles of Confederation (the Articles), which governed the United States from 1781 to 1789. The Articles conspicuously lacked any similar provision declaring federal law to be superior to state law. As a result, during the Confederation era, federal statutes did not bind state courts in the absence of state legislation implementing them. To address this issue and related political difficulties, the Confederation Congress called for a convention in 1787 to revise the Articles. While the Supremacy Clause was not a source of major disagreement at the Constitutional Convention that followed, it generated intense controversy during debates over the Constitution's ratification. But advocates of federal supremacy prevailed. The Constitution was ratified in 1788 with the Supremacy Clause.[1]

The Supremacy Clause is among the Constitution's most significant structural provisions. In the late eighteenth and early nineteenth centuries, the Supreme Court relied on the Clause to establish a robust role for the federal government in managing the nation's affairs. In its early cases, the Court invoked the Clause to conclude that federal treaties and statutes superseded inconsistent state laws. These decisions enabled the young Republic to enforce the treaty ending the Revolutionary War, charter a central bank, and enact other legislation without interference from recalcitrant states.[2]

The Supreme Court continued to apply this foundational principle—that federal law prevailed over conflicting state law—throughout the latter half of the nineteenth century.[3] But other aspects of the Court's federalism jurisprudence limited the Supremacy Clause's role during that era. Throughout this period, the Court embraced what academics have called the doctrine of "dual federalism," under which the federal government and the states occupied largely distinct, non-overlapping zones of constitutional authority.[4] While federal supremacy persisted as a background principle during these years, the Court's bifurcation of federal and state authority minimized the instances in which the two could conflict.[5]

To the extent that the Supremacy Clause did play an explicit role in the federalism disputes of this era, the Supreme Court applied it in ways that reinforced dual federalism's sharp division of federal and state power. In a series of early-twentieth-century decisions, the Court developed a precursor to the doctrine of "field preemption"—the principle that some federal legislation implicitly prevents states from adopting any laws regulating the same

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[1] *See* ArtVI.C2.2.1 Articles of Confederation and Supremacy of Federal Law to ArtVI.C2.2.3 Debate and Ratification of Supremacy Clause.

[2] *See* Gibbons v. Ogden, 22 U.S. 1 (1824); McCulloch v. Maryland, 17 U.S. 316 (1819); Ware v. Hylton, 3 U.S. 199 (1796).

[3] *See* Davis v. Elmira Sav. Bank, 161 U.S. 275 (1896).

[4] *See, e.g.*, Edward S. Corwin, *The Passing of Dual Federalism*, 36 Va. L. Rev. 1, 4 (1950).

[5] *See* N.Y. Cent. & Hudson River R.R. Co. v. Tonsellito, 244 U.S. 360 (1917); Charleston & W. Carolina Ry. v. Varnville Furniture Co., 237 U.S. 597 (1915); Chi., Rock Island & Pac. Ry. v. Hardwick Farmers Elevator Co., 226 U.S. 426 (1913).

general subject. Some of the Court's early field-preemption decisions aggressively employed the new doctrine, concluding that *any* congressional action in certain fields *automatically* displaced all state laws in those fields.[6]

But the Supreme Court's initial foray into field preemption soon gave way to broader legal and political trends. During the New Deal era of the 1930s and 1940s, the Court acceded to demands for a more active national government by revising other elements of its federalism jurisprudence.[7] This about-face marked the demise of dual federalism, as the Court expanded the areas in which the federal government and the states possessed concurrent authority. To prevent the federal government's newly expanded powers from smothering state regulatory authority, the Court simultaneously *narrowed* the circumstances in which federal law displaced state law. Besides retreating from the "automatic" field preemption of the early twentieth century, the Court articulated a "presumption against preemption," under which federal law does not displace state law "unless that was the clear and manifest purpose of Congress."[8]

As the preceding discussion suggests, the Supreme Court has channeled contemporary Supremacy Clause doctrine into the language of "federal preemption." The Court's cases recognize several types of preemption. At the highest level of generality, federal law can preempt state law either *expressly* or *impliedly*. Federal law *expressly* preempts state law when it contains explicit language to that effect.[9] By contrast, federal law *impliedly* preempts state law when that intent is implicit in its structure and purpose.[10]

The Court has also identified different subcategories of implied preemption. As noted, *field preemption* occurs where federal law is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[11] In contrast, *conflict preemption* occurs where compliance with both federal and state law is impossible ("impossibility preemption") or where state law poses an obstacle to federal objectives ("obstacle preemption").[12]

Because preemption issues are primarily questions of statutory interpretation, the Supremacy Clause's role in contemporary legal doctrine differs from that of many other constitutional provisions. The basic principle enshrined in the Clause—federal supremacy—is now well-settled. Generally, litigants do not dispute the Clause's meaning or advance conflicting theories on its scope. Rather, preemption cases ordinarily turn on the same types of issues—like the textualist/purposivist divide and administrative deference—that recur in all manner of statutory litigation.[13]

This essay chronicles the Supremacy Clause's evolution from a deeply controversial repudiation of the Articles of Confederation to its contemporary role as an essential bedrock of the structural Constitution.

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[6] *See Chi., Rock Island & Pac. Ry.*, 226 U.S. at 435.

[7] Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[8] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[9] *See* Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985).

[10] *See id.*

[11] Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (internal quotation marks and citation omitted).

[12] *See id.*

[13] *See* ArtVI.C2.3.4 Modern Doctrine on Supremacy Clause. For an overview of the textualist/purposivist debate in statutory interpretation, see Valerie C. Brannon, Cong. Rsch. Serv., R45153, Statutory Interpretation: Theories, Tools, and Trends (2018), https://crsreports.congress.gov/product/pdf/R/R45153. For an overview of administrative deference, see Valerie C. Brannon & Jared P. Cole, Cong. Rsch. Serv., LSB10204, Deference and its Discontents: Will the Supreme Court Overrule *Chevron*? (2018), https://crsreports.congress.gov/product/pdf/LSB/LSB10204.

ArtVI.C2.2 Historical Background

ArtVI.C2.2.1 Articles of Confederation and Supremacy of Federal Law

Article VI, Clause 2:

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

The Supremacy Clause was a response to the political regime established under the Articles of Confederation (the Articles), which governed the United States from 1781 to 1789.[1] The Articles established a weak national government, providing that the states retained their "sovereignty, freedom, and independence, and every Power, Jurisdiction, and right" that was not "expressly delegated to the United States, in Congress assembled."[2] Under the Articles, the Confederation Congress—which performed both legislative and executive functions—had the power to wage war, coin money, establish post offices, and negotiate with Indian tribes.[3] But the Confederation Congress could not levy taxes or regulate interstate commerce. Moreover, the Articles did not make federal law supreme over state law. While Article XIII required states to "abide by the determinations of" the Confederation Congress,[4] the effect of that provision was limited. Indeed, under Article XIII, it was unclear whether federal law was binding in state courts without state legislation implementing it.[5] James Madison thus criticized the Articles as establishing "nothing more than a mere treaty" of "amity of commerce" and "alliance" in which federal law was merely "recommendatory" for the states.[6]

Article XIII's ambiguity on federal supremacy was particularly important vis-à-vis the Treaty of Paris, which ended the Revolutionary War between Britain and the United States in 1783.[7] Among other things, the treaty prohibited "impediment[s]" to the recovery of pre-war debts.[8] But the lack of clarity over federal supremacy—coupled with an absence of state legislation implementing the treaty—created uncertainties surrounding the enforcement of state laws impairing the rights of British creditors.[9] These types of uncertainties—and broader

[1] Articles of Confederation and Perpetual Union (1777); *but see* Vasan Kesavan, *When Did the Articles of Confederation Cease to be Law?*, 78 Notre Dame L. Rev. 35, 44 (2002) (discussing academic arguments over whether the Articles of Confederation "cease[d] to be law" when the Constitution was ratified in the early summer of 1788, or when a new Congress and President assumed office in the spring of 1789).

[2] Articles of Confederation and Perpetual Union art. II.

[3] *Id.* art. IX.

[4] *Id.* art. XIII.

[5] *See* Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 247–48 (2000) ("[Article XIII] did not necessarily mean that Congress's acts automatically became part of the law applied in state courts; it could be read to mean only that each state legislature was supposed to pass laws implementing Congress's directives. If a state legislature failed to do so, and if Congress's acts had the status of another sovereign's law, then Congress's acts might have no effect in the courts of that state.").

[6] James Madison, "Vices of the Political System of the United States," (Apr. 1787), *in* 9 The Papers of James Madison 345, 351–52 (Robert A. Rutland & William M.E. Rachal eds., 1975).

[7] Definitive Treaty of Peace Between the United States and His Britannic Majesty, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80.

[8] Articles of Confederation and Perpetual Union art. IV.

[9] Nelson, *supra* note 5, at 248.

dissatisfaction with the national government's weakness—prompted the Confederation Congress to call for a convention in 1787 to "revis[e]" the Articles.[10]

ArtVI.C2.2.2 Supremacy Clause and the Constitutional Convention

Article VI, Clause 2:

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

Despite the Constitutional Convention's limited mandate, its delegates began drafting an entirely new constitution shortly after convening. During the drafting process, the delegates considered several options for resolving conflicts between federal and state law. One proposal—the Virginia Plan—would have granted Congress the power to veto state laws and employ military force against states that disobeyed federal law.[1] Another option—the New Jersey Plan—also proposed giving Congress the power to use military force against recalcitrant states, and included a provision that one scholar has described as the "incubus" of what became the Supremacy Clause.[2] This provision read:

> Resd. that all Acts of the U. States in Congs. made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding. . . .[3]

While the Convention ultimately rejected the New Jersey Plan and proceeded with consideration of the Virginia Plan, it dispensed with the latter's proposals for a congressional veto and the use of military force. Instead, the Convention unanimously approved a provision that closely tracked the New Jersey Plan's "supremacy clause."[4]

In July 1787, the Convention adjourned to allow the Committee of Detail to draw up a draft constitution.[5] The Committee of Detail's final report contained a "supremacy clause" that read:

> The Acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States shall be

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[10] Resolution of Congress (Feb. 21, 1787), *in* The Documentary History of the Ratification of the Constitution 45 (John P. Kaminski & Gaspare J. Saladino eds., 1981).

[1] 1 The Records of the Federal Convention of 1787 21 (Max Farrand ed., 1911) [hereinafter Farrand's Records].

[2] 2 John R. Vile, The Constitutional Convention of 1787: A Comprehensive encyclopedia of America's founding 773 (2005); *see also* Christopher R. Drahozal, The Supremacy Clause: A Reference Guide to the United States Constitution 16 (2004) (describing the provision as "the earliest version of what was to become the Supremacy Clause").

[3] 1 Farrand's Records, *supra* note 1, at 245.

[4] 2 Farrand's Records, *supra* note 1, at 22. The approved clause read: "Resolved that the legislative acts of the United States made by virtue and in pursuance of the articles of Union and all Treaties made and ratified under the authority of the United States shall be the supreme law of the respective States as far as those acts or Treaties shall relate to the said States, or their Citizens and Inhabitants—and that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding." 2 Farrand's Records, *supra* note 1, at 22.

[5] Drahozal, *supra* note 2, at 21.

> the supreme law of the several States, and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions; anything in the Constitutions or laws of the several States to the contrary notwithstanding.[6]

This provision departed from the clause approved by the Convention as a whole by explicitly providing that federal law was supreme over state "Constitutions," in addition to state "laws."

When the Convention considered the Committee of Detail's report, it unanimously approved an amendment clarifying that the federal Constitution itself—in addition to federal statutes and treaties—was supreme over state law.[7] The Convention's Committee of Style ultimately placed the Supremacy Clause in Article VI, immediately before a provision requiring all judges to take an oath supporting the Constitution.[8] The final Supremacy Clause read:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[9]

ArtVI.C2.2.3 Debate and Ratification of Supremacy Clause

Article VI, Clause 2:

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

The Supremacy Clause generated significant controversy during debates over the Constitution's ratification. Anti-Federalist opponents of the Constitution argued that the Clause would make the national government overly powerful and infringe on state sovereignty. The stridency of these criticisms varied.

One Anti-Federalist contended that the Clause would force the country into "one large system of lordly government."[1] Another critic similarly argued that the Constitution would effectuate "a complete consolidation of all of the states into one, however diverse the parts of it

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[6] 2 Farrand's Records, *supra* note 1, at 183.

[7] 2 Farrand's Records, *supra* note 1, at 389. The amendment replaced the phrase "The Acts of the Legislature of the United States made in pursuance of this Constitution" with the following language: "This Constitution & the laws of the U.S. made in pursuance thereof." 2 Farrand's Records, *supra* note 1, at 389.

[8] For a detailed summary of the Supremacy Clause's textual evolution, see Drahozal, *supra* note 2, at 68–70.

[9] 2 Farrand's Records, *supra* note 1, at 663. One commentator has argued that the phrase "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" is a "*non obstante* provision"—an eighteenth-century legal term of art instructing courts not to apply the general presumption against implied repeals. Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 238–41 (2000). According to this theory, the Supremacy Clause's *non obstante* provision means "that courts should not automatically seek narrowing constructions of express preemption clauses" in federal statutes. *Id.* at 294. Other scholars have questioned this reading of the Supremacy Clause and argued that its adoption would be inconsistent with other aspects of contemporary federalism jurisprudence. *See* Daniel J. Meltzer, *Preemption and Textualism*, 112 Mich. L. Rev. 1, 47–52 (2013); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. Rev. 1, 6 n.12 (2007).

[1] A Federal Republican, "A Review of the Constitution" (Nov. 28, 1787), *in* 14 Documentary History of the Ratification of the Constitution 255, 269 (John P. Kaminski et al. eds., 1983).

may be."[2] Some Anti-Federalists framed this criticism as a conceptual argument, asserting that two sovereigns could not exist within the same territory, and that one would "necessarily" destroy the other.[3] Along these lines, one opponent claimed that the Supremacy Clause would allow the federal government to prevent states from levying taxes and thereby "absorb" their powers.[4]

Other Anti-Federalists offered more limited criticisms. Some critics objected to making treaties supreme to state law. These commentators contended that this aspect of the Supremacy Clause would allow for the displacement of state law without the approval of both Houses of Congress, because the President and the Senate could make treaties without the approval of the House of Representatives.[5] Some opponents also argued that, without a federal bill of rights, the Supremacy Clause would allow the federal government to override state constitutional guarantees of individual liberties.[6]

Federalist supporters of the Constitution rejected these arguments. Some supporters dismissed concerns about the elimination of state governments, noting that the Constitution granted the federal government only limited powers.[7] Others minimized the Supremacy Clause's significance, characterizing it as a truism that "resulted by necessary and unavoidable implication from the very act of constituting a Federal Government[ ] and vesting it with certain specified powers."[8] In response to concerns about the treaty power, Federalists contended that the supremacy of treaties was essential to the federal government's credibility as a negotiator with foreign powers.[9] Others argued that, while the House of Representatives had no formal role in the ratification of treaties, it nevertheless operated as a "restraining influence" on that process because of its general legislative powers.[10] Finally, while a federal Bill of Rights was ultimately adopted after the Constitution's ratification, some Federalists

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[2] Agrippa X, Massachusetts Gazette (Jan. 1, 1788), *in* 5 Documentary History of the Ratification of the Constitution 576 (John P. Kaminski et al. eds., 1998).

[3] The Impartial Examiner I, Virginia Independent Chronicles (Feb. 20, 1787), *in* 8 Documentary History of the Ratification of the Constitution 387, 392 (John P. Kaminski et al. eds., 1988); *see also* George Mason, Debates of the Virginia Convention (June 19, 1788), *in* 10 Documentary History of the Ratification of the Constitution 1402 (John P. Kaminski et al. eds., 1993) (arguing that the Constitution would "destroy the State Governments, whatever may have been the intention."); Robert Whitehill, Debates of the Pennsylvania Convention (Dec. 8, 1787), *in* 2 Documentary History of the Ratification of the Constitution 526 (Merill Jensen et al. eds., 1976) (arguing that the Supremacy Clause was a "concluding clause[ ] that the state governments will be abolished").

[4] Brutus I, New York Journal (Oct. 18, 1787), *in* 13 Documentary History of the Ratification of the Constitution 411, 415 (John P. Kaminski et al. eds., 1981); *see also* An Old Whig VI, Philadelphia Independent Gazette (Nov. 24, 1787), *in* 14 Documentary History of the Ratification of the Constitution 215–16 (John P. Kaminski et al. eds., 1983) (arguing that. under the Supremacy Clause, "no individual state can collect a penny, unless by the permission of Congress . . . Not a single source of revenue will remain to any state, which Congress may not stop at their [sic] sovereign will and pleasure").

[5] An Old Whig III, Philadelphia Independent Gazetteer (Oct. 20, 1787), *in* 13 Documentary History of the Ratification of the Constitution 425–26 (John P. Kaminski et al. eds., 1981); Federal Farmer IV, Letters to the Republican (Oct. 12, 1787), *in* 14 Documentary History of the Ratification of the Constitution 42–43 (John P. Kaminski et al. eds., 1983); George Mason, Objections to the Constitution (Oct. 7, 1787), *in* 8 Documentary History of the Ratification of the Constitution 40, 44–45 (John P. Kaminski et al. eds., 1988).

[6] *See* Patrick Henry, Debates of the Virginia Convention (June 19, 1788), *in* 10 Documentary History of the Ratification of the Constitution 1349 (John P. Kaminski et al. eds., 1993); Elbridge Gerry, Objections to Signing the National Constitution (Nov. 3, 1787), *in* 13 Documentary History of the Ratification of the Constitution 546, 548 (John P. Kaminski et al. eds., 1981); George Mason, Objections to the Constitution (Oct. 7, 1787), *in* 8 Documentary History of the Ratification of the Constitution 40, 43 (John P. Kaminski et al. eds., 1988).

[7] A Native of Virginia, Observations upon the Proposed Plan of Federal Government (Apr. 2, 1788), *in* 9 Documentary History of the Ratification of the Constitution 655, 692 (John P. Kaminski et al. eds., 1990).

[8] The Federalist No. 33 (Alexander Hamilton).

[9] The Federalist No. 64 (John Jay).

[10] James Wilson, Debates of the Pennsylvania Convention (Dec. 11, 1787), *in* 2 Documentary History of the Ratification of the Constitution 416 (Merrill Jensen et al. eds., 1976).

challenged the necessity of those amendments during the ratification debates.[11] These advocates contended that explicit rights guarantees were superfluous, because the federal government's limited powers would prevent it from infringing individual liberties.[12]

The Federalists prevailed. In June 1788, New Hampshire became the ninth state to ratify the Constitution, giving it effect in the ratifying states.[13] Federal law thus became the "supreme Law of the Land."[14]

ArtVI.C2.3 Doctrine

ArtVI.C2.3.1 Early Doctrine on Supremacy Clause

Article VI, Clause 2:

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

The balance of power between the federal government and the states continued to be a source of controversy after the Constitution's ratification.[1] But in a series of foundational decisions, the Supreme Court interpreted the Supremacy Clause as establishing a robust role for the national government in managing the nation's affairs. In 1796, the Court held that the Treaty of Paris—which, as noted, prohibited impediments to the recovery of pre-war debts—superseded a Virginia statute allowing debtors to satisfy any obligations to British subjects by payment to the state treasury.[2]

Slightly more than two decades later, the Court again invoked the Supremacy Clause to resolve another hotly contested political dispute. In 1819, the Court held in *McCulloch v. Maryland* that a state tax on notes issued by the Second Bank of the United States impermissibly conflicted with federal law.[3] The Bank had attracted criticism from skeptics of federal power, who challenged Congress's authority to charter it. In *McCulloch*, the Court sustained the federal government's power to charter the Bank under the Necessary and Proper Clause, while invalidating the state tax on the Bank's notes under the Supremacy Clause. Writing for the Court, Chief Justice John Marshall explained that "the power to tax involves the power to destroy," striking down the state tax because it unlawfully burdened the Bank's operations.[4]

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[11] James Wilson, Speech at a Public Meeting in Philadelphia (Oct. 6, 1787), *in* 13 Documentary History of the Ratification of the Constitution 337, 339–340 (John P. Kaminski et al. eds., 1981).

[12] *Id.*

[13] Christopher R. Drahozal, The Supremacy Clause: A Reference Guide to the United States Constitution 34 (2004).

[14] U.S. Const. art. VI cl. 2.

[1] *See generally* William Nisbet Chambers, Political Parties in a New Nation: The American Experience, 1776–1809 (1963) (discussing the key political controversies of the early Republic, many of which involved the relative powers of the federal government and the states).

[2] *See* Ware v. Hylton, 3 U.S. 199, 235–39 (1796).

[3] 17 U.S. 316 (1819).

[4] *Id.* at 327. This principle—that states cannot interfere with or control the operations of the federal government—has evolved into what is often called the "intergovernmental immunity" doctrine. For many years, the Supreme Court applied this doctrine to condemn state laws that "increase[d] the cost to the Federal Government of performing its functions." United States v. Cnty. of Fresno, 429 U.S. 452, 460 (1977). But the Court later narrowed this rule. Today, a state law violates the intergovernmental immunity doctrine only if it regulates the federal government directly or discriminates against the federal government or those with whom the federal government deals. North

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Early Doctrine on Supremacy Clause

Five years after *McCulloch*, the Court employed similar reasoning in *Gibbons v. Ogden*, holding that federal coastal licenses displaced a state law conferring a monopoly on a steamboat company.[5] After concluding that Congress had the authority to issue the licenses under the Commerce Clause, Chief Justice John Marshall explained that the licenses superseded the relevant state law, which "interfere[d] with" federal policy.[6] The early Court thus gave shape to the basic principle underlying the Supremacy Clause: where federal and state law clashed, federal law was supreme.[7]

ArtVI.C2.3.2 Dual Federalism in Late Nineteenth and Early Twentieth Centuries

Article VI, Clause 2:

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

The Supreme Court continued to apply the basic principle of federal supremacy throughout the late nineteenth and early twentieth centuries. But the Supremacy Clause's role during that era was limited by other aspects of the Court's federalism jurisprudence. Throughout this period, the Court embraced what academics have called the doctrine of "dual federalism," under which the federal government and the states occupied largely distinct, non-overlapping zones of constitutional authority.[1] Applying this framework, the Court adopted a narrow interpretation of Congress's Commerce Clause authorities[2] and construed the Tenth Amendment as imposing strict additional limitations on federal power.[3] The Court also relied on the Dormant Commerce Clause to conclude that states lacked the power to regulate certain subjects of exclusive federal concern.[4] While federal supremacy thus persisted

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Dakota v. United States, 495 U.S. 423, 435 (1990) (plurality op.); *id.* at 444 (Scalia, J., concurring in judgment) (noting that "[a]ll agree" with this aspect of the plurality opinion). In evaluating whether a state law discriminates against the federal government, courts assess whether the law singles out the federal government or its contractors or regulates them unfavorably on some basis related to their governmental status. *See* United States v. Washington, No. 21-404 (U.S. June 21, 2022).

[5] 22 U.S. 1, 82–87 (1824).

[6] *Id.* at 82.

[7] The Supremacy Clause also served as the foundation for a mid-nineteenth century decision that occupies an inglorious place in the Nation's constitutional history. In its 1842 decision in *Prigg v. Pennsylvania*, the Supreme Court held that the federal Fugitive Slave Act—which allowed slaveholders to recover escaped slaves—superseded a Pennsylvania law that prohibited the "remov[al]" of African-Americans from the state for the purpose of enslavement. 41 U.S. 539 (1842).

[1] *See* Edward S. Corwin, *The Passing of Dual Federalism*, 36 Va. L. Rev. 1, 4 (1950) (defining "Dual Federalism" as involving the following "postulates": "1. The national government is one of enumerated powers only; 2. Also the purposes which it may constitutionally promote are few; 3. Within their respective spheres the two centers of government are 'sovereign' and hence 'equal'; 4. The relation of the two centers with each other is one of tension rather than collaboration.").

[2] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 303–04 (1936) (holding that the Bituminous Coal Conservation Act of 1935 exceeded the scope of Congress's Commerce Clause authority); ALA Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935) (holding that a "code of fair competition" adopted under the National Industrial Recovery Act exceeded the scope of the Commerce Power); United States v. E.C. Knight, 156 U.S. 1, 12 (1895) (holding that the Sherman Antitrust Act's application to acquisitions in the sugar refining industry exceeded the scope of the Commerce Power).

[3] *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 273–74 (1918) (holding that a federal law prohibiting the interstate shipment of goods produced using child labor violated the Tenth Amendment).

[4] *See, e.g.*, Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 575 (1886) (holding that a state law regulating railroad rates violated the Dormant Commerce Clause); Welton v. Missouri, 91 U.S. 275, 281 (1876) (holding that a

as a background principle during the late nineteenth and early twentieth centuries, the Court's bifurcation of federal and state authority minimized the instances in which the two could conflict.[5]

To the extent that the Supremacy Clause played an explicit role in the federalism disputes of this era, the Court applied it in ways that reinforced the sharp division of federal and state power. In a series of early-twentieth-century decisions, the Court developed a precursor to the doctrine of "field preemption"—the principle that some federal legislation implicitly prevents states from adopting any laws regulating the same general subject. For example, in *Southern Railway v. Reid*, the Court held that the Interstate Commerce Act (ICA)—which regulated railroad rates—superseded a state law requiring railroads to transport tendered freight.[6] The Court reasoned that Congress had "taken possession of the field" of railroad rate regulation with the ICA, thereby precluding even supplementary state regulations.[7] In another decision, the Court held that a different federal law requiring railroads to secure the safe transportation of property upon reasonable terms displaced a state law compelling railroads to settle certain claims within forty days.[8] In his opinion for the Court, Justice Oliver Wendell Holmes rejected the argument that the state law did not conflict with the federal law, explaining that the absence of such a conflict was "immaterial," because "coincidence is as ineffective as opposition" when "Congress has taken [a] particular subject-matter in hand."[9] In yet another field-preemption case, the Court held that a federal law involving railroads' liability for employee injuries superseded state common law claims based on such injuries.[10]

While the Supreme Court's reasoning in these cases varied, one commentator has noted the readiness with which the Court concluded that federal law preempted the relevant fields.[11] For example, in one decision, the Court appeared to suggest that *any* federal legislation in certain fields precluded states from adopting even supplementary regulations of the same subject.[12] Under this theory of "automatic" preemption, Congress's authority over certain subjects was one of "latent exclusivity," meaning "the power of the states ended as soon as Congress chose to exercise its regulatory power" in those fields.[13] However, this view of federal power—which was related to notions of dual federalism—would soon give way to broader legal and political trends.

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state law requiring peddlers of out-of-state merchandise to pay a tax and obtain a license violated the Dormant Commerce Clause because it regulated a subject "of national importance"); *see also* Cooley v. Bd. of Wardens, 53 U.S. 299, 319–20 (1851) (distinguishing between subjects of the Commerce Power that were "in their nature national," and therefore subject to exclusive federal regulation, and those that were subject to concurrent federal and state regulation).

[5] *But see* Davis v. Elmira Sav. Bank, 161 U.S. 275, 284 (1896) (holding that the National Bank Act superseded a state law regarding the distribution of an insolvent national bank's assets).

[6] 222 U.S. 424, 438 (1912).

[7] *Id.* at 442.

[8] Charleston & W. Carolina Ry. v. Varnville Furniture Co., 237 U.S. 597, 603–04 (1915).

[9] *Id.* at 604.

[10] N.Y. Cent. & Hudson River R.R. v. Tonsellito, 244 U.S. 360, 362 (1917).

[11] *See* Stephen A. Gardbaum, *The Nature of Preemption*, 49 Cornell L. Rev. 767, 783 (1994).

[12] *See* Chi., Rock Island & Pac. Ry. v. Hardwick Farmers Elevator Co., 226 U.S. 426, 435 (1913) ("[I]t must follow in consequence of the action of Congress . . . that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme.").

[13] Gardbaum, *supra* note 11, at 783.

ArtVI.C2.3.3 New Deal and Presumption Against Preemption

Article VI, Clause 2:

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

The Supreme Court abandoned dual federalism during the New Deal era of the 1930s and 1940s. In those years, the Court acceded to demands for a more active national government by revising its Commerce Clause and Tenth Amendment jurisprudence.[1] The federal government thereby gained vast new powers to regulate the economy, which it deployed in new and creative ways.[2] But this expansion of federal authority threatened sweeping consequences when paired with the Court's aggressive application of the Supremacy Clause. Specifically, if field preemption automatically followed from many types of federal legislation, Congress's enhanced powers would displace large swathes of state regulation—even in cases when state regulation did not conflict with federal law. To avoid this outcome, the New Deal Court retreated from dual federalist notions of "latent exclusivity," clarifying that federal law displaced state law only if Congress's intention to do so was clear.

In *Mintz v. Baldwin*, for example, the Court rejected the argument that a federal law regulating the inspection and transportation of cattle superseded a state order compelling certain breeders to remove uncertified cattle from the state.[3] In rejecting this argument, the Court explained that "[t]he purpose of Congress to supersede or exclude state action against the ravages of disease is not lightly to be inferred," and that "[t]he intention so to do must definitely and clearly appear."[4] The Court endorsed a similar principle in *Rice v. Santa Fe Elevator Corp.*, where it held that the federal Warehouse Act superseded some—but not all—state law claims against grain-warehouse operators.[5] The Court explained that, in evaluating whether federal law displaces state law, it "start[ed] with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress."[6] The Court continues to apply this "presumption against preemption" to this day-albeit in limited circumstances.[7]

ArtVI.C2.3.4 Modern Doctrine on Supremacy Clause

Article VI, Clause 2:

> *This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United*

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[1] *See* Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding that Congress's Commerce Clause authority extends to intrastate activities that in the aggregate "exert[ ] a substantial economic effect on interstate commerce"); United States v. Darby, 312 U.S. 100, 119–24 (1941) (upholding the Fair Labor Standards Act as a permissible exercise of the Commerce Power that did not violate the Tenth Amendment); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937) (upholding the National Labor Relations Act as a permissible exercise of the Commerce Power).

[2] *See, e.g.*, 2 Bruce Ackerman, We the People: Transformations 281–311 (1998).

[3] 289 U.S. 346, 350 (1933).

[4] *Id.* at 350.

[5] 331 U.S. 218, 230–37 (1947).

[6] *Id.* at 230.

[7] *See* ArtVI.C2.3.4 Modern Doctrine on Supremacy Clause.

States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Since the mid-twentieth century, the Supreme Court has channeled its Supremacy Clause jurisprudence into the language of "federal preemption."[1] The Court's cases identify several types of preemption. At the highest level of generality, federal law can preempt state law either *expressly* or *impliedly*. Federal law *expressly* preempts state law when it contains explicit language to that effect.[2] By contrast, federal law *impliedly* preempts state law when that intent is implicit in its structure and purpose.[3]

The Court has also distinguished between different forms of implied preemption. As noted, *field preemption* occurs where federal law is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[4] In contrast, *conflict preemption* occurs where compliance with federal and state law is impossible ("impossibility preemption") or where state law poses an obstacle to federal objectives ("obstacle preemption").[5]

In all preemption cases, "the purpose of Congress is the ultimate touchstone" of the Court's statutory analysis.[6] In analyzing congressional purpose, the Court continues to invoke the presumption against preemption from *Mintz* and *Rice*—albeit in limited circumstances. While the Court regularly employed this presumption in the 1980s and 1990s,[7] it has invoked it less consistently in recent years.[8] Moreover, in a 2016 decision, the Court departed from prior case law[9] when it explained that the presumption does not apply in express-preemption cases.[10] The Court has also acknowledged exceptions to the presumption in cases involving subjects that the states have not traditionally regulated,[11] and cases involving subjects in which the

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[1] *See* Stephen A. Gardbaum, *The Nature of Preemption*, 49 Cornell L. Rev. 767, 789 n.65 (1994) (noting that the term "preemption" first appeared in the U.S. Reports in 1917, but was not generally used until the 1940s).

[2] *See* Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985).

[3] *See id.*

[4] Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (internal quotation marks and citation omitted).

[5] *See id.*

[6] Wyeth v. Levine, 555 U.S. 555, 565 (2009) (internal quotation marks and citation omitted).

[7] *See, e.g.*, De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 814 (1997); N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995); Bldg. & Const. Trades Council v. Assoc. Builders & Contractors, 507 U.S. 218, 224 (1993); Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 518 (1992); Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 116 (1992); Metro. Life Ins. Co. v. Mass., 471 U.S. 724, 740 (1985); Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 715 (1985); Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

[8] *See, e.g.*, Mutual Pharm. Co., Inc. v. Bartlett, 133 S. Ct. 2466 (2013) (holding that federal law preempted state law without mentioning the presumption against preemption); Kurns v. R.R. Friction Prods. Corp., 565 U.S. 625 (2012) (similar); PLIVA, Inc. v. Mensing, 564 U.S. 604, 622 (2011) (similar); Bruesewitz v. Wyeth LLC, 562 U.S. 223 (2011) (similar); Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364 (2008) (similar); Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861 (2000) (similar).

[9] *See, e.g.*, CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2188–89 (2014) ("When the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors preemption.") (internal quotation marks and citations omitted); Wyeth v. Levine, 555 U.S. 555, 565 (2009) (explaining that the presumption against preemption applies "[i]n all preemption cases"); Altria Grp., Inc. v. Good, 555 U.S. 70, 77 (2008) (explaining that the Court "begin[s its] analysis" with a presumption against preemption "[w]hen addressing questions of *express or implied* pre-emption") (emphasis added); Bates v. Dow Agrosciences, LLC, 544 U.S. 431, 449 (2005) ("Even if [the defendant] had offered us a plausible alternative reading of [the relevant preemption clause]—indeed, even if its alternative were just as plausible as our reading of the text—we would nevertheless have a duty to accept the reading that disfavors preemption."); Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141, 151 (2001) (invoking the presumption against preemption in interpreting ERISA's preemption clause); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (explaining that the presumption against preemption applies "[i]n all preemption cases"); De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 814 (1997) (invoking the presumption against

federal government has historically had a significant regulatory presence.[12] Accordingly, while the presumption remains relevant in certain implied-preemption disputes,[13] the Court has narrowed the circumstances in which it applies.

As the federal government's regulatory role has expanded, preemption has become a ubiquitous feature of the modern administrative state. Preemptive federal statutes now shape the regulatory environment for most major industries, including pharmaceutical drugs, securities, nuclear safety, medical devices, air transportation, banking, automobiles, and telecommunications.[14] While preemption is thus a pervasive feature of the contemporary legal landscape, the Supremacy Clause's role in modern legal doctrine differs from that of many other constitutional provisions. Preemption cases are primarily exercises in *statutory* interpretation—not *constitutional* analysis. Generally, litigants do not dispute the Supremacy Clause's meaning or advance conflicting theories on its scope. The basic principle enshrined in the Clause—federal supremacy—is now well-settled. As a result, the Supremacy Clause does not play a central role in modern debates over federalism; those battles are instead typically fought on the terrain of the Commerce Clause, the Spending Clause, and the Fourteenth Amendment.[15] Today, preemption cases ordinarily turn on the same types of issues—like the textualist/purposivist divide and administrative deference—that recur in all manner of statutory litigation.[16] But the Supremacy Clause's modern role as a background principle hardly negates its importance. Federal supremacy remains a foundational doctrine of constitutional law that undergirds much of the modern regulatory state.

Clause 3—Oaths of Office

ArtVI.C3.1 Oaths of Office Generally

Article VI, Clause 3:

> *The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the*

preemption in interpreting ERISA's preemption clause); *Travelers*, 514 U.S. at 654 (same); *Cipollone*, 505 U.S. at 518 (invoking the presumption against preemption in interpreting the Federal Cigarette Labeling and Advertising Act's preemption clause).

[10] Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1946 (2016) (explaining that in express-preemption cases, the Court "do[es] not invoke any presumption against pre-emption but instead focus[es] on the plain wording of the [preemption] clause, which necessarily contains the best evidence of Congress's pre-emptive intent").

[11] *See* Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347–48 (2001).

[12] *See* United States v. Locke, 529 U.S. 89, 108 (2000).

[13] *See, e.g.*, Wyeth v. Levine, 555 U.S. 555, 565 (2009).

[14] *See generally* Jay B. Sykes & Nicole Vanatko, Cong. Rsch. Serv., R45825, Federal Preemption: A Legal Primer (2019), https://crsreports.congress.gov/product/pdf/R/R45825.

[15] That the Supremacy Clause is not the locus for most modern federalism disputes is attributable to its basic function in the structural Constitution. Unlike the Commerce Clause, the Spending Clause, and the Fourteenth Amendment, the Supremacy Clause is not an independent source of federal authority. Instead, the Supreme Court has explained that the Supremacy Clause is a "rule of decision" for resolving conflicts between federal and state law. Murphy v. NCAA, 138 S. Ct. 1461, 1479 (2018). Because the basic principle underlying this "rule of decision" is now well-established, contemporary federalism cases typically hinge on disagreements over the scope of provisions granting the federal government various powers.

[16] *See, e.g.*, Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1906 (2019) (Gorsuch, J., lead op.) (rejecting a field-preemption argument on textualist grounds); *id.* at 1909 (Ginsburg, J., concurring in the judgment) (concurring with Justice Gorsuch's conclusion, but declining to join his "discussion of the perils of inquiring into legislative motive"); *id.* at 1917 (Roberts, J., dissenting) (arguing that a state law fell within a federally preempted field because of its purpose); Nina A. Mendelson, *Chevron and Preemption*, 102 Mich. L. Rev. 737 (2004) (reviewing the case law on judicial deference to agency determinations that federal law preempts state law).

several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Congress may require no other oath of fidelity to the Constitution, but it may add to this oath such other oath of office as its wisdom may require.[1] It may not, however, prescribe a test oath as a qualification for holding office, such an act being in effect an ex post facto law,[2] and the same rule holds in the case of the states.[3]

Commenting in the *Federalist Papers* on the requirement that state officers, as well as members of the state legislatures, shall be bound by oath or affirmation to support the Constitution, Alexander Hamilton wrote: "Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and it will be rendered auxiliary to the enforcement of its laws."[4] The younger Charles Cotesworth Pinckney had expressed the same idea on the floor of the Philadelphia Convention: "They [the states] are the instruments upon which the Union must frequently depend for the support and execution of their powers. . . ."[5] Indeed, the Constitution itself lays many duties, both positive and negative, upon the different organs of state government,[6] and Congress may frequently add others, provided it does not require the state authorities to act outside their normal jurisdiction. Early congressional legislation contains many illustrations of such action by Congress.

The Judiciary Act of 1789[7] not only left the state courts in sole possession of a large part of the jurisdiction over controversies between citizens of different states and in concurrent possession of the rest, and by other sections state courts were authorized to entertain proceedings by the United States itself to enforce penalties and forfeitures under the revenue laws, examples of the principle that federal law is law to be applied by the state courts, but also any justice of the peace or other magistrates of any of the states were authorized to cause any offender against the United States to be arrested and imprisoned or bailed under the usual mode of process. From the beginning, Congress enacted hundreds of statutes that contained provisions authorizing state officers to enforce and execute federal laws.[8] Pursuant to the same idea of treating state governmental organs as available to the national government for administrative purposes, the Act of 1793 entrusted the rendition of fugitive slaves in part to national officials and in part to state officials and the rendition of fugitives from justice from one state to another exclusively to the state executives.[9]

With the rise of the doctrine of states' rights and of the equal sovereignty of the states with the National Government, the availability of the former as instruments of the latter in the

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[1] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 416 (1819).

[2] *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 337 (1867).

[3] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867). *See also* Bond v. Floyd, 385 U.S. 116 (1966), in which the Supreme Court held that antiwar statements made by a newly elected member of the Georgia House of Representatives were not inconsistent with the oath of office to support to the United States Constitution.

[4] The Federalist No. 27 (Alexander Hamilton). *See also*, *id.* No. 45 (James Madison).

[5] 1 The Records of the Federal Convention of 1787, at 404 (Max Farrand ed., 1937).

[6] *See* U.S. Const. art. I, § 3, cl. 1; *id.* § 4, cl. 1; *id.* § 10; *id.* art. II, § 1, cl. 2; *id.* art. III, 2, cl. 2; *id.* art. IV, §§ 1 & 2; *id.* art. V; *id.* amends. 13–15, 17, 19, 25, & 26.

[7] 1 Stat. 73 (1789).

[8] *See* Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545 (1925); Holcomb, *The States as Agents of the Nation*, 3 Selected Essays on Constitutional Law 1187 (1938); Barnett, *Cooperation Between the Federal and State Governments*, 7 Ore. L. Rev. 267 (1928). *See also* J. Clark, The Rise of a New Federalism (1938); E. Corwin, Court Over Constitution 148–68 (1938).

[9] 1 Stat. 302 (1793).

execution of its power came to be questioned.[10] In *Prigg v. Pennsylvania*,[11] decided in 1842, the constitutionality of the provision of the Act of 1793 making it the duty of state magistrates to act in the return of fugitive slaves was challenged; and in *Kentucky v. Dennison* ,[12] decided on the eve of the Civil War, similar objection was leveled against the provision of the same act which made it "the duty" of the chief executive of a state to render up a fugitive from justice upon the demand of the chief executive of the state from which the fugitive had fled. The Court sustained both provisions, but upon the theory that the cooperation of the state authorities was purely voluntary. In *Prigg*, the Court, speaking by Justice Joseph Story, said that "while a difference of opinion has existed, and may exist still on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this Court, that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation."[13] Subsequent cases confirmed the point that Congress could authorize willing state officers to perform such federal duties.[14] Indeed, when Congress in the Selective Service Act of 1917 authorized enforcement to a great extent through state employees, the Court rejected "as too wanting in merit to require further notice" the contention that the Act was invalid because of this delegation.[15] State officials were frequently employed in the enforcement of the National Prohibition Act, and suits to abate nuisances as defined by the statute were authorized to be brought, in the name of the United States, not only by federal officials, but also by "any prosecuting attorney of any State or any subdivision thereof."[16]

In *Dennison*, however, the Court held that, although Congress could delegate, it could not require performance of an obligation. The "duty" of state executives in the rendition of fugitives from justice was construed to be declaratory of a "moral duty." Chief Justice Roger Taney wrote for the Court: "The Act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it. . . . It is true," the Chief Justice conceded, "that in the early days of the Government, Congress relied with confidence upon the co-operation and support of the States, when exercising the legitimate powers of the General Government, and were accustomed to receive it, [but this, he explained, was] upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the Constitution."[17]

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[10] For the development of opinion, especially on the part of state courts, adverse to the validity of such legislation, *see* 1 J. Kent, Commentaries on American Law 396–404 (1826).

[11] 41 U.S. (16 Pet.) 539 (1842).

[12] 65 U.S. (24 How.) 66 (1861).

[13] 41 U.S. (16 Pet.) 539, 622 (1842). *See also* Kentucky v. Dennison, 65 U.S. (24 How.) 66, 108 (1861). The word "magistrates" in this passage does not refer solely to judicial officers but reflects the usage in that era in which officers generally were denominated magistrates; the power thus upheld is not the related but separate issue of the use of state courts to enforce federal law.

[14] United States v. Jones, 109 U.S. 513, 519 (1883); Robertson v. Baldwin, 165 U.S. 275, 280 (1897); Dallemagne v. Moisan, 197 U.S. 169, 174 (1905); Holmgren v. United States, 217 U.S. 509, 517 (1910); Parker v. Richard, 250 U.S. 235, 239 (1919).

[15] Selective Draft Law Cases, 245 U.S. 366, 389 (1918). The Act was 40 Stat. 76 (1917).

[16] 41 Stat. 314, § 22. In at least two states, the practice was approved by state appellate courts. Carse v. Marsh, 189 Cal. 743, 210 Pac. 257 (1922); United States v. Richards, 201 Wis. 130, 229 N.W. 675 (1930). On this and other issues under the Act, *see* Hart, *Some Legal Questions Growing Out of the President's Executive Order for Prohibition Enforcement*, 13 Va. L. Rev. 86 (1922).

[17] 65 U.S. (24 How.) 66, 107–08 (1861) .

Eighteen years later, in *Ex parte Siebold*,[18] the Court sustained the right of Congress, under Article I, section 4, paragraph 1 of the Constitution, to impose duties upon state election officials in connection with a congressional election and to prescribe additional penalties for the violation by such officials of their duties under state law. Although the doctrine of the holding was expressly confined to cases in which the National Government and the states enjoy "a concurrent power over the same subject matter," no attempt was made to catalogue such cases. Moreover, the outlook of Justice Joseph Bradley's opinion for the Court was decidedly nationalistic rather than dualistic, as is shown by the answer made to the contention of counsel "that the nature of sovereignty is such as to preclude the joint co-operation of two sovereigns, even in a matter in which they are mutually concerned . . . ."[19] To this Justice Bradley replied: "As a general rule, it is no doubt expedient and wise that the operations of the State and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself. We cannot yield to such a transcendental view of state sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity."[20]

Conflict thus developed early between these two doctrinal lines. But it was the *Siebold* line that prevailed. Enforcement of obligations upon state officials through mandamus or through injunctions was readily available, even when the state itself was immune, through the fiction of *Ex Parte Young*,[21] under which a state official could be sued in his official capacity but without the immunities attaching to his official capacity. Although the obligations were, for a long period, in their origin based on the United States Constitution, the capacity of Congress to enforce statutory obligations through judicial action was little doubted.[22] Nonetheless, it was only recently that the Court squarely overruled *Dennison*. "If it seemed clear to the Court in 1861, facing the looming shadow of a Civil War, that 'the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it,' . . . basic constitutional principles now point as clearly the other way."[23] That case is doubly important, because the Court spoke not only to the Extradition Clause and the federal statute directly enforcing it, but it also enforced a purely statutory right on behalf of a Territory that could not claim for itself rights under the Clause.[24]

Even as the Court imposes new federalism limits upon Congress's powers to regulate the states as states, it has reaffirmed the principle that Congress may authorize the federal courts to compel state officials to comply with federal law, statutory as well as constitutional. "[T]he

[18] 100 U.S. 371 (1880).

[19] 100 U.S. at 391.

[20] 100 U.S. at 392.

[21] 209 U.S. 123 (1908). *See also* Board of Liquidation v. McComb, 92 U.S. 531, 541 (1876).

[22] Maine v. Thiboutot, 448 U.S. 1 (1980) .

[23] Puerto Rico v. Branstad, 483 U.S. 219, 227 (1987) (*Dennison* "rests upon a foundation with which time and the currents of constitutional change have dealt much less favorably.").

[24] In including territories in the statute, Congress acted under the Territorial Clause rather than under the Extradition Clause. New York *ex rel.* Kopel v. Bingham, 211 U.S. 468 (1909).

Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply."[25]

No doubt, there is tension between the exercise of Congress's power to impose duties on state officials[26] and the developing doctrine under which the Court holds that Congress may not "commandeer" state legislative or administrative processes in the enforcement of federal programs.[27] However, the existence of the Supremacy Clause and the federal oath of office, as well as a body of precedent, indicates that coexistence of the two lines of principles will be maintained.

ArtVI.C3.2 Religious Test

ArtVI.C3.2.1 Historical Background on Religious Test for Government Offices

Article VI, Clause 3:

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

England historically required public officeholders not only to swear an oath of loyalty to the Crown, the head of the state-sponsored Church of England, but also to take communion in that church.[1] Religious test oaths were initially required in the colonies, as well, as part of the legal framework supporting state-established churches.[2] The *Constitution Annotated* discusses the features of historic state-sponsored religions, known as religious establishments, in the context of the Religion Clauses.[3] Looking specifically at religious tests, early Puritans and other colonists believed oaths requiring conformance to Christian values were necessary to ensure that officials were of good moral character.[4] These arguments held particular force

[25] New York v. United States, 505 U.S. 144, 179 (1992). *See also* FERC v. Mississippi, 456 U.S. 742, 761–65 (1982); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979); Illinois v. City of Milwaukee, 406 U.S. 91, 106–08 (1972).

[26] The practice continues. *See* Pub. L. No. 94-435, title III, 90 Stat. 1394, 15 U.S.C. § 15c (authorizing state attorneys general to bring parens patriae antitrust actions in the name of the state to secure monetary relief for damages to the citizens of the state); Medical Waste Tracking Act of 1988, Pub. L. 100-582, 102 Stat. 2955, 42 U.S.C. § 6992f (authorizing states to impose civil and possibly criminal penalties for violations of the Act); Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, tit. I, 107 Stat. 1536, 18 U.S.C. § 922s (imposing on chief law enforcement officer of each jurisdiction to ascertain whether prospective firearms purchaser has a disqualifying record).

[27] New York v. United States, 505 U.S. 144 (1992).

[1] *See Test Act*, Encyclopedia Britannica, https://www.britannica.com/topic/test-act (last visited July 13, 2022); Leo Pfeffer, Church, State, and Freedom 252 (rev. ed. 1967). For more discussion of English test oaths, see Amdt1.2.2.2 England and Religious Freedom.

[2] *See* Amdt1.2.2.3 State-Established Religion in the Colonies. *Cf., e.g.*, Pfeffer, *supra* note 1, at 252–53 (noting that "for a short time Rhode Island was an exception" in not requiring religious tests and giving examples of the oaths required by early state constitutions).

[3] Amdt1.2.2.1 Introduction to the Historical Background on the Religion Clauses.

[4] *See, e.g.*, Frank Lambert, The Founding Fathers and the Place of Religion in America 250 (2003); John Witte, Jr. & Joel A. Nichols, Religion and the American Constitutional Experiment 50 (4th ed. 2016).

for colonies seeking to establish religiously pure communities.[5] Religious minorities protested these oaths, some because of general religious objections to taking oaths, and others because the oaths elevated specific religious views.[6]

As the movement to disestablish state-sponsored religion gained traction in the years following the Revolution,[7] some Founders argued a person's religious beliefs should no longer disqualify them for public office.[8] At the federal constitutional convention, on August 20, 1787, Charles Pinckney introduced a prohibition on religious tests.[9] His proposal read: "No religious test or qualification shall ever be annexed to any oath of office under the authority of the U.S."[10] Pinckney explained that this provision was expected in "a System founded on Republican Principles."[11] He stressed that the new democracy stemmed from the Enlightenment movement,[12] a philosophy that emphasized individual reasoning over central state dogmas and led to more religious toleration.[13] Opposing Pinckney's proposal, Roger Sherman believed the provision was unnecessary because the "prevailing liberality" towards religious beliefs would itself provide "sufficient security" against religious tests.[14] The convention voted to adopt the final version of Pinckney's proposal on August 30, 1787, with the journal recording the vote as unanimous, and James Madison's notes recording North Carolina as the only "no" vote on the Article as a whole.[15]

The constitutional prohibition on religious tests engendered some controversy during state ratification debates, particularly given that most states still retained some form of religious test for public officeholders.[16] Some delegates to state ratification conventions opposed the provision on the grounds that it would allow non-Christians to obtain public office.[17] One Massachusetts delegate claimed, for example, "that a person could not be a good man without being a good Christian."[18] Delegates favoring the provision believed it helped secure religious liberty by preventing government persecution of disfavored sects and government interference in matters of private conscience.[19] One delegate pointed out that requiring a religious test oath would not necessarily ensure officeholders would be of good morals, since "unprincipled and

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[5] *See, e.g.*, Lambert, *supra* note 4, at 236–37.

[6] *See, e.g.*, Witte & Nichols, *supra* note 4, at 50.

[7] *See* Amdt1.2.2.5 Virginia's Movement Towards Religious Freedom; Amdt1.2.2.8 Early Interpretations of the Religion Clauses.

[8] *See, e.g.*, Pfeffer, *supra* note 1, at 253; *see also, e.g.*, Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), https://founders.archives.gov/documents/Franklin/01-33-02-0330 (expressing his opposition to religious tests and his hope that states would move further away from them).

[9] 2 The Records of the Federal Convention of 1787, at 342 (Max Farrand ed., 1911).

[10] *Id.*

[11] 3 The Records of the Federal Convention of 1787, at 122 (Max Farrand ed., 1911).

[12] *Id.*

[13] *See generally, e.g.*, Shane J. Ralston, American Enlightenment Thought, Internet Encyclopedia of Philosophy, https://iep.utm.edu/american-enlightenment-thought/ (last visited Aug. 15, 2022).

[14] 2 The Records of the Federal Convention of 1787, at 468 (Max Farrand ed., 1911).

[15] *Id.* at 461, 468.

[16] *See, e.g.*, Pfeffer, *supra* note 1, at 254.

[17] Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), (noting this view disapprovingly); *see also, e.g.*, XXX The Documentary History of the Ratification of the Constitution and the Adoption of the Bill of Rights 403 (eds. John P. Kaminski et al. 2009) (statement of Mr. Abbot) [hereinafter Documentary History of Ratification].

[18] VI Documentary History of Ratification, *supra* note 17, at 1377 (statement of Col. Jones).

[19] *See, e.g.*, VI Documentary History of Ratification, *supra* note 17, at 1421–22 (statement of Rev. Backus); X Documentary History of Ratification, *supra* note 17, at 1531 (statement of Mr. Johnson); XXX Documentary History of Ratification, *supra* note 17, at 404–05 (statement of Mr. Parsons). *Accord* A Landholder VII, *reprinted in* III Documentary History of Ratification, *supra* note 17, at 498–500.

dishonest men will not hesitate to subscribe to *any thing*" for their advancement.[20] That same delegate argued "that there are worthy characters among men of every other denomination . . . and even among those who have no other guide, in the way to virtue and heaven, than the dictates of natural religion."[21] Ultimately, not only did the states ratify the Constitution's "no religious test" clause, many states removed or loosened their own religious test oaths between 1789 and 1796.[22]

In the 1800 presidential contest between Thomas Jefferson and John Adams, a New York minister named William Linn published a pamphlet opposing Jefferson on the basis that he "reject[ed]" the "Christian Religion" and openly professed "Deism."[23] Acknowledging that the Constitution did not prevent non-Christians from serving, Linn nonetheless argued that Jefferson should "set his name to the first part of the apostle's creed" in order to prove his character.[24] Linn and like-minded ministers argued that voters should impose their own religious test—a voluntary restriction that would be all the more "striking" given the lack of a constitutional provision requiring Christianity.[25] Voters rejected these arguments and elected Jefferson president.[26] Adams attributed his electoral loss to popular opposition to a religious establishment, noting presumably false claims that Adams would have "introduce[d] an Establishment of Presbyterianism."[27] In his view, a number of voters "said Let Us have an Atheist or Deist or any Thing rather than an Establishment of Presbyterianism."[28]

ArtVI.C3.2.2 Interpretation of Religious Test Clause

Article VI, Clause 3:

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

In a 1787 article defending the necessity of the Constitution's bar on religious tests, Oliver Ellsworth, third Chief Justice of the Supreme Court, defined a religious test as "an act to be done, or profession to be made, relating to religion (such as partaking of the Sacrament according to certain rites and forms, or declaring one's belief of certain doctrines), for the purpose of determining whether his religious opinions are such that he is admissible to a public office."[1] In 1941, the Supreme Court recognized in dicta that the U.S. Constitution

[20] VI Documentary History of Ratification, *supra* note 17, at 1376 (statement of Rev. Shute).

[21] *Id.*

[22] Witte & Nichols, *supra* note 4, at 50–51.

[23] William Linn, Serious Considerations on the Election of a President 4 (1800).

[24] *Id.* at 32.

[25] *Id.* at 28; *see also* Lambert, *supra* note 4, at 276–78.

[26] Lambert, *supra* note 4, at 280–81.

[27] Letter from John Adams to Mercy Otis Warren (Aug. 8, 1807), https://founders.archives.gov/documents/Adams/99-02-02-5203.

[28] *Id.*

[1] A Landholder VII, *reprinted in* III The Documentary History of the Ratification of the Constitution and the Adoption of the Bill of Rights 499 (eds. John P. Kaminski et al. 2009).

prohibited "the religious test oath . . . prevalent in England."[2] Nonetheless, even at that time, a number of state constitutions required office holders to hold a general belief in God's existence.[3]

It was not until 1961 that the Supreme Court ruled that the U.S. Constitution barred religious tests for *state* office.[4] In *Torcaso v. Watkins*, the Court held that a Maryland provision requiring public officeholders to declare a "belief in the existence of God" violated the First Amendment's Establishment and Free Exercise Clauses.[5] The basis of the decision was the First Amendment's protections for "freedom of belief and religion."[6] However, the Court's opinion also relied on Article VI's prohibition on religious tests to support the idea that religious test oaths were contrary to American tradition.[7] Some other decisions have similarly suggested that the Religion Clauses prohibit laws that institute religious tests for participation in public life.[8]

The provision prohibiting religious tests does not prohibit other types of oaths for public officeholders,[9] although First Amendment protections for speech and association may sometimes limit the government's ability to require oaths that burden those rights.[10]

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[2] Bridges v. California, 314 U.S. 252, 265 (1941). *See also, e.g.*, Girouard v. United States, 328 U.S. 61, 65 (1946) (noting that a conscientious objector's "religious scruples would not disqualify him from becoming a member of Congress or holding other public offices," citing Article VI's religious tests bar).

[3] *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 468–70 (1892) (citing various state constitutional provisions to demonstrate their "recognition of religious obligations").

[4] Torcaso v. Watkins, 367 U.S. 488, 496 (1961).

[5] *Id.* at 489 (quoting Md. Const. Declaration of Rights art. 37).

[6] *Id.* at 496.

[7] *Id.* at 491–92.

[8] *See, e.g.*, Bd. of Educ. v. Grumet, 512 U.S. 687, 702 (1994) (plurality opinion); Cantwell v. Connecticut, 310 U.S. 296, 305 (1940).

[9] Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 414 (1950).

[10] Amdt1.7.9.1 Loyalty Oaths to Amdt1.7.9.4 Pickering Balancing Test for Government Employee Speech; Amdt1.8.2.3 Denial of Employment or Public Benefits.

ARTICLE VII
RATIFICATION

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ARTICLE VII—RATIFICATION

ArtVII.1 Historical Background on Ratification Clause

Article VII:

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

In *Owings v. Speed*[1] the question at issue was whether the Constitution operated upon an act of Virginia passed in 1788. The Supreme Court held it did not, stating in part:

> The Conventions of nine States having adopted the Constitution, Congress, in September or October, 1788, passed a resolution in conformity with the opinions expressed by the Convention, and appointed the first Wednesday in March of the ensuing year as the day, and the then seat of Congress as the place, 'for commencing proceedings under the Constitution.'
>
> Both Governments could not be understood to exist at the same time. The New Government did not commence until the old Government expired. It is apparent that the government did not commence on the Constitution being ratified by the ninth State; for these ratifications were to be reported to Congress, whose continuing existence was recognized by the Convention, and who were requested to continue to exercise their powers for the purpose of bringing the new Government into operation. In fact, Congress did continue to act as a Government until it dissolved on the 1st of November, by the successive disappearance of its Members. It existed potentially until the 2d of March, the day proceeding that on which the Members of the new Congress were directed to assemble.
>
> The resolution of the Convention might originally have suggested a doubt, whether the government could be in operation for every purpose before the choice of a President; but this doubt has been long solved, and were it otherwise, its discussion would be useless, since it is apparent that its operation did not commence before the first Wednesday in March 1789 . . . .

[1] 18 U.S. (5 Wheat.) 420, 422–23 (1820).

FIRST AMENDMENT
FUNDAMENTAL FREEDOMS

FIRST AMENDMENT
FUNDAMENTAL FREEDOMS

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FIRST AMENDMENT—FUNDAMENTAL FREEDOMS

Amdt1.1 Overview of First Amendment, Fundamental Freedoms

The First Amendment to the U.S. Constitution,[1] viewed broadly, protects religious liberty and rights related to freedom of speech. Specifically, the Religion Clauses prevent the government from adopting laws "respecting an establishment of religion"—the Establishment Clause—or "prohibiting the free exercise thereof"—the Free Exercise Clause. The First Amendment also expressly protects the freedoms of speech, press, peaceable assembly, and petition to the Government.

The *Constitution Annotated* essays discussing the First Amendment begin with the Religion Clauses, reviewing the history of these Clauses before explaining, in turn, the Supreme Court's interpretation of the Establishment and Free Exercise Clauses. The Religion Clause section ends with an essay exploring the relationship between the Religion Clauses and the Free Speech Clause. The *Constitution Annotated* then turns to this latter Clause, discussing interpretations of the Free Speech Clause before describing Supreme Court cases recognizing constitutional protections for freedom of association. Next, the *Constitution Annotated* explains the Free Press Clause. The First Amendment essays end by discussing the Clauses protecting the freedoms of assembly and petition.

Amdt1.2 Religion

Amdt1.2.1 Overview of the Religion Clauses (Establishment and Free Expression Clauses)

First Amendment:

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

The first two provisions of the First Amendment, known as the Religion Clauses, state that "Congress shall make no law respecting an *establishment* of religion or prohibiting the *free exercise* thereof."[1] The Establishment and Free Exercise Clauses were ratified as part of the Bill of Rights in 1791[2] and apply to the states by incorporation through the Fourteenth Amendment.[3] Together with the constitutional provision prohibiting religious tests as a qualification for office,[4] these clauses promote individual freedom of religion and separation of church and state.

The Supreme Court has acknowledged that the Religion Clauses "are not the most precisely drawn portions of the Constitution."[5] The Framers' goal was "to state an objective, not to write a statute."[6] The clauses are "cast in absolute terms" and either, "if expanded to a

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[1] U.S. CONST. amend. I.

[1] U.S. CONST. amend. I (emphasis added).

[2] For a discussion of the adoption of the Religion Clauses, see Amdt1.2.2.7 Constitutional Convention, Ratification, and the Bill of Rights.

[3] *See* Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947) (incorporating the Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause).

[4] ArtVI.C3.2.1 Historical Background on Religious Test for Government Offices.

[5] Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

[6] *Id.*

logical extreme, would tend to clash with the other."[7] Accordingly, the Court has said that "rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited."[8] The breadth of the clauses has allowed debates over their proper scope since ratification.[9] It has also led to some "internal inconsistency" in the Supreme Court's opinions interpreting these clauses,[10] as well as interpretations that have shifted over time.

The following essays discuss the historical background of the Religion Clauses, including a discussion of colonial religious establishments and the shift in early America towards greater religious freedom.[11] Next, essays address how both clauses prevent the government from interfering in certain religious disputes.[12] Essays then examine, in turn, Supreme Court interpretations of the Establishment Clause[13] and the Free Exercise Clause.[14] Finally, two essays explore the relationship between the two Religion Clauses,[15] as well as the relationship between the Religion Clauses and the First Amendment's Free Speech Clause.[16]

One preliminary issue broadly relevant across Religion Clause jurisprudence is what the First Amendment means when it refers to "religion." Some early cases suggested that courts might determine what is properly considered to be "religion."[17] In an 1890 case rejecting a Free Exercise Clause challenge to a law disenfranchising polygamists, the Court said calling the advocacy of polygamy "a tenet of religion" would "offend the common sense of mankind."[18] Later cases, however, seemed to retreat from this suggestion as they restricted the ability of the government, including courts, to judge the legitimacy of religious beliefs.[19] Nonetheless, the Religion Clauses extend only to sincere religious activities, and in evaluating constitutional claims, the government may investigate whether a person's beliefs are insincere and whether they are secular, stemming from political, sociological, or philosophical views rather than religious beliefs.[20]

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[7] *Id.* at 668–69. *See also* Amdt1.5 Relationship Between the Establishment and Free Exercise Clauses.

[8] *Walz*, 397 U.S. at 669.

[9] *See* Amdt1.2.2.8 Early Interpretations of the Religion Clauses.

[10] *Walz*, 397 U.S. at 668.

[11] Amdt1.2.2.1 Introduction to the Historical Background on the Religion Clauses.

[12] Amdt1.2.3.1 Overview of Government Resolution of Religious Disputes; Amdt1.2.3.2 Doctrinal Basis of Government Resolution of Religious Disputes; Amdt1.2.3.3 Neutral Principles of Law and Government Resolution of Religious Disputes; and Amdt1.2.3.4 Church Leadership and the Ministerial Exception (government resolution of religious disputes).

[13] Amdt1.3.1 General Principle of Government Neutrality to Religion to Amdt1.3.7.3 Establishment Clause and Historical Practices and Tradition (Establishment Clause).

[14] Amdt1.4.1 Overview of Free Exercise Clause to Amdt1.4.3.5 Laws Neutral to Religious Practice Regulating Prisons and the Military (Free Exercise Clause).

[15] Amdt1.5 Relationship Between the Establishment and Free Exercise Clauses.

[16] Amdt1.6 Relationship Between Religion Clauses and Free Speech Clause.

[17] *See* Reynolds v. United States, 98 U.S. 145, 162 (1879) (discussing the meaning of "religion").

[18] Davis v. Beason, 133 U.S. 333, 341–42 (1890), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[19] *See, e.g.*, United States v. Seeger, 380 U.S. 163, 184 (1965); United States v. Ballard, 322 U.S. 78, 88 (1944); Amdt1.4.2 Laws Regulating Religious Belief.

[20] Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 833 (1989); *see also, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) (noting that "philosophical" beliefs would not "rise to the demands of the Religion Clauses," but finding evidence for "the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction"). In a case interpreting a federal conscientious objector statute, the Supreme Court said that "the central consideration in determining whether . . . beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant's life." Welsh v. United States, 398 U.S. 333, 339 (1970).

A religious belief may fall within the scope of the clauses even if it is not consistent with the tenets of a particular Christian sect, and non-Christian religions are also protected.[21] One 1965 case noted "the ever-broadening understanding of the modern religious community," discussing conceptions beyond even traditional theism.[22] In an Establishment Clause case decided a few years earlier, the Court had stated that the government may not "aid all religions as against non-believers," or "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[23]

Amdt1.2.2 Historical Background

Amdt1.2.2.1 Introduction to the Historical Background on the Religion Clauses

First Amendment:

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

As the Supreme Court has recognized, many colonists left Europe and settled in America "to escape the bondage of laws which compelled them to support and attend government-favored churches."[1] Scholars have described the modern concepts of "religious liberty" and "separation of church and state" as originating with the development of the United States.[2] The Framers of the Religion Clauses built upon almost two centuries of historical developments that shaped this American model of religious freedom after the arrival of the earliest colonists. During these formative years—and even after the First Amendment's ratification—the concept of freedom of religion lacked a fixed meaning.[3] The concept evolved significantly over the colonial period in tandem with political and social movements. Accordingly, while the Supreme Court has often suggested that colonial and Revolutionary history is important in determining the meaning of the Religion Clauses,[4] jurists and historians have disagreed about which history appropriately informs the clauses, given the complexity and variability of that history.[5]

The colonists left a European society in which church and state were closely interconnected.[6] Historically, political leaders throughout the world believed that a government could not legislate to preserve public morals or maintain civil order unless the state based its rule in a religion that was followed by the populace.[7] The features of historic state-sponsored religions, known as religious "establishments," included a government-

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[21] *See, e.g.*, *Frazee*, 489 U.S. at 834; Cruz v. Beto, 405 U.S. 319, 322 (1972).

[22] *Seeger*, 380 U.S. at 180.

[23] Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

[1] Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947).

[2] *See, e.g.*, Robert T. Miller, *Religious Conscience in Colonial New England*, 50 J. Church & State 661, 661 (2008); Leo Pfeffer, Church State and Freedom 727 (rev. ed. 1967); Sanford Hoadley Cobb, The Rise of Religious Liberty in America vii (Johnson Reprint Corp. 1970) (1902).

[3] *See, e.g.*, Thomas J. Curry, *Church and State in Seventeenth and Eighteenth Century America*, 7 J. L. & Religion 261, 271–73 (1989).

[4] *E.g.*, Reynolds v. United States, 98 U.S. 145, 162 (1878).

[5] *See generally, e.g.*, Steven K. Green, *The Supreme Court's Ahistorical Religion Clause Historicism*, 73 Baylor L. Rev. 505 (2021).

[6] John Witte, Jr. & Joel A. Nichols, Religion and the American Constitutional Experiment 1 (4th ed. 2016).

[7] *See, e.g.*, Pfeffer, *supra* note 2, at 4; Richard Hooker, Of the Laws of Ecclesiastical Polity (1590s), *reprinted in* The Sacred Rights of Conscience 30–33 (Daniel L. Dreisbach & Mark David Hall eds., 2009); John Locke, A Letter on Toleration (1689), *in* The Sacred Rights of Conscience, *supra*, at 50.

recognized state church; laws outlining religious orthodoxy or church governance; compulsory church attendance; state financial support for the church; proscriptions on religious dissent; the limitation of political participation to the state church's members; and the use of churches for civil functions such as education or marriage.[8]

Even in colonial times, there were debates about what types of state support for religion created a religious "establishment," and what level of state support was appropriate. Although some of the colonists may have fled religious persecution in England and other European countries, many New World colonies initially mandated the practice of a specific religion and persecuted those who did not comply.[9] Some of the colonies that did not designate a single official religion still limited citizenship to Christians and adopted other hallmarks of an established state religion.[10]

During the colonial period and Revolution, however, some colonies began to recognize broader conceptions of religious liberty and embrace greater separation between church and state.[11] Delegates to the Continental Congress expressed diverse views on the issue in debates leading up to the adoption of the First Amendment's Religion Clauses.[12] Although the Religion Clauses immediately constrained the federal government, some states continued to support religious establishments even after the First Amendment's ratification.[13] Nonetheless, all states had disestablished religion decades before the Supreme Court held that states were legally obligated to comply with the Religion Clauses through the Fourteenth Amendment, reflecting continued debates and shifting attitudes towards religious liberty.[14]

Amdt1.2.2.2 England and Religious Freedom

First Amendment:

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

Religious freedom has played a central role in the mythos of the United States's Founding.[1] Accordingly, the Supreme Court has sometimes looked to state sponsorship of religion prior to the Founding to determine what the drafters of the First Amendment's Religion Clauses

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[8] *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003); Chester James Antieau et al., Freedom from Federal Establishment 1–2 (1964).

[9] *See, e.g.*, *Everson*, 330 U.S. at 9–10. *See* Amdt1.2.2.3 State-Established Religion in the Colonies.

[10] *See* Amdt1.2.2.3 State-Established Religion in the Colonies; Amdt1.2.2.4 Colonial Concepts of Religious Liberty.

[11] *See* Amdt1.2.2.5 Virginia's Movement Towards Religious Freedom.

[12] *See* Amdt1.2.2.5 Virginia's Movement Towards Religious Freedom; Amdt1.2.2.6 Continental Congresses and Religious Freedom.

[13] *See* Amdt1.2.2.8 Early Interpretations of the Religion Clauses.

[14] *See* Amdt1.2.2.8 Early Interpretations of the Religion Clauses. The process of disestablishment was gradual in many states, with various elements of the religious establishments being repealed at different times.

[1] *See, e.g.*, Samuel Adams, The Rights of the Colonists, A List of Violations of Rights and a Letter of Correspondence (1772), *reprinted in* The Sacred Rights of Conscience 202–04 (Daniel L. Dreisbach & Mark David Hall eds., 2009); *IV. The Declaration as Adopted by Congress*, Nat'l Archives, Founders Online (July 6, 1775), https://founders.archives.gov/documents/Jefferson/01-01-02-0113-0005. *Cf., e.g.*, Robert T. Miller, *Religious Conscience in Colonial New England*, 50 J. Church & State 661, 662 (2008) (stating that English colonization of North America was motivated by a variety of factors, including not only religious motives but also "imperialism, economic and social pressures, humanitarianism, and the spirit of adventure").

intended to reject.[2] While a unified church and state was once the dominant governance model worldwide,[3] the Church of England provides one particularly salient example of a state religion that was familiar to the Founders.[4]

King Henry VIII established the Church of England through the Act of Supremacy in 1534,[5] and Queen Elizabeth reestablished the Church in 1559 after a period of political and religious turbulence.[6] The Church of England's establishment placed the country's ecclesiastical courts under domestic control rather than under the control of the Pope.[7] These ecclesiastical courts, which operated in parallel with England's civil courts, had jurisdiction over purely religious matters such as spiritual nonconformity; so-called moral offenses such as drunkenness or adultery; and disputes over marriages, tithes, wills, and defamation.[8]

Following the end of the English Civil War in 1651, four acts collectively known as the Clarendon Code reentrenched the church.[9] One of these laws, the Act of Uniformity of 1662, prescribed a common form of worship and required ministers to follow this form of worship to hold religious office.[10] Other laws limited officeholding to Anglicans and restricted non-Anglican worship.[11] The ecclesiastical courts were also restored in 1661 with largely unchanged jurisdiction, although use of the courts declined significantly over the ensuing decades.[12]

Thus, English laws preferred members of the established Church of England, excluded dissenters, and commingled ecclesiastical and civil functions.[13] The government dictated official modes of worship, claimed jurisdiction over areas such as education and marriage that had previously been governed by the Roman Catholic Church, required membership in the established church to be considered a legal citizen, and criminalized religious dissent.[14] Nonetheless, the government did not view the Act of Uniformity as violating freedom of conscience: in England's view, while it dictated *public* observance of religion and prevented dissenters from undermining the established church, it did not dictate *private* beliefs.[15]

The Toleration Act of 1689 lifted criminal penalties for nonconformists' public worship if the dissenters took certain oaths or declared their loyalty to the crown and professed their

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[2] *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 425–26 (1962).

[3] *See, e.g.*, Leo Pfeffer, Church State and Freedom 3 (1967).

[4] *See, e.g.*, Frank Lambert, The Founding Fathers and the Place of Religion in America 184–94 (2003) (discussing the influence of English dissenters on the Founders).

[5] John Witte, Jr. & Joel A. Nichols, Religion and the American Constitutional Experiment 16 (4th ed. 2016).

[6] Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2112–13, 2113 n.30 (2003). *See also* Lambert, *supra* note 4, at 37–40 (discussing political and religious developments in this period).

[7] R.B. Outhwaite, The Rise and Fall of the English Ecclesiastical Courts, 1500–1860, at 15 (J.H. Baker ed., 2006). *See also id.* (noting arguments that the break with Rome led to the decline of these courts); *id.* at 68–77 (discussing these arguments as well as contemporaneous criticisms of the courts).

[8] *Id.* at 5–7.

[9] *Clarendon Code*, Encyclopedia Britannica, https://www.britannica.com/event/Clarendon-Code (last visited June 1, 2022).

[10] *Id.*

[11] *See id.*

[12] Outhwaite, *supra* note 7, at 79, 95.

[13] Chester James Antieau et al., Freedom from Federal Establishment 3 (1964).

[14] Witte & Nichols, *supra* note 5, at 16–17.

[15] Lambert, *supra* note 4, at 40. *Cf., e.g.*, Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 Minn. L. Rev. 1047, 1064 (1996) (discussing English imprisonment of Quakers and execution of Catholics).

Christian belief.[16] However, the law did not extend the right of public worship to Roman Catholics or other non-Protestant dissenters, and all non-Anglicans continued to be barred from holding public office.[17] Furthermore, the Church of England retained its special status. England considered the Toleration Act to apply directly to the colonies.[18] As discussed in subsequent essays, this Act granted more religious liberty than some of the colonies did at the time and influenced those colonies to move toward further religious freedom.[19]

Amdt1.2.2.3 State-Established Religion in the Colonies

First Amendment:

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

At least initially, the colonies largely continued the historical practice of having state-established religion in America; although not every colony had one officially designated state religion, every colonial government had some elements of a religious "establishment," as defined in an earlier essay.[1] Nonetheless, even the colonies that did designate and support an official religion viewed their own governments as quite different from the English system.[2]

The first English colony, Virginia, illustrates the evolving approach to government and religion. Virginia established the Church of England as the colony's official church.[3] Early governors adopted martial laws requiring daily worship and prohibiting blasphemy, among other provisions prescribing religious order.[4] The government supported and required conformity to the established church, and church vestries exercised semi-civil political functions.[5] As England reetrenched the established church after the English Civil War, Virginia followed the crown's instructions by supporting the church.[6] Among other provisions, Virginia laws adopted in 1661 and 1662 required colonists to erect churches and support ministers at public expense, prescribed proper forms of worship, and punished those who publicly worshipped outside the established church.[7] However, in contrast to England, the civil government rather than church authorities assumed jurisdiction over marriages, wills, and

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[16] *Toleration Act*, Encyclopedia Britannica, https://www.britannica.com/event/Toleration-Act-Great-Britain-1689 (last visited June 1, 2022).

[17] *Toleration Act, 1689*, The Jacobite Heritage, http://www.jacobite.ca/documents/1689toleration.htm (last updated Oct. 26, 2003).

[18] The application was debated by the colonies, but in 1752, a Presbyterian minister seeking licenses to preach in Virginia obtained an opinion from the British attorney general saying that the Toleration Act did apply in the colonies and the minister should receive his licenses. George William Pilcher, *Samuel Davies and Religious Toleration in Virginia*, 28 The Historian 48, 62–63 (1965).

[19] *See* Amdt1.2.2.2 England and Religious Freedom; *see also, e.g.*, Pfeffer, *supra* note 3, at 93.

[1] Amdt1.2.2.1 Introduction to the Historical Background on the Religion Clauses.

[2] Thomas J. Curry, The First Freedoms 133, 209–13 (1986).

[3] Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2116 (2003) (discussing the first and second Virginia charters); *see also* Curry, *supra* note 2, at 29 (discussing early religious legislation, including regulations of the Virginia Company).

[4] Articles, Laws, and Orders, Virginia (1610–11), *reprinted in* The Sacred Rights of Conscience 84–86 (Daniel L. Dreisbach & Mark David Hall eds., 2009). Later forms of government in the colony continued to intertwine religious and civil authority. *See* Frank Lambert, The Founding Fathers and the Place of Religion in America 54–56 (2003).

[5] *See* Sanford Hoadley Cobb, The Rise of Religious Liberty in America 80–81, 87 (Johnson Reprint Corp. 1970) (1902).

[6] *Id.* at 91–92.

[7] McConnell, *supra* note 3, at 2118–19.

the appointment of ministers[8]—although such functions were, by law, carried out in accordance with the Church of England's doctrines.[9] The Church of England was also established in the Carolinas, but those colonies tolerated a greater diversity of religious views than Virginia.[10]

The New England colonies of Plymouth, Massachusetts, Connecticut, and New Haven were established by Puritans who similarly provided for colonial government sponsorship of that religion. These colonies sought to establish a unified community operating according to a "pure" religious doctrine[11] that followed "the first Plantation of the Primitive Church" rather than the established Church of England.[12] In Massachusetts Bay, Puritans mandated the construction and financial support of Congregational churches.[13] A public confession of faith was necessary to become a citizen of the colony.[14] Dissenters in these colonies were punished harshly with imprisonment or expulsion, and Massachusetts executed four Quakers between 1658 and 1661.[15] Nonetheless, Puritan churches were independent associations that lacked a central church authority in the manner of the Church of England.[16]

Although New England Puritans operated their colonies according to religious doctrine, they distinguished civil from religious authority, and clergy could exercise authority only over religious affairs.[17] Notably, the Puritans did not create ecclesiastical courts,[18] which they had protested in England.[19] The Puritans' conception of separate spheres of authority, however, did not preclude the civil government from prosecuting idolatry or blasphemy.[20] In the Puritans' view, liberty of conscience did not encompass the liberty to practice religious error.[21] Accordingly, punishing those who deviated from religious doctrine did not violate liberty of conscience, and the government could punish public deviations or errors without improperly invading the church's authority.[22]

There is some debate over whether there was an established church in the colony of New York, in the sense of an officially designated state church.[23] New York, like the Carolinas, demonstrated the conflict between the unpopular established Church of England and other, more popular religious causes.[24] The colony guaranteed free religious exercise to all Christians

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[8] Curry, *supra* note 2, at 30.

[9] McConnell, *supra* note 3, at 2118–19.

[10] *See* Cobb, *supra* note 5, at 116–19; Curry, *supra* note 2, at 56–62.

[11] Curry, *supra* note 2, at 3–5. *Cf.* McConnell, *supra* note 3, at 2121–22 (distinguishing the Pilgrim settlers of Plymouth from other New England Puritans).

[12] John Cotton, Sermon, Gods Promise to His Plantation (1630), https://digitalcommons.unl.edu/etas/22.

[13] Frank Lambert, The Founding Fathers and the Place of Religion in America 76 (2003).

[14] *Id.* at 78–79.

[15] Curry, *supra* note 2, at 21–22.

[16] Curry, *supra* note 2, at 5; Lambert, *supra* note 13, at 82.

[17] Lambert, *supra* note 13, at 82.

[18] Curry, *supra* note 2, at 5.

[19] R.B. Outhwaite, The Rise and Fall of the English Ecclesiastical Courts, 1500–1860, at 72, 76–77 (J.H. Baker ed., 2006). For more discussion of the English ecclesiastical courts, see Amdt1.2.2.1 Introduction to the Historical Background on the Religion Clauses.

[20] Lambert, *supra* note 13, at 84.

[21] Curry, *supra* note 2, at 6. *See also, e.g.*, *id.* at 88–89 (discussing Massachusetts prosecutions of those who criticized Congregationalism or the colony's treatment of religious dissenters); Lambert, *supra* note 13, at 90 (describing Puritan thinkers who defined religious liberty "in terms of religious purity").

[22] Curry, *supra* note 2, at 6, 8; *see also* John Witte, Jr. & Joel A. Nichols, Religion and the American Constitutional Experiment 26–27 (4th ed. 2016) (discussing the cooperation of church and state in Puritan colonies).

[23] *See, e.g.*, Curry, *supra* note 2, at 71.

[24] Curry, *supra* note 2, at 76.

but required parishes to select ministers and collect taxes to establish and support churches at the local level.[25] Following the Toleration Act's adoption in England, New York excluded Catholics from guarantees of the liberty of conscience and adopted the Ministry Act of 1693, which required "the settling of a ministry."[26] There was debate over whether this act referred only to Anglican ministers, or whether the language was broad enough to allow towns to select other Protestant ministers.[27]

Maryland somewhat similarly faced pressure from the Church of England after initially tolerating more religious diversity.[28] Early colonial leaders were Catholic and seemed to hope that Catholics and Protestants could live together peacefully in Maryland.[29] Lord Baltimore largely ignored his authority from England to build and dedicate Anglican churches, along with requests from Catholics for special government recognition.[30] In 1649, Maryland adopted the Act Concerning Religion, which guaranteed that no person "professing to believe in Jesus Christ" could be troubled in the free exercise of religion—but also decreed strict penalties for blasphemy by non-Trinitarians.[31] However, following political and religious upheaval in the colony, in the late 1600s and early 1700s, the Maryland government adopted laws depriving Catholics of their previously held civil rights and, ultimately, establishing the Church of England.[32]

Amdt1.2.2.4 Colonial Concepts of Religious Liberty

First Amendment:

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

Although the colonies did not grant full religious freedom as the concept would be understood today, some nonetheless refrained from establishing an official state-sponsored church and granted more religious liberty than, for example, Virginia or the Puritan colonies.[1]

Rhode Island granted more religious liberty than other New England colonies. Roger Williams, the founder of Rhode Island, was expelled from Massachusetts Bay for criticizing the Puritan government and arguing for a stronger separation between church and state.[2] Williams was himself a Puritan minister who sought to propagate the "true church"—but he believed this could be achieved only by maintaining "a wall of Separation between the Garden

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[25] Curry, *supra* note 2, at 62–63; McConnell, *supra* note 3, at 2130.

[26] Curry, *supra* note 2, at 64–65.

[27] Curry, *supra* note 2, at 65–67.

[28] *See* McConnell, *supra* note 3, at 2128.

[29] Kenneth Lasson, *Free Exercise in the Free State: Maryland's Role in the Development of First Amendment Jurisprudence*, 31 J. Church & St. 419, 422–23 (1989); Curry, *supra* note 2, at 31–33.

[30] Curry, *supra* note 2, at 35–36.

[31] Curry, *supra* note 2, at 38–39; Lasson, *supra* note 29, at 428–29.

[32] Curry, *supra* note 2, at 35–48; Lasson, *supra* note 29, at 435.

[1] In addition to Rhode Island and Pennsylvania, discussed here, New Jersey also did not have an established church. Thomas J. Curry, The First Freedoms 72 (1986). *Cf.* Sanford Hoadley Cobb, The Rise of Religious Liberty in America 416 (Johnson Reprint Corp. 1970) (1902) (saying instructions from the crown to support the Church of England "kept up the fiction of an establishment in New Jersey"). Further, although Georgia established the Church of England, it also guaranteed freedom of religion to non-Catholics and tolerated significant religious diversity. Cobb, *supra*, at 419; Curry, *supra*, at 152–53. For a definition of religious "establishment," *see* Amdt1.2.2.1 Introduction to the Historical Background on the Religion Clauses.

[2] Frank Lambert, The Founding Fathers and the Place of Religion in America 88–89 (2003).

of the Church and the Wildernes[s] of the world."[3] In a pamphlet published in England, Williams argued against civil persecution for matters of conscience, writing that civil states should not be the judges of spiritual matters.[4]

Rhode Island's royal charter granted liberty of conscience, providing that no person would be "molested, punished, disquieted or called in question, for any differences in opinion in matters of religion," so long as the person did not "actually disturb the civil peace."[5] To preserve this civil peace, however, the civil government prohibited crimes such as adultery and fornication, and required observance of the Sabbath.[6] Furthermore, the colony adopted laws limiting citizenship and public office to Protestants.[7] Nonetheless, Rhode Island did not adopt criminal laws persecuting the few Catholic and Jewish people residing within the colony,[8] and in contrast to other New England colonies, Rhode Island generally found no reason to charge Quakers with breach of the civil peace.[9]

Pennsylvania also granted some religious liberty. William Penn, a Quaker, founded Pennsylvania in 1681 as a "holy experiment" in religious liberty.[10] Accordingly, the initial laws for the colony granted religious freedom to all theists, providing that anyone who would "acknowledge the one Almighty and eternal God, to be the Creator, Upholder and Ruler of the world" could not "be molested or prejudiced for their religious persuasion, or practice" or "compelled, at any time, to frequent or maintain any religious worship, place or ministry whatever."[11] Although the diverse religious groups in Pennsylvania had social and political disagreements, they did not face persecution from the government for their religious beliefs alone, as they did elsewhere.[12] While this made Pennsylvania unusually tolerant for the era, the colony still limited office-holding to Christians, forbade work on the Sabbath, and prohibited a variety of "offences against God" such as swearing, drunkenness, and fornication.[13]

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[3] Roger Williams, Mr. Cottons Letter Lately Printed, Examined and Answered (1644), *reprinted in* The Sacred Rights of Conscience 147 (Daniel L. Dreisbach & Mark David Hall eds., 2009); *see also* Curry, *supra* note 1, at 15, 17.

[4] Roger Williams, The Bloudy Tenent, of Persecution for Cause of Conscience (1644), *reprinted in* 5 The Founder's Constitution 48–49 (Philip B. Kurland & Ralph Lerner eds., 1987).

[5] *Rhode Island Royal Charter, 1663*, R.I. Sec'y of State, https://www.sos.ri.gov/assets/downloads/documents/RI-Charter-annotated.pdf (last visited June 14, 2022).

[6] Curry, *supra* note 1, at 20–21.

[7] Leo Pfeffer, Church State and Freedom 85 (rev. ed. 1967).

[8] *Id.*; *see also* Curry, *supra* note 1, at 90–91 (saying that Jewish people in the colony "were free to practice their religion" but "did so as second-class citizens," and claiming that "Catholics never came to the colony in numbers sufficient to test its liberality").

[9] Curry, *supra* note 1, at 23.

[10] Lambert, *supra* note 2, at 102 (quoting a letter from William Penn to James Harrison). *See also* William Penn, *Frame of Government of Pennsylvania* (1682), *in* The Sacred Rights of Conscience, *supra* note 3, at 117.

[11] Laws Agreed Upon in England, &c, 1682, *in* The Sacred Rights of Conscience, *supra* note 3, at 118.

[12] *See, e.g.*, Lambert, *supra* note 2, at 114.

[13] Laws Agreed Upon in England, &c, 1682, *in* The Sacred Rights of Conscience, *supra* note 3, at 118–19.

Amdt1.2.2.5 Virginia's Movement Towards Religious Freedom

First Amendment:

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

Virginia, which initially established the Church of England as the church of the colony,[1] began to provide greater religious liberty in the years leading up to the adoption of the Constitution. Toward the end of the colonial period, some Virginia leaders began to look to Pennsylvania as a model for liberty, expressing distaste for Virginia's state-sponsored religious establishment.[2] By the time Virginia adopted its first state constitution in 1776, it provided that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience."[3] Notwithstanding this new constitutional protection for the free exercise of religion, the Church of England remained Virginia's legally established church.[4] There was significant debate over the next decade about whether the state could or should impose a general assessment to support religion, or whether financial support would instead become voluntary.[5]

In 1779, Jefferson introduced his Virginia Statute for Religious Freedom in the Virginia Assembly.[6] Considered by many to be the forerunner of the First Amendment's Religion Clauses,[7] the bill was a sweeping statement for religious freedom and against state establishment of religion.[8] Among other provisions, it stated that compelled financial support for churches and religious test oaths infringed individual liberty and corrupted religion.[9] It further provided that allowing the civil magistrate "to intrude his powers into the field of opinion . . . at once destroys all religious liberty."[10] Accordingly, the bill would have prevented Virginia from compelling anyone "to frequent or support any religious worship" or otherwise burdening a person "on account of his religious opinions or belief."[11] The bill was not adopted in that legislative session.[12]

By contrast, later in 1779, the Assembly considered—but also rejected—a bill that would have established the "Christian Religion" as the state's official religion, required recognized churches to subscribe to certain beliefs, and assessed ministerial taxes.[13] In 1784, Patrick Henry, who had opposed Jefferson's Statute for Religious Freedom, introduced A Bill

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[1] For a discussion of the Virginia establishment, see Amdt1.2.2.3 State-Established Religion in the Colonies.

[2] *See, e.g.*, *Letter from James Madison to William Bradford* (Apr. 1, 1774), https://founders.archives.gov/documents/Madison/01-01-02-0031.

[3] Va. Const. of 1776, § 16, https://encyclopediavirginia.org/entries/the-constitution-of-virginia-1776.

[4] Thomas J. Curry, The First Freedoms 133, 135–36 (1986).

[5] *Id.* at 136.

[6] Thomas Jefferson, Draft of the Virginia Statute for Religious Freedom, *in* Jefferson & Madison on Separation of Church & State 48 (Lenni Brenner, ed., 2004).

[7] *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 163–64 (1878).

[8] *Draft of the Virginia Statute for Religious Freedom*, *in* Jefferson & Madison on Separation of Church and State, *supra* note 6, at 48–50.

[9] *Id.* at 49.

[10] *Id*. *See also id.* ("[I]t is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order . . . .").

[11] *Id.* at 49–50.

[12] *Id.* at 48.

[13] Curry, *supra* note 4, at 139.

Establishing a Provision for Teachers of the Christian Religion.[14] The law proposed a general assessment: taxpayers could direct the funds to the "society of Christians" of their choice, and any nondesignated funds would be used "for the encouragement of seminaries of learning" in the state.[15]

While the bill creating an assessment for Christian teachers was being considered, James Madison wrote and circulated his Memorial and Remonstrance Against Religious Assessments, which contributed significantly to the bill's defeat.[16] Madison's Memorial and Remonstrance claimed that the right to free exercise of religion was "unalienable," and that religion was "wholly exempt" from the "cognizance" of civil society.[17] He asserted the bill violated fundamental principles of equality and departed from America's "generous policy" of religious freedom for the previously "persecuted and oppressed."[18] Other opponents of the assessment raised concerns about the rights of non-Christians, a position that was still somewhat uncommon in the colonies at that time.[19] Following this public opposition to Henry's bill, Madison reintroduced Jefferson's bill for establishing religious freedom.[20] The Statute for Religious Freedom was enacted in 1786, finally disestablishing religion in the state.[21]

Although Virginia's experience does not represent the full picture of the early American experience with religious liberty, it helped set the stage for the adoption of the Religion Clauses.[22] While Rhode Island, Pennsylvania, and (eventually) Virginia moved towards greater religious freedom, other states—and some within those states—continued to support state establishments and a more limited view of religious liberty.[23]

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[14] *A Bill Establishing a Provision for Teachers of the Christian Religion*, Monticello Digital Classroom, https://classroom.monticello.org/media-item/a-bill-establishing-a-provision-for-teachers-of-the-christian-religion/ (last visited June 17, 2022).

[15] Everson v. Bd. of Educ., 330 U.S. 1, 73–74 (1947) (supplemental appendix).

[16] Curry, *supra* note 4, at 143.

[17] James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), *in* Jefferson & Madison on Separation of Church and State, *supra* note 6, at 68.

[18] *Id.* at 69–71.

[19] *See* Curry, *supra* note 4, at 145.

[20] *Letter from James Madison to Thomas Jefferson* (Jan . 22, 1786), https://founders.archives.gov/documents/Madison/01-08-02-0249.

[21] *Id.* Jefferson was in Paris at the time, and later that year, told Madison the act had "been received with infinite approbation" by European citizens. Letter from Thomas Jefferson to James Madison (Dec. 16, 1786), https://founders.archives.gov/documents/Madison/01-09-02-0108. In Jefferson's eyes, it was "honorable" for the Virginia legislature "to have produced the first legislature who has had the courage to declare that the reason of man may be trusted with the formation of his own opinions." *Id.*

[22] *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 163 (1878). *See also* Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty.*, 71 B.U.L. Rev. 455, 458 (1991) (arguing that overreliance on Jefferson and Madison's writings "has left first amendment jurisprudence theoretically impoverished").

[23] Amdt1.2.2.2 England and Religious Freedom; Amdt1.2.2.4 Colonial Concepts of Religious Liberty.

Amdt1.2.2.6 Continental Congresses and Religious Freedom

First Amendment:

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

The Continental Congresses of 1784–1789 addressed a number of issues relating to religion.[1] In some instances, the Congresses' work reflected the ongoing debates and shifting norms relating to church and state.

One of the grievances that the First Continental Congress identified in its 1774 "Declaration and Resolves" addressed to Great Britain was the Quebec Act.[2] The congressional resolution described this Act as "establishing the Roman Catholic religion" in Quebec, a province which was expanded to include parts of the modern Midwest.[3] On its face, the Quebec Act did not establish a religion in the sense of requiring adherence or compelling support.[4] Instead, it stated that Roman Catholic citizens in the province "may have, hold, and enjoy, the free Exercise of the Religion of the Church of Rome, subject to the King's Supremacy."[5] The colonists saw this parliamentary sanction for the Catholic Church in the expanded territory, albeit limited, as a threat.[6] Nevertheless, only about two weeks after adopting the Declaration and Resolves, the Continental Congress wrote a letter "to the Inhabitants of the Province of Quebec," arguing that Great Britain had violated their rights by altering the province's government and making religious liberty for Catholics a matter of the King's grace.[7] The letter stated that the Quebec Act's guarantee of "liberty of conscience in . . . religion" was a poor substitute for the God-given rights the province had been denied, for the English version of the right was a "precarious" one subject to "arbitrary alterations."[8] These somewhat contradictory stances likely reflected political considerations.

Members of the First Continental Congress also faced appeals for freedom of conscience from within their own territory. Notably, a group of Massachusetts Baptists complained of persecution to delegates of the Continental Congress in 1774.[9] John Adams, in his diary, wrote that he was "indignant . . . at seeing [his] State and her Delegates thus summoned before a self created Trybunal."[10] According to Adams's account, one Pennsylvanian asserted that New England's stance on "Liberty of Conscience" was standing in the way of forming "a Union of the Colonies."[11] The dissenters' primary grievances seemed to be taxes for the support of the

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[1] *See, e.g.*, John Witte, Jr. & Joel A. Nichols, Religion and the American Constitutional Experiment 65–69 (4th ed. 2016).

[2] *Declaration and Resolves of the First Continental Congress*, Avalon Project, Yale L. Sch. (Oct. 14, 1774), https://avalon.law.yale.edu/18th_century/resolves.asp (last visited June 1, 2022).

[3] *Id.*

[4] *See Great Britain: Parliament—The Quebec Act: October 7, 1774*, Avalon Project, Yale L. Sch., https://avalon.law.yale.edu/18th_century/quebec_act_1774.asp (last visited June 1, 2022).

[5] *Id.* Among other provisions, the Act also required any "Ordinance touching Religion" to "receive[ ] his Majesty's Approbation" before going into effect. *Id.*

[6] Frank Lambert, The Founding Fathers and the Place of Religion in America 209, 213 (2003).

[7] Continental Congress to the Inhabitants of the Province of Quebec (Oct. 26, 1744), *reprinted in* 5 The Founder's Constitution 61 (Philip B. Kurland & Ralph Lerner eds., 1987).

[8] *Id.* at 63 (internal quotation marks and emphasis omitted).

[9] *See* Isaac Backus, A History of New England 1774–75, *reprinted in* The Founder's Constitution, *supra* note 7, at 65.

[10] *Diary of John Adams, In Congress, September-October 1774*, https://founders.archives.gov/documents/Adams/01-03-02-0016-0022.

[11] *Id.*

established churches.[12] The Baptists objected to the tax on grounds of conscience.[13] In response, John and Samuel Adams apparently argued that Massachusetts had "the most mild and equitable Establishment of Religion"[14]—but in resisting any commitment to further change, John Adams reportedly said that the objectors "might as well expect a change in the solar system, as to expect [Massachusetts] would give up their establishment."[15]

In other matters, the Continental Congress recognized and seemed to support religion. As the Supreme Court has noted, "the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain."[16] According to a contemporaneous account from John Adams, there was some opposition to the first motion to open a session with prayer given the religious diversity of the representatives, until Samuel Adams "said he was no Bigot, and could hear a Prayer" from someone of another faith.[17] The Continental Congress also, for example, occasionally declared days of fasting and thanksgiving,[18] and voted to import Bibles for distribution,[19] although it never appropriated the funds for this latter activity.[20]

In contrast, the Second Continental Congress recognized and attempted to accommodate pacifists during the Revolutionary War, stating that Congress intended "no violence to their consciences" and asking pacifists to contribute by doing only what they could "consistently with their religious principles."[21] The Northwest Ordinance, adopted by the Confederation Congress in 1787, provided that no person in the territory could "be molested on account of his mode of worship or religious sentiments" so long as he was acting "in a peaceable and orderly manner."[22] Furthermore, in 1785, the Confederation Congress rejected a proposal that would have set aside lots in the western territory for the support of religion,[23] with James Madison saying the provision "smell[ed] . . . of an antiquated Bigotry."[24]

Overall, the roots of both the Establishment Clause and the Free Exercise Clause and the tension between them are evident in the period immediately prior to ratification of the Constitution. While there was some movement towards greater religious liberty and separation of church and state, continued support for religious activity was seen as a basic part

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[12] Thomas J. Curry, The First Freedoms 131 (1986).

[13] Backus, *supra* note 9, at 65.

[14] *Diary of John Adams, In Congress September-October 1774*, https://founders.archives.gov/documents/Adams/01-03-02-0016-0022; *cf.* Backus, *supra* note 9, at 65 (saying both John and Samuel Adams described the Massachusetts establishment as "a very slender one, hardly to be called an establishment").

[15] Backus, *supra* note 9, at 65.

[16] Marsh v. Chambers, 463 U.S. 783, 787 (1983).

[17] *Letter from John Adams to Abigail Adams* (Sept. 16, 1774), https://founders.archives.gov/documents/Adams/04-01-02-0101.

[18] *See, e.g.*, *Religion and the Founding of the American Republic*, Libr. of Cong., https://www.loc.gov/exhibits/religion/rel04.html#obj107 (last visited June 21, 2022).

[19] 8 Journals of the Continental Congress 734–35 (Worthington Chauncy Ford ed., 1907).

[20] Witte & Nichols, *supra* note 1, at 68.

[21] 8 Journals of the Continental Congress 189 (Worthington Chauncy Ford ed., 1905).

[22] Northwest Ordinance § 14, art. 1, (July 13, 1787), https://www.archives.gov/milestone-documents/northwest-ordinance (last reviewed May 10, 2022).

[23] 28 Journals of the Continental Congress 293–94 (John C. Fitzpatrick ed., 1933).

[24] *Letter from James Madison to John Monroe* (May 29, 1785), https://founders.archives.gov/documents/Madison/01-08-02-0156.

of the fabric of society.[25] Even in protecting modes of worship in the territories, the Northwest Ordinance provided that "religion, morality, and knowledge" were "necessary to good government" and should "be encouraged."[26]

Amdt1.2.2.7 Constitutional Convention, Ratification, and the Bill of Rights

First Amendment:

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

The Constitution adopted by the Constitutional Convention in 1787 was largely silent on matters of religion.[1] Nonetheless, matters of religious freedom remained on the Founder's minds.[2] By 1787, a number of states had adopted constitutions containing some protections for religious freedom, though not all were as broad in scope as the ratified First Amendment.[3] Some state constitutions seemingly limited protections for religious freedom to certain types of believers.[4] Furthermore, as discussed elsewhere, some of those states still supported religious establishments,[5] even as other constitutional provisions limited some aspects of state establishments.[6] North Carolina's constitution, for example, granted freedom of conscience and forbade an "establishment of any one religious church or denomination in this State, in preference to any other," but further provided that the constitution did not "exempt preachers of treasonable or seditious discourses, from legal trial and punishment."[7]

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[25] Curry, *supra* note 12, at 218.

[26] Northwest Ordinance (1787), *supra* note 22, § 14, art. 3.

[1] *Cf.* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 Utah L. Rev. 489, 496–97 (describing three aspects of the 1787 Constitution as "tak[ing] into account religious freedom": (1) the provisions permitting affirmations in lieu of oaths; (2) the Sunday Clause of the presidential veto; and (3) the No Religious Test Clause). *See* ArtVI.C3.2.1 Historical Background on Religious Test for Government Offices.

[2] *See, e.g.*, John Witte, Jr. & Joel A. Nichols, Religion and the American Constitutional Experiment 70–71 (4th ed. 2016) (discussing Charles Pinckney's draft Constitution containing a provision prohibiting the federal legislature from passing laws "on the subject of Religion").

[3] *See, e.g.*, Va. Const. of 1776, § 16 ("[A]ll men are equally entitled to the free exercise of religion, according to the dictates of conscience; and . . . it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other."); Mass. Const. of 1780, art. II ("[N]o subject shall be hurt, molested, or restrained of conscience; and . . . it for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship . . . .").

[4] *See, e.g.*, N.J. Const. of 1776, XIX ("[N]o Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles . . . ."); Penn. Const. of 1776, Declaration of Rights, II ("Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship . . . ."); Md. Const. of 1776, Declaration of Rights, XXXIII ("[A]ll persons, professing the Christian religion, are equally entitled to protection in their religious liberty . . . .").

[5] Amdt1.2.2.2 England and Religious Freedom; Amdt1.2.2.4 Colonial Concepts of Religious Liberty. *See also, e.g.*, Md. Const. of 1776, Declaration of Rights, XXXIII ("[T]he Legislature may, in their discretion, lay a general and equal tax, for the support of the Christian religion . . . .").

[6] *See, e.g.*, N.J. Const. of 1776, XVIII ("[N]or shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry . . . ."); *id.* at XIX ("[T]here shall be no establishment of any one religious sect in this Province, in preference to another . . . ."); Delaware Declaration of Rights, § 2 (Sept. 11, 1776), *reprinted in* 5 The Founder's Constitution 70 (Philip B. Kurland & Ralph Lerner eds., 1987) ("[N]o man ought or of right can be compelled to attend any religious worship or maintain any ministry contrary to or against his own free will and consent . . . .").

[7] N.C. Const. of 1776, art. XXXIV; Declaration of Rights art. XIX.

During the debates over ratifying the Constitution, both proponents and opponents argued for the addition of a bill of rights, frequently citing religious freedom as one of the rights that should be expressly protected.[8] Seven states considered amendments expressly protecting religious freedom, and four states ratified the Constitution only after officially recommending such amendments.[9] Virginia, for example, proposed an amendment stating that "all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and . . . no particular religious sect or society ought to be favored or established by Law in preference to others."[10]

James Madison, a key figure in the framing and adoption of the Constitution and the First Amendment, initially considered a bill of rights unnecessary.[11] Among his objections to such an enumeration, he was concerned that express declarations "of some of the most essential rights" would be stated too narrowly.[12] Focusing specifically on "the rights of Conscience," he noted that some states wanted to deny equal rights to non-Christians, suggesting any public definition of religious freedom would be too narrow.[13] Madison, however, was ultimately persuaded to introduce the amendments that would become the Bill of Rights.[14]

On June 8, 1789, Madison introduced a proposed constitutional amendment in the House of Representatives which read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[15] He further proposed an amendment that expressly prohibited *states* from "violat[ing] the equal rights of conscience."[16] Explaining this second provision, Madison believed "every Government should be disarmed of powers which trench upon those particular rights," and wrote that "State Governments are as liable to attack these invaluable privileges as the General Government is."[17]

On August 15, the House considered a version of the amendment that read: "no religion shall be established by law, nor shall the equal rights of conscience be infringed."[18] Debate

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[8] For example, writing from France, Thomas Jefferson argued the need for such protections while otherwise praising the document. *See, e.g.*, *Letter from Thomas Jefferson to James Madison* (Dec. 20, 1787), https://founders.archives.gov/documents/Jefferson/01-12-02-0454; *Letter from Thomas Jefferson to William Stephens Smith* (Feb. 2, 1788), https://founders.archives.gov/documents/Jefferson/01-12-02-0590. *See also, e.g.*, Brutus II (Nov. 1, 1787), *reprinted in* XIII Commentaries on the Constitution 525–26 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (discussing the importance of rights of conscience and the need for a bill of rights); John Leland, Objections to the Constitution (Feb. 28, 1788), *reprinted in* The Sacred Rights of Conscience 409 (Daniel L. Dreisbach & Mark David Hall eds., 2009) (arguing that the proposed Constitution did not sufficiently protect religious liberty).

[9] *See* Carl H. Esbeck, *supra* note 1, at 511. For the text of the proposals, see The Sacred Rights of Conscience, *supra* note 8, at 415–17.

[10] Amendments Proposed by the Virginia Ratifying Convention (June 27, 1788), *in* The Sacred Rights of Conscience, *supra* note 8, at 416.

[11] *Letter from James Madison to Thomas Jefferson* (Oct. 17, 1788), https://founders.archives.gov/documents/Madison/01-11-02-0218.

[12] *Id.*

[13] *Id. But cf., e.g.*, Letter from James Madison to John Brown (Aug. 23, 1785), *reprinted in* Jefferson & Madison on Separation of Church & State 75 (Lenni Brenner, ed., 2004) (giving advice on Kentucky's Constitution, saying it might restrain the legislature "from meddling with religion").

[14] One important figure pushing for express guarantees of religious liberty was John Leland, who mounted a political challenge to Madison and ultimately exacted a guarantee that Madison would propose an amendment protecting religious liberty. *See, e.g.*, Gregory C. Downs, *Religious Liberty That Almost Wasn't: On the Origin of the Establishment Clause of the First Amendment*, 30 U. Ark. Little Rock L. Rev. 19, 21, 27 (2007).

[15] 1 Annals of Cong. 451 (1789).

[16] *Id.* at 452.

[17] *Id.* at 458.

[18] *Id.* at 757.

revealed differences of opinion on what such an amendment should accomplish, but some Members expressed concern that the amendment would unduly prohibit government support for religion—even by the states—and thereby abolish religion altogether.[19] Two days later, the House considered the amendment providing that "no State shall infringe the equal rights of conscience," along with other rights.[20] Madison "conceived this to be the most valuable amendment in the whole list," again arguing it was necessary to prevent both state and federal governments from infringing "these essential rights."[21] Ultimately, the version passed by the House on August 24 read: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed."[22] The House also passed the amendment providing that "[n]o state shall infringe . . . the rights of conscience."[23]

Debate in the Senate was not recorded, but on September 3, 1789, the Senate considered the constitutional amendments adopted by the House.[24] The Senate adopted amendments rewriting the first provision to read: "Congress shall make no law establishing one religious sect or society in preference to others."[25] On September 9, the Senate combined the religion amendments with the other rights that would ultimately be part of the First Amendment into a provision reading: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech . . . ."[26] This version was adopted and sent to the House the same day.[27] The House amendment guaranteeing the rights of conscience against the states was not approved by the Senate.[28]

A joint committee was appointed to resolve the differences between the Chambers, and although there is no surviving record of the committee debate, on September 24, 1789, it reported the text that would become the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof of speech . . . ."[29] On December 15, 1791, this language was ratified by the requisite number of states.

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[19] *See id.* at 757–59.

[20] *Id.* at 783. Informing this fear that voluntarism would lead to the abolition of religion is the fact that at this time, most of the history of religion involved some level of state sponsorship of religion. *See, e.g.*, Amdt1.2.2.1 Introduction to the Historical Background on the Religion Clauses; Amdt1.2.2.3 State-Established Religion in the Colonies.

[21] *Id.* at 784.

[22] *Congress Creates the Bill of Rights*, Nat'l Archives 31, https://www.archives.gov/files/legislative/resources/bill-of-rights/CCBR_IIB.pdf (last visited June 3, 2022).

[23] *Id.* at 140.

[24] S. Journal, 1st Cong., 1st Sess. 70 (1789).

[25] *Id.*

[26] *Id.* at 77. The Senate rejected alternative drafts which would have, for example, spelled out that Congress could not establish any particular sect in preference to another. *Id.* at 70.

[27] *Id.* at 77–78.

[28] *Id.* at 72.

[29] *Id.* at 87; *see also* 1 Annals of Cong. 948 (1789).

Amdt1.2.2.8 Early Interpretations of the Religion Clauses

First Amendment:

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

Even after the First Amendment was ratified and the Founders almost universally embraced the general principle of liberty of conscience, significant disagreement remained as to the scope of the prohibition on establishment and the protections of free exercise.[1]

At the time of the Revolution, the majority of the states retained at least some elements of religious establishments, including requiring church attendance, collecting tithes, and burdening the rights of religious dissenters.[2] States did not become subject to the First Amendment when it was adopted in 1791, and accordingly had more leeway to regulate on the subject of religion, but the movement to disestablish official state religions nonetheless continued to gain support as views changed about the appropriate role of church and state.[3] In 1791, one prominent minister, arguing against state-established religions, noted that by that time, most states had "no legal force used about religion, in directing its course, or supporting its preachers."[4] Seven disestablishments of state sanctioned religions occurred after the First Amendment's adoption, with the last, Massachusetts's, occurring in 1833.[5] This gradual disestablishment was accompanied in many cases by civil regulation of the corporate forms and property rights of the churches,[6] eventually leading to questions about whether such regulation was contrary to constitutional guarantees of religious liberty.[7]

Maryland's experience serves as one example of this trend. The state's 1776 constitution extended legal toleration to all Christian sects but required officeholders to declare Christian belief and authorized the state legislature to impose a general "tax for the support of the Christian religion."[8] Maryland had thus abandoned its Church of England establishment but continued to generally support Christianity and adopted laws regulating the Anglican church.[9] However, a 1784 bill that would have levied a tax for the support of ministers was defeated.[10] The bill's opponents argued that it would have preferred certain sects, impermissibly set up the legislature as the judge of acceptable worship, and set up a confrontation with sects such as Quakers that would refuse to pay.[11] In 1810, Maryland amended its constitution by providing that it would no longer be lawful to tax citizens to support religion.[12] However, the state's

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[1] *See, e.g.*, John Witte, Jr. & Joel A. Nichols, Religion and the American Constitutional Experiment 41 (4th ed. 2016).

[2] *Id.* at 57–58.

[3] *See id.*

[4] John Leland, The Rights of Conscience Inalienable (1791), *reprinted in* The Sacred Rights of Conscience 338 (Daniel L. Dreisbach & Mark David Hall eds., 2009).

[5] Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 Utah L. Rev. 489, 492–93.

[6] *See, e.g.*, Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. Pa. L. Rev. 307, 311–12 (2014).

[7] *See, e.g.*, Amdt1.2.3.2 Doctrinal Basis of Government Resolution of Religious Disputes.

[8] Kenneth Lasson, *Free Exercise in the Free State: Maryland's Role in the Development of First Amendment Jurisprudence*, 31 J. Church & St. 419, 440–41 (1989).

[9] Thomas J. Curry, *Church and State in Seventeenth and Eighteenth Century America*, 7 J. L. & Religion 261, 153–55 (1989).

[10] *Id.* at 155–56.

[11] *Id.*

[12] 380 Archives of Maryland, Amendments to the Maryland Constitutions 19, ch. CLXVII (1810), https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000380/html/am380-19.html.

constitution continued to require officeholders to declare a general belief in existence of God until 1961, when the provision was ruled unconstitutional by the Supreme Court.[13]

These diverse and shifting views over religion were also reflected at the federal level. For example, early Congresses employed chaplains and supported proclamations for national days of thanksgiving.[14] By the 1800s, however, James Madison and Thomas Jefferson had seemingly changed their mind on the propriety of government prayer.[15] Toward the end of his presidency, Jefferson explained that he would not recommend a day of prayer because even voluntary language suggested an authority over religion that, in his view, the government did not possess.[16] James Madison eventually concluded that establishing a congressional chaplain was a "palpable violation" of the Constitution.[17] Further, although as President, he had issued proclamations for national days of prayer and thanksgiving, Madison believed these religious proclamations were similarly problematic.[18] Madison stated that he had issued the proclamations only at Congress's request, and had used language intended "to deaden as much as possible any claim of political right to enjoin religious observances" by referring to "the voluntary compliance of individuals."[19]

Another example of the debate over the separation of church and state involved an 1811 bill that would have incorporated the Protestant Episcopal Church in the District of Columbia.[20] Then-President Madison vetoed the bill, stating that it violated the Establishment Clause by enacting rules for the church's "organization and polity," giving a "legal force and sanction" to certain articles of church administration and actions.[21] The House of Representatives failed to override the veto.[22] In the debate preceding that vote, some proponents of the bill argued that it did not violate the Establishment Clause because it did not establish a National Church such as the Church of England.[23] Another Member argued that if the debated bill infringed the Constitution, then Congress had similarly violated the Constitution by appointing and paying chaplains.[24]

Other debates during this period focused on whether the United States could be considered a Christian nation.[25] In the 1797 Treaty of Tripoli, the government assured the Muslim state of Tripoli that because "the United States of America is not in any sense founded on the Christian Religion, . . . no pretext arising from religious opinions shall ever produce an interruption of

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[13] Torcaso v. Watkins, 367 U.S. 488, 489 (1961).

[14] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 787–88 & n.9 (1983); Witte & Nichols, *supra* note 1, at 89.

[15] Thomas J. Curry, The First Freedoms 218–19 (1986).

[16] *Letter from Thomas Jefferson to Samuel Miller* (Jan. 23, 1808), https://founders.archives.gov/documents/Jefferson/99-01-02-7257.

[17] *James Madison, Detached Memoranda [1817–1832]*, *reprinted in* Jefferson & Madison on Separation of Church and State 264 (Lenni Brenner ed., 2004).

[18] *Id.* at 265.

[19] *Id.* at 266.

[20] James Madison, Veto Message to the House of Representatives of the United States (Feb. 21, 1811), *in* Jefferson & Madison on Separation of Church and State, *supra* note 17, at 198.

[21] *Id.* at 198–99.

[22] 22 Annals of Cong. 998 (1811).

[23] *Id.* at 984.

[24] *Id.*

[25] *Cf.* Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892) (noting a variety of "unofficial declarations" and "organic utterances" in legal documents suggesting "that this is a Christian nation"). In *Vidal v. Girard's Executors*, the Supreme Court described America as "a Christian country" but also relied on the country's "variety of religious sects" and state guarantees of religious freedom in its opinion interpreting a will. 43 U.S. (2 How.) 127, 198–99 (1844).

the harmony existing between the two countries."[26] Beginning in the nineteenth century, Congress failed to adopt a variety of proposals that would have amended the Constitution to describe the United States as a Christian nation, or the federal government as a Christian one.[27]

Amdt1.2.3 Religious Disputes

Amdt1.2.3.1 Overview of Government Resolution of Religious Disputes

First Amendment:

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

Taken together, the Religion Clauses create a separation between church and state.[1] The preamble to the Virginia Statute for Religious Freedom, drafted by Thomas Jefferson, outlined the Founder's view of the separate spheres of authority: "the civil magistrate" should not interfere with religious belief, but should be able "to interfere when principles break out into overt acts against peace and good order."[2]

Under a doctrine sometimes called "religious autonomy"[3] or "ecclesiastical abstention,"[4] the Supreme Court has long held that these principles require civil courts to refrain from adjudicating ecclesiastical disputes.[5] Nonetheless, so long as they avoid "determining ecclesiastical questions," civil courts can resolve disputes between religious parties by applying "neutral principles of law."[6]

For example, churches may sometimes split into factions after disagreeing about religious doctrine, and those factions may then further dispute which group is entitled to possess church property.[7] The Supreme Court has said that religious organizations are subject to the same legal protections and constraints as "other voluntary associations" and may come to court for adjudication of their property rights.[8] However, in the course of adjudicating such a property dispute, the courts must refrain from resolving any "underlying controversies over religious

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[26] Treaty of Peace and Friendship between the United States of America and the Bey and Subjects of Tripoli, of Barbary (1797), *reprinted in* The Sacred Rights of Conscience, *supra* note 4, at 476.

[27] *See* Richard Albert, *Constitutional Amendment and Dismemberment*, 43 Yale J. Int'l L. 1, 40 (2018).

[1] *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting Letter from Thomas Jefferson to the Danbury Baptist Ass'n (Jan. 1, 1802), https://founders.archives.gov/documents/Jefferson/01-36-02-0152-0006).

[2] *Id.* at 163 (quoting Va. Code Ann. § 57-1) (internal quotation mark omitted).

[3] *See, e.g.*, Roman Catholic Archdiocese of San Juan v. Feliciano, No. 18-921, slip op. at 4 (U.S. Feb. 24, 2020) (per curiam). This case involved a claim that the Puerto Rico Supreme Court should have abstained from resolving an allegedly ecclesiastical dispute, but the U.S. Supreme Court instead resolved the case on jurisdictional grounds. *Id.* at 4–5.

[4] *See, e.g.*, Puri v. Khalsa, 844 F.3d 1152, 1162 (9th Cir. 2017); Winkler v. Marist Fathers of Detroit, Inc., 901 N.W.2d 566, 573 (Mich. 2017); St. Joseph Catholic Orphan Soc'y v. Edwards, 449 S.W.3d 727, 738 (Ky. 2014).

[5] Watson v. Jones, 80 U.S. (13 Wall.) 679, 731 (1871). *See also* United States v. Ballard, 322 U.S. 78, 86–88 (1944) (holding, in the context of a criminal prosecution for mail fraud, that the Court would have violated the First Amendment if it submitted the truth of the defendants' religious beliefs to the jury).

[6] Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 447, 449 (1969).

[7] *See, e.g.*, *id.* at 441–42; Jones v. Wolf, 443 U.S. 595, 597 (1979).

[8] *Watson*, 80 U.S. (13 Wall.) at 714; *see also Wolf*, 443 U.S. at 603–04 (noting that by relying on ordinary legal documents like trusts, religious organizations can order their private affairs to "ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members").

doctrine," and may only apply "neutral principles" of property law.[9] Accordingly, the government may not resolve such disputes by evaluating which faction's beliefs more faithfully reflect the religious order's beliefs.[10] By contrast, if a deed or other legal document expressly indicates which group is entitled to the property, a court may enforce that legal instrument,[11] so long as it "defer[s] to the [religious body's] resolution" of any religious issues.[12]

Amdt1.2.3.2 Doctrinal Basis of Government Resolution of Religious Disputes

First Amendment:

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

Since at least the early 1800s, the Supreme Court has resolved religious entities' legal disputes over property rights,[1] focusing in part on the legal rights attached to the corporate form of the religious bodies.[2] In *Watson v. Jones*, issued in 1871, the Court reiterated that "religious organizations" come before the court in the same posture as other entities organized for charitable purposes, saying that "their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints."[3] However, the Supreme Court also articulated limits on civil courts' ability to adjudicate religious disputes, although at first it did not expressly ground these limitations in the Constitution's Religion Clauses.[4]

Specifically, *Watson* involved a religious schism and a property dispute. After some members of a congregation disagreed with the national church's anti-slavery views, the local church separated "into two distinct bodies, with distinct members and officers, each claiming to be the true Walnut Street Presbyterian Church" and entitled to its property.[5] A federal court had concluded that the faction recognized by the national governing body was entitled to the property, and the Supreme Court affirmed.[6] The Court said that where a congregation is subordinate to "superior ecclesiastical tribunals," civil courts should defer to the resolution of any religious issues by the "church judicatories."[7] More broadly, the Court said that civil courts may not adjudicate any matter "which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of

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[9] *Presbyterian Church in the U.S.*, 393 U.S. at 449.

[10] Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 117–19 (1952).

[11] *See Watson*, 80 U.S. (13 Wall.) at 722–23; *Wolf*, 443 U.S. at 606.

[12] *Wolf*, 443 U.S. at 604.

[1] *See* Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 45, 55 (1815) (ruling that an Episcopal church held title to property even after disestablishment of the Church of England in the state).

[2] *See* Pawlet v. Clark, 13 U.S. (9 Cranch) 292, 334, 336 (1815) (ruling that an Episcopal church was not entitled to a glebe where the church had not been legally recognized either by England or by the state of New Hampshire, and was instead "a mere voluntary society of Episcopalians").

[3] 80 U.S. (13 Wall.) 679, 714 (1871).

[4] *Id.* at 729; *see also* Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445, 447 (1969) (noting that *Watson* was "decided before the application of the First Amendment to the States but nonetheless informed by First Amendment considerations").

[5] *Watson*, 80 U.S. at 717.

[6] *See id.* at 735.

[7] *Id.* at 722–23, 727. *See also* Shepard v. Barkley, 247 U.S. 1, 2 (1918) (affirming decision citing *Watson* to defer to church authority's resolution of a property dispute); *cf.* Bouldin v. Alexander, 82 U.S. (15 Wall) 131, 137, 139–40 (1872) ("In a congregational church, the majority, if they adhere to the organization and to the doctrines, represent the church.").

morals required of them."[8] Allowing these decisions "of ecclesiastical cognizance" to be reviewed by secular courts "would lead to the total subversion" of the religious unions, which the Court suggested would be inconsistent with the guarantees of free exercise of religion and no religious establishment.[9] The Supreme Court said that United States laws created these guarantees, but did not specifically reference the Religion Clauses[10] as the Court originally understood the Religion Clauses to apply only to the federal government.[11] Although the adoption of the Fourteenth Amendment in the 1860s imposed the First Amendment's limitations on the states,[12] at the time of *Watson*'s decision in 1871, the Supreme Court had not yet recognized this incorporation of the Religion Clauses.[13]

The Supreme Court expressly grounded *Watson* in the First Amendment in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*.[14] *Kedroff* was decided in 1952, after the Court had expressly held the First Amendment to be incorporated against the states.[15] After the Russian Revolution prompted disputes over the governance of the North American Diocese of the Russian Orthodox Church, New York enacted a law transferring control of the state's Russian Orthodox churches from the "central governing hierarchy" in Russia to the Russian Orthodox Church in America.[16] The Supreme Court held in *Kedroff* that this law violated the Constitution by prohibiting "the free exercise of religion" and breaching the "rule of separation between church and state."[17] The Court highlighted that the state statute required churches in New York to "conform" to the religious doctrine "of the Eastern Confession."[18] It also expressed concern that the state's action was apparently based on a determination that the Russian Orthodox Church in America would more faithfully effectuate the purposes of the religious trust.[19] Ultimately, the Court said that the Constitution protected the "freedom to select the clergy, where no improper methods of choice are proven."[20]

The Court remanded the *Kedroff* case back to New York state court, which again transferred control of state churches to the Russian Church in America—but this time, on

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[8] *Watson*, 80 U.S. (13 Wall.) at 733. The Supreme Court phrased the issue in terms of jurisdiction, saying that civil courts could "exercise no jurisdiction" over a subject matter that was "strictly and purely ecclesiastical in its character." *Id.* By contrast, in *Gonzalez v. Roman Catholic Archbishop,* 280 U.S. 1, 16 (1929), the Court concluded that federal courts had jurisdiction over a religious dispute where the defendant was "a juristic person" and the subject matter involved the terms of a trust.

[9] *Watson*, 80 U.S. (13 Wall.) at 728–29.

[10] *See id.* at 728 ("In this country the full and free right to entertain any religious belief, to practice any religious principle and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.").

[11] *See* Permoli v. New Orleans, 44 U.S. (3 How.) 589, 609–10 (1845) (rejecting a challenge to an ordinance prohibiting certain Catholic burials as a matter "exclusively of state cognisance," holding, *inter alia*, that the U.S. Constitution did not protect "the citizens of the . . . states in their religious liberties"), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[12] Wallace v. Jaffree, 472 U.S. 38, 49 (1985).

[13] *See* Amdt14.S1.4.2 Early Doctrine on Incorporation of the Bill of Rights.

[14] 344 U.S. 94, 116 (1952) (saying that *Watson* "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation" and that its guarantees "must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference").

[15] *Id.* at 100 & n.6.

[16] *Id.* at 105–07.

[17] *Id.* at 107, 110. Subsequent caselaw clarified that resolving controversies over religious doctrine or polity also raises Establishment Clause concerns. *See* Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

[18] *Kedroff*, 344 U.S. at 108.

[19] *Id.* at 109, 117–18.

[20] *Id.* at 116.

grounds of the common law rather than the state statute.[21] When the dispute returned to the Supreme Court in *Kreshik v. St. Nicholas Cathedral of Russian Orthodox Church*, the Court held that the state court had acted unconstitutionally because, like the state statute, the court's common law decision was impermissibly premised on the idea that the Russian Orthodox Church in America would more faithfully carry out the religious trust.[22] *Kreshik* therefore confirmed that courts, as well as legislatures, may violate the Constitution's Religion Clauses by resolving issues of ecclesiastical government.[23]

Amdt1.2.3.3 Neutral Principles of Law and Government Resolution of Religious Disputes

First Amendment:

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

The approach to disputes involving churches that the Court developed in early cases such as *Watson v. Jones* largely still holds sway.[1] The Supreme Court described the prevailing doctrine in 1969:

> [T]here are neutral principles of law, developed for use in all . . . disputes, which can be applied without "establishing" churches to which property is awarded. But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.[2]

On "issues of religious doctrine or polity," civil courts must defer to "the highest court of a hierarchical church organization."[3] Thus, in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, the Supreme Court held that a state erred in awarding church property to local churches, because its decision was based on a judgment that their mother church had "departed from the tenets of faith and practice it held at the time the local churches affiliated with it."[4] The state court had violated the First Amendment by "determin[ing] matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion."[5] This stood in contrast to prior cases where courts had permissibly deferred to and enforced the decisions of the church itself on religious issues.[6]

Decades earlier, in *Gonzalez v. Roman Catholic Archbishop*, the Supreme Court had indicated that courts may have some role in reviewing ecclesiastical disputes.[7] The *Gonzalez* Court declined to enforce a will that purported to appoint someone as a Catholic chaplain,

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[21] 363 U.S. 190, 190–91 (1960).

[22] *See id.* at 191 (citing *Kedroff*, 344 U.S. at 117–18).

[23] *See id.*

[1] *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 714 (1871).

[2] Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

[3] Jones v. Wolf, 443 U.S. 595, 602 (1979).

[4] *Presbyterian Church in the U.S.*, 393 U.S. at 441, 444.

[5] *Id.* at 450.

[6] *See id.* at 450–51 (contrasting the decision with *Gonzalez v. Roman Catholic Archbishop,* 280 U.S. 1, 16 (1929)).

[7] *Gonzalez*, 280 U.S. at 16–17.

where the Archbishop had concluded that the person was not qualified to serve under religious law.[8] The Court said that because the chaplain's appointment was "a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them."[9] However, although the Court ultimately deferred to the decision of the church authority, its opinion suggested that courts could conduct a limited review of churches' decisions on ecclesiastical matters to determine whether there was "fraud, collusion, or arbitrariness."[10]

It is not clear, however, whether the mode of analysis outlined in *Gonzalez* is still viable. Decades later, in *Serbian Eastern Orthodox Diocese v. Milivojevich*, the Supreme Court concluded that a state court violated the First Amendment when it impermissibly inquired "into matters of ecclesiastical cognizance and polity."[11] The Court held that *Gonzalez*'s arbitrariness inquiry was unconstitutional to the extent that it allowed courts to inquire "whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations."[12] Instead, the Court confirmed that the First Amendment requires civil courts "to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law."[13] Accordingly, the Court held that the state court should not have disturbed the Serbian Orthodox Church's decisions to defrock the bishop of its American-Canadian Diocese and to split up the diocese.[14]

By contrast, the Supreme Court has held that courts acted constitutionally when they resolved disputes between religious entities without inquiring into religious doctrine.[15] *Jones v. Wolf* approved a state decision that applied "neutral principles of law" to resolve a property dispute between a local church and its national body.[16] The Supreme Court said the state was not required to defer to the decision of the higher church authority where the dispute involved no "doctrinal controversy."[17] The Court explained that in order to resolve a property dispute, it would be permissible for the state court to apply the "ordinary presumption that . . . a voluntary religious association is represented by a majority of its members."[18] However, the

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[8] *See id.* at 13–14.

[9] *Id.* at 16. In the case before it, the Court concluded that the Archbishop followed "the controlling Canon Law" and did not act "arbitrarily," and accordingly accepted his decision as controlling. *Id.* at 18.

[10] *Id.* at 16.

[11] 426 U.S. 696, 698 (1976).

[12] *Milivojevich*, 426 U.S. at 713.

[13] *Id.*

[14] *See id.* at 717–21.

[15] *E.g.*, Md. & Va. Eldership of Churches of God v. Church of God, Inc., 396 U.S. 367, 367–68 (1970) (per curiam) (resolving a "church property dispute" by relying "upon language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, and upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property").

[16] Jones v. Wolf, 443 U.S. 595, 604 (1979) ("[A] State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.").

[17] *Id.* at 605 ("We cannot agree . . . that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved.").

[18] *Id.* at 607. The state argued that its courts had applied this presumption; the Supreme Court agreed that such a rule of decision "would be consistent with both the neutral-principles analysis and the First Amendment," but held that it was not clear whether the court had in fact followed this approach or whether this was the approach required by state law. *Id.* at 607–09. Accordingly, the Court vacated and remanded the judgment for further proceedings. *Id.* at 610. *See also* Bouldin v. Alexander, 82 U.S. (15 Wall) 131, 137, 139–40 (1872) (resolving question as to "the legally constituted trustees of the church" by looking to the terms of the deed, and noting that although the Court could not review church decisions about "who ought to be members," the actions of a minority of members to excommunicate the trustees were "not the action of the church" and were inoperative for determining trusteeship).

Court cautioned that to the extent "the neutral-principles method . . . requires a civil court to examine certain religious documents, ... a civil court must take special care to scrutinize the document in purely secular terms."[19] In cases where interpreting "instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body."[20]

Amdt1.2.3.4 Church Leadership and the Ministerial Exception

First Amendment:

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

The broader ecclesiastical abstention doctrine has specifically been applied to questions about who may lead a religious group. The Supreme Court held in 1952 that religious associations' "freedom to select the clergy" was protected by the First Amendment's Free Exercise Clause.[1] For another example, in 1976's *Serbian Eastern Orthodox Diocese v. Milivojevich*, the Court ruled that a state court ran afoul of the ecclesiastical abstention principles outlined in *Watson v. Jones* when it overturned a church's decision to defrock a bishop.[2] In the ensuing decades, lower courts built on these precedents to develop a doctrine known as the "ministerial exception," which prevented courts from interfering with "the employment relationship between a religious institution and its ministers."[3]

The Supreme Court adopted the ministerial exception in 2012 in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, when it held that the doctrine limited the scope of certain employment discrimination laws.[4] Specifically, in *Hosanna-Tabor*, a teacher at a Lutheran school claimed that she had been fired in violation of the federal Americans with Disabilities Act of 1990.[5] The school sought to dismiss her claim, arguing that the suit was barred under the "ministerial exception."[6] The Court agreed, recognizing the existence of the exception and its basis in the First Amendment.[7] The Court ruled that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so" impermissibly "interferes with the internal governance of the church," violating both the Free Exercise and Establishment Clauses.[8] The Court further held that this ministerial exception

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[19] *Wolf*, 443 U.S. at 604.

[20] *Id.*

[1] Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116 (1952) ("Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.").

[2] 426 U.S. 696, 717–18 (1976).

[3] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 & n.2 (2012) (citing lower court decisions). *Cf.* NLRB v. Catholic Bishop, 440 U.S. 490, 502–04, 507 (1979) (holding that if a federal statute were read to grant the National Labor Relations Board jurisdiction over religious school teachers, it would present a "significant risk" of infringing the First Amendment, and accordingly, interpreting the statute to exclude "teachers in church-operated schools").

[4] *Hosanna-Tabor*, 565 U.S. at 188.

[5] *Id.* at 179.

[6] *Id.* at 180.

[7] *Id.* at 188–89.

[8] *Id.* ("By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.").

applied to the teacher's claim in *Hosanna-Tabor* even though she was not "the head of a religious congregation."[9] In the Court's view, the the teacher qualified "as a minister" because of her distinct role within the church, including her title as a "minister"; her religious training and commissioning; her duties to lead religous activities in furtherance of the church's mission; and the teacher's own characterization of her position.[10] As a result, the Court held, the First Amendment did not permit applying nondiscrimination provisions to the teacher's employment law claims.[11]

In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court suggested that one particular factor from *Hosanna-Tabor*—the individual's job functions—was the most important for determining whether a particular employee qualifies for the ministerial exception.[12] *Our Lady of Guadalupe* involved two employment discrimination claims brought by teachers fired by religious schools.[13] The Court ruled that the two teachers fell within the ministerial exception[14] even though, relative to the teacher in *Hosanna-Tabor*, they did not have the title of "minister," had less religious training, and were not practicing members of their employer's religion.[15] Instead, the Court said that "[w]hat matters, at bottom, is what an employee does."[16] Specifically, the Court recognized "that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school."[17] The Court further stated that the two teachers in the combined cases "performed vital religious duties," emphasizing that they provided religious instruction, prayed with their students, and were "expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith."[18] Consequently, in the Court's view, "judicial intervention" in either dispute would have "threaten[ed] the school's independence in a way that the First Amendment does not allow."[19]

[9] *Id.* at 190.

[10] *Id.* at 191–92.

[11] *Id.* at 194. The EEOC and the teacher had originally sought an order reinstating the teacher to her position, but at the Supreme Court, the teacher sought only front pay. *Id.* The Supreme Court said that while the reinstatement order "would have plainly violated the Church's freedom under the Religion Clauses to select its own ministers," the monetary relief was similarly unconstitutional "as a penalty on the Church for terminating an unwanted minister." *Id.* The Court emphasized that the monetary relief "would depend on a determination that Hosanna-Tabor was wrong to have relieved [the teacher] of her position"—a ruling "barred by the ministerial exception." *Id.*

[12] No. 19-267, slip op. at 18 (U.S. July 8, 2020). However, the Court emphasized that "a variety of factors may be important" in any given case. *Id.* at 16.

[13] *Id.* at 2.

[14] The majority opinion seemed to move away from using the term "ministerial exception," referring instead to "the *Hosanna-Tabor exception*," *id.* at 16, or "the exemption we recognized in *Hosanna-Tabor*," *id.* at 21. This nomenclature choice could be related to the substance of the decision; elsewhere, the Court emphasized that not all religions use the title of "minister," cautioning against "attaching too much significance to titles." *Id.* at 17.

[15] *Id.* at 23–26.

[16] *Id.* at 18.

[17] *Id.*

[18] *Id.* at 21.

[19] *Id.* at 27.

Amdt1.3 Establishment Clause

Amdt1.3.1 General Principle of Government Neutrality to Religion

First Amendment:

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

The First Amendment's Establishment Clause forbids the government from making any law "respecting an establishment of religion."[1] Perhaps most obviously, this provision prevents the federal government from establishing an official national religion akin to the Church of England.[2] But a law may "respect" an establishment even if it does not explicitly establish a religion.[3] Thus, relying on the historical background preceding the adoption of the First Amendment, and looking particularly to the colonists' experiences with religious establishments, the Supreme Court has long understood the Establishment Clause to bar other types of government support that would tend to "establish" religion, as well.[4] According to the Court, for the Founders, laws respecting "the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[5]

The Supreme Court has often referred to government *neutrality* towards religion as its guiding principle in applying the Establishment Clause.[6] For example, the Court has said the state must "be a neutral in its relations with groups of religious believers and non-believers."[7] The Court has further recognized that the government may provide some types of support without violating the Establishment Clause.[8] While "neutrality" has remained the general touchstone, the Court has adopted a variety of approaches to determine whether any given action is sufficiently neutral.[9]

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[1] U.S. Const. amend. I. The Establishment Clause applies to the states by incorporation through the Fourteenth Amendment. *See* Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947); *see also* Amdt14.S1.4.2 Early Doctrine on Incorporation of the Bill of Rights. For more information on how the Supreme Court has defined religious belief and activity, see Amdt1.2.1 Overview of the Religion Clauses (Establishment and Free Expression Clauses) and Amdt1.4.2 Laws Regulating Religious Belief.

[2] *See, e.g.*, *Everson*, 330 U.S. at 15. *See also, e.g.*, Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.").

[3] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (emphasis added).

[4] *Everson*, 330 U.S. at 8–15. *See also* Amdt1.2.2.1 Introduction to the Historical Background on the Religion Clauses.

[5] Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

[6] *See, e.g.*, McCreary Cnty. v. Am. Civil Liberties Union, 545 U.S. 844, 874 (2005); Wallace v. Jaffree, 472 U.S. 38, 60 (1985).

[7] *Everson*, 330 U.S. at 18.

[8] *Id.* at 17.

[9] *Cf., e.g.*, Mitchell v. Helms, 530 U.S. 793, 837–38 (2000) (O'Connor, J., concurring in the judgment) (arguing that the plurality opinion's Establishment Clause analysis treated neutrality as a factor with "close to . . . singular importance" in a way inconsistent with the Supreme Court's prior jurisprudence).

Amdt1.3.2 Accommodationist and Separationist Theories of the Establishment Clause

First Amendment:

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

The Supreme Court's Establishment Clause decisions embody, to varying degrees, two views of the Establishment Clause that have been described as "separationist" and "accommodationist."[1] These two views reflect an inherent tension between the two Religion Clauses.[2] The Establishment Clause prohibits the government from providing some types of support to religion, requiring some separation between church and state, while the Free Exercise Clause prohibits the government from excluding religious individuals "from receiving the benefits of public welfare legislation" because of their faith, allowing and even requiring some accommodation of religion.[3]

The separationist view is embodied by Thomas Jefferson's statement that the First Amendment created "a wall of separation between church and State."[4] Thus, in *Everson v. Board of Education* in 1947, the Supreme Court said that this wall "must be kept high and impregnable."[5] It went on:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.[6]

The "separation" of church and state is intended not only to protect the government from religious influence, but also to protect religious exercise by preventing the government from intervening in religious affairs.[7]

Just five years after *Everson*, though, in *Zorach v. Clauson*, the Court confirmed that the government could sometimes accommodate private religious practices without violating *Everson*'s wall.[8] It held that "no constitutional requirement . . . makes it necessary for government to be hostile to religion."[9] In 1971, in *Lemon v. Kurtzman*, the Supreme Court said

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[1] *See, e.g.*, Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. Pa. J. Const. L. 725, 725 (2006); Ira C. Lupu, *The Lingering Death of Separationism*, 62 Geo. Wash. L. Rev. 230, 232 (1994).

[2] *See* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

[3] *Id.*; *see also* Amdt1.6 Relationship Between Religion Clauses and Free Speech Clause.

[4] *See Everson*, 330 U.S. at 16 (quoting Letter from Thomas Jefferson to the Danbury Baptist Ass'n (Jan. 1, 1802), https://founders.archives.gov/documents/Jefferson/01-36-02-0152-0006 (internal quotation marks omitted)).

[5] *Id.* at 18.

[6] *Id.* at 15–16.

[7] *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 431 (1962).

[8] Zorach v. Clauson, 343 U.S. 306, 314 (1952).

[9] *Id.*

that "far from being a 'wall,'" the line separating church from state "is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[10] And in a dissenting opinion in 1985, then-Associate Justice William Rehnquist argued that "[t]here is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in *Everson*."[11]

Amdt1.3.3 Establishment Clause Tests Generally

First Amendment:

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

As discussed in the prior essay, the Supreme Court's Establishment Clause jurisprudence has changed over time, vacillating between separationist and accommodationist views.[1] Due in part to these distinct views of the Religion Clauses, the Supreme Court has employed a variety of analyses to determine whether any given law violates the Establishment Clause, depending in part on the type of government support being challenged. And even where the Supreme Court has applied the same tests to similar types of government aid, the way those tests have been applied has shifted as either the separationist or the accommodationist mode of analysis has been ascendant. One opinion noted the Court's "unwillingness to be confined to any single test or criterion in this sensitive area."[2]

For example, the Court has said a law that creates express denominational preferences is generally subject to a strict scrutiny analysis, and "must be invalidated unless it is justified by a compelling governmental interest" and "closely fitted to further that interest."[3] Most laws, however, do not involve such express discrimination, and the Establishment Clause forbids more than just the "governmental preference of one religion over another."[4] Accordingly, the Court historically adopted other tests to evaluate other types of laws.

The Court's predominant approach to evaluating Establishment Clause challenges during much of the modern era was a tripartite analysis known as the *Lemon* test,[5] although the Court used that test less frequently in the early 2000s[6] and by 2022, said it had "long ago abandoned" that approach.[7] *Lemon v. Kurtzman*'s three-part test instructed courts that for a government action to be considered constitutional: (1) it "must have a secular legislative *purpose*"; (2) "its principal or primary *effect* must be one that neither advances nor inhibits religion"; and (3) it "must not foster 'an excessive government *entanglement* with religion.'"[8]

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[10] Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

[11] Wallace v. Jaffree, 472 U.S. 38, 92, 106 (1985) (Rehnquist, J., dissenting).

[1] Amdt1.3.2 Accommodationist and Separationist Theories of the Establishment Clause.

[2] Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

[3] Larson v. Valente, 456 U.S. 228, 246–47 (1982). *But see* Trump v. Hawaii, No. 17-965, slip op. at 26, 30 (U.S. June 26, 2018) (concluding that although certain statements suggested the President intended to exclude Muslims from the country, the Court would apply the "circumscribed judicial inquiry [that governs] when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen").

[4] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 216 (1963).

[5] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). *See also, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 668 (2002) (O'Connor, J., concurring) (describing *Lemon* as "[a] central tool" in Establishment Clause analysis).

[6] *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, No. 17-1717, slip op. at 20 (U.S. June 20, 2019) (listing cases in which the Court "expressly declined to apply the [*Lemon*] test or . . . simply ignored it").

[7] Kennedy v. Bremerton Sch. Dist., No. 21-418, (U.S. June 27, 2022).

[8] *Lemon*, 403 U.S. at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)) (emphasis added).

These factors were not exclusive to *Lemon*: the Court looked to purpose and effect prior to that decision,[9] and continued to do so even in subsequent opinions that did not expressly cite *Lemon*.[10]

Since the adoption of *Lemon* there were questions about the degree to which each of its three factors was dispositive in particular cases. In an opinion issued the same day as *Lemon*, a plurality of the Court said standards in this area should "be viewed as guidelines," citing the difficulty of adopting one test to govern all circumstances.[11] The Court also employed variations on the *Lemon* test. For example, in *Lynch v. Donnelly*, issued in 1984, Justice Sandra Day O'Connor argued in a concurring opinion that in the first and second prongs of the *Lemon* test, the Court should ask whether a government action had "endorsed" religion.[12] The Supreme Court as a whole sometimes used this endorsement test.[13] Further, in a 1997 decision, the Supreme Court seemed to suggest a refinement of the last two prongs of the *Lemon* test, saying the Court uses "three primary criteria . . . to evaluate whether government aid has the effect of advancing religion:" looking to whether laws "result in governmental indoctrination; define [their] recipients by reference to religion; or create an excessive entanglement."[14]

Apart from the *Lemon* factors, the Supreme Court has sometimes evaluated Establishment Clause challenges by looking to whether the law is unduly coercive—particularly in the context of government-sponsored prayer.[15] "Coercion" includes at least legal compulsion,[16] but the Supreme Court has also held that "indirect coercive pressure" created by government support for "a particular religious belief" can run afoul of the Establishment Clause.[17]

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[9] *See, e.g.*, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963) ("The test may be stated as follows: what are the purpose and the primary effect of the enactment?"); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 598 (1961) (looking to a state law's purpose and effect); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 110, 115 (1952) (holding that a state law violated the "rule of separation between church and state," concluding that the "purpose, meaning, and effect" of the law was to interfere in "a matter of ecclesiastical government"); *see also Walz*, 397 U.S. at 674 ("Determining that the [law's] legislative purpose . . . is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry . . . . We must also be sure that the end result—the effect—is not an excessive government entanglement with religion.").

[10] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 648–49 (2002) ("The Establishment Clause . . . prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." (quoting Agostini v. Felton, 521 U.S. 203, 222–23 (1997)); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 838–39 (1995) ("[W]e must . . . inquire first into the purpose and object of the governmental action in question and then into the practical details of the program's operation.").

[11] Tilton v. Richardson, 403 U.S. 672, 678 (1971) (plurality opinion) ("Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired."). The *Tilton* plurality's analysis nonetheless considered the same three factors named in *Lemon*. *Id.*

[12] Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

[13] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 655 (2002); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 307–08 (2000); Wallace v. Jaffree, 472 U.S. 38, 56 (1985).

[14] Agostini v. Felton, 521 U.S. 203, 234 (1997).

[15] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992). *Cf.* Town of Greece v. Galloway, 572 U.S. 565, 587 (2014) (stating that the coercive effect of a "prayer opportunity . . . must be evaluated against the backdrop of historical practice").

[16] Justice Clarence Thomas has argued that the Establishment Clause is violated *only* by legal coercion, Van Orden v. Perry, 545 U.S. 677, 693 (2005) (Thomas, J., concurring), effected "by force of law and threat of penalty," Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in the judgment) (quoting *Lee*, 505 U.S. at 640 (Scalia, J., dissenting)) (internal quotation marks omitted). *See also* Kennedy v. Bremerton Sch. Dist., No. 21-418, slip op. at 25 (U.S. June 27, 2022) ("Members of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause.").

[17] Engel v. Vitale, 370 U.S. 421, 431 (1962).

Finally, the Supreme Court has sometimes reviewed laws by reference to historical traditions—and in a 2022 ruling, said this was the test courts should use "in place of Lemon and the endorsement test."[18] In decisions since the mid-1900s, the Court's Establishment Clause analysis has sometimes looked to the history of government regulation or accommodation of religion, and the responses to those government actions.[19] In particular, some cases evaluating the constitutionality of government-sponsored prayer practices have looked to historical practice, in addition to the coercion analysis discussed above.[20] Accordingly, the Supreme Court has ruled unconstitutional prayer practices that it believed were inconsistent with early understandings of the Establishment Clause,[21] but upheld legislative prayer schemes that were consistent with long-standing historical practices.[22]

In 2022's *Kennedy v. Bremerton School District* the Supreme Court said it had "abandoned *Lemon* and its endorsement test offshoot" in favor of "an analysis focused on original meaning and history."[23] The Court said the shortcomings of *Lemon*'s "'ambitiou[s],' abstract, and ahistorical approach to the Establishment Clause" *Lemon* test were "apparent."[24] Nonetheless, the Court did not expressly overrule *Lemon* or other precedent applying that test, leaving questions about how courts will apply those rulings in the future.[25]

The following essays provide more detail on the Supreme Court's decisions interpreting the Establishment Clause, focusing primarily on explaining the different types of analyses the Court has employed over time. Following Supreme Court precedent, the essays discuss cases involving financial assistance and non-financial assistance to religion separately. Although the two types of cases have sometimes employed the same analyses—both applied the *Lemon* test in at least some instances—the application of those analyses has differed based on the factual circumstances.

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[18] *Bremerton Sch. Dist.*, No. 21-418, slip op. at 23.

[19] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 688–92 (2005) (plurality opinion) (rejecting constitutional challenge to Ten Commandments display on the grounds of the Texas Capitol after reviewing the history and practice of "acknowledgments of the role played by the Ten Commandments in our Nation's heritage"); Walz v. Tax Comm'n, 397 U.S. 664, 675–80 (1970) (evaluating tax exemptions for religious properties in light of "an unbroken practice of according the exemption to churches, openly and by affirmative state action"); Torcaso v. Watkins, 367 U.S. 488, 490–92, 496 (1961) (holding a state religious test for public office unconstitutional, after reviewing colonial opposition to such oaths); Everson v. Bd. of Educ., 330 U.S. 1, 8–14 (1947) (reviewing "the background and environment of the period in which that constitutional language [of the Establishment Clause] was fashioned and adopted").

[20] *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, No. 17-1717, slip op. at 24–25 (U.S. June 20, 2019) (plurality opinion).

[21] *Engel*, 370 U.S. at 424.

[22] Town of Greece v. Galloway, 572 U.S. 565, 591–92 (2014); Marsh v. Chambers, 463 U.S. 783 (1983).

[23] *Bremerton Sch. Dist.*, , 24.

[24] *Id.* at 22 (quoting *Am. Legion*, slip op. at 12, 13 (plurality opinion)).

[25] Generally, lower courts must follow Supreme Court precedent that "has direct application in a case" even if the precedent "appears to rest on reasons rejected in some other line of decisions," leaving to the Supreme Court "the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

Amdt1.3.4 Financial Assistance to Religion

Amdt1.3.4.1 Overview of Financial Assistance to Religion

First Amendment:

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

When the government provides *financial* aid to religious entities, as opposed to providing other types of aid such as facilities or supplies, such support presents heightened Establishment Clause concerns.[1] The Court has recognized that "financial support" of religion was squarely in the minds of those who adopted the Establishment Clause.[2]

Historically, the Supreme Court generally evaluated such aid under the three-part framework of *Lemon v. Kurtzman*—although its financial aid cases have also reflected the varying approaches to *Lemon*, including the endorsement approach.[3] While the Court has since "abandoned" the *Lemon* test in favor of an approach that looks to historical tradition,[4] it has not specifically overruled that opinion or some other cases applying that analysis, meaning the outcomes of those rulings may still be considered binding precedent. Accordingly, particularly in light of the fact that the Court has not frequently applied a test looking to historical traditions in the context of financial aid,[5] there is some uncertainty regarding how at least certain types of financial aid may be reviewed in the future.

In addition, one central issue in modern Establishment Clause jurisprudence concerns *who* decides that aid will be provided to a religious entity. The Supreme Court has said financial aid will be especially problematic if the government is giving funds *directly* to religious entities, as opposed to giving funds to religious entities *indirectly*—that is, giving funds to third parties who privately choose to use public funds to support religious entities.[6] The Court has said that indirect aid will generally be permissible under *Lemon* if the "government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice."[7]

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[1] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 818–19 (2000) (plurality opinion); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 842, 844 (1995); Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

[2] Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

[3] *See* Amdt1.3.4.3 Adoption of the Lemon Test; Amdt1.3.4.4 Application of the Lemon Test.

[4] Kennedy v. Bremerton Sch. Dist., No. 21-418, (U.S. June 27, 2022).

[5] Everson v. Board of Education, 330 U.S. 1, 8–14 (1947), see Amdt1.3.4.2 Early Cases on Financial Assistance to Religion, looked to history to inform its understanding of the general principles animating the Religion Clauses. Additionally, Walz v. Tax Comm'n, 397 U.S. 664, 675–80 (1970), see Amdt1.3.4.3 Adoption of the Lemon Test, looked to historical practice in addition to the *Lemon* factors to evaluate the constitutionality of a tax exemption.

[6] *See, e.g.*, Locke v. Davey, 540 U.S. 712, 719 (2004). *See also* Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002); Lemon v. Kurtzman, 403 U.S. 602, 621 (1971). *Cf. Helms*, 530 U.S. at 818 (plurality opinion) ("Whether one chooses to label this [non-financial aid] program 'direct' or 'indirect' is a rather arbitrary choice, one that does not further the constitutional analysis.").

[7] *Zelman*, 536 U.S. at 652. *Zelman* analyzed indirect aid programs under the "purpose" and "effect" prongs of the *Lemon* test. *Id.* at 649–50.

Amdt1.3.4.1
Overview of Financial Assistance to Religion

In a few cases, the Supreme Court has considered the *denial* of financial assistance, and has held in those cases that the government did not violate the Establishment Clause either by imposing a generally applicable tax on a religious entity[8] or denying a tax exemption for religiously motivated activity.[9]

Amdt1.3.4.2 Early Cases on Financial Assistance to Religion

First Amendment:

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

The Supreme Court first recognized that the Establishment Clause applied to the states (through the Fourteenth Amendment) in 1947's *Everson v. Board of Education*.[1] Prior to *Everson*, the Court had issued only two decisions evaluating federal financial assistance to religious institutions.[2] Both took a fact-specific approach to evaluating the constitutional challenges in those cases rather than attempting to articulate a broader test, and both rejected the Establishment Clause challenges. Accordingly, these early cases, along with *Everson*, demonstrated that not all forms of government aid to religion violate the Establishment Clause.[3]

Everson thus was the Supreme Court's first significant modern attempt to elucidate the terms of the Establishment Clause.[4] The Court upheld a state program that reimbursed parents for bus fare to send their children to school, including children who attended parochial schools.[5] The Court largely declined to articulate a single test for courts to evaluate Establishment Clause challenges, although it did make some broad pronouncements about how to approach the Religion Clauses. For instance, in balancing the two Religion Clauses, the Court cautioned that in "protecting" citizens from "state-established churches," it did not want to "inadvertently prohibit [the state] from extending its general state law benefits to all its citizens without regard to their religious belief."[6] The Court said that the First Amendment "requires the state to be . . . neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[7]

Applying these general principles, the Supreme Court said that the bus fare reimbursement program was constitutional.[8] Although it used "tax-raised funds" to help some

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[8] Jimmy Swaggart Ministries v. Cal. Bd. of Equalization, 493 U.S. 378, 394 (1990).

[9] Hernandez v. Commissioner, 490 U.S. 680, 695 (1989); Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1983); *see also* Amdt1.3.4.5 Zelman and Indirect Assistance to Religion.

[1] Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947). *See also* Amdt14.S1.4.2 Early Doctrine on Incorporation of the Bill of Rights.

[2] Quick Bear v. Leupp, 210 U.S. 50, 81–82 (1908) (concluding that a congressional appropriation of funds to religious schools did not violate the Establishment Clause where the appropriation involved the Rosebud Sioux Tribe's decisions about the use of its own money); Bradfield v. Roberts, 175 U.S. 291, 297–99 (1899) (concluding that a federal appropriation to expand a hospital owned by a religious order did not violate the Establishment Clause given the secular legal character of the corporation and Congress's secular goal to care for the sick).

[3] *See, e.g.*, Tilton v. Richardson, 403 U.S. 672, 679 (1971) (plurality opinion) ("The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield v. Roberts* . . . ." (citation omitted)).

[4] *See* Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947).

[5] *Id.* at 3.

[6] *Id.* at 16.

[7] *Id.* at 18.

[8] *Id.* at 17.

children "get to church schools," this was only "as a part of a general program" that paid "the fares of pupils attending public and other schools."[9] In the Court's view, the Establishment Clause did not require the state to "cut[ ] off church schools" from "general government services."[10]

Amdt1.3.4.3 Adoption of the Lemon Test

First Amendment:

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

The tripartite Establishment Clause test asking courts to look to purpose, effect, and entanglement is primarily associated with *Lemon v. Kurtzman*, decided in 1971.[1] However, the Supreme Court first compiled these three factors a year earlier, in *Walz v. Tax Commission*.[2] The *Walz* petitioners raised an Establishment Clause challenge to a state tax exemption for religious properties used solely for religious worship.[3] In upholding the exemption, the Court held first that its "legislative purpose" was "neither the advancement nor the inhibition of religion; . . . neither sponsorship nor hostility."[4] The state had granted the exemption not only to religious properties, but to "a broad class of property owned by nonprofit, quasi-public corporations" that the state considered to be "beneficial and stabilizing influences in community life."[5] The Court then considered whether the effect of the law was "an excessive government entanglement with religion."[6] The Court acknowledged that the exemption would create some entanglement by giving churches "an indirect economic benefit," but stated that the exemption entailed less government involvement than either taxing the churches or giving them a direct money subsidy.[7] As part of its analysis into whether the exemption impermissibly sponsored religion, the Court also emphasized widespread historical precedent for tax exemptions.[8] Ultimately, the Court ruled that the exemption created "only a minimal and remote involvement between church and state."[9]

In *Lemon*, the Supreme Court formally synthesized a three-part test for analyzing Establishment Clause challenges: to be constitutional, laws (1) "must have a secular legislative purpose;" (2) must have a "principal or primary effect . . . that neither advances nor

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[9] *Id.*

[10] *Id.* at 17–18. Somewhat similarly, the Supreme Court has held that states do not violate the Establishment Clause by providing unemployment benefits to individuals who are fired based on their unwillingness to work on the Sabbath, ruling instead that this accommodation of religious practices merely reflects government neutrality towards religion. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144–45 (1987); Sherbert v. Verner, 374 U.S. 398, 409 (1963). *See also* Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 719–20 (1981) (reaching a similar conclusion with respect to an individual who was denied unemployment benefits after leaving his job because his newly assigned job responsibilities, producing armaments, violated his religious beliefs).

[1] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[2] Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970). The Supreme Court looked to the first two *Lemon* factors, purpose and effect, prior to *Walz*. *See* Amdt1.3.5.3 Purpose and Effect Test Before Lemon.

[3] *Walz*, 397 U.S. at 666–67.

[4] *Id.* at 672.

[5] *Id.* at 673.

[6] *Id.* at 674.

[7] *Id.* at 674–75.

[8] *Id.* at 676–78 (noting that all fifty states provided tax exemptions for places of worship at the time of decision, and noting examples from colonial times and early Congresses).

[9] *Id.* at 676.

inhibits religion . . .;" (3) and "must not foster 'an excessive government entanglement with religion.'"[10] The Court applied this test in *Lemon* to conclude that two state programs providing public funds to church-affiliated schools were unconstitutional because they created an excessive entanglement with religion.[11]

The first program provided supplemental payments to teachers in nonpublic schools.[12] The Court believed there was significant "danger that a teacher under religious control and discipline" could not separate "the religious from the purely secular aspects of . . . education."[13] Given this "potential for impermissible fostering of religion," the Court said that the state would have to ensure "that subsidized teachers do not inculcate religion"—and noted that the state had in fact imposed a number of restrictions on the use of state aid.[14] But in the Supreme Court's view, these restrictions created an "excessive and enduring entanglement between state and church" by requiring "a comprehensive, discriminating, and continuing state surveillance" of the religious schools.[15]

The second program considered in *Lemon* reimbursed nonpublic schools for purchasing certain secular educational services or textbooks.[16] The Court ruled this program unconstitutional for the same reasons as the first, noting that the program required the state to review reimbursements and required schools to use certain accounting procedures.[17] The Court said that the second program suffered from "the further defect of providing state financial aid directly to the church-related school."[18] This was particularly concerning to the Court because historically, programs involving "a continuing cash subsidy . . . have almost always been accompanied by varying measures of [government] control and surveillance."[19] The Court was also concerned about the "divisive political potential" and the relatively unprecedented nature of both programs, stating that these factors might suggest a danger of even greater government regulation of religious schools in the future.[20]

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[10] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (internal citation omitted) (quoting *Walz*, 397 U.S. at 674).

[11] *Id.* at 613–14.

[12] *Id.* at 606–07.

[13] *Id.* at 617.

[14] *Id.* at 619.

[15] *Id.*

[16] *Id.* at 607.

[17] *Id.* at 620–21.

[18] *Id.* at 621.

[19] *Id.*

[20] *Id.* at 622–24. Two years later, however, the Supreme Court held that, with respect to the second program, the state could reimburse schools for services they had provided before the program was ruled unconstitutional, emphasizing the schools' reliance interests. Lemon v. Kurtzman (Lemon II), 411 U.S. 192, 201–03 (1973). *But see* New York v. Cathedral Acad., 434 U.S. 125, 131, 133 (1977) (ruling unconstitutional a state law attempting to reimburse schools for expenses incurred in reliance on a law that the Supreme Court declared unconstitutional, noting that unlike in *Lemon II*, the "constitutional defect" in the law "lay in the payment itself, rather than in the process of its administration").

Amdt1.3.4.4 Application of the Lemon Test

First Amendment:

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

Since 1971, the Supreme Court has most frequently evaluated financial assistance to religious entities under the *Lemon* framework, notwithstanding its gradual disfavor and eventual "abandonment" of *Lemon*.[1] In a series of decisions issued during the 1970s, the Court applied these three factors to a series of programs offering funds to schools, holding some of those programs constitutional and others unconstitutional. The Court rejected Establishment Clause challenges to generally available aid programs that provided that funds could not be used "for sectarian purposes," concluding this type of restriction ensured the program would not have an unconstitutional effect of advancing religion under *Lemon*.[2] For example, in *Tilton v. Richardson* and *Hunt v. McNair*, the Court upheld programs that funded the construction or improvement of educational facilities, but expressly excluded facilities used for religious worship or instruction.[3] Further, in *Tilton*, the Court ruled that a provision that would have allowed federally funded facilities to revert to religious purposes after 20 years was unconstitutional.[4]

The Court also applied *Lemon* to disapprove of a number of financial aid programs in the 1970s.[5] In *Committee for Public Education and Religious Liberty v. Nyquist* and *Levitt v. Committee for Public Education*, the Supreme Court held that two state programs funding private schools violated the Establishment Clause because the programs lacked any measures to ensure that the funds would not be used for religious purposes.[6] In *Nyquist*, the Court considered a state law that, among other things, offered grants to private schools for facilities maintenance and repair.[7] The law did not "restrict payments . . . to the upkeep of facilities used exclusively for secular purposes," and would have, for example, allowed schools to use the funds for "the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught."[8] Accordingly, the Court concluded that the program failed the effect prong of *Lemon* because it would "inevitably . . . subsidize and advance the religious mission of sectarian schools."[9]

Similarly, in *Levitt*, the Supreme Court held that a state program reimbursing religious schools for performing certain testing and recordkeeping services violated the Establishment

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[1] Kennedy v. Bremerton Sch. Dist., No. 21-418, (U.S. June 27, 2022).

[2] Roemer v. Bd. of Pub. Works, 426 U.S. 736, 747 (1976) (plurality opinion) (upholding a state program offering grants to private institutions of higher education); *id.* at 767 (White, J., concurring in the judgment).

[3] Tilton v. Richardson, 403 U.S. 672, 689 (1971) (plurality opinion) (upholding most of a federal program providing construction grants for educational facilities); Lemon v. Kurtzman, 403 U.S. 602, 664 (1971) (White, J., concurring in the judgment in *Tilton*); Hunt v. McNair, 413 U.S. 734, 749 (1973) (upholding a state law authorizing the issuance of revenue bonds to a religious college for construction and improvement of certain nonsectarian facilities).

[4] *Tilton*, 403 U.S. at 683 (plurality opinion); *id.* at 692 (Douglas, J., dissenting).

[5] New York v. Cathedral Acad., 434 U.S. 125, 133 (1977); Sloan v. Lemon, 413 U.S. 825, 828 (1973); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 (1973); Levitt v. Committee for Public Education, 413 U.S. 472, 482 (1973).

[6] *Nyquist*, 413 U.S. at 779–80; *Levitt*, 413 U.S. at 480.

[7] *Nyquist*, 413 U.S. at 774.

[8] *Id.*

[9] *Id.* at 779–80. *See also Sloan*, 413 U.S. at 828 (concluding that a state tuition reimbursement program was unconstitutional under *Nyquist* because there was "no constitutionally significant difference" between the programs in both cases).

Clause because "the aid that [would] be devoted to secular functions [was] not identifiable and separable from aid to sectarian activities."[10] The Court noted that the tests were prepared by "teachers under the authority of religious institutions" and ruled that there was an inherent risk of the test being used for "religious indoctrination."[11] Seven years after its decision in *Levitt*, the Supreme Court upheld a revised version of the same testing-reimbursement law.[12] The new law did not allow reimbursement for teacher-prepared tests and allowed states to audit payments.[13] The Court ruled that these new safeguards were sufficient to ensure "that the cash reimbursements would cover only secular services,"[14] and did not create an impermissible entanglement with religion.[15]

Starting in 1980, the Supreme Court almost uniformly rejected Establishment Clause challenges to financial aid provisions, finding a constitutional violation in only one case, discussed below.[16] The Court's analysis generally continued to focus on purpose, effect, and entanglement, although it occasionally referred more generally to a program's neutrality without explicitly citing *Lemon*.[17] Further, the Court began to move away from the separationist approach of *Nyquist* and *Levitt*, suggesting that financial aid programs might not have to prohibit expressly the religious use of funds in order to be ruled constitutional.[18] Indeed, the Supreme Court has rejected Establishment Clause challenges to a number of programs in part because they offer benefits broadly to both religious and nonreligious recipients.[19]

In *Mueller v. Allen*, the Supreme Court concluded that a state could allow individual tax deductions for tuition, textbooks, and transportation costs incurred in sending students to religious schools.[20] While the program disallowed deductions for instructional materials used

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[10] *Levitt*, 413 U.S. at 480.

[11] *Id.* The state responded to the Supreme Court's decision in Levitt in part by attempting to allow schools to recover any expenses they had incurred in reliance on the law that the Court declared unconstitutional. New York v. Cathedral Acad., 434 U.S. 125, 127 (1977). The Court held that these new payments were similarly unconstitutional because they did not "differ in any substantial way from those authorized" under the law it had already ruled unconstitutional. *Id.* at 131.

[12] Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 657, 659 (1980).

[13] *Id.* at 652.

[14] *Id.* at 659.

[15] *Id.* at 660. The Court also rejected an Establishment Clause challenge to a program that supplied testing and scoring services to nonpublic schools, but did "not authorize any payment to nonpublic school personnel," noting that the testing program was controlled entirely by the state. Wolman v. Walter, 433 U.S. 229, 240–41 (1977), *partially overruled on other grounds by* Mitchell v. Helms, 530 U.S. 793 (2000).

[16] Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989) (plurality opinion). *Cf.* Carson v. Makin, No. 20-1088, slip op. at 16–17 (U.S. June 21, 2022) (suggesting that a funding condition attempting to prevent religious uses of funds in an indirect aid program could "raise serious concerns about state entanglement with religion and denominational favoritism" by requiring scrutiny of "whether and how a religious school pursues its educational mission").

[17] *See* Espinoza v. Mont. Dep't of Revenue, No. 18-1195, slip op. at 7 (U.S. June 30, 2020) ("[T]he Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs."); Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1983) (rejecting an Establishment Clause challenge to an IRS policy that extended tax exemptions only to nonprofit organizations that did not racially discriminate, noting that the policy had a neutral, secular basis).

[18] *See* Mitchell v. Helms, 530 U.S. 793, 856 (2000) (O'Connor, J., concurring) ("*Wolman* and *Levitt* were both based on the same presumption that government aid will be used in the inculcation of religion that we have chosen not to apply to textbook lending programs and that we have more generally rejected in recent decisions."); *see also* Bowen v. Kendrick, 487 U.S. 589, 634–35 (1988) (Blackmun, J., dissenting) (arguing that the majority opinion "mark[ed] a sharp departure from" the Court's precedents, including *Levitt*).

[19] *See* Mueller v. Allen, 463 U.S. 388, 397 (1983); Bowen v. Kendrick, 487 U.S. 589, 610–11 (1988); *see also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 842 (1995) ("It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups . . . .").

[20] *Mueller*, 463 U.S. at 402–03.

to "inculcate" religious tenets or doctrine,[21] the Court's analysis did not seem to turn on this restriction. The Court instead stressed, among other factors, that the tax deduction was "available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend non-sectarian private schools or sectarian private schools."[22] Because the benefit was broadly available and neutral on its face with respect to religion, the Court believed that the program had a primarily secular effect and did not imply state endorsement of religion.[23]

The Court solidified this approach in *Bowen v. Kendrick*, upholding a federal grant program for adolescent health services even though it did not expressly prohibit the use of federal funds for religious purposes.[24] The Court noted that the statute made funds available to a wide variety of organizations and concluded that there was no evidence that a "significant proportion of the federal funds" would be given to religious institutions.[25] Further, the Court said that it would assume that even absent an express restriction on the religious use of funds, religious grantees could carry out the funded programs "in a lawful, secular manner."[26]

Texas Monthly, Inc. v. Bullock, however, illustrates the limits of the Supreme Court's favored approach of the 1980s. In *Texas Monthly*, the Court struck down a state tax exemption for periodicals distributed by a religious faith that consisted wholly of religious writings.[27] Justice William Brennan, writing for a plurality of the Court, concluded that this exemption failed the endorsement test.[28] He said that "when government directs a subsidy *exclusively* to religious organizations that is not required by the Free Exercise Clause," that conveys an impermissible message of "state sponsorship of religious belief."[29]

Amdt1.3.4.5 Zelman and Indirect Assistance to Religion

First Amendment:

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

The Supreme Court has generally been more permissive of indirect financial aid programs, where the government does not give funds directly to religious organizations but gives them instead to third parties who make "genuinely independent and private choices" to support religious entities.[1] In such circumstances, the Court has not required the government to

[21] *Id.* at 403.

[22] *Id.* at 397.

[23] *Id.*

[24] *Bowen*, 487 U.S. at 614.

[25] *Id.* at 608, 610.

[26] *Id.* at 612, 614.

[27] Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989) (plurality opinion).

[28] *Id.* at 17.

[29] *Id.* at 15 (emphasis added). Justice Harry Blackmun, joined by Justice Sandra Day O'Connor, agreed that the tax exemption violated the Establishment Clause because the state had "engaged in preferential support for the communication of religious messages." *Id.* at 28 (Blackmun, J., concurring).

[1] Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986). *Cf.* Quick Bear v. Leupp, 210 U.S. 50, 81–82 (1908) (concluding a congressional appropriation of funds to religious schools did not violate the Establishment Clause where the appropriation involved the Rosebud Sioux Tribe's decisions about the use of its own money, suggesting that prohibiting private entities from "us[ing] their own money" to support religion would raise concerns under the Constitution's Free Exercise Clause).

include religious use restrictions.[2] Instead, where financial aid is provided to religious entities indirectly, the Court has said that such programs satisfy *Lemon*'s effect prong even if the funds ultimately support religious activities—so long as the program is "neutral in all respects toward religion,"[3] particularly in the sense of using religiously neutral criteria to distribute aid.[4]

One 1973 case, *Committee for Public Education and Religious Liberty v. Nyquist*, suggested that the Supreme Court might view at least some types of indirect aid programs with heightened scrutiny.[5] *Nyquist* struck down an indirect aid program that assisted only private schools, providing tuition reimbursements and tax benefits to parents.[6] With respect to the tuition reimbursements, the Court concluded that regardless of the fact that the funds were given to parents and not directly to schools, the program was still unconstitutional because "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions."[7] The Court ruled that the tax benefits were similarly unconstitutional, saying that "in practical terms," there was little difference between the tuition grant and the tax benefits.[8]

In *Zelman v. Simmons-Harris*, however, the Supreme Court suggested that indirect aid programs will generally satisfy *Lemon*, if they are "programs of true private choice."[9] *Zelman* rejected an Establishment Clause challenge to a municipal program that offered "tuition aid" to parents with financial need who sought to enroll their children in schools in underperforming districts.[10] The parents could choose to use the tuition aid at religious or nonreligious private schools, as well as public schools.[11] The Court said that where the government program aided "a broad class of citizens" who then chose to "direct government aid to religious schools wholly as a result of their own genuine and independent private choice," any support for religion was "reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits."[12] Consequently, under the endorsement test, "no reasonable observer would think" that such a program "carries with it the imprimatur of government endorsement" of religion.[13]

Zelman distinguished but did not overrule *Nyquist*, saying "*Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a

[2] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002).

[3] *Id.* at 653.

[4] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 838–39 (2000) (O'Connor, J., concurring in the judgment).

[5] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774 (1973).

[6] *Id.* at 762–67, 798. The case also involved direct grants to private schools for maintenance and repair costs, discussed Amdt1.3.4.4 Application of the Lemon Test. The Court noted that "all or practically all" of the schools eligible for the direct grants were Catholic, but that religious schools from other denominations and secular private schools were eligible for aid under the indirect aid provisions. *Nyquist*, 413 U.S. at 768 & n.23.

[7] *Nyquist*, 413 U.S. at 783. The Court held that a similar tuition reimbursement program violated the Establishment Clause in *Sloan v. Lemon,* 413 U.S. 825, 830 (1973), concluding that *Nyquist* mandated this outcome.

[8] *Nyquist*, 413 U.S. at 790–91. The Court distinguished *Walz v. Tax Commission,* 397 U.S. 664, 666–67 (1970), by noting, as one relevant factor, that the tax exemption in *Walz* "covered all property devoted to religious, educational, or charitable purposes," while the tax benefits in *Nyquist* "flow[ed] primarily to the parents of children attending sectarian, nonpublic schools." *Nyquist*, 413 U.S. at 794.

[9] Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002).

[10] *Id.* at 646.

[11] *Id.* at 653. In its analysis, the Court noted that there was "no evidence" that parents did not have "genuine opportunities . . . to select secular educational options for their school-age children." *Id.* at 655. *See also* Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986) (ruling that a state tuition aid program did not violate the Establishment Clause after noting that "nothing in the record indicates that . . . any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education").

[12] *Zelman*, 536 U.S. at 653.

[13] *Id.* at 655.

broad class of individual recipients defined without regard to religion."[14] The Court emphasized that the program in *Nyquist* provided benefits "exclusively to private schools," rather than providing benefits "generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."[15] *Zelman* thus seemed to leave open the question of whether an indirect aid program that was neutral towards religion on its face and supported both religious and secular *private* entities, but did not also aid *public* entities, would raise Establishment Clause concerns. However, the Supreme Court has more recently said that an Establishment Clause challenge to a state tax benefit program indirectly assisting only private schools would be "unavailing."[16] Accordingly, although the Supreme Court has never expressly overruled *Nyquist*, that case may now be narrowed to such a limited set of facts that the Court is unlikely to rely on it in future cases.

Further reinforcing *Zelman*, the Supreme Court has held that states do not violate the Establishment Clause by offering scholarship funds to students who may choose to use those funds at religious schools or for religious studies,[17] or by offering tax credits for donating to private organizations that granted scholarships to private schools.[18] To take one last example, the Supreme Court ruled that it did not violate the Establishment Clause for a public university to pay for the printing of a religious student publication in *Rosenberger v. Rector and Visitors of the University of Virginia*.[19] The university generally offered funds to approved student groups.[20] The student groups chose how to use the funds, and the funds were given to the printer, rather than being paid directly to the religious student group.[21] Under the circumstances, the Court said it was not "plausible" that any religious speech supported with these funds would be attributed to the university.[22] The Court emphasized that the funds were available on a "religion-neutral basis" as part of a program that funded "secular services" such as printing.[23]

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[14] *Id.* at 662.

[15] *Id.* at 661 (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 n.38 (1973) (internal quotation mark omitted)). *See also, e.g.*, Mitchell v. Helms, 530 U.S. 793, 819 n.8 (2000) (plurality opinion) (stating that *Nyquist* "involved serious concerns about whether the payments were truly neutral").

[16] Espinoza v. Mont. Dep't of Revenue, No. 18-1195, slip op. at 7 (U.S. June 30, 2020).

[17] Locke v. Davey, 540 U.S. 712, 719 (2004) (ruling that a state could have allowed state scholarship recipients to use scholarship funds to pursue degrees in devotional theology); *Witters*, 474 U.S. at 489 (ruling that a state could provide tuition aid to a visually impaired student studying religious subjects at a religious college). *See also* Carson v. Makin, No. 20-1088, slip op. at 10 (U.S. June 21, 2022) (ruling that a state could have allowed families to use tuition assistance payments at religious schools).

[18] *Espinoza*, slip op. at 7.

[19] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 842 (1995).

[20] *Id.* at 823–24.

[21] *Id.* at 842.

[22] *Id.* at 841.

[23] *Id.* at 843–44. Seemingly illustrating the difference between direct aid and indirect aid, the Court cautioned that "if the State pays a church's bills it is subsidizing it, and we must guard against this abuse." *Id.* at 844. But the Court said that *Rosenberger* did not present this circumstance, in part because the university was paying "outside printers," attaining a "degree of separation from the student publication." *Id.*

Amdt1.3.4.6 Denying Financial Assistance to Religion

First Amendment:

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

Government decisions that refuse to grant a tax exemption may be viewed as a decision to *deny* financial aid. On that theory, religious entities have sometimes argued that the federal government's decision to deny them a tax exemption for religiously motivated actions violated the Establishment Clause where the exemption allegedly preferred certain religions.[1] The Supreme Court rejected the constitutional challenges in two such cases, noting that the federal government's tax laws were generally neutral in their purpose and effect, and that the challenged policies did not *facially* discriminate on the basis of religion.[2] In one of the cases, the Court further concluded that the decision to tax the church did not threaten an "excessive entanglement between church and state," even though the government would have to obtain certain information from religious entities to ascertain tax liability.[3] The Court described this as a "routine regulatory interaction" that did not require an impermissible inquiry "into religious doctrine" or entail "'detailed monitoring and close administrative contact' between secular and religious bodies."[4]

Entanglement was at the core of another Supreme Court opinion rejecting an Establishment Clause challenge to a state's decision to impose generally applicable sales and use taxes on religious publications.[5] A religious organization that sold evangelical materials such as books and tapes sought an exemption from state tax liability, arguing that the state would violate *Lemon*'s entanglement prong by taxing its materials.[6] The Supreme Court rejected this argument, saying that even if the law imposed accounting burdens on the organization, "such administrative and recordkeeping burdens do not rise to a constitutionally significant level."[7] Among other factors, the Court noted that the scheme did not require invasive surveillance or inspection of the organization's "day-to-day operations," and did not require the state "to inquire into the religious content of the items sold or the religious motivation for selling or purchasing the items."[8] The Court emphasized that materials were

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[1] Hernandez v. Commissioner, 490 U.S. 680, 695 (1989) (arguing that by denying tax-deductible status to certain payments made to the Church of Scientology for services rendered, the federal government created "an unconstitutional denominational preference" by disfavoring religions that impose fixed costs for participating in religious practices); Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1983) (arguing that a federal policy denying tax-exempt status to schools that practice racial discrimination "preferr[ed] religions whose tenets do not require racial discrimination over those which believe racial intermixing is forbidden").

[2] *Hernandez*, 490 U.S. at 696; *Bob Jones Univ.*, 461 U.S. at 604 n.30. *Cf.* Larson v. Valente, 456 U.S. 228, 230, 246–47 (1982) (holding that a state statute imposing "registration and reporting requirements upon only those religious organizations that solicit more than fifty per cent of their funds from nonmembers" created a denominational preference, triggering strict scrutiny). For a more detailed discussion of *Larson* see Amdt1.3.6.5 Lemon's Entanglement Prong.

[3] *Hernandez*, 490 U.S. at 696.

[4] *Id.* at 696–97 (quoting Aguilar v. Felton, 473 U.S. 402, 414 (1985)).

[5] Jimmy Swaggart Ministries v. Cal. Bd. of Equalization, 493 U.S. 378, 397 (1990).

[6] *Id.* at 382, 392. The organization's argument focused on *Lemon*'s entanglement prong, but the Supreme Court also briefly considered the first two prongs of the *Lemon* test, ruling that "it is undeniable that a generally applicable tax has a secular purpose and neither advances nor inhibits religion, for the very essence of such a tax is that it is neutral and nondiscriminatory on questions of religious belief." *Id.* at 394.

[7] *Id.* at 394.

[8] *Id.* at 395–96.

"subject to the tax regardless of content or motive": the state cared only "whether there is a sale or a use, a question which involves only a secular determination."[9]

In *Harris v. McRae*, the Court considered a statute that even more directly denied financial assistance.[10] The Court rejected an Establishment Clause challenge to the Hyde Amendment, a law prohibiting federal funds from being used to fund certain abortions under the Medicaid program.[11] Challengers to the Hyde Amendment argued that this funding condition unconstitutionally "incorporate[d] into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences."[12] The Supreme Court, however, concluded that the condition did not violate *Lemon*, saying the fact that the restriction "may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause."[13] In the Court's view, the Hyde Amendment was "as much a reflection of 'traditionalist' values towards abortion, as it [wa]s an embodiment of the views of any particular religion."[14]

Amdt1.3.5 Non-Financial Assistance to Religion

Amdt1.3.5.1 Overview of Non-Financial Assistance to Religion

First Amendment:

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

Apart from financial aid, the Supreme Court has recognized that other types of support for religion can violate the Establishment Clause.[1] Broadly considered, the Establishment Clause "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship."[2] Accordingly, for example, the Supreme Court has held invalid laws that required public schools to tailor their teachings to religious doctrine[3] or to conduct prayers,[4] as well as laws that created denominational preferences.[5] The Supreme Court has also, with varied outcomes, considered Establishment Clause challenges to government actions such as the

[9] *Id.* at 396.

[10] Harris v. McRae, 448 U.S. 297 (1980).

[11] *Id.* at 302–03.

[12] *Id.* at 319.

[13] *Id.* at 319–20.

[14] *Id.* at 319.

[1] *See generally, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947).

[2] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[3] Epperson v. Arkansas, 393 U.S. 97, 106–07 (1968).

[4] *See* Lee v. Weisman, 505 U.S. 577, 599 (1992); Engel v. Vitale, 370 U.S. 421, 424 (1962).

[5] *E.g.*, Larson v. Valente, 456 U.S. 228, 255 (1982); *see generally, e.g.*, Gillette v. United States, 401 U.S. 437, 450 (1971) ("[T]he Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization.").

sponsorship of monuments involving religious symbols,[6] the provision of textbooks, facilities, or other non-financial resources to religious schools,[7] and laws attempting to accommodate religiously motivated conduct.[8]

As discussed elsewhere, Establishment Clause challenges to financial aid cases have primarily been analyzed under *Lemon v. Kurtzman* or *Zelman v. Simmons-Harris*, distinguishing between direct and indirect aid.[9] The distinction between direct and indirect aid has not been as significant in evaluating non-financial aid.[10] Supreme Court cases involving non-financial support for religion have frequently employed *Lemon*'s three-part inquiry into purpose, effect, and entanglement,[11] but have also used other types of inquiries, including looking for government endorsement or coercion, or considering historical practices.[12] By 2022, the Supreme Court said it had "abandoned Lemon and its endorsement test offshoot."[13] Instead, moving forward, the Court said the Establishment Clause "must be interpreted by 'reference to historical practices and understandings.'"[14] There are a greater number of cases that looked to historical traditions or coercion in the context of nonfinancial aid, as compared to financial aid cases.[15]

Amdt1.3.5.2 Early Cases on Non-Financial Assistance to Religion

First Amendment:

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

Following 1947's *Everson v. Board of Education*,[1] the Supreme Court's early cases considering non-financial support for religion stressed general principles of neutrality towards

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[6] *Compare, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (concluding a city's Christmas display did not violate the Establishment Clause), *with, e.g.*, Stone v. Graham, 449 U.S. 39, 41 (1980) (concluding a courthouse display of the Ten Commandments did violate the Establishment Clause).

[7] *Compare, e.g.*, Bd. of Educ. v. Allen, 392 U.S. 236 (1968) (rejecting an Establishment Clause challenge to a textbook lending program), *with, e.g.*, Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203, 210–11 (1948) (concluding a program allowing private religious teachers to teach religion in public schools violated the Establishment Clause).

[8] *Compare, e.g.*, McGowan v. Maryland, 366 U.S. 420, 452 (1961) (rejecting an Establishment Clause challenge to laws prohibiting commercial activities on Sunday), *with, e.g.*, Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985) (concluding a law giving workers the right not to work on their chosen Sabbath violated the Establishment Clause).

[9] *See* Amdt1.3.4.1 Overview of Financial Assistance to Religion; Lemon v. Kurtzman, 403 U.S. 602 (1971); Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[10] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 818 (2000) (plurality opinion) ("Whether one chooses to label this program 'direct' or 'indirect' is a rather arbitrary choice, one that does not further the constitutional analysis."); Meek v. Pittenger, 421 U.S. 349, 250 (1975) (holding that "it would exalt form over substance" to rule an indirect aid program constitutional when the program was otherwise similar to a direct aid program the Court had previously ruled unconstitutional), *partially overruled by* Mitchell v. Helms, 530 U.S. 793 (2000). *But cf. Zelman*, 536 U.S. at 649, 652–53 (citing Mitchell as a case that recognized the distinction between direct aid programs and programs involving private choice).

[11] *See* Amdt1.3.6.1 Lemon's Purpose Prong.

[12] *See* Amdt1.3.6.2 Overview of Lemon's Effect Prong.

[13] Kennedy v. Bremerton Sch. Dist., No. 21-418, (U.S. June 27, 2022).

[14] *Id.* at 23 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

[15] *See* Amdt1.3.7.2 Coercion and Establishment Clause Doctrine; Amdt1.3.7.3 Establishment Clause and Historical Practices and Tradition.

[1] Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947). *See* Amdt1.3.4.2 Early Cases on Financial Assistance to Religion.

religion.[2] In *Illinois ex rel. McCollum v. Board of Education*, decided in 1948, the Court held that a program allowing private religious teachers to teach religion in public schools violated the "wall of separation between Church and State" referred to in *Everson*.[3] The Court raised concerns about "the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education."[4] The school acted unconstitutionally by using "the State's compulsory public school machinery" to provide pupils for religious classes.[5]

Four years later, the Supreme Court concluded in *Zorach v. Clauson* that a different "released time" program allowing students to leave school grounds to receive religious instruction did not violate the Establishment Clause.[6] By contrast to the program invalidated in *McCollum*, the *Zorach* program "involve[d] neither religious instruction in public school classrooms nor the expenditure of public funds," and used no "coercion to get public school students into religious classrooms."[7] The Court said that while the First Amendment required the "complete and unequivocal" separation of church and state as to matters "within the scope of its coverage," it did not require separation "in every and all aspects."[8] Disallowing the public schools' accommodation of students' "religious needs," according to the Court, would have stretched the separation concept to an undesired "extreme[ ]."[9]

Also drawing on *Everson*, the Court's early cases sometimes reviewed "the background and environment of the period in which [the Establishment Clause] was fashioned and adopted" to analyze whether state laws would be consistent with the Founders' intent.[10] In *Torcaso v. Watkins*, the Supreme Court looked to colonial history with religious test oaths, and held that the "policy of probing religious beliefs by test oaths or limiting public offices to persons who have . . . a belief in some particular kind of religious concept" was "historically and constitutionally discredited."[11] The Court held that a state law requiring public officials to declare a "belief in the existence of God" violated the Establishment Clause because its "purpose" and "effect" was to put "the power and authority of the State . . . on the side of one particular sort of believers."[12] More broadly, the Court declared that the government cannot "pass laws or impose requirements which aid all religions as against non-believers," nor can it "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[13]

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[2] One pre-*Everson* case, *Davis v. Beason* upheld a state law barring those who practiced or advocated bigamy and polygamy from voting in the Idaho Territory. 133 U.S. 333, 345 (1890). The Court held that a state could prohibit practices that are "destructive of society," saying: "Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated." *Id. See also* Selective Draft Law Cases, 245 U.S. 366, 389–90 (1918) (summarily rejecting Establishment Clause challenge to draft law containing limited exemptions for ministers and members of certain religious sects); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904) (summarily rejecting Establishment Clause challenge to immigration law excluding noncitizens found to be anarchists).

[3] Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203, 210–11 (1948).

[4] *Id.* at 209.

[5] *Id.* at 212.

[6] Zorach v. Clauson, 343 U.S. 306, 308, 312 (1952).

[7] *Id.* at 308–09, 311.

[8] *Id.* at 312.

[9] *Id.* at 313, 315.

[10] Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947).

[11] Torcaso v. Watkins, 367 U.S. 488, 490–92, 494 (1961).

[12] *Id.* at 489, 495.

[13] *Id.* at 495.

In *Engel v. Vitale*, the Supreme Court looked to history again to hold unconstitutional a state law requiring a specified prayer to be recited at the beginning of a school day.[14] As part of its analysis, the Court noted that as "a matter of history[,] . . . this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America."[15] The Court further reviewed post-Revolution movements to disestablish religion in the former colonies, concluding that when the First Amendment was adopted, "there was a widespread awareness among many Americans . . . . that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services."[16]

Amdt1.3.5.3 Purpose and Effect Test Before Lemon

First Amendment:

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

In the 1960s, the Court began to move away from the general neutrality principles embodied in the metaphor of a wall separating church and state, focusing more specifically on whether challenged laws had the purpose or effect of aiding religion.[1] To evaluate the constitutionality of state criminal laws prohibiting commercial activities on Sunday, *McGowan v. Maryland* reviewed "the history of Sunday Closing Laws."[2] That review led the Court to conclude that, although "the original laws which dealt with Sunday labor were motivated by religious forces," such laws had subsequently lost "some of their totally religious flavor."[3] Ultimately, the Court accepted the state's judgment "that the [challenged] statutes' present purpose and effect is not to aid religion but to set aside a day of rest and recreation."[4] The Court held that creating a common day of rest embodied a secular purpose, and emphasized that the statute allowed "nonlaboring persons" to engage in a variety of nonreligious Sunday activities.[5] However, the Court cautioned that a law might violate the Establishment Clause if "its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion."[6]

Formalizing this focus on purpose and effect, *School District of Abington Township v. Schempp* clarified:

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[14] Engel v. Vitale, 370 U.S. 421, 424 (1962).

[15] *Id.* at 425.

[16] *Id.* at 428–29.

[1] *See, e.g.,* Torcaso v. Watkins, 367 U.S. 488, 489 (1961).

[2] McGowan v. Maryland, 366 U.S. 420, 432 (1961).

[3] *Id.* at 432–34.

[4] *Id.* at 449. The Court employed a similar analysis to reject Establishment Clause challenges to Sunday Closing laws in three other opinions issued the same day as *McGowan*. Gallagher v. Crown Kosher Super Market, Inc., 366 U.S. 617, 630 (1961) (plurality opinion); Braunfeld v. Brown, 366 U.S. 599, 601 (1961) (plurality opinion); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 598 (1961). *Cf.* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985) (holding that a state law giving workers the right not to work on their chosen Sabbath violated the Establishment Clause, given that the law's "primary effect" was to "impermissibly advance[ ] a particular religious practice").

[5] *McGowan*, 366 U.S. at 450–52.

[6] *Id.* at 453.

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. . . . [T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[7]

The Court applied this analysis in *Schempp* to hold that two states violated the Establishment Clause by requiring schools to begin the school day with Bible readings.[8] One of the states argued that the Bible readings served a secular purpose—promoting moral values and teaching literature.[9] The Court rejected this claim based on evidence showing that the reading was a religious exercise.[10]

Impermissible religious purpose arose again in *Epperson v. Arkansas*, in which the Supreme Court invalidated a state law that prohibited teaching evolution in school.[11] After reviewing the law's history, the Court said there was "no doubt" that the law prohibited "discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man."[12] This purpose of advancing a specific religious doctrine violated the First Amendment.[13] By contrast, the Court concluded that a federal law relieving conscientious objectors from military service did not violate the Establishment Clause, even though it included only objectors whose religious beliefs opposed all wars, excluding objectors opposed only to specific wars.[14] The Court believed that the law's differing treatment of religious objectors did not doom the law where it did not facially discriminate between religions, and critically, where the government had demonstrated that the law served a number of valid secular purposes.[15]

By contrast, the Supreme Court rejected an Establishment Clause challenge to a textbook lending program in *Board of Education v. Allen*, applying the test outlined in *Schempp*.[16] The law required public schools to lend textbooks to students, including students enrolled at private schools.[17] The Court held that the law served a secular purpose—furthering childrens' "educational opportunities"—and that there was no evidence that the law had the effect of impermissibly advancing religion.[18] Among other factors, the Court noted that the textbooks

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[7] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963).

[8] *Id.* at 223–24. The laws allowed individual students to opt out of the readings, but nonetheless required the schools to conduct the readings. *Id.* at 205, 211–12. *See also* Chamberlin v. Dade Cnty. Bd. of Pub. Instruction, 377 U.S. 402, 402 (1964) (per curiam) (holding that a similar state law was unconstitutional under *Schempp*); Wallace v. Jaffree, 466 U.S. 924, 924 (1984) (mem.) (affirming lower court ruling holding state law authorizing teacher-led prayer unconstitutional); Treen v. Karen B., 455 U.S. 913, 913 (1982) (mem.), *aff'g* 653 F.2d 897 (5th Cir. 1981) (ruling state law authorizing student-led prayer during class unconstitutional).

[9] *Schempp*, 374 U.S. at 223.

[10] *Id.* at 224. *See also id.* at 225 ("It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories.").

[11] Epperson v. Arkansas, 393 U.S. 97, 106–07 (1968). *See also* Edwards v. Aguillard, 482 U.S. 578, 593 (1987) (ruling unconstitutional a state law prohibiting teaching evolution unless "creation science" was also taught, where the law's primary purpose was "to advance a particular religious belief").

[12] *Epperson*, 393 U.S. at 107.

[13] *Id.* at 106–07.

[14] Gillette v. United States, 401 U.S. 437, 450 (1971).

[15] *Id.* at 452–54. *See also id.* at 452 ("[A] claimant alleging 'gerrymander' must be able to show the absence of a neutral, secular basis for the lines government has drawn.").

[16] Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968).

[17] *Id.* at 239.

[18] *Id.* at 243–44.

were loaned to students, not parochial schools, and that the program included only secular textbooks.[19] Consequently, the Court concluded the program aided only the secular education conducted in religious schools, rejecting the idea "that the processes of secular and religious training are so intertwined that secular textbooks furnished to students . . . are in fact instrumental in the teaching of religion."[20]

Amdt1.3.6 Non-Financial Assistance to Religion and the Lemon Test

Amdt1.3.6.1 Lemon's Purpose Prong

First Amendment:

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

The Supreme Court's 1971 decision in *Lemon v. Kurtzman* further entrenched the Establishment Clause's focus on purpose and effect, and added a third element to the inquiry: entanglement.[1] Under *Lemon*, to be considered constitutional, laws (1) "must have a secular legislative purpose;" (2) must have a "principal or primary effect . . . that neither advances nor inhibits religion"; (3) and "must not foster 'an excessive government entanglement with religion.'"[2] However, the Court said in 2022 that it had "long ago abandoned *Lemon* and its endorsement test offshoot."[3] Nonetheless, it has not expressly overruled either *Lemon* or most other cases analyzing specific government actions by reference to purpose, effect, or entanglement—so the holdings of those cases remain binding in some courts.[4] Furthermore, even as the Court has shifted its doctrinal framework, over the years, it has sometimes given weight to the same kinds of facts or reasoning over those different frameworks. For those reasons, this essay explains the Court's *Lemon* jurisprudence in some detail.

The first *Lemon* factor focused on the purpose of a government policy.[5] According to the Supreme Court: "When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality . . . ."[6] To determine a law's purpose, courts looked to the "text, legislative history, and implementation of the statute."[7] Accordingly, in ruling one government display of the Ten Commandments unconstitutional, the Supreme Court analyzed the history of the display and

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[19] *Id.* at 243–45.

[20] *Id.* at 248. Subsequent Supreme Court cases approved of textbook lending programs deemed similar to the program upheld in *Allen*. *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 238 (1977); Meek v. Pittenger, 421 U.S. 349, 359 (1975) (plurality opinion). Both *Wolman* and *Meek* were partially overruled on other grounds by Mitchell v. Helms, 530 U.S. 793 (2000).

[1] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). *See also* Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (discussing entanglement as an aspect of the inquiry into a law's effect). *Lemon* is discussed in more detail in Amdt1.3.5.1 Overview of Non-Financial Assistance to Religion.

[2] *Lemon*, 403 U.S. at 612–13 (quoting *Walz*, 397 U.S. at 674).

[3] Kennedy v. Bremerton Sch. Dist., No. 21-418, (U.S. June 27, 2022). *See also* Amdt1.3.6.6 Endorsement Variation on Lemon.

[4] *See, e.g.*, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) (saying lower courts must follow Supreme Court precedent unless it has been specifically overruled by the Court, even if the precedent "appears to rest on reasons rejected in some other line of decisions"). Some cases applying *Lemon* 's effect prong have been expressly overruled. *See* Amdt1.3.6.4 Lemon's Effect Prong and Pervasively Sectarian Institutions.

[5] *Lemon*, 403 U.S. at 612.

[6] McCreary Cnty. v. ACLU, 545 U.S. 844, 860 (2005).

[7] *Id.* at 862 (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000)) (internal quotation marks omitted).

the county orders requiring the display, concluding that the original version had an "unmistakable" religious object, and that subsequent amendments to the display had failed to "cast off the objective so unmistakable in the earlier displays."[8]

It was relatively rare for the Supreme Court to find that a law failed *Lemon*'s first factor, as it said a law would be unconstitutional "only when . . . there was no question that the statute or activity was motivated *wholly* by religious considerations."[9] Thus, the presence of "legitimate secular purposes" could outweigh potential religious purposes.[10] For example, the Court recognized supporting secular education[11] and protecting speech[12] as legitimate secular purposes. Further, to satisfy *Lemon*, the law's purpose did not have to "be unrelated to religion."[13] The Supreme Court has approved of laws that seek to accommodate religion, or to "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[14] For example, in *Wisconsin v. Yoder*, the Court rejected an Establishment Clause challenge to a state decision exempting the Amish from compulsory public education, saying "[t]he purpose and effect of such an exemption are not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society . . . to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose."[15]

However, the Court cautioned that the asserted secular purpose must "be genuine, not a sham, and not merely secondary to a religious objective."[16] The relevant inquiry was whether Congress "act[ed] with the intent of promoting a particular point of view in religious matters."[17] Thus, in one case, the Court ruled unconstitutional a state law relating to the teaching of "creation science," concluding that the law did not further its stated purpose of "academic freedom."[18] Instead, the Court believed that the evidence demonstrated that the primary purpose of the law "was to restructure the science curriculum to conform with a particular religious viewpoint."[19]

Two cases involving government displays of religious symbols further illustrate this first factor of the *Lemon* inquiry. First, in *Stone v. Graham*, the Supreme Court held that a state law requiring public schools to post a copy of the Ten Commandments in classrooms was unconstitutional because it had "no secular legislative purpose."[20] The Court said that the law's "avowed" secular purpose—displaying the Ten Commandments as part of "the fundamental legal code"—could not "blind" it to the law's "plainly religious" purpose.[21] Noting

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[8] *Id.* at 869, 873. *Cf. Kennedy*, slip op. at 30 n.7 (concluding there was no "indelible taint of coercion by association" with prior prayer practices, and analyzing only the more recent prayer practices that it believed were the appropriate subject of the dispute).

[9] Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (emphasis added). *See also, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (ruling unconstitutional a state law authorizing a minute of silence for meditation or voluntary prayer in public schools because the law "had *no* secular purpose").

[10] *See Lynch*, 465 U.S. at 680–81.

[11] *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 240 (1977), *partially overruled on other grounds by* Mitchell v. Helms, 530 U.S. 793 (2000).

[12] *See, e.g.*, Bd. of Educ. v. Mergens, 496 U.S. 226, 248 (1990).

[13] Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987).

[14] *Amos*, 483 U.S. at 335; *see also* Amdt1.5 Relationship Between the Establishment and Free Exercise Clauses.

[15] Wisconsin v. Yoder, 406 U.S. 205, 234 n.22 (1972).

[16] McCreary Cnty. v. ACLU, 545 U.S. 844, 864 (2005).

[17] *Amos*, 483 U.S. at 335.

[18] Edwards v. Aguillard, 482 U.S. 578, 586 (1987).

[19] *Id.* at 593.

[20] Stone v. Graham, 449 U.S. 39, 41 (1980).

[21] *Id.*

that the Ten Commandments were not "integrated into the school curriculum" in any "appropriate" field of study, the Court concluded that the only possible effect of the posting could be "to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments," an impermissible religious objective.[22]

By contrast, in *Lynch v. Donnelly*, the Court rejected an Establishment Clause challenge to a city's Christmas display, which included a crèche along with a number of other decorations such as reindeer, candy-striped poles, and a Christmas tree.[23] The Court said that under these circumstances, the city had stated "legitimate secular purposes": "to celebrate the Holiday and to depict the origins of that Holiday."[24] The religious nature of the crèche had to be viewed in the context of the whole display, and the Court concluded that there was "insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message."[25]

Amdt1.3.6.2 Overview of Lemon's Effect Prong

First Amendment:

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

The second *Lemon* requirement was that a government policy must have a "principal or primary effect . . . that neither advances nor inhibits religion."[1] In 1997, the Supreme Court said it used "three primary criteria . . . to evaluate whether government aid has the effect of advancing religion:" looking to whether laws "result in governmental indoctrination; define [their] recipients by reference to religion; or create an excessive entanglement."[2]

The Supreme Court sometimes discussed the effect inquiry in terms of "incidental" or "indirect" benefits, saying that a policy will not have an impermissible effect if it only incidentally aids religion.[3] For example, the Court has characterized the textbook lending program in *Board of Education v. Allen* and the bus transportation program in *Everson v. Board of Education* as using "primarily secular means to accomplish a primarily secular end," aiding religion only indirectly, rather than as the "primary effect."[4] Similarly, the Court has said a law will not violate *Lemon*'s effect prong "simply because it *allows* churches to advance

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[22] *Id.* at 42. *See also* McCreary Cnty. v. ACLU, 545 U.S. 844, 868 (2005) (holding a courthouse display of the Ten Commandments violated the Establishment Clause, noting "two obvious similarities to" the *Stone* display: "both set out a text of the Commandments as distinct from any traditionally symbolic representation, and each stood alone, not part of an arguably secular display").

[23] Lynch v. Donnelly, 465 U.S. 668, 671 (1984).

[24] *Id.* at 681.

[25] *Id.* at 680.

[1] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). For a discussion of *Lemon*'s abandonment and the relevance of cases in this section, see Amdt1.3.6.1 Lemon's Purpose Prong and Amdt1.3.6.6 Endorsement Variation on Lemon.

[2] Agostini v. Felton, 521 U.S. 203, 234 (1997).

[3] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 683 (1984) (holding that a city's display of a crèche provided only an "indirect, remote, and incidental" benefit to religion); Widmar v. Vincent, 454 U.S. 263, 273–75 (1981) (holding that allowing student groups to use university facilities for religious activities offered only "incidental" benefits to religion). A government policy will also satisfy this prong if it has *no* effect on religion. Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 305 (1985) (rejecting Establishment Clause challenge to federal recordkeeping requirements that would apply only to certain *commercial* activities, with "no impact on petitioners' own *evangelical* activities or on individuals engaged in *volunteer* work for other religious organizations" (emphasis added)).

[4] Sch. Dist. v. Ball, 473 U.S. 373, 393 (1985) (internal quotation marks omitted); *see also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 843–44 (1995) ("Any benefit to religion is incidental to the government's provision of secular [printing] services for secular purposes on a religion-neutral basis.").

religion."[5] Instead, to violate the effect prong, "it must be fair to say that the *government itself* has advanced religion through its own activities and influence."[6] Thus, one relevant concern is whether any aid to religion can be attributed to the government, rather than private parties.[7]

Generally, the Supreme Court has said that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."[8] Thus, following the pre-*Lemon* precedent of *Allen*,[9] the Supreme Court rejected Establishment Clause challenges to school aid programs that were generally available to both religious and nonreligious recipients and supplied discrete secular services controlled by the state, including standardized testing services, speech and diagnostic health services, and off-site therapeutic and remedial services;[10] providing a sign-language interpreter;[11] and allowing religious groups to use school facilities.[12] However, as discussed in more detail elsewhere, the fact that a program is neutral in the sense of even distribution of benefits has not always been dispositive to the inquiry—particularly if the aid was not secular or if it was diverted to religious uses.[13]

Amdt1.3.6.3 Lemon's Effect Prong and Accommodation of Religion

First Amendment:

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

As under the purpose prong, the government may generally accommodate religious activity without violating *Lemon*'s effect prong.[1] For example, in 1987, the Supreme Court rejected a constitutional challenge to a provision in the Civil Rights Act of 1964 that exempted

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[5] Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987).

[6] *Id.* The Court held in *Amos* that a federal statute exempting religious organizations from certain federal nondiscrimination requirements did not violate this principle, finding "no persuasive evidence . . . that the Church's ability to propagate its religious doctrine . . . is any greater now than it was prior to the passage of the relevant law." *Id.* Accordingly, the Court said "any advancement of religion" could not "be fairly attributed to the Government." *Id.*

[7] *See* Mitchell v. Helms, 530 U.S. 793, 809 (2000) (plurality opinion).

[8] Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993).

[9] Bd. of Educ. v. Allen, 392 U.S. 236 (1968); see discussion in Amdt1.3.5.3 Purpose and Effect Test Before Lemon.

[10] Wolman v. Walter, 433 U.S. 229, 240–41, 244, 248 (1977), *partially overruled on other grounds by* Mitchell v. Helms, 530 U.S. 793 (2000).

[11] *Zobrest*, 509 U.S. at 10.

[12] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 113 (2001) (holding elementary school would not violate the Establishment Clause by allowing a religious club to use its facilities); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (holding school board would not violate the Establishment Clause by allowing a church to use its facilities to show a religious film); Bd. of Educ. v. Mergens, 496 U.S. 226, 253 (1990) (holding that Congress could require public secondary schools, as a condition for federal funds, to grant equal access to student religious speech in forums); Widmar v. Vincent, 454 U.S. 263, 274 (1981) (holding university would not violate the Establishment Clause by allowing religious groups to use its facilities on an equal basis as other student groups); *see also* Amdt1.6 Relationship Between Religion Clauses and Free Speech Clause.

[13] *See* Amdt1.3.6.4 Lemon's Effect Prong and Pervasively Sectarian Institutions; Mitchell v. Helms, 530 U.S. 793, 848–49 (2000) (O'Connor, J., concurring in the judgment).

[1] Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334–35 (1987). *See also* Cutter v. Wilkinson, 544 U.S. 709, 713–14 (2005). *Cutter* held that a federal law limiting the federal government's ability to restrict prisoners' religious freedoms was a permissible accommodation under the Establishment Clause. *Id.* at 720. However, the Court clarified that it did not resolve the case under *Lemon*'s three-part test, but "on other grounds." *Id.* at 717 n.6. Its analysis relied primarily on prior Supreme Court precedent

religious organizations from certain employment discrimination provisions.[2] While the Court acknowledged that the exemption "single[d] out religious entities for a benefit," it nonetheless concluded that the Establishment Clause allowed the accommodation, given that the government had "act[ed] with the proper purpose of lifting a regulation that burdens the exercise of religion."[3]

The Court has also warned, however, that "[a]t some point, accommodation may devolve into 'an unlawful fostering of religion.'"[4] Two years earlier, the Court had ruled unconstitutional a state law that barred employers from requiring employees to work on any day that the employee observed as the Sabbath.[5] By giving employees "an absolute and unqualified right not to work on whatever day they designate as their Sabbath," the Court said the law's "primary effect . . . impermissibly advance[d] a particular religious practice."[6] In implicit contrast to the Sunday Closing law approved in *McGowan v. Maryland*,[7] the law specifically referred to the "Sabbath," a religious term, and did not create a *common* day of rest.[8] This law granting an "unyielding weighting in favor of Sabbath observers" could be seen as an example of an impermissible accommodation.[9]

Two other examples further illustrate when laws crossed the line from permissible accommodation to impermissible advancement of religion.[10] In *Larkin v. Grendel's Den*, the Court held that a state law giving "churches and schools the power effectively to veto applications for liquor licenses within a 500-foot radius" violated the Establishment Clause.[11] According to the Court, the law had the impermissible effect of advancing religion: the veto power could be "employed for explicitly religious goals" and the "joint exercise of legislative authority . . . provide[d] a significant symbolic benefit to religion."[12] Similarly, in *Board of Education of Kiryas Joel Village School District v. Grumet*, the Court said that a state had violated the Establishment Clause by drawing a school district that "divide[d] residents according to religious affiliation."[13] The Court believed that the inhabitants of the school district did not merely happen to be "united by common doctrine," but instead said that the state intentionally limited the district to a specific sect, giving that religious group "exclusive control of the political subdivision."[14] This went beyond the bounds of a permissible

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relating to religious accommodations. *Id.* at 720–24. For a discussion of *Lemon*'s abandonment and the relevance of cases in this section that applied the *Lemon* test, see Amdt1.3.6.1 Lemon's Purpose Prong and Amdt1.3.6.6 Endorsement Variation on Lemon.

[2] *Amos*, 483 U.S. at 329–30.

[3] *Id.* at 338.

[4] *Id.* at 334–35 (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 145 (1987)).

[5] Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710–11 (1985).

[6] *Id.* at 709–10.

[7] McGowan v. Maryland, 366 U.S. 420, 432 (1961); *see* Amdt1.3.5.3 Purpose and Effect Test Before Lemon.

[8] *See* Caldor, Inc. v. Thornton, 464 A.2d 785, 792–93 (Conn. 1983).

[9] *Estate of Thornton*, 472 U.S. at 710; *see also* Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 725 (1994) (O'Connor, J., concurring) (giving *Estate of Thornton* as an example of "an accommodation" that violated the Establishment Clause).

[10] *See, e.g.*, *Grumet*, 512 U.S. at 712 ("The question at the heart of these cases is: What may the government do, consistently with the Establishment Clause, to accommodate people's religious beliefs?").

[11] Larkin v. Grendel's Den, 459 U.S. 116, 117 (1982).

[12] *Id.* at 125–26.

[13] *Grumet*, 512 U.S. at 699 (plurality opinion); *accord id.* at 711 (Stevens, J., concurring).

[14] *Id.* at 698 (plurality opinion). *See also id.* ("[A] State may not delegate its civic authority to a group chosen according to a religious criterion.").

accommodation by "singl[ing] out a particular religious sect for special treatment"—the "unconstitutional delegation of political power."[15]

Amdt1.3.6.4 Lemon's Effect Prong and Pervasively Sectarian Institutions

First Amendment:

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

In a series of rulings that were eventually partially overturned, the Supreme Court suggested that providing certain secular materials or services to religious schools could violate *Lemon*'s effect prong because of the pervasively religious character of the schools.[1] Thus, in *Meek v. Pittenger* and *Wolman v. Walter*, the Supreme Court concluded that programs providing instructional materials such as maps or laboratory equipment to nonpublic schools were unconstitutional.[2] The Court held in *Meek* that although the aid was "ostensibly limited to wholly neutral, secular instructional material and equipment," it would "inescapably result[ ] in the direct and substantial advancement of religious activity" because the schools' secular educational functions could not be separated from their predominantly religious activities.[3] In both cases, the Court emphasized that while the programs were open to all private schools, most of the private schools participating in the programs were religious.[4] Thus, the programs had "the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools" participating.[5] The Court recognized in *Wolman* that these rulings were in "tension" with *Board of Education v. Allen*, discussed elsewhere,[6] which had ruled that "secular" textbooks could be provided to religious schools in a way that served nonsectarian educational purposes.[7] That tension was ultimately resolved by *Mitchell v. Helms*, as discussed below.[8]

Building on the reasoning of *Meek* and *Wolman*, the Supreme Court also invalidated programs that offered secular education in private schools in *School District v. Ball* and *Aguilar v. Felton*.[9] *Ball* involved two state programs: a shared time program paying public school employees to teach supplemental classes at religious schools during the school day, and a community education program paying public and nonpublic teachers to lead various classes at religious schools after the school day.[10] For both programs, the Court emphasized the pervasive religious atmosphere in which the classes were being taught, saying there was "a substantial risk" that the religious messages conveyed by the school during its regular

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[15] *Id.* at 706 (majority opinion).

[1] *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 412 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); Wolman v. Walter, 433 U.S. 229, 250–51 (1977), *partially overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

[2] Meek v. Pittenger, 421 U.S. 349, 366 (1975); *Wolman*, 433 U.S. at 251. *Wolman* also held unconstitutional a provision of the state law that funded field trips, citing concerns about private schools' and teachers' control over such activities, but it upheld other kinds of aid that the state law provided. *See id.* at 253–54; 255.

[3] *Meek*, 421 U.S. at 365–66; *accord Wolman*, 433 U.S. at 250.

[4] *Meek*, 421 U.S. at 364; *accord Wolman*, 433 U.S. at 234.

[5] *Meek*, 421 U.S. at 363; *accord Wolman*, 433 U.S. at 250.

[6] Bd. of Educ. v. Allen, 392 U.S. 236 (1968); *see* Amdt1.3.5.3 Purpose and Effect Test Before Lemon.

[7] *Wolman*, 433 U.S. at 251 n.18; *accord* Mitchell v. Helms, 530 U.S. 793, 835–36 (2000) (plurality opinion).

[8] *See Mitchell*, 530 U.S. at 835 (plurality opinion); *id.* at 837 (O'Connor, J., concurring in the judgment).

[9] Sch. Dist. v. Ball, 473 U.S. 373, 397 (1985); Aguilar v. Felton, 473 U.S. 402, 414 (1985).

[10] *Ball*, 473 U.S. at 375–77.

activities would "infuse the supposedly secular classes."[11] Accordingly, the programs "entailed too great a risk of state-sponsored indoctrination."[12] *Aguilar* involved a federal law allowing federal funds to be used to pay public employees teaching in nonpublic schools.[13] Similar to *Ball*, the Court stressed the "pervasively sectarian environment" in which the program was being offered, although it ruled on *Lemon*'s entanglement prong rather than the effect prong.[14]

The Court reconsidered the same federal program in *Agostini v. Felton*, overruling *Aguilar* and partially overruling *Ball* (with respect to the shared time program).[15] The Court said that its prior decisions had erred by assuming that the programs would inevitably result in state-sponsored indoctrination merely because the instruction happened on the premises of a pervasively sectarian school.[16] Instead, the *Agostini* Court emphasized that the federal law allocated public education services "on the basis of criteria that neither favor nor disfavor religion."[17] Ultimately, the Court approved the program because it did not violate "any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."[18]

The 2000 decision *Mitchell v. Helms* revisited *Meek* and *Wolman*, reviewing a federal program authorizing public schools to lend secular materials purchased with federal funds to private schools.[19] The Supreme Court rejected an Establishment Clause challenge to the program and partially overruled *Meek* and *Wolman* in a split decision.[20] The four-Justice plurality opinion applied the "effects" criteria outlined in *Agostini*, ruling that the program was constitutional because it created no indoctrination attributable to the state and did not define the recipients by reference to religion.[21] For the plurality, the program was sufficiently neutral towards religion because it "offer[ed] aid on the same terms, without regard to religion, to all who adequately further [a legitimate secular] purpose."[22] Even if some aid were diverted to religious uses, the plurality would have held, those religious uses "cannot be attributed to the government and [are] thus not of constitutional concern."[23]

Concurring in the judgment, Justice Sandra Sandra Day O'Connor expressed concerns about the "unprecedented breadth" of the plurality's statements about neutrality and

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[11] *Id.* at 387; *accord id.* at 388.

[12] *Id.* at 386. The Court also concluded that the programs impermissibly promoted religion under the endorsement test and that the programs "subsidize[d] the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." *Id.* at 397. To state the latter rationale another way, the program relieved the schools "of an otherwise necessary cost" of providing a religious education. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 12 (1993). These alternate grounds were also overruled, with respect to the shared time program, in *Agostini v. Felton,* 521 U.S. 203, 227–28 (1997).

[13] *Aguilar*, 473 U.S. at 404.

[14] *Id.* at 412–13 (expressing concern that "ongoing inspection" and "a permanent and pervasive state presence in the sectarian schools" would be required to ensure the funded teachers were not engaged in religious indoctrination).

[15] *Agostini*, 521 U.S. at 235. Thus, the Court did not overrule *Ball*'s ruling on the community education program that funded private school teachers. *See id.*

[16] *See id.* at 223. *See also* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13 (1993) ("[T]he Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school.").

[17] *Agostini*, 521 U.S. at 232.

[18] *Id.* at 234.

[19] Mitchell v. Helms, 530 U.S. 793, 802–03 (2000) (plurality opinion).

[20] *See id.* at 835; *id.* at 837 (O'Connor, J., concurring in the judgment).

[21] *Id.* at 808 (plurality opinion).

[22] *Id.* at 810.

[23] *Id.* at 820.

divertibility.[24] In her view, the federal program was constitutional not simply because aid was "distributed on the basis of neutral, secular criteria," but also because restrictions on the funds ensured that "religious schools reap[ed] no financial benefit," and because federal law required the supplied materials to be secular.[25] Justice O'Connor believed that whether the aid had been diverted to religious instruction was a relevant consideration, but concluded that any diversion in this case was "*de minimis*."[26] She agreed with the plurality opinion that *Meek* and *Wolman* erred in assuming without evidence "that secular instructional materials and equipment would be diverted to use for religious indoctrination."[27] For Justice O'Connor, while the mere possibility of diversion was insufficient to doom a program, the Establishment Clause did bar the actual diversion of government aid to religious uses.[28]

Accordingly, following *Mitchell*, the Supreme Court will not assume that government aid will be impermissibly used for religious activities under *Lemon*'s effect prong merely because the recipient has a religious character.[29] Further, it appears that a majority of Justices agreed with Justice O'Connor that actual diversion of aid to religious indoctrination violates the Constitution.[30] Some lower courts have also recognized Justice O'Connor's approach to the neutrality inquiry as controlling.[31] It remains to be seen what effect the "abandonment" of *Lemon* will have on the analysis of aid that is used for religious indoctrination.[32]

Amdt1.3.6.5 Lemon's Entanglement Prong

First Amendment:

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

Under *Lemon*'s "entanglement" prong, a law could create impermissible entanglement either through excessive government surveillance or through its divisive political potential.[1] The Court therefore struck down laws that would require "comprehensive, discriminating, and continuing" government supervision and control of religion,[2] or that impermissibly politicized religion.[3] However, contrary to the language in *Lemon* itself, the Supreme Court did not always

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[24] *Id.* at 837–38 (O'Connor, J., concurring in the judgment).

[25] *Id.* at 848–49.

[26] *Id.* at 849.

[27] *Id.* at 851.

[28] *Id.* at 853; *see also id.* at 858 ("To establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes.").

[29] *Id.* at 828 (plurality opinion); *id.* at 851 (O'Connor, J., concurring in the judgment).

[30] *Id.* at 853 (O'Connor, J., concurring in the judgment); *id.* at 890 (Souter, J., dissenting).

[31] Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1058 (9th Cir. 2007); Columbia Union Coll. v. Oliver, 254 F.3d 496, 504 (4th Cir. 2001); DeStefano v. Emergency Hous. Grp., Inc., 247 F.3d 397, 419 (2d Cir. 2001); *accord* Trinity Lutheran Church of Columbia, Inc. v. Comer, No. 15-577, slip op. at 6 (U.S. June 26, 2017) (Sotomayor, J., dissenting).

[32] Kennedy v. Bremerton Sch. Dist., No. 21-418, (U.S. June 27, 2022). *See also* ArtI.S1.2.1 Origin of Limits on Federal Power.

[1] *See* Marsh v. Chambers, 463 U.S. 783, 798–99 (1983) (Brennan, J., dissenting) (describing *Lemon*'s entanglement prong as involving these two aspects). For a discussion of *Lemon*'s abandonment and the relevance of cases in this section, see Amdt1.3.6.1 Lemon's Purpose Prong and Amdt1.3.6.6 Endorsement Variation on Lemon.

[2] Lemon v. Kurtzman, 403 U.S. 602, 619 (1971). *See also* Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970) (discussing unconstitutional government "surveillance").

[3] *Lemon*, 403 U.S. at 622 (pointing to "the divisive political potential of" the challenged programs and noting that "political division along religious lines was one of the principal evils against which the First Amendment was intended

treat the entanglement prong of the *Lemon* test as a distinct inquiry.[4] Notably, the Supreme Court treated entanglement as an element of *Lemon*'s effect prong in 1997's *Agostini v. Felton*.[5]

To violate the Establishment Clause under *Lemon*'s third prong, an entanglement had to be "excessive," as some "[i]nteraction between church and state is inevitable."[6] The Court has sometimes noted that laws creating permissible accommodations have created "a more complete separation" between church and state, the opposite of a greater entanglement.[7] Further, the Court has concluded that relatively minor oversight or administrative burdens did not qualify as impermissible entanglement.[8] For example, the Court said applying the recordkeeping requirements of the Fair Labor Standards Act to religious organizations did not create an excessive entanglement, emphasizing that the requirements applied only to certain commercial activities, with "no impact on petitioners' own evangelical activities or on individuals engaged in volunteer work for other religious organizations."[9] In another case, the Court concluded minor "custodial oversight" of religious groups, where the law prohibited greater government control or sponsorship of the groups' activities, did not violate the entanglement prong.[10]

By contrast, the Supreme Court said in *Larkin v. Grendel's Den* that a statute giving churches the power to veto liquor licenses for nearby businesses "enmeshe[d] churches in the exercise of substantial governmental powers contrary to our consistent interpretation of the Establishment Clause."[11] According to the Court, "few entanglements could be more offensive" than delegating "discretionary governmental powers" to religious groups.[12]

As discussed in more detail elsewhere,[13] the Supreme Court held in a few decisions in the 1970s and 1980s that providing certain secular materials or services to religious schools violated the effect and entanglement prongs of *Lemon*.[14] Notably, in *Aguilar v. Felton*, the Supreme Court said that a law allowing federal funds to be used to pay public employees teaching in nonpublic schools was unconstitutional "because the supervisory system established by the [implementing city would] inevitably result[ ] in the excessive entanglement of church and state."[15] The Court relied on the fact that the aid was "provided in a pervasively sectarian environment," and assumed that "because assistance is provided in the

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to protect"); Larson v. Valente, 456 U.S. 228, 253–54 (1982) (ruling that the challenged state laws impermissibly politicized religion, selectively imposing "burdens and advantages upon particular denominations").

[4] *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 233 (1997) ("[I]t is simplest to recognize why entanglement is significant and treat it—as we did in *Walz*—as an aspect of the inquiry into a statute's effect."); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) ("We must . . . be sure that the end result—the effect—is not an excessive government entanglement with religion.").

[5] *Agostini*, 521 U.S. at 234.

[6] *Id.* at 233.

[7] Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987) (rejecting an Establishment Clause challenge to a religious exemption from a federal nondiscrimination law); *see also* Bd. of Educ. v. Mergens, 496 U.S. 226, 253 (1990) (noting that prohibiting religious speech in school facilities "might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur").

[8] *See Mergens*, 496 U.S. at 253; Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 305 (1985); Lynch v. Donnelly, 465 U.S. 668, 684 (1984).

[9] *Tony & Susan Alamo Found.*, 471 U.S. at 305.

[10] *Mergens*, 496 U.S. at 253.

[11] Larkin v. Grendel's Den, 459 U.S. 116, 126 (1982).

[12] *Id.* at 127.

[13] *See* Amdt1.3.6.1 Lemon's Purpose Prong.

[14] Wolman v. Walter, 433 U.S. 229, 258 (1977); Meek v. Pittenger, 421 U.S. 349, 372 (1975).

[15] Aguilar v. Felton, 473 U.S. 402, 409 (1985).

form of teachers, ongoing inspection is required to ensure the absence of a religious message."[16] However, these rulings were subsequently overruled.[17] The Supreme Court said it would "no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment," and accordingly, would "also discard the assumption that *pervasive* monitoring of [the funded] teachers is required."[18]

Lemon relied in part on the "divisive political potential" of the school funding programs at issue in that case to find that there was an unconstitutional excessive entanglement.[19] However, the Court later suggested that "political divisiveness alone" is not enough "to invalidate otherwise permissible conduct,"[20] and further, that divisiveness may only be relevant in cases involving "direct subsid[ies]" to religious entities.[21] Notwithstanding these statements, in *Larson v. Valente*, decided in 1982, the Supreme Court held that a state statute imposing "registration and reporting requirements upon only those religious organizations that solicit more than fifty per cent of their funds from nonmembers" violated *Lemon*'s entanglement prong because of its political divisiveness.[22] The opinion first ruled that the law created a denominational preference, triggering strict scrutiny.[23] But after concluding that the law failed strict scrutiny, the Court also went on to apply *Lemon*'s three-part test.[24] The Court said that "the 'risk of politicizing religion'" was "obvious" in a law that selectively imposed burdens on "particular denominations."[25]

Amdt1.3.6.6 Endorsement Variation on Lemon

First Amendment:

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

In *Lynch v. Donnelly*, issued in 1984, Justice Sandra Day O'Connor suggested a "clarification" of *Lemon*.[1] She argued that the Court should ask whether a city's Christmas display had "endorsed Christianity," saying that the first and second prongs of the *Lemon* test relate to endorsement.[2] Justice O'Connor stated: "The purpose prong of the *Lemon* test asks

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[16] *Id.* at 412.

[17] *See* Mitchell v. Helms, 530 U.S. 793, 835 (2000) (plurality opinion) (partially overruling *Meek* and *Wolman*); *id.* at 837 (O'Connor, J., concurring in the judgment) (same); Agostini v. Felton, 521 U.S. 203, 235 (1997) (overruling *Aguilar*).

[18] *Agostini*, 521 U.S. at 234.

[19] Lemon v. Kurtzman, 403 U.S. 602, 621 (1971).

[20] *Agostini*, 521 U.S. at 233–34; Lynch v. Donnelly, 465 U.S. 668, 684 (1984). *Cf.* Lee v. Weisman, 505 U.S. 577, 587–88 (1992) (stating that although divisiveness will not "necessarily invalidate[ ]" attempts to accommodate religion, the "potential for divisiveness" was "of particular relevance" in a case centering "around an overt religious exercise in a secondary school environment where . . . subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation").

[21] *Lynch*, 465 U.S. at 684.

[22] Larson v. Valente, 456 U.S. 228, 230, 253 (1982).

[23] *Id.* at 246–47.

[24] *Id.* at 251–52.

[25] *Id.* at 254 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 695 (1970) (opinion of Harlan, J.)).

[1] Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). *Cf.* Widmar v. Vincent, 454 U.S. 263, 271 n.10 (1981) (noting that by "creating a forum [for speech] the University does not thereby endorse or promote any of the particular ideas aired there"); Engel v. Vitale, 370 U.S. 421, 436 (1962) (holding that "the governmental endorsement of [a specific] prayer" was unconstitutional).

[2] *Lynch*, 465 U.S. at 690.

whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[3] In a later concurrence, Justice O'Connor stated that endorsement should be judged by whether a "reasonable observer" would think the government is endorsing religion.[4]

The Supreme Court as a whole employed this endorsement variation on *Lemon* in a number of cases.[5] For example, in cases involving non-financial aid to religious schools, the Court sometimes asked whether children or the larger community would perceive the challenged government support as an endorsement of religion.[6] Further, like *Lynch v. Donnelly* itself, some of the Court's Establishment Clause cases focusing on endorsement have involved government-sponsored displays or monuments involving religious symbols.[7] In *Lynch*, the Court upheld the display of a crèche as part of a set of holiday symbols, but in *County of Allegheny v. ACLU*, the Court held that a county violated the Establishment Clause by displaying a crèche by itself in a prominent position in a county building.[8] The Court held that the latter display "endorse[d] Christian doctrine."[9] Although there was a sign stating that the crèche was owned by a private religious organization, the Court said that under the circumstances, the sign showed only "that the government is endorsing the religious message of that organization."[10] Addressing a different kind of symbol in *Capitol Square Review & Advisory Board v. Pinette*, the Supreme Court ruled that a public body had not impermissibly endorsed religion when it allowed the Ku Klux Klan to set up a cross in a plaza that had been used as a public forum for a variety of speakers "for many, many years."[11] Given the context, the Court concluded that the cross would be seen as "*private* speech endorsing religion," and not attributed to the government.[12]

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[3] *Id.*

[4] Allegheny Cnty. v. ACLU, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring).

[5] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 307–08 (2000) (holding that a school policy permitting student-led prayer at football games conveyed impermissible endorsement, noting the school's control over the delivery and content of the prayer); Edwards v. Aguillard, 482 U.S. 578, 585 (1987) (applying endorsement version of *Lemon*'s purpose inquiry to hold unconstitutional a state law prohibiting teaching evolution unless "creation science" was also taught); Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (applying endorsement version of *Lemon*'s purpose inquiry to hold unconstitutional a state law authorizing a minute of silence for meditation or voluntary prayer in public schools).

[6] *Compare* Sch. Dist. v. Ball, 473 U.S. 373, 390 (1985) (noting that "[t]he symbolism of a union between church and state is most likely to influence children of tender years"), *partially overruled by* Agostini v. Felton, 521 U.S. 203 (1997), *with* Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (holding that secondary school students were "likely to understand" that a school did not endorse student speech that a federal law required it to host on a nondiscriminatory basis), *and* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (holding that there was "no realistic danger" that allowing a private group to use school facilities for religious activities outside of school hours would be perceived as an endorsement), *and* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 113 (2001) (same).

[7] *See Lynch*, 465 U.S. at 687 (rejecting Establishment Clause challenge to municipal Christmas display that included a crèche).

[8] Cnty. of Allegheny v. ACLU, 492 U.S. 573, 601 (1989).

[9] *Id.* at 598–99, 601.

[10] *Id.* at 600. Similar to *Lynch*, the Court in *County of Allegheny* upheld the county's separate display of a menorah "stand[ing] next to a Christmas tree and a sign saluting liberty." *Id.* at 614 (opinion of Blackmun, J.). Justice Harry Blackmun and Justice Sandra Day O'Connor separately concluded that the display conveyed an essentially secular message of pluralism in the context of winter holidays. *Id.* at 616 (Blackmun, J., concurring); *id.* at 635 (O'Connor, J., concurring). Justice Anthony Kennedy would have allowed the display where he found no evidence of coercion or proselytization. *Id.* at 663–64 (Kennedy, J., concurring in the judgment in part and dissenting in part).

[11] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 766 (1995) (plurality opinion); *see also id.* at 772 (O'Connor, J., concurring) (agreeing that the display did not violate the endorsement test).

[12] Capitol Square Review & Advisory Bd., 515 U.S. at 765 (plurality opinion); *accord id.* at 774 (O'Connor, J., concurring). *See also* Amdt1.6 Relationship Between Religion Clauses and Free Speech Clause. In *Salazar v. Buono*, the Supreme Court somewhat similarly considered whether a federal district court had properly prevented the federal

Amdt1.3.7 Non-Financial Assistance to Religion and Non-Lemon Tests

Amdt1.3.7.1 Abandonment of the Lemon Test

First Amendment:

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

The Supreme Court did not generally apply *Lemon* rigidly, and two years after the decision, the Court described its three factors—purpose, effect, and entanglement—as "helpful signposts" in the Establishment Clause inquiry.[1] These three factors were also part of Establishment Clause jurisprudence before *Lemon*.[2] Since at least the early 1990s, however, the Supreme Court faced calls to reconsider *Lemon*.[3] While some opinions in the beginning of the 2000s continued to use the *Lemon* factors or variations on that test as their primary mode of analysis,[4] the Court ultimately said *Lemon* was "abandoned" in a 2022 opinion.[5]

The Court's 2019 decision in *American Legion v. American Humanist Association* had already limited *Lemon*'s applicability, suggesting that in the future, it would not apply *Lemon* to evaluate "longstanding monuments, symbols, and practices."[6] Instead, a plurality of the Court said such practices should instead be considered constitutional so long as they "follow in" a historical "tradition" of religious accommodation.[7] In 2022's *Kennedy v. Bremerton School District*, the Court said it had "long ago abandoned *Lemon* and its endorsement test offshoot," citing portions of *American Legion* that discussed a number of earlier cases in which the Court did not apply *Lemon*.[8] Instead, moving forward, the Court said the Establishment Clause "must be interpreted by 'reference to historical practices and understandings.'"[9] The analysis

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government from transferring control of public land containing a Latin cross that was erected by a private group as a World War I memorial. 559 U.S. 700, 705–06 (2010) (plurality opinion). The lower court had initially ruled that the monument conveyed impermissible endorsement, and then further concluded that transferring the land was not a permissible way to remedy this constitutional violation. *Id.* at 708–11. A three-Justice plurality suggested that the memorial was consistent with the Establishment Clause, and concluded that the district court had erred by viewing Congress's "policy of accommodation" as embodying "an illicit governmental purpose." *Id.* at 717–19. Two other Justices would have reversed the ruling on standing grounds. *Id.* at 729 (Scalia, J., concurring in the judgment).

[1] Hunt v. McNair, 413 U.S. 734, 741 (1973); *see also* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[2] Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987).

[3] *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) ("[W]e do not accept the invitation of petitioners and amicus the United States to reconsider our decision in Lemon v. Kurtzman . . . ."); *see also* McCreary Cnty. v. ACLU, 545 U.S. 844, 861 (2005) ("[T]he Counties ask us to abandon *Lemon*'s purpose test, or at least to truncate any enquiry into purpose here.").

[4] *See* Salazar v. Buono, 559 U.S. 700, 705–06 (2010) (plurality opinion) (analyzing the constitutionality of a Latin cross war memorial using the endorsement test); McCreary Cnty. v. ACLU, 545 U.S. 844, 859–60 (2005) (reaffirming the use of the *Lemon* test in analyzing the constitutionality of a Ten Commandments display, particularly the purpose prong).

[5] Kennedy v. Bremerton Sch. Dist., No. 21-418, (U.S. June 27, 2022).

[6] Am. Legion v. Am. Humanist Ass'n, No. 17-1717, slip op. at 16, 25 (U.S. June 20, 2019) (plurality opinion). *See also id.* at 6 (Thomas, J., concurring in judgment) (stating that he "would take the logical next step and overrule the *Lemon* test in all contexts"). Some Justices had previously written that *Lemon* should not apply to monuments, but had not gathered a majority coalition for such a holding. *See* Van Orden v. Perry, 545 U.S. 677, 686 (2005) (plurality opinion) (saying that *Lemon* was "not useful" to analyze a "passive monument," and that its analysis was instead "driven both by the nature of the monument and by our Nation's history"); Allegheny Cnty. v. ACLU, 492 U.S. 573, 595 (1989) (opinion of Blackmun, J.) (stating that the endorsement test "provide[d] a sound analytical framework for evaluating governmental use of religious symbols").

[7] *Am. Legion*, slip op. at 28.

[8] *Kennedy*, No. 21-418, slip op. at 22; *Am. Legion*, No. 17-1717, slip op. at 13.

[9] *Kennedy*, slip op. at 23 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

in *Kennedy* itself referred to the Court's prior cases on coercion, suggesting that will also provide an appropriate mode of analysis in the future.[10]

Amdt1.3.7.2 Coercion and Establishment Clause Doctrine

First Amendment:

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

Particularly in the context of government-sponsored prayer practices, the Supreme Court has sometimes evaluated Establishment Clause challenges by looking for impermissible government coercion.[1] Although the Court has said the Establishment Clause is concerned with many aspects of the relationship between government and religion,[2] "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."[3]

The Supreme Court has accordingly held that the government violates the Establishment Clause where there is coercion, including "indirect coercive pressure."[4] In *Engel v. Vitale*, the Court clarified that a law requiring a specific prayer to be recited in schools was unconstitutional even though participation was voluntary, in the sense that students could opt out.[5] Similarly, in *Lee v. Weisman*, the Court held that a high school violated the Establishment Clause with its involvement in prayers at high school graduations.[6] The school had "decided that an invocation and a benediction should be given," chosen "the religious participant" to give that invocation, and offered guidelines directing the content of the prayers.[7] The Court's opinion stressed the "heightened concerns with . . . subtle coercive pressure in the elementary and secondary public schools."[8] Under the circumstances, the Court said that "the dissenter of high school age" would have "a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow."[9] In *Santa Fe Independent School District v. Doe*, the Court again held that a school policy permitting student-led prayer at football games created impermissible coercion.[10] Although many students could freely choose whether to attend games, the delivery of a pregame prayer "over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to

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[10] *Id.* at 24–30.

[1] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310 (2000).

[2] Engel v. Vitale, 370 U.S. 421, 431 (1962).

[3] Lee v. Weisman, 505 U.S. 577, 587 (1992).

[4] *Id.* at 430–311. *Cf., e.g.*, Allegheny Cnty. v. ACLU, 492 U.S. 573, 659–60 (1989) (Kennedy, J., dissenting) (giving examples of impermissible coercion as including "taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing").

[5] *Engel*, 370 U.S. at 433.

[6] *Lee*, 505 U.S. at 587.

[7] *Id.* at 587–88.

[8] *Id.* at 592.

[9] *Id.* at 593. The dissent disagreed with analysis, saying courts should interpret the Establishment Clause by reference to historical practices of coercion rather than "psychological coercion." *Id.* at 631–32 (Scalia, J., dissenting). Justice Clarence Thomas has continued to assert this criticism, arguing that the Establishment Clause is violated only by *legal* coercion, Van Orden v. Perry, 545 U.S. 677, 693 (2005) (Thomas, J., concurring), effected "by force of law and threat of penalty," Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in the judgment) (quoting *Lee*, 505 U.S. at 640 (Scalia, J., dissenting)).

[10] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310 (2000).

a school policy that explicitly and implicitly encourages public prayer" nonetheless had "the improper effect of coercing those present to participate in an act of religious worship."[11]

The Supreme Court has reached different conclusions with respect to policies involving adults. For example, in *Lee*, the Supreme Court distinguished a prior case that rejected an Establishment Clause challenge to prayers at state legislative sessions, noting the "obvious differences" between a session "where adults are free to enter and leave" and a graduation ceremony, "the one school event most important for the student to attend."[12] Further, in a case where *parents* chose whether or not to allow their students to attend the meetings of a private religious club, the Supreme Court held that the school would not create impermissible coercion merely by allowing the meetings to occur on school premises after school hours.[13]

In *Kennedy v. Bremerton School District*, the Court considered whether a school would have violated the Establishment Clause by allowing a football coach to pray at the fifty yard line immediately after football games.[14] The school argued that the coach impermissibly coerced students to join his prayers, noting that the coach had previously led students in prayer before games and conducted overtly religious inspirational talks after games, and some students felt pressured to participate in the earlier prayers.[15] The Court concluded those arguments were not relevant because the school's disciplinary action against the coach focused on later instances when the coach "did not seek to direct any prayers to students."[16] In comparison to *Santa Fe*, the Court concluded that the coach's prayers "were not publicly broadcast or recited to a captive audience," and students were not "expected to participate."[17] People who saw or heard his prayers on the 50-yard line could be offended, but not coerced, in the Court's view.[18] The Court further said that the school could not require teachers to "eschew any visible religious expression," because that would impermissibly "preference secular activity."[19]

More broadly, *Kennedy* said that in the future, courts should evaluate Establishment Clause challenges "by 'reference to historical practices and understandings.'"[20] The Supreme Court acknowledged that while coercion "was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment," the Justices "have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause."[21] The Court did not expressly resolve those open disputes, ruling instead that in *Kennedy*, the coach's "private religious

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[11] *Id.* at 310, 312.

[12] *Lee*, 505 U.S. at 596–97 (discussing Marsh v. Chambers, 463 U.S. 783 (1983)). *See also* Town of Greece v. Galloway, 572 U.S. 565, 590 (2014) (plurality opinion) ("[I]n the general course legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate."); *see also id.* at 591 ("The inclusion of a brief, ceremonial prayer as part of a larger exercise in civic recognition suggests that its purpose and effect are to acknowledge religious leaders . . . rather than to exclude or coerce nonbelievers.").

[13] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 115–16 (2001)

[14] Kennedy v. Bremerton Sch. Dist., No. 21-418, slip op. at 20 (U.S. June 27, 2022).

[15] *Id.* at 26–27; *id.* at 4–5, 18 (Sotomayor, J., dissenting).

[16] *Id.* at 26.

[17] *Id.* at 30.

[18] *Id.* at 26–27.

[19] *Id.* at 28.

[20] *Id.* at 23 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

[21] *Id.* at 25.

exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion."[22]

Amdt1.3.7.3 Establishment Clause and Historical Practices and Tradition

First Amendment:

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

As previously discussed, the Supreme Court has long evaluated Establishment Clause challenges in part by reference to historical understandings of the Clause.[1] That mode of analysis did not disappear after the Court's decision in *Lemon*,[2] and eventually became the Court's primary mode of analysis, as further discussed below.[3] However, while earlier cases largely relied on history to rule government actions unconstitutional, post-*Lemon* cases largely pointed to historical tradition to uphold government actions that the Court saw as permissible accommodations of religion.[4] For example, in an opinion rejecting an Establishment Clause challenge to a city's Christmas display, the Court noted the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."[5]

In the 2019 decision *American Legion v. American Humanist Association*, a split majority of the Supreme Court rejected a constitutional challenge to a Latin Cross erected as a World War I memorial.[6] The plurality opinion (with some support from Justice Clarence Thomas, concurring in the judgment) stated that "longstanding monuments, symbols, and practices" should not be evaluated under *Lemon* 's tripartite analysis, but should instead be considered constitutional so long as they "follow in" a historical "tradition" of religious accommodation.[7] A majority of the Court acknowledged that the cross was a Christian symbol, but decided that "the symbol took on an added secular meaning when used in World War I memorials."[8] Among other factors, the Court emphasized that the monument had "stood undisturbed for nearly a century" and had "acquired historical importance" to the community.[9] Consequently, the Court

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[22] *Id. Cf. id.* at 30 (Sotomayor, J., dissenting) (arguing that the Court's opinion focused on direct coercion and did not account for earlier Supreme Court precedent recognizing that "indirect coercion may [also] raise serious establishment concerns").

[1] *See* Amdt1.3.5.2 Early Cases on Non-Financial Assistance to Religion.

[2] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("The Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees.").

[3] Kennedy v. Bremerton Sch. Dist., No. 21-418, slip op. at 23 (U.S. June 27, 2022).

[4] *Compare, e.g.*, *Lynch*, 465 U.S. at 681 (upholding a Christmas display that "depict[ed] the historical origins" of the event, consistent with prior accommodations taking "note of a significant historical religious event"), *and* Van Orden v. Perry, 545 U.S. 677, 686 (2005) (plurality opinion) (citing *Lynch* and looking to "our Nation's history" and factual context to uphold a Ten Commandments monument on the grounds of the Texas State Capitol), *with, e.g.*, Engel v. Vitale, 370 U.S. 421, 429–30 (1962) (holding a school prayer practice was contrary to Founding Era history), *and* Torcaso v. Watkins, 367 U.S. 488, 491–92 (1961) (invalidating a religious test oath after concluding history "discredited such oaths").

[5] *Lynch*, 465 U.S. at 674.

[6] Am. Legion v. Am. Humanist Ass'n, No. 17-1717, slip op. at 28 (U.S. June 20, 2019).

[7] *Id.* at 16, 25, 28 (plurality opinion). *See also id.* at 6 (Thomas, J., concurring in judgment) (agreeing with the plurality opinion rejecting *Lemon*'s "relevance" to certain claims but saying that he "would take the logical next step and overrule the *Lemon* test in all contexts").

[8] *Id.* at 28.

[9] *Id.* at 28, 31.

concluded that "destroying or defacing the Cross . . . would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment."[10]

The Supreme Court had previously applied an analysis looking to historical traditions in two cases involving prayer at state and local legislative sessions.[11] In 1983's *Marsh v. Chambers*, the Court noted that "opening . . . sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[12] It upheld the state's prayer practice after concluding that the public employment of the legislative chaplain and the "Judeo-Christian" nature of the prayers were consistent with historical practices, given that "there [was] no indication that the prayer opportunity ha[d] been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[13] The Supreme Court engaged in a similar analysis in 2014's *Town of Greece v. Galloway*, ruling that a municipality's challenged prayer practices "fit[ ] within the tradition long followed in Congress and the state legislatures."[14] The Court rejected an argument that the prayers should be considered unconstitutional because they were identified with a single religion, saying that some of the early prayers during congressional sessions had a "decidedly Christian nature."[15] These legislative prayer cases were presumably encompassed in the *American Legion* plurality's reference to "longstanding . . . practices,"[16] although future cases will have to elucidate what other government activities may be described by that phrase.

In 2022's *Kennedy v. Bremerton School District*, the Court ruled definitively that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[17] While the Court's opinion said Establishment Clause analysis should focus "on original meaning and history,"[18] its own analysis of the school prayer practice at issue in that case proceeded by looking to prior cases on coercion.[19] Apart from stating generally that coercion was part of "a historically sensitive understanding" of the Clause, the Court did not look to evidence of original meaning or Founding-era history relevant to the specific disputed practice.[20] Accordingly, the opinion left open a number of questions regarding how to analyze any disputed government action by reference to historical tradition.

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[10] *Id.* at 31.

[11] Town of Greece v. Galloway, 572 U.S. 565, 591–92 (2014); Marsh v. Chambers, 463 U.S. 783, 793 (1983).

[12] *Marsh*, 463 U.S. at 786.

[13] *Id.* at 793–95.

[14] *Town of Greece*, 572 U.S. at 577.

[15] *Id.* at 578–79. *See also id.* at 583–84 (looking to prayers offered to Congress to "discern . . . a commonality of theme and tone" and concluding that "[t]he prayers delivered in the town of Greece do not fall outside the tradition this Court has recognized").

[16] *See* Am. Legion v. Am. Humanist Ass'n, No. 17-1717, slip op. at 16 (U.S. June 20, 2019) (plurality opinion).

[17] Kennedy v. Bremerton Sch. Dist., No. 21-418, slip op. at 23 (U.S. June 27, 2022) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

[18] *Id.* at 24.

[19] *See id.* at 24–30. The coercion analysis in the case is discussed in Amdt1.3.7.2 Coercion and Establishment Clause Doctrine.

[20] *See id.* at 25.

Amdt1.4 Free Exercise Clause

Amdt1.4.1 Overview of Free Exercise Clause

First Amendment:

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

The First Amendment's Free Exercise Clause forbids Congress from "prohibiting the free exercise" of religion.[1] The general framework for the Supreme Court's Free Exercise jurisprudence was largely established in the 1940 case *Cantwell v. Connecticut*, which also gave the Supreme Court the opportunity to apply the Free Exercise Clause to the states.[2] In *Cantwell*, the Court explained that the Religion Clauses "embrace[ ] two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[3] Starting with the first freedom, as explored in more detail in a subsequent essay,[4] the Free Exercise Clause "categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such."[5]

The Court also clarified in *Cantwell* that religious actions, as opposed to beliefs, are "subject to regulation for the protection of society."[6] However, the Court cautioned that the government must exercise its regulatory power cautiously so it does not "unduly . . . infringe" religious freedom.[7] Therefore, a law that burdens but does not directly regulate religious belief is not categorically prohibited but will likely still be subject to constitutional scrutiny. Over the years, the Court has fleshed out standards to determine when regulations of religious conduct unduly infringe constitutionally protected free exercise. These standards have differed over time and circumstances, as discussed in the following essays.

The prevailing standard governing most laws was established in 1990's *Employment Division v. Smith*, in which the Supreme Court ruled that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[8] This statement echoed early, pre-*Cantwell* cases involving free exercise challenges to criminal laws prohibiting polygamy in U.S. territories.[9] In these cases,

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[1] U.S. Const. amend. I.

[2] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (holding that the Free Exercise Clause had been incorporated against the states through the Fourteenth Amendment); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 262 (1934) (holding that the "'liberty' protected by the due process clause" of the Fourteenth Amendment includes the right to hold and teach certain religious beliefs). *See also* Amdt14.S1.4.2 Early Doctrine on Incorporation of the Bill of Rights.

[3] *Cantwell*, 310 U.S. at 303–04. *See also* Sause v. Bauer, No. 17-742, slip op. at 2 (U.S. June 28, 2018) ("Prayer unquestionably constitutes the 'exercise' of religion. At the same time, there are clearly circumstances in which a police officer may lawfully prevent a person from praying at a particular time and place.");

[4] Amdt1.4.2 Laws Regulating Religious Belief.

[5] McDaniel v. Paty, 435 U.S. 618, 626 (1978) (plurality opinion).

[6] *Cantwell*, 310 U.S. at 304. *See also* Braunfeld v. Brown, 366 U.S. 599, 603–04 (1961) (plurality opinion) ("[L]egislative power . . . may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion."); Sherbert v. Verner, 374 U.S. 398, 403 (1963) (noting that the government may regulate religiously motivated actions under otherwise valid laws that protect "public safety, peace or order").

[7] *Cantwell*, 310 U.S. at 304.

[8] *See* Emp. Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

[9] Late Corp. of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) [hereinafter *LDS*]; Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1845). *LDS* and *Davis* involved laws attaching

the Supreme Court rejected the challenges brought by those who practiced religiously motivated polygamy, holding that the government could permissibly prohibit polygamy and the defendants' religious beliefs could not excuse them from punishment.[10] Similarly, early cases rejected the idea that conscientious objectors had a constitutional right "to avoid bearing arms," in light of Congress's broad war powers authority.[11] Although *Smith* hearkened back to these earlier cases,[12] the opinion's lenient standard of constitutional scrutiny departed from some cases in the mid-twentieth century that had suggested the government needed a compelling interest to apply a facially neutral law in a way that burdened a person's religious activity.[13]

Even after *Smith*, though, a law that imposes special burdens on religious activities may not be considered neutral or generally applicable and will likely trigger heightened scrutiny.[14] Accordingly, one critical factor in evaluating Free Exercise Clause challenges has been whether a law discriminates against religion in its text, purpose, or effect.[15] As one opinion cautioned, "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[16]

Although it has not always been an explicit part of its analysis, the Supreme Court has suggested in some decisions that a government policy does not violate the Free Exercise Clause unless it has some coercive effect towards a person's religious exercise.[17] While recognizing that "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions," may violate the First Amendment, the Court has further clarified that "incidental effects of government programs" with "no tendency to coerce individuals into acting contrary to their religious beliefs" do not trigger heightened constitutional scrutiny.[18] For example, the Court rejected a free exercise challenge to a program that allowed public schools to release students during the school day to take religious classes at private religious institutions.[19] The program did not involve any free exercise issue, in the Court's view, because it did not involve coercion: no one was "forced to go to the religious classroom and no religious

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legal consequences to the criminal practice of polygamy: a business's dissolution and a person's disenfranchisement. *Cf.* Cleveland v. United States, 329 U.S. 14, 20 (1946) (concluding that religious motivation did not negate criminal intent in polygamy prosecution); Miles v. United States, 103 U.S. 304, 310–11 (1880) (holding that because religion was not a defense to a polygamy prosecution, the constitutional rights of a juror in a bigamy trial "could not" be violated by inquiring "whether he himself was living in polygamy, and whether he believed it to be in accordance with the divine will and command").

[10] *LDS*, 136 U.S. at 50; *Davis*, 133 U.S. at 341–42; *Reynolds*, 98 U.S. at 166. In *Reynolds*, the Court looked to the long historical precedent of laws prohibiting polygamy. *Id.* at 164–66. In the other two cases, the Court appeared to take a more normative approach, saying that to call advocating polygamy "a tenet of religion is to offend the common sense of mankind," *Davis*, 133 U.S. at 341–42, and describing the religious belief in the practice of polygamy a "pretence" and "sophistical plea" for engaging in criminal activity, *LDS*, 136 U.S. at 49.

[11] United States v. Macintosh, 283 U.S. 605, 624 (1931).

[12] *See Smith*, 494 U.S. at 879, 882 (citing *Reynolds* and conscientious objector caselaw as support).

[13] Sherbert v. Verner, 374 U.S. 398, 403 (1963); *see* Amdt1.4.3.2 Laws Neutral to Religious Practice from the 1960s through the 1980s.

[14] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

[15] *See* Amdt1.4.4 Laws that Discriminate Against Religious Practice.

[16] Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (plurality opinion).

[17] Bd. of Educ. v. Allen, 392 U.S. 236, 248–49 (1968) (rejecting a free exercise challenge to a textbook lending program because the challengers had not alleged the program "coerce[d] them as individuals in the practice of their religion"). *See also* Tilton v. Richardson, 403 U.S. 672, 689 (1971) (plurality opinion) (rejecting a free exercise challenge to a federal program offering grants for constructing academic facilities because the challengers could not "identify any coercion directed at the practice or exercise of their religious beliefs").

[18] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988); *see also* Amdt1.4.3.3 Laws Neutral to Religious Practice and Internal Government Affairs.

[19] Zorach v. Clauson, 343 U.S. 306, 308 (1952).

exercise or instruction [was] brought to the classrooms of the public schools."[20] Accordingly, the Court has sometimes held that where a government action does not require regulated entities to act in a way that their religious beliefs prohibit, there is no Free Exercise Clause violation.[21] Essentially, a law that does not regulate belief or burden religious exercise will not violate the Free Exercise Clause.[22]

Amdt1.4.2 Laws Regulating Religious Belief

First Amendment:

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

The Supreme Court has long held that the Free Exercise Clause prohibits "any governmental regulation of religious *beliefs* as such," as opposed to "overt *acts* prompted by religious beliefs or principles."[1] The Constitution categorically prohibits the government from compelling "the acceptance of any creed or the practice of any form of worship."[2] Accordingly, a law that expressly requires declaring a specific religious belief will violate the Free Exercise Clause.[3] In *Torcaso v. Watkins*, decided in 1961, the Supreme Court held that a state constitutional provision requiring public officeholders to declare a "belief in the existence of God" violated the Free Exercise Clause.[4] Although the Court noted the "historical precedent" for such "religious test oaths" in Europe and in the Colonies,[5] it held that the adoption of the U.S. Constitution and the First Amendment, combined with countervailing evidence of opposition to the oaths during colonial times, rendered religious test oaths "historically and

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[20] *Id.* at 311.

[21] *See, e.g.*, Jimmy Swaggart Ministries v. Cal. Bd. of Equalization, 493 U.S. 378, 391–92 (1990) (holding that a generally applicable sales and use tax, applied to religious materials, imposed "no constitutionally significant burden on appellant's religious practices or beliefs"); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 18 (1989) (plurality opinion) (saying that the Free Exercise Clause did not require a sales tax exemption for religious publications where there was no evidence that the payment of the tax "would offend . . . religious beliefs or inhibit religious activity"); Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 303–04 (1985) (rejecting free exercise challenge to federal law that would require a religious employer to compensate employees, saying that although they held religious objections to cash wages, the required compensation could come in the form of benefits). *Cf.* Native Am. Church of Navajoland, Inc. v. Ariz. Corp. Comm'n, 329 F. Supp. 907, 910 (D. Ariz. 1971) (rejecting free exercise challenge to a state denial of corporate status based on the corporation's stated purpose to advocate for religious peyote use, saying that the state's refusal to grant corporate status "by itself does not infringe in any significant way on the free exercise of their religious practices"), *aff'd*, 405 U.S. 901 (1972) (mem.).

[22] *Tony & Susan Alamo Foundation*, 471 U.S. at 303.

[1] Sherbert v. Verner, 374 U.S. 398, 402–03 (1963) (emphasis added in second quotation); *accord* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

[2] Braunfeld v. Brown, 366 U.S. 599, 603 (1961) (plurality opinion); *accord Sherbert*, 374 U.S. at 402. *See also, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 106 (1968) (holding that a state law prohibiting teaching evolution in public schools violated both Religion Clauses, saying "the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma").

[3] Torcaso v. Watkins, 367 U.S. 488, 495–96 (1961). *Cf., e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that a school violated the First Amendment by expelling a student who, citing religious objections, refused to comply with a state law requiring teachers and pupils to salute the flag). Although the Supreme Court cited *Barnette* in at least one later case as involving a Free Exercise claim, *see* Everson v. Bd. of Educ., 330 U.S. 1, 15 n.22 (1947), other Supreme Court cases have treated *Barnette* as an interpretation of the Free Speech Clause, *see, e.g.*, United States v. United Foods, 533 U.S. 405, 410 (2001); Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion). The *Barnette* opinion itself said its resolution of the case did not "turn on [the student's] possession of particular religious views," suggesting that other "citizens who do not share these religious views" might similarly object to this "compulsory rite" and would also receive constitutional protection. *Id.* at 634–35.

[4] *Torcaso*, 367 U.S. at 489 (quoting Md. Const. Declaration of Rights art. 37).

[5] *Id.* at 489–90.

constitutionally discredited."[6] By "limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept," the state law violated constitutional free exercise protections.[7]

The First Amendment's "absolute prohibition of infringements on the 'freedom to believe'" does not apply to laws that are "directed primarily at status, acts, and conduct."[8] However, even when courts are considering conduct-focused laws, the constitutional prohibition on regulation of belief can sometimes limit the bounds of judicial inquiry.[9] For example, in *United States v. Ballard*, the Supreme Court held that it would violate the Free Exercise Clause for a jury to determine whether criminal defendants' religious beliefs were true or false.[10] The defendants were charged with mail fraud after promoting a religious movement that claimed supernatural healing powers.[11] The district court had instructed the jury only to consider whether the defendants "honestly and in good faith" held their beliefs.[12] The court of appeals, in contrast, held that the defendants could only be convicted of fraud if the government proved that the defendants' beliefs, as they stated them, were false.[13] The Supreme Court did not decide whether the jury could consider the *sincerity* of the defendants' beliefs, as the district court thought, but it definitively rejected the court of appeals' view that the jury should decide the *truth* of those beliefs, citing the absolute prohibition on government regulation of belief.[14] The Court stated that "[h]eresy trials are foreign to our Constitution."[15] The Court later emphasized that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[16] Neither do religious beliefs have to comport with the "dogma of an established religious sect."[17]

The Court later reached the question it did not squarely resolve in *Ballard*, clarifying that although courts may not probe the truth of an individual's religious beliefs, they may assess the sincerity or good faith with which the individual holds those beliefs in evaluating the

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[6] *Id.* at 491–92, 494.

[7] *Id.* at 494, 496.

[8] McDaniel v. Paty, 435 U.S. 618, 627 (1978) (plurality opinion). In *McDaniel*, a plurality of the Court concluded that a state provision barring ministers from serving as delegates to a state constitutional convention did not operate because of the ministers' *beliefs*, as prohibited by *Torcaso*, but instead disqualified ministers based on their *status*. *Id.* at 627. The plurality opinion nonetheless applied a heightened level of scrutiny and held the law unconstitutional. *Id.* at 629. Two Justices would have held that the law unconstitutionally regulated belief. *Id.* at 631–32 (Brennan, J., concurring in the judgment). *McDaniel*, and cases exploring the additional distinction between laws operating based on religious status versus religious activity, are discussed Amdt1.4.4 Laws that Discriminate Against Religious Practice, and Amdt1.5 Relationship Between the Establishment and Free Exercise Clauses.

[9] The Supreme Court has suggested that Congress is similarly limited when it outlines protections for religious belief. *See* United States v. Seeger, 380 U.S. 163, 184 (1965) (interpreting scope of federal conscientious objector law broadly, citing, among other considerations, the government's inability to question the validity of religious objectors' beliefs). *Cf.* Rusk v. Espinosa, 456 U.S. 951 (1982) (mem.), *aff'g* 634 F.2d 477 (10th Cir. 1980) (holding that city ordinance exempting "religious" groups from solicitation regulations violated the Free Exercise Clause as an impermissible prior restraint, because it gave administrative official overbroad discretion to determine what was religious).

[10] United States v. Ballard, 322 U.S. 78, 88 (1944).

[11] *Id.* at 79–80.

[12] *Id.* at 81–82.

[13] *Id.* at 83.

[14] *Id.* at 86.

[15] *Id.*

[16] Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981).

[17] *Id.* at 715–16; Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 834 (1989). *Cf.* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 724 (2014) (saying the courts have "no business" addressing whether a religious belief is "reasonable" when interpreting a federal statute protecting religious exercise).

merits of a free exercise claim or defense.[18] A belief must be religious rather than secular to enjoy First Amendment protection,[19] and the Supreme Court has suggested there may be some claims "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause."[20] Accordingly, courts may also scrutinize a claimed belief to ensure that it is religious in nature rather than secular, and in the course of that inquiry, may evaluate evidence showing the centrality of a belief to a certain faith.[21] Citing early cases upholding criminal laws prohibiting polygamy,[22] the Court has rejected the claim that "any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment."[23] While "[t]he determination of what is a 'religious' belief or practice" may be "a difficult and delicate task," it may not depend on the government's "perception of the particular belief or practice."[24]

Amdt1.4.3 Laws Neutral to Religious Practice

Amdt1.4.3.1 Laws Neutral to Religious Practice during the 1940s and 1950s

First Amendment:

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

The Supreme Court's early cases interpreting the Free Exercise Clause did not articulate one clear standard for evaluating claims under that clause, although some consistent principles did emerge, particularly in cases dealing with similar fact patterns.

Starting with *Cantwell v. Connecticut* in 1940 and continuing through the following two decades, the Supreme Court considered a series of cases involving state and local regulations restricting solicitation or other activity in public spaces, as applied to people engaged in religious speech.[1] Many of these cases invoked both the First Amendment's Free Exercise and Free Speech Clauses.[2] Some cases striking down restrictions on religious speech seemed to draw from free speech jurisprudence outlining protections for speech in public forums.[3]

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[18] *See, e.g.*, *Frazee*, 489 U.S. at 833; *Thomas*, 450 U.S. at 716; *Seeger*, 380 U.S. at 185.

[19] *E.g.*, *Frazee*, 489 U.S. at 833. For additional discussion of how the Supreme Court has defined the scope of beliefs protected by the Religion Clauses, see Amdt1.2.1 Overview of the Religion Clauses (Establishment and Free Expression Clauses).

[20] *Thomas*, 450 U.S. at 715. *Cf.* Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571 (1942) (rejecting a Free Exercise Clause challenge to a prosecution of a pastor under a statute prohibiting offensive addresses, saying the Court could not "conceive that cursing a public officer is the exercise of religion in any sense of the term," but further holding that even if the activity was religious, that would not shield "concomitant acts committed in violation of a valid criminal statute").

[21] *See* Wisconsin v. Yoder, 406 U.S. 205, 216–17 (1972).

[22] See discussion Amdt1.4.1 Overview of Free Exercise Clause.

[23] Murdock v. Pennsylvania, 319 U.S. 105, 109–10 (1943).

[24] *Thomas*, 450 U.S. at 714. *See also, e.g.*, Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) ("[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment.").

[1] *See* Cantwell v. Connecticut, 310 U.S. 296, 300 (1940).

[2] *See, e.g.*, Kunz v. New York, 340 U.S. 290, 293–94 (1951) (holding that a city violated the First Amendment by revoking a minister's permit based on his ridicule of other religious beliefs, citing cases interpreting and applying both the Free Exercise and Free Speech Clauses); *see also* Amdt1.6 Relationship Between Religion Clauses and Free Speech Clause.

[3] *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 507–09 (1946) (holding that, as applied to a person distributing religious literature, a state law prohibiting trespass and a company town policy prohibiting the distribution of

Similarly, the Court held unconstitutional under the Free Exercise Clause regulations that it believed were impermissibly broad and discretionary prior restraints on religious speech.[4]

In *Cantwell*, for example, the Court held that a state violated the Free Exercise Clause in convicting a man and his two sons under a state law that prohibited unapproved solicitations.[5] The man had played a religious record in the street, and his usual practice was to request that listeners would buy further religious materials.[6] The Court acknowledged that the state may generally regulate solicitation if the regulation "does not involve any religious test and does not unreasonably obstruct or delay the collection of funds."[7] However, the regulation challenged in *Cantwell* allowed a licensing official to decide whether any given solicitation was "religious" and should be approved.[8] In the Court's view, this broad discretion placed "a forbidden burden upon the exercise of liberty protected by the Constitution."[9]

Concerns about impermissible prior restraints also drove the decision in *Murdock v. Pennsylvania*, in which the Court held that a city could not require religious groups to pay for a license in order to distribute religious literature.[10] The Court emphasized first that the "hand distribution of religious tracts is an age-old form of missionary evangelism" that enjoyed the same "protection as the more orthodox and conventional exercises of religion" such as "preaching from the pulpits."[11] Further, the fact that the religious groups sought contributions did not "transform [their] evangelism into a commercial enterprise" that would merit lessened constitutional protection.[12] The Court distinguished taxes on a preacher's income or property (which it suggested might be allowed) from the challenged city ordinance, because the city's licensing tax "restrain[ed] *in advance* those constitutional liberties of press and religion and inevitably tend[ed] to suppress their exercise."[13] Before its decision in *Murdock*, the Court had previously approved a similar license fee, stating that religious groups could be subject to reasonable fees when they "use the ordinary commercial methods of sales."[14] However, the Court vacated that decision approving the license fee when it issued *Jones*, concluding that the

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literature violated the First Amendment, citing protections for speech and religion and a public interest in ensuring "that the channels of communication remain free"); Tucker v. Texas, 326 U.S. 517, 520 (1946) (applying *Marsh* to rule unconstitutional a similar application of a different state's law); Jamison v. Texas, 318 U.S. 413, 414, 416 (1943) (ruling unconstitutional under the Free Speech and Free Exercise Clauses a municipal ordinance prohibiting the distribution of handbills, emphasizing that a person lawfully on a public street retains speech rights). *See also* Amdt1.7.7.1 The Public Forum.

[4] *See Kunz*, 340 U.S. at 293; Niemotko v. Maryland, 340 U.S. 268, 273 (1951); Follett v. Town of McCormick, 321 U.S. 573, 577 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 114 (1943); Jones v. City of Opelika, 319 U.S. 103, 104 (1943) (mem.); Largent v. Texas, 318 U.S. 418, 422 (1943); *Cantwell*, 310 U.S. at 305. *See also* Amdt1.4.4 Laws that Discriminate Against Religious Practice; Amdt1.7.2.3 Prior Restraints on Speech.

[5] *Cantwell*, 310 U.S. at 303. The Court also held that the First Amendment precluded a breach-of-the-peace conviction based on this conduct. *Id.* at 311.

[6] *Id.* at 303.

[7] *Id.* at 305.

[8] *Id.*

[9] *Id.* at 307. *See also Largent*, 318 U.S. at 422 (holding that a city's permitting system involving discretionary judgments was "administrative censorship" that "abridge[d] the freedom of religion, of the press and of speech," in the context of a conviction for distributing religious books).

[10] Murdock v. Pennsylvania, 319 U.S. 105, 114 (1943).

[11] *Id.* at 108–09.

[12] *Id.* at 110–11.

[13] *Id.* at 112, 114 (emphasis added).

[14] Jones v. Opelika, 316 U.S. 584, 597–98 (1942), *vacated*, 319 U.S. 103 (1943) (mem.). Among other factors, the Court in *Jones* emphasized that the fee did not constitute a "complete prohibition," was "nondiscriminatory" in the sense that it applied to all booksellers equally, and did not vest "discretionary power in the public authorities to refuse a license to any one desirous of selling religious literature." *Id.* at 596, 598.

groups "were engaged in a . . . religious venture" rather than a commercial one.[15] In subsequent cases, the Court made clear that *Murdock* bars only flat license taxes that operate as preconditions on exercising constitutional rights.[16]

By contrast, in *Poulos v. New Hampshire*, the Supreme Court held that a city could require religious groups to comply with a permitting scheme to conduct meetings in a public park.[17] The Supreme Court "assume[d]" that the permitting scheme entitled religious groups to hold religious services in the park "at reasonable hours and times."[18] Based on that assumption, the Court upheld the permitting scheme as a reasonable "regulation" rather than "suppression" of speech.[19] It also interpreted the law as giving licensing officials "no discretion as to granting permits, no power to discriminate, no control over speech."[20] Accordingly, the scheme was "not the kind of prepublication license" held unlawful in cases like *Murdock* and others, but instead "a ministerial, police routine for adjusting the rights of citizens so that the opportunity for effective freedom of speech may be preserved."[21]

Other cases from this time period similarly rejected Free Exercise Clause challenges to laws that the Court characterized as reasonable regulations.[22] One example is *Prince v. Massachusetts*, in which a woman was convicted of violating a state child labor law for distributing religious materials and soliciting donations with her minor niece.[23] The defendant argued that this application of the law violated her and her niece's freedom of religion.[24] The Supreme Court acknowledged that the Free Exercise Clause protected "[t]he rights of children to exercise their religion, and of parents to give them religious training and to encourage them

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[15] *Murdock*, 319 U.S. at 111; Jones v. City of Opelika, 319 U.S. 103, 104 (1943) (mem.). *See also* Follett v. Town of McCormick, 321 U.S. 573, 574–75, 577 (1944) (ruling it unconstitutional to impose a flat license tax "in all material respects the same as the ones involved in" *Jones* and *Murdock* on a resident preacher).

[16] *See* Jimmy Swaggart Ministries v. Cal. Bd. of Equalization, 493 U.S. 378, 389 (1990) (holding that *Murdock* and *Follett* "apply only where a flat license tax operates as a prior restraint on the free exercise or religious beliefs," and did not bar the application of a "generally applicable sales and use tax" to religious materials); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 24 (1989) (plurality opinion) (holding that *Murdock* and *Follett* would not bar the application of a general sales tax to religious publications).

[17] Poulos v. New Hampshire, 345 U.S. 395, 402–04 (1953).

[18] *Id.* at 408.

[19] *Id.* at 408.

[20] *Id.* at 404. The state officials had in fact denied the defendant a permit to conduct religious activity in a park and arrested him after he held unapproved services, apparently exercising discretion in their control over speech. *See id* at 397. Although this action was contrary to the Court's construction of the statute, the Court nevertheless concluded that the defendant could still be prosecuted for proceeding with the services instead of appealing the city's denial decision. *Id.* at 414.

[21] *Id.* at 403. *See also* Cox v. New Hampshire, 312 U.S. 569, 578 (1941) (rejecting a Free Exercise Clause challenge to a statute prohibiting processions on public streets).

[22] *See, e.g.*, Jones v. Opelika, 316 U.S. 584, 596–98 (1942) (involving a licensing scheme for booksellers, as applied to sales that the Court said were "partaking more of commercial than religious or educational transactions"), *vacated*, 319 U.S. 103 (1943) (mem.); Minersville School Dist. v. Gobitis, 310 U.S. 586, 597–98 (1940) (involving a requirement for school children to participate in a flag salute, which the Court said served the government's legitimate interest in national unity), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). *Cf. In re* Summers, 325 U.S. 561, 571, 573 (1945) (rejecting a conscientious objector's Free Exercise Clause challenge to a licensing scheme requiring attorneys to swear to support the state constitution and its provision requiring military service, emphasizing "the right of Congress to require military service from every able-bodied man" and the lack of any purpose to discriminate against religious groups); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 262–63 (1934) (saying a constitutional right for religious objectors to avoid military training as a condition of university attendance was "untenable" in light of citizens' duty "to support and defend government").

[23] Prince v. Massachusetts, 321 U.S. 158, 159–62 (1944).

[24] *Id.* at 164. The Court noted that the plaintiff's claim under the Free Exercise Clause was "buttresse[d] . . . with a claim of parental right as secured by the due process clause of the [Fourteenth] Amendment." *Id.* The case also involved an equal protection claim, which the Court similarly rejected. *Id.* at 170–71.

in the practice of religious belief."[25] Nonetheless, the Court also recognized that the state has broad powers to regulate child welfare, and additionally ruled that the state has greater authority "over children's activities . . . than over like actions of adults."[26] The Court declined to apply heightened scrutiny as urged by the defendant, instead accepting the state's conclusion that "an absolute prohibition" on child labor in certain places was "necessary to accomplish its legitimate objectives."[27]

These early cases dealing with burdens placed on religion by facially neutral laws outlined general principles; their main importance was in establishing that general regulations in the public interest were constitutional so long as they did not run afoul of doctrines prohibiting prior restraints or protecting speech in public forums. However, some early cases hinted at a potentially more rigorous standard of review that would emerge in the 1960s. *Murdock*, for example, ruled that the flat license tax was "not narrowly drawn to safeguard the people of the community in their homes against the evils of solicitations."[28] Another case expressed concern about a licensing scheme that lacked "narrowly drawn, reasonable and definite standards for the officials to follow."[29] Other cases emphasized that laws permissibly regulated religious activity in part because they did not reveal any purpose to discriminate against certain religions or to bar religious exercise.[30] The Court would pick up each of these threads in future cases.

Amdt1.4.3.2 Laws Neutral to Religious Practice from the 1960s through the 1980s

First Amendment:

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

In the 1960s through the 1980s, the Supreme Court began to apply a heightened level of scrutiny in many Free Exercise Clause challenges—although the precise contours of this heightened scrutiny were inconsistent, both in the particulars of the test and in its application.

In 1961's *Braunfeld v. Brown*, business owners who observed the Saturday Sabbath challenged a law requiring their businesses to close on Sundays.[1] Although the law was facially neutral as to religion, the merchants argued the law burdened their religious exercise by either compelling them "to give up their Sabbath observance" or putting them "at a serious economic disadvantage" if they closed for the entire weekend.[2] A plurality of the Court cautioned that courts should not unduly constrain "legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself."[3] The plurality held that "if the State regulates conduct by enacting a general law within its

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[25] *Prince*, 321 U.S. at 165.

[26] *Id.* at 167–68.

[27] *Id.* at 170. The Court further said that "[s]treet preaching" could be "regulated within reasonable limits" for adults and could be prohibited for "children not accompanied by an older person." *Id.* at 169.

[28] Murdock v. Pennsylvania, 319 U.S. 105, 116 (1943). The Court emphasized that the state might have been able to achieve its goals with more narrow restrictions, such as registration requirements, "nominal" fees, or more narrowly drawn proscriptions on certain types of solicitation. *Id.* at 116–17.

[29] Niemotko v. Maryland, 340 U.S. 268, 271 (1951).

[30] Tucker v. Texas, 326 U.S. 517, 520 (1946); *In re Summers*, 325 U.S. 561, 571, 571 (1945).

[1] Braunfeld v. Brown, 366 U.S. 599, 601 (1961) (plurality opinion). Sunday closing laws also engendered a number of Establishment Clause challenges. *See* Amdt1.3.5.3 Purpose and Effect Test Before Lemon.

[2] *Braunfeld*, 366 U.S. at 601–02.

[3] *Id.* at 603, 606.

power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."[4] In the Court's view, the Sunday closing law had a valid secular purpose and effect in creating a common day of rest,[5] and there were no effective alternative measures that would achieve this purpose without incidentally burdening religious freedom.[6] Although the opinion seemed to state a somewhat heightened standard of review, the Court upheld the law after concluding that proposed alternative schemes that would accommodate the business owners "might well" be less effective at achieving the state's goals.[7] Subsequent cases similarly seemed to suggest that laws placing only "incidental burdens" on religious beliefs might be more readily upheld.[8]

The Court articulated and applied a heightened standard of review to evaluate a free exercise claim in *Sherbert v. Verner*, issued just two years after *Braunfeld*.[9] A state had denied unemployment benefits to an employee who was fired after refusing to work on the Sabbath, claiming the employee was ineligible for benefits because she had "failed, without good cause . . . to accept suitable work."[10] The Supreme Court held first that this denial burdened the employee's religious exercise by forcing "her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[11] The Court then said that to justify this "substantial infringement" of her rights, the state could not show "merely . . . a rational relationship to some colorable state interest," but would have to demonstrate that its policy served a "compelling state interest"[12]—an element seemingly not required in *Braunfeld*.[13] The Court held that the state had not met its burden, as its concerns about fraudulent claims filed by "unscrupulous claimants feigning religious objections to Saturday work" were unsupported by the record.[14] Further, the state had not shown that "alternative forms of regulations" could not "combat such abuses without infringing First Amendment rights."[15] This stood in contrast to *Braunfeld*, which the Court said involved a "less direct burden upon religious practices," and where the alternative methods appeared to pose such significant administrative problems that they "would have rendered the entire statutory scheme unworkable."[16]

A number of subsequent decisions seemed to follow *Sherbert*'s heightened scrutiny standard, particularly in the unemployment benefits context. Additional decisions in the 1980s

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[4] *Id.* at 607.

[5] *See id.*; McGowan v. Maryland, 366 U.S. 420, 507 (1961) (opinion of Frankfurter, J.) (rejecting the Free Exercise Clause claims in *Braunfeld* after concluding the law had this valid secular purpose).

[6] *Braunfeld*, 366 U.S. at 608 (plurality opinion); *accord McGowan*, 366 U.S. at 520 (opinion of Frankfurter, J.).

[7] *Braunfeld*, 366 U.S. at 608–09 (plurality opinion).

[8] *See, e.g.*, Gillette v. United States, 401 U.S. 437, 462 (1971) (rejecting Free Exercise Clause challenge to federal law exempting from military service only those who objected, on religious grounds, to participating in *all* wars, not those with religious objections to a *particular* war, saying the law's "incidental burdens" on religious beliefs were "strictly justified by substantial governmental interests"); Johnson v. Robison, 415 U.S. 361, 385 (1974) (rejecting Free Exercise Clause challenge to federal law excluding conscientious objectors from veterans' benefits, citing *Gillette* to conclude that the law's "incidental burden" on religion was justified by the government's "substantial interest in raising and supporting armies").

[9] Sherbert v. Verner, 374 U.S. 398, 406 (1963).

[10] *Id.* at 399–401 (quoting S.C. Code Ann. § 68-114 (1952)).

[11] *Id.* at 404.

[12] *Id.* at 406.

[13] *See* Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (plurality opinion).

[14] *Sherbert*, 374 U.S. at 407.

[15] *Id.* at 407.

[16] *Id.* at 408–09.

held that states had failed to satisfy the compelling interest test in denying unemployment benefits to those who lost employment based on religious objections to the nature of their assigned tasks[17] or to working on certain days.[18] These decisions can be seen as the Court applying the general doctrine of unconstitutional conditions, which holds that the government cannot infringe constitutional rights "by the denial of or placing of conditions upon a benefit or privilege."[19]

In another decision, *Wisconsin v. Yoder*, the Court seemed to apply a *Sherbert*-like form of heightened scrutiny.[20] The case involved Amish parents who held religious objections to sending their children to high school and violated a state compulsory attendance law.[21] Although the Court recognized the state's "interest in universal education" as generally compelling, it held that such interest was "not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children."[22] After noting that the law's effect on the Amish parents' religious exercise was "not only severe, but inescapable," and would "gravely endanger if not destroy the free exercise" of their beliefs,[23] the Court said it had to "searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16."[24] The Court concluded that the evidence did not suggest the law was so necessary to serve the state's interests as "to justify the [law's] severe interference with religious freedom."[25]

The Court again applied a heightened form of scrutiny in *United States v. Lee*, although in that case it rejected a free exercise challenge to the forced payment of social security taxes.[26] An employer raised religious objections to accepting or paying into the national social security

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[17] Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 719 (1981) (involving a religious objection to making armaments, a newly assigned role for the employee).

[18] Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 831, 833 (1989) (involving a sincere religious objection to working on Sunday, which was held to be protected even though the challenger "was not a member of an established religious sect or church"); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987) (involving a religious objection to working on the Sabbath). *Cf.* Luetkemeyer v. Kaufmann, 364 F. Supp. 376, 386 (W.D. Mo. 1973) (rejecting free exercise challenge to provisions excluding private schools from a school transportation program, noting the state's compelling interest in "insist[ing] upon a degree of separation of church and state"), *aff'd*, 419 U.S. 888 (1974) (mem.).

[19] *Sherbert*, 374 U.S. at 404–05; *see also* Amdt1.7.13.1 Overview of Unconstitutional Conditions Doctrine. *Cf.* Bowen v. Roy, 476 U.S. 693, 706, 703 (1986) (plurality opinion) (ruling that a statutory requirement for benefits claimants to provide a Social Security number did not "place a direct condition or burden on the dissemination of religious views"); Native Am. Church of Navajoland, Inc. v. Ariz. Corp. Comm'n, 329 F. Supp. 907, 910 (D. Ariz. 1971) (rejecting free exercise challenge to a state denial of corporate status based on group's religiously motivated activity, saying that the state's refusal to grant corporate status "by itself does not infringe in any significant way on the free exercise of their religious practices"), *aff'd*, 405 U.S. 901 (1972) (mem.).

[20] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[21] *Id.* at 207.

[22] *Id.* at 214, 221; *see also id.* at 215 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."). Further, distinguishing the child labor law that was upheld in *Prince v. Massachusetts,* 321 U.S. 158, 169–70 (1944), the Court said the state's compulsory education law did not confront "any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare." *Yoder*, 406 U.S. at 230. *Prince* is discussed in more detail in Amdt1.4.3.1 Laws Neutral to Religious Practice during the 1940s and 1950s.

[23] *Yoder*, 406 U.S. at 218–19.

[24] *Id.* at 221.

[25] *Id.* at 227. Although this language could be seen as going to the law's fit, or tailoring, the Court phrased the inquiry largely in terms of the state's interest. *See id.* at 228–29 (saying that after reviewing evidence on the law's purpose and effects, "Wisconsin's interest in compelling the school attendance of Amish children to age 16 emerges as somewhat less substantial than requiring such attendance for children generally").

[26] United States v. Lee, 455 U.S. 252, 254 (1982).

system.[27] The Court said the government could justify the law's infringement on his religious liberty by showing the law was "essential to accomplish an overriding governmental interest."[28] After describing the government's interest in "mandatory and continuous participation in" the social security system as "very high," the Court held that "it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs."[29] Accordingly, "religious belief" could not provide a "basis for resisting the tax."[30] More broadly, the Court declared that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[31] Justice John Paul Stevens, in a concurring opinion, suggested that this decision was in "tension" with *Sherbert*.[32]

Subsequent decisions of the Court attempted to reconcile the tension between the two standards in various ways. In *Bob Jones University v. United States*, a religious university argued that racial nondiscrimination requirements infringed upon its religious beliefs prohibiting interracial dating and marriage.[33] The Supreme Court held that the government had satisfied *Sherbert*'s compelling interest test, citing *Lee* for the idea that the government may sometimes burden religious liberty.[34] Another opinion rejected a constitutional challenge to a federal decision to tax certain payments for religious services, saying that *Sherbert*'s compelling interest test applied only if the government had "placed a substantial burden on the observation of a central religious belief or practice."[35] However, the Court in that case said that under *Lee*, even a substantial religious burden would be justified by the government's interest in maintaining a uniformly applicable tax system.[36] In another case involving a Free Exercise Clause challenge to a sales and use tax applied to religious materials, the Court concluded *Sherbert*'s compelling interest standard did not apply where the challenger's religious beliefs did not "forbid payment" of the tax, holding that the collection and payment of the tax imposed "no constitutionally significant burden on appellant's religious practices or beliefs."[37]

In *Bowen v. Roy*, involving a religious objection to the federal government's assignment and use of Social Security numbers, a plurality of the Court agreed that public benefits laws

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[27] *Id.* at 255–56. The law contained a religious exemption available to self-employed individuals, for which he did not qualify. *Id.* at 256.

[28] *Id.* at 258. As support for this standard, the Court cited *Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972); *Gillette v. United States,* 401 U.S. 437, 462 (1971); and *Sherbert v. Verner,* 374 U.S. 398, 406 (1963). *Lee*, 455 U.S. at 257–58. As discussed above, these three cases could be seen as articulating slightly different standards for evaluating Free Exercise Clause claims.

[29] *Lee*, 455 U.S. at 259–60.

[30] *Id.* at 260.

[31] *Id.* at 261.

[32] *Id.* at 263 n.3 (Stevens, J., concurring).

[33] Bob Jones Univ. v. United States, 461 U.S. 574, 602–03 (1983).

[34] *Id.* at 603–04.

[35] Hernandez v. Commissioner, 490 U.S. 680, 699 (1989).

[36] *Id.* at 699–700.

[37] Jimmy Swaggart Ministries v. Cal. Bd. of Equalization, 493 U.S. 378, 391–92 (1990). The Court distinguished prior cases invalidating flat license taxes as unconstitutional prior restraints by saying concerns that the tax would "act as a *precondition* to the free exercise of religious beliefs" were "simply not present where a tax applies to all sales and uses of tangible personal property in the State." *Id.* at 387. Those prior cases evaluating flat license taxes, Murdock v. Pennsylvania, 319 U.S. 105 (1943), and Follett v. Town of McCormick, 321 U.S. 573 (1944), are discussed *supra* Amdt1.4.3.1 Laws Neutral to Religious Practice during the 1940s and 1950s.

should not be subject to the heightened standard of *Sherbert* and *Yoder*.[38] The Court drew a distinction between "government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs" and "governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons."[39] Further, the plurality suggested that the heightened scrutiny applied in *Sherbert* was motivated by concerns specific to the state law's "'good cause' standard," which "created a mechanism for individualized exemptions" that opened the door for religious discrimination.[40] Applying a less rigorous standard, the *Bowen* plurality rejected a free exercise challenge to a federal law requiring benefits applicants to provide a Social Security number, saying there was no evidence "suggesting antagonism by Congress towards religion generally or towards any particular religious beliefs."[41] The Social Security number requirement "clearly promote[d]" the government's stated interest in preventing fraud—a "legitimate and important public interest."[42] The *Bowen* plurality's views on the appropriate standards to evaluate Free Exercise Clause challenges would be largely vindicated with the Supreme Court's 1990 decision in *Employment Division v. Smith*, discussed in a subsequent essay.[43]

Amdt1.4.3.3 Laws Neutral to Religious Practice and Internal Government Affairs

First Amendment:

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

Two Supreme Court cases from the late 1980s held that the First Amendment's Free Exercise Clause is not implicated by internal government procedures—at least, so long as the internal policy is generally applicable and facially neutral towards religion.[1] The religious challenger in *Bowen v. Roy* believed that by assigning his daughter a Social Security number and using that number to administer certain government programs, her spirit had been robbed.[2] The Supreme Court rejected the father's constitutional challenge, saying "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own

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[38] Bowen v. Roy, 476 U.S. 693, 706–08 (1986) (plurality opinion).

[39] *Id.* at 706. *See also* Emp. Div., Dep't of Human Res. of Or. v. Smith, 485 U.S. 660, 671–74 (1988) (saying that *Sherbert* might have been decided differently "if the employees had been discharged for engaging in criminal conduct," and remanding the case to the lower courts to reconsider a free exercise challenge to a denial of unemployment benefits, instructing the courts to consider whether religiously motivated peyote use was constitutionally protected or prohibited by state criminal law); Reynolds v. United States, 98 U.S. 145, 166 (1845) (rejecting a free exercise challenge to a criminal prosecution for bigamy).

[40] *Bowen*, 476 U.S. at 708.

[41] *Id.*

[42] *Id.* at 709. The plaintiffs also challenged the federal government's internal use of Social Security numbers. *See* Amdt1.4.3.3 Laws Neutral to Religious Practice and Internal Government Affairs.

[43] Emp. Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990); *see* Amdt1.4.3.4 Laws Neutral to Religious Practice and Current Doctrine.

[1] *Cf.* Fulton v. City of Philadelphia, No. 19-123, slip op. at 8 (U.S. June 17, 2021) (concluding that prior "cases involving internal government affairs" were not relevant to a government policy that was not generally applicable, noting that the Court has "never suggested that the government may discriminate against religion when acting in its managerial role").

[2] Bowen v. Roy, 476 U.S. 693, 696, 699 (1986). The religious challengers also objected to having to provide a Social Security number in order to obtain certain benefits. *Id.* at 699. That aspect of the case is discussed in Amdt1.4.3.2 Laws Neutral to Religious Practice from the 1960s through the 1980s.

internal affairs in ways that comport with the religious beliefs of particular citizens."[3] The Court further said that the Clause "affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures."[4] In the Court's view, the federal government's use of a Social Security number did not "in any degree impair" the father's free exercise of religion.[5]

The Supreme Court extended this principle in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, holding that the federal government could allow timber harvesting in a national forest that had "historically been used for religious purposes" by certain Native American tribes.[6] The Court declined to analyze the law under any heightened form of scrutiny, although it acknowledged that—as in *Roy*—the government's action would "interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs."[7] Critically, though, the Court further concluded that the government's action would not coerce anyone into violating their religious beliefs or "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[8] While prior cases had held that "indirect coercion or penalties on" religion could trigger heightened constitutional scrutiny, the Court distinguished prohibitions on religious activity from "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs."[9] Even assuming that the government's decision about how to use the public land would destroy the tribes' ability to practice their religion, the Court said that the First Amendment could not give citizens the ability to "veto . . . public programs that do not prohibit the free exercise of religion."[10]

Amdt1.4.3.4 Laws Neutral to Religious Practice and Current Doctrine

First Amendment:

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

In the 1990 decision *Employment Division v. Smith*, the Supreme Court attempted to reconcile its various standards for evaluating Free Exercise Clause challenges, limiting the heightened scrutiny of *Sherbert v. Verner* to a specific context and outlining a lower level of scrutiny for many other government actions.[1] Specifically, in *Smith*, the Court rejected a free exercise claim brought by two members of a Native American church.[2] The state had denied them unemployment benefits after they were fired for using peyote in violation of state

[3] *Roy*, 476 U.S. at 699.

[4] *Id.* at 700.

[5] *Id.*

[6] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 441–42 (1988).

[7] *Id.* at 447–49.

[8] *Id.* at 449.

[9] *Id.* at 450–51.

[10] *Id.* at 451–52.

[1] Emp. Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 884–85 (1990). Sherbert v. Verner, 374 U.S. 398 (1963), is discussed in more detail in Amdt1.4.3.2 Laws Neutral to Religious Practice from the 1960s through the 1980s.

[2] *Smith*, 494 U.S. at 874.

criminal drug laws.[3] The church members argued that this denial of benefits impermissibly burdened their religious practice, because they had used peyote for sacramental purposes.[4] The Supreme Court disagreed, stating that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."'[5]

The majority opinion in *Smith* acknowledged that some prior Supreme Court decisions, such as *Sherbert*, had applied a heightened standard that required the government to demonstrate that any substantial burdens on religion were justified by a compelling governmental interest.[6] However, the Court said those earlier cases concerned laws that were not truly "generally applicable," and had "nothing to do with an across-the-board criminal prohibition on a particular form of conduct."[7] Instead, those cases involved systems like unemployment benefit programs in which the government decided case by case whether to apply laws through "individualized . . . assessment[s]."[8] Because individual exemption decisions presented a greater risk of religious discrimination, they required a heightened standard of review.[9] By contrast, the criminal laws in *Smith* generally prohibited using certain drugs and were "not specifically directed at [the church members'] religious practice."[10] The Court noted that other cases such as *United States v. Lee* and *Braunfeld v. Brown*[11] had upheld the application of generally applicable laws to religiously motivated conduct.[12]

The majority opinion also said that some of the other cases applying a heightened standard of review to invalidate government actions violating the Free Exercise Clause had involved "hybrid" claims, in which plaintiffs claimed the government had violated additional constitutional rights beyond the free exercise of religion.[13] The Court placed its early cases dealing with religious speech in this category, noting they also implicated First Amendment protections for speech and press.[14] In contrast, the benefits claimants in *Smith* presented "a free exercise claim unconnected with any communicative activity" or any other right.[15]

The Court's opinion relied in part on its belief that applying a "'compelling interest' test" in any claim involving the application of a law to religious motivated action "would be courting anarchy."[16] A rule deeming such applications "*presumptively invalid* . . . . would open the prospect of constitutionally required religious exemptions from civic obligations of almost

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[3] *Id.*

[4] *Id.*

[5] *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

[6] *Id.* at 883; *see also* Amdt1.4.3.2 Laws Neutral to Religious Practice from the 1960s through the 1980s.

[7] *Smith*, 494 U.S. at 884.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 878.

[11] United States v. Lee, 455 U.S. 252 (1982), and Braunfeld v. Brown, 366 U.S. 599 (1961) (plurality opinion), are discussed in Amdt1.4.3.2 Laws Neutral to Religious Practice from the 1960s through the 1980s.

[12] *Smith*, 494 U.S.at 880.

[13] *Id.* at 881–82.

[14] *Id.* at 881. These early cases are discussed in Amdt1.4.3.1 Laws Neutral to Religious Practice during the 1940s and 1950s. The Court also characterized *Wisconsin v. Yoder,* 406 U.S. 205 (1972), discussed inAmdt1.4.3.2 Laws Neutral to Religious Practice from the 1960s through the 1980s, as such a hybrid claim, involving "the right of parents . . . to direct the education of their children." *Smith*, 494 U.S. at 881.

[15] *Smith*, 494 U.S. at 882.

[16] *Id.* at 888.

every conceivable kind."[17] This aspect of the Court's decision drew from prior cases that had expressed similar concerns[18] in attempting to avoid outcomes that would "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[19] For example, in a prior case involving a religious objection to internal government procedures, the Court had said that the government "simply could not operate if it were required to satisfy every citizen's religious needs and desires."[20]

Accordingly, after *Smith*, the Court has deemed burdens on free exercise that are "merely the incidental effect of a generally applicable and otherwise valid provision" not to violate the First Amendment.[21] However, some judges and commentators found *Smith* "controversial."[22] Although the Court has so far resisted calls to overrule the case,[23] subsequent cases discussed in another essay have explored limitations on the doctrine, effectively continuing to apply heightened constitutional scrutiny in a way that frequently requires government accommodation of religious exercise.[24] Specifically, *Smith* left open the possibility that some form of heightened scrutiny would apply to laws that were not generally applicable or neutral towards religion.[25] In addition, by declining to overrule *Sherbert* and its progeny, *Smith* suggested that the compelling interest test might still apply in certain circumstances, potentially when statutory schemes require "individualized governmental assessment."[26] The Court has not yet elaborated on *Smith*'s discussion of "hybrid" constitutional claims which might also trigger heightened scrutiny.[27]

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[17] *Id.*

[18] *See id.* at 885 (citing Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) and Reynolds v. United States, 98 U.S. 145 (1845)).

[19] *Reynolds*, 98 U.S. at 167.

[20] *Lyng*, 485 U.S. at 452; *see also id.* ("The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.").

[21] *Smith*, 494 U.S. at 878. *See also* Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 697 n.27 (2010) (citing *Smith* to reject a free exercise claim in which a religious student group sought "an exemption" from a university's "across-the-board" policy generally requiring school-approved student groups to accept all comers).

[22] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, No. 16-111, slip op. at 1 (U.S. June 4, 2018) (Gorsuch, J., concurring). In addition, Congress responded to *Smith* by adopting the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–bb-4, and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc–cc-5, which create a statutory cause of action with a heightened form of scrutiny for certain government actions imposing a substantial burden on religious exercise. RFRA was ruled partly unconstitutional in *City of Boerne v. Flores,* 521 U.S. 507, 536 (1997), discussed in more detail in in Amdt14.S5.4 Modern Doctrine on Enforcement Clause. RLUIPA was upheld against an Establishment Clause challenge in *Cutter v. Wilkinson,* 544 U.S. 709, 720 (2005), briefly discussed in Amdt1.3.6.3 Lemon's Effect Prong and Accommodation of Religion and Amdt1.6 Relationship Between Religion Clauses and Free Speech Clause.

[23] *See, e.g.*, Fulton v. City of Philadelphia, No. 19-123, slip op. at 4–5 (U.S. June 17, 2021).

[24] Amdt1.4.4 Laws that Discriminate Against Religious Practice.

[25] *Smith*, 494 U.S. at 879.

[26] *Id* at 884.

[27] *Id* at 882.

Amdt1.4.3.5 Laws Neutral to Religious Practice Regulating Prisons and the Military

First Amendment:

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

Even before the Supreme Court ruled in *Employment Division v. Smith* that heightened constitutional scrutiny should be limited to certain circumstances, the Court had suggested that a lower level of scrutiny would apply in the context of prisons and the military.[1] In *Goldman v. Weinberger*, the Supreme Court held that the Air Force's uniform dress regulations, which prohibited most members from wearing headgear indoors, could apply to a yarmulke.[2] The Court declined to analyze the free exercise objection under heightened scrutiny, saying instead that the Court's "review of military regulations . . . is far more deferential than constitutional review of similar laws or regulations designed for civilian society."[3] Accordingly, the Court deferred to the Air Force's judgment that "standardized uniforms" were "vital" for discipline and unity, as well as its decision not to accommodate visible religious apparel that would detract from the desired uniformity.[4]

A year later, in *O'Lone v. Estate of Shabazz*, the Court adopted a similarly deferential position to uphold prison regulations that inhibited certain prisoners' religious exercise.[5] The prison chose not to allow Muslim prisoners assigned to outside work details to return to the prison to attend religious services.[6] While acknowledging that prisoners retain some First Amendment rights, the Court also said that prisoners' constitutional claims "are judged under a 'reasonableness' test" that affords more deference to prison administrators than ordinary standards.[7] The Court said that a prison's ability to accommodate religious activity might be "relevant to the reasonableness inquiry," but it would be inappropriate to place "the burden on prison officials to disprove the availability of alternatives."[8] Ultimately, the Court held that the prison regulations were constitutional because they had "a logical connection to legitimate governmental interests" in maintaining institutional order and security.[9]

Nonetheless, the First Amendment's guarantees still apply to members of the military and to prisoners, and the Supreme Court has also held that the government would violate the Free Exercise Clause if it discriminated against a Buddhist prisoner, denying him "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners."[10]

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[1] The Court has also said that a lower level of constitutional scrutiny is appropriate to evaluate free speech claims in similar contexts. *See* Amdt1.7.8.1 Overview of Government Roles. However, Congress subsequently enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, which prevented the government from substantially burdening an institutionalized person's religious exercise unless it met a heightened standard, showing that its action was the least restrictive means to further a compelling governmental interest.

[2] Goldman v. Weinberger, 475 U.S. 503, 504 (1986).

[3] *Id.* at 506–07.

[4] *Id.* at 508–10. The Court described the regulations as "reasonabl[e] and evenhanded[ ]." *Id.* at 510.

[5] O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987).

[6] *Id.* at 346–47.

[7] *Id.* at 348–49; *see also* Turner v. Safley, 482 U.S. 78, 89 (1987) ("When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

[8] *Id.* at 350.

[9] *Id.*

[10] Cruz v. Beto, 405 U.S. 319, 322 (1972). The case came to the Court on an appeal of a motion to dismiss the prisoner's complaint. *Id.* at 320–21. The Court assumed the truth of the allegations for purposes of assessing the motion and vacated the dismissal of his complaint. *Id.* at 322–23. *See also* Cooper v. Pate, 378 U.S. 546, 546 (1964) (per

Amdt1.4.4 Laws that Discriminate Against Religious Practice

First Amendment:

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

The Supreme Court has recognized that the Free Exercise Clause "protect[s] religious observers against unequal treatment."[1] Thus, even after *Employment Division v. Smith* held that laws burdening religion generally will not violate the Free Exercise Clause if they are neutral and generally applicable,[2] a law that imposes special burdens on religious activities may not be considered neutral and generally applicable and will trigger heightened scrutiny.[3] For example, in *McDaniel v. Paty*, the Court struck down a Tennessee law barring ministers from serving as delegates to a state constitutional convention.[4] While the Court splintered with respect to its rationale, a majority agreed that the law violated the Free Exercise Clause by unconstitutionally conditioning the right to exercise one's religion on the "surrender" of the right to seek office as a delegate.[5] As such, the law impermissibly imposed a "special disabilit[y] on the basis of religious views or religious status."[6] To take another example, in *Kennedy v. Bremerton School District*, the Court ruled that a school district violated the Free Exercise Clause by suspending a football coach because he engaged in religious conduct—praying at the fifty-yard line after a football game.[7]

Similarly, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court held that a church that ran a preschool and daycare center could not be disqualified from participating in a Missouri program that offered funding to resurface playgrounds because of the church's religious affiliation.[8] The Court concluded that Missouri's policy of excluding an otherwise eligible recipient from a public benefit solely because of its religious character imposed an unlawful penalty on the free exercise of religion—a result that triggered the "most exacting scrutiny."[9] The Court rejected the State of Missouri's argument that withholding funds did not prohibit the church from engaging in any religious conduct or otherwise exercising its religious rights.[10] Relying on *McDaniel*, Chief Justice John Roberts concluded that because the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion,"

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curiam) (holding lower courts erred by dismissing the complaint of a prisoner who alleged "that solely because of his religious beliefs he was denied permission to purchase certain religious publications and denied other privileges enjoyed by other prisoners").

[1] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993) (quoting Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 148 (1987) (Stevens, J., concurring in judgment)).

[2] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).

[3] *Church of Lukumi Babalu Aye*, 508 U.S. at 531–32.

[4] 435 U.S. 618, 629 (1978) (plurality opinion).

[5] *Id.* at 626; *accord id.* at 633–34 (Brennan, J., concurring in the judgment).

[6] *Smith*, 494 U.S at 877 (describing the holding in *McDaniel*).

[7] Kennedy v. Bremerton Sch. Dist., No. 21-418, slip op. at 31–32 (U.S. June 27, 2022). The Court held that the school's policies were not neutral because they were based on the religious character of the actions, and the policies were not generally applicable because the school allowed coaching staff to engage in other types of personal activities after the game. *Id.* at 14. Although the Court acknowledged that strict scrutiny would ordinarily apply under the Free Exercise Clause, there were open questions in the case about whether a lower standard should apply under a Free Speech Clause framework. *Id.* at 19–20. The Court avoided answering that open question by concluding the school could not "sustain its burden under any" of the suggested levels of scrutiny. *Id.* at 20.

[8] *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, No. 15-577, slip op. at 15 (U.S. June 26, 2017).

[9] *Id.* at 10. The Supreme Court later clarified that *Trinity Lutheran* had applied "strict scrutiny." Espinoza v. Mont. Dep't of Revenue, No. 18-1195, slip op. at 12 (U.S. June 30, 2020).

[10] *Trinity Lutheran*, slip op. 10

as well as "outright" prohibitions on religious exercise, Trinity Lutheran had a right to participate in a government benefit program without having to disavow its religious status.[11] In evaluating whether the state's policy was justified by "a state interest 'of the highest order,'" the Court noted the parties' agreement that the Establishment Clause did not require religious organizations' exclusion from the program, and said that the state's "policy preference" for achieving an even greater separation of church and state did not "qualify as compelling."[12] As a result, the Court held that Missouri's policy violated the Free Exercise Clause.[13] In a later case discussed in more detail in another essay, the Court further held that a law excluding religious schools from a state's tuition assistance program based on the fact that the schools would use the funds for religious activities was similarly unconstitutional.[14]

Even if a law does not *expressly* target religion, it will trigger strict scrutiny if its *object* "is to infringe upon or restrict practices because of their religious motivation."[15] In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court struck down a set of ordinances enacted by a Florida city that had the "impermissible object" of targeting "conduct motivated by religious beliefs."[16] The Florida ordinances prohibited animal sacrifice, making certain exemptions for animals killed for food consumption, and were passed in direct response to the establishment of a Santeria church within the city and city residents' concerns about the Santeria practice of animal sacrifice.[17] The Supreme Court concluded that the ordinances were not neutral within the meaning of *Smith* because they unconstitutionally sought to suppress Santeria religious worship.[18] Among other factors, the Court noted that the laws accomplished a "religious gerrymander": although the text did not expressly refer to Santeria, the law nonetheless prohibited only Santeria sacrifice.[19] The Court also held that the ordinances were not generally applicable under *Smith* because they selectively burdened "only . . . conduct motivated by religious belief."[20] The Court therefore applied "the most rigorous of scrutiny" and ruled the ordinances unconstitutional.[21]

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[11] *Id.* at 10–11. As a result, the Court characterized the church's injury not so much as being the "denial of a grant" itself, but rather the "refusal to allow the Church . . . to compete with secular organizations for a grant." *Id.* at 11.

[12] *Id.* at 6, 14 (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978) (plurality opinion)).

[13] *Id.* at 14–15. *See also Espinoza*, slip op. at 10, 20 (holding that a state violated the Free Exercise Clause by excluding religious schools from a tax credit program based solely on the schools' "religious status"); Mitchell v. Helms, 530 U.S. 793, 835 n.19 (2000) (plurality opinion) (saying that excluding religious schools from a federal program authorizing public schools to lend materials to private schools "would raise serious questions under the Free Exercise Clause."). *But see* Locke v. Davey, 540 U.S. 712, 721–22 (2004) (rejecting free exercise challenge to state provision prohibiting scholarships from being used for devotional theology degrees, saying the state could permissibly choose not to fund this "distinct category of instruction" and noting the state's historically grounded "antiestablishment interests"). These cases are discussed in more detail in Amdt1.5 Relationship Between the Establishment and Free Exercise Clauses.

[14] Carson v. Makin, No. 20-1088, slip op. at 15–17 (U.S. June 21, 2022); *see also* Amdt1.5 Relationship Between the Establishment and Free Exercise Clauses.

[15] Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993). *See also* Tucker v. Texas, 326 U.S. 517, 520 (1946) (rejecting a free exercise challenge after noting that the challenged laws did not indicate "a purpose to bar freedom of press and religion"); *In re* Summers, 325 U.S. 561, 571 (1945) (rejecting a free exercise challenge after noting that the challenged policy did not appear motivated by a "purpose to discriminate" against certain religious groups).

[16] *Church of Lukumi Babalu Aye*, 508 U.S. at 524.

[17] *Id.* at 526–28.

[18] *Id.* at 540.

[19] *Id.* at 534–35.

[20] *Id.* at 543.

[21] *Id.* at 546.

Amdt1.4.4
Laws that Discriminate Against Religious Practice

The Court has suggested that it is equally unconstitutional for hostility to religion to motivate the government's decisions to *apply* its laws.[22] Consequently, even laws that are neutral on their face and in their purpose may violate the Free Exercise Clause if they are applied in a way that discriminates against religious activity.[23] For example, the Supreme Court held that a city violated the First Amendment when it applied an ordinance prohibiting certain activities in public parks in a discriminatory fashion.[24] According to the Court, the evidence showed that a certain group's religious service had been treated differently "than a religious service of other sects," amounting "to the state preferring some religious groups over this one."[25] The Court cautioned that it was "no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."[26]

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, another case involving allegations of religious hostility, the Court set aside state administrative proceedings enforcing Colorado's anti-discrimination laws against a baker who had refused to make a cake for a same-sex wedding.[27] The Court held that the state had violated the Free Exercise Clause because the Colorado Civil Rights Commission had not considered the baker's case "with the religious neutrality that the Constitution requires."[28] The Court highlighted two aspects of the state proceedings that had, in its view, demonstrated impermissible religious hostility: first, certain statements by some of the Commissioners during the proceedings before the Commission[29]; and second, "the difference in treatment between [the petitioner's] case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission."[30]

Seemingly building on the Court's second rationale in *Masterpiece Cakeshop*, the Supreme Court has said that government regulations are not neutral and trigger strict scrutiny "whenever they treat *any* comparable secular activity more favorably than religious exercise."[31] In November 2020 and April 2021, the Supreme Court issued two per curiam opinions applying strict scrutiny to state regulations that limited gatherings, including

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[22] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, No. 16-111, slip op. at 18 (U.S. June 4, 2018). *See also* Cruz v. Beto, 405 U.S. 319, 322 (1972) (holding that the government would violate the Free Exercise Clause if it discriminated against a Buddhist prisoner by denying him "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners"); Niemotko v. Maryland, 340 U.S. 268, 272 (1951) ("The conclusion is inescapable that the use of the park was denied because of the City Council's dislike for or disagreement with the [Jehovah's] Witnesses or their views. The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body."). In some cases involving both Religion Clauses, the Court has suggested that refusing to accommodate religious activity might also demonstrate impermissible hostility to religion. *See* Amdt1.5 Relationship Between the Establishment and Free Exercise Clauses.

[23] *See, e.g.*, Fowler v. Rhode Island, 345 U.S. 67, 67, 70 (1953).

[24] *Id.*

[25] *Id.* at 69.

[26] *Id.* at 69–70.

[27] *Masterpiece Cakeshop*, slip op. at 3. In a subsequent case, the Supreme Court emphasized that these "'official expressions of hostility' to religion" led the Court to "set aside" the policies "without further inquiry." Kennedy v. Bremerton Sch. Dist., No. 21-418, slip op. at 12 (U.S. June 27, 2022) (quoting Masterpiece Cakeshop, slip op. at 18). Two members of the six-Justice majority in *Masterpiece Cakeshop*, however, had stated that the case was reviewed under strict scrutiny analysis in a concurring opinion. *Masterpiece Cakeshop*, slip op. at 1 (Gorsuch, J., concurring).

[28] *Masterpiece Cakeshop*, slip op. at 3.

[29] *Id.* at 13–14.

[30] *Id.* at 14. *See also id.* at 16 ("A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness.").

[31] Tandon v. Newsom, No. 20A151, slip op. at 1 (U.S. Apr. 9, 2021) (per curiam).

religious gatherings, in response to the COVID-19 pandemic.[32] In the first case, *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court noted that while houses of worship were subject to strict occupancy limits, "essential" businesses faced no such restrictions.[33] This "especially harsh treatment" of religious groups triggered strict scrutiny, which the government could not satisfy.[34] In the second case, *Tandon v. Newsom*, the Court explained that "whether two activities are comparable . . . must be judged against the asserted government interest that justifies the regulation at issue."[35] In the context of restrictions to prevent the spread of COVID-19, the Court said comparability was "concerned with the risks various activities pose."[36] Applying these principles to the challenged restrictions, the opinion held that the state did treat "some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time."[37] The Court further held that the challengers were likely to prevail under a strict scrutiny analysis because the state had "not shown that 'public health would be imperiled' by employing less restrictive measures."[38]

Accordingly, a law that contains exemptions may be subject to strict scrutiny if those exemptions create or allow religious discrimination.[39] As discussed in more detail elsewhere,[40] early Supreme Court jurisprudence considering restrictions on religious speech in public forums invalidated rules that granted officials broad discretion that they could use to discriminate against religious speech.[41] Citing seemingly similar concerns, *Smith* said that the Court had reviewed laws creating "a system of individual exemptions" under a heightened level of scrutiny requiring the government to demonstrate a compelling interest.[42] The Supreme Court explained that, for example, it had applied this heightened standard of review to an unemployment compensation system that required "individualized governmental assessment" of whether an individual had shown "good cause" for refusing work.[43]

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[32] Roman Catholic Diocese of Brooklyn v. Cuomo, No. 20A87, slip op. at 3 (U.S. Nov. 25, 2020) (per curiam); *Tandon*, slip op. at 1. The per curiam opinion in *Roman Catholic Diocese of Brooklyn* also "addresse[d]" another case, *Agudath Israel of America v. Cuomo,* No. 20A90. No. 20A87, slip op. at 1 (U.S. Nov. 25, 2020). *See also* S. Bay United Pentecostal Church v. Newsom, No. 20A136 (U.S. Feb. 5, 2021) (mem.) (granting temporary relief enjoining prohibition on indoor worship services); Gateway City Church v. Newsom, No. 20A138 (U.S. Feb. 26, 2021) (mem.) (granting temporary relief enjoining prohibition on indoor worship services and stating that such relief was "clearly dictated by this Court's decision in *South Bay United Pentecostal Church v. Newsom*").

[33] *Roman Catholic Diocese of Brooklyn*, slip op. at 3. The per curiam opinion did not explicitly analyze whether activities at these essential businesses were comparable to the religious activities before concluding that the policy was not neutral, though it did note that "factories and schools have contributed to the spread of COVID-19." *See id.* at 3. In a concurring opinion, Justice Neil Gorsuch emphasized that strict scrutiny is triggered if the government treats "religious exercises worse than *comparable* secular activities," and emphasized that people may also gather for extended periods in the businesses designated as essential. *Id.* at 1–2 (Gorsuch J., concurring) (emphasis added).

[34] *Id.* at 3, 4 (per curiam). The Court held that while the government had a "compelling interest" in "stemming the spread of COVID-19," these regulations were not narrowly tailored to that interest. *Id.* at 4.

[35] *Tandon*, slip op. at 2.

[36] *Id.*

[37] *Id.* at 3.

[38] *Id.* at 4 (quoting *Roman Catholic Diocese of Brooklyn*, slip op. at 5).

[39] *See Tandon*, slip op. at 2.

[40] Amdt1.4.3.1 Laws Neutral to Religious Practice during the 1940s and 1950s.

[41] *See, e.g.*, Niemotko v. Maryland, 340 U.S. 268, 273 (1951); Cantwell v. Connecticut, 310 U.S. 296, 305 (1940).

[42] *Smith*, 494 U.S. at 883–84. *Smith* did not expressly draw a comparison between the broad "good cause" inquiry that was at issue in *Sherbert v. Verner,* 374 U.S. 398, 401 (1963), and the broad discretionary regimes governing public forums. Instead, *Smith* suggested that the Court had applied a heightened standard of review in the latter set of cases because they involved "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." 494 U.S. at 881.

[43] *Smith*, 494 U.S. at 884.

The Court expanded on this aspect of the *Smith* opinion in *Fulton v. City of Philadelphia*, decided in 2021, saying that the presence of individualized exemptions may render a law not generally applicable and therefore subject to strict scrutiny.[44] In *Fulton*, the Supreme Court held that a Catholic foster care agency was entitled to a constitutional exception from a city's nondiscrimination policy.[45] The city had refused to sign a contract with the agency unless it agreed to a provision prohibiting discrimination on the basis of certain protected classes, including sexual orientation, in the provision of services.[46] The agency argued that this provision would impermissibly require it to certify same-sex foster parents in violation of its religious beliefs.[47] The Supreme Court agreed, saying that the contract's nondiscrimination provision was not generally applicable under *Smith* because it allowed a city official to grant exceptions, in the official's "sole discretion."[48] Although the city had never actually granted an exception to either secular or religious activities under its other contracts, and asserted that it had no intention of granting any such exception in the future, the Court nonetheless held that the nondiscrimination provision "incorporate[d] a system of individual exemptions," and that the city could not "refuse to extend that [exemption] system to cases of religious hardship without compelling reason."[49] Ultimately, the Supreme Court concluded that the city failed to meet this standard, because it had offered "no compelling reason why it has a particular interest in denying an exception to [the religious agency] while making them available to others."[50]

Amdt1.5 Relationship Between the Establishment and Free Exercise Clauses

First Amendment:

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

The First Amendment's Religion Clauses prohibit the government from making any law "respecting an *establishment* of religion, or prohibiting the *free exercise* thereof."[1] Together, the Free Exercise and Establishment Clauses guarantee religious freedom,[2] deeming "religious beliefs and religious expression . . . too precious to be either proscribed or prescribed by the State."[3]

In many ways, the two provisions work together to ensure government neutrality towards religion: the Establishment Clause prohibits "a fusion of governmental and religious functions" or official governmental support for "the tenets of one or of all orthodoxies," while the Free Exercise Clause protects "the right of every person to freely choose his own course" of

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[44] Fulton v. City of Philadelphia, No. 19-123, slip op. at 6–7 (U.S. June 17, 2021).

[45] *Id.* at 15.

[46] *Id.* at 3.

[47] *Id.* at 3, 15.

[48] *Id.* at 11.

[49] *Id.* (quoting Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990)) (internal quotation marks omitted) (alteration in original).

[50] *Id.* at 15.

[1] U.S. Const. amend. I (emphasis added). The Religion Clauses apply to Congress in the text of the provision, and to the states by incorporation through the Fourteenth Amendment. *See* Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947) (incorporating the Establishment Clause); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 262 (1934) (incorporating the Free Exercise Clause); *see also* Amdt14.S1.4.2 Early Doctrine on Incorporation of the Bill of Rights.

[2] *E.g.*, Reynolds v. United States, 98 U.S. 145, 162 (1878).

[3] Lee v. Weisman, 505 U.S. 577, 589 (1992).

religious observance "free of any compulsion from the state."[4] The two clauses, however, operate in distinct ways, and "forbid two quite different kinds of governmental encroachment upon religious freedom."[5] The Free Exercise Clause is concerned with "governmental compulsion," while the Establishment Clause is "violated by . . . laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."[6] Viewed another way, the Free Exercise Clause protects the individual's religious beliefs, while the Establishment Clause is additionally concerned with institutional "tendencies to political tyranny and subversion of civil authority."[7]

The Supreme Court has long recognized a "tension" between the Religion Clauses.[8] For example, in 1947's *Everson v. Board of Education*, the Court rejected an Establishment Clause challenge to a state program that paid the bus fares of schoolchildren, including those who attended religious schools.[9] While acknowledging that the Establishment Clause prevented the state from giving "tax-raised funds to the support of an institution which teaches the tenets and faith of any church," the Court also cautioned that neither could the state exclude citizens, "*because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."[10] The Court said it had to be "careful" that, in service of protecting "against state-established churches," it would not "inadvertently prohibit [the state] from extending . . . general . . . benefits to all its citizens without regard to their religious belief."[11] In the words of the Court: "State power is no more to be used so as to handicap religions than it is to favor them."[12] Accordingly, in some decisions, the Court has cautioned that the government "may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'"[13]

The Court has recognized "room for play in the joints" between the proscriptions of "governmentally established religion" and "governmental interference with religion," pursuing "a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[14] Accordingly, the Court has recognized, as in *Everson*, that the government may sometimes accommodate or indirectly support religious entities or activities without violating the Establishment Clause, even when those accommodations are

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[4] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963). *See also, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 182 (2012) ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."); Amdt1.2.3.1 Overview of Government Resolution of Religious Disputes.

[5] Engel v. Vitale, 370 U.S. 421, 430 (1962).

[6] *Id.*

[7] McGowan v. Maryland, 366 U.S. 420, 430 (1961). *See also* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) ("The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority." (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 713 (1871))).

[8] *E.g.*, Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973); Tilton v. Richardson, 403 U.S. 672, 677 (1971) (plurality opinion). *See also* Amdt1.3.2 Accommodationist and Separationist Theories of the Establishment Clause. *Cf.* Kennedy v. Bremerton Sch. Dist., No. 21-418, slip op. at 20 (U.S. June 27, 2022) (questioning an interpretation that would create tension between the Establishment, Free Exercise, and Free Speech Clauses, saying they should instead be viewed as having complementary purposes).

[9] *Everson*, 330 U.S. at 17.

[10] *Id.* at 16.

[11] *Id.*

[12] *Id.* at 18.

[13] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963) (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)). In *Schempp*, however, the Court invalidated mandatory Bible readings in schools despite this caution against hostility to religion, holding these religious exercises instead violated the Establishment Clause's requirement of "strict neutrality." *Id.*

[14] Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

not required by the Free Exercise Clause.[15] A permissible accommodation will generally relieve a burden on religious exercise, such as by exempting religious practices from a general regulation.[16] Attempts at accommodation may go too far and violate the Establishment Clause, however, if they merely aid religious exercise rather than relieving a burden.[17] For instance, in one case, the Court concluded that a state had violated the Establishment Clause by intentionally giving a specific religious group "exclusive control" of a school district.[18] This "proposed accommodation single[d] out a particular religious sect for special treatment," and the Court clarified that "permissible legislative accommodations" must honor "neutrality as among religions."[19] Notwithstanding this case's concern about preferential treatment, the Supreme Court has seemed to move more towards an accommodationist view of the Establishment Clause in recent decades.[20]

Conversely, turning to the second aspect of the "play in the joints" described above,[21] the government may sometimes limit its support for religion without violating the Free Exercise Clause, even when those restrictions are not required by the Establishment Clause.[22] Stated another way, the government may sometimes take "antiestablishment" positions, such as declining to provide support to certain religious activities, without violating the Free Exercise Clause.[23] In *Locke v. Davey*, the Court held that a state did not violate the Free Exercise Clause by prohibiting students from using publicly funded scholarships to pursue devotional theology degrees.[24] Although providing such scholarships would not violate the Establishment

[15] *See, e.g.*, *id.* at 671–72 (describing prior cases and holding that a property tax exemption that included religious properties used solely for religious purposes did not violate the Establishment Clause). *See also, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 714 (2005) (holding that federal statute protecting prisoners' religious exercise did not "exceed the limits of permissible government accommodation of religious practices"); Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987) (holding that exempting religious organizations' secular activities from federal law prohibiting employment discrimination was a permissible accommodation consistent with the Establishment Clause); Wisconsin v. Yoder, 406 U.S. 205, 234 n.22 (1972) (holding that exempting the Amish from the state's compulsory education system was a permissible accommodation consistent with the Establishment Clause); Selective Draft Law Cases, 245 U.S. 366, 389–90 (1918) (saying the "unsoundness" of Free Exercise and Establishment Clause challenges to an exemption from the draft for conscientious objectors was "apparent").

[16] *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 613 n.59 (1989); *Amos*, 483 U.S. at 338; *Yoder*, 406 U.S. at 234 n.22. *See also, e.g.*, *Cutter*, 544 U.S. at 720 ("Foremost, we find RLUIPA's institutionalized-persons provision compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise."); *id.* (noting that the Act must "be administered neutrally among different faiths" and that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries").

[17] *See Cnty. of Allegheny*, 492 U.S. at 613 n.59 (explaining that a county's crèche display was not a permissible accommodation, because prohibiting the display in a county building would "not impose a burden on the practice of Christianity (except to the extent that some Christian sect seeks to be an officially approved religion)"); *see also, e.g.*, Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989) (plurality opinion) (ruling that a state tax exemption for religious periodicals violated the Establishment Clause as a subsidy directed "*exclusively* to religious organizations that is not required by the Free Exercise Clause" (emphasis added)).

[18] Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 698 (1994) (plurality opinion); *accord id.* at 711 (Stevens, J., concurring).

[19] *Id.* at 706–07 (plurality opinion); *see also* Amdt1.3.6.3 Lemon's Effect Prong and Accommodation of Religion. *Cf., e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144–45, n.11 (1987) (holding that the government would not violate the Establishment Clause by extending generally available unemployment benefits equally to "religious observers who must leave their employment due to an irreconcilable conflict between the demands of work and conscience").

[20] Amdt1.3.3 Establishment Clause Tests Generally.

[21] Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

[22] Locke v. Davey, 540 U.S. 712, 722 (2004).

[23] *Id.*

[24] *Id.* at 725.

Clause,[25] the Court nonetheless concluded that the state could take a "more stringent" approach to "antiestablishment" than the U.S. Constitution and choose not to fund these specific religious activities.[26] The Court characterized the state's interest in not using public funds to support church leadership as "historic and substantial," and noted that the state policy contained no evidence of "animus towards religion."[27] In a similar vein, the Court in 1974 upheld a state's ability to exclude religious schools from school transportation programs.[28]

Since deciding *Locke*, however, the Court has seemingly narrowed the "play in the joints"[29] on this issue, rejecting states' interests in "preventing establishment" in other cases presenting different factual circumstances.[30] The Court has suggested that in some cases, failing to accommodate religious activity would demonstrate impermissible hostility to religion.[31] Further, more recent decisions have ruled that states violated the Free Exercise Clause by excluding religious organizations from generally available benefits programs. First, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court held that a state acted unconstitutionally when it excluded religious organizations from receiving grants to purchase rubber playground surfaces.[32] The Court explained that because the program barred religious organizations based solely on their religious character, this religious penalty was subject "to the 'most rigorous' scrutiny" and could be justified only by "a state interest 'of the highest order.'"[33] In the Court's view, the state's interest in "skating as far as possible from religious establishment concerns" was insufficiently "compelling" in light of the policy's "clear infringement on free exercise."[34] The Court distinguished *Locke* by saying the state in *Locke* had permissibly chosen to deny a scholarship because of what the recipient "proposed *to do*—use the funds to prepare for the ministry."[35] By contrast, in *Trinity Lutheran*, the Supreme Court held that the state was impermissibly denying funds because of what the recipient

[25] *Id.* at 719 (characterizing the program as indirect aid); *see also* Amdt1.3.4.5 Zelman and Indirect Assistance to Religion.

[26] *Locke*, 540 U.S. at 722.

[27] *Id.* at 725.

[28] Luetkemeyer v. Kaufmann, 419 U.S. 888 (1974) (mem.), *aff'g* 364 F. Supp. 376, 386 (W.D. Mo. 1973) (holding that the state's "long established constitutional policy . . . insist[ing] upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment" was a compelling state interest that justified "any possible" free exercise infringement).

[29] Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

[30] McDaniel v. Paty, 435 U.S. 618, 628–29 (1978) (plurality opinion) (saying that a state's antiestablishment interest in provisions disqualifying clergy from legislative office "lost whatever validity [it] may once have enjoyed," ruling that the "essence" of the state's rationale was "contrary to the [modern] anti-establishment principle with its command of neutrality"); *see also* Widmar v. Vincent, 454 U.S. 263, 275–76 (1981) (holding that a state's interest "in proscribing indirect state support for religion" was not "sufficiently 'compelling'" to justify closing university facilities to religious worship, given that the state's antiestablishment interests were "limited by the Free Exercise Clause and in this case by the Free Speech Clause as well").

[31] *See, e.g.*, Kennedy v. Bremerton Sch. Dist., No. 21-418, slip op. at 28–29 (U.S. June 27, 2022) (saying preventing teachers from engaging in personal religious activity would "preference secular activity" and be hostile to religion); Am. Legion v. Am. Humanist Ass'n, No. 17-1717, slip op. at 2 (U.S. June 20, 2019) (saying that removing a cross that had "become a prominent community landmark" would express hostility to religion); *see generally* Zorach v. Clauson, 343 U.S. 306, 314 (1952) (saying disallowing accommodation "would . . . find in the Constitution a requirement that the government show a callous indifference to religious groups," impermissibly "preferring those who believe in no religion over those who do believe").

[32] Trinity Lutheran Church of Columbia, Inc. v. Comer, No. 15-577, slip op. at 15 (U.S. June 26, 2017). *See also* Amdt1.4.4 Laws that Discriminate Against Religious Practice.

[33] *Trinity Lutheran*, slip op. at 14 (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) and McDaniel v. Paty, 435 U.S. 618, 628 (1978)).

[34] *Id.*

[35] *Id.* at 12.

"*was*"—a church.[36] A plurality of the Court further clarified that the *Trinity Lutheran* decision did "not address religious uses of funding or other forms of discrimination."[37]

The Court built on *Trinity Lutheran*'s nondiscrimination principle in *Espinoza v. Montana Department of Revenue*, ruling that a state could not bar religious schools from participating in a tax credit program benefiting private school students.[38] The state supreme court had concluded that the program, which originally included religious schools, violated a state constitutional provision that prohibited the government from providing direct or indirect financial support to religious schools.[39] The U.S. Supreme Court rejected the state's argument that it had barred religious schools from the program based on how they would *use* the funds—for religious education—and held instead that the text of the state constitution barred religious schools from public benefits solely because of their religious character.[40] Again distinguishing *Locke*, the Court emphasized that the state had not merely excluded any "particular 'essentially religious' course of instruction," but barred all aid to religious schools.[41] Further, unlike the "'historic and substantial' state interest in not funding the training of clergy" at issue in *Locke*, there was no similar historically grounded interest in disqualifying religious schools from public aid more generally.[42] Accordingly, following the analysis in *Trinity Lutheran*, the Court ruled that the exclusion based on religious status was unconstitutional under a strict scrutiny standard.[43]

In *Carson v. Makin*, the Court squarely rejected the idea that states could exclude religious schools from an indirect aid program based on religious uses of the funds, further narrowing the play in the joints.[44] A state program allowed parents to use tuition assistance funds at public schools or "approved" private schools, which had to be "nonsectarian."[45] Maine raised two claims to try to avoid *Trinity Lutheran*.[46] First, the state argued its program was designed to provide a *public* education, which inherently entailed a *secular* education.[47] The Court rejected this claim, saying the state could not recast a discriminatory exclusion as a permissible funding condition.[48] Second, seizing on the possible distinction in *Trinity Lutheran* between religious status and religious use, the state said it excluded sectarian schools based on concerns about public funds being used for religious activities.[49] In contrast to *Espinoza*, the Court in *Carson* accepted that the state was excluding the schools based on their religious use of funds, rather than merely their religious identity.[50] Nonetheless, the Court held that

[36] *Id.*

[37] *Id.* at 14 n.3 (plurality opinion).

[38] Espinoza v. Mont. Dep't of Revenue, No. 18-1195, slip op. at 18–20 (U.S. June 30, 2020).

[39] *Id.* at 5.

[40] *Id.* at 10. Although the Court expressed concerns about the text of the state constitutional provision, the ruling solely invalidated this particular application of the provision. *See id* at 11–12.

[41] *Id.* at 13.

[42] *Id.* (quoting Locke v. Davey, 540 U.S. 712, 725 (2004)).

[43] *Id.* at 18–20.

[44] Carson v. Makin, No. 20-1088, slip op. at 15–17 (U.S. June 21, 2022).

[45] *Id.* at 2–3. The assistance was available in districts that did not have a public secondary school. *Id.* at 2.

[46] *Id.* at 11.

[47] *Id.*

[48] *Id.* at 13. The Court stated that the nonsectarian private schools already participating in the program differed from public schools in a variety of ways, undermining the state's claim that the program sought to provide the equivalent of a public education. *Id.* at 12–13.

[49] *Id.* at 16.

[50] *Id.*

"use-based discrimination" is just as "offensive to the Free Exercise Clause,"[51] at least in the context of a "neutral" indirect benefit program that did not violate the Establishment Clause.[52] Accordingly, as in *Trinity Lutheran* and *Espinoza*, the Court ruled the exclusion unconstitutional under a strict scrutiny analysis.[53] Further, while *Trinity Lutheran* had distinguished *Locke* in part by emphasizing that the theology-degree exclusion was based on the recipient's use of the funds, the *Carson* opinion distinguished *Locke* by characterizing the case as having a "narrow focus on vocational religious degrees."[54]

Amdt1.6 Relationship Between Religion Clauses and Free Speech Clause

First Amendment:

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

The Supreme Court has described the First Amendment as protecting certain rights of conscience.[1] This general description can encompass the related protections for both speech and religion: "Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority."[2]

Supreme Court cases recognizing protections for religious speech have explored the precise relationship between the Free Speech and Free Exercise Clauses. The Court has recognized that each Clause protects private religious speech on its own,[3] but in some cases, has invoked both Clauses to outline protections for religious speech.[4] The two Clauses "work in tandem": "[w]here the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities."[5] For example, in *Jamison v. Texas*, the Court held that a city ordinance prohibiting the distribution of handbills violated both the Free Exercise and the Free Speech Clauses when it was applied to a person who was advertising religious services and materials.[6] The Court emphasized constitutional protections for expressing one's views on public streets as well as

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[51] *Id.*

[52] *Id.* at 10

[53] *Id.* at 9–10.

[54] *Id.* at 18.

[1] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 50 (1985) (saying the Supreme Court "has identified the individual's freedom of conscience as the central liberty that unifies the various Clauses in the First Amendment"); *see also* Amdt1.2.2.1 Introduction to the Historical Background on the Religion Clauses.

[2] *Wallace*, 472 U.S. at 52.

[3] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 269 (1981) (saying that religious worship and discussion "are forms of speech and association protected by the First Amendment"); Cantwell v. Connecticut, 310 U.S. 296, 300 (1940) (ruling that applying a law prohibiting solicitation to people engaged in religious speech violated the Free Exercise Clause).

[4] *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 509 (1946) (holding both clauses protected a person's right to distribute religious literature); Murdock v. Pennsylvania, 319 U.S. 105, 114 (1943) (same); Largent v. Texas, 318 U.S. 418, 422 (1943) (same); Jamison v. Texas, 318 U.S. 413, 414 (1943) (same).

[5] Kennedy v. Bremerton Sch. Dist., No. 21-418, slip op. at 11 (U.S. June 27, 2022). In this case, the Supreme Court separately analyzed the Free Exercise and Free Speech Clause claims of a football coach who sought to pray on the football field after games, and held that regardless of which constitutional standard it applied, the coach prevailed. *See id.* at 19–20.

[6] *Jamison*, 318 U.S. at 414.

protections for "a clearly religious activity."[7] In a similar vein, some early cases interpreting free exercise protections seemed to consider certain free speech concepts such as the public forum doctrine.[8]

In a later case, though, the Supreme Court emphasized that the First Amendment nonetheless "protects speech and religion by quite different mechanisms," pointing in part to the Establishment Clause.[9] Namely, the Free Speech Clause contemplates that the government will participate in public discussions, as part of the "full expression" of speech.[10] By contrast, while the Free Exercise Clause's "freedom of conscience and worship . . . has close parallels in the speech provisions of the First Amendment, . . . the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs."[11] However, the Court has since cautioned against a reading of the Clauses that creates tension or allows the Establishment Clause to "trump the other two."[12] The Court has ruled that schools may not violate a party's free exercise or free speech rights based on "phantom constitutional violations" stemming from "misconstruction[s] of the Establishment Clause."[13]

A number of Supreme Court cases have considered whether the government violated the Establishment Clause by impermissibly supporting or endorsing private religious speech.[14] For instance, in *Widmar v. Vincent*, a university prevented a student group from using its buildings for religious worship, citing Establishment Clause concerns.[15] The Court recognized that although the group's private religious speech was protected by the Free Speech Clause, the government's obligation to comply with the Establishment Clause could provide a compelling interest allowing the university to restrict that speech—if allowing the group to use its facilities would constitute impermissible support.[16] However, in *Widmar* and a number of other cases, the Court held that schools do not violate the Establishment Clause merely by hosting religious speech, where the speech can be attributed to private parties rather than the government.[17]

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[7] *Id.* at 416–17.

[8] These cases are discussed in more detail in Amdt1.4.3.1 Laws Neutral to Religious Practice during the 1940s and 1950s. By contrast, some Supreme Court cases have invoked only the Free Speech Clause to hold that religious speech is constitutionally protected. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 717 (1977) (holding the Free Speech Clause prevented the government from requiring people to display a message they objected to on moral and religious grounds); Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 654 (1981) (holding the Free Speech Clause did not prevent the government from imposing reasonable time, place, and manner restrictions on an organization's religious practice). Cases involving only the Free Speech Clause and not the Free Exercise Clause are discussed Amdt1.2.2.1 Introduction to the Historical Background on the Religion Clauses.

[9] Lee v. Weisman, 505 U.S. 577, 591 (1992).

[10] *Id.*

[11] *Id.*

[12] Kennedy v. Bremerton Sch. Dist., No. 21-418, slip op. at 30 (U.S. June 27, 2022) (internal quotation marks omitted).

[13] *Id.* at 30–31.

[14] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 303 n.12 (2000) (collecting cases). The Free Speech Clause aspects of these cases are discussed Amdt1.7.7.1 The Public Forum and Amdt1.7.8.2 Government Speech and Government as Speaker.

[15] Widmar v. Vincent, 454 U.S. 263, 265, 270 (1981).

[16] *Id.* at 269–71.

[17] *Id.* at 274; *see also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 113 (2001) (holding elementary school would not violate the Establishment Clause by allowing a religious club to use its facilities); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 840 (1995) (holding university would not violate the Establishment Clause by allowing religious groups to use generally available student activity fund to publish religious newspaper); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (holding school board would not violate the Establishment Clause by allowing a church to use its facilities to show a religious film); Bd. of Educ. v. Mergens, 496 U.S. 226, 253 (1990) (holding federal law did not violate the Establishment Clause by creating a funding condition prohibiting public secondary schools from denying access to forums based on students' speech, including religious

To determine whether speech should be considered private, the Court has looked to factors such as whether a forum is generally available to a variety of participants, both religious and nonreligious, as well as the amount of control the government exercised over the speech.[18] In one case, the Supreme Court held that a state impermissibly denied a private group permission to display a cross in a public park, concluding that the cross "was private expression . . . . fully protected under the Free Speech Clause."[19] The fact that the "purely *private* religious speech" was "connected to the State only through its occurrence in a public forum"—a park where the state had previously hosted a variety of other speech—meant that the government did not violate the Establishment Clause by hosting the display.[20]

More broadly, the Supreme Court has rejected Establishment Clause challenges where schools "grant[ed] access to . . . facilities on a religion-neutral basis to a wide spectrum of student groups," including religious groups.[21] The Court stated this principle directly in *Board of Education v. Mergens*, in which a federal law prohibited public secondary schools from denying students access to forums based on the content of their speech.[22] The Court upheld that law, holding that requiring schools to host religious speech did not violate the Establishment Clause.[23] Among other factors, the Court highlighted that the law required schools to host a wide variety of speech "on a nondiscriminatory basis," and that the specific school raising this constitutional claim had in fact recognized a "broad spectrum" of student clubs, "counteract[ing] any possible message of official endorsement of or preference for religion or a particular religious belief."[24]

By contrast, in *Santa Fe Independent School District v. Doe*, the Court held that student-led prayers held prior to public school football games could not "be regarded as 'private speech.'"[25] The Court emphasized that not only did the invocations "take place on government property at government-sponsored school-related events," but the government also helped to select the speaker, "invite[d] and encourage[d] religious messages," and otherwise appeared to support the speech.[26] In addition, the Court noted that the school allowed "only one student, the same student for the entire season, to give the invocation," which was "subject to particular regulations that confine the content and topic of the student's message."[27] Consequently, the school practice violated the Establishment Clause.[28]

Thus, while the Free Speech and the Free Exercise Clauses serve similar goals of preventing government infringement of individual freedom of thought, their protections are

speech). *Cf.* Shurtleff v. Boston, No. 20-1800, slip op. at 12 (U.S. May 2, 2022) (implicitly ruling city would not violate Establishment Clause by flying a religious flag at city hall, where the flag raising did not qualify as government speech under Free Speech Clause).

[18] *See, e.g.*, *Rosenberger*, 515 U.S. at 842. *Rosenberger* is discussed in more detail in Amdt1.3.4.4 Application of the Lemon Test.

[19] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995).

[20] *Id.* at 767 (plurality opinion); *see also id.* at 774–75 (O'Connor, J., concurring) (agreeing with the plurality's holding, noting that the case involved "truly private speech . . . allowed on equal terms in a vigorous public forum").

[21] *Rosenberger*, 515 U.S. at 842.

[22] Bd. of Educ. v. Mergens, 496 U.S. 226, 253 (1990).

[23] *Id.* at 248.

[24] *Id.* at 250, 252.

[25] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000).

[26] *Id.* at 302, 306–10.

[27] *Id.* at 303.

[28] *Id.* at 317.

not necessarily coextensive.[29] Further, while Establishment Clause concerns could theoretically justify restrictions on private religious speech, the Court has largely held that the government only violates the Establishment Clause if it goes beyond merely hosting private religious speech to give special support to religious activity. Cases reading the Establishment Clause to have a more limited scope could further contract the government's ability to restrict religious speech by employees or on public property.[30] For example, in *Kennedy v. Bremerton School District*, the Supreme Court ruled that a school violated the Free Exercise and Free Speech Clauses when it punished a football coach for praying on the football field after games.[31] The Court refused to consider concerns about government *endorsement* of prayer, and in considering the applicability of *Santa Fe*, looked only to aspects of that decision that it believed went to government *coercion*.[32] Ultimately, the Court concluded there was no coercion in the coach's prayer practice, as discussed in more detail in another essay.[33]

Amdt1.7 Free Speech Clause

Amdt1.7.1 Historical Background on Free Speech Clause

First Amendment:

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

The Free Speech Clause went through several iterations before it was adopted as part of the First Amendment. James Madison drafted an initial version of the speech and press clauses that was introduced in the House of Representatives on June 8, 1789. Madison's draft provided: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[1] The House of Representatives special committee rewrote Madison's language to make the speech and press clauses read: "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed."[2] The Senate subsequently rewrote the speech and press clauses to read: "That Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances."[3] Later, the Senate combined the religion clauses and the speech and press clauses[4] and the House and Senate agreed to final language in conference.

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[29] *Cf., e.g.*, Kennedy v. Bremerton Sch. Dist., No. 21-418, slip op. at 19–20 (U.S. June 27, 2022) (noting dispute over whether Free Exercise Clause strict scrutiny analysis or more lenient Free Speech Clause test applied to expressive activity protected under both Clauses).

[30] *See id.* at 29–30.

[31] *See id.* at 31–32.

[32] *See id.* at 23, 30.

[33] *See id.* at 29–30; Amdt1.3.7.2 Coercion and Establishment Clause Doctrine.

[1] Annals of Cong. 434 (1789). Madison had also proposed language limiting the power of the states in a number of respects, including a guarantee of freedom of the press. *Id.* at 435. Although passed by the House, the amendment was defeated by the Senate.

[2] *Id.* at 731.

[3] The Bill of Rights: A Documentary History 1148–49 (B. Schwartz ed. 1971).

[4] *Id.* at 1153.

There was relatively little debate over the speech and press clauses in the House, and there is no record of debate over the clauses in the Senate.[5] During debate over the clauses, Madison warned against the dangers that would arise "from discussing and proposing abstract propositions, of which the judgment may not be convinced. I venture to say, that if we confine ourselves to an enumeration of simple, acknowledged principles, the ratification will meet with but little difficulty."[6] The general statement of these "simple" principles, however, gave rise to controversy when applied to specific government actions.[7]

The Sedition Act of 1798 sparked one such controversy that "crystallized a national awareness of the central meaning of the First Amendment."[8] The law punished anyone who would "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame . . . or to bring them . . . into contempt or disrepute."[9] While Thomas Jefferson and Madison condemned the act as unconstitutional, the Adams Administration used it to prosecute its political opponents.[10] Although the Supreme Court never ruled the Sedition Act unconstitutional prior to its expiration in 1801, the Court later recognized "a broad consensus" from the political and judicial branches that the act was unconstitutional.[11]

Amdt1.7.2 Procedural Matters

Amdt1.7.2.1 The Overbreadth Doctrine, Statutory Language, and Free Speech

First Amendment:

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

The overbreadth doctrine focuses on the need for precision in drafting a statute that may affect First Amendment rights, and more concretely, allows a special kind of facial challenge to statutes.[1] Ordinarily, to prevail in a facial challenge—a claim challenging a statute on its face,

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[5] The House debate insofar as it touched upon this amendment was concerned almost exclusively with a motion to strike the right to assemble and an amendment to add a right of the people to instruct their Representatives. 1 Annals of Cong. 731–49 (Aug. 15, 1789).

[6] *Id.* at 738.

[7] For example, Madison refused to concur officially in President George Washington's condemnation of "[c]ertain self-created societies"—political clubs supporting the French Revolution—and he successfully deflected Federalist interest in censuring such societies. I. Brant, James Madison: Father of the Constitution 1787–1800, at 416–20 (1950). "If we advert to the nature of republican government," Madison told the House, "we shall find that the censorial power is in the people over the government, and not in the government over the people." 4 Annals of Cong. 934 (1794). However, while a member of his county's committee on public safety, Madison had promoted prosecution of Loyalist speakers and the burning of their pamphlets during the Revolutionary period. 1 Papers of James Madison 147, 161–62, 190–92 (W. Hutchinson & W. Rachal, eds., 1962). Writing to Madison in 1788, Jefferson stated: "A declaration that the Federal Government will never restrain the presses from printing anything they please, will not take away the liability of the printers for false facts printed." 13 Papers of Thomas Jefferson 442 (J. Boyd ed., 1955). A year later, Jefferson suggested to Madison that the free speech-free press clause might read something like: "The people shall not be deprived or abridged of their right to speak, to write or otherwise to publish anything but false facts affecting injuriously the life, liberty, property, or reputation of others or affecting the peace of the confederacy with foreign nations." 15 Papers, *supra*, at 367.

[8] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273 (1964).

[9] 1 Stat. 596 (1798)

[10] *See* J. Smith, Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties 159 et seq. (1956).

[11] *N.Y. Times Co.*, 376 U.S. at 276.

[1] NAACP v. Button, 371 U.S. 415, 432–33 (1963).

rather than only in certain applications—a litigant "must 'establish that no set of circumstances exists under which the [law] would be valid,' or show that the law lacks 'a plainly legitimate sweep.'"[2] Accordingly, if a statute sweeps in both protected and unprotected activity, the Court will ordinarily only invalidate its application to protected conduct.[3] In the context of the First Amendment, however, the Supreme Court has allowed a person whose own conduct may not be constitutionally protected to bring a facial challenge to a law, if the statute is so broadly written that it sweeps in protected speech and could therefore have "a deterrent effect on free expression."[4] The overbreadth doctrine thus allows the facial invalidation of a law that "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'"[5] For example, in *United States v. Stevens*, the Supreme Court applied the overbreadth doctrine to rule unconstitutional a federal law that "criminalize[d] the commercial creation, sale, or possession of certain depictions of animal cruelty."[6] The Court described the statute as "a criminal prohibition of alarming breadth," and concluded that "the presumptively impermissible applications of [the law] . . . far outnumber any permissible ones."[7]

The Supreme Court has recognized, however, that "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct."[8] The Supreme Court has cautioned that facial "[i]nvalidation for overbreadth is 'strong medicine' that is not to be 'casually employed.'"[9] The requirement that a law must be "substantially" overbroad

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[2] Ams. for Prosperity Found. v. Bonta, No. 19-251, slip op. at 15 (U.S. July 1, 2021) (internal citations omitted) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987); Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008)).

[3] *See, e.g.,* Barr v. Am. Ass'n of Political Consultants, No. 19-631, slip op at 13–14 (U.S. July 6, 2020) (discussing severability doctrine and the "power and preference" for partial invalidation of a statute); United States v. Salerno, 481 U.S. 739, 745 (1987) ("[W]e have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."). *But cf.*, *e.g.*, Aptheker v. Secretary of State, 378 U.S. 500, 515–16 (1964) (concluding a First Amendment overbreadth case provided the appropriate analysis for a right-to-travel challenge to a statute that could not be narrowed due to the law's "indiscriminately cast and overly broad scope").

[4] Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984).

[5] Virginia v. Hicks, 539 U.S. 113, 118–19 (2003) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

[6] United States v. Stevens, 559 U.S. 460, 464, 482 (2010).

[7] *Id.* at 474, 481. *See, also, e.g.*, United States v. Robel, 389 U.S. 258, 266 (1967) (federal law barring members of registered Communist-action organizations from employment in defense facilities); Lewis v. City of New Orleans, 415 U.S. 130, 131–32 (1974) (state law prohibiting using fighting words towards police performing official duties); Erznoznik v. City of Jacksonville, 422 U.S. 205, 217–18 (1975) (city ordinance prohibiting films with nudity from being shown when visible from public streets); Doran v. Salem Inn, 422 U.S. 922, 932–34 (1975) (local ordinance prohibiting topless dancing in certain establishments, in the context of an appeal of a preliminary injunction); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 633–39 (1980) (municipal ordinance prohibiting certain charitable organizations from soliciting contributions); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 949–50 (1984) (charitable solicitation statute placing 25% cap on fundraising expenditures); City of Houston v. Hill, 482 U.S. 451, 455, 467 (1987) (city ordinance making it unlawful to "oppose, molest, abuse, or interrupt" police officer in performance of duty); Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 570, 577 (1987) (resolution banning all "First Amendment activities" at airport); Reno v. ACLU, 521 U.S. 844, 874–879 (1997) (statute banning "indecent" material on the internet); Iancu v. Brunetti, No. 18-302, slip op. at 11 (June 24, 2019) (federal law prohibiting the registration of immoral or scandalous trademarks); *Ams. for Prosperity Found.*, slip op. at 16 (state law requiring charities to file forms disclosing information about donors).

[8] *Hicks*, 539 U.S. at 119 (upholding an ordinance banning from streets within a low-income housing development any person who is not a resident or employee and who "cannot demonstrate a legitimate business or social purpose for being on the premises"). The Supreme Court has also rejected application of the doctrine in, for example, Arnett v. Kennedy, 416 U.S. 134, 158–64 (1974) (plurality opinion); Parker v. Levy, 417 U.S. 733, 757–61 (1974); and New York v. Ferber, 458 U.S. 747, 766–74 (1982).

[9] United States v. Williams, 553 U.S. 285, 293 (2008) (quoting L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 39 (1999)).

accounts for this concern.[10] In addition, the Supreme Court has said "a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts, and its deterrent effect on legitimate expression is both real and substantial."[11] Further, the Court has said "that overbreadth analysis does not normally apply to commercial speech."[12]

Amdt1.7.2.2 Vagueness, Statutory Language, and Free Speech

First Amendment:

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

Vagueness is a due process doctrine that can be brought into play with regard to any criminal and many civil statutes,[1] but it has a special significance when applied to governmental restrictions of speech: fear that a vague restriction may apply to one's speech may deter constitutionally protected speech as well as constitutionally unprotected speech.[2] In the First Amendment context, vagueness concerns are often combined with claims that the law is substantially overbroad and sweeps in too much protected speech.[3] Vagueness has been the basis for voiding numerous such laws, especially in the fields of loyalty oaths,[4] obscenity and indecency,[5] and restrictions on public demonstrations.[6] However, outside of the overbreadth context, the Court has rejected vagueness challenges where "the statutory terms are clear in their application to [a plaintiff's] proposed conduct"—even when that application may implicate speech, and when the scope of the law "may not be clear in every application."[7]

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[10] *Hicks*, 539 U.S. at 119–20.

[11] *Erznoznik*, 422 U.S. at 216.

[12] Bd. of Trs. v. Fox, 492 U.S. 469, 481 (1989); *see also, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350, 380 (1977) ("[T]he justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context.")

[1] The vagueness doctrine generally requires that a statute be precise enough to give fair warning to actors that contemplated conduct is criminal, and to provide adequate standards to enforcement agencies, factfinders, and reviewing courts. *See* Amdt5.8.1 Overview of Void for Vagueness Doctrine through Amdt5.8.4 Laws That Establish Permissible Criminal Sentences.

[2] *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 807 (2011).

[3] *see* ; *see also, e.g.*, NAACP v. Button, 371 U.S. 415, 432–33 (1963).

[4] *E.g.*, Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Baggett v. Bullitt, 377 U.S. 360 (1964); Keyishian v. Board of Regents, 385 U.S. 589 (1967). *See also* Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) (attorney discipline, extrajudicial statements).

[5] *E.g.*, Winters v. New York, 333 U.S. 507 (1948); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Interstate Circuit v. City of Dallas, 390 U.S. 676 (1968); Reno v. ACLU, 521 U.S. 844, 870–874 (1997). In *National Endowment for the Arts v. Finley,* 524 U.S. 569 (1998), the Court held that a "decency" criterion for the awarding of grants, which "in a criminal statute or regulatory scheme . . . could raise substantial vagueness concerns," was not unconstitutionally vague in the context of a condition on public subsidy for speech.

[6] *E.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940); Gregory v. City of Chicago, 394 U.S. 111 (1969); Coates v. City of Cincinnati, 402 U.S. 611 (1971). *See also* Smith v. Goguen, 415 U.S. 566 (1974) (flag desecration law); Lewis v. City of New Orleans, 415 U.S. 130 (1974) (punishment of opprobrious words); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) (door-to-door canvassing).

[7] Holder v. Humanitarian Law Project, 561 U.S. 1, 21 (2010); *see also, e.g.*, Young v. Am. Mini Theatres, 427 U.S. 50, 59–61 (1976) (rejecting vagueness challenge brought by litigants who were "not affected" by "any element of vagueness" in the challenged laws, where they had not shown the statute had a real and substantial deterrent effect on protected speech).

Amdt1.7.2.3 Prior Restraints on Speech

First Amendment:

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

The Supreme Court has recognized that "liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship."[1] Under the English licensing system, which expired in 1695, all printing presses and printers were licensed and nothing could be published without prior approval of the state or church authorities.[2] The great struggle for liberty of the press was for the right to publish without a license what for a long time could be published only with a license.[3] Given this history, the Supreme Court reviews "[a]ny system of prior restraints of expression" with "a heavy presumption against its constitutional validity."[4] To state this another way, the government "carries a heavy burden of showing justification for the imposition of such a restraint."[5]

The United States Supreme Court's first encounter with a law imposing a prior restraint came in *Near v. Minnesota ex rel. Olson*, in which a 5-4 majority voided a law authorizing the permanent enjoining of future violations by any newspaper or periodical once found to have published or circulated an "obscene, lewd and lascivious" or a "malicious, scandalous and defamatory" issue.[6] An injunction had been issued after the newspaper in question had printed a series of articles tying local officials to gangsters.[7] Although the dissenters maintained that the injunction constituted no prior restraint, because that doctrine applied to prohibitions of publication without advance approval of an executive official,[8] the majority deemed it "the essence of censorship" that, in order to avoid a contempt citation, the newspaper would have to clear future publications in advance with the judge.[9] Recognizing that liberty of the press to scrutinize closely the conduct of public affairs was essential, Chief Justice Charles Hughes stated: "The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. *Subsequent punishment* for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."[10] The Court, however, did not explore the kinds of restrictions to which the term "prior restraint" would apply other than to assert that prior restraint would only be permissible in "exceptional cases."[11]

The Supreme Court has written that "[t]he special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected

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[1] Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931).

[2] 3 Joseph Story, Commentaries on the Constitution of the United States § 1876 (1833).

[3] Lovell v. Griffin, 303 U.S. 444, 451 (1938); *Near*, 283 U.S. at 713.

[4] Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963).

[5] Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

[6] *Near*, 283 U.S. at 702, 723.

[7] *Id.* at 704.

[8] *Id.* at 733–36 (Butler, J., dissenting).

[9] *Id.* at 713 (majority opinion).

[10] *Id.* at 720 (emphasis added).

[11] *Id.* at 716.

by the First Amendment."[12] The prohibition on prior restraint, thus, essentially limits restraints until a final judicial determination is made that the First Amendment does not protect the restricted speech. For example, it limits temporary restraining orders and preliminary injunctions pending final judgments rather than permanent injunctions following final judgments that the First Amendment does not protect the restricted speech.[13]

In a number of cases during the mid-1900s, the Court invoked the doctrine of prior restraint to strike down restrictions on First Amendment rights, including a series of loosely drawn statutes and ordinances requiring licenses to hold meetings and parades and to distribute literature, with uncontrolled discretion in the licensor whether or not to issue them.[14] The doctrine that generally emerged from these early cases was that permit systems and prior licensing are constitutionally valid so long as the issuing official's discretion was limited to questions of time, place, and manner.[15] In a 1965 opinion, *Freedman v. Maryland*, the Supreme Court clarified that in the noncriminal context, a prior restraint may be upheld only if it contains certain procedural safeguards.[16] First, the burden must be on the government to prove that the speech is unprotected.[17] Second, the restraint may not "be administered in a manner which would lend an effect of finality to the censor's determination whether [speech] constitutes protected expression."[18] To meet this second requirement, a statute or "authoritative judicial construction" must ensure "that the censor will, within a specified brief period, either issue a license or go to court to restrain" the speech.[19] Content-neutral time, place, and manner regulations do not have to satisfy the procedural safeguards of

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[12] Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 390 (1973); *see also* Vance v. Univ. Amusement Co., 445 U.S. 308, 315–16 (1980) ("[T]he burden of supporting an injunction against a future exhibition [of allegedly obscene motion pictures] is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication.").

[13] See Mark A. Lemley and Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 169–71 (1998).

[14] *E.g.*, Lovell v. Griffin, 303 U.S. 444 (1938); Cantwell v. Connecticut, 310 U.S. 296 (1940); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Staub v. City of Baxley, 355 U.S. 313 (1958). For other applications, see Grosjean v. American Press Co., 297 U.S. 233 (1936); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Follett v. McCormick, 321 U.S. 573 (1944). Some of these cases involved both free speech and free exercise rights. *See* Amdt1.4.3.1 Laws Neutral to Religious Practice during the 1940s and 1950s.

[15] Cox v. New Hampshire, 312 U.S. 569 (1941); Poulos v. New Hampshire, 345 U.S. 395 (1953). In *Carroll v. President & Comm'rs of Princess Anne,* 393 U.S. 175 (1968), the Court held invalid the issuance of an ex parte injunction to restrain the holding of a protest meeting. The *Carroll* Court held that usually notice must be given the parties to be restrained and an opportunity for them to rebut the contentions presented to justify the sought-for restraint. In *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971), the Court held invalid as a prior restraint an injunction preventing the petitioners from distributing 18,000 pamphlets attacking respondent's alleged "blockbusting" real estate activities; he was held not to have borne the "heavy burden" of justifying the restraint. The Court stated: "No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court. Designating the conduct as an invasion of privacy . . . is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record." *Id.* at 419–20. *See also* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (ordinance vesting in the mayor unbridled discretion to grant or deny annual permit for location of newsracks on public property is facially invalid as prior restraint).

[16] Freedman v. Maryland, 380 U.S. 51, 58 (1965).

[17] *Id.*

[18] *Id.*

[19] *Id.* at 59. The Court further explained that "[a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution," and "the procedure must . . . assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Id.* at 59. The necessity of immediate appellate review of orders restraining the exercise of First Amendment rights was strongly emphasized in *National Socialist Party v. Village of Skokie,* 432 U.S. 43 (1977), and seems to explain the Court's action in *Philadelphia Newspapers v. Jerome,* 434 U.S. 241 (1978). *But see* Moreland v. Sprecher, 443 U.S. 709 (1979) (party can relinquish right to expedited review through failure to properly request it).

Freedman—although pursuant to those early cases, they still must "contain adequate standards to guide the official's decision and render it subject to effective judicial review."[20]

The Court has also encountered the doctrine in the national security area, for example, when the government attempted to enjoin press publication of classified documents pertaining to the Vietnam War[21] and, although the Court rejected the effort, at least five and perhaps six Justices concurred on principle that, in some circumstances, prior restraint of publication would be constitutional.[22]

Confronting a claimed conflict between free press and fair trial guarantees, the Court unanimously set aside a state court injunction barring the publication of information that might prejudice the subsequent trial of a criminal defendant.[23] Though agreed as to the result, the Justices were divided as to whether "gag orders" were ever permissible and if so what the standards for imposing them were. The majority opinion used a now-discredited formulation of the "clear and present danger" test and considered as factors in any decision on the imposition of a restraint upon press reporters "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."[24] Though the Court found that one seeking a restraining order must meet "the heavy burden of demonstrating, in advance of trial, that without a prior restraint a fair trial would be denied," it refused to "rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint."[25] On a different level, however, are orders that restrain the press as a party to litigation in the dissemination of information obtained through pretrial discovery. In *Seattle Times Co. v. Rhinehart*, the Court determined that such orders protecting parties from abuses of discovery require "no heightened First Amendment scrutiny."[26]

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[20] Thomas v. Chi. Park Dist., 534 U.S. 316, 322–23 (2002).

[21] New York Times Co. v. United States, 403 U.S. 713 (1971). The vote was 6-3, with Justices Hugo Black, William O. Douglas, William Brennan, Potter Stewart, Byron White, and Thurgood Marshall in the majority and Chief Justice Warren Burger and Justices John Harlan and Harry Blackmun in the minority. Each Justice issued an opinion.

[22] The three dissenters thought such restraint appropriate in this case. *Id.* at 748, 752, 759. Justice Potter Stewart thought restraint would be proper if disclosure "will surely result in direct, immediate, and irreparable damage to our Nation or its people," *id.* at 730, while Justice Byron White did not endorse any specific phrasing of a standard. *Id.* at 730–33. Justice William Brennan would preclude even interim restraint except upon "governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea." *Id.* at 712–13. With respect to the right of the Central Intelligence Agency to prepublication review of the writings of former agents and its enforcement through contractual relationships, see Snepp v. United States, 444 U.S. 507 (1980); Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975); United States v. Marchetti, 446 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

[23] Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[24] *Id.* at 562 (quoting Dennis v. United States, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494, 510 (1951)). Applying the tests, the Court agreed that (a) there was intense and pervasive pretrial publicity and more could be expected, but that (b) the lower courts had made little effort to assess the prospects of other methods of preventing or mitigating the effects of such publicity and that (c) in any event the restraining order was unlikely to have the desired effect of protecting the defendant's rights. *Id.* at 562–67. For more information on the Court's movement away from the clear-and-present danger standard, see Amdt1.7.5.3 Incitement Movement from Clear and Present Danger Test.

[25] *Nebraska Press Ass'n*, 427 U.S. at 569–70. The Court distinguished between reporting on judicial proceedings held in public and reporting of information gained from other sources, but found that a heavy burden must be met to secure a prior restraint on either. *Id.* at 570. *See also* Oklahoma Pub. Co. v. District Court, 430 U.S. 308 (1977) (setting aside injunction restraining news media from publishing name of juvenile involved in pending proceeding when name has been learned at open detention hearing that could have been closed but was not); Smith v. Daily Mail Pub. Co., 443 U.S. 97 (1979).

[26] 467 U.S. 20, 36 (1984). The decision was unanimous, all other Justices joining Justice Lewis Powell's opinion for the Court, but Justices William Brennan and Thurgood Marshall noting additionally that under the facts of the case important interests in privacy and religious freedom were being protected. *Id.* at 37, 38.

Amdt1.7.2.4 State Action Doctrine and Free Speech

First Amendment:

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

The First Amendment by its terms applies only to laws enacted by Congress and not to the actions of private persons.[1] As such, the First Amendment is subject to a "state action" (or "governmental action") limitation similar to that applicable to the Fifth and Fourteenth Amendments.[2] The Supreme Court has stated that "a private entity can qualify as a state actor in a few limited circumstances," such as "[1] when the private entity performs a traditional, exclusive public function; [2] when the government compels the private entity to take a particular action; or [3] when the government acts jointly with the private entity."[3] In addition, some private entities established by the government to carry out governmental objectives may qualify as state actors for purposes of the First Amendment. For example, in *Lebron v. National Railroad Passenger Corp.*, the Court held that the national passenger train company Amtrak, "though nominally a private corporation," qualified as "an agency or instrumentality of the United States" for purposes of the First Amendment.[4] It did not matter, in the Court's view, that the federal statute establishing Amtrak expressly stated that Amtrak was not a federal agency because Amtrak was "established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees."[5]

Starting with the "public function" test, the Court extended the First Amendment to apply to the actions of a private party in *Marsh v. Alabama*, barring the punishment of a resident of a company-owned town for distributing religious literature.[6] While the town was owned by a private corporation, "it ha[d] all the characteristics of any other American town," including residences, businesses, streets, utilities, public safety officers, and a post office.[7] Under these circumstances, the Court held that "the corporation's property interests" did not "settle the question"[8]: "[w]hether a corporation or a municipality owns or possesses the town[,] the public in either case has an identical interest in the functioning of the community in such manner

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[1] Through interpretation of the Fourteenth Amendment, the prohibition extends to the states as well. *See* Bill of Rights: The Fourteenth Amendment and Incorporation. Of course, the First Amendment also applies to the non-legislative branches of government—to every "government agency—local, state, or federal." Herbert v. Lando, 441 U.S. 153, 168 n.16 (1979).

[2] *See, e.g.*, Amdt1.7.2.4 State Action Doctrine and Free Speech.

[3] Manhattan Cmty. Access Corp. v. Halleck, No. 17-702, slip op. at 6 (U.S. June 17, 2019) (internal citations omitted) (citing Jackson v. Metro. Edison Co., 419 U.S. 345, 352–54 (1974), Blum v. Yaretsky, 457 U.S. 991, 1004–05 (1982), and Lugar v. Edmondson Oil Co., 457 U.S. 922, 941–42 (1982), respectively).

[4] 513 U.S. 374, 383, 394 (1995); see also Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 55 (2015) (extending the holding of *Lebron*, such that Amtrak was considered a governmental entity "for purposes of" the Fifth Amendment due process and separation-of-powers claims presented by the case).

[5] Lebron, 513 U.S. at 391–93, 398.

[6] Marsh v. Alabama, 326 U.S. 501, 509 (1946). A state statute "ma[de] it a crime to enter or remain on the premises of another after having been warned not to do so"; the resident had been warned that, pursuant to a company policy, she could not distribute religious literature without a permit, and she subsequently disregarded that warning and refused to leave a sidewalk. *Id.* at 503–04. Accordingly, although the case involved a criminal prosecution brought by the State of Alabama, liability turned on the *town's* ability to prevent residents from distributing literature without a permit. *See id.*

[7] *Id.* at 502–03.

[8] *Id.* at 505.

that the channels of communication remain free."[9] Consequently, the corporation could not be permitted "to govern a community of citizens" in a way that "restrict[ed] their fundamental liberties."[10]

Since *Marsh* was issued in 1946, however, it has largely been limited to the facts presented in that case, and applies only if a private entity exercises "powers traditionally *exclusively* reserved to the State."[11] The Supreme Court extended the *Marsh* decision in 1968: in *Amalgamated Food Employees Union v. Logan Valley Plaza*, the Court held that a private shopping mall could not prevent individuals from peacefully picketing on the premises, noting similarities between "the business block in *Marsh* and the shopping center" at issue in that case.[12] However, the Court subsequently disclaimed *Logan Valley* in *Hudgens v. NLRB*, rejecting the idea that "large self-contained shopping center[s]" are "the functional equivalent of a municipality."[13] Instead, the Court held that in *Hudgens*, where a shopping center manager had threatened to arrest picketers for trespassing, "the constitutional guarantee of free expression ha[d] no part to play."[14] As a result, the picketers "did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike."[15] In another decision in which the Supreme Court held that the First Amendment did not prevent a shopping center from banning the distribution of handbills, the Court distinguished *Marsh* by noting that "the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State."[16] By contrast, the disputed shopping center had not assumed "municipal functions or power."[17] The fact that the shopping center was generally open to the public did not qualify as a "dedication of [the] privately owned and operated shopping center to public use" sufficient "to entitle respondents to exercise therein the asserted First Amendment rights."[18]

More recently, in *Manhattan Community Access Corp. v. Halleck*, the Supreme Court held that Manhattan Neighborhood Network (MNN), a private, nonprofit corporation designated by New York City to operate public access channels in Manhattan, was not a state actor for purposes of the First Amendment because it did not exercise a "traditional, exclusive public function."[19] Emphasizing the limited number of functions that met this standard under the Court's precedents,[20] the Court reasoned that operating public access channels "has not traditionally and exclusively been performed by government" because "a variety of private and

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[9] *Id.* at 507. *See also id.* at 508 (noting that residents of company towns, like residents of other towns, "must make decisions which affect the welfare of community and nation," and that to do this, they must have access to "uncensored" information).

[10] *Id.* at 509.

[11] Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974) (emphasis added). *Accord* Lugar v. Edmonson Oil Co., 457 U.S. 922, 939 (1982); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158–59 (1978).

[12] 391 U.S. 308, 317 (1968). In dissent, Justice Hugo Black would have ruled that the picketers could not, "under the guise of exercising First Amendment rights, trespass on . . . private property for the purpose of picketing." *Id.* at 329 (Black, J., dissenting).

[13] Hudgens v. NLRB, 424 U.S. 507, 520 (1976).

[14] *Id.* at 521.

[15] *Id.*

[16] Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972).

[17] *Id.*

[18] *Id.* at 569–70.

[19] Manhattan Cmty. Access Corp. v. Halleck, No. 17-702, slip op. at 2–3, 6 (U.S. June 17, 2019)

[20] *Id.* at 6–7 (stating that while "running elections" and "operating a company town" qualify as traditional, exclusive public functions, "running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and supplying electricity" do not).

public actors" had performed the function since the 1970s.[21] Moreover, the Court reasoned, "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints."[22]

Apart from the factual circumstances presented by the company town that exercises powers "traditionally" and "exclusively" held by the government,[23] the Court has sometimes applied the First Amendment against private parties if they have a "sufficiently close relationship" to the government.[24] Such circumstances may exist where a private company "is subject to extensive state regulation"—although government regulation alone is not sufficient to establish the state action requirement.[25] Instead, the inquiry in such a case is "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[26] Accordingly, for example, in *Manhattan Community Access Corp.*, the Supreme Court also held that the city's selection of MNN and the state's extensive regulation of MNN did not in and of themselves create state action.[27]

The question of when broadcast companies are engaged in governmental action subject to the First Amendment has sometimes been a difficult one. In *Columbia Broadcasting System v. Democratic National Committee*, the Court considered whether a radio station that had a license from the government to broadcast over airwaves in the public domain needed to comply with the First Amendment when it sold air time to third parties.[28] The radio station had a policy of refusing to sell air time to persons seeking to express opinions on controversial issues.[29] Three Justices joined a plurality opinion concluding that the radio station was not engaged in governmental action when it enforced this policy.[30] They reasoned that the federal government had not partnered with or profited from the broadcaster's decisions and that Congress had "affirmatively indicated" that broadcasters subject to federal law retained certain journalistic license.[31] In the view of those Justices, if the Court were "to read the First Amendment to spell out governmental action in the circumstances presented . . . , few licensee decisions on the content of broadcasts or the processes of editorial evaluation would escape constitutional scrutiny."[32] In contrast, three other Members of the Court would have held that the radio station was engaged in governmental action because of the degree of governmental

[21] *Id.* at 7.

[22] *Id.* at 10.

[23] Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974).

[24] *See* Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 462 (1952) (holding that such a relationship existed where the private company operated a public utility that represented a "substantial monopoly" under congressional authority and, more importantly, the company operated "under the regulatory supervision" of a governmental agency, and the particular action being challenged involved action by that agency).

[25] Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974); *see also* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

[26] *Jackson*, 419 U.S. at 351.

[27] *See id.* at 11 (reasoning that absent performance of a traditional and exclusive public function, a private entity is not a state actor merely because the government licenses, contracts with, grants a monopoly to, or subsidizes it); *id.* at 12 (reasoning that state regulations that "restrict MNN's editorial discretion" and effectively require it to "operate almost like a common carrier" do not make MNN a state actor). The majority also rejected the argument that MNN was simply standing in for New York City in managing government property, reasoning that the record did not show that any government owned, leased, or otherwise had a property interest in the public access channels or the broader cable network in which they operated. *Id.* at 14–15.

[28] 412 U.S. 94 (1973).

[29] *Id.* at 98.

[30] *Id.* at 120 (plurality opinion of Burger, C.J., and Stewart and Rehnquist, JJ.).

[31] *Id.* at 119–20.

[32] *Id.* at 120.

regulation of broadcasters' activities and the station's use of the airwaves, a public resource.[33] And three Justices would not have decided the state action question.[34] Nevertheless, these three Justices joined the Court's opinion concluding that even if the broadcaster was engaged in governmental action, the First Amendment did not require "a private right of access to the broadcast media."[35]

Amdt1.7.3 Content-Based and Content-Neutral Regulation of Speech

Amdt1.7.3.1 Overview of Content-Based and Content-Neutral Regulation of Speech

First Amendment:

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

At its core, the First Amendment's Free Speech Clause prohibits the government from suppressing or forcing conformity with particular ideas or messages.[1] To guard against such abuses of power, the Supreme Court typically has subjected laws that "target speech based on its communicative content" to strict judicial scrutiny.[2] This rule applies not only to laws in the form of federal and state statutes and local ordinances,[3] but also to government regulations and policies[4] and judicial codes of conduct.[5] Additionally, the rule applies not only to outright bans or restrictions on speech but also to financial or other regulatory burdens on speech.[6] Although this essay focuses on when a law is content based or content neutral and the legal

[33] *Id.* at 150 (Douglas, J., concurring in the judgment); *id.* at 172–73 (Brennan and Marshall, JJ., dissenting).

[34] *See id.* at 171 (Brennan, J., dissenting) (noting that Justices Byron White, Harry Blackmun, and Lewis Powell would not have reached the state action question).

[35] *Id.* at 129 (majority opinion).

[1] *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) (explaining that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (opining that under the First Amendment, the government may not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein").

[2] Reed v. Town of Gilbert, 576 U.S. 155, 163–64 (2015); *see also* Citizens United v. FEC, 558 U.S. 310, 340 (2010) ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints."); Ashcroft v. ACLU, 542 U.S. 656, 660 (2004) (to guard against content-based prohibitions as a "repressive force in the lives and thoughts of a free people," the Constitution "demands that content-based restrictions on speech be presumed invalid and that the Government bear the burden of showing their constitutionality" (internal citations omitted)).

[3] *E.g., Reed*, 576 U.S. at 164 (holding that a town's sign ordinance violated the First Amendment).

[4] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 264, 277 (1981) (holding that a state university's policy to open its buildings to student groups while denying student groups access "for purposes of religious worship or religious teaching" violated the First Amendment).

[5] *See* Republican Party v. White, 536 U.S. 765, 768 (2002) (holding unconstitutional an ethical standard promulgated by a state supreme court that prohibited candidates for judicial office from "announc[ing]" their "views on disputed legal or political issues").

[6] *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (explaining that the "government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace").

effects of that determination, the free speech principles disfavoring content-based discrimination also apply to other forms of government action,[7] including the enforcement of content-neutral laws.[8]

The Court's approach to determining whether a law targets speech based on its content has shifted over time.[9] In the 1980s and early 1990s, for example, the Court examined both the text and justifications for a law, but sometimes placed more emphasis on the latter, asking whether the government's regulatory purpose was related to the suppression of a particular message or form of expression.[10] The Court's 2015 decision in *Reed v. Town of Gilbert* heralded a more text-focused approach, clarifying that content-based distinctions "on the face" of a law warrant heightened scrutiny even if the government advances a content-neutral justification for that law.[11]

Under *Reed*, a law can be content based "on its face" or due to a discriminatory purpose or justification.[12] A facially content-based law "draws distinctions based on the message a speaker conveys."[13] Such a law might define regulated speech by "particular subject matter" or by "its function or purpose."[14] The law might even regulate speech on the basis of the particular views expressed.[15] By comparison, a law that is content neutral on its face still may be deemed content based if the law "cannot be justified without reference to the content of the regulated speech," or was adopted "because of disagreement with the message [the speech] conveys."[16]

After *Reed*, lower courts diverged over whether a law was necessarily content based on its face if its application or enforcement turned on the content of the speech at issue. In *City of Austin v. Reagan National Advertising of Austin, LLC*, the Court clarified that a law is facially content based if it applies to particular speech because of the subject matter, topic, or viewpoint expressed—that is, if it turns on the "substantive message" conveyed.[17] A law may be facially content neutral, the Court explained, even if "a reader must ask: who is the speaker and what is the speaker saying" to determine if the law applies,[18] so long as that examination is "only in service of drawing neutral" lines that are "agnostic as to content."[19] Thus, in *City of Austin*, the Court upheld an ordinance that placed certain restrictions only on signs advertising off-premises businesses, even though application of those restrictions depended upon the content of the sign relative to its location.[20]As a general matter, content-based laws are

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[7] *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 390–92 (1987) (holding that a county law enforcement office unlawfully fired a clerical employee based on the content of her speech even under the more lenient standards applicable when the government is acting as employer).

[8] *See, e.g.*, Cohen v. California, 403 U.S. 15, 18 (1971) (reversing the judgment of conviction of a defendant who was arrested for disorderly conduct in a courthouse because of the content of the message inscribed on his jacket).

[9] *See* Amdt1.7.3.2 Development of a Judicial Approach to Content-Based Speech Laws.

[10] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[11] *Reed*, 576 U.S. at 163–64.

[12] *Id.*

[13] *Id.* at 163.

[14] *Id.*

[15] *Id.* Because the Supreme Court considers viewpoint discrimination "an egregious form of content discrimination," cases analyzing viewpoint-based laws are discussed separately in a later essay. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995). *See* Amdt1.7.4.1 Overview of Viewpoint-Based Regulation of Speech.

[16] *Reed*, 576 U.S. at 164 (quoting Ward v. Rock Against Racism, 491 U. S. 781, 791 (1989)).

[17] No. 20-1029, slip op. at 6, 8–9 (Apr. 21, 2022).

[18] *Id.* at 6 (internal quotation marks omitted).

[19] *Id.*

[20] *Id.* at 8.

"presumptively unconstitutional" and subject to a strict scrutiny standard of judicial review.[21] This is a difficult test for the government to satisfy.[22] Under strict scrutiny, the government must show that its law serves a compelling governmental interest and is narrowly tailored to advance that interest.[23] Narrow tailoring in this context typically means that "[i]f a less restrictive alternative would serve the [g]overnment's purpose, the legislature must use that alternative."[24] Thus, in challenges to content-based laws under strict scrutiny, the government bears the burden of proving that any proposed alternatives are less effective than the challenged law.[25]

The Court has recognized some exceptions to the general rule that content-based laws receive strict scrutiny, two of which reflect the Court's "limited categorical approach" to First Amendment law.[26] Specifically, the Court has subjected laws regulating "commercial speech" to an intermediate form of scrutiny.[27] Even in the commercial context, though, the Court has applied or considered applying strict scrutiny to laws that completely ban a subset of commercial speech because of its content or that are aimed at particular commercial speakers.[28] In addition to the category of commercial speech (which is protected speech), the Court has recognized some narrowly defined categories of "unprotected speech" that the government may regulate *because of* their harmful content,[29] such as "true threats" and "defamation."[30] Within those categories, the government may not draw additional content-based distinctions unless "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable."[31]

There are also some specific contexts in which the Court has allowed for certain types of content-based distinctions,[32] including schools,[33] prisons,[34] and nonpublic forums (that is, government-owned property opened for specific or limited public purposes).[35] Additionally, the Court has held that when the government is providing a public subsidy, such as a tax exemption, or funding a government program, it may draw some types of content-based distinctions to identify the activities it seeks to subsidize and to define the limits of the government program.[36]

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[21] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

[22] *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983) ("With respect to noncommercial speech, this Court has sustained content-based restrictions only in the most extraordinary circumstances.").

[23] United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000).

[24] *Id.*

[25] Ashcroft v. ACLU, 542 U.S. 656, 665 (2004).

[26] R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992).

[27] *See* Amdt1.7.6.1 Commercial Speech Early Doctrine to Amdt1.7.6.2 Central Hudson Test and Current Doctrine.

[28] *E.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552, 565 (2011); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501–04 (1996) (plurality opinion); Cincinnati v. Discovery Network, 507 U.S. 410, 429 (1993).

[29] United States v. Stevens, 559 U.S. 460, 468 (2010); *R.A.V.*, 505 U.S. at 383; New York v. Ferber, 458 U.S. 747, 763–64 (1982).

[30] *See* Amdt1.7.5.5 Fighting Words; Amdt1.7.5.6 True Threats; Amdt1.7.5.7 Defamation.

[31] *R.A.V.*, 505 U.S. at 388.

[32] *See* FCC v. Pacifica Found., 438 U.S. 726, 744 (1978) (plurality opinion) (explaining that "[b]oth the content and the context of speech are critical elements of First Amendment analysis").

[33] Mahanoy Area Sch. Dist. v. B.L., No. 20-255, slip op. at 5 (U.S. June 23, 2021) (identifying three categories of student speech that schools may regulate). *See* Amdt1.7.8.3 School Free Speech and Government as Educator.

[34] *E.g.*, Beard v. Banks, 548 U.S. 521, 526 (2006). *See* Amdt1.7.8.4 Prison Free Speech and Government as Prison Administrator.

[35] Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018). *See* Amdt1.7.7.1 The Public Forum.

[36] *See* Amdt1.7.13.3 Conditions on Tax Exemptions; Amdt1.7.13.4 Conditions on Federal Funding.

The Court has distinguished content-based laws from content-neutral laws, while acknowledging that deciding whether a particular law "is content based or content neutral is not always a simple task."[37] A content-neutral law that imposes only an incidental burden on speech "will be sustained if 'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'"[38] Similarly, the government "may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"[39]

Amdt1.7.3.2 Development of a Judicial Approach to Content-Based Speech Laws

First Amendment:

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

As explained in Amdt1.7.3.1 Overview of Content-Based and Content-Neutral Regulation of Speech, laws regulating protected speech on the basis of its content are generally subject to strict judicial scrutiny.[1] As the Supreme Court has acknowledged, however, deciding whether a particular law "is content based or content neutral is not always a simple task."[2] When confronted with the question, the Court has examined a law's text (that is, the face of the law) and considered arguments about the law's justification, purpose, design, and operation.

Whether a content-based distinction on the face of the law rendered that law presumptively invalid has changed over time, with earlier cases lacking a consistent approach.[3] For example, in the 1980s and early 1990s, the Court sometimes considered laws that drew content-based distinctions on their face to be content neutral (and subject to a form of intermediate scrutiny) so long as they were supported by a content-neutral justification.[4]

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[37] Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994).

[38] *Id.* at 662 (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)).

[39] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)). For more discussion of the time, place, and manner doctrine, see Amdt1.7.7.1 The Public Forum.

[1] *See* Amdt1.7.3.1 Overview of Content-Based and Content-Neutral Regulation of Speech.

[2] Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994).

[3] *Compare* Erznoznik v. Jacksonville, 422 U.S. 205, 209–11 (1975) (suggesting that intermediate scrutiny was inappropriate for an ordinance prohibiting drive-in movie theaters from showing films containing nudity when their screens were visible from a public place, because the ordinance "discriminate[d] among movies solely on the basis of content"), *with* Young v. Am. Mini Theatres, 427 U.S. 50, 71–73 (1976) (viewing an ordinance restricting the location of "adult" movie theatres as a permissible restriction on the "place" where films could be exhibited even though the law distinguished among films based on their content).

[4] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (explaining that the "principal inquiry in determining content neutrality" is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys" and that the "government's purpose is the controlling consideration"); *see, e.g.*, Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 791 n.1, 804 (1984) (applying intermediate scrutiny to an ordinance that excepted certain historical and cultural markers from a general prohibition on posting signs on public property). Relatedly, the Court has upheld some zoning restrictions on adult theatres on the grounds that the restrictions were based on the undesirable "secondary effects" of such theatres rather than the content of the movies shown there. *See* Amdt1.7.3.7 Content-Neutral Laws Burdening Speech.

This approach started to shift in the mid-1990s, as the Court began to clarify that a content-neutral purpose cannot "save a law which, on its face, discriminates based on content."[5]

In its 2015 decision in *Reed v. Town of Gilbert*, the Court squarely held that a facially content-based law is subject to strict scrutiny "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[6] Thus, under the approach set out in *Reed*, a law may be content based, and thus presumptively unconstitutional, if it draws content-based distinctions on its face *or* if it reflects a discriminatory purpose.[7]

Amdt1.7.3.3 Laws Making Facial Content-Based Distinctions Regarding Speech

First Amendment:

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

The Supreme Court has recognized that the "First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."[1] In 1980, the Court struck down a state order prohibiting private utility companies from including inserts in their billing envelopes discussing "controversial issues of public policy."[2] The Court reasoned that the order imposed an impermissible content-based restriction even though it did "not favor either side of a political controversy," reaffirming the general rule that the government may not regulate speech based on its subject matter.[3] The Court explained that to "allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth."[4]

Drawing on these precedents, the Court set out the modern test for determining whether a law is facially content based in two decisions involving local sign ordinances. In its 2015 decision in *Reed v. Town of Gilbert*, the Court held that a law is content based "on its face" if it "draws distinctions based on the message a speaker conveys."[5] The Court explained that "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose."[6] The ordinance at issue in *Reed* fell into the former category because it "single[d]

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[5] Turner Broad. Sys. v. FCC, 512 U.S. 622, 642–43 (1994).

[6] *Reed*, 576 U.S. at 165 (quoting Cincinnati v. Discovery Network, Inc., 507 U. S. 410, 429 (1993)).

[7] *Id.*

[1] Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 537, 544 (1980) (citing Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972)).

[2] *Id.* at 533.

[3] *Id.* at 537–39; *see also* FCC v. League of Women Voters, 468 U.S. 364, 366, 383 (1984) (reasoning that a ban on "editorializing" by noncommercial broadcasting stations receiving federal funds was "defined solely on the basis of the content of the suppressed speech").

[4] *Consol. Edison Co.*, 447 U.S. at 538.

[5] 576 U.S. 155, 163 (2015).

[6] *Id.*

out specific subject matter for differential treatment" by, for example, placing more onerous restrictions on "political" signs than on "ideological" signs.[7]

Other examples of laws that the Court has determined to be facially content based include a federal statute criminalizing the commercial sale of "depictions of animal cruelty,"[8] a federal statute requiring cable television operators to scramble or restrict the daytime transmission of channels "primarily dedicated to sexually-oriented programming,"[9] a federal statute restricting "indecent" and "patently offensive" internet communications,[10] and a state law imposing a sales tax on general interest magazines but exempting religious, trade, and sports magazines.[11]

Although *Reed* clarified the meaning of "content based" to some extent, courts continued to grapple with the question of whether a law is content based—and thus presumptively unconstitutional—whenever the government must read the speech at issue to determine the law's applicability or the speaker's compliance with the law.[12] In its 2022 decision in *City of Austin v. Reagan National Advertising of Austin, LLC*, the Court rejected that formulation of the rule as "too extreme an interpretation of this Court's precedent."[13] The case involved a city ordinance restricting "off-premises signs"—signs advertising or directing readers to businesses or events at another location, but not restricting signs advertising activities on the same premises. In practice, determining whether the restrictions applied required reading the sign to identify whether it advertised a business or event on or off of the premises where the sign was posted. In the majority's view, that ordinance was content neutral because it did not

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[7] *Id.* at 159–60, 169; *see also* Burson v. Freeman, 504 U.S. 191, 197, 207, 211 (1992) (plurality opinion) (concluding that a state law prohibiting the solicitation of votes and the display or distribution of campaign materials within 100 feet of a polling place entrance was content based because the statute reached only political speech, not "other categories of speech, such as commercial solicitation," but concluding that the law nonetheless survived strict scrutiny); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 493, 521 (1981) (plurality opinion) (striking down a billboard ordinance that "favor[ed] certain kinds of messages—such as onsite commercial advertising, and temporary political campaign advertisements—over others").

[8] United States v. Stevens, 559 U.S. 460, 468 (2010).

[9] United States v. Playboy Entm't Grp., 529 U.S. 803, 806, 811 (2000); *see also* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115–18, 123 (1991) (holding that a state law imposed an unconstitutional, content-based burden on speech by requiring anyone who contracts with an accused or convicted person for a depiction of the person's crime to turn over any income from that work to the state's crime victims board); Erznoznik v. Jacksonville, 422 U.S. 205, 211–12 (1975) (holding that an ordinance prohibiting drive-in movie theaters visible from public streets from showing films depicting nudity was an invalid, content-based prohibition).

[10] Reno v. ACLU, 521 U.S. 844, 868 (1997); *see also* Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 122 (1989) (suggesting that a law banning "indecent" interstate commercial telephone communications regulated "the content of constitutionally protected speech"); Boos v. Barry, 485 U.S. 312, 315, 334 (1988) (finding content based and holding unconstitutional a law banning the display of signs outside of an embassy that bring the foreign government of that embassy into "public disrepute").

[11] Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 223, 230–33 (1987) (holding that this "selective taxation" system violated the First Amendment).

[12] City of Austin v. Reagan Nat'l Advert. of Austin, LLC, No. 20-1029, slip op. at 6 (Apr. 21, 2022); Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 134 (1992) (holding that a county ordinance requiring a permit to hold a public parade or assembly and a fee for "necesary and reasonable" police protection was content based as implemented because "[i]n order to assess accurately the cost of security for parade participants," the county "must necessarily examine the content of the message that is conveyed"). Other decisions of the Court sometimes framed the standard as whether the law turns on what a speaker says. *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 27 (2010) (holding that a federal statute prohibiting material support to foreign terrorist organizations was content based because whether the law would allow the plaintiffs to speak with a foreign terrorist organization "depends on what they say").

[13] *City of Austin*, slip op. at 6.

"single out any topic or subject matter for differential treatment."[14] Instead, the ordinance distinguished signs based on a content-neutral factor—location—rather than their "substantive message."[15]

City of Austin also addressed the statement in *Reed* that laws that distinguish speech based on its "function or purpose" are content based.[16] The Court opined that not every "classification that considers function or purpose" is content based.[17] Instead, the Court suggested that defining regulated speech by its function is only problematic when function is used as a "proxy" for regulating content, such as when a legislature attempts to regulate political signs by describing regulated signs as those "designed to influence the outcome of an election."[18]

As with laws that restrict a discrete category of speech, laws that exempt one category of speech from a broader speech restriction could also create a facial content-based distinction.[19] In *Regan v. Time, Inc.*, the Court evaluated a statutory exception to a long-standing ban on photographic reproductions of currency,[20] allowing certain publishers to use these photographs for "educational, historical, or newsworthy purposes."[21] The Court held that the purpose provision was "constitutionally infirm" because whether a photograph is "newsworthy" or "educational" requires the government to make a content-based judgment.[22]

The Court again struck down a content-based exception in *Barr v. American Association of Political Consultants*.[23] That case concerned a 1991 federal law that, among other things, prohibited automated calls to cell phones, also known as "robocalls."[24] Congress had added a provision in 2015 that exempted calls made to collect debt owed to the federal government, such as student loan debt, from the robocall restriction.[25] Five Justices held that the robocall restriction was impermissibly content based,[26] with a different majority concluding that the appropriate remedy was to "sever" the government-debt exception.[27] A plurality of the Court wrote that "[b]ecause the law favors speech made for collecting government debt over political and other speech, the law is a content-based restriction on speech."[28] Thus, even though Congress had *removed* a restriction on speech when it added the government-debt exception,

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[14] *Id.* at 8.

[15] *Id. See* Amdt1.7.3.7 Content-Neutral Laws Burdening Speech.

[16] *City of Austin*, slip op. at 11.

[17] *Id.*

[18] *Id. See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 345 (1995) (reasoning that a state's ban on anonymous campaign literature defined the regulated documents "by their content," which was "publications containing speech designed to influence the voters in an election").

[19] *See* Carey v. Brown, 447 U.S. 455, 460–63, 471 (1980) (holding that a statute banning residential picketing but exempting labor picketing was a content-based restriction on speech that violated the First Amendment and the Equal Protection Clause); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 93, 102 (1972) (holding the same with respect to an ordinance banning picketing outside of schools).

[20] Regan v. Time, Inc., 468 U.S. 641, 644 (1984) (plurality opinion).

[21] *Id.* (quoting 18 U.S.C. § 504(1)).

[22] *Id.* at 648–49 (majority opinion). The Court ruled that the purpose provision was "unenforceable," but upheld other statutory exceptions allowing the photographs to be published subject to certain size and color limitations. *Id.* at 658–59 (plurality opinion).

[23] Barr v. Am. Ass'n of Political Consultants, No. 19-631, slip op. (U.S. July 6, 2020) (plurality opinion); *id.* at 1 (Gorsuch, J., concurring in the judgment in part and dissenting in part).

[24] *Id.* at 1 (plurality opinion).

[25] *Id.*

[26] *Id.* at 9; *id.* at 3 (Gorsuch, J., concurring in the judgment in part and dissenting in part).

[27] *Id.* at 25 (plurality opinion); *id.* at 2 (Sotomayor, J., concurring in the judgment); *id.* at 1 (Breyer, J., concurring in the judgment with respect to severability and dissenting in part).

[28] *Id.* at 7 (plurality opinion).

that 2015 amendment created a "discriminatory exception" that resulted in "unequal treatment" of government-debt collection speech versus speech on other topics.[29]

Amdt1.7.3.4 Laws Regulating Speech with a Content-Discriminatory Purpose

First Amendment:

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

Even if a law is content neutral on its face, it could still be considered content based if it "cannot be 'justified without reference to the content of the regulated speech'" or was "adopted by the government 'because of disagreement with the message [the speech] conveys.'"[1] For example, in 1990, the Court held that a defendant could not be prosecuted for burning a flag in violation of a federal statute.[2] The case followed the Court's landmark symbolic-speech case *Texas v. Johnson*, in which the Court recognized that flag burning is a constitutionally-protected expressive activity under some circumstances.[3] Unlike the state law at issue in *Johnson*, however, the federal statute contained "no explicit" content-based limitation on flag burning.[4] The Court nonetheless concluded that Congress was concerned with the "communicative impact of flag destruction" because its stated goal of protecting the "physical integrity" of the flag depended on "a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideals."[5] That justification for the law rendered it content based for purposes of First Amendment analysis.

The Court has also encountered laws that are content based both on their face and in their "design" and "practical operation."[6] In *Sorrell v. IMS Health Inc.*, the Court considered a state law that prohibited the use of certain pharmacy records for marketing purposes without the prescribers' consent.[7] The Court held that on its face, the law imposed content-based restrictions on the use of these records because it "disfavor[ed] marketing," which is "speech with a particular content."[8] The Court observed, too, evidence of a content-discriminatory purpose, pointing to statements in the legislative record suggesting that "the law's express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs"—a content-based justification.[9]

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[29] *Id.* at 18, 20.

[1] Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015) (quoting *Ward*, 491 U.S. at 791).

[2] United States v. Eichman, 496 U.S. 310, 319 (1990).

[3] 491 U.S. 397 (1989). *See* Amdt1.7.14.1 Overview of Symbolic Speech.

[4] *Eichman*, 496 U.S. at 315.

[5] *Id.* at 315–17 (observing too that the law prohibited mutilating, defacing, defiling, burning, or trampling upon a flag but authorized the disposal of a "worn or soiled" flag).

[6] Sorrell v. IMS Health Inc., 564 U.S. 552, 565 (2011).

[7] *Id.* at 559.

[8] *Id.* at 564. For a discussion of the components of the law that the Court deemed viewpoint discriminatory, see Amdt1.7.4.3 Viewpoint Discrimination in Facially Neutral Laws.

[9] *Id.* at 565. Although it found the law to be content based, the Court ultimately concluded that the law failed even the intermediate scrutiny that applies to commercial speech restrictions. *Id.* at 571.

Amdt1.7.3.5 Laws Making Speaker-Based Distinctions in Regulating Speech

First Amendment:

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

The Supreme Court has recognized that the "First Amendment protects speech and speaker, and the ideas that flow from each."[1] While "a differential burden on speakers is insufficient by itself to raise First Amendment concerns,"[2] laws that are "designed or intended to suppress or restrict the expression of specific speakers" because of their ideas violate the First Amendment.[3] In terms of First Amendment analysis, this means that, unlike laws that regulate speech based on subject matter, topic, or viewpoint, laws that distinguish among different speakers are not necessarily deemed content based or presumptively unconstitutional. For example, a regulation distinguishing between cable operators and broadcasters, the Court observed in a 1994 case, differentiated among "speakers in the television programming market" based on "the manner in which [they] transmit their messages to viewers" rather than their content.[4] The Court explained that such distinctions are "not presumed invalid" as long as they are not "a subtle means of exercising a content preference."[5]

Speaker-based distinctions can, however, invite heightened scrutiny in some circumstances. As previously noted, speaker-based distinctions raise the specter of content-based discrimination. The Supreme Court has observed that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content."[6] The law in *Sorrell v. IMS Health, Inc.*, for example, prohibited pharmaceutical companies from using pharmacy records revealing physicians' individual prescribing practices for marketing purposes without the prescribers' consent.[7] The law did not prohibit other entities from using the records for non-marketing purposes, thus allowing, for example, educational institutions to use the regulated records for research purposes.[8] The Court observed that in addition to imposing content-based restrictions on how the information was used, the law targeted pharmaceutical companies for disfavored treatment, which contributed to the content-based nature of the law.[9]

Even apart from a desire to control the content of speech, the government may violate the First Amendment if it singles out "disfavored speakers" for speech restrictions.[10] In *Citizens United v. FEC*, for example, the Court held that Congress may not prohibit political speech in the form of independent expenditures because of a speaker's corporate identity.[11]

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[1] Citizens United v. FEC, 558 U.S. 310, 341 (2010).

[2] Leathers v. Medlock, 499 U.S. 439, 452 (1991).

[3] United States v. Playboy Entm't Grp., 529 U.S. 803, 812 (2000).

[4] Turner Broad. Sys. v. FCC, 512 U.S. 622, 645 (1994).

[5] *Id.*

[6] *Citizens United*, 558 U.S. at 340.

[7] Sorrell v. IMS Health Inc., 564 U.S. 552, 559 (2011). For additional discussion of *Sorrell*, see Amdt1.7.3.4 Laws Regulating Speech with a Content-Discriminatory Purpose.

[8] *Sorrell*, 564 U.S. at 563, 573.

[9] *Id.* at 564. For a discussion of the components of the law that the Court deemed viewpoint discriminatory, see Amdt1.7.4.3 Viewpoint Discrimination in Facially Neutral Laws.

[10] Citizens United v. FEC, 558 U.S. 310, 341 (2010).

[11] *Id.* at 341–65. *See* Amdt1.7.11.3 Campaign Finance Expenditure Limits.

Thus, speech restrictions that apply to some speakers but not others may trigger heightened scrutiny, especially where the law contains other, facial distinctions based on the message conveyed, or reflects a content-discriminatory purpose.[12]

Amdt1.7.3.6 Content-Based and Compelled Speech

First Amendment:

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

The Supreme Court has suggested that laws that compel speech, such as labeling or disclosure requirements, are typically content based because they alter the content of the speaker's message.[1] For example, in a 2018 case, the Court considered a state law that required licensed pregnancy resource centers to post a notice that the state provided free or low-cost access to certain services, including abortion.[2] The Court held that this requirement regulated speech based on its content.[3] The Court reasoned that by requiring the petitioners (pregnancy resource centers that opposed abortion) "to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly 'alters the content' of petitioners' speech."[4] The Court concluded that heightened scrutiny should apply,[5] because the law required the petitioners to adopt a "government-drafted script" about a service—abortion—that the petitioners opposed.[6]

Thus, laws that compel private speakers to make a particular statement or to include certain information in their own speech are likely content based.[7] Whether such requirements

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[12] In *FCC v. League of Women Voters*, the Court struck down a law banning noncommercial educational broadcasting stations that received federal funds from "editorializing." 468 U.S. 364, 402 (1984). In explaining its application of heightened scrutiny, the Court observed that the law "single[d] out noncommercial broadcasters and denie[d] them the right to address their chosen audience on matters of public importance," which suggested that Congress sought "to limit discussion of controversial topics and thus to shape the agenda for public debate." *Id.* at 384. For additional discussion of *League of Women Voters*, see Amdt1.7.13.5 Restrictions on Editorializing.

[1] Nat'l Inst. of Family & Life Advocates (NIFLA) v. Becerra, No. 16-1140, slip op. at 7 (U.S. June 26, 2018); Riley v. Nat'l Fed'n of Blind, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech.").

[2] *NIFLA*, slip op. at 3.

[3] *Id.* at 7.

[4] *Id.* (quoting *Riley*, 487 U.S. at 795).

[5] In some circumstances, the Court has evaluated commercial disclosure requirements under a less rigorous standard of scrutiny. *See* Amdt1.7.12.1 Overview of Compelled Speech.

[6] *NIFLA*, slip op. at 7, 9. Although the Court suggested that the notice requirement should receive strict scrutiny, the Court declined to resolve whether strict or intermediate scrutiny was the appropriate standard because it concluded that the law "cannot survive even intermediate scrutiny." *Id.* at 14–16 (evaluating the law at the preliminary injunction stage and concluding that the petitioners were likely to succeed on the merits of their First Amendment challenge).

[7] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 345 (1995) (reasoning that a state's ban on anonymous campaign literature was "a direct regulation of the content of speech" because it required such documents to contain the name and address of the person or organization that issued them); *Riley*, 487 U.S. at 795 (evaluating a requirement that professional fundraisers disclose information about charitable contributions collected during the previous year before soliciting funds as a content-based regulation of speech); Pac. Gas & Elec. Co. v. Pub. Utils. Com., 475 U.S. 1, 9–16, 20–21 (1986) (plurality opinion) (invalidating a state law that required a private company to include in its billing envelopes, alongside its own newsletter, third-party speech that the company opposed).

would receive strict scrutiny, intermediate scrutiny, or a lesser degree of scrutiny, depends, among other things, on whether they involve commercial speech and concern the speaker's own product or services.[8]

Amdt1.7.3.7 Content-Neutral Laws Burdening Speech

First Amendment:

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

The Court has distinguished content-based laws from content-neutral laws, while acknowledging that deciding whether a particular law "is content based or content neutral is not always a simple task."[1] A content-neutral law that imposes only an incidental burden on speech "will be sustained if 'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'"[2] Similarly, the government "may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"[3]

A series of cases allowing speech to be regulated due to its "secondary effects" is related to these content-neutral standards.[4] In *Young v. American Mini Theater*, the Court recognized a municipality's authority to zone land to prevent deterioration of urban areas, upholding an ordinance providing that adult theaters showing motion pictures that depicted specified sexual activities or specified anatomical areas could not be located within 100 feet of any two other establishments included within the ordinance or within 500 feet of a residential area.[5]

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[8] *NIFLA*, slip op. at 14. *See also*, Amdt1.7.11.4 Campaign Finance Disclosure and Disclaimer Requirements, for a discussion of the exacting scrutiny standard that generally applies to campaign-finance disclosure requirements.

[1] Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994).

[2] *Id.* at 662 (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)). *See also, e.g.*, San Francisco Arts & Ath., Inc. v. U.S. Olympic Comm., 483 U.S. 522, 536–40 (1987) (applying this standard to uphold an incidental speech restriction prohibiting certain uses of the word "Olympic"). The distinction between, on the one hand, directly regulating, and, on the other hand, incidentally affecting, the content of expression was sharply drawn by Justice John Harlan in Konigsberg v. State Bar of California, 366 U.S. 36, 49–51 (1961): "Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. . . . On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendments forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved." *Cf, e.g.*, Arcara v. Cloud Books, 478 U.S. 697, 707 (1986) (upholding the application of a statute authorizing closure of places of prostitution to an adult bookstore, saying *O'Brien* was not applicable to "a statute directed at imposing sanctions on nonexpressive activity").

[3] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)). For more discussion of the time, place, and manner doctrine, see Amdt1.7.7.1 The Public Forum.

[4] *See, e.g.*, Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (saying an ordinance was content-neutral where the law was justified by a desire to combat undesirable secondary effects of speech, rather than justified by reference to the speech's content). *Cf.* R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) ("Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech[.]").

[5] 427 U.S. 50, 70 (1976) (plurality opinion) (saying governments could regulate "the places where sexually explicit films may be exhibited," drawing a line "on the basis of content without violating the government's paramount

The Court endorsed this approach in *Renton v. Playtime Theatres*, rejecting a constitutional challenge to a zoning ordinance restricting the locations of adult theaters after concluding that although the ordinance targeted businesses selling sexually explicit materials, the law was content-neutral because it was justified by studies showing adult theaters produced undesirable secondary effects, rather than being justified by reference to the content of the regulated speech.[6] By contrast, for example, the Court rejected one city's argument that it could prohibit as a nuisance "any movie containing nudity which is visible from a public place."[7] Concluding that the ordinance was not well tailored to the city's stated goals of protecting the privacy interests of passers-by or protecting children, the Court held instead that the law was an unconstitutional content-based regulation.[8]

Amdt1.7.4 Viewpoint-Based Regulation of Speech

Amdt1.7.4.1 Overview of Viewpoint-Based Regulation of Speech

First Amendment:

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

Content-based regulation of speech is generally subject to strict scrutiny and presumptively unconstitutional.[1] The Supreme Court considers viewpoint-based regulation of speech to be "an egregious form of content discrimination."[2] A law[3] is viewpoint-based when it regulates speech based on its "specific motivating ideology" or the speaker's "opinion or perspective."[4] The following general principles have emerged from the Supreme Court's decisions on viewpoint discrimination and the Free Speech Clause of the First Amendment.

First, the Free Speech Clause ordinarily prohibits the government from restricting speech based on the particular views expressed in that speech.[5] Even when regulating speech that is otherwise proscribable, the government typically may not permit some viewpoints and

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obligation of neutrality" because the place-based regulation was unaffected by the viewpoint or message of the film); *id.* at 82 n.6 (Powell, J., concurring) (saying the regulation was not impermissibly content-based when it treated "certain movie theaters differently because they have markedly different effects upon their surroundings").

[6] *Renton*, 475 U.S. at 48, 51. The Supreme Court also upheld zoning of sexually oriented businesses in FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990), and City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002). *Cf.* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566–72 (1991) (plurality opinion) (upholding application of Indiana's public indecency statute to prohibit totally nude dancing under the *O'Brien* standard); *id.* at 582 (Souter, J., concurring) (saying he would uphold the law based on "the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondents' establishments"); Erie v. Pap's A.M., 529 U.S. 277, 290 (2000) (plurality opinion) (upholding the application of a statute prohibiting public nudity to an adult entertainment establishment, citing both *O'Brien* and *Renton* and noting that "one purpose of the ordinance is to combat harmful secondary effects"); *id.* at 310 (Scalia, J., concurring) (expressing doubt about the "secondary effects").

[7] Erznoznik v. City of Jacksonville, 422 U.S. 205, 208 (1975).

[8] *Id.* at 211–18.

[1] *See* Amdt1.7.5.1 Overview of Categorical Approach to Restricting Speech.

[2] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

[3] This group of essays generally refers to viewpoint-based *laws*, which may include statutes or regulations. However, as these cases illustrate, the principle of viewpoint neutrality also extends to the policies of public institutions, the enforcement of public laws, and other types of government actions. *See, e.g.*, Bose Corp. v. Consumers Union, 466 U.S. 485, 505 (1984) (stating that the "principle of viewpoint neutrality" imposes "a special responsibility on judges" when deciding whether a particular communication receives First Amendment protection).

[4] *Rosenberger*, 515 U.S. at 829.

[5] *See* Amdt1.7.4.2 Viewpoint-Based Distinctions on the Face of a Law.

disallow others.[6] The government may differentiate among viewpoints only in limited circumstances,[7] such as when the government itself is the speaker,[8] or when the government selectively funds certain speech as part of a government program.[9] These limited exceptions are discussed elsewhere in the *Constitution Annotated.*[10]

Second, the government generally may not compel a private party to espouse a particular viewpoint.[11] This principle extends to compelled association[12] and compelled subsidization of speech.[13]

Third, laws that do not single out a specific viewpoint on their face, but that were enacted for the purpose of suppressing an idea or message, or otherwise invite discriminatory enforcement, sometimes run afoul of the First Amendment as well.[14]

Amdt1.7.4.2 Viewpoint-Based Distinctions on the Face of a Law

First Amendment:

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

A law that explicitly regulates speech on the basis of the particular ideas or opinions expressed is said to be viewpoint-based "on its face."[1] Such facially viewpoint-based laws,

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[6] *See* Amdt1.7.4.4 Viewpoint-Based Distinctions Within Proscribable Speech.

[7] *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 403 (2007) (holding that a high school principal may "restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use").

[8] *See, e.g.*, Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 219 (2015) (holding that an organization could not "force Texas to include a Confederate battle flag on its specialty license plates" because those plates were "government speech"); Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009) (holding that a city's "decision to accept certain privately donated monuments while rejecting respondent's" was "best viewed as a form of government speech" that did not require viewpoint-neutrality).

[9] *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (explaining that "viewpoint-based funding decisions can be sustained" where the government uses "private speakers to transmit information pertaining to its own program"); Rust v. Sullivan, 500 U.S. 173, 193 (1991) (holding that the government does not discriminate on the basis of viewpoint when "it has merely chosen to fund one activity to the exclusion of" another).

[10] *See* Amdt1.7.8.2 Government Speech and Government as Speaker; Amdt1.7.13.6 Selective Funding Arrangements; Amdt1.7.13.7 Government's Message Versus Private Speakers.

[11] *See* Pac. Gas & Elec. Co. v. Pub. Utils. Com., 475 U.S. 1, 12 (1986) (plurality opinion) (concluding that an agency order requiring a regulated utility company to include a message from an opposing organization in its billing envelopes discriminated on the basis of viewpoint and violated the First Amendment); Wooley v. Maynard, 430 U.S. 705, 717 (1977) (holding that the State of New Hampshire could not constitutionally punish the respondents for covering up the state motto "Live Free or Die," to which they objected on religious grounds, on their vehicles' license plates). *See* Amdt1.7.12.1 Overview of Compelled Speech.

[12] *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (holding that the "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints"); Hurley v. Irish-American Gay, Lesbian, and Bisexual Group, 515 U.S. 557, 581 (1995) (reasoning that the government may not "compel" a speaker "to alter [its] message by including one more acceptable to others"). *See* Amdt1.7.12.1 Overview of Compelled Speech.

[13] *See, e.g.*, United States v. United Foods, 533 U.S. 405, 416 (2001) (holding that compelling handlers of fresh mushrooms to subsidize generic advertising for that product when some handlers objected to the views expressed in those advertisements violated the First Amendment); Bd. of Regents v. Southworth, 529 U.S. 217, 233 (2000) (holding that "[w]hen a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others"). *See* Amdt1.7.12.1 Overview of Compelled Speech and Amdt1.7.12.3 Compelled Subsidization.

[14] *See* Amdt1.7.4.5 Viewpoint Neutrality in Forum Analysis.

[1] Iancu v. Brunetti, No. 18-302, slip op. at 6 (U.S. June 24, 2019).

which are unconstitutional in most contexts,[2] can take several forms. The most obvious form is a law that, by its terms, regulates speech based on "the specific motivating ideology or the opinion or perspective of the speaker."[3]

A law need not single out a particular ideology or message to be viewpoint-based, however. For example, a law that categorically prohibits "religious" speech may be viewpoint-based even if it does not draw sectarian distinctions. In *Lamb's Chapel v. Center Moriches Union Free School District*, the Court considered a local public school board's regulations that allowed organizations to use school property for "social, civic, or recreational uses" but not for "religious purposes."[4] Based on that rule, the school district refused to allow a church to use the property to show a film series about family and child-rearing—subjects that fell within the social-or-civic-use purpose.[5] The Court held that this refusal violated the Free Speech Clause: even though the school district's regulation treated "all religions and all uses for religious purposes" alike, the school district still discriminated on the basis of viewpoint by excluding the films solely on the basis of their "religious standpoint."[6]

Laws that allow the government to determine whether speech is disparaging or offensive also raise concerns about viewpoint discrimination.[7] In the 2017 case *Matal v. Tam*, the Court considered a provision of the Lanham Act, a federal trademark statute, that prohibited the registration of trademarks "which may disparage . . . persons, living or dead."[8] After holding that trademarks are not a form of government speech (for which viewpoint-based distinctions are sometimes permissible),[9] the Court ruled that the Lanham Act's "disparagement clause" violated the First Amendment.[10] The plurality opinion explained that although the clause "evenhandedly prohibit[ed] disparagement of all groups," it discriminated on the basis of viewpoint because it "denie[d] registration to any mark that is offensive to a substantial

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[2] As explained in the Overview, there are certain contexts in which the government can draw viewpoint-based distinctions, such as when the government itself is the speaker. *See* Amdt1.7.4.1 Overview of Viewpoint-Based Regulation of Speech. *See also* Amdt1.7.8.2 Government Speech and Government as Speaker; Amdt1.7.13.6 Selective Funding Arrangements; Amdt1.7.13.7 Government's Message Versus Private Speakers.

[3] Reed v. Town of Gilbert, 576 U.S. 155, 168 (2015) (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995))).

[4] 508 U.S. 384, 387 (1993).

[5] *Id.* at 393.

[6] *Id.*; *see also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995) (holding that a public university's denial of funding to a student-run religious publication amounted to viewpoint discrimination because the university "does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints").

[7] The Court held in *Snyder v. Phelps* that the government cannot punish speech in a public place on a matter of public concern "simply because it is upsetting or arouses contempt." 562 U.S. 443, 458 (2011). In that case, the Court held that the First Amendment barred an intentional infliction of emotional distress claim against members of a church who picketed a soldier's funeral. *Id.* at 459. In the Court's assessment, "any distress" caused by the picketing "turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself." *Id.* at 457.

[8] Matal v. Tam, No. 15-1293, slip op. at 5 (U.S. June 19, 2017) (quoting 15 U.S.C. § 1052(a)).

[9] *Id.* at 18. A plurality of the Court further rejected analogies to federal benefits and government-funded programs for which "some content- and speaker-based restrictions are permitted." *Id.* at 18–23 (plurality opinion). The Court did not resolve the question of whether trademarks are commercial speech. The plurality reasoned that the law failed even the "relaxed" intermediate scrutiny standard applicable to commercial speech regulations. *Id.* at 23–24.

[10] *Id.* at 26 (majority opinion).

percentage of the members of any group," and "[g]iving offense is a viewpoint."[11] Two years later, the Court struck down the Lanham Act's bar to registering "immoral or scandalous" trademarks on similar grounds.[12]

By comparison, in a case involving a government-funded program, the Court upheld a statute requiring a federal agency to "take into consideration general standards of decency and respect for the diverse beliefs and values of the American public" in awarding grants to support the arts.[13] The Court did not "perceive a realistic danger" that the statute would "compromise First Amendment values."[14] The program, the Court observed, was based on otherwise "subjective" grant criteria such as artistic excellence.[15] Given that context, making "decency and respect" a consideration was unlikely to "effectively preclude or punish the expression of particular views."[16]

Amdt1.7.4.3 Viewpoint Discrimination in Facially Neutral Laws

First Amendment:

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

A law can discriminate on the basis of viewpoint even if it is viewpoint-neutral on its face. In assessing whether a facially neutral law nevertheless discriminates on the basis of viewpoint, the Supreme Court has asked whether the law, in its "design" or "operation," favors or disfavors a particular point of view.[1]

With regard to discriminatory design, the Court appears to distinguish between a law intended to or crafted to suppress a particular viewpoint and a law advanced or supported by a group with a particular viewpoint. According to the Court, "facially neutral and valid justifications" cannot save a law "that is in fact based on the desire to suppress a particular point of view."[2] A law is not viewpoint-based, however, "simply because its enactment was motivated by the conduct of the partisans on one side of a debate."[3] Further, while the Supreme Court has examined the general purposes of a statute to assess viewpoint neutrality in some cases,[4] the Court has declined to examine the motivations of particular legislators or regulators in other cases.[5]

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[11] *Id.* at 22 (plurality opinion). At least four of the concurring Justices agreed with the plurality that the clause discriminated on the basis of viewpoint. *Id.* at 1 (Kennedy, J., concurring in part and concurring in the judgment).

[12] Iancu v. Brunetti, No. 18-302, slip op. at 6 (U.S. June 24, 2019) (reasoning that "the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation").

[13] Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 576 (1998) (quoting 20 U.S.C. § 954(d)(1)). *See* Amdt1.7.13.6 Selective Funding Arrangements.

[14] *Nat'l Endowment for the Arts*, 524 U.S. at 583.

[15] *Id.* at 585, 589–90.

[16] *Id.* at 583, 590.

[1] Turner Broad. Sys. v. FCC, 512 U.S. 622, 647 (1994).

[2] Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 812 (1985) (holding that the federal government's decision to exclude advocacy groups from a charity drive aimed at federal employees was reasonable in light of the purposes of the charity drive, but allowing the respondent organization to argue that the decision was a pretext for viewpoint discrimination on remand).

[3] Hill v. Colorado, 530 U.S. 703, 724 (2000) (explaining that enacting a law "in response to the activities of antiabortion protesters" did not render that law viewpoint-based).

[4] *E.g.*, *Turner Broad. Sys.*, 512 U.S. at 646.

[5] *E.g.*, United States v. O'Brien, 391 U.S. 367, 383–84 (1968).

Various decisions of the Court suggest at least three indicators that a law may have been designed to suppress a particular viewpoint. First, a law that singles out particular *speakers* may be aimed at restricting certain content or certain viewpoints.[6] For example, in *Sorrell v. IMS Health, Inc.*, the Court held unconstitutional a law limiting who could access certain information about prescriptions and for what purposes.[7] In addition to being content-based on its face, the Court explained, the law authorized "actual viewpoint discrimination" in practice.[8] Formal legislative findings showed that "the law's express purpose and practical effect [were] to diminish the effectiveness of marketing by manufacturers of brand-name drugs."[9] In other words, the Court concluded, the law targeted specific speakers in order to target their messages.[10] Thus, the law, while viewpoint-neutral on its face, was impermissibly "aimed at a particular viewpoint."[11]

Second—and related to speaker-based distinctions—a law that contains numerous *exemptions* may have the impermissible effect of restricting the speech of individuals or entities with a certain point of view. Exceptions and exemptions are not necessarily viewpoint-based: a law that regulates speech may include certain exemptions to avoid undermining the government's purpose or restricting more speech than is necessary. For example, in a 2014 case, the Court concluded that there was "nothing inherently suspect" in exempting abortion clinic employees from a law that otherwise restricted the zones in which persons could speak outside abortion clinics, because of the need to allow clinic employees "to do their jobs."[12] Because exemptions can introduce content or viewpoint-based distinctions,[13] however, a law that is "wildly underinclusive" may signal that the law was designed to "disfavor[ ] a particular speaker or viewpoint."[14]

Third, a law that restricts only a particular *form* of expression may be aimed at suppressing a particular viewpoint. For example, *Tinker v. Des Moines Independent Community School District* arose from the suspension of three public high school students for violating a school policy prohibiting wearing armbands to school.[15] School officials had adopted the policy after learning that a group of students planned to wear black armbands to school as a symbol of opposition to the Vietnam War.[16] The Supreme Court held that the public school's denial of this "form of expression" violated the First Amendment.[17] Although schools have

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[6] *See* Citizens United v. FEC, 558 U.S. 310, 340, 353–55 (2010) (opining that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content"). Court-ordered injunctions, which necessarily apply to particular litigants (and thus particular speakers), present different considerations than a generally-applicable law that targets particular speakers. In *Madsen v. Women's Health Ctr.*, the Court held that an injunction against a group of anti-abortion protestors was not impermissibly viewpoint-based because it was based on the group's "past actions," not "the contents of [their] message." 512 U.S. 753, 762–63 (1994).

[7] 564 U.S. 552, 579–80 (2011).

[8] *Id.* at 565.

[9] *Id.*

[10] *Id.*

[11] *Id*.

[12] McCullen v. Coakley, 573 U.S. 464, 483 (2014). For other reasons, the Court ultimately held that the law violated the First Amendment because it "burden[ed] substantially more speech than necessary to achieve" the government's interests. *Id.* at 490.

[13] *E.g.*, Barr v. Am. Ass'n of Pol. Consultants, Inc., No. 19-631, slip op. at 9 (U.S. July 6, 2020) (plurality opinion).

[14] Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 802 (2011). *See* Nat'l Inst. of Family and Life Advocates v. Becerra, No. 16-1140, slip op. at 6 n.2, 15 (U.S. June 26, 2018) (expressing reservations about a law's underinclusivity because of the scope of its exemptions, but declining to decide whether the law was viewpoint-based because it violated the First Amendment on other grounds).

[15] 393 U.S. 503, 504 (1969).

[16] *Id.*

[17] *Id.* at 514.

some leeway to restrict student expression that might reasonably lead to "substantial disruption of or material interference with school activities,"[18] there was no indication that such disturbances would take place under the circumstances.[19] Instead, the Court observed, the school adopted the policy in anticipation of this "particular opinion" and prohibited this "particular symbol" but no other political symbols.[20] A public school cannot restrict student speech, the Court explained, based on a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[21]

In addition to the design of a law, a claim of viewpoint discrimination may be based on how the law operates in practice. A facially neutral law may be viewpoint-based if, in operation, it restricts or promotes a particular viewpoint.[22] Here again the Court has drawn some distinctions. Government action is not automatically viewpoint-based simply because it *affects* groups with opposing viewpoints unequally.[23] However, a law that *invites* discriminatory enforcement may violate the principle of viewpoint-neutrality.[24] The Court has held, for example, that a licensing law is vulnerable to a First Amendment challenge if it "gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers."[25]

Even if a law does not discriminate on the basis of viewpoint on its face, in its design, or in its operation, discriminatory enforcement of that law may still violate the First Amendment because enforcement involves government action subject to the First Amendment.[26] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, which the Court ultimately decided on free exercise rather than free speech grounds, is instructive on this point.[27] In that case, a bakery owner was charged with violating the state's antidiscrimination law after refusing to make a cake for a same-sex couple's wedding.[28] The Court's decision focused not on the validity of the antidiscrimination law, but rather on its application to the bakery owner. In the record, the Court found evidence of "a clear and impermissible hostility toward the sincere religious beliefs that motivated [the baker's] objection."[29] The offending statements, the Court held, "violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or *religious viewpoint*."[30]

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[18] *Id. See* Amdt1.7.8.3 School Free Speech and Government as Educator.

[19] *Tinker*, 393 U.S. at 514.

[20] *Id.* at 510.

[21] *Id.* at 509; *see also* Healy v. James, 408 U.S. 169, 187 (1972) (providing that a state college may not deny official recognition to a student group based on "mere disagreement" with the group's philosophy).

[22] Sorrell v. IMS Health Inc., 564 U.S. 552, 565 (2011).

[23] In *Wood v. Moss*, the Court held that Secret Service agents had not violated a clearly established First Amendment principle by separating protestors and supporters of the President at an impromptu dinner stop. 572 U.S. 744, 748 (2014). The Court suggested that the agents could not treat those groups differently solely based on their respective viewpoints. *Id.* at 761–62. The record showed, however, that the "because of their location, the protesters posed a potential security risk to the President, while the supporters, because of their location, did not." *Id.* at 762.

[24] *See* Amdt1.7.4.5 Viewpoint Neutrality in Forum Analysis.

[25] Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 759, 772 (1988) (holding unconstitutional parts of a city ordinance "giving the mayor unfettered discretion to deny a permit application and unbounded authority to condition the permit on any additional terms" the mayor deemed necessary).

[26] *See, e.g.*, Cohen v. California, 403 U.S. 15, 18, 26 (1971) (overturning a conviction that was based, not on conduct prohibited by the statute, but on the offensiveness of the defendant's speech).

[27] *See* No. 16-111, slip op. at 1, 3–4 (U.S. June 4, 2018). *See* Amdt1.4.4 Laws that Discriminate Against Religious Practice.

[28] No. 16-111, slip op. at 1, 4 (U.S. June 4, 2018).

[29] *Id.* at 12.

[30] *Id.* at 16 (emphasis added). The Court cited both free speech and free exercise cases for this principle, but decided the case solely on free exercise grounds. *Id.* at 16–17.

Amdt1.7.4.4 Viewpoint-Based Distinctions Within Proscribable Speech

First Amendment:

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

Although content-based regulation of speech typically receives strict scrutiny,[1] there are certain, limited categories of speech—sometimes called "unprotected" speech—that the government may prohibit because of its harmful content.[2] Even when regulating in these areas, however, the government is not free to draw *viewpoint*-based distinctions, as explained in *R.A.V. v. City of Saint Paul*.[3] *R.A.V.* involved an ordinance that criminalized, among other acts, placing a burning cross on someone's property knowing that it would "arouse[ ] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[4] For purposes of its analysis, the U.S. Supreme Court accepted the Minnesota Supreme Court's conclusion that the law reached only expressive acts that constitute "fighting words"—a category of unprotected speech.[5] The Court nevertheless concluded that the law violated the First Amendment because it drew *additional* distinctions between different types of fighting words based on subject matter and viewpoint.[6] The ordinance, the Court explained, applied "only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'"[7] The Court held that the city could not "impose special prohibitions on those speakers who express views on disfavored subjects"—that is, on race, religion, or one of the other named topics.[8] The Court also held that the ordinance effectively amounted to "actual viewpoint discrimination" because persons "arguing *in favor* of racial, color, etc., tolerance and equality" could use fighting words that "could not be used by those speakers' opponents."[9]

Eleven years later, in *Virginia v. Black*, the Court held that a state could prohibit cross-burning with the intent to intimidate because "burning a cross is a particularly virulent form of intimidation," and such "true threats" are considered unprotected speech under the First Amendment.[10] The ordinance in *R.A.V.* was distinguishable, the Court explained, because it singled out threats made on the basis of certain viewpoints.[11]

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[1] *See* Amdt1.7.5.1 Overview of Categorical Approach to Restricting Speech.

[2] R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992) (referring to "proscribable content"); *id.* at 406 (White, J., concurring in the judgment) (referring to "unprotected speech").

[3] *Id.* at 388–91 (majority opinion).

[4] *Id.* at 380.

[5] *Id.* at 380–81. *See* Amdt1.7.5.5 Fighting Words.

[6] *R.A.V.*, 505 U.S. at 381, 391.

[7] *Id.* at 391. Justice Antonin Scalia, writing for the majority, gave the following example: "One could hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.'" *Id.* at 391–92.

[8] *Id.* at 391.

[9] *Id.*

[10] 538 U.S. 343, 359–60, 363 (2003). The Court ruled that a certain provision of the statute at issue was unconstitutionally overbroad. *Id.* at 367 (plurality opinion).

[11] *Id.* at 361 (majority opinion).

Amdt1.7.4.5 Viewpoint Neutrality in Forum Analysis

First Amendment:

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

The government's latitude to regulate speech depends, in part, on the forum where that speech occurs. When the government regulates speech in a traditional public forum, such as a public park or sidewalk, or intentionally designates a forum for public speech, content-based regulations are subject to strict scrutiny.[1] In contrast, when the government opens up a nonpublic forum for a limited public purpose, it "may impose some content-based restrictions on speech."[2] Regardless of the type of forum, however, restrictions on content generally must be viewpoint-neutral to comply with the First Amendment.[3]

The Court applied these standards in several cases involving programs for student organizations at public universities, which generally have been considered limited or nonpublic forums. In one such case from 1995, the Court acknowledged that the government sometimes needs to limit forums it creates to "certain groups" or "certain topics," but ruled that once a government "has opened a limited forum," it may not "discriminate against speech on the basis of its viewpoint."[4] In that case, the university discriminated on the basis of viewpoint by denying funding to a student group because of its religious perspective.[5] By comparison, requiring registered student organizations "to accept all comers" is "textbook viewpoint neutral," the Court held in a 2010 decision.[6]

Apart from the requirement of viewpoint-neutrality, a regulation of speech in a nonpublic forum must be "reasonable" in light of the forum's purpose.[7] A law that is viewpoint-neutral on its face may be unreasonable if it lacks discernible standards to encourage viewpoint-neutral enforcement. In *Minnesota Voters Alliance v. Mansky*, a 2018 decision, the Court reviewed a state's political "apparel ban," which prohibited wearing any "political badge, political button, or other political insignia" within a polling place.[8] The Court held that a polling place on Election Day is a nonpublic forum subject to reasonable, content-based restrictions.[9] The apparel ban was viewpoint-neutral on its face, the Court determined, because it made "no

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[1] Minn. Voters All. v. Mansky, No. 16-1435, slip op. at 7 (U.S. June 14, 2018).

[2] *Id.* at 8; *see,* e.*g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 48–49 (1983) (reasoning that because a public school's mail system was not a public forum, it had no constitutional obligation to let any organization use its mail boxes).

[3] *See* Manhattan Cmty. Access Corp. v. Halleck, No. 17-1702, slip op. at 8–9 (U.S. June 17, 2019) (stating that "[w]hen the government provides a forum for speech (known as a public forum)," it "ordinarily may not exclude speech or speakers from the forum on the basis of viewpoint"); Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985) (explaining that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral").

[4] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

[5] *Id.* at 825–27; *see also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 109 (2001) (holding that a public school engaged in viewpoint discrimination when it excluded a club from its "afterschool forum" because of the club's "religious nature").

[6] Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 694–95 (2010) (holding, in addition, that the policy did not discriminate on the basis of viewpoint in effect); *see also* Turner Broad. Sys. v. FCC, 512 U.S. 622, 647 (1994) (holding that a federal statute requiring cable companies to transmit certain broadcast stations was not viewpoint-based because it did not differentiate among the messages that the stations carry).

[7] *Cornelius*, 473 U.S. at 806.

[8] No. 16-1435, slip op. at 3 (U.S. June 14, 2018).

[9] *Id.* at 8–9.

distinction based on the speaker's political persuasion."[10] The Court nonetheless struck down the apparel ban because it was overbroad in its operation, reaching apparel expressing viewpoints on issues on and off the ballot.[11] In addition, the lack of "objective, workable standards" for election judges to apply made the apparel ban susceptible to viewpoint-discriminatory enforcement, which contributed to its unreasonableness.[12]

Amdt1.7.5 Categorical Approach

Amdt1.7.5.1 Overview of Categorical Approach to Restricting Speech

First Amendment:

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

While content-based restrictions on protected speech are presumptively unconstitutional, the Supreme Court has recognized that the First Amendment permits restrictions upon the content of speech falling within a few limited categories, including obscenity, child pornography, defamation, fraud, incitement, fighting words, true threats, and speech integral to criminal conduct.[1] This "limited categorical approach"[2] to content-based regulations of speech derives from *Chaplinsky v. New Hampshire*, wherein the Court opined that there exist "certain well- defined and narrowly limited classes of speech [that] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth" such that the government may prevent those utterances and punish those uttering them without raising any constitutional issues.[3] More recent decisions of the Court reflect a reluctance to add any new categories of excepted speech and an inclination to interpret narrowly the excepted categories of speech that have long-established roots in First Amendment law.[4] Further, a 1992 decision cautioned that although "these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)," these categories are not "entirely invisible to the Constitution."[5] Specifically, the Court said a regulation of one of these categories of speech might still violate the First Amendment if it contained additional content- or viewpoint-based distinctions unrelated to the proscribable content: while "the government may proscribe libel . . . it may not make the further content discrimination of proscribing *only* libel critical of the government."[6]

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[10] *Id.* at 9.

[11] *Id.* at 13–17.

[12] *Id.* at 18.

[1] *See* United States v. Stevens, 559 U.S. 460, 468 (2010).

[2] R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992).

[3] 315 U.S. 568, 571–72 (1942).

[4] *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 718 (2012) (plurality opinion) ("Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements."); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 792 (2011) (holding that the obscenity exception to the First Amendment does not cover violent speech); *Stevens*, 559 U.S. at 472 (declining to "carve out" an exception to First Amendment protections for depictions of illegal acts of animal cruelty); Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988) (refusing to restrict speech based on its level of "outrageousness").

[5] *R.A.V.*, 505 U.S. at 383.

[6] *Id.* at 383–84.

Amdt1.7.5.2 Early Doctrine of Incitement

First Amendment:

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

Criminal punishment for advocating illegal or merely unpopular goals and ideas did not originate in the United States with the post-World War II concern with Communism. Prosecutions occurred under the Sedition Act of 1798,[1] and under the federal espionage laws[2] and state sedition and criminal syndicalism laws[3] in the 1920s and early 1930s.[4] Certain expression, oral or written, may incite, urge, counsel, advocate, or importune the commission of criminal conduct; other expression, such as picketing, demonstrating, and engaging in certain forms of "symbolic" action, may either counsel the commission of criminal conduct or itself constitute criminal conduct. Setting aside the problem of symbolic action,[5] the Court had to determine when expression that may be a nexus to criminal conduct is subject to punishment and restraint. Initially, the Court seemed disposed in the few cases reaching it to rule that if the conduct could be made criminal, advocating or promoting the conduct could be made criminal.[6]

In the Court's 1919 decision *Schenck v. United States*,[7] which concerned defendants convicted of violating the Espionage Act by disseminating leaflets seeking to disrupt recruitment of military personnel, Justice Oliver Wendell Holmes formulated the "clear and present danger" test that governed this area for decades. To determine whether speech could be proscribed, he said, "[t]he question . . . is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[8] Consequently, the Court unanimously affirmed the convictions. One week later, in *Frohwerk v. United States*, the Court again unanimously affirmed convictions under the same act with Justice Holmes writing, "the First Amendment . . . obviously was not[ ] intended to give immunity for every possible use of language. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free

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[1] Ch. 74, 1 Stat. 596 (1798). As discussed in Amdt1.7.1 Historical Background on Free Speech Clause, the Sedition Act was eventually widely considered unconstitutional.

[2] The cases included *Schenck v. United States,* 249 U.S. 47 (1919) (affirming conviction for attempting to disrupt conscription by circulation of leaflets condemning the draft); *Debs v. United States,* 249 U.S. 211 (1919) (affirming conviction for attempting to create insubordination in armed forces based on one speech advocating socialism and opposition to war, and praising resistance to the draft); *Abrams v. United States,* 250 U.S. 616 (1919) (affirming convictions based on two leaflets, one of which attacked President Wilson as a coward and hypocrite for sending troops into Russia and the other of which urged workers not to produce materials to be used against their brothers).

[3] The cases included *Gitlow v. New York,* 268 U.S. 652 (1925) (affirming conviction based on publication of "manifesto" calling for the furthering of the "class struggle" through mass strikes and other mass action); Whitney v. California, 274 U.S. 357 (1927) (affirming conviction based upon adherence to party which had platform rejecting parliamentary methods and urging a "revolutionary class struggle," the adoption of which defendant had opposed).

[4] *See also, e.g.*, Taylor v. Mississippi, 319 U.S. 583 (1943), setting aside convictions of three Jehovah's Witnesses under a statute that prohibited teaching or advocacy intended to encourage violence, sabotage, or disloyalty to the government after the defendants had said that it was wrong for the President "to send our boys across in uniform to fight our enemies" and that boys were being killed "for no purpose at all." The Court found no evil or sinister purpose, no advocacy of or incitement to subversive action, and no threat of clear and present danger to government.

[5] *See* Amdt1.7.14.1 Overview of Symbolic Speech.

[6] Davis v. Beason, 133 U.S. 333 (1890); Fox v. Washington, 236 U.S. 273 (1915).

[7] 249 U.S. 47 (1919).

[8] 249 U.S. at 52.

speech."[9] And, in *Debs v. United States*,[10] Justice Holmes upheld a conviction because "the natural and intended effect" and the "reasonably probable effect" of the speech for which the defendant was prosecuted was to obstruct military recruiting.

In *Abrams v. United States*,[11] however, Justices Holmes and Louis Brandeis dissented on affirming the convictions of several alien anarchists who had printed leaflets seeking to encourage discontent with the United States' participation in World War I. The majority simply referred to *Schenck* and *Frohwerk* to rebut the First Amendment argument, but the dissenters urged that the government had made no showing of a clear and present danger. Another case in which the Court affirmed a conviction by simply saying that "[t]he tendency of the articles and their efficacy were enough for the offense" drew a similar dissent.[12]

The Court did not invariably affirm convictions during this period in cases like those under consideration. In *Fiske v. Kansas*,[13] the Court held that a criminal syndicalism law had been invalidly applied to convict one against whom the only evidence was the "class struggle" language of the constitution of the organization to which he belonged. A conviction for violating a "red flag" law was voided because the statute was found unconstitutionally vague.[14] Neither case mentioned clear and present danger. An "incitement" test seemed to underlie the opinion in *DeJonge v. Oregon*,[15] upsetting a conviction under a criminal syndicalism statute for attending a meeting held under the auspices of an organization that was said to advocate violence as a political method, although the meeting was orderly and no violence was advocated during it. In *Herndon v. Lowry*,[16] the Court narrowly rejected the contention that the standard of guilt could be made the "dangerous tendency" of one's words, and indicated that the power of a state to abridge speech "even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government."

Finally, in Thornhill v. Alabama,[17] a state anti-picketing law was invalidated because "no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter." During the same term, the Court reversed the breach of the peace conviction of a Jehovah's Witness who had played an inflammatory phonograph record to persons on the street, the Court discerning no clear and present danger of disorder.[18]

The Court also applied the clear and present danger test in *Terminiello v. City of Chicago*,[19] in which a 5-4 majority struck down a conviction obtained after the judge instructed the jury that a breach of the peace could be committed by speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." Justice William O. Douglas wrote for the majority that:

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[9] Frohwerk v. United States, 249 U.S. 204, 206 (1919) (citations omitted).

[10] 249 U.S. 211, 215–16 (1919).

[11] 250 U.S. 616 (1919).

[12] Schaefer v. United States, 251 U.S. 466, 479 (1920). *See also* Pierce v. United States, 252 U.S. 239 (1920).

[13] 274 U.S. 380 (1927).

[14] Stromberg v. California, 283 U.S. 359 (1931).

[15] 299 U.S. 353 (1937). *See id.* at 364–65.

[16] 301 U.S. 242, 258 (1937). At another point, clear and present danger was alluded to without any definite indication it was the standard. *Id.* at 261.

[17] 310 U.S. 88, 105 (1940). The Court admitted that the picketing resulted in economic injury to the employer, but found such injury "neither so serious nor so imminent" as to justify restriction. The doctrine of clear and present danger did not play a future role in labor picketing cases.

[18] Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

[19] 337 U.S. 1 (1949).

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.[20]

The dissenters focused on the disorders that had actually occurred as a result of Terminiello's speech, Justice Robert Jackson saying: "Rioting is a substantive evil, which I take it no one will deny that the State and the City have the right and the duty to prevent and punish . . . . In this case the evidence proves beyond dispute that danger of rioting and violence in response to the speech was clear, present and immediate."[21] The disorderly consequences of speech were emphasized in *Feiner v. New York*,[22] in which Chief Justice Fred Vinson said that "[t]he findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech."

Amdt1.7.5.3 Incitement Movement from Clear and Present Danger Test

First Amendment:

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

In *Gitlow v. New York*,[1] a conviction for distributing a manifesto in violation of a law making it criminal to advocate, advise, or teach the duty, necessity, or propriety of overthrowing organized government by force or violence, the Court affirmed in the absence of any evidence regarding the effect of the distribution and in the absence of any contention that it created any immediate threat to the security of the state. In so doing, the Court distinguished the "clear and present danger" test used in *Schenck*: *Schenck* governed "cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results."[2] By contrast, in *Gitlow*, the Court observed that "the legislative body itself ha[d] previously determined the danger of substantive evil arising from utterances of a specified character."[3] Thus, a state legislative determination "that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power" was almost conclusive to the Court.[4]

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[20] 337 U.S. at 4–5.

[21] 337 U.S. at 25–26.

[22] 340 U.S. 315, 321 (1951).

[1] 268 U.S. 652 (1925).

[2] *Id.* at 670–71.

[3] 268 U.S. at 671.

[4] 268 U.S. at 668. Justice Oliver Wendell Holmes dissented. "If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory,

In *Whitney v. California*,[5] the Court affirmed a conviction under a criminal syndicalism statute based on the defendant's association with and membership in an organization that advocated the commission of illegal acts, finding again that the determination of a legislature that such advocacy involves "danger to the public peace and the security of the State" was entitled to almost conclusive weight. In a technical concurrence on procedural grounds, which in fact disagreed with the substance of the majority opinion, Justice Louis Brandeis restated the "clear and present danger" test, saying "even advocacy of violation [of the law] . . . is not a justification for denying free speech where the advocacy fails short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. . . . In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."[6]

In *Dennis v. United States*,[7] the Court sustained the constitutionality of the Smith Act,[8] which proscribed advocacy of the overthrow by force and violence of the government of the United States, and upheld convictions under it. The plurality opinion in *Dennis* recognized that *Whitney* and *Gitlow* had largely been superseded by *Schenck*, and applied a revised version of the clear and present danger test to conclude that the evil sought to be prevented was serious enough to justify suppression of speech.[9] The plurality said the phrase "clear and present danger" should not "be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case."[10] Many of the cases in which it had previously been used to reverse convictions had turned "on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech."[11]

By contrast, in *Dennis,* the plurality reasoned that "[o]verthrow of the government by force and violence is certainly a substantial enough interest for the government to limit speech."[12] Further, the plurality said the government did not need to wait to act until the plan was set in action.[13] The Court adopted a flexible version of the "clear and present danger" test: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies

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that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." *Id.* at 673.

[5] 274 U.S. 357, 371 (1927), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[6] 274 U.S. at 376.

[7] 341 U.S. 494 (1951).

[8] 54 Stat. 670 (1940), 18 U.S.C. § 2385.

[9] *Dennis*, 341 U.S. at 507–09, 517.

[10] *Id.* at 508.

[11] 341 U.S. at 508.

[12] 341 U.S. at 509.

[13] 341 U.S. at 508, 509.

such invasion of free speech as is necessary to avoid the danger."[14] The "requisite danger" of a conspiracy was found to justify the convictions.[15]

The clear and present danger test was a lighter restriction on governmental power after *Dennis*, and it virtually disappeared from the Court's language over the next twenty years.[16] Its replacement for part of this period was the much disputed "balancing" test, which made its appearance the year before *Dennis* in *American Communications Ass'n v. Douds*.[17] There the Court sustained a law barring the National Labor Relations Board from investigating a labor union's petition if any of its officers failed to file annually an oath disclaiming membership in the Communist Party and belief in the violent overthrow of the government.[18] Chief Justice Fred Vinson, for the Court, rejected reliance on the clear and present danger test because the government's interest in the law was "not in preventing the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced."[19] Instead, the Court concluded that the law did not interfere with speech—the government's interest was "in protecting the free flow of commerce from what Congress considers to be substantial evils of conduct that are not the products of speech at all."[20] In evaluating the permissibility of the oath, the Court said it had to balance "the conflicting individual and national interests." The Court further reasoned, "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented."[21] As the interest in the restriction, the government's right to prevent political strikes and disruption of commerce, was much more substantial than the limited interest on the other side in view of the relative handful of persons affected in only a partial manner, the Court perceived no difficulty upholding the statute.[22]

During the 1950s and early 1960s, the Court used the balancing test in decisions that did not concern threatening expression or advocacy but rather governmental inquiries into or regulation of associations and personal beliefs premised on these being predictive of future or intended conduct that government could regulate or prohibit. Thus, in the leading case on

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[14] 341 U.S. at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950). Justice Felix Frankfurter, concurring, adopted a balancing test. *Id.* at 517. Justice Robert Jackson appeared to proceed on a conspiracy approach rather than one depending on advocacy. *Id.* at 561. Justices Hugo Black and William O. Douglas dissented, reasserting clear and present danger as the standard. *Id.* at 579, 581. Note the recurrence to the Learned Hand formulation in *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 562 (1976), although the Court appeared in fact to apply balancing.

[15] *Dennis*, 341 U.S. at 510–11. In *Yates v. United States,* 354 U.S. 298 (1957), the Court discussed its constitutional jurisprudence while interpreting the Smith Act to require advocacy of unlawful action, to require the urging of doing something now or in the future, rather than merely advocacy of forcible overthrow as an abstract doctrine, and by finding the evidence lacking to prove the former.

[16] *Cf.* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 8 (1965). *See* Garner v. Louisiana, 368 U.S. 157, 185–207 (1961) (Harlan, J., concurring).

[17] 339 U.S. 382 (1950). *See also* Osman v. Douds, 339 U.S. 846 (1950). Balancing language was used by Justice Hugo Black in his opinion for the Court in *Martin v. City of Struthers,* 319 U.S. 141, 143 (1943), but it seems not to have influenced the decision. Similarly, in *Schneider v. Irvington,* 308 U.S. 147, 161–62 (1939), Justice Owen Roberts used balancing language that he apparently did not apply.

[18] The law, § 9(h) of the Taft-Hartley Act, 61 Stat. 146 (1947), was repealed, 73 Stat. 525 (1959), and replaced by a section making it a criminal offense for any person "who is or has been a member of the Communist Party" during the preceding five years to serve as an officer or employee of any union. § 504, 73 Stat. 536 (1959); 29 U.S.C. § 504 . It was held unconstitutional in *United States v. Brown,* 381 U.S. 437 (1965).

[19] *Id.* at 396.

[20] *Id.* For additional discussion of *Douds* and other cases involving loyalty oaths impinging on associational freedom, see Amdt1.8.2.3 Denial of Employment or Public Benefits.

[21] 339 U.S. at 399, 410.

[22] 339 U.S. at 400–06.

balancing, *Konigsberg v. State Bar of California*,[23] the Court upheld a state's refusal to certify an applicant for admission to the bar. Describing the relevant analysis, the Court said "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved."[24]

The Court used balancing to sustain congressional and state inquiries into associations and individual activities that were alleged to be subversive[25] and proceedings against the Communist Party and its members.[26] The Court did not use balancing, however, when it struck down restrictions on receiving materials mailed from Communist countries[27] or in cases involving picketing, pamphleteering, and demonstrating in public places.[28] But the only case in which the Court specifically rejected balancing involved a statutory regulation like those that had led the Court to adopt the test in the first place. In *United States v. Robel*,[29] the Court held invalid under the First Amendment a statute that made it unlawful for any member of an organization that the Subversive Activities Control Board had ordered to register to work in a defense establishment.[30] Writing for the Court, Chief Justice Earl Warren reasoned that the law was flawed because its proscription operated per se "without any need to establish that an individual's association poses the threat feared by the Government in proscribing it,"[31] and, as a result, the rationale of the decision was not clear and present danger but the existence of less restrictive means by which the governmental interest could be accomplished.[32] In a concluding footnote, the Court said: "It has been suggested that this case should be decided by 'balancing' the governmental interests . . . against the First Amendment rights asserted by the appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more circumscribed. . . . We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict."[33]

The government used the Smith Act provision criminalizing organizing or becoming a member of an organization that teaches, advocates, or encourages the overthrow of government by force or violence against Communist Party members. In *Scales v. United States*,[34] the Court affirmed a conviction and held it constitutional against First Amendment

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[23] 366 U.S. 36 (1961).

[24] 366 U.S. at 50–51. Again, the ruling in *Konigsberg* is discussed in more detail in Amdt1.8.2.3 Denial of Employment or Public Benefits.

[25] Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959); Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961).

[26] Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961); Scales v. United States, 367 U.S. 203 (1961).

[27] Lamont v. Postmaster General, 381 U.S. 301 (1965).

[28] *E.g.*, Cox v. Louisiana, 379 U.S. 536 and 559 (1965) (2 cases); Edwards v. South Carolina, 372 U.S. 229 (1963); Adderley v. Florida, 385 U.S. 39 (1966); Brown v. Louisiana, 383 U.S. 131 (1966). *But see* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), where balancing reappears and in which other considerations overbalance the First Amendment claims.

[29] 389 U.S. 258 (1967).

[30] Subversive Activities Control Act of 1950, § 5(a)(1)(D), 64 Stat. 992, 50 U.S.C. § 784 (a)(1)(D).

[31] United States v. Robel, 389 U.S. 258, 265 (1967).

[32] 389 U.S. at 265–68.

[33] 389 U.S. at 268 n.20.

[34] 367 U.S. 203 (1961). Justices Hugo Black and William O. Douglas dissented on First Amendment grounds, *id.* at 259, 262, while Justice William Brennan and Chief Justice Warren dissented on statutory grounds. *Id.* at 278.

attack. Advocacy such as the Communist Party engaged in, Justice John Harlan wrote for the Court, was unprotected under *Dennis*, and he could see no reason why membership that constituted a purposeful form of complicity in a group engaging in such advocacy should be a protected form of association. Of course, he observed "[i]f there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired, but the membership clause . . . does not make criminal all association with an organization which has been shown to engage in illegal advocacy."[35] Only an "active" member of the Party—one who with knowledge of the proscribed advocacy intends to accomplish the aims of the organization—was to be punished, the Court said, not a "nominal, passive, inactive or purely technical" member.[36]

Amdt1.7.5.4 Incitement Current Doctrine

First Amendment:

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

In *Brandenburg v. Ohio*,[1] the Supreme Court reversed a conviction under a criminal syndicalism statute of advocating the necessity or propriety of criminal or terrorist means to achieve political change. The prevailing doctrine developed in the Communist Party cases was that "mere" advocacy was protected but that a call for concrete, forcible action even far in the future was not protected speech and knowing membership in an organization calling for such action was not protected association, regardless of the probability of success.[2] In *Brandenburg*, however, the Court reformulated these and other rulings to mean "that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action."[3] The Court has applied the *Brandenburg* formulation in subsequent cases, although a number of questions remain with respect to the imminence and likelihood aspects of the standard.[4]

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[35] 367 U.S. at 229.

[36] 367 U.S. at 220. In *Noto v. United States,* 367 U.S. 290 (1961), the Court reversed a conviction under the membership clause because the evidence was insufficient to prove that the Party had engaged in unlawful advocacy. "[T]he mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it." *Id.* at 297–98.

[1] 395 U.S. 444 (1969).

[2] Yates v. United States, 354 U.S. 298 (1957); Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961). *See also* Bond v. Floyd, 385 U.S. 116 (1966); Watts v. United States, 394 U.S. 705 (1969).

[3] 395 U.S. at 447 (emphasis added).

[4] *See, e.g.*, Hess v. Indiana, 414 U.S. 105 (1973); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982). In *Stewart v. McCoy,* 537 U.S. 993 (2002), Justice John Paul Stevens, in a statement accompanying a denial of certiorari, wrote that, while *Brandenburg*'s "requirement that the consequence be 'imminent' is justified with respect to mere advocacy, the same justification does not necessarily adhere to some speech that performs a teaching function. Long range planning of criminal enterprises—which may include oral advice, training exercises, and perhaps the preparation of written materials—involve speech that should not be glibly characterized as mere 'advocacy' and certainly may create significant public danger. Our cases have not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech." *Id.* at 995.

Amdt1.7.5.5 Fighting Words

First Amendment:

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

In *Chaplinsky v. New Hampshire*,[1] the Court unanimously sustained a conviction under a state law proscribing "any offensive, derisive or annoying word" addressed to any person in a public place after accepting the state court's interpretation of the statute as being limited to "fighting words"—that is, to words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." The Court sustained the statute as "narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace."[2] The Court further explained that "by their very utterance," fighting words "inflict injury or tend to incite an immediate breach of the peace."[3] Accordingly, "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[4]

Chaplinsky still remains viable for the principle that "the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[5] But, in actuality, the Court has closely scrutinized statutes on vagueness and overbreadth grounds and set aside convictions as not being within the doctrine. *Chaplinsky* thus remains the governing standard, but the Court has not upheld a government action on the basis of that doctrine since *Chaplinsky* itself.[6]

In the related "hostile audience" situation, the Court sustained a conviction for disorderly conduct of one who refused police demands to cease speaking after his speech seemingly stirred numbers of his listeners to mutterings and threatened disorders.[7] But this case has been significantly limited by cases that hold the Fifth Amendment protects the peaceful expression of views that stirs people to anger because of the content of the expression, or perhaps because of the manner in which it is conveyed, and that government may not use breach of the peace and disorderly conduct statutes to curb such expression. Specifically, the

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[1] 315 U.S. 568 (1942).

[2] 315 U.S. at 573.

[3] 315 U.S. at 572.

[4] *Id.*

[5] Cohen v. California, 403 U.S. 15, 20 (1971). Cohen's conviction for breach of the peace, occasioned by his appearance in public with an "offensive expletive" lettered on his jacket, was reversed, in part because the words were not a personal insult and there was no evidence of audience objection.

[6] The Court held that government may not punish profane, vulgar, or opprobrious words simply because they are offensive, but only if they are "fighting words" that have a direct tendency to cause acts of violence by the person to whom they are directed. Gooding v. Wilson, 405 U.S. 518 (1972); Hess v. Indiana, 414 U.S. 105 (1973); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Lucas v. Arkansas, 416 U.S. 919 (1974); Kelly v. Ohio, 416 U.S. 923 (1974); Karlan v. City of Cincinnati, 416 U.S. 924 (1974); Rosen v. California, 416 U.S. 924 (1974); *see also* Eaton v. City of Tulsa, 416 U.S. 697 (1974).

[7] Feiner v. New York, 340 U.S. 315 (1951). *See also* Milk Wagon Drivers v. Meadowmoor Dairies, 312 U.S. 287 (1941), in which the Court held that a court could enjoin peaceful picketing because violence occurring at the same time against the businesses picketed could have created an atmosphere in which even peaceful, otherwise protected picketing could be illegally coercive. *But compare* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

Court has held that "speech cannot be restricted simply because it is upsetting or arouses contempt," at least when the speech occurs in "a public place on a matter of public concern."[8]

The cases are unclear as to what extent the police must go to protect a speaker against hostile audience reaction or whether only actual disorder or a clear and present danger of disorder entitles the authorities to terminate the speech or other expressive conduct.[9] The Court has also held that, absent incitement to illegal action, government may not punish mere expression or proscribe ideas,[10] regardless of the trifling or annoying caliber of the expression.[11]

Amdt1.7.5.6 True Threats

First Amendment:

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

The Supreme Court has cited three "reasons why threats of violence are outside the First Amendment"—"protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[1] In *Watts v. United States*, however, the Court held that only "true" threats are outside ordinary First Amendment protections.[2] The defendant in *Watts* expressed his opposition to the military draft at a public rally, saying, "If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J."[3] He was convicted of violating a federal statute that prohibited "any threat to take the life of or to inflict bodily harm upon the President of the United States." The Supreme Court reversed. Interpreting the statute "with the commands of the First Amendment clearly in mind,"[4] the Court found that the defendant had not made a "true 'threat,'" but had indulged in mere "political hyperbole."[5]

In *NAACP v. Claiborne Hardware Co.*, White merchants in Claiborne County, Mississippi, sued the NAACP to recover losses caused by a boycott by Black citizens of their businesses, and to enjoin future boycott activity.[6] During the course of the boycott, NAACP Field Secretary Charles Evers told an audience of "black people that any 'uncle toms' who broke the boycott

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[8] Snyder v. Phelps, 562 U.S. 443, 458 (2011).

[9] The principle actually predates *Feiner*. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940); Terminiello v. Chicago, 337 U.S. 1 (1949). For subsequent application, *see* Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965); Brown v. Louisiana, 383 U.S. 131 (1966); Gregory v. City of Chicago, 394 U.S. 111 (1969); Bachellar v. Maryland, 397 U.S. 564 (1970). Significant is Justice John Harlan's statement of the principle reflected by *Feiner*. "Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. *Cf.* Feiner v. New York, 340 U.S. 315 (1951)." Cohen v. California, 403 U.S. 15, 20 (1971).

[10] Cohen v. California, 403 U.S. 15 (1971); Bachellar v. Maryland, 397 U.S. 564 (1970); Street v. New York, 394 U.S. 576 (1969); Schacht v. United States, 398 U.S. 58 (1970); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959); Stromberg v. California, 283 U.S. 359 (1931).

[11] Coates v. City of Cincinnati, 402 U.S. 611 (1971); Cohen v. California, 403 U.S. 15 (1971); Gooding v. Wilson, 405 U.S. 518 (1972).

[1] R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

[2] 394 U.S. 705, 708 (1969) (per curiam).

[3] 394 U.S. at 706.

[4] 394 U.S. at 707.

[5] 394 U.S. at 708.

[6] 458 U.S. 886 (1982). Claiborne is also discussed below under "Public Issue Picketing and Parading."

would 'have their necks broken' by their own people."[7] The Court acknowledged that this language "might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence."[8] Yet, no violence had followed directly from Evers' speeches, and the Court found that Evers' "emotionally charged rhetoric did not transcend the bounds of protected speech set forth in *Brandenburg*. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech."[9] Although the Court held that, under *Brandenburg*, Evers' speech did not constitute unprotected incitement of lawless action,[10] the Court also cited *Watts*, thereby implying that Evers' speech also did not constitute a "true threat."[11]

In 2003's *Virginia v. Black*, the Supreme Court considered a First Amendment challenge to a state law that banned cross burning carried out with the intent to intimidate.[12] The Court held that, at least in theory, states could prohibit such cross burnings as a "true threat."[13] Specifically, intimidation can be prohibited as "a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[14] Cross burning could fall within this category of "intimidating speech," given that the "history of cross burning in this country" demonstrated they were often "intended to create a pervasive fear in victims that they are a target of violence."[15] However, the Court concluded that the specific state law before it was unconstitutional insofar as it allowed the mere fact of cross burning to provide prima facie evidence of the intent to intimidate, creating a chill on constitutionally protected speech.[16]

Amdt1.7.5.7 Defamation

First Amendment:

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

One of the most foundational cases in First Amendment jurisprudence occurred in 1964 with the Court's decision in *New York Times Co. v. Sullivan*.[1] The *Times* had published a paid advertisement by a civil rights organization criticizing the response of a Southern community to demonstrations led by Dr. Martin Luther King and containing several factual errors. The plaintiff, a city commissioner in charge of the police department, claimed that the advertisement had libeled him even though he was not referred to by name or title and even

[7] 458 U.S. at 900, n.29. *See id.* at 902 for a similar remark by Evers.

[8] 458 U.S. at 927.

[9] 458 U.S. at 928.

[10] Brandenburg v. Ohio, 395 U.S. 444 (1969). *Brandenburg* is discussed above under "Is There a Present Test?"

[11] *Claiborne*, 458 U.S. at 928 n.71.

[12] Virginia v. Black, 538 U.S. 343, 347 (2003).

[13] *Id.* at 360, 363.

[14] *Id.* at 360.

[15] *Id.*

[16] *Id.* at 364–65 (plurality opinion); *id.* at 386 (Souter, J., concurring in the judgment in part and dissenting in part) (concluding that the law was an impermissibly content-based statute, in part because "the prima facie evidence provision skews prosecutions . . . toward suppressing ideas."). A cross burning done as "a statement of ideology, a symbol of group solidarity," or "in movies such as Mississippi Burning," however, would be protected speech. *Id.* at 365–366 (plurality opinion).

[1] 376 U.S. 254 (1964).

though several of the incidents described had occurred prior to his assumption of office. Unanimously, the Court reversed the lower court's judgment for the plaintiff. To the contention that the First Amendment did not protect libelous publications, the Court replied that constitutional scrutiny could not be completely foreclosed by the "label" attached to something. The Court said libel could "claim no talismanic immunity from constitutional limitations," and the standards for proving defamation must "satisfy the First Amendment."[2] The Court considered the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[3] Because the advertisement was "an expression of grievance and protest on one of the major public issues of our time, [it] would seem clearly to qualify for the constitutional protection [unless] it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent."[4]

Prior interpretations had established that the First Amendment contained no exception "for any test of truth."[5] The Court explained that error is inevitable in any free debate, to place on the speaker the burden of proving truth would introduce self-censorship and stifle the free expression which the First Amendment protects.[6] Nor would injury to official reputation afford a warrant for repressing otherwise free speech. Public officials are subject to public scrutiny and "[c]riticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputation."[7] Ultimately, the Court said the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[8]

In the wake of the *Times* ruling, the Court decided two cases involving the type of criminal libel statute upon which Justice Felix Frankfurter had relied in analogy to uphold the group libel law in *Beauharnais v. Illinois*, discussed in a subsequent essay.[9] In neither case did the Court apply the concept of *Times* to void them altogether. *Garrison v. Louisiana*[10] held that a statute that did not incorporate the *Times* rule of "actual malice" was invalid, while in *Ashton v. Kentucky*[11] a common-law definition of criminal libel as "any writing calculated to create disturbances of the peace, corrupt the public morals or lead to any act, which, when done, is indictable" was too vague to be constitutional.

Subsequent cases elaborated which defamed individuals had to satisfy the *Times* rule. Explaining the definition of a "public official," the Court said this includes "at the very least to those among the hierarchy of government employees who have, or appear to the public to have,

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[2] 376 U.S. at 269. Justices Hugo Black, William O. Douglas, and Arthur Goldberg, concurring, would have held libel laws per se unconstitutional. *Id.* at 293, 297.

[3] 376 U.S. at 269, 270.

[4] 376 U.S. at 271.

[5] 376 U.S. at 271.

[6] 376 U.S. at 271–72, 278–79. The substantial truth of an utterance is ordinarily a defense to defamation. *See* Masson v. New Yorker Magazine, 501 U.S. 496, 516 (1991).

[7] 376 U.S. at 272–73.

[8] 376 U.S. at 279–80. The same standard applies for defamation contained in petitions to the government, the Court having rejected the argument that the petition clause requires absolute immunity. McDonald v. Smith, 472 U.S. 479 (1985).

[9] Beauharnais v. Illinois, 343 U.S. 250, 254–58 (1952); Amdt1.7.5.8 Application of Defamation Cases to Group Libel, Hate Speech.

[10] 379 U.S. 64 (1964).

[11] 384 U.S. 195 (1966).

substantial responsibility for or control over the conduct of governmental affairs."[12] But the Court appeared to expand the concept of "public official" to take on overtones of anyone holding public elective or appointive office.[13] Moreover, candidates for public office were subject to the *Times* rule and comment on their character or past conduct, public or private, insofar as it touches upon their fitness for office, is protected.[14]

Thus, a wide range of reporting about both public officials and candidates was quickly held to be subject to heightened constitutional standards. While the First Amendment protects scrutiny and criticism of the conduct of official duties by public officials,[15] the Court has also held that criticism that reflects generally upon an official's integrity and honesty is protected.[16] Candidates for public office, the Court has said, place their whole lives before the public, and it is difficult to see what criticisms could not be related to their fitness.[17]

Only three years after its *Sullivan* decision, the Court said the First Amendment also required a heightened standard to prove defamation of a "public figure," which included those otherwise private individuals who have attained some prominence, either through their own efforts or because it was thrust upon them, with respect to a matter of public interest, or, in Chief Justice Earl Warren's words, those persons who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."[18] Later, the Court curtailed the definition of "public figure" by

[12] Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

[13] *See* Rosenblatt v. Baer, 383 U.S. 75 (1966) (supervisor of a county recreation area employed by and responsible to the county commissioners may be public official within *Times* rule); Garrison v. Louisiana, 379 U.S. 64 (1964) (elected municipal judges); Henry v. Collins, 380 U.S. 356 (1965) (county attorney and chief of police); St. Amant v. Thompson, 390 U.S. 727 (1968) (deputy sheriff); Greenbelt Cooperative Pub. Ass'n v. Bresler, 398 U.S. 6 (1970) (state legislator who was major real estate developer in area); Time, Inc. v. Pape, 401 U.S. 279 (1971) (police captain). The categorization does not, however, include all government employees. Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979).

[14] Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971).

[15] Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

[16] Garrison v. Louisiana, 379 U.S. 64 (1964), involved charges that judges were inefficient, took excessive vacations, opposed official investigations of vice, and were possibly subject to "racketeer influences." The Court rejected the argument that these criticisms were not about how the judges conducted their courts but were personal attacks upon their integrity and honesty. The Court observed: "Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation . . . .The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." *Id.* at 76–77.

[17] In *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 274–75 (1971), the Court said: "The principal activity of a candidate in our political system, his 'office,' so to speak, consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him. A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a husband or father remain of 'purely private' concern. And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul' when an opponent or an industrious reporter attempts to demonstrate the contrary. Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks. The clash of reputations is the staple of election campaigns and damage to reputation is, of course, the essence of libel. But whether there remains some exiguous area of defamation against which a candidate may have full recourse is a question we need not decide in this case."

[18] Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967) (Chief Justice Earl Warren concurring in the result). *Curtis* involved a college football coach, and *Associated Press v. Walker*, decided in the same opinion, involved a retired general active in certain political causes. The suits arose from reporting allegations, respectively, that the football coach fixed a football game and the retired general led a violent crowd in opposition to enforcement of a desegregation decree. While the Court was extremely divided, Chief Justice Warren's rule became the generally accepted rule. Essentially, four Justices opposed applying the *Times* standard to "public figures," although they would have imposed a lesser but constitutionally based burden on public figure plaintiffs. *Id.* at 133 (plurality opinion of Harlan, Clark,

playing down the matter of public interest and emphasizing that one becomes a "public figure" by voluntarily assuming a role in public affairs.[19]

Second, in a fragmented ruling, the Court applied the *Times* standard to private citizens who had simply been involved in events of public interest, usually, though not invariably, not through their own choosing.[20] But, in *Gertz v. Robert Welch, Inc.*[21] the Court clarified that *Sullivan*'s actual malice standard did not apply to any defamation on a matter of public concern. Instead, persons who are neither public officials nor public figures may recover for the publication of defamatory falsehoods so long as state defamation law establishes a standard higher than strict liability, such as negligence; damages may not be presumed, however, but must be proved, and punitive damages will be recoverable only upon the *Times* showing of "actual malice."[22]

Subsequent cases have revealed a trend toward narrowing the scope of the "public figure" concept. A socially prominent litigant in a particularly messy divorce controversy was held not to be such a person,[23] and a person convicted years before of contempt after failing to appear before a grand jury was similarly not a public figure even as to commentary with respect to his conviction.[24] Also the Court deemed a scientist who sought and received federal grants for research, the results of which were published in scientific journals, not to be a public figure for purposes of an allegedly defamatory comment about the value of his research.[25] Public figures, the Court reiterated, are those who (1) occupy positions of such persuasive power and influence that they are deemed public figures for all purposes or (2) have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved, and are public figures with respect to comment on those issues.[26]

The Court has elaborated on the principles governing defamation actions brought by private figures. First, when a private plaintiff sues a media defendant for publication of information that is a matter of public concern—such as the *Gertz* situation—the burden is on the plaintiff to establish the information is false. Thus, the Court held in *Philadelphia Newspapers v. Hepps*,[27] the common law rule that defamatory statements are presumptively false must give way to the First Amendment interest that true speech on matters of public concern not be inhibited. This means, as the dissenters noted, that a *Gertz* plaintiff must establish falsity in addition to establishing some degree of fault (for example, negligence).[28] On the other hand, the Court held in *Dun & Bradstreet v. Greenmoss Builders* that the *Gertz* standard limiting award of presumed and punitive damages applies only in cases involving

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Stewart, and Fortas, JJ.). Three Justices applied *Times*, *id.* at 162 (Warren, C.J.), and *id.* at 172 (Brennan and White, JJ.). Two Justices would have applied absolute immunity. *Id.* at 170 (Black and Douglas, JJ.). *See also* Greenbelt Cooperative Pub. Ass'n v. Bresler, 398 U.S. 6 (1970).

[19] Public figures "[f]or the most part [are] those who . . . have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

[20] Rosenbloom v. Metromedia, 403 U.S. 29 (1971). *Rosenbloom* had been prefigured by *Time, Inc. v. Hill,* 385 U.S. 374 (1967), a "false light" privacy case considered *infra*

[21] 418 U.S. 323, 346 (1974).

[22] *Id.* at 347, 349.

[23] Time, Inc. v. Firestone, 424 U.S. 448 (1976). *See also* Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979).

[24] Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979).

[25] Hutchinson v. Proxmire, 443 U.S. 111 (1979).

[26] 443 U.S. at 134 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974)).

[27] 475 U.S. 767 (1986).

[28] 475 U.S. at 780 (Stevens, J., dissenting).

matters of public concern, and that selling credit reporting information to subscribers is not such a matter of public concern.[29] The Court has left unclear whether it matters if the defendant to the defamation suit is from the media rather than a private person. The plurality in *Dun & Bradstreet* declined to follow the lower court's rationale that *Gertz* protections are unavailable to nonmedia defendants, and a majority of Justices agreed on that point.[30] In *Philadelphia Newspapers*, however, the Court expressly reserved the issue of "what standards would apply if the plaintiff sues a nonmedia defendant."[31]

Other issues besides who is covered by the *Times* privilege are of considerable importance. The Court has distinguished "actual malice" from the common law meaning of malice.[32] Under *Times,* constitutional "actual malice" means the defendant published the defamation with knowledge that it was false or with reckless disregard of whether it was false.[33] Reckless disregard is not simply negligent behavior, but publication with serious doubts as to the truth of what is uttered.[34] A defamation plaintiff under the *Times* or *Gertz* standard has the burden of proving by "clear and convincing" evidence, not merely by the preponderance of evidence standard generally used in civil cases, that the defendant acted with knowledge of falsity or with reckless disregard.[35] Moreover, the Court has held, a *Gertz* plaintiff has the burden of proving the actual falsity of the defamatory publication.[36] A plaintiff suing the press for defamation under the *Times* or *Gertz* standards is not required to prove his case or establish "actual malice" absent discovery of the defendant's editorial processes.[37] Through discovery, the plaintiff may inquire into the defendant's state of mind; his thoughts, opinions, and conclusions with respect to the material he gathered; and how he reviewed and handled it. As with other areas of protection or qualified protection under the First Amendment (as well as some other constitutional provisions), appellate courts, and ultimately the Supreme Court, must independently review the findings below to ascertain that constitutional standards were met.[38]

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[29] 472 U.S. 749 (1985). Justice Lewis Powell wrote a plurality opinion joined by Justices William Rehnquist and Sandra Day O'Connor, and Chief Justice Warren Burger and Justice ByronWhite, both of whom had dissented in *Gertz*, added brief concurring opinions agreeing that the *Gertz* standard should not apply to credit reporting. Justice William Brennan, joined by Justices Thurgood Marshall, Harry Blackmun, and John Paul Stevens, dissented, arguing that *Gertz* had not been limited to matters of public concern, and should not be extended to do so.

[30] 472 U.S. at 753 (plurality); *id.* at 773 (Justice White); *id.* at 781–84 (dissent).

[31] 475 U.S. at 779 n.4. Justice Wiliam Brennan added a brief concurring opinion expressing his view that such a distinction is untenable. *Id.* at 780.

[32] *See, e.g.*, Herbert v. Lando, 441 U.S. 153, 199 (1979) (Stewart, J., dissenting).

[33] New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964); Garrison v. Louisiana, 379 U.S. 64, 78 (1964); Cantrell v. Forest City Publishing Co., 419 U.S. 245, 251–52 (1974).

[34] St. Amant v. Thompson, 390 U.S. 727, 730–33 (1968); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967). A finding of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" is alone insufficient to establish actual malice. Harte-Hanks Communications v. Connaughton, 491 U.S. 657 (1989) (nonetheless upholding the lower court's finding of actual malice based on the "entire record").

[35] Gertz v. Robert Welch, Inc., 418 U.S. 323, 331–32 (1974); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 83 (1967). *See* New York Times Co. v. Sullivan, 376 U.S. 254, 285–86 (1964) ("convincing clarity"). A corollary is that the issue on motion for summary judgment in a *New York Times* case is whether the evidence is such that a reasonable jury might find that actual malice has been shown with convincing clarity. Anderson v. Liberty Lobby, 477 U.S. 242 (1986).

[36] Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986) (leaving open the issue of what "quantity" or standard of proof must be met).

[37] Herbert v. Lando, 441 U.S. 153 (1979).

[38] New York Times Co. v. Sullivan, 376 U.S. 254, 284–86 (1964). *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933–34 (1982). Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 688 (1989) ("the reviewing court must consider the factual record in full"); Bose Corp. v. Consumers Union of United States, 466 U.S. 485 (1984) (the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a) must be subordinated to this constitutional principle).

While the Court had suggested in dicta that statements of opinion, unlike assertions of fact, might be absolutely protected,[39] the Court held in *Milkovich v. Lorain Journal Co.*[40] that there is no constitutional distinction between fact and opinion, hence no "wholesale defamation exemption" for any statement that can be labeled "opinion."[41] Instead, the issue is whether, regardless of the context in which a statement is uttered, the statement is sufficiently factual to be susceptible of being proved true or false. Thus, if statements of opinion may "reasonably be interpreted as stating actual facts about an individual,"[42] then the truthfulness of the factual assertions may be tested in a defamation action. There are sufficient protections for free public discourse already available in defamation law, the Court concluded, without creating "an artificial dichotomy between 'opinion' and fact."[43]

In *Masson v. New Yorker Magazine*,[44] the Court considered whether a publisher's alterations to quotations attributed to a public figure met the actual malice standard given journalistic conventions allowing publishers to make some alterations to correct grammar and syntax. The Court ruled that "a deliberate alteration of words [in a quotation] does not equate with knowledge of falsity for purposes of [*New York Times*] unless the alteration results in a material change in the meaning conveyed by the statement."[45]

Amdt1.7.5.8 Application of Defamation Cases to Group Libel, Hate Speech

First Amendment:

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

In *Beauharnais v. Illinois*,[1] relying on dicta in past cases,[2] the Court upheld a state group libel law that made it unlawful to defame a race or class of people. The defendant had been convicted under this statute after he had distributed a leaflet, part of which was in the form of a petition to his city government, taking a hard-line white-supremacy position and calling for action to keep African Americans out of White neighborhoods. Justice Felix Frankfurter for the Court sustained the statute along the following reasoning. Libel of an individual, he established, was a common-law crime and was now made criminal by statute in every state in the Union. These laws raise no constitutional difficulty because libel is within that class of speech that is not protected by the First Amendment. If an utterance directed at an individual may be the object of criminal sanctions, then no good reason appears to deny a state the power to punish the same utterances when they are directed at a defined group, "unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the

[39] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) ("under the First Amendment there is no such thing as a false idea"); Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) (holding protected the accurate reporting of a public meeting in which a particular position was characterized as "blackmail"); Letter Carriers v. Austin, 418 U.S. 264 (1974) (holding protected a union newspaper's use of epithet "scab").

[40] 497 U.S. 1 (1990).

[41] 497 U.S. at 18.

[42] 497 U.S. at 20. In *Milkovich* the Court held to be actionable assertions and implications in a newspaper sports column that a high school wrestling coach had committed perjury in testifying about a fight involving his team.

[43] 497 U.S. at 19.

[44] 501 U.S. 496 (1991).

[45] 501 U.S. at 517.

[1] 343 U.S. 250 (1952).

[2] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 707–08 (1931).

State."[3] Justice Felix Frankfurter then reviewed the history of racial strife in Illinois to conclude that the legislature could reasonably have feared substantial evils from defamatory racist statements. He also held that the Constitution did not require states to accept a defense of truth, because historically a defendant had to show not only truth but publication with good motives and for justifiable ends.[4]

The holding of *Beauharnais*, premised in part on the categorical exclusion of defamatory statements from First Amendment protection, has been undercut by subsequent developments, including the Court's subjecting defamation law to First Amendment challenge and endorsing "uninhibited, robust, and wide-open" debate on public issues in *New York Times Co. v. Sullivan*.[5] Further, in *R.A.V. v. City of St. Paul*, the Court, in an opinion by Justice Antonin Scalia, explained and qualified the categorical exclusions for defamation, obscenity, and fighting words. These categories of speech are not "entirely invisible to the Constitution," even though they "can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content*."[6] Content discrimination unrelated to that "distinctively proscribable content," however, runs afoul of the First Amendment.[7] Therefore, the city's bias-motivated crime ordinance, interpreted as banning the use of fighting words known to offend on the basis of race, color, creed, religion, or gender, but not on such other possible bases as political affiliation, union membership, or homosexuality, was invalidated for its content discrimination. Consequently, the *R.A.V.* Court held: "The First Amendment does not permit [the city] to impose special prohibitions on those speakers who express views on disfavored subjects."[8]

In *Virginia v. Black*, the Court held that its opinion in *R.A.V.* did not make it unconstitutional for a state to prohibit burning a cross with the intent of intimidating any person or group of persons.[9] The state law did not single out only speech on certain disfavored topics; nor, as a factual matter, did all "cross burners direct their intimidating conduct solely to racial or religious minorities."[10] Under *R.A.V.*, the statute permissibly targeted a subset of true threats "because burning a cross is a particularly virulent form of intimidation."[11]

The Court has also struck down non-libel legislation intended to prevent offense of individuals and groups of people as unconstitutional. For example, in *Matal v. Tam*, the Supreme Court considered a federal law prohibiting registering trademarks that "may

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[3] Beauharnais v. Illinois, 343 U.S. 250, 254–58 (1952).

[4] 343 U.S. at 265–66.

[5] 376 U.S. 254 (1964). *See also* Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.) (ordinances prohibiting distribution of materials containing racial slurs are unconstitutional), *aff'd*, 578 F.2d 1197 (7th Cir.), *stay denied*, 436 U.S. 953 (1978), *cert. denied*, 439 U.S. 916 (1978) (Justices Harry Blackmun and William Rehnquist dissenting on the basis that Court should review case that is in "some tension" with *Beauharnais*). *But see* New York v. Ferber, 458 U.S. 747, 763 (1982) (obliquely citing *Beauharnais* with approval).

[6] 505 U.S. 377, 383 (1992).

[7] 505 U.S. at 384.

[8] *Id.* 505 U.S. at 391. On the other hand, the First Amendment permits enhancement of a criminal penalty based on the defendant's motive in selecting a victim of a particular race. Wisconsin v. Mitchell, 508 U.S. 476 (1993). The law has long recognized motive as a permissible element in sentencing, the Court noted. *Id.* at 485. It distinguished R.A.V. as involving a limitation on speech rather than conduct, and because the state might permissibly conclude that bias-inspired crimes inflict greater societal harm than do non-bias inspired crimes (for example, they are more likely to provoke retaliatory crimes). *Id.* at 487–88. *See generally* Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 Sup. Ct. Rev. 1.

[9] 538 U.S. 343 (2003). A plurality held, however, that a statute may not presume, from the fact that a defendant burned a cross, that he had an intent to intimidate. The state must prove that he did, as "a burning cross is not always intended to intimidate," but may constitute a constitutionally protected expression of opinion. *Id.* at 365–66.

[10] 538 U.S. at 362 (majority opinion).

[11] 538 U.S. at 362–63.

disparage . . . or bring . . . into contempt[ ] or disrepute" any "persons, living or dead."[12] In *Tam*, the Patent and Trademark Office rejected a trademark application for THE SLANTS for an Asian-American dance-rock band because it found the mark may be disparaging to Asian Americans.[13] The Court held that the disparagement provision violated the Free Speech Clause as "[i]t offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[14] Two years later, the Court invalidated another statutory trademark restriction—one prohibiting the registration of "immoral" or "scandalous" marks—on similar grounds.[15]

Amdt1.7.5.9 False Statements Outside of Defamation

First Amendment:

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

As defamatory false statements can lead to legal liability, false statements in other contexts can violate legal prohibitions. For instance, more than 100 federal criminal statutes punish false statements in areas of concern to federal courts or agencies,[1] and the Court has often noted the limited First Amendment value of such speech.[2] The Court, however, has rejected the idea that all false statements fall outside of First Amendment protection.

In *United States v. Alvarez*,[3] the Court overturned the Stolen Valor Act of 2005,[4] which imposed criminal penalties for falsely representing oneself to have been awarded a military decoration or medal. In an opinion by Justice Anthony Kennedy, four Justices distinguished false statement statutes that threaten the integrity of governmental processes or that further criminal activity, and evaluated the Act under a strict scrutiny standard.[5] Noting that the Stolen Valor Act applied to false statements made "at any time, in any place, to any person,"[6] Justice Anthony Kennedy suggested that upholding this law would leave the government with the power to punish any false discourse without a clear limiting principle. The plurality applied strict scrutiny to the Act as a content-based law. Justice Stephen Breyer, in a separate opinion joined by Justice Elena Kagan, concurred in judgment, but did so only after evaluating the prohibition under an intermediate scrutiny standard. While Justice Breyer was also

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[12] No. 15-1293, slip op. (2017).

[13] *Id.* at 1.

[14] *Id.* at 1–2.

[15] Iancu v. Brunetti, 588 U.S., No. 18-302, slip op. at 2 (2019) (quoting 15 U.S.C. § 1052 (a)). *See also* Amend. 1, Non-obscene But Sexually Explicit and Indecent Expression.

[1] United States v. Wells, 519 U.S. 482, 505–507, nn. 8–10 (1997) (Stevens, J., dissenting) (listing statute citations).

[2] *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. at 52 (1988) ("False statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas."); Virginia State Bd. of Pharmacy Virginia Citizens Consumer Council, 425 U.S. at 771 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

[3] 567 U.S., No. 11-210, slip op. (2012).

[4] 18 U.S.C. § 704.

[5] *Alvarez*, slip op. at 8-12 (Kennedy, J.). Justice Anthony Kennedy was joined by Chief Justice John Roberts and Justices Ruth Bader Ginsburg and Sonia Sotomayor.

[6] *Alvarez*, slip op. at 10 (Kennedy, J). Justice Anthony Kennedy was joined in his opinion by Chief Justice John Roberts and Justices Ruth Bader Ginsburg and Sonia Sotomayor.

concerned about the breadth of the Act, his opinion suggested that a statute more finely tailored to "a subset of lies where specific harm is likely to occur" could withstand legal challenge.[7]

Amdt1.7.5.10 Privacy Torts

First Amendment:

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

Government power to protect the privacy interests of its citizens by penalizing publication or authorizing causes of action for publication directly implicates First Amendment rights. Privacy is a concept composed of several aspects.[1] As a tort concept, it embraces at least four branches of protected interests: protection from unreasonable intrusion upon one's seclusion, from appropriation of one's name or likeness, from unreasonable publicity given to one's private life, and from publicity which unreasonably places one in a false light before the public.[2]

Although the Court has recognized valid governmental interests in extending protection to privacy,[3] it has nevertheless interposed substantial free expression interests in the balance. The Court's constitutional jurisprudence in this area has drawn heavily from its rulings in *New York Times v. Sullivan* and other defamation cases discussed in an earlier essay.[4] Thus, in *Time, Inc. v. Hill*,[5] the *Times* standard requiring proof of actual malice precluded recovery under a state privacy statute that permitted recovery for harm caused by exposure to public attention in any publication which contained factual inaccuracies, although not necessarily defamatory inaccuracies, in communications on matters of public interest. Given that this actual malice standard did not limit the recovery of compensatory damages for defamation by private persons, the question arose whether *Hill* applied to all "false-light" cases or only such cases involving public officials or public figures.[6] More specifically, one defamation case left unresolved the issue "whether the State may ever define and protect an area of privacy free from unwanted publicity in the press."[7] In *Cox Broadcasting Corp. v. Cohn*, the Court declined to pass on the broad question, holding instead that the accurate publication of information obtained from public records is absolutely privileged.[8] Thus, the state could not permit a civil

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[7] *Alvarez*, slip op. at 8–9 (Breyer, J).

[1] *See, e.g.*, William Prosser, Law of Torts 117 (4th ed. 1971); Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960); J. Thomas McCarthy, The Rights of Publicity and Privacy (1987); Thomas Emerson, The System of Freedom of Expression 544–61 (1970). Note that we do not have here the question of the protection of one's privacy from governmental invasion.

[2] Restatement (Second), of Torts §§ 652A–652I (1977). These four branches were originally propounded in Prosser's 1960 article, incorporated in the Restatement, and now "routinely accept[ed]." McCarthy, § 5.8[A].

[3] Time, Inc. v. Hill, 385 U.S. 374, 383 n.7 (1967); and *id.* at 402, 404 (Harlan, J., concurring in part and dissenting in part), 411, 412–15 (Fortas, J., dissenting); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 487–89 (1975).

[4] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Amdt1.7.5.7 Defamation.

[5] 385 U.S. 374 (1967). *See also* Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974).

[6] *Cf.* Cantrell v. Forest City Publishing Co., 419 U.S. 245, 250–51 (1974); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 490 n.19 (1975).

[7] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975) (explaining the open question).

[8] More specifically, the information was obtained "from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection." 420 U.S. at 491. There was thus involved both the First Amendment and the traditional privilege of the press to report the events of judicial proceedings. *Id.* at 493, 494–96.

recovery for invasion of privacy occasioned by the reporting of the name of a rape victim obtained from court records and from a proceeding in open court.[9]

Continuing to adhere to "limited principles that sweep no more broadly than the appropriate context of the instant case," the Court invalidated an award of damages against a newspaper for printing the name of a sexual assault victim lawfully obtained from a sheriff's department press release.[10] The state was unable to demonstrate that imposing liability served a "need" to further a state interest of the highest order, since the same interest could have been served by the more limited means of self regulation by the police, since the particular per se negligence statute precluded inquiry into the extent of privacy invasion (for example, inquiry into whether the victim's identity was already widely known), and since the statute singled out "mass communications" media for liability rather than applying evenhandedly to anyone disclosing a victim's identity.[11]

The tort of intentional infliction of emotional distress has presented special concerns due to its "outrageousness" standard of liability. In *Hustler Magazine, Inc. v. Falwell*,[12] the Court applied the *New York Times v. Sullivan* standard to a public figure seeking damages for intentional infliction of emotional distress. The case involved an advertisement "parody" portraying the plaintiff, described by the Court as a "nationally known minister who has been active as a commentator on politics and public affairs," as stating that he lost his virginity "during a drunken incestuous rendezvous with his mother in an outhouse."[13] Affirming liability in this case, the Court believed, would subject "political cartoonists and satirists . . . to damage awards without any showing that their work falsely defamed its subject."[14] The Court noted that "most if not all jurisdictions" had imposed liability for this tort only where the conduct was "outrageous."[15] However, the Court rejected the idea that this "outrageousness" standard could distinguish supposedly impermissible parodies from more traditional political cartoons, explaining that "'[o]utrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views."[16] Therefore, proof of intent to cause injury, "the gravamen of the tort," was insufficient "in the area of public debate about public figures." Additional proof that the publication contained a false statement of fact made with actual malice was necessary, the Court concluded, in order "to give adequate 'breathing space' to the freedoms protected by the First Amendment."[17]

The Court next considered whether an intentional infliction of emotional distress action could be brought by a father against public protestors who picketed the military funeral of his son, where the plaintiff was neither a public official nor a public figure. In *Snyder v. Phelps*,[18] the Court avoided addressing whether the actual malice standard applied to the intentional

[9] 420 U.S. at 491.

[10] The Florida Star v. B.J.F., 491 U.S. 524, 533 (1989).

[11] *Id.* at 537–41. The Court left open the question "whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, the government may ever punish not only the unlawful acquisition, but the ensuing publication as well." *Id.* at 535 n.8. In *Bartnicki v. Vopper,* 532 U.S. 514 (2001), the Court held that a content-neutral statute prohibiting the publication of illegally intercepted communications (in this case a cell phone conversation) violates free speech where the person who publishes the material did not participate in the interception, and the communication concerns a public issue.

[12] 485 U.S. 46 (1988).

[13] 485 U.S. at 47, 48.

[14] 485 U.S. at 53.

[15] 485 U.S. at 53.

[16] 485 U.S. at 55.

[17] 485 U.S. at 53, 56.

[18] 562 U.S. ___, No. 09-751, slip op. (March 2, 2011).

infliction of emotional distress upon a private citizen, finding that where public protesters are addressing issues of public concern, the fact that such protests occurred in a setting likely to upset private individuals did not reduce the First Amendment protection of that speech. In *Phelps*, the congregation of the Westboro Baptist Church, based on the belief that God punishes the United States for its tolerance of homosexuality, particularly in America's armed forces, had engaged in nearly 600 protests at funerals, mostly military. While it was admitted that the plaintiff had suffered emotional distress after a protest at his son's funeral, the Court declined to characterize the protests as directed at the father personally.[19] Rather, considering the "content, form, and context" of that speech,[20] the Court found that the dominant themes of the protest went to public concerns, and thus could not serve as the basis for a tort suit.[21]

The Court has further suggested that the actual malice standard does not apply to a right of publicity claim. In *Zacchini v. Scripps-Howard Broadcasting Co.*,[22] the Court held unprotected by the First Amendment a broadcast of a video tape of the "entire act" of a "human cannonball" in the context of the performer's suit for damages against the company for having "appropriated" his act, thereby injuring his right to the publicity value of his performance. The Court emphasized two differences between the legal action permitted here and the legal actions found unprotected or not fully protected in defamation and other privacy-type suits. First, the interest sought to be protected was, rather than a party's right to his reputation and freedom from mental distress, the right of the performer to remuneration for putting on his act. Second, the other torts if permitted decreased the information that would be made available to the public, whereas permitting this tort action would have an impact only on "who gets to do the publishing."[23] In both respects, the tort action was analogous to patent and copyright laws in that both provide an economic incentive to persons to make the investment required to produce a performance of interest to the public.[24]

Amdt1.7.5.11 Obscenity

First Amendment:

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

Although public discussion of political affairs is at the core of the First Amendment, the guarantees of speech and press are broader, extending also, for example, to sexually explicit entertainment. The Supreme Court has rejected the idea that the First Amendment "applies only to the exposition of ideas," saying "[t]he line between the informing and the entertaining

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[19] Signs displayed at the protest included the phrases "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You." slip op. at 2.

[20] *Id.* at 8 (citations omitted).

[21] Justice Alito, in dissent, argued that statements made by the defendants on signs and on a website could have been reasonably interpreted as directed at the plaintiffs, and that even if public themes were a dominant theme at the protest, that this should not prevent a suit from being brought on those statements arguably directed at private individuals. slip op. at 9–11 (Alito, J., dissenting).

[22] 433 U.S. 562 (1977). The "right of publicity" tort is conceptually related to one of the privacy strands: "appropriation" of one's name or likeness for commercial purposes. *Id.* at 569–72. Justices Lewis Powell, William Brennan, and Thurgood Marshall dissented, finding the broadcast protected, *id.* at 579, and Justice Stevens dissented on other grounds. *Id.* at 582.

[23] 433 U.S. at 573–74. Plaintiff was not seeking to bar the broadcast but rather to be paid for the value he lost through the broadcasting.

[24] 433 U.S. at 576–78.

is too elusive for the protection of that basic right."[1] The right to impart and to receive "information and ideas, regardless of their social worth . . . is fundamental to our free society."[2] Accordingly, obscene material, referring to certain sexually explicit material,[3] may be protected even if it is "arguably devoid of any ideological content."[4] Nonetheless, while sexually explicit material may be entitled to constitutional protection, the Court has said the subcategories of obscenity and child pornography—the latter discussed in a subsequent essay—can generally be regulated without triggering heightened scrutiny.[5]

Adjudication over the constitutional law of obscenity began in *Roth v. United States*,[6] in which the Court ruled that obscenity is not "within the area of protected speech and press."[7] The Court undertook a brief historical survey to demonstrate that "the unconditional phrasing of the First Amendment was not intended to protect every utterance."[8] All or practically all the states that ratified the First Amendment had laws making blasphemy or profanity or both crimes, and provided for prosecutions of libels as well. This history was deemed to demonstrate that "obscenity, too, was outside the protection intended for speech and press."[9] The Court said that although "[a]ll ideas having even the slightest redeeming social importance" were entitled to First Amendment protections, "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[10] Because obscenity was not protected at all, tests such as clear and present danger, which the Court had previously applied to assess the constitutionality of other laws, were irrelevant.[11]

The Court clarified, however, that, "sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, for example, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press . . . . It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient

[1] Winters v. New York, 333 U.S. 507, 510 (1948). Illustrative of the general observation is the fact that "[m]usic, as a form of expression and communication, is protected under the First Amendment." Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989). Nude dancing is also. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 564 (1991).

[2] Stanley v. Georgia, 394 U.S. 557, 564 (1969).

[3] *See, e.g.*, Cohen v. California, 403 U.S. 15, 20 (1971) (noting that "obscene expression" must be "erotic," not just crude); *accord* Mahanoy Area Sch. Dist. v. B.L., No. 20-255, slip op. at 8 (U.S. June 23, 2021).

[4] *Id.* at 566. *See also* Winters v. New York, 333 U.S. 507 (1948); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Commercial Pictures Corp. v. Regents, 346 U.S. 587 (1954); Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959). The last case involved the banning of the movie *Lady Chatterley's Lover* on the ground that it dealt too sympathetically with adultery. The Court stated: "It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." *Id.* at 688–89.

[5] Amdt1.7.5.12 Child Pornography.

[6] 354 U.S. 476 (1957). Heard at the same time and decided in the same opinion was *Alberts v. California*, involving a state obscenity law. The Court's first opinion in the obscenity field was *Butler v. Michigan,* 352 U.S. 380 (1957), considered *infra*. Earlier the Court had divided 4-4 and thus affirmed a state court judgment that Edmund Wilson's *Memoirs of Hecate County* was obscene. Doubleday & Co. v. New York, 335 U.S. 848 (1948).

[7] Roth v. United States, 354 U.S. 476, 485 (1957). Justice William Brennan later changed his mind on this score, arguing that, because the Court had failed to develop a workable standard for distinguishing the obscene from the non-obscene, regulation should be confined to protecting children and non-consenting adults. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

[8] 354 U.S. at 483.

[9] 354 U.S. at 482–83.

[10] 354 U.S. at 484. *See also* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[11] 354 U.S. at 486 (quoting Beauharnais v. Illinois, 343 U.S. 250, 266 (1952)).

interest."[12] The Court identified the relevant standard for unprotected obscenity as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[13] The Court defined material appealing to prurient interest as "material having a tendency to excite lustful thoughts," and defined prurient interest as "a shameful or morbid interest in nudity, sex, or excretion."[14]

In the years after *Roth*, the Court considered many obscenity cases. The cases can be grouped topically, but, with the exception of those cases dealing with protection of children,[15] unwilling adult recipients,[16] and procedure,[17] these cases are best explicated chronologically. In *Manual Enterprises v. Day*,[18] the Court upset a Post Office ban upon mailing certain magazines addressed to homosexual audiences, but none of the Court's opinions gained the support of the majority. Nor did a majority opinion emerge in *Jacobellis v. Ohio*, which reversed

[12] 354 U.S. at 487, 488.

[13] 354 U.S. at 489.

[14] 354 U.S. at 487 n.20. A statute defining "prurient" as "that which incites lasciviousness or lust" covers more than obscenity, the Court later indicated in *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 498 (1985). The Court noted that obscenity consists in appeal to "a shameful or morbid" interest in sex, not in appeal to "normal, healthy sexual desires." *Id. Brockett* involved a facial challenge to the statute, so the Court did not have to explain the difference between "normal, healthy" sexual desires and "shameful" or "morbid" sexual desires.

[15] In *Butler v. Michigan,* 352 U.S. 380 (1957), the Court unanimously reversed a conviction under a statute that punished general distribution of materials unsuitable for children. Protesting that the statute "reduce[d] the adult population of Michigan to reading only what is fit for children," the Court pronounced the statute void. Narrowly drawn proscriptions for distribution or exhibition to children of materials which would not be obscene for adults are permissible, *Ginsberg v. New York,* 390 U.S. 629 (1968), although the Court insists on a high degree of specificity. Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Rabeck v. New York, 391 U.S. 462 (1968). Even those Justices who would proscribe obscenity regulation for adults concurred in protecting children in this context. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73, 113 (1973) (Brennan, J., dissenting). But children do have First Amendment protection and government may not bar dissemination of everything to them. The Court stated: "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." Erznoznik v. City of Jacksonville, 422 U.S. 205, 212–14 (1975) (in context of nudity on movie screen). *See also* FCC v. Pacifica Foundation, 438 U.S. 726, 749–50 (1978); Pinkus v. United States, 436 U.S. 293, 296–98 (1978).

[16] The Court emphasized protecting unwilling adults in *Rowan v. Post Office Dep't,* 397 U.S. 728 (1970), which upheld a scheme by which recipients of objectionable mail could put their names on a list and require the mailer to send no more such material. But, absent intrusions into the home, *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978), or a degree of captivity that makes it impractical for the unwilling viewer or auditor to avoid exposure, government may not censor content, in the context of materials not meeting constitutional standards for denomination as pornography, to protect the sensibilities of some. Erznoznik v. City of Jacksonville, 422 U.S. 205, 208–12 (1975). *But see* Pinkus v. United States, 436 U.S. 293, 300 (1978) (jury in determining community standards must include both "'sensitive' and 'insensitive' persons" in the community, but may not "focus[ ] upon the most susceptible or sensitive members when judging the obscenity of materials . . . ").

[17] The First Amendment requires that procedures for suppressing distribution of obscene materials provide for expedited consideration, for placing the burden of proof on government, and for hastening judicial review. Additionally, Fourth Amendment search and seizure law has absorbed First Amendment principles, so that the law governing searches for and seizures of allegedly obscene materials is more stringent than in most other areas. Marcus v. Search Warrant, 367 U.S. 717 (1961); A Quantity of Books v. Kansas, 378 U.S. 205 (1964); Heller v. New York, 413 U.S. 483 (1973); Roaden v. Kentucky, 413 U.S. 496 (1973); Lo-Ji Sales v. New York, 442 U.S. 319 (1979); *see also* Walter v. United States, 447 U.S. 649 (1980). Scienter—knowledge of the nature of the materials—is a prerequisite to conviction, *Smith v. California,* 361 U.S. 147 (1959), but the prosecution need only prove the defendant knew the contents of the material, not that he knew they were legally obscene. Hamling v. United States, 418 U.S. 87, 119–24 (1974). *See also* Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (public nuisance injunction of showing future films on basis of past exhibition of obscene films constitutes impermissible prior restraint); McKinney v. Alabama, 424 U.S. 669 (1976) (criminal defendants may not be bound by a finding of obscenity of materials in prior civil proceeding to which they were not parties). None of these strictures applies, however, to forfeitures imposed as part of a criminal penalty. Alexander v. United States, 509 U.S. 544 (1993) (upholding RICO forfeiture of the entire adult entertainment book and film business of an individual convicted of obscenity and racketeering offenses). Justice Anthony Kennedy, dissenting in *Alexander*, objected to the "forfeiture of expressive material that had not been adjudged to be obscene." *Id.* at 578.

[18] 370 U.S. 478 (1962).

a conviction for exhibiting a motion picture.[19] In *Ginzburg v. United States*,[20] the Court held that in "close" cases borderline materials could be determined to be obscene if the seller "pandered" them in a way that indicated he was catering to prurient interests. On the same day, the same five-Justice majority affirmed a state conviction under a law prohibiting distributing obscene books by applying the "pandering" test and concluding that courts could hold material to be legally obscene if it appealed to the prurient interests of the deviate group to which it was directed.[21] On the same day, however, the Court held that *Fanny Hill*, a novel, which at that point was 277 years old, was not legally obscene.[22] The Court's prevailing opinion restated the *Roth* tests that, to be considered obscene, material must (1) have a dominant theme in the work considered as a whole that appeals to prurient interest, (2) be patently offensive because it goes beyond contemporary community standards, and (3) be utterly without redeeming social value.[23]

After the divisions engendered by the disparate opinions in the three 1966 cases, the Court over the next several years submerged its differences by issuing per curiam dispositions in nearly three dozen cases in which it reversed convictions or civil determinations of obscenity in all but one. The initial case was *Redrup v. New York*,[24] in which, after noting that the cases involved did not present special questions requiring other treatment, such as concern for juveniles, protection of unwilling adult recipients, or proscription of pandering,[25] the Court succinctly summarized the varying positions of the seven Justices in the majority and said: "[w]hichever of the constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand . . . ."[26] Although the Court's subsequent cases followed the pattern established in *Redrup*,[27] the Court's changing membership led to speculation about the continuing vitality of *Roth* and the Court's *Redrup* approach.[28]

At the end of the October 1971 Term, the Court requested argument on whether the display of sexually oriented films or of sexually oriented pictorial magazines, when surrounded

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[19] 378 U.S. 184 (1964). Without opinion, citing *Jacobellis*, the Court reversed a judgment that Henry Miller's *Tropic of Cancer* was obscene. Grove Press v. Gerstein, 378 U.S. 577 (1964). *Jacobellis* is best known for Justice Potter Stewart's concurrence, contending that criminal prohibitions should be limited to "hard-core pornography." The category "may be indefinable," he added, but "I know it when I see it, and the motion picture involved in this case is not that." *Id.* at 197. The difficulty with this visceral test is that other members of the Court did not always "see it" the same way; two years later, for example, Justice Stewart was on opposite sides in two obscenity decisions decided on the same day. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966) (concurring on basis that book was not obscene); Mishkin v. New York, 383 U.S. 502, 518 (1966) (dissenting from finding that material was obscene).

[20] 383 U.S. 463 (1966). Pandering remains relevant in pornography cases. Splawn v. California, 431 U.S. 595 (1977); Pinkus v. United States, 436 U.S. 293, 303–04 (1978).

[21] Mishkin v. New York, 383 U.S. 502 (1966). *See id.* at 507–10 for discussion of the legal issue raised by the limited appeal of the material. The Court relied on *Mishkin* in Ward v. Illinois, 431 U.S. 767, 772 (1977).

[22] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966).

[23] 383 U.S. at 418. On the precedential effect of the *Memoirs* plurality opinion, see *Marks v. United States,* 430 U.S. 188, 192–94 (1977).

[24] 386 U.S. 767 (1967).

[25] 386 U.S. at 771.

[26] 386 U.S. at 770–71. The majority was thus composed of Chief Justice Earl Warren and Justices Hugo Black, William O. Douglas, William Brennan, Potter Stewart, Byron White, and Abe Fortas.

[27] *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82–83 & n.8 (1973) (Brennan, J., dissenting) (describing *Redrup* practice and listing thirty-one cases decided on the basis of it).

[28] *See* United States v. Reidel, 402 U.S. 351 (1971) (federal prohibition of dissemination of obscene materials through the mails is constitutional); United States v. Thirty-seven Photographs, 402 U.S. 363 (1971) (customs seizures of obscene materials from baggage of travelers are constitutional). In *Grove Press v. Maryland State Board of Censors,* 401 U.S. 480 (1971), a state court determination that the motion picture "I Am Curious (Yellow)" was obscene was affirmed by an equally divided Court, Justice William O. Douglas not participating. And *Stanley v. Georgia,* 394 U.S. 557, 560– 64, 568 (1969), had insisted that *Roth* remained the governing standard.

by notice to the public of their nature and by reasonable protection against exposure to juveniles, was constitutionally protected.[29] By a 5-4 vote during the October 1972 Term, the Court in *Paris Adult Theatre I v. Slaton* adhered to the *Roth* principle that the First and Fourteenth Amendments do not protect obscene material even if access is limited to consenting adults.[30] Writing for the Court, Chief Justice Warren Burger observed that the states have wider interests than protecting juveniles and unwilling adults from exposure to pornography; legitimate state interests, effectuated through the exercise of the police power, exist in protecting and improving the quality of life and the total community environment, in improving the tone of commerce in the cities, and in protecting public safety. Consequently, Chief Justice Warren reasoned, it does not matter that the states may be acting based on unverifiable assumptions in deciding to suppress the trade in pornography because the Constitution does not require, in the context of the trade in ideas, that governmental courses of action be subject to empirical verification any more than it does in other fields. Chief Justice Warren further noted that the Constitution does not embody any concept of laissez-faire, or of privacy, or of "free will," that curbs governmental efforts to suppress pornography.[31]

In *Miller v. California*,[32] the Court prescribed the currently prevailing standard by which courts identify unprotected pornographic materials. Because of the inherent dangers in regulating any form of expression, the Court noted, laws to regulate pornography must be carefully limited and their scope confined to materials that "depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."[33] The Court further reasoned that law "must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[34] The Court disavowed and discarded the standard that a work must be "utterly without redeeming social value" to be suppressed.[35] In determining whether material appeals to a prurient interest or is patently offensive, the trier-of-fact, whether a judge or a jury, is not bound by a hypothetical national standard but may apply the

[29] Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Alexander v. Virginia, 408 U.S. 921 (1972).

[30] 413 U.S. 49 (1973).

[31] 413 U.S. at 57, 60–62, 63–64, 65–68. Delivering the principal dissent, Justice William Brennan argued that the Court's *Roth* approach allowing the suppression of pornography was a failure, that the Court had not and could not formulate standards by which protected materials could be distinguished from unprotected materials, and that the First Amendment had been denigrated through the exposure of numerous persons to punishment for the dissemination of materials that fell close to one side of the line rather than the other, but more basically by deterrence of protected expression caused by the uncertainty. *Id.* at 73. Justice William Brennan stated: "I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Id.* at 113. Justices Stewart and Marshall joined Justice William Brennan's opinion; Justice William O. Douglas dissented separately, adhering to the view that the First Amendment absolutely protected all expression. *Id.* at 70.

[32] 413 U.S. 15 (1973).

[33] Miller v. California, 413 U.S. 15, 27 (1973). The Court may read into federal statutes standards it has formulated. United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 130 n.7 (1973) (Court is prepared to construe statutes proscribing materials that are "obscene," "lewd," "lascivious," "filthy," "indecent," and "immoral" as limited to the types of "hard core" pornography reachable under the *Miller* standards). For other cases applying *Miller* standards to federal statutes, see *Hamling v. United States,* 418 U.S. 87, 110–16 (1974) (use of the mails); *United States v. Orito,* 413 U.S. 139 (1973) (transportation of pornography in interstate commerce). The Court's insistence on specificity in state statutes, either as written by the legislature or as authoritatively construed by the state court, appears to have been significantly weakened, in fact if not in enunciation, in *Ward v. Illinois,* 431 U.S. 767 (1977).

[34] *Miller v. California*, 413 U.S. at 24.

[35] 413 U.S. at 24–25.

trier-of-fact's local community standard.[36] Prurient interest and patent offensiveness, the Court indicated, "are essentially questions of fact."[37] By contrast, the prong of the *Miller* test that looked at the material's "value" is not subject to a community standards test; instead, the appropriate standard is "whether a reasonable person would find [literary, artistic, political, or scientific] value in the material, taken as a whole."[38]

The Court in *Miller* reiterated that it was not permitting an unlimited degree of suppression of materials. Only "hard core" materials were to be deemed without the protection of the First Amendment, and the Court's idea of the content of "hard core" pornography was revealed in "a few plain examples of what a state" could regulate: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[39] Subsequently, the Court held that a publication was not obscene if it "provoked only normal, healthy sexual desires."[40] To be obscene it must appeal to "a shameful or morbid interest in nudity, sex, or excretion."[41] The Court has also indicated that obscenity is not be limited to pictures; books containing only descriptive language may be suppressed.[42]

First Amendment values, the Court stressed in *Miller*, "are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."[43] While the Court had said juries as triers-of-fact should determine, based on their understanding of community standards, whether material was "patently offensive," it was less clear how appeals courts could appropriately review these jury determinations. In *Jenkins v. Georgia*,[44] the Court, while adhering to the *Miller* standards, stated that "juries [do not] have unbridled discretion in determining what is 'patently offensive.'" *Miller* was intended to make clear that only "hard-core" materials could be suppressed and this concept and the Court's descriptive itemization of some types of hardcore materials were "intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of

[36] It is the unprotected nature of obscenity that allows this inquiry; offensiveness to local community standards is, of course, a principle completely at odds with mainstream First Amendment jurisprudence. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[37] 413 U.S. at 30–34. The Court stated: "A juror is entitled to draw on his knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law." Hamling v. United States, 418 U.S. 87, 104 (1974). The holding does not compel any particular circumscribed area to be used as a "community." In federal cases, it will probably be the judicial district from which the jurors are drawn, *id.* at 105–106. The jurors may be instructed to apply "community standards" without any definition being given of the "community." Jenkins v. Georgia, 418 U.S. 153, 157 (1974). In a federal prosecution for using the mails to transmit pornography, the fact that the legislature of the state in which the transaction occurred had abolished pornography regulation except for dealings with children does not preclude permitting jurors in a federal case to make their own definitions of what is offensive to contemporary community standards; they may be told of the legislature's decision but they are not bound by it. Smith v. United States, 431 U.S. 291 (1977).

[38] Pope v. Illinois, 481 U.S. 497, 500–01 (1987).

[39] Miller v. California, 413 U.S. 15, 25 (1973). Quoting *Miller*'s language in *Hamling v. United States,* 418 U.S. 87, 114 (1974), the Court reiterated that it was only "hard-core" material that was unprotected. The Court stated: "While the particular descriptions there contained were not intended to be exhaustive, they clearly indicate that there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is 'patently offensive' within the meaning of the obscenity test set forth in the *Miller* cases." Referring to this language in *Ward v. Illinois,* 431 U.S. 767 (1977), the Court upheld a state court's power to construe its statute to reach sadomasochistic materials not within the confines of the *Miller* language.

[40] Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985).

[41] *Id.*

[42] Kaplan v. California, 413 U.S. 115 (1973).

[43] 413 U.S. at 25.

[44] 418 U.S. 153 (1974).

material subject to such a determination."[45] Viewing the motion picture in question convinced the Court that "[n]othing in the movie falls within either of the two examples given in *Miller* of material which may constitutionally be found to meet the 'patently offensive' element of those standards, nor is there anything sufficiently similar to such material to justify similar treatment."[46] But, in a companion case, the Court found that a jury determination of obscenity "was supported by the evidence and consistent with" the standards.[47]

While the Court's decisions from the *Paris Adult Theatre* and *Miller* era were rendered by narrow majorities,[48] they have since guided the Court. For example, the Court struck down federal regulations aimed at preventing the transmission of indecent materials over the telephone and internet, where those statutes did not adhere to the *Miller* standard.[49] Even as to materials falling within the constitutional definition of obscene, the Court has recognized a limited private, protected interest in possession within the home,[50] unless those materials constitute child pornography. In *Stanley v. Georgia,* the appellant appealed his state conviction for possessing obscene films that police officers discovered in his home pursuant to a search warrant for other items which the police did not find. The Court reversed, holding that mere private possession of obscene materials in the home cannot be a criminal offense. The Constitution protects the right to receive information and ideas, the Court said, regardless of their social value, and "that right takes on an added dimension" in the context of a prosecution for possession of something in one's own home. The Court stated: "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[51] Despite the Court's unqualified assertion in *Roth* that the First Amendment did not protect obscenity, the Court remained concerned with the government interest in regulating commercial distribution of obscene materials. Though the *Stanley* Court said its decision did not impair *Roth* and cases relying on that decision,[52] by rejecting each state contention in support of a conviction, the Court appeared to reject much of *Roth's* basis. In *Stanley,* the Court made the following points: (1) there is no government interest in protecting an individual's mind from the effect of obscenity; (2) the absence of ideological content in films is irrelevant, since the Court would not distinguish transmission of ideas and entertainment; (3) no empirical evidence supported a contention that exposure to obscene materials may incite a person to antisocial conduct and, even if such evidence existed, government may address this by enforcing laws proscribing the offensive conduct; (4) it is not necessary to punish mere possession in order to punish distribution; and (5) private possession was unlikely to

[45] 418 U.S. at 160–61.

[46] 418 U.S. at 161. The film at issue was *Carnal Knowledge*.

[47] Hamling v. United States, 418 U.S. 87 (1974). In *Smith v. United States,* 431 U.S. 291, 305–06 (1977), the Court explained that jury determinations in accordance with their own understanding of the tolerance of the average person in their community are not unreviewable. Judicial review would pass on (1) whether the jury was properly instructed to consider the entire community and not simply the members' own subjective reaction or the reactions of a sensitive or of a callous minority, (2) whether the conduct depicted fell within the examples specified in *Miller*, (3) whether the work lacked serious literary, artistic, political, or scientific value, and (4) whether the evidence was sufficient. The Court indicated that the value test of *Miller* "was particularly amenable to judicial review." The value test is not to be measured by community standards, the Court later held in *Pope v. Illinois,* 481 U.S. 497 (1987), but instead by a "reasonable person" standard. An erroneous instruction on this score, however, may be "harmless error." *Id.* at 503.

[48] For other 5-4 decisions of the era, see *Marks v. United States,* 430 U.S. 188 (1977); *Smith v. United States,* 431 U.S. 291 (1977); *Splawn v. California,* 431 U.S. 595 (1977); and *Ward v. Illinois,* 431 U.S. 767 (1977).

[49] *See, e.g.*, Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 126 (1989); Reno v. Aclu, 521 U.S. 844, 874 (1997); *see also*

[50] Stanley v. Georgia, 394 U.S. 557 (1969).

[51] 394 U.S. at 564.

[52] 394 U.S. at 560–64, 568.

contribute to the problems prompting laws barring public dissemination of obscene materials or exposing children and unwilling adults to such materials.[53]

The Court has confined *Stanley*'s holding to its facts and has also dispelled any suggestion that *Stanley* applies outside the home or recognizes a right to obtain or supply pornography.[54] For instance, the Court has held *Stanley* does not apply to possessing child pornography in the home because the state interest in protecting children from sexual exploitation far exceeds the interest in *Stanley* of protecting adults from themselves.[55]

Amdt1.7.5.12 Child Pornography

First Amendment:

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

In *New York v. Ferber*,[1] the Court recognized another category of expression that is outside the coverage of the First Amendment: the visual depiction of children in films or still photographs in a variety of sexual activities or exposures of the genitals. The reason that such depictions may be prohibited was the governmental interest in protecting the physical and psychological well-being of children, whose participation in the production of these materials would subject them to exploitation and harm. The state may go beyond a mere prohibition of the use of children, because it is not possible to protect children adequately without prohibiting the exhibition and dissemination of the materials and advertising about them. Thus, the Court held that "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."[2] But, because expression is involved, the government must carefully define what conduct is to be prohibited and may reach only "works that *visually* depict sexual conduct by children below a specified age."[3]

The Court has considered cases addressing the private possession of child pornography in the home. In *Osborne v. Ohio*[4] the Court upheld a state law criminalizing possessing or viewing of child pornography as applied to someone who possessed such materials in his home. Distinguishing a prior case protecting the personal possession of obscene material, the Court ruled that Ohio's interest in preventing exploitation of children far exceeded what it characterized as Georgia's "paternalistic interest" in protecting the minds of adult viewers of obscene material.[5] Because the state's interest in regulating child pornography was of greater importance, the Court saw less need to require states to demonstrate a strong necessity for regulating private possession in addition to the commercial distribution and sale.

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[53] 394 U.S. at 565–68.

[54] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65–68 (1973). Transportation of unprotected material for private use may be prohibited, United States v. Orito, 413 U.S. 139 (1973), and the mails may be closed, United States v. Reidel, 402 U.S. 351 (1971), as may channels of international movement, United States v. Thirty-seven Photographs, 402 U.S. 363 (1971); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973).

[55] Osborne v. Ohio, 495 U.S. 103 (1990).

[1] 458 U.S. 747 (1982). The Court's decision was unanimous, although there were several limiting concurrences. *Compare*, *e.g.*, 775 (Justice William Brennan, arguing for exemption of "material with serious literary, scientific, or educational value"), *with* 774 (Justice O'Connor, arguing that such material need not be excepted). The Court did not pass on the question, inasmuch as the materials before it were well within the prohibitable category. *Id.* at 766–74.

[2] 458 U.S. at 763–64.

[3] 458 U.S. at 764 (emphasis original). Child pornography need not meet *Miller* obscenity standards to be unprotected by the First Amendment. *Id.* at 764–65.

[4] 495 U.S. 103 (1990).

[5] 495 U.S. at 108.

In *Ashcroft v. Free Speech Coalition*, the Court held unconstitutional the federal Child Pornography Prevention Act (CPPA) to the extent that it prohibited pictures that were not produced with actual minors.[6] The law prohibited computer-generated ("virtual") child pornography, and photographs of adult actors who appeared to be minors, and could have extended to "a Renaissance painting depicting a scene from classical mythology."[7] The Court observed that statutes prohibiting child pornography that uses real children are constitutional because they target "[t]he production of the work, not the content."[8] The CPPA, by contrast, targeted the content, not the means of production. The government's rationales for the CPPA included that "[p]edophiles might use the materials to encourage children to participate in sexual activity" and might "whet their own sexual appetites" with it, "thereby increasing . . . the sexual abuse and exploitation of actual children."[9] The Court found these rationales inadequate because the government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts" and "may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'"[10] The government had also argued that the existence of "virtual" child pornography "can make it harder to prosecute pornographers who do use real minors," because, "[a]s imaging technology improves . . . , it becomes more difficult to prove that a particular picture was produced using actual children."[11] This rationale, the Court found, "turns the First Amendment upside down. The Government may not suppress lawful speech as a means to suppress unlawful speech."[12]

In *United States v. Williams*,[13] the Supreme Court upheld a federal statute that prohibits knowingly advertising, promoting, presenting, distributing, or soliciting material "in a manner that reflects the belief, or that is intended to cause another to believe, that the material" is child pornography that is obscene or that depicts an actual minor (that is, is child pornography that is not constitutionally protected).[14] Under the provision, in other words, "an Internet user who solicits child pornography from an undercover agent violates the statute, even if the officer possesses no child pornography. Likewise, a person who advertises virtual child pornography as depicting actual children also falls within the reach of the statute."[15] The Court found that these activities are not constitutionally protected because "[o]ffers to engage in illegal transactions [as opposed to abstract advocacy of illegality] are categorically excluded from First Amendment protection," even "when the offeror is mistaken about the factual predicate of his offer," such as when the child pornography that one offers to buy or sell does not exist or is constitutionally protected.[16]

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[6] 535 U.S. 234 (2002).

[7] 535 U.S. at 241.

[8] 535 U.S. at 249; *see also id.* at 241.

[9] 535 U.S. at 241.

[10] 535 U.S. at 253.

[11] 535 U.S. at 242.

[12] 535 U.S. at 255. Following *Ashcroft v. Free Speech Coalition*, Congress enacted the PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003), which, despite the decision in that case, defined "child pornography" so as to continue to prohibit computer-generated child pornography (but not other types of child pornography produced without an actual minor). 18 U.S.C. § 2256 (8)(B). In *United States v. Williams,* 128 S. Ct. 1830, 1836 (2008), the Court, without addressing the PROTECT Act's new definition, cited *Ashcroft v. Free Speech Coalition* with approval.

[13] 128 S. Ct. 1830 (2008).

[14] 18 U.S.C. § 2252A (a)(3)(B).

[15] 128 S. Ct. at 1839.

[16] 128 S. Ct. at 1841, 1842, 1843. In a dissenting opinion joined by Justice Ruth Bader Ginsburg, Justice David Souter agreed that "Congress may criminalize proposals unrelated to any extant image," but disagreed with respect to "proposals made with regard to specific, existing [constitutionally protected] representations." *Id.* at 1849. Justice David Souter believed that, "if the Act stands when applied to identifiable, extant [constitutionally protected]

However, the principles applying to child pornography do not extend to protecting children from encountering sexually explicit material. Although the government has a "compelling" interest in protecting children from seeing or hearing indecent material, total bans applicable to adults and children alike are constitutionally suspect.[17] In *Reno v. American Civil Liberties Union*,[18] the Court struck down two provisions of the Communications Decency Act of 1996 (CDA), one of which would have prohibited use of an "interactive computer service" to display indecent material "in a manner available to a person under 18 years of age."[19] This prohibition would, in effect, have banned indecent material from all internet sites except those accessible only by adults. Although intended "to deny minors access to potentially harmful speech . . . , [the CDA's] burden on adult speech," the Court wrote, "is unacceptable if less restrictive alternatives would be at least as effective. . . . [T]he Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'"[20]

In *Reno*, the Court distinguished *FCC v. Pacifica Foundation*,[21] in which it had upheld the Federal Communications Commission's (FCC) restrictions on indecent radio and television broadcasts, because (1) "[t]he CDA's broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet," (2) the CDA imposes criminal penalties, and the Court has never decided whether indecent broadcasts "would justify a criminal prosecution," and (3) broadcast radio and television, unlike the internet, have, "as a matter of history . . . 'received the most limited First Amendment protection,' . . . in large part because warnings could not

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pornographic photographs, then in practical terms *Ferber* and *Free Speech Coalition* fall. They are left as empty as if the Court overruled them formally" *Id.* at 1854. Justice Antonin Scalia's opinion for the majority replied that this "is simply not true . . . Simulated child pornography will be as available as ever, so long as it is offered and sought *as such*, and not as real child pornography . . . There is no First Amendment exception from the general principle of criminal law that a person attempting to commit a crime need not be exonerated because he has a mistaken view of the facts." *Id.* at 1844–45.

[17] *See* Sable Communications v. FCC, 492 U.S. 115 (1989) (FCC's "dial-a-porn" rules imposing a total ban on "indecent" speech are unconstitutional, given less restrictive alternatives—*e.g.*, credit cards or user IDs—of preventing access by children). *Pacifica Foundation* is distinguishable, the Court reasoned, because that case did not involve a "total ban" on broadcast, and also because there is no "captive audience" for the "dial-it" medium, as there is for the broadcast medium. 492 U.S. at 127–28. Similar rules apply to regulation of cable TV. In Denver Area Educational Telecommunications Consortium518 U.S. 727, 755 (1996), the Court, acknowledging that protection of children from sexually explicit programming is a "compelling" governmental interest (but refusing to determine whether strict scrutiny applies), nonetheless struck down a requirement that cable operators segregate and block indecent programming on leased access channels. The segregate-and-block restrictions, which included a requirement that a request for access be in writing, and which allowed for up to thirty days' delay in blocking or unblocking a channel, were not sufficiently protective of adults' speech and viewing interests to be considered either narrowly or reasonably tailored to serve the government's compelling interest in protecting children. In *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803 (2000), the Supreme Court, explicitly applying strict scrutiny to a content-based speech restriction on cable TV, struck down a federal statute designed to "shield children from hearing or seeing images resulting from signal bleed." *Id.* at 806. In striking down the Communications Decency Act of 1996, the Court would "neither accept nor reject the Government's submission that the First Amendment does not forbid a blanket prohibition on all 'indecent' and 'patently offensive' messages communicated to a 17-year-old—no matter how much value the message may have and regardless of parental approval. It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute." Reno v. American Civil Liberties Union, 521 U.S. 844 (1997). In *Playboy Entertainment Group*, 529 U.S. at 825, the Court wrote: "Even upon the assumption that the government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech." The Court also would "not discount the possibility that a graphic image could have a negative impact on a young child" (*id.* at 826), thereby suggesting again that it may take age into account when applying strict scrutiny.

[18] 521 U.S. 844 (1997).

[19] The other provision the Court struck down would have prohibited indecent communications, by telephone, fax, or e-mail, to minors.

[20] 521 U.S. at 874–75. The Court did not address whether, if less restrictive alternatives would not be as effective, the government would then be permitted to reduce the adult population to only what is fit for children. *Id.*

[21] 438 U.S. 726 (1978).

adequately protect the listener from unexpected program content."[22] By contrast, on the internet, at least as it existed in 1997, the Court believed "the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material."[23]

After the Supreme Court struck down the CDA, Congress enacted the Child Online Protection Act (COPA), which banned "material that is harmful to minors" on websites that have the objective of earning a profit.[24] In *ACLU v. Reno,* the Third Circuit upheld a preliminary injunction against enforcement of the statute on the ground that, "because the standard by which COPA gauges whether material is 'harmful to minors' is based on identifying 'contemporary community standards[,]' the inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech."[25] The Third Circuit reasoned that COPA would have resulted in communications available to a nationwide audience being judged by the standards of the community most likely to be offended. In *Ashcroft v. ACLU,* the Supreme Court vacated and remanded the Third Circuit decision, holding "that COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment."[26]

Upon remand, the Third Circuit again upheld the preliminary injunction, and the Supreme Court affirmed and remanded the case for trial. The Supreme Court found that the district court had not abused its discretion in granting the preliminary injunction, because the government had failed to show that proposed alternatives to COPA would not be as effective in accomplishing its goal. The primary alternative to COPA, the Court noted, is blocking and filtering software. Filters are less restrictive than COPA because "[t]hey impose selective restrictions on speech at the receiving end, not universal restriction at the source."[27] Subsequently, the district court found COPA to violate the First Amendment and issued a permanent injunction against its enforcement; the Third Circuit affirmed, and the Supreme Court denied certiorari.[28]

In *United States v. American Library Association, Inc.*, a four-Justice plurality of the Supreme Court upheld the Children's Internet Protection Act (CIPA), which, as the plurality summarized it, provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them."[29] The plurality asked "whether libraries would violate the First Amendment by

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[22] 521 U.S. at 867.

[23] *Id.*

[24] "Harmful to minors" statutes ban the distribution of material to minors that is not necessarily obscene under the *Miller* test. In *Ginsberg v. New York,* 390 U.S. 629, 641 (1968), the Supreme Court, applying a rational basis standard, upheld New York's harmful-to-minors statute.

[25] ACLU v. Reno, 217 F.3d 162, 166 (3d Cir. 2000).

[26] Ashcroft v. ACLU, 535 U.S. 564, 585 (2002).

[27] Ashcroft v. ACLU, 542 U.S. 656, 667 (2004). Justice Stephen Breyer, dissenting, wrote that blocking and filtering software is not a less restrictive alternative because "it is part of the status quo" and "[i]t is always less restrictive to do *nothing* than to do *something*." *Id.* at 684. The majority opinion countered that Congress "may act to encourage the use of filters," and "[t]he need for parental cooperation does not automatically disqualify a proposed less restrictive alternative." *Id.* at 669.

[28] American Civil Liberties Union v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd sub nom.* American Civil Liberties Union v. Mukasey, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009).

[29] 539 U.S. 194, 199 (2003).

employing the filtering software that CIPA requires"[30]—in other words, whether CIPA would effectively violate library *patrons*' rights. The plurality concluded that it did not, after finding that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum," and that it therefore would not be appropriate to apply strict scrutiny to determine whether the filtering requirements are constitutional.[31] The plurality acknowledged "the tendency of filtering software to 'overblock'—that is, to erroneously block access to constitutionally protected speech that falls outside the categories that software users intend to block."[32] It found, however, that, "[a]ssuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled."[33]

The plurality also considered whether CIPA imposes an unconstitutional condition on the receipt of federal assistance—in other words, whether the government can require public *libraries* to limit their speech if they accept federal funds. The plurality found that, assuming that government entities have First Amendment rights (it did not decide the question), "CIPA does not 'penalize' libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress's decision not to subsidize their doing so."[34]

Amdt1.7.6 Commercial Speech

Amdt1.7.6.1 Commercial Speech Early Doctrine

First Amendment:

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

In the 1970s, the Court's treatment of "commercial speech" changed from total nonprotection under the First Amendment to qualified protection. In 1942, the Court had stated that speech concerning commercial transactions is undeserving of First Amendment protection in *Valentine v. Chrestensen*.[1] In *Chrestensen*, the Court upheld a city ordinance prohibiting distributing on the street "commercial and business advertising matter," as applied to an exhibitor of a submarine who distributed leaflets describing his submarine on one side and on the other side protesting the city's refusal of certain docking facilities. The *Chrestensen* doctrine was limited to expression promoting commercial activities; whether the speaker disseminated his expression for profit or through commercial channels did not subject

[30] 539 U.S. at 203.

[31] 539 U.S. at 205.

[32] 539 U.S. at 208.

[33] 539 U.S. at 209. Justice Anthony Kennedy, concurring, noted that, "[i]f some libraries do not have the capacity to unblock specific Web sites or to disable the filter . . . that would be the subject for an as-applied challenge, not the facial challenge made in this case." 539 U.S. at 215. Justice David Souter, dissenting, noted that "the statute says only that a library 'may' unblock, not that it must." 539 U.S. at 233.

[34] 539 U.S. at 212.

[1] 316 U.S. 52 (1942). *See also* Breard v. City of Alexandria, 341 U.S. 622 (1951). The doctrine was one of the bases upon which the banning of all commercials for cigarettes from radio and television was upheld. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971) (three-judge court), *aff'd per curiam*, 405 U.S. 1000 (1972).

it to any greater regulation than if he offered it for free.[2] The doctrine lasted in this form for decades, until the Court's approach began shifting in the 1970s.

Relying on the *Chrestensen* doctrine in a 5-4 decision issued in 1973, the Court sustained the application of a city's ban on employment discrimination to bar sex-designated employment advertising in a newspaper.[3] Suggesting that speech does not lose its constitutional protection simply because it appears in a commercial context, the Court nonetheless described placing want-ads in newspapers as "classic examples of commercial speech," controlled by *Chrestensen* because they were devoid of expressions relating to social policy and "did no more than propose a commercial transaction." But the Court also noted that the advertisements facilitated employment discrimination, which was itself illegal.[4]

In 1975, the Court overturned a conviction under a state statute that made it illegal for any publication by sale or circulation to encourage or prompt procuring an abortion. The Court held the statute unconstitutional as applied to an editor of a weekly newspaper who published an advertisement announcing the availability of legal and safe abortions in another state and detailing assistance that state residents could get to obtain abortions in the other state.[5] Distinguishing *Chrestensen*, the Court discerned that the advertisements conveyed information of other than a purely commercial nature, that they related to services that were legal in the other jurisdiction, and that the state could not prevent its residents from obtaining abortions in the other state or punish them for doing so.

In 1976, the Court eliminated these distinctions by disclaiming *Chrestensen*'s commercial speech "exception" to the First Amendment as it voided a statute that effectively prohibited licensed pharmacists from advertising prescription drug prices.[6] In a suit brought by consumers to protect their right to receive information, the Court held that speech that does no more than propose a commercial transaction is nonetheless of such social value and entitled to protection. Noting that consumers' interests in receiving factual information about prices may sometimes be even "keener" than their interest in political debate, the Court concluded that price competition and access to information about it serves the public interest.[7] The Court ruled that state interests in the ban—protecting professionalism and the quality of prescription goods—were either badly served or not served by the statute.[8]

Turning from the interests of consumers to receive information to that of advertisers to communicate, the Court in 1977 voided a municipal ordinance that barred displaying "For sale" and "Sold" signs on residential lawns, purportedly to limit "white flight" resulting from a "fear psychology" that developed among White residents following sale of homes to non-Whites. The right of owners to communicate their intention to sell a commodity and the right of potential buyers to receive the message was protected, the Court determined; the

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[2] Books that are sold for profit, Smith v. California, 361 U.S. 147, 150 (1959); Ginzburg v. United States, 383 U.S. 463, 474–75 (1966), advertisements dealing with political and social matters which newspapers carry for a fee, New York Times Co. v. Sullivan, 376 U.S. 254, 265–66 (1964), and motion pictures which are exhibited for an admission fee, United States v. Paramount Pictures, 334 U.S. 131, 166 (1948); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952), were all during this period held entitled to full First Amendment protection regardless of the commercial element involved.

[3] Pittsburgh Press Co. v. Comm'n on Human Relations, 413 U.S. 376 (1973).

[4] 413 U.S. at 385, 389. The Court continues to hold that government may ban commercial speech related to illegal activity. Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 563–64 (1980).

[5] Bigelow v. Virginia, 421 U.S. 809 (1975).

[6] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

[7] 425 U.S. at 763–64.

[8] 425 U.S. at 766–70.

community interest could have been achieved by less restrictive means and in any event may not be achieved by restricting the free flow of truthful information.[9]

Amdt1.7.6.2 Central Hudson Test and Current Doctrine

First Amendment:

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

The Supreme Court established the standard that generally governs government restrictions on commercial speech in 1980's *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[1] In that case, the Court explained that commercial speech enjoys "lesser protection" than "other constitutionally guaranteed expression."[2] After emphasizing that First Amendment protection for commercial speech "is based on the informational function of advertising," the Court said that "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."[3] Accordingly, the Court held that the government may prohibit "forms of communication more likely to deceive the public than to inform it" as well as "commercial speech related to illegal activity."[4] But if the regulated "communication is neither misleading nor related to unlawful activity," the government's action is subject to intermediate scrutiny.[5] Under *Central Hudson*'s intermediate standard, the government must prove that its interest is "substantial," and that the regulation "directly advances" that interest and is "not more extensive than is necessary to serve that interest."[6] In *Central Hudson*, the Court ruled a state regulation banning promotional advertising by electric utilities unconstitutional.[7] Although the Court recognized the state's alleged interests in energy conservation and equitable pricing as substantial, it concluded the total ban was not sufficiently narrowly tailored to the government's interest.[8] The Court stressed that the state regulation extended to "all promotional advertising, regardless of the impact of the touted service on overall energy use"—including barring advertisements of more energy efficient products.[9]

The Court has since described *Central Hudson* as setting out a four-pronged test for restraints upon commercial expression.[10] The test applies to commercial speech, which the Court has defined alternately as speech that "does 'no more than propose a commercial

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[9] Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977).

[1] 447 U.S. 557, 566 (1980).

[2] *Id.* at 563. Commercial speech is viewed by the Court as usually hardier than other speech; because advertising is the sine qua non of commercial profits, it is less likely to be chilled by regulation. Thus, the difference inheres in both the nature of the speech and the nature of the governmental interest. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771–72 n.24 (1976); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978).

[3] *Central Hudson*, 447 U.S. at 563.

[4] Id. at 563–64.

[5] Id. at 564.

[6] Id. at 566.

[7] Id. at 558, 572.

[8] Id. at 568–71.

[9] Id. at 570.

[10] In one case, the Court referred to the test as having three prongs, referring to its second, third, and fourth prongs, as, respectively, its first, second, and third. The Court in that case did, however, apply *Central Hudson*'s first prong as well. Florida Bar v. Went For It, Inc., 515 U.S. 618, 624 (1995).

transaction'"[11] and as "expression related solely to the economic interests of the speaker and its audience."[12] The Court has also distinguished laws that regulate the conduct of sellers—an "area traditionally subject to government regulation"—from those that regulate a seller's speech.[13] In *Expressions Hair Design v. Schneiderman*, the Court held that a New York State statute that prohibited businesses from displaying a cash price alongside a surcharge for credit card purchases burdened speech.[14] Relying on Supreme Court precedent suggesting that "price regulation alone regulates conduct, not speech," the lower court held that the statute was constitutional.[15] The Supreme Court disagreed, stating "[w]hat the law does regulate is how sellers may communicate their prices," and "[i]n regulating the communication of prices rather than prices themselves, [the statute] regulates speech."[16] The Court, however, remanded the case to the lower court to determine in the first instance whether the law survives First Amendment scrutiny.[17]

Under the first prong of the test, certain commercial speech is not entitled to protection; the informational function of advertising is the First Amendment concern and if an advertisement does not accurately inform the public about lawful activity, it can be suppressed.[18] Accordingly, a statute prohibiting the practice of optometry under a trade name was sustained because there was "a significant possibility" that the public might be misled through deceptive use of the same or similar trade names.[19] Second, if the speech is protected, the interest of the government in regulating and limiting it must be assessed. The state must assert a substantial interest to be achieved by restrictions on commercial speech.[20] Third, the

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[11] *Va. State Bd. of Pharm.*, 425 U.S. at 762 (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

[12] *Central Hudson*, 447 U.S. at 561. The Court has viewed as noncommercial the advertising of views on public policy that would inhere to the economic benefit of the speaker. Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980). *See also*, *e.g.*, Harris v. Quinn, 573 U.S. 616, 648 (2014) (holding that union speech on matters of public concern did "much more than" propose a commercial transaction). So too, the Court has refused to treat as commercial speech charitable solicitation undertaken by professional fundraisers, characterizing the commercial component as "inextricably intertwined with otherwise fully protected speech." Riley v. National Fed'n of the Blind, 487 U.S. 781, 796 (1988). By contrast, a mixing of home economics information with a sales pitch at a *Tupperware* party did not remove the transaction from commercial speech. Board of Trustees v. Fox, 492 U.S. 469 (1989). The mere linking of a product to matters of public debate does not thereby entitle an ad to the increased protection afforded noncommercial speech. Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983).

[13] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). In *Ohralik*, the Court said it could cite "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees." *Id.* at 456 (citations omitted). .

[14] No. 15-1391 (2017).

[15] *Id.* at 5.

[16] *Id.* at 9–10.

[17] *Id.* at 1.

[18] Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 563, 564 (1980). Within this category fall the cases involving the possibility of deception through such devices as use of trade names, Friedman v. Rogers, 440 U.S. 1 (1979), and solicitation of business by lawyers, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), as well as the proposal of an unlawful transaction, Pittsburgh Press Co. v. Commission on Human Relations, 413 U.S. 376 (1973).

[19] Friedman v. Rogers, 440 U.S. 1 (1979).

[20] Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 564, 568–69 (1980). *See also* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) (governmental interest in protecting USOC's exclusive use of word "Olympic" is substantial); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (government's interest in curbing strength wars among brewers is substantial, but interest in facilitating state regulation of alcohol is not substantial). *Contrast* United States v. Edge Broadcasting Co., 509 U.S. 418 (1993), finding a substantial federal interest in facilitating state restrictions on lotteries. "Unlike the situation in *Edge Broadcasting*," the *Coors* Court explained, "the policies of some states do not prevent neighboring states from pursuing their own alcohol-related policies within their respective borders." 514 U.S. at 486. However, in *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60 (1983), the Court deemed insubstantial a governmental interest in protecting postal patrons from offensive but not obscene materials. *Accord* Matal v. Tam, No. 15-1293, slip op. at 25 (U.S. June 19, 2017) (plurality opinion).

restriction cannot be sustained if it provides only ineffective or remote support for the asserted purpose.[21] Instead, the regulation must "directly advance" the governmental interest. The Court resolves this issue with reference to aggregate effects, and does not limit its consideration to effects on the challenging litigant.[22] Fourth, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restriction cannot survive.[23]

Although *Central Hudson* described the fourth prong as testing whether a restriction is more extensive than necessary, the Court has rejected the idea that a "least restrictive means" test is required.[24] Instead, what is required is a reasonable "fit" between means and ends, with the means "narrowly tailored to achieve the desired objective."[25] The Court, however, does "not equate this test with the less rigorous obstacles of rational basis review; . . . the existence of 'numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the 'between ends and means is reasonable.'"[26]

In *City of Cincinnati v. Discovery Network, Inc.*,[27] the Court showed the importance of the "reasonable fit" standard by striking down a city's prohibition on distributing "commercial handbills" through freestanding newsracks located on city property. The city's aesthetic interest in reducing visual clutter was furthered by reducing the total number of newsracks, but the distinction between prohibited "commercial" publications and permitted "newspapers" bore "no relationship *whatsoever*" to this legitimate interest.[28] The city could not, the Court

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[21] 447 U.S. at 569. The ban here was found to directly advance one of the proffered interests. *Contrast* this holding *with* Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (prohibition on display of alcohol content on beer labels does not directly and materially advance government's interest in curbing strength wars among brewers, given the inconsistencies and "overall irrationality" of the regulatory scheme); and Edenfield v. Fane, 507 U.S. 761 (1993) (Florida's ban on in-person solicitation by certified public accountants does not directly advance its legitimate interests in protecting consumers from fraud, protecting consumer privacy, and maintaining professional independence from clients), where the restraints were deemed indirect or ineffectual.

[22] United States v. Edge Broadcasting Co., 509 U.S. 418, 427 (1993) ("this question cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity").

[23] Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 565, 569–71 (1980). *See also* Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) (ruling that the governmental interest in not interfering with parental efforts at controlling children's access to birth control information could not justify a ban on commercial mailings about birth control products); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (there are less intrusive alternatives—*e.g.*, direct limitations on alcohol content of beer—to prohibition on display of alcohol content on beer label); Matal v. Tam, No. 15-1293, slip op. at 25–26 (U.S. June 19, 2017) (ruling that a ban on disparaging trademarks was not "narrowly drawn" to the government's interest in "protecting the orderly flow of commerce"). Note, however, that, in *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.,* 483 U.S. 522, 539 (1987), the Court applied the test in a manner deferential to Congress: "the restrictions [at issue] are not broader than Congress reasonably could have determined to be necessary to further these interests."

[24] Board of Trustees v. Fox, 492 U.S. 469, 476–77 (1989).

[25] Board of Trustees v. Fox, 492 U.S. 469, 480 (1989). In a 1993 opinion the Court elaborated on the difference between reasonable fit and least restrictive alternative. "A regulation need not be 'absolutely the least severe that will achieve the desired end,' but if there are numerous and obvious less-burdensome alternatives to the restriction . . . , that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13 (1993).

[26] Florida Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995). *See*, *e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 371–72 (2002) (discussing previous cases in which the Court had looked to the availability of less-speech restrictive alternatives for the government to achieve its interests).

[27] 507 U.S. 410 (1993). *See also* Edenfield v. Fane, 507 U.S. 761 (1993), decided the same Term, relying on the "directly advance" third prong of *Central Hudson* to strike down a ban on in-person solicitation by certified public accountants.

[28] 507 U.S. at 424.

ruled, single out commercial speech to bear the full onus when "all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault."[29]

Accordingly, as in *Central Hudson* itself, the Court has sometimes struck down total bans as insufficiently narrowly tailored. For instance, the Court held that a state could not forbid lawyers from advertising the prices they charged for performing routine legal services.[30] The Court did not deem any of the proffered state justifications for the ban sufficient to overcome the private and societal interest in the free exchange of this form of speech.[31] The Court also held that a state may not categorically prohibit attorney advertising through mailings that target persons known to face particular legal problems,[32] or prohibit an attorney from holding himself out as a certified civil trial specialist,[33] or prohibit a certified public accountant (CPA) from holding herself out as a certified financial planner.[34]

Nonetheless, as stated, the Court's current commercial speech doctrine does not require the least restrictive means, and the Court has upheld a number of commercial speech restrictions under this intermediate scrutiny standard. For instance, in *Ohralik v. Ohio State Bar Ass'n*, the Supreme Court rejected a constitutional challenge to a state regulation restricting person-to-person solicitation of clients by attorneys.[35] Similarly, the Court upheld a rule prohibiting high school coaches from recruiting middle school athletes, finding that "the dangers of undue influence and overreaching that exist when a lawyer chases an ambulance are also present when a high school coach contacts an eighth grader."[36] The Court later refused, however, to extend this principle to in-person solicitation by certified public accountants, explaining that CPAs, unlike attorneys, are not professionally "trained in the art of persuasion," and that the typical business executive client of a CPA is "far less susceptible to manipulation" than was the accident victim in *Ohralik*.[37] A ban on personal solicitation is "justified only in situations 'inherently conducive to overreaching and other forms of

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[29] 507 U.S. at 426. The Court also noted the "minute" effect of removing 62 "commercial" newsracks while 1,500 to 2,000 other newsracks remained in place. *Id.* at 418.

[30] Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Chief Justice Warren Burger and Justices Lewis Powell, Potter Stewart, and William Rehnquist dissented. *Id.* at 386, 389, 404.

[31] 433 U.S. at 368–79. *See also In re* R.M.J., 455 U.S. 191 (1982) (invalidating sanctions imposed on attorney for deviating in some respects from rigid prescriptions of advertising style and for engaging in some proscribed advertising practices, because the state could show neither that his advertising was misleading nor that any substantial governmental interest was served by the restraints).

[32] Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988). *Shapero* was distinguished in *Florida Bar v. Went For It, Inc.,* 515 U.S. 618 (1995), a 5-4 decision upholding a prohibition on targeted direct-mail solicitations to victims and their relatives for a 30-day period following an accident or disaster. "*Shapero* dealt with a broad ban on *all* direct mail solicitations" (*id.* at 629), the Court explained, and was not supported, as Florida's more limited ban was, by findings describing the harms to be prevented by the ban. Dissenting Justice Anthony Kennedy disagreed that there was a valid distinction, pointing out that in *Shapero* the Court had said that "the mode of communication [mailings versus potentially more abusive in-person solicitation] makes all the difference," and that mailings were at issue in both *Shapero* and *Florida Bar*. 515 U.S. at 637 (quoting *Shapero*, 486 U.S. at 475).

[33] Peel v. Illinois Attorney Disciplinary Comm'n, 496 U.S. 91 (1990).

[34] Ibanez v. Florida Bd. of Accountancy, 512 U.S. 136 (1994) (also ruling that Accountancy Board could not reprimand the CPA, who was also a licensed attorney, for truthfully listing her CPA credentials in advertising for her law practice).

[35] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). *But compare In re* Primus, 426 U.S. 412 (1978). The distinction between in-person and other attorney advertising was continued in *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626 (1985) ("print advertising . . . in most cases . . . will lack the coercive force of the personal presence of the trained advocate").

[36] Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 551 U.S. 291, 298 (2007).

[37] Edenfield v. Fane, 507 U.S. 761, 775 (1993).

misconduct.'"[38] To allow enforcement of such a broad prophylactic rule absent identification of a serious problem such as ambulance chasing, the Court explained, would dilute commercial speech protection "almost to nothing."[39]

Two additional cases illustrate application of the intermediate scrutiny standard. In 1993, the Court upheld a federal law that prohibited broadcasters from broadcasting lottery advertisements in states that prohibit lotteries, while allowing stations in states that sponsor lotteries to broadcast such ads. The Court held there was a "reasonable fit" between the restriction and the asserted federal interest in supporting state anti-gambling policies without unduly interfering with policies of neighboring states that promote lotteries.[40] The prohibition "directly served" the congressional interest, and could be applied to a broadcaster whose principal audience was in an adjoining lottery state, and who sought to run ads for that state's lottery.[41]

Six years later, the Court struck down a provision of the same statute as applied to advertisements for private casino gambling that are broadcast by radio and television stations located in a state where such gambling is legal.[42] The Court emphasized the interrelatedness of the four parts of the *Central Hudson* test: "Each [part] raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three."[43] For example, although the Court recognized the government had a substantial interest in reducing the social costs of gambling, the fact that Congress has simultaneously encouraged gambling, because of its economic benefits, made it more difficult for the government to demonstrate that its restriction on commercial speech materially advanced its asserted interest and constituted a reasonable "fit."[44] In this case, the federal law's operation was "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it."[45] Moreover, the Court noted "the regulation distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all."[46]

As mentioned above, the Supreme Court has sometimes suggested that the government has greater power to regulate commercial speech because it "occurs in an area traditionally subject to government regulation."[47]In *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, the Court seemed to take this principle further when it asserted that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."[48] Subsequently, however, the Court eschewed reliance on this language,[49]

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[38] 507 U.S. at 774 (quoting *Ohralik*, 436 U.S. at 464).

[39] 507 U.S. at 777.

[40] United States v. Edge Broadcasting Co., 509 U.S. 418 (1993).

[41] 507 U.S. at 428.

[42] Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173 (1999).

[43] 527 U.S. at 184.

[44] 527 U.S. at 186–87.

[45] 527 U.S. at 190.

[46] 527 U.S. at 195.

[47] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978). *See also, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011) ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.").

[48] 478 U.S. 328, 345–46 (1986).

[49] In *Rubin v. Coors Brewing Co.,* 514 U.S. 476 (1995) (invalidating a federal ban on revealing alcohol content on malt beverage labels), the Court rejected reliance on *Posadas*, pointing out that the statement in *Posadas* had been made only after a determination that the advertising could be upheld under *Central Hudson*. The Court found it unnecessary to consider the greater-includes-lesser argument in *United States v. Edge Broadcasting Co.,* 509 U.S. 418, 427 (1993), upholding through application of *Central Hudson* principles a ban on broadcast of lottery ads.

and a majority of the Court ultimately rejected *Posadas* in *44 Liquormart, Inc. v. Rhode Island*,[50] striking down the state's ban on advertisements that provide truthful information about liquor prices. The plurality opinion in *44 Liquormart* called *Posadas*'s First Amendment analysis "erroneous," declining to give force to its "highly deferential approach," and proclaiming that a state "does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate."[51] Four other Justices concluded that *Posadas* was inconsistent with the "closer look" that the Court has since required in applying the principles of *Central Hudson*.[52]

The "different degree of protection" the Court accords commercial speech has a number of consequences as regards other First Amendment doctrine. For instance, somewhat broader times, places, and manner regulations are to be tolerated,[53] and the rule against prior restraints may be inapplicable.[54] Further, disseminators of commercial speech are not protected by the overbreadth doctrine.[55] Nonetheless, there are circumstances in which the nature of the restriction placed on commercial speech may alter the First Amendment analysis, and even result in applying a heightened level of scrutiny.

For instance, in *Sorrell v. IMS Health, Inc.*,[56] the Court struck down state restrictions on pharmacies and "data-miners" selling or leasing information on the prescribing behavior of doctors for marketing purposes and related restrictions limiting the use of that information by pharmaceutical companies.[57] These prohibitions, however, were subject to a number of exceptions, including provisions allowing such prescriber-identifying information to be used for health care research. Because the restrictions only applied to the use of this information for marketing and because they principally applied to pharmaceutical manufacturers of non-generic drugs, the Court found that these restrictions were content-based and speaker-based limits and thus subject to heightened scrutiny.[58] However, the Court declined to say definitively whether *Central Hudson* or "a stricter form of judicial scrutiny" should apply because, in the Court's view, the law failed to pass constitutional muster even under *Central Hudson*.[59]

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[50] 517 U.S. 484 (1996).

[51] 517 U.S. at 510 (opinion of Stevens, J., joined by Kennedy, Thomas, and Ginsburg, JJ.). Justice John Paul Stevens' opinion also dismissed the *Posadas* "greater-includes-the-lesser argument" as "inconsistent with both logic and well-settled doctrine," pointing out that the First Amendment "presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct." *Id.* at 511–512.

[52] 517 U.S. at 531–32 (O'Connor, J., concurring, joined by Rehnquist, C.J., Souter, and Breyer, JJ.).

[53] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976); Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977). But, in *Linmark Associates v. Township of Willingboro,* 431 U.S. 85, 93–94 (1977), the Court refused to accept a times, places, and manner defense of an ordinance prohibiting "For Sale" signs on residential lawns. First, ample alternative channels of communication were not available, and second, the ban was seen rather as a content limitation.

[54] Central Hudson Gas & Elec. Co. v. PSC, 447 U.S. 557, 571 n.13 (1980), citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772 n.24 (1976). *See* Amdt1.7.2.3 Prior Restraints on Speech.

[55] Bates v. State Bar of Arizona, 433 U.S. 350, 379–81 (1977); Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 565 n.8 (1980).

[56] 564 U.S. 552, 557 (2011).

[57] "Detailers," marketing specialists employed by pharmaceutical manufacturers, used the reports to refine their marketing tactics and increase sales to doctors. 564 U.S. at 558.

[58] 564 U.S. at 565.

[59] 564 U.S. at 571. Although the state advanced a variety of proposed governmental interests to justify the regulations, the Court found these interests (expectation of physician privacy, discouraging harassment of physicians, and protecting the integrity of the doctor-physician relationship) were ill-served by the content-based restrictions. *Sorrell*, 564 U.S. at 572–77. The Court also rejected the argument that the regulations were an appropriate way to reduce health care costs, noting that "[t]he State seeks to achieve its policy objectives through the indirect means of restraining certain speech by certain speakers—that is, by diminishing detailers' ability to influence prescription

More recently, the Court noted, "several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases."[60] *Sorrell*'s suggestion that content-based regulations of commercial speech might be subject to "a stricter form of judicial scrutiny"[61] may be further evidence that the Court is increasing protection of commercial speech. Nonetheless, the *Central Hudson* test remains the primary test for commercial speech restrictions.[62]

Amdt1.7.7 Public Forum Doctrine

Amdt1.7.7.1 The Public Forum

First Amendment:

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

In 1895, while on the highest court of Massachusetts, future Justice Oliver Wendell Holmes rejected a contention that public property was by right open to the public as a place where the right of speech could be recognized,[1] and on review the United States Supreme Court endorsed Justice Oliver Wendell Holmes's view.[2] Years later, beginning with *Hague v. CIO*,[3] the Court reconsidered the issue. Justice Owen Roberts wrote in *Hague*:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

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decisions. Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the 'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech." *Id.* at 577.

[60] Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002). For instance, Justice John Paul Stevens criticized the *Central Hudson* test because it seemingly allows regulation of any speech propounded in a commercial context regardless of the content of that speech: "[A]ny description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead." Rubin v. Coors Brewing Co., 514 U.S. 476, 494 (1995) (Stevens, J., concurring). Justice Clarence Thomas, similarly, wrote that, in cases "in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the *Central Hudson* test should not be applied because such an interest' is per se illegitimate." Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 197 (1999) (Thomas, J., concurring) (internal quotation marks omitted). Other decisions in which the Court majority acknowledged that some Justices would grant commercial speech greater protection than it has under the *Central Hudson* test include United States v. United Foods, Inc., 533 U.S. 405, 409–410 (2001) (mandated assessments, used for advertising, on handlers of fresh mushrooms struck down as compelled speech, rather than under *Central Hudson*), and Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001) (various state restrictions on tobacco advertising struck down under *Central Hudson* as overly burdensome).

[61] *Sorrell*, 564 U.S. at 571.

[62] *See, e.g.*, City of Austin v. Reagan Nat'l Advert. of Austin, LLC, No. 20-1029, slip op. at 6 (U.S. Apr. 21, 2022) ("The *Metromedia* court did not need to decide whether the off-premises prohibition was content based, as it regulated only commercial speech and so was subject to intermediate scrutiny in any event." (discussing Metromedia, Inc. v. San Diego, 453 U.S. 490, 507–12 (1981) (plurality opinion))).

[1] Commonwealth v. Davis, 162 Mass. 510, 511 (1895) ("For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of rights of a member of the public than for the owner of a private house to forbid it in the house.")

[2] Davis v. Massachusetts, 167 U.S. 43, 48 (1897).

[3] 307 U.S. 496 (1939). Only Justice Hugo Black joined the John Owen Roberts opinion, but only Justices James McReynolds and Pierce Butler dissented from the result.

> Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[4]

Although majority of the Justices did not join Justice Roberts's opinion, the Court subsequently endorsed the view in several opinions.[5]

In the 1960s, the Court appeared to call the Roberts view into question,[6] and subsequently a majority endorsed an opinion by Justice Hugo Black asserting a narrower view of speech rights in public places.[7] Later decisions restated and quoted the Roberts language from *Hague*, and that is now the position of the Court.[8] Public streets and parks,[9] including those adjacent to courthouses[10] and foreign embassies,[11] as well as public libraries[12] and the grounds of legislative bodies,[13] are open to public demonstrations, although the uses to which public areas are dedicated may shape the range of permissible expression and conduct that may occur there.[14] Moreover, not all public properties are public forums. In *U.S. Postal Service v. Greenburgh Civic Ass'ns*, the Court stated: "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government,"[15] while in *Grayned v. City of Rockford*, the Court stated: "The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time."[16] Thus, by the nature of the use to which the property is put or by tradition, some sites are

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[4] *Id.* at 515.

[5] *E.g.*, Schneider v. Town of Irvington, 308 U.S. 147, 163 (1939); Kunz v. New York, 340 U.S. 290, 293 (1951).

[6] Cox v. Louisiana, 379 U.S. 536, 555 (1965). For analysis of this case in the broader context, *see* Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1.

[7] Adderley v. Florida, 385 U.S. 39 (1966). *See id.* at 47–48; Cox v. Louisiana, 379 U.S. 559, 578 (1965) (Black, J., concurring in part and dissenting in part); Jamison v. Texas, 318 U.S. 413, 416 (1943) (Black, J., for the Court).

[8] *E.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Carey v. Brown, 447 U.S. 455, 460 (1980).

[9] Hague v. CIO, 307 U.S. 496 (1939); Niemotko v. Maryland, 340 U.S. 268 (1951); Kunz v. New York, 340 U.S. 290 (1951); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Coates v. City of Cincinnati, 402 U.S. 611 (1971); Grayned v. City of Rockford, 408 U.S. 104 (1972); Greer v. Spock, 424 U.S. 828, 835–36 (1976); Carey v. Brown, 447 U.S. 455 (1980).

[10] Narrowly drawn statutes that serve the state's interests in security and in preventing obstruction of justice and influencing of judicial officers are constitutional. Cox v. Louisiana, 379 U.S. 559 (1965). A restriction on carrying signs or placards on the grounds of the Supreme Court is unconstitutional as applied to the public sidewalks surrounding the Court, since it does not sufficiently further the governmental purposes of protecting the building and grounds, maintaining proper order, or insulating the judicial decision making process from lobbying. United States v. Grace, 461 U.S. 171 (1983).

[11] In *Boos v. Barry,* 485 U.S. 312 (1988), the Court struck down as content-based a District of Columbia law prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tends to bring the foreign government into "public odium" or "public disrepute." However, another aspect of the District's law, making it unlawful for three or more persons to congregate within 500 feet of an embassy and refuse to obey a police dispersal order, was upheld; under a narrowing construction, the law had been held applicable only to congregations directed at an embassy, and reasonably believed to present a threat to the peace or security of the embassy.

[12] Brown v. Louisiana, 383 U.S. 131 (1966) (sit-in in library reading room).

[13] Edwards v. South Carolina, 372 U.S. 229 (1963); Jeanette Rankin Brigade v. Capitol Police Chief, 342 F. Supp. 575 (D.D.C. 1972) (three-judge court), *aff'd*, 409 U.S. 972 (1972) (voiding statute prohibiting parades and demonstrations on United States Capitol grounds).

[14] *E.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972) (sustaining ordinance prohibiting noisemaking adjacent to school if that noise disturbs or threatens to disturb the operation of the school); Brown v. Louisiana, 383 U.S. 131 (1966) (silent vigil in public library protected while noisy and disruptive demonstration would not be); Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) (wearing of black armbands as protest protected but not if it results in disruption of school); Cameron v. Johnson, 390 U.S. 611 (1968) (preservation of access to courthouse); Frisby v. Schultz, 487 U.S. 474 (1988) (ordinance prohibiting picketing "before or about" any residence or dwelling, narrowly construed as prohibiting only picketing that targets a particular residence, upheld as furthering significant governmental interest in protecting the privacy of the home).

[15] United States Postal Serv. V. Council of Greenburgh Civic Assn's, 453 U.S. 114, 129 (1981).

[16] Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

simply not as open for expression as streets and parks are.[17] But if government does open non-traditional forums for expressive activities, it may not discriminate on the basis of content or viewpoint in according access.[18]

Speech in public forums is subject to time, place, and manner regulations that take into account such matters as control of traffic in the streets, the scheduling of two meetings or demonstrations at the same time and place, the preventing of blockages of building entrances, and the like.[19] Such regulations are closely scrutinized in order to protect free expression, and, to be valid, must be justified without reference to the content or subject matter of speech,[20] must serve a significant governmental interest,[21] and must leave open ample alternative channels for communication of the information.[22] The Court has written that a time, place, or manner regulation

> must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied. . .[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest. . . .[23]

A content-neutral time, place, and manner regulation of the use of a public forum must also "contain adequate standards to guide the official's decision and render it subject to effective judicial review."[24] Unlike a content-based licensing scheme, however, it need not "adhere to the procedural requirements set forth in *Freedman*."[25] In *Freedman v. Maryland*, the Court had set forth certain requirements, including that the "burden of proving that the film [or other speech] is unprotected expression must rest on the censor," and that the censor must, "within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution."[26]

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[17] *E.g.*, *Minn. Voters All. v. Mansky*, No. 16-1435, slip op. at 13 (U.S. June 14, 2018) (polling places); ISKCON v. Lee, 505 U.S. 672, 679 (1992) (publicly owned airport terminal); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (interschool mail system); Council of Greenburgh Civic Ass'ns, 453 U.S. at 128 (private mail boxes); Greer v. Spock, 424 U.S. 828, 838 (1976) (military bases); Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (plurality opinion) (advertising space in city rapid transit cars); Adderley v. Florida, 385 U.S. 39, 47–48 (1966) (jails).

[18] *E.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipal theater); Madison Sch. Dist. v. WERC, 429 U.S. 167 (1976) (school board meeting); Heffron v. ISKCON, 452 U.S. 640 (1981) (state fair grounds); Widmar v. Vincent, 454 U.S. 263 (1981) (university meeting facilities).

[19] *See, e.g.*, Heffron v. ISKCON, 452 U.S. 640, 647–50 (1981), and *id.* at 656 (Brennan, J., concurring in part and dissenting in part) (stating law and discussing cases); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (prohibition of sleep-in demonstration in area of park not designated for overnight camping).

[20] Niemotko v. Maryland, 340 U.S. 268 (1951); Cox v. Louisiana, 379 U.S. 536 (1965); Police Dep't of Chicago v. Mosle, 408 U.S. 92 (1972); Madison Sch. Dist. v. WERC, 429 U.S. 167 (1976); Carey v. Brown, 447 U.S. 455 (1980); Widmar v. Vincent, 454 U.S. 263 (1981). In *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), a divided Court permitted the city to sell commercial advertising space on the walls of its rapid transit cars but to refuse to sell political advertising space.

[21] *E.g.*, the governmental interest in safety and convenience of persons using public forum, Heffron v. ISKCON, 452 U.S. 640, 650 (1981); the interest in preservation of a learning atmosphere in school, Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); and the interest in protecting traffic and pedestrian safety in the streets, Cox v. Louisiana, 379 U.S. 536, 554–55 (1965); Kunz v. New York, 340 U.S. 290, 293–94 (1951); Hague v. CIO, 307 U.S. 496, 515–16 (1939).

[22] Heffron v. ISKCON, 452 U.S. 640, 654–55 (1981); Consol. Edison Co. v. PSC, 447 U.S. 530, 535 (1980).

[23] Ward v. Rock Against Racism, 491 U.S. 781, 798–99, 800 (1989).

[24] Thomas v. Chi. Park Dist., 534 U.S. 316, 323 (2002).

[25] *Id.* at 322(citing Freedman v. Maryland, 380 U.S. 51 (1965)). *See* National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977).

[26] *Freedman*, 380 U.S. at 58–59.

A corollary to the rule forbidding regulation based on content is the principle—a merging of free expression and equal protection standards—that government may not discriminate between different kinds of messages in affording access.[27] In order to ensure against covert forms of discrimination against expression and between different kinds of content, the Court has insisted that licensing systems be constructed as free as possible of the opportunity for arbitrary administration.[28] The Court has also applied its general strictures against prior restraints in the contexts of permit systems and judicial restraint of expression.[29]

It appears that the government may not deny access to the public forum for demonstrators on the ground that the past meetings of these demonstrators resulted in violence,[30] and may not vary a demonstration licensing fee based on an estimate of the amount of hostility likely to

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[27] Police Dep't of Chicago v. Mosle, 408 U.S. 92 (1972) (ordinance void that barred all picketing around school building except labor picketing); Carey v. Brown, 447 U.S. 455 (1980) (same); Widmar v. Vincent, 454 U.S. 263 (1981) (striking down college rule permitting access to all student organizations except religious groups); Niemotko v. Maryland, 340 U.S. 268 (1951) (striking down denial of permission to use parks for some groups but not for others); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down ordinance that prohibited symbols, such as burning crosses, that constituted fighting words that insult on the basis of some factors, such as race, but not on the basis of other factors). These principles apply only to the traditional public forum and to the governmentally created "limited public forum." Government may, without creating a limited public forum, place "reasonable" restrictions on access to nonpublic areas. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 48 (1983) (use of school mail system); and Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788 (1985) (charitable solicitation of federal employees at workplace). *See also* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (city may sell commercial advertising space on the walls of its rapid transit cars but refuse to sell political advertising space); Capitol Square Review Bd. v. Pinette, 515 U.S. 753 (1995) (denial of permission to Ku Klux Klan, allegedly in order to avoid Establishment Clause violation, to place a cross in plaza on grounds of state capitol); Rosenberger v. Univ. of Va., 515 U.S. 819 (1995) (University's subsidy for printing costs of student publications, available for student "news, information, opinion, entertainment, or academic communications," could not be withheld because of the religious content of a student publication); Lamb's Chapel v. Center Moriches Sch. Dist., 508 U.S. 384 (1993) (school district rule prohibiting after-hours use of school property for showing of a film presenting a religious perspective on child-rearing and family values, but allowing after-hours use for non-religious social, civic, and recreational purposes).

[28] *E.g.*, Hague v. CIO, 307 U.S. 496, 516 (1939); Schneider v. Town of Irvington, 308 U.S. 147, 164 (1939); Cox v. New Hampshire, 312 U.S. 569 (1941); Poulos v. New Hampshire, 345 U.S. 395 (1953); Staub v. City of Baxley, 355 U.S. 313, 321–25 (1958); Cox v. Louisiana, 379 U.S. 536, 555–58 (1965); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–53 (1969). Writing for the Court, Justice Potter Stewart described these and other cases as "holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license without narrow, objective, and definite standards to guide the licensing authority is unconstitutional." *Shuttlesworth*, 394 U.S. at 150–51. A person faced with an unconstitutional licensing law may ignore it, engage in the desired conduct, and challenge the constitutionality of the permit system upon a subsequent prosecution for violating it. *Id.* at 151; Jones v. Opelika, 316 U.S. 584, 602 (1942) (Stone, C.J., dissenting), adopted per curiam on rehearing, 319 U.S. 103 (1943); *see also* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (upholding facial challenge to ordinance vesting in the mayor unbridled discretion to grant or deny annual permit for location of newsracks on public property); Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988) (invalidating as permitting "delay without limit" licensing requirement for professional fundraisers); Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123 (1992). *But see* Walker v. City of Birmingham, 388 U.S. 307 (1967) (same rule not applicable to injunctions).

[29] In *Shuttlesworth v. City of Birmingham*, the Court reaffirmed the holdings of the earlier cases, and, additionally, both Justice Potter Stewart, for the Court, 39 U.S. at 155 n.4, and Justice John Harlan concurring, *id.* at 162– 64, asserted that the principles of *Freedman v. Maryland,* 380 U.S. 51 (1965), governing systems of prior censorship of motion pictures, were relevant to permit systems for parades and demonstrations. The Court also voided an injunction against a protest meeting that was issued ex parte, without notice to the protestors and with, of course, no opportunity for them to rebut the representations of the seekers of the injunction. Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968).

[30] The only precedent is *Kunz v. New York*, 340 U.S. 290 (1951). The holding was on a much narrower basis, but in dictum the Court said: "The court below has mistakenly derived support for its conclusions from the evidence produced at the trial that appellant's religious meetings had, in the past, caused some disorder. There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder and violence." *Id.* at 294. A different rule applies to labor picketing. *See* Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, 312 U.S. 287 (1941) (background of violence supports prohibition of all peaceful picketing). The military may ban a civilian, previously convicted of destroying government property, from reentering a military base, and may apply the ban to prohibit the civilian from reentering the base for purposes of peaceful demonstration during an Armed Forces Day "open house." United States v. Albertini, 472 U.S. 675 (1985).

be engendered.[31] The Court has also suggested that the government cannot effectuate a "heckler's veto," the governmental termination of a speech or demonstration because of hostile crowd reaction.[32]

The Court has defined three categories of public property for public forum analysis.[33] First, there is the traditional public forum—places such as streets and parks that have traditionally been used for public assembly and debate.[34] In such a forum, the government "may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited."[35] Second, there is the designated public forum, where the government opens property for communicative activity and thereby creates a public forum.[36] Such a forum may be limited—hence the expression "limited public forum"—for "use by certain groups, for example, *Widmar v. Vincent* (student groups), or for discussion of certain subjects, for example, *City of Madison Joint School District v. Wisconsin PERC* (school board business),"[37] but, within the framework of such legitimate limitations, "a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."[38] Third, in a "nonpublic forum," or "a space that 'is not by tradition or designation a forum for public communication,'"[39] the government "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[40]

Amdt1.7.7.2 Public and Nonpublic Forums

First Amendment:

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

The distinction between public and nonpublic forums may be difficult to ascertain. Whether a speech restriction will be reviewed under strict scrutiny or only for reasonableness

[31] *Forsyth Cnty.*, 505 U.S. 123 (a fee based on anticipated crowd response necessarily involves examination of the content of the speech, and is invalid as a content regulation).

[32] Dicta indicate that a hostile reaction will not justify suppression of speech, Hague v. CIO, 307 U.S. 496, 502 (1939) ; Cox v. Louisiana, 379 U.S. 536, 551 (1965); Bachellar v. Maryland, 397 U.S. 564, 567 (1970), and one holding appears to point this way. Gregory v. City of Chicago, 394 U.S. 111 (1969). In a 2022 decision involving how the Free Speech, Free Exercise, and Establishment Clauses interplay, the Court rejected a "heckler's veto" in the Establishment Clause context, stating "This Court has since made plain, too, that the Establishment Clause does not include anything like a 'modified heckler's veto in which". . . religious activity can be proscribed' based on '"perceptions"' or '"discomfort."' Kennedy v. Bremerton School Dist., No. 21-418, (U.S. June 27, 2022). However, the Court upheld a breach of the peace conviction of a speaker who refused to cease speaking upon the demand of police who feared imminent violence. Feiner v. New York, 340 U.S. 315 (1951). In *Niemotko v. Maryland,* 340 U.S. 268, 273 (1951) (concurring opinion), Justice Felix Frankfurter wrote: "It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd whatever its size and temper and not against the speaker." *Id*

[33] *E.g.*, Minn. Voters All. v. Mansky, No. 16-1435, slip op. at 7 (U.S. June 14, 2018).

[34] Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009).

[35] *Minn. Voters All.*, slip op. at 11. *See also* Summum, 555 U.S. at 469. *Cf.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("[T]ime, place, or manner restrictions. . . are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

[36] *Minn. Voters All.*, slip op. at 11. *See also Summum*, 555 U.S. at 469–70.

[37] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 46 n.7 (1983).

[38] 460 U.S. at 46.

[39] *Minn. Voters All.*, slip op. at 7 (quoting *Perry Educ. Ass'n*, 460 U.S. at 46).

[40] *Perry Educ. Ass'n*, 460 U.S. at 46.

thus may turn in part on whether the government has "intentionally open[ed] a nontraditional forum for public discourse," creating a designated public forum.[1] To determine whether a forum is a designated public forum or a nonpublic forum, the Court will look to the government's intent in opening the forum,[2] the restrictions initially placed on speakers' access to the forum,[3] and the nature of the forum.[4] For example, in *Cornelius v. NAACP Legal Defense and Educational Fund*, the Court held that the Combined Federal Campaign (CFC), "an annual charitable fundraising drive conducted in the federal workplace,"[5] was a nonpublic forum.[6] Notwithstanding the fact that the federal government had opened the forum for solicitation by *some* charitable organizations, the Court concluded that "neither [the government's] practice nor its policy [was] consistent with an intent to designate the CFC as a public forum open to *all* tax-exempt organizations."[7] Accordingly, the Court upheld the government's decision to exclude certain charitable organizations as reasonable in light of the purpose of the forum.[8] Similarly, the Court concluded in another case that a school district had not created a public forum with its system for internal school mail because the district had not, "by policy or by practice," "opened its mail system for indiscriminate use by the general public."[9] The Court therefore concluded that the school district could permissibly exclude a teacher's association from using the mail system, while also allowing a different teacher's association—the teachers' exclusive representative—to use the mail system, because the school's policy was reasonable and consistent with the purposes of the forum.[10]

However, although the government has greater discretion to restrict speech in nonpublic forums,[11] the First Amendment still prohibits certain restrictions even in nonpublic forums. For instance, the Court held in *Minnesota Voters Alliance v. Mansky* that "[a] polling place in Minnesota qualifies as a nonpublic forum."[12] After reviewing the long history of state regulation of polling places on election day,[13] the Court concluded that because the polling

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[1] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985); *see also United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 206 (2003) (plurality opinion) ("To create such a [designated public] forum, the government must make an affirmative choice to open up its property for use as a public forum."); United States v. Kokinda, 497 U.S. 720, 727 (1990) (plurality opinion) (holding certain sidewalks were a nonpublic forum because the government owner had not "expressly dedicated" them "to any expressive activity"). *Cf.* Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 814 (1984) ("Appellees' reliance on the public forum doctrine is misplaced. They fail to demonstrate the existence of a traditional right of access respecting such items as utility poles for purposes of their communication comparable to that recognized for public streets and parks. . . .").

[2] *Cornelius*, 473 U.S. at 803.

[3] *See Perry Educ. Ass'n*, 460 U.S. at 4748.

[4] *Cornelius*, 473 U.S. at 803.

[5] *Id.* at 790.

[6] *Id.* at 805.

[7] *Id.* at 804 (emphasis added).

[8] *Id.* at 809.

[9] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983). The Court also stated, however, that "even if we assume that by granting access to the Cub Scouts, YMCA's, and parochial schools, the School District has created a 'limited' public forum, the constitutional right of access would in any event extend only to other entities of similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as [the Perry Local Educators' Association], which is concerned with the terms and conditions of teacher employment." *Id.* at 48. In *United States v. Kokinda,* 497 U.S. 720, 730 (1990) (plurality opinion), the Court interpreted this language to mean that in a limited public forum, "regulation of the reserved nonpublic uses would still require application of the reasonableness test."

[10] *Perry Educ. Ass'n*, 460 U.S. at 50–51. *See also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 269–70 (1988) (holding that a student newspaper created as part of "a supervised learning experience" was not a public forum).

[11] See, e.g., United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 204–05 (2003) (plurality opinion).

[12] *Minn. Voters All. v. Mansky*, No. 16-1435, slip op. at 8 (U.S. June 14, 2018).

[13] *Id.* at 1–3.

place was "government-controlled property set aside for the sole purpose of voting,"[14] it qualified as "a special enclave, subject to greater restriction."[15] Although the forum's designation as a nonpublic forum meant that the Court did not apply strict scrutiny, the Court nonetheless struck down a Minnesota law that barred all "political" apparel from polling places as unreasonable.[16] The Court acknowledged that the state could permissibly seek to "prohibit certain apparel" in polling places "because of the message it conveys,"[17] but concluded that the particular scheme followed by Minnesota was not "capable of reasoned application."[18] In the Court's view, the breadth of the term "political" and the state's "haphazard interpretations"[19] of that term failed to provide "objective, workable standards" to guide the discretion of the election judges who implemented the statute.[20]

Application of these principles continues to raise often difficult questions. In *United States v. Kokinda*, a majority of Justices, who ultimately upheld a ban on soliciting contributions on postal premises under the "reasonableness" review governing nonpublic forums, could not agree on the public forum status of a sidewalk located entirely on postal service property.[21] Two years later, in *International Society for Krishna Consciousness, Inc. v. Lee*, the Court was similarly divided as to whether non-secured areas of airport terminals, including shops and restaurants, constitute public forums.[22] A five-Justice majority held that airport terminals are not public forums and upheld regulations banning the repetitive solicitation of money within the terminals.[23]

A decade later, the Court considered the public forum status of the internet. In *United States v. American Library Association, Inc.*, a four-Justice plurality held that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum."[24] The plurality therefore did not apply strict scrutiny in upholding the Children's Internet Protection Act, which provides that a public school or "library may not receive federal assistance to provide

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[14] *Id.* at 8.

[15] *Id.* (quoting Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 1992)) (internal quotation marks omitted).

[16] *Id.* at 13.

[17] *Id.* at 12.

[18] *Id.* at 19.

[19] *Id.* at 13.

[20] *Id.* at 18.

[21] 497 U.S. 720, 727 (1990) ("[R]egulation of speech activity where the Government has not dedicated its property to First Amendment activity is examined only for reasonableness.").

[22] 505 U.S. 672 (1992).

[23] *Id.* at 683 ("[N]either by tradition nor purpose can the terminals be described as satisfying the standards we have previously set out for identifying a public forum.").

[24] 539 U.S. 194, 205–06 (2003) ("We have 'rejected the view that traditional public forum status extends beyond its historic confines.' The doctrines surrounding traditional public forums may not be extended to situations where such history is lacking." (quoting Ark. Educ. TV Comm'n v. Forbes, 523 U.S. 666, 679 (1998))). While decided on constitutional vagueness grounds, in *Reno v. American Civil Liberties Union*, the Court struck down a provision of the Communications Decency Act of 1996 that prohibited the use of an "interactive computer service" (that is, the internet) to display indecent material "in a manner available to a person under 18 years of age." 521 U.S. 844, 860 (1997). The Court did not consider the internet's status as a forum for free speech, but observed that the internet "constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can 'publish' information." *Id.* at 853.

Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them."[25]

More recently, in *Packingham v. North Carolina*, the Court appeared to equate the internet to traditional public forums like a street or public park. Specifically, Justice Anthony Kennedy, writing for the Court, observed that, "[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular."[26] Consequently, the Court struck down a North Carolina law making it a felony for registered sex offenders to use commercial social networking websites that allow minor children to be members, such as Facebook. Applying strict scrutiny, the Court held that the North Carolina law impermissibly restricted lawful speech as it was not narrowly tailored to serve the government's interest in protecting minors from registered sex offenders because it "foreclose[d] access to social media altogether," thereby "prevent[ing] the user from engaging in the legitimate exercise of First Amendment rights."[27]

Amdt1.7.7.3 Quasi-Public Places

First Amendment:

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

The First Amendment precludes government restraint of expression and it does not require individuals to turn over their homes, businesses, or other property to those wishing to communicate about a particular topic.[1] But it may be that in some instances private property is so functionally akin to public property that private owners may not forbid expression upon

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[25] *Am. Library Ass'n*, 539 U.S. at 199; *see also id.* at 206 ("A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak.").

[26] Packingham v. North Carolina, No. 15-1194, slip op. at 4–5 (U.S. June 19, 2017) (quoting *Am. Civil Liberties Union*, 521 at 868); *see also id.* at 6 ("This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.").

[27] *Id.* at 6, 8; *see id.* at 7 ("[G]iven the broad wording of the North Carolina statute at issue, it might well bar access not only to commonplace social media websites but also to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com."). The Court was careful to point out, however, that its opinion should not be read as barring states from enacting laws more specific than that of North Carolina, noting that "[s]pecific criminal acts are not protected speech even if speech is the means for their commission." *Id.* (citing Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969)). Indeed, "it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor." *Id.*

[1] In *Garner v. Louisiana,* 368 U.S. 157, 185, 201–07 (1961), Justice John Harlan, concurring, would have reversed breach of the peace convictions of "sit-in" demonstrators who conducted their sit-in at lunch counters of department stores. He asserted that the protesters were sitting at the lunch counters where they knew they would not be served in order to demonstrate that segregation at such counters existed. "Such a demonstration. . .is as much a part of the 'free trade in ideas'. . .as is verbal expression, more commonly thought of as 'speech.'" Conviction for breach of peace was void in the absence of a clear and present danger of disorder. The Justice would not, however, protect "demonstrations conducted on private property over the objection of the owner. . . just as it would surely not encompass verbal expression in a private home if the owner has not consented." He had read the record to indicate that the demonstrators were invitees in the stores and that they had never been asked to leave by the owners or managers. *See also* Frisby v. Schultz, 487 U.S. 474 (1988) (government may protect residential privacy by prohibiting altogether picketing that targets a single residence).

it. In *Marsh v. Alabama*,[2] the Court held that the private owner of a company town could not forbid distribution of religious materials by a Jehovah's Witness on a street in the town's business district. The town, wholly owned by a private corporation, had all the attributes of any American municipality, aside from its ownership, and was functionally like any other town. In those circumstances, the Court reasoned, "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[3] This precedent lay unused for some twenty years until the Court first indicated a substantial expansion of it, and then withdrew to a narrow interpretation.

First, in *Food Employees Union v. Logan Valley Plaza*,[4] the Court held constitutionally protected the picketing of a store located in a shopping center by a union objecting to the store's employment of nonunion labor. Finding that the shopping center was the functional equivalent of the business district involved in *Marsh*, the Court announced there was "no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership."[5] "[T]he State," said Justice Thurgood Marshall, "may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put."[6] The Court observed that it would have been hazardous to attempt to distribute literature at the entrances to the center, and it reserved for future decision "whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put."[7]

Four years later, the Court answered the reserved question in the negative.[8] Several members of an antiwar group had attempted to distribute leaflets on the mall of a large shopping center, calling on the public to attend a protest meeting. Center guards invoked a trespass law against them, and the Court held that they could rightfully be excluded. The center had not dedicated its property to a public use, the Court said; rather, it had invited the public in specifically to conduct business with those stores located in the center. Plaintiffs' leafleting, not directed to any store or to the customers *qua* customers of any of the stores, was unrelated to any activity in the center. Unlike the situation in *Logan Valley Plaza*, there were reasonable alternatives by which plaintiffs could reach those who used the center. Thus, in the absence of a relationship between the purpose of the expressive activity and the business of the shopping center, the property rights of the center owner will overbalance the expressive rights to persons who would use their property to communicate.

Then, the Court formally overruled *Logan Valley Plaza*, holding that shopping centers are not functionally equivalent to the company town involved in *Marsh*.[9] Suburban malls may be

[2] 326 U.S. 501 (1946).

[3] 326 U.S. at 506.

[4] Amalgamated Food Emps. Union v. Logan Valley Plaza, 391 U.S. 308 (1968).

[5] 391 U.S. at 319. Justices Hugo Black, John Harlan, and Byron White dissented. *Id.* at 327, 333, 337.

[6] 391 U.S. at 319–20.

[7] 391 U.S. at 320 n.9.

[8] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[9] Hudgens v. NLRB, 424 U.S. 507 (1976). Justice Potter Stewart's opinion for the Court asserted that Logan Valley had in fact been overruled by *Lloyd Corp.*, 424 U.S. at 517–18, but Justice Lewis Powell, the author of the Lloyd Corp. opinion, did not believe that to be the case, *id.* at 523.

the "new town squares" in the view of sociologists, but they are private property in the eye of the law. The ruling came in a case in which a union of employees engaged in an economic strike against one store in a shopping center was barred from picketing the store within the mall. The rights of employees in such a situation are generally to be governed by federal labor laws[10] rather than the First Amendment, although there is also the possibility that state constitutional provisions may be interpreted more expansively by state courts to protect some kinds of public issue picketing in shopping centers and similar places.[11] Henceforth, only when private property "'has taken on *all* the attributes of a town'" is it to be treated as a public forum.[12]

Amdt1.7.8 Role of Government

Amdt1.7.8.1 Overview of Government Roles

First Amendment:

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

The Supreme Court has granted the government more allowance to control speech in certain contexts where the government is the speaker, or the government otherwise has a valid interest in regulating speech in order to perform certain functions like operating schools or prisons. For example, the government has an interest in educating children free from distractions. In the context of these special government roles, the government may impose some restrictions on expression to achieve its legitimate objectives, but if the regulation goes too far, it will violate the First Amendment.[1]

This idea of granting deference to the government when it performs certain functions is related to the idea that certain individuals—such as members of the military—stand in a distinct relationship with the government.[2] To take another example, government employers have some leeway to control their employees' words and actions similar to private employers, both because those employees stand in a distinct relationship with the government and

[10] *But see* Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978).

[11] In PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), the Court held that a state court interpretation of the state constitution to protect picketing in a privately owned shopping center did not deny the property owner any federal constitutional rights. *But cf.* Pacific Gas & Elec. v. Public Utils. Comm'n, 475 U.S. 1 (1986) (holding that a state may not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees, a majority of Justices distinguishing PruneYard as not involving such forced association with others' beliefs).

[12] Hudgens v. NLRB, 424 U.S. 507, 516–17 (1976) (quoting Justice Hugo Black's dissent in *Logan Valley Plaza,* 391 U.S. 308, 332–33 (1968)).

[1] The Court has distinguished content-based regulations—regulations that are imposed because the government disapproves of the content of particular expression—from content-neutral regulations—regulations that serve legitimate governmental interests and do not discriminate based on speech's content. *Compare* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); *and* Schacht v. United States, 398 U.S. 58 (1970), *with* Greer v. Spock, 424 U.S. 828 (1976); Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973); *and* United States v. O'Brien, 391 U.S. 367 (1968). Content-based regulations are subject to strict scrutiny, but content-neutral regulations are subject to lesser scrutiny. *See* Amdt1.7.5.1 Overview of Categorical Approach to Restricting Speech.

[2] *See, e.g.*, Parker v. Levy, 417 U.S. 733, 758 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.").

because the government has a valid interest in efficiently providing public services.[3] The issue of public employee speech is discussed in a subsequent series of essays, but it is similarly premised on the concept of government's legitimate interests in performing certain functions.[4]

Amdt1.7.8.2 Government Speech and Government as Speaker

First Amendment:

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

As an outgrowth of the government subsidy cases, such as *Rust v. Sullivan*,[1] the Court has established the "government speech doctrine" that recognizes that a government entity "is entitled to say what it wishes"[2] and to select the views that it wants to express.[3] In this vein, when the government speaks, the government is not barred by the Free Speech Clause of the First Amendment from determining the content of what it says and can engage in viewpoint discrimination.[4] The underlying rationale for the government speech doctrine is that the government could not "function" if the government could not favor or disfavor points of view in enforcing a program.[5] And the Supreme Court has recognized that the government speech doctrine even extends to when the government receives private assistance in helping deliver a government controlled message.[6] As a consequence, the Court, relying on the government speech doctrine, has rejected First Amendment challenges to (1) regulations prohibiting recipients of government funds from advocating, counseling, or referring patients for abortion;[7] (2) disciplinary actions taken as a result of statements made by public employees pursuant to their official duties;[8] (3) mandatory assessments made against cattle merchants when used to fund advertisements whose message was controlled by the government;[9] (4) a city's decision to reject a monument for placement in a public park;[10] and (5) a state's decision to reject a design for a specialty license plate for an automobile.[11]

A central issue prompted by the government speech doctrine is determining when speech is that of the government, which can be difficult when the government utilizes or relies on private parties to relay a particular message. In *Johanns v. Livestock Marketing Association*, the Court held that the First Amendment did not prohibit the compelled subsidization of

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[3] *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

[4] *See* Amdt1.7.9.1 Loyalty Oaths, Amdt1.7.9.2 Political Activities and Government Employees, Amdt1.7.9.3 Honoraria and Government Employees, and Amdt1.7.9.4 Pickering Balancing Test for Government Employee Speech.

[1] 500 U.S. 173 (1991).

[2] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[3] *Id.* at 833. *Accord, e.g.*, Shurtleff v. Boston, No. 20-1800 (U.S. May 2, 2022).

[4] *See* Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009). Nonetheless, while the First Amendment's Free Speech Clause has no applicability with regard to government speech, other constitutional provisions—such as the Equal Protection principles of the Fifth and Fourteenth Amendments—may constrain what the government can say. *Id.* at 468–69.

[5] *See id.* at 468 ("Indeed, it is not easy to imagine how government could function if it lacked this freedom.").

[6] *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005).

[7] *See Rust*, 500 U.S. at 194.

[8] *See* Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006).

[9] *See Livestock Mktg. Ass'n*, 544 U.S. at 562.

[10] *See Pleasant Grove City*, 555 U.S. at 472.

[11] *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 203 (2015).

advertisements promoting the sale of beef because the underlying message of the advertisements was "effectively controlled" by the government.[12]

The line can also be blurred when "a government invites the people to participate in a program," such as when the government opens up its property for use by private speakers.[13] In *Pleasant Grove City v. Summum*, the Court shifted from an exclusive focus on the "effective control" test in holding that "permanent monuments displayed on public property," even when provided by private parties, generally "represent government speech."[14] In so concluding, the Court relied not only on the fact that a government, in selecting monuments for display in a park, generally exercises "effective control" and has "final approval authority" over the monument, but also on (1) the government's long history of "us[ing] monuments to speak for the public"; and (2) the public's common understanding as to monuments and their role in conveying a message from the government.[15] In *Walker v. Texas Division, Sons of Confederate Veterans*, the Court relied on the same analysis used in *Pleasant Grove City* to conclude that the State of Texas, in approving privately crafted designs for specialty license plates, could reject designs the state found offensive without running afoul of the Free Speech Clause.[16] Specifically, the *Walker* Court held that license plate designs amounted to government speech because (1) states historically used license plates to convey government messages; (2) the public closely identifies license plate designs with the state; and (3) the State of Texas maintained effective control over the messages conveyed on its specialty license plates.[17]

By contrast, in *Shurtleff v. Boston*, the Supreme Court concluded that private flags flown at a city hall plaza did not qualify as government speech.[18] While "the history of flag flying. . . at the seat of government" suggested such flags usually conveyed governmental messages, other factors specific to the city program pointed the other way.[19] Given that the city sometimes flew its own flags but regularly let private groups use the flagpole, the Court suggested the evidence was inconclusive on public perceptions.[20] The critical inquiry was government control: the Court concluded that the city exercised no active control over the flag raisings or the messages of the flags.[21] While the city might have exercised control over scheduling or physical maintenance, there was no evidence it had ever reviewed the flags or denied a group's request, prior to the denial that formed the basis of the lawsuit.[22] Accordingly, while *Shurtleff* looked to multiple factors to analyze whether the flags were government speech, effective control was "the most salient" factor in the case.[23]

In 2017's *Matal v. Tam*, the Supreme Court looked at a different type of activity to hold that trademarks do not constitute government speech, concluding that it is "far-fetched to suggest

[12] *See Livestock Mktg. Ass'n*, 544 U.S. at 560.

[13] Shurtleff v. Boston, No. 20-1800, slip op. at 5 (U.S. May 2, 2022). In this context, the government speech doctrine sometimes overlaps with the public forum doctrine, discussed in Amdt1.7.7.1 The Public Forum, in determining whether the speech is governmental or private.

[14] *See Pleasant Grove City*, 555 U.S. at 470.

[15] *Id.* at 470–73.

[16] *See Walker*, 576 U.S. at 203–04.

[17] *See id.* at 210–13. *Accord Shurtleff*, slip op. at 6 ("Our past cases have looked to several types of evidence to guide the analysis, including: the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression.").

[18] *Shurtleff*, slip op. at 12.

[19] *Id.* at 7–9.

[20] *Id.* at 9.

[21] *Id.*

[22] *Id.* at 10–11.

[23] *Id.* at 10.

that the content of a registered mark is government speech."[24] The Court distinguished trademarks from the license plates at issue in *Walker*, a case the Court stated "likely marks the outer bounds of the government-speech doctrine."[25] First, the Court noted that, unlike license plates, trademarks do not have a history of use to convey messages by the government.[26] Second, the Court further reasoned that the government does not maintain direct control over the messages conveyed in trademarks—indeed, "[t]he Federal Government does not dream up these marks, and it does not edit marks submitted for registration."[27] And third, the public, according to the *Tam* Court, does not closely identify trademarks with the government.[28] Thus, while *Tam* demonstrates the Court's continuing reliance on the multi-factor test for determining government speech from *Walker* and *Summum*, that test is not so flexible as to allow for expression like trademarks to be deemed the speech of the government.

In both *Shurtleff* and *Tam*, the Supreme Court held that because the flags and trademarks were not government speech, the government had acted unconstitutionally by creating viewpoint-based distinctions.[29] In *Shurtleff*, the Court noted that the city had made the plaza with the flagpole available to the public and had itself described that plaza as a public forum.[30] Accordingly, after ruling that the flags were "private, not government, speech," the Court held that the city had violated the Free Speech Clause by excluding a flag based on its religious viewpoint.[31] Although the Court's opinions in *Tam* did not clearly agree on whether public forum analysis applied,[32] a majority nonetheless ruled that the federal law barring disparaging trademarks entailed unconstitutional viewpoint discrimination.[33]

Amdt1.7.8.3 School Free Speech and Government as Educator

First Amendment:

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

Although the Supreme Court had previously held that students in public schools are entitled to some constitutional protection,[1] as are minors generally,[2] it established the controlling standard for assessing First Amendment rights in the school environment in

[24] Matal v. Tam, No. 15-1293, slip op. at 14 (U.S. June 19, 2017).

[25] *Id.* at 17–18 ("Trademarks are private, not government, speech.")

[26] *Id.*

[27] *Id.* at 2.

[28] *Id.* at 17.

[29] Shurtleff v. Boston, No. 20-1800, slip op. at 2 (U.S. May 2, 2022); *Tam*, (plurality opinion); *id.* at 1 (Kennedy, J., concurring).

[30] *Shurtleff*, slip op. at 3; *see also id.* at 2 (describing the legal question as whether the flagpole was government speech or instead open for citizens' views).

[31] *Id.* at 12.

[32] *Cf. Tam*, slip op. at 22 (plurality opinion) (saying limited public forum cases were "potentially. . .analogous").

[33] *Id.*; *id.* at 1 (Kennedy, J., concurring).

[1] *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[2] *In re* Gault, 387 U.S. 1 (1967). Children are subject to some restrictions that could not constitutionally be applied to adults. *E.g.*, Ginsberg v. New York, 390 U.S. 629 (1968) (upholding state law restricting access to certain material deemed "harmful to minors," although not obscene as to adults).

Tinker v. Des Moines Independent Community School District.[3] In that case, the Court articulated a need to balance students' First Amendment protections with the goals and needs of educators and the community.

In *Tinker*, high school principals had banned students from wearing black armbands as a symbol of protest against the United States' actions in Vietnam.[4] Reversing the lower courts' refusal to reinstate students who had been suspended for violating the ban, the Court set out a balancing test for applying the First Amendment in schools.[5] According to the Court, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students," and neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[6] Notwithstanding these protections, the Court affirmed the comprehensive authority of the states and of school officials, consistent with fundamental constitutional safeguards, "to prescribe and control conduct in the schools."[7] On balance, therefore, school authorities may restrict expression to prevent disruption of school activities or discipline,[8] but such restrictions must be justified by "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[9]

The Court reaffirmed *Tinker* in *Healy v. James*, finding no basis to believe that, "First Amendment protections should apply with less force on college campuses than in the community at large."[10] In *Healy*, the Court held that students' rights of association, implicit in the First Amendment, were violated when a public college denied a student group official recognition as a campus organization.[11] Denying recognition, the Court held, was impermissible if it was based on factors such as the student organization's affiliation with the national Students for a Democratic Society, on disagreement with the organization's philosophy, or on an *unfounded* fear of disruption.[12] The Court suggested that how courts strike the balance under the *Tinker* inquiry may differ depending on the students' ages. The Court emphasized that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,'" but also concluded that a college administration may require "that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law."[13]

In 1982, the Court faced a conflict between a school system's obligation to inculcate community values in students and the free-speech rights of those students. In *Board of Education v. Pico*, the Court considered a case challenging a school board's authority to remove

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[3] 393 U.S. 503 (1969).

[4] *Id.* at 504

[5] *Id.* at 514.

[6] *Id.* at 506.

[7] *Id.* at 507.

[8] *Id.*

[9] *Id.* at 509 (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). *See also* Papish v. Bd. of Curators, 410 U.S. 667 (1973) (state university could not expel a student for using "indecent speech" in campus newspaper); *but cf.* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (upholding two-day suspension, and withdrawal of privilege of speaking at graduation, for student who used sexual metaphor in speech given to high school assembly).

[10] 408 U.S. 169 (1972).

[11] *Id.* at 180.

[12] *Id.* at 187–90.

[13] *Id.* at 193. Because a First Amendment right was in issue, the college had the burden to justify rejecting a request for recognition rather than the requesters to justify affirmatively their right to be recognized. *Id.* at 184. *See also* Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding an anti-noise ordinance that forbade persons on grounds adjacent to a school to willfully make noise or to create any other diversion during school hours that "disturbs or tends to disturb" normal school activities).

certain books from high school and junior high school libraries.[14] The procedural posture of the case required the Court to assume that the books were removed because the school board disagreed with the books' content for political reasons.[15] A plurality of the Court thought that students retained substantial free-speech protections and that among these was the right to receive information and ideas.[16] Although the plurality conceded that school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political," it reasoned that a school board was constitutionally prohibited from removing library books in order to deny access to political ideas with which the board disagreed.[17] The four dissenters argued that the Constitution did not prevent the school board from expressing community values in this way regardless of its motivation.[18]

The Court struck a different balance between student freedom and educator authority in *Hazelwood School District v. Kuhlmeier*,[19] in which it relied on public forum analysis to hold that editorial control and censorship of a student newspaper sponsored by a public high school need be only "reasonably related to legitimate pedagogical concerns."[20] The Court distinguished the facts of *Kuhlmeier* from *Tinker*, explaining that "[t]he question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—-is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."[21] The student newspaper at issue had been created by school officials as a part of the school curriculum, and served "as a supervised learning experience for journalism students."[22] Because the newspaper was not a public forum, school officials could maintain editorial control so long as their actions were "reasonably related to legitimate pedagogical concerns."[23] Thus, a principal's decision to remove an article describing student pregnancy in a manner believed inappropriate for younger students, and another article on divorce critical of a named parent, were upheld.[24]

In *Morse v. Frederick*,[25] the Court held that a school could punish a pupil for displaying a banner that said, "BONG HiTS 4 JESUS" at a school-sponsored event even absent evidence

[14] Bd. of Educ. v. Pico, 457 U.S. 853 (1982).

[15] *Id.* at 872.

[16] *Id.* at 866–67.

[17] *Id.* at 862, 864–69, 870–72. Justices Thurgood Marshall and John Paul Stevens joined Justice William Brennan's opinion fully. Justice Harry Blackmun believed "that certain forms of state discrimination between ideas are improper" and agreed that the government "may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons." *Id.* at 878–79 (Blackmun, J., concurring in part and concurring in the judgment). Justice Byron White provided the fifth vote for reversal, and he would have avoided "a dissertation" on the First Amendment issue. *Id.* at 883 (White, J., concurring in the judgment). Instead, he voted to reverse the trial court's grant of summary judgment based on an unresolved factual issue going to the reasons for the school board's removal. *Id.*

[18] Justice William Rehnquist wrote the principal dissent. *Id.* at 904 (Rehnquist, J., dissenting). *See also id.* at 885 (Burger, C.J., dissenting), 893 (Powell, J., dissenting), 921 (O'Connor, J., dissenting).

[19] 484 U.S. 260 (1988).

[20] *Id.* at 273.

[21] *Id.* at 270–71.

[22] *Id.* at 270.

[23] *Id.* at 273.

[24] *Id.* at 276.

[25] 551 U.S. 393 (2007).

the banner caused substantial disruption.[26] The Court reasoned that schools "may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use,"[27] but indicated that it might have reached a different result if the banner had addressed the issue of "the criminalization of drug use or possession."[28] In his concurrence, Justice Samuel Alito commented that the Court's opinion "provides no support for any restriction on speech that can plausibly be interpreted as commenting on any political or social issue."[29]

While the *Kuhlmeier* and *Morse* cases focused on applying *Tinker* to *on-campus* speech, the Court addressed *Tinker*'s application to off-campus speech in its 2021 *Mahanoy Area School District v. B.L.* decision.[30] In *Mahanoy*, the Court held that while public schools may have a special interest in some off-campus student speech, there are several features of off-campus speech that diminish "the unique educational characteristics that might call for the special First Amendment leeway" to regulate speech that *Tinker* provided.[31] The Court identified three distinguishing characteristics of off-campus speech that the Court reasoned made the *Tinker* standards less applicable.[32] First, off-campus speech, in some circumstances, should fall within the zone of parental, rather than school officials', responsibility.[33] Second, the Court reasoned that allowing schools to regulate off-campus speech would provide an opportunity to regulate student speech 24 hours a day, which may, in effect, chill students' protected speech.[34] Third, the Court emphasized that while a school does have authority to regulate speech that interrupts the school's work,[35] schools also have an interest in protecting students' unpopular expressions, as America's public schools are "the nurseries of democracy."[36] Although the Court recognized that some off-campus speech—-such as severe bullying, threats, or participation in online school activities—may require school regulation, it was hesitant to establish any clear general rules about what constitutes off-campus speech.[37] In light of these considerations, the Court held that a school could not regulate a student's social media posts that criticized the school because the circumstances of the speech—the fact that the posts were made at an off-campus convenience store on a personal cellphone to a limited group of people and did not name the specific school or school authorities—diminished the school's interest in regulation.[38]

The line of cases from *Tinker* to *Mahanoy* address the First Amendment rights of school and university students. Teachers and other employees of schools also have rights, but those rights are generally analyzed under rules that apply to the government as an employer.[39]

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[26] *Id.* at 401.

[27] *Id.* at 397.

[28] *Id.* at 403.

[29] *Id.* at 422.

[30] No. 20-255 (U.S. June 23, 2021).

[31] *Id.* at 5–7.

[32] *Id.* at 7.

[33] *Id.*

[34] *Id.*

[35] The Court also reiterated that, pursuant to *Tinker*, schools have a "special interest in regulating speech that 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'" *Id.*

[36] *Id.*

[37] *Id.* at 5–6.

[38] *Id.* at 7–8.

[39] *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S., 589 (1967). *See also* Amdt1.7.9.1 Loyalty Oaths, Amdt1.7.9.2 Political Activities and Government Employees, Amdt1.7.9.3 Honoraria and Government Employees, and Amdt1.7.9.4 Pickering Balancing Test for Government Employee Speech.

Amdt1.7.8.4 Prison Free Speech and Government as Prison Administrator

First Amendment:

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

A prison inmate retains only those First Amendment rights that are not inconsistent with his status as a prisoner or the legitimate penological objectives of the corrections system.[1] The Supreme Court has recognized that the government has legitimate interests in preserving internal prison order and discipline, maintaining of institutional security against escape or unauthorized entry, and rehabilitating prisoners.[2] In applying these general standards, the Court initially seemed to arrive at somewhat divergent points in assessing prison restrictions on mail and on face-to-face news interviews between reporters and prisoners. Later cases took a more deferential approach to restrictions on both, and the Court walked back language in earlier rulings that suggested heightened scrutiny applied in assessing restrictions on inmates' mail.

In *Procunier v. Martinez*,[3] the Court invalidated mail censorship regulations that permitted authorities to hold back or to censor mail to and from prisoners whenever they thought that the letters "unduly complain," express "inflammatory . . . views," or were "defamatory" or "otherwise inappropriate."[4] The Court based this ruling not on the rights of the prisoner, but instead on the outsider's right to communicate with the prisoner either by sending or by receiving mail. Under this framework, the Court held, mail regulation must further an important interest unrelated to suppressing expression; regulation must be shown to further the substantial interest of security, order, and rehabilitation; and regulation must not be used simply to censor opinions or other expressions. Further, a restriction must be no greater than is necessary to protecting particular government interest involved.

In *Turner v. Safley*,[5] however, the Court held that a standard that is more deferential to the government applies when the free speech rights only of inmates are at stake. In upholding a Missouri restriction on correspondence between inmates at different institutions, while striking down a prohibition on inmate marriages absent a compelling reason such as

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[1] Pell v. Procunier, 417 U.S. 817, 822 (1974). The Supreme Court has applied this same deferential review to the assessment of neutral regulations inhibiting religious exercise. *See* Amdt1.4.3.5 Laws Neutral to Religious Practice Regulating Prisons and the Military. In a related, but distinct context, however, state laws that restrict the First Amendment rights of former prisoners that are still under the supervision of the state may trigger strict scrutiny. For example, in *Packingham v. North Carolina*, the Court struck down a North Carolina law making it a felony for registered sex offenders to use commercial social networking websites that allow minor children to be members, such as Facebook. 582 U.S. ___, No. 15-1194, slip op. (2017). The Court held that the North Carolina law impermissibly restricted lawful speech because it was not narrowly tailored to serve the significant government interest in protecting minors from registered sex offenders. *Id.* at 8 (holding that it was "unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences.").

[2] Procunier v. Martinez, 416 U.S. 396, 412 (1974). The Court later clarified that to the extent *Martinez* suggested a "categorical discrimination between incoming correspondence from prisoners (to which we applied a reasonableness standard . . .) and incoming correspondence from nonprisoners" (to which *Martinez* suggested the Court might have applied a heightened standard), those aspects of the decision were overruled. Thornburgh v. Abbott, 490 U.S. 401, 413–14 (1989).

[3] 416 U.S. 396 (1974). *But see* Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977), in which the Court sustained prison regulations barring solicitation of prisoners by other prisoners to join a union, banning union meetings, and denying bulk mailings concerning the union from outside sources. The reasonable fears of correctional officers that organizational activities of the sort advocated by the union could impair discipline and lead to possible disorders justified the regulations.

[4] 416 U.S. at 396.

[5] 482 U.S. 78 (1987).

pregnancy or birth of a child, the Court announced the appropriate standard: "[W]hen a regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[6] Four factors "are relevant in determining the reasonableness of a regulation at issue,"[7] the Court explained:

> First, is there a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it? Second, are there alternative means of exercising the right that remain open to prison inmates? Third, what impact will accommodation of the asserted constitutional right . . . have on guards and other inmates, and on the allocation of prison resources generally? And, fourth, are ready alternatives for furthering the governmental interest available?[8]

Two years after *Turner v. Safley*, in *Thornburgh v. Abbott*, the Court restricted *Procunier v. Martinez* to regulating *outgoing* correspondence, finding that the needs of prison security justify a more deferential standard for prison regulations restricting incoming material, whether those incoming materials are correspondence from other prisoners, correspondence from nonprisoners, or outside publications.[9]

In *Beard v. Banks*, a plurality of the Supreme Court upheld "a Pennsylvania prison policy that 'denies newspapers, magazines, and photographs' to a group of specially dangerous and recalcitrant inmates."[10] These inmates were housed in Pennsylvania's Long Term Segregation Unit and one of the prison's penological rationales for its policy, which the plurality found to satisfy the four *Turner* factors, was to motivate better behavior on the part of the prisoners by providing them with an incentive to move back to the regular prison population.[11] Applying the four *Turner* factors to this rationale, the plurality found that (1) there was a logical connection between depriving inmates of newspapers and magazines and providing an incentive to improve behavior; (2) the Policy provided no alternatives to the deprivation of newspapers and magazines, but this was "not 'conclusive' of the reasonableness of the Policy"; (3) the impact of accommodating the asserted constitutional right would be negative; and (4) no alternative would "fully accommodate the prisoner's rights at *de minimis* cost to valid penological interests."[12] The plurality believed that its "real task in this case is not balancing these factors, but rather determining whether the Secretary shows more than simply a logical relation, that is, whether he shows a *reasonable* relation" between the policy and legitimate penological objections, as *Turner* requires.[13] The plurality concluded that he had. Justices Clarence Thomas and Antonin Scalia concurred in the result but would eliminate the *Turner* factors because they believe that "States are free to define and redefine all types of punishment,

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[6] 482 U.S. at 89. In *Overton v. Bazzetta,* 539 U.S. 126 (2003), the Court applied *Turner* to uphold various restrictions on visitation by children and by former inmates, and on all visitation except attorneys and members of the clergy for inmates with two or more substance-abuse violations; an inmate subject to the latter restriction could apply for reinstatement of visitation privileges after two years. "If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations." *Id.* at 137.

[7] 482 U.S. at 89.

[8] Beard v. Banks, 548 U.S. 521, 529 (2006) (citations and internal quotation marks omitted; this quotation quotes language from *Turner v. Safley*, 482 U.S. at 89–90).

[9] 490 U.S. 401, 411–14 (1989). *Thornburgh v. Abbott* noted that, if regulations deny prisoners publications on the basis of their content, but the grounds on which the regulations do so is content-neutral (for example, to protect prison security), then the regulations will be deemed neutral. *Id.* at 415–16.

[10] 548 U.S. 521, 524–25 (2006). This was a 4-2-2 decision, with Justice Samuel Alito, who had written the court of appeals decision, not participating.

[11] 548 U.S. at 531.

[12] 548 U.S. at 531–32.

[13] 548 U.S. at 533.

including imprisonment, to encompass various types of deprivation—*provided only that those deprivations are consistent with the Eighth Amendment*."[14]

Only two months after *Procunier v. Martinez*, the Court rejected a First Amendment challenge to regulations barring face-to-face media interviews with specific inmates.[15] Prison restrictions on such interviews implicate the First Amendment rights of prisoners, the Court held, but such rights must be balanced against "the legitimate penological objectives of the corrections system" and "internal security within the corrections facilities," taking into account available alternative means of communications, such as mail and "limited visits from members of [prisoners'] families, the clergy, their attorneys, and friends of prior acquaintance."[16]

While reaffirming "news gathering is not without its First Amendment protections,"[17] the Court held that the First Amendment did not impose on the government any affirmative obligation "to accord the press special access to information not shared by members of the public generally."[18] In *Houchins v. KQED*,[19] a broadcaster sued for access to a prison from which public and press alike were barred and as to which there was considerable controversy over conditions of incarceration. Following initiation of the suit, the administrator of the prison authorized limited public tours. The tours were open to the press, but cameras and recording devices were not permitted, there was no opportunity to talk to inmates, and the tours did not include the maximum security area about which much of the controversy centered. The Supreme Court overturned the injunction obtained in the lower courts, the plurality reiterating that the First Amendment does not "mandate[ ] a right of access to government information or sources of information within the government's control," and "until the political branches decree otherwise . . . the media have no special right of access to the Alameda County Jail different from or greater than that accorded the public generally."[20] Justice Potter Stewart, whose vote was necessary to the disposition of the case, agreed with the equal access holding but would have allowed the trial court to craft an injunction more narrowly drawn to protect the press's right to use cameras and recorders so as to enlarge public access to the information.[21]

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[14] 548 U.S. at 537 (Thomas, J., concurring), quoting *Overton v. Bazzetta*, 539 U.S. at 139 (Thomas, J., concurring) (emphasis originally in *Overton*).

[15] Pell v. Procunier, 417 U.S. 817 (1974).

[16] 417 U.S. at 822–25.

[17] Branzburg v. Hayes, 408 U.S. 665, 707 (1972), *quoted in* Pell v. Procunier, 417 U.S. 817, 833 (1974).

[18] 417 U.S. at 834. The holding was applied to federal prisons in *Saxbe v. Washington Post,* 417 U.S. 843 (1974).

[19] Houchins v. KQED,438 U.S. 1, 17 (1978). In this case, there was no majority opinion of the Court. A plurality opinion represented the views of only three Justices; two Justices did not participate, three Justices dissented, and one Justice concurred with views that departed somewhat from the plurality.

[20] 438 U.S. at 15–16.

[21] 438 U.S. at 18–19 (Stewart, J., concurring in the judgment).

Amdt1.7.9 Public Employee Speech and Government as Employer

Amdt1.7.9.1 Loyalty Oaths

First Amendment:

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

An area in which significant First Amendment issues are often raised is the establishment of loyalty-security standards for government employees. Such programs generally take one of two forms or may combine the two. First, government may establish a system investigating employees or prospective employees under standards relating to presumed loyalty. Second, government may require its employees or prospective employees to subscribe to a loyalty oath disclaiming belief in or advocacy of, or membership in an organization that stands for or advocates unlawful or disloyal action.

Following the Civil War, the state and federal governments adopted test oaths, which the Supreme Court generally voided as ex post facto laws and bills of attainder.[1] Accepting the state court construction that the law required each candidate to "make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government by *force or violence*,' and that he is not knowingly a member of an organization engaged in such an attempt," the Court unanimously sustained the provision in a one-paragraph per curiam opinion.[2] Less than two months later, the Court upheld a requirement that employees take an oath that they had not within a prescribed period advised, advocated, or taught the overthrow of government by unlawful means, nor been a member of an organization, with similar objectives; every employee was also required to swear that he was not and had not been a member of the Communist Party.[3] Writing for the Court, Justice Tom Clark perceived no problem with the inquiry into Communist Party membership but cautioned that no issue had been raised whether an employee who was or had been a member could be discharged merely for that reason.[4] With regard to the oath, the Court did not discuss First Amendment considerations but stressed that it believed the appropriate authorities would not construe the oath adversely against persons who were innocent of an organization's purpose during their affiliation, who had severed their associations upon knowledge of an organization's purposes, or who had been members of an organization at a time when it was not unlawfully engaged.[5] Otherwise, the oath requirement was valid as "a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty" and as being "reasonably designed to protect the integrity and competency of the service."[6]

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[1] Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867).

[2] Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951). In *Indiana Communist Party v. Whitcomb,* 414 U.S. 441 (1974), a requirement that parties and candidates seeking ballot space subscribe to a similar oath was voided because the oath's language did not comport with the advocacy standards of *Brandenburg v. Ohio,* 395 U.S. 444 (1969). Four Justices concurred more narrowly. 414 U.S. at 452 n.3. *See also* Whitcomb v. Communist Party of Indiana, 410 U.S. 976 (1973).

[3] Garner v. Board of Pub. Works, 341 U.S. 716 (1951). Justice Felix Frankfurter dissented in part on First Amendment grounds, *id.* at 724, Justice Harold Burton dissented in part, *id.* at 729, and Justices Hugo Black and William O. Douglas dissented completely, on bill of attainder grounds, *id.* at 731.

[4] *Id.* at 720. Justices Felix Frankfurter and Burton agreed with this ruling. *Id.* at 725–26, 729–30.

[5] *Id.* at 723–24.

[6] 341 U.S. at 720–21. Justice Felix Frankfurter objected that the oath placed upon the takers the burden of assuring themselves that every organization to which they belonged or had been affiliated with for a substantial period of time had not engaged in forbidden advocacy.

Amdt1.7.9.1
Loyalty Oaths

In the following Term, the Court sustained in *Adler v. Board of Education* a state statute disqualifying for government employment persons who advocated the overthrow of government by force or violence or persons who were members of organizations that so advocated.[7] The statute had been supplemented by a provision applicable to teachers calling for the drawing up of a list of organizations that advocated violent overthrow and making membership in any listed organization prima facie evidence of disqualification. Justice Sherman Minton observed that everyone had a right to assemble, speak, think, and believe as he pleased, but had no right to work for the state in its public school system except upon compliance with the state's reasonable terms. He stated: "If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not."[8] A state could deny employment based on a person's advocacy of overthrow of the government by force or violence or based on unexplained membership in an organization so advocating with knowledge of the advocacy.[9] With regard to the required list, the Justice observed that the state courts had interpreted the law to provide that a person could rebut the presumption attached to his mere membership.[10]

The same year, the Court invalidated an oath requirement, addressed to membership in the Communist Party and other proscribed organizations, which the state courts had interpreted to disqualify from employment "solely on the basis of organizational membership."[11] Stressing that membership might be innocent, that one might be unaware of an organization's aims, or that he might have severed a relationship upon learning of its aims, the Court struck the law down; one must be or have been a member with knowledge of illegal aims.[12] But subsequent cases reiterated the power of governmental agencies to inquire into the associational relationships of their employees for purposes of determining fitness and upheld dismissals for refusal to answer relevant questions.[13] In *Shelton v. Tucker*,[14] however, a 5-4 majority held that, although a state could inquire into the fitness and competence of its teachers, a requirement that every teacher annually list every organization to which he belonged or had belonged in the previous five years was invalid because it was too broad, bore no rational relationship to the state's interests, and had a considerable potential for abuse.

The Court relied on vagueness when loyalty oaths aimed at "subversives" next came before it. In *Cramp v. Board of Public Instruction*,[15] it unanimously held an oath too vague that required one to swear, among other things, that "I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party." Similarly, in *Baggett v. Bullitt*,[16] the Court struck down two oaths, one requiring teachers to swear that they "will by precept and example promote respect for the flag and the institutions of the United States of America and

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[7] Adler v. Board of Educ., 342 U.S. 485 (1952).

[8] 342 U.S. at 492.

[9] *Id.*

[10] *Id.* at 494–96.

[11] Wieman v. Updegraff, 344 U.S. 183, 190 (1952).

[12] *Id.* at 190–91.

[13] Beilan v. Board of Education, 357 U.S. 399 (1958); Lerner v. Casey, 357 U.S. 468 (1958); Nelson v. Cnty. of Los Angeles, 362 U.S. 1 (1960). *Compare* Slochower v. Bd. of Higher Educ., 350 U.S. 551 (1956). For the self-incrimination aspects of these cases, see Amdt5.4.3 General Protections Against Self-Incrimination Doctrine and Practice.

[14] 364 U.S. 479 (1960). "It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *Id.* at 485–86.

[15] 368 U.S. 278 (1961). For further proceedings on this oath, *see* Connell v. Higginbotham, 305 F. Supp. 445 (M.D. Fla. 1970), *aff'd in part and rev'd in part*, 403 U.S. 207 (1971). 377 U.S. 360 (1964).

[16] 377 U.S. 360 (1964). Justices Clark and John Harlan dissented. *Id. at 380.*

the State of Washington, reverence for law and order and undivided allegiance to the government," and the other requiring all state employees to swear, among other things, that they would not "aid in the commission of any act intended to overthrow, destroy, or alter or assist in the overthrow, destruction, or alteration" of government. Although couched in vagueness terms, the Court's opinion stressed that the vagueness was compounded by its effect on First Amendment rights and seemed to emphasize that the state could not deny employment to one simply because he unintentionally lent indirect aid to the cause of violent overthrow by engaging in lawful activities that he knew might add to the power of persons supporting illegal overthrow.[17]

More precisely drawn oaths survived vagueness attacks but fell before First Amendment objections in the next three cases. *Elfbrandt v. Russell*[18] involved an oath that as supplemented would have been violated by one who "knowingly and willfully becomes or remains a member of the communist party. . . or any other organization having for its purposes the overthrow by force or violence of the government" with "knowledge of said unlawful purpose of said organization." The law's blanketing in of "knowing but guiltless" membership was invalid, wrote Justice William O. Douglas for the Court, because one could be a knowing member but not subscribe to the illegal goals of the organization; moreover, it appeared that one must also have participated in the unlawful activities of the organization before public employment could be denied.[19] Next, in *Keyishian v. Board of Regents*,[20] the oath provisions sustained in *Adler*[21] were declared unconstitutional. A number of provisions were voided as vague,[22] but the Court held invalid a new provision making Communist Party membership prima facie evidence of disqualification for employment because the opportunity to rebut the presumption was too limited. It could be rebutted only by denying membership, denying knowledge of advocacy of illegal overthrow, or denying that the organization advocates illegal overthrow. But "legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations."[23] Similarly, in *Whitehill v. Elkins*,[24] an oath was voided because the Court thought it might include within its proscription innocent membership in an organization that advocated illegal overthrow of government.

Loyalty oath cases from the 1970s reflected the heightened constitutional protections announced in *Keyishian*. In *Connell v. Higginbotham*,[25] the Court invalidated an oath provision reading "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence" because the statute provided for summary dismissal of an employee refusing to take the oath, with no opportunity to explain that refusal. *Cole v. Richardson*[26] upheld a clause in an oath "that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence, or by any illegal or unconstitutional method" upon the construction that this clause was mere

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[17] 377 U.S. at 369–70.

[18] 384 U.S. 11 (1966) Justices Byron White, Clark, John Harlan and Potter Stewart dissented. *Id.* at 20.

[19] *Id.* at 16, 17, 19. "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities pose no threat, either as citizens or public employees." *Id.* at 17.

[20] 385 U.S. 589 (1967). Justices Clark, John Harlan, Potter Stewart, and Byron White dissented. *Id.* at 620.

[21] 342 U.S. 485 (1952).

[22] Keyishian v. Board of Regents, 385 U.S. 589, 597–604 (1967).

[23] *Id.* at 608. The statement here makes specific intent or active membership alternatives in addition to knowledge, whereas *Elfbrandt v. Russell,* 384 U.S. 11, 19 (1966), requires both in addition to knowledge.

[24] 389 U.S. 54 (1967). Justices John Harlan, Potter Stewart, and Byron White dissented. *Id.* at 62.

[25] 403 U.S. 207 (1971).

[26] 405 U.S. 676, 683–84 (1972).

"repetition, whether for emphasis or cadence," of the first part of the oath, which was a valid "uphold and defend" positive oath. More broadly, as *Keyishian* suggests and as discussed in subsequent essays, the Court has rejected the *Adler* rationale that public employment may be subject to unreasonable conditions because there is no right to public employment.[27] Instead, the controlling principle now is that government may not deny employment or other benefits on a basis that infringes a person's constitutionally protected interests.[28]

Amdt1.7.9.2 Political Activities and Government Employees

First Amendment:

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

Abolition of the "spoils system" in federal employment brought with it restrictions on political activities by federal employees. In 1876, federal employees were prohibited from requesting from, giving to, or receiving from any other federal employee money for political purposes, and the Civil Service Act of 1883 more broadly forbade civil service employees to use their official authority or influence to coerce political action of any person or to interfere with elections.[1] By the Hatch Act, federal employees, and many state employees as well, are forbidden to "take any active part in political management or in political campaigns."[2] As applied through the regulations and rulings of the Office of Personnel Management, formerly the Civil Service Commission, the Act prevents employees from running for public office, distributing campaign literature, playing an active role at political meetings, circulating nomination petitions, attending a political convention except as a spectator, publishing a letter soliciting votes for a candidate, and all similar activity.[3] The question was whether government, which may not prohibit citizens in general from engaging in these activities, could nonetheless so control the off-duty activities of its own employees.

In *United Public Workers v. Mitchell*,[4] the Court answered in the affirmative. While the Court refused to consider the claims of persons who had not yet engaged in forbidden political activities, it ruled against a mechanical employee of the Mint who had done so. The Court's opinion, by Justice Stanley Reed, recognized that the restrictions of political activities imposed by the Act did in some measure impair First Amendment and other constitutional rights,[5] but it based its decision upon the established principle that no right is absolute. The standard by

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[27] *Keyishian*, 385 U.S. at 605–06.

[28] Perry v. Sindermann, 408 U.S. 593, 597 (1972) (citation omitted). A finding, however, that protected expression or conduct played a substantial part in the decision to dismiss or punish does not conclude the case; the employer may show by a preponderance of the evidence that the same decision would have been reached in the absence of the protected expression or conduct. Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 416 (1979).

[1] 19 Stat. 143, § 6, 18 U.S.C. §§ 602–03, sustained in *Ex parte* Curtis, 106 U.S. 371 (1882); 22 Stat. 403, as amended, 5 U.S.C. § 7323.

[2] 53 Stat. 1147 § 9(a), (1939), as amended, 5 U.S.C. § 7324(a)(2). By 54 Stat. 767 (1940), as amended, 5 U.S.C. §§ 1501–08, the restrictions on political activity were extended to state and local governmental employees working in programs financed in whole or in part with federal funds. This provision was sustained against federalism challenges in Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947). All the states have adopted laws patterned on the Hatch Act. *See* Broadrick v. Oklahoma, 413 U.S. 601, 604 (1973).

[3] The Commission on Political Activity of Government Personnel, Findings and Recommendations 11, 19–24 (Washington: 1968).

[4] 330 U.S. 75, 94–104 (1947)

[5] *Id.* at 94–95.

which the Court judged the validity of the permissible impairment of First Amendment rights was a due process standard of reasonableness.[6] Thus, changes in the standards of judging incidental restrictions on expression suggested the possibility of a reconsideration of *Mitchell*.[7]

In *Civil Service Commission v. National Association of Letter Carriers*, however, a divided Court, reaffirming *Mitchell*, sustained the Act's limitations upon political activity against a range of First Amendment challenges.[8] The Court emphasized that the interest of the government in forbidding partisan political activities by its employees was so substantial that it overrode the rights of those employees to engage in political activities and association.[9] The issue in *Letter Carriers*, however, was whether the language that Congress had enacted, forbidding employees to take "an active part in political management or in political campaigns,"[10] was unconstitutional on its face, either because the statute was too imprecise to allow government employees to determine what was forbidden and what was permitted, or because the statute covered conduct that Congress could not forbid as well as conduct subject to prohibition or regulation. With respect to vagueness, the plaintiffs contended and the lower court had held that the quoted proscription was inadequate to provide sufficient guidance and that the only further elucidation Congress had provided was in a section stating that the forbidden activities were the same activities that the Commission had as of 1940, and reaching back to 1883, "determined are at the time of the passage of this act prohibited on the part of employees. . .by the provisions of the civil-service rules. . . ."[11] This language had been included, it was contended, to deprive the Commission of power to alter thousands of rulings it had made that were not available to employees and that were in any event mutually inconsistent and too broad.

The Court held, on the contrary, that Congress had intended to confine the Commission to the boundaries of its rulings as of 1940 but had further intended the Commission by a process of case-by-case adjudication to flesh out the prohibition and to give content to it. The Commission had done that. It had regularly summarized in understandable terms the rules that it applied, and it was authorized as well to issue advisory opinions to employees uncertain of the propriety of contemplated conduct. "[T]here are limitations in the English language with respect to being both specific and manageably brief," said the Court, but it thought the prohibitions as elaborated in Commission regulations and rulings were "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interests."[12] There were conflicts, the Court conceded, between some of the things forbidden and some of the protected expressive activities, but these were at most marginal. Thus, some conduct arguably protected did, under some circumstances, so partake of partisan activities as to be properly proscribable. But the Court would not invalidate the entire statute for this degree of overbreadth.[13] Subsequently, in *Bush v. Lucas*[14]

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[6] *Id.* at 101–02.

[7] The Act was held unconstitutional by a divided three-judge district court. Nat'l Ass'n of Letter Carriers v. Civil Serv. Comm'n, 346 F. Supp. 578 (D.D.C. 1972).

[8] 413 U.S. 548 (1973). In *Broadrick v. Oklahoma,* 413 U.S. 601 (1973), the Court refused to consider overbreadth attacks on a state statute of much greater coverage because the plaintiffs had engaged in conduct that the statute clearly could constitutionally proscribe.

[9] The interests the Court recognized as served by the proscription on partisan activities were (1) the interest in the efficient and fair operation of governmental activities and the appearance of such operation, (2) the interest in fair elections, and (3) the interest in protecting employees from improper political influences. 413 U.S. at 557–67.

[10] *Id.* at 570 n.17.

[11] *Id.*.

[12] *Id.* at 578–79.

[13] *Id.* at 580–81.

[14] 462 U.S. 367, 385 (1983).

the Court held that the civil service laws and regulations constitute a sufficiently "elaborate, comprehensive scheme" to afford federal employees an adequate remedy for deprivation of First Amendment rights as a result of disciplinary actions by supervisors, and that therefore there is no need to create an additional judicial remedy for the constitutional violation.

The Court has also addressed the balance between elected officials' First Amendment rights to speak about matters of public concern and elected bodies' rights to censure objectionable speech. In *Houston Community College System v. Wilson*, a community college Board of Trustees censured one of its elected members after he made public comments that the Board found "inappropriate," "reprehensible," and "not consistent with the best interests of the College."[15] The Board member claimed the censure violated his First Amendment right to be free from government retaliation for engaging in protected speech.[16] While acknowledging that elected representatives, like the Board member, have the right to speak freely on government policy, the Court recognized that the censure issued by the other elected representatives was also a form of protected speech.[17] According to the Court, the Board member could not use his First Amendment rights "as a weapon to silence other representatives seeking to do the same."[18] Although it concluded that the censure at issue did not violate the First Amendment, the Court explained its decision was a "narrow one" involving only a First Amendment retaliation claim regarding the "censure of one member of an elected body by other members of the same body."[19] As a result, claims involving other forms of discipline or punishment, such as expulsion or exclusion, may produce a different outcome.[20]

Amdt1.7.9.3 Honoraria and Government Employees

First Amendment:

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

In *United States v. National Treasury Employees Union (NTEU)*,[1] the Court struck down an honoraria ban as applied to lower-level employees of the Federal Government. The Court distinguished the honoraria ban from the Hatch Act on the grounds that the honoraria ban suppressed employees' right to free expression while the Hatch Act sought to protect that right.[2] The Court also observed that there was no evidence of improprieties in the acceptance of honoraria by members of the plaintiff class of federal employees.[3] The Court emphasized further difficulties with the "crudely crafted" honoraria ban: it was limited to expressive activities and had no application to other sources of outside income, it applied when neither the subjects of speeches and articles nor the persons or groups paying for them bore any connection to the employee's job responsibilities, and it exempted a "series" of speeches or articles without

[15] 20-804, slip op. at 2 (U.S. March 24, 2022).

[16] *Id*. at 4.

[17] *Id.* at 9.

[18] *Id*.

[19] *Id.* at 13.

[20] *Id*.

[1] 513 U.S. 454 (1995).

[2] *See id.* at 471.

[3] *See id.* The plaintiff class consisted of all Executive Branch employees below grade GS-16. Also covered by the ban were senior executives, Members of Congress, and other federal officers, but the possibility of improprieties by these groups did not justify application of the ban to "the vast rank and file of federal employees below grade GS-16." *Id.* at 472.

also exempting individual articles and speeches. These "anomalies" led the Court to conclude that the "speculative benefits" of the ban were insufficient to justify the burdens it imposed on expressive activities.[4]

Amdt1.7.9.4 Pickering Balancing Test for Government Employee Speech

First Amendment:

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

While the government does not have complete freedom to restrict the speech of its employees, it does have some power. "[I]t cannot be gainsaid," the Court said in *Pickering v. Board of Education*, "that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[1] *Pickering* concerned the dismissal of a high school teacher who had written a critical letter to a local newspaper reflecting on the administration of the school system. The letter also contained several factual errors. "The problem in any case," Justice Thurgood Marshall wrote for the Court, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[2] The Court's analysis suggested some factors that might be relevant in conducting the balancing test. Dismissal of a public employee for criticism of his superiors was improper, the Court indicated, where the relationship of employee to superior was not so close, such as day-to-day personal contact, that problems of discipline or harmony among coworkers, or problems of personal loyalty and confidence, would arise.[3] The school board had not shown that any harm had resulted from the false statements in the letter, and it could not proceed on the assumption that the false statements were per se harmful, inasmuch as the statements primarily reflected a difference of opinion between the teacher and the board about the allocation of funds. Moreover, the allocation of funds is a matter of important public concern about which teachers have informed and definite opinions of which the community should be aware. The *Pickering* Court stated: "In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[4]

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[4] *Id.* at 477.

[1] 391 U.S. 563, 568 (1968).

[2] *Id.* at 568.

[3] *Id.* at 568–70. *Contrast* Connick v. Myers, 461 U.S. 138 (1983), where *Pickering* was distinguished on the basis that the employee, an assistant district attorney, worked in an environment where a close personal relationship involving loyalty and harmony was important. "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Id.* at 151–52.

[4] 391 U.S. at 573. The Court extended *Pickering* to private communications of an employee's views to the employer in *Givhan v. Western Line Consol. Sch. Dist.,* 439 U.S. 410 (1979), although it recognized that different considerations might arise in different contexts. That is, with respect to public speech, content may be determinative in weighing impairment of the government's interests, whereas, with private speech, as "[w]hen a government employee personally confronts his immediate superior,. . .the manner, time, and place in which it is delivered" may also be relevant. *Id.* at 415 n.4. As discussed below, however, in *Garcetti v. Ceballos,* 547 U.S. 410 (2006), the Court held that there is no First Amendment protection at all for government employees when they make statements pursuant to their official duties.

Combining a balancing test of governmental interest and employee rights with a purportedly limiting statutory construction, the Court, in *Arnett v. Kennedy*,[5] sustained the constitutionality of a federal law that authorized the removal or suspension without pay of an employee "for such cause as will promote the efficiency of the service" when the "cause" cited concerned speech by an employee. The employee charged that his superiors had made an offer of a bribe to a private person. The quoted statutory phrase, the Court held, "is without doubt intended to authorize dismissal for speech as well as other conduct."[6] But, referencing its *Letter Carriers* analysis,[7] it ruled that the authority conferred was not impermissibly vague, inasmuch as it is not possible to encompass within a statute all the myriad situations that arise in the course of employment, and inasmuch as the language used was informed by developed principles of agency adjudication coupled with a procedure for obtaining legal counsel from the agency on the interpretation of the law.[8] Nor was the language overbroad, continued the Court, because it "proscribes only that public speech which improperly damages and impairs the reputation and efficiency of the employing agency, and it thus imposes no greater controls on the behavior of federal employees than are necessary for the protection of the government as an employer. . . .We hold that the language 'such cause as will promote the efficiency of the service' in the Act excludes constitutionally protected speech, and that the statute is therefore not overbroad."[9]

The Court clarified the *Pickering* inquiry in *Connick v. Myers*,[10] involving what the Court characterized, in the main, as an employee grievance rather than an effort to inform the public on a matter of public concern. The employee, an assistant district attorney involved in a dispute with her supervisor over transfer to a different section, was fired for insubordination after she circulated a questionnaire among her peers soliciting views on matters relating to employee morale. The Court found this firing permissible, stating: "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[11] Whether an employee's speech addresses a matter of public concern, the Court indicated, must be determined not only by its content, but also by its form and context.[12] Because one aspect of the employee's speech did raise matters of public concern, *Connick* also applied *Pickering*'s balancing test, holding that "a wide degree of deference is appropriate" when "close working relationships" between employer and employee are involved.[13] The issue of public concern is not only a threshold inquiry, but, under *Connick*, still figures in the balancing of interests: as the *Connick* Court stated, "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression" and its importance to the public.[14]

On the other hand, the Court has indicated that an employee's speech may be protected as relating to matters of public concern even in the absence of any effort or intent to inform the

[5] 416 U.S. 134 (1974). The quoted language is from 5 U.S.C. § 7501(a).

[6] 416 U.S. at 160.

[7] Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 578–79 (1973).

[8] Arnett v. Kennedy, 416 U.S. 134, 158–64 (1974).

[9] 416 U.S. at 162.

[10] 461 U.S. 138 (1983).

[11] *Id.* at 146.

[12] *Id.* at 147–148.

[13] *Id.* at 151–52.

[14] *Id.* at 150.

public.[15] In *Rankin v. McPherson*[16] the Court held protected an employee's comment, made to a co-worker upon hearing of an unsuccessful attempt to assassinate the President, and in a context critical of the President's policies—If they go for him again, I hope they get him. Indeed, the Court in *McPherson* emphasized the clerical employee's lack of contact with the public in concluding that the employer's interest in maintaining the efficient operation of the office (including public confidence and good will) was insufficient to outweigh the employee's First Amendment rights.[17]

In *City of San Diego v. Roe*,[18] the Court held that a police department could fire a police officer who sold a video on the adults-only section of eBay that showed him stripping off a police uniform and masturbating. The Court found that the officer's "expression does not qualify as a matter of public concern. . . and *Pickering* balancing does not come into play."[19] The Court also noted that the officer's speech, unlike federal employees' speech in *United States v. National Treasury Employees Union (NTEU)*,[20] "was linked to his official status as a police officer, and designed to exploit his employer's image," and therefore "was detrimental to the mission and functions of his employer."[21] The Court, therefore, had "little difficulty in concluding that the City was not barred from terminating Roe under either line of cases [that is, *Pickering* or *NTEU*]."[22]

In *Garcetti v. Ceballos*, the Court held that there is no First Amendment protection—*Pickering* balancing is not to be applied—"when public employees make statements pursuant to their official duties," even if those statements are about matters of public concern.[23] In this case, a deputy district attorney had presented his supervisor with a memo expressing his concern that an affidavit that the office had used to obtain a search warrant contained serious misrepresentations. The deputy district attorney claimed that he was subjected to retaliatory employment actions, and he sued. The Supreme Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[24] The fact that the employee's speech occurred inside his office, and the fact that the speech concerned the subject matter of his employment, were not sufficient to foreclose First Amendment protection.[25] Rather, the "controlling factor" was "that his expressions were made pursuant to his duties."[26]

In distinguishing between wholly unprotected "employee speech" and quasi-protected "citizen speech," sworn testimony outside of the scope of a public employee's ordinary job

[15] This conclusion was implicit in *Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979), which the Court characterized in *Connick* as involving "an employee speak[ing] out as a citizen on a matter of general concern, not tied to a personal employment dispute, but. . .[speaking] privately." 461 U.S. at 148, n.8

[16] 483 U.S. 378 (1987).

[17] "Where. . .an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful function from that employee's private speech is minimal." *Id.* at 390–91.

[18] 543 U.S. 77 (2004) (per curiam).

[19] *Id.* at 84.

[20] 513 U.S. 454 (1995). For discussion on United States v. NTEU, see Amdt1.7.9.3 Honoraria and Government Employees.

[21] City of San Diego v. Roe, 543 U.S. 77, 84 (2004) (per curiam).

[22] *Id.* at 80.

[23] 547 U.S. 410, 421 (2006).

[24] *Id.* at 421. However, "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id.* at 419. Such necessity, however, may be based on a "common-sense conclusion" rather than on "empirical data." Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 551 U.S. 291, 300 (2007) (citing *Garcetti*).

[25] *Id.* at 421.

[26] *Id.*

duties appears to be "citizen speech." In *Lane v. Franks*,[27] the director of a state government program for underprivileged youth was terminated from his job following his testimony regarding the alleged fraudulent activities of a state legislator that occurred during the legislator's employment in the government program. The employee challenged the termination on First Amendment grounds.

The Court held generally that testimony by a subpoenaed public employee made outside the scope of his ordinary job duties is to be treated as speech by a citizen, subject to the *Pickering-Connick* balancing test.[28] The Court noted that "[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation to the court and society at large, to tell the truth."[29] In so holding, the Court confirmed that *Garcetti*'s holding is limited to speech made in accordance with an employee's official job duties and does not extend to speech that merely concerns information learned during that employment. The Court in *Lane* ultimately found that the plaintiff's speech deserved protection under the *Pickering-Connick* balancing test because the speech was both a matter of public concern (the speech was testimony about misuse of public funds) and the testimony did not raise concerns for the government employer.[30]

In a 2022 case, the Supreme Court expressly connected the issue of public employee speech to the related issue of government speech,[31] saying that the Free Speech Clause question in *Kennedy v. Bremerton School District* turned on whether a football coach had acted "in his capacity as a private citizen," or whether instead his actions "amount[ed] to government speech attributable to" his public employer.[32] The school had disciplined the coach for praying at the 50-yard line immediately after football games, while he was still on duty.[33] The parties agreed that the coach's prayer implicated a matter of public concern, but the school argued his speech was unprotected under *Pickering* because he was speaking in his official capacity as a public employee.[34] The Court held instead that the coach's prayers were private speech, stating the speech was not within the scope of his ordinary duties and he "was not seeking to convey a government-created message."[35] The Court noted further that during this postgame period, employees "were free to attend briefly to [other] personal matters" and students were engaged in other activities, suggesting the coach's "prayers were not delivered as an address to the team, but instead in his capacity as a private citizen."[36] Although the coach was on duty and his prayers were delivered at his workplace, these facts were not dispositive to the analysis.[37] Ultimately, the Court held that the school had not met its burden to justify the restrictions on the coach's religious speech.[38]

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[27] 573 U.S. 228 (2014).

[28] *Id.* at 238.

[29] *Id.*

[30] *Id.* at 241–42. The Court, however, held that because no relevant precedent in the lower court or in the Supreme Court clearly established that the government employer could not fire an employee because of testimony the employee gave, the defendant was entitled to qualified immunity. *Id.* at 243.

[31] *See* Amdt1.7.8.2 Government Speech and Government as Speaker.

[32] Kennedy v. Bremerton Sch. Dist., No. 21-418, slip op. at 16 (U.S. June 27, 2022).

[33] *Id.* at 7.

[34] *See id.* at 16.

[35] *Id.* at 17.

[36] *Id.* at 17–18.

[37] *Id*. *See also id.* at 18 (suggesting it would be inappropriate to treat "everything teachers and coaches say in the workplace as government speech subject to government control").

[38] *See id.* at 19–20. This aspect of the Court's ruling, which turned on an interpretation of the First Amendment's Establishment Clause, is discussed .

The protections applicable to government employees have been extended to independent government contractors, the Court announcing that "the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of their protection."[39]

In sum, although a public employer may not muzzle its employees or penalize them for their expressions and associations to the same extent that a private employer can,[40] the public employer nonetheless has broad leeway in restricting employee speech. If the employee speech does not relate to a matter of "public concern," then *Connick* applies and the employer is largely free of constitutional restraint.[41] If the speech does relate to a matter of public concern, then unless the speech was made by an employee pursuant to his duties, *Pickering*'s balancing test is applied, with the governmental interests in efficiency, workplace harmony, and the satisfactory performance of the employee's duties[42] balanced against the employee's First Amendment rights.[43] Although the general approach is easy to describe, it has proven difficult to apply.[44] The First Amendment, however, does not stand alone in protecting the speech of public employees; statutory protections for "whistleblowers" add to the mix.[45]

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[39] Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 673 (1996). *See also* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 715 (1996) (government may not "retaliate[ ] against a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance").

[40] *See, e.g.*, Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980) (political patronage systems impermissibly infringe protected belief and associational rights of employees); Madison Sch. Dist. v. WERC, 429 U.S. 167 (1976) (school teacher may not be prevented from speaking at a public meeting in opposition to position advanced by union with exclusive representation rights). The public employer may, as may private employers, permit collective bargaining and confer on representatives of its employees the right of exclusive representation, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 223–32 (1977), but the fact that its employees may speak does not compel government to listen to them. *See* Smith v. Arkansas State Highway Emps., 441 U.S. 463 (1979) (employees have right to associate to present their positions to their employer but the employer is not constitutionally required to engage in collective bargaining). *See also* Minnesota State Bd. for Cmty. Coll. v. Knight, 465 U.S. 271 (1984) (public employees not members of union have no First Amendment right to meet separately with public employers compelled by state law to "meet and confer" with exclusive bargaining representative). Government may also inquire into the fitness of its employees and potential employees, but it must do so in a manner that does not needlessly endanger the expression and associational rights of those persons. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479 (1969).

[41] In *Connick*, the Court noted that it did not suggest "that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment." Rather, it was beyond First Amendment protection "absent the most unusual of circumstances." Connick v. Myers, 461 U.S. 138, 147 (1983). In *Ceballos*, however, the Court, citing *Connick* at 147, wrote that, if an employee did not speak as a citizen on a matter of public concern, then "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

[42] In some contexts, the governmental interest is more far-reaching. *See* Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (interest in protecting secrecy of foreign intelligence sources).

[43] The Court stated in *Janus v. American Federation of State, County, and Municipal Employees, Council 31,* No. 16-1466, slip op. at 23–24 (U.S. June 27, 2018), that this analysis "requires modification" when a court considers "general rules that affect broad categories of employees." In such a case, "the government must shoulder a correspondingly 'heav[ier]' burden and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights." *Id.* at 24 (quoting United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 466 (1995)) (alteration in original).

[44] In *Waters v. Churchill,* 511 U.S. 661 (1994), a plurality of a divided Court concluded that a public employer does not violate the First Amendment if the employer (1) had reasonably believed that the employee's conversation involved personal matters and (2) dismissed the employee because of that reasonable belief, even if the belief was mistaken. *Id.* at 679–80 (plurality opinion) (O'Connor, J., joined by Rehnquist, C.J., Souter and Ginsburg, JJ.). More than two decades later, a six-Justice majority approvingly cited to the plurality opinion from *Waters*, concluding that the employer's motive is dispositive in determining whether a public employee's First Amendment rights had been violated as a result of the employer's conduct. *See* Heffernan v. City of Paterson, 578 U.S. 266, 272 (2016). In so doing, the Court held that the converse of the situation in *Waters* —a public employer's firing of an employee based on the mistaken belief that the employee *had* engaged in activity *protected* by the First Amendment—was actionable as a violation of the Constitution. *See id.* ("After all, in the law, what is sauce for the goose is normally sauce for the gander."). Put another way, when an employer demotes an employee to prevent the employee from engaging in protected political activity, the employee is entitled to challenge that unlawful action under the First Amendment, "even if. . .the employer makes a factual mistake about the employee's behavior." *Id.* at 273. The Court concluded that the employer's motivation is

Amdt1.7.10 Media Regulation

Amdt1.7.10.1 Overview of Media Regulation

First Amendment:

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

The protections of the First Amendment extend regardless of the medium of expression—speech will remain constitutionally protected whether it is communicated in a park, in a newspaper, or in a movie.[1] Nonetheless, the standards for assessing First Amendment protections may vary according to the medium of expression.[2] In particular, as discussed in the following essays, the Supreme Court has recognized that "differential treatment" of speech may sometimes be "'justified by some special characteristic of' the particular medium being regulated."[3] Further, although the Supreme Court has recognized that both the Free Speech and Free Press Clauses protect media outlets,[4] such organizations are not relieved from complying with generally applicable laws simply because such laws may have incidental effects on the exercise of free speech rights.[5]

Amdt1.7.10.2 Taxation of Media

First Amendment:

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

The First Amendment often requires heightened scrutiny of restrictions that target or disfavor the media. For example, the Supreme Court has invalidated taxes that single out media organizations for payment. In *Grosjean v. American Press Co.*, while recognizing that newspapers are not "immune from any of the ordinary forms of taxation for support of the government," the Court voided a state 2% tax on the gross receipts of advertising in newspapers with a circulation exceeding 20,000 copies a week.[1] In the Court's view, the tax was analogous to the eighteent-century English practice of imposing advertising and stamp taxes on newspapers for the express purpose of pricing the opposition penny press beyond the means of the mass of the population.[2] The tax at issue focused exclusively upon newspapers, it

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central with respect to public employee speech issues because of (1) the text of the First Amendment—which "focus[es] upon the activity of the Government"; and (2) the underlying purposes of the public employee speech doctrine, which is to prevent the chilling effect that results when an employee is discharged for having engaged in protected activity. *Id.* at 273–74.

[45] *See, e.g.*, Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16.

[1] *See*, *e.g.*, Joseph Burstyn v. Wilson, 343 U.S. 495, 503 (1952) (noting that although each "method of expression tends to present its own peculiar problems . . . . the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary").

[2] *See*, *e.g.*, Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) ("Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.").

[3] Turner Broad. Sys. v. FCC, 512 U.S. 622, 660–61 (1994) (quoting Minn. Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585 (1983)).

[4] *See*, *e.g.*, Grosjean v. Am. Press Co., 297 U.S. 233, 244 (1936); *see also* Amdt1.9.1 Overview of Freedom of the Press.

[5] *See* Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991).

[1] Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

[2] 297 U.S. at 245–48.

imposed a serious burden on the distribution of news to the public, and it appeared to be a discriminatorily selective tax aimed almost solely at the opposition to the state administration.[3] Combined with the standard that government may not impose a tax as a prior restraint upon the exercise of a constitutional right itself,[4] these tests seem to permit general business taxes upon receipts of businesses engaged in communicating protected expression without raising any First Amendment issues.[5]

Ordinarily, a tax singling out the press for differential treatment is highly suspect, and creates a heavy burden of justification on the state. This is so, the Court explained in 1983, in part because "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression."[6] The Court said the state's interest in raising revenue was not sufficient justification for differential treatment of the press, where the state had alternative means to achieve the same interest. Moreover, the Court refused to adopt a rule permitting analysis of the "effective burden" imposed by a differential tax; even if the current effective tax burden could be measured and upheld, the threat of increasing the burden on the press might have "censorial effects," and "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation."[7]

A tax that targets specific subgroups within a segment of the press for differential treatment can also trigger heightened constitutional scrutiny. An Arkansas sales tax exemption for newspapers and for "religious, professional, trade, and sports journals" published within the state was struck down as an invalid content-based regulation of the press.[8] Entirely as a result of content, some magazines were treated less favorably than others. The measure was viewed as not narrowly tailored to achieve allegedly "compelling" state interests such as raising revenue, encouraging "fledgling" publishers, and fostering communications.[9]

In 1991, the Court upheld a state tax that discriminated among different components of the communications media on a content-neutral basis, proclaiming that "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas."[10]

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[3] 297 U.S. at 250–51. The Court distinguished *Grosjean* on this latter basis in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575 (1983).

[4] Murdock v. Pennsylvania, 319 U.S. 105 (1943) (ruling license tax operating as a prior restraint on distribution of religious material unconstitutional); Follett v. McCormick, 321 U.S. 573 (1944) (same). For further discussion of these cases, see Amdt1.4.3.1 Laws Neutral to Religious Practice during the 1940s and 1950s.

[5] *See* Cammarano v. United States, 358 U.S. 498 (1959) (no First Amendment violation to deny business expense tax deduction for expenses incurred in lobbying about measure affecting one's business); Leathers v. Medlock, 499 U.S. 439 (1991) (no First Amendment violation in applying general gross receipts tax to cable television services while exempting other communications media).

[6] Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983) (invalidating a Minnesota use tax on the cost of paper and ink products used in a publication, and exempting the first $100,000 of such costs each calendar year; Star & Tribune paid roughly two-thirds of all revenues the state raised by the tax). The Court seemed less concerned, however, when the affected group within the press was not so small, upholding application of a gross receipts tax to cable television services even though other segments of the communications media were exempted. Leathers v. Medlock, 499 U.S. 439 (1991).

[7] 460 U.S. at 588, 589.

[8] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987). For a discussion of general First Amendment treatment of content-based speech regulation, see Amdt1.7.5.1 Overview of Categorical Approach to Restricting Speech.

[9] 481 U.S. at 231–32.

[10] Leathers v. Medlock, 499 U.S. 439, 453 (1991) (tax applied to all cable television systems within the state, but not to other segments of the communications media).

The general principle that government may not impose a financial burden based on the content of speech underlay the Court's invalidation of New York's "Son of Sam" law, which provided that a criminal's income from publications describing his crime was to be placed in escrow and made available to victims of the crime.[11] Although the Court recognized a compelling state interest in ensuring that criminals do not profit from their crimes, and in compensating crime victims, it found that the statute was not narrowly tailored to those ends. The statute applied only to income derived from speech, not to income from other sources, and it was significantly overinclusive because it reached a wide range of literature (for example, the *Confessions of Saint Augustine* and Thoreau's *Civil Disobedience*) "that did not enable a criminal to profit from his crime while a victim remains uncompensated."[12]

Amdt1.7.10.3 Labor and Antitrust Regulation of Media

First Amendment:

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

Just as newspapers and other communications businesses are subject to nondiscriminatory taxation, they are entitled to no immunity from the application of general laws regulating their relations with their employees and prescribing wage and hour standards. In *Associated Press v. NLRB*,[1] application of the National Labor Relations Act to a newsgathering agency was found to raise no constitutional problem. The Court explained that "[t]he publisher of a newspaper has no special immunity from the application of general laws," and noted that the federal law did not interfere with "the impartial distribution of news." Similarly, the Court has found no problem with requiring newspapers to pay minimum wages and observe maximum hours.[2]

In another case, the Court rejected a First Amendment challenge to using antitrust laws to break up restraints on competition in the newsgathering and publishing field.[3] The Court suggested that antitrust regulation could *serve* First Amendment purposes—protecting press freedom by promoting "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."[4] Thus, both newspapers and broadcasters, as well as other such industries, may not engage in monopolistic and other anticompetitive activities free of the possibility of antitrust law attack,[5] even if such activities might promote speech.[6]

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[11] Simon & Schuster v. New York Crime Victims Bd., 502 U.S. 105 (1991).

[12] 502 U.S. at 122.

[1] 301 U.S. 103, 132 (1937).

[2] Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

[3] Associated Press v. United States, 326 U.S. 1, 7, 20 (1945).

[4] 326 U.S. at 20.

[5] Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (refusal of newspaper publisher who enjoyed a substantial monopoly to sell advertising to persons also advertising over a competing radio station violated antitrust laws); United States v. Radio Corp. of America, 358 U.S. 334 (1959) (FCC approval no bar to antitrust suit); United States v. Greater Buffalo Press, 402 U.S. 549 (1971) (monopolization of color comic supplements). *See also* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (upholding FCC rules prospectively barring, and in some instances requiring divesting to prevent, the common ownership of a radio or television broadcast station and a daily newspaper located in the same community).

[6] Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) (pooling arrangement between two newspapers violated antitrust laws; First Amendment argument that one paper will fail if arrangement is outlawed rejected). In

Amdt1.7.10.4 Broadcast Radio and Television

First Amendment:

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

Because there are a limited number of broadcast frequencies for radio and non-cable television use, the Federal Government licenses access to these frequencies, permitting some applicants to use them and denying the greater number of applicants such permission. Even though this licensing system is in form a variety of prior restraint, the Court has held that it does not present a First Amendment issue because of the unique characteristic of broadcast scarcity.[1] Thus, the Federal Communications Commission (FCC) has broad authority to determine the right of access to broadcasting,[2] although, to avoid heightened constitutional scrutiny, the regulation must be exercised in a manner that is neutral with regard to the content of the materials broadcast.[3]

In *Red Lion Broadcasting Co. v. FCC*, the Court upheld an FCC regulation that required broadcasters to afford persons an opportunity to reply if they were attacked on the air on the basis of their "honesty, character, integrity or like personal qualities," or if they were legally qualified candidates and a broadcast editorial endorsed their opponent or opposed them.[4] In *Red Lion*, Justice Byron White explained that "differences in the characteristics of [various] media justify differences in First Amendment standards applied to them."[5] In contrast to speaking or publishing, the Court noted that broadcast frequencies are limited and some few must be given the privilege over others. The Court held that a particular licensee, however, has no First Amendment right to hold that license and his exclusive privilege may be qualified. The Court ruled that the government could require that a licensee to "conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."[6] Furthermore, Justice Byron White explained that by helping expand access to different ideas, these restrictions furthered the "collective right" of the viewers and listeners, "to have the medium function consistently with the ends and purposes of the First Amendment."[7] The broadcasters had argued that, if they were required to provide equal time at their expense to

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response to this decision, Congress enacted the Newspaper Preservation Act to sanction certain joint arrangements where one paper is in danger of failing. 84 Stat. 466 (1970), 15 U.S.C. §§ 1801–1804.

[1] NBC v. United States, 319 U.S. 190, 226–27 (1943) (saying "[t]he right of free speech does not include . . . the right to use the facilities of radio without a license," but noting that a "different" issue would be presented if Congress had authorized licensing on "the basis of [applicants'] political, economic or social views, or . . . any other capricious basis"); *accord* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375–79, 387–89 (1969); FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 798–802 (1978).

[2] NBC v. United States, 319 U.S. 190 (1943); Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933); FCC v. Pottsville, 309 U.S. 134 (1940); FCC v. ABC, 347 U.S. 284 (1954); Farmers Union v. WDAY, 360 U.S. 525 (1958).

[3] "But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views or upon any other capricious basis. If it did, or if the Commission by these regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different." NBC v. United States, 319 U.S. 190, 226 (1943).

[4] 395 U.S. 367, 373 (1969). "The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine. . . ." *Id.* at 369. The two issues passed on in *Red Lion* were integral parts of the doctrine.

[5] 395 U.S. at 386.

[6] 395 U.S. at 389.

[7] 395 U.S. at 390.

persons attacked and to points of view different from those expressed on the air, expression would be curbed through self-censorship, for fear of controversy and economic loss. Justice Byron White thought this possibility "at best speculative," but if it should materialize "the Commission is not powerless to insist that they give adequate and fair attention to public issues."[8]

In *Columbia Broadcasting System v. Democratic National Committee*,[9] the Court rejected claims of political groups that a broadcaster's policy of not running "editorial" advertisements violated the First Amendment. Though it declined to require broadcaster access based on the First Amendment or existing federal law, the Court left open the possibility that "at some future date Congress or the [FCC]—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable."[10] Consequently, in *CBS v. FCC*,[11] the Court upheld a federal law requiring "reasonable access" to broadcast stations for candidates seeking federal elective office. The constitutional analysis restated the spectrum scarcity rationale and the role of the broadcasters as fiduciaries for the public interest.

In *FCC v. League of Women Voters*,[12] the Court took the same general approach to governmental regulation of broadcasting, but struck down a total ban on editorializing by stations receiving public funding. In summarizing the principles guiding analysis in this area, the Court reaffirmed that Congress may regulate in ways that would be impermissible in other contexts, but indicated that broadcasters are entitled to greater protection than may have been suggested by *Red Lion*, saying broadcast "restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues."[13] The Court said that "in sharp contrast to the restrictions upheld in *Red Lion* or in [*CBS v. FCC*], which left room for editorial discretion and simply required broadcast editors to grant others access to the microphone, [the challenged federal law] directly prohibits the broadcaster from speaking out on public issues even in a balanced and fair manner."[14] The ban on all editorializing was deemed too severe and restrictive a means of accomplishing the governmental purposes—protecting public broadcasting stations from being coerced, through threat or fear of withdrawal of public funding, into becoming "vehicles for governmental propagandizing," and also keeping the stations "from becoming convenient targets for capture by private interest groups wishing to express their own partisan viewpoints."[15] Expression of editorial opinion was described as a "form of speech . . . that lies at the heart of First Amendment protection,"[16] and the ban was said to be "defined solely on the basis of . . . content," since it had been interpreted as speech directed at "controversial issues of public importance."[17] Moreover, the ban on editorializing was both overinclusive, applying to commentary on local

[8] 395 U.S. at 392–93.

[9] 412 U.S. 94 (1973).

[10] 412 U.S. at 131.

[11] 453 U.S. 367 (1981). The dissent argued that the FCC had assumed, and the Court had confirmed it in assuming, too much authority under the congressional enactment. In its view, Congress had not meant to do away with the traditional deference to the editorial judgments of the broadcasters. *Id.* at 397 (Justices Byron White, William Rehnquist, and John Paul Stevens).

[12] 468 U.S. 364 (1984), holding unconstitutional § 399 of the Public Broadcasting Act of 1967, as amended.

[13] 468 U.S. at 380. The Court rejected the suggestion that only a "compelling" rather than "substantial" governmental interest can justify restrictions.

[14] 468 U.S. at 385.

[15] 468 U.S. at 384–85. Dissenting Justice John Paul Stevens thought that the ban on editorializing served an important purpose of "maintaining government neutrality in the free marketplace of ideas." *Id.* at 409.

[16] 468 U.S. at 381.

[17] 468 U.S. at 383.

issues of no likely interest to Congress, and underinclusive, not applying at all to expression of controversial opinion in the context of regular programming. Therefore, the Court concluded, the restriction was not narrowly enough tailored to fulfill the government's purposes.

Sustaining FCC discipline of a broadcaster who aired a record containing a series of repeated "barnyard" words, considered "indecent" but not obscene, the Court articulated additional justifications allowing greater regulation of indecent broadcasting.[18] The Court noted first that broadcast was "uniquely pervasive," confronting individuals "not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[19] Second, the Court emphasized that, "broadcasting is uniquely accessible to children, even those too young to read. . . . amply justify[ing] special treatment of indecent broadcasting."[20] The Court emphasized the "narrowness" of its holding, which "requires consideration of a host of variables."[21] The use of more than "an occasional expletive," the time of day of the broadcast, the likely audience, "and differences between radio, television, and perhaps closed-circuit transmissions" were all relevant in the Court's view.[22]

Amdt1.7.10.5 Cable Television

First Amendment:

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

The Court has recognized that cable television "implicates First Amendment interests," because a cable operator communicates ideas through selection of original programming and through exercise of editorial discretion in determining which stations to include in its offering.[1] Moreover, "settled principles of . . . First Amendment jurisprudence" govern review of cable regulation; cable is not limited by "scarce" broadcast frequencies and does not require the same less rigorous standard of review that the Court applies to regulation of broadcasting.[2] Cable does, however, have unique characteristics that can justify regulations singling out cable

[18] FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

[19] 438 U.S. at 748.

[20] 438 U.S. at 749–50. This was the only portion of the constitutional discussion that obtained the support of a majority of the Court. In *Denver Area Educational Telecommunications Consortium v. FCC,* 518 U.S. 727, 748 (1996), the Court noted that spectrum scarcity "has little to do with a case that involves the effects of television viewing on children."

[21] 438 U.S. at 750. *See also id.* at 742–43 (plurality opinion), and *id.* at 755–56 (Powell, J., concurring) ("The Court today reviews only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion.").

[22] 438 U.S. at 750. Subsequently, the FCC began to apply its indecency standard to fleeting uses of expletives in non-sexual and non-excretory contexts. The U.S. Court of Appeals for the Second Circuit found this practice arbitrary and capricious under the Administrative Procedure Act, but the Supreme Court disagreed and upheld the FCC policy without reaching the First Amendment question. FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009). *See also* CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008), *vacated and remanded*, 556 U.S. 1218 (2009) (invalidating, on non-constitutional grounds, a fine against CBS for broadcasting Janet Jackson's exposure of her breast for nine-sixteenths of a second during a Super Bowl halftime show). The Supreme Court vacated and remanded this decision to the Third Circuit for further consideration in light of *FCC v. Fox Television Stations, Inc.*

[1] City of Los Angeles v. Preferred Communications, 476 U.S. 488 (1986) (leaving for future decision how the operator's interests are to be balanced against a community's interests in limiting franchises and preserving utility space); Turner Broadcasting System v. FCC, 512 U.S. 622, 636 (1994).

[2] Turner Broadcasting System v. FCC, 512 U.S. 622, 638–39 (1994).

for special treatment.[3] The Court in *Turner Broadcasting System v. FCC*[4] upheld federal statutory requirements that cable systems carry local commercial and public television stations. Although these "must-carry" requirements "distinguish[ed] between speakers in the television programming market," they did so based on the manner of transmission and not on the content the messages conveyed, and hence were content-neutral.[5] The regulations could therefore be measured by the "intermediate level of scrutiny" set forth in *United States v. O'Brien*.[6] Two years later, however, a splintered Court could not agree on what standard of review to generally apply to content-based restrictions of cable broadcasts. Striking down a requirement that cable operators must, in order to protect children, segregate and block programs with patently offensive sexual material, a plurality opinion in *Denver Area Educational Telecommunications Consortium v. FCC*,[7] found it unnecessary to determine whether strict scrutiny or some lesser standard applies, because it deemed the restriction invalid under any of the alternative tests. The plurality[8] rejected assertions that public forum analysis,[9] or a rule giving cable operators' editorial rights "general primacy" over the rights of programmers and viewers,[10] should govern.

Subsequently, in *United States v. Playboy Entertainment Group, Inc.*,[11] the Supreme Court made clear, as it had not in *Denver Consortium*, that strict scrutiny applies to content-based speech restrictions on cable television. The Court struck down a federal statute designed to "shield children from hearing or seeing images resulting from signal bleed," which refers to blurred images or sounds that come through to non-subscribers.[12] The statute required cable operators, on channels primarily dedicated to sexually oriented programming, either to scramble fully or otherwise fully block such channels, or to not provide such programming when a significant number of children are likely to be viewing it, which, under an FCC regulation meant to transmit the programming only from 10 p.m. to 6 a.m. The Court found that, even without "discount[ing] the possibility that a graphic image could have a negative impact on a young child," it could not conclude that Congress had used "the least restrictive

[3] 512 U.S. at 661 (referring to the "bottleneck monopoly power" exercised by cable operators in determining which networks and stations to carry, and to the resulting dangers posed to the viability of broadcast television stations). *See also* Leathers v. Medlock, 499 U.S. 439 (1991) (application of state gross receipts tax to cable industry permissible even though other segments of the communications media were exempted).

[4] 512 U.S. 622 (1994).

[5] 512 U.S. at 645. "Deciding whether a particular regulation is content-based or content-neutral is not always a simple task," the Court confessed. *Id.* at 642. Indeed, dissenting Justice Sandra Day O'Connor, joined by Justices Antonin Scalia, Ruth Bader Ginsburg, and Clarence Thomas, viewed the rules as content-based. *Id.* at 674–82.

[6] 391 U.S. 367, 377 (1968). The Court remanded *Turner* for further factual findings relevant to the *O'Brien* test. On remand, the district court upheld the must-carry provisions, and the Supreme Court affirmed, concluding that it "cannot displace Congress's judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination." Turner Broadcasting System v. FCC, 520 U.S. 180, 224 (1997).

[7] 518 U.S. 727, 755 (1996) (invalidating § 10(b) of the Cable Television Consumer Protection and Competition Act of 1992). The Court upheld § 10(a) of the Act, which permitted cable operators to prohibit indecent material on leased access channels; and struck down § 10(c), which permitted a cable operator to prevent transmission of "sexually explicit" programming on public access channels. In upholding § 10(a), Justice Stephen Breyer's plurality opinion cited FCC v. Pacifica Foundation, 438 U.S. 726 (1978), and noted that cable television "is as 'accessible to children' as over-the-air broadcasting, if not more so." 518 U.S. at 744.

[8] This section of Justice Stephen Breyer's opinion was joined by Justices John Paul Stevens, Sandra Day O'Connor, and David Souter. 518 U.S. at 749.

[9] Justice Anthony Kennedy, joined by Justice Ruth Bader Ginsburg, advocated this approach, 518 U.S. at 791, and took the plurality to task for its "evasion of any clear legal standard." 518 U.S. at 784.

[10] Justice Thomas, joined by Chief Justice William Rehnquist and Justice Antonin Scalia, advocated this approach.

[11] 529 U.S. 803, 813 (2000).

[12] 529 U.S. at 806.

means for addressing the problem."[13] Congress in fact had enacted another provision that was less restrictive and that served the government's purpose. This other provision required that, upon request by a cable subscriber, a cable operator, without charge, fully scramble or otherwise fully block any channel to which a subscriber does not subscribe.[14]

Amdt1.7.10.6 Newspapers, Telephones, and the Internet

First Amendment:

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

The Supreme Court has clarified that the relaxed First Amendment standards allowing greater regulation of broadcast and (to a lesser extent) cable television do not apply to newspapers, telephone communications, or the internet. Looking first at newspapers, the Court was unanimous in holding void under the First Amendment a state law that granted a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper.[1] Granting that the number of newspapers had declined over the years, that ownership had become concentrated, and that new entries were prohibitively expensive, the Court agreed with proponents of the law that the problem of newspaper responsibility was a great one. But press responsibility, although desirable, "is not mandated by the Constitution," whereas press freedom is. The compulsion exerted by government on a newspaper to print what it would not otherwise print, "a compulsion to publish that which 'reason tells them should not be published,'" runs afoul of the free press clause.[2]

The Court expressly distinguished the broadcast medium from telephone[3] and internet[4] communications in ruling unconstitutional two different statutes prohibiting certain transmissions of indecent messages. A 2017 opinion went so far as to equate the internet with streets or parks, historically some of the most important—and constitutionally protected—forums for the exercise of First Amendment rights.[5]

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[13] 529 U.S. at 826–27. The Court stated: "Even upon the assumption that the government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech." *Id.* at 825.

[14] 47 U.S.C. § 560.

[1] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

[2] 418 U.S. at 256. The Court also adverted to the imposed costs of the compelled printing of replies but this seemed secondary to the quoted conclusion. The Court has also held that a state may not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees. Although a plurality opinion to which four Justices adhered relied heavily on *Tornillo*, there was no Court majority consensus as to rationale. Pacific Gas & Elec. v. Public Utilities Comm'n, 475 U.S. 1 (1986). *See also* Hurley v. Irish-American Gay Group, 515 U.S. 557 (1995) (state may not compel parade organizer to allow participation by a parade unit proclaiming message that organizer does not wish to endorse).

[3] Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 127–28 (1989) (noting the previously recognized "'unique' attributes of broadcasting," primarily the problem of an unwilling captive audience, were not present in the context of dial-in services (quoting FCC v. Pacifica Found., 438 U.S. 726, 762 (1978))).

[4] Reno v. ACLU, 521 U.S. 844, 868–69 (1997) (saying the factors justifying greater regulation of broadcast "are not present in cyberspace").

[5] Packingham v. North Carolina, No. 15-1194, slip op. at 4–5 (U.S. June 19, 2017). *See also* Amdt1.7.7.1 The Public Forum.

Amdt1.7.11 Political Speech

Amdt1.7.11.1 Overview of Campaign Finance

First Amendment:

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

Federal and state governments regulate political campaign financing. At the federal level, the Federal Election Campaign Act (FECA)[1] imposes contribution limits, source restrictions for contributions, disclosure and disclaimer requirements for political advertising, and a presidential public financing system.[2] In a landmark 1976 ruling, *Buckley v. Valeo*, and its progeny, the Supreme Court has held that such regulation can infringe on First Amendment guarantees of freedom of speech and association.[3] According to the Court, limits on campaign contributions—which involve giving money to an entity, such as a candidate's campaign committee—and expenditures—which involve spending money directly for electoral advocacy—implicate rights of political expression and association under the First Amendment.[4] Likewise, the Court has held that campaign disclosure and disclaimer requirements can infringe on the right to privacy of association and belief as guaranteed under the First Amendment.[5] In evaluating challenges under the First Amendment, the Court has assigned different standards of review to various types of campaign finance regulation, based on the burdens imposed and the government interests served.[6]

Amdt1.7.11.2 Campaign Finance Contribution Limits and Source Restrictions

First Amendment:

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

The Supreme Court in *Buckley v. Valeo* held that contribution limits are subject to a more lenient standard of review than expenditure limits because they impose only a marginal restriction on speech and will be upheld if the government can demonstrate that they are a "closely drawn" means of achieving a "sufficiently important" governmental interest.[1] Unlike expenditure limits, which reduce the amount of expression, the Court opined that contribution limits involve "little direct restraint" on the speech of a contributor.[2] While acknowledging that a contribution limit restricts an aspect of a contributor's freedom of association by affecting a

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[1] Codified, as amended, primarily at 52 U.S.C. §§ 30101–30146 and sections of titles 18 and 26. FECA was first enacted in 1971, and was amended in 1974, 1976, 1979, and most recently and significantly, by the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155.

[2] The term *disclaimer* generally refers to statements of attribution that appear directly on a campaign-related communication, and the term *disclosure* generally refers to requirements for periodic reporting to the Federal Election Commission (FEC) that are publicly available for inspection.

[3] *See* 424 U.S. 1 (1976) (per curiam).

[4] *See id.* at 23.

[5] *See id.* at 64.

[6] For additional discussion on campaign finance, see Amdt1.7.11.2 Campaign Finance Contribution Limits and Source Restrictions, Amdt1.7.11.3 Campaign Finance Expenditure Limits, and Amdt1.7.11.4 Campaign Finance Disclosure and Disclaimer Requirements.

[1] *See* 424 U.S. 1, 25 (1976).

[2] *Id.* at 21.

contributor's ability to support a candidate, the Court determined that a contribution limit still permits symbolic expressions of support and does not infringe on a contributor's freedom to speak about candidates and issues.[3]

Under the First Amendment, the Supreme Court has evaluated the constitutionality of specific types of contribution limits. In *Buckley*, the Court upheld the constitutionality of the Federal Election Campaign Act (FECA)[4] base limits, which cap the amounts of money an individual can contribute to a candidate, party, or political committee.[5] In assessing whether a contribution limit is closely drawn, the Court determined it necessary to examine whether the limit is so low that it significantly impedes a candidate from raising the necessary funds for effective advocacy.[6] In *Nixon v. Shrink Missouri Government PAC*, the Court announced that while limits must be closely drawn to a sufficiently important interest, the amount of the limitation "need not be 'fine tuned.'"[7] In contrast, in *Randall v. Sorell*, in a plurality opinion, the Court determined that contribution limits were too low to comport with First Amendment free-speech guarantees when they were substantially lower than limits previously upheld by the Court and limits in effect in other states.[8]

Similarly, in *McConnell v. FEC*, the Supreme Court upheld against facial constitutional challenges, among other things, a prohibition on national political parties fundraising or spending federally-unregulated funds, known as *soft money*.[9] The Court determined that the subject provisions of law are, in effect, contribution limits and source restrictions—not expenditure limits because they do not limit the total amount of funds that parties can spend.[10] Hence, the Court applied the "less rigorous" standard of scrutiny that it applied in *Buckley* to contribution limits.[11] However, the *McConnell* Court invalidated a prohibition on individuals age seventeen and under from making contributions, reasoning that minors enjoy First Amendment protection and that the prohibition was not closely drawn to serve a sufficiently important government interest.[12]

The Court has considered the constitutionality of aggregate contribution limits, which cap the *total* amount that an individual can contribute to a candidate, political party, or political committee. In *Buckley*, the Court upheld the constitutionality of a FECA aggregate contribution limit in effect in 1976, characterizing the limit as a "quite modest restraint" that served to prevent circumvention of base limits.[13] In *McCutcheon v. FEC*, however, in a plurality opinion, the Court invalidated a similar aggregate limit, determining that regardless of whether strict scrutiny or the "closely drawn" standard applies, the Court needed to "assess

[3] *See id.* at 21, 24.

[4] Codified, as amended, primarily at 52 U.S.C. §§ 30101–30146 and sections of titles 18 and 26. FECA was first enacted in 1971, and was amended in 1974, 1976, 1979, and most recently and significantly, by the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. Law No. 107–155.

[5] *See Buckley*, 424 U.S. at 29.

[6] *See id.* at 21.

[7] 528 U.S. 377, 387–88 (2000) (quoting *Buckley*, 424 U.S. at 30, n. 3).

[8] *See id.* at 261.

[9] 540 U.S. 93, 188–89 (2003).

[10] *See id.* at 138–39. ("Plaintiffs contend that we must apply strict scrutiny to § 323 because many of its provisions restrict not only contributions but also the spending and solicitation of funds raised outside of FECA's contribution limits. for purposes of determining the level of scrutiny, it is irrelevant that Congress chose in § 323 to regulate contributions on the demand rather than the supply side.") *Id.* at 138.

[11] *Id.* 138–39

[12] *See id.* at 137, 231–32 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511–513 (1969); *Buckley*, 424 U.S. at 20–22).

[13] *See Buckley*, 424 U.S. at 38.

the fit" between the government's stated objective and the means to achieve it.[14] Observing a "substantial mismatch" between the two, the opinion concluded that even under the more lenient standard of review, the limits could not be upheld.[15]

In *Davis v. FEC*, the Supreme Court held that a FECA provision establishing a series of staggered increases in contribution limits for candidates whose opponents significantly self-finance their campaigns violates the First Amendment.[16] The Court reasoned that limits on a candidate's right to advocate for his or her own election are not justified by the compelling governmental interest of preventing corruption because the use of personal funds actually lessens a candidate's reliance on outside contributions, thereby counteracting coercive pressures and risks of abuse that contribution limits seek to avoid.[17]

The Supreme Court has also upheld the constitutionality of laws limiting *who* can make a campaign contribution, known as a source restriction. In *FEC v. Beaumont*, the Supreme Court upheld the constitutionality of a FECA prohibition on corporations making direct campaign contributions from their general treasuries in connection with federal elections.[18] The Court observed that large, unlimited contributions can threaten "political integrity," necessitating restrictions in order to counter corruption or its appearance.[19] In that same vein, while not issuing an opinion, the Supreme Court in *Bluman v. FEC* affirmed a lower court ruling that upheld the constitutionality of another FECA source restriction that prohibits contributions by foreign nationals.[20]

Amdt1.7.11.3 Campaign Finance Expenditure Limits

First Amendment:

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

In contrast to contribution limits, the Supreme Court has determined that expenditure limits impose a substantial restraint on speech and association and, hence, are subject to a

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[14] *See McCutcheon,* 572 U.S at 199.

[15] *Id.*

[16] *See* Davis v. FEC, 555 U.S. at 740, 744 (2008). *See also* FEC v. Ted Cruz for Senate, No. 21-12, (U.S. May 16, 2022) (holding that a FECA limit on the amount of post-election campaign contributions that may be used to repay a candidate for personal loans made pre-election violates the First Amendment, determining that the limit did not serve the governmental interest of avoiding quid pro quo candidate corruption).

[17] *See id.* While conceding that the law did not directly impose a limit on a candidate's expenditure of personal funds, the Court concluded that it impermissibly required a candidate to make a choice between the right of free political expression and being subjected to discriminatory contribution limits, and created a fundraising advantage for his or her opponents. *See id*. *See also* Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 755 (2011) (holding unconstitutional a voluntary public financing system that granted additional financing to a publicly-financed state office candidate in response to a privately-financed opponent engaging in spending, because it subjected privately-financed candidates and independent expenditure groups to "a substantial burden" on their political speech).

[18] 539 U.S. 146, 163 (2003). While FECA prohibits contributions by corporations and labor unions from their own funds or "general treasuries," the law permits contributions from separate segregated funds or political action committees (PACs) that are established and administered by corporations and unions. 52 U.S.C. §§ 30118(a), 30118(b)(2)(C).

[19] *Id.* at 154–55. Regarding corporations specifically, the Court determined that the corporate structure requires careful regulation to counter the "misuse of corporate advantages." *Id.* at 155.

[20] *See* Bluman v. FEC, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *summ. aff'd*, 565 U.S. 1104 (2012) (upholding, among other things, the constitutionality of the FECA prohibition on foreign nationals making contributions, identifying the compelling governmental interest in limiting foreign citizen participation in the U.S. government by preventing foreign influence over the U.S. political process).

strict scrutiny standard of review that requires narrow tailoring to serve a compelling governmental interest.[1] According to the Court in *Buckley v. Valeo*, expenditure limits impose a restriction on the amount of money that a candidate can spend on communications, thereby reducing the number and depth of issues discussed and the size of the audience reached.[2] Such restrictions, the Court determined, are not justified by an overriding governmental interest because expenditures do not involve money flowing directly to the benefit of a candidate's campaign fund and hence, the risk of quid pro quo corruption does not exist.[3] Upon a similar premise, the Court rejected the government's interest in limiting the ability of a wealthy candidate to draw upon personal wealth to finance a campaign and invalidated a law limiting expenditures from personal funds.[4] When a candidate self-finances, the Court observed, the candidate's dependence on outside contributions is reduced, thereby lessening the risk of corruption.[5]

Relying on *Buckley*, in the 2010 decision of *Citizens United v. FEC*, the Court invalidated two FECA prohibitions on independent electoral spending by corporations and labor unions.[6] The Court invalidated, first, the long-standing prohibition on corporations and labor unions[7] using their general treasury funds for independent expenditures,[8] and second, a Bipartisan Campaign Reform Act (BCRA) prohibition on the use of such funds for electioneering communications.[9] According to the Court, independent expenditures and electioneering communications are protected speech, regardless of whether the speaker is a corporation. Although the statutory prohibition contained an exception that permitted the use of corporate treasury funds to establish, administer, and solicit contributions to a political action committee (PAC) for such spending,[10] the Court determined that merely permitting speech through a PAC does not equate to allowing a corporation to speak directly because corporations and PACs are separate associations.[11] The Court also concluded that upholding the ban on corporate independent electoral spending would have the "dangerous, and unacceptable" result of permitting Congress to prohibit the political speech of media corporations.[12]

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[1] *See* Buckley v. Valeo, 424 U.S. 1, 23 (1976).

[2] *See id.*

[3] *See id.* Essentially, quid pro quo corruption captures the notion of "a direct exchange of an official act for money." *See, e.g.,* McCutcheon v. FEC, 572 U.S. 185, 192 (2014).

[4] *See id.* at 58.

[5] *See id.* at 53 ("[T]he use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed.")

[6] 558 U.S. 310 (2010). *See also* Am. Tradition P'ship. v. Bullock, 567 U.S. 516 (2014) (per curiam) (rejecting arguments attempting to distinguish a state law from the federal law invalidated by *Citizens United* and reiterating that "political speech does not lose First Amendment protection simply because its source is a corporation.").

[7] Although the issue before the Court was limited to the application of the prohibition on independent expenditures and electioneering communications to Citizens United, a corporation, the reasoning of the opinion also appears to apply to labor unions. ("The text and purpose of the First Amendment point in the same direction: Congress may not prohibit political speech, even if the speaker is a corporation or union.") *Citizens United*, 558 U.S. at 376.

[8] Codified at 52 U.S.C. § 30118(a) (defining an "independent expenditure" as a communication that "expressly advocat[es] the election or defeat of a clearly identified candidate" and is not coordinated with any candidate or party).

[9] Codified at 52 U.S.C. §§ 30118(b)(2), 30104(f)(3) (defining an "electioneering communication" to include "any broadcast, cable, or satellite" transmission that "refers to a clearly identified" federal office candidate and is transmitted within 60 days of a general election or 30 days of a primary).

[10] 52 U.S.C. § 30118(b)(2)(c). The law also permits a corporation to establish a PAC in order to make contributions. As a result of *Citizens United*, corporations are currently only required to use PAC funds to make contributions, not expenditures.

[11] *See Citizens United*, 558 U.S. at 337.

[12] *Id.* at 351.

While invalidating the FECA ban on corporate and union-funded independent expenditures, the *Citizens United* ruling also overturned a 1990 ruling, *Austin v. Michigan Chamber of Commerce*,[13] determining that it conflicted with a 1978 precedent, *First National Bank of Boston v. Bellotti*.[14] In *Bellotti*, the Court had invalidated a state prohibition on corporate independent expenditures related to referenda, holding that the government cannot restrict political speech because the speaker is a corporation.[15] Criticizing the *Austin* decision for "bypass[ing] *Buckley* and *Bellotti*," the Court in *Citizens United* rejected the "antidistortion interest" that the Court in *Austin* "identified" to justify limits on political speech.[16] According to the Court, independent expenditures, including those made by corporations, do not cause corruption or the appearance of corruption.[17] The Court further denounced the *Austin* precedent for permitting "interfer[ence] with the 'open marketplace' of ideas protected by the First Amendment" through a ban on speech by millions of associations of citizens—many of them small corporations without large aggregations of wealth.[18]

Similarly, in invalidating the BCRA-enacted prohibition on corporate and union treasury-funded electioneering communications, the *Citizens United* ruling overruled a portion of its 2003 decision in *McConnell v. FEC* that upheld the facial validity of the prohibition, concluding that the *McConnell* decision had relied on *Austin*.[19] The Court reached this conclusion despite a limiting principle imposed by a 2007 ruling, *FEC v. Wisconsin Right to Life, Inc. (WRTL)*.[20] In *WRTL*, the Court had narrowed the definition of an electioneering communication to mitigate concerns that the law could prohibit First Amendment protected issue speech, known as issue advocacy. According to the Court in *WRTL*, the term "electioneering communication" could constitutionally encompass only express advocacy[21]—communications expressly advocating for the election or defeat of a clearly identified candidate, including for example, statements such as "vote for" or "vote against"—or the "functional equivalent" of express advocacy. Further, the Court in *WRTL* advised that communications that could reasonably be interpreted as something other than an appeal to vote for or against a specific candidate could not be considered electioneering communications.

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[13] 494 U.S. 652 (1990).

[14] *Id.* at 348. ("The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them.")

[15] 435 U.S. 765 (1978).

[16] *Citizens United*, 558 U.S. at 348 (determining that "the corrosive and distorting" impact of large amounts of money that were acquired with the benefit of the corporate form, but were unrelated to the public's support for the corporation's political views, constituted a sufficiently compelling governmental interest to justify such a restriction).

[17] *See id.* at 357.

[18] *Id.* at 354.

[19] *See id.* at 365–66. Referencing Justice Antonin Scalia's concurrence in *WRTL*, the Court agreed with the conclusion that "*Austin* was a significant departure from ancient First Amendment principles," and held "that stare decisis does not compel the continued acceptance of *Austin*." *Id.* at 319 (quoting *WRTL*, 551 U.S. at 449 (Scalia, J., concurring in part and concurring in judgment)).

[20] 551 U.S. 449 (2007). *WRTL* was decided four years after the Supreme Court upheld the electioneering communication prohibition against a First Amendment facial challenge in McConnell v. FEC, 540 U.S. 93 (2003). While not expressly overruling *McConnell*, the Court in *WRTL* limited the prohibition's application.

[21] In *Buckley*, the Supreme Court provided the genesis for the concept of issue and express advocacy communications. In order to avoid invalidation of a provision of FECA on grounds of unconstitutional vagueness, the Court applied a limiting construction so that the provision applied only to noncandidate "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office" (that is, express advocacy). In a footnote, the Court explained that this limiting construction would restrict the application of the provision to communications containing express advocacy terms, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." *Buckley*, 424 U.S. at 44, n.52.

Amdt1.7.11.4 Campaign Finance Disclosure and Disclaimer Requirements

First Amendment:

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

The Supreme Court has generally affirmed the constitutionality of campaign disclosure requirements. In *Buckley v. Valeo*, the Court identified three governmental interests justifying Federal Election Campaign Act (FECA) disclosure requirements.[1] First, the Court determined that disclosure provides the electorate with information as to the source of campaign money, how it is spent, and "the interests to which a candidate is most likely to be responsive"—an informational interest.[2] Second, the Court stated that disclosure serves to deter corruption and its appearance by uncovering large contributions and expenditures "to the light of publicity," observing that with this information, voters are better able to detect illicit "post-election special favors" by an officeholder in exchange for the contributions.[3] Third, the Court identified disclosure requirements as an essential method of detecting violations for referral to law enforcement.[4] In upholding the constitutionality of FECA's disclosure requirements for independent expenditures, the Court determined that so long as they encompass only funds used for express advocacy communications, the requirement is constitutional.[5] Likewise, in *McConnell v. FEC*, rejecting a facial challenge to enhanced disclosure requirements, the Court observed that the *Buckley* ruling distinguished between express advocacy and issue advocacy for the purposes of statutory construction, not constitutional command, and therefore, the First Amendment did not require creating "a rigid barrier" between the two in this case.[6] In other words, the Court determined, because electioneering communications are intended to influence an election, the absence of "magic words" of express advocacy does not obviate the government's interest in requiring disclosure of such ads in order to combat corruption or its appearance.[7]

Expanding on its holding in *Buckley*, in subsequent campaign finance disclosure cases, the balancing of interests has tipped in favor of the constitutionality of disclosure requirements under the First Amendment. In *Citizens United v. FEC*, the Court upheld FECA's disclosure requirements for electioneering communications as applied to a political documentary and broadcast advertisements promoting it.[8] The Court determined that while they may burden the ability to speak, disclosure requirements "impose no ceiling on campaign-related activities," and "do not prevent anyone from speaking."[9] Accordingly, the Court evaluated the requirements under a standard of "exacting scrutiny," a less-rigorous standard than the "strict

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[1] *See Buckley*, 424 U.S. at 66–68.

[2] *Id.* at 66–67.

[3] *Id.* at 67.

[4] *See id.* at 66–68.

[5] *See id.* at 79–80. ("[W]hen the maker of the expenditure is . . . an individual other than a candidate or a group other than a 'political committee,' the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach . . . is not impermissibly broad, we construe 'expenditure' . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.").

[6] *Id.* at 193, 201–02.

[7] *Id.* at 193–94.

[8] *See Citizens United*, 558 U.S. at 366–371.

[9] *Id.* at 366 (quoting *Buckley*, 424 U.S. at 64).

scrutiny" standard the Court has used to evaluate restrictions on campaign expenditures.[10] Exacting scrutiny requires a "substantial relation" between the disclosure requirement and a "sufficiently important" government interest, the Court announced.[11] Further, in *Doe v. Reed*, the Court upheld the constitutionality of a Washington State public records law.[12] Categorizing the statute as a disclosure requirement and, therefore, "not a prohibition of speech," the Court evaluated the law under the standard of exacting scrutiny.[13] The Court determined that the law was substantially related to the governmental interest of safeguarding the integrity of the electoral process and announced that public disclosure "promotes transparency and accountability in the electoral process to an extent other measures cannot."[14]

Similar to disclosure requirements, the Supreme Court has upheld the constitutionality under the First Amendment of campaign finance disclaimer requirements.[15] In *McConnell v FEC*, the Supreme Court upheld the facial validity of the FECA disclaimer requirements, as amended by Bipartisan Campaign Reform Act (BCRA).[16] Specifically, the Court determined that the FECA disclaimer requirement "bear[ ] a sufficient relationship to the important governmental interest of 'shedding the light of publicity on campaign financing.'"[17] Revisiting the issue in *Citizens United*, the Court upheld the disclaimer requirement in BCRA as applied to a political documentary and the broadcast advertisements that an organization planned to run promoting the movie.[18] According to the Court, while they may burden the ability to speak, like disclosure requirements, disclaimer requirements "impose no ceiling on campaign-related activities," and "do not prevent anyone from speaking."[19]

[10] *See id.* at 366–67.

[11] *Id.* The Court expressly rejected the argument that the scope of FECA's disclosure requirements for electioneering communications must be limited to speech that is express advocacy, or the "functional equivalent of express advocacy." *Id.* at 369–370. *See also* Indep. Inst. v. FEC, 216 F. Supp. 3d 176, 189 (D.D.C. 2016), *summ. aff'd*, Indep. Inst. v. FEC, No. 16–743 (U.S. Feb. 27, 2017) (summarily affirming a three-judge federal district court ruling that upheld the constitutionality of FECA's disclosure requirements for electioneering communications, after determining that the First Amendment does not require limiting disclosure requirements to speech that is the functional equivalent of express advocacy).

[12] 561 U.S. 186 (2010).

[13] *Id.* at 196.

[14] *Id.* at 199. *See also*, Americans for Prosperity Foundation v. Bonta, No. 19–251, slip op. at 2, 11 (U.S. July 1, 2021) (subjecting a California disclosure law to an exacting scrutiny standard that requires a "narrow tailoring" to a sufficiently important governmental interest asserted; while not a campaign finance case, the ruling may have consequences for the constitutionality of campaign finance disclosure requirements going forward).

[15] Although FECA does not contain the term "disclaimer," the law specifies the content of attribution statements to be included in certain communications, which are known as disclaimer requirements. *See, e.g.,* FEC webpage, *Advertising and disclaimers*, available at https://www.fec.gov/help-candidates-and-committees/making-disbursements/advertising/ (last visited Dec. 29, 2021).

[16] *See McConnell*, 540 U.S. at 230–31.

[17] *Id.* at 231.

[18] *See Citizens United*, 558 U.S. at 367.

[19] *Id.* at 366.

Amdt1.7.11.5 Lobbying

First Amendment:

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

To lobby means generally "to try to persuade a government official . . . in an attempt to influence some action proposed to be taken."[1] In its most basic form, lobbying is a form of petitioning the government,[2] a right protected under the First Amendment.[3]

While the First Amendment protects the right to petition, the Supreme Court has determined that Congress may regulate individuals who are paid to lobby Congress. For example, Congress may require that lobbyists register, make specific disclosures, and submit reports to Congress. In *United States v. Harriss*, individuals charged with violating the Federal Regulation of Lobbying Act argued that the registration, reporting, and disclosure requirements of that statute violated their right to petition under the First Amendment.[4] In upholding the Act, the Court recognized that "[p]resent-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected."[5] According to the Court, it is important that elected representatives have the necessary information to be able to "evaluate such pressures."[6] Rather than prohibiting lobbying, the Act merely required a "modicum of information" from those hired to influence Congress to make transparent "who is being hired, who is putting up the money, and how much."[7] Requiring disclosures about lobbying activities was within Congress's "power of self-protection," for the purpose of maintaining "the integrity of a basic governmental process."[8]

Beyond regulating paid lobbyists, the Court has also held that Congress has no obligation to subsidize the lobbying activities of private entities. In *Cammarano v. United States*, the Court upheld a regulation that denied a tax deduction for business expenses spent on lobbying.[9] The Court explained that the taxpayers were not being denied a tax deduction for engaging in constitutionally protected activities, rather, they were "simply being required to pay for those activities entirely out of their own pockets."[10] Citing *Cammarano*, the Court subsequently upheld a statutory provision that similarly denied tax benefits for lobbying activities.[11] In *Regan v. Taxation With Representation of Washington*, a nonprofit organization challenged the denial of its tax-exempt status under Section 501(c)(3) of the Internal Revenue

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[1] *Lobby*, Black's Law Dictionary (11th ed. 2019).

[2] *See* Amdt1.10.1 Historical Background on Freedoms of Assembly and Petition.

[3] *See* Eastern R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127, 137 (1961) (recognizing that "[i]n a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends on the ability of the people to make their wishes known to their representative").

[4] United States v. Harriss, 347 U.S. 612, 617 (1954).

[5] *Id.* at 625.

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] 358 U.S. 498, 513 (1959).

[10] *Id.*; see also Textile Mills Sec. Corp. v. Comm'r of Internal Revenue, 314 U.S. 326 (1941) (holding that the Commissioner of Internal Revenue properly disallowed a tax deduction for an expense paid by a corporation to hire a publicist and two legal experts to help secure the passage of certain legislation).

[11] Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1983).

Code because a substantial part of its activities were lobbying related.[12] The organization claimed, among other things, that the prohibition on lobbying activities under 501(c)(3) violated the First Amendment.[13] In rejecting this argument, the Court determined that Congress had not infringed on or regulated any First Amendment activity, rather, it had "merely refused to pay for the lobbying our of public moneys."[14]

Although the Court has allowed Congress to regulate paid lobbyists and to decline to subsidize lobbying activity, it has refused to apply other laws when their application chills the underlying exercise of the right to petition the government. For example, the *Noerr-Pennington* doctrine—established by *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[15] and *United Mine Workers v. Pennington*[16]—provides limited immunity from antitrust liability for those "engaging in conduct . . . aimed at influencing decisionmaking by the government."[17] Under this line of cases, competitors who work in concert to influences the government do not violate the Sherman Antitrust Act.[18] The Court has reiterated that the *Noerr-Pennington* doctrine was crafted to "avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances."[19] The right to petition extends to "all departments of the Government," and includes access to administrative agencies and courts.[20] The *Noerr-Pennington* doctrine shields efforts to influence public officials "regardless of intent or purpose."[21] The Court, however, has recognized a "sham exception" to the doctrine, excluding conduct from immunity that is a "mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor."[22]

Amdt1.7.11.6 Legislative Investigations

First Amendment:

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

As discussed in an earlier essay, Congress possesses an inherent power of investigation in aid of legislation.[1] Nonetheless, the government's power of investigation is subject to First

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[12] *Id.* at 542.

[13] *Id.*

[14] *Id.* at 545–46. *See* Amdt1.7.13.3 Conditions on Tax Exemptions.

[15] 365 U.S. 127 (1961).

[16] 381 U.S. 657 (1965).

[17] Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 555–56 (2014).

[18] *Pennington*, 381 U.S. at 669; *see also* City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 379–80 (1991) (reiterating that the "federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government"); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) (declining to extend the *Noerr-Pennington* immunity to efforts to influence a private association).

[19] *Octane Fitness, LLC*, 572 U.S. at 556 (citing Professional Real Estate Investors, Inc. v. Columbia Pictures Industries Inc., 508 U.S. 49, 56 (1993)).

[20] California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

[21] *Omni*, 499 U.S. at 380 (citing *Pennington*, 381 U.S. at 670).

[22] *Octane Fitness, LLC*, 572 U.S. at 556. For example, litigation can be considered a "sham" under this doctrine if it is (1) "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and if it conceals "'an attempt to interfere *directly* with the business relationships of a competitor,' . . . through the 'use [of] the government *process*—as opposed to the *outcome of that process*.'" *Professional Real Estate Investors, Inc.*, 508 U.S. at 60–61.

[1] *See* ArtI.S8.C18.7.3 Congress's Investigation and Oversight Powers (1787–1864) to ArtI.S8.C18.7.7 Constitutional Limits of Congress's Investigation and Oversight Powers.

Amendment restrictions when the power as exercised results in deterrence or penalization of protected beliefs, associations, and conduct. In early cases, the Supreme Court narrowly construed the authority of congressional committees in order to avoid First Amendment infringement.[2] Later cases introduced a test that balanced the interests of the legislative bodies in inquiring about both protected and unprotected associations and conduct against what were perceived to be limited restraints upon the speech and association rights of witnesses, and upheld committee investigations.[3] Later, the Court articulated the balance somewhat differently and required that the investigating agency show "a subordinating interest which is compelling" to justify the inquiry's restraint on First Amendment rights.[4]

Amdt1.7.12 Compelled Speech

Amdt1.7.12.1 Overview of Compelled Speech

First Amendment:

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

For both the religion and speech clauses of the First Amendment, liberty of belief is the foundation of the liberty to practice one's religion and to express one's opinions.[1] As the Supreme Court has stated: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[2] Speaking in the context of religious freedom, the Court said that, although the freedom to act on one's beliefs could be limited, the freedom to believe what one will "is absolute."[3] Accordingly, as discussed in the following essays, courts will ordinarily subject government actions that compel speech to heightened constitutional scrutiny—but courts will more readily uphold certain types of disclosure requirements, particularly in the commercial context. An earlier essay discussed the Court's jurisprudence involving disclosures and disclaimers imposed in the context of campaign finance and electioneering regulations.[4]

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[2] *See* United States v. Rumely, 345 U.S. 41, 44–46 (1953); Watkins v. United States, 354 U.S. 178, 197–98 (1957); Sweezy v. New Hampshire, 354 U.S. 234, 249–51 (1957).

[3] Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959); Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961).

[4] Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963). *See also* DeGregory v. Attorney General of New Hampshire, 383 U.S. 825 (1966).

[1] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940); United States v. Ballard, 322 U.S. 78 (1944); Torcaso v. Watkins, 367 U.S. 488 (1961); American Communications Ass'n v. Douds, 339 U.S. 382, 408 (1950); Bond v. Floyd, 385 U.S. 116, 132 (1966); Speiser v. Randall, 357 U.S. 513 (1958); Baird v. State Bar of Arizona, 401 U.S. 1, 5–6 (1971) (plurality opinion), and *id.* at 9–10 (Stewart, J., concurring).

[2] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). *See* Amdt1.4.2 Laws Regulating Religious Belief.

[3] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[4] Amdt1.7.11.4 Campaign Finance Disclosure and Disclaimer Requirements.

Amdt1.7.12.2 Flag Salutes and Other Compelled Speech

First Amendment:

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

One question the Supreme Court has considered is whether the government may compel a person to declare or affirm publicly a personal belief. In *Minersville School District v. Gobitis*,[1] the Supreme Court had upheld the power of Pennsylvania to expel from its schools children who refused upon religious grounds to join in a flag salute ceremony and recite the pledge of allegiance. The Court explained that "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[2] But three years later, in *West Virginia State Bd. of Educ. v. Barnette*,[3] a 6-3 majority of the Court overturned *Gobitis*.[4] Focusing on the free speech arguments rather than protections for religious exercise, the Court said that the state policy constituted "a compulsion of students to declare a belief," requiring "the individual to communicate by word and sign his acceptance of the political ideas [the flag] bespeaks."[5] The Court ruled that the power of a state to follow a policy that "requires affirmation of a belief and an attitude of mind," however, is limited by the First Amendment, which, under the standard then prevailing, required the state to prove that for the students to remain passive during the ritual "creates a clear and present danger that would justify an effort even to muffle expression."[6]

The rationale of *Barnette* became the basis for the Court's decision in *Wooley v. Maynard*,[7] which voided a requirement by the state of New Hampshire that motorists display passenger vehicle license plates bearing the motto "Live Free or Die."[8] Acting on the complaint of a motorist who again raised religious objections to this statement, the Court held that the plaintiff could not be compelled by the state to display a message making an ideological statement on his private property. In a subsequent case, however, the Court found that compelling property owners to facilitate the speech of others by providing access to their property did not violate the First Amendment, at least where the speech was not likely to be identified with the owner and the owner could effectively disavow any connection with the speaker's message.[9]

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[1] 310 U.S. 586 (1940).

[2] 310 U.S. at 594. Justice Stone alone dissented, arguing that the First Amendment religion and speech clauses forbade coercion of "these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions." *Id.* at 601.

[3] 319 U.S. 624 (1943).

[4] Justice Felix Frankfurter dissented at some length, denying that the First Amendment authorized the Court "to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen." 319 U.S. at 646, 647. Justices Roberts and Stanley Reed simply noted their continued adherence to *Gobitis*. *Id.* at 642.

[5] 319 U.S. at 631, 633.

[6] 319 U.S. at 633, 634. *See also* Janus v. American Federation of State, County, and Municipal Employees, Council 31, 585 U.S. ____, No. 16-1466, slip op. at 9 (U.S. June 2018) (noting that compelled speech imposes a distinct harm by "forcing free and independent individuals to endorse ideas they find objectionable").

[7] 430 U.S. 705 (1977).

[8] The state had prosecuted vehicle owners who covered the motto on their vehicle's license plate.

[9] *See PruneYard Shopping Center v. Robins,* 447 U.S. 74, 85–88 (1980) (upholding a state requirement that privately owned shopping centers permit others to engage in speech or petitioning on their property).

The Supreme Court has also held other governmental efforts to compel speech to violate the First Amendment; these include a North Carolina statute that required professional fundraisers for charities to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations,[10] a Florida statute that required newspapers to grant political candidates equal space to reply to the newspapers' criticism and attacks on their records,[11] an Ohio statute that prohibited the distribution of anonymous campaign literature,[12] a Massachusetts statute that required private citizens who organized a parade to include among the marchers a group imparting a message—in this case support for gay rights—that the organizers did not wish to convey,[13] and a California law that required certain pro-life centers that offer pregnancy-related services to provide certain notices.[14] The Court also struck down a federal funding condition that required funding recipients to adopt a policy explicitly opposing sex trafficking.[15]

The principle of *Barnette*, however, does not extend so far as to bar a government from requiring employees or certain persons seeking professional licensing or other benefits to swear an oath that they will uphold and defend the Constitution.[16]

In contrast to the arguably political speech at issue in *Barnette*, the Supreme Court has at times found no First Amendment violation when government compels the disclosure of information in a commercial or professional setting. Regarding compelled disclosures in commercial speech, the Court held that an advertiser's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal," and accordingly, a provision requiring a seller to disclose factual information about his goods or services will not violate the First Amendment so long as the requirement is "reasonably related to the State's interest in preventing deception of consumers."[17]

Moreover, the Court has upheld regulations of professional conduct that only incidentally burden speech. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the

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[10] Riley v. National Fed'n of the Blind of North Carolina, 487 U.S. 781 (1988). In *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.,* 538 U.S. 600, 605 (2003), the Supreme Court held that a fundraiser who has retained 85% of gross receipts from donors, but falsely represented that "a significant amount of each dollar donated would be paid over to" a charitable organization, could be sued for fraud.

[11] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). In *Pacific Gas & Electric Co. v. Public Utilities Comm'n,* 475 U.S. 1 (1986), a Court plurality held that a state could not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees.

[12] McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995).

[13] Hurley v. Irish-American Gay Group, 515 U.S. 557 (1995).

[14] *See* Nat'l Inst. of Family and Life Advocates v. Becerra, 585 U.S. ___, No. 16-1140, slip op. at 7 (U.S. June 2018). Specifically, in *National Institute of Family and Life Advocates v. Becerra*, the Court reviewed a California law that, in relevant part, required medically licensed crisis pregnancy centers to notify women that the State of California provided free or low-cost services, including abortion. *Id.* at 2–4 (describing the California law). For the Court, "[b]y requiring [licensed clinics] to inform women how they can obtain state-subsidized abortions—at the same time [those clinics] try to dissuade women from choosing that option," the California law "plainly alters the content" of the clinics' speech, subjecting the law to heightened scrutiny. *Id.* at 7 (internal citations and quotations omitted).

[15] Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 570 U.S. 205, 221 (2013). For additional discussion of this case, see Amdt1.7.13.9 Conditions Exceeding the Scope of the Program.

[16] Cole v. Richardson, 405 U.S. 676 (1972); Connell v. Higginbotham, 403 U.S. 207 (1971); Bond v. Floyd, 385 U.S. 116 (1966); Knight v. Board of Regents, 269 F. Supp. 339 (S.D.N.Y. 1967) (three-judge court), *aff'd*, 390 U.S. 36 (1968); Hosack v. Smiley, 276 F. Supp. 876 (C.D. Colo. 1967) (three-judge court), *aff'd*, 390 U.S. 744 (1968); Ohlson v. Phillips, 304 F. Supp. 1152 (C.D. Colo. 1969) (three-judge court), *aff'd*, 397 U.S. 317 (1970); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 161 (1971); Fields v. Askew, 279 So. 2d 822 (Fla. 1973), *aff'd per curiam*, 414 U.S. 1148 (1974). For additional discussion of cases involving employee oaths, see Amdt1.7.9.4 Pickering Balancing Test for Government Employee Speech and Amdt1.8.2.3 Denial of Employment or Public Benefits.

[17] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651, 652 n.14 (1985). *See* Milavetz, Gallop, & Milavetz v. United States, 559 U.S. 229 (2010) (requiring advertisement for certain "debt relief" businesses to disclose that the services offered include bankruptcy assistance). For additional discussion of the Court's treatment of commercial speech, see Amdt1.7.6.1 Commercial Speech Early Doctrine.

Court considered a law requiring physicians to obtain informed consent before they could perform an abortion.[18] Specifically, the law at issue in *Casey* required doctors to tell their patients prior to an abortion about the nature of the procedure, the health risks involved, the age of the unborn child, and the availability of printed materials from the state about various forms of assistance.[19] In a plurality opinion, the Court rejected a free-speech challenge to the informed consent requirement, viewing the law as "part of the practice of medicine" and a permissible incidental regulation of speech.[20]

However, the Court has cautioned that reduced scrutiny for compelled commercial and professional speech is limited to particular contexts. For example, limited scrutiny of compelled commercial disclosures only applies to requirements that sellers provide "purely factual" and "uncontroversial information" in their commercial dealings.[21] As a result, in considering the constitutionality of a California law requiring certain medically licensed, pro-life crisis pregnancy centers to disclose information to patients about the availability of state-subsidized procedures, including abortions, the Court in *National Institute of Family and Life Advocates v. Becerra* concluded that the *Zauderer* rule for compelled disclosures of purely factual, uncontroversial information was inapplicable.[22] Specifically, the Court noted that the notice requirements were unrelated to services that the clinics provided and that the notice included information about abortion, "anything but an 'uncontroversial' topic."[23]

In that same ruling, the Court rejected the argument that the California law's disclosure requirements were comparable to the informed consent regulations upheld in Casey.[24] In contrast to the law in *Casey*, the *National Institute of Family and Life Advocates Court* concluded that the disclosure requirements were not tied to a particular medical procedure and did not require disclosure of information about the risks or benefits of any medical procedures the clinics provided.[25] In this sense, the California law, unlike the informed consent law in *Casey*, did not incidentally burden speech, but instead "regulat[ed] speech as speech."[26]

The Supreme Court has also rejected a First Amendment challenge to the compelled labeling of foreign political propaganda. Specifically, in *Meese v. Keene*, the Court upheld a provision of the Foreign Agents Registration Act of 1938 that required that, when an agent of a foreign principal seeks to disseminate foreign "political propaganda," he must label such

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[18] *See* 505 U.S. 833, 881 (1992) (plurality opinion).

[19] *Id.*

[20] *Id.* at 884.

[21] *See, e.g.*, Nat'l Inst. of Family and Life Advocates v. Becerra, No. 16-1140, slip op. at 8 (U.S. June 2018).

Moreover, even under *Zauderer*, commercial disclosure requirements cannot be unjustified or unduly burdensome. *See* 471 U.S. at 651. Applying this limit on the *Zauderer* rule, the *National Institute of Family and Life Advocates* Court reviewed a separate provision of the California law discussed above that required *unlicensed* crisis pregnancy centers to notify women that California has not licensed the clinics to provide medical services. *Id.* at 4–5 (describing the requirements for the unlicensed centers). The Court, noting the lack of evidence in the record that pregnant women were unaware that the covered facilities were not staffed by medical professionals and remarking on the breadth of the regulations that required a posting of the notice "no matter what the facilities say on site or in their advertisements," concluded that the regulations of unlicensed crisis pregnancy centers unduly burdened speech. *Id.* at 18–19.

[22] *Id.* at 9.

[23] *Id.*

[24] *Id.* at 11.

[25] *Id.*

[26] *Id.* Having concluded that the California disclosure requirements for licensed crisis pregnancy centers should be evaluated under a more rigorous form of scrutiny than what the Court employed in *Zauderer* or *Casey*, the *National Institute of Family and Life Advocates* Court, employing intermediate scrutiny, held that the California law likely violated the First Amendment. *Id.* at 14. Specifically, the Court viewed the law to be both underinclusive—the law excluded several similar clinics without explanation—and overinclusive—the state could have employed other methods, such as a state-sponsored advertising campaign, to achieve its purpose of informing low-income women about its services without "burdening a speaker with unwanted speech." *Id.* at 14–16 (internal citations omitted).

material with certain information, including his identity, the principal's identity, and the fact that he has registered with the Department of Justice. The Court emphasized that "Congress did not prohibit, edit, or restrain the distribution of advocacy materials," but only "required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda."[27]

Amdt1.7.12.3 Compelled Subsidization

First Amendment:

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

It is to be expected that disputes will sometimes arise between an organization and some of its members regarding the organization's messaging or expression. Of course, unless there is some governmental connection, there will be no federal constitutional application to any such controversy.[1] But, in at least some instances, when government compels membership in an organization or in some manner lends its authority to such compulsion, there may be constitutional limitations arising from the First Amendment's protections for speech and association.[2] It does not always violate the constitution when compulsory fees are used to subsidize the speech of others.[3] However, the Court has recognized constitutional limitations can arise, for example, in connection with union shop labor agreements permissible under the National Labor Relations Act and the Railway Labor Act.[4] The Court has recognized in this context that "'compelled funding of the speech of other private speakers or groups' presents the same dangers as compelled speech."[5]

In *Railway Employees' Dep't v. Hanson*, the Supreme Court upheld the constitutionality of a law authorizing private union shop agreements that required employees to join a union,

[27] Meese v. Keene, 481 U.S. 465, 480 (1987).

[1] The Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 537, 29 U.S.C. §§ 411–413, enacted a bill of rights for union members, designed to protect, among other things, freedom of speech and assembly and the right to participate in union meetings on political and economic subjects.

[2] This essay discusses the free speech aspects of these cases. For a discussion of the free association aspects, see Amdt1.8.4.1 Union Membership and Fees.

[3] For instance, the Court has said that the First Amendment did not preclude a public university from charging its students an activity fee used to support student organizations that engage in extracurricular speech, provided that the money was allocated to those groups by use of viewpoint-neutral criteria. Board of Regents of the Univ. of Wisconsin System v. Southworth, 529 U.S. 217 (2000) (upholding fee except to the extent a student referendum substituted majority determinations for viewpoint neutrality in allocating funds). Nor did the First Amendment preclude the government from "compel[ling] financial contributions that are used to fund advertising," provided that such contributions did not finance "political or ideological" views. Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 471, 472 (1997) (upholding Secretary of Agriculture's marketing orders that assessed fruit producers to cover the expenses of generic advertising of California fruit). But the Court has emphasized that the advertising funded by compelled financial contributions in *Glickman* was "ancillary to a more comprehensive program restricting marketing autonomy" and not "the principal object of the regulatory scheme." United States v. United Foods, Inc., 533 U.S. 405, 411, 412 (2001) (striking down Secretary of Agriculture's mandatory assessments, used for advertising, upon handlers of fresh mushrooms). The Court held that the First Amendment, however, was not violated when the government compelled financial contributions to fund *government* speech, even though the contributions were raised through a targeted assessment rather than through general taxes. Johanns v. Livestock Marketing Ass'n, 544 U.S. 550 (2005).

[4] Section 8(a)(3) of the Labor-Management Relations Act of 1947, 61 Stat. 140, 29 U.S.C. § 158(a)(3), permits the negotiation of union shop agreements. Such agreements, however, may be outlawed by state "right to work" laws. Section 14(b), 61 Stat. 151, 29 U.S.C. § 164(b). *See* Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); AFL v. American Sash & Door Co., 335 U.S. 538 (1949). In industries covered by the Railway Labor Act, union shop agreements may be negotiated regardless of contrary state laws. 64 Stat. 1238, 45 U.S.C. § 152, Eleventh; *see* Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956).

[5] Harris v. Quinn, 573 U.S. 616, 647 (2014) (quoting Knox v. SEIU, Local 1000, 567 U.S. 298, 309 (2012)).

noting that the record in the case did not indicate that union dues were being "used as a cover for forcing ideological conformity or other action in contravention of the First Amendment," such as by being spent to support political candidates.[6] In *International Ass'n of Machinists v. Street*, where union dues had been collected pursuant to a union shop agreement and had been spent to support political candidates, the Court avoided the First Amendment issue by construing the Railway Labor Act to prohibit the use of compulsory union dues for political causes.[7]

The Supreme Court held in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, that "public sector agency-shop arrangements violate the First Amendment,"[8] overruling a forty-year old precedent, *Abood v. Detroit Board of Education*, that had generally approved of such arrangements.[9] However, even *Abood* itself had only permitted some aspects of compelled fee regimes,[10] and the Court had, for years prior to *Janus*, signaled its growing discomfort with *Abood*.[11] Understanding the historical course of the jurisprudence governing compelled agency fees is important to understand the ramifications of *Janus*.

In *Abood v. Detroit Bd. of Education*,[12] the Court found *Hanson* and *Street* applicable to the public employment context.[13] Recognizing that any system of compelled support restricted employees' right not to associate and not to support, the Court nonetheless found the governmental interests served by an "agency shop" agreement[14]—the promotion of labor peace and stability of employer-employee relations—to be of overriding importance and to justify the impact upon employee freedom.[15] But the Court drew a different balance when it considered whether employees compelled to support the union were constitutionally entitled to object to the use of those exacted funds to support political candidates or to advance ideological causes not germane to the union's duties as collective-bargaining representative. The Court believed that to compel one to expend funds in such a way is to violate his freedom of belief and the right to act on those beliefs just as much as if government prohibited him from acting to further his own beliefs.[16] The Court's remedy, however, was not to restrain the union from making non-collective bargaining related expenditures, but was to require that those funds come only

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[6] 351 U.S. 225, 238 (1956).

[7] 367 U.S. 740, 749–50 (1961). Justices William O. Douglas, Hugo Black, Felix Frankfurter, and John Harlan would have reached the constitutional issue, with differing results. On the same day that it decided *Street*, the Court, in *Lathrop v. Donohue,* 367 U.S. 820 (1961), declined to reach the constitutional issues presented by roughly the same fact situation in a suit by lawyers compelled to join an "integrated bar." These issues, however, were faced squarely in *Keller v. State Bar of California,* 496 U.S. 1, 14 (1990), which held that an integrated state bar may not, against a members' wishes, devote compulsory dues to ideological or other political activities not "necessarily or reasonably related to the purpose of regulating the legal profession or improving the quality of legal service available to the people of the State."

[8] No. 16-1466, slip op. at 33 (U.S. June 2018).

[9] 431 U.S. 209, 229 (1977).

[10] *Id.* at 235.

[11] *See, e.g.*, Harris v. Quinn, 573 U.S. 616 (2014). In *Friedrichs v. California Teachers Association* the Court was equally divided on the question of whether to overrule *Abood*. No. 14-915, slip op. at 1 (U.S. Mar. 2016).

[12] 431 U.S. 209 (1977).

[13] That a public entity was the employer and the employees consequently were public employees was deemed constitutionally immaterial for the application of the principles of *Hanson* and *Street*, *id.* at 226–32, but, in a concurring opinion joined by Chief Justice Warren Burger and Justice Harry Blackmun, Justice Lewis Powell found the distinction between public and private employment crucial. *Id.* at 244.

[14] An agency shop agreement requires all employees, regardless of union membership, to pay a fee to the union that reflects the union's efforts in obtaining employment benefits through collective bargaining. The Court in *Abood* noted that it is the "practical equivalent" of a union shop agreement. 431 U.S. at 217 n.10.

[15] 431 U.S. at 217–23. For a similar argument over the issue of corporate political contributions and shareholder rights, see *First National Bank v. Bellotti,* 435 U.S. 765, 792–95 (1978), and *id.* at 802, 812–21 (White, J., dissenting).

[16] 431 U.S. at 232–37.

from employees who do not object. Therefore, the lower courts were directed to oversee development of a system under which employees could object generally to such use of union funds and could obtain either a proportionate refund or a reduction of future exactions.[17] Later, the Court further tightened the requirements. It concluded that a proportionate refund was inadequate because "even then the union obtains an involuntary loan for purposes to which the employee objects";[18] an advance reduction of dues corrected the problem only if accompanied by sufficient information by which employees may gauge the propriety of the union's fee.[19] Therefore, the union procedure must also "provide for a reasonably prompt decision by an impartial decisionmaker."[20]

In *Davenport v. Washington Education Ass'n*,[21] the Court noted that, although it had previously outlined the *minimum* "procedural requirements that public-sector unions collecting agency fees must observe in order to ensure that an objecting nonmember can prevent the use of his fees for impermissible purposes,"[22] it "never suggested that the First Amendment is implicated whenever governments place limitations on a union's entitlement to agency fees above and beyond what *Abood* and *Hudson* require."[23] Thus, the Court held in *Davenport* that the State of Washington could prohibit "expenditure of a nonmember's agency fees for election-related purposes unless the nonmember affirmatively consents."[24] The Court added that "Washington could have gone much further, restricting public-sector agency fees to the portion of union dues devoted to collective bargaining. Indeed, it is uncontested that it would be constitutional for Washington to eliminate agency fees entirely."[25]

In *Knox v. Service Employees International Union*,[26] the Court suggested constitutional limits on a public union assessing political fees in an agency shop other than through a voluntary opt-in system. The union in *Knox* had proposed and implemented a special fee to fund political advocacy before providing formal notice with an opportunity for non-union employees to opt out. Five Justices characterized agency shop arrangements in the public sector as constitutionally problematic, and described the Court's prior jurisprudence allowing opt-out provisions as anomalous, in the sense of the burdens it imposed on the constitutional rights of objecting nonmembers. The majority more specifically held that the Constitution required that separate notices be sent out for special political assessments that allowed non-union employees to opt in rather than requiring them to opt out.[27]

Doubts on the constitutionality of mandatory union dues in the public sector intensified in *Harris v. Quinn*.[28] Building on concerns outlined in *Knox*, the Court expressed reservations

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[17] 431 U.S. at 237–42. On the other hand, the Court ruled that nonmembers could be charged for such general union expenses as contributions to state and national affiliates, expenses of sending delegates to state and national union conventions, and costs of a union newsletter. Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991). The Court said a local union could also charge nonmembers a fee that went to the national union to pay for litigation expenses incurred on behalf of other local units, but only if (1) the litigation is related to collective bargaining rather than political activity, and (2) the litigation charge is reciprocal in nature, that is, other locals contribute similarly. Locke v. Karass, 129 S. Ct. 798, 802 (2009).

[18] Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 466 U.S. 435, 444 (1984).

[19] Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986).

[20] 475 U.S. at 309.

[21] 551 U.S. 177 (2007).

[22] 551 U.S. at 181, citing 475 U.S. 292, 302, 304–310 (1986).

[23] 551 U.S. at 185, quoting Keller v. State Bar of Cal., 496 U.S. 1, 17 (1990), and adding emphasis.

[24] 551 U.S. at 184.

[25] 551 U.S. at 184 (citations omitted).

[26] 567 U.S. 298 (2012).

[27] *Id.* (Alito, J., joined by Roberts, C.J., Scalia, Kennedy, and Thomas, JJ.).

[28] 573 U.S. 616 (2014).

about *Abood*'s central holding that the collection of an agency fee from public employees withstood First Amendment scrutiny because of the desirability of "labor peace" and the problem of "free ridership." Specifically, the Court questioned (1) the scope of the precedents (like *Hanson* and *Street*) that the *Abood* Court relied on; (2) *Abood*'s failure to appreciate the distinctly political context of public sector unions; and (3) *Abood*'s dismissal of the administrative difficulties in distinguishing between public union expenditures for collective bargaining and expenditures for political purposes.[29] Notwithstanding these concerns about *Abood*'s core holding, the Court in *Harris* declined to overturn *Abood* outright. Instead, the Court focused on the peculiar status of the employees at issue in the case before it: home health care assistants subsidized by Medicaid. These "partial-public employees" were under the direction and control of their individual clients and not the state, had little direct interaction with state agencies or employees, and derived only limited benefits from the union.[30] As a consequence, the Court concluded that *Abood*'s rationale—the labor peace and free rider concerns—did not justify compelling dissenting home health care assistants to subsidize union speech.[31]

In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, the Supreme Court formally overruled *Abood* and held "that public sector agency-shop arrangements violate the First Amendment."[32] The Court rejected the governmental interests said to justify the compelled fees in *Abood*, holding instead that labor peace can be achieved through less restrictive means and that the government does not have a "compelling interest" in avoiding free riders.[33] The majority opinion criticized *Abood*'s extension of *Hanson* and *Street*, saying neither of those cases "gave careful consideration to the First Amendment" and arguing that *Abood*'s reliance on those cases led it to apply an overly deferential standard to analyze public-sector agency fee arrangements.[34] In the Court's view, granting too much deference to legislative judgments about the strength of asserted government interests or about whether the challenged action truly supports those interests "is inappropriate in deciding free speech issues."[35] The Court also disagreed with additional justifications said to justify the agency-shop arrangements, notably holding that they could not be upheld under *Pickering v. Board of Education*,[36] a case in which the Court acknowledged that public employers may sometimes place certain restrictions on employees' speech.[37] Accordingly, after *Janus*, "States and public-sector unions may no longer extract agency fees from nonconsenting employees."[38]

Turning to government restrictions on union support, in *Ysursa v. Pocatello Education Ass'n*,[39] the Court upheld an Idaho statute that prohibited payroll deductions for union political activities. Because the statute did not restrict political speech, but merely declined to subsidize it by providing for payroll deductions, the state did not abridge the union's First Amendment right and therefore could justify the ban merely by demonstrating a rational basis

[29] *Id.* at 8–20.

[30] *Id.* at 24–27.

[31] *Id.* at 27.

[32] No. 16-1466, slip op. at 33 (U.S. June 2018).

[33] *Id.* at 12–13.

[34] *Id.* at 36.

[35] *Id.* at 37.

[36] 391 U.S. 563 (1968). *See* Amdt1.7.9.4 Pickering Balancing Test for Government Employee Speech.

[37] *Janus*, slip op. at 26.

[38] *Id.* at 48.

[39] 129 S. Ct. 1093 (2009).

for it. The Court found that it was "justified by the State's interest in avoiding the reality or appearance of government favoritism or entanglement with partisan politics."[40]

The Court has held that a labor relations body may not prevent a union member or employee represented exclusively by a union from speaking out at a public meeting on an issue of public concern, simply because the issue was a subject of collective bargaining between the union and the employer.[41]

Amdt1.7.13 Unconstitutional Conditions on Speech

Amdt1.7.13.1 Overview of Unconstitutional Conditions Doctrine

First Amendment:

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

The "unconstitutional conditions" doctrine reflects the Supreme Court's repeated pronouncement that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests."[1] Although the doctrine is not limited to the First Amendment context,[2] many of the leading Supreme Court cases on unconstitutional conditions have involved the freedom of speech. While the doctrine does not have a formal test,[3] the basic principle is that the government normally may not require a person, as a condition of receiving a public benefit, to relinquish a constitutional right—most notably, by speaking or refraining from speaking on a certain subject.[4] How this principle applies in a

[40] 129 S. Ct. at 1098. The unions had argued that, even if the limitation was valid as applied at the state level, it violated their First Amendment rights when applied to local public employers. The Court held that a political subdivision, "created by the state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Id.* at 1101, quoting Williams v. Mayor of Baltimore, 289 U.S. 36, 40 (1933).

[41] Madison School Dist. v. WERC, 429 U.S. 167 (1977).

[1] Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.").

[2] *Cf.*, *e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (conditioning a building permit's issuance upon an uncompensated, public right-of-access across the permit applicant's property violated the Fifth Amendment's Takings Clause); Donald v. Phila. & Reading Coal & Iron Co., 241 U.S. 329, 332 (1916) (holding that Wisconsin exceeded its authority by revoking out-of-state corporations' business licenses for removing lawsuits brought by Wisconsin citizens to federal court). *See* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 5 (1988) (explaining that the doctrine is not "anchored to any single clause of the Constitution," and has been invoked in cases involving Congress's spending power, the states' police power, individual liberties, property rights, substantive due process, and equal protection).

[3] *See, e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, 1419 (1989) (positing that the unconstitutional conditions doctrine "serves a limited but crucial role" in that it "identifies a characteristic technique by which government appears not to, but in fact does burden [individual] liberties, triggering a demand for especially strong justification by the state"); Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 Geo. L.J. 1, 5–6, 10 (2001) (advancing a "unified theory" of unconstitutional conditions that "centers on coercion" but also accounts for "particularistic constitutional doctrine").

[4] *Perry*, 408 U.S. at 597. Some legal scholars have argued that this principle is rooted in substantive due process considerations. *See, e.g.*, Zygmunt J.B. Plater & Michael O'Loughlin, *Semantic Hygiene for the Law of Regulatory Takings, Due Process, and Unconstitutional Conditions: Making Use of a Muddy Supreme Court Exactions Case*, 89 U. Colo. L. Rev. 741, 745, 796 (2018) (situating the unconstitutional conditions inquiry for permit exactions under Fourteenth Amendment substantive due process rather than the Fifth Amendment's Takings Clause).

particular legal challenge depends in part on the "benefit" offered by the government, which can take different forms, including public employment, a tax exemption, or government funding.[5]

Amdt1.7.13.2 Conditions of Public Employment

First Amendment:

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

Some of the earliest unconstitutional conditions cases involving free speech arose in the public employment context. *Perry v. Sindermann*, a 1972 case, involved a state college's decision not to renew the contract of a professor who had publicly criticized the college administration's policies.[1] The Supreme Court held that, even though the professor did not have a "contractual or tenure right to re-employment," he could still contend that the college impermissibly retaliated against him for exercising his First Amendment rights.[2] The Court reasoned that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited," thus allowing the government to "'produce a result which [it] could not command directly.'"[3]

The Court reiterated its skepticism of "indirect" constraints on freedom of speech in its 1976 decision in *Elrod v. Burns*. In *Elrod*, the Court ruled unconstitutional a county sheriff's practice of firing non-policymaking employees solely because of their political party affiliation after a change in leadership.[4] Writing for a plurality of the Court, Justice William Brennan reasoned that the "threat of dismissal" for failure to support "the favored political party" "unquestionably inhibits protected belief and association."[5] Like the *Perry* Court, the *Elrod* plurality rejected the "notion that because there is no right to a government benefit, such as public employment, the benefit may be denied for any reason."[6] Instead, it concluded that the government cannot use an indirect means (that is, the benefit of public employment) "to achieve what it may not command directly" (that is, support for a particular political party).[7]

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[5] Licenses and permits sometimes are considered a government benefit that is subject to the unconstitutional conditions doctrine. *Compare* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604 (2013) (discussing the "special application" of the unconstitutional conditions doctrine in the context of land-use permits), *with* Matal v. Tam, No. 15-1293, slip op. at 19 (U.S. June 19, 2017) (plurality opinion) (concluding that unconstitutional conditions cases did not apply to a restriction on federal trademark registration). However, the state interests at issue in licensing may justify restrictions on protected speech and expression in some circumstances. *See, e.g.*, California v. La Rue, 409 U.S. 109, 118 (1972) (upholding a state regulation prohibiting nude dancing in establishments licensed by the state to serve alcohol).

[1] Perry v. Sindermann, 408 U.S. 593, 595 (1972).

[2] *Id.* at 596–98 (reaffirming the holdings of Shelton v. Tucker, 364 U.S. 479 (1960) and Keyishian v. Board of Regents, 385 U.S. 589 (1967)).

[3] *Id.* at 597 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)). The Court remanded the case for consideration of whether the college, in fact, declined to renew the professor's contract on an "impermissible basis" and whether due process entitled the professor to a hearing on the grounds for the college's decision. *Id.* at 598, 603.

[4] Elrod v. Burns, 427 U.S. 347, 353 (1976) (plurality opinion); *see also id.* at 374–75 (Stewart and Blackmun, JJ., concurring in the judgment) ("The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the plurality that he cannot.").

[5] *Id.* at 359 (plurality opinion).

[6] *Id.* at 360.

[7] *Id.* at 361.

While acknowledging the long history of patronage politics in America,[8] the plurality evaluated the dismissal practice under the "exacting" scrutiny standard used to judge the validity of other "significant impairment[s]" of free speech rights.[9] If patronage dismissal was to "survive constitutional challenge," Justice William Brennan wrote, "it must further some vital government end by a means that is least restrictive of freedom of belief and association."[10] The plurality rejected the argument that patronage dismissals further "government effectiveness and efficiency."[11] While acknowledging that the practice might foster "political loyalty" or preserve aspects of the democratic process, the plurality concluded that the practice was not narrowly tailored to achieve these ends.[12]

Following *Elrod*, the Court clarified in *Branti v. Finkel* that "the ultimate inquiry" in evaluating a patronage dismissal "is not whether the label 'policymaker' or 'confidential' fits a particular position."[13] Instead, "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[14] In the case of an assistant public defender, the Court found it "manifest" that the attorney's continued employment could not "properly be conditioned upon his allegiance to the political party in control of the county government."[15] The Court reasoned that the "primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State"—a duty untethered to "partisan political interests."[16]

The Court extended the reasoning of *Elrod* and *Branti* to other forms of political patronage decisions in *Rutan v. Republican Party of Illinois*.[17] The *Rutan* Court held that a state governor's office could not constitutionally base "promotion, transfer, recall [after a layoff], and hiring decisions involving low-level public employees . . . on party affiliation and support."[18] The Court concluded that, like patronage dismissals, these practices significantly infringed public employees' First Amendment rights.[19] The Court then held that the political patronage practices were not "narrowly tailored to further vital governmental interests."[20] Citing less speech-restrictive alternatives, the Court reasoned that a "government's interest in securing effective employees can be met by discharging, demoting, or transferring staff members whose work is deficient," and its "interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views."[21]

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[8] *Id.* at 362.

[9] *Id.* (citing Buckley v. Valeo, 424 U.S. 1, 64–65 (1976); NAACP v. Alabama, 357 U.S. 449, 460–61 (1958)).

[10] *Id.* at 363.

[11] *Id.* at 364–66.

[12] *See id.* at 367, 369.

[13] Branti v. Finkel, 445 U.S. 507, 518 (1980).

[14] *Id.*

[15] *Id.* at 519.

[16] *Id.* at 519.

[17] Rutan v. Republican Party of Ill., 497 U.S. 62, 79 (1990); *see also* O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 726 (1996) (extending "the protections of Elrod and Branti" to situations "where government retaliates against a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance").

[18] *Rutan*, 497 U.S. at 65.

[19] *Id.* at 73.

[20] *Id.* at 74.

[21] *Id.*; *see also id.* at 78 (finding no "vital" governmental interest in patronage hiring practices for the same reasons).

Amdt1.7.13.3 Conditions on Tax Exemptions

First Amendment:

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

The Supreme Court has treated tax exemptions as a kind of government subsidy subject to the unconstitutional conditions doctrine. In an early unconstitutional conditions case, *Speiser v. Randall*, the Supreme Court considered a California law requiring applicants for a veterans' property tax exemption to sign an oath that they "do not advocate the overthrow" of the federal or state government "by force or violence or other unlawful means."[1] The Court stated that to "deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech."[2] In the Court's view, such a requirement would "coerc[e] the claimants to refrain from the proscribed speech."[3]

In another decision concerning tax exemptions, *Regan v. Taxation with Representation of Washington* (TWR), the Supreme Court held that the government need not subsidize private entities' speech to comply with the First Amendment.[4] Specifically, the *TWR* Court upheld the Internal Revenue Code's ban on "substantial lobbying" activities by tax-exempt Section 501(c)(3) organizations.[5] In the statutory scheme before the Court, both Section 501(c)(3) "charitable" and Section 501(c)(4) "social welfare" organizations were exempt from federal taxation.[6] However, only donations to Section 501(c)(3)s were tax deductible.[7] The Supreme Court held that the "substantial lobbying" restriction on Section 501(c)(3) organizations was not an unconstitutional condition.[8] Unlike in *Speiser* where the taxpayer had to refrain from speaking in order to qualify for a tax exemption, the Court reasoned, TWR could engage in substantial lobbying activities, while still qualifying as a tax-exempt organization (albeit not one that could receive tax-deductible contributions).[9] The Court concluded that the lobbying restriction merely reflected Congress's decision "not to subsidize" substantial lobbying.[10]

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[1] Speiser v. Randall, 357 U.S. 513, 515 (1958) (quoting Cal. Rev. & Tax Code § 32 (1953)).

[2] *Id.* at 518.

[3] *Id.* at 519. The *Speiser* Court did not hold that speech advocating the overthrow of the government is protected by the First Amendment. Rather, it held that the process of claiming the California exemption was unconstitutionally coercive because it would potentially chill protected speech. In the Court's view, the public would be wary of "the line separating the lawful and the unlawful," and would therefore "steer far wider of the unlawful zone." *Id.* at 522–29,

[4] Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983).

[5] *Id.* at 551.

[6] *Id.* at 554; *see also* 26 U.S.C. § 501(c)(3)–(4).

[7] *Taxation with Representation of Wash.*, 461 U.S. at 554.

[8] *Id.* at 551

[9] *Id.* at 544.

[10] *Id.* at 549–51; *see also* Cammarano v. United States, 358 U.S. 498, 512–13 (1959) (holding that the exclusion of lobbying expenses from income tax deduction for ordinary and necessary business expenses did not violate the First Amendment).

Amdt1.7.13.4 Conditions on Federal Funding

First Amendment:

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

From 1980 to 2020, much of the Court's jurisprudence on free-speech-related unconstitutional conditions developed in the context of conditions on federal funding, specifically federal grant programs.[1] These cases proceeded from the principle, identified in *Regan v. Taxation with Representation of Washington*,[2] that the government is not required to subsidize speech with which it does not agree.

Amdt1.7.13.5 Restrictions on Editorializing

First Amendment:

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

In *FCC v. League of Women Voters of California*, the Court considered a condition prohibiting any "noncommercial educational broadcasting station" that received certain federal grants from "editorializing."[1] The Court rejected the Government's argument that this condition was a permissible exercise of Congress's spending power in the form of a decision not to "subsidize" editorializing by public broadcast stations.[2] Unlike the organization in *TWR*, the Court reasoned, a regulated station had no way "to segregate its activities according to the source of its funding," creating a complete bar to editorializing.[3]

Finding *TWR* inapposite, the Court analyzed the condition as a restriction on a broadcaster's speech according to First Amendment standards.[4] After affirming that Congress has more leeway to regulate broadcasting than other types of media such as newspapers,[5] the Court stated that the condition against editorializing was constitutional only if it was "narrowly tailored to further a substantial governmental interest."[6] After considering three different potential government interests, the Court ultimately concluded that the condition failed to meet this standard.[7] First, the Court reasoned, the condition did not substantially advance an interest in protecting grantee-stations from "governmental coercion and

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[1] The Supreme Court has found unconstitutional funding conditions outside of the free-speech context as well. *E.g.*, Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012). *See* Intro.7.3 Federalism and the Constitution; ArtI.S8.C1.2.1 Overview of Spending Clause.

[2] 461 U.S. 540 (1983).

[1] FCC v. League of Women Voters of Cal., 468 U.S. 364, 366 (1984) (internal quotation marks omitted) (quoting 47 U.S.C. § 399). The condition applied to recipients of grants from the Corporation for Public Broadcasting, a private, nonprofit corporation established by the Public Broadcasting Act of 1967 to, among other duties, "make grants to local broadcasting stations that would 'aid in financing local educational . . . programming costs of such stations.'" *Id.* at 369 (quoting 47 U.S.C. § 396(g)(2)(C) (1976 ed.))).

[2] *Id.* at 399.

[3] *Id.* at 400.

[4] *Id.* at 374–80.

[5] *See id.* at 375–80 (reasoning that due to "spectrum scarcity" (that is, the limited number of broadcast frequencies) and other factors, "the broadcasting industry plainly operates under restraints not imposed upon other media," and stating that if "a similar ban on editorializing [were] applied to newspapers and magazines, we would not hesitate to strike it down as violative of the First Amendment").

[6] *Id.* at 380. *See* Amdt1.7.10.1 Overview of Media Regulation.

[7] *League of Women Voters of Cal.*, 468 U.S. at 398–99.

interference" that might be associated with federal funding, nor was it narrowly tailored to further that asserted interest.[8] Second, the Court recognized the government's interest in preventing viewer or listener confusion about the source of the editorializing, but concluded that a less-restrictive disclaimer requirement would have served this interest as effectively.[9] Third, the Court reasoned that the condition was not narrowly tailored to Congress's substantial interest in "ensuring adequate and balanced coverage of public issues"—an interest "already secured by a variety of other regulatory means that intrude far less drastically upon the 'journalistic freedom' of noncommercial broadcasters."[10]

Amdt1.7.13.6 Selective Funding Arrangements

First Amendment:

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

Because the Constitution does not require the government to subsidize speech,[1] the Court has held that the government may "selectively fund a program to encourage certain activities," including activities that involve speech, "without at the same time funding" other activities.[2] The Court announced this rule in 1991 in *Rust v. Sullivan*, a case involving funding for family-planning services under Title X of the Public Health Service Act.[3] That act provides that no funds appropriated under Title X "shall be used in programs where abortion is a method of family planning."[4] For the Supreme Court, there was "no question" that this restriction was constitutional.[5] The Court held that the government made a permissible choice to "fund one activity to the exclusion of the other."[6]

The challenged regulations implementing this statutory restriction posed a closer question, but the Court ultimately upheld the regulatory conditions as well. One provision barred a Title X project from providing "counseling concerning the use of abortion as a method of family planning" or "referral[s] for abortion as a method of family planning."[7] The Court rejected the argument that the prohibition on abortion counseling and referrals discriminated on the basis of viewpoint.[8] The Court reasoned that the government was not "suppressing a dangerous idea"; it was prohibiting "a project grantee or its employees from engaging in

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[8] *Id.* at 390 (reasoning that several other aspects of the act "substantially reduce the risk of governmental interference with the editorial judgments of local stations without restricting those stations' ability to speak on matters of public concern"). In the Court's view, the condition also did "virtually nothing . . . to reduce the risk that public stations will serve solely as outlets for expression of narrow partisan views" from private factions. *Id.* at 397.

[9] *Id.* at 395 (suggesting a disclaimer that "the editorial represents only the view of the station's management and does not in any way represent the views of the Federal Government or any of the station's other sources of funding").

[10] *Id.* at 380, 397–98 (quoting Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110 (1973)).

[1] Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983); *see, e.g.*, Lyng v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers of America, 485 U.S. 360 (1988) (holding that a condition barring households of striking workers from food stamp eligibility did "not infringe either the associational or expressive rights" of union members, reasoning that while "[e]xercising the right to strike inevitably risks economic hardship," the First Amendment does not compel the "Government to minimize that result by qualifying the striker for food stamps").

[2] Rust v. Sullivan, 500 U.S. 173, 193–95 (1991).

[3] *Id.* at 178.

[4] *Id.* (quoting 42 U.S.C. § 300a-6).

[5] *Id.* at 192.

[6] *Id.* at 193.

[7] *Id.* at 179 (quoting 42 C.F.R. § 59.8(a)(1) (1989)).

[8] Rust v. Sullivan, 500 U.S. 173, 194 (1991).

activities outside of the project's scope"; the program was "designed" to "encourage family planning," not fund "prenatal care."[9] The Court concluded that "when the Government appropriates public funds to establish a program[,] it is entitled to define the limits of that program."[10]

In addition, the Court upheld provisions in the regulations prohibiting Title X projects from "engaging in activities that 'encourage, promote or advocate abortion as a method of family planning'" and requiring Title X projects to be "'physically and financially separate' from prohibited abortion activities."[11] In the Court's view, the regulations did not "force the Title X grantee to give up abortion-related speech; they merely require[d] that the grantee keep such activities separate and distinct from Title X activities," thereby ensuring that public funds are "spent for the purposes for which they were authorized."[12] In other words, the regulations governed "the scope of the Title X *project*'s activities," leaving "the grantee unfettered in its other activities."[13]

Building on *Rust*, the Court in *National Endowment for the Arts v. Finley* suggested that including some subjective criteria in competitive grantmaking does not necessarily amount to impermissible viewpoint discrimination.[14] There, the Court upheld a federal statute requiring the NEA, in awarding grants, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[15] The Court concluded that this "advisory language" imposed "no categorical requirement" to reject applicants whose works did not meet the "decency and respect" provision.[16] Thus, the Court held, the provision did not "introduce considerations that, in practice, would effectively preclude or punish the expression of particular views."[17] Instead, the Court concluded, the provision "merely adds some imprecise considerations to an already subjective selection process."[18] As such, it did not violate the First Amendment on its face.[19]

Amdt1.7.13.7 Government's Message Versus Private Speakers

First Amendment:

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

The Court has cautioned that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple

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[9] *Id.* at 193–94 (internal quotation marks and citation omitted).

[10] *Id.* at 194.

[11] *Id.* at 180, 196 (quoting 42 C.F.R. §§ 59.9, 59.10(a)).

[12] *Id.* at 196

[13] *Id.*

[14] Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587–88 (1998).

[15] *Id.* at 572 (quoting 20 U.S.C. § 954(d)(1)).

[16] *Id.* at 581.

[17] *Id.* at 583.

[18] *Id.* at 589; *see also id.* at 585 ("Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding. The NEA has limited resources and it must deny the majority of the grant applications that it receives . . . . The agency may decide to fund particular projects for a wide variety of reasons. . . .").

[19] *Id.* at 590. The Court did not foreclose an "as-applied" challenge if, for instance, "the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints." *Id.* at 587.

semantic exercise."[1] In *Legal Services Corp. v. Velazquez*, the Court struck down a condition on federal grants to local organizations providing free legal services to indigent clients.[2] The condition prohibited grantees from representing clients in cases which "involve an effort to amend or otherwise challenge existing law" regarding "a Federal or State welfare system."[3] As interpreted by the government, the condition required lawyers working for a grantee both to decline a representation that would involve such arguments and to withdraw from a representation when such arguments "became apparent after representation was well underway."[4]

The Court held that the condition was unconstitutional.[5] The Court distinguished *Rust*, explaining that in the circumstances presented there, the government "used private speakers to transmit information pertaining to its own program"[6] In other words, the government was the speaker in *Rust* through its program.[7] In contrast, the Court reasoned, the federal program in *Velazquez* "was designed to facilitate private speech, not to promote a governmental message."[8] Congress funded the program so that grantees could "provide attorneys to represent the interests of indigent clients."[9] In addition, a lawyer working for a grantee speaks on her client's behalf; she is "not the government's speaker."[10] The condition, the Court reasoned, could prohibit lawyers from presenting "all the reasonable and well-grounded arguments necessary for proper resolution" of welfare cases, thereby "distort[ing]" the "usual functioning" of the legal system to the detriment of individual clients and the courts deciding those cases.[11] The Court observed that while Congress "was not required to fund the whole range of legal representations or relationships," it could not use funding of private speech to "suppress[ ]. . . ideas thought inimical to the Government's own interest."[12]

Amdt1.7.13.8 Public Entities and Private Access

First Amendment:

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

In 2003, the Court upheld a speech-related condition on funding for a governmental entity. The case, *United States v. American Library Association* (ALA), concerned two federal programs that provided rebates and grants to help public libraries provide internet access for

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[1] Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 547 (2001).

[2] *Id.* at 536.

[3] *Id.* at 538 (quoting Omnibus Consolidated Rescissions and Appropriations Act of 1996, § 504, 110 Stat. 1321–53).

[4] *Id.* at 539.

[5] *Id.* at 549.

[6] *Id.* at 541 ("As we said in *Rosenberger*, 'when the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.'" (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995))).

[7] The *Velazquez* Court acknowledged that the *Rust* Court did not explicitly rely on the government speech rationale, but noted that later Supreme Court cases "explained *Rust* on this understanding." *Id. See* Amdt1.7.8.2 Government Speech and Government as Speaker.

[8] *Legal Servs. Corp.*, 531 U.S. at 542.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 543–54.

[12] *Id.* at 548–49.

patrons.[1] A condition on both programs required recipient libraries to install filtering software to block access to pornographic sites and other material deemed harmful to minors.[2] The ALA argued that this condition violated libraries' First Amendment right to provide constitutionally protected speech to the public.[3]

The Court rejected ALA's unconstitutional conditions argument without resolving whether public libraries, as governmental entities, have First Amendment rights.[4] A plurality of the Court reasoned that, as in *Rust*, Congress was defining the limits of the programs it was funding—programs designed to help libraries "fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes."[5] More specifically, the plurality explained, the required filtering software blocks online materials that libraries traditionally would have excluded from their off-line collections.[6] Echoing *TWR* and *Rust*, the plurality also concluded that the condition did not "penalize" a recipient's decision to "provide [its] patrons with unfiltered Internet access"; it "simply reflect[ed] Congress's decision not to subsidize" such access.[7]

Amdt1.7.13.9 Conditions Exceeding the Scope of the Program

First Amendment:

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

Ten years after *United States v. American Library Association*, in *Agency for International Development v. Alliance for Open Society International*, the Court considered a condition requiring recipients of federal funding for global HIV/AIDs programs to "have a policy explicitly opposing prostitution and sex trafficking."[1] A group of funding recipients—domestic organizations with programs outside the United States—challenged this policy requirement on free speech grounds, arguing that it would require them to limit even their privately funded activities.[2] During the course of the litigation, the federal government issued guidelines allowing funding recipients to work with affiliate organizations that did not have the specified policy so long as the recipients "retain 'objective integrity and independence from any affiliated organization.'"[3]

The Court acknowledged that the government could not adopt the policy requirement "as a direct regulation of speech."[4] Because the policy requirement was a funding condition,[5]

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[1] United States v. Am. Library Ass'n, 539 U.S. 194, 199 (2003) (plurality opinion).

[2] *Id.* at 201 (citing 20 U.S.C. §§ 9134(f)(1)(A)(i), (B)(i) (2001) and 47 U.S.C. §§ 254(h)(6)(B)(i), (C)(i) (2001)).

[3] *Id.* at 210.

[4] *Id.* at 210–11. Although only four Justices joined the main opinion, two additional Justices concurred in the Court's judgment. *Id.* at 214–215 (Kennedy, J.); *id.* at 215–20 (Breyer, J.). The Court also rejected the ALA's argument that the condition exceeded Congress's spending power by requiring public libraries to violate their patrons' First Amendment rights. *Id.* at 202–08, 214 (plurality opinion).

[5] *Id.* at 211 (plurality opinion). The plurality rejected an analogy to *Velazquez*, reasoning that unlike lawyers for indigent clients, public libraries "have no comparable role that pits them against the Government" such that restrictions on their speech threaten to "distort" libraries' usual functions. *Id.* at 213.

[6] *Id.* at 212.

[7] *Id.* at 199.

[1] 570 U.S. 205, 208 (2013) (quoting 22 U.S.C. § 7631(f) (2012)).

[2] *Id.*

[3] *Id.* at 211 (quoting 45 C.F.R. § 89.3).

[4] *Id.* at 213.

however, the Court considered whether it "define[d] the limits of the government spending program" or sought "to leverage funding to regulate speech outside the contours of the program itself."[6] For a majority of the Court, the policy requirement clearly fell "on the unconstitutional side of [that] line."[7] The Court reasoned that "the condition by its very nature affects 'protected conduct outside the scope of the federally funded program'" because it requires recipients to "adopt—as their own—the Government's view on an issue of public concern."[8] The government's guidelines about affiliation with noncompliant entities did not "save" the condition because they required the recipient to either distance itself from its affiliate and their shared message, or clearly identify with its affiliate while espousing the government's message "only at the price of evident hypocrisy."[9]

The "distinction drawn in these cases—between conditions that define the federal program and those that reach outside it—is not always self-evident."[10] Nevertheless, it appears to be the line that the Supreme Court has drawn in analyzing funding conditions that affect a recipient's speech—that is, at least for restrictions that the government could not impose directly.[11]

Amdt1.7.13.10 Requirements That Can Be Imposed Directly

First Amendment:

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

In a 2006 decision, the Supreme Court held that a funding condition that affects speech is not an unconstitutional condition "if it could be constitutionally imposed directly."[1] In *Rumsfeld v. Forum for Academic & Institutional Rights*, the Court considered a law that required a federal department to withhold certain funds from any higher education institution that had "a policy or practice" of giving military recruiters less favorable access to its campus and students than non-military recruiters.[2] The requirement comported with the First Amendment, the Court held, because it primarily regulated conduct and the government's interest in supporting military recruiting was sufficient to justify any incidental burdens on expression.[3] Because Congress could directly require higher education institutions to provide

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[5] *See id.* at 214 (explaining that if a party objects to a funding condition, its usual "recourse is to decline the funds," even if the condition affects the party's First Amendment rights, but that in some situations, "a funding condition can result in an unconstitutional burden on First Amendment rights").

[6] *Id.* at 214–15.

[7] Agency for Int'l Dev.v. All. for Open Soc'y Int'l, 570 U.S. 205, 217 (2013).

[8] *Id.* at 218.

[9] *Id.* at 219. In 2020, the Supreme Court upheld the same policy condition as applied to the plaintiffs' foreign affiliates, holding that the First Amendment did not protect separately incorporated, foreign organizations operating abroad. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, No. 19-177, slip op. at 1–7 (U.S. June 29, 2020). The Court explained that the plaintiffs, while domestic organizations, could not "export their own First Amendment rights to shield foreign organizations from Congress's funding conditions." *Id.* at 6–7.

[10] *Alliance for Open Soc'y Int'l*, 570 U.S. at 217.

[11] Rumsfeld v. Forum for Acad. & Inst'l Rights, 547 U.S. 47, 59–60 (2006).

[1] Rumsfeld v. Forum for Acad. & Inst'l Rights, 547 U.S. 47, 59–60 (2006).

[2] *Id.* at 52–55 (quoting 10 U.S.C. § 983(b) (2000 ed., Supp. IV)).

[3] *Id.* at 60–70 (reasoning that while "recruiting assistance provided by the schools often includes elements of speech," the burden on such speech was incidental to its regulation of conduct in the form of recruiting practices, and concluding in the alternative that the law met the intermediate scrutiny standard applicable to regulations of expressive conduct).

equal access to military recruiters, it could also take the indirect measure of conditioning funding on compliance with the equal-access requirement.[4]

Amdt1.7.14 Symbolic Speech

Amdt1.7.14.1 Overview of Symbolic Speech

First Amendment:

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

Communication of political, economic, social, and other views is not accomplished solely by face-to-face speech, broadcast speech, or writing in newspapers, periodicals, and pamphlets. There is also "expressive conduct" or "symbolic speech," which includes activities such as picketing and marching, distribution of leaflets and pamphlets, door-to-door solicitation, flag desecration, and draft-card burnings.[1] Sit-ins and stand-ins may effectively express a protest about certain things.[2]

The Supreme Court has said that conduct will be sufficiently "communicative . . . to bring the First Amendment into play" if there is an "intent to convey a particularized message, and . . . the likelihood was great that the message would be understood by those who viewed it."[3] Further, the conduct must itself be "inherently" expressive—merely "combining speech and conduct" is not sufficient to "transform conduct into 'speech.'"[4] Expressive conduct is evaluated under a "less stringent" constitutional standard than pure speech and thus more subject to regulation and restriction.[5] Some expressive conduct may be forbidden altogether, when "a sufficiently important governmental interest in regulating the nonspeech element" of the activity justifies "incidental limitations" on the protected expression.[6] The relevant test is an intermediate scrutiny standard that was announced in *United States v. O'Brien*: "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the

[4] *Id.* at 59–60.

[1] *See*, *e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion). The concept of expressive conduct has also come up in the context of government speech. *E.g.*, Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 216 (2015). For a discussion of these cases, see Amdt1.7.8.2 Government Speech and Government as Speaker.

[2] In *Brown v. Louisiana,* 383 U.S. 131 (1966), the Court held protected a peaceful, silent stand-in in a segregated public library. Speaking of speech and assembly, Justice Abe Fortas said for the Court: "As this Court has repeatedly stated, these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities." *Id.* at 141–42. *See also* Garner v. Louisiana, 368 U.S. 157, 185, 201 (1961) (Harlan, J., concurring). On a different footing is expressive conduct in a place where such conduct is prohibited for reasons other than suppressing speech. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (upholding Park Service restriction on overnight sleeping as applied to demonstrators wishing to call attention to the plight of the homeless).

[3] Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting Spence v. Washington, 418 U.S. 405, 410–11 (1974)) (internal quotation mark omitted).

[4] Rumsfeld v. Forum for Acad. & Institutional Rights, 547 U.S. 47, 67 (2006) (holding that conduct was not "inherently expressive" where it was "expressive only because the [litigants] accompanied their conduct with speech explaining it"). *Cf.* United States v. O'Brien, 391 U.S. 367, 376 (1968) (saying conduct may be protected when "'speech' and 'nonspeech' elements are combined in the same course of conduct").

[5] *Johnson*, 491 U.S. at 403.

[6] *O'Brien*, 391 U.S. at 376.

furtherance of that interest."[7] This intermediate standard is related to the idea that even regulations of pure speech may sometimes be justified if they regulate only the time, place, or manner of the speech—that is, focusing on non-content elements of the speech.[8] If speech is oral, it may be noisy enough to be disturbing,[9] and, if it is written, it may be litter;[10] in either case, the noise or litter aspects of the speech may be regulable.[11]

United States v. O'Brien[12] affirmed a conviction and upheld a congressional prohibition against destruction of draft registration certificates; O'Brien had publicly burned his draft card. Finding that the government's interest in having registrants retain their cards at all times was an important one and that the prohibition of destruction of the cards worked no restriction of First Amendment freedoms broader than necessary to serve the interest, the Court upheld the statute. Subsequently, the Court upheld a "passive enforcement" policy singling out for prosecution for failure to register for the draft those young men who notified authorities of an intention not to register for the draft and those reported by others.[13]

Amdt1.7.14.2 Leaflets and Handbills

First Amendment:

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

In *Lovell v. City of Griffin*,[1] the Supreme Court struck down a permit system applying to the distribution of circulars, handbills, or literature of any kind. The First Amendment, the Court said, "necessarily embraces pamphlets and leaflets," which "have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest."[2] State courts, responding to what appeared to be a hint in *Lovell* that prevention of littering and other interests might be sufficient to sustain a flat ban on literature distribution,[3] upheld total prohibitions and were reversed in *Schneider v. State*.[4] The Court held that "[m]ere legislative preferences" for keeping "the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from

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[7] *Id.* at 377.

[8] Turner Broad. Sys. v. FCC, 512 U.S. 622, 662 (1994) (equating the *O'Brien* standard with the intermediate scrutiny standard applicable to content-neutral restrictions); *see also* Amdt1.7.5.1 Overview of Categorical Approach to Restricting Speech; Amdt1.7.7.1 The Public Forum.

[9] *E.g.*, Saia v. New York, 334 U.S. 558 (1948); Kovacs v. Cooper, 336 U.S. 77 (1949).

[10] *E.g.*, Schneider v. Town of Irvington, 308 U.S. 147 (1939).

[11] *Cf.* Cohen v. California, 403 U.S. 15 (1971).

[12] 391 U.S. 367 (1968)

[13] Wayte v. United States, 470 U.S. 598 (1985). The incidental restriction on First Amendment rights to speak out against the draft was no greater than necessary to further the government's interests in "prosecutorial efficiency," obtaining sufficient proof prior to prosecution, and promoting general deterrence (or not appearing to condone open defiance of the law). *See also* United States v. Albertini, 472 U.S. 675 (1985) (order banning a civilian from entering military base upheld as applied to attendance at base open house by an individual previously convicted of destroying military property).

[1] 303 U.S. 444 (1938).

[2] 303 U.S. at 452.

[3] 303 U.S. at 451.

[4] Schneider v. Town of Irvington, 308 U.S. 147, 161, 162 (1939). The Court noted that the right to distribute leaflets was subject to certain obvious regulations, *id.* at 160, and called for a balancing, with the weight inclined to the First Amendment rights. *See also* Jamison v. Texas, 318 U.S. 413 (1943).

handing literature to one willing to receive it."[5] In *Talley v. California*,[6] the Court struck down an ordinance that banned all handbills that did not carry the name and address of the author, printer, and sponsor. The Court noted that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind," allowing criticism of "oppressive practices and laws either anonymously or not at all."[7] Imposing identification requirements "might deter perfectly peaceful discussions of public matters of importance."[8] Responding to the city's defense that the ordinance was aimed at providing a means to identify those responsible for fraud, false advertising, and the like, the Court noted that "the ordinance is in no manner so limited," saying the Court would not, therefore, "pass on the validity of an ordinance limited to these or any other supposed evils."[9]

Talley's anonymity rationale was strengthened in *McIntyre v. Ohio Elections Comm'n*,[10] invalidating Ohio's prohibition on the distribution of anonymous campaign literature. There is a "respected tradition of anonymity in the advocacy of political causes," the Court noted, and neither of the interests asserted by Ohio justified the limitation. The Court held that the state's interest in informing the electorate was "plainly insufficient," and, although the more weighty interest in preventing fraud in the electoral process might be accomplished by a direct prohibition, it could not be accomplished indirectly by an indiscriminate ban on a whole category of speech.[11] Ohio could not apply the prohibition, therefore, to punish anonymous distribution of pamphlets opposing a referendum on school taxes.[12]

The handbilling cases were distinguished in *City Council v. Taxpayers for Vincent*,[13] in which the Court held that a city may prohibit altogether the use of utility poles for posting of signs. Although a city's concern over visual blight could be addressed by an anti-littering ordinance not restricting the expressive activity of distributing handbills, in the case of utility pole signs "it is the medium of expression itself" that creates the visual blight. Hence, the city's prohibition, unlike a prohibition on distributing handbills, was narrowly tailored to curtail no more speech than necessary to accomplish the city's legitimate purpose.[14] Ten years later, however, the Court unanimously invalidated a town's broad ban on residential signs that permitted only residential identification signs, "for sale" signs, and signs warning of safety

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[5] 308 U.S. at 161, 162.

[6] 362 U.S. 60 (1960).

[7] 362 U.S. at 64.

[8] 362 U.S. at 65.

[9] 362 U.S. at 64. In *Zwickler v. Koota,* 389 U.S. 241 (1967), the Court directed a lower court to consider the constitutionality of a statute which made it a criminal offense to publish or distribute election literature without identification of the name and address of the printer and of the persons sponsoring the literature. The lower court voided the law, but changed circumstances on a new appeal caused the Court to dismiss. Golden v. Zwickler, 394 U.S. 103 (1969).

[10] 514 U.S. 334 (1995).

[11] 514 U.S. at 348–49.

[12] In *Buckley v. American Constitutional Law Foundation,* 525 U.S. 182 (1999), the Court struck down a Colorado statute requiring initiative-petition circulators to wear identification badges. It found that "the restraint on speech in this case is more severe than was the restraint in *McIntyre*" because "[p]etition circulation is a less fleeting encounter, for the circulator must endeavor to persuade electors to sign the petition. . . . [T]he badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest." *Id.* at 199. In *Watchtower Bible & Tract Soc'y v. Village of Stratton,* 536 U.S. 150, 166 (2002), concern for the right to anonymity was one reason that the Court struck down an ordinance that made it a misdemeanor to engage in door-to-door advocacy without first registering with the mayor and receiving a permit.

[13] 466 U.S. 789 (1984).

[14] Justice William Brennan argued in dissent that adequate alternative forms of communication were not readily available because handbilling or other person-to-person methods would be substantially more expensive, and that the regulation for the sake of aesthetics was not adequately justified.

hazards.[15] Prohibiting homeowners from displaying political, religious, or personal messages on their own property entirely foreclosed "a venerable means of communication that is unique and important," and that is "an unusually cheap form of communication" without viable alternatives for many residents.[16] The ban was thus reminiscent of total bans on leafleting, distribution of literature, and door-to-door solicitation that the Court had struck down in the 1930s and 1940s. The prohibition in *Vincent* was distinguished as not removing a "uniquely valuable or important mode of communication," and as not impairing citizens' ability to communicate.[17]

Amdt1.7.14.3 Flags as a Case Study in Symbolic Speech

First Amendment:

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

Very little expression is "mere" speech. Conduct may have a communicative content, intended to express a point of view. Expressive conduct may consist of flying a particular flag as a symbol[1] or in refusing to salute a flag as a symbol.[2]

In one case, the Supreme Court concluded that "the flag salute is a form of utterance," explaining that symbolism is communication, and "[t]he use of an emblem or flag to symbolize some system, idea, institution, or personality is a short cut from mind to mind."[3] When conduct or action has a communicative content to it, governmental regulation or prohibition implicates the First Amendment, but this does not mean that such conduct or action is necessarily immune from governmental process.

The Court divided when it had to deal with one of the more popular forms of "symbolic" conduct of the late 1960s and early 1970s—flag burning and other forms of flag desecration. Thus, in *Street v. New York*,[4] the defendant had been convicted under a statute punishing desecration "by words or act" upon evidence that when he burned the flag he had uttered contemptuous words. The conviction was set aside because it might have been premised on his words alone or on his words and the act together, and no valid governmental interest supported penalizing verbal contempt for the flag.[5]

A few years later the Court reversed two other flag desecration convictions, one on due process/vagueness grounds, the other under the First Amendment. In *Smith v. Goguen*,[6] a statute punishing anyone who "publicly . . . treats contemptuously the flag of the United States" was held unconstitutionally vague, and a conviction for wearing trousers with a small

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[15] City of Ladue v. Gilleo, 512 U.S. 43 (1994).

[16] 512 U.S. at 54, 57.

[17] 512 U.S. at 54. The city's legitimate interest in reducing visual clutter could be addressed by "more temperate" measures, the Court suggested. *Id.* at 58.

[1] Stromberg v. California, 283 U.S. 359 (1931).

[2] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[3] 319 U.S. at 632.

[4] 394 U.S. 576 (1969).

[5] 394 U.S. at 591–93. In *Radich v. New York,* 401 U.S. 531 (1971), *aff'g*, 26 N.Y.2d 114, 257 N.E.2d 30 (1970), an equally divided Court, Justice William O. Douglas not participating, sustained a flag desecration conviction of one who displayed sculptures in a gallery, using the flag in apparently sexually bizarre ways to register a social protest. Defendant subsequently obtained his release on habeas corpus, United States *ex rel.* Radich v. Criminal Court, 459 F.2d 745 (2d Cir. 1972), *cert. denied*, 409 U.S. 115 (1973).

[6] 415 U.S. 566 (1974).

United States flag sewn to the seat was overturned. The language subjected the defendant to criminal liability under a standard "so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag."[7]

The First Amendment was the basis for reversal in *Spence v. Washington*,[8] which set aside a conviction under a statute punishing the display of a United States flag to which something is attached or superimposed. The defendant had hung his flag from his apartment window upside down with a peace symbol taped to the front and back. The act, the Court thought, was a form of communication, and because of the nature of the act, and the factual context and environment in which it was undertaken, the Court held it to be protected. The context considered by the Court included the fact that the flag was privately owned, that it was displayed on private property, and that there was no danger of breach of the peace. The Court also emphasized that the act was intended to express an idea and it did so without damaging the flag. The Court assumed that the state had a valid interest in preserving the flag as a national symbol, but left unclear whether that interest extended beyond protecting the physical integrity of the flag.[9]

The underlying assumption that flag burning could be prohibited as a means of protecting the flag's symbolic value was later rejected. Twice, in 1989 and again in 1990, the Court held that prosecutions for flag burning at a public demonstration violated the First Amendment. First, in *Texas v. Johnson*[10] the Court rejected a state desecration statute designed to protect the flag's symbolic value, and then in *United States v. Eichman*[11] rejected a more limited federal statute purporting to protect only the flag's physical integrity. Both cases were decided by 5-4 votes, with Justice William Brennan writing the Court's opinions.[12] The Texas statute invalidated in *Johnson* defined the prohibited act of "desecration" as any physical mistreatment of the flag that the actor knew would seriously offend other persons. This emphasis on causing offense to others meant that the law was not "unrelated to the suppression of free expression" and that consequently the deferential standard of *United States v. O'Brien*, discussed in an earlier essay, was inapplicable.[13] Applying strict scrutiny instead, the Court ruled that the state's prosecution of someone who burned a flag at a political protest was not justified under the state's asserted interest in preserving the flag as a symbol of nationhood and national unity. The Court's opinion left open the question whether the Court would uphold a "content-neutral" statute protecting the physical integrity of the flag.

Immediately following *Johnson*, Congress enacted a new flag protection statute providing punishment for anyone who "knowingly mutilates, defaces, physically defiles, burns,

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[7] 415 U.S. at 578.

[8] 418 U.S. 405 (1974).

[9] 418 U.S. at 408–11, 412–13. Subsequently, the Court vacated, over the dissents of Chief Justice Warren Burger and Justices Byron White, Harry Blackmun, and William Rehnquist, two convictions for burning flags and sent them back for reconsideration in the light of *Goguen* and *Spence*. Sutherland v. Illinois, 418 U.S. 907 (1974); Farrell v. Iowa, 418 U.S. 907 (1974). The Court, however, dismissed, "for want of a substantial federal question," an appeal from a flag desecration conviction of one who, with no apparent intent to communicate but in the course of "horseplay," blew his nose on a flag, simulated masturbation on it, and finally burned it. Van Slyke v. Texas, 418 U.S. 907 (1974).

[10] 491 U.S. 397 (1989).

[11] 496 U.S. 310 (1990).

[12] In each case Justice William Brennan's opinion for the Court was joined by Justices Thurgood Marshall, Harry Blackmun, Antonin Scalia, and Anthony Kennedy, and in each case Chief Justice William Rehnquist and Justices White, John Paul Stevens, and Sandra Day O'Connor dissented. In *Johnson* the Chief Justice's dissent was joined by Justices Byron White and Sandra Day O'Connor, and Justice John Paul Stevens dissented separately. In *Eichman* Justice John Paul Stevens wrote the only dissenting opinion, to which the other dissenters subscribed.

[13] 491 U.S. at 407–08. For discussion of the *O'Brien* intermediate scrutiny standard, see Amdt1.7.14.1 Overview of Symbolic Speech.

maintains on the floor or ground, or tramples upon any flag of the United States."[14] The law was designed to be content-neutral and to protect the "physical integrity" of the flag.[15] Nonetheless, the 1990 decision in *United States v. Eichman* overturned convictions of flag burners, as the Court found that the law suffered from "the same fundamental flaw" as the Texas law in *Johnson*.[16] The government's underlying interest, characterized by the Court as resting upon "a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideals,"[17] still related to the suppression of free expression. Support for this interpretation was found in the fact that most of the prohibited acts are usually associated with disrespectful treatment of the flag; this suggested to the Court "a focus on those acts likely to damage the flag's symbolic value."[18] As in *Johnson*, such a law could not withstand strict scrutiny analysis.

Amdt1.7.14.4 Public Issue Picketing and Parading

First Amendment:

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

In its early cases, the Supreme Court held that picketing and parading were forms of expression entitled to some First Amendment protection.[1] Those early cases did not, however, explicate the difference in application of First Amendment principles that the difference between mere expression and speech-plus would entail. Many of these cases concerned disruptions or feared disruptions of the public peace occasioned by the expressive activity and the ramifications of this on otherwise protected activity.[2] A series of other cases concerned the permissible characteristics of permit systems in which parades and meetings were licensed, and expanded the procedural guarantees that must accompany a permissible licensing system.[3] In *Hughes v. Superior Court*, however, the Supreme Court upheld an injunction against picketers asking a grocery store to adopt a quota-hiring system for Black employees, affirming the state court's ruling that picketing to coerce the adoption of racially discriminatory hiring was contrary to state public policy.[4]

A series of civil rights picketing and parading cases led the Court to formulate standards seemingly more protective of expressive activity. The process began with *Edwards v. South Carolina*,[5] in which the Court reversed a breach of the peace conviction of several Black protesters for their refusal to disperse as ordered by police. The statute was so vague, the Court concluded, that the demonstrators had been convicted simply because they peaceably

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[14] The Flag Protection Act of 1989, Pub. L. No. 101-131 (1989).

[15] *See* H.R. Rep. No. 231, 101st Cong., 1st Sess. 8 (1989) ("The purpose of the bill is to protect the physical integrity of American flags in all circumstances, regardless of the motive or political message of any flag burner").

[16] 496 U.S. at 317–19.

[17] 496 U.S. at 316.

[18] 496 U.S. at 317.

[1] Hague v. CIO, 307 U.S. 496 (1939); Cox v. New Hampshire, 312 U.S. 569 (1941); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951).

[2] Cantwell v. Connecticut, 310 U.S. 296 (1940); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Terminiello v. City of Chicago, 337 U.S. 1 (1949); Feiner v. New York, 340 U.S. 315 (1951).

[3] *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977); Carroll v. President & Commr's of Princess Anne, 393 U.S. 175 (1968).

[4] Hughes v. Superior Court, 339 U.S. 460 (1950).

[5] 372 U.S. 229 (1963).

expressed unpopular views. Describing the demonstration upon the grounds of the legislative building in South Carolina's capital, Justice Potter Stewart observed that "[t]he circumstances in this case reflect an exercise of these basic [First Amendment] constitutional rights in their most pristine and classic form."[6] In subsequent cases, however, the Court rejected the idea that the First Amendment "afford[s] the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as . . . to those who communicate ideas by pure speech."[7] The Court emphasized that "certain forms of conduct mixed with speech may be regulated or prohibited," and further concluded that picketing and parading may be regulated under a sufficiently narrowly drawn statute "even though [such conduct is] intertwined with expression and association."[8]

The Court must determine, of course, whether the regulation is aimed primarily at conduct, or whether instead the aim is to regulate the content of speech. In a series of decisions, the Court refused to permit restrictions on parades and demonstrations, and reversed convictions for breach of the peace and similar offenses, when, in the Court's view, opponents of the demonstrators' messages had created the disturbance.[9] Subsequently, however, the Court upheld a ban on residential picketing in *Frisby v. Shultz*,[10] finding that the city ordinance was narrowly tailored to serve the "significant" governmental interest in protecting residential privacy. As interpreted, the ordinance banned only picketing that targeted a single residence, and it is unclear whether the Court would uphold a broader restriction on residential picketing.[11]

In 1982's *NAACP v. Claiborne Hardware Co.*,[12] the Justices confronted a case, that, like *Hughes v. Superior Court*,[13] involved a state court injunction on picketing, although this one also involved a damage award. The case arose in the context of a protest against racial conditions by Black citizens of Claiborne County, Mississippi. Listing demands that included desegregation of public facilities, hiring Black policemen, hiring more Black employees by local stores, and ending verbal abuse by police, the local chapter of the National Association for the Advancement of Colored People, Inc. (NAACP) unanimously voted to boycott the area's White merchants. The boycott was carried out through speeches and nonviolent picketing and solicitation of others to cease doing business with the merchants. Individuals were designated to watch stores and identify Black people patronizing the stores; their names were then announced at meetings and published. Persuasion of others included social pressures and threats of social ostracism. Acts of violence did occur from time to time, directed in the main at Black people who did not observe the boycott.

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[6] 372 U.S. at 235. *See also* Fields v. South Carolina, 375 U.S. 44 (1963); Henry v. City of Rock Hill, 376 U.S. 776 (1964).

[7] Cox v. Louisiana, 379 U.S. 536, 555 (1965). Nonetheless, in this opinion, the Court concluded that a state breach-of-the-peace law granting city officials "completely uncontrolled discretion" to permit parades or demonstrations was unconstitutional. *Id.* at 557–58. The Court described the facts as "strikingly similar to those present in Edwards v. South Carolina." *Id.* at 544–45.

[8] Cox v. Louisiana, 379 U.S. 559, 563 (1965). The Court ruled the state law at issue in this opinion sufficiently narrowly drawn, as it targeted picketing near a courthouse, with the intent of interfering with the administration of justice. *Id.* at 562, 564.

[9] Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965); Gregory v. City of Chicago, 394 U.S. 111 (1969); Bachellar v. Maryland, 397 U.S. 564 (1970). *See also* Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *stay denied*, 436 U.S. 953, *cert. denied*, 439 U.S. 916 (1978).

[10] 487 U.S. 474 (1988).

[11] An earlier case involving residential picketing had been resolved on equal protection rather than First Amendment grounds, the ordinance at issue making an exception for labor picketing. Carey v. Brown, 447 U.S. 455 (1980).

[12] 458 U.S. 886 (1982).

[13] 339 U.S. 460 (1950).

The state Supreme Court imposed joint and several liability upon leaders and participants in the boycott, and upon the NAACP, for all of the merchants' lost earnings during a seven-year period on the basis of the common law tort of malicious interference with the merchants' business, holding that the existence of acts of physical force and violence and the use of force, violence, and threats to achieve the ends of the boycott deprived it of any First Amendment protection.

Reversing, the Supreme Court observed that the goals of the boycotters were legal and that most of their means were constitutionally protected; although violence was not protected, its existence alone did not deprive the other activities of First Amendment coverage, particularly where there was no evidence that the boycott organizers authorized, ratified, or even had specific knowledge of the violence. Thus, speeches and nonviolent picketing, both to inform the merchants of grievances and to encourage others to join the boycott, were protected activities, and association for those purposes was also protected.[14] The Court ruled that the activity was protected even though nonparticipants had been urged to join by threats of social ostracism: "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[15] The boycott had a disruptive effect upon local economic conditions and resulted in loss of business for the merchants, but in the Court's view, these consequences did not justify suppression of the boycott. Government may regulate certain economic activities having an incidental effect upon speech (for example, labor organizing or business conspiracies to restrain competition),[16] but that power of government does not extend to suppression of picketing and other boycott activities involving, as this case did, speech upon matters of public affairs with the intent of affecting governmental action and motivating private actions to achieve racial equality.[17]

The critical issue for the lower court, however, had been the occurrence of violent acts. The Supreme Court first affirmed that the "First Amendment does not protect violence" or prevent a state "from imposing tort liability for business losses that are caused by violence and by threats of violence."[18] Nonetheless, the Court stressed that the First Amendment demands precision of regulation "[w]hen such conduct occurs in the context of constitutionally protected activity," limiting "the grounds that may give rise to damages liability and . . . the persons who may be held accountable for those damages."[19] In other words, the states may impose damages for the consequences of violent conduct, but they may not award compensation for the

[14] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907–08 (1982).

[15] 458 U.S. at 910. The Court cited *Thomas v. Collins,* 323 U.S. 516, 537 (1945), a labor picketing case, and *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971), a public issues picketing case, which had also relied on the labor cases. *Compare* NLRB v. Retail Store Employees, 447 U.S. 607, 618–19 (1980) (Stevens, J., concurring) (labor picketing that coerces or "signals" others to engage in activity that violates valid labor policy, rather than attempting to engage reason may be prohibited). To the contention that liability could be imposed on "store watchers" and on a group known as "Black Hats" who also patrolled stores and identified Black patrons of the businesses, the Court responded: "There is nothing unlawful in standing outside a store and recording names. Similarly, there is nothing unlawful in wearing black hats, although such apparel may cause apprehension in others." 458 U.S. at 925.

[16] *See, e.g.*, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (upholding application of per se antitrust liability to trial lawyers association's boycott designed to force higher fees for representation of indigent defendants by court-appointed counsel).

[17] In evaluating the permissibility of government regulation in this context that has an incidental effect on expression, the Court applied the standards of *United States v. O'Brien*, which permits a regulation "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restiction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 458 U.S. at 912, n.47, quoting *O'Brien*, 391 U.S. 367, 376–77 (1968) (footnotes omitted).

[18] 458 U.S. at 916.

[19] 458 U.S. at 916–17.

consequences of nonviolent, protected activity.[20] Thus, the state courts had to compute, upon proof by the merchants, what damages had been the result of violence, and only those nonviolent persons who associated with others with an awareness of violence and an intent to further it could similarly be held liable.[21] Because most of the acts of violence had occurred early on, in 1966, there was no way constitutionally that much if any of the later losses of the merchants could be recovered in damages.[22] As to the field secretary of the local NAACP, the Court refused to permit imposition of damages based upon speeches that could be read as advocating violence, because they did not meet the standard for speech likely to incite imminent lawless action.[23] The award against the NAACP fell with the denial of damages against its local head, and, in any event, the protected right of association required a rule that would immunize the NAACP without a finding that it "authorized—either actually or apparently—or ratified unlawful conduct."[24]

Claiborne Hardware is, thus, a seminal decision in the Court's effort to formulate standards governing state power to regulate or to restrict expressive conduct that comes close to or crosses over the line to encompass some violent activities; it requires great specificity and the drawing of fine discriminations by government so as to reach only that portion of the activity that does involve violence or the threat of violence.[25]

More recently, disputes arising from anti-abortion protests outside abortion clinics have occasioned another look at principles distinguishing lawful public demonstrations from proscribable conduct. In *Madsen v. Women's Health Center*,[26] the Court refined principles governing issuance of "content-neutral" injunctions that restrict expressive activity.[27] The

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[20] 458 U.S. at 917–18.

[21] 458 U.S. at 918–29, relying on a series of labor cases and on the subversive activities association cases, *e.g.*, Scales v. United States, 367 U.S. 203 (1961), and Noto v. United States, 367 U.S. 290 (1961).

[22] 458 U.S. at 920–26. The Court distinguished Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941), in which an injunction had been sustained against both violent and nonviolent activity, not on the basis of special rules governing labor picketing, but because the violence had been "pervasive." 458 U.S. at 923.

[23] 458 U.S. at 926–29. The field secretary's "emotionally charged rhetoric . . . did not transcend the bounds of protected speech set forth in *Brandenburg v. Ohio,* 395 U.S. 444 (1969)."

[24] 458 U.S. at 931. In ordinary business cases, the rule of liability of an entity for actions of its agents is broader. *E.g.*, American Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982). The different rule in cases of organizations formed to achieve political purposes rather than economic goals appears to require substantial changes in the law of agency with respect to such entities. Note, 96 HARV. L. REV. 171, 174–76 (1982).

[25] "Concerted action is a powerful weapon. History teaches that special dangers are associated with conspiratorial activity. And yet one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means."

"[P]etitioners' ultimate objectives were unquestionably legitimate. The charge of illegality . . . derives from the means employed by the participants to achieve those goals. The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection."

"The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. [The burden can be met only] by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognizes the importance of avoiding the imposition of punishment for constitutionally protected activity. . . . A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees." 458 U.S. at 933–34.

[26] 512 U.S. 753 (1994).

[27] The Court rejected the argument that the injunction was necessarily content-based or viewpoint-based because it applied only to anti-abortion protesters. The Court stated: "An injunction by its very nature applies only to a particular group (or individuals) . . . . It does so, however, because of the group's past actions in the context of a specific dispute between real parties." There had been no similarly disruptive demonstrations by pro-abortion factions at the abortion clinic. 512 U.S. at 762. For more discussion of the standards for content-based and content-neutral regulations in public forums, see Amdt1.7.7.1 The Public Forum.

appropriate test, the Court stated, is "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant governmental interest."[28] Regular time, place, and manner analysis (requiring that regulation be narrowly tailored to serve a significant governmental interest) "is not sufficiently rigorous," the Court explained, "because injunctions create greater risk of censorship and discriminatory application, and because of the established principle that an injunction should be no broader than necessary to achieve its desired goals."[29] Applying its new test, the Court upheld an injunction prohibiting protesters from congregating, picketing, patrolling, demonstrating, or entering any portion of the public right-of-way within thirty-six feet of an abortion clinic—after concluding that the injunction targeted this particular group of protesters because of their past actions, rather than because of the content or viewpoint of their speech. The Court also upheld the injunction's noise restrictions designed to ensure the health and well-being of clinic patients. Other aspects of the injunction, however, did not pass the test. The Court believed inclusion of private property within the thirty-six-foot buffer was not adequately justified, nor was inclusion in the noise restriction of a ban on "images observable" by clinic patients. A ban on physically approaching any person within 300 feet of the clinic unless that person indicated a desire to communicate burdened more speech than necessary, in the Court's view. Also, a ban on demonstrating within 300 feet of the residences of clinic staff was not sufficiently justified, as the Court said the restriction covered a much larger zone than an earlier residential picketing ban that the Court had upheld.[30]

In *Schenck v. Pro-Choice Network of Western New York*,[31] the Court applied the *Madsen* test to another injunction that placed restrictions on demonstrating outside an abortion clinic. The Court upheld the portion of the injunction that banned "demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities"—what the Court called "fixed buffer zones."[32] It struck down a prohibition against demonstrating "within fifteen feet of any person or vehicles seeking access to or leaving such facilities"—what it called "floating buffer zones."[33] The Court cited "public safety and order"[34] in upholding the fixed buffer zones, but it found that the floating buffer zones "burden[ed] more speech than is necessary to serve the relevant governmental interests"[35] because they made it "quite difficult for a protester who wishes to engage in peaceful expressive activity to know how to remain in compliance with the injunction."[36] The Court also upheld a "provision, specifying that once sidewalk counselors who had entered the buffer zones were required to 'cease and desist' their counseling, they had to retreat 15 feet from the people they had been counseling and had to remain outside the boundaries of the buffer zones."[37]

In *Hill v. Colorado*,[38] the Court upheld a Colorado statute that made it unlawful, within 100 feet of the entrance to any health care facility, to "knowingly approach" within eight feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill

[28] 512 U.S. at 765.

[29] 512 U.S. at 765.

[30] Referring to Frisby v. Schultz, 487 U.S. 474 (1988).

[31] 519 U.S. 357 (1997).

[32] 519 U.S. at 366 n.3.

[33] 519 U.S. at 366 n.3.

[34] 519 U.S. at 376.

[35] 519 U.S. at 377.

[36] 519 U.S. at 378.

[37] 519 U.S. at 367.

[38] 530 U.S. 703 (2000).

to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person."[39] This decision is notable because it upheld a statute, and not, as in *Madsen* and *Schenck*, merely an injunction directed to particular parties. The Court found the statute to be a content-neutral time, place, and manner regulation of speech that "reflect[ed] an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners."[40] The restrictions were content-neutral because they regulated only the places where some speech may occur, and because they applied equally to all demonstrators, regardless of viewpoint. Although the restrictions did not apply to all speech, the Court deemed the "kind of cursory examination" that might be required to distinguish casual conversation from protest, education, or counseling not "problematic," noting that it often would not be necessary to know the exact content of speech to determine whether a person's course of conduct was covered by the law.[41] The Court further held that the law was narrowly tailored to achieve the state's interests, saying that the eight-foot restriction did not significantly impair the ability to convey messages by signs, and ordinarily allowed speakers to come within a normal conversational distance of their targets. Because the statute allowed the speaker to remain in one place, persons who wished to hand out leaflets could position themselves beside entrances near the path of oncoming pedestrians, and consequently were not deprived of the opportunity to get the attention of persons entering a clinic.

In *McCullen v. Coakley*, the Court applied the same content-neutral analysis as that in *Hill*, but nonetheless struck down a statutory thirty-five-foot buffer zone at entrances and driveways of abortion facilities.[42] The Court concluded that the buffer zone was not narrowly tailored to serve governmental interests in maintaining public safety and preserving access to reproductive healthcare facilities, the concerns claimed by Massachusetts to underlie the law.[43] The opinion cited several alternatives to the buffer zone that would not curtail the use of public sidewalks as traditional public forums for speech, nor significantly burden the ability of those wishing to provide "sidewalk counseling" to women approaching abortion clinics. Specifically, the Court held that, to preserve First Amendment rights, targeted measures, such as injunctions, enforcement of anti-harassment ordinances, and use of general crowd control authority, as needed, are preferable to broad, prophylactic measures.[44]

Different types of issues were presented by *Hurley v. Irish-American Gay Group*,[45] in which the Court held that a state's public accommodations law could not be applied to compel private organizers of a St. Patrick's Day parade to accept in the parade a unit that would proclaim a message that the organizers did not wish to promote. Each participating unit affects the message conveyed by the parade organizers, the Court observed, and application of the public accommodations law to the content of the organizers' message contravened the "fundamental rule . . . that a speaker has the autonomy to choose the content of his own message."[46]

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[39] 530 U.S. at 707.

[40] 530 U.S. at 714.

[41] 530 U.S. at 722.

[42] 573 U.S. ___, No. 12-1168, slip op. at 11–18 (2014).

[43] *Id.* at 19–23.

[44] *Id.* at 23–29.

[45] 515 U.S. 557 (1995).

[46] 515 U.S. at 573.

Amdt1.7.14.5 Labor Union Protests and Marches

First Amendment:

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

The Supreme Court has suggested that "public-issue picketing" rests "on the highest rung of the hierarchy of First Amendment values," while *labor* picketing might be treated somewhat differently.[1] Though the public issue cases are "logically relevant" to labor picketing, the cases dealing with application of economic pressures by labor unions are set apart by different "economic and social interests."[2]

It was in a labor case that the Court first held picketing to be entitled to First Amendment protection.[3] Striking down a flat prohibition on picketing with intent to influence or induce someone to do something, the Court said: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."[4] The Court further reasoned that "the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests."[5]

The Court soon recognized several caveats to this protection, saying, for example, that peaceful picketing may be enjoined if it is associated with violence and intimidation.[6] Although initially the Court continued to find picketing protected in the absence of violence,[7] it soon decided a series of cases recognizing a potentially far-reaching exception: injunctions against peaceful picketing in the course of a labor controversy may be enjoined when such picketing is counter to valid state policies in a domain open to state regulation.[8] The apparent culmination of this course of decision was *International Brotherhood of Teamsters v. Vogt*, in which Justice Felix Frankfurter broadly rationalized all the cases and derived the rule that "a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at

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[1] Carey v. Brown, 447 U.S. 455, 466–67 (1980).

[2] Niemotko v. Maryland, 340 U.S. 268, 276 (1951).

[3] Thornhill v. Alabama, 310 U.S. 88 (1940). Picketing as an aspect of communication was recognized in *Senn v. Tile Layers Union,* 301 U.S. 468 (1937).

[4] 310 U.S. at 102.

[5] 310 U.S. at 104. *See also* Carlson v. California, 310 U.S. 106 (1940). In *AFL v. Swing,* 312 U.S. 321 (1941), the Court held unconstitutional an injunction against peaceful picketing based on a state's common-law policy against picketing in the absence of an immediate dispute between employer and employee.

[6] Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941).

[7] Bakery & Pastry Drivers Local v. Wohl, 315 U.S. 769 (1942); Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942); Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943).

[8] Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (upholding on basis of state policy forbidding agreements in restraint of trade an injunction against picketing to persuade business owner not to deal with non-union peddlers); International Bhd. of Teamsters v. Hanke, 339 U.S. 470 (1950) (upholding injunction against union picketing protesting non-union proprietor's failure to maintain union shop card and observe union's limitation on weekend business hours); Building Service Emp. Intern. Union v. Gazzam, 339 U.S. 532 (1950) (injunction against picketing to persuade innkeeper to sign contract that would force employees to join union in violation of state policy that employees' choice not be coerced); Local 10, United Ass'n of Journeymen Plumbers v. Graham, 345 U.S. 192 (1953) (injunction against picketing in conflict with state's right-to-work statute).

preventing effectuation of that policy."[9] Although the Court has not disavowed this broad language, the *Vogt* exception has apparently not swallowed the entire *Thornhill* rule.[10] The Court has indicated that "a broad ban against peaceful picketing might collide with the guarantees of the First Amendment."[11]

Amdt1.7.14.6 Solicitation

First Amendment:

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

In *Martin v. City of Struthers*, the Supreme Court struck down an ordinance forbidding solicitors or distributors of literature from knocking on residential doors in a community, the asserted aims of the ordinance being to protect privacy, to protect the sleep of many who worked night shifts, and to protect against burglars posing as canvassers. The 5-4 majority concluded that "[t]he dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas."[1]

Later, although striking down an ordinance because of vagueness, the Court observed that it "has consistently recognized a municipality's power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing" with a more "narrowly drawn ordinance, that does not vest in municipal officers the undefined power to determine what messages residents will hear."[2] However, an ordinance that limited solicitation of contributions door-to-door by charitable organizations to those that use at least 75% of their receipts directly for charitable purposes, defined so as to exclude the expenses of solicitation, salaries, overhead, and other administrative expenses, was invalidated as overbroad.[3] The Court rejected a privacy rationale, as just as much intrusion was likely by permitted as by non-permitted solicitors. A rationale of prevention of fraud was also unavailing, as the Court did not believe that all associations that spent more than 25% of their receipts on overhead were actually engaged in a profit-making enterprise, and, in any event, more narrowly drawn regulations, such as disclosure requirements, could serve this governmental interest.

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[9] International Bhd. of Teamsters v. Vogt, 354 U.S. 284, 293 (1957). *See also* American Radio Ass'n v. Mobile Steamship Ass'n, 419 U.S. 215, 228–32 (1974); NLRB v. Retail Store Employees, 447 U.S. 607 (1980); International Longshoremens' Ass'n v. Allied International, 456 U.S. 212, 226–27 (1982).

[10] The dissenters in *Vogt* asserted that the Court had "come full circle" from *Thornhill*. 354 U.S. at 295 (Douglas, J., joined by Warren, C.J., and Black, J.).

[11] NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 63 (1964) (requiring—and finding absent in NLRA—"clearest indication" that Congress intended to prohibit all consumer picketing at secondary establishments). *See also* Youngdahl v. Rainfair, 355 U.S. 131, 139 (1957) (indicating that, where violence is scattered through time and much of it was unconnected with the picketing, the state should proceed against the violence rather than the picketing).

[1] Martin v. City of Struthers, 319 U.S. 141, 147 (1943).

[2] Hynes v. Mayor of Oradell, 425 U.S. 610, 616–17 (1976).

[3] Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980). *See also* Larson v. Valente, 456 U.S. 228 (1982) (state law distinguishing between religious organizations and their solicitation of funds on basis of whether organizations received more than half of their total contributions from members or from public solicitation violates the Establishment Clause). Meyer v. Grant, 486 U.S. 414 (1988) (criminal penalty on use of paid circulators to obtain signatures for ballot initiative suppresses political speech in violation of First and Fourteenth Amendments).

The Court similarly invalidated laws regulating solicitation in *Secretary of State v. Joseph H. Munson Co.*,[4] and *Riley v. National Federation of the Blind*.[5] In *Munson*, the Court invalidated an overbroad Maryland statute limiting professional fundraisers to 25% of the amount collected plus certain costs, and allowing waiver of this limitation if it would effectively prevent the charity from raising contributions. In *Riley*, the Court invalidated a North Carolina fee structure containing even more flexibility.[6] The Court saw "no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent," and expressed concern about the law placing the burden on the fundraiser to show that a fee structure is reasonable.[7] Moreover, a requirement that fundraisers disclose to potential donors the percentage of donated funds previously used for charity was also invalidated in *Riley*, the Court indicating that the "more benign and narrowly tailored" alternative of disclosure to the state (accompanied by state publishing of disclosed percentages) could make the information publicly available without so threatening the effectiveness of solicitation.[8]

In *Watchtower Bible & Tract Soc'y v. Village of Stratton*, the Court struck down an ordinance that made it a misdemeanor to engage in door-to-door advocacy—religious, political, or commercial—without first registering with the mayor and receiving a permit.[9] "It is offensive to the very notion of a free society," the Court wrote,"that a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so."[10] The Court ruled that the ordinance violated the right to anonymity, burdened the freedom of speech of those who hold "religious or patriotic views" that prevent them from applying for a license, and effectively banned "a significant amount of spontaneous speech" that might be engaged in on a holiday or weekend when it was not possible to obtain a permit.[11]

Amdt1.8 Freedom of Association

Amdt1.8.1 Overview of Freedom of Association

First Amendment:

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

The First Amendment protects many activities, such as communication, assembly, and worship, that are not solely personal but may be based on communities and relationships of all kinds (that is, association). Even though the First Amendment's text does not expressly

[4] 467 U.S. 947 (1984).

[5] 487 U.S. 781 (1988).

[6] A fee of up to 20% of collected receipts was deemed reasonable, a fee of between 20% and 35% was permissible if the solicitation involved advocacy or the dissemination of information, and a fee in excess of 35% was presumptively unreasonable, but could be upheld upon one of two showings: that advocacy or dissemination of information was involved, or that otherwise the charity's ability to collect money or communicate would be significantly diminished.

[7] 487 U.S. at 793.

[8] 487 U.S. at 800. North Carolina's requirement for licensing of professional fundraisers was also invalidated in *Riley*, *id.* at 801–02. In *Illinois ex rel. Madigan v. Telemarketing Assocs.,* 538 U.S. 600 (2003), the Court held unanimously that the First Amendment does not prevent a state from bringing fraud actions against charitable solicitors who falsely represent that a "significant" amount of each dollar donated would be used for charitable purposes.

[9] 536 U.S. 150 (2002).

[10] 536 U.S. at 165–66.

[11] 536 U.S. at 167.

identify a "freedom of association,"[1] the Supreme Court has recognized this right as "an indispensable means of preserving" other First Amendment freedoms.[2] Specifically, the Court "has recognized a right to associate for the purpose of engaging" in "speech, assembly, petition for the redress of grievances, and the exercise of religion."[3]

This right of "expressive association" is the focus of this set of essays.[4] The Court has also recognized a "personal liberty" interest in "certain intimate human relationships," protected not only by the First Amendment, but also by the Due Process Clause of the Fourteenth Amendment.[5] This concept of "intimate association" is discussed at the end of this section and in the essays on substantive due process.[6]

The Supreme Court did not always recognize a constitutional right of association. In 1886, in a case involving the formation of state militias, the Court decreed that state governments "have the power to regulate or prohibit associations and meetings of the people, except in the case of peaceable assemblies" formed to petition the government.[7] It would be fifty years before the Court came to see the right of assembly as a distinct avenue for other kinds of association.[8] In 1937, the Court held that the "right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."[9] The Court applied this interpretation of the freedom of assembly in a 1945 case, holding that the right of union organizers to inform others about the advantages and disadvantages of joining a union "is protected not only as part of free speech, but as part of free assembly."[10]

Starting in the 1950s, the Court began to refer to the freedom of association as a right distinct from, but closely related to, the freedoms of speech and assembly, which are expressly listed in the First Amendment.[11] By 1958, the Court considered it "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of" civil liberties such as the freedom of speech.[12] Although political association is a classic

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[1] Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

[2] Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984).

[3] *Id.*

[4] *Id.*

[5] *Id.* at 617–18. *See, e.g.*, *Griswold*, 381 U.S. at 486 (recognizing marriage as a protected relationship); Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (holding that "same-sex couples may exercise the fundamental right to marry," that is "inherent in the liberty of the person" and protected under the Fourteenth Amendment). Although these two conceptions of associational freedom differ, the Court has explained that "[i]n many cases, government interference with one form of protected association will also burden the other form of association." Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 544 (1987).

[6] *Roberts*, 468 U.S. at 618. *See* Amdt14.S1.6.3.4 Family Autonomy and Substantive Due Process and Amdt14.S1.6.3.5 Marriage and Substantive Due Process.

[7] Presser v. Illinois, 116 U.S. 252, 267 (1886). *See* Amdt1.10.1 Historical Background on Freedoms of Assembly and Petition.

[8] *See* Thomas v. Collins, 323 U.S. 516, 530 (1945) ("It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable.").

[9] De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

[10] *Thomas*, 323 U.S. at 532, 539–40.

[11] U.S. Const. amend. I; *e.g.*, Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 409 (1950).

[12] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958). Legal scholars have debated whether the Court initially grounded this right of association in the First Amendment (applicable to the states through the Fourteenth Amendment) or in the Fourteenth Amendment's Due Process Clause. *See* John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 Tenn. L. Rev. 485, 501–17, 530–33 (2010) (discussing these two constitutional arguments and the early legal commentary after *NAACP v. Alabama ex rel. Patterson*); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 624 (1980) (writing that before the Court's 1965 decision in *Griswold v. Connecticut*, "the notion of constitutional protection of the freedom of association was a First Amendment doctrine and little more"). Ultimately, the Court recognized two different strands of freedom of association, tying the freedom of

example of expressive association,[13] the First Amendment also protects "forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members."[14]

Only a few Supreme Court decisions involving the freedom of association concern direct restrictions on association. For example, in *Coates v. Cincinnati*, the Court held that a local ordinance violated the freedoms of association and assembly on its face.[15] The challenged ordinance made it a crime for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by."[16] According to the Court, this ordinance was "aimed directly at activity protected by the Constitution"—the freedoms of association and assembly.[17]

More commonly, the Court has considered cases in which the regulation of other behavior indirectly affects the freedom to associate. For example, because association supports other First Amendment activity, the Court has recognized that compelling disclosure of one's associations can inhibit exercising protected First Amendment rights, particularly where disclosure would subject an individual to threats, harassment, or economic reprisals.[18] Accordingly, First Amendment protections "are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals," but also by laws or regulations that may have a "chilling effect on association."[19]

The Court's decisions in this area, though not always reconcilable, reflect a balancing of First Amendment rights and governmental interests as well as the major political and social events of the era. For example, in the 1950s and 1960s, the Court adjudicated many cases in which the government asked U.S. citizens to reveal or disavow their actual or perceived affiliations with the Communist Party.[20] The Court largely credited concerns that states and the federal government expressed at that time about the security threat that Communism posed to the United States,[21] even while applying increasing First Amendment scrutiny to

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expressive association to the First Amendment and the freedom of intimate association primarily to the Fourteenth Amendment. *See* Roberts v. United States Jaycees, 468 U.S. 609, 617–18 (1984).

[13] *See* Sweezy v. New Hampshire, 354 U.S. 234, 245 (1957) (plurality opinion) (calling the "freedom of political association" a "highly sensitive area[ ]" of First Amendment activity requiring investigations to be "carefully circumscribed"); Cal. Democratic Party v. Jones, 530 U.S. 567, 575 (2000) (observing the "special place the First Amendment reserves" for a political party's selection of its own candidate).

[14] Griswold v. Connecticut, 381 U.S. 479, 483 (1965); *see also Alabama ex rel. Patterson*, 357 U.S. at 460–61 (stating that "it is immaterial," for First Amendment purposes, "whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters").

[15] 402 U.S. 611, 615 (1971). The Court also held that the ordinance was unconstitutionally vague in violation of the Fourteenth Amendment's Due Process Clause. *Id.* at 614–15.

[16] *Id.* at 611 (internal quotation marks omitted).

[17] *Id.* at 616. By comparison, in *City of Chicago v. Morales*, a plurality of the Court concluded that a Chicago loitering ordinance did not substantially affect protected association because the ordinance defined loiter as "remaining in one place 'with no apparent purpose.'" 527 U.S. 41, 53 (1999). The Court nevertheless held that the ordinance was unconstitutionally vague in violation of the Fourteenth Amendment's Due Process Clause. *Id.* at 51.

[18] *Alabama ex rel. Patterson*, 357 U.S. at 462–63. *See* Amdt1.8.3.2 Disclosure of Membership Lists.

[19] Ams. for Prosperity Found. v. Bonta, No. 19-251, slip op. at 19 (U.S. July 1, 2021). Government actions other than compelled disclosure can also burden the freedom of association. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 931 (1982) (reasoning that holding an organization liable for unlawful conduct that it neither authorized nor ratified "would impermissibly burden the rights of political association").

[20] *See* Amdt1.8.3.1 Associational Privacy to Amdt1.8.3.5 Donor Disclosure Requirements.

[21] *See, e.g.*, Uphaus v. Wyman, 360 U.S. 72, 80 (1959) (holding that New Hampshire's interest in ferreting out "subversive activities" outweighed the associational-privacy interests of attendees at a summer camp run by suspected Communists).

laws that burdened the association of other groups.[22] Describing its own decisions in 1963, the Court explained, "the Communist Party is not an ordinary or legitimate political party[,]" and thus, Party membership "is a permissible subject of regulation and legislative scrutiny."[23] While the Court later abandoned some of its presumptions about the dangers of bare association, the Court's care with respect to issues of national security remained evident in later cases, such as a 2010 decision upholding a ban on domestic support of designated foreign terrorist organizations.[24]

Although many of the leading Supreme Court decisions on the freedom of association concerned burdens on association, the Court has also held that "compelled association" can violate the First Amendment.[25] For example, in some circumstances, laws requiring organizations to include persons with whom they disagree on political, religious, or ideological matters can violate members' freedom of association, particularly if those laws interfere with an organization's message.[26]

As with other individual rights protected by the Constitution, the freedom of association is not absolute.[27] First, the government may prohibit "agreements to engage in illegal conduct," even though such agreements "undoubtedly possess some element of association."[28] Second, forms of association that are neither "intimate" nor "expressive" within the meaning of First Amendment case law may not receive constitutional protection.[29] Third, as noted above, even when a law implicates protected association, the government's interests may outweigh the burdens on association in some circumstances.[30] Finally, although individuals have a right to organize as a group to express their views, there is no corresponding constitutional obligation on the part of the government to listen to the group's concerns.[31]

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[22] *See, e.g.*, *Alabama ex rel. Patterson*, 357 U.S. at 463 (holding that *Alabama* did not have a "subordinating" interest in obtaining the NAACP's membership lists "sufficient to justify the deterrent effect" that disclosure could have on NAACP members' right of association).

[23] Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539, 547 (1963).

[24] *See* Amdt1.8.2.5 Material Support Bar.

[25] Special rules apply in the context of certain religious organizations. For example, the First Amendment protects a religious organization's freedom to select its own ministers to a greater degree than a secular organization's selection of its employees. *See* Amdt1.2.3.4 Church Leadership and the Ministerial Exception. The Supreme Court has explained that, although the "right to freedom of association is a right enjoyed by religious and secular groups alike," the First Amendment itself "gives special solicitude to the rights of religious organizations" through its Religion Clauses. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 189 (2012).

[26] Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000). *See* Amdt1.8.4.2 Nondiscrimination and Equal-Access Requirements.

[27] U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973).

[28] Brown v. Hartlage, 456 U.S. 45, 55 (1982); *see also* Madsen v. Women's Health Ctr., 512 U.S. 753, 776 (1994) (stating that the freedom of association "does not extend to joining with others for the purpose of depriving third parties of their lawful rights").

[29] For example, in 1989 the Court ruled that a state could license dance halls that were open only to teenagers. Dallas v. Stanglin, 490 U.S. 19, 28 (1989). Excluding adults did not infringe the teenagers' right to associate with persons outside of their age group, the Court held, declaring that there is no "generalized right of 'social association' that includes chance encounters in dance halls." *Id.* at 25.

[30] *E.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 40 (2010).

[31] *See* Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 288 (1984) (recognizing the "government's freedom to choose its advisers" in upholding a state law requiring public universities to "meet and confer" with the faculty union rather than individual faculty members); Smith v. Ark. State Highway Emps., 441 U.S. 463, 465 (1979) (per curiam) (stating that although the First Amendment protects a public employee's right to "associate and speak freely and petition openly," it "does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it"); Babbitt v. UFW Nat'l Union, 442 U.S. 289, 313 (1979) (holding that a state "was not constitutionally obliged to provide a procedure pursuant to which agricultural employees, through a chosen representative, might compel their employers to negotiate").

Amdt1.8.2 Restrictions on Expressive Association

Amdt1.8.2.1 Barriers to Group Advocacy and Legal Action

First Amendment:

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

The Supreme Court has recognized that joining together to advance political and civil rights is "expressive and associational conduct at the core of the First Amendment's protective ambit."[1] Accordingly, when the government regulates in ways that restrict or burden such association, it typically must show that its law or action is narrowly drawn to achieve a compelling governmental interest.[2] In the Supreme Court's words, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[3]

A state generally has the authority to regulate professions that it licenses, including attorneys.[4] That authority may apply even to professionals' speech, especially in a commercial context. For example, a state may restrict "in-person solicitation by lawyers who seek to communicate purely commercial offers of legal assistance to lay persons" in certain places, such as an accident scene, where consumers are particularly vulnerable to undue influence.[5]

When professionals are engaged in "political expression and association," however, a state "must regulate with significantly greater precision."[6] In particular, the freedom of association includes a "basic right to group legal action" and protects "collective activity undertaken to obtain meaningful access to the courts."[7] This protection extends to the activities of lawyers and legal organizations themselves in some circumstances.[8] Thus, a state may not bar organizations that use "litigation as a vehicle for effective political expression and association" from offering legal services to prospective clients based on "some potential" for violation of ethical standards.[9]

The 1963 case *NAACP v. Button* established that the First Amendment protects "cooperative, organizational activity" to pursue "legitimate political ends" through litigation.[10] The case involved a Virginia law banning "the improper solicitation of any legal or professional business," which the Virginia courts had construed to ban certain outreach activities of the National Association for the Advancement of Colored People, Inc. (NAACP) related to the provision of legal assistance.[11] The Supreme Court began its analysis by clarifying that "abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against

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[1] *In re* Primus, 436 U.S. 412, 424 (1978).

[2] NAACP v. Button, 371 U.S. 415, 433 (1963).

[3] *Id.*

[4] *In re Primus*, 436 U.S. at 422.

[5] *Id.* at 422 (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)). Courts generally review First Amendment challenges to commercial speech restrictions under a less-rigorous standard called "intermediate scrutiny." *See* Amdt1.7.6.1 Commercial Speech Early Doctrine.

[6] *Id.* at 438.

[7] United Transp. Union v. State Bar of Mich., 401 U.S. 576, 585 (1971).

[8] *E.g.*, *Button*, 71 U.S. 415.

[9] *In re Primus*, 436 U.S. at 431.

[10] 371 U.S. at 430.

[11] *Id.* at 419–26.

governmental intrusion."[12] Although the NAACP "is not a conventional political party," the Court explained, its litigation activity enables "the distinctive contribution of a minority group to the ideas and beliefs of our society."[13] "For such a group," the Court continued, "association for litigation may be the most effective form of political association."[14] The Court therefore held that Virginia's broadly construed law violated the First Amendment "by unduly inhibiting protected freedoms of expression and association."[15]

Following the *Button* decision, the Court held in three cases that labor unions enjoyed First Amendment protection in assisting their members to pursue legal remedies. In the first case, the union advised members to seek legal advice before settling injury claims and recommended particular attorneys;[16] in the second, the union retained attorneys on a salaried basis to represent members;[17] in the third, the union recommended certain attorneys whose fee would not exceed a specified percentage of the recovery.[18] In each case, the Court concluded that the government had an insufficient regulatory interest to prohibit the legal services at issue because the government relied on a remote possibility of harm to prospective clients resulting from unethical practices.[19]

Because not all forms of advocacy are protected under the First Amendment, not all associations for the purpose of advocacy are protected to the same degree. In *Scales v. United States*, the Court upheld the "membership clause" of the Smith Act, which, under the Court's interpretation, made it a felony for an individual to be an active member of an organization that advocates the overthrow of the U.S. government by force or violence if the individual shares that specific intent.[20] The defendant in *Scales* was convicted based on his membership in the Communist Party of the United States.[21] That group's advocacy, the Court explained, "is not constitutionally protected speech."[22] The Court reasoned that membership in a group engaged in "forbidden advocacy" should receive no greater First Amendment protection than the proscribable speech itself.[23]

Additionally, although access to the courts was a key consideration in *Button*, not all laws limiting such access burden the freedom of association. For example, the Court upheld a statutory limit on attorney's fees for certain veterans' benefits claims, reasoning that the limitation did not infringe the freedom of association because it applied "across-the-board to individuals and organizations alike."[24] In another case, the Court concluded that waiving the

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[12] *Id.* at 429.

[13] *Id.* at 431.

[14] *Id.* The Court later employed a similar rationale in extending the First Amendment's protection to a lawyer's solicitation of a client on behalf of the American Civil Liberties Union (ACLU). *In re Primus*, 436 U.S. at 431–32.

[15] *Button*, 371 U.S. at 437.

[16] Bhd. of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964).

[17] United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217 (1967).

[18] United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971).

[19] *Bhd. of R.R. Trainmen*, 377 U.S. at 6–8; *United Mine Workers*, 389 U.S. at 225; *United Transp. Union*, 401 U.S. at 583.

[20] 367 U.S. 203, 205, 221–22 (1961).

[21] *Id.* at 205–06.

[22] *Id.* at 228. Eight years later, in *Brandenburg v. Ohio*, the Court revised the standard applied in *Scales* for distinguishing between "abstract advocacy" of illegal conduct (which the First Amendment protects) and "incitement" (which the government can proscribe and punish). Under *Brandenburg*, speech falls outside the First Amendment's protection only if it is directed to producing *imminent* lawless action and *likely* to produce such action. 395 U.S. 444, 447 (1969).

[23] *Scales*, 367 U.S. at 229.

[24] Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 335 (1985) *superseded by statute*, Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105.

court fees of indigent individuals, but not organizations, did not violate the First Amendment.[25] Because an organization could qualify for the fee waiver only if its members were individually indigent anyway, the Court reasoned, litigating as an organization would not materially assist their expressive capacity.[26] Thus, it appears that barriers to litigation are unlikely to impede the freedom of association if they have similar effects on individuals and organizations.

Amdt1.8.2.2 Election Laws

First Amendment:

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

Even though states have broad authority to administer their elections, the Court has recognized the potential for state election laws to burden the associational rights of voters, candidates, and political parties.[1] Whether an election law "governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself," it "inevitably affects" an "individual's right to vote and his right to associate with others for political ends."[2] In evaluating whether such a law comports with the First Amendment, the Supreme Court has balanced the interests of the state in administering its elections with the burdens of the challenged requirement on individual rights.[3]

States may impose some restrictions on a candidate's or party's access to the ballot. For example, the Court held that a state may require political parties to "demonstrate a significant, measurable quantum of community support" in order to appear on a general election ballot.[4] Such a requirement serves the state's "vital interests" in preserving "the integrity of the electoral process" and "regulating the number of candidates on the ballot to avoid undue voter confusion."[5] The Court also upheld, on similar grounds, a California election law prohibiting an individual from running as an independent candidate if that individual was defeated in another party's primary during the same election cycle or had a registered affiliation with another political party within the preceding year.[6]

The Court has found other ballot-access requirements to unduly infringe the associational rights of candidates and voters.[7] In 1974, the Court struck down an Indiana law forbidding a

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[25] Rowland v. Cal. Men's Colony, 506 U.S. 194, 211–12 (1993).

[26] *Id.*

[1] *See* Kusper v. Pontikes, 414 U.S. 51, 57 (1973) ("[I]n exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections.").

[2] Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).

[3] *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997).

[4] Am. Party of Tex. v. White, 415 U.S. 767, 782 (1974); *see also* Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986) (reaffirming that this rule applies to minor-party and independent candidates); Jenness v. Fortson, 403 U.S. 431, 438 (1971) (upholding Georgia's requirement that a prospective candidate who did not receive at least 20% of the votes in a primary election submit a nominating petition with the signatures of 5% of the eligible electorate in order to appear on the general election ballot); N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 204 (2008) (holding that a state "may similarly demand a minimum degree of support for candidate access to a primary ballot").

[5] *Am. Party of Tex.*, 415 U.S. at 782 n.14.

[6] Storer v. Brown, 415 U.S. 724, 733 (1974).

[7] *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 31, 34 (1968) (reasoning that Ohio's ballot access requirements gave "the two old, established parties a decided advantage over any new parties struggling for existence and thus place[d] substantially unequal burdens on both the right to vote and the right to associate" in violation of the Fourteenth Amendment's Equal Protection Clause).

political party from appearing on an election ballot unless it filed an affidavit stating under oath that it did not advocate the overthrow of the government by force or violence.[8] The Court held that the state could not condition access to the ballot on such a "loyalty oath," because the First Amendment protects advocacy of violent overthrow as an "abstract doctrine."[9] In another case, the Court held that an Ohio law requiring individuals to file a statement of candidacy for the presidency in March—well before the major parties' primaries and the November general election—unconstitutionally burdened the associational rights of independent voters.[10] In 1992, the Court reversed a state supreme court decision barring a new political party from appearing on the ballot under a particular name.[11]

The right of association generally protects a political party's decisions about its internal structure and processes for choosing candidates for national office.[12] According to the Court, "a State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure an election that is orderly and fair."[13] Several cases illustrate these principles. In *Democratic Party of the United States v. Wisconsin*, the Court held that while a state was free to allow non-Democrats to vote in its Democratic primary, it could not constitutionally compel the Democratic Party to seat the state's delegates (who were bound by the primary results) at the party's national convention.[14] In *Tashjian v. Republican Party*, the Court held that a state could not prohibit the Republican Party from opening up its primary to independents.[15] In *California Democratic Party v. Jones*, the Court held that California's "blanket primary" violated political parties' freedom of association because it "force[d] political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival."[16] Similarly, in upholding a Puerto Rico law authorizing an incumbent political party to fill an interim vacancy in a legislative seat held by that party, the Court ruled that the party did not need to open its election to nonmembers, analogizing the process to a party's primary election.[17]

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[8] Communist Party of Ind. v. Whitcomb, 414 U.S. 441, 450 (1974).

[9] *Id.* at 442, 450. *See* Amdt1.7.9.1 Loyalty Oaths to Amdt1.7.9.4 Pickering Balancing Test for Government Employee Speech.

[10] Anderson v. Celebrezze, 460 U.S. 780, 806 (1983).

[11] Norman v. Reed, 502 U.S. 279, 290 (1992) (reasoning that the state's interest in "electoral order" did not justify the state supreme court's "inhospitable reading" of the statutory requirements for a new party to access the ballot).

[12] Tashjian v. Republican Party, 479 U.S. 208, 224 (1986). *Cf.* Marchioro v. Chaney, 442 U.S. 191, 199 (1979) (stating that "[t]here can be no complaint that the party's right to govern itself has been substantially burdened by statute when the source of the complaint is the party's own decision to confer critical authority" on a state committee).

[13] Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 233 (1989); *see also* Cousins v. Wigoda, 419 U.S. 477, 491 (1975) (explaining that a state's "interest in protecting the integrity of its electoral process" is not "compelling in the context of the selection of delegates to" a national party convention, given the national nature of the convention and the need for uniform standards).

[14] 450 U.S. 107 (1981).

[15] *Tashjian*, 479 U.S. at 225. *But cf.* Clingman v. Beaver, 544 U.S. 581, 587 (2005) (upholding an Oklahoma law barring parties from opening their primaries to voters other than registered party members and registered independents).

[16] 530 U.S. 567, 577 (2000). *Cf.* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 458–59 (2008) (upholding a state law allowing voters to vote for any candidate appearing on a primary ballot listing candidates along with their "party preference," because that law did not "on its face provide for the nomination of candidates or compel political parties to associate with or endorse candidates").

[17] Rodriguez v. Popular Democratic Party, 457 U.S. 1, 14 (1982). Despite the Court's solicitude for political parties' rights to control their own procedures and organization, those associational rights may be constrained by other constitutional rights. *See* Morse v. Republican Party, 517 U.S. 186, 228 (1996) (plurality opinion) (stating that associational rights "could not justify a major political party's decision to exclude eligible voters from the candidate selection process because of their race" because the Fifteenth Amendment "foreclose[s] such a possibility").

The Court is willing to let states restrict some individual political activity in order to protect the integrity and effectiveness of political associations. For example, the Court upheld a New York law requiring a voter to enroll as a party member at least thirty days before the general election each year in order to vote in the next primary for that party.[18] The Court reasoned that the law was intended to prevent "party 'raiding,' whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary," and that this was a "particularized legitimate purpose."[19] In contrast, the Court found the anti-raiding rationale insufficient to sustain an Illinois law that prohibited an individual from voting in a primary election because she had voted in another party's primary within the preceding twenty-three months.[20] Unlike New York's law, the Illinois law effectively "'lock[ed]' voters into a pre-existing party affiliation from one primary to the next," requiring them to "forgo voting in *any* primary for a period of almost two years" in order to "break the 'lock.'"[21]

Like election laws, government-imposed limits on *contributions* to political candidates or political organizations also can burden associational rights of candidates or organizations and their supporters.[22] For example, the Court held that a local ordinance that imposed a $250 limit on "contributions to committees formed to support or oppose ballot measures" violated the freedom of association of the committees and their contributors.[23] A key factor for the Court was that "an affluent person" could "spend without limit to advocate individual views on a ballot measure," but the ordinance restricted only contributions "made in concert with one or more others in the exercise of the right of association."[24]

The Supreme Court commonly analyzes First Amendment challenges to contribution limits and related campaign finance laws in terms of the burdens they might place on both the freedoms of speech and association.[25] These cases are discussed in the Freedom of Speech section of the First Amendment essay.[26]

Amdt1.8.2.3 Denial of Employment or Public Benefits

First Amendment:

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

Generally speaking, the First Amendment prohibits the government from denying an individual access to a job or profession because of the individual's current or past associations alone. There are, however, some instances in which the Court has upheld employment-related restrictions on association, as discussed below.

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[18] Rosario v. Rockefeller, 410 U.S. 752 (1973).

[19] *Id.* at 760, 762.

[20] Kusper v. Pontikes, 414 U.S. 51, 61 (1973).

[21] *Id.* at 60–61.

[22] *See* McCutcheon v. FEC, 572 U.S. 185, 204 (2014) (plurality opinion) (explaining how an "aggregate limit on how many candidates and committees an individual may support through contributions" limits an individual's associational rights by potentially forcing him to "choose which of several policy concerns he will advance" (emphasis removed)).

[23] Citizens Against Rent Control/Coalition for Fair Hous. v. Berkeley, 454 U.S. 290, 291, 300 (1981).

[24] *Id.* at 296.

[25] *See id.* at 300 (explaining that the "two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression").

[26] *See* Amdt1.7.11.1 Overview of Campaign Finance to Amdt1.7.11.6 Legislative Investigations.

During the 1950s and 1960s, the Supreme Court considered actions taken by the federal and state governments to address Communism in the workplace. In 1950, the Court considered the "grave and difficult problem" presented by a federal law that effectively "discouraged" unions from electing members of the Communist Party to leadership positions in the union.[1] While recognizing that the law affected protected association, the Court reasoned that the statute mainly regulated "harmful conduct" in the form of political strikes designed to obstruct labor relations and interstate commerce.[2] The Court upheld the law, concluding that it was directed not at what Communists "advocate or believe," but what "they have done and are likely to do again."[3]

Two years later, in *Adler v. Board of Education*, the Court upheld a New York law that disqualified members of the Communist Party and other state-designated organizations from holding offices or teaching positions in the public school system.[4] The Court concluded that the state may deny these individuals "the privilege of working for the [public] school system" because of their "unexplained membership in an organization found by the school authorities, after notice and a hearing, to teach and advocate the overthrow of the government by force or violence, and known by such persons to have such purpose."[5]

By the mid-1960s, however, the Court largely had abandoned *Adler*'s reasoning.[6] For example, in 1966, the Court considered an Arizona law that subjected a state employee to "immediate discharge and criminal penalties" if, at the time of taking the oath of office or thereafter, the employee knowingly was a member of the Communist Party or any other organization whose purposes included the overthrow of the state government.[7] The Court held that this "guilt by association" approach violated the First Amendment.[8] That the statute applied only to individuals who knew of the organization's unlawful purpose did not save it.[9] The Court held that a "law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms."[10]

In 1967, the Court likewise held unconstitutional a provision of the federal Subversive Activities Control Act of 1950 that prohibited a member of a "Communist-action organization" from gaining employment "in any defense facility."[11] The Court concluded that the statute violated the First Amendment right of association because it swept "indiscriminately across all types of association with Communist-action groups, without regard to the quality and degree of membership."[12] More precise regulation was needed, the Court explained, to address "the congressional concern over the danger of sabotage and espionage in national defense industries" and comply with the First Amendment.[13] "It would indeed be ironic," the Court

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[1] Am. Commcn's Ass'n v. Douds, 339 U.S. 382, 393 (1950). Specifically, the law required the officers of each union to file an affidavit stating that they were not members of the Communist Party in order for the National Labor Relations Board to entertain claims filed by that union. *Id.* at 385.

[2] *Id.* at 396.

[3] *Id.*

[4] 342 U.S. 485, 492 (1952).

[5] *Id.*

[6] Keyishian v. Bd. of Regents, 385 U.S. 589, 595, 606 (1967).

[7] Elfbrandt v. Russell, 384 U.S. 11, 13, 16 (1966).

[8] *Id.* at 19.

[9] *Id.* at 13.

[10] *Id.* at 19; *see also Keyishian*, 385 U.S. at 606 (similarly distinguishing "[m]ere knowing membership" from "a specific intent to further the unlawful aims of an organization").

[11] United States v. Robel, 389 U.S. 258, 260 (1967) (quoting Section 5(a)(1)(D) of the act).

[12] *Id.* at 262.

[13] *Id.* at 266–67.

observed, "if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile."[14]

In a series of cases involving political patronage requirements that began in the 1970s, the Supreme Court held that the government cannot fire or demote a public employee because of the employee's political affiliation except in narrow circumstances involving high-ranking employees with policy-making functions.[15]

Related to association-based employment restrictions are cases involving "loyalty oaths" that required government employees to disclaim membership in certain organizations. These cases are discussed in the Freedom of Speech essay because they involved compelled speech.[16] The extent to which the government can require a prospective employee or applicant for a professional license to disclose prior associations is discussed in more detail in another essay.[17]

While the foregoing cases dealt with employment, the Court has also signaled that group association cannot be the sole basis for denying public benefits. For example, the Court held that a public university's refusal to register a student group because of its affiliation with a national organization violated the students' freedom of association.[18] Similarly, a state may not require an individual to "forfeit" the right of association "as the price for exercising another" protected right.[19]

Amdt1.8.2.4 Conditions of Incarceration

First Amendment:

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

Incarceration is a special context in which the government has more authority to restrict the freedom of association. The Supreme Court has explained that the "fact of confinement and the needs of the penal institution impose limitations on constitutional rights," most notably, the freedom of association.[1] Accordingly, the standard of review for freedom-of-association claims is deferential to the government and prison administrators. The Court has held that

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[14] *Id.* at 264. For a case in which the Court found national security interests to justify restrictions on protected speech and association with foreign organizations, see Amdt1.8.2.5 Material Support Bar.

[15] *See* Elrod v. Burns, 427 U.S. 347, 372 (1976) (plurality opinion) (concluding that political patronage dismissals, in which a public employer fires an employee because of the employee's affiliation or non-affiliation with a particular political party, violate the First Amendment as a general practice, because they "severely restrict political belief and association"); *id.* at 375 (Stewart, J., concurring in the judgment). *See also* Branti v. Finkel, 445 U.S. 507, 519 (1980) (holding that "the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government"); Rutan v. Republican Party, 497 U.S. 62, 65 (1990) (holding that "promotion, transfer, recall, and hiring decisions involving low-level public employees" may not be "based on party affiliation and support"); O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 726 (1996) (generally extending "the First Amendment safe-guards of political association afforded to employees" to "independent contractors"). *See* Amdt1.7.13.2 Conditions of Public Employment.

[16] *See* Amdt1.7.9.1 Loyalty Oaths to Amdt1.7.9.4 Pickering Balancing Test for Government Employee Speech.

[17] *See* Amdt1.8.3.3 Character and Fitness and Evidentiary Disclosures.

[18] Healy v. James, 408 U.S. 169, 186–87 (1972). However, the Court stated that the university could require applicants to affirm that they will comply with reasonable campus regulations. *Id.* at 193.

[19] Lefkowitz v. Cunningham, 431 U.S. 801, 807–08 (1977) (holding that a state may not require a person to waive the person's Fifth Amendment right against self-incrimination as a condition of holding a political party office); Aptheker v. Sec'y of State, 378 U.S. 500, 507 (1964) (holding that a state may not restrict the right to travel based on an individual's membership in a particular association).

[1] Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977). *See* Amdt1.7.8.4 Prison Free Speech and Government as Prison Administrator.

"when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[2] In evaluating reasonableness, the Court has considered: (1) whether there is a "valid, rational connection between the prison regulation" and a "legitimate and neutral" governmental interest; (2) whether prison inmates have "alternative means of exercising the right" available to them; (3) the "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) the "absence of ready alternatives" to the regulation.[3]

Applying the "reasonable relationship" test, the Court upheld a ban on inmate solicitation and group meetings for a prisoners' union;[4] restrictions on visitation by children;[5] and restrictions on certain types of correspondence between inmates.[6] In contrast, the Court struck down a regulation prohibiting prisoners to marry only with the permission of the prison's superintendent and only for "compelling reasons."[7] The Court held that the fundamental constitutional right to marry—a right of intimate association—applies in the prison context and that the regulation at issue was "not reasonably related" to the prison's "security and rehabilitation concerns."[8]

Amdt1.8.2.5 Material Support Bar

First Amendment:

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

Although foreign organizations operating abroad generally do not have First Amendment rights,[1] the First Amendment does protect the associations of U.S. persons and residents, even if those associations are with foreign persons.[2] Still, the government may proscribe some types of interactions with foreign groups or individuals in the interest of national security.[3]

In *Holder v. Humanitarian Law Project*, two U.S. citizens and six domestic organizations challenged the constitutionality of a federal ban on providing material support or resources to designated foreign terrorist organizations.[4] They argued that the law criminalized protected speech and association with two foreign groups that the United States had designated as foreign terrorist organizations.[5] The Supreme Court agreed that the law restricted the freedom

[2] Turner v. Safley, 482 U.S. 78, 89 (1987), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb).

[3] *Id.* at 89–90 (internal quotation marks omitted).

[4] *Jones*, 433 U.S. at 129–33.

[5] Overton v. Bazzetta, 539 U.S. 126 (2003).

[6] *Turner*, 482 U.S. at 93; *see also* Shaw v. Murphy, 532 U.S. 223, 231 (2001) (declining "to cloak the provision of legal assistance with any First Amendment protection above and beyond the protection normally accorded prisoners' speech" under *Turner*).

[7] *Turner*, 482 U.S. at 98–99.

[8] *Id.* at 95–97.

[1] *See* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., No. 19-177, slip op. at 6 (U.S. June 29, 2020).

[2] *See* Kleindienst v. Mandel, 408 U.S. 753, 762–70 (1972) (reasoning that the government's denial of a visa to a foreign scholar implicated the First Amendment rights of American professors who wished to meet and confer with him in person, but holding that the Executive Branch had discretion to deny the visa for a "facially legitimate" reason).

[3] *See* Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

[4] *Id.* at 10 (citing 18 U.S.C. § 2339B).

[5] *Id.* at 14–15.

of speech, but it held that the United States's interests in national security and combating international terrorism justified the prohibition.[6]

With regard to the plaintiffs' freedom-of-association claim, the Court concluded that the statute did "not penalize mere association with a foreign terrorist organization," suggesting that the First Amendment would protect membership in a foreign terrorist organization or independent advocacy of the group's political goals.[7] Instead, the Court reasoned, the statute prohibited only providing specified forms of material support to such organizations.[8] In the plaintiffs' case, that support took the form of providing training or legal expertise on issues of peaceful dispute resolution and humanitarian aid.[9] To the extent the prohibition burdened association, the Court held, it was justified on the same national security grounds as the statute's restrictions on speech.[10]

Amdt1.8.3 Disclosure of Association

Amdt1.8.3.1 Associational Privacy

First Amendment:

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

The Supreme Court has recognized "the vital relationship between freedom to associate and privacy in one's associations."[1] In some circumstances, government-compelled disclosure of an individual's affiliations can expose that individual to harm in the form of threats, harassment, or economic reprisals.[2] This potential exposure may dissuade individuals from joining together for the purpose of collective advocacy, thus chilling protected speech and association.[3] Accordingly, the Supreme Court has barred the government from compelling organizations to reveal their members, or individuals to reveal their memberships, in some circumstances.[4]

At the same time, the Court has not recognized an absolute right to privacy of one's associations, often weighing the government's interests in disclosure against the likelihood of harm resulting from the exposure.[5] In some cases, this analysis took the form of a balancing test, with the government's interests presumptively tipping the scales.[6] In other cases, the Court applied a form of heightened scrutiny under which the government bore the burden of demonstrating that its interests in disclosure were sufficiently important to justify the intrusion into associational rights.[7]

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[6] *Id.* at 28–39 (applying strict scrutiny).

[7] *Id.* at 39.

[8] *Id.*

[9] *Id.* at 10, 14–15.

[10] *Id.* at 40.

[1] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

[2] *Id.* at 462–63.

[3] *Id.*

[4] *E.g.*, *Alabama ex rel. Patterson*, 357 U.S. 449.

[5] *E.g.*, Buckley v. Valeo, 424 U.S. 1, 65–66 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

[6] *E.g.*, Barenblatt v. United States, 360 U.S. 109, 126, 134 (1959).

[7] *E.g.*, Ams. for Prosperity Found. v. Bonta, No. 19-251, slip op. at 9 (U.S. July 1, 2021).

Whether disclosure will be public also appears to be a factor in the Court's analysis. For example, in *Nixon v. Administrator of General Services*, former President Richard M. Nixon challenged a federal law directing the Administrator of General Services to take custody of President Nixon's papers and tape recordings and issue regulations governing the archival screening of the materials and public access to archived materials.[8] The case involved several constitutional claims,[9] one of which was that the screening process violated the President's "rights of associational privacy and political speech."[10] The Supreme Court acknowledged that "involvement in partisan politics is closely protected by the First Amendment" and that compelled disclosure "can seriously infringe on privacy of association and belief," but it ultimately concluded that the President's First Amendment claim was "clearly outweighed by the important governmental interests promoted by" the federal law.[11]

Amdt1.8.3.2 Disclosure of Membership Lists

First Amendment:

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

The Supreme Court began to apply heightened scrutiny in cases involving compelled disclosure of association in a series of cases in the 1950s and 1960s in which certain states were attempting to thwart the activities of the National Association for the Advancement of Colored People, Inc. (NAACP).[1] In *NAACP v. Alabama ex rel. Patterson*, the Court unanimously set aside a state court's contempt order against the NAACP for refusing to produce a list of its members within the state.[2] The state ostensibly requested the information to verify compliance with business registration requirements. The Court, however, held that the state had failed to demonstrate a need for the identities of the organization's "rank-and-file members" that would outweigh the harm to publicly exposed members in the form of "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[3]

The Court in *Bates v. City of Little Rock* also held that a city government could not constitutionally compel the NAACP to disclose its local members.[4] In that case, there was "substantial uncontroverted evidence" that publicly identified members had experienced "harassment and threats of bodily harm."[5] The asserted governmental interest in that case was the assessment of occupational license taxes.[6] Although the Court found this interest to be sufficiently compelling, it concluded that the city failed to demonstrate that obtaining and publishing local membership lists was "reasonably related" to this interest, given that the city

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[8] 433 U.S. 425, 429 (1977).

[9] *See* ArtII.S3.4.1 Overview of Executive Privilege and ArtI.S9.C3.3.1 Overview of Ex Post Facto Laws.

[10] *Nixon*, 433 U.S. at 466.

[11] *Id.* at 452, 467–68. The Court appeared to suggest that the law satisfied "a compelling public need that cannot be met in a less restrictive way"—a standard akin to strict scrutiny. *Id.* at 467.

[1] *See* Ams. for Prosperity Found. v. Bonta, No. 19-251, slip op. at 6 (U.S. July 1, 2021) (discussing Alabama *ex rel.* Patterson, 357 U.S. 449 (1958)).

[2] 357 U.S. at 460–61.

[3] *Id.* at 462–464.

[4] Bates v. City of Little Rock, 361 U.S. 516, 527 (1960).

[5] *Id.* at 524.

[6] *Id.* at 525.

could obtain information about businesses and occupations without collecting information about individual members.[7] The Court reaffirmed in *Louisiana ex rel. Gremillion v. NAACP*, another case involving compelled disclosure of membership lists, that "regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights."[8]

By contrast, the Court rejected a First Amendment challenge by the Communist Party of the United States to the federal Subversive Activities Control Act of 1950.[9] Pursuant to the Act, the U.S. government determined that the Communist Party must register with the U.S. Attorney General as a Communist-action organization and provide the names and addresses of its officers and any individuals who were members during the previous twelve months.[10] Registration, in turn, triggered other regulatory requirements.[11]

After the Court upheld the "Communist action organization" designation as merely "regulatory," it turned to the registration requirement itself, considering whether it infringed the right of party members to associate anonymously.[12] The Court acknowledged its holdings in *NAACP* and *Bates*, but it held that the federal government had a greater interest in registration than the state parties in those cases because Communist-action organizations are "substantially dominated or controlled" by foreign powers seeking "the overthrow of existing government by any means necessary."[13]

Amdt1.8.3.3 Character and Fitness and Evidentiary Disclosures

First Amendment:

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

Under Supreme Court precedent, states can require applicants for professional licenses to meet qualifications that are rationally related to the profession, including demonstrating "good moral character."[1] However, as discussed in a previous section, a state generally cannot deny an individual a professional license solely on the basis of his or her past or present, lawful affiliations.[2] In a similar vein, inquiries into an applicant's associations must be sufficiently tailored in light of their potential chilling effect on association.[3]

Character and fitness cases once produced "[s]harp conflicts and close divisions" in the Court, particularly following the federal and state investigations into Communist activity in

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[7] *Id.*

[8] 366 U.S. 293, 297 (1961). The Court also held unconstitutional, on due process grounds, a statute requiring certain businesses with out-of-state contacts to certify that none of their officers is a member of a Communist or subversive organization, as a condition of doing business in the state. *Id.* at 294–95.

[9] Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1, 4 (1961).

[10] *Id.* at 8–9.

[11] *Id.* at 9.

[12] *Id.* at 81.

[13] *Id.* at 88–89.

[1] Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232, 239 (1957); *see also* Adler v. Bd. of Educ., 342 U.S. 485, 493 (1952) (reasoning that a public school a prospective teacher's "associates, past and present" in "determining fitness and loyalty").

[2] *See, e.g.*, *Schware*, 353 U.S. at 245–46 (holding that a state bar association could not refuse to admit a prospective lawyer on the assumption that "his past membership in the Communist Party" indicated present "bad moral character"). *See* Amdt1.8.2.3 Denial of Employment or Public Benefits.

[3] Shelton v. Tucker, 364 U.S. 479, 488 (1960).

the 1950s.[4] In general, the Court's decisions show a concern for character inquiries based on membership in Communist organizations, but more suspicion about inquiries based on other kinds of association. Thus, in *Konigsberg v. State Bar of California*, the Court allowed a state bar association to question an applicant, in private, about his prior membership in the Communist Party, citing California's "interest in having lawyers who are devoted to the law in its broadest sense," including "its procedures for orderly change."[5] And a decade later, the Court reaffirmed that "Bar examiners may ask about Communist affiliations as a preliminary to further inquiry into the nature of the association and may exclude an applicant for refusal to answer."[6] On the same day, however, a plurality of the Court concluded that the State Bar of Arizona could *not* deny admission to a candidate based on her refusal to divulge whether she had ever been a member of the Communist Party or *any* organization "that advocates overthrow of the United States Government by force or violence."[7] The difference between these two cases, in the plurality's view, appeared to be the Arizona bar's interest in organizations other than the Communist Party, which the plurality characterized as "[b]road and sweeping."[8]

The breadth of the state's inquiry was also at issue in *Shelton v. Tucker*.[9] There, the Court ruled that, though a state had a broad interest in ensuring the fitness of its school teachers, that interest did not justify a regulation requiring all teachers to list all organizations to which they had belonged within the previous five years.[10] The Court explained that the "unlimited and indiscriminate sweep of the statute" defeated its connection to a "legitimate inquiry into the fitness and competency" of public school teachers.[11]

Disclosure of a person's associations may be permissible during a sentencing hearing following a criminal conviction. The Supreme Court has explained that the "Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."[12] However, those associations must be relevant to proving aggravating or mitigating circumstances, not just the defendant's "abstract beliefs."[13]

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[4] Baird v. State Bar of Ariz., 401 U.S. 1, 2–3 (1971) (plurality opinion).

[5] 366 U.S. 36, 49–54 (1961).

[6] Law Students C.R. Rsch. Council, Inc. v. Wadmond, 401 U.S. 154, 165–66 (1971) (rejecting a facial challenge to the New York Bar Association's screening process).

[7] *Baird*, 401 U.S. at 4–5 (plurality opinion) (internal quotation marks and citation omitted); *see also In re* Stolar, 401 U.S. 23, 30 (1971) (plurality opinion) (reaching the same conclusion with respect to an applicant for admission to the Ohio Bar who refused to answer a similar question).

[8] *Baird*, 401 U.S. at 6 (plurality opinion); *see also In re Stolar*, 401 U.S. at 27–28 (plurality opinion) (holding that Ohio could not require an applicant to the state bar association to "list all the organizations to which he has belonged since registering as a law student and those of which he has ever been a member").

[9] 364 U.S. 479 (1960).

[10] *Id. Cf.* Beilan v. Bd. of Pub. Educ., 357 U.S. 399, 404 (1958) (holding that a public school district could fire a teacher for "statutory 'incompetency' based on his refusal to answer the Superintendent's questions" about his affiliation with a Communist political association).

[11] *Shelton*, 364 U.S. at 490; Schneider v. Smith, 390 U.S. 17, 23, 26–27 (1968) (holding that a federal statute authorizing the executive branch to "safeguard" U.S. merchant ships against "sabotage or other subversive acts," 50 U.S.C. § 191(b), did not authorize regulations establishing a screening program for personnel on such vessels that delved into their past associations, ideas, and beliefs).

[12] Dawson v. Delaware, 503 U.S. 159, 165 (1992).

[13] *Id.* at 165–67 (holding that the sentencing court improperly admitted evidence of the defendant's membership in the Aryan Brotherhood that focused only on the organization's "racist beliefs").

Amdt1.8.3.4 Legislative Inquiries

First Amendment:

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

The First Amendment constrains government action, not just in the administration and enforcement of public laws, but also in conducting legislative investigations.[1] A legislature's power of inquiry is "broad," encompassing "inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."[2] Legislative investigations "may properly probe historic events for any light that may be thrown on present conditions and problems."[3] The Court has warned, however, that even if "the general scope of the inquiry is authorized and permissible," a legislature is not necessarily "free to inquire into or demand all forms of information."[4] Because of First Amendment constraints, a legislature may not "probe" an individual's associations "at will and without relation to existing need."[5]

The test to be applied in balancing legislative interests against individual rights of association is not entirely settled. In a case concerning a state legislature's investigation of the National Association for the Advancement of Colored People, Inc. (NAACP), the Court stated that to "intrude[ ] into the area of constitutionally protected rights of speech, press, association and petition," the state must show "a substantial relation between the information sought and a subject of overriding and compelling state interest."[6] This test mirrors the exacting scrutiny standard the Court has applied in other contexts involving government-compelled disclosure of private associations.[7]

The Supreme Court appears to have applied a more relaxed standard of review in other cases involving legislative inquiries decided during the same time period,[8] particularly those involving investigations into the associations and activities of members or suspected members of the Communist Party.[9] For example, in *Barenblatt v. United States*, the Court held that a Subcommittee of the House Committee on Un-American Activities could question a witness about his membership in the Communist Party without violating the First Amendment.[10] The Court reasoned that the hearing, which concerned "alleged Communist infiltration into the field of education," involved a "valid legislative purpose," because Congress had "wide power to

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[1] Watkins v. United States, 354 U.S. 178, 197 (1957).

[2] Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539, 545 (1963). *See* ArtI.S8.C18.7.3 Congress's Investigation and Oversight Powers (1787–1864) to ArtI.S8.C18.7.7 Constitutional Limits of Congress's Investigation and Oversight Powers.

[3] DeGregory v. Att'y Gen., 383 U.S. 825, 829 (1966).

[4] *Gibson*, 372 U.S. at 545.

[5] *DeGregory*, 383 U.S. at 829.

[6] *Gibson*, 372 U.S. at 546.

[7] *See generally* Amdt1.8.3.5 Donor Disclosure Requirements.

[8] *E.g.*, Uphaus v. Wyman, 360 U.S. 72, 78 (1959) (reasoning that the state legislature's requests related "directly to the Legislature's area of interest" and that the subpoena demand was not "burdensome").

[9] *See Gibson*, 372 U.S. at 547 (distinguishing *Barenblatt v. United States*, *Wilkinson v. United States*, and *Braden v. United States*, reasoning that "the necessary preponderating governmental interest and, in fact, the very result in those cases were founded on the holding that the Communist Party is not an ordinary or legitimate political party . . . and that, because of its particular nature, membership therein is itself a permissible subject of regulation and legislative scrutiny"). *See* Amdt1.7.5.3 Incitement Movement from Clear and Present Danger Test.

[10] 360 U.S. 109 (1959).

legislate in the field of Communist activity in this Country" as a means of "self-preservation."[11] If the Court applied a balancing test in this decision, it did not discuss the witness's countervailing First Amendment interests.[12]

Although both state and federal legislatures may conduct investigations, congressional inquiries have the added protection of the Speech or Debate Clause, which generally protects the legislative actions of Members of Congress from judicial interference.[13] In the 1975 *Eastland* decision, the Supreme Court cited the Speech or Debate Clause in declining to adjudicate a freedom-of-association-based challenge to a subpoena from a congressional subcommittee.[14] *Eastland* involved a pre-enforcement challenge to a congressional subpoena, but the other cases discussed above suggest that a First Amendment defense may yet be available in a contempt proceeding for refusal to comply with a congressional subpoena.[15]

Amdt1.8.3.5 Donor Disclosure Requirements

First Amendment:

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

As previously discussed, the Supreme Court has recognized a First Amendment interest in the privacy of one's associations and held that compelled disclosure of an organization's members can chill that protected association.[1] In 1976, in *Buckley v. Valeo*, the Court extended this reasoning to disclosure of a political candidate's financial contributors required by federal campaign finance laws.[2] The Court observed that the "invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.'"[3]

In view of these considerations, the Court applied a heightened standard of review called "exacting scrutiny," which the Court derived from its analysis in *NAACP v. Alabama ex rel.*

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[11] *Id.* at 113. The Court upheld the contempt-of-Congress convictions of two other witnesses on similar grounds in *Wilkinson v. United States*, 365 U.S. 399 (1961) and Braden v. United States, 365 U.S. 431 (1961). By contrast, the Court overturned the contempt conviction of a New Hampshire resident, with a plurality of the Court concluding that the state attorney general's questioning of the witness about his and others' involvement in the Progressive Party exceeded the legislature's investigative mandate. Sweezy v. New Hampshire, 354 U.S. 234, 251–54 (1957) (plurality opinion).

[12] *Barenblatt*, 360 U.S. at 134. In this case, the Court appeared to place the burden on the witness to show why his interests "were not subordinate to those of the state." *Id.* According to the Court, there was "no indication" in the record that the subcommittee "was attempting to pillory witnesses" or employed "indiscriminate dragnet procedures, lacking in probable cause." *Id.*

[13] *See* ArtI.S6.C1.3.1 Overview of Speech or Debate Clause to ArtI.S6.C1.3.7 Persons Who Can Claim the Speech or Debate Privilege.

[14] Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 501 (1975).

[15] *See Id.* at 515–16 (Marshall, J., concurring in the judgment) (positing that the defendant in a contempt trial "may defend on the basis of the constitutional right to withhold information from the legislature, and his right will be respected along with the legitimate needs of the legislature").

[1] *See* Amdt1.8.3.2 Disclosure of Membership Lists.

[2] 424 U.S. 1, 65–66 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81. The Court determined that the challenged contribution and expenditure limitations also implicated the freedom of association, as well as the freedom of speech; its holdings on these limitations are discussed in Freedom of Speech: Campaign Finance and the Electoral Process, Amdt1.7.11.1 Overview of Campaign Finance to Amdt1.7.11.6 Legislative Investigations.

[3] *Id.* at 66 (quoting Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 78–79 (1974) (Powell, J., concurring)).

Patterson.[4] Under *Buckley*'s formulation of exacting scrutiny, the government must show a "substantial relation" between a "subordinating" state interest and the information required to be disclosed.[5] Ultimately, the Court in *Buckley* concluded that the federal government's interests in an informed electorate, deterring corruption, and detecting violations of certain contribution limits outweighed the right to contribute anonymously in that case.[6]

The Court reached a different conclusion with respect to state campaign finance disclosures as applied to "the Socialist Workers Party, a minor political party which historically has been the object of harassment by government officials and private parties."[7] In reasoning analogous to *NAACP*, the Court found that disclosure of either the parties' contributors or the recipients of their campaign disbursements would "subject those persons identified to the reasonable probability of threats, harassment, or reprisal."[8]

The Court also applied exacting scrutiny in a 2010 case involving the disclosure of petition sponsors rather than donors.[9] In *Doe v. Reed*, voters seeking to challenge a state law through the referendum process had to submit a petition with the requisite number of signatures to the secretary of state.[10] Such petitions were subject to public disclosure and included the names and addresses of signatories.[11] The Court held that petition activity is protected by the First Amendment and that disclosure requirements in the electoral context are subject to exacting scrutiny.[12] Balancing the relevant interests, the Court held that "preserving the integrity of the electoral process" by combating "petition-related fraud" was a sufficiently important purpose to justify the "modest burdens" that disclosure might cause.[13]

The balance of interests tilted in favor of the organizations and their donors in the Court's 2021 decision in *Americans for Prosperity Foundation v. Bonta*.[14] That case involved a California regulation requiring charities soliciting funds in the state to disclose to the State Attorney General the names, addresses, and total contributions of an organization's significant donors.[15] Although the Justices in the majority divided over the applicable level of First Amendment scrutiny,[16] they agreed that under exacting scrutiny, the government must "narrowly tailor" a disclosure requirement to the asserted governmental interest.[17] The majority concluded that California's disclosure rule failed this requirement because of the

[4] *Id.* at 64 (citing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958)).

[5] *Id.*

[6] *Id.* at 68.

[7] Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 88 (1982).

[8] *Id.* at 101–02.

[9] Doe v. Reed, 561 U.S. 186 (2010).

[10] *Id.* at 190–91.

[11] *Id.* at 192–93.

[12] *Id.* at 195–96. "Exacting scrutiny" is a First Amendment standard of review developed to evaluate disclosures in the election context. *Id.* at 196 (citing Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81)).

[13] *Id.* at 198–201.

[14] No. 19-251, slip op. at 19 (U.S. July 1, 2021).

[15] *Id.* at 2.

[16] The plurality suggested that any disclosure requirement affecting association should receive exacting scrutiny. *Id.* at 7–8 (plurality opinion). Several Justices whose concurrence was necessary to the result in *Bonta* questioned this conclusion. *See id.* at 1–4 (Thomas, J., concurring in part and concurring in the judgment) (arguing that the Court's precedents require application of strict scrutiny, a higher standard), *and id.* at 2 (Alito, J., concurring in part and concurring in the judgment) (stating that he and Justice Gorsuch are "not prepared at this time to hold that a single standard applies to all disclosure requirements").

[17] *Id.* at 9–11 (majority opinion).

"dramatic mismatch" between the state's interest in preventing charitable fraud and its "up-front," "blanket demand" for the disclosure.[18]

Amdt1.8.4 Compelled Association

Amdt1.8.4.1 Union Membership and Fees

First Amendment:

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

The First Amendment comes into play when the government or a public employer requires employees to join or financially support a union as a condition of employment.[1] Requiring employees to subsidize a union—even when membership is not required[2]—compels employees to fund the union's speech, implicating both speech and expressive association.[3]

For over forty years, the Court's decisions allowed such government-compelled union fees to some extent. In 1977, in *Abood v. Detroit Board of Education*, the Court ruled that public-sector employers could require their employees to pay agency fees to their union representatives for the purposes of collective bargaining, contract administration, and grievance procedures.[4] Compulsory union fees—also called "agency fees"—could not, however, be used for political purposes.[5] The Court reasoned that the First Amendment bars a state from compelling an individual "to contribute to the support of an ideological cause he may oppose as a condition" of public employment.[6]

Abood's allowance of fees for activities germane to collective bargaining, though criticized at times by Members of the Court,[7] held sway until 2018, when the Supreme Court overruled this aspect of the decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.[8] The *Janus* Court held that compulsory agency fees unduly burdened the speech and association of public-sector employees who did not want to join or financially support their workplace union.[9]

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[18] *Id.* at 12–14.

[1] Similar arrangements in the private sector would not trigger First Amendment protection absent governmental action. Janus v. AFSCME, Council 31, No. 16-1466, slip op. at 35 n.24 (U.S. June 27, 2018).

[2] *See* Ry. Emps.' Dep't v. Hanson, 351 U.S. 225, 231, 238 (1956) (suggesting that "forcing ideological conformity" through union membership would violate the First Amendment).

[3] *See* Knox v. SEIU, Local 1000, 567 U.S. 298, 310–11 (2012) (explaining that when the government "exacts compulsory union fees as a condition of public employment," those fees "constitute a form of compelled speech and association").

[4] 431 U.S. 209, 225–26 (1977), *overruled by* Janus v. AFSCME, Council 31, No. 16-1466, slip op. at 2 (U.S. June 27, 2018).

[5] *Id.* at 235–36.

[6] *Id.* at 235.

[7] Cases applying or questioning the *Abood* decision are discussed in more detail in Amdt1.7.12.3 Compelled Subsidization.

[8] *Janus*, 3slip op. at 497.

[9] *Id.* at 12, 17, 33.

Amdt1.8.4.2 Nondiscrimination and Equal-Access Requirements

First Amendment:

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

Nondiscrimination laws implicate the freedom of association to the extent that they require organizations to admit or otherwise associate with individuals that they would otherwise exclude. While the Supreme Court has recognized a right *not to associate*, it has also held that the Constitution "places no value on discrimination."[1] Many of the cases involving freedom of association thus concern the interplay between government-imposed nondiscrimination or equal-access requirements and a group's freedom to associate with individuals of its choosing.[2] The Supreme Court decisions in this area also are informed, in part, by the Court's solicitude for an organization's own freedom of speech.[3]

In general, the government may impose nondiscrimination requirements on private, social organizations through public accommodations laws and other statutory requirements if those laws "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[4] In *Roberts v. United States Jaycees*, the Court held that Minnesota, through its public accommodations law, could require the United States Jaycees to include women in its membership.[5] The Court reasoned that the government had a compelling interest in ensuring that women had equal access to publicly available goods and services, including the programs offered by the Jaycees.[6] Additionally, applying the law to the Jaycees advanced that interest through "the least restrictive means."[7] The exclusion of women, the Court ruled, was not necessary to preserve the integrity of the organization's own expressive activities, which included civic, charitable, lobbying, fundraising, and other activities that did not depend on an all-male membership.[8] The Court reached a similar decision, based on similar reasoning, three years later in *Board of Directors of Rotary International v. Rotary Club of Duarte*.[9]

Consistent with *Roberts* and *Duarte*, in *New York State Club Association v. City of New York*, the Court upheld New York City's Human Rights Law, which prohibited race, creed, sex, and other discrimination in places "of public accommodation, resort, or amusement," and

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[1] Norwood v. Harrison, 413 U.S. 455, 469–70 (1973) (explaining that "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections"); *see also* Ry. Mail Ass'n v. Corsi, 326 U.S. 88, 93–94 (1945) (rejecting a claim that New York Civil Rights Law interfered with an organization's "right of selection to membership" in violation of the Due Process Clause of the Fourteenth Amendment).

[2] *See, e.g.*, Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (rejecting a law firm's argument that applying a federal nondiscrimination statute to its decision not to promote a female associate to partner would violate the firm's freedom of association); Runyon v. McCrary, 427 U.S. 160, 178 (1976) (holding that Congress can prohibit private schools from excluding children on the basis of race without violating a parent's or a child's right to free association).

[3] *E.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

[4] Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

[5] *Id.* at 628–29.

[6] *Id.* at 623–26.

[7] *Id.* at 626.

[8] *Id.* at 627. The Court also held that the Jaycees did not have a right of "intimate association," because they lacked "the distinctive characteristics" of that form of association, such as small size, identifiable purpose, and selectivity in membership. *Id.* at 621.

[9] 481 U.S. 537, 547, 549 (1987).

extended to certain private clubs.[10] The Court reasoned that the City's antidiscrimination law was neither invalid in all its applications nor "substantially overbroad" because the city could constitutionally apply the law to large clubs with commercial operations.[11]

Essential to the holding of *Roberts* and *Rotary International* was the Court's conclusion that including women in those organizations would not impinge on the organization's ability to present its message. In contrast, where nondiscrimination requirements would affect an organization's messaging, the Court has been more protective of the right of association under the First Amendment. In *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, the private organizers of Boston's St. Patrick's Day parade denied a group's request to march in the parade.[12] The group claimed that its exclusion was based on its members' sexual orientation and thus violated the state's public accommodations law.[13] The parade organizers responded that application of that statute would violate their freedom of expressive association.[14] The Supreme Court agreed with the parade organizers. It first held that parades are a form of expression even if they lack a "particularized message" because marchers in a parade are usually "making some sort of collective point."[15] The Court next reasoned that the group sought to engage in expressive speech by marching as a unit celebrating its members' gay, lesbian, and bisexual identities and Irish heritage.[16] Because "every participating unit affects the message conveyed by the private organizers," the Court reasoned, application of the statute would effectively conflict with the First Amendment by requiring the private organizers to "alter the expressive content of their parade."[17] The Court distinguished *Roberts* and *New York State Club Association* as not involving "a trespass on the organization's message itself."[18] Even if the parade could be analogized to a large, private club, such that Massachusetts could "generally justify a mandated access provision," the Court reasoned, the First Amendment would still allow such a group to "exclude an applicant whose manifest views were at odds with a position taken by the club's existing members."[19]

In *Boy Scouts of America v. Dale*, the Court similarly held that the First Amendment allowed the Boy Scouts of America to refuse a leadership role to an "avowed homosexual," despite New Jersey's public accommodations law.[20] Citing *Hurley*, the Court held that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[21] The Boy Scouts, the Court found, engaged in expressive activity in seeking to transmit a system of values, which, for that organization, included opposing homosexual conduct.[22] The Court also gave "deference to [the] association's view of what would impair its expression."[23] Allowing a gay rights activist to serve in the

[10] 487 U.S. 1, 10 (1988) (quoting N.Y.C. Admin. Code § 8-109(1) (1986)).

[11] *Id.* at 11–15.

[12] 515 U.S. 557, 561 (1995).

[13] *Id.*

[14] *Id.* at 562–63.

[15] *Id.* at 568–69.

[16] *Id.* at 570.

[17] *Id.* at 572–73.

[18] *Id.* at 580.

[19] *Id.* at 580–81.

[20] 530 U.S. 640, 644 (2000).

[21] *Id.* at 648.

[22] *Id.* at 651.

[23] *Id.* at 653.

Scouts would "force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[24]

The Court distinguished *Dale* in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*[25] In holding that a law requiring colleges to allow military recruiters on campus did not violate the schools' freedom of expressive association, the Court observed that "[r]ecruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association."[26]

The "close scrutiny" given to public accommodations laws that limit associational freedom in cases ranging from *Roberts* to *Dale* may not apply in all contexts.[27] *Christian Legal Society Chapter of the University of California v. Martinez* concerned a public law school's "accept-all-comers policy" that required student organizations to "open eligibility for membership and leadership to all students" as a condition of registration.[28] A student organization argued that this policy violated their associational rights because the organization wanted to accept or exclude students based on their religion or sexual orientation.[29] The Court did not ask whether the policy was the least restrictive means of advancing the school's interests in nondiscrimination. Instead, it analogized the school's program for registered student organizations to a "limited public forum" where a regulation of First Amendment activity need only be reasonable and viewpoint-neutral.[30] The Court held that the policy met both of those requirements.[31]

Amdt1.8.5 Intimate Association

First Amendment:

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

While the previous sections have focused on expressive association, the Constitution also protects certain forms of "intimate association."[1] These protections primarily extend from the personal liberty interests protected by the Due Process Clause of the Fourteenth Amendment,[2] which the Court has construed to include an implied "right of personal privacy."[3] The relationships "entitled to this sort of constitutional protection" are "those that attend the

[24] *Id.*

[25] 547 U.S. 47 (2006).

[26] *Id.* at 69. For additional discussion of *Forum for Academic and Institutional Rights, Inc.*, see Amdt1.7.13.10 Requirements That Can Be Imposed Directly.

[27] Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 680 (2010).

[28] *Id.* at 668.

[29] *Id.*

[30] *Id.* at 680–83.

[31] *Id.* at 697.

[1] Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

[2] Although the Court has characterized the right of intimate association as having First Amendment dimensions, it has not recognized any intimate relationships that qualify for constitutional protection under the First Amendment, other than those identified in its due process decisions. *See See id.* at 619–20 (citing due process decisions).

[3] Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977); *see also, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that "[w]ithout doubt," the "liberty" protected by the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual" to marry and to "establish a home and bring up children").

creation and sustenance of a family,"[4] including those formed through marriage,[5] childbirth,[6] child-rearing,[7] and "cohabitation with one's relatives."[8] Those constitutional liberties are discussed more fully elsewhere in the *Constitution Annotated*.[9]

Infrequently, the Supreme Court has considered the degree to which the First Amendment may also protect association in family and intimate relationships. In *Lyng v. International Union*, the Court rejected a First Amendment challenge to a federal law that denied eligibility for food stamps while any member of a household was on strike.[10] The Court reasoned that the law did not violate the freedom of association of close relatives because it did not "directly and substantially interfere with family living arrangements."[11]

Amdt1.9 Freedom of the Press

Amdt1.9.1 Overview of Freedom of the Press

First Amendment:

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

Some have raised the question of whether the Free Speech Clause and the Free Press Clause are coextensive, with respect to protections for the media. A number of Supreme Court decisions considering the regulation of media outlets analyzed the relevant constitutional protections without significantly differentiating between the two clauses.[1] In one 1978 ruling, the Court expressly considered whether the "institutional press" is entitled to greater freedom from governmental regulations or restrictions than are non-press individuals, groups, or associations. Justice Potter Stewart argued in a concurring opinion: "That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of

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[4] *Roberts*, 468 U.S. at 619.

[5] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (reasoning that for a state to deny the "fundamental freedom" to marry on "so unsupportable a basis" as race would "deprive all the State's citizens of liberty without due process of law"); Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (holding that "same-sex couples may exercise the fundamental right to marry," that is "inherent in the liberty of the person").

[6] *See Carey*, 431 U.S. at 685 (stating that "the decision whether or not to beget or bear a child is at the very heart" of choices protected by the right of personal privacy implicit in the Fourteenth Amendment). *See* Amdt14.S1.6.3.6 Sexual Activity, Privacy, and Substantive Due Process.

[7] *See, e.g.*, *Meyer*, 262 U.S. at 399 (reversing a teacher's conviction for teaching a student the German language, reasoning that the prohibition on teaching languages other than English in primary schools interfered with, among other things, "the power of parents to control the education of their own").

[8] *Roberts*, 468 U.S. at 619. *See, e.g.*, Moore v. E. Cleveland, 431 U.S. 494, 506 (1977) (holding that an ordinance that prohibited certain relatives outside of the "nuclear family" from living together violated the Fourteenth Amendment).

[9] *See* Amdt14.S1.6.3.4 Family Autonomy and Substantive Due Process and Amdt14.S1.6.3.5 Marriage and Substantive Due Process.

[10] 485 U.S. 360, 362 (1988).

[11] *Id.* at 365–66 (internal quotation marks omitted). The Court also held that the law did not violate the associational rights of the striking worker and the worker's union. *Id.* at 366–68. *See also* Dep't of Hous. v. Rucker, 535 U.S. 125, 130, 136 n.6 (2002) (stating that *Lyng* "forecloses" tenants' freedom-of-association challenge against a statute authorizing local public housing authorities to "evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity").

[1] *See*, *e.g.*, Associated Press v. NLRB, 301 U.S. 103, 130 (1937) (ruling that applying an antitrust law to the Associated Press did not violate either the freedom of speech or of the press); *see also* Amdt1.7.10.2 Taxation of Media; Amdt1.7.10.3 Labor and Antitrust Regulation of Media.

the press in performing it effectively."[2] But, in a plurality opinion, Chief Justice Warren Burger wrote: "The Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others."[3] The plurality ultimately concluded that the First Amendment did not grant media the privilege of special access to prisons.[4]

Several Supreme Court holdings firmly point to the conclusion that the Free Press Clause does not confer on the press the power to compel government to furnish information or otherwise give the press access to information that the public generally does not have.[5] Nor, in many respects, is the press entitled to treatment different in kind from the treatment to which any other member of the public may be subjected.[6] The Court has ruled that "[g]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects."[7] At the same time, the Court has recognized that laws *targeting* the press, or treating different subsets of media outlets differently, may sometimes violate the First Amendment.[8] Further, it does seem clear that, to some extent, the press, because of its role in disseminating news and information, is entitled to heightened constitutional protections—that its role constitutionally entitles it to governmental "sensitivity," to use Justice Potter Stewart's word.[9]

Amdt1.9.2 Protection of Confidential Sources

First Amendment:

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

News organizations have claimed that the First Amendment compels a reporter's privilege: an exception to the ancient rule that every citizen owes to his government a duty to give what testimony he is capable of giving.[1] The Court rejected the argument for a limited

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[2] Houchins v. KQED 438 U.S. 1, 17 (1978) (concurring opinion). Justice Potter Stewart initiated the debate in a speech, subsequently reprinted as Stewart, *Or of the Press*, 26 HASTINGS L. J. 631 (1975). Other articles are cited in *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 798 (1978) (Burger, C.J., concurring).

[3] 435 U.S. at 798.

[4] 435 U.S. at 15–16.

[5] Houchins v. KQED, 438 U.S. 1 (1978), and *id.* at 16 (Stewart, J., concurring); Saxbe v. Washington Post, 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974); Nixon v. Warner Communications, 435 U.S. 589 (1978). The trial access cases recognize a right of access of both public and press to trials. Richmond Newspapers v. Virginia, 448 U.S. 555 (1980); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

[6] Branzburg v. Hayes, 408 U.S. 665 (1972) (grand jury testimony by newspaper reporter); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (search of newspaper offices); Herbert v. Lando, 441 U.S. 153 (1979) (defamation by press); Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (newspaper's breach of promise of confidentiality).

[7] Cohen v. Cowles Media, 501 U.S. 663, 669 (1991).

[8] *See*, *e.g.*, Grosjean v. Am. Press Co., 297 U.S. 233, 244 (1936) (holding that a tax focused exclusively on newspapers violated the freedom of the press); *see also* Amdt1.7.10.2 Taxation of Media.

[9] *E.g.*, Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974); Landmark Communications v. Virginia, 435 U.S. 829 (1978). *See also* Zurcher v. Stanford Daily, 436 U.S. 547, 563–67 (1978), and *id.* at 568 (Powell, J., concurring); Branzburg v. Hayes, 408 U.S. 665, 709 (1972) (Powell, J., concurring). Several concurring opinions in *Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980) imply recognition of some right of the press to gather information that apparently may not be wholly inhibited by nondiscriminatory constraints. *Id.* at 582–84 (Stevens, J.), 586 n.2 (Brennan, J.), 599 n.2 (Potter, J.). Yet the Court has also suggested that the press is pro tected in order to promote and to protect the exercise of free speech in society at large, including peoples' interest in receiving information. *E.g.*, Mills v. Alabama, 384 U.S. 214, 218–19 (1966); CBS v. FCC, 453 U.S. 367, 394–95 (1981).

[1] 8 J. WIGMORE, EVIDENCE 2192 (3d ed. 1940). *See* Blair v. United States, 250 U.S. 273, 281 (1919); United States v. Bryan, 339 U.S. 323, 331 (1950).

exemption permitting reporters to conceal their sources from a grand jury and to keep confidential certain information they obtain and choose at least for the moment not to publish in *Branzburg v. Hayes*.[2] Emphasizing the importance of the grand jury in creating a "[f]air and effective law enforcement [system] aimed at providing security for the person and property of the individual," the Court concluded the public interest "in ensuring effective grand jury proceedings" overrode "the consequential, but uncertain, burden on news gathering" that would result from requiring reporters to respond to relevant grand jury questions.[3] Not only was it uncertain to what degree confidential informants would be deterred from providing information, said Justice Byron White for the Court, but the conditional nature of the alleged reporter's privilege might not mitigate the deterrent effect, eventually leading to claims for an absolute privilege. Confidentiality could be protected by the secrecy of grand jury proceedings and by the experience of law enforcement officials in themselves dealing with informers. Difficulties would arise as well in identifying who should have the privilege and who should not. But the principal basis of the holding was that the investigation and exposure of criminal conduct was a governmental function of such importance that it overrode the interest of reporters in avoiding the incidental burden on their newsgathering activities occasioned by such governmental inquiries.[4]

The Court observed that Congress, as well as state legislatures and state courts, are free to adopt privileges for reporters.[5] As for federal courts, Federal Rule of Evidence 501 provides that the common law generally governs a claim of privilege.[6] The federal courts have not resolved whether the common law provides a journalists' privilege.[7]

Nor does the status of an entity as a newspaper (or any other form of news medium) protect it from issuance and execution on probable cause of a search warrant for evidence or other material properly sought in a criminal investigation, the Court held in *Zurcher v. Stanford*

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[2] 408 U.S. 665 (1972). "The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them." *Id.* at 682.

[3] 408 U.S. at 690–91. The cases consolidated in *Branzburg* all involved grand juries, so the reference to criminal trials should be considered dictum.

[4] Chief Justice Warren Burger and Justices Harry Blackmun, Lewis Powell, and William Rehnquist joined the Court's opinion. Justice Lewis Powell, despite having joined the majority opinion, also submitted a concurring opinion in which he suggested a privilege might be available if, in a particular case, "the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement." 408 U.S. at 710. Justice Potter Stewart's dissenting opinion in *Branzburg* referred to Justice Lewis Powell's concurring opinion as "enigmatic." *Id.* at 725. Judge Tatel of the D.C. Circuit wrote, "Though providing the majority's essential fifth vote, he [Justice Lewis Powell] wrote separately to outline a 'case-by-case' approach that fits uncomfortably, to say the least, with the *Branzburg* majority's categorical rejection of the reporters' claims." *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 987 (D.C. Cir. 2005) (Tatel, J., concurring) (citation omitted), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005) (Tatel, J., concurring), *cert. denied*, 545 U.S. 1150 (2005), *reissued with unredacted material*, 438 F.3d 1141 (D.C. Cir. 2006).

One commentator noted that: "courts in almost every circuit around the country interpreted Justice Lewis Powell's concurrence, along with parts of the Court's opinion, to create a balancing test when faced with compulsory process for press testimony and documents outside the grand jury context." Association of the Bar of the City of New York, The Federal Common Law of Journalists' Privilege: A Position Paper 4–5 (2005), http://www.abcny.org/pdf/report/White%20paper%20on%20reporters%20privilege.pdf (citing examples).

[5] 408 U.S. at 706.

[6] Rule 501 also provides that, in civil actions and proceedings brought in federal court under state law, the availability of a privilege shall be determined in accordance with state law.

[7] *See, e.g.*, *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 972 (D.C. Cir. 2005) (Tatel, J., concurring) (citation omitted), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005) (Tatel, J., concurring), *cert. denied*, 545 U.S. 1150 (2005), *reissued with unredacted material*, 438 F.3d 1141 (D.C. Cir. 2006) (U.S. Court of Appeals for the District of Columbia "is not of one mind on the existence of a common law privilege").

Daily.[8] The press had argued that to permit searches of newsrooms would threaten the ability to gather, analyze, and disseminate news, because searches would be disruptive, confidential sources would be deterred from coming forward with information because of fear of exposure, reporters would decline to put in writing their information, and internal editorial deliberations would be exposed. The Court thought that First Amendment interests were involved, but it seemed to doubt that the consequences alleged would occur. It observed that the built-in protections of the warrant clause would adequately protect those interests and noted that magistrates could guard against abuses when warrants were sought to search newsrooms by requiring particularizations of the type, scope, and intrusiveness that would be permitted in the searches.[9]

Amdt1.9.3 Access to Government Places and Papers

First Amendment:

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

Conflict between constitutional rights is not uncommon. One difficult conflict to resolve is the conflict between a criminal defendant's Fifth and Sixth Amendment rights to a fair trial and the First Amendment's protection of the rights to obtain and publish information about defendants and trials. Convictions obtained in the context of prejudicial pre-trial publicity[1] and during trials that were media spectaculars[2] have been reversed, but the prevention of such occurrences is of paramount importance to the governmental and public interest in the finality of criminal trials and the successful prosecution of criminals. However, the imposition of gag orders preventing press publication of information directly confronts the First Amendment's bar on prior restraints,[3] although the courts have a good deal more discretion in preventing the information from becoming public in the first place.[4]

When the Court held that the Sixth Amendment right to a public trial did not guarantee access of the public and the press to *pre*-trial suppression hearings,[5] the decision raised questions concerning the extent to which, if at all, the speech and press clauses protected the public and the press in seeking to attend the trials themselves.[6] In a split ruling in *Richmond*

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[8] Zurcher v. Stanford Daily, 436 U.S. 547, 563–67 (1978). Justice Lewis Powell thought it appropriate that "a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment" when he assesses the reasonableness of a warrant in light of all the circumstances. *Id.* at 568 (concurring). Justices Potter Stewart and Thurgood Marshall would have imposed special restrictions upon searches when the press was the object, *id.* at 570 (dissenting), and Justice John Paul Stevens dissented on Fourth Amendment grounds. *Id.* at 577.

[9] Congress enacted the Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879, 42 U.S.C. § 2000aa, to protect the press and other persons having material intended for publication from federal or state searches in specified circumstances, and creating damage remedies for violations.

[1] *See*, *e.g.*, Irvin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963).

[2] Sheppard v. Maxwell, 384 U.S. 333 (1966); *compare* Estes v. Texas, 381 U.S. 532 (1965), *with* Chandler v. Florida, 449 U.S. 560 (1981).

[3] Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[4] *See, e.g.*, Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) (disciplinary rules restricting extrajudicial comments by attorneys are void for vagueness, but such attorney speech may be regulated if it creates a "substantial likelihood of material prejudice" to the trial of a client); Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (press, as party to action, restrained from publishing information obtained through discovery).

[5] Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

[6] *DePasquale* rested solely on the Sixth Amendment, the Court reserving judgment on whether there is a First Amendment right of public access. 443 U.S. at 392.

Newspapers v. Virginia, the Court held that the First Amendment protected the right of access to criminal trials against the wishes of the defendant.[7]

Chief Justice Warren Burger pronounced the judgment of the Court, but his opinion was joined by only two other Justices.[8] The Chief Justice emphasized the history showing that trials were traditionally open. This openness, moreover, was no "quirk of history" but "an indispensable attribute of an Anglo-American trial."[9] He explained that this characteristic flowed from the public interest in seeing fairness and proper conduct in the administration of criminal trials; the "therapeutic value" to the public of seeing its criminal laws in operation, purging the society of the outrage felt at the commission of many crimes, convincingly demonstrated why the tradition had developed and been maintained.[10] Thus, the opinion concluded that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice."[11] Ultimately, the plurality ruled that "in the context of trials . . . the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted."[12]

Justice William Brennan, joined by Justice Thurgood Marshall, followed a different route to the same conclusion. He argued that rather than solely protecting individual communications, "the First Amendment . . . has a *structural* role to play in securing and fostering our republican system of self-government."[13] He argued that in order to secure robust public debate and "other civic behavior," the First Amendment must also ensure that debate is "informed," protecting not only "communication itself but also . . . the indispensable conditions of meaningful communication."[14]

Two years later, the Supreme Court articulated a standard for determining when the government's or the defendant's interests could outweigh the public right of access. *Globe Newspaper Co. v. Superior Court*[15] involved a statute, unique to one state, that mandated the exclusion of the public and the press from trials during the testimony of a sex-crime victim under the age of 18. For the Court, Justice William Brennan wrote that the First Amendment guarantees press and public access to criminal trials, both because of the tradition of openness[16] and because public scrutiny of a criminal trial serves the valuable functions of enhancing the quality and safeguards of the integrity of the factfinding process, of fostering the appearance of fairness, and of permitting public participation in the judicial process. The right recognized by the Court was not absolute; instead, in order to close all or part of a trial

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[7] 448 U.S. 555 (1980). The decision was 7-1, with Justice William Rehnquist dissenting, *id.* at 604, and Justice Lewis Powell not participating. Justice Lewis Powell, however, had taken the view in *Gannett Co. v. DePasquale,* 443 U.S. 368, 397 (1979) (concurring), that the First Amendment did protect access to trials.

[8] *See* Richmond Newspapers v. Virginia, 448 U.S. 555, 582 (1980) (Stevens, J., concurring).

[9] 448 U.S. at 569 (plurality opinion).

[10] *Id.* at 570–71.

[11] *Id.* at 573.

[12] 448 U.S. at 564–69. The emphasis on experience and history was repeated by the Chief Justice in his opinion for the Court in *Press-Enterprise Co. v. Superior Court,* 478 U.S. 1 (1986) (Press-Enterprise II).

[13] *Id.* at 587 (Brennan, J., concurring in the judgment).

[14] *Id.* at 587–88.

[15] 457 U.S. 596 (1982). Chief Justice Warren Burger, with Justice William Rehnquist, dissented, arguing that the tradition of openness that underlay *Richmond Newspapers*, was absent with respect to sex crimes and youthful victims and that *Richmond Newspapers* was unjustifiably extended. *Id.* at 612. Justice John Paul Stevens dissented on the ground of mootness. *Id.* at 620.

[16] That there was no tradition of openness with respect to the testimony of minor victims of sex crimes was irrelevant, the Court argued. As a general matter, all criminal trials have been open. The presumption of openness thus attaches to all criminal trials and to close any particular kind or part of one because of a particular reason requires justification on the basis of the governmental interest asserted. 457 U.S. at 605 n.13.

government must show that "the denial is necessitated by a compelling governmental interest, and [that it] is narrowly tailored to serve that interest."[17] The Court was explicit that the right of access was to *criminal* trials,[18] leaving open the question of the openness of civil trials.

The Court next applied and extended the right of access in several other areas of criminal proceedings, striking down state efforts to exclude the public from voir dire proceedings, from a suppression hearing, and from a preliminary hearing. The Court determined in *Press-Enterprise I*[19] that historically voir dire had been open to the public, and that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[20] No such findings had been made by the state court, which had ordered closed, in the interest of protecting the privacy interests of some prospective jurors, forty-one of the forty-four days of voir dire in a rape-murder case. The trial court also had not considered the possibility of less restrictive alternatives, for example, *in camera* consideration of jurors' requests for protection from publicity. In *Waller v. Georgia*,[21] the Court held that "under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press Enterprise*,"[22] and noted that the need for openness at suppression hearings "may be particularly strong" because the conduct of police and prosecutor is often at issue.[23] And, in *Press Enterprise II*,[24] the Court held that there is a similar First Amendment right of the public to access most criminal proceedings (here a preliminary hearing) even when the accused requests that the proceedings be closed. Thus, an accused's Sixth Amendment-based request for closure must meet the same stringent test applied to governmental requests to close proceedings: there must be "specific findings . . . demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."[25] Openness of preliminary hearings was deemed important because, under California law, the hearings can be "the final and most important step in the criminal proceeding" and therefore may be "the sole occasion for public observation of the criminal justice system," and also because the safeguard of a jury is unavailable at preliminary hearings.[26]

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[17] 457 U.S. at 606–07. Protecting the well-being of minor victims was a compelling interest, the Court held, and might justify exclusion in specific cases, but it did not justify a mandatory closure rule. The other asserted interest—encouraging minors to come forward and report sex crimes—was not well served by the statute.

[18] The Court throughout the opinion identifies the right as access to *criminal trials*, even italicizing the words at one point. 457 U.S. at 605.

[19] Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984).

[20] 464 U.S. at 510.

[21] 467 U.S. 39 (1984).

[22] Gannett Co. v. DePasquale, 443 U.S. 368 (1979), did not involve assertion *by the accused* of his Sixth Amendment right to a public trial; instead, the accused in that case had requested closure. "[T]he constitutional guarantee of a public trial is for the benefit of the defendant." *Id.* at 381.

[23] 467 U.S. at 47.

[24] Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986).

[25] 478 U.S. at 14.

[26] 478 U.S. at 12.

Amdt1.10 Freedoms of Assembly and Petition

Amdt1.10.1 Historical Background on Freedoms of Assembly and Petition

First Amendment:

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

The right of petition took its rise from the modest provision made for it in chapter 61 of the Magna Carta (1215).[1] To this meager beginning are traceable, in some measure, Parliament itself and its procedures for the enactment of legislation, the equity jurisdiction of the Lord Chancellor, and proceedings against the Crown by "petition of right." Thus, while the King summoned Parliament for the purpose of supply, the latter—but especially the House of Commons—petitioned the King for a redress of grievances as its price for meeting the financial needs of the Monarch, and as the House of Commons increased in importance, it came to claim the right to dictate the form of the King's reply, until, in 1414, the House of Commons declared itself to be "as well assenters as petitioners." Two hundred and fifty years later, in 1669, the House of Commons further resolved that every commoner in England possessed "the inherent right to prepare and present petitions" to it "in case of grievance," and of the House of Commons "to receive the same" and to judge whether they were "fit" to be received. Finally chapter 5 of the Bill of Rights of 1689 asserted the right of the subjects to petition the King and "all commitments and prosecutions for such petitioning to be illegal."[2]

The Supreme Court has asserted a similarly historical basis for the right of peaceable assembly for lawful purposes, saying "it is, and always has been, one of the attributes of citizenship under a free government."[3] One commentator has noted that the Court originally conceived the rights of petition and assembly as components of a single right but that the Court later treated the right of assembly as protecting a distinct interest in "the holding of meetings for peaceable political action."[4]

The right of petition recognized by the First Amendment first came into prominence in the early 1830s, when petitions against slavery in the District of Columbia began flowing into Congress in a constantly increasing stream, which reached its climax in the winter of 1835. Finally on January 28, 1840, the House adopted as a standing rule: "That no petition, memorial, resolution, or other paper praying the abolition of slavery in the District of Columbia, or any State or Territories of the United States in which it now exists, shall be received by this House, or entertained in any way whatever." Because of efforts of John Quincy Adams, this rule was repealed five years later.[5] For many years the rules of the House of Representatives have provided that Members having petitions to present may deliver them to the Clerk and the petitions, except such as in the judgment of the Speaker are of an obscene or

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[1] C. Stephenson & F. Marcham, Sources of English Constitutional History 125 (1937).

[2] 12 Encyclopedia of the Social Sciences 98 (1934).

[3] United States v. Cruikshank, 92 U.S. 542, 551 (1876).

[4] Edward S. Corwin, The Constitution and What It Means Today 293–94 (Harold W. Chase & Craig R. Ducat eds., 1973) (citations omitted). Comparing *United States v. Cruikshank*, 92 U.S. 542, 552 (1876) to *De Jonge v. Oregon*, 299 U.S. 353, 364–365 (1937), Corwin observed: "Historically, the right of petition is the primary right, the right peaceably to assemble a subordinate and instrumental right, as if Amendment I read: 'the right of the people peaceably to assemble' in order to 'petition the government.' Today, however, the right of peaceable assembly is the language of the Court, 'cognate to those of free speech and free press and is equally fundamental. . . . The holding of meetings for peaceable political action cannot be proscribed.'" *Id.*

[5] The account is told in many sources. *E.g.*, Samuel flagg Bemis, John Quincy Adams and the Union, chs. 17, 18 and pp. 446–47 (1956); William Lee Miller, Arguing About Slavery: The Great Battle in the United States Congress (1996), 465–487; David P. Currie, The Constitution in Congress: Descent into the Maelstrom, 1829–1861 (2005), 3–23.

insulting character, shall be entered on the Journal.[6] Even so, petitions for the repeal of the espionage and sedition laws and against military measures for recruiting resulted, in World War I, in imprisonment.[7] Processions for the presentation of petitions in the United States have not been particularly successful. In 1894 General Coxey of Ohio organized armies of unemployed to march on Washington and present petitions, only to see their leaders arrested for unlawfully walking on the grass of the Capitol. The march of the veterans on Washington in 1932 demanding bonus legislation was defended as an exercise of the right of petition. The Administration, however, regarded it as a threat against the Constitution and called out the army to expel the bonus marchers and burn their camps. Marches and encampments have become more common since, but the results have been mixed.

Amdt1.10.2 Doctrine on Freedoms of Assembly and Petition

First Amendment:

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

The right of assembly was first before the Supreme Court in 1876[1] in *United States v. Cruikshank*.[2] The Enforcement Act of 1870[3] forbade conspiring or going onto the highways or onto the premises of another to intimidate any other person from freely exercising and enjoying any right or privilege granted or secured by the Constitution of the United States. Defendants had been indicted under this Act on charges of having deprived certain citizens of their right to assemble together peaceably with other citizens "for a peaceful and lawful purpose." Although the Court held the indictment inadequate because it did not allege that the attempted assembly was for a purpose related to the Federal Government, its dicta broadly declared the outlines of the right of assembly:

> The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States.[4]

Absorption of the Assembly and Petition Clauses into the liberty protected by the Due Process Clause of the Fourteenth Amendment means that the *Cruikshank* limitation is no

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[6] Rule 22, ¶ 1, Rules of the House of Representatives, H.R. Doc. No. 256, 101st Congress, 2d Sess. 571 (1991).

[7] 1918 Att'y Gen. Ann. Rep. 48.

[1] See, however, Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868), in which the Court gave as one of its reasons for striking down a tax on persons leaving the state its infringement of the right of every citizen to come to the seat of government and to transact any business he might have with it.

[2] 92 U.S. 542 (1876).

[3] Act of May 31, 1870, ch. 114, 16 Stat. 141 (1870).

[4] United States v. Cruikshank, 92 U.S. 542, 552–53 (1876). *See also* Presser v. Illinois, 116 U.S. 252, 267 (1886) (describing *Cruikshank* as holding "that the right peaceably to assemble was not protected by the [First Amendment] . . . , unless the purpose of the assembly was to petition the government for a redress of grievances").

longer applicable.[5] Today the right of peaceable assembly is, in the language of the Court, "cognate to those of free speech and free press and is equally fundamental."[6] Broadly, the Court has said that the government may not proscribe "peaceable assembly for lawful discussion," and even though participants may "have committed crimes elsewhere, ... mere participation in a peaceable assembly and a lawful public discussion" may not provide "the basis for a criminal charge" absent evidence that their speech "transcend[ed] the bounds of the freedom of speech which the Constitution protects."[7]

Illustrative of this expansion is *Hague v. CIO*,[8] in which the Court, though splintered with regard to reasoning and rationale, struck down an ordinance that vested an uncontrolled discretion in a city official to permit or deny any group the opportunity to conduct a public assembly in a public place. Justice Roberts, in an opinion that Justice Hugo Black joined and with which Chief Justice Charles Hughes concurred, described the right of assembly as one that "is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."[9] In *Coates v. Cincinnati*, the Court described the right of assembly as protecting "the right of the people to gather in public places for social or political purposes," and struck down an ordinance prohibiting "annoying" assemblies as containing "an obvious invitation to discriminatory enforcement."[10]

Furthermore, the right of petition has also expanded beyond what might be implied by the language of "a redress of grievances." For example, the Supreme Court has recognized that the clause protects a right of access to the courts, beyond just a right to petition the legislature.[11] The clause also goes beyond a narrow idea of "grievances" and comprehends demands for an exercise by the government of its powers in furtherance of the interest and prosperity of the petitioners and of their views on politically contentious matters.[12] The right extends to all departments of the government, including the "approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government."[13]

Later cases recognize overlap between the rights of assembly and petition and the speech and press clauses, and, indeed, all four rights may well be considered as elements of an

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[5] DeJonge v. Oregon, 299 U.S. 353 (1937); Hague v. CIO, 307 U.S. 496 (1939); Bridges v. California, 314 U.S. 252 (1941); Thomas v. Collins, 323 U.S. 516 (1945).

[6] De Jonge v. Oregon, 299 U.S. 353, 364, 365 (1937). *See also* Herndon v. Lowry, 301 U.S. 242 (1937).

[7] 299 U.S. at 365.

[8] 307 U.S. 496 (1939).

[9] 307 U.S. at 515. For another holding that the right to petition is not absolute, see McDonald v. Smith, 472 U.S. 479 (1985) (the fact that defamatory statements were made in the context of a petition to government does not provide absolute immunity from libel).

[10] Coates v. City of Cincinnati, 402 U.S. 611, 615–16 (1971).

[11] *See*, *e.g.*, Bill Johnson's Rests. v. NLRB, 461 U.S. 731, 742–43 (1983) (holding that the First Amendment protects "[t]he filing and prosecution of a well-founded lawsuit"); Lozman v. City of Riviera Beach, No. 17-21, slip op. at 12 (U.S. June 18, 2018) (outlining constitutional protections against retaliation for filing a lawsuit against a city); *but see*, *e.g.*, Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 556–57 (2014) (holding that the right to petition does not extend to grant immunity from an "exceptional" award of attorney's fees in patent litigation).

[12] *See* Eastern R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961). For further discussion of the *Noerr-Pennington* doctrine providing limited antitrust immunity for constitutionally protected lobbying activity, see Amdt1.7.11.5 Lobbying.

[13] California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). *See also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913–15 (1982); Missouri v. NOW, 620 F.2d 1301 (8th Cir. 1980), *cert. denied*, 449 U.S. 842 (1980) (because of its political nature, a boycott of states not ratifying the Equal Rights Amendment may not be subjected to antitrust suits).

inclusive right to freedom of expression.[14] While certain conduct may still be denominated as either petition[15] or assembly[16] rather than speech, similar standards will likely be applied in most cases.[17] For instance, as discussed in an earlier essay, where a public employee sues a government employer under the First Amendment's Speech Clause, the employee must show that he or she spoke as a citizen on a matter of public concern.[18] In *Borough of Duryea, Pennsylvania v. Guarnieri*,[19] the Court similarly held that a police chief who alleged retaliation for having filed a union grievance challenging his termination was not protected by the right to petition, because his complaints did not go to matters of public concern.[20] Further, the right of assembly has largely been superseded by the Court's recognition of an right of an implied right of association.[21]

[14] *See*, *e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (noting "the close nexus between the freedoms of speech and assembly," and saying the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech").

[15] *E.g.*, United States v. Harriss, 347 U.S. 612 (1954); Eastern R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961); BE & K Construction Co. v. NLRB, 536 U.S. 516 (2002).

[16] *E.g.*, Coates v. City of Cincinnati, 402 U.S. 611 (1971).

[17] *See, e.g.*, Borough of Duryea, Pennsylvania v. Guarnieri, 564 U.S. ___, No. 09-1476, slip op. at 7 (2011) ("It is not necessary to say that the [Speech and Petition] Clauses are identical in their mandate or their purpose and effect to acknowledge that the rights of speech and petition share substantial common ground"); *But see id.* ("Courts should not presume there is always an essential equivalence in the [Speech and Petition] Clauses or that Speech Clause precedents necessarily and in every case resolve Petition Clause claims").

[18] Connick v. Myers, 461 U.S. 138 (1983); Amdt1.7.9.4 Pickering Balancing Test for Government Employee Speech.

[19] 564 U.S. ___, No. 09-1476, slip op. (2011).

[20] Justice Antonin Scalia, in dissent, disputed the majority's suggestion that a petition need be of "public concern" to be protected, noting that the Petition Clause had historically been a route for seeking relief of private concerns. slip op. at 5–7 (2011) (Scalia, J., dissenting). Justice Antonin Scalia also suggested that the Clause should be limited to petitions directed to an executive branch or legislature, and that grievances submitted to an adjudicatory body are not so protected. *Id.* at 1–3.

[21] Amdt1.8.1 Overview of Freedom of Association.

SECOND AMENDMENT
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SECOND AMENDMENT—RIGHT TO BEAR ARMS

Amdt2.1 Overview of Second Amendment, Right to Bear Arms

For much of its early history, the Second Amendment went largely unscrutinized by the Supreme Court. The few nineteenth century cases implicating the Second Amendment established for a time that the Amendment was a bar to federal, but not state, government action,[1] and the Court's only significant Second Amendment decision in the twentieth century seemed to suggest that the right protected under the Amendment was tied only to state militia use of certain types of firearms.[2] In this relative vacuum, the lower federal courts and legal scholars disputed the meaning of the Second Amendment and how it applied, if at all, to an expanding universe of federal, state, and local laws governing the private possession and sale of firearms.[3]

By the beginning of the twenty-first century, many of the U.S. Courts of Appeals that considered the matter concluded that the Second Amendment protected a collective right tied to militia or military use of firearms,[4] while some courts and commentators maintained that the Amendment enshrined an individual right to possess firearms outside the context of militia or military activity.[5] In the 2008 case *District of Columbia v. Heller*,[6] the Supreme Court held, after a lengthy historical analysis, that the Second Amendment protects an individual right to possess firearms for historically lawful purposes, including self-defense in the home.[7] The *Heller* majority also provided some guidance on the scope of the right, explaining that it "is not unlimited" and that "nothing in [the] opinion should be taken to cast doubt" on "longstanding prohibitions" like "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," among other "presumptively lawful" regulations.[8]

Two years after *Heller*, the Court revisited the question of whether the Second Amendment applies to the states, concluding in *McDonald v. City of Chicago*[9] that the right to keep and bear arms is a "fundamental" right that is incorporated through the Fourteenth Amendment against the states.[10] In a subsequent decision in *Caetano v. Massachusetts*,[11] the Court issued a brief, per curiam opinion vacating a Massachusetts Supreme Court decision that had upheld

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[1] United States v. Cruikshank, 92 U.S. 542 (1875); Presser v. Illinois, 116 U.S. 252 (1886); Miller v. Texas, 153 U.S. 535 (1894). The Fourteenth Amendment, through which the Second Amendment was later held to be applicable to the states, was ratified following the Civil War, in 1868. *See infra* Amdt14.1 Overview of Fourteenth Amendment, Equal Protection and Rights of Citizens.

[2] United States v. Miller, 307 U.S. 174, 178 (1939) (explaining that the Second Amendment was enacted "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces" and "must be interpreted and applied with that end in view").

[3] *See*, *e.g.*, Richard A. Allen, *What Arms? A Textualist View of the Second Amendment*, 18 Geo. Mason U. C.R. L.J. 191, 191–93 (2008) (explaining the views taken by courts and scholars following *Miller*); Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J. L. & Liberty 48, 49 & n.4 (2008) (collecting cases on both sides of the debate).

[4] *E.g.,* United States v. Nelson, 859 F.2d 1318, 1320 (8th Cir. 1988) (stating that cases after *Cruikshank* had "analyzed the second amendment purely in terms of protecting state militias, rather than individual rights," and the defendant had "made no arguments that the [challenged statute] would impair any state militia"); Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999) ("[T]he Second Amendment establishes no right to possess a firearm apart from the role possession of the gun might play in maintaining a state militia."); United States v. Napier, 233 F.3d 394, 403 (6th Cir. 2000) (recognizing that as of the date of decision, the lower federal courts had uniformly held that the Second Amendment protects a collective, rather than an individual, right).

[5] *See*, *e.g.*, United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989).

[6] 554 U.S. 570 (2008).

[7] *Id.* at 595.

[8] *Id.* at 626–27 & n.26.

[9] 561 U.S. 742 (2010).

[10] *Id.* at 778, 791 (plurality op.); *id.* at 806 (Thomas, J., concurring in part and concurring in judgment).

a law prohibiting the possession of stun guns. The Court in *Caetano* reiterated that the Second Amendment applies to the states and extends to "bearable arms" that "were not in existence at the time of the founding."[12]

In the 2022 case *New York State Rifle & Pistol Association v. Bruen*,[13] the Court considered the constitutionality under the Second Amendment of a portion of New York's firearms licensing scheme that restricts the carrying of certain licensed firearms outside the home. In a 6-3 decision, the Court struck down New York's requirement that an applicant for an unrestricted license to carry a handgun outside the home for self-defense must establish "proper cause," ruling that the requirement is at odds with the Second Amendment.[14] In doing so, the Court recognized that the Second Amendment protects a right that extends beyond the home[15] and also clarified that the proper test for evaluating Second Amendment challenges to firearms laws is an approach rooted in text and the "historical tradition" of firearms regulation, rejecting a "two-step" methodology employed by many of the lower courts.[16]

Amdt2.2 Historical Background on Second Amendment

Second Amendment:

> *A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*

Historical surveys of the Second Amendment often trace its roots, at least in part, through the English Bill of Rights of 1689,[1] which declared that "subjects, which are protestants, may have arms for their defence suitable to their condition, and as allowed by law."[2] That provision grew out of friction over the English Crown's efforts to use loyal militias to control and disarm dissidents and enhance the Crown's standing army, among other things, prior to the Glorious Revolution that supplanted King James II in favor of William and Mary.[3]

The early American experience with militias and military authority would inform what would become the Second Amendment as well. In Founding-era America, citizen militias drawn from the local community existed to provide for the common defense, and standing armies of professional soldiers were viewed by some with suspicion.[4] The Declaration of Independence listed as greivances against King George III that he had "affected to render the Military independent of and superior to the Civil power" and had "kept among us, in times of peace, Standing Armies without the Consent of our legislatures."[5] Following the Revolutionary War, several states codified constitutional arms-bearing rights in contexts that echoed these concerns—for instance, Article XIII of the Pennsylvania Declaration of Rights of 1776 read:

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[11] 577 U.S. 411 (2016).

[12] *Id.* at 412.

[13] No. 20-843 (U.S. June 23, 2022).

[14] *Id.* at 62–63.

[15] *Id.* at 23–24.

[16] *Id.* at 8–15.

[1] *See* William Rawle, A View of the Constitution of the United States of America 126 (1829) ("In England, a country which boasts so much of its freedom, the right was secured to protestant subjects only, on the revolution of 1688; and it is cautiously described to be that of bearing arms for their defence, 'suitable to their conditions, and as allowed by law.'").

[2] 3 Joseph Story, Commentaries on the Constitution of the United States § 1891 (1833).

[3] Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 115–16 (1994).

[4] *See* The Federalist No. 29 (Alexander Hamilton) (referencing proposition that "standing armies are dangerous to liberty" and militias are "the most natural defense of a free country").

[5] The Declaration of Independence paras. 13–14 (U.S. 1776).

> That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.[6]

Similarly, as another example, Massachusetts's Declaration of Rights from 1780 provided:

> The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.[7]

Mistrust of standing armies, like the one employed by the English Crown to control the colonies, and anti-Federalist concerns with centralized military power colored the debate surrounding ratification of the federal Constitution and the need for a Bill of Rights.[8] Provisions in the Constitution gave Congress power to establish and fund an Army,[9] as well as authority to organize, arm, discipline, and call forth the militia in certain circumstances (while reserving to the states authority over appointment of militia officers and training).[10] The motivation for these provisions appears to have been "recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense."[11] However, despite structural limitations such as a two-year limit on Army appropriations and certain militia reservations to the states, fears remained during the ratification debates that these provisions of the Constitution gave too much power to the federal government and were dangerous to liberty.[12]

In the *Federalist*, James Madison argued that "the State governments, with the people on their side," would be more than adequate to counterbalance a federally controlled "regular army," even one "fully equal to the resources of the country."[13] In Madison's view, "the advantage of being armed," together with "the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of."[14] Nevertheless, several states considered or proposed to the First Congress constitutional amendments that would explicitly protect arms-bearing rights, in various formulations.[15]

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[6] Pa. Declaration of Rights § XIII (1776), *in* 5 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 3083 (Francis N. Thorpe ed., 1909).

[7] Ma. Declaration of Rights § XVII (1780), *in* 3 *id.* at 1892.

[8] *See, e.g.*, 3 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, As Recommended by the General Convention at Philadelphia in 1787, at 401 (Jonathan Elliot ed., 1836) (statement of Gov. Edmund Randolph) ("With respect to a standing army, I believe there was not a member in the federal Convention, who did not feel indignation at such an institution.").

[9] U.S. Const. art. II, § 8, cl. 12.

[10] *Id.* art. II, § 8, cl. 15–16.

[11] Perpich v. Dep't of Def., 496 U.S. 334, 340 (1990).

[12] *See* Steven J. Heyman, *Natural Rights and the Second Amendment*, *in* The Second Amendment in Law and History: Historians and Constitutional Scholars on the Right to Bear Arms 200–01 (Carl T. Bogus ed., 2000) (collecting anti-federalist objections regarding power over militia and "to raise a standing army that could be used to destroy public liberty and erect a military despotism").

[13] The Federalist No. 46 (James Madison).

[14] *Id.*

[15] *E.g.*, Amendments Proposed by the Virginia Convention June 27, 1788, *in* Creating the Bill of Rights: the Documentary Record from the First Federal Congress 19 (Helen E. Veit et al. eds., 1991) (proposing among other things, "[t]hat the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people

Amdt2.2
Historical Background on Second Amendment

Tasked with "digesting the many proposals for amendments made by the various state ratification conventions and stewarding them through the First Federal Congress,"[16] James Madison produced an initial draft of the Second Amendment as follows:

> The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.[17]

The committee of the House of Representatives that considered Madison's formulation altered the order of the clauses such that the militia clause now came first, with a new specification of the militia as "composed of the body of the people," and made several other wording and punctuation changes.[18]

Debate in the House largely centered on the proposed Amendment's religious-objector clause, with Elbridge Gerry, for instance, arguing that the clause would give "the people in power" the ability to "declare who are those religiously scrupulous, and prevent them from bearing arms."[19] Gerry proposed that the provision "be confined to persons belonging to a religious sect scrupulous of bearing arms," but his proposed addition was not accepted.[20] Other proposals not accepted included striking out the entire clause, making it subject to "paying an equivalent," which Roger Sherman found problematic given religious objectors would be "equally scrupulous of getting substitutes or paying an equivalent,"[21] and adding after "a well regulated militia" the phrase "trained to arms," which Elbridge Gerry believed would make clear that it was "the duty of the Government" to provide the referenced security of a free State.[22]

As resolved by the House of Representatives on August 24, 1789, the version of the Second Amendment sent to the Senate remained similar to the version initially drafted by James Madison, with one of the largest changes being the re-ordering of the first two clauses.[23] The provision at that time read:

> A well regulated militia, composed of the body of the People, being the best security of a free State, the right of the People to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.[24]

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trained to arms is the proper, natural and safe defence of a free State[,]" and "[t]hat any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead"); Amendments Proposed by the New York Convention July 26, 1788, *in id.* at 22 (proposing similar language but omitting religious-objector provision); Amendments Proposed by the New Hampshire Convention June 21, 1788, *in id.* at 17 (proposing that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion").

[16] Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America 59 (2006).

[17] 1 Annals of Cong. 451 (1789) (Joseph Gales ed., 1834).

[18] The Complete Bill of Rights: The Drafts, Debates, Sources, & Origins 264 (Neil H. Cogan ed., 2015) (House Committee of Eleven Report, July 28, 1789) [hereinafter, Complete Bill of Rights].

[19] 1 Annals of Cong. 778 (1789) (Joseph Gales ed., 1834).

[20] *Id.* at 779.

[21] *Id.*

[22] *Id.* at 780.

[23] Complete Bill of Rights, *supra* note 18, at 267 (House Resolution, August 24, 1789).

[24] Complete Bill of Rights, *supra* note 18, at 267 (House Resolution, August 24, 1789).

The Amendment would take what would become its final form in the Senate, where the religious-objector clause was finally removed and several other phrases were modified.[25] For instance, the phrase referencing the militia as "composed of the body of the People" was struck, and the descriptor of the militia as "the best security of a free State" was modified to "necessary to the security of a free State."[26] Several other changes were proposed and rejected, including adding limitations on a standing army "in time of peace" and adding next to the words "bear arms" the phrase "for the common defence."[27] The final language of the Second Amendment was agreed to and transmitted to the states in late September of 1789.[28]

Amdt2.3 Early Second Amendment Jurisprudence

Second Amendment:

> *A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*

For most of its history, the Second Amendment was not substantively addressed by the Supreme Court. Few nineteenth and early twentieth century cases implicated the Second Amendment directly, and thus the small number of references in early cases were glancing and largely unilluminating as to the nature and scope of the right protected by the Amendment.

In the 1820 case *Houston v. Moore*,[1] the Court addressed the constitutionality of a state statute providing for state court-martial punishment of militia members called into the service of the United States who refused deployment.[2] The case turned not on the Second Amendment but rather on the nature of federal and state authority over the militia, with the Court concluding that the state retained concurrent jurisdiction, at least where not withdrawn by Congress, to punish militia members in such circumstances.[3] In a dissenting opinion, Justice Joseph Story agreed that "a State might organize, arm, and discipline its own militia in the absence of, or subordinate to, the regulations of Congress." Justice Story explained that "[the Second Amendment] may not, perhaps, be thought to have any important bearing on this point. If it have, it comfirms and illustrates, rather than impugns the reasoning already suggested."[4] Although Justice Story did not provide further elaboration of how the Second Amendment might "confirm[ ] and illustrate[ ]" the proposition that a state retains concurrent, subordinate authority over the militia, it seems he may have been suggesting that the Amendment's reference to the importance of a "well regulated militia" supported such authority.

Another passing reference to the Second Amendment in a pre-Civil War case came in the infamous and now-superseded *Dred Scott v. Sandford*[5] decision. In holding that Black Americans were not citizens of the United States, the majority opinion in *Dred Scott* listed among the implications of an alternative conclusion that citizenship "would give them the full

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[25] Any Senate debate of what would become the Second Amendment does not survive in recorded form. *See* James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 Tex. L. Rev. 1, 36 (1986) ("The documentary record of debates on the Bill of Rights consists . . . of deliberations in the House of Representatives.").

[26] Complete Bill of Rights, *supra* note 18, at 270.

[27] Complete Bill of Rights, *supra* note 18, at 268–69.

[28] Complete Bill of Rights, *supra* note 18, at 274.

[1] 18 U.S. 1 (1820).

[2] *Id.* at 12.

[3] *Id.* at 14.

[4] *Id.* at 21 (Story, J., dissenting).

[5] 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

liberty of speech in public and in private . . . ; to hold public meetings upon political affairs, and to keep and carry arms wherever they went."[6]

Following the Civil War, the Court issued several opinions that more squarely implicated the Second Amendment and established for a time that the Amendment was a bar only to federal government action.[7] In *United States v. Cruikshank*,[8] the Court vacated the convictions of a group of men under a federal statute proscribing conspiracies to deprive citizens of rights "granted or secured . . . by the constitution or laws of the United States," among other things.[9] The indictment averred, in relevant part, that the defendants intended to prevent two Black men from exercising their right "of 'bearing arms for a lawful purpose.'"[10] The Court rejected the proposition that this could be a valid basis for a violation of the statute, as "[t]his is not a right granted by the Constitution."[11] Rather, according to the Court, the Second Amendment "means no more than that it shall not be infringed by Congress," i.e., it "has no other effect than to restrict the powers of the national government," and thus the actions of private "fellow-citizens" could not deprive the victims of a right covered by the Second Amendment.[12] In the 1886 case *Presser v. Illinois*,[13] the Supreme Court addressed a Second Amendment challenge to Illinois laws prohibiting "bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law."[14] The Court held that these provisions did not infringe the right of the people to keep and bear arms, as the Second Amendment "is a limitation only upon the power of congress and the national government, and not upon that of the state."[15]

Given scant guidance from the Supreme Court, there was no definitive resolution in the twentieth century of what the right protected by the Second Amendment encompasses, and what role, if any, the textual reference to a "well regulated Militia" plays in addressing that question. The Second Amendment is divided into a first clause ("A well regulated Militia, being necessary to the security of a free State") and a second clause ("the right of the people to keep and bear Arms shall not be infringed"). Courts, commentators, and Congress debated, over the course of decades, the meaning of, and relationship between, these two clauses, primarily with respect to whether (1) in light of the first clause, the Amendment protects a collective right tied

[6] *Id.* at 417; *see also id.* at 450 (stating, in reference to the applicability of the Bill of Rights to the territories, that Congress could not "deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding."). In a later case, the Court in dicta suggested that "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons." Robertson v. Baldwin, 165 U.S. 275, 281–82 (1897). As described *infra*, the Court has since squarely addressed a Second Amendment challenge to state laws restricting public carry, in *New York State Rifle & Pistol Assocation v. Bruen,* No. 20-843 (U.S. June 23, 2022).

[7] This view of the Second Amendment has been invalidated by subsequent Supreme Court precedent. *See* Amdt2.5 Post-Heller Issues and Application of Second Amendment to States; *see also* Amdt14.S1.4.1 Overview of Incorporation of the Bill of Rights.

[8] 92 U.S. 542 (1875).

[9] *Id.* at 548.

[10] *Id.* at 553.

[11] *Id.*

[12] *Id.*

[13] 116 U.S. 252 (1886).

[14] *Id.* at 264–65.

[15] *Id.* at 265; *see also* Miller v. Texas, 153 U.S. 535, 538 (1894) (stating that it was "well settled" that the Second Amendment "operate[s] only upon the federal power, and [has] no reference whatever to proceedings in state courts").

to maintaining formal, organized militia units; or (2) in light of the second clause, the Amendment protects an individual right to possess a firearm unconnected with service in a militia.[16]

The Supreme Court's most thorough consideration of the Second Amendment in the twentieth century came in *United States v. Miller*,[17] a 1939 decision that seemed to tie the Second Amendment right "to keep and bear arms" to militia use. *Miller* involved a federal statute, the National Firearms Act, which required registration of short-barreled shotguns, among other things.[18] After reciting the original provisions of the Constitution dealing with the militia, the *Miller* Court observed that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted with that end in view."[19] The significance of the militia, the Court continued, was that it was composed of "civilians primarily, soldiers on occasion."[20] It was upon this force that the states could rely for defense and securing of the laws, on a force that "comprised all males physically capable of acting in concert for the common defense," who, "when called for service . . . were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[21]

The *Miller* Court accordingly rejected the proposition that the federal restriction on short-barreled shotguns violated the Second Amendment, holding that absent evidence "tending to show that possession or use of" a short-barreled shotgun "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, [the Court] cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."[22] According to the Court, there was no indication that such weapons were "any part of the ordinary military equipment or that [their] use could contribute to the common defense."[23] Years after *Miller*, the Court, in upholding a federal firearms statute prohibiting a convicted felon from possessing a firearm, characterized in a footnote *Miller's* holding as being that "the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'"[24]

The lack of clarity regarding the fundamental nature and scope of the Second Amendment following *Miller* fueled disagreement in the latter part of the twentieth century as to its application to an expanding set of federal, state, and local laws governing the private possession and sale of firearms. Writing in dissent in *Adams v. Williams*,[25] a 1972 Fourth

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[16] A sampling of the diverse literature in which the same historical, linguistic, and case law background shows the basis for strikingly different conclusions includes: Staff of Subcomm. on the Constitution, S. Comm. on the Judiciary, 97th Congress, 2d Sess., The Right to Keep and Bear Arms (Comm. Print 1982); Don B. Kates, Handgun Prohibition and the Original Meaning of the Second Amendment (1984); Gun Control and the Constitution: Sources and Explorations on the Second Amendment (Robert J. Cottrol ed., 1993); Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right (1984); Symposium, *Gun Control*, 49 Law & Contemp. Probs. 1 (1986); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989); Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right (1994); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461 (1995); William Van Alystyne, *The Second Amendment and the Personal Right to Bear Arms*, 43 Duke L.J. 1236 (1994); Symposium, *Symposium on the Second Amendment: Fresh Looks*, 76 Chi.-Kent L. Rev. 3 (2000).

[17] 307 U.S. 174 (1939).

[18] *Id.* at 175.

[19] *Id.* at 178.

[20] *Id.* at 179.

[21] *Id.*

[22] *Id.* at 178.

[23] *Id.*

[24] Lewis v. United States, 445 U.S. 55, 65 n.8 (1980).

[25] 407 U.S. 143 (1972).

Amendment case involving an arrest for unlawful possession of a handgun without a permit, Justice William O. Douglas, joined by Justice Thurgood Marshall, underscored his view that the Second Amendment "was designed to keep alive the militia" and thus would not pose an obstacle even to a ban on the possession of pistols by "everyone except the police."[26] In a concurring opinion in the later case *Printz v. United States*,[27] involving the background check process for certain firearm purchases under the Brady Handgun Violence Prevention Act, Justice Clarence Thomas acknowledged that the Second Amendment was "somewhat overlooked" in the Court's jurisprudence but had "engendered considerable academic, as well as public, debate."[28] On the latter point, Justice Thomas alluded to "an impressive array of historical evidence" in scholarly commentary indicating that the Second Amendment protects a "personal right" to keep and bear arms and suggested that such an understanding supported an argument that the federal government's regulation of at least the "purely intrastate sale or possession of firearms" would be unconstitutional.[29]

Lower courts and at least one congressional subcommittee weighed in as well. In the ninety-seventh Congress, the Senate Judiciary Committee's Subcommittee on the Constitution issued a report concluding, among other things, that the Second Amendment protects "a right of the individual citizen to privately possess and carry in a peaceful manner firearms and similar arms."[30] By the turn of the century, most U.S. Courts of Appeals to have considered the matter interpreted the Second Amendment as speaking of a collective right tied to military or militia use of firearms,[31] though a divided panel of the U.S. Court of Appeals for the Fifth Circuit in 2001 reached a contrary conclusion.[32] Then, in 2007, a split panel of the D.C. Circuit struck down District of Columbia restrictions on the private possession of handguns as inconsistent with the Second Amendment,[33] and the Supreme Court granted review,[34] leading to the Court's first significant pronouncements on the Second Amendment in almost seventy years.

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[26] *Id.* at 150–51 (Douglas, J., dissenting).

[27] 521 U.S. 898 (1997).

[28] *Id.* at 938 n.2 (Thomas, J., concurring).

[29] *Id.* at 939.

[30] Staff of Subcomm. on the Constitution, S. Comm. on the Judiciary, 97th Congress, 2d Sess., The Right to Keep and Bear Arms 11 (Comm. Print 1982).

[31] *E.g.*, United States v. Nelson, 859 F.2d 1318, 1320 (8th Cir. 1988) (stating that cases after *Cruikshank* had "analyzed the [S]econd [A]mendment purely in terms of protecting state militias, rather than individual rights," and the defendant had "made no arguments that the [challenged statute] would impair any state militia"); Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999) ("[T]he Second Amendment establishes no right to possess a firearm apart from the role possession of the gun might play in maintaining a state militia."); United States v. Napier, 233 F.3d 394, 403 (6th Cir. 2000) (recognizing that, as of the date of decision, the lower federal courts had uniformly held that the Second Amendment protects a collective, rather than an individual, right).

[32] United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001). One judge on the panel wrote a special concurrence refusing to join in the section of the opinion concluding that the Second Amendment protected an individual right, characterizing it as dicta and unnecessary to resolve the case. *Id.* at 272 (Parker, J., specially concurring).

[33] Parker v. District of Columbia, 478 F.3d 370, 400–01 (D.C. Cir. 2007).

[34] District of Columbia v. Heller, 552 U.S. 1035 (2007) (mem.) (order granting petition for writ of certiorari, as limited).

Amdt2.4 Heller and Individual Right to Firearms

Second Amendment:

> *A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*

Before the Supreme Court's decision in *District of Columbia v. Heller*,[1] the District of Columbia had a web of regulations governing the ownership and use of firearms that, taken together, amounted to a near-total ban on operative handguns in the District. One law generally barred the registration of most handguns.[2] Another law required persons with registered firearms to keep them "unloaded and either disassembled or secured by a trigger lock, gun safe, locked box, or other secure device."[3] A third law prohibited persons within the District of Columbia from carrying (openly or concealed, in the home or elsewhere) an unlicensed firearm.[4] In 2003, six D.C. residents challenged these measures as unconstitutional under the Second Amendment, arguing that the Constitution provides an individual right to keep and bear arms.[5] In particular, the residents contended that the Second Amendment provides individuals a right to possess "functional firearms" that are "readily accessible to be used . . . for self-defense in the home."[6]

The challenge made its way to the Supreme Court, which, in a 5-4 decision authored by Justice Antonin Scalia, concluded that the Second Amendment provides an individual right to keep and bear arms for lawful purposes.[7] The majority arrived at this conclusion after undertaking an extensive analysis of the founding-era meaning of the words in the Second Amendment's "prefatory clause" ("A well regulated Militia, being necessary to the security of a free State") and "operative clause" ("the right of the people to keep and bear Arms shall not be infringed").[8] Applying that interpretation to the challenged D.C. firearm laws, the Court concluded that the District's functional ban on handgun possession in the home and the requirement that lawful firearms in the home be rendered inoperable were unconstitutional.[9]

The majority analyzed the Second Amendment's two clauses and concluded that the prefatory clause announces the Amendment's purpose.[10] Furthermore, although there must be some link between the stated purpose in the prefatory clause and the command in the operative clause, the Court concluded that "the prefatory clause does not limit . . . the scope of the operative clause."[11] Accordingly, the Court assessed the meaning of the Second Amendment's two clauses.

Beginning with the operative clause, the Supreme Court first concluded that the phrase the "right of the people," as used in the Bill of Rights, universally communicates an individual right, and thus the Second Amendment protects a right that is "exercised individually and

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[1] 554 U.S. 570 (2008).

[2] Parker v. District of Columbia, 478 F.3d 370, 373 (D.C. Cir. 2007).

[3] *See id.*

[4] *See id.*

[5] Parker v. District of Columbia, 311 F. Supp. 2d 103, 103–04 (D.D.C. 2004).

[6] *Parker*, 478 F.3d at 374.

[7] District of Columbia v. Heller, 554 U.S. 570, 595, 626–27 (2008).

[8] *Id.* at 577.

[9] The Court did not evaluate the challenged licensing law on that ground that the District had asserted that, "'if the handgun ban is struck down and respondent registers a handgun, he could obtain a license, assuming he is not otherwise disqualified,'" which the Court interpreted to mean that "he is not a felon and is not insane." *See id.* at 630–31.

[10] *Id.* at 577.

[11] *Id.* at 577–78.

belongs to all Americans."[12] Next, the Court turned to the meaning of "to keep and bear arms."[13] "Arms," the Court asserted, has the same meaning now as it did during the eighteenth century: "any thing that a man wears for his defence, or takes into his hands, or use[s] in wrath to cast at or strike another," including weapons not specifically designed for military use.[14] The Court then turned to the full phrase "keep and bear arms." To "keep arms," as understood during the founding period, the Court maintained, was a "common way of referring to possessing arms, for militiamen *and everyone else*."[15] The Court further explained that "bearing arms," during the founding period as well as currently, means to carry weapons for the purpose of confrontation; but even so, the Court added, the phrase does not "connote[] participation in a structured military organization."[16] Taken together, the Court concluded that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."[17] The Court added that its textual analysis was supported by the Amendment's historical background, which was relevant to its analysis because, the Court reasoned, the Second Amendment was "widely understood" to have codified a pre-existing individual right to keep and bear arms.[18]

Turning back to the prefatory clause, the Supreme Court majority concluded that the term "well-regulated militia" does not refer to state or congressionally regulated military forces as described in the Constitution's Militia Clause;[19] rather, the Second Amendment's usage refers to all "able-bodied men" who are "capable of acting in concert for the common defense."[20] The Court opined that the security of a free "state," does not refer to the security of each of the several states, but rather the security of the country as a whole.[21]

Coming back to the Court's initial declaration that the two clauses must "fit" together, the majority concluded that the two clauses fit "perfectly" in light of the historical context showing that "tyrants had eliminated a militia consisting of all the able-bodied men . . . by taking away the people's arms."[22] Thus, the Court announced the reason for the Second Amendment's codification was "to prevent elimination of the militia," which "might be necessary to oppose an oppressive military force if the constitutional order broke down."[23] The Court clarified that the reason for codification does not define the entire scope of the right the Second Amendment guarantees.[24] This is so because, the Court explained, the Second Amendment codified a pre-existing right that included using firearms for self-defense and hunting, and thus the pre-existing right also informs the meaning of the Second Amendment.[25]

The Supreme Court majority added that its conclusion was not foreclosed by its earlier ruling in *Miller*, which seemed to tie the Second Amendment right to militia use. The Supreme Court in *Heller* concluded that *Miller* addressed only the type of weapons eligible for Second

[12] *Id.* at 579–81.

[13] *Id.* at 581–91.

[14] *Id.* at 581.

[15] *Id.* at 582–83.

[16] *Id.* at 584.

[17] *Id.* at 592.

[18] *Id.* at 592–95.

[19] U.S. CONST. art I, § 8, cl. 15 ("The Congress shall have Power . . . to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.").

[20] *Heller*, 554 U.S. at 595–96.

[21] *Id.* at 597.

[22] *Id.* at 598.

[23] *Id.* at 599.

[24] *Id.*

[25] *Id.* at 599–600.

Amendment protection.[26] Furthermore, in the Court's view, the fact that *Miller* assessed a type of unlawfully possessed weapon supported its conclusion that the Second Amendment protects an individual right, with the Court noting that "it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen."[27] Nor, the Court added, did *Miller* "purport to be a thorough examination of the Second Amendment," and thus, the Court reasoned, it could not be read to mean more than "say[ing] only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[28]

After announcing that the Second Amendment protects an individual's right to possess firearms, the Supreme Court explained that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited."[29] Nevertheless, the Court left for another day an analysis of the full scope of the Second Amendment.[30] The Court did clarify, however, that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of firearms," among other "presumptively lawful" regulations.[31] As for the kind of weapons that may obtain Second Amendment protection, the Court explained that *Miller* limits Second Amendment coverage to weapons "in common use at the time" that the reviewing court is examining a particular firearm, which, the Court added, "is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons."[32]

Finally, the Supreme Court applied the Second Amendment, as newly interpreted, to the contested D.C. firearm regulations and concluded that they were unconstitutional.[33] First, the Court declared that possessing weapons for self-defense is "central to the Second Amendment right," yet D.C.'s handgun ban prohibited "an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose."[34] Moreover, the handgun prohibition extended into the home, where, the Court added, "the need for defense of self, family, and property is most acute."[35] Additionally, the requirement that firearms in the home be kept inoperable is unconstitutional because, the Court concluded, that requirement "makes it impossible for citizens to use them for the core lawful purpose of self-defense."[36] Thus, the Court ruled that D.C.'s handgun ban could not survive under any level of scrutiny that a court typically would apply to a constitutional challenge of an enumerated right.[37]

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[26] *Id.* at 621–22.

[27] *Id.* at 622.

[28] *Id.* at 623–25.

[29] *Id.* at 626.

[30] *Id.*

[31] *Id.* at 626–27 & n.26.

[32] *Id.* at 627 (internal citations and quotation marks omitted); *id.* at 582 ("Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communication . . . and the Fourth Amendment applies to modern forms of search . . . the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.").

[33] *Id.* at 628–36.

[34] *Id.* at 628.

[35] *Id.* at 628–29.

[36] *Id.* at 630.

[37] *Id.* at 628–29.

Justice John Paul Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented.[38] Justice Stevens did not directly quarrel with the majority's conclusion that the Second Amendment provides an individual right, asserting that it "protects a right that can be enforced by individuals."[39] But he disagreed with the majority's interpretation of the scope of the right, contending that neither the text nor history of the Amendment supports "limiting any legislature's authority to regulate private civilian uses of firearms" or "that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution."[40] Additionally, he characterized the majority's interpretation of *Miller* as a "dramatic upheaval in the law."[41] In his view, *Miller* interpreted the Second Amendment as "protect[ing] the right to keep and bear arms for certain military purposes" and not "curtail[ing] the Legislature's power to regulate the nonmilitary use and ownership of weapons." This interpretation, Justice Stevens added, "is both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adaptation."[42]

Justice Stephen Breyer, joined by Justices Stevens, David Souter, and Ruth Bader Ginsburg, authored another dissent.[43] Although agreeing with Justice Stevens that the Second Amendment protects only militia-related firearm uses, in his dissent he argued that the District's laws were constitutional even under the majority's conclusion that the Second Amendment protects firearm possession in the home for self-defense.[44] He began by assessing the appropriate level of scrutiny under which Second Amendment challenges should be analyzed.[45] Justice Breyer suggested an interest-balancing inquiry in which a court would evaluate "the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter."[46] In making that evaluation, Justice Breyer would have asked "how the statute seeks to further the governmental interests that it serves, how the statute burdens the interests that the Second Amendment seeks to protect, and whether there are practical less burdensome ways of furthering those interests."[47] Applying those questions to the challenged D.C. laws, Justice Breyer concluded that (1) the laws sought to further compelling public-safety interests; (2) the D.C. restrictions minimally burdened the Second Amendment's purpose to preserve a "well regulated Militia" and burdened "to some degree" an interest in self-defense; and (3) there were no reasonable but less restrictive alternatives to reducing the number of handguns in the District.[48] Thus, in Justice Breyer's view, the District's gun laws were constitutional. He also anticipated that the majority's decision would "encourage legal challenges to gun regulation throughout the Nation."[49] The majority did not seem to voice disagreement with this

[38] *Id.* at 636–80 (Stevens, J., dissenting).

[39] *Id.* at 636.

[40] *Id.* at 636–37.

[41] *Id.* at 639.

[42] *Id.* at 637–38.

[43] *Id.* at 681–723 (Breyer, J., dissenting).

[44] *Id.* at 681–82.

[45] *Id.* at 687–91.

[46] *Id.* at 689–90. The majority explicitly rejected Justice Breyer's suggested approach. *Id.* at 634 (majority op.) ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon.").

[47] *Id.* at 693 (Breyer, J., dissenting).

[48] *Id.* at 691–719.

[49] *Id.* at 718.

prediction, but noted that "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field."[50]

Amdt2.5 Post-Heller Issues and Application of Second Amendment to States

Second Amendment:

> *A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*

The Supreme Court's decision in *Heller* left several questions regarding the scope and application of the Second Amendment unanswered, including what methodology or level of scrutiny should ordinarily apply to laws implicating the Second Amendment right to keep and bear arms and how far Second Amendment protections extend, if at all, beyond keeping firearms for self defense in the home. Additionally, because *Heller* involved a challenge to a D.C. law, which is generally not treated as a state for purposes of constitutional law,[1] a question beyond the scope of *Heller* was whether the Second Amendment applies to the states. Several Supreme Court cases near the end of the nineteenth century established the Second Amendment as a constraint only on federal government action.[2] However, as the Supreme Court noted in *Heller*, those decisions "did not engage in the sort of Fourteenth Amendment inquiry required by" later Supreme Court cases[3]—specifically, cases establishing the doctrine of "selective incorporation" through which particular provisions in the Bill of Rights that are "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition" are considered to be incorporated in the Due Process Clause of the Fourteenth Amendment such that they apply to the states.[4]

The Supreme Court revisited the issue of whether the Second Amendment applies to the states in the 2010 case *McDonald v. City of Chicago*,[5] concluding that it does. *McDonald* involved Second Amendment challenges to ordinances banning handgun possession in the City of Chicago and its neighboring suburb of Oak Park, Illinois.[6] The lower courts held that they were bound by the Supreme Court precedent establishing that the Second Amendment does not apply to the states, but the Supreme Court reversed in a 4-1-4 ruling.[7] The Court, in an opinion authored by Justice Alito, concluded that "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."[8] Thus, a plurality of the Court held that the Second Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment.[9] The plurality first noted that *Heller* makes "unmistakabl[e]" that the basic right to self-defense is a "central component" of the Second Amendment and "deeply rooted in this

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[50] *Id.* at 635 (majority op.).

[1] *See* Hepburn & Dundas v. Ellzey, 6 U.S. (2 Cranch) 445 (1805).

[2] *See supra* Amdt2.3 Early Second Amendment Jurisprudence.

[3] District of Columbia v. Heller, 554 U.S. 570, 620 n.23 (2008).

[4] *See infra* Amdt14.S1.4.1 Overview of Incorporation of the Bill of Rights.

[5] 561 U.S. 742 (2010).

[6] Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago, 567 F.3d 856, 857 (7th Cir. 2009).

[7] *McDonald*, 561 U.S. at 749.

[8] *Id.* at 778.

[9] *Id.* at 791. Although Justice Thomas was part of the five-Justice majority of the *McDonald* Court who agreed that the Second Amendment was applicable to the states via the Fourteenth Amendment, he disagreed with his colleagues' view that the Due Process Clause served as the proper basis for this incorporation. *Id.* at 805–58 (Thomas, J., concurring). In Justice Thomas's view, the Fourteenth Amendment's Privileges or Immunities Clause provided the source for incorporation. *Id.* at 805–06, 855.

Nation's history and tradition."[10] The Court reiterated much of the information recited in *Heller* about the founders' relationship to arms, including the fear many held—based on King George III's attempts to disarm the colonists—that the newly created federal government, too, would disarm the people to impose its will.[11] The Court explained that, even though the initial perceived threat of disarmament had dissipated by the 1850s, "the right to keep and bear arms was highly valued for purposes of self-defense."[12] The Court also pointed to congressional debate in 1868 of the Fourteenth Amendment, during which Senators had referred to the right to keep and bear arms as a "fundamental right deserving of protection."[13]

In his concurring opinion, Justice Thomas said that he would have construed the Second Amendment to be applicable to the states via the Privileges or Immunities Clause of the Fourteenth Amendment because, in his view, "the right to keep and bear arms is guaranteed by the Fourteenth Amendment as a privilege of American citizenship."[14] Justice Thomas's opinion nevertheless provided the crucial fifth vote to hold that the Second Amendment applies to the states.

Justice Breyer dissented (joined by Justices Ginsburg and Sotomayor), contending that "nothing in the Second Amendment's text, history, or underlying rationale . . . warrant[s] characterizing it as 'fundamental' insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes."[15] Additionally, he asserted that the Constitution provides no authority for "transferring ultimate regulatory authority over the private uses of firearms from democratically elected legislators to courts or from the States to the Federal Government."[16]

Justice Stevens authored another dissenting opinion, arguing that the question before the Court was not whether the Second Amendment, as a whole, applies to the states, but rather whether the Fourteenth Amendment requires that the liberty interest asserted—"the right to possess a functional, personal firearm, including a handgun, within the home"—be enforceable against the states.[17] In his view, the Second Amendment is not enforceable against the states, particularly because the Amendment is a "federalism provision" that is "directed at preserving the autonomy of the sovereign States, and its logic therefore resists incorporation by a federal court against the states."[18]

Between *McDonald* in 2010 and *New York State Rifle & Pistol Association v. Bruen* in 2022, the Supreme Court issued only one other decision substantively addressing the Second Amendment.[19] In *Caetano v. Massachusetts*,[20] the Court issued a brief, per curiam opinion vacating a Massachusetts Supreme Court decision that upheld a law prohibiting the

[10] *Id.* at 767–68 (internal emphasis, citations, and quotation marks omitted) (plurality op.).

[11] *Id.* at 768.

[12] *Id.* at 770.

[13] *Id.* at 775–76 (internal citations and quotation marks omitted).

[14] *Id.* at 778 (Thomas, J., concurring).

[15] *Id.* at 913 (Breyer, J., dissenting).

[16] *Id.*

[17] *Id.* at 858, 884, 890 (Stevens, J., dissenting).

[18] *Id.* at 897 (internal citations and quotation marks omitted).

[19] In 2019, the Court granted review in a case challenging portions of New York City's handgun licensing regime that limited the transportation of firearms to shooting ranges and second homes outside the city, but changes to the laws at issue prompted the Court to effectively dismiss the case as moot in April 2020 without ruling on the merits. *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1526 (2020). Several Justices wrote or joined separate opinions in the case signaling concern that the Second Amendment was not being properly applied by some courts. *E.g.*, *id.* at 1527 (Kavanaugh, J., concurring) ("[I] share Justice Alito's concern that some federal and state courts may not be properly applying *Heller* and *McDonald*.").

[20] 577 U.S. 411 (2016).

possession of stun guns. The Supreme Court reiterated in *Caetano* that the Second Amendment applies to the states and extends to "bearable arms" that "were not in existence at the time of the founding."[21]

The plethora of Second Amendment challenges to federal, state, and local gun laws in the years following *Heller* and *McDonald*, coupled with the lack of guidance from the Supreme Court on questions such as what standard of review governs and whether the Second Amendment applies outside the home, led the lower federal courts to develop their own rules and frameworks for analyzing Second Amendment cases. With respect to the question of how to evaluate the constitutionality of gun laws under the Second Amendment, the lower federal courts in post-*Heller* cases generally applied a two-step framework.[22] At step one, a court would ask whether the law at issue burdened conduct protected by the Second Amendment, which typically involved an inquiry into the historical meaning of the right.[23] If the law did not burden protected conduct, it was upheld.[24] If the challenged law did burden protected conduct, a court would next apply either strict scrutiny—an exacting form of constitutional review requiring the government to show that the law is narrowly tailored to achieve a compelling government interest[25]—or a somewhat lower standard of "intermediate scrutiny" to determine whether the law was nevertheless constitutional.[26] Whether a court applied intermediate or strict scrutiny would ordinarily depend on whether the law severely burdened the "core" protection of the Second Amendment.[27] What precisely constituted the "core" of the Second Amendment, however, produced some disagreement among the U.S. Courts of Appeals, particularly with respect to whether it extended beyond the home.[28] Nonetheless, using the two-step framework, the U.S. Courts of Appeals after *Heller* upheld many firearms regulations,

[21] *Id.* at 412.

[22] *See, e.g.*, Powell v. Tompkins, 783 F.3d 332, 347 n.9 (1st Cir. 2015) (collecting cases).

[23] *E.g.*, Silvester v. Harris, 843 F.3d 816, 820–21 (9th Cir. 2016); Ezell v. City of Chicago, 651 F.3d 684, 701 (7th Cir. 2011). Courts at step one sometimes recognized a safe harbor for the kinds of "longstanding" and "presumptively lawful" regulations that the Supreme Court in *Heller* appeared to insulate from doubt. *E.g.*, United States v. Bena, 664 F.3d 1180, 1183 (8th Cir. 2011) ("It seems most likely that the Supreme Court viewed the regulatory measures listed in *Heller* as presumptively lawful because they do not infringe on the Second Amendment right."). In a variation, some courts treated such regulations not as *per se* constitutional but merely as being entitled to a presumption of constitutionality. *See, e.g.*, Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 686 (6th Cir. 2016) ("*Heller* only established a presumption that such bans were lawful; it did not invite courts onto an analytical off-ramp to avoid constitutional analysis.")

[24] *E.g.*, Medina v. Whitaker, 913 F.3d 152, 160 (D.C. Cir. 2019) (concluding that, based on historical evidence, "a felony conviction removes one from the scope of the Second Amendment").

[25] *E.g.*, NIFLA v. Becerra, 138 S. Ct. 2361, 2371 (2018) (describing strict scrutiny standard in the context of the First Amendment).

[26] Courts sometimes would go on to step two in an "abundance of caution" even if it was doubtful that a challenged law burdened conduct protected by the Second Amendment. Nat'l Rifle Ass'n of Am., Inc. v. ATF, 700 F.3d 185, 204 (5th Cir. 2012); *see* Woollard v. Gallagher, 712 F.3d 865, 875 (4th Cir. 2013) ("[W]e and other courts of appeals have sometimes deemed it prudent to instead resolve post-*Heller* challenges to firearm prohibitions at the second step[.]").

[27] *E.g.*, *Nat'l Rifle Ass'n*, 700 F.3d at 195.

[28] *Compare* Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 94 (2d Cir. 2012) ("The state's ability to regulate firearms . . . is qualitatively different in public than in the home."); Gould v. Morgan, 907 F.3d 659, 672 (1st Cir. 2018) (stating that the right "is at its zenith inside the home" and "is plainly more circumscribed outside the home"); *and* Bonidy v. U.S. Postal Serv., 790 F.3d 1121, 1126 (10th Cir. 2015) ("If Second Amendment rights apply outside the home, we believe they would be measured by the traditional test of intermediate scrutiny."), *with* Wrenn v. District of Columbia, 864 F.3d 650, 661 (D.C. Cir. 2017) (recognizing that the right of law-abiding citizens to carry a concealed firearm is a core component of the Second Amendment); *and* Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) ("The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside.").

often after concluding that the "core" of the Second Amendment was not severely burdened and thus intermediate scrutiny should be applied.[29]

Amdt2.6 Bruen and Concealed-Carry Licenses

Second Amendment:

> *A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*

The Supreme Court in the 2022 case *New York State Rifle & Pistol Association v. Bruen*[1] considered the constitutionality of a portion of New York's handgun licensing regime relating to concealed-carry licenses for self-defense. The laws at issue in the case generally required a New York resident wishing to possess a firearm in public to get a "carry" license authorizing concealed carry, which typically required the license applicant to show "proper cause"—for carry unrelated to specific purposes like hunting or target practice, a "special need for self-protection distinguishable from that of the general community."[2]

The lower court in *Bruen* upheld the challenged laws based on the two-step inquiry described above,[3] but in a 6-3 decision, the Supreme Court reversed.[4] The majority opinion, authored by Justice Clarence Thomas, began by addressing the proper standard for evaluating Second Amendment challenges to firearm regulations and rejected the two-step framework that "combines history with means-end scrutiny."[5] In the majority's view, the two-step approach was inconsistent with *Heller*, which focused on text and history and "did not invoke any means-end test such as strict or intermediate scrutiny."[6] As such, the Court concluded that the standard for applying the Second Amendment is rooted solely in text and history, stating the test as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[7]

Turning, then, to the first question in the analysis—whether the Second Amendment's text covers the conduct at issue—the majority opinion concluded that it did, as the word "bear" in

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[29] *E.g.*, *Gould*, 907 F.3d at 676–77; *Bonidy*, 790 F.3d at 1128–29; Kanter v. Barr, 919 F.3d 437, 450–51 (7th Cir. 2019). Not all firearms regulations were upheld, however. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 264 (2d Cir. 2015) (concluding that a law limiting the number of rounds that could be loaded into a firearm did not survive intermediate scrutiny on the record before the court); *Wrenn*, 864 F.3d at 667 (holding that restrictions on obtaining concealed carry license effectively banned exercise of core Second Amendment right and were thus unconstitutional); *but see Kachalsky*, 701 F.3d at 94 (applying intermediate scrutiny and upholding similar restrictions after concluding that possession of firearms outside the home is outside core of Second Amendment).

[1] No. 20-843 (U.S. June 23, 2022).

[2] *Id.* at 3 (quoting *In re* Klenosky, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980)).

[3] N.Y. State Rifle & Pistol Ass'n v. Beach, 818 F. App'x 99, 100 (2d Cir. 2020) (summary order) (citing Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 83, 100–01 (2d Cir. 2012)).

[4] *Bruen*, slip op. at 63.

[5] *Id.* at 8.

[6] *Id.* at 13.

[7] *Id.* at 15 (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961)).

the text "naturally encompasses public carry."[8] As such, according to the majority, the Second Amendment "presumptively guarantees . . . a right to 'bear' arms in public for self-defense."[9]

On the next question of consistency with the country's "historical tradition of firearm regulation," the majority opinion provided some further guidance as to how to conduct the analysis, acknowledging that the "regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868."[10] For this reason, the majority explained that historical analysis of modern-day gun laws may call for reasoning by analogy to determine whether historical and modern firearm regulations are "relevantly similar."[11]

With respect to how to determine what qualifies as relevantly similar, the majority opinion identified "at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense."[12] As an example of modern laws that could pass muster by means of historical analogy, the majority opinion pointed to laws prohibiting firearms in "sensitive places" such as schools or government buildings, though the majority rejected the proposition that the "sensitive place" category could apply so broadly as to cover "all places of public congregation that are not isolated from law enforcement."[13]

Throughout the majority opinion, the Court provided further guideposts as to what sort of historical evidence would be most valuable, cautioning, among other things, against reading too much into early English law that did not necessarily "survive[] to become our Founders' law" or ascribing too much significance to post-enactment history, at least where that history was inconsistent with the original meaning of the constitutional text.[14] The majority declined to weigh in on whether the prevailing historical understanding for analytical purposes should be pegged to when the Second Amendment was adopted in 1791 or when the Fourteenth Amendment was ratified in 1868, as the majority opinion concluded that the public understanding was the same at both points for relevant purposes with respect to public carry.[15]

With framework and guidance in place, the majority opinion turned to its historical analysis, assessing whether a variety of laws from England and the United States proffered by the respondents met the burden of establishing that New York's laws were consistent with the country's historical tradition of firearms regulation.[16] Ultimately, the majority concluded that the respondents did not meet the burden "to identify an American tradition justifying the State's proper-cause requirement."[17] While acknowledging that history reflected restrictions on public carry, which limited "the intent for which one could carry arms, the manner by which one carried arms," or the particular circumstances "under which one could not carry arms," the majority opinion concluded that "American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense" or made public carry

[8] *Id.* at 23.
[9] *Id.* at 24.
[10] *Id.* at 18.
[11] *Id.* at 20.
[12] *Id.*
[13] *Id.* at 21–22.
[14] *Id.* at 26–28.
[15] *Id.* at 29.
[16] *Id.* at 29–62.
[17] *Id.* at 30.

contingent on a showing of a special need.[18] The few historical laws that the majority viewed as extending that far were, according to the opinion, "late-in-time outliers."[19]

Justice Samuel Alito joined the Court's majority opinion in full but wrote separately to respond primarily to points made by the dissent. Justice Alito emphasized in his concurrence that the majority opinion did not disturb *Heller* or *McDonald* and said nothing about who may be prohibited from possessing a firearm, what kinds of weapons may be possessed, or the requirements for purchasing a firearm.[20] Justice Brett Kavanaugh, joined by Chief Justice John Roberts, agreed that the New York's licensing regime violated the Second Amendment but wrote separately to underscore that the Court's decision would not prohibit states from imposing licensing requirements for public carry based on objective criteria so long as the requirements "do not grant open-ended discretion to licensing officials and do not require a showing of some special need apart from self-defense."[21] Justice Kavanaugh, quoting from *Heller*, reiterated that the Second Amendment right is not unlimited and may allow for many kinds of gun regulations.[22] Justice Amy Coney Barrett wrote a solo concurrence to highlight two open methodological questions regarding the role of post-ratification practice in historical inquiry and whether 1791 or 1868 should be the relevant benchmark year.[23] She underscored that both questions were unnecessary to resolve in the present case but might have a bearing on a future case.[24]

Justice Stephen Breyer authored a dissent, joined by Justices Elena Kagan and Sonia Sotomayor. The dissent objected to deciding the case on the pleadings without an evidentiary record as to how New York's standard was actually being applied.[25] More fundamentally, Justice Breyer disagreed with the majority's "rigid history-only approach," which he argued unnecessarily disrupted consensus in the U.S. Courts of Appeals, misread *Heller*, and put the Second Amendment on a different footing than other constitutional rights.[26] The dissent also viewed the history-focused approach as "deeply impractical" because it imposed on judges without historical expertise—and courts without needed resources—the task of parsing history, raised numerous intractable questions about what history to consider and how to weigh it, and would "often fail to provide clear answers to difficult questions" while giving judges "ample tools to pick their friends out of history's crowd."[27] The dissent viewed the majority's historical analysis regarding public carry as an embodiment of these impracticalities, as the majority found reasons to discount the persuasive force of numerous historical regulations similar to New York's that appeared to meet the Court's "analogical reasoning" test.[28]

[18] *Id.* at 62.

[19] *Id.*

[20] *Id.* at 2 (Alito, J., concurring).

[21] *Id.* at 1–2 (Kavanaugh, J., concurring).

[22] *Id.* at 3.

[23] *Id.* at 1–2 (Barrett, J., concurring).

[24] *Id.* at 2.

[25] *Id.* at 14 (Breyer, J., dissenting).

[26] *Id.* at 21–25.

[27] *Id.* at 25–34.

[28] *Id.* at 34–50.

THIRD AMENDMENT
QUARTERING SOLDIERS

THIRD AMENDMENT
QUARTERING SOLDIERS

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THIRD AMENDMENT—QUARTERING SOLDIERS

Amdt3.1 Overview of Third Amendment, Quartering Soldiers

The Third Amendment limits the federal government's ability to use private homes as lodging for soldiers. The Supreme Court has never decided a case directly implicating the Third Amendment and has cited it only in a handful of opinions.[1] As a result, some legal scholars consider the Amendment to be "an interesting study in constitutional obsolescence."[2] When ratified, however, the Third Amendment enshrined "protections of great importance,"[3] reflecting the Founders' pre-Revolutionary experiences with British soldiers and centuries of English history.[4]

Despite the Amendment's near-disuse as to its original protections,[5] it took on a new dimension in the second half of the twentieth century, with courts and scholars citing it as one of the constitutional "guarantees creat[ing] zones of privacy"[6] and for a "traditional and strong resistance of Americans to any military intrusion into civilian affairs."[7]

Amdt3.2 Historical Background on Third Amendment

Third Amendment:

> *No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.*

The practice of quartering soldiers dates back to at least the Roman Republic, when territorial governors used it as a tool of oppression and source of income.[1] In seventeenth-century Britain, the Petition of Right of 1628 levied multiple complaints against King Charles I, including maintaining a standing army and the involuntary quartering of soldiers;[2] it called on King Charles to end those practices.[3] When quartering continued, the English Parliament in 1679 passed the Anti-Quartering Act, which prohibited the involuntarily quartering and billeting of soldiers.[4] A decade later, the Declaration of Rights (later codified as the Bill of Rights of 1689) cited King James II's continued practices of

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[1] *See infra* Amdt3.3 Government Intrusion and Third Amendment.

[2] Morton J. Horwitz, *Is the Third Amendment Obsolete?*, 26 Val. Univ. L. Rev. 209, 212 (1991); *accord* William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 Am. J. Legal Hist. 393, 393 (1991).

[3] Fields & Hardy, *supra* note 2, at 394.

[4] *See infra* Amdt3.2 Historical Background on Third Amendment.

[5] *Contra* Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982).

[6] Griswold v. Connecticut, 381 U.S. 479, 484 (1965); *see also* Katz v. United States, 389 U.S. 347, 350 n.5 (1967).

[7] Laird v. Tatum, 408 U.S. 1, 15 (1972); *see* Amdt3.3 Government Intrusion and Third Amendment.

[1] R. Morris Coates & Gary M. Pecquet, *The Calculus of Conquests: The Decline and Fall of the Returns to Roman Expansion*, 17 Indep. Rev. 517, 528 (2013).

[2] Petition of Right 1628, 3 Car. 1, c. 1, § VI (Eng.) ("[O]f late great Companies of Souldiers and Marriners have been dispersed into divers Counties of the Realme, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourne against the Lawes and Customes of this Realme and to the great grievance and vexacion of the people.").

[3] *Id.* § VIII (demanding that the King "remove the said Souldiers and Mariners and that your people may not be soe burthened in tyme to come").

[4] 31 Car. 2, c. 1 (1679) (Eng.) ("Noe officer military or civill nor any other person whatever shall from henceforth presume to place quarter or billet any souldier or souldiers.").

maintaining a standing army and quartering as two justifications for his ouster in the "Glorious Revolution."[5] The Mutiny Act of 1689 further codified protections against quartering.[6]

Concerns over the existence of standing armies and their quartering in private homes spread to the American colonies. The Mutiny Act's prohibitions on quartering did not extend to the colonies, where involuntary quartering continued.[7] Although colonial legislatures attempted to regulate quartering to varying degrees,[8] the British Parliament did not extend the Mutiny Act's protections to the colonies until 1765.[9] The Quartering Act forbade quartering in private homes but required the colonies to bear the costs of barracks and supplies for British soldiers or, in the alternative, to house British soldiers in "inns, livery stables, ale-houses, victualling-houses," and other such establishments.[10]

The Quartering Act of 1765 contributed to growing tensions between the colonists and British Forces. This friction ultimately led to outright conflict, one notable example being the Boston Massacre in 1770.[11] In response to these hostilities, the British Parliament passed the so-called "Intolerable" or "Coercive Acts," including the Quartering Act of 1774.[12] The 1774 Act expanded British officers' ability to refuse unsuitable housing and seize "uninhabited houses, out-houses, barns, or other buildings" for purposes of quartering soldiers.[13] As opposition to the Intolerable Acts led to revolution, the colonists' experiences with quartering influenced the Declaration of Independence, which counted among its grievances against King George III the "Quartering [of] large bodies of armed troops among us."[14]

As the newly independent states adopted organic laws, four states—Delaware, Maryland, Massachusetts, and New Hampshire—included restrictions on quartering.[15] These early state

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[5] Bill of Rights 1689, 1 W. & M. 2d sess., c. 2.

[6] 1 W. & M., c. 6.

[7] William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 Am. J. Legal Hist. 393, 406, 414 (1991).

[8] *See id.* One such law was the New York Assembly's 1683 Charter of Libertyes and Privilidges, which provided: "Noe Freeman shall be compelled to receive any Marriners or Souldiers into his house and there suffer them to Sojourne, against their willes provided Alwayes it be not in time of Actuall Warr within this province." B. Carmon Hardy, *A Free People's Intolerable Grievance: The Quartering of Troops and the Third Amendment*, *in* The Bill of Rights—A Lively Heritage 74 (Jon Kukla ed., 1987).

[9] 5 Geo. 3 c. 33 (1765).

[10] *Id.*

[11] *See* Fields & Hardy, *supra* note 7, at 415–16; Morton J. Horwitz, *Is the Third Amendment Obsolete?*, 26 Val. Univ. L. Rev. 209, 210 (1991).

[12] 14 Geo. 3 c. 54 (1774). Other Intolerable Acts included the Boston Port Act, 14 Geo. 3 c. 19 (1774) (prohibiting the use of the Port of Boston in commerce); the Administration of Justice Act, 14 Geo. 3 c. 39 (1774) (authorizing British officials to be tried in Great Britain instead of Massachusetts "to prevent a failure of justice"), and the Massachusetts Government Act, 14 Geo. 3 c. 45 (1774) (placing the Massachusetts colony directly under the British government's control).

[13] 14 Geo. 3 c. 54, ¶ 2. The interpretation of the Quartering Act of 1774—including whether it permitted quartering in private homes-is the subject of some debate. *Compare* Fields & Hardy, *supra* note 7, at 416 ("The 1774 Act, one of the so called 'Intolerable Acts,' was even more onerous than the 1765 Act in that it authorized the quartering of soldiers in the private homes of the colonists."), *with* David Ammerman, In the Common Cause: American Response to the Coercive Acts of 1774, at 10 (1974) ("The act did not, as has often been asserted, provide for billeting soldiers in private homes.").

[14] The Declaration of Independence para. 13 (U.S. 1776).

[15] Each of these states prohibited peacetime quartering in any house without the owner's consent. Del. Declaration of Rights § 21 (1776); Md. Const. art. XXVIII (1776); Mass Const. art. XXVII (1780); N.H. Const. art. I, § XXVII (1784). In wartime, Delaware and Maryland limited quartering to "such manner only as the Legislature shall direct," Del. Declaration of Rights § 21 (1776); Md. Const. art. XXVIII (1776), while Massachusetts and New Hampshire permitted wartime quartering when authorized "by the civil magistrate" under the legislature's direction, Mass Const. art. XXVII (1780); N.H. Const. art. I, § XXVII (1784).

protections initially had no national analogue: the Articles of Confederation contained no restrictions on quartering.[16] Likewise, although the Framers of the Constitution considered including such a restriction,[17] it was not part of the final draft submitted to the states for ratification. Some Framers objected to the omission, arguing that the Constitution's failure to prohibit quartering, while allowing standing armies, strengthened the central government's power.[18]

Reflecting this concern, five states' ratifying conventions recommended amending the Constitution to include a prohibition on quartering in the Bill of Rights.[19] The proposed amendments took two forms. Maryland and New Hampshire proposed amendments that would have prohibited involuntary quartering during peacetime but were silent as to quartering during wartime.[20] In contrast, Virginia, New York, and North Carolina proposed amendments with the same peacetime restrictions that also subjected wartime quartering to limits imposed by law.[21] This second version formed the basis for the amendment as introduced in the House of Representatives by James Madison[22] and ultimately adopted as the Third Amendment.

Amdt3.3 Government Intrusion and Third Amendment

Third Amendment:

> *No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.*

The Third Amendment has rarely been the subject of litigation.[1] The Supreme Court has never directly construed it, and only two lower federal courts—the U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit—have examined the Third Amendment in depth.[2] This lack of judicial interpretation may be due to the Amendment's straightforward phrasing. As Justice Joseph Story stated in his *Commentaries on the Constitution of the United States*, the "provision speaks for itself" as

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[16] *See* Articles of Confederation of 1781.

[17] *See, e.g.*, James Madison, Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America (Gaillard Hunt & James Brown Scott eds., 1920) ("Mr. Pinkney submitted to the House . . . the following propositions . . .'No soldier shall be quartered in any House in time of peace without consent of the owner.'").

[18] *See, e.g.*, Letter from the Federal Farmer, no. 16 (1788), *reprinted in* 5 The Founder's Constitution 217 (Philip B. Kurland & Ralph Lerner eds., 1987) ("[I]s there any provision in the constitution to prevent the quartering of soldiers on the inhabitants? . . . Though it is not to be presumed, that we are in any immediate danger from this quarter, yet it is fit and proper to establish, beyond dispute, those rights which are particularly valuable to individuals . . . .").

[19] Tom W. Bell, Note, *The Third Amendment: Forgotten but Not Gone*, 2 Wm. & Mary Bill of Rts. J. 117, 129 (1993); Fields & Hardy, *supra* note 7, at 81.

[20] Bell, *supra* note 19, at 129–30.

[21] Bell, *supra* note 19, at 129–30.

[22] 1 Annals of Cong. 451 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison) ("No soldier shall in time of peace be quartered in any house without the consent of the owner; nor at any time, but in a manner warranted by law.").

[1] Although the United States quartered troops during both the War of 1812 and the Civil War, *see* Tom W. Bell, Note, *The Third Amendment: Forgotten but Not Gone*, 2 Wm. & Mary Bill of Rts. J. 117, 136–39 (1993), there do not appear to have been any cases alleging Third Amendment violations based on this quartering. Congress did, however, authorize compensation for damage caused by quartering during the War of 1812. *See, e.g.*, Act of Apr. 17, 1822, ch. 22, 6 Stat. 264 (authorizing payment "for the loss of a house by fire . . . while, without the consent of the owner, it was occupied by the troops of the United States").

[2] Engblom v. Carey, 522 F. Supp. 57 (S.D.N.Y. 1981), *aff'd in part and rev'd in part*, 677 F.2d 957 (2d Cir. 1982).

"secur[ing] the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion."[3]

The few Supreme Court cases that mention the Third Amendment support this view. In *Griswold v. Connecticut*, a case involving the constitutional right to contraception, the Court included the Third Amendment as one of several constitutional guarantees with "penumbras" that "create zones of privacy."[4] Likewise, in *Katz v. Connecticut*, concerning the meaning of a "search" or "seizure" under the Fourth Amendment, the Court noted the Third Amendment as "another aspect of privacy from governmental intrusion."[5] Finally, in *Laird v. Tatum*, involving a challenge to an army surveillance program directed at civilians, the Supreme Court cited the Third Amendment as an example of "a traditional and strong resistance of Americans to any military intrusion into civilian affairs."[6]

Engblom v. Carey, the only federal appeals court case to examine the Third Amendment in depth, concerned whether the State of New York violated correction officers' Third Amendment rights when it used their state-owned residences without their consent to house members of the New York National Guard.[7] The Second Circuit recognized the Third Amendment as "designed to assure a fundamental right of privacy."[8] The court further held that the Fourteenth Amendment incorporated the Third Amendment and made it enforceable against the states.[9] However, the Second Circuit did not reach the issue of whether the State of New York violated the plaintiffs' Third Amendment rights because it decided the case on procedural grounds.

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[3] 3 Joseph Story, Commentaries on the Constitution of the United States § 1893 (1833); *accord* Warren E. Burger, *Introduction*, *in* Burnham Holmes, The American Heritage History of the Bill of Rights: The Third Amendment 6 (1991) ("[T]he Third Amendment still embodies the same basic principles: that the military must be subject to civilian control, and that the government cannot intrude into private homes without good reason."); *see also* Samuel F. Miller, Lectures on the Constitution of the United States (1891) (reflecting Justice Miller's view that the Third Amendment "seems to have been thought necessary" and "is so thoroughly in accord with all our ideas, that further comment is unnecessary").

[4] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[5] Katz v. United States, 389 U.S. 347, 350 n.5 (1967). For more information about *Katz*, see Amdt4.3.3 Katz and Reasonable Expectation of Privacy Test.

[6] Laird v. Tatum, 408 U.S. 1, 15 (1972).

[7] Engblom v. Carey, 677 F.2d 957, 958–59 (2d Cir. 1982).

[8] *Id.* at 962 (citing *Griswold*, 381 U.S. at 484).

[9] *Id.* at 961 ("[W]e agree with the district court that the Third Amendment is incorporated into the Fourteenth Amendment for application to the states."); *see* Engblom v. Carey, 552 F. Supp. 57, 65 (S.D.N.Y. 1981) ("Here, it should not be necessary to wander too far into the thicket of incorporation jurisprudence. Under any of the theories extant . . . the right not to have troops quartered in one's home must be considered so incorporated." (internal citations omitted)). For more information on the Fourteenth Amendment's incorporation of the Bill of Rights, see Amdt14.S1.4.1 Overview of Incorporation of the Bill of Rights.

FOURTH AMENDMENT
SEARCHES AND SEIZURES

FOURTH AMENDMENT
SEARCHES AND SEIZURES

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FOURTH AMENDMENT—SEARCHES AND SEIZURES

Amdt4.1 Overview of Fourth Amendment, Searches and Seizures

Informed by common law practices, the Fourth Amendment[1] protects the "full enjoyment of the rights of personal security, personal liberty, and private property"[2] by prohibiting unreasonable searches and seizures. In particular, the Fourth Amendment provides that warrants must be supported by probable cause and that the person to be seized, the place to be searched, and the evidence to be sought is specified in the warrant. The Supreme Court, however, has interpreted the Fourth Amendment to allow exceptions to the warrant requirement.

Amdt4.2 Historical Background on Fourth Amendment

Fourth Amendment:

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

Few provisions of the Bill of Rights grew so directly out of the colonial experience as the Fourth Amendment, which protects against the government's use of "writs of assistance."[1] Although it does not appear to have been discussed in political tracts published in the colonies until 1772,[2] the idea that freedom from unreasonable searches and seizures is a fundamental right had been a long-standing tenet of English political thought. "Every man's house is his castle" was a celebrated maxim in England, as demonstrated in the 1603 *Semayne's Case*.[3] A civil case regarding execution of process, *Semayne's Case* recognized the homeowner's right to defend his house against unlawful entry, even by the King's agents, and the authority of government officers to enter property upon notice in order to arrest or execute the King's process.[4] Two other landmark English cases were *Entick v. Carrington*[5] and *Wilkes v. Wood*.[6] In *Wilkes*, John Wilkes sued officers, challenging the legality of warrants issued against him for his political activity.[7] The court declared that the warrants amounted to "a discretionary power given to messengers to search where their suspicions may chance to fall. If such a power is

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[1] U.S. Const. amend. IV.

[2] 3 Joseph Story, Commentaries on the Constitution of the United States § 1902 (1833).

[1] *See* Riley v. California, 573 U.S. 373, 403 (2014) (explaining that "the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity").

[2] Apparently the first statement of freedom from unreasonable searches and seizures appeared in The Rights of the Colonists and a List of Infringements and Violations of Rights, 1772, which Samuel Adams took the lead in drafting. 1 B. Schwartz, The Bill of Rights: A Documentary History 199, 205–06 (1971).

[3] 5 Coke's Repts. 91a, 77 Eng. Rep. 194 (K.B. 1604). One of the most forceful expressions of the maxim was that of William Pitt in Parliament in 1763: "The poorest man may in his cottage bid defiance to all the force of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement."

[4] *Id.* at 195–96 ("In all cases when the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K.'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors.").

[5] 19 Howell's State Trials 1029, 95 Eng. Rep. 807 (1765).

[6] 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (1763)

[7] *Id.* at 490. It was alleged that "Mr. Wood, with several of the King's messengers, and a constable, entered Mr. Wilkes's house; that Mr. Wood was aiding and assisting to the messengers, and gave directions concerning breaking

truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."[8] *Entick v. Carrington* was one of a series of civil actions against state officers who, pursuant to general warrants, had raided many homes and other places in search of materials connected with John Wilkes' polemical pamphlets attacking not only governmental policies but the King himself.[9]

Entick, an associate of Wilkes, sued because agents had forcibly broken into his house, broken into locked desks and boxes, and seized many printed charts, pamphlets, and the like.[10] In an opinion sweeping in terms, the court declared the warrant and the behavior it authorized subversive "of all the comforts of society," and the issuance of a warrant for the seizure of all of a person's papers rather than only those alleged to be criminal in nature "contrary to the genius of the law of England."[11] Besides its general character, the court said, the warrant was bad because it was not issued on a showing of probable cause and no record was required to be made of what had been seized.[12]

The Supreme Court has said that *Entick v. Carrington* is a "great judgment," "one of the landmarks of English liberty," "one of the permanent monuments of the British Constitution," and a guide to an understanding of what the Framers meant in writing the Fourth Amendment.[13] It is these landmark cases, the Court has noted that "the battle of individual liberty and privacy was finally won."[14]

In the colonies, smuggling rather than seditious libel afforded the leading examples of the necessity for protection against unreasonable searches and seizures. In order to enforce the revenue laws, English authorities made use of writs of assistance, which were general warrants authorizing the bearer to enter any house or other place to search for and seize "prohibited and uncustomed" goods, and command all subjects to assist in these endeavors. Once issued, the writs remained in force throughout the lifetime of the sovereign and six months thereafter. When, upon the death of George II in 1760, the authorities were required to obtain new writs, James Otis attacked such writs on libertarian grounds in 1761, asserting the authorizing statutes were invalid because they conflicted with England's constitution.[15] Otis lost and the writs were issued and used, but his arguments were much cited in the colonies not only on the immediate subject but also with regard to judicial review.

The provision that became the Fourth Amendment underwent some modest changes in Congress. James Madison's introduced version provided: "The rights to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches

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open Mr. Wilkes's locks, and seizing his papers . . . ." *Id.* at 489; *see also id.* at 499 ("As to the proof of what papers were taken away, the plaintiff could have no account of them; and those who were able to have given an account . . . have produced none.").

[8] *Id.* at 498.

[9] *See also* Wilkes v. Wood, 98 Eng. 489 (C.P. 1763); Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763), *aff'd* 19 Howell's State Trials 1002, 1028, 97 Eng. Rep. 1075 (K.B. 1765).

[10] *Id.* at 807–08.

[11] 95 Eng. Rep. 817, 818 (1705).

[12] *See Id.* at 817 ("[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.").

[13] Boyd v. United States, 116 U.S. 616, 626 (1886).

[14] Stanford v. Texas, 379 U.S. 476, 483 (1965).

[15] The arguments of Otis and others as well as much background material are contained in Quincy's Massachusetts Reports, 1761–1772, App. I, pp. 395–540, and in 2 Legal Papers of John Adams 106–47 (Wroth & Zobel eds., 1965). *See also* Dickerson, Writs of Assistance as a Cause of the American Revolution, in The Era of the American Revolution: Studies Inscribed to Evarts Boutell Greene 40 (R. Morris, ed., 1939).

and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized."[16] As reported from committee, with an inadvertent omission corrected on the floor,[17] the section was almost identical to the introduced version. The House defeated a motion to substitute "and no warrant shall issue" for "by warrants issuing" in the committee draft. The rejected language, however, was ultimately included in the ratified constitutional provision.[18]

As noted above, the noteworthy disputes over search and seizure in England and the colonies involved the character of warrants. There were, however, lawful warrantless searches, primarily searches incident to arrest, and these apparently elicited less controversy. Thus, the question arises whether the Fourth Amendment's two clauses should be read together to mean that searches and seizures that are "reasonable" are those which meet the requirements of the second clause; that is, are searches and seizures pursuant to warrants issued under the prescribed safeguards, or whether the two clauses are independent, so that searches under warrant must comply with the second clause but that there are "reasonable" searches under the first clause that need not comply with the second clause.[19] Over time, the Court has considered the scope of the right to search incident to arrest.[20]

Amdt4.3 Scope of Protected Rights

Amdt4.3.1 Overview of Unreasonable Searches and Seizures

Fourth Amendment:

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

The Fourth Amendment prohibits unreasonable searches and seizures. For a judge to issue a search warrant, there must be probable cause and a particularized description of what is to be searched or seized. In *Harris v. United States*,[1] the Supreme Court approved as "reasonable" the warrantless search of a four-room apartment pursuant to the arrest of the man found

[16] 1 Annals of Congress 434–35 (June 8, 1789).

[17] The word "secured" was changed to "secure" and the phrase "against unreasonable searches and seizures" was reinstated. *Id.* at 754 (August 17, 1789).

[18] *Id.* It has been theorized that the author of the defeated revision, who was chairman of the committee appointed to arrange the amendments prior to House passage, simply inserted his provision and that it passed unnoticed. N. Lasson, The History and Development of The Fourth Amendment to The United States Constitution 101–03 (1937).

[19] The amendment was originally in one clause as quoted above; it was the insertion of the defeated amendment to the language which changed the text into two clauses and arguably had the effect of extending the protection against unreasonable searches and seizures beyond the requirements imposed on the issuance of warrants. It is also possible to read the two clauses together to mean that some seizures even under warrants would be unreasonable, and this reading has indeed been effectuated in certain cases, although for independent reasons. Boyd v. United States, 116 U.S. 616 (1886); Gouled v. United States, 255 U.S. 298 (1921), overruled by Warden v. Hayden, 387 U.S. 294 (1967); *but see id.* at 303 (reserving the question whether "there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.")

[20] Approval of warrantless searches pursuant to arrest first appeared in dicta in several cases. Weeks v. United States, 232 U.S. 383, 392 (1914); Carroll v. United States, 267 U.S. 132, 158 (1925); Agnello v. United States, 269 U.S. 20, 30 (1925). Whether or not there is to be a rule or a principle generally preferring or requiring searches pursuant to warrant to warrantless searches, however, has ramifications far beyond the issue of searches pursuant to arrest. *See e.g.,* United States v. United States District Court, 407 U.S. 297, 319–20 (1972).

[1] 331 U.S. 145 (1947).

there. A year later, the Court's majority set aside a conviction based on evidence seized during a warrantless search pursuant to an arrest and adopted the "cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable."[2]

This rule was set aside two years later, when the Court held that the test "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."[3] Whether a search is reasonable, the Court said, "must find resolution in the facts and circumstances of each case."[4] The Court, however, returned to its emphasis upon a warrant in *Chimel v. California*.[5] In *Chimel*, the Court held that "[t]he [Fourth] Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence. In the scheme of the Amendment, therefore, the requirement that 'no Warrants shall issue, but upon probable cause,' plays a crucial part."[6] Therefore, the Court explained, "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through a warrant procedure."[7] Search warrant exceptions would depend on the rationale for the exception, and the scope of such a search would be similarly limited.[8]

During the 1970s, the Court was closely divided on which standard to apply.[9] For a while, the Court adopted the view that warrantless searches were per se unreasonable, with a few carefully prescribed exceptions.[10] Gradually, however, guided by the variable-expectation-of-privacy approach to the Fourth Amendment's coverage, the Court broadened its view of permissible exceptions and the scope of those exceptions.[11] In 1991, the Court held that "[t]he

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[2] Trupiano v. United States, 334 U.S. 699, 705 (1948). *See also* McDonald v. United States, 335 U.S. 451 (1948).

[3] United States v. Rabinowitz, 339 U.S. 56, 66 (1950).

[4] *Id.* at 63.

[5] 395 U.S. 752 (1969).

[6] Chimel v. California, 395 U.S. 752, 761 (1969)

[7] Terry v. Ohio, 392 U.S. 1, 20 (1968). In United States v. United States District Court, 407 U.S. 297, 321 (1972), Justice Lewis Powell explained that the "very heart" of the Fourth Amendment's mandate is "that where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." Thus, what is "reasonable" in terms of a search and seizure depends on the warrant. Coolidge v. New Hampshire, 403 U.S. 443, 473–84 (1971). *See also* Davis v. Mississippi, 394 U.S. 721, 728 (1969); Katz v. United States, 389 U.S. 347, 356–58 (1967); Warden v. Hayden, 387 U.S. 294, 299 (1967).

[8] Chimel v. California, 395 U.S. 752, 762–64 (1969) (limiting scope of search incident to arrest). *See also* United States v. United States District Court, 407 U.S. 297 (1972) (rejecting argument that it was "reasonable" to allow President through Attorney General to authorize warrantless electronic surveillance of persons thought to be endangering the national security); Katz v. United States, 389 U.S. 347 (1967) (although officers acted with great self-restraint and reasonably in engaging in electronic seizures of conversations from a telephone booth, a magistrate's antecedent judgment was required); Preston v. United States, 376 U.S. 364 (1964) (warrantless search of seized automobile not justified because not within rationale of exceptions to warrant clause). There were exceptions, *e.g.*, Cooper v. California, 386 U.S. 58 (1967) (warrantless search of impounded car was reasonable); United States v. Harris, 390 U.S. 234 (1968) (warrantless inventory search of automobile).

[9] *See, e.g.*, Almighty-Sanchez v. United States, 413 U.S. 266 (1973), Justices Potter Stewart, William O. Douglas, William Brennan, and Thurgood Marshall adhered to the warrant-based rule, while Justices Byron White, Harry Blackmun, and William Rehnquist, and Chief Justice Warren Burger placed greater emphasis upon whether the search was reasonable. *Id.* at 285. Justice Lewis Powell generally agreed with the former group of Justices, *id.* at 275 (concurring).

[10] *E.g.*, G.M. Leasing Corp. v. United States, 429 U.S. 338, 352–53 (1977) (unanimous); Marshall v. Barrow's, Inc., 436 U.S. 307, 312 (1978); Michigan v. Tyler, 436 U.S. 499, 506 (1978); Mincey v. Arizona, 437 U.S. 385, 390 (1978) (unanimous); Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Ross, 456 U.S. 798, 824–25 (1982).

[11] *E.g.*, Chambers v. Maroney, 399 U.S. 42 (1970) (warrantless search of automobile taken to police station); Texas v. White, 423 U.S. 67 (1975) (same); New York v. Belton, 453 U.S. 454 (1981) (search of vehicle incident to arrest); United States v. Ross, 456 U.S. 798 (1982) (automobile search at scene); Brigham City, Utah v. Stuart, 547 U.S. 398 (2006) (warrantless entry into a home when police have an objectively reasonable basis for believing that an occupant is

touchstone of the Fourth Amendment is reasonableness," and that the Amendment "merely proscribes [state-initiated searches and seizures] which are unreasonable."[12] By 1992, the "reasonableness" approach prevailed over the "warrants-with-narrow-exceptions" standard.[13] The Court held that "reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances," and the Court had "consistently eschewed bright-lines rules."[14] Since the 1990s, the Court has recognized more exceptions to the warrant requirement, tending to confine the warrant requirement to cases that are exclusively "criminal" in nature. Furthermore, even within that core area of "criminal" cases, the Court broadened some exceptions. Nevertheless, throughout the years, the Court has grappled with what constitutes a search[15] or a seizure,[16] what does it mean to establish probable cause,[17] when are warrants necessary,[18] and what are the various exceptions to the warrant requirement.

Administrative searches justified by "special needs beyond the normal need for law enforcement" are the most important exception to the warrant requirement.[19] Under this general rubric the Court has upheld warrantless searches by administrative authorities in public schools,[20] government offices,[21] and prisons,[22] and drug testing of public and transportation employees.[23] In all of these instances, the warrant and probable cause requirements are dispensed with in favor of a reasonableness standard that balances the government's regulatory interest against the individual's privacy interest. The breadth of the administrative search exception is shown by the fact overlapping law enforcement objectives

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seriously injured or imminently threatened with such injury); Michigan v. Fisher, 558 U.S., No. 09-91 (2009) (applying *Brigham City*). On the other hand, the warrant-based standard did preclude a number of warrantless searches. *E.g.*, Almighty-Sanchez v. United States, 413 U.S. 266 (1973) (warrantless stop and search of auto by roving patrol near border); Marshall v. Barrow's, Inc., 436 U.S. 307 (1978) (warrantless administrative inspection of business premises); Mincey v. Arizona, 437 U.S. 385 (1978) (warrantless search of home that was "homicide scene"); Arizona v. Gant, 556 U.S., No. 07-542 (2009) (search of vehicle incident to arrest where arrestee had no access to vehicle).

[12] Florida v. Jimeno, 500 U.S. 248, 250 (1991).

[13] Of the Justices on the Court in 1992, only Justice John Paul Stevens frequently sided with the warrants-with-narrow-exceptions approach. *See, e.g.*, Illinois v. Rodriguez, 497 U.S. 177, 189 (1990) (Marshall, J., dissenting joined by Stevens, J.); New Jersey v. T.L.O., 469 U.S. 325, 370 (1985) (Stevens, J., dissenting); California v. Acevedo, 500 U.S. 565, 585 (1991) (Stevens, J., dissenting).

[14] Ohio v. Robinette, 519 U.S. 33, 39 (1996).

[15] *See e.g.*, Katz v. United States, 389 U.S. 347, 351–52 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.").

[16] *See e.g.*, Torres v. Madrid, No. 19-292, slip op. at 3 (U.S. March 25, 2021) ("The 'seizure' of a 'person' plainly refers to an arrest."); *see also* Olmstead v. United States, 277 U.S. 438 (1928); *but see* Warden v. Hayden, 387 U.S. 294, 304 (1967) (explaining the Court's "shift in emphasis from property to privacy ha[d] come about through a subtle interplay of substantive and procedural reform").

[17] *See e.g.*, Henry v. United States, 361 U.S. 98, 102 (1959) ("Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.)".

[18] *See e.g.*, Terry v. Ohio, 392 U.S. 1, 20 (1968) ("[T]he police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure.").

[19] New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

[20] *Id*. at 341 (holding that "the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law").

[21] *See* O'Connor v. Ortega, 480 U.S. 709, 724–25 (1987) (holding that "a probable cause requirement" for searches conducted to work-related investigations "would impose intolerable burdens on public employers").

[22] *See* Hudson v. Palmer, 468 U.S. 517, 526 (1984) (explaining that a prisoner has no expectation of privacy and, accordingly, "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell").

[23] *See* Skinner v. Ry. Labor Exec. Ass'n, 489 U.S. 602, 614 (1989); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 672 (1989)

and administrative "special needs" do not require a warrant; instead, the Court has upheld warrantless inspection of automobile junkyards and dismantling operations in spite of the strong law enforcement component of the regulation.[24]

Although search warrants are generally required in law enforcement contexts, the Court has relaxed this requirement. For example, the Court expanded the scope of valid "incident to arrest" searches from areas within the immediate reach of the arrested suspect to a "protective sweep" of the entire home, if arresting officers have a "reasonable" belief that the home harbors an individual who may pose a danger.[25] The Court has also recognized that exigent circumstances may justify officers performing a blood test on a motorist without a warrant to determine his or her blood alcohol concentration (BAC).[26] In another case, the Court shifted its focus from whether exigent circumstances justified an officer's failure to obtain a warrant, to whether an officer had a "reasonable" belief that the circumstances constituted an exception to the warrant requirement.[27] The Court has also held exigent circumstances merited an exception even if police conduct had caused the exigency, so long as the police conduct was "reasonable" in that it neither threatened to violate nor violated the Fourth Amendment.[28]

The Court has addressed the Fourth Amendment's scope with respect to whom the Fourth Amendment protects; that is, who constitutes "the people," reasoning that it "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with [the United States] to be considered part of that community."[29] The Fourth Amendment therefore does not apply to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country.[30] The community of protected people includes U.S. citizens who go abroad, and aliens who have voluntarily entered U.S. territory and developed substantial connections with this country.[31] There is no resulting broad principle, however, that the Fourth Amendment constrains federal officials wherever and against whomever they act.

Amdt4.3.2 Early Doctrine on Fourth Amendment

Fourth Amendment:

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but*

[24] New York v. Burger, 482 U.S. 691 (1987).

[25] Maryland v. Buie, 494 U.S. 325 (1990).

[26] *See* Missouri v. McNeely, 569 U.S. 141, 156 (2013) (rejecting a *per se* exception to the warrant requirement for BAC blood testing in suspected "drunk-driving" cases and requiring that exigent circumstances be evaluated under a "totality of the circumstances" test). *Cf.* Mitchell v. Wisconsin, No. 18-6210, (U.S. June 27, 2019) (plurality opinion) (declining to "revisit" the rule established in *McNeely* but concluding that in circumstances involving unconscious drivers, where a breath test for BAC cannot be performed, exigent circumstances generally exist to take a warrantless blood test).

[27] Illinois v. Rodriguez, 497 U.S. 177 (1990).

[28] Kentucky v. King, 563 U.S. 452 (2011) (police justified in entering apartment after smelling burning marijuana in a hallway, knocking on apartment door, and hearing noises consistent with evidence being destroyed).

[29] United States v. Vertigo-Urquidez, 494 U.S. 259, 265 (1990).

[30] *Id*. at 266 ("[T]he purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.")

[31] *Id*. at 271–72.

upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

For the Fourth Amendment to apply, there must be a "search" and "seizure" with a subsequent attempt to use what was seized judicially.[1] Whether a search and seizure within the meaning of the Fourth Amendment has occurred, and whether a complainant's interests were constitutionally infringed, often turns upon the complainant's interest and whether the government officially abused it. In *Entick v. Carrington*, Lord Camden summarized British law on searches and seizures, writing:

> The great end for which men entered in society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set foot upon my ground without my license but he is liable to an action though the damage be nothing . . . .[2]

The Court's view of the Fourth Amendment as protecting property interests[3] has informed its approach in numerous cases.[4] For example, in *Olmstead v. United States*,[5] the Court noted that the Fourth Amendment did not cover wiretapping because the defendant's premises had not been physically invaded; the Court determined, however, that where there was an invasion—a technical trespass—the Fourth Amendment applied to electronic surveillance.[6]

With the invention of the microphone, telephone, and dictagraph recorder, government officers could "eavesdrop" with much greater secrecy and expediency. Inevitably, the use of electronic devices in law enforcement was challenged, and in 1928 the Court reviewed convictions obtained based on evidence gained by taps on telephone wires in violation of state law. On a 5-4 vote, the Court held that the Fourth Amendment did not cover wiretapping.[7] Writing for the Court, Chief Justice William Taft relied on two lines of argument for the conclusion. First, because the Fourth Amendment was designed to protect one's property interest in one's premises, there was no search so long as there was no physical trespass on premises owned or controlled by the defendant.[8] Second, the government had obtained all the evidence by listening, but intercepting a conversation could not qualify as a seizure because

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[1] *See, e.g.*, California v. Hodari D., 499 U.S. 621, 626 (1991) (explaining that, because there was no "seizure" of the defendant as he fled from police before being tackled, the drugs that he abandoned in flight could not be excluded as the fruits of an unreasonable seizure).

[2] 19 Howell's State Trials 1029, 1035, 95 Eng. Reg. 807, 817–18 (1765).

[3] Boyd v. United States, 116 U.S. 616, 627 (1886); Adams v. New York, 192 U.S. 585, 598 (1904).

[4] Thus, the rule that "mere evidence" cannot be seized but only the fruits of crime, its instrumentalities, or contraband, turned upon the public's right to possess the materials or the police power to make possession unlawful. Gouled v. United States, 255 U.S. 298 (1921), *overruled by* Warden v. Hayden, 387 U.S. 294 (1967). *See also* Davis v. United States, 328 U.S. 582 (1946). Standing to contest unlawful searches and seizures was based upon property interests, United States v. Jeffers, 342 U.S. 48 (1951); Jones v. United States, 362 U.S. 257 (1960), as well as upon the validity of a consent to search. Chapman v. United States, 365 U.S. 610 (1961); Stoner v. California, 376 U.S. 483 (1964); Frazier v. Culp, 394 U.S. 731, 740 (1969).

[5] 277 U.S. 438 (1928). *See also* Goldman v. United States, 316 U.S. 129, 135 (1942) (holding that a detectaphone placed against wall of adjoining room did not constitute a search or a seizure).

[6] Silverman v. United States, 365 U.S. 505, 509–10 (1961) (holding that a "spike mike" pushed through a party wall until it hit a heating duct by police officers violated the Fourth Amendment, and conversations overheard by the officers were inadmissible).

[7] Olmstead v. United States, 277 U.S. 438 (1928).

[8] *Id.* at 464–65.

the Fourth Amendment referred only to seizing tangible items.[9] Finally, violating state law did not render the evidence excludable, since the exclusionary rule operated only on evidence seized in violation of the Constitution.[10]

Six years after *Olmstead*, Congress enacted the Federal Communications Act (FCA). FCA Section 605 included a broadly worded proscription which the Court viewed as limiting governmental wiretapping.[11] Thus, in *Nardone v. United States*,[12] the Court held that wiretapping by federal officers could violate Section 605 if the officers both intercepted and divulged the contents of conversation they overheard, and that testimony in court would constitute a form of prohibited divulgence. Such evidence was therefore excluded, although wiretapping was not illegal under the Court's interpretation if the information was not used outside the governmental agency. Because Section 605 applied to intrastate as well as interstate transmissions,[13] the ban appeared intended to govern state police officers, but the Court declined to apply either the statute or the due process clause to exclude such evidence from state criminal trials.[14] The Court held that state efforts to legalize wiretapping pursuant to court orders to be precluded because Congress had intended to occupy the field completely through Section 605.[15]

The Court used *Olmstead's* trespass rationale in cases concerning "bugging" premises rather than tapping telephones. Thus, in *Goldman v. United States*,[16] the Court found no Fourth Amendment violation when a listening device was placed against a party wall in order to overhear conversations on the other side. But when officers drove a "spike mike" into a party wall until it came into contact with a heating duct and thus broadcast defendant's conversations, the Court determined that the trespass brought the case within the Fourth Amendment.[17] In so holding, the Court overruled, in effect, *Olmstead's* second rationale that conversations could not be seized.

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[9] *Id.* at 464.

[10] Among the dissenters were Justice Oliver Wendell Holmes, who characterized "illegal" wiretapping as "dirty business," 277 U.S. at 470, and Justice Louis Brandeis. *Id.* at 485.

[11] Ch. 652, 48 Stat. 1103 (1934), providing, inter alia, that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, purport, effect, or meaning of such intercepted communication to any person." The legislative history did not indicate what Congress had in mind in including this language. The section, which appeared at 47 U.S.C. § 605, was rewritten by Title III of the Omnibus Crime Act of 1968, 82 Stat. 22, § 803, so that the "regulation of the interception of wire or oral communications in the future is to be governed by" the provisions of Title III. S. Rep. No. 1097, 90th Cong., 2d Sess. 107–08 (1968).

[12] 302 U.S. 379 (1937). Derivative evidence—evidence discovered as a result of information obtained through a wiretap—was similarly inadmissible (*Nardone v. United States,* 308 U.S. 338 (1939)) although the testimony of witnesses might be obtained by exploiting wiretap information. Goldstein v. United States, 316 U.S. 114 (1942). Eavesdropping on a conversation on an extension telephone with the consent of one of the parties did not violate the statute. Rathbun v. United States, 355 U.S. 107 (1957).

[13] Weiss v. United States, 308 U.S. 321 (1939).

[14] Schwartz v. Texas, 344 U.S. 199 (1952). At this time, evidence obtained in violation of the Fourth Amendment could be admitted in state courts. Wolf v. Colorado, 338 U.S. 25 (1949). Although *Wolf* was overruled by *Mapp v. Ohio,* 367 U.S. 643 (1961), it was some seven years later and after wiretapping itself had been made subject to the Fourth Amendment that *Schwartz*was overruled in *Lee v. Florida,* 392 U.S. 378 (1968).

[15] Bananti v. United States 355 U.S. 96 (1957).

[16] 316 U.S. 129 (1942).

[17] Silverman v. United States, 365 U.S. 505 (1961). *See also* Clinton v. Virginia, 377 U.S. 158 (1964) (physical trespass found with regard to amplifying device stuck in a partition wall with a thumb tack).

Amdt4.3.3 Katz and Reasonable Expectation of Privacy Test

Fourth Amendment:

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

Following *Olmstead v. United States* and *Goldman v. United States*, the Court determined in May 1967 that "[t]he premise that property interests control the right of the government to search and seize has been discredited" and that "the principal object of the Fourth Amendment is the protection of privacy rather than property."[1] Overruling *Olmstead* and *Goldman* in December 1967, the Court dispensed with the requirement of actual physical trespass because the Fourth Amendment "protects people, not places" to make electronic surveillance subject to the Amendment's requirements.[2]

The test, the Court propounded in *Katz v. United States*, examined the expectation of privacy upon which one may "justifiably" rely.[3] The Court stated: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[4] That is, the "capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was reasonable expectation of freedom from governmental intrusion."[5]

In *Kyllo v. United States*,[6] the Court revitalized *Katz*'s focus on privacy when it invalidated the warrantless use of a thermal imaging device directed at a private home from a public street. To limit police use of new technology that can "shrink the realm of guaranteed privacy," the Court stated that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' . . . constitutes a search—at least where (as here) the technology in question is not in general public use."[7] Relying on *Katz*, the Court rejected as

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[1] Warden v. Hayden, 387 U.S. 294, 304 (1967).

[2] Katz v. United States, 389 U.S. 347, 353 (1967) (warrantless use of listening and recording device placed on outside of phone booth violates Fourth Amendment). *See also* Kyllo v. United States, 533 U.S. 27, 32–33 (2001) (holding presumptively unreasonable the warrantless use of a thermal imaging device to detect activity within a home by measuring heat outside the home, and noting that a contrary holding would permit developments in police technology "to erode the privacy guaranteed by the Fourth Amendment."

[3] 389 U.S. at 353. Justice John Harlan, concurring, formulated a two pronged test for determining whether the privacy interest is paramount: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361.

[4] 389 U.S. at 351–52.

[5] Mancusi v. DeForte, 392 U.S. 364, 368 (1968) (official had a reasonable expectation of privacy in an office he shared with others, although he owned neither the premises nor the papers seized). Minnesota v. Olson, 495 U.S. 91 (1990) (overnight guest in home has a reasonable expectation of privacy). *But cf.* Minnesota v. Carter, 525 U.S. 83 (1998) (a person present in someone else's apartment for only a few hours for the purpose of bagging cocaine for later sale has no legitimate expectation of privacy); *Cf.* Rakas v. Illinois, 439 U.S. 128 (1978) (auto passengers demonstrated no legitimate expectation of privacy in glove compartment or under seat of auto). The Fourth Amendment protects property rights however. A "seizure" of property can occur when there is some meaningful interference with an individual's possessory interests in that property, and regardless of whether there is any interference with the individual's privacy interest. Soldal v. Cook County, 506 U.S. 56 (1992) (a seizure occurred when sheriff's deputies assisted in the disconnection and removal of a mobile home in the course of an eviction from a mobile home park). The reasonableness of a seizure, however, is an additional issue that may still hinge on privacy interests. United States v. Jacobsen, 466 U.S. 109, 120–21 (1984) (DEA agents reasonably seized package for examination after private mail carrier had opened the damaged package for inspection, discovered presence of contraband, and informed agents).

[6] 533 U.S. 27 (2001).

[7] 533 U.S. at 34.

"mechanical" the Government's attempted distinction between off-the-wall and through-the-wall surveillance. Permitting all off-the-wall observations, the Court observed, "would leave the homeowner at the mercy of advancing technology—including technology that could discern all human activity in the home." To some extent, the Court grounded its concern about privacy expectations in "Founding-era understandings,"[8] explaining that the Fourth Amendment "seeks to secure 'the privacies of life' against 'arbitrary power,'"[9] and that "a central aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance.'"[10]

Although the Court strongly reaffirmed the sanctity of the home, protection of privacy in other contexts became more problematic. A two-part test that Justice John Harlan suggested in *Katz* often provided a starting point for analysis.[11] The first element, the "subjective expectation" of privacy, has largely dwindled as a viable standard, because, as Justice John Harlan noted in a subsequent case, "our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present."[12] As for the second element, whether one has a "legitimate" expectation of privacy that society finds "reasonable" to recognize, the Court has said that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."[13]

Thus, protecting the home is at the apex of Fourth Amendment coverage because of the right associated with ownership to exclude others;[14] but ownership of other things, that is, automobiles, does not carry a similar high degree of protection.[15] The Court usually considers whether a person has taken normal precautions to maintain his privacy—that is, precautions customarily taken by those seeking to exclude others—to be significant when determining legitimacy of expectation.[16] On the other hand, the Court has held that "a person has no legitimate expectation of privacy in information he voluntarily provides to third parties."[17]

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[8] Carpenter v. United States, No. 16-402, slip op. at 6 (U.S. June 22, 2018).

[9] *Id.* (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

[10] *Id.* (quoting United States v. Di Re, 332 U.S. 581, 595 (1948)).

[11] Justice John Harlan's opinion has been much relied upon. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 19 (1968); Rakas v. Illinois, 439 U.S. 128, 143–144 n.12 (1978); Smith v. Maryland, 442 U.S. 735, 740–41 (1979); United States v. Salvucci, 448 U.S. 83, 91–92 (1980); Rawlings v. Kentucky, 448 U.S. 98, 105–06 (1980); Bond v. United States, 529 U.S. 334, 338 (2000).

[12] United States v. White, 401 U.S. 745, 786 (1971). *See* Smith v. Maryland, 442 U.S. 735, 740 n.5 (1979) (government could not condition "subjective expectations" by, say, announcing that henceforth all homes would be subject to warrantless entry, and thus destroy the "legitimate expectation of privacy").

[13] Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978).

[14] *E.g.*, Alderman v. United States, 394 U.S. 165 (1969); Mincey v. Arizona, 437 U.S. 385 (1978); Payton v. New York, 445 U.S. 573 (1980); Kyllo v. United States, 533 U.S. 27, 31 (2001).

[15] *E.g.*, United States v. Ross, 456 U.S. 798 (1982). *See also* Donovan v. Dewey, 452 U.S. 594 (1981) (commercial premises); Maryland v. Macon, 472 U.S. 463 (1985) (no legitimate expectation of privacy in denying to undercover officers allegedly obscene materials offered to public in bookstore).

[16] *E.g.*, United States v. Chadwick, 433 U.S. 1, 11 (1977); Katz v. United States, 389 U.S. 347, 352 (1967). *But cf.* South Dakota v. Opperman, 428 U.S. 364 (1976) (no legitimate expectation of privacy in automobile left with doors locked and windows rolled up). In *Rawlings v. Kentucky,* 448 U.S. 98 (1980), the fact that the defendant had dumped a cache of drugs into his companion's purse, having known her for only a few days and knowing others had access to the purse, was taken to establish that he had no legitimate expectation the purse would be free from intrusion.

[17] Smith v. Maryland, 442 U.S. 735, 74344 (1979). *See also* United States v. Miller, 425 U.S. 435, 442 (1976). Concurring in *United States v. Jones,* 565 U.S. 400 (2012), Justice Sonia Sotomayor questioned the continuing viability of this principle in "the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." *Id.* at 417 (Sotomayor, J., concurring). Relying on this concurrence, the *Carpenter* Court recognized a limit to the third-party doctrine when it "decline[d] to extend Smith and Miller" to "the qualitatively different category of cell-site records." *Carpenter*, slip op. at 11. The Court noted that this data provides

Some expectations, the Court has held, are simply not among those that society is prepared to accept.[18] In the context of rapidly evolving communications devices, the Court was reluctant to consider "the whole concept of privacy expectations," preferring other decisional grounds. The Court stated: "The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."[19]

The Court's balancing standard required "an assessing of the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement." Whereas Justice John Harlan saw a greater need to restrain police officers from intruding on individual privacy through the warrant requirement,[20] the Court's solicitude for law enforcement may have provided a counterbalance.

Weighing law enforcement investigative needs[21] and privacy interests led the Court to apply a two-tier or sliding-tier scale of privacy interests. The Court originally designed the privacy test to determine whether the Fourth Amendment protected an interest.[22] If so, then ordinarily a warrant was required, subject only to narrowly defined exceptions, and the scope of the search was "strictly tied to and justified by the circumstances which rendered its initiation permissible."[23] The Court used the test to determine whether the interest invaded is important or persuasive enough to require a warrant;[24] if the individual has a lesser expectation of privacy, then the invasion may be justified, absent a warrant, by the reasonableness of the intrusion.[25] Exceptions to the warrant requirement are no longer evaluated solely by the justifications for the exception, for example, exigent circumstances, and

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"an all-encompassing record of the [cell phone] holder's whereabouts," tracking "nearly exactly the movements of [the cell phone's] owner" and operating both prospectively and retroactively. *Id.* at 2217–18. Instead, the Court held that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through" cell-site location information. *Id.* at 2217.

[18] *E.g.*, United States v. Miller, 425 U.S. 435 (1976) (bank records); Smith v. Maryland, 442 U.S. 735 (1979) (numbers dialed from one's telephone); Hudson v. Palmer, 468 U.S. 517 (1984) (prison cell); Illinois v. Andreas, 463 U.S. 765 (1983) (shipping container opened and inspected by customs agents and resealed and delivered to the addressee); California v. Greenwood, 486 U.S. 35 (1988) (garbage in sealed plastic bags left at curb for collection).

[19] City of Ontario v. Quon, 560 U.S. 746, 759 (2010). The Court cautioned that "[a] broad holding concerning employees' privacy expectations vis-a-vis employer-provided technological equipment might have implications for future cases that cannot be predicted." *Id.* at 760.

[20] United States v. White, 401 U.S. 745, 786–87 (1971) (Harlan, J., dissenting).

[21] E.g., Robbins v. California, 453 U.S. 420, 429, 433–34 (1981) (Powell, J., concurring), quoted with approval in *United States v. Ross,* 456 U.S. 798, 815–16 & n.21 (1982),

[22] Katz v. United States, 389 U.S. 347, 351–52 (1967).

[23] Terry v. Ohio, 392 U.S. 1, 19 (1968).

[24] The prime example is the home, so that for entries either to search or to arrest, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Payton v. New York, 445 U.S. 573, 590 (1980); Steagald v. United States, 451 U.S. 204, 212 (1981); Kirk v. Louisiana, 536 U.S. 635 (2002) (per curiam). *See also* Mincey v. Arizona, 437 U.S. 385 (1978). Privacy in the home is not limited to intimate matters. "In the home *all* details are intimate details, because the entire area is held safe from prying government eyes." Kyllo v. United States, 533 U.S. 27, 37 (2001).

[25] One has a diminished expectation of privacy in automobiles. Arkansas v. Sanders, 442 U.S. 753, 761 (1979) (collecting cases); United States v. Ross, 456 U.S. 798, 804–09 (1982). A person's expectation of privacy in personal luggage and other closed containers is substantially greater than in an automobile, United States v. Chadwick, 433 U.S. 1, 13 (1977); Arkansas v. Sanders, 442 U.S. 753 (1979), although, if the luggage or container is found in an automobile as to which there exists probable cause to search, the legitimate expectancy diminishes accordingly. *United States v. Ross*, *supra*. There is also a diminished expectation of privacy in a mobile home parked in a parking lot and licensed for vehicular travel. California v. Carney, 471 U.S. 386 (1985) (leaving open the question of whether the automobile exception also applies to a "mobile" home being used as a residence and not adapted for immediate vehicular use).

the scope of the search is no longer tied to and limited by the justification for the exception.[26] The result has been a considerable expansion, beyond what existed prior to *Katz*, of the power of police and other authorities to conduct searches.

In *Berger v. New York*,[27] the Court confirmed the obsolescence of the alternative holding in *Olmstead* that conversations could not be seized in the Fourth Amendment sense.[28] *Berger* held unconstitutional on its face a state eavesdropping statute under which judges were authorized to issue warrants permitting police officers to trespass on private premises to install listening devices. The warrants were to be issued upon a showing of "reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded."[29] For the five-Justice majority, Justice Tom Clark invalidated the statute, explaining that wiretapping is a search and seizure within the meaning of the Fourth Amendment and, as such, there must be a showing of probable cause and the warrant must particularly describe the place to be searched and the persons or things to be seized, disallowing "general warrants."[30]

Amdt4.3.4 Current Doctrine on Searches and Seizures

Fourth Amendment:

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

In *United States v. Jones*,[1] the Court seemed to revitalize the significance of governmental trespass in determining whether a Fourth Amendment search has occurred. In *Jones*, the Court considered whether the attachment of a Global Positioning System (GPS) device to a car used by a suspected narcotics dealer and the monitoring of such device for twenty-eight days, constituted a search. Although the Court ruled unanimously that this month-long monitoring violated Jones's rights, it splintered on the reasoning. A majority of the Court relied on the theory of common law trespass to find that attaching the device to the car represented a physical intrusion into Jones's constitutionally protected "effect" or private property.[2] While

[26] *E.g.*, Texas v. White, 423 U.S. 67 (1975) (if probable cause to search automobile existed at scene, it can be removed to station and searched without warrant); United States v. Robinson, 414 U.S. 218 (1973) (once an arrest has been validly made, search pursuant thereto is so minimally intrusive in addition that scope of search is not limited by necessity of security of officer); United States v. Edwards, 415 U.S. 800 (1974) (incarcerated suspect; officers need no warrant to take his clothes for test because little additional intrusion). *But see* Ybarra v. Illinois, 444 U.S. 85 (1979) (officers on premises to execute search warrant of premises may not without more search persons found on premises).

[27] 388 U.S. 41 (1967).

[28] *Id.* at 50–53.

[29] *Id.* at 54.

[30] Id. at 58.

[1] 565 U.S. 400 (2012).

[2] *Id.* at 403–07. The physical trespass analysis was reprised in subsequent opinions. In its 2013 decision in *Florida v. Jardines,* 569 U.S. 1 (2013), the Court assessed whether a law enforcement officer had the legal authority to conduct a drug sniff with a trained canine on the front porch of a suspect's home. Reviewing the law of trespass, the Court observed that visitors to a home, including the police, must have either explicit or implicit authority from the homeowner to enter upon and engage in various activities in the curtilage (that is, the area immediately surrounding the home). Finding that the use of the dog to find incriminating evidence exceeded "background social norms" of what a visitor is normally permitted to do on another's property, the Court held that the drug sniff constituted a search. 569 U.S. 1, 7–10 (2013). Similarly, in its 2015 per curiam opinion in *Grady v. North Carolina*, the Court emphasized the "physical intru[sion]" on a person when it found that attaching a device to a person's body, without consent, for the

this holding obviated the need to assess the month-long tracking under *Katz*'s reasonable expectation of privacy test, five Justices, who concurred either with the majority opinion or concurred with the judgment, would have held that long-term GPS tracking can implicate an individual's expectation of privacy.[3] Some have read these concurrences as partly premised on the idea that while government access to a small data set—for example, one trip in a vehicle—might not violate one's expectation of privacy, aggregating a month's worth of personal data allows the government to create a "mosaic" about an individual's personal life that violates that individual's reasonable expectation of privacy.[4]

The Court confirmed in *Carpenter v. United States* that the Fourth Amendment is implicated when government action violates individuals' "reasonable expectation of privacy in the whole of their physical movements," regardless of whether the challenged conduct constitutes a physical trespass.[5] The Court held that the

> government could not, without a warrant, access seven days of a defendant's cell-site location information, which is data that continuously tracks the location of a cell phone.[6] Observing that "historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in *Jones*," the Court highlighted the continuing importance of the expectations-of-privacy test.[7] The Court acknowledged that it had previously declined to extend Fourth Amendment protection to information that a person had voluntarily given to a third party like a wireless carrier, but declined to extend that line of cases to "the qualitatively different category of cell-site records."[8]

Amdt4.3.5 Open Fields Doctrine

Fourth Amendment:

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but*

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purpose of tracking the person's movements, constitutes a search within the meaning of the Fourth Amendment. 575 U.S. 306, 309–11 (2015). Neither the majority in *Jardines* nor the Court in *Grady* addressed whether the challenged conduct violates a reasonable expectation of privacy under *Katz v. United States*. *Grady*, 575 U.S. at 309–19; *Jardines*, 569 U.S. at 10–12.

[3] *Jones*, 565 U.S. at 400, 431 (Alito, J., concurring in the judgment, joined by Ginsburg, Breyer, Kagan, JJ.) (concluding that respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the respondent's vehicle); *id.* at 415 (Sotomayor, J., concurring) (disagreeing with Justice Samuel Alito's "approach" to the specific case but agreeing "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.").

[4] *See, e.g.*, *In re Application for Telephone Information Needed for a Criminal Investigation*, 119 F. Supp. 3d 1011, 1021–22 (N.D. Cal. 2015) (discussing the import of the two concurring opinions from *Jones*); United States v. Brooks, 911 F. Supp. 2d 836, 842 (D. Ariz. 2012) (noting that "[w]hile it does appear that in some future case, a five justice 'majority' is willing to accept the principle that Government surveillance can implicate an individual's reasonable expectation of privacy over time, *Jones* does not dictate the result of the case at hand . . . "); *but see* United States v. Graham, 824 F.3d 421, 435–36 (4th Cir. 2016) (arguing that Justice Samuel Alito's *Jones* concurrence should be read more narrowly so as to not implicate government access to information collected by third-party actors, no matter the quantity of information collected); *In re Application of FBI*, No. BR 14– 01, 2014 WL 5463097, at *10 (FISA Ct. Mar. 20, 2014) ("While the concurring opinions in *Jones* may signal that some or even most of the Justices are ready to revisit certain settled Fourth Amendment principles, the decision in *Jones* itself breaks no new ground . . . .").

[5] No. 16-402, slip op. at 12 (U.S. June 22, 2018).

[6] *Id.* at 11–12.

[7] *Id.* at 13.

[8] *Id.* at 11.

upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In *Hester v. United States*,[1] the Court held that the Fourth Amendment did not protect "open fields" and that, therefore, police searches in such areas as pastures, wooded areas, open water, and vacant lots need not comply with the requirements of warrants and probable cause. The Court's announcement in *Katz v. United* States[2] that the Amendment protects "people not places" cast some doubt on the vitality of the open fields principle, but all such doubts were cast away in *Oliver v. United States*.[3] Invoking *Hester*'s reliance on the literal wording of the Fourth Amendment (open fields are not "effects") and distinguishing *Katz*, the Court in *Oliver* ruled that the open fields exception applies to fields that are fenced and posted. The Court held that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."[4] The Court further explained that an individual may not demand privacy for activities conducted within outbuildings and visible by trespassers peering into the buildings from just outside.[5] Even within the curtilage and notwithstanding that the owner has gone to the extreme of erecting a ten foot high fence in order to screen the area from ground-level view, there is no reasonable expectation of privacy from naked-eye inspection from fixed-wing aircraft flying in navigable airspace.[6] Similarly, naked-eye inspection from helicopters flying even lower contravenes no reasonable expectation of privacy.[7] Furthermore, aerial photography of commercial facilities secured from ground-level public view is permissible, the Court finding such spaces more analogous to open fields than to the curtilage of a dwelling.[8]

Amdt4.3.6 Seizure of Property

Amdt4.3.6.1 Inspections

Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

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[1] 265 U.S. 57 (1924). *See also* Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 86 (1974).

[2] 389 U.S. 347, 353 (1967). *Cf.* Cady v. Dombrowski, 413 U.S. 433, 450 (1973) (citing *Hester* approvingly).

[3] 466 U.S. 170 (1984) (approving warrantless intrusion past no trespassing signs and around locked gate, to view field not visible from outside property).

[4] 466 U.S. at 178. *See also* California v. Greenwood, 486 U.S. 35 (1988) (approving warrantless search of garbage left curbside "readily accessible to animals, children, scavengers, snoops, and other members of the public").

[5] United States v. Dunn, 480 U.S. 294 (1987) (determining that space immediately outside a barn, accessible only after crossing a series of "ranch-style" fences and situated one-half mile from the public road, constitutes unprotected "open field").

[6] California v. Ciraolo, 476 U.S. 207 (1986). Activities within the curtilage are nonetheless still entitled to some Fourth Amendment protection. The Court has described four considerations for determining whether an area falls within the curtilage: proximity to the home, whether the area is included within an enclosure also surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to shield the area from view of passersby. See California v. Greenwood, 486 U.S. 35, 37 (1988) (holding that the Fourth Amendment does not prohibit warrantless searches and seizures of garbage left for collection outside the curtilage of a home); United States v. Dunn, 480 U.S. 294 (1987) (barn 50 yards outside of fence surrounding home, used for processing chemicals, and separated from public access only by a series of livestock fences, by a chained and locked driveway, and by one-half mile's distance, is not within curtilage). *See also* Collins v. Virginia, No. 16-1027, slip op. at 6 (U.S. May 2018) ("Just like the front porch, side garden, or area 'outside the front window,' the driveway enclosure where Officer Rhodes searched the motorcycle . . . is properly considered curtilage." (quoting Florida v. Jardines, 569 U.S. 1, 6 (2013))).

[7] Florida v. Riley, 488 U.S. 445, 451–52 (1989) (holding that a view through partially open roof of greenhouse did not constitute a "search" requiring a warrant).

[8] Dow Chemical Co. v. United States, 476 U.S. 227, 233–35 (1986) (suggesting that aerial photography of the curtilage would be impermissible).

upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Certain early cases held that the Fourth Amendment applied only when a search was undertaken for criminal investigatory purposes,[1] and the Supreme Court initially employed a reasonableness test for such searches without requiring either a warrant or probable cause in the absence of a warrant.[2] But, in 1967, the Court held in *Camara v. Municipal Court* and *See v. City of Seattle* that administrative inspections to detect building code violations require warrants if the occupant objects.[3] The Supreme Court stated, "We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. . . . But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.' It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."[4] In 1970 and 1972, however, the Supreme Court ruled certain administrative inspections used to enforce regulatory schemes with regard to alcohol and firearms, respectively, to be exempt from the Fourth Amendment warrant requirement and able to be authorized by statute.[5]

Reaffirming *Camara* and *See* in its 1978 *Marshall v. Barlow's, Inc.* decision,[6] the Court held that an Occupational Safety and Health Act (OSHA) provision that authorized federal inspectors to search work areas of employment facilities covered by OSHA for safety hazards and regulatory violations, without a warrant or other legal process violated the Fourth Amendment. The Court distinguished the liquor and firearms exceptions based on a long tradition of close government supervision in those industries, so that a person in those businesses gave up his privacy expectations. Noting that Congress had recently enacted OSHA, which regulated practically every business in or affecting interstate commerce, the Court reasoned that a legislature cannot extend regulation and then follow it with warrantless inspections. The Court further noted that OSHA inspectors had unbounded discretion in choosing which businesses to inspect and when to do so, leaving businesses at the mercy of possibly arbitrary actions and without assurances as to limitations on scope and standards of inspections. Further, warrantless inspections did not serve an important governmental interest, as the Court expected most businesses to consent to inspections and that OSHA could resort to an administrative warrant in order to inspect sites where a business refused consent.[7]

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[1] *In re* Strouse, 23 F. Cas. 261 (No. 13,548) (D. Nev. 1871); *In re* Meador, 16 F. Cas. 1294, 1299 (No. 9375) (N.D. Ga. 1869).

[2] Abel v. United States, 362 U.S. 217 (1960); Frank v. Maryland, 359 U.S. 360 (1959); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

[3] Camara v. Municipal Court, 387 U.S. 523 (1967) (home); See v. City of Seattle, 387 U.S. 541 (1967) (commercial warehouse).

[4] *Camara*, 387 U.S. at 530.

[5] Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); United States v. Biswell, 406 U.S. 311 (1972). *Colonnade*, involving liquor, was based on the long history of close supervision of the industry. *Biswell*, involving firearms, introduced factors that were subsequently to prove significant. Thus, although the statute was of recent enactment, firearms constituted a pervasively regulated industry, so that dealers had no reasonable expectation of privacy, because the law provides for regular inspections. Further, warrantless inspections were needed for effective enforcement of the statute.

[6] 436 U.S. 307 (1978). Dissenting, Justice John Paul Stevens, with Justices William Rehnquist and Harry Blackmun, argued that not the warrant clause but the reasonableness clause should govern administrative inspections. *Id.* at 325.

[7] Administrative warrants issued only on a showing that a specific business had been chosen for inspection based on a general administrative plan would suffice. Even without a necessity for probable cause, the requirement would assure the interposition of a neutral officer to establish that the inspection was reasonable and properly authorized.

In *Donovan v. Dewey*,[8] the Court clarified *Barlow's* reach, articulating a new standard that appeared to permit some governmental inspection of commercial property without a warrant. Under the Federal Mine Safety and Health Act (FMSHA), governing underground and surface mines (including stone quarries), federal officers must inspect underground mines at least four times a year and surface mines at least twice a year, pursuant to extensive safety regulations. FMSHA specifically allowed inspections to be absent advanced notice and required the Secretary of Labor to institute court actions for injunctive and other relief if inspectors were denied admission. Sustaining FMSHA, the Court proclaimed that government had "greater latitude" to conduct warrantless inspections of commercial property than of homes, because "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections."[9]

The Court distinguished *Dewey* from *Barlow's* in several ways. First, *Dewey* involved a single industry, unlike *Barlow's* broad coverage. Second, OSHA gave minimal direction to inspectors as to time, scope, and frequency of inspections, while FMSHA specified a regular number of inspections pursuant to standards. Third, the Court deferred to Congress's determination that unannounced inspections were necessary to enforce safety laws effectively. Fourth, FMSHA provided businesses an opportunity to contest the search in the civil proceeding the Secretary had to bring if the business denied consent.[10] The Court explained that if only lengthy government supervision made warrantless inspections permissible, "absurd results would occur," because "new and emerging industries . . . that pose enormous potential safety and health problems" would escape warrantless inspections.[11]

Applying the *Dewey* three-part test in *New York v. Burger*[12] to automobile junkyard and vehicle dismantling operation inspections, for which administrative and penal objectives overlapped, the Court concluded that New York has a substantial interest in stemming automobile thefts, that regulating vehicle dismantling operations reasonably serves that interest, and that statutory safeguards provide adequate substitutes for a warrant requirement. The Court rejected the suggestion that the warrantless inspection provisions were designed as an expedient means to enforcing penal laws and instead saw them serving narrower, valid regulatory purposes, such as establishing a system for tracking stolen automobiles and parts, and enhancing legitimate businesses' ability to compete. "[A] State can

436 U.S. at 321, 323. The dissenters objected that the warrant clause was being constitutionally diluted. *Id.* at 325. Administrative warrants were approved also in *Camara v. Municipal Court,* 387 U.S. 523, 538 (1967). Previously, one of the reasons given for finding administrative and noncriminal inspections not covered by the Fourth Amendment was the fact that the warrant clause would be as rigorously applied to them as to criminal searches and seizures. Frank v. Maryland, 359 U.S. 360, 373 (1959). *See also* Almeida-Sanchez v. United States, 413 U.S. 266, 275 (1973) (Powell, J., concurring) (suggesting a similar administrative warrant procedure empowering police and immigration officers to conduct roving searches of automobiles in areas near the Nation's borders); *id.* at 270 n.3 (indicating that majority Justices were divided on the validity of such area search warrants); *id.* at 288 (White, J., dissenting indicating approval); United States v. Martinez-Fuerte, 428 U.S. 543, 547 n.2, 562 n.15 (1976).

[8] 452 U.S. 594 (1981).

[9] Donovan v. Dewey, 452 U.S. 594, 598–99 (1981).

[10] 452 U.S. at 596–97, 604–05. Pursuant to the statute, however, the Secretary has promulgated regulations providing for the assessment of civil penalties for denial of entry and Dewey had been assessed a penalty of $1,000. *Id.* at 597 n.3. It was also true in *Barlow's* that the government resorted to civil process upon refusal to admit. 436 U.S. at 317 & n.12.

[11] *Dewey*, 452 U.S. at 606. Duration of regulation will now be a factor in assessing the legitimate expectation of privacy of a business. *Id. Accord*, New York v. Burger, 482 U.S. 691 (1987) (although duration of regulation of vehicle dismantling was relatively brief, history of regulation of junk business generally was lengthy, and current regulation of dismantling was extensive).

[12] 482 U.S. 691 (1987).

address a major social problem *both* by way of an administrative scheme *and* through penal sanctions," the Court declared; in such circumstances warrantless administrative searches are permissible even though they may uncover evidence of criminal activity.[13]

In its 2015 *City of Los Angeles v. Patel* decision, the Court declined to extend the "more relaxed standard" applying to searches of closely regulated businesses to hotels when it invalidated a Los Angeles ordinance that gave police the ability to inspect hotel registration records without advance notice and carried a 6-month term of imprisonment and a $1,000 fine for hotel operators who failed to make such records available.[14] The *Patel* Court, characterizing inspections pursuant to this ordinance as "administrative searches,"[15] held "that a hotel owner must be afforded an *opportunity* to have a neutral decision maker review an officer's demand to search the registry before he or she faces penalties for failing to comply" for such a search to be permissible under the Fourth Amendment.[16] In so doing, the Court expressly declined to treat the hotel industry as a "closely regulated" industry subject to the more relaxed standard applied in *Dewey* and *Burger* on the grounds that doing so would "permit what has always been a narrow exception to swallow the rule."[17] The Court emphasized that, over the prior forty-five years, it had recognized only four industries as having "such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise."[18] These four industries involve liquor sales, firearms dealing, mining, and running an automobile junkyard, and the Court distinguished hotel operations from these industries, in part, because "nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare."[19] However, the Court also suggested that, even if hotels were to be seen as pervasively regulated, the Los Angeles ordinance would still be deemed unreasonable because (1) there was no substantial government interest informing the regulatory scheme; (2) warrantless inspections were not necessary to further the government's purpose; and (3) the inspection program did not provide, in terms of the certainty and regularity of its application, a constitutionally adequate substitute for a warrant.[20]

In contexts not directly concerned with whether an industry is comprehensively regulated, the Court has elaborated the constitutional requirements affecting administrative inspections

[13] 482 U.S. at 712.

[14] 135 S. Ct. 2443, 2444 (2015). *Patel* involved a facial, rather than an as-applied, challenge to the Los Angeles ordinance. The Court clarified that facial challenges under the Fourth Amendment are "not categorically barred or especially disfavored." *Id.* at 2449. Some had apparently taken the Court's earlier statement in *Sibron v. New York,* 392 U.S. 40 (1968), that "[t]he constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case," *id.* at 59, to foreclose facial Fourth Amendment challenges. *Patel*, 135 S. Ct. at 2449. However, the *Patel* Court construed *Sibron*'s language to mean only that "claims for facial relief under the Fourth Amendment are unlikely to succeed when there is substantial ambiguity as to what conduct a statute authorizes." *Id.*

[15] *Patel*, 135 S. Ct. at 2452.

[16] *Id.* at 2453. The Court further noted that actual pre-compliance review need only occur in those "rare instances" where a hotel owner objects to turning over the registry, and that the Court has never "attempted to prescribe" the exact form of such review. *Id.* at 2452–53.

[17] *Id.* at 2454–55.

[18] *Id.* (quoting *Barlow's*, 436 U.S. at 313).

[19] *Id.* The majority further stated that the existence of regulations requiring hotels to maintain licenses, collect taxes, and take other actions did not establish a "comprehensive scheme of regulation" distinguishing hotels from other industries. *Id.* at 2455. It also opined that the historical practice of treating hotels as public accommodations does not necessarily mean that hotels are to be treated as comprehensively regulated for purposes of warrantless searches. *Id.* at 2454–55.

[20] *Id.* at 2456. Specifically, the Court noted that the government's alleged interest in ensuring that hotel operators not falsify their records, as they could if given an opportunity for pre-compliance review, applied to every recordkeeping requirement. *Id.* The Court similarly noted that there were other ways to further the city's interest in warrantless inspections (for example, *ex parte* warrants) and that the ordinance failed to sufficiently constrain a police officer's discretion as to which hotels to search and under what circumstances. *Id.*

and searches. In *Michigan v. Tyler*,[21] for example, the Court subdivided the process by which an investigation of the cause of a fire may be conducted. Entry to fight the fire is, of course, an exception based on exigent circumstances, and no warrant or consent is needed; fire fighters on the scene may seize evidence relating to the cause under the plain view doctrine. Additional entries to investigate the cause of the fire must be made pursuant to warrant procedures governing administrative searches. Evidence of arson discovered in the course of such an administrative inspection is admissible at trial, but if the investigator finds probable cause to believe that arson has occurred and requires further access to gather evidence for a possible prosecution, he must obtain a criminal search warrant.[22] In other cases, the Court approved a system of "home visits" by welfare caseworkers, where recipients must admit the worker or lose eligibility for benefits[23] and held that a sheriff's assistance to a trailer park owner in disconnecting and removing a mobile home constituted a "seizure" of the home.[24]

The Court has recognized situations, some of them analogous to administrative searches, where "'special needs' beyond normal law enforcement . . . justify departures from the usual warrant and probable cause requirements."[25] In *Skinner*, the Court applied the *Dewey*/*Burger* warrantless search rationale to urinalysis drug testing, reasoning that, because of the history of pervasive regulation of the railroad industry, railroad employees have a diminished expectation of privacy, which makes mandatory urinalysis less intrusive and more reasonable.[26]

With respect to automobiles, the Court has distinguished random automobile stops from activities to inventory and secure valuables and firearms. The Court held random stops of automobiles to check drivers' licenses, vehicle registrations, and safety conditions to be too intrusive; the degree to which random stops would advance the legitimate governmental interests involved did not outweigh the individual's legitimate expectations of privacy.[27] In contrast, in *South Dakota v. Opperman*,[28] the Court sustained the admission of evidence that

[21] 436 U.S. 499 (1978).

[22] The Court also held that, after the fire was extinguished, if fire investigators were unable to proceed at the moment, because of dark, steam, and smoke, it was proper for them to leave and return at daylight without any necessity of complying with its mandate for administrative or criminal warrants. 436 U.S. at 510–11. *But cf.* Michigan v. Clifford, 464 U.S. 287 (1984) (no such justification for search of private residence begun at 1:30 p.m. when fire had been extinguished at 7 a.m.).

[23] Wyman v. James, 400 U.S. 309 (1971). It is not clear what rationale the majority used. It appears to have proceeded on the assumption that a "home visit" was not a search and that the Fourth Amendment does not apply when criminal prosecution is not threatened. Neither premise is valid under *Camara* and its progeny, although *Camara* preceded *Wyman*. Presumably, the case would today be analyzed under the expectation of privacy/need/structural protection theory of the more recent cases.

[24] Soldal v. Cook County, 506 U.S. 56, 61 (1992) (home "was not only seized, it literally was carried away, giving new meaning to the term 'mobile home'").

[25] City of Ontario v. Quon, 560 U.S. 746 (2010) (reasonableness test for obtaining and reviewing transcripts of on-duty text messages of police officer using government-issued equipment); Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (administrative needs of probation system justify warrantless searches of probationers' homes on less than probable cause); Hudson v. Palmer, 468 U.S. 517, 526 (1984) (no Fourth Amendment protection from search of prison cell); New Jersey v. T.L.O., 469 U.S. 325 (1985) (simple reasonableness standard governs searches of students' persons and effects by public school authorities); O'Connor v. Ortega, 480 U.S. 709 (1987) (reasonableness test for work-related searches of employees' offices by government employer); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (neither probable cause nor individualized suspicion is necessary for mandatory drug testing of railway employees involved in accidents or safety violations).

[26] *Skinner*, 489 U.S. at 627.

[27] Delaware v. Prouse, 440 U.S. 648 (1979). Standards applied in this case had been developed in the contexts of automobile stops at fixed points or by roving patrols in border situations. Almeida-Sanchez v. United States, 413 U.S. 266 (1973); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); United States v. Ortiz, 422 U.S. 891 (1975); United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

[28] 428 U.S. 364 (1976). The Court emphasized the reduced expectation of privacy in automobiles and the noncriminal purpose of the search.

police found when they impounded an automobile from a public street for multiple parking violations and entered the car to secure and inventory valuables for safekeeping, discovering marijuana in the glove compartment. Further, in *Cady v. Dumbrowski*,[29] the Court upheld the constitutionality of a warrantless search of an out-of-state policeman's automobile following an accident in order to find and safeguard his service revolver, which yielded criminal evidence.[30] The Court in *Cady* recognized that local police often engage in "community caretaking functions" that are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute,"[31] and in the context of "the extensive regulation of motor vehicles and traffic," such a warrantless "caretaking 'search'" of a vehicle that had been towed and stored at a garage was reasonable under the Fourth Amendment when undertaken to secure a firearm that could pose a risk to public safety.[32]

In *Caniglia v. Strom*,[33] the Court declined to extend *Cady* beyond the automobile context. In *Caniglia*, police responded to a request for a welfare check of a potentially suicidal man at his home and, following removal of the man from his porch for a psychiatric evaluation at a hospital, conducted a warrantless search of the man's home to seize firearms he might have used to harm himself or others.[34] The lower court concluded that the decision to remove the man and his firearms was permissible under the Fourth Amendment pursuant to "a freestanding community-caretaking" doctrine drawn from *Cady* "that justifies warrantless searches and seizures in the home."[35] The Supreme Court disagreed.[36] The Court in *Caniglia* stated that *Cady* made an "unmistakable distinction between vehicles and homes," noting that the location of the *Cady* search in an impounded vehicle rather than a home was "'a constitutional difference' that the [*Cady*] opinion repeatedly stressed."[37] As such, the Court in *Caniglia* reiterated that "[w]hat is reasonable for vehicles is different from what is reasonable for homes," clarifying that *Cady* did not suggest a broader "community caretaking" doctrine independently justifying warrantless searches in the home.[38]

Amdt4.3.6.2 Property Subject to Seizure

Fourth Amendment:

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

While search warrants have long been issued to seize contraband and the fruits and instrumentalities of crime,[1] in 1921, a unanimous Court in *Gouled v. United States*,[2] limited property subject to seizures to contraband and the fruits and instrumentalities of crime and

[29] 413 U.S. 433 (1973).

[30] *Id.* at 447–48.

[31] *Id.* at 441.

[32] *Id.* at 441, 447–48.

[33] 141 S. Ct. 1596 (2021).

[34] *Id.* at 1598.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 1599.

[38] *Id.* at 1600.

[1] United States v. Lefkowitz, 285 U.S. 452, 465–66 (1932). Of course, evidence seizable under warrant is subject to seizure without a warrant in circumstances in which warrantless searches are justified.

refused to permit a seizure of "mere evidence," consisting of the defendant's papers for use as evidence against him at trial. The Court recognized that there was "no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure,"[3] but their character as evidence rendered them immune. The Court explained that immunity "was based upon the dual, related premises that historically the right to search for and seize property depended upon the assertion by the Government of a valid claim of superior interest, and that it was not enough that the purpose of the search and seizure was to obtain evidence to use in apprehending and convicting criminals."[4]

In 1967, the Court overturned the "mere evidence" rule in *Warden v. Hayden*.[5] It is now settled that such evidentiary items as fingerprints,[6] blood,[7] urine samples,[8] fingernail and skin scrapings,[9] voice and handwriting exemplars,[10] conversations,[11] and other demonstrative evidence may be obtained through the warrant process or without a warrant where "special needs" of government are shown.[12] However, the Court has held some medically assisted bodily intrusions impermissible, for example, forcible administration of an emetic to induce vomiting[13] and surgery under general anesthetic to remove a bullet lodged in a suspect's chest.[14] In determining which medical tests and procedures are reasonable, the Court has considered the extent to which the procedure threatens the individual's safety or health, "the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity," and the importance of the evidence to the prosecution's case.[15]

Amdt4.3.6.3 Property Seizures and Self-Incrimination Protections

Fourth Amendment:

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but*

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[2] 255 U.S. 298 (1921). United States v. Lefkowitz, 285 U.S. 452 (1932), applied the rule in a warrantless search of premises. The rule apparently never applied in case of a search of the person. *Cf.* Schmerber v. California, 384 U.S. 757 (1966).

[3] Gouled v. United States, 255 U.S. 298, 306 (1921).

[4] Warden v. Hayden, 387 U.S. 294, 303 (1967). *See* Gouled v. United States, 255 U.S. 298, 309 (1921). The holding was derived from dicta in *Boyd v. United States,* 116 U.S. 616, 624–29 (1886).

[5] Warden v. Hayden, 387 U.S. 294 (1967).

[6] Davis v. Mississippi, 394 U.S. 721 (1969).

[7] Schmerber v. California, 384 U.S. 757 (1966); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (warrantless blood testing for drug use by railroad employee involved in accident).

[8] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (warrantless drug testing of railroad employee involved in accident).

[9] Cupp v. Murphy, 412 U.S. 291 (1973) (sustaining warrantless taking of scrapings from defendant's fingernails at the station house, on the basis that it was a very limited intrusion and necessary to preserve evanescent evidence).

[10] United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973) (both sustaining grand jury subpoenas to produce voice and handwriting exemplars, as no reasonable expectation of privacy exists with respect to those items).

[11] Berger v. New York, 388 U.S. 41, 44 n.2 (1967). *See also id.* at 97 n.4, 107–08 (Harlan and White, JJ., concurring), 67 (Douglas, J., concurring).

[12] An important result of *Warden v. Hayden* is that third parties not suspected of criminal culpability are subject to warrants for searches and seizures of evidence. Zurcher v. Stanford Daily, 436 U.S. 547, 553–60 (1978).

[13] Rochin v. California, 342 U.S. 165 (1952).

[14] Winston v. Lee, 470 U.S. 753 (1985).

[15] Winston v. Lee, 470 U.S. 753, 761–63 (1985). Chief Justice Burger concurred on the basis of his reading of the Court's opinion "as not preventing detention of an individual if there are reasonable grounds to believe that natural bodily functions will disclose the presence of contraband materials secreted internally." *Id.* at 767. *Cf.* United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Supreme Court has distinguished the Fourth Amendment protection from unreasonable searches from the Fifth Amendment protection from self-incrimination. While the Court initially appeared to find some overlap between these two protections in its 1886 decision, *Boyd v. United States*,[1] the Court's modern jurisprudence views the two Amendments as addressing different concerns.

In its first lengthy consideration of the Fourth Amendment, the Court addressed the protections the Fourth and Fifth Amendments afforded. In *Boyd*, the Government had alleged that goods had been imported illegally and were thereby subject to forfeiture pursuant to a quasi-criminal proceeding. In assessing the legality of a statute that authorized courts to require defendants to produce any document that might "tend to prove any allegation made by the United States,"[2] the Court unanimously agreed that there was a Fifth Amendment self-incrimination problem. Justice Joseph Bradley for a majority of the Court, however, also relied on the Fourth Amendment. Although the statute did not authorize a search but instead compelled production of documents, Justice Joseph Bradley concluded that the law was within Search and Seizure Clause restrictions.[3] With this point established, Justice Joseph Bradley relied on Lord Camden's opinion in *Entick v. Carrington*[4] for the proposition that seizure of items to be used only as evidence was impermissible. Justice Joseph Bradley announced that the "essence of the offence" committed by the government against Boyd:

> is not the breaking of his doors, and the rummaging of his drawers . . . but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.[5]

Although it may be doubtful that equating search warrants with subpoenas and other compulsory process ever really amounted to much of a limitation,[6] the Court currently dispenses with any theory of "convergence" of the two amendments.[7] In *Warden v. Hayden*,[8] Justice William Brennan for the Court cautioned that the items seized were not "'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. . . . This case thus does

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[1] 116 U.S. 616 (1886).

[2] Act of June 22, 1874, § 5, 18 Stat. 187.

[3] Boyd v. United States, 116 U.S. 616, 622 (1886).

[4] Howell's State Trials 1029, 95 Eng. Rep. 807 (1765).

[5] Boyd v. United States, 116 U.S. 616, 630 (1886) *See* Agnello v. United States, 269 U.S. 33–34 (1925) ("It is well settled that, when properly invoked, the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment."); Marron v. United States, 275 U.S. 192, 194 (1927) ("It has long been settled that the Fifth Amendment protects every person against incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment.").

[6] *E.g.*, Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208–09 (1946).

[7] Andresen v. Maryland, 427 U.S. 463 (1976); Fisher v. United States, 425 U.S. 391, 405–14 (1976). *Fisher* states that "the precise claim sustained in *Boyd* would now be rejected for reasons not there considered." *Id.* at 408.

[8] 387 U.S. 294, 302–03 (1967). Seizure of a diary was at issue in *Hill v. California,* 401 U.S. 797, 805 (1971), but it had not been raised in the state courts and was deemed waived.

not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."

Following *Warden*, police executed a warrant to search the defendant's offices for specified documents pertaining to a fraudulent land sale in *Andresen v. Maryland*.[9] The *Andresen* Court sustained the lower court's admission of the papers discovered as evidence at the defendant's trial. The Court held that the Fifth Amendment did not apply because the defendant had not been forced to produce or authenticate the documents.[10] As for the Fourth Amendment, because the "business records" seized were evidence of criminal acts, the Court held that they could be seized under *Warden v. Hayden*; the fact that they were "testimonial" in nature (records in the defendant's handwriting) was irrelevant.[11] Acknowledging that "there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers," the Court observed that, although some "innocuous documents" would have to be examined to ascertain which papers were to be seized, authorities, just as with electronic "seizures" of telephone conversations, "must take care to assure that [searches] are conducted in a manner that minimizes unwarranted intrusions upon privacy."[12] As *Andresen* concerned business records, it is unclear whether its discussion equally applies to "personal" papers, such as diaries and letters, for which the privacy interest is greater.[13]

Amdt4.3.7 Unreasonable Seizures of Persons

Fourth Amendment:

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

That the Fourth Amendment was intended to protect against arbitrary arrests as well as against unreasonable searches was early assumed by Chief Justice John Marshall[1] and is now established law.[2] At common law, warrantless arrests of persons who had committed a breach of the peace or a felony were permitted,[3] and this history is reflected in the fact that the Fourth Amendment is satisfied if the arrest is made in a public place on probable cause, regardless of whether a warrant has been obtained.[4] To determine whether an officer has probable cause to

[9] 427 U.S. 463 (1976).

[10] 427 U.S. at 470–77.

[11] 427 U.S. at 478–84.

[12] 427 U.S. at 482, n.11. Minimization, as required under federal law, has not proved to be a significant limitation. Scott v. United States, 425 U.S. 917 (1976).

[13] *E.g.*, United States v. Miller, 425 U.S. 435, 440, 444 (1976); Fisher v. United States, 425 U.S. 391, 401 (1976); California Bankers Ass'n v. Shultz, 416 U.S. 21, 78–79 (1974) (Powell, J., concurring).

[1] *Ex parte* Burford, 7 U.S. (3 Cr.) 448 (1806).

[2] Giordenello v. United States, 357 U.S. 480, 485–86 (1958); United States v. Watson, 423 U.S. 411, 416–18 (1976); Payton v. New York, 445 U.S. 573, 583–86 (1980); Steagald v. United States, 451 U.S. 204, 211–13 (1981).

[3] 1 J. Stephen, A History of the Criminal Law of England 193 (1883). At common law warrantless arrest was also permissible for some misdemeanors not involving a breach of the peace. See the lengthy historical treatment in *Atwater v. City of Lago Vista,* 532 U.S. 318, 326–45 (2001).

[4] United States v. Watson, 423 U.S. 411 (1976). *See also* United States v. Santana, 427 U.S. 38 (1976) (sustaining warrantless arrest of suspect in her home when she was initially approached in her doorway and then retreated into house). However, a suspect arrested on probable cause but without a warrant is entitled to a prompt, nonadversary hearing before a magistrate under procedures designed to provide a fair and reliable determination of probable cause in order to keep the arrestee in custody. Gerstein v. Pugh, 420 U.S. 103 (1975). A "prompt" hearing now means a hearing that is administratively convenient. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (authorizing "as a

make a warrantless arrest, courts consider the "totality of the circumstances," examining "the events leading up to the arrest" and deciding "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to" probable cause.[5] Probable cause is not a "high bar,"[6] requiring only a "probability or substantial chance of criminal activity, not an actual showing of such activity."[7] However, in order to effectuate an arrest in the home, absent consent or exigent circumstances, police officers must have a warrant.[8]

The Fourth Amendment applies to "seizures," and it is not necessary that a detention be a formal arrest in order to bring to bear the requirements of warrants, or probable cause in instances in which warrants are not required.[9] Some objective justification must be shown to validate all seizures of the person,[10] including seizures that involve only a brief detention short of arrest, although the nature of the detention will determine whether probable cause or some reasonable and articulable suspicion is necessary.[11]

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general matter" detention for up to 48 hours without a probable-cause hearing, after which time the burden shifts to the government to demonstrate extraordinary circumstances justifying further detention).

[5] Maryland v. Pringle, 540 U.S. 366, 371 (2003) (internal citations and quotations omitted). The totality of circumstances approach requires courts to consider the "whole picture" and to not look at each fact as presented to the reasonable officer in isolation. *See* District of Columbia v. Wesby, 138 S. Ct. 577, 588 (2018). Moreover, the existence of an "innocent explanation" for a particular circumstance is insufficient to deny probable cause for an arrest when, in considering all of the circumstances, including any plausible innocent explanations, a reasonable officer can conclude that there is a "substantial chance of criminal activity." *Id.* at 588.

[6] Kaley v. United States, 571 U.S. 320, 338 (2014).

[7] Illinois v. Gates, 462 U.S. 213, 232 (1983).

[8] Payton v. New York, 445 U.S. 573 (1980) (voiding state law authorizing police to enter private residence without a warrant to make an arrest); Steagald v. United States, 451 U.S. 204 (1981) (officers with arrest warrant for A entered B's home without search warrant and discovered incriminating evidence; violated Fourth Amendment in absence of warrant to search the home); Hayes v. Florida, 470 U.S. 811 (1985) (officers went to suspect's home and took him to police station for fingerprinting).

[9] United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave"). *See also* Reid v. Georgia, 448 U.S. 438 (1980); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Terry v. Ohio, 392 U.S. 1, 16–19 (1968); Kaupp v. Texas, 538 U.S. 626 (2003). Apprehension by the use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985) (police officer's fatal shooting of a fleeing suspect); Brower v. County of Inyo, 489 U.S. 593 (1989) (police roadblock designed to end car chase with fatal crash); Scott v. Harris, 550 U.S. 372 (2007) (police officer's ramming fleeing motorist's car from behind in attempt to stop him); Plumhoff v. Rickard, 572 U.S. 765 (2014) (police use of fifteen gunshots to end a police chase). The "application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued." Torres v. Madrid, No. 19-292, slip op. at 17 (U.S. Mar. 25, 2021).

The Court has also made clear that the Fourth Amendment applies to pre-trial detention. *See* Manuel v. Joliet, 137 S. Ct. 911, 914 (2017) (holding that a petitioner who "was held in jail for seven weeks after a judge relied on allegedly fabricated evidence to find probable cause that he had committed a crime" could "challenge his pretrial detention on the ground that it violated the Fourth Amendment").

[10] The justification must be made to a neutral magistrate, not to the arrestee. There is no constitutional requirement that an officer inform an arrestee of the reason for his arrest. Devenpeck v. Alford, 543 U.S. 146, 155 (2004) (the offense for which there is probable cause to arrest need not be closely related to the offense stated by the officer at the time of arrest).

[11] Delaware v. Prouse, 440 U.S. 648, 650 (1979) ("unreasonable seizure . . . to stop an automobile . . . for the purpose of checking the driving license of the operator and the registration of the car, where there is neither probable cause to believe nor reasonable suspicion" that a law was violated); Brown v. Texas, 443 U.S. 47, 51 (1979) (detaining a person for the purpose of requiring him to identify himself constitutes a seizure requiring a "reasonable, articulable suspicion that a crime had just been, was being, or was about to be committed"); Reid v. Georgia, 448 U.S. 438, 441 (1980) (requesting ticket stubs and identification from persons disembarking from plane not reasonable where stated justifications would apply to "a very large category of innocent travelers," for example, travelers arrived from "a principal place of origin of cocaine"); Michigan v. Summers, 452 U.S. 692, 705 (1981) ("it is constitutionally reasonable to require that [a] citizen . . . remain while officers of the law execute a valid warrant to search his home"); Illinois v. McArthur, 531 U.S. 326 (2001) (approving "securing" of premises, preventing homeowner from reentering, while a search warrant is obtained); Los Angeles County v. Rettele, 550 U.S. 609 (2007) (where deputies executing a search warrant did not know that the house being searched had recently been sold, it was reasonable to hold new

The Fourth Amendment does not require an officer to consider whether to issue a citation rather than arresting (and placing in custody) a person who has committed a minor offense—even a minor traffic offense. In *Atwater v. City of Lago Vista*,[12] the Court, even while acknowledging that the case before it involved "gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment," refused to require that "case-by-case determinations of government need" to place traffic offenders in custody be subjected to a reasonableness inquiry, "lest every discretionary judgment in the field be converted into an occasion for constitutional review."[13] Citing some state statutes that limit warrantless arrests for minor offenses, the Court contended that the matter is better left to statutory rule than to application of broad constitutional principle.[14] Thus, *Atwater* and *County of Riverside v. McLaughlin*[15] together mean that—as far as the Constitution is concerned—police officers have almost unbridled discretion to decide whether to issue a summons for a minor traffic offense or whether instead to place the offending motorist in jail, where she may be kept for up to 48 hours with little recourse. Even when an arrest for a minor offense is prohibited by state law, the arrest will not violate the Fourth Amendment if it was based on probable cause.[16]

Until relatively recently, the legality of arrests was seldom litigated in the Supreme Court because of the rule that a person detained pursuant to an arbitrary seizure—unlike evidence obtained as a result of an unlawful search—remains subject to custody and presentation to court.[17] But the application of self-incrimination and other exclusionary rules to the states and the heightening of their scope in state and federal cases alike brought forth the rule that verbal evidence, confessions, and other admissions, like all derivative evidence obtained as a result of unlawful seizures, could be excluded.[18] Thus, a confession made by one illegally in custody must be suppressed, unless the causal connection between the illegal arrest and the confession had become so attenuated that the latter should not be deemed "tainted" by the former.[19] Similarly, fingerprints and other physical evidence obtained as a result of an unlawful arrest must be suppressed.[20]

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homeowners, who had been sleeping in the nude, at gunpoint for one to two minutes without allowing them to dress or cover themselves, even though the deputies knew that the homeowners were of a different race from the suspects named in the warrant).

[12] 532 U.S. 318 (2001).

[13] *Id.* at 346–47.

[14] *Id.* at 352.

[15] 500 U.S. 44 (1991).

[16] Virginia v. Moore, 128 S. Ct. 1598 (2008). *See also* Heien v. North Carolina, 574 U.S. 54, 60–61 (2014) (holding that a mistake of law can give rise to the reasonable suspicion necessary to uphold the seizure of a vehicle). The law enforcement officer in *Heien* had stopped the vehicle because it had only one working brake light, which the officer understood to be a violation of the North Carolina vehicle code. *Id.* at 57–58. However, a North Carolina court subsequently held, in a case of first impression, that the vehicle code only requires one working brake light. *Id.* at 58–59. In holding that reasonable suspicion can rest on a mistaken understanding of a legal prohibition, a majority of the Supreme Court noted prior cases finding that mistakes of fact do not preclude reasonable suspicion and concluded that "reasonable men make mistakes of law, too." *Id.* at 61 (citing Illinois v. Rodriguez, 497 U.S. 177, 183–86 (1990), and Hill v. California, 401 U.S. 797, 802–05 (1971), as cases involving mistakes of fact).

[17] Ker v. Illinois, 119 U.S. 436, 440 (1886); *see also* Albrecht v. United States, 273 U.S. 1 (1927); Frisbie v. Collins, 342 U.S. 519 (1952).

[18] Wong Sun v. United States, 371 U.S. 471 (1963). Such evidence is the "fruit of the poisonous tree," Nardone v. United States, 308 U.S. 338, 341 (1939), that is, evidence derived from the original illegality. Previously, if confessions were voluntary for purposes of the self-incrimination clause, they were admissible notwithstanding any prior official illegality. Colombe v. Connecticut, 367 U.S. 568 (1961).

[19] Although there is a presumption that the illegal arrest is the cause of the subsequent confession, the presumption is rebuttable by a showing that the confession is the result of "an intervening . . . act of free will." Wong Sun v. United States, 371 U.S. 471, 486 (1963). The factors used to determine whether the taint has been dissipated are the time between the illegal arrest and the confession, whether there were intervening circumstances (such as

The Court has also recognized that the Fourth Amendment prohibits "unreasonable seizure[s] pursuant to legal process," sometimes referred to as "malicious prosecution."[21] Malicious prosecution is actionable as a Fourth Amendment violation "to the extent that the defendant's actions cause the plaintiff to be 'seized' without probable cause."[22] In *Thompson v. Clark*, a plaintiff brought a claim for malicious prosecution in violation of the Fourth Amendment under 42 U.S.C. § 1983.[23] When determining the elements of a constitutional tort claim under § 1983, the Court must first look to the elements of "the most analogous tort as of 1871, when § 1983 was enacted."[24] In *Thompson*, the Court identified the tort of malicious prosecution as the most analogous to plaintiff's Fourth Amendment claim.[25] The Court held that a malicious prosecution may constitute a Fourth Amendment "seizure" for purposes of Section 1983 if the plaintiff proves the "favorable termination" of the underlying criminal case against him, a standard that does not require some affirmative indication of the plaintiff's innocence.[26]

Amdt4.4 Probable Cause

Amdt4.4.1 Overview of Probable Cause

Fourth Amendment:

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

Requirements for establishing probable cause through reliance on information received from an informant has divided the Court in several cases. Although involving a warrantless arrest, *Draper v. United States*[1] may be said to have begun the line of cases. A previously reliable, named informant reported to an officer that the defendant would arrive with narcotics on a particular train, and described the clothes he would be wearing and the bag he would be carrying; the informant, however, gave no basis for his information. FBI agents met the train,

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consultation with others, *Miranda* warnings, etc.), and the degree of flagrancy and purposefulness of the official conduct. Brown v. Illinois, 422 U.S. 590 (1975) (*Miranda* warnings alone insufficient); Dunaway v. New York, 442 U.S. 200 (1979); Taylor v. Alabama, 457 U.S. 687 (1982); Kaupp v. Texas, 538 U.S. 626 (2003). In *Johnson v. Louisiana,* 406 U.S. 356 (1972), the fact that the suspect had been taken before a magistrate who advised him of his rights and set bail, after which he confessed, established a sufficient intervening circumstance.

[20] Davis v. Mississippi, 394 U.S. 721 (1969); Taylor v. Alabama, 457 U.S. 687 (1982). In *United States v. Crews,* 445 U.S. 463 (1980), the Court, unanimously but for a variety of reasons, held proper the identification in court of a defendant, who had been wrongly arrested without probable cause, by the crime victim. The court identification was not tainted by either the arrest or the subsequent in-custody identification. *See also* Hayes v. Florida, 470 U.S. 811, 815 (1985), suggesting in dictum that a "narrowly circumscribed procedure for fingerprinting detentions on less than probable cause" may be permissible.

[21] Thompson v. Clark, No. 20-659, at slip op. at 4 (U.S. April 4, 2022) (noting that "[t]his Court's precedents recognize such claim," (citing Manuel v. Joliet, 580 U.S. 357, 363–64, 367–68 (2017); Albright v. Oliver, 510 U.S. 266, 271 (1994) (plurality opinion))).

[22] *Id.* at 5 (quoting Pitt v. District of Columbia, 491 F. 3d 494, 510–11 (D.C. Cir. 2007)).

[23] *Id.* at 3.

[24] *Id.* at 5.

[25] *Id.* at 6.

[26] *Id.* at 1.

[1] 358 U.S. 307 (1959). For another case applying essentially the same probable cause standard to warrantless arrests as govern arrests by warrant, see *McCray v. Illinois,* 386 U.S. 300 (1967) (informant's statement to arresting officers met *Aguilar* probable cause standard). *See also* Whitely v. Warden, 401 U.S. 560, 566 (1971) (standards must be "at least as stringent" for warrantless arrest as for obtaining warrant).

observed that the defendant fully fit the description, and arrested him. The Court held that the corroboration of part of the informer's tip established probable cause to support the arrest. A case involving a search warrant, *Jones v. United States*,[2] apparently considered the affidavit as a whole to see whether the tip plus the corroborating information provided a substantial basis for finding probable cause, but the affidavit also set forth the reliability of the informer and sufficient detail to indicate that the tip was based on the informant's personal observation. *Aguilar v. Texas*[3] held insufficient an affidavit that merely asserted that the police had "reliable information from a credible person" that narcotics were in a certain place, and held that when the affiant relies on an informant's tip he must present two types of evidence to the magistrate. First, the affidavit must indicate the informant's basis of knowledge—the circumstances from which the informant concluded that evidence was present or that crimes had been committed—and, second, the affiant must present information that would permit the magistrate to decide whether or not the informant was trustworthy. Then, in *Spinelli v. United States*,[4] the Court applied *Aguilar* in a situation in which the affidavit contained both an informant's tip and police information of a corroborating nature.

The Court rejected the "totality" test derived from *Jones* and held that the informant's tip and the corroborating evidence must be separately considered. The tip was rejected because the affidavit contained neither any information which showed the basis of the tip nor any information which showed the informant's credibility. The corroborating evidence was rejected as insufficient because it did not establish any element of criminality but merely related to details which were innocent in themselves. No additional corroborating weight was due as a result of the bald police assertion that the defendant was a known gambler, although the tip related to gambling. Returning to the totality test, however, the Court in *United States v. Harris*[5] approved a warrant issued largely on an informer's tip that over a 2-year period he had purchased illegal whiskey from the defendant at the defendant's residence, most recently within 2 weeks of the tip. The affidavit contained rather detailed information about the concealment of the whiskey, and asserted that the informer was a "prudent person," that the defendant had a reputation as a bootlegger, that other persons had supplied similar information about him, and that he had been found in control of illegal whiskey within the previous 4 years. The Court determined that the detailed nature of the tip, the personal observation thus revealed, and the fact that the informer had admitted to criminal behavior by his purchase of whiskey were sufficient to enable the magistrate to find him reliable, and that the supporting evidence, including defendant's reputation, could supplement this determination.

The Court expressly abandoned the two-part *Aguilar-Spinelli* test and returned to the "totality of the circumstances" approach to evaluate probable cause based on an informant's tip in *Illinois v. Gates*.[6] The main defect of the two-part test, Justice William Rehnquist concluded for the Court, was in treating an informant's reliability and his basis for knowledge as independent requirements. Instead, "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other

[2] 362 U.S. 257 (1960).

[3] 378 U.S. 108 (1964).

[4] 393 U.S. 410 (1969). Both concurring and dissenting Justices recognized tension between *Draper* and *Aguilar*. *See id.* at 423 (White, J., concurring), *id.* at 429 (Black, J., dissenting and advocating the overruling of *Aguilar*).

[5] 403 U.S. 573 (1971). *See also* Adams v. Williams, 407 U.S. 143, 147 (1972) (approving warrantless stop of motorist based on informant's tip that "may have been insufficient" under *Aguilar* and *Spinelli* as basis for warrant).

[6] 462 U.S. 213 (1983). Justice William Rehnquist's opinion of the Court was joined by Chief Justice Warren Burger and by Justices Harry Blackmun, Lewis Powell, and Sandra Day O'Connor. Justices William Brennan, Thurgood Marshall, and John Paul Stevens dissented.

indicia of reliability."[7] In evaluating probable cause, "[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."[8]

Amdt4.4.2 Probable Cause Doctrine

Fourth Amendment:

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

Much litigation has concerned the sufficiency of the complaint to establish probable cause. Mere conclusory assertions are not enough.[1] In *United States v. Ventresca*,[2] however, an affidavit by a law enforcement officer asserting his belief that an illegal distillery was being operated in a certain place, explaining that the belief was based upon his own observations and upon those of fellow investigators, and detailing a substantial amount of these personal observations clearly supporting the stated belief, was held to be sufficient to constitute probable cause. "Recital of some of the underlying circumstances in the affidavit is essential," the Court said, observing that "where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause," the reliance on the warrant process should not be deterred by insistence on too stringent a showing.[3]

Amdt4.4.3 Non-Traditional Contexts and Probable Cause

Fourth Amendment:

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

Where the warrant process is used to authorize seizure of books and other items that may be protected by the First Amendment, the Court has required government to observe more exacting standards than in other cases.[1] Seizure of materials arguably protected by the First Amendment is a form of prior restraint that requires strict observance of the Fourth Amendment. At a minimum, a warrant is required, and additional safeguards may be required for large-scale seizures. Thus, in *Marcus v. Search Warrant*,[2] the seizure of 11,000 copies of 280

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[7] 462 U.S. at 213.

[8] 462 U.S. at 238. For an application of the *Gates* "totality of the circumstances" test to the warrantless search of a vehicle by a police officer, *see, e.g*. Florida v. Harris, 568 U.S. 237 (2013).

[1] Byars v. United States, 273 U.S. 28 (1927) (affiant stated he "has good reason to believe and does believe" that defendant has contraband materials in his possession); Giordenello v. United States, 357 U.S. 480 (1958) (complainant merely stated his conclusion that the defendant had committed a crime). *See also* Nathanson v. United States, 290 U.S. 41 (1933).

[2] 380 U.S. 102 (1965).

[3] 380 U.S. at 109.

[1] Marcus v. Search Warrant, 367 U.S. 717, 730–31 (1961); Stanford v. Texas, 379 U.S. 476, 485 (1965).

[2] 367 U.S. 717 (1961). *See* Kingsley Books v. Brown, 354 U.S. 436 (1957).

publications pursuant to warrant issued ex parte by a magistrate who had not examined any of the publications but who had relied on the conclusory affidavit of a policeman was voided. Failure to scrutinize the materials and to particularize the items to be seized was deemed inadequate, and it was further noted that police "were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity."[3] A state procedure that was designed to comply with *Marcus* by the presentation of copies of books to be seized to the magistrate for his scrutiny prior to issuance of a warrant was nonetheless found inadequate by a plurality of the Court, which concluded that "since the warrant here authorized the sheriff to seize all copies of the specified titles, and since [appellant] was not afforded a hearing on the question of the obscenity even of the seven novels [seven of fifty-nine listed titles were reviewed by the magistrate] before the warrant issued, the procedure was . . . constitutionally deficient."[4]

Confusion remains, however, about the necessity for and the character of prior adversary hearings on the issue of obscenity. In a later decision the Court held that, with adequate safeguards, no pre-seizure adversary hearing on the issue of obscenity is required if the film is seized not for the purpose of destruction as contraband (the purpose in *Marcus* and *A Quantity of Books*), but instead to preserve a copy for evidence.[5] It is constitutionally permissible to seize a copy of a film pursuant to a warrant as long as there is a prompt post-seizure adversary hearing on the obscenity issue. Until there is a judicial determination of obscenity, the Court advised, the film may continue to be exhibited; if no other copy is available either a copy of it must be made from the seized film or the film itself must be returned.[6]

The seizure of a film without the authority of a constitutionally sufficient warrant is invalid; seizure cannot be justified as incidental to arrest, as the determination of obscenity may not be made by the officer himself.[7] Nor may a warrant issue based "solely on the conclusory assertions of the police officer without any inquiry by the [magistrate] into the factual basis for the officer's conclusions."[8] Instead, a warrant must be "supported by affidavits setting forth specific facts in order that the issuing magistrate may 'focus searchingly on the question of obscenity.'"[9] This does not mean, however, that a higher standard of probable cause is required in order to obtain a warrant to seize materials protected by the First Amendment. "Our reference in *Roaden* to a 'higher hurdle . . . of reasonableness' was not intended to establish a 'higher' standard of probable cause for the issuance of a warrant to seize books or films, but instead related to the more basic requirement, imposed by that decision, that the police not rely on the 'exigency' exception to the Fourth Amendment warrant requirement, but instead obtain a warrant from a magistrate . . . ."'[10]

In *Stanford v. Texas*,[11] the Court voided a seizure of more than 2,000 books, pamphlets, and other documents pursuant to a warrant that merely authorized the seizure of books,

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[3] Marcus v. Search Warrant, 367 U.S. 717, 732 (1961).

[4] A Quantity of Books v. Kansas, 378 U.S. 205, 210 (1964).

[5] Heller v. New York, 413 U.S. 483 (1973).

[6] *Id.* at 492–93. *But cf.* New York v. P.J. Video, Inc., 475 U.S. 868, 875 n.6 (1986), rejecting the defendant's assertion, based on *Heller*, that only a single copy rather than all copies of allegedly obscene movies should have been seized pursuant to warrant.

[7] Roaden v. Kentucky, 413 U.S. 496 (1973). *See also* Lo-Ji Sales v. New York, 442 U.S. 319 (1979); Walter v. United States, 447 U.S. 649 (1980). These special constraints are inapplicable when obscene materials are purchased, and there is consequently no Fourth Amendment search or seizure. Maryland v. Macon, 472 U.S. 463 (1985).

[8] Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 637 (1968) (per curiam).

[9] New York v. P.J. Video, Inc., 475 U.S. 868, 873–74 (1986) (quoting Marcus v. Search Warrant, 367 U.S. 717, 732 (1961)).

[10] New York v. P.J. Video, Inc., 475 U.S. 868, 875 n.6 (1986).

[11] 379 U.S. 476 (1965).

pamphlets, and other written instruments "concerning the Communist Party of Texas." "[T]he constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. . . . No less a standard could be faithful to First Amendment freedoms."[12]

However, the First Amendment does not bar the issuance or execution of a warrant to search a newsroom to obtain photographs of demonstrators who had injured several policemen, although the Court appeared to suggest that a magistrate asked to issue such a warrant should guard against interference with press freedoms through limits on type, scope, and intrusiveness of the search.[13]

Amdt4.5 Warrant Requirement

Amdt4.5.1 Overview of Warrant Requirement

Fourth Amendment:

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

Emphasis upon the necessity of warrants places the judgment of an independent magistrate between law enforcement officers and the privacy of citizens, authorizes invasion of that privacy only upon a showing that constitutes probable cause, and limits that invasion by specification of the person to be seized, the place to be searched, and the evidence to be sought.[1] Although a warrant is issued ex parte, its validity may be contested in a subsequent suppression hearing if incriminating evidence is found and a prosecution is brought.[2]

Amdt4.5.2 Neutral and Detached Magistrate

Fourth Amendment:

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but*

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[12] 379 U.S. at 485–86. *See also* Marcus v. Search Warrant, 367 U.S. 717, 723 (1961).

[13] Zurcher v. Stanford Daily, 436 U.S. 547 (1978). *See id.* at 566 (containing suggestion mentioned in text), and *id.* at 566 (Powell, J., concurring) (more expressly adopting that position). In the Privacy Protection Act, Pub. L. No. 96-440, 94 Stat. 1879 (1980), 42 U.S.C. § 2000aa, Congress provided extensive protection against searches and seizures not only of the news media and news people but also of others engaged in disseminating communications to the public, unless there is probable cause to believe the person protecting the materials has committed or is committing the crime to which the materials relate.

[1] Although the exceptions may be different for arrest warrants and search warrants, the requirements for the issuance of the two are the same. Aguilar v. Texas, 378 U.S. 108, 112 n.3 (1964). Also, the standards by which the validity of warrants are to be judged are the same, whether federal or state officers are involved. Ker v. California, 374 U.S. 23 (1963).

[2] Most often, in the suppression hearings, the defendant will challenge the sufficiency of the evidence presented to the magistrate to constitute probable cause. Spinelli v. United States, 393 U.S. 410 (1969); United States v. Harris, 403 U.S. 573 (1971). He may challenge the veracity of the statements used by the police to procure the warrant and otherwise contest the accuracy of the allegations going to establish probable cause, but the Court has carefully hedged his ability to do so. Franks v. Delaware, 438 U.S. 154 (1978). He may also question the power of the official issuing the warrant, Coolidge v. New Hampshire, 403 U.S. 443, 449–53 (1971), or the specificity of the particularity required. Marron v. United States, 275 U.S. 192 (1927).

upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In numerous cases, the Court has referred to the necessity that warrants be issued by a "judicial officer" or a "magistrate."[1] "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."[2] These cases do not mean that only a judge or an official who is a lawyer may issue warrants, but they do stand for two tests of the validity of the power of the issuing party to so act. "He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search."[3] The first test cannot be met when the issuing party is himself engaged in law enforcement activities,[4] but the Court has not required that an issuing party have that independence of tenure and guarantee of salary that characterizes federal judges.[5] And, in passing on the second test, the Court has been essentially pragmatic in assessing whether the issuing party possesses the capacity to determine probable cause.[6]

Amdt4.5.3 Probable Cause Requirement

Fourth Amendment:

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

The concept of "probable cause" is central to the meaning of the Warrant Clause. Neither the Fourth Amendment nor the federal statutory provisions relevant to the area define

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[1] United States v. Lefkowitz, 285 U.S. 452, 464 (1932); Giordenello v. United States, 357 U.S. 480, 486 (1958); Jones v. United States, 362 U.S. 257, 270 (1960); Katz v. United States, 389 U.S. 347, 356 (1967); United States v. United States District Court, 407 U.S. 297, 321 (1972); United States v. Chadwick, 433 U.S. 1, 9 (1977); Lo-Ji Sales v. New York, 442 U.S. 319 (1979).

[2] Johnson v. United States, 333 U.S. 10, 13–14 (1948).

[3] Shadwick v. City of Tampa, 407 U.S. 345, 354 (1972).

[4] Coolidge v. New Hampshire, 403 U.S. 443, 449–51 (1971) (warrant issued by state attorney general who was leading investigation and who as a justice of the peace was authorized to issue warrants); Mancusi v. DeForte, 392 U.S. 364, 370–72 (1968) (subpoena issued by district attorney could not qualify as a valid search warrant); Lo-Ji Sales v. New York, 442 U.S. 319 (1979) (justice of the peace issued open-ended search warrant for obscene materials, accompanied police during its execution, and made probable cause determinations at the scene as to particular items).

[5] Jones v. United States, 362 U.S. 257, 270–71 (1960) (approving issuance of warrants by United States Commissioners, many of whom were not lawyers and none of whom had any guarantees of tenure and salary); Shadwick v. City of Tampa, 407 U.S. 345 (1972) (approving issuance of arrest warrants for violation of city ordinances by city clerks who were assigned to and supervised by municipal court judges). The Court reserved the question "whether a State may lodge warrant authority in someone entirely outside the sphere of the judicial branch. Many persons may not qualify as the kind of 'public civil officers' we have come to associate with the term 'magistrate.' Had the Tampa clerk been entirely divorced from a judicial position, this case would have presented different considerations." *Id.* at 352.

[6] 407 U.S. at 350–54 (placing on defendant the burden of demonstrating that the issuing official lacks capacity to determine probable cause). *See also* Connally v. Georgia, 429 U.S. 245 (1977) (unsalaried justice of the peace who receives a sum of money for each warrant issued but nothing for reviewing and denying a warrant is not sufficiently detached).

"probable cause"; the definition is entirely a judicial construct. An applicant for a warrant must present to the magistrate facts sufficient to enable the officer himself to make a determination of probable cause. "In determining what is probable cause . . . [w]e are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit . . . for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant."[1] Probable cause is to be determined according to "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[2] Warrants are favored in the law and their use will not be thwarted by a hypertechnical reading of the supporting affidavit and supporting testimony.[3] For the same reason, reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant."[4] Courts will sustain the determination of probable cause so long as "there was substantial basis for [the magistrate] to conclude that" there was probable cause.[5]

Amdt4.5.4 Particularity Requirement

Fourth Amendment:

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

"The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."[1] This requirement thus acts to limit the scope of the search, as the executing officers should be limited to looking in places where the described object could be

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[1] Dumbra v. United States, 268 U.S. 435, 439, 441 (1925). "[T]he term 'probable cause'. . . means less than evidence which would justify condemnation." Lock v. United States, 11 U.S. (7 Cr.) 339, 348 (1813). *See* Steele v. United States, 267 U.S. 498, 504–05 (1925). It may rest upon evidence that is not legally competent in a criminal trial, Draper v. United States, 358 U.S. 307, 311 (1959), and it need not be sufficient to prove guilt in a criminal trial. Brinegar v. United States, 338 U.S. 160, 173 (1949). *See* United States v. Ventresca, 380 U.S. 102, 107–08 (1965). An "anticipatory" warrant does not violate the Fourth Amendment as long as there is probable cause to believe that the condition precedent to execution of the search warrant will occur and that, once it has occurred, "there is a fair probability that contraband or evidence of a crime will be found in a specified place." United States v. Grubbs, 547 U.S. 90, 95 (2006), quoting Illinois v. Gates, 462 U.S. 213, 238 (1983). "An anticipatory warrant is 'a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of a crime will be located at a specified place.'" 547 U.S. at 94.

[2] Brinegar v. United States, 338 U.S. 160, 175 (1949).

[3] United States v. Ventresca, 380 U.S. 102, 108–09 (1965).

[4] Jones v. United States, 362 U.S. 257, 270–71 (1960). Similarly, the preference for proceeding by warrant leads to a stricter rule for appellate review of trial court decisions on warrantless stops and searches than is employed to review probable cause to issue a warrant. Ornelas v. United States, 517 U.S. 690 (1996) (determinations of reasonable suspicion to stop and probable cause to search without a warrant should be subjected to de novo appellate review).

[5] Aguilar v. Texas, 378 U.S. 108, 111 (1964). It must be emphasized that the issuing party "must judge for himself the persuasiveness of the facts relied on by a [complainant] to show probable cause." Giordenello v. United States, 357 U.S. 480, 486 (1958). An insufficient affidavit cannot be rehabilitated by testimony after issuance concerning information possessed by the affiant but not disclosed to the magistrate. Whiteley v. Warden, 401 U.S. 560 (1971).

[1] Marron v. United States, 275 U.S. 192, 196 (1927). *See* Stanford v. Texas, 379 U.S. 476 (1965). Of course, police who are lawfully on the premises pursuant to a warrant may seize evidence of crime in "plain view" even if that evidence is not described in the warrant. Coolidge v. New Hampshire, 403 U.S. 443, 464–71 (1971).

expected to be found.[2] The purpose of the particularity requirement extends beyond prevention of general searches; it also assures the person whose property is being searched of the lawful authority of the executing officer and of the limits of his power to search. It follows, therefore, that the warrant itself must describe with particularity the items to be seized, or that such itemization must appear in documents incorporated by reference in the warrant and actually shown to the person whose property is to be searched.[3]

Amdt4.5.5 Knock and Announce Rule

Fourth Amendment:

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

The Fourth Amendment's "general touchstone of reasonableness . . . governs the method of execution of the warrant."[1] Until recently, however, most such issues have been dealt with by statute and rule.[2] It was a rule at common law that before an officer could break and enter he must give notice of his office, authority, and purpose and must in effect be refused admittance,[3] and until recently this has been a statutory requirement in the federal system[4] and generally in the states. In *Ker v. California*,[5] the Court considered the rule of announcement as a constitutional requirement, although a majority there found circumstances justifying entry without announcement.

In *Wilson v. Arkansas*,[6] the Court determined that the common law "knock and announce" rule is an element of the Fourth Amendment reasonableness inquiry. The rule is merely a presumption, however, that yields under various circumstances, including those posing a

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[2] In *Terry v. Ohio,* 392 U.S. 1, 17–19, (1968), the Court wrote: "This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. Kremen v. United States, 353 U.S. 346 (1957); Go-Bart Importing Co. v. United States, 282 U.S. 344, 356–58 (1931); *see* United States v. Di Re, 332 U.S. 581, 586–87 (1948). The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible. Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring); *see, e.g.*, Preston v. United States, 376 U.S. 364, 367–368 (1964); Agnello v. United States, 269 U.S. 20, 30–31 (1925)." *See also* Andresen v. Maryland, 427 U.S. 463, 470–82 (1976), and *id.* at 484, 492–93 (Brennan, J., dissenting). In *Stanley v. Georgia,* 394 U.S. 557, 569 (1969), Justices Potter Stewart, William Brennan, and Byron White would have based the decision on the principle that a valid warrant for gambling paraphernalia did not authorize police upon discovering motion picture films in the course of the search to project the films to learn their contents.

[3] Groh v. Ramirez, 540 U.S. 551 (2004) (a search based on a warrant that did not describe the items to be seized was "plainly invalid"; particularity contained in supporting documents not cross-referenced by the warrant and not accompanying the warrant is insufficient); United States v. Grubbs, 547 U.S. 90, 97, 99 (2006) (because the language of the Fourth Amendment "specifies only two matters that must be 'particularly describ[ed]' in the warrant: 'the place to be searched' and 'the persons or things to be seized[,]' . . . the Fourth Amendment does not require that the triggering condition for an anticipatory warrant be set forth in the warrant itself."

[1] United States v. Ramirez, 523 U.S. 65, 71 (1998).

[2] Rule 41(c), Federal Rules of Criminal Procedure, provides, inter alia, that the warrant shall command its execution in the daytime, unless the magistrate "for reasonable cause shown" directs in the warrant that it be served at some other time. *See* Jones v. United States, 357 U.S. 493, 498–500 (1958); Gooding v. United States, 416 U.S. 430 (1974). A separate statutory rule applies to narcotics cases. 21 U.S.C. § 879(a).

[3] Semayne's Case, 5 Coke's Rep. 91a, 77 Eng. Rep. 194 (K.B. 1604).

[4] 18 U.S.C. § 3109. *See* Miller v. United States, 357 U.S. 301 (1958); Wong Sun v. United States, 371 U.S. 471 (1963).

[5] 374 U.S. 23 (1963). *Ker* was an arrest warrant case, but no reason appears for differentiating search warrants. Eight Justices agreed that federal standards should govern and that the rule of announcement was of constitutional stature, but they divided 4-4 whether entry in this case had been pursuant to a valid exception. Justice John Harlan who had dissented from the federal standards issue joined the four finding a justifiable exception to carry the result.

[6] 514 U.S. 927 (1995).

threat of physical violence to officers, those in which a prisoner has escaped and taken refuge in his dwelling, and those in which officers have reason to believe that destruction of evidence is likely. The test, articulated two years later in *Richards v. Wisconsin*,[7] is whether police have "a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime." In *Richards*, the Court held that there is no blanket exception to the rule whenever officers are executing a search warrant in a felony drug investigation; instead, a case-by-case analysis is required to determine whether no-knock entry is justified under the circumstances.[8] Similarly, if officers choose to knock and announce before searching for drugs, circumstances may justify forced entry if there is not a prompt response.[9] Recent federal laws providing for the issuance of warrants authorizing in certain circumstances "no-knock" entries to execute warrants will no doubt present the Court with opportunities to explore the configurations of the rule of announcement.[10] A statute regulating the expiration of a warrant and issuance of another "should be liberally construed in favor of the individual."[11] Similarly, just as the existence of probable cause must be established by fresh facts, so the execution of the warrant should be done in timely fashion so as to ensure so far as possible the continued existence of probable cause.[12]

Amdt4.5.6 Other Considerations When Executing a Warrant

Fourth Amendment:

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

Because police actions in execution of a warrant must be related to the objectives of the authorized intrusion, and because privacy of the home lies at the core of the Fourth Amendment, police officers violate the Amendment by bringing members of the media or other third parties into a home during execution of a warrant if presence of those persons was not in aid of execution of the warrant.[1]

In executing a warrant for a search of premises and of named persons on the premises, police officers may not automatically search someone else found on the premises.[2] If they can articulate some reasonable basis for fearing for their safety they may conduct a "patdown" of

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[7] 520 U.S. 385, 394 (1997).

[8] The fact that officers may have to destroy property in order to conduct a no-knock entry has no bearing on the reasonableness of their decision not to knock and announce. United States v. Ramirez, 523 U.S. 65 (1998).

[9] United States v. Banks, 540 U.S. 31 (2003) (forced entry was permissible after officers executing a warrant to search for drugs knocked, announced "police search warrant," and waited fifteen to twenty-five seconds with no response).

[10] In narcotics cases, magistrates are authorized to issue "no-knock" warrants if they find there is probable cause to believe (1) the property sought may, and if notice is given, will be easily and quickly destroyed or (2) giving notice will endanger the life or safety of the executing officer or another person. 21 U.S.C. § 879(b). *See also* D.C. Code, § 23-591.

[11] Sgro v. United States, 287 U.S. 206 (1932).

[12] Sgro v. United States, 287 U.S. 206 (1932).

[1] Wilson v. Layne, 526 U.S. 603 (1999). *Accord*, Hanlon v. Berger, 526 U.S. 808 (1999) (media camera crew "ride-along" with Fish and Wildlife Service agents executing a warrant to search respondent's ranch for evidence of illegal taking of wildlife).

[2] Ybarra v. Illinois, 444 U.S. 85 (1979) (patron in a bar), relying on and reaffirming United States v. Di Re, 332 U.S. 581 (1948) (occupant of vehicle may not be searched merely because there are grounds to search the automobile). *But*

the person, but in order to search they must have probable cause particularized with respect to that person. However, in *Michigan v. Summers*,[3] the Court held that officers arriving to execute a warrant for the search of a house could detain, without being required to articulate any reasonable basis and necessarily therefore without probable cause, the owner or occupant of the house, whom they encountered on the front porch leaving the premises. The Court determined that such a detention, which was "substantially less intrusive" than an arrest, was justified because of the law enforcement interests in minimizing the risk of harm to officers, facilitating entry and conduct of the search, and preventing flight in the event incriminating evidence is found.[4] For the same reasons, officers may use "reasonable force," including handcuffs, to effectuate a detention.[5] Also, under some circumstances, officers may search premises on the mistaken but reasonable belief that the premises are described in an otherwise valid warrant.[6]

Limits on detention incident to a search were addressed in *Bailey v. United States,* a case in which an occupant exited his residence and traveled some distance before being stopped and detained.[7] The *Bailey* Court held that the detention was not constitutionally sustainable under the rule announced in *Summers*.[8] According to the Court, application of the categorical exception to probable cause requirements for detention incident to a search is determined by spatial proximity, that is, whether the occupant is found "within the immediate vicinity of the premises to be searched,"[9] and not by temporal proximity, that is, whether the occupant is detained "as soon as reasonably practicable" consistent with safety and security. In so holding, the Court reasoned that limiting the *Summers* rule to the area within which an occupant poses a real threat ensures that the scope of the rule regarding detention incident to a search is confined to its underlying justification.[10]

Although, for purposes of execution, as for many other matters, there is little difference between search warrants and arrest warrants, one notable difference is that the possession of

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see Maryland v. Pringle, 540 U.S. 366 (2003) (distinguishing *Ybarra* on basis that passengers in car often have "common enterprise," and noting that the tip in *Di Re* implicated only the driver).

[3] 452 U.S. 692 (1981).

[4] 452 U.S. at 701–06. *Ybarra* was distinguished on the basis of its greater intrusiveness and the lack of sufficient connection with the premises. *Id.* at 695 n.4. By the time Summers was searched, police had probable cause to do so. *Id.* at 695. The warrant here was for contraband, *id.* at 701, and a different rule may apply with respect to warrants for other evidence, *id.* at 705 n.20. In *Los Angeles County v. Rettele,* 550 U.S. 609 (2007), the Court found no Fourth Amendment violation where deputies did not know that the suspects had sold the house that the deputies had a warrant to search. The deputies entered the house and found the new owners, of a different race from the suspects, sleeping in the nude. The deputies held the new owners at gunpoint for one to two minutes without allowing them to dress or cover themselves. As for the difference in race, the Court noted that, "[w]hen the deputies ordered white respondents from their bed, they had no way of knowing whether the African-American suspects were elsewhere in the house." *Id.* at 613. As for not allowing the new owners to dress or cover themselves, the Court quoted its statement in *Michigan v. Summers* that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 1993 (quoting 452 U.S. at 702–03).

[5] Muehler v. Mena, 544 U.S. 93, 98–99 (2005) (also upholding questioning the handcuffed detainee about her immigration status).

[6] Maryland v. Garrison, 480 U.S. 79 (1987) (officers reasonably believed there was only one "third floor apartment" in city row house when in fact there were two).

[7] 568 U.S. 186 (2013). In *Bailey*, the police obtained a warrant to search Bailey's residence for firearms and drugs *Id.* at 190. Meanwhile, detectives staked out the residence, saw Bailey leave and drive away, and then called in a search team. *Id.* While the search was proceeding, the detectives tailed Bailey for about a mile before stopping and detaining him. *Id.* at 190–92.

[8] As an alternative ground, the district court had found that stopping Bailey was lawful as an investigatory stop under *Terry v. Ohio,* 392 U.S. 1, 20 (1968), but the Supreme Court offered no opinion on whether, assuming the stop was valid under *Terry*, the resulting interaction between law enforcement and Bailey could independently have justified Bailey's detention. *Bailey*, 568 U.S. at 202.

[9] *Bailey*, 568 U.S. at 202–04.

[10] *Id.* at 202.

a valid arrest warrant cannot authorize authorities to enter the home of a third party looking for the person named in the warrant; in order to do that, they need a search warrant signifying that a magistrate has determined that there is probable cause to believe the person named is on the premises.[11]

Amdt4.6 Exceptions to Warrant Requirement

Amdt4.6.1 Overview of Exceptions to Warrant Requirement

Fourth Amendment:

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

Although the Supreme Court stresses the importance of warrants and has repeatedly referred to searches without warrants as "exceptional,"[1] it appears that the greater number of searches, as well as the vast number of arrests, take place without warrants. The Reporters of the American Law Institute Project on a Model Code of Pre-Arraignment Procedure have noted "their conviction that, as a practical matter, searches without warrant and incidental to arrest have been up to this time, and may remain, of greater practical importance" than searches pursuant to warrants. "[T]he evidence on hand . . . compel[s] the conclusion that searches under warrants have played a comparatively minor part in law enforcement, except in connection with narcotics and gambling laws."[2] Nevertheless, the Court frequently asserts that "the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specially established and well-delineated exceptions.'"[3] The exceptions are said to be "jealously and carefully drawn,"[4] and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative."[5] Although the record indicates an effort to categorize the exceptions, the number and breadth of those exceptions have been growing.

Amdt4.6.2 Consent Searches

Fourth Amendment:

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but*

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[11] Steagald v. United States, 451 U.S. 204 (1981). An arrest warrant is a necessary and sufficient authority to enter a suspect's home to arrest him. Payton v. New York, 445 U.S. 573 (1980).

[1] *E.g.*, Johnson v. United States, 333 U.S. 10, 14 (1948); McDonald v. United States, 335 U.S. 451, 453 (1948); Camara v. Municipal Court, 387 U.S. 523, 528–29 (1967); G.M. Leasing Corp. v. United States, 429 U.S. 338, 352–53, 355 (1977).

[2] American Law Institute, A Model Code of Pre-Arraignment Procedure, Tent. Draft No. 3 (Philadelphia: 1970), xix.

[3] Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)); G.M. Leasing Corp. v. United States, 429 U.S. 338, 352–53, 358 (1977).

[4] Jones v. United States, 357 U.S. 493, 499 (1958).

[5] McDonald v. United States, 335 U.S. 451, 456 (1948). In general, with regard to exceptions to the warrant clause, conduct must be tested by the reasonableness standard enunciated by the first clause of the Amendment, Terry v. Ohio, 392 U.S. 1, 20 (1968). The Court's development of its privacy expectation tests substantially changed the content of that standard.

upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourth Amendment rights, like other constitutional rights, may be waived, and one may consent to a search of his person or premises by officers who have not complied with the Amendment.[1] The Court, however, has insisted that the burden is on the prosecution to prove the voluntariness of the consent[2] and awareness of the right of choice.[3] Reviewing courts must determine on the basis of the totality of the circumstances whether consent has been freely given or has been coerced. Actual knowledge of the right to refuse consent is not essential for a search to be found voluntary, and police therefore are not required to inform a person of his rights, as through a Fourth Amendment version of *Miranda* warnings.[4] But consent will not be regarded as voluntary when the officer asserts his official status and claim of right and the occupant yields because of these factors.[5] When consent is obtained through the deception of an undercover officer or an informer's gaining admission without advising a suspect who he is, the Court has held that the suspect has simply assumed the risk that an invitee would betray him, and evidence obtained through the deception is admissible.[6] Moreover, while the Court has appeared to endorse implied consent laws that view individuals who engage in certain regulated activities as having implicitly agreed to certain searches related to that activity and the enforcement of such laws through civil penalties,[7] the implied consent doctrine does not extend so far as to deem individuals to have impliedly consented to a search on "pain of committing a criminal offense."[8]

Additional issues arise in determining the validity of consent to search when consent is given not by the suspect, but by a third party. In the earlier cases, third-party consent was deemed sufficient if that party "possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected."[9] Now, however, actual common authority over the premises is not required; it is sufficient if the searching officer had a reasonable but mistaken belief that the third party had common authority and could consent

[1] Amos v. United States, 255 U.S. 313 (1921); Zap v. United States, 328 U.S. 624 (1946); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[2] Bumper v. North Carolina, 391 U.S. 543 (1968).

[3] Johnson v. United States, 333 U.S. 10, 13 (1948).

[4] Schneckloth v. Bustamonte, 412 U.S. 218, 231–33 (1973). *See also* Ohio v. Robinette, 519 U.S. 33 (1996) (officer need not always inform a detained motorist that he is free to go before consent to search auto may be deemed voluntary); United States v. Drayton, 536 U.S. 194, 207 (2002) (totality of circumstances indicated that bus passenger consented to search even though officer did not explicitly state that passenger was free to refuse permission).

[5] Amos v. United States, 255 U.S. 313 (1921); Johnson v. United States, 333 U.S. 10 (1948); Bumper v. North Carolina, 391 U.S. 543 (1968).

[6] On Lee v. United States, 343 U.S. 747 (1952); Lopez v. United States, 373 U.S. 427 (1963); Hoffa v. United States, 385 U.S. 293 (1966); Lewis v. United States, 385 U.S. 206 (1966); United States v. White, 401 U.S. 745 (1971). *Cf.* Osborn v. United States, 385 U.S. 323 (1966) (prior judicial approval obtained before wired informer sent into defendant's presence). Problems may be encountered by police, however, in special circumstances. *See* Massiah v. United States, 377 U.S. 201 (1964); United States v. Henry, 447 U.S. 264 (1980); United States v. Karo, 468 U.S. 705 (1984) (installation of beeper with consent of informer who sold container with beeper to suspect is permissible with prior judicial approval, but use of beeper to monitor private residence is not).

[7] *See, e.g.*, Missouri v. McNeely, 569 U.S. 141, 161 (2013) (plurality opinion) (discussing implied consent laws that "require motorists, as a condition of operating a motor vehicle, . . . to consent to [blood alcohol concentration] testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense" or risk losing their license); South Dakota v. Neville, 459 U.S. 553, 554, 563–64 (1983); *see also* Mitchell v Wisconsin, No. 18-6210 (U.S. June 27, 2019) (upholding Wisconsin's implied consent law that allows for taking a blood sample from an unconscious drunk driver).

[8] *See* Birchfield v. North Dakota, 136 S. Ct. 2160, 2185–86 (2016).

[9] United States v. Matlock, 415 U.S. 164, 171 (1974) (valid consent by woman with whom defendant was living and sharing the bedroom searched). *See also* Chapman v. United States, 365 U.S. 610 (1961) (landlord's consent insufficient); Stoner v. California, 376 U.S. 483 (1964) (hotel desk clerk lacked authority to consent to search of guest's room); Frazier v. Culp, 394 U.S. 731 (1969) (joint user of duffel bag had authority to consent to search).

to the search.[10] If, however, one occupant consents to a search of shared premises, but a physically present co-occupant expressly objects to the search, the search is unreasonable.[11] Common social expectations inform the analysis. A person at the threshold of a residence could not confidently conclude he was welcome to enter over the express objection of a present co-tenant. Expectations may change, however, if the objecting co-tenant leaves, or is removed from, the premises with no prospect of imminent return.[12]

Amdt4.6.3 Exigent Circumstances and Warrants

Fourth Amendment:

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

The Court has recognized "the exigencies of the situation" as an exception to the warrant requirement, which "make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment."[1] Exigent circumstances requires a court "to examine whether an emergency justified a warrantless search in each particular case."[2] The Court has identified several types of circumstances that give rise to an exigency sufficient to justify a warrantless search, including a search incident to arrest,[3] law enforcement's need to provide emergency aid,[4] "hot pursuit" of a fleeing suspect,[5] and the

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[10] Illinois v. Rodriguez, 497 U.S. 177 (1990). *See also* Florida v. Jimeno, 500 U.S. 248, 251 (1991) (it was "objectively reasonable" for officer to believe that suspect's consent to search his car for narcotics included consent to search containers found within the car).

[11] Georgia v. Randolph, 547 U.S. 103 (2006) (warrantless search of a defendant's residence based on his estranged wife's consent was unreasonable and invalid as applied to a physically present defendant who expressly refused to permit entry). The Court in *Randolph* admitted that it was "drawing a fine line," *id.* at 121, between situations where the defendant is present and expressly refuses consent, and that of *United States v. Matlock,* 415 U.S. 164, 171 (1974), and *Illinois v. Rodriguez,* 497 U.S. 177 (1990), where the defendants were nearby but were not asked for their permission. In a dissenting opinion, Chief Justice John Roberts observed that the majority's ruling "provides protection on a random and happenstance basis, protecting, for example, a co-occupant who happens to be at the front door when the other occupant consents to a search, but not one napping or watching television in the next room." 547 U.S. at 127.

[12] Fernandez v. California, 571 U.S. 292 (2014) (consent by co-occupant sufficient to overcome objection of a second co-occupant who was arrested and removed from the premises, so long as the arrest and removal were objectively reasonable).

[1] Mincey v. Arizona, 437 U.S. 385, 394 (1978); *see also* Kirk v. Louisiana, 536 U.S. 635, 638 (2002) (per curiam) (holding that "police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home"); Payton v. New York, 445 U.S. 573, 590 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.").

[2] Riley v. California, 573 U.S. 373, 402 (2014).

[3] See Amdt4.6.4.1 Search Incident to Arrest Doctrine.

[4] Michigan v. Fisher, 558 U.S. 45, 47–48 (2009) (per curiam); Brigham City v. Stuart, 547 U.S. 398, 403 (2006); *see also* McDonald v. United States, 335 U.S. 451, 455 (1948) ("Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police.").

[5] United States v. Santana, 427 U.S. 38, 42–43 (1976); *see also* Birchfield v. North Dakota, 579 U.S. 438, 456 (2016) ("The exigent circumstances exception allows a warrantless search when an emergency leaves police insufficient time to seek a warrant. It permits, for instance, the warrantless entry of private property when there is a need to provide urgent aid to those inside, when police are in hot pursuit of a fleeing suspect, and when police fear the imminent destruction of evidence."); Michigan v. Tyler, 436 U.S. 499, 509–10 (1979) (recognizing entering a burning building to put out a fire and investigate its cause constitutes exigent circumstances).

prevention of the imminent destruction of evidence.[6] In situations absent dangerous and life-threatening circumstances, the Court recognizes that warrantless searches are permissible in circumstances where "there is a compelling need for official action and no time to secure a warrant."[7]

The Court has refused to adopt a categorical rule as to what circumstances constitutes an exigency and, instead, applies a case-by-case analysis dependent on "all of the facts and circumstances of the particular case."[8] To determine whether exigent circumstances existed to justify a warrantless search, the Court "looks to the totality of circumstances."[9] In rendering emergency assistance, the officer must have "an objectively reasonable basis for believing" that an individual within the home was in need of immediate assistance.[10] When the police, in executing a warrantless search, have not created the exigency in question, the Court has held that such "warrantless entry to prevent the destruction of evidence is reasonable and thus allowed."[11] In contrast, the Court in *Johnson v. United States* rejected the government's claim that exigent circumstances justified a warrantless search of an individual's home.[12] In *Johnson*, the police gained entry into the suspect's home after a "demand[ ] under color of office."[13] The Court, in rejecting the government's claim that the search was conducted because of the "opium smell in the room," held that the government offered no reason "for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate."[14] The Court reasoned that "[t]hese are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which [the Court] suppose[d] in time would disappear."[15]

In terms of determining the reasonableness for the police to proceed without a warrant when they are in hot pursuit of a suspect, the Court has held that, in such circumstances, "the need to act quickly . . . is even greater . . . while the intrusion is much less."[16] For example, the Court has held that the "Fourth Amendment does not require police officers to delay in the

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[6] Cupp v. Murphy, 412 U.S. 291, 296 (1973); Ker v. California, 374 U.S. 23, 40–41 (1963); see *Brigham City*, 547 U.S. at 403; Georgia v. Randolph, 547 U.S. 103, 116, n. 6, (2006); Minnesota v. Olson, 495 U.S. 91, 100 (1990). See also Amdt4.6.4.1 Search Incident to Arrest Doctrine and Amdt4.6.4.2 Vehicle Searches.

[7] *Tyler*, 436 U.S. at 509.

[8] Missouri v. McNeely, 569 U.S. 141, 151–52 (2013); *Cf. id.* at 150, n. 3 (discussing "a limited class of traditional exceptions to the warrant requirement that apply categorically and thus do not require an assessment of whether the policy justifications underlying the exception"); *but see Brigham City*, 547 U.S. at 403 (listing prior holdings that found exigent circumstances)

[9] Missouri v. McNeely, 569 U.S. 141, 149 (2013); *see also City v. Stuart*, 547 U.S. 398, 406 (2006)

[10] Michigan v. Fisher, 558 U.S. 45, 47 (2009) (per curiam) (quoting Mincey v. Arizona, 437 U.S. 385 (1978)).

[11] Kentucky v. King, 563 U.S. 452, 462 (2011); *id.* at 470 ("Any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency."); *see also* Ker v. California, 374 U.S. 23, 42 (1963) (upholding a warrantless search of an apartment, finding that "[t]he officers had reason to act quickly because of Ker's furtive conduct and the likelihood that the marijuana would be distributed or hidden before a warrant could be obtained at that time of night").

[12] 333 U.S. 10 (1948).

[13] *Id.* at 13.

[14] *Id.* at 15.

[15] *Id.*

[16] United States v. Santana, 427 U.S. 38, 42 (1976); *See id.* at 43 ("[A] suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place."); Warden v. Hayden, 387 U.S. 294, 297–98 (1967)

course of an investigation if to do so would gravely endanger their lives or the lives of others."[17] In *Lange v. California*, the Court reiterated that the exigent circumstances exception is generally applied on a "case-by-case basis,"[18] and declined to hold that pursuing a misdemeanor suspect categorically qualifies as an exigent circumstance exception to the warrant requirement.[19]

Amdt4.6.4 Warrantless Searches Dependent on Probable Cause

Amdt4.6.4.1 Search Incident to Arrest Doctrine

Fourth Amendment:

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

The common-law rule permitting searches of the person of an arrestee as an incident to the arrest has occasioned little controversy in the Court.[1] The Court has even upheld a search incident to an illegal (albeit not unconstitutional) arrest.[2] The dispute has centered around the scope of the search. Because it was the stated general rule that the scope of a warrantless search must be strictly tied to and justified by the circumstances that rendered its justification permissible, and because it was the rule that the justification of a search of the arrestee was to prevent destruction of evidence and to prevent access to a weapon,[3] it was argued to the Court that a search of the person of the defendant arrested for a traffic offense, which discovered heroin in a crumpled cigarette package, was impermissible, because there could have been no destructible evidence relating to the offense for which he was arrested and no weapon could have been concealed in the cigarette package. The Court rejected this argument, ruling that "no additional justification" is required for a custodial arrest of a suspect based on probable cause.[4]

The Court has disavowed a case-by-case evaluation of searches made post-arrest[5] and instead has embraced categorical evaluations as to post-arrest searches. Thus, in *Riley v.*

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[17] *Warden*, 387 U.S. at 298–99.

[18] No. 20-18, slip op. at 4 (U.S. June 23, 2021).

[19] *Id.* at 16.

[1] Weeks v. United States, 232 U.S. 383, 392 (1914); Carroll v. United States, 267 U.S. 132, 158 (1925); Agnello v. United States, 269 U.S. 20, 30 (1925).

[2] Virginia v. Moore, 128 S. Ct. 1598 (2008) (holding that, where an arrest for a minor offense is prohibited by state law, the arrest will not violate the Fourth Amendment if it was based on probable cause).

[3] Terry v. Ohio, 392 U.S. 1, 19 (1968); Chimel v. California, 395 U.S. 752, 762, 763 (1969). The Court, in *Birchfield v. North Dakota*, explained that the precedent allowing for a warrantless search of an arrestee in order to prevent the destruction of evidence applies to both evidence that could be actively destroyed by a suspect and to evidence that can be destroyed due to a natural process, such as the natural dissipation of the alcohol content in a suspect's blood. 136 S. Ct. 2160, 2182–83 (2016).

[4] United States v. Robinson, 414 U.S. 218, 235 (1973). *See also id.* at 237–38 (Powell, J., concurring). The Court applied the same rule in *Gustafson v. Florida,* 414 U.S. 260 (1973), involving a search of a motorist's person following his custodial arrest for an offense for which a citation would normally have issued. Unlike the situation in *Robinson*, police regulations did not require the *Gustafson* officer to take the suspect into custody, nor did a departmental policy guide the officer as to when to conduct a full search. The Court found these differences inconsequential, and left for another day the problem of pretextual arrests in order to obtain basis to search. Soon thereafter, the Court upheld conduct of a similar search at the place of detention, even after a time lapse between the arrest and search. United States v. Edwards, 415 U.S. 800 (1974).

[5] In this vein, the search incident to arrest exception to the warrant requirement differs from other exceptions to the warrant requirement, such as the exigent circumstances exception. *See Birchfield*, 136 S. Ct. at 2174 (noting that

California,[6] the Court declined to extend the holding of *United States v. Robinson* to the search of the digital data contained in a cell phone found on an arrestee. Specifically, the Court distinguished a search of cell phones, which contain vast quantities of personal data, from the limited physical search at issue in *Robinson*.[7] Focusing primarily on the rationale that searching cell phones would prevent the destruction of evidence, the government argued that cell phone data could be destroyed remotely or become encrypted by the passage of time. The Court, however, both discounted the prevalence of these events and the efficacy of warrantless searches to defeat them. Rather, the Court noted that other means existed besides a search of a cell phone to secure the data contained therein, including turning the phone off or placing the phone in a bag that isolates it from radio waves.[8] Because of the more substantial privacy interests at stake when digital data is involved in a search incident to an arrest and because of the availability of less intrusive alternatives to a warrantless search, the Court in *Riley* concluded that, as a "simple" categorical rule, before police can search a cell phone incident to an arrest, the police must "get a warrant."[9]

Two years after *Riley*, the Court again crafted a new brightline rule with respect to searches following an arrest in another "situation[ ] that could not have been envisioned when the Fourth Amendment was adopted."[10] In *Birchfield v. North Dakota*, the Court examined whether compulsory breath and blood tests administered in order to determine the blood alcohol concentration (BAC) of an automobile driver, following the arrest of that driver for suspected "drunk driving," are unreasonable under the search incident to arrest exception to the Fourth Amendment's warrant requirement.[11] In examining laws criminalizing the refusal to submit to either a breath or blood test, similar to *Riley*, the Court relied on a general balancing approach used to assess whether a given category of searches is reasonable, weighing the individual privacy interests implicated by such tests against any legitimate state interests.[12] With respect to *breath* tests, the *Birchfield* Court viewed the privacy intrusions posed by such tests as "almost negligible" in that a breath test is functionally equivalent to the process of using a straw to drink a beverage and yields a limited amount of useful information for law enforcement agents.[13] In contrast, the Court concluded that a mandatory *blood* test raised more serious privacy interests,[14] as blood tests pierce the skin, extract a part of the subject's body, and provide far more information than a breathalyzer test.[15] Turning to the state's interest in obtaining BAC readings for persons arrested for drunk driving, the *Birchfield* Court acknowledged the government's "paramount interest" in preserving public safety on highways, including the state's need to deter drunk driving from occurring in the first place through the imposition of criminal penalties for failing to cooperate with drunk driving investigations.[16] Weighing these competing interests, the Court ultimately concluded that the

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while "other exceptions to the warrant requirement 'apply categorically'," the exigent circumstances exception to the warrant requirement applies on a case-by-case basis (quoting Missouri v. McNeely, 569 U.S. 141, 150 n.3 (2013))).

[6] 573 U.S. 373 (2014).

[7] "Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." *Id.* at 393.

[8] *Id.* at 390.

[9] *Id.* at 403.

[10] *See Birchfield*, 136 S. Ct. at 2176.

[11] *Id.* at 2176.

[12] *Id.*

[13] *Id.* at 2176–78. The Court disclaimed a criminal defendant's possessory interest in the air in his lungs, as air in one's lungs is not a part of one's body and is regularly exhaled from the lungs as a natural process. *Id.* at 2177.

[14] "Blood tests are a different matter." *Id.* at 2178.

[15] *Id.* at 2177–78.

[16] *Id.* at 2178–79.

Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving because the "impact of breath tests on privacy is slight," whereas the "need for BAC testing is great."[17] In so doing, the Court rejected the alternative of requiring the state to obtain a warrant prior to the administration of a BAC breath test, noting (1) the need for clear, categorical rules to provide police adequate guidance in the context of a search incident to an arrest and (2) the potential administrative burdens that would be incurred if warrants were required prior to every breathalyzer test.[18] Nonetheless, the Court reached a "different conclusion" with respect to *blood* tests, finding that such tests are "significantly more intrusive" and their "reasonability must be judged in light of the availability of the less intrusive alternative of a breath test."[19] As a consequence, the Court held that while a warrantless breath test following a drunk-driving arrest is categorically permissible as a reasonable search under the Fourth Amendment, a warrantless blood test cannot be justified by the search incident to arrest doctrine.[20]

However, the Justices have long found themselves in disagreement about the scope of the search incident to arrest as it extends beyond the person to the area in which the person is arrested—most commonly either his premises or his vehicle. Certain early cases went both ways on the basis of some fine distinctions,[21] but in *Harris v. United States*,[22] the Court approved a search of a four-room apartment pursuant to an arrest under warrant for one crime, where the search turned up evidence of another crime. A year later, in *Trupiano v. United States*,[23] a raid on a distillery resulted in the arrest of a man found on the premises and a seizure of the equipment; the Court reversed the conviction because the officers had had time to obtain a search warrant and had not done so. "A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest."[24] The Court in *Lange v. California* declined to classify categorically the hot pursuit of a fleeing misdemeanor suspect as an exigent circumstance justifying warrantless entry of a premise. Instead, the Court held that the need for a warrant will depend on the totality of the circumstances and a case-by-case analysis of the exigencies present "to determine whether there is a law enforcement emergency."[25]

The Court overruled *Trupiano* in *United States v. Rabinowitz*,[26] in which officers had arrested the defendant in his one-room office pursuant to an arrest warrant and proceeded to search the room completely. The Court observed that the issue was not whether the officers

[17] *Id.* at 2184.

[18] *Id.* at 2179–81. The *Birchfield* Court also rejected "more costly" and previously tried alternatives to penalties for refusing a breath test, such as sobriety checkpoints, ignition interlocks, and the use of treatment programs. *Id.* at 2182–83.

[19] *Id.* at 2184. In so doing, the Court rejected the argument that warrantless blood tests are needed as an alternative to warrantless breath tests to detect impairing substances other than alcohol or to obtain the BAC of an unconscious or uncooperative driver. *Id.* at 2184. In such situations, the Court reasoned that the state could obtain a warrant for the blood test, or in the case of an uncooperative driver, prosecute the defendant for refusing to undergo the breath test. *Id.* at 2184–85.

[20] *Id.* at 2186–87.

[21] *Compare* Marron v. United States, 275 U.S. 192 (1927), *with* Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931), *and* United States v. Lefkowitz, 285 U.S. 452 (1932).

[22] 331 U.S. 145 (1947).

[23] 334 U.S. 699 (1948).

[24] 334 U.S. at 708.

[25] No. 20-18, slip op. at 16 (U.S. June 23, 2021)

[26] 339 U.S. 56 (1950).

had the time and opportunity to obtain a search warrant but whether the search incident to arrest was reasonable. Though *Rabinowitz* referred to searches of the area within the arrestee's "immediate control,"[27] it provided no standard by which this area was to be determined, and extensive searches were permitted under the rule.[28]

In *Chimel v. California*,[29] however, a narrower view was asserted, the primacy of warrants was again emphasized, and a standard by which the scope of searches pursuant to arrest could be ascertained was set out. "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of someone who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

"There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant."[30]

Although the viability of *Chimel* had been in doubt for some time as the Court refined and applied its analysis of reasonable and justifiable expectations of privacy,[31] it has in some but not all contexts survived the changed rationale. Thus, in *Mincey v. Arizona*,[32] the Court rejected a state effort to create a "homicide-scene" exception for a warrantless search of an entire apartment extending over four days. The occupant had been arrested and removed and it was true, the Court observed, that a person legally taken into custody has a lessened right of privacy in his person, but he does not have a lessened right of privacy in his entire house. And, in *United States v. Chadwick*,[33] emphasizing a person's reasonable expectation of privacy in his luggage or other baggage, the Court held that, once police have arrested and immobilized a suspect, validly seized bags are not subject to search without a warrant.[34] Police may, however,

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[27] 339 U.S. at 64.

[28] *Cf.* Chimel v. California, 395 U.S. 752, 764–65 & n.10 (1969). But, in *Kremen v. United States,* 353 U.S. 346 (1957), the Court held that the seizure of the entire contents of a house and the removal to F.B.I. offices 200 miles away for examination, pursuant to an arrest under warrant of one of the persons found in the house, was unreasonable. In decisions contemporaneous to and subsequent to *Chimel*, applying pre-*Chimel* standards because that case was not retroactive, Williams v. United States, 401 U.S. 646 (1971), the Court has applied *Rabinowitz* somewhat restrictively. *See* Von Cleef v. New Jersey, 395 U.S. 814 (1969), which followed *Kremen*; Shipley v. California, 395 U.S. 818 (1969), and Vale v. Louisiana, 399 U.S. 30 (1970) (both involving arrests outside the house with subsequent searches of the house); Coolidge v. New Hampshire, 403 U.S. 443, 455–57 (1971). Substantially extensive searches were, however, approved in *Williams v. United States,* 401 U.S. 646 (1971), and *Hill v. California,* 401 U.S. 797 (1971).

[29] 395 U.S. 752 (1969).

[30] 395 U.S. at 762–63.

[31] *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 492, 493, 510 (1971), in which the four dissenters advocated the reasonableness argument rejected in *Chimel*.

[32] 437 U.S. 385, 390–91 (1978). *Accord*, Flippo v. West Virginia, 528 U.S. 11 (1999) (per curiam).

[33] 433 U.S. 1 (1977). Defendant and his luggage, a footlocker, had been removed to the police station, where the search took place.

[34] If, on the other hand, a sealed shipping container had already been opened and resealed during a valid customs inspection, and officers had maintained surveillance through a "controlled delivery" to the suspect, there is no

in the course of jailing an arrested suspect, conduct an inventory search of the individual's personal effects, including the contents of a shoulder bag, since "the scope of a station-house search may in some circumstances be even greater than those supporting a search immediately following arrest."[35]

Chimel has, however, been qualified by another consideration. Not only may officers search areas within the arrestee's immediate control in order to alleviate any threat posed by the arrestee, but they may extend that search if there may be a threat posed by "unseen third parties in the house." A "protective sweep" of the entire premises (including an arrestee's home) may be undertaken on less than probable cause if officers have a "reasonable belief," based on "articulable facts," that the area to be swept may harbor an individual posing a danger to those on the arrest scene.[36]

Stating that it was "in no way alter[ing] the fundamental principles established in the *Chimel* case," the Court in *New York v. Belton*[37] held that police officers who had made a valid arrest of the occupant of a vehicle could make a contemporaneous search of the entire passenger compartment of the automobile, including containers found therein. Believing that a fairly simple rule understandable to authorities in the field was desirable, the Court ruled "that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'"[38]

Belton was "widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search."[39] In *Arizona v. Gant*,[40] however, the Court disavowed this understanding of *Belton*[41] and held that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that the vehicle contains evidence of the offense of arrest."[42]

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reasonable expectation of privacy in the contents of the container, and officers may search it upon the arrest of the suspect, without having obtained a warrant. Illinois v. Andreas, 463 U.S. 765 (1983).

[35] Illinois v. LaFayette, 462 U.S. 640, 645 (1983) (inventory search) (following South Dakota v. Opperman, 428 U.S. 364 (1976)). Similarly, an inventory search of an impounded vehicle may include the contents of a closed container. Colorado v. Bertine, 479 U.S. 367 (1987). Inventory searches of closed containers must, however, be guided by a police policy containing standardized criteria for exercise of discretion. Florida v. Wells, 495 U.S. 1 (1990).

[36] Maryland v. Buie, 494 U.S. 325, 334 (1990). This "sweep" is not to be a full-blown, "top-to-bottom" search, but only "a cursory inspection of those spaces where a person may be found." *Id.* at 335–36.

[37] 453 U.S. 454, 460 n.3 (1981).

[38] 453 U.S. at 460 (quoting Chimel v. California, 395 U.S. 752, 763 (1969)). In this particular instance, Belton had been removed from the automobile and handcuffed, but the Court wished to create a general rule removed from the fact-specific nature of any one case. "'Container' here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk." 453 U.S. at 460–61 n.4.

[39] Arizona v. Gant, 556 U.S. 332, 341 (2009).

[40] 556 U.S. 332 (2009).

[41] "To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would . . . untether the rule from the justifications underlying the *Chimel* exception . . . ." 556 U.S. at 343.

[42] 556 U.S. 332, 351 (2009). Justice Samuel Alito, in a dissenting opinion joined by Chief Justice John Roberts and Justice Anthony Kennedy and in part by Justice Stephen Breyer, wrote that "there can be no doubt that" the majority had overruled *Belton*. 556 U.S. at 356.

Amdt4.6.4.2 Vehicle Searches

Fourth Amendment:

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

In the early days of the automobile, the Court created an exception for searches of vehicles, holding in *Carroll v. United States*[1] that vehicles may be searched without warrants if the officer undertaking the search has probable cause to believe that the vehicle contains contraband. The Court explained that the mobility of vehicles would allow them to be quickly moved from the jurisdiction if time were taken to obtain a warrant.[2]

Initially, the Court limited *Carroll*'s reach, holding impermissible the warrantless seizure of a parked automobile merely because it is movable, and indicating that vehicles may be stopped only while moving or reasonably contemporaneously with movement.[3] The Court also ruled that the search must be reasonably contemporaneous with the stop, so that it was not permissible to remove the vehicle to the station house for a warrantless search at the convenience of the police.[4]

The Court next developed a reduced privacy rationale to supplement the mobility rationale, explaining that "the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property."[5] "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thoroughfares where both its occupants and its contents are in plain view.'"[6] Although motor homes serve as residences and as repositories for personal effects, and their contents are often shielded from public view, the Court extended the automobile exception to them as well, holding that there is a diminished expectation of privacy in a mobile home parked in a parking lot and licensed for vehicular travel, hence "readily mobile."[7]

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[1] 267 U.S. 132 (1925). *Carroll* was a Prohibition-era liquor case, whereas a great number of modern automobile cases involve drugs.

[2] 267 U.S. at 153. *See also* Husty v. United States, 282 U.S. 694 (1931); Scher v. United States, 305 U.S. 251 (1938); Brinegar v. United States, 338 U.S. 160 (1949). All of these cases involved contraband, but in *Chambers v. Maroney,* 399 U.S. 42 (1970), the Court, without discussion, and over Justice John Harlan's dissent, *id.* at 55, 62, extended the rule to evidentiary searches.

[3] Coolidge v. New Hampshire, 403 U.S. 443, 458–64 (1971). This portion of the opinion had the adherence of a plurality only, Justice John Harlan concurring on other grounds, and there being four dissenters. *Id.* at 493, 504, 510, 523.

[4] Preston v. United States, 376 U.S. 364 (1964); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968).

[5] Arkansas v. Sanders, 442 U.S. 753, 761 (1979).

[6] Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion), *quoted in* United States v. Chadwick, 433 U.S. 1, 12 (1977). *See also* United States v. Ortiz, 422 U.S. 891, 896 (1975); United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976); South Dakota v. Opperman, 428 U.S. 364, 367–68 (1976); Robbins v. California, 453 U.S. 420, 424–25 (1981); United States v. Ross, 456 U.S. 798, 807 n.9 (1982).

[7] California v. Carney, 471 U.S. 386, 393 (1985) (leaving open the question of whether the automobile exception also applies to a "mobile" home being used as a residence and not "readily mobile").

The Court has stated, however, that the automobile exception "does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein."[8] This limit to the exception exists because "the scope of the automobile exception extends no further than the automobile itself."[9] To search a vehicle under the automobile exception, an officer "must have a lawful right of access" to that vehicle,[10] and generally, law enforcement officers have no right to enter a home or its curtilage without express or implied permission or without a warrant.[11]

The reduced expectancy concept has broadened police powers to conduct automobile searches without warrants, but they still must have probable cause to search a vehicle,[12] and they may not make random stops of vehicles on the roads but instead must base stops of individual vehicles on probable cause or some "articulable and reasonable suspicion"[13] of traffic or safety violation or some other criminal activity.[14] If police stop a vehicle, then the vehicle's passengers as well as its driver are deemed to have been seized from the moment the car comes to a halt, and the passengers as well as the driver may challenge the constitutionality of the stop.[15] A driver with lawful possession and control of a rental car may also be able to challenge the constitutionality of a stop, even if that driver is not listed as an authorized driver on the rental agreement.[16] Likewise, a police officer may frisk (pat down for weapons) both the driver and any passengers whom he reasonably concludes "might be armed and presently dangerous."[17]

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[8] Collins v. Virginia, 138 S. Ct. 1663, 1675 (2018); *see also* Caniglia v. Strom, No. 20-157, slip op. at 3–4 (U.S. May 17, 2021) (rejecting an expanded "community caretaking" rule and holding that there is an "unmistakable distinction between vehicles and homes," and declining to "expand the scope of exceptions to the warrant requirement to permit warrantless entry into the home").

[9] *Id.* at 1671.

[10] *Id.* at 1672.

[11] *See, e.g.*, Florida v. Jardines, 569 U.S. 1, 7–8 (2013).

[12] Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (roving patrols); United States v. Ortiz, 422 U.S. 891 (1975). *Cf.* Colorado v. Bannister, 449 U.S. 1 (1980). An automobile's "ready mobility [is] an exigency sufficient to excuse failure to obtain a search warrant once probable cause is clear"; there is no need to find the presence of "unforeseen circumstances" or other additional exigency. Pennsylvania v. Labron, 527 U.S. 465 (1996). *Accord*, Maryland v. Dyson, 527 U.S. 465 (1999) (per curiam). *Cf.* Florida v. Harris, 568 U.S. 237 (2013).

[13] Delaware v. Prouse, 440 U.S. 648, 663 (1979) (discretionary random stops of motorists to check driver's license and automobile registration constitute Fourth Amendment violation); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (affirming an appellate court's judgment that stopping a vehicle on a highway near an international border merely because the occupants appeared to be of Mexican ancestry was an unconstitutional search for unlawfully present aliens). *But cf.* United States v. Arvizu, 534 U.S. 266 (2002) (reasonable suspicion justified stop by border agents of vehicle traveling on unpaved backroads in an apparent effort to evade a border patrol checkpoint on the highway). In *Prouse*, the Court cautioned that it was not precluding the states from developing methods for spot checks, such as questioning all traffic at roadblocks, that involve less intrusion or that do not involve unconstrained exercise of discretion. 440 U.S. at 663.

[14] For example, an officer who learns, through a license plate search of a vehicle, that the registered owner has a revoked license may have a reasonable suspicion to stop that vehicle if it matches the description of the registered car and if, at the time of the stop, the officer has no countervailing reason to think the driver is not the registered owner. Kansas v. Glover, 140 S. Ct. 1183, 1184, 1191 (2020). An officer who observes a traffic violation may stop a vehicle even if his real motivation is to investigate for evidence of other crime. Whren v. United States, 517 U.S. 806 (1996). The existence of probable cause to believe that a traffic violation has occurred establishes the constitutional reasonableness of traffic stops regardless of the actual motivation of the officers involved, and regardless of whether it is customary police practice to stop motorists for the violation observed. Similarly, pretextual arrest of a motorist who has committed a traffic offense is permissible. Arkansas v. Sullivan, 532 U.S. 769 (2001) (per curiam) (upholding search of the motorist's car for a crime not related to the traffic offense).

[15] Brendlin v. California, 551 U.S. 249, 263 (2007).

[16] Byrd v. United States, 138 S. Ct. 1518, 1523–24 (2018). *But see id.* at 1529 (noting that a "car thief would not have a reasonable expectation of privacy in a stolen car").

[17] Arizona v. Johnson, 129 S. Ct. 781, 786 (2009).

By contrast, fixed-checkpoint stops in the absence of any individualized suspicion have been upheld for purposes of promoting highway safety[18] or policing the international border,[19] but not for more generalized law enforcement purposes.[20] Once police have validly stopped a vehicle, they may also, based on articulable facts warranting a reasonable belief that weapons may be present, conduct a *Terry*-type protective search of those portions of the passenger compartment in which a weapon could be placed or hidden.[21] And, in the absence of such reasonable suspicion as to weapons, police may seize contraband and suspicious items "in plain view" inside the passenger compartment.[22]

Although officers who have stopped a car to issue a routine traffic citation may conduct a *Terry*-type search, even including a pat-down of driver and passengers if there is reasonable suspicion that they are armed and dangerous, they may not conduct a full-blown search of the car[23] unless they exercise their discretion to arrest the driver instead of issuing a citation.[24] And once police have probable cause to believe there is contraband in a vehicle, they may remove the vehicle from the scene to the station house in order to conduct a search, without thereby being required to obtain a warrant.[25] "[T]he justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven

[18] Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (upholding a sobriety checkpoint at which all motorists are briefly stopped for preliminary questioning and observation for signs of intoxication).

[19] United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (rejecting a Fourth Amendment challenge to a Border Patrol stop of vehicles at a permanent checkpoint designed to apprehend unlawfully present aliens). *See also* United States v. Flores-Montano, 541 U.S. 149 (2004) (upholding a search at the border involving disassembly of a vehicle's fuel tank).

[20] City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (vehicle checkpoint set up for the "primary purpose [of] detect[ing] evidence of ordinary criminal wrongdoing" (here interdicting illegal narcotics) does not fall within the highway safety or border patrol exception to the individualized suspicion requirement, and hence violates the Fourth Amendment). *Edmond* was distinguished in *Illinois v. Lidster,* 540 U.S. 419 (2004), upholding use of a checkpoint to ask motorists for help in solving a recent hit-and-run accident that had resulted in death. The public interest in solving the crime was deemed "grave," while the interference with personal liberty was deemed minimal.

[21] Michigan v. Long, 463 U.S. 1032, 1049 (1983) (holding that contraband found in the course of such a search is admissible).

[22] Texas v. Brown, 460 U.S. 730 (1983). Similarly, because there is no reasonable privacy interest in the vehicle identification number, required by law to be placed on the dashboard so as to be visible through the windshield, police may reach into the passenger compartment to remove items obscuring the number and may seize items in plain view while doing so. New York v. Class, 475 U.S. 106 (1986). Because there also is no legitimate privacy interest in possessing contraband, and because properly conducted canine sniffs are "generally likely[ ] to reveal only the presence of contraband," police may conduct a canine sniff around the perimeter of a vehicle stopped for a traffic offense so long as the stop is not prolonged beyond the time needed to process the traffic violation. *Compare* Illinois v. Caballes, 543 U.S. 405 (2005) (a canine sniff around the perimeter of a car following a routine traffic stop does not offend the Fourth Amendment if the duration of the stop is justified by the traffic offense) *with* Rodriguez v. United States, 135 S. Ct. 1609, 1613, 1614–15 (2015) (finding that the stop in question had been prolonged for seven to eight minutes beyond the time needed to resolve the traffic offense in order to conduct a canine sniff).

[23] Knowles v. Iowa, 525 U.S. 113 (1998) (invalidating an Iowa statute permitting a full-blown search incident to a traffic citation).

[24] *See* Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (police officers, in their discretion, may arrest a motorist for a minor traffic offense rather than issuing a citation); New York v. Belton, 453 U.S. 454 (1981) (officers who arrest an occupant of a vehicle may make a contemporaneous search of the entire passenger compartment, including closed containers); Thornton v. United States, 541 U.S. 615 (2004) (the *Belton* rule applies regardless of whether the arrestee exited the car at the officer's direction, or whether he did so prior to confrontation); Arizona v. Gant, 556 U.S. 332, 351 (2009)(the *Belton* rule applies "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that the vehicle contains evidence of the offense of arrest"); Arkansas v. Sullivan, 532 U.S. 769 (2001) (pretextual arrest of motorist who has committed a traffic offense is permissible even if purpose is to search vehicle for evidence of other crime).

[25] Michigan v. Thomas, 458 U.S. 259 (1982). The same rule applies if it is the vehicle itself that is forfeitable contraband; police, acting without a warrant, may seize the vehicle from a public place. Florida v. White, 526 U.S. 559 (1999).

away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant."[26] Because of the lessened expectation of privacy, inventory searches of impounded automobiles are justifiable in order to protect public safety and the owner's property, and any evidence of criminal activity discovered in the course of the inventories is admissible in court.[27] The Justices were evenly divided, however, on the propriety of warrantless seizure of an arrestee's automobile from a public parking lot several hours after his arrest, its transportation to a police impoundment lot, and the taking of tire casts and exterior paint scrapings.[28]

Police in undertaking a warrantless search of an automobile may not extend the search to the persons of the passengers therein[29] unless there is a reasonable suspicion that the passengers are armed and dangerous, in which case a *Terry* pat down is permissible,[30] or unless there is individualized suspicion of criminal activity by the passengers.[31] But because passengers in an automobile have no reasonable expectation of privacy in the interior area of the car, a warrantless search of the glove compartment and the spaces under the seats, which turned up evidence implicating the passengers, invaded no Fourth Amendment interest of the passengers.[32] Luggage and other closed containers found in automobiles may also be subjected to warrantless searches based on probable cause, regardless of whether the luggage or containers belong to the driver or to a passenger, and regardless of whether it is the driver or a passenger who is under suspicion.[33] The same rule now applies whether the police have probable cause to search only the containers[34] or whether they have probable cause to search the automobile for something capable of being held in the container.[35]

Amdt4.6.4.3 Containers in Vehicles

Fourth Amendment:

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

Not only is the warrant requirement inapplicable to brief stops of vessels, but also none of the safeguards applicable to stops of automobiles on less than probable cause are necessary

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[26] *Michigan v. Thomas*, 458 U.S. at 261. *See also* Chambers v. Maroney, 399 U.S. 42 (1970); Texas v. White, 423 U.S. 67 (1975); United States v. Ross, 456 U.S. 798, 807 n.9 (1982).

[27] Cady v. Dombrowski, 413 U.S. 433 (1973); South Dakota v. Opperman, 428 U.S. 364 (1976). *See also* Cooper v. California, 386 U.S. 58 (1967); United States v. Harris, 390 U.S. 234 (1968). Police, in conducting an inventory search of a vehicle, may open closed containers in order to inventory contents. Colorado v. Bertine, 479 U.S. 367 (1987).

[28] Cardwell v. Lewis, 417 U.S. 583 (1974). Justice Lewis Powell concurred on other grounds.

[29] United States v. Di Re, 332 U.S. 581 (1948);Ybarra v. Illinois, 444 U.S. 85, 94–96 (1979).

[30] Knowles v. Iowa, 525 U.S. 113, 118 (1998).

[31] Maryland v. Pringle, 540 U.S. 366 (2003) (probable cause to arrest passengers based on officers finding $783 in glove compartment and cocaine hidden beneath back seat armrest, and on driver and passengers all denying ownership of the cocaine).

[32] Rakas v. Illinois, 439 U.S. 128 (1978).

[33] Wyoming v. Houghton, 526 U.S. 295, 307 (1999) ("police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search").

[34] California v. Acevedo, 500 U.S. 565 (1991) (overruling Arkansas v. Sanders, 442 U.S. 753 (1979).

[35] United States v. Ross, 456 U.S. 798 (1982). A *Ross* search of a container found in an automobile need not occur soon after its seizure. United States v. Johns, 469 U.S. 478 (1985) (three-day time lapse). *See also* Florida v. Jimeno, 500 U.S. 248 (1991) (consent to search automobile for drugs constitutes consent to open containers within the car that might contain drugs).

predicates to stops of vessels. In *United States v. Villamonte-Marquez*,[1] the Court upheld a random stop and boarding of a vessel by customs agents, lacking any suspicion of wrongdoing, for purpose of inspecting documentation. The boarding was authorized by statute derived from an act of the First Congress[2] and hence had "an impressive historical pedigree" carrying with it a presumption of constitutionality. Moreover, "important factual differences between vessels located in waters offering ready access to the open sea and automobiles on principal thoroughfares in the border area" justify application of a less restrictive rule for vessel searches. The reason why random stops of vehicles have been held impermissible under the Fourth Amendment, the Court explained, is that stops at fixed checkpoints or roadblocks are both feasible and less subject to abuse of discretion by authorities. "But no reasonable claim can be made that permanent checkpoints would be practical on waters such as these where vessels can move in any direction at any time and need not follow established 'avenues' as automobiles must do."[3] Because there is a "substantial" governmental interest in enforcing documentation laws, "especially in waters where the need to deter or apprehend smugglers is great," the Court found the "limited" but not "minimal" intrusion occasioned by boarding for documentation inspection to be reasonable.[4] Dissenting Justice William Brennan argued that the Court for the first time was approving "a completely random seizure and detention of persons and an entry onto private, noncommercial premises by police officers, without any limitations whatever on the officers' discretion or any safeguards against abuse."[5]

Amdt4.6.4.4 Plain View Doctrine

Fourth Amendment:

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

Somewhat similar in rationale is the rule that objects falling in the "plain view" of an officer who has a right to be in the position to have that view are subject to seizure without a warrant[1] or that, if the officer needs a warrant or probable cause to search and seize, his lawful

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[1] 462 U.S. 579 (1983).

[2] 19 U.S.C. § 1581(a), derived from § 31 of the Act of Aug. 4, 1790, ch. 35, 1 Stat. 164.

[3] 462 U.S. at 589. Justice William Brennan's dissent argued that a fixed checkpoint was feasible in this case, involving a ship channel in an inland waterway. *Id.* at 608 n.10. The fact that the Court's rationale was geared to the difficulties of law enforcement in the open seas suggests a reluctance to make exceptions to the general rule. Note as well the Court's later reference to this case as among those "reflect[ing] longstanding concern for the protection of the integrity of the border." United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985).

[4] 462 U.S. at 593.

[5] 462 U.S. at 598. Justice William Brennan contended that all previous cases had required some "discretion-limiting" feature such as a requirement of probable cause, reasonable suspicion, fixed checkpoints instead of roving patrols, and limitation of border searches to border areas, and that these principles set forth in *Delaware v. Prouse,* 440 U.S. 648 (1979), should govern. *Id.* at 599, 601.

[1] Washington v. Chrisman, 455 U.S. 1 (1982) (officer lawfully in dorm room may seize marijuana seeds and pipe in open view); United States v. Santana, 427 U.S. 38 (1976) ("plain view" justification for officers to enter home to arrest after observing defendant standing in open doorway); Harris v. United States, 390 U.S. 234 (1968) (officer who opened door of impounded automobile and saw evidence in plain view properly seized it); Ker v. California, 374 U.S. 23 (1963) (officers entered premises without warrant to make arrest because of exigent circumstances seized evidence in plain sight). *Cf.* Coolidge v. New Hampshire, 403 U.S. 443, 464–73 (1971), and *id.* at 510 (White, J., dissenting). Maryland v. Buie, 494 U.S. 325 (1990) (items seized in plain view during protective sweep of home incident to arrest); Texas v. Brown, 460 U.S. 730 (1983) (contraband on car seat in plain view of officer who had stopped car and asked for driver's license); New York v. Class, 475 U.S. 106 (1986) (evidence seen while looking for vehicle identification number). There

observation will provide grounds therefor.[2] The plain view doctrine is limited, however, by the probable cause requirement: officers must have probable cause to believe that items in plain view are contraband before they may search or seize them.[3]

The Court has analogized from the plain view doctrine to hold that, once officers have lawfully observed contraband, "the owner's privacy interest in that item is lost," and officers may reseal a container, trace its path through a controlled delivery, and seize and reopen the container without a warrant.[4]

Amdt4.6.5 Warrantless Searches Not Dependent on Probable Cause

Amdt4.6.5.1 Terry Stop and Frisks Doctrine and Practice

Fourth Amendment:

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

While arrests are subject to Fourth Amendment requirements, courts have followed the common law in upholding the authority of police officers to take a person into custody without a warrant if they have probable cause to believe the person has committed a felony or a misdemeanor in their presence.[1] Probable cause must be satisfied by conditions existing prior to the arrest and cannot be established retroactively.[2] There are, however, instances when a person's conduct or manner arouse a police officer's suspicions, but probable cause to arrest such a person is lacking.[3] In its 1968 *Terry v. Ohio* decision,[4] the Court, with only Justice William O. Douglas dissenting, approved a police officer's on-the-street investigation that involved "patting down" the subject of the investigation for weapons.

Terry arose when a police officer observed three individuals engaging in conduct that appeared to him, on the basis of training and experience, to be "casing" a store for a likely armed robbery. Upon approaching the men, identifying himself, and not receiving prompt identification, the officer seized one of the men, patted the exterior of his clothes, and discovered a gun. For the Court, Chief Justice Earl Warren wrote that the Fourth Amendment applies "whenever a police officer accosts an individual and restrains his freedom to walk away."[5] Because the warrant clause is necessarily and practically of no application to the type

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is no requirement that the discovery of evidence in plain view must be "inadvertent." *See* Horton v. California, 496 U.S. 128 (1990) (in spite of Amendment's particularity requirement, officers with warrant to search for *proceeds* of robbery may seize *weapons* of robbery in plain view).

[2] Steele v. United States, 267 U.S. 498 (1925) (officers observed contraband in view through open doorway; had probable cause to procure warrant). *Cf.* Taylor v. United States, 286 U.S. 1 (1932) (officers observed contraband in plain view in garage, warrantless entry to seize was unconstitutional).

[3] Arizona v. Hicks, 480 U.S. 321 (1987) (police lawfully in apartment to investigate shooting lacked probable cause to inspect expensive stereo equipment to record serial numbers).

[4] Illinois v. Andreas, 463 U.S. 765, 771 (1983) (locker customs agents had opened, and which was subsequently traced). *Accord*, United States v. Jacobsen, 466 U.S. 109 (1984) (inspection of package opened by private freight carrier who notified drug agents).

[1] United States v. Watson, 423 U.S. 411 (1976).

[2] Henry v. United States, 361 U.S. 98 (1959); Johnson v. United States, 333 U.S. 10, 16–17 (1948); Sibron v. New York, 392 U.S. 40, 62–63 (1968).

[3] "The police may not arrest upon mere suspicion but only on 'probable cause.'" Mallory v. United States, 354 U.S. 449, 454 (1957).

[4] 392 U.S. 1 (1968).

[5] *Id.* at 16. *See id.* at 16–20.

of on-the-street encounter present in *Terry*, the Chief Justice considered whether the policeman's actions were reasonable. The Chief Justice reasoned that the test of reasonableness in this sort of situation is whether the police officer can point to "specific and articulable facts which, taken together with rational inferences from those facts" would lead a neutral magistrate on review to conclude that a man of reasonable caution would be warranted in believing that possible criminal behavior was at hand and that both an investigative stop and a "frisk" was required.[6] Because the police officer witnessed conduct that reasonably led him to believe that an armed robbery was in prospect, he was as reasonably led to believe that the men were armed and probably dangerous and that his safety required a "frisk." Because the object of a "frisk" is to discover dangerous weapons, "it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."[7]

In a later case, the Court held that an officer may seize an object if, in the course of a weapons frisk, "plain touch" reveals the presence of the object, and the officer has probable cause to believe it is contraband.[8] The Court viewed the situation as analogous to that covered by the "plain view" doctrine: obvious contraband may be seized, but a search may not be expanded to determine whether an object is contraband.[9] Also impermissible is physical manipulation, without reasonable suspicion, of a bus passenger's carry-on luggage stored in an overhead compartment.[10]

Terry did not address the grounds that could permissibly lead an officer to stop a person on the street or elsewhere in order to ask questions rather than frisk for weapons, the right of the stopped individual to refuse to cooperate, and the permissible response of the police to that refusal. The Court provided a partial answer in its 2004 decision, *Hiibel v. Sixth Judical District Court*, when it upheld a state law that required a suspect to disclose his name in the course of a valid *Terry* stop.[11] Questions about a suspect's identity "are a routine and accepted part of many *Terry* stops," the Court explained.[12]

After *Terry*, the standard for stops for investigative purposes evolved into one of "reasonable suspicion of criminal activity." That test permits some stops and questioning without probable cause in order to allow police officers to explore the foundations of their

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[6] *Id.* at 20, 21, 22.

[7] *Id.* at 23–27, 29. *See also* Sibron v. New York, 392 U.S. 40 (1968) (after policeman observed defendant speak with several known narcotics addicts, he approached him and placed his hand in defendant's pocket, thus discovering narcotics; this was impermissible, because he lacked a reasonable basis for the frisk and in any event his search exceeded the permissible scope of a weapons frisk); Adams v. Williams, 407 U.S. 143 (1972) (stop and frisk based on informer's in-person tip that defendant was sitting in an identified parked car, visible to informer and officer, in a high crime area at 2 a.m., with narcotics and a gun at his waist); Pennsylvania v. Mimms, 434 U.S. 106 (1977) (after validly stopping car, officer required defendant to get out of car, observed bulge under his jacket, and frisked him and seized weapon; while officer did not suspect driver of crime or have an articulable basis for safety fears, safety considerations justified his requiring driver to leave car); Maryland v. Wilson, 519 U.S. 408, 413 (1997) (after validly stopping car, officer may order passengers as well as driver out of car; "the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger"); Arizona v. Johnson, 129 S. Ct. 781, 786 (2009) (after validly stopping car, officer may frisk (pat down for weapons) both the driver and any passengers whom he reasonably concludes "might be armed and presently dangerous").

[8] Minnesota v. Dickerson, 508 U.S. 366 (1993).

[9] 508 U.S. at 375, 378–79. In *Dickerson* the Court held that seizure of a small plastic container that the officer felt in the suspect's pocket was not justified; the officer should not have continued the search, manipulating the container with his fingers, after determining that no weapon was present.

[10] Bond v. United States, 529 U.S. 334 (2000) (bus passenger has reasonable expectation that, although other passengers might handle his bag in order to make room for their own, they will not "feel the bag in an exploratory manner").

[11] Hiibel v. Sixth Judicial Dist. Ct., 542 U.S. 177 (2004).

[12] 542 U.S. at 186.

suspicions.[13] Although it did not elaborate a set of rules to govern applying the tests, the Court was initially restrictive in recognizing permissible bases for reasonable suspicion.[14] The Court invalidated extensive intrusions on individual privacy, for example, transporting a person to the station house for interrogation and fingerprinting, absent probable cause,[15] and the Court has held that an uncorroborated, anonymous tip is an insufficient basis for a *Terry* stop and that there is no "firearms" exception to the reasonable suspicion requirement.[16] Since the 1980s, however, the Court has taken less restrictive approaches.[17]

The Court's approach for when a "seizure" has occurred for Fourth Amendment purposes has evolved. The *Terry* Court recognized in dictum that "not all personal intercourse between policemen and citizens involves 'seizures' of persons," and suggested that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."[18] In the 1980 *United States v. Mendenhall* decision, Justice Potter Stewart, joined by Justice William Rehnquist, proposed a similar standard—that a person has been seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[19] A majority of the Justices subsequently endorsed this reasonable perception standard[20] and applied it in several later cases in which the admissibility of evidence turned on whether police actions prior to uncovering evidence violated the Fourth Amendment. No seizure occurred, for example, when Immigration and Naturalization Service (INS) agents seeking to identify unlawfully present aliens conducted workforce surveys within a garment factory; while some agents were positioned at exits, others systematically moved through the factory and questioned employees.[21] The Court held this brief questioning, even with blocked exits, amounted to "classic consensual encounters rather than Fourth Amendment seizures."[22] The Court has also ruled that no seizure occurred when police in a squad car drove alongside a

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[13] In *United States v. Cortez,* 449 U.S. 411 (1981), a unanimous Court attempted to capture the "elusive concept" of the basis for permitting a stop. Officers must have "articulable reasons" or "founded suspicions," derived from the totality of the circumstances. The Court stated "Based upon that whole picture the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id.* at 417–18. The inquiry is thus quite fact-specific. In the anonymous tip context, the same basic approach requiring some corroboration applies regardless of whether the standard is probable cause or reasonable suspicion; the difference is that less information, or less reliable information, can satisfy the lower standard. Alabama v. White, 496 U.S. 325 (1990).

[14] *E.g.*, Brown v. Texas, 443 U.S. 47 (1979) (individual's presence in high crime area gave officer no articulable basis to suspect him of crime); Delaware v. Prouse, 440 U.S. 648 (1979) (reasonable suspicion of a license or registration violation is necessary to authorize automobile stop; random stops impermissible); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (officers could not justify random automobile stop solely on basis of Mexican appearance of occupants); Reid v. Georgia, 448 U.S. 438 (1980) (no reasonable suspicion for airport stop based on appearance that suspect and another passenger were trying to conceal the fact that they were traveling together). *But cf.* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (halting vehicles at fixed checkpoints to question occupants as to citizenship and immigration status permissible, even if officers should act on basis of appearance of occupants).

[15] Davis v. Mississippi, 394 U.S. 721 (1969); Dunaway v. New York, 442 U.S. 200 (1979). Illinois v. Wardlow, 528 U.S. 119 (2000) (unprovoked flight from high crime area upon sight of police produces "reasonable suspicion").

[16] Florida v. J.L., 529 U.S. 266 (2000) (reasonable suspicion requires that a tip be reliable in its assertion of illegality, not merely in its identification of someone).

[17] *See, e.g.*, Prado Navarette v. California, 572 U.S. 393 (2014) (anonymous 911 call reporting an erratic swerve by a particular truck traveling in a particular direction held to be sufficient to justify stop); United States v. Sokolow, 490 U.S. 1, 9 (1989) (airport stop based on drug courier profile may rely on a combination of factors that individually may be "quite consistent with innocent travel"); United States v. Hensley, 469 U.S. 221 (1985) (reasonable suspicion to stop a motorist may be based on a "wanted flyer" as long as issuance of the flyer has been based on reasonable suspicion).

[18] 392 U.S. at 19, n.16.

[19] 446 U.S. 544, 554 (1980).

[20] *See, e.g.*, Florida v. Royer, 460 U.S. 491 (1983), in which there was no opinion of the Court, but in which the test was used by the plurality of four, *id.* at 502, and also endorsed by dissenting Justice Harry Blackmun, *id.* at 514.

[21] INS v. Delgado, 466 U.S. 210 (1984).

[22] 466 U.S. at 221.

suspect who had turned and run down the sidewalk when he saw the squad car approach. Under the circumstances (no siren, flashing lights, display of a weapon, or blocking of the suspect's path), the Court concluded the police conduct "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon [one's] freedom of movement."[23]

The Court later ruled that the *Mendenhall* "free-to-leave" inquiry was misplaced in the context of a police sweep of a bus, but that a modified reasonable perception approach still governed.[24] In conducting a bus sweep aimed at detecting illegal drugs and their couriers, police officers typically board a bus during a stopover at a terminal and ask to inspect tickets, identification, and at times, the luggage of selected passengers. The Court did not focus on whether an "arrest" had taken place, but instead suggested that the appropriate inquiry is "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[25] "When the person is seated on a bus and has no desire to leave," the Court explained, "the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter."[26]

The Supreme Court's analysis of seizure, however, is different in the context of fleeing suspects, where the Court seemingly applies a more formalistic approach than the *Mendenhall* reasonable-perception standard. In *Brower v. County of Inyo*, the Supreme Court concluded that a seizure occurred when a suspect's car collided with a police roadblock, and explained that a "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control."[27] The Court reasoned that such a use of force becomes a seizure "only when there is a governmental termination of freedom of movement through means intentionally applied."[28] The Court seemingly modified that standard in *California v. Hodari D.*, another Fourth Amendment case involving a fleeing suspect.[29] In *Hodari D.*, the Court held that an actual chase with evident intent to capture did not amount to a "seizure" because the suspect had not complied with the officer's order to halt. The Court reasoned that *Mendenhall* stated a "necessary" but not a "sufficient" condition for a seizure of the person is through a show of authority.[30] A Fourth Amendment "seizure" of the person, the Court determined, is the same as a common law arrest; there must be either application of physical force (or the laying on of hands) or submission to the assertion of authority.[31] Three decades after *Hodari D.*, the Court revisited the nature of seizure in the context of a fleeing suspect in its 2021 *Torres v. Madrid* decision.[32] In *Torres*, the Court held that a suspect was seized when struck twice by bullets

[23] Michigan v. Chesternut, 486 U.S. 567, 575 (1988).

[24] Florida v. Bostick, 501 U.S. 429 (1991).

[25] 501 U.S. at 436.

[26] *Id.* The Court asserted that the case was "analytically indistinguishable from *Delgado*. Like the workers in that case [subjected to the INS 'survey' at their workplace], Bostick's freedom of movement was restricted by a factor independent of police conduct—i.e., by his being a passenger on a bus." *Id. See also* United States v. Drayton, 536 U.S. 194 (2002), applying *Bostick* to uphold a bus search in which one officer stationed himself in the front of the bus and one in the rear, while a third officer worked his way from rear to front, questioning passengers individually. Under these circumstances, and following the arrest of his traveling companion, the defendant had consented to the search of his person.

[27] Brower v. Cty. of Inyo, 489 U.S. 593, 596 (1989).

[28] *Id.* at 597.

[29] 499 U.S. 621 (1991).

[30] *Id.* at 628. As in *Michigan v. Chesternut*, the suspect dropped incriminating evidence while being chased.

[31] Adherence to this approach would effectively nullify the Court's earlier position that Fourth Amendment protections extend to "seizures that involve only a brief detention short of traditional arrest." United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975), *quoted in* INS v. Delgado, 466 U.S. 210, 215 (1984).

[32] No. 19-292, slip op. at 1 (U.S. Mar. 25, 2021).

fired by law enforcement, even though she temporarily evaded capture.[33] The Court reasoned that the "application of physical force to the body of a person with intent to restrain is a seizure" within the meaning of the Fourth Amendment, "even if the force does not succeed in subduing the person."[34] According to the Court, such a seizure lasts "only as long as the application of force."[35] Thus, in *Torres*, officers seized the suspect "the instant that the bullets struck her."[36] The Court clarified that, unlike seizure by application of force, seizure by show of authority still requires either "voluntary submission" or "termination of freedom of movement."[37]

Amdt4.6.5.2 Terry Stop and Frisks and Vehicles

Fourth Amendment:

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

A *Terry* search need not be limited to a stop and frisk of the person, but may extend as well to a protective search of the passenger compartment of a car if an officer possesses "a reasonable belief, based on specific and articulable facts . . . that the suspect is dangerous and . . . may gain immediate control of weapons."[1] How lengthy a *Terry* detention may be varies with the circumstances. In approving a twenty-minute detention of a driver made necessary by the driver's own evasion of drug agents and a state police decision to hold the driver until the agents could arrive on the scene, the Court indicated that it is "appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant."[2]

Similar principles govern detention of luggage at airports in order to detect the presence of drugs; *Terry* "limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person's luggage on less than probable cause."[3] The general rule is that "when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* . . . would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope."[4] Seizure of luggage for an expeditious "canine sniff" by a dog trained to detect narcotics can satisfy this test even though seizure of luggage is in effect detention of the traveler, since the procedure

[33] *Id.* at 1–3.

[34] *Id.* at 1.

[35] *Id.* at 10.

[36] *Id.* at 11.

[37] *Id.* at 14–15.

[1] Michigan v. Long, 463 U.S. 1032 (1983) (suspect appeared to be under the influence of drugs, officer spied hunting knife exposed on floor of front seat and searched remainder of passenger compartment). Similar reasoning has been applied to uphold a "protective sweep" of a home in which an arrest is made if arresting officers have a reasonable belief that the area swept may harbor another individual posing a danger to the officers or to others. Maryland v. Buie, 494 U.S. 325 (1990).

[2] United States v. Sharpe, 470 U.S. 675, 686 (1985). A more relaxed standard has been applied to detention of travelers at the border, the Court testing the reasonableness in terms of "the period of time necessary to either verify or dispel the suspicion." United States v. Montoya de Hernandez, 473 U.S. 531, 544 (1985) (approving warrantless detention for more than 24 hours of traveler suspected of alimentary canal drug smuggling).

[3] United States v. Place, 462 U.S. 696, 709 (1983).

[4] 462 U.S. at 706.

results in "limited disclosure," impinges only slightly on a traveler's privacy interest in the contents of personal luggage, and does not constitute a search within the meaning of the Fourth Amendment.[5] By contrast, taking a suspect to an interrogation room on grounds short of probable cause, retaining his air ticket, and retrieving his luggage without his permission taints consent given under such circumstances to open the luggage, since by then the detention had exceeded the bounds of a permissible *Terry* investigative stop and amounted to an invalid arrest.[6] But the same requirements for brevity of detention and limited scope of investigation are apparently inapplicable to border searches of international travelers, the Court having approved a twenty-four hour detention of a traveler suspected of smuggling drugs in her alimentary canal.[7]

Amdt4.6.6 Special Needs Doctrine

Amdt4.6.6.1 Overview of Border Searches

Fourth Amendment:

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

Congress has broad authority to regulate persons or items entering the United States, an authority rooted in its power to regulate foreign commerce and to protect the integrity of the Nation's borders.[1] Authorized by the First Congress,[2] customs searches at the border require no warrant, probable cause, or even a showing of some degree of suspicion that accompanies investigatory stops.[3] The Supreme Court has described searches at the international border as "necessary to prevent smuggling and to prevent prohibited articles from entry."[4] Despite this seemingly broad authority to search persons and items at the border, the Fourth Amendment provides some constraints. The Fourth Amendment generally requires a government officer to secure a warrant based on probable cause before conducting a search or seizure.[5] Nonetheless,

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[5] 462 U.S. at 707. However, the search in *Place* was not expeditious, and hence exceeded Fourth Amendment bounds, when agents took ninety minutes to transport luggage to another airport for administration of the canine sniff. The length of a detention short of an arrest has similarly been a factor in other cases. *Compare* Illinois v. Caballes, 543 U.S. 405 (2005) (a canine sniff around the perimeter of a car following a routine traffic stop does not offend the Fourth Amendment if the duration of the stop is justified by the traffic offense) *with* Rodriguez v. United States, 135 S. Ct. 1609, 1613, 1614–15 (2015) (finding that the stop in question had been prolonged for seven to eight minutes beyond the time needed to resolve the traffic offense in order to conduct a canine sniff).

[6] Florida v. Royer, 460 U.S. 491 (1983). On this much the plurality opinion of Justice Byron White (*id.* at 503), joined by three other Justices, and the concurring opinion of Justice William Brennan (*id.* at 509) were in agreement.

[7] United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

[1] *See* United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) (recognizing "Congress's power to protect the Nation by stopping and examining persons entering this country"); United States v. 12,200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 125 (1973) ("The Constitution gives Congress broad, comprehensive powers '(t)o regulate Commerce with foreign Nations.'") (quoting U.S. CONST. art. I, § 8, cl. 3)).

[2] *See* United States v. Ramsey, 431 U.S. 606, 616 (1977) (noting that Congress "enacted the first customs statute" in 1789).

[3] Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973); United States v. Thirty-Seven Photographs, 402 U.S. 363, 376 (1971); Carroll v. United States, 267 U.S. 132, 154 (1925).

[4] *12,200-Foot Reels of Super 8mm. Film*, 413 U.S. at 125 ("Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry.").

[5] *See* Riley v. California, 134 S. Ct. 2473, 2482 (2014) ("Such a warrant ensures that the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'") (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)); Kentucky v.

because the "touchstone" of the Fourth Amendment is reasonableness,[6] courts have recognized certain exceptions when the government may engage in a warrantless search or seizure.[7]

Amdt4.6.6.2 Searches at International Borders

Fourth Amendment:

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

Under what is typically referred to as the "border search exception" to the Fourth Amendment, federal officers may generally conduct warrantless searches of persons and items upon their entry into the United States without needing reasonable suspicion or probable cause of wrongdoing.[1] The Supreme Court has stated, "[t]hat searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration."[2] The Court has cited a lower expectation of privacy at the border, articulating that "the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border."[3] While searches subject to this reduced Fourth Amendment scrutiny may potentially take place along any segment of the international border, stops and searches may also occur at the "functional equivalent" of the border, including international airports in the United States and post offices receiving international airmail.[4]

When determining whether a border search or detention is reasonable, courts have generally distinguished between routine and nonroutine searches and seizures—with the latter requiring a level of particularized suspicion of illegal activity. The Supreme Court has

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King, 563 U.S. 452, 459 (2011) ("Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, this Court has inferred that a warrant must generally be secured.").

[6] *See* United States v. Knights, 534 U.S. 112, 118–19 (2001) ("The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'") (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

[7] *King*, 563 U.S. at 459 ("[B]ecause 'the ultimate touchstone of the Fourth Amendment is "reasonableness"'. . . [t]he warrant requirement is subject to certain reasonable exceptions.") (quoting Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006)); Texas v. Brown, 460 U.S. 730, 735 (1983) ("Our cases hold that procedure by way of a warrant is preferred, although in a wide range of diverse situations we have recognized flexible, common-sense exceptions to this requirement.").

[1] *See* Montoya de Hernandez, 473 U.S. at 538 ("Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant"); United States v. Ramsey, 431 U.S. 606, 616–19 (1977); Almeida-Sanchez v. United States, 413 U.S. 266, 272–73 (1973); Carroll v. United States, 267 U.S. 132, 154 (1925) ("Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country identify himself as entitled to come in and his belongings as effects which may be lawfully brought in.").

[2] United States v. Ramsey, 431 U.S. 606, 616 (1977) (sustaining warrantless search of incoming mail). *See also* Illinois v. Andreas, 463 U.S. 765, 773 (1983) (sustaining a customs inspector's opening of a locked container that had been shipped from abroad).

[3] United States v. Montoya de Hernandez, 473 U.S. 531, 540 (1985).

[4] *Id.* at 538 (examining the detention and search of an air traveler arriving at an airport in the United States on an international flight); *Ramsey*, 431 U.S. at 620 (rejecting any distinction between items mailed to the United States and items carried into the United States); *Almeida-Sanchez*, 413 U.S. at 272–73 (describing the border's functional equivalent to include an international airport or "an established station near the border, at a point marking the confluence of two or more roads that extend from the border").

described a nonroutine search or seizure as one that goes beyond a limited intrusion, such as prolonged detentions, strip searches, body cavity searches, and involuntary x-ray searches.[5]

In *United States v. Montoya de Hernandez*, the Supreme Court ruled that a sixteen hour detention of an arriving airline traveler from Colombia did not violate the Fourth Amendment—even though it went beyond the scope of a routine customs inspection—because it was based on reasonable suspicion that she was smuggling contraband.[6] Additionally, according to the Court, an extended detention as a result of a border search may be constitutionally permissible if the detention "was reasonably related in scope to the circumstances which justified it initially."[7]

In *United States v. Flores-Montano*, the Supreme Court held that federal officers may search motor vehicles at the border without a warrant, reasonable suspicion, or probable cause, even to the extent of removing, disassembling, and reassembling the fuel tank.[8] The Court observed, however, that there may be circumstances in which a search of a vehicle at the international border would "be deemed unreasonable because of the particularly offensive manner in which it is carried out."[9]

Amdt4.6.6.3 Searches Beyond the Border

Fourth Amendment:

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

Under the "border search exception," federal officers may generally conduct routine, warrantless searches of persons and items entering the United States without reasonable suspicion or probable cause of unlawful activity. However, stops and searches conducted in areas farther from the border may require at least heightened suspicion or probable cause of unlawful activity to withstand Fourth Amendment scrutiny.

The Supreme Court has addressed Fourth Amendment limitations on "roving patrols" near the border.[1] In *Almeida-Sanchez v. United States*, the Court held that a warrantless stop

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[5] *Montoya de Hernandez*, 473 U.S. at 541 n.4. The Supreme Court has not explicitly defined the scope of searches that may be categorized as routine. According to lower courts, routine searches generally include searches of automobiles, baggage, purses, wallets, outer clothing, and other goods entering the country. *See, e.g.*, Angulo v. Brown, 978 F.3d 942, 949 (5th Cir. 2020) ("The Government does not need to show any level of suspicion to thoroughly search an entrant's vehicle at the border."); Bradley v. United States, 299 F.3d 197 (3d Cir. 2002) (pat down over clothing); United States v. Johnson, 991 F.2d 1287 (7th Cir. 1993) (suitcase, purse, wallet, and overcoat); United States v. Sandoval Vargas, 854 F.2d 1132 (9th Cir. 1988) (car); United States v. Braks, 842 F.2d 509 (1st Cir. 1988) (dress); United States v. Flores, 594 F.2d 438 (5th Cir. 1979) (car); United States v. Lafroscia, 485 F.2d 457 (2d Cir. 1973) (car); United States v. Gonzalez, 483 F.2d 223 (2d Cir. 1973) (baggage); United States v. Stornini, 443 F.2d 833 (1st Cir. 1971) (baggage).

[6] *Montoya de Hernandez*, 473 U.S. at 541. For more discussion about reasonable suspicion, see Amdt4.6.5.1 Terry Stop and Frisks Doctrine and Practice.

[7] *Montoya de Hernandez*, 473 U.S. at 542; *see also* United States v. Flores-Montano, 541 U.S. 149, 155 n.3 (2004) (noting that a 1-hour delay incident to a border search did not render the search into one requiring reasonable suspicion, reasoning that "delays of one to two hours at international borders are to be expected").

[8] *Flores-Montano*, 541 U.S. at 155.

[9] *Id.* at 155 n.2 (internal quotation omitted).

[1] Roving patrols occur when immigration officers traverse certain areas near the border and stop vehicles suspected of carrying unlawfully present aliens or contraband, even in the absence of an indication that the vehicle had crossed the border. *See* United States v. Ortiz, 422 U.S. 891, 894 (1975) (noting that roving patrols "often operate at night on seldom-traveled roads" and "look for criminal activity, both alien smuggling and contraband smuggling").

and search of an automobile some twenty miles from the border violated the Fourth Amendment because the Border Patrol officers lacked probable cause to believe that the vehicle contained unlawfully present aliens.[2] While recognizing the government's authority to conduct routine inspections and searches at the border without a warrant or any individualized suspicion, the Court determined that vehicle searches in areas away from the physical border were "of a wholly different sort" because individuals have greater Fourth Amendment protections in the interior of the United States.[3]

In *United States v. Brignoni-Ponce*, the Supreme Court considered whether roving patrol stops for the more limited purpose of questioning motorists about immigration status or any suspicious circumstance is constitutionally permissible.[4] The Court held that roving patrol stops must be supported by "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that an automobile contains unlawfully present aliens.[5] The Court reasoned that stops absent suspicion would risk "potentially unlimited interference" with border area residents' use of the highways, and determined that the "reasonable suspicion" standard should apply to roving patrol stops given their "modest intrusion."[6] The Court held that federal officers who stopped a vehicle near the border lacked reasonable suspicion because they relied solely on the apparent Mexican ancestry of the vehicle's occupants, and that the occupants' ancestry in itself failed to provide reasonable belief that the vehicle concealed unlawfully present aliens.[7]

Applying *Brignoni-Ponce*'s reasonable suspicion test, the Supreme Court held in *United States v. Cortez* that there was reasonable suspicion for a stop near the border because the agents had previously uncovered clues of alien smuggling in the area and knew where the suspects would likely appear.[8] In *United States v. Arvizu*, the Court concluded that a Border Patrol agent had reasonable suspicion to stop a minivan found to be carrying more than 100 pounds of contraband based on observing the van on a remote road often used by smugglers and other observations of the van's occupants.[9] "Taken together," these observations raised a reasonable inference of criminal activity.[10]

The Supreme Court has also addressed vehicle stops at fixed immigration checkpoints, which, unlike roving patrols, are typically located at stationary points on major highways near the border. In *United States v. Martinez-Fuerte*, the Supreme Court held that federal officers may briefly stop and question motorists at "reasonably located" checkpoints, even in the

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[2] Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).

[3] *Id.* at 273–75. In a dissenting opinion, Justices Byron White, Harry Blackmun, William Rehnquist, and Chief Justice Warren Burger would have found the search reasonable based on Congress's determination that roving patrol searches were the only effective means to police border smuggling. *Id.* at 293, 298 (White, J., dissenting).

[4] United States v. Brignoni-Ponce, 422 U.S. 873, 874 (1975).

[5] *Id.* at 884.

[6] *Id.* at 879–82. The Court cited its prior decisions in *Terry v. Ohio,* 392 U.S. 1 (1968), and *Adams v. Williams,* 407 U.S. 143 (1972), which applied the reasonable suspicion standard to brief investigatory stops, and the Court stated that those cases "establish that in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime." *Brignoni-Ponce*, 422 U.S. at 881. The Court concluded that applying this standard "allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference." *Id.* at 883. The Court listed the criteria that would bear upon the reasonable suspicion analysis, including the characteristics of the area in which the vehicle is found, the vehicle's proximity to the border, the driver's physical characteristics and behavior, and the appearance of the persons inside the vehicle. *Id.* at 884–85.

[7] *Id.* at 885–86.

[8] United States v. Cortez, 449 U.S. 411, 413–21 (1981).

[9] United States v. Arvizu, 534 U.S. 266, 269–70 (2002).

[10] *Id.* at 277–78.

absence of reasonable suspicion that a vehicle contains unlawfully present aliens.[11] Given the "regularized manner" of immigration checkpoints, the Court reasoned, motorists "are not taken by any surprise" when they see a checkpoint and can be reasonably certain that the stops are authorized.[12]

However, there are Fourth Amendment constraints on Border Patrol agents' ability to engage in more intrusive actions at fixed immigration checkpoints.[13] In *United States v. Ortiz*, the Supreme Court held that "at traffic checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause" of unlawful activity.[14] The Court reasoned that the routine nature of a checkpoint stop "does not mitigate the invasion of privacy that a search entails" and that allowing agents to have unlimited discretion to search a vehicle at a checkpoint would be antithetical to the Fourth Amendment.[15] Thus, in that case, the Court held that Border Patrol agents unlawfully searched a vehicle at a checkpoint because they lacked probable cause that the vehicle contained unlawfully present aliens.[16]

The Supreme Court has also considered the constitutionality of warrantless stops and inspections of vessels within interior U.S. waters away from the border.[17] In *United States v. Villamonte-Marquez*, the Court held that government officers may board vessels on inland waters with ready access to the open sea for routine document checks without suspicion of criminal activity.[18] The Court reasoned that the government has a strong interest in assuring compliance with vessel documentation requirements, especially in heavy drug trafficking areas, and that the nature of maritime commerce made it impracticable to stop all vessels at permanent water checkpoints.[19]

Amdt4.6.6.4 Drug Testing

Fourth Amendment:

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

In two 1989 decisions the Court held that no warrant, probable cause, or even individualized suspicion is required for mandatory drug testing of certain classes of railroad and public employees. In each case, "special needs beyond the normal need for law enforcement" were identified as justifying the drug testing. In *Skinner v. Railway Labor Executives' Ass'n*,[1] the Court upheld regulations requiring railroads to administer blood, urine, and breath tests to employees involved in certain train accidents or violating certain safety

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[11] United States v. Martinez-Fuerte, 428 U.S. 543, 545, 562, 566 (1976).

[12] *Id.* at 559. Similarly, outside of the border context, the Court has upheld the use of fixed "sobriety" checkpoints at which all motorists are briefly stopped for preliminary questioning and observation for signs of intoxication. Michigan v. Sitz, 496 U.S. 444, 455 (1990).

[13] *Martinez-Fuerte*, 428 U.S. at 567.

[14] United States v. Ortiz, 422 U.S. 891, 896–97 (1975).

[15] *Id.* at 894–96.

[16] *Id.* at 897–98.

[17] United States v. Villamonte-Marquez, 462 U.S. 579 (1983).

[18] *Id.* at 593.

[19] *Id.* at 588–92.

[1] 489 U.S. 602 (1989).

rules; in *National Treasury Employees Union v. Von Raab*[2] the Court upheld a Customs Service screening program requiring urine testing of employees seeking transfer or promotion to positions having direct involvement with drug interdiction or to positions requiring the incumbent to carry firearms.

The Court in *Skinner* found a "compelling" governmental interest in testing the railroad employees without any showing of individualized suspicion, since operation of trains by anyone impaired by drugs "can cause great human loss before any signs of impairment become noticeable."[3] By contrast, the intrusions on privacy were termed "limited." Blood and breath tests were passed off as routine; the urine test, although more intrusive, was deemed permissible because of the "diminished expectation of privacy" in employees having some responsibility for safety in a pervasively regulated industry.[4] The lower court's emphasis on the limited effectiveness of the urine test (it detects past drug use but not necessarily the level of impairment) was misplaced, the Court ruled. It is enough that the test may provide some useful information for an accident investigation; in addition, the test may promote deterrence as well as detection of drug use.[5]

In *Von Raab* the governmental interests underlying the Customs Service's screening program were also termed "compelling": to ensure that persons entrusted with a firearm and the possible use of deadly force not suffer from drug-induced impairment of perception and judgment, and that "front-line [drug] interdiction personnel [be] physically fit, and have unimpeachable integrity and judgment."[6] The possibly "substantial" interference with privacy interests of these Customs employees was justified, the Court concluded, because, "[u]nlike most private citizens or government employees generally, they have a diminished expectation of privacy."[7]

Emphasizing the "special needs" of the public school context, reflected in the "custodial and tutelary" power that schools exercise over students, and also noting schoolchildren's diminished expectation of privacy, the Court in *Vernonia School District v. Acton*[8] upheld a school district's policy authorizing random urinalysis drug testing of students who participate in interscholastic athletics. The Court redefined the term "compelling" governmental interest. The phrase does not describe a "fixed, minimum quantum of governmental concern," the Court explained, but rather "describes an interest which appears *important enough* to justify the particular search at hand."[9] Applying this standard, the Court concluded that "deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs . . . or deterring drug use by engineers and trainmen."[10] On the other hand, the interference with privacy interests was not great, the Court decided, since schoolchildren are routinely required to submit to various physical examinations and vaccinations. Moreover, "[l]egitimate privacy expectations are even less [for] student athletes, since they normally suit up, shower, and dress in locker rooms that afford no privacy, and since they voluntarily subject themselves to physical exams and other regulations

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[2] 489 U.S. 656 (1989).

[3] 489 U.S. at 628.

[4] 489 U.S. at 628.

[5] 489 U.S. at 631–32.

[6] *Von Raab*, 489 U.S. at 670–71. Dissenting Justice Antonin Scalia discounted the "feeble justifications" relied upon by the Court, believing instead that the "only plausible explanation" for the drug testing program was the "symbolism" of a government agency setting an example for other employers to follow. 489 U.S. at 686–87.

[7] 489 U.S. at 672.

[8] 515 U.S. 646 (1995).

[9] 515 U.S. at 661.

[10] 515 U.S. at 661.

above and beyond those imposed on non-athletes."[11] The Court "caution[ed] against the assumption that suspicionless drug testing will readily pass muster in other contexts," identifying as "the most significant element" in *Vernonia* the fact that the policy was implemented under the government's responsibilities as guardian and tutor of schoolchildren.[12]

Seven years later, the Court in *Board of Education v. Earls*[13] extended *Vernonia* to uphold a school system's drug testing of all junior high and high school students who participated in extra-curricular activities. The lowered expectation of privacy that athletes have "was not essential" to the decision in *Vernonia*, Justice Clarence Thomas wrote for a 5-4 Court majority.[14] Rather, that decision "depended primarily upon the school's custodial responsibility and authority."[15] Another distinction was that, although there was some evidence of drug use among the district's students, there was no evidence of a significant problem, as there had been in *Vernonia*. Rather, the Court referred to "the nationwide epidemic of drug use," and stated that there is no "threshold level" of drug use that need be present.[16] Because the students subjected to testing in *Earls* had the choice of not participating in extra-curricular activities rather than submitting to drug testing, the case stops short of holding that public school authorities may test all junior and senior high school students for drugs. Thus, although the Court's rationale seems broad enough to permit across-the-board testing,[17] Justice Stephen Breyer's concurrence, emphasizing among other points that "the testing program avoids subjecting the entire school to testing,"[18] raises some doubt on this score. The Court also left another basis for limiting the ruling's sweep by asserting that "regulation of extracurricular activities further diminishes the expectation of privacy among schoolchildren."[19]

In two other cases, the Court found that there were no "special needs" justifying random testing. Georgia's requirement that candidates for state office certify that they had passed a drug test, the Court ruled in *Chandler v. Miller*[20] was "symbolic" rather than "special." There was nothing in the record to indicate any actual fear or suspicion of drug use by state officials, the required certification was not well designed to detect illegal drug use, and candidates for state office, unlike the customs officers held subject to drug testing in *Von Raab*, are subject to "relentless" public scrutiny. In the second case, a city-run hospital's program for drug screening of pregnant patients suspected of cocaine use was invalidated because its purpose was to

[11] 515 U.S. at 657.

[12] 515 U.S. at 665.

[13] 536 U.S. 822 (2002).

[14] 536 U.S. at 831.

[15] 536 U.S. at 831.

[16] 536 U.S. at 836.

[17] Drug testing was said to be a "reasonable" means of protecting the school board's "important interest in preventing and deterring drug use among its students," and the decision in *Vernonia* was said to depend "primarily upon the school's custodial responsibility and authority." 536 U.S. at 838, 831.

[18] Concurring Justice Stephen Breyer pointed out that the testing program "preserves an option for a conscientious objector," who can pay a price of nonparticipation that is "serious, but less severe than expulsion." 536 U.S. at 841. Dissenting Justice Ruth Bader Ginsburg pointed out that extracurricular activities are "part of the school's educational program" even though they are in a sense "voluntary." "Voluntary participation in athletics has a distinctly different dimension" because it "expose[s] students to physical risks that schools have a duty to mitigate." *Id.* at 845, 846.

[19] 536 U.S. at 831–32. The best the Court could do to support this statement was to assert that "some of these clubs and activities require occasional off-campus travel and communal undress," to point out that all extracurricular activities "have their own rules and requirements," and to quote from general language in *Vernonia*. *Id.* Dissenting Justice Ruth Bader Ginsburg pointed out that these situations requiring a change of clothes on occasional out-of-town trips are "hardly equivalent to the routine communal undress associated with athletics." *Id.* at 848.

[20] 520 U.S. 305 (1997).

collect evidence for law enforcement.[21] In the previous three cases in which random testing had been upheld, the Court pointed out, the "special needs" asserted as justification were "divorced from the general interest in law enforcement."[22] By contrast, the screening program's focus on law enforcement brought it squarely within the Fourth Amendment's restrictions.

Amdt4.6.6.5 National Security

Fourth Amendment:

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

In *Katz v. United States*,[1] Justice Byron White sought to preserve for a future case the possibility that in "national security cases" electronic surveillance upon the authorization of the President or the Attorney General could be permissible without prior judicial approval.[2] The Executive Branch then asserted the power to wiretap and to "bug" in two types of national security situations, against domestic subversion and against foreign intelligence operations, first basing its authority on a theory of "inherent" presidential power and then in the Supreme Court withdrawing to the argument that such surveillance was a "reasonable" search and seizure and therefore valid under the Fourth Amendment. Unanimously, the Court held that at least in cases of domestic subversive investigations, compliance with the warrant provisions of the Fourth Amendment was required.[3] Whether or not a search was reasonable, wrote Justice Lewis Powell for the Court, was a question which derived much of its answer from the warrant clause; except in a few narrowly circumscribed classes of situations, only those searches conducted pursuant to warrants were reasonable. The Government's duty to preserve the national security did not override the guarantee that before government could invade the privacy of its citizens it must present to a neutral magistrate evidence sufficient to support issuance of a warrant authorizing that invasion of privacy.[4] This protection was even more

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[21] Ferguson v. City of Charleston, 532 U.S. 67 (2001).

[22] 532 U.S. at 79.

[1] 389 U.S. 347, 363–64 (1967) (concurring opinion). Justices William O. Douglas and William William Brennan rejected the suggestion. *Id.* at 359–60 (concurring opinion). When it enacted its 1968 electronic surveillance statute, Congress alluded to the problem in ambiguous fashion, 18 U.S.C. § 2511(3), which the Court subsequently interpreted as having expressed no congressional position at all. United States v. United States District Court, 407 U.S. 297, 302–08 (1972).

[2] *See also* Carpenter v. United States, 138 S. Ct. 2206, 2220 (2018) ("[O]ur opinion does not consider other collection techniques involving foreign affairs or national security.").

[3] United States v. United States District Court, 407 U.S. 297 (1972). Chief Justice Warren Burger concurred in the result and Justice Byron White concurred on the ground that the 1968 law required a warrant in this case, and therefore did not reach the constitutional issue. *Id.* at 340. Justice William Rehnquist did not participate. Justice Lewis Powell carefully noted that the case required "no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." *Id.* at 308.

[4] The case contains a clear suggestion that the Court would approve a congressional provision for a different standard of probable cause in national security cases. "We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of 'ordinary crime.' The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crimes specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some future crisis or emergency. . . . Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant

needed in "national security cases" than in cases of "ordinary" crime, the Justice continued, because the tendency of government so often is to regard opponents of its policies as a threat and hence to tread in areas protected by the First Amendment as well as by the Fourth.[5] Rejected also was the argument that courts could not appreciate the intricacies of investigations in the area of national security or preserve the secrecy which is required.[6]

The question of the scope of the President's constitutional powers, if any, remains judicially unsettled.[7] Congress has acted, however, providing for a special court to hear requests for warrants for electronic surveillance in foreign intelligence situations, and permitting the President to authorize warrantless surveillance to acquire foreign intelligence information provided that the communications to be monitored are exclusively between or among foreign powers and there is no substantial likelihood any "United States person" will be overheard.[8]

Amdt4.6.6.6 School Searches

Fourth Amendment:

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

In *New Jersey v. T.L.O.*,[1] the Court set forth the principles governing searches by public school authorities. The Fourth Amendment applies to searches conducted by public school officials because "school officials act as representatives of the State, not merely as surrogates for the parents."[2] However, "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."[3] Neither the warrant requirement nor the probable cause standard is appropriate, the Court ruled. Instead, a simple reasonableness standard governs all searches of students' persons and effects by school authorities.[4] A search must be reasonable at its inception, that is, there must be "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law

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application may vary according to the governmental interest to be enforced and the nature of citizen right deserving protection. . . . It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements of § 2518 but should allege other circumstances more appropriate to domestic security cases. . . ." 407 U.S. at 322–23.

[5] 407 U.S. at 313–24.

[6] 407 U.S. at 320.

[7] *See* United States v. Butenko, 494 F.2d 593 (3d Cir.), *cert. denied*, 419 U.S. 881 (1974); Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976), *appeal after remand*, 565 F.2d 742 (D.C. Cir. 1977), *on remand*, 444 F. Supp. 1296 (D.D.C. 1978), *aff'd in part, rev'd in part*, 606 F.2d 1172 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981); Smith v. Nixon, 606 F.2d 1183 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981); United States v. Truong Ding Hung, 629 F.2d 908 (4th Cir. 1980), *after remand*, 667 F.2d 1105 (4th Cir. 1981); Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982).

[8] Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1797, 50 U.S.C. §§ 1801–1811. *See* United States v. Belfield, 692 F.2d 141 (D.C. Cir. 1982) (upholding constitutionality of disclosure restrictions in Act).

[1] 469 U.S. 325 (1985).

[2] 469 U.S. at 336.

[3] 469 U.S. at 340.

[4] This single rule, the Court explained, will permit school authorities "to regulate their conduct according to the dictates of reason and common sense." 469 U.S. at 343. Rejecting the suggestion of dissenting Justice John Paul Stevens, the Court was "unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules." *Id.* at n.9.

or the rules of the school."[5] School searches must also be reasonably related in scope to the circumstances justifying the interference, and "not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[6] In applying these rules, the Court upheld as reasonable the search of a student's purse to determine whether the student, accused of violating a school rule by smoking in the lavatory, possessed cigarettes. The search for cigarettes uncovered evidence of drug activity held admissible in a prosecution under the juvenile laws.

In *Safford Unified School District #1 v. Redding*,[7] a student found in possession of prescription ibuprofen pills at school stated that the pills had come from another student, 13-year-old Savana Redding. The Court found that the first student's statement was sufficiently plausible to warrant suspicion that Savana was involved in pill distribution, and that this suspicion was enough to justify a search of Savana's backpack and outer clothing.[8] School officials, however, had also "directed Savana to remove her clothes down to her underwear, and then 'pull out' her bra and the elastic band on her underpants"[9]—an action that the Court thought could fairly be labeled a strip search. Taking into account that "adolescent vulnerability intensifies the patent intrusiveness of the exposure" and that, according to a study, a strip search can "result in serious emotional damage," the Court found that the search violated the Fourth Amendment.[10] "Because there were no reasons to suspect the drugs presented a danger or were concealed in her underwear," the Court wrote, "the content of the suspicion failed to match the degree of intrusion."[11] But, even though the Court found that the search had violated the Fourth Amendment, it found that the school officials who conducted the search were protected from liability through qualified immunity, because the law prior to *Redding* was not clearly established.[12]

Amdt4.6.6.7 Searches of Prisoners, Parolees, and Probationers

Fourth Amendment:

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

The "undoubted security imperatives involved in jail supervision" require "defer[ence] to the judgment of correctional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to the problems of jail security."[1] So saying, the Court, in *Florence v. Board of Chosen Freeholders*, upheld routine strip searches,

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[5] 469 U.S. at 342. The Court has further elaborated that this "reasonable suspicion" standard is met if there is a "moderate chance" of finding evidence of wrongdoing. Safford Unified School District #1 v. Redding, 557 U.S. 364, 371 (2009).

[6] 469 U.S. at 342.

[7] 557 U.S. 364 (2009).

[8] 557 U.S. 364, 373–74 (2009).

[9] 557 U.S. at 374.

[10] 557 U.S. at 375.

[11] 557 U.S. at 368, 375. Justice Clarence Thomas dissented from the finding of a Fourth Amendment violation.

[12] *See* Amdt4.7.1 Exclusionary Rule and Evidence to Amdt4.7.4 Good Faith Exception to Exclusionary Rule. Justices John Paul Stevens and Ruth Bader Ginsburg dissented from the grant of qualified immunity.

[1] Florence v. Board of Chosen Freeholders, 566 U.S. 318, 322–23, 330 (2012). *See also*, *e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979). The *Florence* Court made clear it was referring to "jails" in "a broad sense to include prisons and other detention facilities." 566 U.S. 318, 322 (2012).

including close-up visual cavity inspections, as part of processing new arrestees for entry into the general inmate population, without the need for individualized suspicion and without an exception for those arrested for minor offenses.[2] Correctional officials had asserted significant penological interests to justify routine strip searches of new arrivals: detecting and preventing the introduction into the inmate population of infections, infestations, and contraband of all sorts; and identifying gang members. Having cited serious concerns and having applied their professional expertise, the officials had, in the Court's opinion, acted reasonably and not clearly overreacted. But despite taking a deferential approach and recounting the grave dangers correctional officers face, the *Florence* Court did not hold that individuals being processed for detention have no privacy rights at all. In separate concurrences, moreover, two members of the five-Justice majority held out the prospect of exceptions and refinements in future rulings on blanket strip search policies for new detainees.[3]

The Court in *Maryland v. King* cited a legitimate interest in having safe and accurate booking procedures to identify persons being taken into custody in order to sustain taking DNA samples from those charged with serious crimes.[4] Tapping the "unmatched potential of DNA identification" facilitates knowing with certainty who the arrestee is, the arrestee's criminal history, the danger the arrestee poses to others, the arrestee's flight risk, and other relevant facts.[5] By comparison, the Court characterized an arrestee's expectation of privacy as diminished and the intrusion posed by a cheek swab as minimal.[6]

Searches of prison cells by prison administrators are not limited even by a reasonableness standard, the Court's having held that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."[7] Thus, prison administrators may conduct random "shakedown" searches of inmates' cells without the need to adopt any established practice or plan, and inmates must look to the Eighth Amendment or to state tort law for redress against harassment, malicious property destruction, and the like.

Neither a warrant nor probable cause is needed for an administrative search of a probationer's home. It is enough, the Court ruled in *Griffin v. Wisconsin*, that such a search was conducted pursuant to a valid regulation that itself satisfies the Fourth Amendment's reasonableness standard (for example, by requiring "reasonable grounds" for a search).[8] "A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements."[9] "Probation, like incarceration, is a form of criminal sanction," the Court noted, and a warrant or probable cause requirement would interfere with the "ongoing

[2] 566 U.S. 318 (2012). The Court upheld similarly invasive strip searches of all inmates following contact visits in *Bell v. Wolfish*. 441 U.S. 520, 558–60 (1979).

[3] 566 U.S. 318 (2012) (Roberts, C.J., concurring); 566 U.S. 318 (2012) (Alito, J., concurring). In the opinion of the dissenters, a strip search of the kind conducted in *Florence* is unconstitutional if given to an arriving detainee arrested for a minor offense not involving violence or drugs, absent a reasonable suspicion to believe that the new arrival possesses contraband. 566 U.S. 318 (2012) (Breyer, J., dissenting).

[4] 569 U.S. 435, 449 (2013).

[5] *Id.* at 449–56, 460–61.

[6] *Id.* at 460–64.

[7] Hudson v. Palmer, 468 U.S. 517, 526 (1984). *See also* Bell v. Wolfish, 441 U.S. 520, 555–57 (1979) ("It is difficult to see how the detainee's interest in privacy is infringed by the room-search rule [allowing unannounced searches]. No one can rationally doubt that room searches represent an appropriate security measure . . . .").

[8] 483 U.S. 868 (1987) (search based on information from police detective that there was or might be contraband in probationer's apartment).

[9] 483 U.S. at 873–74.

[non-adversarial] supervisory relationship" required for proper functioning of the system.[10] A warrant is also not required if the purpose of a search of a probationer is investigate a crime rather than to supervise probation.[11]

"[O]n the 'continuum' of state-imposed punishments . . . , parolees have [even] fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment."[12] The Fourth Amendment, therefore, is not violated by a warrantless search of a parolee that is predicated upon a parole condition to which a prisoner agreed to observe during the balance of his sentence.[13]

Amdt4.6.6.8 Workplace Searches

Fourth Amendment:

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

Similar principles apply to a public employer's work-related search of its employees' offices, desks, or file cabinets, except that in this context the Court distinguished searches conducted for law enforcement purposes. In *O'Connor v. Ortega*,[1] a majority of Justices agreed, albeit on somewhat differing rationales, that neither a warrant nor a probable cause requirement should apply to employer searches "for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct."[2] Four Justices would require a case-by-case inquiry into the reasonableness of such searches;[3] one would hold that such searches "do not violate the Fourth Amendment."[4]

In *City of Ontario v. Quon*,[5] the Court bypassed adopting an approach for determining a government employee's reasonable expectation of privacy, an issue unresolved in *O'Connor*. Rather, the *Quon* Court followed the "special needs" holding in *O'Connor* and found that, even assuming a reasonable expectation of privacy, a city's warrantless search of the transcripts of a police officer's on-duty text messages on city equipment was reasonable because it was justified at its inception by noninvestigatory work-related purposes and was not excessively intrusive.[6] A jury had found the purpose of the search to be to determine whether the city's contract with its wireless service provider was adequate, and the Court held that "reviewing

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[10] 483 U.S. at 879.

[11] United States v. Knights, 534 U.S. 112 (2001) (probationary status informs both sides of the reasonableness balance).

[12] Samson v. California, 547 U.S. 843, 850 (2006) (internal quotation marks altered).

[13] 547 U.S. at 852. The parole condition at issue in *Samson* required prisoners to "agree in writing to be subject to a search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." *Id.* at 846, quoting Cal. Penal Code Ann. § 3067(a).

[1] 480 U.S. 709 (1987).

[2] 480 U.S. at 725. Not at issue was whether there must be individualized suspicion for investigations of work-related misconduct.

[3] This position was stated in Justice Sandra Day O'Connor's plurality opinion, joined by Chief Justice William Rehnquist and by Justices White and Lewis Powell.

[4] 480 U.S. at 732 (Scalia, J., concurring in judgment).

[5] 560 U.S. 746 (2010).

[6] In *Quon*, a police officer was dismissed after a review of the transcripts of his on-duty text messages revealed that a large majority of his texting was not related to work, and some messages were sexually explicit.

the transcripts was reasonable because it was an efficient and expedient way to determine whether [the officer's] overages were the result of work-related messaging or personal use."[7]

Amdt4.7 Excluding Evidence

Amdt4.7.1 Exclusionary Rule and Evidence

Fourth Amendment:

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

The Fourth Amendment declares a right to be free from unreasonable searches and seizures, but how this right translates into concrete terms is not specified. Several possible methods of enforcement have been suggested, but only one—the exclusionary rule—has been applied with any frequency by the Supreme Court, and Court in recent years has limited its application.

Theoretically, there are several alternatives to the exclusionary rule. An illegal search and seizure may be criminally actionable and officers undertaking one thus subject to prosecution, but the examples when officers are criminally prosecuted for overzealous law enforcement are extremely rare.[1] A police officer who makes an illegal search and seizure is subject to internal departmental discipline, which may be backed up by the oversight of police review boards in the few jurisdictions that have adopted them, but, again, the examples of disciplinary actions are exceedingly rare.[2]

Civil remedies are also available. Persons who have been illegally arrested or who have had their privacy invaded will usually have a tort action available under state statutory or common law, or against the Federal Government under the Federal Tort Claims Act.[3] Moreover, police officers acting under color of state law who violate a person's Fourth Amendment rights are subject to a suit in federal court for damages and other remedies[4] under a civil rights statute.[5] Although federal officers and others acting under color of federal law are

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[7] 560 U.S. 746, 761 (2010).

[1] Edwards, *Criminal Liability for Unreasonable Searches and Seizures*, 41 VA. L. REV. 621 (1955).

[2] Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123 (1967).

[3] 28 U.S.C. §§ 1346(b), 2671–2680. Section 2680(h) prohibits suits against the Federal Government for false arrest and specified other intentional torts, but contains an exception "with regard to acts or omissions of investigative or law enforcement officials of the United States Government."

[4] If there are continuing and recurrent violations, federal injunctive relief would be available. *Cf.* Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966); Wheeler v. Goodman, 298 F. Supp. 935 (W.D.N.C. 1969) (preliminary injunction); Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969) (permanent injunction), *vacated on jurisdictional grounds sub nom.*, Goodman v. Wheeler, 401 U.S. 987 (1971).

[5] 42 U.S.C. § 1983 (1964). *See* Monroe v. Pape, 365 U.S. 167 (1961). In some circumstances, the officer's liability may be attributed to the municipality. Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978). These claims that officers have used excessive force in the course of an arrest or investigatory stop are to be analyzed under the Fourth Amendment, not under substantive due process. The test is "whether the officers' actions are 'objectively reasonable' under the facts and circumstances confronting them." Graham v. Connor, 490 U.S. 386, 397 (1989) (cited with approval in *Scott v. Harris*, in which a police officer's ramming a fleeing motorist's car from behind in an attempt to stop him was found reasonable). Thus, the Court has noted, "[a]s in other areas of our Fourth Amendment jurisprudence, '[d]etermining whether the force used to effect a particular seizure is reasonable' requires balancing of the individual's Fourth Amendment interests against the relevant government interests." Cty. of L.A. v. Mendez, 137 S. Ct. 1539, 1546 (2017) (quoting *Graham*, 490 U.S. at 396) (rejecting the Ninth Circuit's "provocation rule" under which law enforcement officers who "make a 'seizure' of a person using force that is judged to be reasonable based on a consideration of the circumstances relevant to that determination" can "nevertheless be held liable for injuries caused

not subject to this statute, the Supreme Court has held that a right to damages for a violation of Fourth Amendment rights arises by implication and that this right is enforceable in federal courts upon proof of injuries resulting from agents' violation of the Amendment.[6]

Although a damages remedy might be made more effectual,[7] legal and practical problems stand in the way.[8] Law enforcement officers have available to them the usual common-law defenses, the most important of which is the claim of good faith.[9] Such "good faith" claims, however, are not based on the subjective intent of the officer. Instead, officers are entitled to qualified immunity "where clearly established law does not show that the search violated the Fourth Amendment,"[10] or where they had an objectively reasonable belief that a warrantless search later determined to violate the Fourth Amendment was supported by probable cause or exigent circumstances.[11] On the practical side, persons subjected to illegal arrests and searches and seizures are often disreputable persons toward whom juries are unsympathetic, or they are indigent and unable to sue. The result, therefore, is that the Court has emphasized exclusion of unconstitutionally seized evidence in subsequent criminal trials as the only effective enforcement method.

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by the seizure on the ground that they committed a separate Fourth Amendment violation that contributed to their need to use force"). "The operative question in excessive force cases is 'whether the totality of the circumstances justifie[s] a particular sort of search or seizure.'" *Id.* (quoting Tennessee v. Garner, 471 U.S. 1, 8–9 (1985)).

[6] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). The possibility had been hinted at in *Bell v. Hood,* 327 U.S. 678 (1946); *But see* Egbert v. Boule, No. 21-147, slip op. at 6 (U.S. June 8, 2022) (explaining that, since the *Bivens* decision, the Court has come "to appreciate more fully the tension between judicially created causes of action and the Constitution's separation of legislative and judicial power," that "recognizing a cause of action under *Bivens* is a disfavored judicial activity," and that "[a]t bottom, creating a cause of action is a legislative endeavor."); *id.* at 9 (holding that the Court of Appeals erred in creating a cause of action under *Bivens* for a Fourth Amendment excessive-force claim); *id.* at 1 (stating that, since *Bivens*, the Court has declined "11 times to imply a similar cause of action for other alleged constitutional violations.").

[7] *See, e.g.*, Chief Justice Burger's dissent in *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 411, 422–24 (1971), which suggests a statute allowing suit against the government in a special tribunal and a statutory remedy in lieu of the exclusionary rule.

[8] Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

[9] This is the rule in actions under 42 U.S.C. § 1983, Pierson v. Ray, 386 U.S. 547 (1967), and on remand in *Bivens* the court of appeals promulgated the same rule to govern trial of the action. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972).

[10] Pearson v. Callahan, 555 U.S. 223 (2009), quoted in *Safford Unified School District #1 v. Redding,* 557 U.S. 364, 377 (2009). In *Saucier v. Katz,* 533 U.S. 194 (2001), the Court had mandated a two-step procedure to determine whether an officer has qualified immunity: first, a determination whether the officer's conduct violated a constitutional right, and then a determination whether the right had been clearly established. In *Pearson*, the Court held "that, while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 555 U.S. at 236. *See also* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[11] Anderson v. Creighton, 483 U.S. 635 (1987). The qualified immunity inquiry "has a further dimension" beyond what is required in determining whether a police officer used excessive force in arresting a suspect: the officer may make "a reasonable mistake" in his assessment of what the law requires. Saucier v. Katz, 533 U.S. 194, 205–06 (2001). *See also* Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (because cases create a "hazy border between excessive and acceptable force," an officer's misunderstanding as to her authority to shoot a suspect attempting to flee in a vehicle was not unreasonable); Malley v. Briggs, 475 U.S. 335, 345 (1986) (qualified immunity protects police officers who applied for a warrant unless "a reasonably well-trained officer in [the same] position would have known that his affidavit failed to establish probable cause and that he should not have applied for a warrant"). *But see* Mullenix v. Luna, 136 S. Ct. 305, 310 (2015) (per curiam) ("The Court has . . . never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone be the basis for denying qualified immunity.").

Amdt4.7.2 Adoption of Exclusionary Rule

Fourth Amendment:

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

Exclusion of evidence as a remedy for Fourth Amendment violations found its beginning in *Boyd v. United States*,[1] which, as noted above, involved not a search and seizure but a compulsory production of business papers, which the Court likened to a search and seizure. Further, the Court analogized the Fifth Amendment's self-incrimination provision to the Fourth Amendment's protections to derive a rule that required exclusion of the compelled evidence because the defendant had been compelled to incriminate himself by producing it.[2] *Boyd* was closely limited to its facts and an exclusionary rule based on Fourth Amendment violations was rejected by the Court a few years later, with the Justices adhering to the common-law rule that evidence was admissible however acquired.[3]

Nevertheless, ten years later the common-law view was itself rejected and an exclusionary rule propounded in *Weeks v. United States*.[4] Weeks had been convicted on the basis of evidence seized from his home in the course of two warrantless searches; some of the evidence consisted of private papers such as those sought to be compelled in *Boyd*. Unanimously, the Court held that the evidence should have been excluded by the trial court. The Fourth Amendment, Justice William Day said, placed on the courts as well as on law enforcement officers restraints on the exercise of power compatible with its guarantees. "The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful searches and enforced confessions . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."[5] The basis of the ruling is ambiguous, but seems to have been an assumption that admission of illegally seized evidence would itself violate the Fourth Amendment. "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secured against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to

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[1] 116 U.S. 616 (1886).

[2] "We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man in a criminal case to be a witness against himself, which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms." 116 U.S. at 633. It was this use of the Fifth Amendment's clearly required exclusionary rule, rather than one implied from the Fourth, on which Justice Hugo Black relied, and, absent a Fifth Amendment self-incrimination violation, he did not apply such a rule. Mapp v. Ohio, 367 U.S. 643, 661 (1961) (concurring opinion); Coolidge v. New Hampshire, 403 U.S. 443, 493, 496–500 (1971) (dissenting opinion). The theory of a "convergence" of the two Amendments has now been disavowed by the Court. *See* Amdt4.3.6.2 Property Subject to Seizure.

[3] Adams v. New York, 192 U.S. 585 (1904). Since the case arose from a state court and concerned a search by state officers, it could have been decided simply by holding that the Fourth Amendment was inapplicable. *See* National Safe Deposit Co. v. Stead, 232 U.S. 58, 71 (1914).

[4] 232 U.S. 383 (1914).

[5] 232 U.S. at 392.

punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."[6]

Because the Fourth Amendment does not restrict the actions of state officers,[7] there was originally no question about the application of an exclusionary rule in state courts[8] as a mandate of federal constitutional policy.[9] But, in *Wolf v. Colorado*,[10] a unanimous Court held that freedom from unreasonable searches and seizures was such a fundamental right as to be protected against state violations by the Due Process Clause of the Fourteenth Amendment.[11] However, the Court held that the right thus guaranteed did not require that the exclusionary rule be applied in the state courts, because there were other means to observe and enforce the right. "Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective."[12]

It developed, however, that the Court had not vested in the states total discretion with regard to the admissibility of evidence, as the Court proceeded to evaluate under the due process clause the methods by which the evidence had been obtained. Thus, in *Rochin v. California*,[13] evidence of narcotics possession had been obtained by forcible administration of an emetic to defendant at a hospital after officers had been unsuccessful in preventing him from swallowing certain capsules. The evidence, said Justice Felix Frankfurter for the Court, should have been excluded because the police methods were too objectionable. "This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents . . . is bound to offend even hardened sensibilities. They are methods too close to the rack and screw."[14] The *Rochin* standard was limited in *Irvine v. California*,[15] in which defendant was

[6] 232 U.S. at 393.

[7] Smith v. Maryland, 59 U.S. (18 How.) 71, 76 (1855); National Safe Deposit Co. v. Stead, 232 U.S. 58, 71 (1914).

[8] The history of the exclusionary rule in the state courts was surveyed by Justice Frankfurter in *Wolf v. Colorado,* 338 U.S. 25, 29, 33–38 (1949). The matter was canvassed again in *Elkins v. United States,* 364 U.S. 206, 224–32 (1960).

[9] During the period in which the Constitution did not impose any restrictions on state searches and seizures, the Court permitted the introduction in evidence in federal courts of items seized by state officers which had they been seized by federal officers would have been inadmissible, Weeks v. United States, 232 U.S. 383, 398 (1914), so long as no federal officer participated in the search, Byars v. United States, 273 U.S. 28 (1927), or the search was not made on behalf of federal law enforcement purposes. Gambino v. United States, 275 U.S. 310 (1927). This rule became known as the "silver platter doctrine" after the phrase coined by Justice Frankfurter in *Lustig v. United States,* 338 U.S. 74, 78–79 (1949): "The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." In *Elkins v. United States,* 364 U.S. 206 (1960), the doctrine was discarded by a 5-4 majority, which held that, because *Wolf v. Colorado,* 338 U.S. 25 (1949), had made state searches and seizures subject to federal constitutional restrictions through the Fourteenth Amendment's due process clause, the "silver platter doctrine" was no longer constitutionally viable. During this same period, since state courts were free to admit any evidence no matter how obtained, evidence illegally seized by federal officers could be used in state courts, Wilson v. Schnettler, 365 U.S. 381 (1961), although the Supreme Court ruled out such a course if the evidence had first been offered in a federal trial and had been suppressed. Rea v. United States, 350 U.S. 214 (1956).

[10] 338 U.S. 25 (1949).

[11] "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." 338 U.S. at 27–28.

[12] 338 U.S. at 31.

[13] 342 U.S. 165 (1952). The police had initially entered defendant's house without a warrant. Justices Hugo Black and William O. Douglas concurred in the result on self-incrimination grounds.

[14] 342 U.S. at 172.

[15] 347 U.S. 128 (1954).

convicted of bookmaking activities on the basis of evidence secured by police who repeatedly broke into his house and concealed electronic gear to broadcast every conversation in the house. Justice Robert Jackson's plurality opinion asserted that *Rochin* had been occasioned by the element of brutality, and that while the police conduct in *Irvine* was blatantly illegal the admissibility of the evidence was governed by *Wolf*, which should be consistently applied for purposes of guidance to state courts. The Justice also entertained considerable doubts about the efficacy of the exclusionary rule.[16] *Rochin* emerged as the standard, however, in a later case in which the Court sustained the admissibility of the results of a blood test administered while defendant was unconscious in a hospital following a traffic accident, the Court observing the routine nature of the test and the minimal intrusion into bodily privacy.[17]

Then, in *Mapp v. Ohio*,[18] the Court held that the exclusionary rule applied to the states. It was "logically and constitutionally necessary," wrote Justice Thomas Clark for the majority, "that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right" to be secure from unreasonable searches and seizures. "To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."[19] The Court further held that, because illegally seized evidence was to be excluded from both federal and state courts, the standards by which the question of legality was to be determined should be the same, regardless of whether the court in which the evidence was offered was state or federal.[20]

Important to determination of such questions as the application of the exclusionary rule to the states and the ability of Congress to abolish or to limit it is the fixing of the constitutional source and the basis of the rule. For some time, it was not clear whether the exclusionary rule was derived from the Fourth Amendment, from some union of the Fourth and Fifth Amendments, or from the Court's supervisory power over the lower federal courts. It will be recalled that in *Boyd*[21] the Court fused the search and seizure clause with the provision of the Fifth Amendment protecting against compelled self-incrimination. In *Weeks v. United States*,[22] though the Fifth Amendment was mentioned, the holding seemed clearly to be based on the Fourth Amendment. Nevertheless, in opinions following *Weeks* the Court clearly identified the

[16] 347 U.S. at 134–38. Justice Clark, concurring, announced his intention to vote to apply the exclusionary rule to the states when the votes were available. *Id.* at 138. Justices Hugo Black and William O. Douglas dissented on self-incrimination grounds, *id.* at 139, and Justice William O. Douglas continued to urge the application of the exclusionary rule to the states. *Id.* at 149. Justices Frankfurter and Burton dissented on due process grounds, arguing the relevance of *Rochin*. *Id.* at 142.

[17] Breithaupt v. Abram, 352 U.S. 432 (1957). Chief Justice Earl Warren and Justices Hugo Black and William O. Douglas dissented. Though a due process case, the results of the case have been reaffirmed directly in a Fourth Amendment case. Schmerber v. California, 384 U.S. 757 (1966).

[18] 367 U.S. 643 (1961).

[19] 367 U.S. at 655–56. Justice Black concurred, doubting that the Fourth Amendment itself compelled adoption of an exclusionary rule but relying on the Fifth Amendment for authority. *Id.* at 661. Justice Potter Stewart would not have reached the issue but would have reversed on other grounds, *id.* at 672, while Justices John Harlan, Felix Frankfurter, and Charles Whittaker dissented, preferring to adhere to *Wolf*. *Id.* at 672. Justice Harlan advocated the overruling of *Mapp* down to the conclusion of his service on the Court. *See* Coolidge v. New Hampshire, 403 U.S. 443, 490 (1971) (concurring opinion).

[20] Ker v. California, 374 U.S. 23 (1963).

[21] Boyd v. United States, 116 U.S. 616 (1886).

[22] 232 U.S. 383 (1914). Defendant's room had been searched and papers seized by officers acting without a warrant. "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." *Id.* at 393.

basis for the exclusionary rule as the Self-Incrimination Clause of the Fifth Amendment.[23] Then, in *Mapp v. Ohio*,[24] the Court tied the rule strictly to the Fourth Amendment, finding exclusion of evidence seized in violation of the Amendment to be the "most important constitutional privilege" of the right to be free from unreasonable searches and seizures, finding that the rule was "an essential part of the right of privacy" protected by the Amendment.

"This Court has ever since [*Weeks* was decided in 1914] required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and *constitutionally required*—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a 'form of words.'"[25] It was a necessary step in the application of the rule to the states to find that the rule was of constitutional origin rather than a result of an exercise of the Court's supervisory power over the lower federal courts, because the latter could not constitutionally be extended to the state courts.[26] In fact, in *Wolf v. Colorado*,[27] in declining to extend the exclusionary rule to the states, Justice Frankfurter seemed to find the rule to be based on the Court's supervisory powers. *Mapp* establishes that the rule is of constitutional origin, but this does not necessarily establish that it is immune to statutory revision.

Suggestions appear in a number of cases, including *Weeks*, to the effect that admission of illegally seized evidence is itself unconstitutional.[28] These suggestions were often combined

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[23] *E.g.*, Gouled v. United States, 255 U.S. 298, 306, 307 (1921); Amos v. United States, 255 U.S. 313, 316 (1921); Agnello v. United States, 269 U.S. 20, 33–34 (1925); McGuire v. United States, 273 U.S. 95, 99 (1927). In *Olmstead v. United States,* 277 U.S. 438, 462 (1928), Chief Justice Taft ascribed the rule both to the Fourth and the Fifth Amendments, while in dissent Justices Holmes and Brandeis took the view that the Fifth Amendment was violated by the admission of evidence seized in violation of the Fourth. *Id.* at 469, 478–79. Justice Black was the only modern proponent of this view. Mapp v. Ohio, 367 U.S. 643, 661 (1961) (concurring opinion); Coolidge v. New Hampshire, 403 U.S. 443, 493, 496–500 (1971) (dissenting opinion). *See*, however, Justice Clark's plurality opinion in *Ker v. California,* 374 U.S. 23, 30 (1963), in which he brought up the self-incrimination clause as a supplementary source of the rule, a position which he had discarded in *Mapp*.

[24] 367 U.S. 643, 656 (1961). Wolf v. Colorado, 338 U.S. 25, 28 (1949), also ascribed the rule to the Fourth Amendment exclusively.

[25] Mapp v. Ohio, 367 U.S. 643, 648 (1961) (emphasis added).

[26] An example of an exclusionary rule not based on constitutional grounds may be found in *McNabb v. United States,* 318 U.S. 332 (1943), and *Mallory v. United States,* 354 U.S. 449 (1957), in which the Court enforced a requirement that arrestees be promptly presented to a magistrate by holding that incriminating admissions obtained during the period beyond a reasonable time for presentation would be inadmissible. The rule was not extended to the States, *cf.* Culombe v. Connecticut, 367 U.S. 568, 598–602 (1961), but the Court's resort to the self-incrimination clause in reviewing confessions made such application irrelevant in most cases in any event. For an example of a transmutation of a supervisory rule into a constitutional rule, *see* McCarthy v. United States, 394 U.S. 459 (1969), and Boykin v. Alabama, 395 U.S. 238 (1969).

[27] *Weeks* "was not derived from the explicit requirements of the Fourth Amendment . . . . The decision was a matter of judicial implication." 338 U.S. 25, 28 (1949). Justice Black was more explicit. "I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." *Id.* at 39–40. He continued to adhere to the supervisory power basis in strictly search-and-seizure cases, Berger v. New York, 388 U.S. 41, 76 (1967) (dissenting), except where self-incrimination values were present. Mapp v. Ohio, 367 U.S. 643, 661 (1961) (concurring). *See also id.* at 678 (Harlan, J., dissenting); Elkins v. United States, 364 U.S. 206, 216 (1960) (Stewart, J., for the Court).

[28] "The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful searches and enforced confessions . . . should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution . . . ." Weeks v. United States, 232 U.S. 383, 392 (1914). In *Mapp v. Ohio,* 367 U.S. 643, 655, 657 (1961), Justice Clark maintained that "the Fourth Amendment include[s] the exclusion of the evidence seized in violation of its provisions" and that it, and the Fifth Amendment with regard to confessions "assures . . . that no man is to be convicted on unconstitutional evidence." In *Terry v. Ohio,* 392 U.S. 1, 12, 13 (1968), Chief Justice Warren wrote: "Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. . . . A ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence."

with a rationale emphasizing "judicial integrity" as a reason to reject the proffer of such evidence.[29] Yet the Court permitted such evidence to be introduced into trial courts when the defendant lacked "standing" to object to the search and seizure that produced the evidence or when the search took place before the announcement of the decision extending the exclusionary rule to the states.[30] At these times, the Court turned to the "basic postulate of the exclusionary rule itself. The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[31] "*Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action. Indeed, all of the cases since *Wolf* requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action."[32]

For as long as we have had the exclusionary rule, critics have attacked it, challenged its premises, disputed its morality.[33] By the early 1980s, a majority of Justices had stated a desire either to abolish the rule or to sharply curtail its operation,[34] and numerous opinions had rejected all doctrinal bases other than deterrence.[35] At the same time, these opinions voiced strong doubts about the efficacy of the rule as a deterrent, and advanced public interest values in effective law enforcement and public safety as reasons to discard the rule altogether or curtail its application.[36] Thus, the Court emphasized the high costs of enforcing the rule to exclude reliable and trustworthy evidence, even when violations have been technical or in good faith, and suggested that such use of the rule may well "generat[e] disrespect for the law and administration of justice,"[37] as well as free guilty defendants.[38] No longer does the Court

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[29] Elkins v. United States, 364 U.S. 206, 222–23 (1960); Mapp v. Ohio, 367 U.S. 643, 660 (1961). *See* McNabb v. United States, 318 U.S. 332, 339–40 (1943).

[30] Linkletter v. Walker, 381 U.S. 618 (1965).

[31] Elkins v. United States, 364 U.S. 206, 217 (1960).

[32] Linkletter v. Walker, 381 U.S. 618, 636–37 (1965). The Court advanced other reasons for its decision as well. *Id.* at 636–40.

[33] Among the early critics were Judge Benjamin Cardozo, *People v. Defore,* 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (the criminal will go free "because the constable has blundered"), and Dean Wigmore. 8 J. Wigmore, A Treatise on the Anglo-American System of Evidence 2183–84 (3d ed. 1940). For extensive discussion of criticism and support, with citation to the literature, *see* 1 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 1.2 (4th ed. 2004).

[34] *E.g.*, Stone v. Powell, 428 U.S. 465, 496 (1976) (Chief Justice Burger: rule ought to be discarded now, rather than wait for a replacement as he argued earlier); *id.* at 536 (Justice Byron White: modify rule to admit evidence seized illegally but in good faith); Schneckloth v. Bustamonte, 412 U.S. 218, 261 (1973) (Powell, J.,); Brown v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J.); Robbins v. California, 453 U.S. 420, 437 (1981) (Rehnquist, C.J.,); California v. Minjares, 443 U.S. 916 (1979) (Rehnquist, J., joined by Burger, C.J.); Coolidge v. New Hampshire, 403 U.S. 443, 510 (1971) (Black, J., dissenting joined by Blackmun, J. that "the Fourth Amendment supports no exclusionary rule").

[35] *E.g.*, United States v. Janis, 428 U.S. 433, 446 (1976) (deterrence is the "prime purpose" of the rule, "if not the sole one."); United States v. Calandra, 414 U.S. 338, 347–48 (1974); United States v. Peltier, 422 U.S. 531, 536–39 (1975); Stone v. Powell, 428 U.S. 465, 486 (1976); Rakas v. Illinois, 439 U.S. 128, 134 n.3, 137–38 (1978); Michigan v. DeFillippo, 443 U.S. 31, 38 n.3 (1979). Thus, admission of the fruits of an unlawful search or seizure "work[s] no new Fourth Amendment wrong," the wrong being "fully accomplished by the unlawful search or seizure itself," *United States v. Calandra*, 414 U.S. at 354, and the exclusionary rule does not "cure the invasion of the defendant's rights which he has already suffered." *Stone v. Powell*, 428 U.S. at 540 (White, J., dissenting). "Judicial integrity" is not infringed by the mere admission of evidence seized wrongfully. "[T]he courts must not commit or encourage violations of the Constitution," and the integrity issue is answered by whether exclusion would deter violations by others. United States v. Janis, 428 U.S. at 458 n.35; United States v. Calandra, 414 U.S. at 347, 354; United States v. Peltier, 422 U.S. at 538; Michigan v. Tucker, 417 U.S. 433, 450 n.25 (1974).

[36] United States v. Janis, 428 U.S. 433, 448–54 (1976), contains a lengthy review of the literature on the deterrent effect of the rule and doubts about that effect. *See also* Stone v. Powell, 428 U.S. 465, 492 n.32 (1976).

[37] *Stone v. Powell*, 428 U.S. at 490, 491.

[38] Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting).

declare that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[39]

Although the exclusionary rule has not been completely repudiated, its use has been substantially curbed. For instance, defendants who themselves were not subjected to illegal searches and seizures may not object to the introduction of evidence illegally obtained from co-conspirators or codefendants,[40] and even a defendant whose rights have been infringed may find the evidence admitted, not as proof of guilt, but to impeach his testimony.[41] Further, evidence obtained through a wrongful search and seizure may sometimes be used directly in the criminal trial, if the prosecution can show a sufficient attenuation of the link between police misconduct and obtaining the evidence.[42] Defendants who have been convicted after trials in which they were given a full and fair opportunity to raise claims of Fourth Amendment violations may not subsequently raise those claims on federal habeas corpus because, the Court found, the costs outweigh the minimal deterrent effect.[43]

The exclusionary rule is inapplicable in parole revocation hearings,[44] and a violation of the "knock-and-announce" rule (the procedure that police officers must follow to announce their presence before entering a residence with a lawful warrant)[45] does not require suppression of the evidence gathered pursuant to a search.[46] If an arrest or a search that was valid at the time

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[39] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

[40] *E.g.*, Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Padilla, 508 U.S. 77 (1993) (only persons whose privacy or property interests are violated may object to a search on Fourth Amendment grounds; exerting control and oversight over property by virtue of participation in a criminal conspiracy does not alone establish such interests); United States v. Salvucci, 448 U.S. 83 (1980); Rawlings v. Kentucky, 448 U.S. 98 (1980). In *United States v. Payner,* 447 U.S. 727 (1980), the Court held it impermissible for a federal court to exercise its supervisory power to police the administration of justice in the federal system to suppress otherwise admissible evidence on the ground that federal agents had flagrantly violated the Fourth Amendment rights of third parties in order to obtain evidence to use against others when the agents knew that the defendant would be unable to challenge their conduct under the Fourth Amendment.

[41] United States v. Havens, 446 U.S. 620 (1980); Walder v. United States, 347 U.S. 62 (1954). *Cf.* Agnello v. United States, 269 U.S. 20 (1925) (now vitiated by *Havens*). The impeachment exception applies only to the defendant's own testimony, and may not be extended to use illegally obtained evidence to impeach the testimony of other defense witnesses. James v. Illinois, 493 U.S. 307 (1990).

[42] *Wong Sun v. United States,* 371 U.S. 471, 487–88 (1963); *Alderman v. United States,* 394 U.S. 165, 180–85 (1969); *Brown v. Illinois,* 422 U.S. 590 (1975); *Taylor v. Alabama,* 457 U.S. 687 (1982); *Utah v. Strieff,* 136 S. Ct. 2056 (2016). *United States v. Ceccolini,* 435 U.S. 268 (1978), refused to exclude the testimony of a witness discovered through an illegal search. Because a witness was freely willing to testify and therefore more likely to come forward, the application of the exclusionary rule was not to be tested by the standard applied to exclusion of inanimate objects. Deterrence would be little served and relevant and material evidence would be lost to the prosecution. In *New York v. Harris,* 495 U.S. 14 (1990), the Court refused to exclude a station-house confession made by a suspect whose arrest at his home had violated the Fourth Amendment because, even though probable cause had existed, no warrant had been obtained. And, in *Segura v. United States,* 468 U.S. 796 (1984), evidence seized pursuant to a warrant obtained after an illegal entry was admitted because there had been an independent basis for issuance of the warrant. This rule also applies to evidence observed in plain view during the initial illegal search. Murray v. United States, 487 U.S. 533 (1988). *See also* United States v. Karo, 468 U.S. 705 (1984) (excluding consideration of tainted evidence, there was sufficient untainted evidence in affidavit to justify finding of probable cause and issuance of search warrant).

[43] Stone v. Powell, 428 U.S. 465, 494 (1976).

[44] Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357 (1998).

[45] The "knock and announce" requirement is codified at 18 U.S.C. § 3109, and the Court has held that the rule is also part of the Fourth Amendment reasonableness inquiry. Wilson v. Arkansas, 514 U.S. 927 (1995).

[46] Hudson v. Michigan, 547 U.S. 586 (2006). Writing for the majority, Justice Antonin Scalia explained that the exclusionary rule was inappropriate because the purpose of the knock-and-announce requirement was to protect human life, property, and the homeowner's privacy and dignity; the requirement has never protected an individual's interest in preventing seizure of evidence described in a warrant. *Id.* at 594. Furthermore, the Court believed that the "substantial social costs" of applying the exclusionary rule would outweigh the benefits of deterring knock-and-announce violations by applying it. *Id.* The Court also reasoned that other means of deterrence, such as civil remedies, were available and effective, and that police forces have become increasingly professional and

it took place becomes bad through the subsequent invalidation of the statute under which the arrest or search was made, the Court has held that evidence obtained thereby is nonetheless admissible.[47] In other cases, a grand jury witness was required to answer questions even though the questions were based on evidence obtained from an unlawful search and seizure,[48] and federal tax authorities were permitted in a civil proceeding to use evidence that had been unconstitutionally seized from a defendant by state authorities.[49]

A significant curtailment of the exclusionary rule came in 1984 with the adoption of a "good faith" exception. In *United States v. Leon*,[50] the Court created an exception for evidence obtained as a result of officers' objective, good-faith reliance on a warrant, later found to be defective, issued by a detached and neutral magistrate. Justice Byron White's opinion for the Court could find little benefit in applying the exclusionary rule where there has been good-faith reliance on an invalid warrant. Thus, there was nothing to offset the "substantial social costs exacted by the [rule]."[51] "The exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates," and in any event the Court considered it unlikely that the rule could have much deterrent effect on the actions of truly neutral magistrates.[52] Moreover, the Court thought that the rule should not be applied "to deter objectively reasonable law enforcement activity," and that "[p]enalizing the officer for the magistrate's error . . . cannot logically contribute to the deterrence of Fourth Amendment violations."[53] The Court also suggested some circumstances in which courts would be unable to find that officers' reliance on a warrant was objectively reasonable: if the officers have been "dishonest or reckless in preparing their affidavit," if it should have been obvious that the magistrate had "wholly abandoned" his neutral role, or if the warrant was obviously deficient on its face (for example, lacking in particularity).

The Court applied the *Leon* standard in *Massachusetts v. Sheppard*,[54] holding that an officer possessed an objectively reasonable belief that he had a valid warrant after he had pointed out to the magistrate that he had not used the standard form, and the magistrate had indicated that the necessary changes had been incorporated in the issued warrant. Then, the Court then extended *Leon* to hold that the exclusionary rule is inapplicable to evidence obtained by an officer acting in objectively reasonable reliance on a statute later held to violate

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respectful of constitutional rights in the past half-century. *Id.* at 599. Justice Kennedy wrote a concurring opinion emphasizing that "the continued operation of the exclusionary rule . . . is not in doubt." *Id.* at 603. In dissent, Justice Stephen Breyer asserted that the majority's decision "weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection." *Id.* at 605.

[47] Michigan v. DeFillippo, 443 U.S. 31 (1979) (statute creating substantive criminal offense). Statutes that authorize unconstitutional searches and seizures but which have not yet been voided at the time of the search or seizure may not create this effect, however, Torres v. Puerto Rico, 442 U.S. 465 (1979); Ybarra v. Illinois, 444 U.S. 85 (1979). This aspect of *Torres* and *Ybarra* was to a large degree nullified by *Illinois v. Krull,* 480 U.S. 340 (1987), rejecting a distinction between substantive and procedural statutes and holding the exclusionary rule inapplicable in the case of a police officer's objectively reasonable reliance on a statute later held to violate the Fourth Amendment. Similarly, the exclusionary rule does not require suppression of evidence that was seized incident to an arrest that was the result of a clerical error by a court clerk. Arizona v. Evans, 514 U.S. 1 (1995).

[48] United States v. Calandra, 414 U.S. 338 (1974).

[49] United States v. Janis, 428 U.S. 433 (1976). Similarly, the rule is inapplicable in civil proceedings for deportation of aliens. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

[50] 468 U.S. 897 (1984). The same objectively reasonable "good-faith" rule now applies in determining whether officers obtaining warrants are entitled to qualified immunity from suit. Malley v. Briggs, 475 U.S. 335 (1986).

[51] 468 U.S. at 907.

[52] 468 U.S. at 916–17.

[53] 468 U.S. at 919, 921.

[54] 468 U.S. 981 (1984).

the Fourth Amendment.[55] Justice Harry Blackmun's opinion for the Court reasoned that application of the exclusionary rule in such circumstances would have no more deterrent effect on officers than it would when officers reasonably rely on an invalid warrant, and no more deterrent effect on legislators who enact invalid statutes than on magistrates who issue invalid warrants.[56] Finally, the Court has held that the exclusionary rule does not apply if the police conduct a search in objectively reasonable reliance on binding judicial precedent, even a defendant successfully challenges that precedent.[57]

The Court also applied *Leon* to allow the admission of evidence obtained incident to an arrest that was based on a mistaken belief that there was probable cause to arrest, where the mistaken belief had resulted from a negligent bookkeeping error by a police employee other than the arresting officer. In *Herring v. United States*,[58] a police employee had failed to remove from the police computer database an arrest warrant that had been recalled five months earlier, and the arresting officer as a consequence mistakenly believed that the arrest warrant remained in effect. The Court upheld the admission of evidence because the error had been "the result of isolated negligence attenuated from the arrest."[59] Although the Court did "not suggest that all recordkeeping errors by the police are immune from the exclusionary rule," it emphasized that, "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[60]

Herring is significant because previous cases applying the good-faith exception to the exclusionary rule have involved principally Fourth Amendment violations not by the police, but by other governmental entities, such as the judiciary or the legislature. Although the error in *Herring* was committed by a police employee other than the arresting officer, the introduction of a balancing test to evaluate police conduct raises the possibility that even

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[55] Illinois v. Krull, 480 U.S. 340 (1987). The same difficult-to-establish qualifications apply: there can be no objectively reasonable reliance "if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws," or if "a reasonable officer should have known that the statute was unconstitutional." *Id.* at 355.

[56] Dissenting Justice Sandra Day O'Connor disagreed with this second conclusion, suggesting that the grace period "during which the police may freely perform unreasonable searches . . . creates a positive incentive [for legislatures] to promulgate unconstitutional laws," and that the Court's ruling "destroys all incentive on the part of individual criminal defendants to litigate the violation of their Fourth Amendment rights" and thereby obtain a ruling on the validity of the statute. 480 U.S. at 366, 369.

[57] Davis v. United States, 564 U.S. 229 (2011). Justice Stephen Breyer, in dissent, points out that under *Griffith v. Kentucky,* 479 U.S. 314 (1987), "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . . ." Thus, the majority opinion in *Davis* would allow the incongruous result that a defendant could prove his Fourth Amendment rights had been violated, but could still be left without a viable remedy. *Id.* at 253 (Breyer, J., dissenting).

[58] 555 U.S. 135 (2009), *Herring* was a 5-4 decision, with two dissenting opinions.

[59] 129 S. Ct. at 698.

[60] 129 S. Ct. at 703, 702. Justice Ruth Bader Ginsburg, in a dissent joined by Justices John Paul Stevens, David Souter, and Stephen Breyer, stated that "the Court's opinion underestimates the need for a forceful exclusionary rule and the gravity of recordkeeping errors in law enforcement." *Id.* at 706. Justice Ginsburg added that the majority's suggestion that the exclusionary rule "is capable of only marginal deterrence when the misconduct at issue is merely careless, not intentional or reckless . . . runs counter to a foundational premise of tort law—that liability for negligence, i.e., lack of due care, creates an incentive to act with greater care." *Id.* at 708. Justice Breyer, in a dissent joined by Justice Souter, noted that, although the Court had previously held that recordkeeping errors made by a court clerk do not trigger the exclusionary rule, Arizona v. Evans, 514 U.S. 1 (1995), he believed that recordkeeping errors made by the police should trigger the rule, as the majority's "case-by-case, multifactored inquiry into the degree of police culpability" would be difficult for the courts to administer. *Id.* at 711.

Fourth Amendment violations caused by the negligent actions of an arresting officer might in the future evade the application of the exclusionary rule.[61]

For instance, it is unclear from the Court's analysis in *Leon* and its progeny whether a majority of the Justices would also support a good-faith exception for evidence seized without a warrant, although there is some language broad enough to apply to warrantless seizures.[62] It is also unclear what a good-faith exception would mean in the context of a warrantless search, because the objective reasonableness of an officer's action in proceeding without a warrant is already taken into account in determining whether there has been a Fourth Amendment violation.[63] The Court's increasing willingness to uphold warrantless searches as not "unreasonable" under the Fourth Amendment, however, may reduce the frequency with which the good-faith issue arises in the context of the exclusionary rule.[64]

Amdt4.7.3 Standing to Suppress Illegal Evidence

Fourth Amendment:

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

The Court for a long period followed a rule of "standing" by which it determined whether a party was the appropriate person to move to suppress allegedly illegal evidence. Akin to Article III justiciability principles, which emphasize that one may ordinarily contest only those government actions that harm him, the standing principle in Fourth Amendment cases "require[d] of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."[1] Subsequently, the Court departed from the concept of standing to telescope the inquiry into one inquiry rather than two. Finding that standing served no useful analytical purpose, the Court has held that the issue of exclusion is to be determined solely upon a resolution of the substantive question whether the claimant's

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[61] *See* United States v. Leon, 468 U.S. 897, 926 (1984) (articulating, in dicta, an "intentional or reckless" misconduct standard for obviating "good faith" reliance on an invalid warrant).

[62] The thrust of the analysis in *Leon* was with the reasonableness of reliance on a warrant. The Court several times, however, used language broad enough to apply to warrantless searches as well. *See, e.g.*, 468 U.S. at 909 (quoting Justice Byron White's concurrence in *Illinois v. Gates*): "the balancing approach that has evolved . . . 'forcefully suggest[s] that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment'"; and *id.* at 919: "[the rule] cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity."

[63] *See* Yale Kamisar, *Gates, 'Probable Cause', 'Good Faith', and Beyond*, 69 IOWA L. REV. 551, 589 (1984) (imposition of a good-faith exception on top of the "already diluted" standard for validity of a warrant "would amount to double dilution").

[64] *See, e.g.*, Illinois v. Rodriguez, 497 U.S. 177 (1990) (upholding search premised on officer's reasonable but mistaken belief that a third party had common authority over premises and could consent to search); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (no requirement of knowing and intelligent waiver in consenting to warrantless search); New York v. Belton, 453 U.S. 454 (1981) (upholding warrantless search of entire interior of passenger car, including closed containers, as incident to arrest of driver); Arizona v. Gant, 556 U.S. 332, 351 (2009) (the *Belton* rule applies "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that the vehicle contains evidence of the offense of arrest"); United States v. Ross, 456 U.S. 798 (1982) (upholding warrantless search of movable container found in a locked car trunk).

[1] Jones v. United States, 362 U.S. 257, 261 (1960). That is, the movant must show that he was "a victim of search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of search or seizure directed at someone else." *Id. See* Alderman v. United States, 394 U.S. 165, 174 (1969).

Fourth Amendment rights have been violated. "We can think of no decided cases of this Court that would have come out differently had we concluded . . . that the type of standing requirement . . . reaffirmed today is more properly subsumed under substantive Fourth Amendment doctrine. Rigorous application of the principle that the rights secured by this Amendment are personal, in place of a notion of 'standing,' will produce no additional situations in which evidence must be excluded. The inquiry under either approach is the same."[2] One must therefore show that "the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect."[3] The Court has clarified that this "concept of standing in Fourth Amendment cases . . . should not be confused with Article III standing," emphasizing that "Fourth Amendment standing is subsumed under substantive Fourth Amendment doctrine" and is not a preliminary "jurisdictional question."[4]

The *Katz* reasonable-expectation-of-privacy inquiry largely supplanted property-ownership concepts that previously might have supported either standing to suppress or the establishment of an interest that has been invaded—but has not entirely replaced or "repudiate[d]" the Fourth Amendment's "concern for government trespass."[5] In the 1960 case *Jones v. United States*, the Supreme Court held that a person could establish standing to challenge a search or seizure where that person was "legitimately on [the] premises" as a guest or invitee of the owner of the premises.[6] This statement about legitimate presence was later limited by the Court in *Rakas v. Illinois*,[7] which emphasized that to challenge a search, a person must assert a *personal* interest protected by the Fourth Amendment.[8] And while prior case law had seemed to suggest that ownership of a seized item would alone suffice to establish standing, the Court clarified in *Rakas* that under *Katz*, "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."[9] Under the

[2] Rakas v. Illinois, 439 U.S. 128, 139 (1978).

[3] 439 U.S. at 140.

[4] Byrd v. United States, 138 S. Ct. 1518, 1530 (2018).

[5] United States v. Jones, 565 U.S. 400, 406–07 (2012) ("[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas . . . it enumerates. *Katz* did not repudiate that understanding."). *See also* Grady v. North Carolina, 135 S. Ct. 1368, 1370 (2015) (per curiam); Florida v. Jardines, 569 U.S. 1, 5–6 (2013).

[6] 362 U.S. 257, 266–67 (1960). *See also* United States v. Jeffers, 342 U.S. 48, 51–53 (1951) (allowing defendant with access to a hotel room to challenge the seizure of narcotics that were his property, concluding that the search and the seizure were "incapable of being untied").

[7] 439 U.S. 128, 143 (1978) ("[T]he *Jones* statement that a person need only be 'legitimately on premises' in order to challenge the validity of the search of a dwelling place cannot be taken in its full sweep beyond the facts of that case."). In *Jones*, the Court had also held that a person had standing "where the indictment itself charges possession." 362 U.S. at 264. But in *Simmons v. United States,* 390 U.S. 377, 390 (1968), the Court held "that testimony given by a defendant" to establish possession of things searched or seized and meet standing requirements is not "admissible against him at trial on the question of guilt or innocence." The Court recognized that *Simmons* (among other legal developments) had undermined the justification for "automatic standing" on the basis of an indictment and overruled this part of *Jones* in *United States v. Salvucci,* 448 U.S. 83, 88–89 (1980).

[8] *See Rakas*, 439 U.S. at 136 ("A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed.") (citing Alderman v. United States, 394 U.S. 165, 171–72 (1969)). *See, e.g.*, *id.* at 143 (holding that defendants' "claims must fail" where, even though the defendants were in a car with the permission of the car's owner, "[t]hey asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized"). In *Rakas*, the Court distinguished *United States v. Jeffers,* 342 U.S. 48 (1951), by holding that "[s]tanding in *Jeffers* was based on Jeffers' possessory interest in both the premises searched and the property seized." 439 U.S. at 136.

[9] *Rakas*, 439 U.S. at 143. *See also* United States v. Salvucci, 448 U.S. 83, 92 (1980) ("We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched."); *see, e.g.*, Rawlings v. Kentucky, 448 U.S. 98, 105–06 (1980) (holding defendant could

reasonable-expectations-of-privacy test, a person may "have a legally sufficient interest" to implicate the protections of the Fourth Amendment even if that interest "might not have been a recognized property interest at common law."[10] Nonetheless, a "property" or "possessory interest" in the premises searched remains relevant to the inquiry.[11]

Amdt4.7.4 Good Faith Exception to Exclusionary Rule

Fourth Amendment:

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

Another significant curtailment of the exclusionary rule involves the attenuation exception, which permits the use of evidence discovered through the government's unconstitutional conduct if the "causal link" between that misconduct and the discovery of the evidence is seen by the reviewing courts as sufficiently remote or has been interrupted by some intervening circumstances.[1] In a series of decisions issued over several decades, the Court has invoked this exception in upholding the admission of challenged evidence. For example, in *Wong Sun v. United States*, the Court upheld the admission of an unsigned statement made by a defendant who initially had been unlawfully arrested because, thereafter, the defendant was lawfully arraigned, released on his own recognizance, and, only then, voluntarily returned several days later to make the unsigned statement.[2] Similarly, in its 1984 decision in *Segura v. United States*, the Court upheld the admission of evidence obtained following an illegal entry into a residence because the evidence was seized the next day pursuant to a valid search warrant that had been issued based on information obtained by law enforcement before the illegal entry.[3]

More recently, in its 2016 decision in *Utah v. Strieff*, the Court rejected a challenge to the admission of certain evidence obtained as the result of an unlawful stop on the grounds that the discovery of an arrest warrant after the stop attenuated the connection between the unlawful stop and the evidence seized incident to the defendant's arrest.[4] As a threshold matter, the Court rejected the state court's view that the attenuation exception applies only in cases involving "an independent act of a defendant's 'free will.'"[5] Instead, the Court relied on

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not challenge seizure of his drugs from another's purse, where the defendant had no legitimate expectation of privacy in the purse). In *Rakas*, the Court distinguished United States v. Jones, 362 U.S. 257 (1960), by stating that in that case, "Jones not only had permission to use the apartment of his friend, but had a key to the apartment . . . . [and] [e]xcept with respect to his friend, Jones had complete dominion and control over the apartment and could exclude others from it," 439 U.S. at 149. *Cf.* Florida v. Jardines, 569 U.S. 1, 5 (2013) ("When 'the Government obtains information by physically intruding' on persons, houses, *papers*, or *effects*, 'a "search"' within the original meaning of the Fourth Amendment has 'undoubtedly occurred.'" (quoting United States v. Jones, 565 U.S. 400, 406 n.3 (2012)) (emphasis added)).

[10] *Rakas*, 439 U.S. at 143.

[11] *Id.* at 148. *See also*, *e.g.*, United States v. Padilla, 508 U.S. 77, 82 (1993) (per curiam) ("Expectations of privacy and property interests govern the analysis of Fourth Amendment search and seizure claims.").

[1] Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016).

[2] 371 U.S. 471, 491 (1963).

[3] 468 U.S. 796, 813–16 (1984).

[4] *Strieff*, 136 S. Ct. at 2059. The state in *Strieff* had conceded that law enforcement lacked reasonable suspicion for the stop, *id.* at 2060, and the Supreme Court characterized the search of the defendant following his arrest as a lawful search incident to arrest, *id.* at 2063.

[5] *Id.* at 2061 (quoting State v. Strieff, 457 P.3d 532, 544 (Utah 2015)).

three factors it had set forth in a Fifth Amendment case, *Brown v. Illinois*,[6] to determine whether the subsequent lawful acquisition of evidence was sufficiently attenuated from the initial misconduct: (1) the "temporal proximity" between the two acts; (2) the presences of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.[7] On the whole, the *Strieff* Court, reiterating that suppression of evidence should be the courts' "last resort, not our first impulse,"[8] concluded that the circumstances of the case weighed in favor of the admission of the challenged evidence. While the closeness in time between the initial stop and the search was seen by the Court as favoring suppression,[9] the presence of intervening circumstances in the form of a valid warrant for the defendant's arrest strongly favored the state,[10] and in the Court's view, there was no indication that this unlawful stop was part of any "systematic or recurrent police misconduct."[11] In particular, the Court, relying on the second factor, emphasized that the discovery of a warrant "broke the causal chain" between the unlawful stop and the discovery of the challenged evidence.[12] As such, the *Strieff* Court appeared to establish a rule that the existence of a valid warrant, "predat[ing the] investigation" and "entirely unconnected with the stop," generally favors finding sufficient attenuation between the unlawful conduct and the discovery of evidence.[13]

[6] *See* 422 U.S. 590, 603–04 (1975) (holding that the state supreme court in this case had erroneously concluded that *Miranda* warnings always served to purge the taint of an illegal arrest).

[7] *See Strieff*, 136 S. Ct. at 2062–64.

[8] *Id.* at 2061 (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006) (internal quotations omitted)).

[9] *Id.* at 2062 (noting that "only minutes" passed between the unlawful stop and the discovery of the challenged evidence).

[10] *Id.* at 2062–63. The *Strieff* Court emphasized that it viewed the warrant as "compelling" the officer to arrest the suspect. *Id.* at 2063; *see also id.* at 2062 (similar).

[11] *Id.* at 2063.

[12] *Id.* at 2063.

[13] *Id.* at 2062.

FIFTH AMENDMENT
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FIFTH AMENDMENT—RIGHTS OF PERSONS

Amdt5.1 Overview of Fifth Amendment, Rights of Persons

The Fifth Amendment protects individuals by preventing the government from abusing its prosecutorial powers. For instance, the Fifth Amendment, provides a check on government prosecutions by requiring "presentment or indictment of a Grand Jury" for a "capital, or otherwise infamous crime."[1] Likewise, the Fifth Amendment's Double Jeopardy Clause prevents the government from re-prosecuting a person for a crime for which he or she has been acquitted. The Fifth Amendment prohibition against requiring a person in a criminal case to testify against him- or herself secured a common law privilege that one commentator saw as preventing use of the "rack or torture in order to procure a confession of guilt,"[2] while the Fifth Amendment's Due Process Clause—"nor be deprived of life, liberty, or property, without due process of law"[3] —provided for "the right of trial according to the process and proceedings of the common law."[4] In interpreting the Due Process Clause, the Supreme Court has recognized that the Fifth Amendment guarantees procedural and substantive due process. The Fifth Amendment's guarantee of procedural due process often requires the federal government to provide notice and a hearing before depriving a person of a protected life, liberty, or property interest, while substantive due process generally protects certain fundamental constitutional rights from federal government interference in specific subject areas such as liberty of contract, marriage, or privacy. Finally, the Takings Clause of the Fifth Amendment requires that the government pay "just compensation" to owners of private property that the government takes for public use.

Amdt5.2 Grand Jury Clause

Amdt5.2.1 Historical Background on Grand Jury Clause

Fifth Amendment:

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

The history of the grand jury is rooted in the common and civil law, extending back to Athens, pre-Norman England, and the Assize of Clarendon promulgated by Henry II.[1] The right seems to have been first mentioned in the colonies in the Charter of Liberties and Privileges of 1683, which was passed by the first assembly permitted to be elected in the colony of New York.[2] Included from the first in James Madison's introduced draft of the Bill of Rights, the provision elicited no recorded debate and no opposition. "The grand jury is an English

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[1] U.S. Const. amend. V.

[2] 3 Joseph Story, Commentaries on the Constitution of the United States § 1788 (1833).

[3] U.S. Const. amend. V.

[4] 3 Story, *supra* note 2, at § 1789.

[1] Wayne L. Morse, *A Survey of the Grand Jury System*, 10 Ore. L. Rev. 101 (1931).

[2] 1 Bernard Schwartz, The Bill of Rights: A Documentary History 162, 166 (1971). The provision read: "That in all Cases Capital or Criminal there shall be a grand Inquest who shall first present the offence. . . ."

institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor."[3]

Amdt5.2.2 Grand Jury Clause Doctrine and Practice

Fifth Amendment:

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

The prescribed constitutional function of grand juries in federal courts[1] is to return criminal indictments. But grand juries serve a considerably broader series of purposes as well. Principal among these is the investigative function, which grand juries serve by summoning witnesses, compelling testimony, and gathering evidence. Operating in secret, under the direction but not control of a prosecutor, grand juries may examine witnesses in the absence of their counsel.[2] The exclusionary rule is inapplicable in grand jury proceedings, with the result

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[3] Costello v. United States, 350 U.S. 359, 362 (1956). "The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law. The Framers, most of them trained in the English law and traditions, accepted the grand jury as a basic guarantee of individual liberty; notwithstanding periodic criticism, much of which is superficial, overlooking relevant history, the grand jury continues to function as a barrier to reckless or unfounded charges . . . . Its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance." United States v. Mandujano, 425 U.S. 564, 571 (1976) (plurality opinion). *See id.* at 589–91 (Brennan, J., concurring).

[1] This provision applies only in federal courts and is not applicable to the states, either as an element of due process or as a direct command of the Fourteenth Amendment. Hurtado v. California, 110 U.S. 516 (1884); Palko v. Connecticut, 302 U.S. 319, 323 (1937); Alexander v. Louisiana, 405 U.S. 625, 633 (1972).

[2] Witnesses are not entitled to have counsel present in the room. Fed. R. Civ. P. 6(d). The validity of this restriction was asserted in dictum in *In re Groban*, 352 U.S. 330, 333 (1957), and inferentially accepted by the dissent in that case. *In re Groban*, 352 U.S. at 346–47 (Black, J., distinguishing grand juries from the investigative entity before the Court). The decision in *Coleman v. Alabama*, 399 U.S. 1 (1970), deeming the preliminary hearing a "critical stage of the prosecution" at which counsel must be provided, called this rule in question, inasmuch as the preliminary hearing and the grand jury both determine whether there is probable cause with regard to a suspect. *See Coleman*, 399 U.S. at 25 (Burger, C.J., dissenting). In *United States v. Groban*, 352 U.S. 330, 333 (1957), and inferentially accepted by the dissent in that case. *In re Groban*, 352 U.S. at 346–47 (Justice Black, distinguishing grand juries from the investigative entity before the Court). The decision in *Coleman v. Alabama*, 399 U.S. 1 (1970), deeming the preliminary hearing a "critical stage of the prosecution" at which counsel must be provided, called this rule in question, inasmuch as the preliminary hearing and the grand jury both determine whether there is probable cause with regard to a suspect. *See Coleman*, 399 U.S. at 25 (Burger, C.J., dissenting). In *United States v. Mandujano*, 425 U.S. 564, 581 (1976) (plurality

that a witness called before a grand jury may be questioned on the basis of knowledge obtained through illegally seized evidence.[3] Similarly, grand jury witnesses are not entitled to be informed that they may be indicted for the offense under inquiry.[4] While some constitutional guarantees that apply in other settings are thus inapplicable in grand jury proceedings, other guarantees do apply in such proceedings. For example, a grand jury may not compel a person to produce books and papers that would incriminate him or her.[5] Besides indictments, grand juries may also issue reports that may indicate nonindictable misbehavior, mis- or malfeasance of public officers, or other objectionable conduct.[6] Despite the vast power of grand juries, there is little in the way of judicial or legislative response designed to impose some supervisory restrictions on them.[7]

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opinion), Chief Justice Warren Burger wrote: "Respondent was also informed that if he desired he could have the assistance of counsel, but that counsel could not be inside the grand jury room. That statement was plainly a correct recital of the law. No criminal proceedings had been instituted against respondent, hence the Sixth Amendment right to counsel had not come into play." By emphasizing the point of institution of criminal proceedings, relevant to the right of counsel at line-ups and the like, the Chief Justice not only reasserted the absence of a right to counsel in the room but also, despite his having referred to it, cast doubt upon the existence of any constitutional requirement that a grand jury witness be permitted to consult with counsel out of the room, and, further, raised the implication that a witness or putative defendant unable to afford counsel would have no right to appointed counsel. Concurring, Justice William Brennan argued that access to counsel was essential and constitutionally required for the protection of constitutional rights; Brennan accepted the likelihood, without agreeing, that consultation outside the room would be adequate to preserve a witness's rights, *Mandujano*, 425 U.S. at 602–09 (with Justice Thurgood Marshall). Justices Potter Stewart and Harry Blackmun reserved judgment. *Id.* at 609.

[3] United States v. Calandra, 414 U.S. 338 (1974). The Court has interpreted a provision of federal wiretap law, 18 U.S.C. § 2515, to prohibit use of unlawful wiretap information as a basis for questioning witnesses before grand juries. Gelbard v. United States, 408 U.S. 41 (1972).

[4] United States v. Washington, 431 U.S. 181 (1977). Because defendant when he appeared before the grand jury was warned of his rights to decline to answer questions on the basis of self-incrimination, the decision was framed in terms of those warnings, but the Court twice noted that it had not decided, and was not deciding, "whether any Fifth Amendment warnings whatever are constitutionally required for grand jury witnesses . . . ." *Id.* at 186.

[5] In *Hale v. Henkel*, the Supreme Court observed: "Of course, the grand jury's subpoena power is not unlimited. It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law . . . Although, for example, an indictment based on evidence obtained in violation of a defendant's Fifth Amendment privilege is nevertheless valid, the grand jury may not force a witness to answer questions in violation of that constitutional guarantee. . . . Similarly, a grand jury may not compel a person to produce books and papers that would incriminate him. The grand jury is also without power to invade a legitimate privacy interest protected by the Fourth Amendment. A grand jury's subpoena *duces tecum* will be disallowed if it is 'far too sweeping in its terms to be regarded as reasonable' under the Fourth Amendment." Hale v. Henkel, 201 U.S. 43, 76 (1906). "Judicial supervision is properly exercised in such cases to prevent the wrong before it occurs." United States v. Calandra, 414 U.S. 338, 346 (1974). *See also* United States v. Dionisio, 410 U.S. 1, 11–12 (1973). Grand juries must operate within the limits of the First Amendment and may not harass the exercise of speech and press rights. Branzburg v. Hayes, 408 U.S. 665, 707–08 (1972). Protection of Fourth Amendment interests is as extensive before the grand jury as before any investigative officers, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); *Hale*, 201 U.S. at 76–77, but not more so either. United States v. Dionisio, 410 U.S. 1 (1973) (subpoena to give voice exemplars); United States v. Mara, 410 U.S. 19 (1973) (handwriting exemplars). The Fifth Amendment's Self-Incrimination Clause must be respected. Blau v. United States, 340 U.S. 159 (1950); Hoffman v. United States, 341 U.S. 479 (1951). On common-law privileges, *see* Blau v. United States, 340 U.S. 332 (1951) (husband-wife privilege); Alexander v. United States, 138 U.S. 353 (1891) (attorney-client privilege). The traditional secrecy of grand jury proceedings has been relaxed a degree to permit a limited discovery of testimony. *Compare* Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959), *with* Dennis v. United States, 384 U.S. 855 (1966). *See* Fed. R. Crim. P. 6(e) (secrecy requirements and exceptions).

[6] The grand jury "is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime." Blair v. United States, 250 U.S. 273, 281 (1919). On the reports function of the grand jury, see *In re* Grand Jury January, 1969, 315 F. Supp. 662 (D. Md. 1970), and Report of the January 1970 Grand Jury (Black Panther Shooting) (N.D. Ill., released May 15, 1970). Congress has now specifically authorized issuance of reports in cases concerning public officers and organized crime. 18 U.S.C. § 333.

[7] Congress has required that in the selection of federal grand juries, as well as petit juries, random selection of a fair cross section of the community is to take place, and has provided a procedure for challenging discriminatory selection by moving to dismiss the indictment. 28 U.S.C. §§ 1861–68. Racial discrimination in selection of juries is constitutionally proscribed in both state and federal courts.

Amdt5.2.2
Grand Jury Clause Doctrine and Practice

By its terms, the Grand Jury Clause applies only to "capital" or "otherwise infamous" crimes. Whether a crime qualifies as "infamous" depends on the quality of the associated punishment.[8] The Supreme Court has held that the prospect of imprisonment in a state prison or penitentiary[9] or hard labor at a non-penitentiary workhouse[10] are sufficient to render a crime "infamous" within the meaning of the Grand Jury Clause. By contrast, the Court has held that conduct punishable by a fine of not more than $1,000 or imprisonment for not more than six months can be tried without indictment.[11] In analyzing whether a crime is "infamous," the pivotal question is whether the offense is one for which the court is authorized to award such punishment; the sentence actually imposed is immaterial.[12]

A person can be tried only upon the indictment as found by the grand jury—in particular, upon the language in the charging part of the instrument.[13] A change in the indictment that does not narrow its scope deprives the court of the power to try the accused.[14] Although additions to offenses alleged in an indictment are prohibited, the Supreme Court has ruled that it is permissible "to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it," as, for example, a lesser included offense.[15]

Because there is no constitutional requirement that an indictment be presented by a grand jury as a body, an indictment delivered by the foreman in the absence of other grand jurors is valid.[16] If valid on its face, an indictment returned by a legally constituted, non-biased grand jury satisfies the requirement of the Fifth Amendment and is enough to call for a trial on the merits; such an indictment is not open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury.[17]

Amdt5.2.3 Military Exception to Grand Jury Clause

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be*

[8] *Ex parte* Wilson, 114 U.S. 417 (1885).

[9] Mackin v. United States, 117 U.S. 348, 352 (1886).

[10] United States v. Moreland, 258 U.S. 433 (1922).

[11] Duke v. United States, 301 U.S. 492 (1937).

[12] *Ex parte Wilson*, 114 U.S. at 426.

[13] *See* Stirone v. United States, 361 U.S. 212 (1960), which held that a variation between pleading and proof deprived petitioner of his right to be tried only upon charges presented in the indictment.

[14] *Ex parte* Bain, 121 U.S. 1, 12 (1887). In *United States v. Cotton*, the Supreme Court overruled *Ex parte Bain* in *United States v. Miller*, 471 U.S. 130 (1985), to the extent that it held that a narrowing of an indictment is impermissible. The Court also overruled *Ex parte Bain* to the extent that it held that a defective indictment was not just substantive error, but that it deprived a court of subject-matter jurisdiction over a case. United States v. Cotton, 535 U.S. 625 (2002). While a defendant's failure to challenge an error of substantive law at trial level may result in waiver of such issue for purpose of appeal, challenges to subject-matter jurisdiction may be made at any time. Thus, where a defendant failed to assert his right to a non-defective grand jury indictment, appellate review of the matter would limited to a "plain error" analysis. *Cotton*, 535 U.S. at 631.

[15] United States v. Miller, 471 U.S. 130, 144 (1985).

[16] Breese v. United States, 226 U.S. 1 (1912).

[17] Costello v. United States, 350 U.S. 359 (1956); Lawn v. United States, 355 U.S. 339 (1958); United States v. Blue, 384 U.S. 251 (1966). *Cf.* Gelbard v. United States, 408 U.S. 41 (1972).

compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Grand Jury Clause contains an exception for persons serving in the armed forces. All persons in the regular armed forces are subject to court martial rather than grand jury indictment or trial by jury.[1] The Supreme Court has held that the exception's limiting words—"when in actual service in time of War or public danger"—apply only to members of the militia, not to members of the regular armed forces.[2] Thus, members of the regular armed forces can be tried by court martial even when the alleged offenses are not connected to their service in the armed forces.[3]

Amdt5.3 Double Jeopardy Clause

Amdt5.3.1 Overview of Double Jeopardy Clause

Fifth Amendment:

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

The Clause speaks of being put in "jeopardy of life or limb," which as derived from the common law, generally referred to the possibility of capital punishment upon conviction, but it is now settled that the Clause protects with regard "to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute."[1] Despite the Clause's literal language, it can apply as well to sanctions that are civil in form if they clearly are applied in a manner that constitutes "punishment."[2] Ordinarily,

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[1] Johnson v. Sayre, 158 U.S. 109, 114 (1895). *See also* Lee v. Madigan, 358 U.S. 228, 232–35, 241 (1959).

[2] *Sayre*, 158 U.S. at 114.

[3] Solorio v. United States, 483 U.S. 435 (1987). The *Solorio* Court overruled *O'Callahan v. Parker*, 395 U.S. 258 (1969) in which the Court had held that offenses that are not "service connected" may not be punished under military law, but instead must be tried in the civil courts. Chief Justice William Rehnquist's opinion in *Solorio* for the Court was joined by Justices Byron White, Lewis Powell, Sandra Day O'Connor, and Antonin Scalia. Justice John Paul Stevens concurred in the judgment but thought it unnecessary to reexamine *O'Callahan*. Dissenting Justice Thurgood Marshall, joined by Justices William Brennan and Harry Blackmun, thought the service connection rule justified by the language of the Fifth Amendment's exception, based on the nature of cases (those "*arising in* the land or naval forces") rather than the status of defendants. Offenses against the laws of war, whether committed by citizens or by alien enemy belligerents, may be tried by a military commission. *Ex parte* Quirin, 317 U.S. 1, 44 (1942).

[1] *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 169 (1874). The Clause generally has no application in noncriminal proceedings. Helvering v. Mitchell, 303 U.S. 391 (1938).

[2] The Clause applies in juvenile court proceedings that are formally civil. Breed v. Jones, 421 U.S. 519 (1975). *See also* United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); United States v. Halper, 490 U.S. 435 (1989) (civil penalty under the False Claims Act constitutes punishment if it is overwhelmingly disproportionate to compensating the government for its loss, and if it can be explained only as serving retributive or deterrent purposes); Montana Dep't of Revenue v. Kurth Ranch, 511 U.S. 767 (1994) (tax on possession of illegal drugs, "to be collected only after any state or federal fines or forfeitures have been satisfied," constitutes punishment for purposes of double jeopardy). *But see* Seling v. Young, 531 U.S. 250 (2001) (a statute that has been held to be civil and not criminal in nature cannot be deemed punitive "as applied" to a single individual). The issue of whether a law is civil or punitive in nature is essentially the same for ex post facto and for double jeopardy analysis. 531 U.S. at 263.

The Clause applies in juvenile court proceedings that are formally civil. Breed v. Jones, 421 U.S. 519 (1975). *See also* United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); United States v. Halper, 490 U.S. 435 (1989) (civil penalty under the False Claims Act constitutes punishment if it is overwhelmingly disproportionate to compensating

however, civil in rem forfeiture proceedings may not be considered punitive for purposes of double jeopardy analysis,[3] and the same is true of civil commitment following expiration of a prison term.[4]

Amdt5.3.2 Historical Background on Double Jeopardy Clause

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

The concept of double jeopardy has a long history, but its development was uneven and its meaning has varied. The English view of double jeopardy, under the influence of Sir Edward Coke and William Blackstone, came gradually to mean that a defendant at trial could plead former conviction or former acquittal as a special plea in bar to defeat the prosecution.[1] In this country, the common-law rule was in some cases limited to this rule and in other cases extended to bar a new trial even though the former trial had not concluded in either an acquittal or a conviction.

The rule's elevation to fundamental status by its inclusion in several state bills of rights following the Revolution continued the differing approaches.[2] James Madison's version of the guarantee as introduced in the House of Representatives read: "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense."[3] Some Members of the House opposed this proposal on the grounds that it could be construed to prohibit a second trial after a successful appeal by a defendant. They viewed this as problematic for two reasons. First, they argued that such a rule could constitute a hazard to the public by freeing the guilty. Second, they reasoned that prohibiting re-trials after successful

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the government for its loss, and if it can be explained only as serving retributive or deterrent purposes); Montana Dep't of Revenue v. Kurth Ranch, 511 U.S. 767 (1994) (tax on possession of illegal drugs, "to be collected only after any state or federal fines or forfeitures have been satisfied," constitutes punishment for purposes of double jeopardy). *But see* Seling v. Young, 531 U.S. 250 (2001) (a statute that has been held to be civil and not criminal in nature cannot be deemed punitive "as applied" to a single individual). The issue of whether a law is civil or punitive in nature is essentially the same for ex post facto and for double jeopardy analysis. 531 U.S. at 263.

[3] United States v. Ursery, 518 U.S. 267 (1996) (forfeitures, pursuant to 19 U.S.C. § 981 and 21 U.S.C. § 881, of property used in drug and money laundering offenses, are not punitive). The Court in *Ursery* applied principles that had been set forth in *Various Items of Personal Property v. United States,* 282 U.S. 577 (1931) (forfeiture of distillery used in defrauding government of tax on spirits), and *United States v. One Assortment of 89 Firearms,* 465 U.S. 354 (1984) (forfeiture, pursuant to 18 U.S.C. § 924(d), of firearms "used or intended to be used in" firearms offenses). A two-part inquiry is followed. First, the Court inquires whether Congress intended the forfeiture proceeding to be civil or criminal. Then, if Congress intended that the proceeding be civil, the court determines whether there is nonetheless the "clearest proof" that the sanction is "so punitive" as to transform it into a criminal penalty. *89 Firearms*, 465 U.S. at 366.

[4] Kansas v. Hendricks, 521 U.S. 346, 369–70 (1997) (commitment under state's Sexually Violent Predator Act).

[1] M. Friedland, Double Jeopardy part 1 (1969); Crist v. Bretz, 437 U.S. 28, 32–36 (1978), and *id.* at 40 (Powell, J., dissenting); United States v. Wilson, 420 U.S. 332, 340 (1975).

[2] J. Sigler, Double Jeopardy: The Development of a Legal and Social Policy 21–27 (1969). The first bill of rights that expressly adopted a double jeopardy clause was the New Hampshire Constitution of 1784. "No subject shall be liable to be tried, after an acquittal, for the same crime or offence." Art. I, Sec. XCI, 4 F. Thorpe, *The Federal and State Constitution*, reprinted in H.R. Doc. No. 357, 59th Congress, 2d Sess. 2455 (1909). A more comprehensive protection was included in the Pennsylvania Declaration of Rights of 1790, which had language almost identical to the present Fifth Amendment provision. *Id.* at 3100.

[3] 1 Annals of Congress 434 (June 8, 1789).

appeals might make appellate courts less likely to reverse improper convictions.[4] Ultimately, the language barring a second trial was dropped in response to these concerns.[5]

Amdt5.3.3 Dual Sovereignty Doctrine

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Throughout most of its history, the Double Jeopardy Clause was only binding on the Federal Government. In *Palko v. Connecticut*,[1] the Supreme Court rejected an argument that the Fourteenth Amendment incorporated *all* provisions of the first eight Amendments as limitations on the states. The Court, however, enunciated a due process theory under which *some* Bill of Rights guarantees are considered so "fundamental" that they are "of the very essence of the scheme of ordered liberty" and "neither liberty nor justice would exist if they were sacrificed."[2] The Double Jeopardy Clause, like many other procedural rights of defendants, was not considered "fundamental" in *Palko*; it could be absent and fair trials could still be had. Still, a defendant's due process rights, absent double jeopardy, might be violated in the Court's view if the state "creat[ed] a hardship so acute and shocking as to be unendurable," but that was not the situation in *Palko*.[3]

In *Benton v. Maryland*, however, the Supreme Court concluded "that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage."[4] And, the Court noted, "[o]nce it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' the same constitutional standards apply against both the State and Federal Governments." Accordingly, after *Benton*, the double jeopardy limitation applies to both federal and state governments. State rules on double jeopardy, with regard to matters such as when jeopardy attaches, must be considered in light of federal standards.[5]

In a federal system, different governmental bodies[6] may have different interests to serve when defining crimes and enforcing their laws. Where different bodies have overlapping

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[4] *Id.* at 753.

[5] 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1149, 1165 (1971). In *Crist v. Bretz,* 437 U.S. 28, 40 (1978) (dissenting), Justice Lewis Powell attributed to inadvertence the broadening of the "rubric" of double jeopardy to incorporate the common law rule against dismissal of the jury prior to verdict, a question the majority passed over as being "of academic interest only." *Id.* at 34 n.10.

[1] 302 U.S. 319 (1937).

[2] *Id.* at 325, 326.

[3] *Id.* at 328.

[4] 395 U.S. 784, 795 (1969) (citation omitted).

[5] Crist v. Bretz, 437 U.S. 28, 37–38 (1978). *But see id.* at 40 (Powell, J., dissenting, joined by Burger, C.J. & Rehnquist, J.) (standard governing states should be more relaxed).

[6] *Id. See also* cases cited in Bartkus v. Illinois, 359 U.S. 121, 132 n.19 (1959); Abbate v. United States, 359 U.S. 187, 192–93 (1959).

jurisdiction, a person may engage in conduct that will violate the laws of more than one body.[7] Although the Court had long accepted in dictum the principle that prosecution by two governments of the same defendant for the same conduct would not constitute double jeopardy, it was not until *United States v. Lanza*[8] that the conviction in federal court of a person previously convicted in a state court for performing the same acts was sustained. The *Lanza* Court stated: "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."[9] The Court's reasoning came to be known as the "dual sovereignty" doctrine.

Although the Supreme Court has been asked to overrule the dual sovereignty doctrine in a number of cases, it has repeatedly declined to do so.[10] In 2019, in *Gamble v. United States*, the Court clarified that "where there are two sovereigns, there are two laws, and two 'offences.'"[11] The Court asserted that this dual sovereignty doctrine was justified by historical understandings of the Double Jeopardy Clause.[12] Observing that the Clause prohibits dual prosecution for the same "offence," the Court explained that at the time the Constitution was written, an "offence" was defined as a violation of a particular law.[13] In the Court's view, two sovereigns will have two different laws, meaning that violations of those laws will be two different offenses.[14] In *Gamble*, the Court emphasized that by 2019, the doctrine had been applied in "a chain of precedent linking dozens of cases over 170 years."[15]

In prior cases, the Supreme Court also recognized practical considerations justifying the dual sovereignty doctrine, noting that without this principle, states could "hinder[ ]" federal law enforcement by imposing more lenient sentences on defendants under state law, thereby barring federal prosecution even if the "defendants' acts impinge more seriously on a federal interest than on a state interest."[16] In *Gamble*, the Court also noted the international consequences of the doctrine, stating that if "only one sovereign may prosecute for a single act, no American court—state or federal—could prosecute conduct already tried in a foreign court."[17] If the Double Jeopardy Clause barred such U.S. prosecutions, the Court noted this could raise prudential concerns about the U.S. Government's ability to vindicate its interests in enforcing its own criminal laws, particularly if the foreign government's legal system is seen as somehow inadequate.[18]

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[7] This issue was recognized as early as in *Houston v. Moore,* 18 U.S. (5 Wheat.) 1 (1820), and the doctrine's rationale was confirmed within thirty years. Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); United States v. Marigold, 50 U.S. (9 How.) 560 (1850); Moore v. Illinois, 55 U.S. (14 How.) 13 (1853).

[8] 260 U.S. 377 (1922).

[9] *Id.* at 382. *See also* Hebert v. Louisiana, 272 U.S. 312 (1924); Screws v. United States, 325 U.S. 91, 108 (1945); Jerome v. United States, 318 U.S. 101 (1943).

[10] Gamble v. United States, No. 17-646, slip op. at 3 (U.S. June 17, 2019); *Abbate*, 359 U.S. at 195; *Bartkus*, 359 U.S. at 138. The Court has applied the dual sovereignty doctrine without expressly reconsidering and reaffirming its validity in a number of additional cases, as detailed in *Gamble*, slip op. at 6, and *Bartkus*, 359 U.S. at 129–33.

[11] *Gamble*, slip op. at 3, 4 (quoting U.S. Const. amend. V).

[12] *Id.* at 4.

[13] *Id.* at 4.

[14] *Abbate*, 359 U.S. at 195; *accord, e.g.*, United States v. Wheeler, 435 U.S. 313, 318 (1978).

[15] *Gamble*, slip op. at 8.

[16] *Abbate*, 359 U.S. at 195; *accord, e.g.*, *Wheeler*, 435 U.S. at 318.

[17] *Gamble*, slip op. at 6.

[18] *Id.*

The dual sovereignty doctrine has also been applied to permit successive prosecutions by two different states for the same conduct,[19] and to permit a federal prosecution after a conviction in an Indian tribal court for an offense stemming from the same conduct.[20] When two different governmental bodies are subject to the same sovereign, however, the Double Jeopardy Clause bars separate prosecutions by those bodies for the same offense.[21]

In *Puerto Rico v. Sanchez Valle*,[22] the Supreme Court held that the separate prosecutions of an individual by the United States and Puerto Rico for the same underlying conduct violated the Double Jeopardy Clause because the two governments are not "separate sovereigns." Even though Puerto Rico has exercised self-rule through a popularly ratified constitution since the mid-twentieth century, the Court concluded that the "original source" of Puerto Rico's authority to prosecute crimes was Congress—specifically a federal statute authorizing the people of Puerto Rico to draft their own constitution.[23] As a result, both the United States and Puerto Rico were exercising prosecutorial authority that stemmed from the same source.

More recently, the Supreme Court has emphasized the source of the authority *defining the offense*, as opposed to the body carrying out the prosecution, when determining the dual sovereignty doctrine's applicability. In *Denezpi v. United States*,[24] the Court upheld a federal prosecution that followed a Court of Indian Offenses prosecution. According to the Court, even assuming that prosecution in the Court of Indian Offenses—which was created by the federal Executive Branch and operates pursuant to the *Code of Federal Regulations*[25]—is a form of prosecution by the United States, double jeopardy does not attach so long as the United States is prosecuting an offense defined by a separate sovereign, such as a federally recognized tribe. Because the defendant in *Denezpi* was convicted of violating a tribal ordinance in the first prosecution, the Double Jeopardy Clause did not prohibit a subsequent prosecution in federal court for a federal statutory offense arising from the same conduct.[26]

Amdt5.3.4 Re-Prosecution After Mistrial

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

The common law generally provided that jeopardy attached only after a judgment of conviction or acquittal. But the constitutional rule is that jeopardy attaches much earlier, in

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[19] Heath v. Alabama, 474 U.S. 82 (1985) (defendant who crossed state line in the course of a kidnapping and murder was prosecuted for murder in both states).

[20] *E.g.*, United States v. Lara, 541 U.S. 193, 199 (2004); *Wheeler*, 435 U.S. at 329–30.

[21] *See, e.g.,* Waller v. Florida, 397 U.S. 387 (1970) (trial by municipal court precluded trial for same offense by state court); Grafton v. United States, 206 U.S. 333 (1907) (trial by military court-martial precluded subsequent trial in territorial court).

[22] 579 U.S. 59 (2016).

[23] *Id.* at 61.

[24] No. 20-7622, slip op. at 5 (U.S. June 13, 2022).

[25] *See* 25 C.F.R. §§ 11.102 *et seq*.

[26] *Denezpi*, slip op. at 16.

jury trials when the jury is sworn, and in trials before a judge without a jury, when the first evidence is presented.[1] Therefore, if after jeopardy attaches the trial is terminated for some reason, it may be that a second trial, even if the termination was erroneous, is barred.[2]

The Supreme Court has justified this rule on the grounds that a defendant has a "valued right to have his trial completed by a particular tribunal."[3] According to the Court, this right is rooted in a defendant's interest in completing the trial "once and for all" and "conclud[ing] his confrontation with society,"[4] so as to be spared the expense and ordeal of repeated trials, the anxiety and insecurity of having to live with the possibility of conviction, and the possibility that the prosecution may strengthen its case with each try as it learns more of the evidence and of the nature of the defense.[5] These reasons both inform the determination of when jeopardy attaches and the evaluation of the permissibility of retrial depending upon the reason for a trial's premature termination.

A second trial may be permitted where a mistrial is the result of "manifest necessity"[6]—for example, when the jury cannot reach a verdict[7] or circumstances plainly prevent the continuation of the trial.[8] The question of whether there is double jeopardy becomes more difficult, however, with mistrials triggered by events within the prosecutor's control, prosecutorial misconduct, or judicial error. In such cases, courts ordinarily balance the defendant's right in having the trial completed against the public interest in fair trials.[9]

Thus, when a lower court granted a mistrial because of a defective indictment, the Supreme Court held that retrial was not barred. Instead, the Court explained in *Illinois v. Somerville* that a trial judge "properly exercises his discretion" in cases in which an impartial

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[1] The rule traces back to *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). *See also* Kepner v. United States, 195 U.S. 100 (1904); Downum v. United States, 372 U.S. 734 (1963) (trial terminated just after jury sworn but before any testimony taken). In *Crist v. Bretz*, 437 U.S. 28 (1978), the Court held this standard of the attachment of jeopardy was "at the core" of the Clause and it therefore binds the states. *But see id.* at 40 (Powell, J., dissenting). An accused is not put in jeopardy by preliminary examination and discharge by the examining magistrate, Collins v. Loisel, 262 U.S. 426 (1923), by an indictment which is quashed, Taylor v. United States, 207 U.S. 120, 127 (1907), or by arraignment and pleading to the indictment. Bassing v. Cady, 208 U.S. 386, 391–92 (1908). A defendant may be tried after preliminary proceedings that present no risk of final conviction. *E.g.*, Ludwig v. Massachusetts, 427 U.S. 618, 630–32 (1976) (conviction in prior summary proceeding does not foreclose trial in a court of general jurisdiction, where defendant has absolute right to demand a trial de novo and thus set aside the first conviction); Swisher v. Brady, 438 U.S. 204 (1978) (double jeopardy not violated by procedure under which masters hear evidence and make preliminary recommendations to juvenile court judge, who may confirm, modify, or remand).

[2] *Cf.* United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963). The Supreme Court has stated: "Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." Arizona v. Washington, 434 U.S. 497, 503–05 (1978) (citations omitted).

[3] Wade v. Hunter, 336 U.S. 684, 689 (1949).

[4] United States v. Jorn, 400 U.S. 470, 486 (1971) (plurality opinion).

[5] Arizona v. Washington, 434 U.S. 497, 503–05 (1978); Crist v. Bretz, 437 U.S. 28, 35–36 (1978). *See* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 86–97.

[6] United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

[7] United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); Logan v. United States, 144 U.S. 263 (1892). *See* Renico v. Lett, 559 U.S. 766 (2010) (in a habeas review case, discussing the broad deference given to trial judge's decision to declare a mistrial because of jury deadlock). *See also*, Yeager v. United States, 557 U.S. 110, 118 (2009); Blueford v. Arkansas, 566 U.S. 599 (2012) (re-prosecution for a greater offense allowed following jury deadlock on a lesser included offense).

[8] Simmons v. United States, 142 U.S. 148 (1891) (juror's impartiality became questionable during trial); Thompson v. United States, 155 U.S. 271 (1884) (discovery during trial that one of the jurors had served on the grand jury that had indicted defendant and was therefore disqualified); Wade v. Hunter, 336 U.S. 684 (1949) (court-martial discharged because enemy advancing on site).

[9] Illinois v. Somerville, 410 U.S. 458, 463 (1973).

verdict cannot be reached or in which a verdict on conviction would have to be reversed on appeal because of an obvious error.[10] The Court stated: "If an error could make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require that the government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court."[11]

On the other hand, in *Downum v. United States*, the Court held that a re-trial was not permissible when a prosecutor knew prior to jury selection that a key witness would be unavailable but later moved for a mistrial on the basis of that unavailability.[12] Although *Downum* appeared to establish the principle that a prosecutorial or judicial error could never constitute a "manifest necessity" for terminating a trial, *Illinois v. Somerville* distinguished and limited *Downum* to situations in which the error lends itself to prosecutorial manipulation.[13]

Another kind of case arises when the prosecutor moves for mistrial because of prejudicial misconduct by the defense. In *Arizona v. Washington*,[14] defense counsel made prejudicial comments about the prosecutor's past conduct, and the prosecutor's motion for a mistrial was granted over defendant's objections. The Court ruled that retrial was not barred by double jeopardy. While the Court acknowledged that mistrial was not literally "necessary" because the trial judge could have given limiting instructions to the jury, it deferred to the trial judge's determination that defense counsel's comments had likely impaired the jury's impartiality.[15]

The Supreme Court has considered the trial judge's motivation when the trial judge has erred in exercising discretion to declare a mistrial sua sponte or a prosecutor's motion. In *Gori v. United States*,[16] the Court permitted a defendant's retrial when the trial judge had, on his own motion and with no indication of the wishes of defense counsel, declared a mistrial because he thought the prosecutor's line of questioning was intended to expose the defendant's criminal record, which would have constituted prejudicial error. Although the Court thought that the judge's action was an abuse of discretion, the Court approved retrial on the grounds that the judge had intended to benefit the defendant by his decision to declare a mistrial.[17]

The Court, however, reached the opposite conclusion in other cases. For example, in *United States v. Jorn*, the Court refused to permit retrial where the trial judge discharged the jury erroneously because he disbelieved the prosecutor's assurance that certain witnesses had been properly apprised of their constitutional rights.[18] The Court observed that the "doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option [to go to the first jury and perhaps obtain an acquittal] until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings."[19]

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[10] *Id.* at 464.

[11] *Id.*

[12] Downum v. United States, 372 U.S. 734 (1963).

[13] *Somerville*, 410 U.S. at 464–65, 468–69.

[14] 434 U.S. 497 (1978).

[15] *Id.* at 497.

[16] 367 U.S. 364 (1961). *See also* United States v. Tateo, 377 U.S. 463 (1964) (re-prosecution permitted after the setting aside of a guilty plea found to be involuntary because of coercion by the trial judge).

[17] *Id.*

[18] United States v. Jorn, 400 U.S. 470, 483 (1971).

[19] *Id.* at 485. The opinion of the Court was by a plurality of four, but two other Justices joined it after first arguing that jurisdiction was lacking to hear the government's appeal.

Later cases appear to accept *Jorn* as an example of a case where the trial judge "acts irrationally or irresponsibly."[20] But if the trial judge acts deliberately, giving prosecution and defense the opportunity to explain their positions, and according respect to defendant's interest in concluding the matter before the one jury, then he is entitled to deference. This approach perhaps rehabilitates the result if not the reasoning in *Gori* and maintains the result and much of the reasoning of *Jorn*.[21]

In *Jorn*, the Supreme Court recognized that "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by a prosecutorial or judicial error."[22] Similarly, in *United States v. Scott*, the Supreme Court noted that "Such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact."[23] In *United States v. Dinitz*,[24] the trial judge had excluded defendant's principal attorney for misbehavior and had then given defendant the option of recess while he appealed the exclusion, a mistrial, or continuation with an assistant defense counsel.

Holding that the defendant could be retried after he sought a mistrial, the Court reasoned that, although the exclusion might have been in error, it was not done in bad faith to goad the defendant into requesting a mistrial or to prejudice his prospects for acquittal.[25] The Court explained that the defendant's choice to terminate the trial and go on to a new trial should be respected. To hold otherwise would require defendants to shoulder the burden and anxiety of proceeding to a probable conviction followed by an appeal and possible re-trial.[26]

But the Court has also reserved the possibility that the defendant's motion might be necessitated by prosecutorial or judicial overreaching motivated by bad faith or undertaken to harass or prejudice, and in those cases retrial would be barred.[27] It is unclear what types of prosecutorial or judicial misconduct would constitute such overreaching.[28] But in *Oregon v. Kennedy*,[29] the Court adopted a narrow "intent" test, so that "[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." Therefore, ordinarily, a defendant who moves for or acquiesces in a mistrial is bound by his decision and may be required to stand for retrial.

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[20] Arizona v. Washington, 434 U.S. 497, 514 (1978).

[21] *Id.* at 515–16. *See also* Illinois v. Somerville, 410 U.S. 458, 462, 465–66, 469–71 (1973) (discussing *Gori* and *Jorn*).

[22] United States v. Jorn, 400 U.S. 470, 485 (1971) (plurality opinion).

[23] United States v. Scott, 437 U.S. 82, 93 (1978).

[24] 424 U.S. 600 (1976). *See also* Lee v. United States, 432 U.S. 23 (1977) (defendant's motion to dismiss because the information was improperly drawn made after opening statement and renewed at close of evidence was functional equivalent of mistrial and when granted did not bar retrial, Court emphasizing that defendant by his timing brought about foreclosure of opportunity to stay before the same trial).

[25] United States v. Dinitz, 424 U.S. 600 (1976).

[26] *Id.* at 609.

[27] *Id.* at 611.

[28] *Compare* United States v. Dinitz, 424 U.S. 600, 611 (1976), *with* United States v. Tateo, 377 U.S. 463, 468 n.3 (1964).

[29] 456 U.S. 667, 676 (1982). The Court thought a broader standard requiring an evaluation of whether acts of the prosecutor or the judge prejudiced the defendant would be unmanageable and would be counterproductive because courts would be loath to grant motions for mistrials knowing that re-prosecution would be barred. *Id.* at 676–77. The defendant had moved for mistrial after the prosecutor had asked a key witness a prejudicial question. Four Justices concurred, noting that the question did not constitute overreaching or harassment and objecting both to the Court's reaching the broader issue and to its narrowing the exception. *Id.* at 681.

Amdt5.3.5 Re-Prosecution After Conviction

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

A basic purpose of the Double Jeopardy Clause is to protect a defendant "against a second prosecution for the same offense after conviction."[1] It is "settled" that "no man can be twice lawfully punished for the same offense."[2] The defendant's interest in finality, which informs much of double jeopardy jurisprudence, is quite attenuated following conviction, and he will most likely appeal, whereas the prosecution will ordinarily be content with its judgment.[3] Double jeopardy issues involving re-prosecution ordinarily arise, therefore, only in the context of successful defense appeals and controversies over punishment.

Generally, a defendant who is successful in having his conviction set aside on appeal may be tried again for the same offense, on the grounds that defendants "waived" objections to further prosecution by appealing.[4] An exception to this rule exists, however, when a defendant tried for one offense is convicted of a lesser offense and succeeds in having that conviction set aside. In *Green v. United States*,[5] the defendant had been tried for first-degree murder but convicted of second-degree murder. The Court held that, following reversal of that conviction, the defendant could not be tried again for first-degree murder, on the theory that the first verdict was an implicit acquittal of the first-degree murder charge.[6] The defendant could, however, be re-tried for second-degree murder.[7]

Another exception to the "waiver" theory involves appellate reversals grounded on evidentiary insufficiency. Thus, in *Burks v. United States*,[8] the appellate court set aside the defendant's conviction on the basis that the prosecution had failed to rebut defendant's proof of insanity. The Court explained that the Double Jeopardy Clause foreclosed the prosecution from having another opportunity to supply evidence which it failed to muster in the first proceeding. On the other hand, if a reviewing court reverses a jury conviction because of its disagreement

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[1] North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

[2] *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1874).

[3] A prosecutor dissatisfied with the punishment imposed upon the first conviction might seek another trial in order to obtain a greater sentence. *Cf.* Ciucci v. Illinois, 356 U.S. 571 (1958) (under Due Process Clause, Double Jeopardy Clause not then applying to states).

[4] United States v. Ball, 163 U.S. 662 (1896). The English rule precluded a new trial in these circumstances, and circuit Justice Joseph Story adopted that view. United States v. Gilbert, 25 F. Cas. 1287 (No. 15204) (C.C.D.Mass. 1834). The history is briefly surveyed in Justice Felix Frankfurter's dissent in *Green v. United States,* 355 U.S. 184, 200–05 (1957).

[5] 355 U.S. 184 (1957).

[6] The decision necessarily overruled *Trono v. United States*, 199 U.S. 521 (1905), although the Court purported to distinguish the decision. *Green*, 355 U.S. at 194–97 (1957). *See also* Brantley v. Georgia, 217 U.S. 284 (1910) (no due process violation where defendant is convicted of higher offense on second trial).

[7] *See Green*, 355 U.S. at 190.

[8] 437 U.S. 1 (1978).

on the *weight*—as opposed to the *sufficiency* of the evidence—retrial is permitted.[9] Also, the *Burks* rule does not bar re-prosecution following a reversal based on erroneous admission of evidence, even if the remaining properly admitted evidence would be insufficient to convict.[10]

Amdt5.3.6 Re-Prosecution After Acquittal

Amdt5.3.6.1 Overview of Re-Prosecution After Acquittal

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

That a defendant may not be retried following an acquittal is "the most fundamental rule in the history of double jeopardy jurisprudence."[1] "[T]he law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'"[2] Although, in other areas of double jeopardy doctrine, consideration is given to the public-safety interest in having a criminal trial proceed to an error-free conclusion, no such balancing of interests is permitted with respect to acquittals, "no matter how erroneous," no matter even if they were "egregiously erroneous."[3] Thus, an acquittal resting on the trial judge's misreading of the elements of an offense precludes further prosecution.[4]

The acquittal being final, there is no governmental appeal constitutionally possible from such a judgment. This was firmly established in *Kepner v. United States*,[5] which arose under a Philippines appeals system in which the appellate court could make an independent review of the record, set aside the trial judge's decision, and enter a judgment of conviction.[6] Previously,

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[9] Tibbs v. Florida, 457 U.S. 31 (1982). The decision was 5-4, the dissent arguing that weight and insufficiency determinations should be given identical Double Jeopardy Clause treatment. *Id.* at 47 (Justices White, Brennan, Marshall, and Blackmun).

[10] Lockhart v. Nelson, 488 U.S. 33 (1988) (state may reprosecute under habitual offender statute even though evidence of a prior conviction was improperly admitted; at retrial, state may attempt to establish other prior convictions as to which no proof was offered at prior trial).

[1] United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

[2] United States v. Scott, 437 U.S. 82, 91 (1978) (quoting Green v. United States, 355 U.S. 184, 188 (1957)).

[3] Burks v. United States, 437 U.S. 1, 16 (1978); Fong Foo v. United States, 369 U.S. 141, 143 (1962). For evaluation of those interests of the defendant that might support the absolute rule of finality, and rejection of all such interests save the right of the jury to acquit against the evidence and the trial judge's ability to temper legislative rules with leniency, see Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 122–37.

[4] Evans v. Michigan, 568 U.S. 313 (2013) (acquittal after judge ruled the prosecution failed to prove that a burned building was not a dwelling, but such proof was not legally required for the arson offense charged).

[5] 195 U.S. 100 (1904). The case interpreted not the constitutional provision but a statutory provision extending double jeopardy protection to the Philippines. The Court has described the case, however, as correctly stating constitutional principles. *See, e.g.*, United States v. Wilson, 420 U.S. 332, 346 n.15 (1975); United States v. DiFrancesco, 449 U.S. 117, 113 n.13 (1980).

[6] In dissent, Justice Oliver Wendell Holmes, joined by three other Justices, propounded a theory of "continuing jeopardy," so that until the case was finally concluded one way or another, through judgment of conviction or acquittal, and final appeal, there was no second jeopardy no matter how many times a defendant was tried. 195 U.S. at 134. The

under the Due Process Clause, there was no barrier to state provision for prosecutorial appeals from acquittals.[7] But there are instances in which the trial judge will dismiss the indictment or information without intending to acquit or in circumstances in which retrial would not be barred, and the prosecution, of course, has an interest in seeking on appeal to have errors corrected. Until 1971, however, the law providing for federal appeals was extremely difficult to apply and insulated from review many purportedly erroneous legal rulings,[8] but in that year Congress enacted a new statute permitting appeals in all criminal cases in which indictments are dismissed, except in those cases in which the Double Jeopardy Clause prohibits further prosecution.[9] In part because of the new law, the Court has dealt in recent years with a large number of problems in this area.

Amdt5.3.6.2 Acquittal by Jury and Re-Prosecution

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Little or no controversy accompanies the rule that once a jury has acquitted a defendant, government may not, through appeal of the verdict or institution of a new prosecution, place the defendant on trial again.[1] Thus, the Court early held that, when the results of a trial are set aside because the first indictment was invalid or for some reason the trial's results were voidable, a judgment of acquittal must nevertheless remain undisturbed.[2]

Court has numerous times rejected any concept of "continuing jeopardy." *E.g.*, Green v. United States, 355 U.S. 184, 192 (1957); United States v. Wilson, 420 U.S. 332, 351–53 (1975); Breed v. Jones, 421 U.S. 519, 533–35 (1975).

[7] Palko v. Connecticut, 302 U.S. 319 (1937). *Palko* is no longer viable. *Cf.* Greene v. Massey, 437 U.S. 19 (1978).

[8] The Criminal Appeals Act of 1907, 34 Stat. 1246, was "a failure . . . , a most unruly child that has not improved with age." United States v. Sisson, 399 U.S. 267, 307 (1970). *See also* United States v. Oppenheimer, 242 U.S. 85 (1916); Fong Foo v. United States, 369 U.S. 141 (1962).

[9] Title III of the Omnibus Crime Control Act, Pub. L. No. 91-644, 84 Stat. 1890, 18 U.S.C. § 3731. Congress intended to remove all statutory barriers to governmental appeal and to allow appeals whenever the Constitution would permit, so that interpretation of the statute requires constitutional interpretation as well. United States v. Wilson, 420 U.S. 332, 337 (1975). *See* Sanabria v. United States, 437 U.S. 54, 69 n.23 (1978), and *id.* at 78 (Stevens, J., concurring).

[1] What constitutes a jury acquittal may occasionally be uncertain. In *Blueford v. Arkansas,* 566 U.S. 599 (2012), the defendant was charged with capital murder in an "acquittal-first" jurisdiction, in which the jury must unanimously agree that a defendant is not guilty of a greater offense before it may begin to consider a lesser included offense. After several hours of deliberations, the foreperson of the jury stated in open court that the jury was unanimously against conviction for capital murder and the lesser included offense of first degree murder, but was deadlocked on manslaughter, the next lesser included offense. After further deliberations, the judge declared a mistrial because of a hung jury. Six Justices of the Court subsequently held that the foreperson's statement on capital murder and first degree murder lacked the necessary finality of an acquittal, and found that Double Jeopardy did not bar a subsequent prosecution for those crimes. Three dissenting Justices held that Double Jeopardy required a partial verdict of acquittal on the greater offenses under the circumstances.

In *Schiro v. Farley*, 510 U.S. 222 (1994), the Court ruled that a jury's action in leaving the verdict sheet blank on all but one count did not amount to an acquittal on those counts, and that consequently conviction on the remaining count, alleged to be duplicative of one of the blank counts, could not constitute double jeopardy. In any event, the Court added, no successive prosecution violative of double jeopardy could result from an initial sentencing proceeding in the course of an initial prosecution.

[2] In *United States v. Ball*, 163 U.S. 662 (1896), three defendants were placed on trial; Ball was acquitted and the other two were convicted, and the two appealed and obtained a reversal on the ground that the indictment had been

Amdt5.3.6.3 Acquittal by Trial Judge and Re-Prosecution

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

When a trial judge acquits a defendant, that action concludes the matter to the same extent that acquittal by jury verdict does.[1] There is no possibility of retrial for the same offense.[2] But it may be difficult at times to determine whether the trial judge's action was in fact an acquittal or whether it was a dismissal or some other action, which the prosecution may be able to appeal or the judge may be able to reconsider.[3] The question is "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[4] Thus, an appeal by the government was held barred in a case in which the deadlocked jury had been discharged, and the trial judge had granted the defendant's motion for a judgment of acquittal under the appropriate federal rule, explicitly based on the judgment that the government had not proved facts constituting the offense.[5] Even if, as happened in *Sanabria v. United States*,[6] the trial judge erroneously excludes evidence and then acquits on the basis that the remaining evidence is insufficient to convict, the judgment of acquittal produced thereby is final and unreviewable.[7]

Some limited exceptions exist with respect to the finality of trial judge acquittal. First, because a primary purpose of the Due Process Clause is the prevention of successive trials and not of prosecution appeals per se, it is apparently the case that, if the trial judge permits the case to go to the jury, which convicts, and the judge thereafter enters a judgment of acquittal, even one founded upon his belief that the evidence does not establish guilt, the prosecution may appeal, because the effect of a reversal would be not a new trial but reinstatement of the

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defective; all three were again tried and all three were convicted. Ball's conviction was set aside as violating the clause; the trial court's action was not void but only voidable, and Ball had taken no steps to void it while the government could not take such action. Similarly, in *Benton v. Maryland,* 395 U.S. 784 (1969), the defendant was convicted of burglary but acquitted of larceny; the conviction was set aside on his appeal because the jury had been unconstitutionally chosen. He was again tried and convicted of both burglary and larceny, but the larceny conviction was held to violate the Double Jeopardy Clause. On the doctrine of "constructive acquittals" by conviction of a lesser included offense, *see* discussion under Amdt5.3.5 Re-Prosecution After Conviction

[1] United States v. Martin Linen Supply Co., 430 U.S. 564, 570–72 (1977); Sanabria v. United States, 437 U.S. 54, 63–65 (1978); Finch v. United States, 433 U.S. 676 (1977).

[2] In *Fong Foo v. United States*, 369 U.S. 141 (1962), the Court acknowledged that the trial judge's action in acquitting was "based upon an egregiously erroneous foundation," but it was nonetheless final and could not be reviewed. *Id.* at 143.

[3] As a general rule a state may prescribe that a judge's midtrial determination of the sufficiency of the prosecution's proof may be reconsidered. Smith v. Massachusetts, 543 U.S. 462 (2005) (Massachusetts had not done so, however, so the judge's midtrial acquittal on one of three counts became final for double jeopardy purposes when the prosecution rested its case).

[4] United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

[5] 430 U.S. at 570–76. *See also* United States v. Scott, 437 U.S. 82, 87–92 (1978); Smalis v. Pennsylvania, 476 U.S. 140 (1986) (demurrer sustained on basis of insufficiency of evidence is acquittal).

[6] 437 U.S. 54 (1978).

[7] *See also* Smith v. Massachusetts, 543 U.S. 462 (2005) (acquittal based on erroneous interpretation of precedent).

jury's verdict and the judgment thereon.[8] Second, if the trial judge enters or grants a motion of acquittal, even one based on the conclusion that the evidence is insufficient to convict, then the prosecution may appeal if jeopardy had not yet attached in accordance with the federal standard.[9]

Amdt5.3.6.4 Trial Court Rulings Terminating Trial Before Verdict and Re-Prosecution

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

If, after jeopardy attaches, a trial judge grants a motion for mistrial, ordinarily the defendant is subject to retrial;[1] if, after jeopardy attaches, but before a jury conviction occurs, the trial judge acquits, perhaps on the basis that the prosecution has presented insufficient evidence or that the defendant has proved a requisite defense such as "insanity" or entrapment, the defendant is not subject to retrial.[2] This is so even where the trial court's ruling on the sufficiency of the evidence is based on an erroneous interpretation of the statute defining the elements of the offense.[3] However, it may be that the trial judge will grant a motion to dismiss that is neither a mistrial nor an acquittal, but is instead a termination of the trial in defendant's favor based on some decision not relating to his factual guilt or innocence, such as prejudicial preindictment delay.[4] The prosecution may not simply begin a new trial but must seek first to appeal and overturn the dismissal, a course that was not open to federal prosecutors until enactment of the Omnibus Crime Control Act in 1971.[5] That law has resulted in tentative and uncertain rulings with respect to when such dismissals may be appealed and further proceedings directed. In the first place, it is unclear in many instances whether a judge's ruling is a mistrial, a dismissal, or an acquittal.[6] In the second place, because the

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[8] In *United States v. Wilson*, 420 U.S. 332 (1975), following a jury verdict to convict, the trial judge granted defendant's motion to dismiss on the ground of prejudicial delay, not a judgment of acquittal; the Court permitted a government appeal because reversal would have resulted in reinstatement of the jury's verdict, not in a retrial. In *United States v. Jenkins,* 420 U.S. 358, 365 (1975), the Court assumed, on the basis of *Wilson*, that a trial judge's acquittal of a defendant following a jury conviction could be appealed by the government because, again, if the judge's decision were set aside there would be no further proceedings at trial. In overruling *Jenkins* in *United States v. Scott,* 437 U.S. 82 (1978), the Court noted the assumption and itself assumed that a judgment of acquittal bars appeal only when a second trial would be necessitated by reversal. *Id.* at 91 n.7.

[9] Serfass v. United States, 420 U.S. 377 (1975) (after request for jury trial but before attachment of jeopardy judge dismissed indictment because of evidentiary insufficiency; appeal allowed); United States v. Sanford, 429 U.S. 14 (1976) (judge granted mistrial after jury deadlock, then four months later dismissed indictment for insufficient evidence; appeal allowed, because granting mistrial had returned case to pretrial status).

[1] *See* Amdt5.3.4 Re-Prosecution After Mistrial.

[2] *See* Amdt5.3.4 Re-Prosecution After Mistrial.

[3] *See* Evans v. Michigan, 568 U.S. 313 (2013).

[4] United States v. Wilson, 420 U.S. 332 (1975) (preindictment delay); United States v. Jenkins, 420 U.S. 358 (1975) (determination of law based on facts adduced at trial; ambiguous whether judge's action was acquittal or dismissal); United States v. Scott, 437 U.S. 82 (1978) (preindictment delay).

[5] *See* United States v. Scott, 437 U.S. 82, 84–86 (1978); United States v. Sisson, 399 U.S. 267, 291–96 (1970).

[6] *Cf.* Lee v. United States, 432 U.S. 23 (1977).

Justices have such differing views about the policies underlying the Double Jeopardy Clause, determinations of which dismissals preclude appeals and further proceedings may result from shifting coalitions and from revised perspectives. Thus, the Court first fixed the line between permissible and impermissible appeals at the point at which further proceedings would have had to take place in the trial court if the dismissal were reversed. If the only thing that had to be done was to enter a judgment on a guilty verdict after reversal, appeal was constitutional and permitted under the statute;[7] if further proceedings, such as continuation of the trial or some further factfinding was necessary, appeal was not permitted.[8] Now, but by a close division of the Court, the determining factor is not whether further proceedings must be had but whether the action of the trial judge, whatever its label, correct or not, resolved some or all of the factual elements of the offense charged in defendant's favor, whether, that is, the court made some determination related to the defendant's factual guilt or innocence.[9] Such dismissals relating to guilt or innocence are functional equivalents of acquittals, whereas all other dismissals are functional equivalents of mistrials.

Amdt5.3.7 Multiple Punishments for Same Offense

Amdt5.3.7.1 Legislative Discretion as to Multiple Sentences

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

A single criminal action may violate multiple laws resulting in multiple sentences.[1] The Double Jeopardy Clause does not appear to bar legislatures from splitting criminal actions

[7] United States v. Wilson, 420 U.S. 332 (1975) (after jury guilty verdict, trial judge dismissed indictment on grounds of preindictment delay; appeal permissible because upon reversal all trial judge had to do was enter judgment on the jury's verdict).

[8] United States v. Jenkins, 420 U.S. 358 (1975) (after presentation of evidence in bench trial, judge dismissed indictment; appeal impermissible because if dismissal was reversed there would have to be further proceedings in the trial court devoted to resolving factual issues going to elements of offense charged and resulting in supplemental findings).

[9] United States v. Scott, 437 U.S. 82 (1978) (at close of evidence, court dismissed indictment for preindictment delay; ruling did not go to determination of guilt or innocence, but, like a mistrial, permitted further proceedings that would go to factual resolution of guilt or innocence). The Court thought that double jeopardy policies were resolvable by balancing the defendant's interest in having the trial concluded in one proceeding against the government's right to one complete opportunity to convict those who have violated the law. The defendant chose to move to terminate the proceedings and, having made a voluntary choice, is bound to the consequences, including the obligation to continue in further proceedings. *Id.* at 95–101. The four dissenters would have followed *Jenkins*, and accused the Court of having adopted too restrictive a definition of acquittal. Their view is that the rule against retrials after acquittal does not, as the Court believed, "safeguard determination of innocence; rather, it is that a retrial following a final judgment for the accused necessarily threatens intolerable interference with the constitutional policy against multiple trials." *Id.* at 101, 104 (Justices Brennan, White, Marshall, and Stevens). They would, therefore, treat dismissals as functional equivalents of acquittals, whenever further proceedings would be required after reversals.

[1] Multiple sentences may arise in (1) "double-description" cases in which conduct arising out of a single transaction violates multiple criminal laws (*e.g.*, Gore v. United States, 357 U.S. 386, 392–93 (1958) (one sale of narcotics resulted in three separate counts: (i) sale of drugs not in pursuance of a written order, (ii) sale of drugs not in the original stamped package, and (iii) sale of drugs with knowledge that they had been unlawfully imported)); and (2) "unit-of-prosecution" cases in which the same conduct may violate the same statutory prohibition multiple times. *E.g.*, Bell v. United States, 349 U.S. 81 (1955) (defendant who transported two women across state lines for an immoral purpose in one trip in same car indicted on two counts of violating Mann Act). *See* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 111–22.

that occur in a single transaction into separate crimes thereby allowing prosecutors a choice of charges to try and making multiple punishments possible.[2] In *Missouri v. Hunter*, the Supreme Court stated: "Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct . . . a court's task of statutory construction is at an end and . . . the trial court or jury may impose cumulative punishment under such statutes in a single trial."[3]

The Court has held that the Double Jeopardy Clause establishes a presumption against multiple punishments for the same criminal transaction unless Congress has "spoken in language that is clear and definite"[4] that multiple punishments are to be imposed. Absent clearly expressed congressional intent, courts use the "same evidence" rule to determine whether Congress intended to punish conduct occurring in the same criminal transaction as separate offenses. Explaining the "same evidence" rule in *Blockburger v. United States*, the Supreme Court stated: "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[5] For example, in *Gore v. United States*,[6] the Court held that because the defendant's act of selling narcotics violated three distinct criminal statutes, each of which required proof of a fact not required by the others, the government could prosecute the defendant on all three counts in the same proceeding.[7]

The Court has also held that the "same evidence" rule does not upset "established doctrine" that, for double jeopardy purposes, "a conspiracy to commit a crime is a separate offense from the crime itself,"[8] or the related principle that Congress may provide that predicate offenses and "continuing criminal enterprise" are separate offenses.[9] On the other hand, in *Whalen v. United States*,[10] the Court determined that a defendant could not be punished separately for the crimes of rape and killing in the course of rape when the offenses concerned a single criminal transaction and victim, the statutes required proof of the same facts, and the statutes

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[2] Albernaz v. United States, 450 U.S. 333, 343–44 (1981) (defendants convicted on separate counts of conspiracy to import marijuana and conspiracy to distribute marijuana for the same marijuana).

[3] Missouri v. Hunter, 459 U.S. 359, 368–69 (1983) (separate offenses of "first degree robbery" defined to include robbery under threat of violence and "armed criminal action").

[4] United States v. Universal C.I.T. Corp., 344 U.S. 218, 221–22 (1952).

[5] Blockburger v. United States, 284 U.S. 299, 304 (1932). *Blockburger* was not a double jeopardy case, but it derived the rule from Gavieres v. United States, 220 U.S. 338, 342 (1911), which was a double jeopardy case. *See also* Carter v. McClaughry, 183 U.S. 365 (1902); Morgan v. Devine, 237 U.S. 632 (1915); Albrecht v. United States, 273 U.S. 1 (1927); Pinkerton v. United States, 328 U.S. 640 (1946); Am. Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Michener, 331 U.S. 789 (1947); Pereira v. United States, 347 U.S. 1 (1954); Callanan v. United States, 364 U.S. 587 (1961).

[6] 357 U.S. 386 (1958).

[7] *See also* Albernaz v. United States, 450 U.S. 333 (1981); Iannelli v. United States, 420 U.S. 770 (1975) (defendant convicted on two counts, one of the substantive offense, one of conspiracy to commit the substantive offense; defense raised variation of *Blockburger* test, Wharton's Rule requiring that one may not be punished for conspiracy to commit a crime when the nature of the crime necessitates participation of two or more persons for its commission; Court recognized Wharton's Rule as a double-jeopardy inspired presumption of legislative intent but held that congressional intent in this case was "clear and unmistakable" that both offenses be punished separately).

[8] United States v. Felix, 503 U.S. 378, 391 (1992). *But cf.* Rutledge v. United States, 517 U.S. 292 (1996) (21 U.S.C. § 846, prohibiting conspiracy to commit drug offenses, does not require proof of any fact that is not also a part of the continuing criminal enterprise offense under 21 U.S.C. § 848, so there are not two separate offenses).

[9] Garrett v. United States, 471 U.S. 773 (1985) ("continuing criminal enterprise" is a separate offense under the Comprehensive Drug Abuse Prevention and Control Act of 1970).

[10] 445 U.S. 684 (1980).

and legislative history did not indicate that Congress wanted the offenses punished separately.[11] A guilty plea ordinarily precludes collateral attack.[12]

Amdt5.3.7.2 Successive Prosecutions for Same Offense and Double Jeopardy

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Successive prosecutions raise double jeopardy concerns. It is more burdensome for a defendant to face charges in separate proceedings, and if those proceedings occur over a lengthy period, the defendant must live in a continuing state of uncertainty. At the same time, multiple prosecutions allow the state to hone its trial strategies.[1]

In *Brown v. Ohio*,[2] the Court applied the "same evidence test" to bar successive prosecutions for different statutory offenses involving the same conduct. The defendant had been convicted of "joyriding"—defined as operating a motor vehicle without the owner's consent—and was then prosecuted and convicted of stealing the same automobile. Because the state courts had conceded that joyriding was a lesser included offense of auto theft, the Court overturned the second conviction,[3] observing that each offense required the same proof and for double jeopardy purposes met the "same evidence" test in *Blockburger v. United States*.[4] The Court later applied the same principles to hold that a conviction for failing to reduce speed to avoid an accident did not preclude a second trial for involuntary manslaughter. In reaching this conclusion, the Court reasoned that failing to reduce speed was not a necessary element of the manslaughter offense.[5]

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[11] The Court reasoned that a conviction for killing in the course of rape could not be had without providing all of the elements of the offense of rape. *See also* Jeffers v. United States, 432 U.S. 137 (1977) (no indication in legislative history Congress intended defendant to be prosecuted both for conspiring to distribute drugs and for distributing drugs in concert with five or more persons); Simpson v. United States, 435 U.S. 6 (1978) (defendant improperly prosecuted both for committing bank robbery with a firearm and for using a firearm to commit a felony); Bell v. United States, 349 U.S. 81 (1955) (simultaneous transportation of two women across state lines for immoral purposes one violation of Mann Act rather than two).

[12] United States v. Broce, 488 U.S. 563 (1989) (defendant who pled guilty to two separate conspiracy counts is barred from collateral attack alleging that in fact there was only one conspiracy and that double jeopardy applied).

[1] For discussion on this dynamic, see Grady v. Corbin, 495 U.S. 508, 518–19 (1990), *overruled by* United States v. Dixon, 509 U.S. 688 (1993) ("We therefore accept the Government's invitation to overrule *Grady*, and Counts II, III, IV, and V of Foster's subsequent prosecution are not barred.").

[2] 432 U.S. 161 (1977). *Cf. In re* Nielsen, 131 U.S. 176 (1889) (prosecution for adultery held impermissible following the defendant's conviction for cohabiting with more than one woman, even though second prosecution required proof of an additional fact—that he was married to another woman).

[3] *See also* Harris v. Oklahoma, 433 U.S. 682 (1977) (defendant who had been convicted of felony murder for participating in a store robbery with another person who shot a store clerk could not be prosecuted for robbing the store, since store robbery was a lesser-included crime in the offense of felony murder).

[4] 284 U.S. 299, 304 (1932). *Blockburger* was not a double jeopardy case, but it derived the rule from *Gavieres v. United States*, 220 U.S. 338, 342 (1911), which was a double jeopardy case. *See also* Carter v. McClaughry, 183 U.S. 365 (1902); Morgan v. Devine, 237 U.S. 632 (1915); Albrecht v. United States, 273 U.S. 1 (1927); Pinkerton v. United States, 328 U.S. 640 (1946); Am. Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Michener, 331 U.S. 789 (1947); Pereira v. United States, 347 U.S. 1 (1954); Callanan v. United States, 364 U.S. 587 (1961).

[5] Illinois v. Vitale, 447 U.S. 410 (1980).

The *Brown* Court noted some limitations to its holding[6] and more have emerged subsequently. Principles appropriate in the "classically simple" lesser-included-offense and related situations are not readily transposable to "multilayered conduct" governed by the law of conspiracy and continuing criminal enterprise, and it remains the law that "a substantive crime and a conspiracy to commit that crime are not the 'same offense' for double jeopardy purposes."[7] For double jeopardy purposes, a defendant is "punished . . . only for the offense of which [he] is convicted"; a later prosecution or later punishment is not barred simply because the underlying criminal activity has been considered at sentencing for a different offense.[8] Similarly, recidivism-based sentence enhancement does not constitute multiple punishment for the "same" prior offense, but instead is a stiffened penalty for the later crime.[9]

Amdt5.3.7.3 Collateral Estoppel (Issue Preclusion) and Double Jeopardy

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

The Supreme Court has also interpreted the Double Jeopardy Clause to incorporate the doctrine of "collateral estoppel" or "issue preclusion"[1] which prohibits re-litigating an issue of fact or law raised and necessarily resolved by a prior judgment.[2] The Court first recognized the Double Jeopardy Clause's issue-preclusion component in *Ashe v. Swenson*,[3] which involved a robbery of six poker players.[4] After being acquitted of robbing *one* of the players because of insufficient evidence, the *Ashe* defendant was tried and convicted of robbing *another* player.[5] Because the sole issue in dispute in the first trial was whether the defendant was one of the robbers, the Court held that the defendant's acquittal for robbing one player in the first trial

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[6] The Court suggested that if the legislature had provided that joyriding is a separate offense for each day the vehicle is operated without the owner's consent, so that the two indictments each specifying a different date on which the offense occurred would have required different proof, the result might have been different, but this, of course, met the *Blockburger* problem. Brown v. Ohio, 432 U.S. 161, 169 n.8 (1977). The Court also suggested that an exception might be permitted where the state is unable to proceed on the more serious charge at the outset because the facts necessary to sustain that charge had not occurred or had not been discovered. *Id.* at 169 n.7. *See also* Jeffers v. United States, 432 U.S. 137, 150–54 (1977) (plurality opinion) (exception where defendant elects separate trials); Ohio v. Johnson, 467 U.S. 493 (1984) (trial court's acceptance of guilty plea to lesser included offense and dismissal of remaining charges over prosecution's objections does not bar subsequent prosecution on those "remaining" counts).

[7] United States v. Felix, 503 U.S. 378, 389 (1992). The fact that *Felix* constituted a "large exception" to *Grady* was one of the reasons the Court cited in overruling *Grady*. United States v. Dixon, 509 U.S. 688, 709–10 (1993)

[8] Witte v. United States, 515 U.S. 389 (1995) (consideration of defendant's alleged cocaine dealings in determining sentence for marijuana offenses does not bar subsequent prosecution on cocaine charges).

[9] Monge v. California, 524 U.S. 721, 728 (1998).

[1] *See* Ashe v. Swenson, 397 U.S. 436, 445 (1970). Collateral estoppel and issue preclusion are synonymous terms. *See* Black's Law Dictionary 312 (10th ed. 2014) (defining "collateral estoppel").

[2] *See* Restatement (Second) of Judgments § 27 (Am. Law Inst. 1981).

[3] 397 U.S. at 445. Previously, the Court in *Hoag v. New Jersey*, concluded that successive trials arising out of a tavern hold-up in which five customers were robbed did not violate the Due Process Clause of the Fourteenth Amendment. *See* 356 U.S. 464, 466 (1958).

[4] *Ashe*, 397 U.S. at 437.

[5] *Id.* at at 439–40.

precluded the government from subsequently charging him with robbing another player.[6] Explaining that courts must apply issue preclusion in criminal cases with "realism and rationality," the *Ashe* Court reasoned that the underlying record ust be closely examined to determine what the first jury's verdict of acquittal "actually decided."[7] If a criminal judgment does not depend on a jury's determination of a particular factual issue, re-litigation of that issue *can* occur.[8]

In *United States v. Powell*, the Court rejected an argument that issue preclusion barred an "inconsistent" jury verdict that included an acquittal on a drug charge but guilty verdicts on using a telephone to "caus[e] and faciliat[e]" that same drug offense.[9] Reaffirming a precedent from more than a half a century before,[10] the *Powell* Court held that the "Government's inability to invoke review, the general reluctance to inquire into the workings of the jury, and the possible exercise of lenity" by the jury cautioned against allowing defendants to challenge inconsistent verdicts on issue preclusion grounds.[11]

In 2016, the Court extended the logic of *Powell* in *Bravo-Fernandez v. United States*.[12] In *Bravo-Fernandez*, a jury returned inconsistent verdicts of conviction and acquittal with respect to two criminal defendants, but the convictions were later vacated for legal errors unrelated to the inconsistency.[13] Recognizing *Powell*'s conclusion that inconsistent verdicts do not indicate whether an acquittal resulted from "mistake, compromise, or lenity,"[14] the Court held that the government could re-prosecute on the counts on which a conviction had been initially obtained. According to the Court, because of the "irrationality" of the earlier inconsistent verdicts,[15] the criminal defendants could not demonstrate that the first jury had "actually decided" that they did not commit the crime underlying the second trial.[16] As a result, while the government could not re-prosecute the defendants in *Bravo-Fernandez* on the charges that had resulted in acquittal,[17] the government could re-prosecute on charges that had previously resulted in guilty verdicts.

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[6] *Id.* at 446 (quoting Green v. United States, 355 U.S. 184, 190 (1957)).

[7] *Id.* at 444.

[8] *See* Bobby v. Bies, 556 U.S. 825, 834 (2009) (citing Restatement (Second) of Judgments § 27 cmt. h).

[9] *See* United States v. Powell, 469 U.S. 57, 68 (1984).

[10] *See* Dunn v. United States, 284 U.S. 390, 392 (1932).

[11] 469 U.S. at 68–69.

[12] No. 15-537, slip op. at 15, 20 (U.S. Nov. 29, 2016) ("We therefore bracket this case with *Powell*. . .").

[13] *Id.* at 361. Had the convictions been overturned because of lack of evidence, the government would have been prohibited from retrying the defendants, as a court's evaluation of the evidence as insufficient to convict is the equivalent to an acquittal and, accordingly, bars reprosecution for that same offense. *See* Burks v. United States, 437 U.S. 1, 10–11 (1978).

[14] *See Bravo-Fernandez*, No. 15-537, slip op. at 15.

[15] *Id.* at 16.

[16] *Id.* at 15. The *Bravo-Fernandez* Court distinguished the case from *Yeager v. United States,* 557 U.S. 110 (2009), where the Court held that *Powell* did not extend to the situation where a jury returned a verdict of acquittal on one count and hung on another count and prosecutors attempted to retry on the hung count. *Id.* at 124. Because the jury "speaks only though its verdict," a hung count did not reveal anything about the jury's reasoning and only the acquittal could factor into the issue preclusion analysis. *Id.* at 122. Unlike in *Yeager*, the acquittals in *Bravo-Fernandez* were accompanied with inconsistent guilty verdicts, leading the Court to conclude that the criminal defendants could not demonstrate that the jury had actually decided the underlying issue at the second trial. *See Bravo-Fernandez*, No. 15-537, slip op. at 15–16.

[17] *See Bravo-Fernandez*, No. 15-537, slip op. at 16 (noting that the earlier acquittals "remain inviolate").

Amdt5.4 Self-Incrimination

Amdt5.4.1 Historical Background on Self-Incrimination

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

The source of the Self-Incrimination Clause was the maxim "nemo tenetur seipsum accusare," that "no man is bound to accuse himself." The maxim is but one aspect of two different systems of law enforcement which competed in England for acceptance; the accusatorial and the inquisitorial. In the accusatorial system, which predated the reign of Henry II but was expanded and extended by him, first the community and then the state by grand and petit juries proceeded against alleged wrongdoers through the examination of others, and in the early years through examination of the defendant as well. The inquisitorial system, which developed in the ecclesiastical courts, compelled the alleged wrongdoer to affirm his culpability through the use of the oath ex officio. Under the oath, an official had the power to make a person before him take an oath to tell the truth to the full extent of his knowledge as to all matters about which he would be questioned; before administration of the oath the person was not advised of the nature of the charges against him, or whether he was accused of crime, and was also not informed of the nature of the questions to be asked.[1]

The use of this oath in Star Chamber proceedings, especially to root out political heresies, combined with opposition to the ecclesiastical oath ex officio, led over a long period of time to general acceptance of the principle that a person could not be required to accuse himself under oath in any proceeding before an official tribunal seeking information looking to a criminal prosecution, or before a magistrate investigating an accusation against him with or without oath, or under oath in a court of equity or a court of common law.[2] The precedents in the colonies are few in number, but following the Revolution six states had embodied the privilege against self-incrimination in their constitutions,[3] and the privilege was one of those recommended by several state ratifying conventions for inclusion in a federal bill of rights.[4] James Madison's version of the Clause read "nor shall be compelled to be a witness against himself," but a House amendment inserted "in any criminal case" into the provision.[5]

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[1] Mary H. Maguire, *Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesiastical Courts in England*, in Essays in History and Political Theory in Honor of Charles Howard McIlwain 199 (C. Wittke ed., 1936).

[2] The traditional historical account is 8 J. Wigmore, A Treatise on the Anglo-American System of Evidence § 2250 (J. McNaughton rev. 1961), but more recent historical studies have indicated that Dean Wigmore was too grudging of the privilege. Leonard Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination (1968); Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1 (1949).

[3] 3 F. Thorpe, *The Federal and State Constitutions*, reprinted in H. Doc. No. 357, 59th Congress, 2d Sess. 1891 (1909) (Massachusetts); 4 *id.* at 2455 (New Hampshire); 5 *id.* at 2787 (North Carolina), 3038 (Pennsylvania); 6 *id.* at 3741 (Vermont); 7 *id.* at 3813 (Virginia).

[4] Amendments were recommended by an "Address" of a minority of the Pennsylvania convention after they had been voted down as a part of the ratification action, 2 Bernard Schwartz, The Bill of Rights: A Documentary History 628, 658, 664 (1971), and then the ratifying conventions of Massachusetts, South Carolina, New Hampshire, Virginia, and New York formally took this step.

[5] *Id.* at 753 (August 17, 1789).

Amdt5.4.2 Early Doctrine on Self-Incrimination

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

By the latter part of the eighteenth century, English and early American courts had determined that coerced confessions were potentially excludable from admission at trial because they were untrustworthy.[1] For much of the nineteenth century, the Supreme Court invoked unreliability as the basis for excluding such confessions without mentioning the constitutional bar against self-incrimination.[2]

In the 1897 case of *Bram v. United States*, the Court suggested that the Fifth Amendment imposed separate restrictions on a confession's admissibility. These restrictions focused on the confession's voluntariness as an indicator of its trustworthiness as evidence. The Court wrote that in criminal trials in federal court, "wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"[3]

Although the Supreme Court approved this Fifth Amendment interpretation in subsequent cases[4] and reaffirmed *Bram* itself,[5] the Court held in 1912 that a confession should not be excluded merely because the authorities had not warned a suspect of his right to remain silent.[6] "In other cases, the Court expressed doubts as to whether the Fifth Amendment's protection against self-incrimination—rather than a common-law principle that forced confessions were untrustworthy—required exclusion of involuntary confessions from federal criminal trials."[7] Because the Supreme Court had not yet ruled that the Self-Incrimination Clause applies to states through the Fourteenth Amendment, admissibility of confessions in state courts continued to be governed under due process standards developed from common-law principles. It was only in the 1960s, after the Court extended the Self-Incrimination Clause to the states, that a divided Court reaffirmed and extended the 1897 *Bram* ruling and imposed on both federal and state trial courts new rules for admitting or excluding confessions and other admissions made to police during custodial interrogation.[8]

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[1] 3 John Wigmore, A Treatise on the Anglo-American System of Evidence § 823 (1940); *Developments in the Law—Confessions*, 79 Harv. L. Rev. 935, 954–59 (1966).

[2] Hopt v. Utah, 110 U.S. 574, 584–85 (1884). At the time of the Court's decision, Utah was a territory and subject to direct federal judicial supervision.

[3] Bram v. United States, 168 U.S. 532, 542 (1897).

[4] Ziang Sun Wan v. United States, 266 U.S. 1, 14–15 (1924). This case held that the circumstances of detention and interrogation were relevant on the question of a confession's admissibility. *Id.*

[5] Burdeau v. McDowell, 256 U.S. 465, 475 (1921); Powers v. United States, 223 U.S. 303, 313 (1912); Shotwell Mfg. Co. v. United States, 371 U.S. 342, 347 (1963).

[6] Powers v. United States, 223 U.S. 303 (1912).

[7] United States v. Carignan, 342 U.S. 36, 41 (1951). *See also* McNabb v. United States, 318 U.S. 332, 346 (1943); Brown v. Mississippi, 297 U.S. 278, 285 (1936); Stein v. New York, 346 U.S. 156, 191 n.35 (1953).

[8] Miranda v. Arizona, 384 U.S. 436 (1966). According to John Wigmore, "there never was any historical connection . . . between the constitutional [self-incrimination] clause and the [common law] confession-doctrine," 3 John Wigmore, A Treatise on the Anglo-American System of Evidence § 823, at 250 n.5 (1940); *see also* 8 *id.* at § 2266 (1961). The two

Amdt5.4.3 General Protections Against Self-Incrimination Doctrine and Practice

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

The Court has settled upon the principle that the Clause serves two interrelated interests: the preservation of an accusatorial system of criminal justice, which goes to the integrity of the judicial system, and the preservation of personal privacy from unwarranted governmental intrusion.[1] To protect these interests and to preserve these values, the privilege "is not to be interpreted literally." Rather, the "sole concern [of the privilege] is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of penalties affixed to the criminal acts."[2] Furthermore, "[t]he privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . ."[3]

The privilege against self-incrimination parries the general obligation to provide testimony under oath when called upon, but it also applies in police interrogations. In all cases, the privilege must be supported by a reasonable fear that a response will be incriminatory. The issue is a matter of law for a court to determine,[4] and therefore, with limited exceptions, one must claim the privilege to benefit from it.[5] Otherwise, silence in the face of questioning may be insufficient to invoke the privilege because it may not afford an adequate opportunity either to test whether information withheld falls within the privilege or to cure a violation through a

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rules appear to have developed separately. The bar against self-incrimination derived primarily from notions of liberty and fairness, whereas proscriptions against involuntary confessions derived primarily from notions of reliability. However, the rules stemmed from some of the same considerations. Some commentators have considered the confession rule in some respects to be an off-shoot of the privilege against self-incrimination. *See* Leonard Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination 325–32, 495 n.43 (1968). *See also* Culombe v. Connecticut, 367 U.S. 568, 581–84, especially 583 n.25 (1961).

[1] In *Tehan v. United States ex rel. Shott*, the Court noted:

> [T]he basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution shoulders the entire load. . . . The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent. . . . By contrast, the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone.

Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 415, 416 (1966); *see also* California v. Byers, 402 U.S. 424, 448–58 (1971) (Harlan, J., concurring); Schmerber v. California, 384 U.S. 757, 760–65 (1966); Miranda v. Arizona, 384 U.S. 436, 460 (1966). For a critical view of the privilege, see Henry Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671 (1968).

[2] *Ullmann*, 350 U.S. at 438–39.

[3] Hoffman v. United States, 341 U.S. 479, 486 (1951); *see also* Emspak v. United States, 349 U.S. 190 (1955); Blau v. United States, 340 U.S. 332 (1951); Blau v. United States, 340 U.S. 159 (1950).

[4] *E.g.*, Mason v. United States, 244 U.S. 362 (1917).

[5] The primary exceptions are for a criminal defendant not taking the stand and a suspect being subject to inherently coercive circumstances (*e.g.*, custodial interrogation). *See* Salinas v. Texas, 570 U.S. 178, 183–86 (2013) (plurality opinion).

grant of immunity.[6] A witness who fails to claim the privilege explicitly when an affirmative claim is required is deemed to have waived it, and waiver may be found where the witness has answered some preliminary questions but desires to stop at a certain point.[7] However, an assertion of innocence in conjunction with a claim of the privilege does not obviate the right of witnesses to invoke it, as their responses still may provide the government with evidence it may later seek to use against them.[8]

Although individuals must have reasonable cause to apprehend danger and cannot be the judge of the validity of their claims, a court that would deny a claim of the privilege must be "*perfectly clear*, from a careful consideration of all the circumstances in the case, that the individual is mistaken, and that the answer[s] *cannot possibly* have such tendency to incriminate."[9] To reach a determination, furthermore, a trial judge may not require a witness to disclose so much of the danger as to render the privilege nugatory. As the Court observed:

> [I]f the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.[10]

The privilege against self-incrimination is a personal one and cannot be used by or on behalf of any organization, such as a corporation. Thus, a corporation cannot object on self-incrimination grounds to a subpoena of its records and books or to the compelled testimony of those corporate agents who have been given personal immunity from criminal prosecution.[11] Nor may a corporate official with custody of corporate documents that incriminate him personally resist their compelled production on the assertion of his personal privilege.[12]

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[6] In *Salinas v. Texas*, 570 U.S. 178 (2013), the defendant—Salinas—answered all questions during noncustodial questioning about a double murder, other than one about whether his shotgun would match shells recovered at the murder scene. He fell silent on this inquiry, but did not assert the privilege against self-incrimination. At closing argument at Salinas's murder trial, the prosecutor argued that this silence indicated guilt, and a majority of the Court found the comments constitutionally permissible. The Court affirmed the Texas Supreme Court's ruling that Salinas had failed to invoke his Fifth Amendment rights because he did not do so explicitly. Although no opinion drew a majority of Justices, in an opinion joined by Chief Justice John Roberts and Justice Anthony Kennedy, Justice Samuel Alito observed that a defendant could choose to remain silent for numerous reasons other than avoiding self-incrimination. *Id.* at 188–89 (plurality opinion).

[7] Rogers v. United States, 340 U.S. 367 (1951); United States v. Monia, 317 U.S. 424 (1943). The "waiver" concept here has been pronounced "analytically [un]sound," with the Court preferring to reserve the term "waiver" "for the process by which one affirmatively renounces the protection of the privilege." Garner v. United States, 424 U.S. 648, 654 n.9 (1976). Thus, the Court has settled upon the concept of "compulsion" as applied to "cases where disclosures are required in the face of claim of privilege." *Id.* "[I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself." *Id.* at 654. Similarly, the Court has enunciated the concept of "voluntariness" to be applied in situations where it is claimed that a particular factor denied the individual a "free choice to admit, to deny, or to refuse to answer." *Id.* at 654 n.9, 656–65.

[8] Ohio v. Reiner, 532 U.S. 17 (2001).

[9] Hoffman v. United States, 341 U.S. 479, 488 (1951) (quoting Temple v. Commonwealth, 75 Va. 892, 898 (1881)). For an application of these principles, see Malloy v. Hogan, 378 U.S. 1, 11–14 (1964), and *id.* at 33 (White, Stewart JJ., dissenting). Where the government is seeking to enforce an essentially noncriminal statutory scheme through compulsory disclosure, some Justices would apparently relax the *Hoffman* principles. *Cf.* California v. Byers, 402 U.S. 424 (1971) (plurality opinion).

[10] *Hoffman*, 341 U.S. at 486–87.

[11] United States v. White, 322 U.S. 694, 701 (1944); Baltimore & Ohio R.R. v. ICC, 221 U.S. 612 (1911); Hale v. Henkel, 201 U.S. 43, 69–70, 74–75 (1906).

[12] United States v. White, 322 U.S. 694, 699–700 (1944); Wilson v. United States, 221 U.S. 361, 384–385 (1911). But the government may make no evidentiary use of the act of production in proceeding individually against the corporate

A witness has traditionally been able to claim the privilege in any proceeding whatsoever in which testimony is legally required when his answer might be used against him in that proceeding or in a future criminal proceeding or when it might be exploited to uncover other evidence against him.[13] Incrimination is not complete once guilt has been adjudicated, and hence the privilege may be asserted during the sentencing phase of trial.[14] Conversely, there is no valid claim on the ground that the information sought can be used in proceedings which are not criminal in nature,[15] and there can be no valid claim if there is no criminal prosecution[16] The Court in recent years has also applied the privilege to situations, such as police interrogation of suspects, in which there is no *legal* compulsion to speak.[17]

What the privilege protects against is compulsion of "testimonial" disclosures. Thus, the clause is not offended by such non-testimonial compulsions as requiring a person in custody to stand or walk in a police lineup, to speak prescribed words, to model particular clothing, or to give samples of handwriting, fingerprints, or blood.[18] A person may be compelled to produce

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custodian. Braswell v. United States, 487 U.S. 99 (1988). *Cf.* George Campbell Painting Corp. v. Reid, 392 U.S. 286 (1968); United States v. Rylander, 460 U.S. 752 (1983) (witness who had failed to appeal production order and thus had burden in contempt proceeding to show inability to then produce records could not rely on privilege to shift this evidentiary burden).

[13] Thus, not only may a defendant or a witness in a criminal trial, including a juvenile proceeding, In re Gault, 387 U.S. 1, 42–57 (1967), claim the privilege but so may a party or a witness in a civil court proceeding, McCarthy v. Arndstein, 266 U.S. 34 (1924), a potential defendant or any other witness before a grand jury, Reina v. United States, 364 U.S. 507 (1960); Counselman v. Hitchcock, 142 U.S. 547, 563 (1892), or a witness before a legislative inquiry, Watkins v. United States, 354 U.S. 178, 195–96 (1957); Quinn v. United States, 349 U.S. 155 (1955); Emspak v. United States, 349 U.S. 190 (1955), or before an administrative body. In re Groban, 352 U.S. 330, 333, 336–37, 345–46 (1957); ICC v. Brimson, 154 U.S. 447, 478–80 (1894).

[14] Estelle v. Smith, 451 U.S. 454, 462–63 (1981) ("We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned"); Mitchell v. United States, 526 U.S. 314 (1999) (non-capital sentencing).

[15] Allen v. Illinois, 478 U.S. 364 (1986) (declaration that person is "sexually dangerous" under Illinois law is not a criminal proceeding); Minnesota v. Murphy, 465 U.S. 420, 435 n.7 (1984) (revocation of probation is not a criminal proceeding, hence "there can be no valid claim of the privilege on the ground that the information sought can be used in revocation proceedings"). In *Murphy*, the Court went on to explain that "a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. Under such circumstances, a probationer's 'right to immunity as a result of his compelled testimony would not be at stake,' and nothing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer . . . ." *Id.* (citations omitted).

[16] Chavez v. Martinez, 538 U.S. 760 (2003) (rejecting damages claim brought by suspect interrogated in hospital but not prosecuted).

[17] Miranda v. Arizona, 384 U.S. 436 (1966).

[18] Schmerber v. California, 384 U.S. 757, 764 (1966); United States v. Wade, 388 U.S. 218, 221–23 (1967); Holt v. United States, 218 U.S. 245, 252 (1910). In *California v. Byers,* 402 U.S. 424 (1971), four Justices believed that requiring any person involved in a traffic accident to stop and give his name and address did not involve testimonial compulsion and therefore the privilege was inapplicable, *id.* at 431–34 (Chief Justice Burger and Justices Stewart, White, and Blackmun), but Justice Harlan, *id.* at 434 (concurring), and Justices Hugo Black, William O. Douglas, Brennan, and Marshall, *id.* at 459, 464 (dissenting), disagreed. In *South Dakota v. Neville,* 459 U.S. 553 (1983), the Court indicated as well that a state may compel a motorist suspected of drunk driving to submit to a blood alcohol test, and may also give the suspect a choice about whether to submit, but use his refusal to submit to the test as evidence against him. The Court rested its evidentiary ruling on the absence of coercion, preferring not to apply the sometimes difficult distinction between testimonial and physical evidence. In another case, involving roadside videotaping of a drunk driving suspect, the Court found that the slurred nature of the suspect's speech, as well as his answers to routine booking questions as to name, address, weight, height, eye color, date of birth, and current age, were not testimonial in nature. Pennsylvania v. Muniz, 496 U.S. 582 (1990). On the other hand, the suspect's answer to a request to identify the date of his sixth birthday was considered testimonial. *Id.* Two Justices challenged the interpretation limiting application to "testimonial" disclosures, claiming that the original understanding of the word "witness" was not limited to someone who gives testimony, but included someone who gives any kind of evidence. United States v. Hubbell, 530 U.S. 27, 49 (2000) (Justice Thomas, joined by Justice Scalia, concurring).

specific documents even though they contain incriminating information.[19] If, however, the existence of specific documents is not known to the government, and the act of production informs the government about the existence, custody, or authenticity of the documents, then the privilege is implicated.[20] Application of these principles resulted in a holding that the Independent Counsel could not base a prosecution on incriminating evidence identified and produced as the result of compliance with a broad subpoena for all information relating to the individual's income, employment, and professional relationships.[21]

The protection is against "compulsory" incrimination, and traditionally the Court has treated within the Clause only those compulsions which arise from legally enforceable obligations, culminating in imprisonment for refusal to testify or to produce documents.[22] The compulsion need not be imprisonment, but can also be termination of public employment[23] or disbarment of a lawyer[24] as a legal consequence of a refusal to make incriminating admissions. The degree of coercion may also prove decisive, the Court having ruled that moving a prisoner from a medium security unit to a maximum security unit was insufficient to compel him to incriminate himself in spite of the attendant loss of privileges and the harsher living conditions.[25] However, although it appears that prisoners[26] and probationers[27] have less

[19] Fisher v. United States, 425 U.S. 391 (1976). Compelling a taxpayer by subpoena to produce documents produced by his accountants from his own papers does not involve testimonial self-incrimination and is not barred by the privilege. "[T]he Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating." *Id.* at 408 (emphasis by Court). Even further removed from the protection of the privilege is seizure pursuant to a search warrant of business records in the handwriting of the defendant. Andresen v. Maryland, 427 U.S. 463 (1976). A court order compelling a target of a grand jury investigation to sign a consent directive authorizing foreign banks to disclose records of any and all accounts over which he had a right of withdrawal is not testimonial in nature, since the factual assertions are required of the banks and not of the target. Doe v. United States, 487 U.S. 201 (1988).

[20] In *United States v. Doe*, 465 U.S. 605 (1984), the Court distinguished *Fisher*, upholding lower courts' findings that the act of producing tax records implicates the privilege because it would compel admission that the records exist, that they were in the taxpayer's possession, and that they are authentic. Similarly, a juvenile court's order to produce a child implicates the privilege, because the act of compliance "would amount to testimony regarding [the subject's] control over and possession of [the child]." Baltimore Dep't of Social Services v. Bouknight, 493 U.S. 549, 555 (1990).

[21] United States v. Hubbell, 530 U.S. 27 (2000).

[22] *E.g.*, Marchetti v. United States, 390 U.S. 39 (1968) (criminal penalties attached to failure to register and make incriminating admissions); Malloy v. Hogan, 378 U.S. 1 (1964) (contempt citation on refusal to testify). *See also* South Dakota v. Neville, 459 U.S. 553 (1983) (no compulsion in introducing evidence of suspect's refusal to submit to blood alcohol test, since state could have forced suspect to take test and need not have offered him a choice); Selective Service System v. Minnesota PIRG, 468 U.S. 841 (1984) (no coercion in requirement that applicants for federal financial assistance for higher education reveal whether they have registered for draft).

[23] Garrity v. New Jersey, 385 U.S. 493 (1967); Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968). *See also* Lefkowitz v. Turley, 414 U.S. 70 (1973), holding unconstitutional state statutes requiring the disqualification for five years of contractors doing business with the state if at any time they refused to waive immunity and answer questions respecting their transactions with the state. The state may require employees or contractors to respond to inquiries, but only if it offers them immunity sufficient to supplant the privilege against self-incrimination. *See also* Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

[24] Spevack v. Klein, 385 U.S. 511 (1967).

[25] McKune v. Lile, 536 U.S. 24 (2002). The transfer was mandated for refusal to participate in a sexual abuse treatment program that required revelation of sexual history and admission of responsibility. The plurality declared that rehabilitation programs are permissible if the adverse consequences for non-participation are "related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life." 536 U.S. at 38 (opinion of Justice Anthony Kennedy). Concurring Justice Sandra Day O'Connor stated her belief that the "minor" change in living conditions seemed "very unlikely to actually compel [the prisoner] to [participate]." *Id.* at 51.

[26] *See*, in addition to *McKune v. Lile*, Baxter v. Palmigiano, 425 U.S. 308 (1976) (adverse inference from inmate's silence at prison disciplinary hearing); and Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 286 (1998) (adverse inference from inmate's silence at clemency hearing).

[27] Minnesota v. Murphy, 465 U.S. 420 (1984) (the possibility of revocation of probation was not so coercive as to compel a probationer to provide incriminating answers to probation officer's questions).

protection than others do, the Court has not developed a clear doctrinal explanation to identify the differences between permissible and impermissible coercion.[28]

It has long been the rule that a defendant who takes the stand on his own behalf does so voluntarily and cannot then claim the privilege to defeat cross-examination on matters reasonably related to the subject matter of his direct examination,[29] and that such a defendant may be impeached by proof of prior convictions.[30] But, in *Griffin v. California*,[31] the Court refused to permit prosecutorial or judicial comment to the jury upon a defendant's refusal to take the stand on his own behalf, because such comment was a "penalty imposed by courts for exercising a constitutional privilege" and "[i]t cuts down on the privilege by making its assertion costly."[32] Prosecutors' comments violating the *Griffin* rule can nonetheless constitute harmless error.[33] Nor may a prosecutor impeach a defendant's trial testimony through use of the fact that upon his arrest and receipt of a *Miranda* warning he remained silent and did not give the police the exculpatory story he told at trial.[34] But where the defendant took the stand and testified, the Court permitted the impeachment use of his pre-arrest silence when that silence had in no way been officially encouraged, through a *Miranda* warning or otherwise.[35]

Further, the Court held inadmissible at the subsequent trial a defendant's testimony at a hearing to suppress evidence wrongfully seized, because use of the testimony would put the defendant to an impermissible choice between asserting his right to remain silent and invoking his right to be free of illegal searches and seizures.[36] The Court also proscribed the

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[28] The Court in *McKune v. Lile* split 5-4, with no opinion of the Court.

[29] Brown v. Walker, 161 U.S. 591, 597–98 (1896); Fitzpatrick v. United States, 178 U.S. 304, 314–16 (1900); Brown v. United States, 356 U.S. 148 (1958). *See also* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 286 (1998) (testimony at a clemency interview is voluntary, and cannot be compelled).

[30] Spencer v. Texas, 385 U.S. 554, 561 (1967); *cf.* Michelson v. United States, 335 U.S. 469 (1948).

[31] 380 U.S. 609, 614 (1965). The result had been achieved in federal court through statutory enactment. 18 U.S.C. § 3481. *See* Wilson v. United States, 149 U.S. 60 (1893). In *Carter v. Kentucky,* 450 U.S. 288 (1981), the Court held that the Self-Incrimination Clause required a state, upon defendant's request, to give a cautionary instruction to the jurors that they must disregard defendant's failure to testify and not draw any adverse inferences from it. This result, too, had been accomplished in the federal courts through statutory construction. Bruno v. United States, 308 U.S. 287 (1939). In *Lakeside v. Oregon,* 435 U.S. 333 (1978), the Court held that a court may give such an instruction, even over defendant's objection. *Carter v. Kentucky* was applied in *James v. Kentucky,* 466 U.S. 341 (1983) (request for jury "admonition" sufficient to invoke right to "instruction").

[32] Although the *Griffin* rule continues to apply when the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, it does not apply to a prosecutor's "fair response" to a defense counsel's allegation that the government had denied his client the opportunity to explain his actions. United States v. Robinson, 485 U.S. 25, 32 (1988).

[33] Chapman v. California, 386 U.S. 18 (1967); United States v. Hasting, 461 U.S. 499 (1983).

[34] Doyle v. Ohio, 426 U.S. 610 (1976). Post-arrest silence, the Court stated, is inherently ambiguous, and to permit use of the silence would be unfair since the *Miranda* warning told the defendant he could be silent. The same result had earlier been achieved under the Court's supervisory power over federal trials in *United States v. Hale,* 422 U.S. 171 (1975). The same principles apply to bar a prosecutor's use of *Miranda* silence as evidence of an arrestee's sanity. Wainwright v. Greenfield, 474 U.S. 284 (1986). In determining whether a state prisoner is entitled to federal habeas corpus relief because the prosecution violated due process by using his post-*Miranda* silence for impeachment purposes at trial, the proper standard for harmless-error review is that announced in *Kotteakos v. United States,* 328 U.S. 750, 776 (1946)—whether the due process error had substantial and injurious effect or influence in determining the jury's verdict—not the stricter "harmless beyond a reasonable doubt" standard of *Chapman v. California*, 386 U.S. 18, 24 (1967), applicable on direct review. Brecht v. Abrahamson, 507 U.S. 619 (1993). *See also* Fry v. Pliler, 551 U.S. 112, 114 (2007) (the "substantial and injurious effect" standard is to be applied in federal habeas proceedings even "when the state appellate court failed to recognize the error and did not review it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman v. California*").

[35] Jenkins v. Anderson, 447 U.S. 231 (1980). *Cf.* Baxter v. Palmigiano, 425 U.S. 308 (1976) (prison disciplinary hearing may draw adverse inferences from inmate's assertion of privilege so long as this was not the sole basis of decision against him).

[36] Simmons v. United States, 390 U.S. 377 (1968). The rationale of the case was subsequently limited to Fourth Amendment grounds in *McGautha v. California,* 402 U.S. 183, 210–13 (1971).

introduction at a second trial of the defendant's testimony at his first trial, given to rebut a confession which was subsequently held inadmissible, since the testimony was in effect "fruit of the poisonous tree" and had been "coerced" from the defendant through use of the confession.[37] Potentially most far-reaching was a holding that invalidated the penalty structure of a statute under which defendants could escape a possible death sentence by entering a guilty plea; the statute "needlessly encourage[d]" waivers of defendant's Fifth Amendment right to plead not guilty and his Sixth Amendment right to a jury trial.[38]

Although this "needless encouragement" test assessed the nature of the choice required to be made by defendants against the strength of the governmental interest in the system requiring the choice, the Court soon developed another test stressing the voluntariness of the choice. A guilty plea entered by a defendant who correctly understands the consequences of the plea is voluntary unless coerced or obtained under false pretenses; moreover, there is no impermissible coercion where the defendant has the effective assistance of counsel.[39] The Court in an opinion by Justice John Marshall Harlan then formulated still another test in holding that a defendant in a capital case in which the jury in one process decides both guilt and sentence could be put to a choice between remaining silent on guilt or admitting guilt and being able to put on evidence designed to mitigate the possible sentence. The pressure to take the stand in response to the sentencing issue, said the Court, was not so great as to impair the policies underlying the Self-Incrimination Clause, policies described in this instance as proscription of coercion and of cruelty in putting the defendant to an undeniably "hard" choice.[40] Similarly, the Court held that requiring a defendant to give notice to the prosecution before trial of his intention to rely on an alibi defense and to give the names and addresses of witnesses who will support it does not violate the Clause.[41] Nor does it violate a defendant's self-incrimination privilege to create a presumption upon the establishment of certain basic facts from which the jury may infer the defendant's guilt unless he rebuts the presumption.[42]

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[37] Harrison v. United States, 392 U.S. 219 (1968).

[38] Jackson v. United States, 390 U.S. 570, 583 (1968).

[39] Parker v. North Carolina, 397 U.S. 790 (1970); Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970). Parker and Brady entered guilty pleas to avoid the death penalty when it became clear that the prosecution had solid evidence of their guilt; Richardson pled guilty because of his fear that an allegedly coerced confession would be introduced into evidence.

[40] McGautha v. California, 402 U.S. 183, 210–20 (1971). When the Court subsequently required bifurcated trials in capital cases, it was on the basis of the Eighth Amendment, and represented no withdrawal from the position described here. *Cf.* Corbitt v. New Jersey, 439 U.S. 212 (1978); Bordenkircher v. Hayes, 434 U.S. 357 (1978).

[41] Williams v. Florida, 399 U.S. 78, 80–86 (1970). The compulsion of choice, Justice Byron White argued for the Court, proceeded from the strength of the state's case and not from the disclosure requirement. That is, the rule did not affect whether or not the defendant chose to make an alibi defense and to call witnesses, but merely required him to accelerate the timing. It appears, however, that in *Brooks v. Tennessee,* 406 U.S. 605 (1972), the Court used the "needless encouragement" test in striking down a state rule requiring the defendant to testify before any other defense witness or to forfeit the right to testify at all. In the Court's view, this impermissibly burdened the defendant's choice whether to testify or not. Another prosecution discovery effort was approved in *United States v. Nobles,* 422 U.S. 233 (1975), in which a defense investigator's notes of interviews with prosecution witnesses were ordered disclosed to the prosecutor for use in cross-examination of the investigator. The Court discerned no compulsion upon defendant to incriminate himself.

[42] "The same situation might present itself if there were no statutory presumption and a prima facie case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution." Yee Hem v. United States, 268 U.S. 178, 185 (1925), quoted with approval in *Turner v. United States,* 396 U.S. 398, 418 n.35 (1970). Justices Black and Douglas dissented on self-incrimination grounds. *Id.* at 425. *See also* United States v. Gainey, 380 U.S. 63, 71, 74 (1965) (dissenting opinions). For due process limitations on such presumptions, *see* discussion under the Fourteenth Amendment, Amdt14.S1.5.4.9 Burdens of Proof and Presumptions.

The obligation to testify is not relieved by this Clause, if, regardless of whether incriminating answers are given, a prosecution is precluded,[43] or if the result of the answers is not incrimination but rather harm to reputation or exposure to infamy or disgrace.[44] The Clause does not prevent a public employer from discharging an employee who, in an investigation specifically and narrowly directed at the performance of the employee's official duties, refuses to cooperate and to provide the employer with the desired information on grounds of self-incrimination.[45] But it is unclear under what other circumstances a public employer may discharge an employee who has claimed his privilege before another investigating agency.[46]

Finally, the rules established by the Clause and the judicial interpretations apply against the states to the same degree that they apply against the Federal Government,[47] and neither sovereign can compel discriminatory admissions that would incriminate the person in the other jurisdiction.[48] There is no "cooperative internationalism" that parallels the cooperative federalism and cooperative prosecution on which application against states is premised, and consequently concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause.[49]

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[43] Prosecution may be precluded by tender of immunity (see next topic for discussion of immunity), or by pardon, Brown v. Walker, 161 U.S. 591, 598–99 (1896). The effect of a mere tender of pardon by the President remains uncertain. *Cf.* Burdick v. United States, 236 U.S. 79 (1915) (acceptance necessary, and self-incrimination is possible in absence of acceptance); Biddle v. Perovich, 274 U.S. 480 (1927) (acceptance not necessary to validate commutation of death sentence to life imprisonment).

[44] Brown v. Walker, 161 U.S. 591, 605–06 (1896); Ullmann v. United States, 350 U.S. 422, 430–31 (1956). Minorities in both cases had contended for a broader rule. *Walker*, 161 U.S. at 631 (Field, J., dissenting); *Ullmann*, 350 U.S. at 454 (Douglas, J., dissenting).

[45] Gardner v. Broderick, 392 U.S. 273, 278 (1968). Testimony compelled under such circumstances is, even in the absence of statutory immunity, barred from use in a subsequent criminal trial by force of the Fifth Amendment itself. Garrity v. New Jersey, 385 U.S. 493 (1967). However, unlike public employees, persons subject to professional licensing by government appear to be able to assert their privilege and retain their licenses. *Cf.* Spevack v. Klein, 385 U.S. 511 (1967) (lawyer may not be disbarred solely because he refused on self-incrimination grounds to testify at a disciplinary proceeding), *approved in Gardner v. Broderick*, 392 U.S. at 277–78. Justices Harlan, Clark, Stewart, and White dissented generally. 385 U.S. 500, 520, 530.

[46] *See* Slochower v. Board of Higher Education, 350 U.S. 551 (1956), *limited by* Lerner v. Casey, 357 U.S. 468 (1958), and Nelson v. County of Los Angeles, 362 U.S. 1 (1960), which were in turn apparently limited by *Garrity* and *Gardner*.

[47] Malloy v. Hogan, 378 U.S. 1 (1964) (overruling Twining v. New Jersey, 211 U.S. 78 (1908), and Adamson v. California, 332 U.S. 46 (1947)).

[48] Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), (overruling United States v. Murdock, 284 U.S. 141 (1931) (Federal Government could compel a witness to give testimony that might incriminate him under state law), Knapp v. Schweitzer, 357 U.S. 371 (1958) (state may compel a witness to give testimony that might incriminate him under federal law), and Feldman v. United States, 322 U.S. 487 (1944) (testimony compelled by a state may be introduced into evidence in the federal courts)). *Murphy* held that a state could compel testimony under a grant of immunity but that, because the state could not extend the immunity to federal courts, the Supreme Court would not permit the introduction of evidence into federal courts that had been compelled by a state or that had been discovered because of state compelled testimony. The result was apparently a constitutionally compelled one arising from the Fifth Amendment itself, 378 U.S. at 75–80, rather than one taken pursuant to the Court's supervisory power as Justice John Marshall Harlan would have preferred. *Id.* at 80 (concurring). Congress has power to confer immunity in state courts as well as in federal in order to elicit information, *Adams v. Maryland*, 347 U.S. 179 (1954), but whether Congress must do so or whether the immunity would be conferred simply through the act of compelling the testimony *Murphy* did not say.

Whether testimony could be compelled by either the Federal Government or a state that could incriminate a witness in a foreign jurisdiction is unsettled. *See* Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 480, 481 (1972) (reserving question), but an affirmative answer seems unlikely. *Cf. Murphy*, 378 U.S. at 58–63, 77.

[49] United States v. Balsys, 524 U.S. 666 (1998).

Amdt5.4.4 Required Records Doctrine

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Although the privilege is applicable to an individual's papers and effects,[1] it does not extend to corporate persons; hence corporate records, as has been noted, are subject to compelled production.[2] In fact, however, the Court has greatly narrowed the protection afforded in this area to natural persons by developing the "required records" doctrine. That is, it has held "that the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.'"[3] This exception developed out of, as Justice Felix Frankfurter showed in dissent, the rule that documents which are part of the official records of government are wholly outside the scope of the privilege; public records are the property of government and are always accessible to inspection. Because government requires certain records to be kept to facilitate the regulation of the business being conducted, so the reasoning goes, the records become public at least to the degree that government could always scrutinize them without hindrance from the record-keeper. "If records merely because required to be kept by law ipso facto become public records, we are indeed living in glass houses. Virtually every major public law enactment—to say nothing of State and local legislation—has record-keeping provisions. In addition to record-keeping requirements, is the network of provisions for filing reports. Exhaustive efforts would be needed to track down all the statutory authority, let alone the administrative regulations, for record-keeping and reporting requirements. Unquestionably they are enormous in volume."[4]

"It may be assumed at the outset that there are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself."[5] But the only limit that the Court suggested in *Shapiro* was that there must be "a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator."[6] That there are limits established by the Self-Incrimination

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[1] Boyd v. United States, 116 U.S. 616 (1886). *But see* Fisher v. United States, 425 U.S. 391 (1976).

[2] *See* discussion under Amdt4.7.2 Adoption of Exclusionary Rule.

[3] Shapiro v. United States, 335 U.S. 1, 33 (1948) (quoting Davis v. United States, 328 U.S. 582, 589–90 (1946), which quoted Wilson v. United States, 221 U.S. 361, 380 (1911)). Dicta in *Wilson* is the source of the required-records doctrine, the holding of the case being the familiar one that a corporate officer cannot claim the privilege against self-incrimination to refuse to surrender corporate records in his custody. *Cf.* Heike v. United States, 227 U.S. 131 (1913). *Davis* was a search and seizure case and dealt with gasoline ration coupons which were government property even though in private possession. *See Shapiro*, 335 U.S. at 36, 56–70 (Frankfurter, J., dissenting).

[4] 335 U.S. at 51.

[5] 335 U.S. at 32.

[6] 335 U.S. at 32.

Clause itself rather than by a subject matter jurisdiction test is evident in the Court's consideration of reporting and disclosure requirements implicating but not directly involving the required-records doctrine.

Amdt5.4.5 Immunity

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Under the Fifth Amendment, the government cannot compel a person to be "a witness against himself . . . .," although a person may waive the privilege against self-incrimination by declining to assert it, specifically disclaiming it, or testifying on the same matters prior to asserting the privilege.[1] In addition, Congress has passed immunity statutes, which allow "the person presiding over the proceeding" to compel a witness, who has asserted his or her privilege against self-incrimination, to testify, provided that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."[2]

As the Supreme Court has recognized immunity statutes "seek a rational accommodation between the imperatives of the privilege [of self-incrimination] and the legitimate demands of government to compel citizens to testify."[3] Parliament appears to have enacted the first immunity statute in 1710,[4] which, in turn, was widely copied in the colonies. Congress enacted the first federal immunity statute in 1857, providing for immunization of any person who testified before a congressional committee from prosecution for any matter "touching which" he had testified.[5]

The Supreme Court's decision in *Counselman v. Hitchcock* soon rendered Congress's immunity statute unenforceable.[6] In *Counselman*, the Court held that an analogous limited-immunity statute was unconstitutional because it did not confer an immunity coextensive with the privilege it replaced. The Court's reasoning in *Counselman* was ambiguous; it identified two faults in the statute. First, the statute did not proscribe

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[1] See Amdt5.4.3 General Protections Against Self-Incrimination Doctrine and Practice.

[2] 18 U.S.C. § 6002. See also 18 U.S.C. § 6003 (providing specifically for "any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States . . . .").

[3] Kastigar v. United States, 406 U.S. 441, 445–46 (1972). The *Kastigar* Court further noted that "The existence of these [immunity] statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." *Id.* The Supreme Court has held that the Fifth Amendment precludes the use as criminal evidence of compelled admissions, Garrity v. New Jersey, 385 U.S. 493 (1967), but this case and dicta in others is unreconciled with the cases that find that one may "waive" though inadvertently the privilege and be required to testify and incriminate oneself. Rogers v. United States, 340 U.S. 367 (1951).

[4] 9 Anne, c. 14, 3–4 (1710). *See* Kastigar v. United States, 406 U.S. 441, 445 n.13 (1972).

[5] Ch. 19, 11 Stat. 155 (1857). There was an exception for perjury committed while testifying before Congress.

[6] 142 U.S. 547 (1892). The statute struck down was ch. 13, 15 Stat. 37 (1868).

"derivative" evidence.[7] Second, it prohibited only future use of the compelled testimony.[8] The latter language accentuated a division between adherents of "transactional" immunity and of "use" immunity which has continued to the present.[9]

Following *Counselman*, Congress enacted a statute that required transactional immunity in exchange for compelled testimony.[10] The Court sustained this law in *Brown v. Walker*.[11] In 1956, the Court broadly reaffirmed *Walker*.[12] Because the immunity acts passed after *Walker* were generally transactional immunity statutes,[13] the question of the constitutional sufficiency of use immunity did not arise. The dicta in cases dealing with immunity, the Court continued to assert the necessity of transactional immunity.[14]

The Court's incorporation of the Self-Incrimination Clause against the states in 1964 raised new considerations. In particular, state officials lacked the power to confer immunity from federal prosecution.[15] As a consequence, concerns arose that if states could not compel testimony because that they lacked authority to immunize a witness in a subsequent "foreign" prosecution, their law-enforcement efforts could suffer. To avoid this outcome, the Court emphasized the "use" restriction rationale of *Counselman* and announced that as a "constitutional rule, a state witness could not be compelled to incriminate himself under

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[7] Counselman v. Hitchcock, 142 U.S. 547, 564 (1892). *See also id.* at 586.

[8] 142 U.S. at 585–86.

[9] "Transactional" immunity means that once a witness has been compelled to testify about an offense, he may never be prosecuted for that offense, no matter how much independent evidence might come to light; "use" immunity means that no testimony compelled to be given and no evidence derived from or obtained because of the compelled testimony may be used if the person is subsequently prosecuted on independent evidence for the offense.

[10] Ch. 83, 27 Stat. 443 (1893).

[11] Brown v. Walker, 161 U.S. 591 (1896). The majority reasoned that one was excused from testifying only if there could be legal detriment flowing from his act of testifying. If a statute of limitations had run out or if a pardon had been issued with regard to a particular offense, a witness could not claim the privilege and refuse to testify, no matter how much other detriment, such as loss of reputation, would attach to his admissions. Therefore, because the statute acted as a pardon or amnesty and relieved the witness of all legal detriment, he must testify. The four dissenters contended essentially that the privilege protected against being compelled to incriminate oneself regardless of any subsequent prosecutorial effort, *id.* at 610, and that a witness was protected against infamy and disparagement as much as prosecution. *Id.* at 628.

[12] "[The] sole concern [of the privilege] is . . . with the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to the criminal acts'. . . . Immunity displaces the danger. Once the reason for the privilege ceases, the privilege ceases." 350 U.S. at 438–39. The internal quotation is from Boyd v. United States, 116 U.S. 616, 634 (1886). *E.g.*, Hale v. Henkel, 201 U.S. 43, 67 (1906); United States v. Monia, 317 U.S. 424, 425, 428 (1943); Smith v. United States, 337 U.S. 137, 141, 146 (1949); United States v. Murdock, 284 U.S. 141, 149 (1931); Adams v. Maryland, 347 U.S. 179, 182 (1954). In *Ullmann v. United States*, 350 U.S. 422, 436–37 (1956), Justice Felix Frankfurter described the holding of *Counselman* as relating to the absence of a prohibition on the use of derivative evidence.

[13] Kastigar v. United States, 406 U.S. 441, 457–58 (1972); Piccirillo v. New York, 400 U.S. 548, 571 (1971) (Brennan, J., dissenting). The exception was an immunity provision of the bankruptcy laws, 30 Stat. 548 (1898), 11 U.S.C. § 25(a)(10), repealed by 84 Stat. 931 (1970). The right of a bankrupt to insist on his privilege against self-incrimination as against this statute was recognized in *McCarthy v. Arndstein*, 266 U.S. 34, 42 (1924), "because the present statute fails to afford complete immunity from a prosecution." The statute also failed to prohibit the use of derivative evidence. Arndstein v. McCarthy, 254 U.S. 71 (1920).

[14] *E.g.*, Hale v. Henkel, 201 U.S. 43, 67 (1906); United States v. Monia, 317 U.S. 424, 425, 428 (1943); Smith v. United States, 337 U.S. 137, 141, 146 (1949); United States v. Murdock, 284 U.S. 141, 149 (1931); Adams v. Maryland, 347 U.S. 179, 182 (1954). In *Ullmann v. United States*, 350 U.S. 422, 436–37 (1956), Justice Frankfurter described the holding of *Counselman* as relating to the absence of a prohibition on the use of derivative evidence Murphy v. Waterfront Comm'n, 378 U.S. 52, 77–99 (1964). Concurring, Justices White and Stewart argued at length in support of the constitutional sufficiency of use immunity and the lack of a constitutional requirement of transactional immunity. *Id.* at 92. *See also* Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967), recognizing the propriety of compelling testimony with a use restriction attached.

[15] Malloy v. Hogan, 378 U.S. 1 (1964), extended the clause to the states. That Congress could immunize a federal witness from state prosecution and extend use immunity to state courts was held in *Adams v. Maryland*, 347 U.S. 179 (1954), and had been recognized in *Brown v. Walker*, 161 U.S. 591 (1896).

federal law unless federal authorities were precluded from using either his testimony or evidence derived from it."[16] After this decision, Congress enacted a statute replacing all prior immunity statutes and adopting a use-immunity restriction only.[17] The Supreme Court upheld this statute in *Kastigar v. United States*.[18]

Amdt5.4.6 Withdrawal of Government Benefits

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

The line of cases begins with *United States v. Sullivan*,[1] in which a unanimous Court held that the Fifth Amendment did not privilege a bootlegger in not filing an income tax return because the filing would have disclosed the illegality in which he was engaged. "It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime," Justice Oliver Wendell Holmes stated for the Court.[2] However, "[i]f the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return . . . ."[3] Using its taxing power to reach gambling activities over which it might otherwise not have had jurisdiction,[4] Congress enacted a complicated statute imposing an annual occupational tax on gamblers and an excise tax on all their wages, and coupled the tax with an annual registration requirement under which each gambler must file with the Internal Revenue Service (IRS) a declaration of his business with identification of his place of business and his employees and agents, filings which were made available to state and local law enforcement agencies. These requirements were upheld by the Court against self-incrimination challenges on the three grounds that (1) the privilege did not excuse a

[16] Murphy v. Waterfront Comm'n, 378 U.S. 52, 77–99 (1964). Concurring, Justices White and Stewart argued at length in support of the constitutional sufficiency of use immunity and the lack of a constitutional requirement of transactional immunity. *Id.* at 92. *See also* Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967), recognizing the propriety of compelling testimony with a use restriction attached.

[17] Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 201(a), 84 Stat. 922, 18 U.S.C. §§ 6002–6003. Justice Department officials have the authority under the Act to decide whether to seek immunity, and courts will not apply "constructive" use immunity absent compliance with the statute's procedures. United States v. Doe, 465 U.S. 605 (1984).

[18] 406 U.S. 441 (1972). A similar state statute was sustained in *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472 (1972).

[1] 274 U.S. 259, 263, 264 (1927). *Sullivan* was reaffirmed in *Garner v. United States,* 424 U.S. 648 (1976), holding that a taxpayer's privilege against self-incrimination was not violated when he failed to claim his privilege on his tax returns, and instead gave incriminating information leading to conviction. One must assert one's privilege to alert the government to the possibility that it is seeking to obtain incriminating material. It is not coercion forbidden by the clause that upon a claim of the privilege the government could seek an indictment for failure to file, since a valid claim of privilege cannot be the basis of a conviction. The taxpayer was not entitled to a judicial ruling on the validity of his claim and an opportunity to reconsider if the ruling went against him, regardless of whether a good-faith erroneous assertion of the privilege could subject him to prosecution, a question not resolved.

[2] 274 U.S. at 263–64.

[3] 274 U.S. at 263.

[4] The expansion of the commerce power would now obviate reliance on the taxing power.

complete failure to file, (2) because the threshold decision to gamble was voluntary, the required disclosures were not compulsory, and (3) because registration required disclosure only of prospective conduct, the privilege, limited to past or present acts, did not apply.[5]

Constitutional limitations appeared, however, in *Albertson v. SACB*,[6] which struck down under the Self-Incrimination Clause an order pursuant to statute requiring registration by individual members of the Communist Party or associated organizations. "In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime."[7]

The gambling tax reporting scheme was next struck down by the Court.[8] Because of the pervasiveness of state laws prohibiting gambling, said Justice John Marshall Harlan for the Court, "the obligations to register and to pay the occupational tax created for petitioner 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination."[9] Overruling *Kahriger* and *Lewis*, the Court rejected its earlier rationales. Registering per se would have exposed a gambler to dangers of state prosecution, so *Sullivan* did not apply.[10] Any contention that the voluntary engagement in gambling "waived" the self-incrimination claim, because there is "no constitutional right to gamble," would nullify the privilege.[11] And the privilege was not governed by a "rigid chronological distinction" so that it protected only past or present conduct, but also reached future self-incrimination the danger of which is not speculative and insubstantial.[12] Significantly, then, Justice Harlan turned to distinguishing the statutory requirements here from the "required records" doctrine of

[5] United States v. Kahriger, 345 U.S. 22 (1953); Lewis v. United States, 348 U.S. 419 (1955).

[6] 382 U.S. 70 (1965).

[7] 382 U.S. at 79. The decision was unanimous, with Justice Byron White not participating. The same issue had been held not ripe for adjudication in *Communist Party v. SACB,* 367 U.S. 1, 105–10 (1961).

[8] Marchetti v. United States, 390 U.S. 39 (1968) (occupational tax); Grosso v. United States, 390 U.S. 62 (1968) (wagering excise tax). In *Haynes v. United States,* 390 U.S. 85 (1968), the Court struck down a requirement that one register a firearm that it was illegal to possess. The following Term on the same grounds the Court voided a statute prohibiting the possession of marijuana without having paid a transfer tax and registering. Leary v. United States, 395 U.S. 6 (1969); United States v. Covington, 395 U.S. 57 (1969). However, a statute was upheld which prohibited the sale of narcotics to a person who did not have a written order on a prescribed form, since the requirement caused the self-incrimination of the buyer but not the seller, the Court viewing the statute as actually a flat proscription on sale rather than a regulatory measure. Minor v. United States, 396 U.S. 87 (1969). The congressional response was reenactment of the requirements, coupled with use immunity. United States v. Freed, 401 U.S. 601 (1971).

[9] Marchetti v. United States, 390 U.S. 39, 48 (1968).

[10] "Every element of these requirements would have served to incriminate petitioners; to have required him to present his claim to Treasury officers would have obliged him 'to prove guilt to avoid admitting it.'" 390 U.S. at 50.

[11] "The question is not whether petitioner holds a 'right' to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it." 390 U.S. at 51. *But cf.* California v. Byers, 402 U.S. 424, 434 (1971) (plurality opinion), in which it is suggested that because there is no "right" to leave the scene of an accident a requirement that a person involved in an accident stop and identify himself does not violate the Self-Incrimination Clause.

[12] Marchetti v. United States, 390 U.S. 39, 52–54 (1968). "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination . . . . This principle does not permit the rigid chronological distinctions adopted in *Kahriger* and *Lewis*. We see no reason to suppose that the force of the constitutional prohibition is diminished merely because confession of a guilty purpose precedes the act which it is subsequently employed to evidence." *Id.* at 53–54. *Cf.* United States v. Freed, 401 U.S. 601, 605–07 (1971).

Shapiro. "First, petitioner . . . was not . . . obliged to keep and preserve records 'of the same kind as he has customarily kept'; he was required simply to provide information, unrelated to any records which he may have maintained, about his wagering activities. This requirement is not significantly different from a demand that he provide oral testimony . . . . Second, whatever 'public aspects' there were to the records at issue in *Shapiro*, there are none to the information demanded from Marchetti. The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress. Third, the requirements at issue in *Shapiro* were imposed in 'an essentially non-criminal and regulatory area of inquiry' while those here are directed to a 'selective group inherently suspect of criminal activities.' . . . The United States' principal interest is evidently the collection of revenue, and not the punishment of gamblers, . . . but the characteristics of the activities about which information is sought, and the composition of the groups to which inquiries are made, readily distinguish this situation from that in *Shapiro*."[13]

Most recent in this line of cases is *California v. Byers*,[14] which indicates that the Court has yet to settle on an ascertainable standard for judging self-incrimination claims in cases where government is asserting an interest other than criminal law enforcement. *Byers* sustained the constitutionality of a statute which required the driver of any automobile involved in an accident to stop and give his name and address. The state court had held that a driver who reasonably believed that compliance with the statute would result in self-incrimination could refuse to comply. A plurality of the Court, however, determined that *Sullivan* and *Shapiro* applied and not the *Albertson-Marchetti* line of cases, because the purpose of the statute was to promote the satisfaction of civil liabilities resulting from automobile accidents and not criminal prosecutions, and because the statute was directed to all drivers and not to a group which was either "highly selective" or "inherently suspect of criminal activities." The combination of a noncriminal motive with the general character of the requirement made too slight for reliance the possibility of incrimination.[15] Justice Harlan concurred to make up the majority on the disposition of the case, disagreeing with the plurality's conclusion that the stop and identification requirement did not compel incrimination.[16] However, the Justice thought that, where there is no governmental purpose to enforce a criminal law and instead government is pursuing other legitimate regulatory interests, it is permissible to apply a balancing test between the government's interest and the individual's interest. When he balanced the interests protected by the Amendment—protection of privacy and maintenance of an accusatorial system—with the noncriminal purpose, the necessity for self-reporting as a means of securing information, and the nature of the disclosures required, Justice Harlan

[13] Marchetti v. United States, 390 U.S. 39, 57 (1968).

[14] 402 U.S. 424 (1971).

[15] 402 U.S. at 427–31 (Chief Justice Burger and Justices Stewart, White, and Blackmun).

[16] "The California Supreme Court was surely correct in considering that the decisions of this Court have made it clear that invocation of the privilege is not limited to situations where the purpose of the inquiry is to get an incriminating answer. . . . [I]t must be recognized that a reading of our more recent cases . . . suggests the conclusion that the applicability of the privilege depends exclusively on a determination that, from the individual's point of view, there are 'real' and not 'imaginary' risks of self-incrimination in yielding to state compulsion. Thus, *Marchetti* and *Grosso* . . . start from an assumption of a non-prosecutorial governmental purpose in the decision to tax gambling revenue; those cases go on to apply what in another context I have called the 'real danger v. imaginary possibility standard' . . . . A judicial tribunal whose position with respect to the elaboration of constitutional doctrine is subordinate to that of this Court certainly cannot be faulted for reading these opinions as indicating that the 'inherently-suspect-class' factor is relevant only as an indicium of genuine incriminating risk as assessed from the individual's point of view." 402 U.S. at 437–38.

voted to sustain the statute.[17] *Byers* was applied in *Baltimore Dep't of Social Services v. Bouknight*[18] to uphold a juvenile court's order that the mother of a child under the court's supervision produce the child. Although in this case the mother was suspected of having abused or murdered her child, the order was justified out of concern for the child's safety—a "compelling reason[ ] unrelated to criminal law enforcement."[19] Moreover, because the mother had custody of her previously abused child only as a result of the juvenile court's order, the Court analogized to the required records cases to conclude that the mother had submitted to the requirements of the civil regulatory regime as the child's "custodian."

Amdt5.4.7 Custodial Interrogation

Amdt5.4.7.1 Early Doctrine and Custodial Interrogation

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

By the latter part of the eighteenth century English and early American courts had developed a rule that coerced confessions were potentially excludable from admission at trial because they were testimonially untrustworthy.[1] The Supreme Court at times continued to ground exclusion of involuntary confessions on this common law foundation of unreliability without any mention of the constitutional bar against self-incrimination. Consider this dictum from an 1884 opinion: "[V]oluntary confession of guilt is among the most effectual proofs in the law, . . . [b]ut the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law."[2] Subsequent cases followed essentially the same line of thought.[3]

Then, language in the 1897 case of *Bram v. United States* opened the door to eventually extending the doctrinal basis for analyzing the admissibility of a confession beyond the

[17] 402 U.S. at 448–58. The four dissenters argued that it was unquestionable that Byers would have faced real risks of self-incrimination by compliance with the statute and that this risk was sufficient to invoke the privilege. *Id.* at 459, 464 (Justices Black, Douglas, Brennan, and Marshall).

[18] 493 U.S. 549 (1990).

[19] 493 U.S. at 561. By the same token, the Court concluded that the targeted group—persons who care for children pursuant to a juvenile court's custody order—is not a group "inherently suspect of criminal activities" in the *Albertson-Marchetti* sense.

[1] 3 J. Wigmore, A Treatise on the Anglo-American System of Evidence § 823 (3d ed. 1940); *Developments in the Law—Confessions*, 79 Harv. L. Rev. 935, 954–59 (1966).

[2] Hopt v. Utah, 110 U.S. 574, 584–85 (1884). Utah at this time was a territory and subject to direct federal judicial supervision.

[3] Pierce v. United States, 160 U.S. 335 (1896); Sparf and Hansen v. United States, 156 U.S. 51 (1895). In *Wilson v. United States,* 162 U.S. 613 (1896), failure to provide counsel or to warn the suspect of his right to remain silent was held to have no effect on the admissibility of a confession but was only to be considered in assessing its credibility.

common-law test that focused on voluntariness as an indicator of the confession's trustworthiness as evidence."In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"[4] However, though this approach[5] and the case itself were subsequently approved in several cases,[6] the Court would still hold in 1912 that a confession should not be excluded merely because the authorities had not warned a suspect of his right to remain silent,[7] and more than once later opinions could doubt "whether involuntary confessions are excluded from federal criminal trials on the ground of a violation of the Fifth Amendment's protection against self-incrimination, or from a rule that forced confessions are untrustworthy. . . ."[8] One reason for this was that the Self-Incrimination Clause had not yet been made applicable to the states, thereby requiring that the admissibility of confessions in state courts be determined under due process standards developed from common-law principles. It was only after the Court extended the Self-Incrimination Clause to the states that a divided Court reaffirmed and extended the 1897 *Bram* ruling and imposed on both federal and state trial courts new rules for admitting or excluding confessions and other admissions made to police during custodial interrogation.[9]

Amdt5.4.7.2 Pre-Miranda Self-Incrimination Doctrine (1940s to 1960s)

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

From the 1940s to the 1960s, the Supreme Court decided a series of cases that explained when a confession's admission in a criminal trial violates the Fifth Amendment's self-incrimination doctrine. In its 1943 decision in *McNabb v. United States*,[1] the Supreme Court held that confessions obtained after an "unnecessary delay" in presenting a suspect for

[4] Bram v. United States, 168 U.S. 532, 542 (1897).

[5] Ziang Sun Wan v. United States, 266 U.S. 1, 14–15 (1924). This case first held that the circumstances of detention and interrogation were relevant and perhaps controlling on the question of admissibility of a confession.

[6] Burdeau v. McDowell, 256 U.S. 465, 475 (1921); Powers v. United States, 223 U.S. 303, 313 (1912); Shotwell Mfg. Co. v. United States, 371 U.S. 342, 347 (1963).

[7] Powers v. United States, 223 U.S. 303 (1912).

[8] United States v. Carignan, 342 U.S. 36, 41 (1951). *See also* McNabb v. United States, 318 U.S. 332, 346 (1943); Brown v. Mississippi, 297 U.S. 278, 285 (1936); Stein v. New York, 346 U.S. 156, 191 n.35 (1953).

[9] Miranda v. Arizona, 384 U.S. 436 (1966). According to Wigmore, "there never was any historical connection . . . between the constitutional [self-incrimination] clause and the [common law] confession-doctrine," 3 J. Wigmore, A Treatise on the Anglo-American System of Evidence § 823, at 250 n.5 (3d ed. 1940); *see also* vol. 8 *id.* at § 2266 (McNaughton rev. 1961). It appears that while the two rules did develop separately—the bar against self-incrimination deriving primarily from notions of liberty and fairness, proscriptions against involuntary confessions deriving primarily from notions of reliability — they did stem from some of the same considerations, and, in fact, the confession rule may be considered in important respects to be an off-shoot of the privilege against self-incrimination. *See* L. Levy, Origins of the Fifth Amendment: The Right against Self-Incrimination 325–32, 495 n.43 (1968). *See also* Culombe v. Connecticut, 367 U.S. 568, 581–84, especially 583 n.25 (1961) (Justice Frankfurter announcing judgment of the Court).

[1] 318 U.S. 332 (1943). *See also* Anderson v. United States, 318 U.S. 350 (1943).

arraignment after arrest could not be admitted in criminal trials.[2] This rule, developed pursuant to the Court's supervisory power over the lower federal courts[3] and hence not applicable to the states,[4] was designed to implement guarantees that the Federal Rules of Criminal Procedure provides to defendants.[5] The rule was informed by concern over incommunicado interrogation and coerced confessions.[6] Although the Court never specified a minimum time after which delay in presenting a suspect for arraignment could invalidate a confession, Congress in 1968 legislated a six-hour period for interrogation following arrest before the suspect must be presented.[7]

Supreme Court cases from this time period addressed when a confession would become inadmissible because it had been obtained through coercive interrogation tactics. Many of the early cases disclosed clear instances of coercion that the Court determined had produced involuntary confessions. For example, the Court had little difficulty concluding that physical torture was coercive.[8] Moreover, in its first confession case arising from a state court proceeding, the Supreme Court set aside a conviction based solely on confessions obtained through repeated whippings of the defendant with ropes and studded belts.[9] However, the Court also condemned other overtly coercive tactics that did not amount to physical torture. For example, in *Chambers v. Florida*,[10] the Court held that five days of prolonged questioning and incommunicado detention made subsequent confessions involuntary.

Although the Court did not hold that prolonged questioning by itself made a resulting confession involuntary,[11] it increasingly found coercion present even in intermittent questioning over a period of days of incommunicado detention.[12] In *Ashcraft v. Tennessee*,[13] the

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[2] In *Upshaw v. United States*, 335 U.S. 410 (1948), the Court held that a confession obtained after a thirty-hour delay was inadmissible per se. Mallory v. United States, 354 U.S. 449 (1957), held that any confession obtained during an unnecessary delay in arraignment was inadmissible. A confession obtained during a lawful delay before arraignment was admissible. United States v. Mitchell, 322 U.S. 65 (1944).

[3] McNabb v. United States, 318 U.S. 332, 340 (1943); Upshaw v. United States, 335 U.S. 410, 414 n.2 (1948). Burns v. Wilson, 346 U.S. 137, 145 n.12 (1953), indicated that because the Court had no supervisory power over courts-martial, the rule did not apply in military courts.

[4] Gallegos v. Nebraska, 342 U.S. 55, 60, 63–64, 71–73 (1951); Stein v. New York, 346 U.S. 156, 187–88 (1953); Culombe v. Connecticut, 367 U.S. 568, 599–602 (1961).

[5] Rule 5(a) requiring prompt arraignment was promulgated in 1946, but the Court in *McNabb* relied on predecessor statutes, some of which required prompt arraignment. *Cf.* Mallory v. United States, 354 U.S. 449, 451–54 (1957). Rule 5(b) requires that the magistrate at arraignment must inform the suspect of the charge against him; must warn him that what he says may be used against him; must tell him of his right to counsel and his right to remain silent; and must also provide for the terms of bail.

[6] McNabb v. United States, 318 U.S. 332, 343 (1943); Mallory v. United States, 354 U.S. 449, 452–53 (1957).

[7] The provision was part of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 210, 18 U.S.C. § 3501(c).

[8] Brown v. Mississippi, 297 U.S. 278 (1936).

[9] *Id.* The *Brown* Court stated: "[T]he question of the right of the State to withdraw the privilege against self-incrimination is not here involved. The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to a confession is a different matter . . . . It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." *Id.* at 285, 286.

[10] 309 U.S. 227 (1940)

[11] Lisenba v. California, 314 U.S. 219 (1941).

[12] Watts v. Indiana, 338 U.S. 49 (1949) (suspect held incommunicado without arraignment for seven days without being advised of his rights in solitary confinement in a cell with no place to sleep but the floor and subject to questioning each day except Sunday by relays of police officers for periods ranging in duration from three to nine-and-one-half hours); Turner v. Pennsylvania, 338 U.S. 62 (1949) (suspect held on suspicion for five days without arraignment and without being advised of his rights and subject to questioning by relays of officers for periods briefer than in *Watts* during both days and nights); Harris v. South Carolina, 338 U.S. 68 (1949) (suspect in murder case arrested in Tennessee on theft warrant, taken to South Carolina, held incommunicado, and subject to questioning for

Court held that a confession was inadmissible when it was obtained after almost 36 hours of continuous questioning under powerful electric lights by multiple officers, experienced investigators, and highly trained lawyers. Similarly, *Ward v. Texas* voided a conviction based on a confession obtained after three days of questioning during which the defendant was driven from county to county and told falsely of a danger of lynching.[14] In *Stein v. New York*,[15] however, the Court affirmed convictions of experienced criminals who had confessed after twelve hours of intermittent questioning over a period of 32 hours of incommunicado detention. The majority stressed that the correct approach was to balance "the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."[16]

In resolving cases involving confessions during interrogation, the Court attempted by considering the "totality of the circumstances" to determine whether a confession was "voluntary" and admissible or "coerced" and inadmissible. The Court attempted to balance law enforcement's need to question suspects against concerns about undue coercion.[17] Although the Court has often focused on the nature of the coercion without regard to the individual characteristics of the suspect,[18] the Court has occasionally determined that some suspects are susceptible to even mild coercion because of their age or intelligence.[19] In some cases, a single factor indicated that the confession was involuntary.[20] However, in other cases, the Court recited a number of contributing factors without ranking any factor above the others, including the defendant's age and intelligence; whether the defendant was held incommunicado, denied requested counsel, or deprived of access to friends; and whether the authorities employed

three days for periods as long as 12 hours, not advised of his rights, not told of the murder charge, and denied access to friends and family while being told his mother might be arrested for theft).

[13] 322 U.S. 143 (1944).

[14] 316 U.S. 547 (1942). *See also* Canty v. Alabama, 309 U.S. 629 (1940); White v. Texas, 310 U.S. 530 (1940); Lomax v. Texas, 313 U.S. 544 (1941); Vernon v. Alabama, 313 U.S. 540 (1941).

[15] 346 U.S. 156 (1953).

[16] *Id.* at 185.

[17] Culombe v. Connecticut, 367 U.S. 568, 570–602 (1961).

[18] 373 U.S. at 514. *See also* Spano v. New York, 360 U.S. 315 (1959). (after eight hours of almost continuous questioning, suspect was induced to confess by rookie policeman who was a childhood friend and who played on the suspect's sympathies by falsely stating that his job as a policeman and the welfare of his family was at stake); Rogers v. Richmond, 365 U.S. 534 (1961) (suspect resisted questioning for six hours but yielded when officers threatened to bring his wife to headquarters). More recent cases include Davis v. North Carolina, 384 U.S. 737 (1966) (escaped convict held incommunicado sixteen days but periods of interrogation each day were about an hour); Greenwald v. Wisconsin, 390 U.S. 519 (1968); Darwin v. Connecticut, 391 U.S. 346 (1968).

[19] Gallegos v. Colorado, 370 U.S. 49 (1962); Blackburn v. Alabama, 361 U.S. 199 (1960); Fikes v. Alabama, 352 U.S. 191 (1957); Payne v. Arkansas, 356 U.S. 560 (1958); Reck v. Pate, 367 U.S. 433 (1961); Culombe v. Connecticut, 367 U.S. 568 (1961). The suspect in *Spano v. New York*, 360 U.S. 315 (1959), was a 25-year-old with a history of emotional instability. The fact that the suspect was a woman was apparently significant in *Lynumn v. Illinois*, 372 U.S. 528 (1963), in which officers threatened to have the suspect's children taken from her and to have her taken off the welfare relief rolls. But a suspect's mental state alone—even schizophrenia—is insufficient to establish involuntariness absent some coercive police activity. Colorado v. Connelly, 479 U.S. 157 (1986).

[20] *E.g.*, Leyra v. Denno, 347 U.S. 556 (1954) (confession obtained by psychiatrist trained in hypnosis from a physically and emotionally exhausted suspect who had already been subjected to three days of interrogation); Townsend v. Sain, 372 U.S. 293 (1963) (suspect was administered drug with properties of "truth serum" to relieve withdrawal pains of narcotics addiction, although police probably were not aware of drug's side effects).

trickery in obtaining a confession.[21] The Court also held that confessions induced through the exploitation of some illegal action, such as an illegal arrest[22] or an unlawful search and seizure,[23] were inadmissible.

Amdt5.4.7.3 Miranda and Its Aftermath

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

In *Miranda v. Arizona*, the Supreme Court held that prosecutors may not use statements obtained during a custodial interrogation unless the interrogation was conducted pursuant to certain procedural safeguards. Specifically, the Court concluded that such statements are inadmissible at trial unless the individual subject to interrogation was informed of his or her right to remain silent, that any statements could be used against the subject in subsequent proceedings, and of his or her right to an attorney.[1] The *Miranda* Court regarded police interrogation as inherently coercive. The Court explained that the relevant "*Miranda* warnings" were necessary to ensure that suspects were not stripped of their ability to make a free and rational choice between speaking and not speaking.[2] Although the *Miranda* decision became highly controversial, the Court has continued to adhere to it.[3] However, the Court has created exceptions to the *Miranda* warnings over the years, and referred to the warnings as "prophylactic"[4] and "not themselves rights protected by the Constitution."[5]

In *Dickerson v. United States*,[6] the Court addressed a foundational issue, finding that *Miranda* was a "constitutional decision" that could not be overturned by statute, and consequently that 18 U.S.C. § 3501, which provided for a less strict "voluntariness" standard for the admissibility of confessions, could not be sustained.

Consistent application of *Miranda*'s holding on warnings to state proceedings necessarily implied a constitutional basis for *Miranda*, the Court explained, because federal courts "hold

[21] *E.g.*, Johnson v. New Jersey, 384 U.S. 719 (1966); Davis v. North Carolina, 384 U.S. 737 (1966); Ashdown v. Utah, 357 U.S. 426 (1958); Thomas v. Arizona, 356 U.S. 390 (1958)

[22] Wong Sun v. United States, 371 U.S. 471 (1963).

[23] Fahy v. Connecticut, 375 U.S. 85 (1963).

[1] 384 U.S. at 444–445.

[2] Justices Tom Clark, John Harlan, Potter Stewart, and Byron White dissented, finding no historical support for the application of the Clause to police interrogation and rejecting the policy considerations for the extension put forward by the majority. Miranda v. Arizona, 384 U.S. 436, 499, 504, 526 (1966). Justice White argued that while the Court's decision was not compelled or even strongly suggested by the Fifth Amendment, its history, and the judicial precedents, this did not preclude the Court from making new law and new public policy grounded in reason and experience. However, he contended that the change made in *Miranda* was ill-conceived because it arose from a view of interrogation as inherently coercive and because the decision did not adequately protect society's interest in detecting and punishing criminal behavior. *Id.* at 531–45.

[3] *See, e.g.*, Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring) ("The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date.")

[4] New York v. Quarles, 467 U.S. 549, 653 (1984).

[5] Michigan v. Tucker, 417 U.S. 433, 444 (1974).

[6] 530 U.S. 428 (2000).

no supervisory authority over state judicial proceedings."[7] Moreover, *Miranda* itself had purported to guide law enforcement agencies and courts.[8] However, even if *Miranda* is rooted in the Constitution, the Court has indicated that this does not mean a precise articulation of its required warnings is "immutable."[9]

In addition to finding that *Miranda* had "constitutional underpinnings," the *Dickerson* Court also rejected a request to overrule *Miranda*. "Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance," Chief Justice William Rehnquist wrote for the seven-Justice majority, "the principles of *stare decisis* weigh heavily against overruling it now." There was no special justification for overruling the decision; subsequent cases had not undermined the decision's doctrinal underpinnings, but rather had "reaffirm[ed]" its "core ruling." Moreover, *Miranda* warnings had "become so embedded in routine police practice [that they] have become part of our national culture."[10]

As to the viability of *Miranda* claims in federal habeas corpus cases, the Court suggested in 1974 that most claims could be disallowed[11] but reversed course in 1993. The Court ruled in *Withrow v. Williams* that *Miranda* protects a fundamental trial right of the defendant, unlike the Fourth Amendment exclusionary rule addressed in *Stone v. Powell*.[12] Thus, claimed violations of *Miranda* merited federal habeas corpus review because they related to the correct ascertainment of guilt.[13] The *Miranda* rule differed from the *Mapp v. Ohio*[14] exclusionary rule because *Mapp's* primary purpose was to deter future Fourth Amendment violations, which the Court opined would only be marginally advanced by allowing collateral review.[15] A further consideration was that eliminating review of *Miranda* claims would not significantly reduce federal habeas review of state convictions, because most *Miranda* claims could be recast in terms of due process denials resulting from admission of involuntary confessions.[16]

The Court further explored the constitutional nature of *Miranda* in its 2022 case *Vega v. Tekoh*.[17] In *Vega*, the Court reiterated that while *Miranda* was a constitutional decision that adopted constitutional rules, those rules were set forth by the Court as a way to safeguard

[7] 530 U.S. at 438.

[8] 530 U.S. at 439 (quoting from *Miranda*, 384 U.S. at 441–42).

[9] *See, e.g.*, Florida v. Powell, 559 U.S. 50, 60, 63–64 (2010).

[10] 530 U.S. at 443.

[11] In *Michigan v. Tucker*, 417 U.S. 433, 439 (1974), the Court suggested a distinction between a constitutional violation and a violation of "the prophylactic rules developed to protect that right." The holding in *Tucker*, however, turned on the fact that the interrogation had preceded the *Miranda* decision and that warnings—albeit not full *Miranda* warnings—had been given.

[12] 428 U.S. 465 (1976)

[13] 507 U.S. 680 (1993). Even though a state prisoner's *Miranda* claim may be considered in federal habeas review, the scope of federal habeas review is narrow. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a state court judgment may be set aside on habeas review only if the judgment is found to be contrary to, or an unreasonable application of, clearly established Supreme Court precedent. By contrast, a federal court reviewing a state court judgment on direct review considers federal legal questions de novo and can overturn a state court holding based on its own independent assessment of federal legal issues. This difference in scope of review can be critical. *Compare* Yarborough v. Alvarado, 541 U.S. 652 (2004) (habeas petition denied because state court's refusal to take a juvenile's age into account in applying *Miranda* was not an unreasonable application of clearly established Supreme Court precedent), *with* J.D.B. v. North Carolina, 564 U.S. 261 (2011) (on the Court's de novo review of the age issue, a state court's refusal to take a juvenile's age into account in applying *Miranda* held to be in error, and case remanded).

[14] 367 U.S. 643 (1961).

[15] 507 U.S. at 686–93.

[16] 507 U.S. at 693.

[17] No. 21-499 (U.S. June 23, 2022).

constitutional rights under the Fifth Amendment.[18] Therefore, a *Miranda* violation does not necessarily constitute a violation of the Constitution.[19] The Court concluded that because a *Miranda* violation is not a violation of a constitutional right, it is not actionable under 42 U.S.C. § 1983, which requires someone suffer the deprivation of [a] right . . . secured by the Constitution.[20]

Amdt5.4.7.4 Custodial Interrogation Standard

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Law enforcement officers must give *Miranda* warnings prior to "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[1] Such warnings are thus required when a person is (1) taken into custody, and (2) subject to interrogation. The Supreme Court has explained that whether a person is "in custody" depends on the results of a two-part test that considers whether a reasonable person in the suspect's shoes would feel that he could freely exercise his right against self-incrimination and the degree to which the suspect's freedom of action is restricted.

First, whether a person is "in custody" during questioning depends on the degree of coercive pressure imposed on him. The Court applies an objective, context-specific test that considers the degree of intimidation that a reasonable person in the suspect's shoes would feel if he were to freely exercise his right against self-incrimination. A police officer's subjective and undisclosed view that a person being interrogated is a criminal suspect is not relevant for *Miranda* purposes, nor is the subjective view of the person being questioned.[2] However, age may weigh in favor of requiring *Miranda* warnings if the detainee is a juvenile.[3]

Second, the Supreme Court has considered whether various restrictions on a person's freedom of action constitute taking that person into custody for purposes of *Miranda*. The Court has determined that, for example, an ordinary traffic stop does not to amount to *Miranda* "custody."[4] Moreover, interrogating a prison inmate about previous outside conduct does not necessarily amount to custody, even if the inmate is isolated from the general prison

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[18] Id. at 11.

[19] Id. at 13.

[20] Id.

[1] Miranda v. Arizona, 384 U.S. 436, 444 (1966) (emphasis added).

[2] Stansbury v. California, 511 U.S. 318 (1994).

[3] J.D.B. v. North Carolina, 564 U.S. 261 (2011) (case remanded to evaluate whether a 13-year-old student questioned by a uniformed police officer and school administrators on school grounds was in custody).

[4] Berkemer v. McCarty, 468 U.S. 420, 440 (1984) (roadside questioning of motorist stopped for traffic violation not custodial interrogation until "freedom of action is curtailed to a 'degree associated with formal arrest'"). Thus, "custody" for self-incrimination purposes under the Fifth Amendment does not necessarily cover all detentions that are "seizures" under the Fourth Amendment. *Id.*

population for questioning.[5] The fact that a suspect may be present in a police station does not necessarily mean, absent further restrictions, that questioning is custodial.[6] By itself, the fact that the suspect is in his home or other familiar surroundings will not ordinarily lead to a conclusion that the inquiry was custodial.[7] However, questioning a person upon arrest in his home may be custodial.[8] When a person has been subjected to *Miranda* custody that custody ends when he is free to resume his normal life activities after questioning.[9] Nevertheless, a break in custody may not end all *Miranda* implications for subsequent custodial interrogations.[10]

In addition to requiring that a person be taken into custody to trigger *Miranda* warnings, such warnings must precede custodial *interrogation*. It is not necessary under *Miranda* that the police ask a question in order to "interrogate" the suspect, as demonstrated in *Rhode Island v. Innis*.[11] There, police had apprehended the defendant as a murder suspect but had not found the weapon used. While he was being transported to police headquarters in a squad car, the officers did not question the defendant, who after receiving *Miranda* warnings had wanted to consult a lawyer. However, the officers discussed among themselves that a school for children with disabilities was near the crime scene, and that they hoped to find the weapon before it injured a child. The defendant then took them to the weapon's hiding place.

Unanimously rejecting a contention that only express questioning violates *Miranda*, the Court said: We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any

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[5] Howes v. Fields, 565 U.S. 499 (2012) (taking a prisoner incarcerated for disorderly conduct aside for questioning about an unrelated child molestation incident held, 6-3, not to constitute custodial interrogation under the totality of the circumstances), distinguishing *Mathis v. United States*, 391 U.S. 1 (1968) (questioning state prisoner about unrelated federal tax violation held to be custodial interrogation). While the *Howes* Court split 6-3 on whether a custodial interrogation had taken place for Fifth Amendment purposes, the case was before it on habeas review, which requires that a clearly established Supreme Court precedent mandates a contrary result. All the *Howes* Justices agreed that *Mathis* had not, for purposes of habeas review of a state case, "clearly established" that all private questioning of an inmate about previous, outside conduct was "custodial" per se. Rather, *Howes* explained that a broader assessment of all relevant factors in each case was necessary to establish coercive pressure amounting to "custody." *Cf.* Maryland v. Shatzer, 559 U.S. 98 (2010) (extended release of interrogated inmate back into the general prison population broke "custody" for purposes of later questioning); *see also* Illinois v. Perkins, 496 U.S. 292 (1990) (inmate's conversation with an undercover agent does not create a coercive, police-dominated environment and does not implicate *Miranda* if the suspect does not know that he is conversing with a government agent).

[6] Oregon v. Mathiason, 429 U.S. 492 (1977) (suspect came voluntarily to police station to be questioned, he was not placed under arrest while there, and he was allowed to leave at end of interview, even though he was named by victim as culprit; questioning took place behind closed doors, and he was falsely informed his fingerprints had been found at scene of crime); Salinas v. Texas, 570 U.S. 178 (2013) (plurality opinion) (voluntarily accompanying police to station for questioning). *Cf.* Stansbury v. California, 511 U.S. 318 (1994). *See also* Minnesota v. Murphy, 465 U.S. 420 (1984) (required reporting to probationary officer is not custodial situation); Yarborough v. Alvarado, 541 U.S. 652 (2004) (state court determination that a teenager brought to police station by his parents was not "in custody" was not "unreasonable" for purposes of federal habeas review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)).

[7] Beckwith v. United States, 425 U.S. 341 (1976) (IRS agents' interview with taxpayer in private residence was not a custodial interrogation, although inquiry had "focused" on him).

[8] Orozco v. Texas, 394 U.S. 324 (1969) (police entered suspect's bedroom at 4 a.m., told him he was under arrest, and questioned him; four of the eight Justices who took part in the case, including three dissenters, voiced concern about "broadening" *Miranda* beyond the police station).

[9] This holds even in the case of a convict who is released after interrogation back into the general population. Maryland v. Shatzer, 559 U.S. 98 (2010).

[10] Edwards v. Arizona, 451 U.S. 477 (1981).

[11] 446 U.S. 291 (1980). A similar factual situation was presented in *Brewer v. Williams*, 430 U.S. 387 (1977), which the Court decided under the Sixth Amendment. In *Brewer*, *Massiah v. United States*, 377 U.S. 201 (1964), and *United States v. Henry*, 447 U.S. 264 (1980), the Court had difficulty explaining what constitutes interrogation for Sixth Amendment counsel purposes. The *Innis* Court indicated that the definitions are not the same for each Amendment. 446 U.S. at 300 n.4.

words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police.[12]

The Court, however, concluded that the officers' conversation was not the functional equivalent of questioning and the evidence was admissible.[13] A later Court applied *Innis* in *Arizona v. Mauro*[14] to hold that a suspect who had requested an attorney was not "interrogated" when the police instead brought the suspect's wife, who also was a suspect, to speak with him in the police's presence. The majority emphasized that the suspect's wife had asked to speak with her husband; therefore, the meeting was not a police-initiated ruse designed to elicit a response from the suspect. Furthermore, the meeting could not be characterized as a police attempt to use the coercive nature of confinement to extract a confession that would not have been given in an unrestricted environment.

In *Estelle v. Smith*,[15] the Court held that a court-ordered jailhouse interview by a psychiatrist seeking to determine the defendant's competency to stand trial constituted "interrogation" with respect to testimony on issues of guilt and punishment. Thus, the psychiatrist's conclusions about the defendant's dangerousness were inadmissible at the capital sentencing phase of the trial because the defendant had not received his *Miranda* warnings prior to the interview. That a psychiatrist designated to conduct a neutral competency examination had questioned the defendant, rather than a police officer, was "immaterial," the Court concluded, because the psychiatrist's testimony at the penalty phase changed his role from one of neutrality to that of the prosecution's agent.[16]

Amdt5.4.7.5 Miranda Requirements

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Miranda requires that before a suspect in custody is interrogated, he must be given full warnings (or the equivalent) of his rights. Specifically, the suspect must receive express warnings of his right to remain silent; that anything he says may be used as evidence against him; that he has a right to counsel; and that, if he cannot afford counsel, he is entitled to an appointed attorney.[1] In a later decision, the Court held that it is unnecessary for the police to

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[12] Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980).

[13] 446 U.S. at 302–04. *See also* Illinois v. Perkins, 496 U.S. 292 (1990) (absence of coercive environment makes *Miranda* inapplicable to jail cell conversation between suspect and police undercover agent).

[14] 481 U.S. 520 (1987).

[15] 451 U.S. 454 (1981).

[16] 451 U.S. 454 (1981).

[1] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

give the warnings as a verbatim recital of the words in the *Miranda* opinion itself, so long as the words used "fully conveyed" to a defendant his rights.[2]

Once a warned suspect asserts his right to silence and requests counsel, the police must scrupulously respect this assertion. The *Miranda* Court stated that once a warned suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Further, if the suspect requests the assistance of counsel during interrogation, questioning must cease until he has counsel.[3]

Subsequently, the Court has often barred the police from continuing (or reinitiating) interrogation with a suspect requesting counsel until counsel is present, except when the suspect himself initiates further communications. In *Edwards v. Arizona*,[4] initial questioning ceased as soon as the suspect requested counsel, and the police returned the suspect to his cell. Questioning resumed the following day only after different police officers had confronted the suspect and again warned him of his rights; the suspect agreed to talk and thereafter incriminated himself. Nonetheless, the Court held, "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused . . . , having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[5] The *Edwards* rule bars police-initiated questioning stemming from a separate investigation as well as questioning relating to the crime for which the suspect was arrested.[6] It also applies to interrogation by officers of a different law enforcement authority.[7]

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[2] California v. Prysock, 453 U.S. 355 (1981). Rephrased, the test is whether the warnings "*reasonably* conveyed" a suspect's rights. The Court added that reviewing courts "need not examine Miranda warnings as if construing a will or defining the terms of an easement." Duckworth v. Eagan, 492 U.S. 195, 203 (1989) (upholding warning that included possibly misleading statement that a lawyer would be appointed "if and when you go to court"). Even when warnings were not the "*clearest possible* formulation of *Miranda*'s right-to-counsel advisement," the Court found them acceptable as "sufficiently comprehensive and comprehensible when given a commonsense reading." Florida v. Powell, 559 U.S. 50, 63–64 (2010) (upholding warning of a right to talk to a lawyer before answering any questions, coupled with advice that the right could be invoked at any time during police questioning, as adequate to inform a suspect of his right to have a lawyer present during questioning).

[3] Miranda v. Arizona, 384 U.S. 436, 472, 473–74 (1966). While a request for a lawyer is a per se invocation of Fifth Amendment rights, a request for another advisor, such as a probation officer or family member, may be taken into account in determining whether a suspect has evidenced an intent to claim his right to remain silent. Fare v. Michael C., 442 U.S. 707 (1979) (juvenile who requested to see his probation officer, rather than counsel, found under the totality-of-the-circumstances to have not invoked a right to remain silent).

[4] 451 U.S. 477 (1981).

[5] 451 U.S. at 484–85. The decision was unanimous, but three concurrences objected to a special rule limiting waivers with respect to counsel to suspect-initiated further exchanges. *Id.* at 487, 488 (Chief Justice Warren Burger and Justices Lewis Powell and William Rehnquist). In *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), the Court held, albeit without a majority of Justices in complete agreement as to rationale, that an accused who had initiated further conversations with police had knowingly and intelligently waived his right to have counsel present. So too, an accused who expressed a willingness to talk to police, but who refused to make a written statement without presence of counsel, was held to have waived his rights with respect to his oral statements. Connecticut v. Barrett, 479 U.S. 523 (1987). In *Minnick v. Mississippi*, 498 U.S. 146 (1990), the Court interpreted *Edwards* to bar interrogation without counsel present of a suspect who had earlier consulted with an attorney on the accusation at issue. "[W]hen counsel is requested, interrogation must cease, and officials may not reinstate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Id.* at 153. The Court held that *Edwards* should not be applied retroactively to a conviction that had become final, Solem v. Stumes, 465 U.S. 638 (1984), but that *Edwards* applied to cases pending on appeal at the time it was decided. Shea v. Louisiana, 470 U.S. 51 (1985).

[6] Arizona v. Roberson, 486 U.S. 675 (1988). By contrast, the Sixth Amendment right to counsel is offense-specific, and does not bar questioning about a crime unrelated to the crime for which the suspect has been charged. *See* McNeil v. Wisconsin, 501 U.S. 171 (1991).

[7] Minnick v. Mississippi, 498 U.S. 146 (1990).

On the other hand, the *Edwards* rule requiring that a lawyer be provided to a suspect who had requested one in an earlier interrogation does not apply once there has been a meaningful break in custody. The Court in *Maryland v. Shatzer*[8] characterized the *Edwards* rule as a judicially prescribed precaution against using the coercive pressure of prolonged custody to badger a suspect who has previously requested counsel into talking without one. However, after a suspect has been released to resume his normal routine for a sufficient period to dissipate the coercive effects of custody, a period set at 14 days by the *Shatzer* Court, the rationale for solicitous treatment ceases. If the police take the suspect into custody again, the options for questioning him are no longer limited to suspect-initiated talks or providing counsel. Rather, the police may issue new *Miranda* warnings and proceed accordingly.[9] The Court has not extended the *Edwards* rule explicitly to other aspects of the *Miranda* warnings.[10]

Amdt5.4.7.6 Miranda Exceptions

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

A properly warned suspect may waive his *Miranda* rights and submit to custodial interrogation. *Miranda* recognized that a suspect may voluntarily and knowingly give up his rights and respond to questioning, but the Court also cautioned that the prosecution bore a "heavy burden" to establish that a valid waiver had occurred.[1] The Court continued: "[a] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."[2] Subsequent cases indicated that determining whether a suspect has waived his *Miranda* rights is a fact-specific inquiry not easily susceptible to per se rules. According to these cases, resolution of the issue of waiver "must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'"[3] Under this line of cases, a waiver need not always be express, nor does *Miranda* impose a formalistic waiver procedure.[4]

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[8] 559 U.S. 98 (2010).

[9] *Id.*

[10] For a pre-*Edwards* case on the right to remain silent, see Michigan v. Mosley, 423 U.S. 96 (1975) (suspect given Miranda warnings at questioning for robbery, requested cessation of interrogation, and police complied; some two hours later, a different policeman interrogated suspect about a murder, gave him a new Miranda warning, and suspect made incriminating admission; since police "scrupulously honored" suspect's request, admission was valid).

[1] Miranda v. Arizona, 384 U.S. 436, 475 (1966). *See also* Tague v. Louisiana, 444 U.S. 469 (1980). A knowing and intelligent waiver need not be predicated on complete disclosure by police of the intended line of questioning. Thus, an accused's signed waiver following arrest for one crime is not invalidated by police having failed to inform him of their intent to question him about another crime. Colorado v. Spring, 479 U.S. 564 (1987).

[2] *Miranda,* 384 U.S. at 475.

[3] North Carolina v. Butler, 441 U.S. 369, 374–75 (1979) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). In *Oregon v. Elstad*, 470 U.S. 298 (1985), the Court held that a confession following a Miranda warning is not necessarily tainted by an earlier confession obtained without a warning, as long as the earlier confession had been voluntary. *See* Bobby v. Dixon, 565 U.S. 23 (2012). *See also* Moran v. Burbine, 475 U.S. 412 (1986) (signed waivers following Miranda warnings not vitiated by police having kept from suspect information that attorney had been retained for him by a

In *Berghuis v. Thompkins*, citing the societal benefit of requiring an accused to invoke *Miranda* rights unambiguously, the Court refocused its *Miranda* waiver analysis on whether a suspect understood his rights.[5] There, a suspect refused to sign a waiver form, remained largely silent during the ensuing 2-hour and 45-minute interrogation, but then made an incriminating statement. The five-Justice majority found that the suspect had failed to invoke his right to remain silent and had also implicitly waived the right. According to the Court, although a statement following silence alone may be inadequate to waive *Miranda* rights, the prosecution may show an implied waiver by demonstrating that a suspect understood the *Miranda* warnings given to him and subsequently made an uncoerced statement.[6] Furthermore, once a suspect has knowingly and voluntarily waived his *Miranda* rights, police officers may continue questioning until and unless the suspect clearly invokes his rights later.[7]

The admissions of an unwarned or improperly warned suspect *may not be used* directly against him at trial, but the Court has permitted some use for other purposes, such as impeachment. Prosecutors cannot introduce a defendant's confession or other incriminating admissions obtained in violation of *Miranda* against him at trial to establish guilt[8] or determine the sentence, at least in bifurcated trials in capital cases.[9] On the other hand, the "fruits" of such an unwarned confession or admission may be used in some circumstances if the statement was voluntary.[10]

The Court, in opinions that more narrowly construe *Miranda*, has broadened the permissible impeachment purposes for which unlawful confessions and admissions may be used.[11] Thus, in *Harris v. New York*,[12] the Court held that the prosecution could use statements, obtained in violation of *Miranda*, to impeach the defendant's testimony if he voluntarily took the stand and denied commission of the offense. Subsequently, in *Oregon v.*

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relative); Fare v. Michael C., 442 U.S. 707 (1979) (juvenile who consented to interrogation after his request to consult with his probation officer was denied found to have waived rights; totality-of-the-circumstances analysis held to apply). *Elstad* was distinguished in *Missouri v. Seibert*, 542 U.S. 600 (2004), however, when the authorities' failure to warn the suspect prior to the initial questioning was a deliberate attempt to circumvent Miranda by use of a two-step interrogation technique, and the police, prior to eliciting the statement for the second time, did not alert the suspect that the first statement was likely inadmissible.

[4] North Carolina v. Butler, 441 U.S. 369 (1979). In *Butler*, the defendant had refused to sign a waiver but agreed to talk with FBI agents nonetheless. On considering whether the defendant had thereby waived his right to counsel (his right to remain silent aside), the Court held that no express oral or written statement was required. Though the defendant never directly indicated whether he desired counsel, the Court found that a waiver could be inferred from his actions and words.

[5] 560 U.S. 370 (2010).

[6] *Id.* at 384–85.

[7] Davis v. United States, 512 U.S. 452 (1994) (suspect's statement that "maybe I should talk to a lawyer," uttered after Miranda waiver and after an hour and a half of questioning, did not constitute such a clear request for an attorney when, in response to a direct follow-up question, he said "no, I don't want a lawyer").

[8] Miranda v. Arizona, 384 U.S. 436, 479 (1966). *See also* Harrison v. United States, 392 U.S. 219 (1968) (rejecting as tainted the prosecution's use at the second trial of defendant's testimony at his first trial rebutting confessions obtained in violation of *McNabb-Mallory*).

[9] Estelle v. Smith, 451 U.S. 454 (1981). The Court has yet to consider the applicability of the ruling in a noncapital, nonbifurcated trial case.

[10] United States v. Patane, 542 U.S. 630 (2004) (allowing introduction of a pistol, described as a "nontestimonial fruit" of an unwarned statement). *See also* Michigan v. Tucker, 417 U.S. 433 (1974) (upholding use of a witness revealed by defendant's statement elicited without proper Miranda warning). Note, too, that confessions may be the poisonous fruit of other constitutional violations, such as illegal searches or arrests. *E.g.*, Brown v. Illinois, 422 U.S. 590 (1975); Dunaway v. New York, 442 U.S. 200 (1979); Taylor v. Alabama, 457 U.S. 687 (1982).

[11] Under *Walter v. United States*, 347 U.S. 62 (1954), the defendant denied the offense of which he was accused (sale of drugs) and asserted he had never dealt in drugs. The prosecution was permitted to impeach the defendant concerning heroin seized illegally from his home two years before. The Court observed that the defendant could have denied the offense without making the "sweeping" assertions, as to which the government could impeach him.

[12] 401 U.S. 222 (1971). *See also* United States v. Havens, 446 U.S. 620 (1980) (Fourth Amendment).

Hass,[13] the Court permitted prosecutors to impeach the defendant using a statement the defendant made after police had ignored his request for counsel following his *Miranda* warning. Such impeachment material, however, must still meet the standard of voluntariness associated with the pre-*Miranda* tests for the admission of confessions and statements.[14]

The Court has created a "public safety" exception to the *Miranda* warning requirement for serious offenses. In *New York v. Quarles*,[15] the Court held admissible a recently apprehended suspect's response in a public supermarket to the arresting officer's demand to know the location of a gun that the officer had reason to believe the suspect had just discarded or hidden in the supermarket. The Court, in an opinion by Justice William Rehnquist,[16] declined to place officers in the "untenable position" of having to make instant decisions as to whether to proceed with *Miranda* warnings and thereby increase the risk to themselves or to the public or whether to dispense with the warnings and run the risk that resulting evidence will be excluded at trial. While acknowledging that the exception itself would "lessen the desirable clarity of the rule," the Court predicted that confusion would be slight: "[w]e think that police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect."[17] However, no such compelling justification was offered for a *Miranda* exception for lesser offenses, and protecting the rule's "simplicity and clarity" counseled against creating one.[18] The Court stated: "[A] person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested."[19]

Amdt5.5 Due Process

Amdt5.5.1 Overview of Due Process

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

The Fifth Amendment provides that "no person" shall be deprived of "life, liberty, or property, without due process of law."[1] Generally, "due process" guarantees protect individual

[13] 420 U.S. 714 (1975). By contrast, a defendant may not be impeached by evidence of his silence after police have warned him of his right to remain silent. Doyle v. Ohio, 426 U.S. 610 (1976).

[14] *E.g.*, Mincey v. Arizona, 437 U.S. 385 (1978); New Jersey v. Portash, 440 U.S. 450 (1979)

[15] 467 U.S. 649 (1984).

[16] The Court's opinion was joined by Chief Justice Warren Burger and by Justices Byron White, Harry Blackmun, and Lewis Powell. Justice Sandra Day O'Connor would have ruled inadmissible the suspect's response, but not the gun retrieved as a result of the response. Justices Thurgood Marshall, William Brennan, and John Paul Stevens dissented.

[17] 467 U.S. at 658–59.

[18] Berkemer v. McCarty, 468 U.S. 420, 432 (1984).

[19] 468 U.S. at 434.

[1] U.S. Const. amend. V.

rights by limiting the exercise of government power.[2] The Supreme Court has held that the Fifth Amendment, which applies to federal government action, provides persons with both procedural and substantive due process guarantees. If the federal government seeks to deprive a person of a protected life, liberty, or property interest, the Fifth Amendment's Due Process Clause requires that the government first provide certain procedural protections.[3] Procedural due process often requires the government to provide a person with notice and an opportunity for a hearing before such a deprivation.[4] In addition, the Supreme Court has interpreted the Fifth Amendment's Due Process Clause to include substantive due process guarantees that protect certain fundamental constitutional rights from federal government interference, regardless of the procedures that the government follows when enforcing the law.[5] Substantive due process has generally dealt with specific subject areas, such as liberty of contract, marriage, or privacy.

The Fifth Amendment's Due Process Clause protects all persons within U.S. territory, including corporations,[6] aliens,[7] and, presumptively, citizens seeking readmission to the United States.[8] However, the states are not entitled to due process protections against the federal government.[9] The clause is effective in the District of Columbia[10] and in territories that are part of the United States,[11] but it does not apply of its own force to unincorporated territories.[12] Nor does it reach enemy alien belligerents tried by military tribunals outside the territorial jurisdiction of the United States.[13] The Clause restrains Congress in addition to the Executive and Judicial Branches and "cannot be so construed as to leave Congress free to make any process 'due process of law' by enacting legislation to that effect."[14]

Due process cases may arise under both the Fifth and Fourteenth Amendments. Both amendments use the same language but have a different history.[15] The Supreme Court has construed the Fourteenth Amendment's Due Process Clause to impose the same due process limitations on the states as the Fifth Amendment does on the federal government.[16] Fourteenth Amendment due process case law is therefore relevant to the interpretation of the Fifth Amendment. Except for areas in which the federal government is the actor, much of the *Constitution Annotated*'s discussion of due process appears in the Fourteenth Amendment essays.[17]

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[2] *Due Process*, Black's Law Dictionary 610 (10th ed. 2014).

[3] *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (citing Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961)).

[4] Twining v. New Jersey, 211 U.S. 78, 110 (1908); Jacob v. Roberts, 223 U.S. 261, 265 (1912).

[5] *E.g.*, Zablocki v. Redhail, 434 U.S. 374, 386–87 (1978) (citing Loving v. Virginia, 388 U. S. 1 (1967)).

[6] Sinking Fund Cases, 99 U.S. 700, 719 (1879).

[7] Wong Wing v. United States, 163 U.S. 228, 238 (1896).

[8] United States v. Ju Toy, 198 U.S. 253, 263 (1905); *cf.* Quon Quon Poy v. Johnson, 273 U.S. 352 (1927).

[9] South Carolina v. Katzenbach, 383 U.S. 301, 323–24 (1966).

[10] Wight v. Davidson, 181 U.S. 371, 384 (1901).

[11] Lovato v. New Mexico, 242 U.S. 199, 201 (1916).

[12] Public Utility Comm'rs v. Ynchausti & Co., 251 U.S. 401, 406 (1920).

[13] Johnson v. Eisentrager, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946).

[14] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856). *See also* Massachusetts Supreme Judicial Court Chief Justice Lemuel Shaw's opinion in Jones v. Robbins, 74 Mass. (8 Gray) 329 (1857).

[15] French v. Barber Asphalt Paving Co., 181 U.S. 324, 328 (1901).

[16] *Cf.* Arnett v. Kennedy, 416 U.S. 134 (1974); Heiner v. Donnan, 285 U.S. 312, 326 (1932) ("The restraint imposed upon legislation by the due process clauses of the two amendments is the same."); Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 610 (1936).

[17] *See* Amdt14.S1.3 Due Process Generally.

Amdt5.5.2 Historical Background on Due Process

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

The concept of due process developed long before the Framers met in Philadelphia to draft the Constitution. Due process is a "historical product"[1] of the 1215 Magna Carta, in which King John of England promised his barons that "[n]o free man" would be deprived of his life, liberty, or property "except by the lawful judgment of his peers or by the law of the land."[2] The phrase "due process of law" first appeared in a 1354 statutory rendition of Magna Carta provisions: "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law."[3]

Although the Magna Carta resulted from a struggle between the King and his barons,[4] its language influenced the writings of English jurists relied upon by the Constitution's Framers.[5] The Framers' understanding of due process derived in major part from Sir Edward Coke, who in his Second Institutes explained that the term "by law of the land" was equivalent to "due process of law."[6] Coke's writings described aspects of both procedural and substantive due process,[7] which the drafters of colonial charters and declarations of rights relied upon when incorporating due process rights into those instruments, particularly in provisions safeguarding accused persons' rights.[8]

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[1] Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922).

[2] Text and commentary on this chapter may be found in W. McKechnie, Magna Carta: A Commentary on the Great Charter of King John 375–95 (Glasgow, 2d rev. ed. 1914). The chapter became chapter 29 in the Third Reissue of Henry III in 1225. *Id.* at 504, 139–59. As expanded, it read: "No free man shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land." *See also* J. Holt, Magna Carta 226–29 (1965). The 1225 reissue also added to chapter 29 the language of chapter 40 of the original text: "To no one will we sell, to no one will we deny or delay right or justice." This 1225 reissue became the standard text thereafter.

[3] 28 Edw. III, c. 3. *See* F. Thompson, Magna Carta: Its Role in the Making of the English Constitution, 1300–1629, 86–97 (1948), recounting several statutory reconfirmations.

[4] W. McKechnie, Magna Carta: A Commentary on the Great Charter of King John (Glasgow, 2d rev. ed. 1914); J. Holt, Magna Carta (1965).

[5] F. Thompson, Magna Carta: Its Role in the Making of the English Constitution, 1300–1629 (1948).

[6] Sir Edward Coke, Institutes of the Laws of England, Part II, 50–51 (1641). For a review of the influence of Magna Carta and Coke on the colonies and the new nation, *see, e.g.*, A. Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America (1968).

[7] *See* sources cited *supra* note 23.

[8] The 1776 Constitution of Maryland, for example, in its declaration of rights, used the language of Magna Carta including the "law of the land" phrase in a separate article, 3 F. Thorpe, The Federal and State Constitutions, H. Doc. No. 357, 59th Congress, 2d Sess. 1688 (1909), whereas Virginia used the clause in a section guaranteeing procedural rights in criminal cases. 7 *id.* at 3813. New York, in its constitution of 1821, was the first state to incorporate the phrase "due process of law" with inspiration from the United States Constitution. 5 *id.* at 2648.

Amdt5.6 Procedural Due Process and Federal Government

Amdt5.6.1 Overview of Due Process Procedural Requirements

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

If the federal government seeks to deprive a person of a protected life, liberty, or property interest, the Fifth Amendment's Due Process Clause requires that the government first provide certain procedural protections.[1] The Supreme Court has construed the Fourteenth Amendment's Due Process Clause to impose the same procedural due process limitations on the states as the Fifth Amendment does on the Federal Government.[2] Fourteenth Amendment due process case law is therefore relevant to the interpretation of the Fifth Amendment.[3]

The Court first addressed due process in the 1855 Fifth Amendment case *Murray's Lessee v. Hoboken Land and Improvement Co.*[4] In *Murray's Lessee*, the Court held that it would determine (independently from Congress) whether the government had provided due process by evaluating whether the statutory process conflicted with the Constitution and, if not, whether it comported with "those settled usages and modes of proceedings existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."[5]

In the 1884 Fourteenth Amendment case *Hurtado v. California*, the Court held that a process could be judged based on whether it had attained "the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law."[6] To hold that only historical, traditional procedures can constitute due process, the Court said, would render the law "incapable of progress or improvement."[7]

Due process often requires the government to provide a person with notice and an opportunity for a hearing before depriving the person of a protected interest.[8] However, there are some circumstances in which the Court has held those precedural protections are not required. For instance, persons adversely affected by a law cannot challenge the law's validity on the ground that the legislative body that enacted it gave no notice of proposed legislation, held no hearings at which the person could have presented his arguments, and gave no

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[1] *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (citing Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961)).

[2] *Cf.* Arnett v. Kennedy, 416 U.S. 134 (1974).

[3] *See* Amdt14.S1.3 Due Process Generally.

[4] Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 276–77, 280 (1856). The Court took a similar approach in Fourteenth Amendment due process interpretation in *Davidson v. City of New Orleans*, 96 U.S. 97 (1878), and *Munn v. Illinois*, 94 U.S. 113 (1877).

[5] *Murray's Lessee*, 59 U.S. (18 How.) at 276–77, 280.

[6] Hurtado v. California, 110 U.S. 516, 528–29 (1884).

[7] 110 U.S. at 529, 532–37. The Court has followed this flexible approach. *E.g.*, Twining v. New Jersey, 211 U.S. 78 (1908); Powell v. Alabama, 287 U.S. 45 (1932); Palko v. Connecticut, 302 U.S. 319 (1937); Snyder v. Massachusetts, 291 U.S. 97 (1934).

[8] Twining v. New Jersey, 211 U.S. 78, 110 (1908); Jacob v. Roberts, 223 U.S. 261, 265 (1912).

consideration to particular points of view.[9] Similarly, when an administrative agency engages in a legislative function, for example by drafting regulations of general application, it need not hold a hearing prior to promulgation.[10] On the other hand, if a regulation would affect an identifiable class of persons, the Court employs a multi-factor analysis to determine whether notice and hearing is required and, if so, whether it must precede such action.[11]

The Supreme Court articulated the modern test for what process is required before the government may invade a protected interest in a civil proceeding in the 1976 case *Mathews v. Eldridge*.[12] Because most of the cases applying *Mathews* have arisen under the Fourteenth Amendment, the *Constitution Annotated* discusses *Mathews* and subsequent cases applying the *Mathews* test in essays on Fourteenth Amendment procedural due process requirements.[13] Other Fourteenth Amendment essays discuss Supreme Court cases involving key components of procedural due process, including notice, the opportunity for a hearing, and other procedural requirements.[14]

Because the Court has decided relatively few due process cases applying the Fifth Amendment in cases involving criminal procedure, the Fourteenth Amendment essays address the narrower due process inquiry that the Court has often applied in this context.[15] In civil contexts, the Court has applied a broad balancing test that evaluates the government's chosen procedure with respect to the private interest affected, the risk of erroneous deprivation of that interest under the chosen procedure, and the government interest at stake.[16] By contrast, the Court has held that the "appropriate framework" for due process analysis of criminal procedures is a narrow inquiry into whether a procedure is offensive to the concept of fundamental fairness.[17]

Amdt5.6.2 Deportation and Exclusion Proceedings

Amdt5.6.2.1 Exclusion and Removal of Non-U.S. Nationals

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be*

[9] Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915). *See also* Bragg v. Weaver, 251 U.S. 57, 58 (1919). *Cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422, 432–33 (1982).

[10] United States v. Florida East Coast Ry., 410 U.S. 224 (1973).

[11] 410 U.S. at 245 (distinguishing between rule-making, in which legislative facts are at issue, and adjudication, in which adjudicative facts are at issue, and requiring a hearing in the latter proceedings but not in the former). *See* Londoner v. City of Denver, 210 U.S. 373 (1908).

[12] 424 U.S. 319, 333 (1976).

[13] *See* Amdt14.S1.5.4.2 Due Process Test in Mathews v. Eldridge.

[14] *See, e.g.*, Amdt14.S1.5.4.3 Notice of Charge and Due Process and Amdt14.S1.5.4.4 Opportunity for Meaningful Hearing.

[15] Amdt14.S1.5.5.1 Overview of Procedural Due Process in Criminal Cases.

[16] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976). In *Nelson v. Colorado*, the Supreme Court held that the *Mathews* test controls when evaluating state procedures governing the continuing deprivation of property *after* a criminal conviction has been reversed or vacated, with no prospect of reprosecution. *See* No. 15-1256, slip op. at 1, 5 (April 19, 2017).

[17] *See* Medina v. California, 505 U.S. 437, 443 (1992).

compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Supreme Court has long recognized that Congress has "plenary" power over immigration, giving the legislature almost complete authority to decide whether foreign nationals ("aliens," under governing statutes and case law) may enter or remain in the United States.[1] The Court has predicated this broad power on the government's inherent sovereign authority to control its borders and its relations with foreign nations.[2] In exercising its power over immigration, Congress can make laws concerning aliens that would be unconstitutional if applied to citizens.[3] The Court has interpreted this power to apply with most force to the admission and exclusion of aliens seeking to enter the United States.[4] Accordingly, the Court has held, aliens seeking initial entry into the United States have no due process protections regarding their applications for admission.[5] With regard to aliens physically present in the United States, however, the Court has recognized that due process protections may constrain the government's exercise of its immigration power.[6]

Amdt5.6.2.2 Exclusion of Aliens Seeking Entry into the United States

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be

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[1] Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) ("The Court without exception has sustained Congress's 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'") (quoting Boutilier v. INS, 387 U.S. 118, 123 (1967)); Ocean Steam Navigation Co. v. Stranahan, 214 U.S. 320, 343 (1909) (noting the "plenary power of Congress as to the admission of aliens" and the "complete and absolute power of Congress over the subject" of immigration)); *see also* Galvan v. Press, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government . . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."). For additional discussion about Congress's plenary power over immigration, see ArtI.S8.C18.8.1 Overview of Congress's Immigration Powers.

[2] *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[T]he power to admit or exclude aliens is a sovereign prerogative."); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.").

[3] Demore v. Kim, 538 U.S. 510, 522 (2003) ("[T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.").

[4] *See* Zadvydas v. Davis, 533 U.S. 678, 693, 695–96 (2001) (noting that the "distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law" and equating "the political branches' authority to control entry" with "the Nation's armor"); Fiallo v. Bell, 430 U.S. 787, 792 (1977); Jean v. Nelson, 472 U.S. 846, 875 (1985) (Marshall, J., dissenting) (declaring that it is "in the narrow area of entry decisions" that "the Government's interest in protecting our sovereignty is at its strongest and that individual claims to constitutional entitlement are the least compelling").

[5] *See Landon*, 459 U.S. at 32 ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.").

[6] *See Zadvydas*, 533 U.S. at 693 ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.").

compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

According to the Supreme Court, aliens seeking initial entry into the United States have no constitutional rights regarding their applications for admission.[1] The Court has reasoned that the government has the inherent, sovereign authority to admit or exclude aliens, and that aliens standing outside of the geographic boundaries of the United States have no vested right to be admitted into the country.[2]

Thus, in its 1953 decision in *Shaughnessy v. United States ex rel. Mezei*, the Court held that the government could deny entry to an alien without a hearing, notwithstanding the alien's "temporary harborage" on Ellis Island pending the government's attempts to remove him from the United States.[3] More recently, in *Department of Homeland Security v. Thuraissigiam*, the Court in 2020 rejected an alien's constitutional challenge to a federal statute that limits judicial review of an expedited order of removal, reasoning that the alien—who was apprehended shortly after entering the United States unlawfully—could be considered to be an applicant for admission at the border.[4] In short, for aliens seeking admission into the United States, the decision to permit or deny entry by an executive or administrative officer, acting within powers expressly conferred by Congress, is due process of law.[5]

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[1] *See* Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161, slip op. at 36 (U.S. June 25, 2020) (recognizing that an alien seeking initial entry into the United States "has only those rights regarding admission that Congress has provided by statute"); Trump v. Hawaii, No. 17-965, slip op. at 30 (U.S. June 26, 2018) (noting that "foreign nationals seeking admission have no constitutional right to entry" into the United States); Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) ("It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise.") (citations omitted); Leng May Ma v. Barber, 357 U.S. 185, 187 (1958) ("It is important to note at the outset that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, such as petitioner, and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry.'") (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953)).

[2] *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) (noting that "the power to admit or exclude aliens is a sovereign prerogative"); *Mezei*, 345 U.S. at 210 ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("Admission of aliens to the United States is a privilege granted by the sovereign United States Government.").

[3] *Mezei*, 345 U.S. at 210–12, 215. The Court reasoned that, although the alien was being detained inside the United States during the pendency of his exclusion proceedings, he had not effected an "entry" for purposes of immigration law, and could be "treated as if stopped at the border." *Id.* at 212–15. *See also Knauff*, 338 U.S. at 542, 544 (upholding the exclusion of an alien without a hearing, and reasoning that the U.S. government had the "inherent executive power" to deny her admission and that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 342–43 (1909) (holding that Congress's broad power over the entry of aliens enabled it to pass legislation making it unlawful to bring into the United States any alien who had a contagious disease).

[4] *Thuraissigiam*, slip op. at 34–35.

[5] *See id.* at 36 ("[A]n alien in respondent's position [detained shortly after unlawful entry] has only those rights regarding admission that Congress has provided by statute."); United States v. Ju Toy, 198 U.S. 253, 263 (1905) (noting that "the almost necessary result of the power of Congress to pass exclusion laws" was that the decision to exclude an alien "may be intrusted to an executive officer, and that his decision is due process of law"); *see also Landon*, 459 U.S. at 32; *Knauff*, 338 U.S. at 544; Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892). The Supreme Court, however, has held that Congress's largely unencumbered power over the entry of aliens does not extend to lawful permanent residents returning from trips abroad, who retain the same constitutional rights they had before leaving the United States, including the right to due process. *Landon*, 459 U.S. at 33; Rosenberg v. Fleuti, 374 U.S. 449, 460 (1963), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009–546; Kwong Hai Chew v. Colding, 344 U.S. 590, 600–02 (1953). *See also* Kwock Jan Fat v. White, 253 U.S. 454, 458 (1920) (stating that the exclusion of an alien returning to the United States who claimed to be a U.S. citizen could be made only after a hearing based on "adequate support in the evidence").

In certain cases, the exclusion of an alien has been seen to implicate the rights of U.S. citizens. In its 1972 decision in *Kleindienst v. Mandel*, for example the Supreme Court appeared to recognize that U.S. citizens' First Amendment rights were affected by the denial of a nonimmigrant visa to a Marxist journalist who had been invited to speak in the United States by a group of university professors.[6] In *Mandel*, however, the Court also recognized that because the "plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established," the Court would uphold, in the face of a constitutional challenge, an alien's exclusion as long as there is "a facially legitimate and bona fide reason" for the decision.[7] Thus, even when reviewing constitutional challenges brought by U.S. citizens, the Court has limited the scope of judicial review and adopted a highly deferential standard for reviewing the decision to exclude an alien.[8]

U.S. citizens have also asserted that the exclusion of an alien has impinged upon their due process rights.[9] In *Kerry v. Din*, five Justices in 2015 agreed that denying an immigrant visa to the husband of a U.S. citizen on the grounds that he was inadmissible under a provision of federal immigration law (pertaining to "terrorist activities") did not violate the due process rights of the U.S. citizen spouse.[10] These Justices differed in their reasoning, though. A three-Justice plurality held that the U.S. citizen spouse had no protected liberty interest under the Due Process Clause in her husband's ability to come to the United States, and did not decide whether the government had established a facially legitimate and bona fide reason for excluding her husband.[11] A two-Justice concurrence did not reach the question of whether the U.S. citizen wife had asserted a protected liberty interest, but instead concluded that the consular officials' citation of a particular statutory ground for inadmissibility as the basis for denying the visa application satisfied due process under *Mandel*, which requires only that the government state a "facially legitimate and bona fide reason" for the denial.[12]

In *Trump v. Hawaii*, the Supreme Court in 2018 reaffirmed that there is limited judicial review of executive decisions to exclude aliens seeking admission from abroad.[13] The Court

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[6] *See* 408 U.S. 753, 762 (1972); *see also* Kerry v. Din, 576 U.S. 86 (2015) (plurality and concurring opinions, taken together, suggesting that at least a majority of the Court accepts that *Mandel* allows U.S. citizens to challenge visa denials that affect other rights beyond their First Amendment rights); *cf.* Trump v. Int'l Refugee Assistance Project, Nos. 16-1436, 16-1540, slip op. at 11 (U.S. June 26, 2017) (per curiam) (noting that "foreign nationals abroad who have no connection to the United States at all" can be denied entry as such a denial does not "impose any legally relevant hardship" on the foreign nationals themselves).

[7] *Mandel*, 408 U.S. at 769–70. Applying this test, the Court upheld the alien's exclusion based on the government's explanation that the alien had abused visas in the past, and refused to "look behind" the government's justification to determine whether it was supported by any evidence. *Id.*

[8] *See also* Fiallo v. Bell, 430 U.S. 787, 792–94, 798–800 (1977) (rejecting U.S. citizens' and lawful permanent residents' (LPR) equal protection challenge to a statute that granted special immigration preferences to the children and parents of U.S. citizens and LPRs, unless the parent-child relationship was that of a father and an illegitimate child, and recognizing "the limited scope of judicial inquiry into immigration legislation" and Congress's "exceptionally broad power to determine which classes of aliens may lawfully enter the country").

[9] *See, e.g.,* Bustamante v. Mukasey, 531 F.3d 1059, 1062 (9th Cir. 2008).

[10] 576 U.S. 86 (2015).

[11] *Id.* at 100 (Scalia, J., joined by Roberts, C.J. & Thomas, J.) (plurality opinion). According to the plurality, the U.S. citizen spouse's alleged interests had been variously formulated as a "liberty interest in her marriage"; a "right of association with one's spouse"; a "liberty interest in being reunited with certain blood relatives"; and the "liberty interest of a U.S. citizen under the Due Process Clause to be free from arbitrary restrictions on his right to live with his spouse." *Id.* at 93. The plurality also expressly noted that no fundamental right to marriage, as such, had been infringed, because "the Federal Government has not attempted to forbid a marriage." *Id.* at 94 (contrasting the case at hand with Loving v. Virginia, 388 U.S. 1 (1967), Zablocki v. Redhail, 434 U.S. 374 (1978), and Turner v. Safley, 482 U.S. 78 (1987), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb)).

[12] *Id.* at 106 (Kennedy, J., concurring, joined by Alito, J.).

[13] No. 17-965, slip op. at 30 (U.S. June 26, 2018).

rejected an Establishment Clause challenge brought by U.S. citizens and other challengers to a presidential proclamation that provided for the exclusion of specified categories of nonresident aliens from mostly Muslim-majority countries.[14] The Court recognized that decisions concerning the admission or exclusion of aliens generally lie beyond the scope of judicial review, and are subject only to a "highly constrained" judicial inquiry when an exclusion "allegedly burdens the constitutional rights of a U.S. citizen."[15] The Court upheld the proclamation, ruling that it was rationally related to the stated government objective of protecting national security by excluding aliens from countries with deficient information-sharing practices.[16]

Amdt5.6.2.3 Removal of Aliens Who Have Entered the United States

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Despite the government's broad power over immigration, the Supreme Court has recognized that aliens who have physically entered the United States generally come under the protective scope of the Due Process Clause, which applies "to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[1] Consequently, there are greater due process protections in formal removal proceedings brought against aliens already present within the United States.[2] These due process protections generally include the right to a hearing and a meaningful opportunity to be heard before deprivation of a liberty interest.[3]

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[14] *Id.* at 38–39. In *Trump v. Hawaii*, the Supreme Court had determined that a U.S. citizen's "interest in being united with his relatives," when those relatives were foreign nationals seeking to enter the United States, was "sufficiently concrete and particularized to form the basis of an Article III injury in fact" for purposes of establishing legal standing to challenge the presidential proclamation. *Id.* at 25.

[15] *Id.* at 30–32.

[16] *Id.* at 38–39.

[1] Zadvydas v. Davis, 533 U.S. 678, 693 (2001); *see also* Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.") (citations omitted), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009–546.

[2] Removal proceedings are civil in nature and are not criminal prosecutions. Harisiades v. Shaughnessy, 342 U.S. 580, 594–95 (1952); Zakonaite v. Wolf, 226 U.S. 272, 275 (1912). This fact, however, does not mean that a person may be removed from the United States on the basis of a judgment reached under the civil standard of proof, that is, by a preponderance of the evidence. Rather, the Supreme Court has held, an order of removal may be entered only if the government presents clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true. Woodby v. INS, 385 U.S. 276, 286 (1966). However, an alien in formal removal proceedings has the burden of proving his or her eligibility for discretionary relief from removal. Kimm v. Rosenberg, 363 U.S. 405, 408 (1960); *see also* Jay v. Boyd, 351 U.S. 345, 359 (1956) (holding that a special inquiry officer could rely upon undisclosed, confidential information in deciding to deny an alien's application for suspension of deportation as a matter of discretion).

[3] Mathews v. Eldridge, 424 U.S. 319, 333 (1976); *see also* Shaughnessy v. Pedreiro, 349 U.S. 48, 52 (1955) (holding that an alien had the right to full judicial review of his deportation order and that such review was not limited to habeas corpus proceedings), *superseded by statute*, 8 U.S.C. § 1105a; Wong Yang Sung v. McGrath, 339 U.S. 33, 50–51

The Supreme Court, however, has suggested that the extent of due process for aliens present in the United States "may vary depending upon [the alien's] status and circumstance."[4] For instance, at times the Court has indicated that at least some of the constitutional protections to which an alien is entitled may turn upon whether the alien has been admitted into the United States or developed substantial ties to this country.[5] Thus, there is some uncertainty regarding the extent to which due process considerations constrain Congress's exercise of its immigration power with respect to aliens within the United States.

The Supreme Court has considered due process challenges raised by aliens within the United States who are detained and subject to removal. In *Zadvydas v. Davis* the Supreme Court in 2001 construed a statute authorizing the detention of aliens with final orders of removal as having implicit temporal limitations.[6] According to the Court, construing the statute in a manner that would allow the indefinite detention of lawfully admitted aliens who had been ordered removed would raise "serious constitutional concerns."[7] In the Court's view, because aliens within the United States are protected by due process, Congress must give "clear indication" of an intent to authorize the indefinite detention of removable aliens, and the Court indicated there must be some "special justification" for that detention (e.g., to protect the community from "suspected terrorists").[8]

(1950) (holding that deportation proceedings were subject to certain procedural requirements under the Administrative Procedure Act, including the right to a hearing), *superseded by statute*, Immigration and Nationality Act, ch. 477, § 242, 66 Stat. 163, 208–12 (1952) (codified at 8 U.S.C. § 1252); United States *ex rel.* Vajtauer v. Comm'r of Immigr., 273 U.S. 103, 106 (1927) ("Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus*."); Mahler v. Eby, 264 U.S. 32, 43 (1924) ("There is no authority given to the Secretary [of Labor] to deport, except upon his finding after a hearing that the petitioners were undesirable residents."); *Zakonaite*, 226 U.S. at 275 (observing that executive officials may decide whether to deport an alien "after a fair though summary hearing"); *cf.* United States v. Mendoza-Lopez, 481 U.S. 828, 838–39 (1987) (ruling that an alien who is criminally prosecuted for unlawful reentry after removal may collaterally challenge the underlying removal order during the criminal proceedings if the alien had no prior opportunity to seek judicial review of that order), *superseded by statute*, 8 U.S.C. § 1326(d). Under provisions of the Immigration and Nationality Act, aliens apprehended within the interior of the United States are generally subject to formal removal proceedings, and have a number of procedural protections in those proceedings, including the right to seek counsel at no expense to the government, the right to present evidence at a hearing, the ability to apply for any available relief from removal, the right to administratively appeal an adverse decision, and (to the extent permitted by statute) the right to petition for judicial review of a final order of removal. 8 U.S.C. §§ 1229a(a)(1), (b)(1), (b)(4), (c)(1)(A), (c)(4)(A), (c)(5); 1252(a)(1), (b).

[4] *Zadvydas*, 533 U.S. at 694.

[5] *See* Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161, slip op. at 2, 34–36 (U.S. June 25, 2020) (holding that, while "aliens who have established connections in this country have due process rights in deportation proceedings," an alien "at the threshold of initial entry," including a person who is detained shortly after unlawful entry, has only those protections regarding admission that Congress provided by statute); United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) ("These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."); Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."); Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society.").

[6] *Zadvydas*, 533 U.S. at 701.

[7] *Id.* at 682 ("We deal here with aliens who were admitted to the United States but subsequently ordered removed. Aliens who have not yet gained initial admission to this country would present a very different question. Based on our conclusion that indefinite detention of aliens in the former category would raise serious constitutional concerns, we construe the statute to contain an implicit 'reasonable time' limitation, the application of which is subject to federal-court review."). *But see* Clark v. Martinez, 543 U.S. 371, 378–79 (2005) (construing the presumptive time limitation established in *Zadvydas* as also applying to *unadmitted* aliens who were being detained after their removal orders became final because the statute authorizing post-order of removal detention made no distinction between admitted and nonadmitted aliens, and should have the same meaning for both categories).

[8] *Zadvydas*, 533 U.S. at 690–92, 697, 701 (construing a statute so as to avoid a "serious constitutional problem," and recognizing a "presumptively reasonable" detention period of six months for aliens subject to final orders of removal).

In *Demore v. Kim*, however, the Supreme Court in 2003 held that the mandatory detention during the pendency of formal removal proceedings of certain aliens who had committed specified crimes was constitutionally permissible.[9] The Court observed that "Congress may make rules as to aliens that would be unacceptable if applied to citizens," while also citing its "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings . . . ."[10] While recognizing that, under *Zadvydas*, "serious constitutional concerns" were raised by the indefinite detention of lawfully admitted aliens who have been ordered removed, the *Demore* Court reasoned that mandatory detention during the pendency of formal removal proceedings was distinguishable because it served the purpose of preventing criminal aliens from absconding during those proceedings and generally lasted for relatively short periods of time.[11]

Some lower courts construed *Demore*'s holding as applying only to relatively "brief periods" of detention, rather than cases where the alien's detention lasts for extended periods of time.[12] To avoid constitutional concerns, some courts read federal statutes governing the detention of unlawfully present aliens during the pendency of their removal proceedings as containing implicit time limitations and requiring periodic bond hearings.[13] In 2018, the Supreme Court in *Jennings v. Rodriguez* rejected that interpretation, holding that the statutes were textually clear in mandating or authorizing the detention of certain aliens during their removal proceedings, and that nothing in those provisions limited the length of detention or required periodic bond hearings.[14] The Court held that the government has the statutory authority to detain aliens potentially indefinitely during their removal proceedings, but left open the question of whether such indefinite detention is unconstitutional.[15]

Additionally, in *Department of Homeland Security v. Thuraissigiam*, the Supreme Court in 2020 held that an alien detained shortly after entering the United States could not constitutionally challenge a federal statute limiting judicial review of his "expedited removal" proceedings (a streamlined removal process applicable to aliens apprehended at or near the

[9] 538 U.S. 510, 513, 531 (2003).

[10] *Id.* at 522, 526. *See also id.* at 528 ("[W]hen the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal."). A closely divided Court had earlier ruled that, in time of war, the deportation of an enemy alien may be ordered summarily by executive action, and that due process of law did not require the courts to determine the sufficiency of any hearing that was provided. Ludecke v. Watkins, 335 U.S. 160, 173 (1948). Conversely, three of the four dissenting Justices argued that even an enemy alien could not be deported without a fair hearing. *Id.* at 186–87 (Douglas, J., dissenting).

[11] *Demore*, 538 U.S. at 527–29. Although the Supreme Court in *Demore* ruled that mandatory detention during the pendency of formal removal proceedings is not unconstitutional per se, the Court did not address whether there are any constitutional limits to the *duration* of such detention. *See* Tijani v. Willis, 430 F.3d 1241, 1252 (9th Cir. 2005) (Callahan, J., dissenting) ("The constitutional limit, if any, to the duration of an alien's detention under § 1226, however, was left open by the Supreme Court in *Demore*.").

[12] *See, e.g.*, Rodriguez v. Robbins, 804 F.3d 1060, 1079, 1088 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, No. 15-1204 (U.S. Feb. 27, 2018).

[13] *Id.* at 1074.

[14] *Jennings*, slip op. at 12–23. *See also* Johnson v. Chavez, No. 19-897, slip op. at 1–2 (U.S. June 29, 2021) (construing federal statutes as plainly authorizing the detention without bond hearings of aliens whose prior removal orders were reinstated following their unlawful reentry into the United States, and who were placed in proceedings to determine whether they would be subject to persecution in their countries of removal).

[15] Although the Supreme Court has not yet addressed the constitutionality of indefinite detention during the pendency of removal proceedings, the Court has previously suggested in *Demore v. Kim* that aliens may be "detained for the brief period necessary for their removal proceedings." 538 U.S. at 513; *see also id.* at 526 (noting the "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings"). Additionally, in a concurring opinion in *Demore*, Justice Anthony Kennedy declared that a detained alien "could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Id.* at 532 (Kennedy, J., concurring) (citing Zadvydas v. Davis, 533 U.S. 678, 684–86 (2001)).

border).[16] Although the alien had physically entered the United States, the Court determined that he could be "'treated' for due process purposes 'as if stopped at the border'" because he was encountered only twenty-five yards inside the United States and essentially remained "on the threshold" of entry.[17] According to the Court, the "century-old rule" that aliens seeking initial entry into the United States lack due process rights "would be meaningless if it became inoperative as soon as an arriving alien set foot on U.S. soil."[18] The Court observed, moreover, that only aliens "who have established connections in this country" have due process protections in their removal proceedings.[19]

The Supreme Court's jurisprudence indicates that, although aliens present within the United States generally have due process protections, the extent of those constitutional protections may depend on certain factors, including whether the alien has been lawfully admitted or developed ties to the United States, and whether the alien has engaged in specified criminal activity. Therefore, even with regard to aliens present within the United States, the Court has sometimes deferred to Congress's policy judgments that limit the ability of some classes of aliens to contest their detention or removal.

Amdt5.6.3 Military Proceedings and Procedural Due Process

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

The Supreme Court has considered the extent to which the courts should review proceedings before military tribunals for the purpose of determining compliance with the Due Process Clause. In *In re Yamashita*,[1] the majority denied a petition for certiorari and petitions for writs of habeas corpus to review the conviction of a Japanese war criminal by a military commission sitting in the Philippine Islands. The Court held that, because the military commission, in admitting evidence to which objection had been made, had not violated any act of Congress, a treaty, or a military command defining its authority, its rulings on evidence and on the mode of conducting the proceedings were not reviewable by the courts. Furthermore, in *Johnson v. Eisentrager*,[2] the Court overruled a lower court decision that, in reliance upon the dissenting opinion in *Yamashita*, had held that the Due Process Clause required that the legality of the conviction of enemy alien belligerents by military tribunals should be tested by the writ of habeas corpus.

The Executive Branch's failure to provide any type of proceeding for prisoners alleged to be "enemy combatants," whether in a military tribunal or a federal court, was at issue in *Hamdi*

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[16] No. 19-161, slip op. at 1 (U.S. June 25, 2020) (Thomas, J., concurring).

[17] *Id.* at 35–36 (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212, 215 (1953), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009–546).

[18] *Id.* at 35

[19] *Id.* at 2.

[1] 327 U.S. 1 (1946).

[2] 339 U.S. 763 (1950).

v. Rumsfeld.[3] During a military action in Afghanistan,[4] a United States citizen, Yaser Hamdi, was taken prisoner. The Executive Branch argued that it had the authority to hold such an "enemy combatant" while providing him with limited recourse to the federal courts. The Court agreed that the President was authorized to detain a United States citizen seized in Afghanistan.[5] However, the Court ruled that the government could not detain the petitioner indefinitely for purposes of interrogation, but must give him the opportunity to offer evidence that he is not an enemy combatant. At a minimum, the petitioner must be given notice of the asserted factual basis for holding him, must be given a fair chance to rebut that evidence before a neutral decision-maker, and must be allowed to consult an attorney.[6]

Without dissent, in *Hiatt v. Brown*,[7] the Court reversed the judgment of a lower court that had discharged a prisoner serving a sentence imposed by a court-martial because of errors that had deprived the prisoner of due process of law. The Court held that the court below had erred in extending its review, for the purpose of determining compliance with the Due Process Clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain a conviction, the adequacy of the pre-trial investigation, and the competence of the law member and defense counsel. In summary, Justice Tom Clark wrote: "In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision."[8] Similarly, in *Burns v. Wilson*,[9] the Court denied a petition for the writ to review a conviction by a military tribunal on the Island of Guam in which the petitioners asserted that their imprisonment resulted from proceedings that violated their constitutional rights. Four Justices, with whom Justice Sherman Minton concurred, maintained that judicial review is limited to determining whether the military tribunal, or court-martial, had given fair consideration to each of petitioners' allegations, and does not embrace an opportunity "to prove de novo" what petitioners had "failed to prove in the military courts." According to Justice Minton, however, if the military court had jurisdiction, its action is not reviewable.

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[3] 542 U.S. 507 (2004).

[4] In response to the September 11, 2001 terrorist attacks on New York City's World Trade Center and the Pentagon in Washington, D.C., Congress passed the "Authorization for Use of Military Force," Pub. L. No. 107-40, which served as the basis for military action against the Taliban government of Afghanistan and the al Qaeda forces that were harbored there.

[5] There was no opinion of the Court in *Hamdi*. Rather, a plurality opinion, authored by Justice Sandra Day O'Connor (joined by Chief Justice William Rehnquist, Justice Anthony Kennedy, and Justice Stephen Breyer) relied on the "Authorization for Use of Military Force" passed by Congress to support the detention. Justice Clarence Thomas also found that the Executive Branch had the power to detain the petitioner, but he based his conclusion on Article II of the Constitution.

[6] 542 U.S. at 533, 539 (2004). Although only a plurality of the Court voted for both continued detention of the petitioner and for providing these due process rights, four other Justices would have extended due process at least this far. Justice David Souter, joined by Justice Ruth Bader Ginsburg, while rejecting the argument that Congress had authorized such detention, agreed with the plurality as to the requirement of providing minimal due process. *Id.* at 553 (concurring in part, dissenting in part, and concurring in judgment). Justice Antonin Scalia, joined by Justice John Paul Stevens, denied that such congressional authorization was possible without a suspension of the writ of habeas corpus, and thus would have required a criminal prosecution of the petitioner. *Id.* at 554 (dissenting).

[7] 339 U.S. 103 (1950).

[8] 339 U.S. at 111.

[9] 346 U.S. 137 (1953).

Amdt5.7 Substantive Due Process and the Federal Government

Amdt5.7.1 Overview of Substantive Due Process Requirements

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

The Supreme Court has interpreted the Fifth and Fourteenth Amendments' Due Process Clauses—which prohibit the government from depriving any person of "life, liberty, or property, without due process of law"—to protect certain fundamental constitutional rights from federal government interference, regardless of the procedures that the government follows when enforcing the law.[1] Substantive due process has generally dealt with specific subject areas, such as liberty of contract, marriage, or privacy.

The judicial notion of substantive due process developed early in U.S. history. State court judges attempted to formulate a theory of "natural rights" to limit government interference with private property rights.[2] These "vested rights" jurists found in the "law of the land" and the "due process" clauses of the states' constitutions a restriction upon the substantive content of legislation.[3] Other jurists opposed this "vested rights" theory of property protection, arguing that the state's written constitution was its supreme law, and that judges should not look beyond the constitution to the "unwritten law" of "natural rights" when scrutinizing state legislation.[4] Some opponents of this theory argued that the government's "police power" allowed the state to regulate the use and holding of property in the public interest, subject only to the specific prohibitions of the state's written constitution.[5]

The Supreme Court recognized that the Fifth Amendment guaranteed some form of substantive due process in the years leading up to the Civil War. In its 1857 opinion in *Scott v. Sanford*, the Court declared that the Missouri Compromise, which prohibited slavery in some U.S. territories, had been an unconstitutional deprivation of slaveholders' property.[6] The Court wrote that an act of Congress that deprived "a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law."[7] After the Civil War and the ratification of the Fourteenth Amendment's Due Process Clause, the Supreme Court recognized due process

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[1] *E.g.*, Zablocki v. Redhail, 434 U.S. 374, 386–87 (1978) (citing Loving v. Virginia, 388 U. S. 1 (1967)).

[2] *Compare* the remarks of Justices Samuel Chase and James Iredell in Calder v. Bull, 3 U.S. (3 Dall.) 386, 388–89, 398–99 (1798).

[3] The full account is related in E. Corwin, Liberty Against Government ch. 3 (1948). The pathbreaking decision of the era was *Wynhamer v. The People*, 13 N.Y. 378 (1856).

[4] *See* Edward S. Corwin, *Basic Doctrine of American Constitutional Law*, 12 Mich. L. Rev. 247, 247–48 (1914).

[5] *See id.*

[6] 60 U.S. (19 How.) 393, 451–52 (1857), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

[7] *Scott*, 60 U.S. (19 How.) at 450.

guarantees with regard to state legislation.[8] The Court applied a robust notion of substantive due process to strike down economic legislation prior to the Great Depression Era.[9]

Beginning in the twentieth century, the Court developed the doctrine of noneconomic substantive due process under the Fifth and Fourteenth Amendments, beginning with cases in which the Court recognized a constitutional right to privacy.[10] The Court recognized that the Constitution's due process guarantees protected additional fundamental rights from government interference, including the right to use contraceptives, to marry, and to engage in certain adult consensual intimate conduct.[11] However, since the 1980s, the Court has generally declined to invalidate government actions on substantive due process grounds, with a few exceptions.[12] In 2022, the Court further signaled a potential retreat from noneconomic substantive due process when it reversed the position it had held for nearly five decades to hold that the right to abortion is not a constitutionally protected fundamental right.[13]

Amdt5.7.2 Economic Substantive Due Process

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

The Supreme Court has sustained several federal laws and regulations addressing economic matters, imposed under powers specifically granted to the Federal Government, over objections based on the Due Process Clause. For example, Congress may require the owner of a vessel entering United States ports, and on which alien seamen are afflicted with specified diseases, to bear the cost of hospitalizing such persons.[1] Congress may prohibit the transportation in interstate commerce of filled milk[2] or the importation of convict-made goods into any state where their receipt, possession, or sale is a violation of local law.[3] It may require employers to bargain collectively with representatives of their employees chosen in a manner prescribed by law; to reinstate employees discharged in violation of law; and to permit use of a

[8] Amdt14.S1.3 Due Process Generally.

[9] Amdt14.S1.6.2.2 Liberty of Contract and Lochner v. New York.

[10] Warren and Brandeis, The Right of Privacy, *4 Harv. L. Rev. 193* (1890). *See* Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting) (arguing against the admissibility in criminal trials of secretly taped telephone conversations). In *Olmstead*, Justice Louis Brandeis wrote:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

277 U.S. at 478. Amdt14.S1.6.3.2 Historical Background on Noneconomic Substantive Due Process.

[11] Amdt14.S1.6.1 Overview of Substantive Due Process.

[12] *See id.*

[13] *See id.*

[1] United States v. New York S.S. Co., 269 U.S. 304 (1925).

[2] United States v. Carolene Products Co., 304 U.S. 144 (1938); Carolene Products Co. v. United States, 323 U.S. 18 (1944).

[3] Kentucky Whip & Collar Co. v. Illinois Cent. R.R., 299 U.S. 334 (1937).

company-owned hall for union meetings.[4] Subject to First Amendment considerations, Congress may regulate the postal service to deny its facilities to persons who would use them for purposes contrary to public policy.[5]

Amdt5.7.3 Equal Protection

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Unlike the Fourteenth Amendment, the Fifth Amendment "contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress."[1] Nevertheless, the Supreme Court has held that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."[2] Even before the Court reached this position, it had assumed that "discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment."[3] It appears that Chief Justice William Howard Taft first described this theory when he observed that the Due Process and Equal Protection Clauses are "associated" and that "[i]t may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. . . . [Due process] tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law."[4]

Thus, in *Bolling v. Sharpe*,[5] a companion case to *Brown v. Board of Education*,[6] the Court struck down racial segregation in D.C. public schools as a violation of the Fifth Amendment's Due Process Clause, determining that due process guarantees implicitly include a guarantee of equal protection. The Court wrote, "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both

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[4] *E.g.*, Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956); NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

[5] *Ex parte* Jackson, 96 U.S. 727 (1878); Rowan v. Post Office Dep't, 397 U.S. 728 (1970).

[1] Detroit Bank v. United States, 317 U.S. 329, 337 (1943); Helvering v. Lerner Stores Corp., 314 U.S. 463, 468 (1941).

[2] Buckley v. Valeo, 424 U.S. 1, 93 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 214–18 (1995).

[3] Steward Machine Co. v. Davis, 301 U.S. 548, 585 (1937). *See also* Currin v. Wallace, 306 U.S. 1, 13–14 (1939).

[4] Truax v. Corrigan, 257 U.S. 312, 331 (1921). *See also* Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

[5] 347 U.S. 497, 499–500 (1954).

[6] 347 U.S. 483 (1954). With respect to race discrimination, the Court had earlier utilized its supervisory authority over the lower federal courts and its power to construe statutes to reach results that the Court might have grounded in the Fourteenth Amendment's Equal Protection Clause if the cases had come from the states. *E.g.*, Hurd v. Hodge, 334 U.S. 24 (1948); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Railroad Trainmen v. Howard, 343 U.S. 768 (1952). *See also* Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).

stemming from our American ideal of fairness, are not mutually exclusive. . . . [A]s this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."[7]

In subsequent cases, the Court has applied its Fourteenth Amendment jurisprudence to federal legislation that contained classifications based on sex[8] and whether a person was born to married parents,[9] and that set standards of eligibility for food stamps.[10] However, almost all legislation involves some degree of classification among particular categories of persons, things, or events, and, just as the Equal Protection Clause itself does not outlaw "reasonable" classifications, neither does the Due Process Clause necessarily forbid social and economic legislation that contains arbitrary line-drawing.[11] Thus, for example, the Court has sustained a law imposing greater punishment for an offense involving rights of property of the United States than for a like offense involving a private person's right of privacy.[12] A veterans law that extended certain educational benefits to all veterans who had served "on active duty" and thereby excluded conscientious objectors from eligibility was held to be sustainable. The Court held that Congress could reasonably conclude that the disruption caused by military service was qualitatively and quantitatively different from that caused by alternative service, and that the educational benefits would make military service more attractive.[13]

Although the "federal sovereign, like the States, must govern impartially," there may be "overriding national interests which justify selective federal legislation that would be unacceptable for an individual State."[14] One example is the paramount federal power over immigration and naturalization, which allows the federal government to classify among

[7] *Bolling*, 347 U.S. at 499. *See also* United States v. Windsor, 570 U.S. 744, 769–70 (2013) (holding that Section 3 of the Defense of Marriage Act—a provision that restricted federal recognition of same-sex marriages by specifying that, for any federal statute, ruling, regulation, or interpretation by an administrative agency, the word "spouse" would mean a husband or wife of the opposite sex—violated the Fifth Amendment's due process and equal protection components).

[8] Frontiero v. Richardson, 411 U.S. 677 (1973); Califano v. Goldfarb, 430 U.S. 199 (1977). *But see* Rostker v. Goldberg, 453 U.S. 57 (1981); Califano v. Jobst, 434 U.S. 47 (1977).

[9] *Compare* Jiminez v. Weinberger, 417 U.S. 628 (1974), *with* Mathews v. Lucas, 427 U.S. 495 (1976).

[10] Dep't of Agriculture v. Murry, 413 U.S. 508 (1973). *See also* Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).

[11] Richardson v. Belcher, 404 U.S. 78, 81 (1971); FCC v. Beach Commc'ns, 508 U.S. 307 (1993) (exemption from cable TV regulation of facilities that serve only dwelling units under common ownership); Lyng v. Castillo, 477 U.S. 635 (1986) (Food Stamp Act limitation of benefits to households of related persons who prepare meals together). With respect to courts and criminal legislation, see Hurtado v. United States, 410 U.S. 578 (1973); Marshall v. United States, 414 U.S. 417 (1974); United States v. MacCollom, 426 U.S. 317 (1976).

[12] Hill v. United States *ex rel.* Weiner, 300 U.S. 105, 109 (1937). *See also* District of Columbia v. Brooke, 214 U.S. 138 (1909); Panama R.R. v. Johnson, 264 U.S. 375 (1924); Detroit Bank v. United States, 317 U.S. 329 (1943).

[13] Johnson v. Robison, 415 U.S. 361 (1974). *See also* Schlesinger v. Ballard, 419 U.S. 498 (1975) (military law that classified men more adversely than women deemed rational because it had the effect of compensating for prior discrimination against women). Wayte v. United States, 470 U.S. 598 (1985) (selective prosecution of persons who turned themselves in or were reported by others as having failed to register for the draft does not deny equal protection because there was no showing that these men were selected for prosecution because of their protest activities). *See also* Bowen v. Owens, 476 U.S. 340, 341, 350 (1986) (Social Security Act provision that authorized payment of survivor's benefits to a "widowed spouse who remarried after age 60, but not to a similarly situated divorced widowed spouse" does not deny equal protection); Califano v. Jobst, 434 U.S. 47, 48–52 (1977) (sustaining a Social Security Act provision that revoked "disabled dependents' benefits" of any person who married unless that person married someone who was also entitled to receive disabled dependents' benefits).

[14] Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976). *See also* United States v. Vaello-Madero, No. 20-303, slip op. at 1 (U.S. Apr. 21, 2022) (holding that the Fifth Amendment's equal protection component did not require Congress to extend Supplemental Security Income benefits to residents of Puerto Rico to the same extent as it made those benefits available to residents of the states).

categories of persons upon some grounds—alienage, naturally, but also other suspect and quasi-suspect categories[15]—in ways that states cannot.[16]

Amdt5.7.4 Federal Taxation

Amdt5.7.4.1 Restrictions on Federal Government Taxation

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

In laying taxes, the federal government is less narrowly restricted by the Fifth Amendment than are the states by the Fourteenth.[1] The federal government may tax property belonging to its citizens, even if such property is never situated within the jurisdiction of the United States,[2] and it may tax the income of a citizen resident abroad that is derived from property located at his residence.[3] The difference is explained by the fact that protection of the federal government follows the citizen wherever he goes, whereas the benefits of state government accrue only to persons and property within the state's borders. The Supreme Court has said that, in the absence of an equal protection clause, "a claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment . . . ."[4]

Consistent with this holding, the Supreme Court has sustained, over charges of unfair differentiation between persons: a graduated income tax;[5] a higher tax on oleomargarine than on butter;[6] an excise tax on "puts" but not on "calls";[7] a tax on the income of businesses operated by corporations but not on similar enterprises operated by individuals;[8] an income

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[15] *See, e.g.,* Reno v. Flores, 507 U.S. 292, 315 (1993) (upholding regulations generally providing for the release of detained alien juveniles only to parents, close relatives, or legal guardians during pendency of deportation proceedings but not exclusion proceedings against a Fifth Amendment equal protection challenge).

[16] For example, the power to regulate immigration has permitted the federal government to discriminate on the basis of alienage, at least so long as the discrimination satisfies the rational basis standard of review. *See* Mathews v. Diaz, 426 U.S. 67, 79–80, 83 (1976) (holding that federal conditions upon alien eligibility for public assistance were not "wholly irrational," and observing that "[in] the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens . . . The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.'"). Nonetheless, with regard to statutes that touch upon immigration-related matters but do not address the entry or exclusion of aliens, the Court has suggested that if such a law discriminates on the basis of suspect factors other than alienage or national origin a more "exacting standard of review" may be required. *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1693–94 (2017); Sessions v. Morales-Santana, No. 15-1191, slip op. at 2 (2017) (distinguishing between immigration and citizenship contexts, and applying heightened scrutiny to hold that a derivative citizenship statute that discriminated by gender violated equal protection principles).

[1] For more information on due process and state taxation, see Amdt14.S1.5.7.1 State Taxes and Due Process Generally to Amdt14.S1.5.7.4 Collection of State Taxes and Due Process.

[2] United States v. Bennett, 232 U.S. 299, 307 (1914).

[3] Cook v. Tait, 265 U.S. 47 (1924).

[4] Helvering v. Lerner Stores Co., 314 U.S. 463, 468 (1941).

[5] Brushaber v. Union Pac. R.R, 240 U.S. 1, 24 (1916).

[6] McCray v. United States, 195 U.S. 27, 61 (1904).

[7] Treat v. White, 181 U.S. 264 (1901).

[8] Flint v. Stone Tracy Co., 220 U.S. 107 (1911).

tax on foreign corporations, based on their income from sources within the United States, even though domestic corporations were taxed on income from all sources;[9] a tax on foreign-built yachts but not upon domestic yachts;[10] a tax on employers of eight or more persons, with exemptions for agricultural labor and domestic service;[11] a gift tax law embodying a plan of graduations and exemptions under which donors of the same amount might be liable for different sums;[12] an Alaska statute imposing license taxes only on nonresident fishermen;[13] an act that taxed the manufacture of oil and fertilizer from herring at a higher rate than similar processing of other fish or fish offal;[14] an excess profits tax that defined "invested capital" with reference to the original cost of the property rather than to its present value;[15] an undistributed profits tax in the computation of which special credits were allowed to certain taxpayers;[16] an estate tax upon the estate of a deceased spouse in respect of the moiety of the surviving spouse where the effect of the dissolution of the community is to enhance the value of the survivor's moiety;[17] and a tax on nonprofit mutual insurers, even though such insurers organized before a certain date were exempt, as there was a rational basis for the discrimination.[18]

Amdt5.7.4.2 Retroactive Federal Taxes

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Congress has sometimes given retroactive effect to its tax laws by, for example, making them effective from the tax year's beginning or from the date that the bill that became the tax law was introduced.[1] Absent some peculiar circumstance, the Supreme Court has never determined that application of an income tax statute to the entire calendar year in which enactment took place has denied a person due process.[2] The Court has reasoned that a tax is not a penalty or contractual liability but rather "a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its

[9] Nat'l Paper Co. v. Bowers, 266 U.S. 373 (1924).

[10] Billings v. United States, 232 U.S. 261, 282 (1914).

[11] Steward Mach. Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).

[12] Bromley v. McCaughn, 280 U.S. 124 (1929).

[13] Haavik v. Alaska Packers Ass'n, 263 U.S. 510 (1924).

[14] Alaska Fish Co. v. Smith, 255 U.S. 44 (1921).

[15] LaBelle Iron Works v. United States, 256 U.S. 377 (1921).

[16] Helvering v. Nw. Steel Mills, 311 U.S. 46 (1940).

[17] Fernandez v. Wiener, 326 U.S. 340 (1945); *cf.* Coolidge v. Long, 282 U.S. 582 (1931).

[18] United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4 (1970) (per curiam).

[1] United States v. Darusmont, 449 U.S. 292, 296–97 (1981).

[2] Stockdale v. Ins. Companies, 87 U.S. (20 Wall.) 323, 331, 332 (1874); Brushaber v. Union Pac. R.R., 240 U.S. 1, 20 (1916); Cooper v. United States, 280 U.S. 409, 411 (1930); Milliken v. United States, 283 U.S. 15, 21 (1931); Reinecke v. Smith, 289 U.S. 172, 175 (1933); United States v. Hudson, 299 U.S. 498, 500–01 (1937); Welch v. Henry, 305 U.S. 134, 146, 148–50 (1938); Fernandez v. Wiener, 326 U.S. 340, 355 (1945); United States v. Darusmont, 449 U.S. 292, 297 (1981).

burdens."[3] Because "no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process."[4] The Court held valid a special income tax on profits realized from the sale of silver, retroactive for 35 days, which was approximately the period during which the silver purchase bill was before Congress.[5] An income tax law, made retroactive to the beginning of the calendar year in which it was adopted, was found constitutional as applied to the gain from the sale, shortly before its enactment, of property received as a gift during the year.[6] Retroactive assessment of penalties for fraud or negligence,[7] or of an additional tax on the income of a corporation used to avoid a surtax on its shareholder,[8] does not deprive the taxpayer of property without due process of law. Moreover, an additional excise tax imposed upon property still held for sale, after one excise tax had been paid by a previous owner, does not violate the Due Process Clause.[9] The Court similarly upheld a transfer tax measured in part by the value of property held jointly by a husband and wife, including that which came to the joint tenancy as a gift from the decedent spouse.[10] It also upheld the inclusion in a trust settlor's gross income of income accruing to a revocable trust during any period when the settlor had the power to revoke or modify the trust.[11]

Although the Supreme Court during the 1920s struck down gift taxes imposed retroactively upon gifts that were made and completely vested before the enactment of the taxing statute,[12] it later distinguished those decisions and limited their precedential value.[13] In *United States v. Carlton*, the Court declared that "[t]he due process standard to be applied to tax statutes with retroactive effect . . . is the same as that generally applicable to retroactive economic legislation"—retroactive application of legislation must be shown to be "'justified by a rational legislative purpose.'"[14] Applying that principle, the Court upheld retroactive application of a 1987 amendment limiting application of a federal estate tax deduction originally enacted in 1986. Congress's purpose was "neither illegitimate nor arbitrary," the Court noted, since Congress had acted "to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." Also, "Congress acted promptly and established only a modest period of retroactivity."

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[3] Welch v. Henry, 305 U.S. 134, 146–47 (1938).

[4] *Id.*

[5] United States v. Hudson, 299 U.S. 498 (1937). *See also* Stockdale v. Ins. Companies, 87 U.S. (20 Wall.) 323, 331, 341 (1874); Brushaber v. Union Pac. R.R., 240 U.S. 1, 20 (1916); Lynch v. Hornby, d247 U.S. 339, 343 (1918).

[6] Cooper v. United States, 280 U.S. 409 (1930); *see also* Reinecke v. Smith, 289 U.S. 172 (1933).

[7] Helvering v. Mitchell, 303 U.S. 391 (1938).

[8] Helvering v. Nat'l Grocery Co., 304 U.S. 282 (1938).

[9] Patton v. Brady, 184 U.S. 608 (1902).

[10] Tyler v. United States, 281 U.S. 497 (1930); United States v. Jacobs, 306 U.S. 363 (1939).

[11] Reinecke v. Smith, 289 U.S. 172 (1933).

[12] Untermyer v. Anderson, 276 U.S. 440 (1928); Blodgett v. Holden, 275 U.S. 142 (1927), *modified*, 276 U.S. 594 (1928); Nichols v. Coolidge, 274 U.S. 531 (1927). *See also* Heiner v. Donnan, 285 U.S. 312 (1932) (invalidating as arbitrary and capricious a conclusive presumption that gifts made within two years of death were made in contemplation of death).

[13] *Untermyer* was distinguished in United States v. Hemme, 476 U.S. 558, 568 (1986), upholding retroactive application of unified estate and gift taxation to a taxpayer as to whom the overall impact was minimal and not oppressive. All three cases were distinguished in United States v. Carlton, 512 U.S. 26, 30 (1994), as having been "decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded.'" The Court noted further that *Untermyer* and *Blodgett* had been limited to situations involving creation of a wholly new tax, and that *Nichols* had involved a retroactivity period of 12 years. *Id.*

[14] 512 U.S. 26, 30, 31 (1994) (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16–17 (1976)). These principles apply to estate and gift taxes as well as to income taxes, the Court added. 512 U.S. at 34.

The fact that the taxpayer had transferred stock in reliance on the original enactment was not dispositive, since "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code."[15]

Amdt5.7.5 Marriage and Substantive Due Process

In a series of Fourteenth Amendment due process and equal protection cases, the Supreme Court has identified the right to marry as a "fundamental" interest that necessitates "critical examination" of governmental restrictions that "interfere directly and substantially" with the right.[1] However, the Court has rejected some Fifth Amendment Due Process Clause challenges to federal laws that regulate the incidents of, or prerequisites for, marriage, determining that such laws were not entitled to rigorous scrutiny.[2] For example, in *Califano v. Jobst*,[3] a unanimous Court sustained a Social Security Act provision that revoked "disabled dependents' benefits" of any person who married unless that person married someone who was also entitled to receive disabled dependents' benefits.[4] Plaintiff, a recipient of such benefits, married another person with a disability who was not qualified for the benefits, and the plaintiff's benefits were terminated.[5] The plaintiff alleged that distinguishing between classes of "persons who married eligible persons" and "persons who married ineligible persons" infringed upon his right to marry in violation of the equal protection component of the Fifth Amendment's Due Process Clause.[6]

The Court rejected the plaintiff's argument, finding that benefit entitlement was not based upon need but rather upon actual dependency upon the insured wage earner; marriage, Congress could have assumed, generally terminates the dependency upon a parent-wage earner.[7] Therefore, Congress could, as an administrative convenience, designate marriage as the benefits' terminating point, except when both marriage partners were receiving benefits, in order to lessen hardship and recognize that dependency was likely to continue.[8] The marriage rule was therefore not to be strictly scrutinized or invalidated "simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby."[9]

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[15] 512 U.S. at 33.

[1] *E.g.*, Zablocki v. Redhail, 434 U.S. 374, 386–87 (1978) (citing Loving v. Virginia, 388 U. S. 1 (1967)). *See also, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 664 (2015) (collecting cases).

[2] 434 U.S. at 383–87.

[3] 434 U.S. 47 (1977).

[4] *Id.* at 48–52.

[5] *Id.*

[6] *Id.* at 53–58. For additional information on the Supreme Court's interpretations of the equal protection component of the Fifth Amendment's Due Process Clause, see Amdt5.7.3 Equal Protection.

[7] *Califano*, 434 U.S. at 53–58.

[8] *Id.*

[9] *Id.* at 54. *See also* Bowen v. Owens, 476 U.S. 340, 341, 350 (1986) (Social Security Act provision that authorized payment of survivor's benefits to a "widowed spouse who remarried after age 60, but not to a similarly situated divorced widowed spouse" does not deny equal protection); Mathews v. De Castro, 429 U.S. 181 (1976) (Social Security Act provision providing benefits to a married woman under 62 with dependent children in her care whose husband retires or becomes disabled but denying such benefits to a divorced woman under 62 with dependents represents Congress's rational judgment about the likely dependency of married but not divorced women and does not deny equal protection); Califano v. Boles, 443 U.S. 282 (1979) (limitation of certain Social Security benefits to widows and divorced wives of wage earners does not deprive mother of a child born out of wedlock who was never married to wage earner of equal protection).

Amdt5.7.6 Abortion and Substantive Due Process

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

In 1973, the Supreme Court determined in *Roe v. Wade* that the U.S. Constitution protects a woman's decision whether or not to terminate her pregnancy.[1] The constitutional basis for the decision rested upon the conclusion that the right of privacy "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action" encompassed a woman's decision to carry a pregnancy to term.[2] Following *Roe*, several federal abortion restrictions were challenged as infringing the analogous right guaranteed by the Fifth Amendment's Due Process Clause.[3] In 2022, a majority of the Court in *Dobbs v. Jackson Women's Health Organization*[4] overruled *Roe* and a 1992 abortion decision, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[5] In the following cases, which upheld federal abortion restrictions, the overruling of *Roe* and *Casey* would probably not affect the restrictions' continued enforcement.

In *Harris v. McRae*, the Court upheld the Hyde Amendment, an annual appropriations provision that restricts the use of federal funds to pay for abortions provided through the Medicaid program.[6] The Court found that the Hyde Amendment did not violate either the Due Process or Equal Protection Clauses of the Fifth Amendment, and did not violate the Establishment Clause of the First Amendment.[7] While the Court acknowledged that the liberty guaranteed by the Fifth Amendment's Due Process Clause, in particular, protects a woman's freedom of choice for certain personal decisions, it does not "confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom."[8] In *Harris*, the Court also recognized the right of a state participating in the Medicaid program to fund only those medically necessary abortions for which it received federal reimbursement.[9]

In 1991, the Court upheld on both statutory and constitutional grounds the Department of Health and Human Services' regulations restricting recipients of federal family planning funding from using federal funds to counsel women about abortion.[10] In *Rust v. Sullivan*, the

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[1] 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. June 24, 2022). For further discussion on *Roe*, see Amdt14.S1.6.4.1 Abortion, Roe v. Wade, and Pre-Dobbs Doctrine.

[2] *Roe*, 410 U.S. at 152–53.

[3] *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding federal Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531).

[4] *Dobbs*, No. 19-1392.

[5] 505 U.S. 833 (1992), *overruled by Dobbs*, No. 19-1392.

[6] 448 U.S. 297 (1980). In 1976, Representative Henry J. Hyde first offered the amendment to the Departments of Labor and Health, Education, and Welfare Appropriation Act, 1977, that restricted the use of appropriated funds to pay for abortions provided through the Medicaid program. *See* Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 ("None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.").

[7] *Harris*, 448 U.S. at 326.

[8] *Id*. at 318.

[9] *Id*. at 310.

[10] Rust v. Sullivan, 500 U.S. 173 (1991).

Court determined that a woman's right to an abortion was not burdened by the regulations, which implement Title X of the Public Health Service Act.[11] The Court reasoned that there was no constitutional violation because the government has no duty to subsidize an activity simply because it is constitutionally protected and because a woman is "in no worse position than if Congress had never enacted Title X."[12]

In 2007, the Court applied the "undue burden" standard[13] adopted in *Casey* to evaluate abortion regulations to the Partial-Birth Abortion Ban Act of 2003.[14] In *Gonzales v. Carhart*, the Court considered whether the federal law was overbroad, prohibiting both the standard dilation and evacuation (D&E) abortion method—the most common method during the second trimester of pregnancy—and the intact D&E method, described by some as "partial-birth" abortion because the fetus is more fully developed at the time the procedure is performed. Relying on the law's plain language, the Court determined that it could not be interpreted to encompass the standard D&E method.[15] The Court noted that the standard D&E method involves the removal of the fetus in pieces.[16] In contrast, the federal law uses the phrase "delivers a living fetus."[17] The Court explained that the standard D&E method "does not involve the delivery of a fetus because it requires the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix."[18] The Court also identified the law's specific requirement of an "overt act" that kills the fetus as evidence of its inapplicability to the standard D&E method, maintaining that the "distinction matters because, unlike intact D&E, standard D&E does not involve a delivery followed by a fatal act."[19] Ultimately, the Court determined that the law did not impose an undue burden on a woman's ability to obtain an abortion because it prohibited only the less frequently performed intact D&E abortion method.

In *Gonzales*, the Court also concluded that the Partial-Birth Abortion Ban Act was not unconstitutionally vague because it provides doctors with a reasonable opportunity to know what conduct is prohibited.[20] Unlike the Nebraska partial-birth abortion law invalidated by the Court in *Stenberg v. Carhart*,[21] which prohibited the delivery of a "substantial portion" of the fetus,[22] the federal law includes "anatomical landmarks" that identify when an abortion procedure will be subject to the act's prohibitions.[23] Thus, the Court observed: "[I]f an abortion procedure does not involve the delivery of a living fetus to one of these 'anatomical landmarks'—where, depending on the presentation, either the fetal head or the fetal trunk past the navel is outside the body of the mother—the prohibitions of the Act do not apply."[24]

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[11] *Id*. at 201–02.

[12] *Id*. at 203.

[13] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876–77 (1992). In *Casey*, a plurality of the Court adopted an "undue burden" standard for examining abortion regulations, maintaining that this standard better recognized the need to reconcile the government's interest in potential life with a woman's right to decide whether to terminate her pregnancy. The plurality indicated that an undue burden exists if the purpose or effect of an abortion regulation is "to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 878.

[14] Gonzales v. Carhart, 550 U.S. 124 (2007).

[15] *Id*. at 150.

[16] *Id*. at 152.

[17] 18 U.S.C. § 1531(b)(1)(A).

[18] Gonzales, 550 U.S. at 152.

[19] *Id*. at 153.

[20] *Id*. at 149.

[21] 530 U.S. 914 (2000).

[22] *Stenberg*, 530 U.S. at 922. *See also* Neb. Rev. Stat. Ann. § 28-326(9) (Supp. 1999).

[23] *Gonzales*, 550 U.S. at 151. *See also* 18 U.S.C. § 1531(b)(1)(A).

[24] *Gonzales*, 550 U.S. at 148.

The *Gonzales* Court further observed that the Partial-Birth Abortion Ban Act's inclusion of a scienter or knowledge requirement alleviated any vagueness concerns. Because the law applies only when a doctor "deliberately and intentionally" delivers the fetus to an anatomical landmark, the Court determined that a doctor performing the standard D&E method would not face criminal liability if a fetus were delivered beyond the prohibited points by mistake.[25] According to the Court, the scienter requirement "narrow[s] the scope of the Act's prohibition and limit[s] prosecutorial discretion."[26]

Amdt5.7.7 Informational Privacy and Substantive Due Process

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

In a few cases, the Supreme Court has upheld federal record keeping or disclosure requirements against objections that they violated a purported Fifth Amendment substantive due process right to informational privacy. In *California Bankers Association v. Schultz*, the Court determined that the federal Bank Secrecy Act's transaction recordkeeping provisions did not violate the due process rights of banks or their depositors by subjecting them to arbitrary or burdensome requirements.[1] In its 2011 decision in *National Aeronautics & Space Administration (NASA) v. Nelson*, the Supreme Court unanimously ruled against NASA employees who argued that the extensive background checks required to work at NASA facilities violated their constitutional privacy rights.[2] The Court chose to "assume, without deciding," that the Constitution protects a right to informational privacy.[3] However, it held that such a right would not prevent the government from asking reasonable questions in light of the government's interest as an employer and statutory protections that provide meaningful checks against unwarranted disclosures.[4]

Amdt5.7.8 Right to Travel Abroad and Substantive Due Process

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be*

[25] *Id.*

[26] *Id.* at 150.

[1] 416 U.S. 21, 49 (1974).

[2] 562 U.S. 134, 138 (2011).

[3] *Id.*

[4] *Id. See also* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 455–65 (1977) (determining that former President Richard Nixon lacked a significant privacy interest in presidential records that Congress had placed under the custody of an Executive Branch official, in part because of the public interest in the records and the statute's protections against "undue dissemination" of intermingled private materials).

compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Supreme Court has recognized that the Fifth Amendment's Due Process Clause protects an individual citizen's right to travel abroad from arbitrary and indiscriminate government restrictions.[1] The Court recognized such a right in *Kent v. Dulles* when it held that the Secretary of State had exceeded his statutory authority by denying passports to citizens solely because they declined to respond to an inquiry about their beliefs and associations.[2] Subsequently, the Court confirmed that the Fifth Amendment protects a right to travel when it struck down Section 6 of the Subversive Activities Act, which made it unlawful for certain members of Communist organizations to apply for, or use, a passport.[3] The Court held that Section 6 "too broadly and indiscriminately restrict[ed] the right to travel and thereby abridge[d] the liberty guaranteed by the Fifth Amendment."[4] However, the Court has acknowledged that the federal government may restrict citizens' travel abroad to particular areas of the world for national security reasons.[5]

Amdt5.7.9 Right of Access to Federal Courts and Substantive Due Process

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Many of the Supreme Court's cases on due process and the right of access to courts have arisen under the Fourteenth Amendment.[1] The Court has held that, in limited circumstances, litigants have a substantive due process right of access to state courts under the Fourteenth Amendment.[2] For example, due process guarantees prohibit a state from denying welfare assistance recipients access to state courts to dissolve their marriage solely because they cannot afford to pay court fees and costs.[3]

In one case, the Court addressed whether the Fifth Amendment provides a similar right in federal bankruptcy proceedings.[4] In *United States v. Kras*, the Court rejected an indigent bankruptcy petitioner's constitutional challenge to a requirement that a petitioner pay fees required under the Bankruptcy Act and a federal court order in order to obtain discharge of his

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[1] *E.g.*, Aptheker v. Sec'y of State, 378 U.S. 500, 505 (1964). For information on the right to travel between states, see Amdt14.S1.2.1 Privileges or Immunities of Citizens and the Slaughter-House Cases to Amdt14.S1.2.2 Modern Doctrine on Privileges or Immunities Clause and Amdt5.7.3 Equal Protection.

[2] Kent v. Dulles, 357 U.S. 116, 130 (1958).

[3] *See Aptheker*, 378 U.S. at 501–02.

[4] *Id.* at 505.

[5] Zemel v. Rusk 381 U.S. 1, 14 (1965).

[1] For more on the Fourteenth Amendment due process right, see Amdt14.S1.8.12.3 Access to Courts, Wealth, and Equal Protection. The Supreme Court has also recognized that the right of access to courts may implicate equal protection guarantees. *See* Amdt14.S1.8.12.3 Access to Courts, Wealth, and Equal Protection.

[2] Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

[3] *Id.*

[4] United States v. Kras, 409 U.S. 434, 450 (1973).

debts in a non-asset bankruptcy proceeding.[5] The Court noted that discharge of one's debts in bankruptcy was not a constitutional right and did not constitute the exclusive avenue for relief.[6] It also determined that Congress had a rational basis for enacting the fee requirement.[7]

Amdt5.7.10 Congressional Regulation of Public Utilities and Substantive Due Process

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

When Congress has granted federal agencies jurisdiction over various public utilities, it has typically prescribed standards for fixing utility rates that are substantially identical to the constitutional standards by which the Supreme Court has tested the validity of state action. Consequently, the review of such agencies' orders has seldom turned on constitutional issues. In two cases, however, the Court sustained maximum rates that the Secretary of Agriculture prescribed for stockyard companies only after detailed consideration of numerous items excluded from the rate base or from operating expenses, apparently on the assumption that error with respect to any such item would render the rates confiscatory and void.[1] A few years later, in *FPC v. Hope Natural Gas Co.*,[2] the Court adopted an entirely different approach. It held that the validity of the Federal Power Commission's order depended upon whether the impact or total effect of the order was just and reasonable, rather than upon the method of computing the rate base. Rates that enable a company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed cannot be condemned as unjust and unreasonable even though they might produce only a meager return in a rate base computed by the "present fair value" method.

Orders prescribing the form and contents of accounts that public utility companies keep[3]—and statutes requiring a private carrier to furnish the Interstate Commerce Commission with information for valuing its property[4]—have been sustained against the objection that they were arbitrary and invalid. An order of the Secretary of Commerce directing a single common carrier by water to file a summary of its books and records pertaining to its rates was also held not to violate the Fifth Amendment.[5]

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[5] *Id.*

[6] *Id.* at 444–49.

[7] *Id.*

[1] St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936); Denver Union Stock Yards Co. v. United States, 304 U.S. 470 (1938).

[2] 320 U.S. 591 (1944). The result of this case had been foreshadowed by the opinion of Chief Justice Harlan Stone in FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942), to the effect that the Commission was not bound to use any single formula or combination of formulas when determining rates.

[3] A. T. & T. Co. v. United States, 299 U.S. 232 (1936); United States v. New York Tel. Co., 326 U.S. 638 (1946); Northwestern Co. v. FPC, 321 U.S. 119 (1944).

[4] Valvoline Oil Co. v. United States, 308 U.S. 141 (1939); Champlin Rfg. Co. v. United States, 329 U.S. 29 (1946).

[5] Isbrandtsen-Moller Co. v. United States, 300 U.S. 146 (1937).

Amdt5.8 Void for Vagueness Doctrine

Amdt5.8.1 Overview of Void for Vagueness Doctrine

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Criminal statutes that lack sufficient definiteness or specificity are commonly held "void for vagueness."[1] Such legislation "may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."[2] The Supreme Court has observed that: "Men of common intelligence cannot be required to guess at the meaning of [an] enactment."[3] In other situations, a statute may be unconstitutionally vague because the statute is worded in a standardless way that invites arbitrary enforcement. In this vein, the Court has invalidated two kinds of laws as "void for vagueness": (1) laws that define criminal offenses; and (2) laws that fix the permissible sentences for criminal offenses.[4] With respect to laws that define criminal offenses, the Court has required that a penal statute define the offense with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[5] The Court may also apply the void-for-vagueness doctrine to analyze statutes governing civil immigration "removal cases,"[6] "in view of the grave nature of deportation."[7]

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[1] Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

[2] Musser v. Utah, 333 U.S. 95, 97 (1948). The Court stated: "The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable tests to ascertain guilt." *Id.* at 97. In a different case, the Court observed: "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972), *quoted in* Village of Hoffman Estates v. The Flipside, 455 U.S. 489, 498 (1982).

[3] Winters v. New York, 333 U.S. 507, 515–16 (1948). *Cf.* Colten v. Kentucky, 407 U.S. 104, 110 (1972). Thus, a state statute imposing severe, cumulative punishments upon contractors with the state who pay their workers less than the "current rate of per diem wages in the locality where the work is performed" was held to be "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Const. Co., 269 U.S. 385 (1926). Similarly, a statute that allowed jurors to require an acquitted defendant to pay the costs of the prosecution, elucidated only by the judge's instruction to the jury that the defendant should have to pay the costs only if it thought him guilty of "some misconduct" though innocent of the crime with which he was charged, was found to fall short of the requirements of due process. Giaccio v. Pennsylvania, 382 U.S. 399 (1966).

[4] *See* United States v. Beckles, 137 S. Ct. 886, 892 (2017).

[5] *See* Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[6] Sessions v. Dimaya, 138 S. Ct. 1204, 1213 (2018) (plurality opinion).

[7] Jordan v. De George, 341 U.S. 223, 231 (1951).

Amdt5.8.2 Laws That Define Criminal Offenses and the Requirement of Definiteness

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

The Supreme Court has held laws unconstitutional when they do not define offenses with enough specificity. For instance, the Court voided for vagueness a criminal statute providing that a person was a "gangster" and subject to fine or imprisonment if he was without lawful employment, had been either convicted at least three times for disorderly conduct or had been convicted of any other crime, and was "known to be a member of a gang of two or more persons." The Court observed that neither common law nor the statute gave the words "gang" or "gangster" definite meaning, that the enforcing agencies and courts were free to construe the terms broadly or narrowly, and that the phrase "known to be a member" was ambiguous. The statute was held void, and the Court refused to allow specification of details in the particular indictment to save it because it was the statute, not the indictment, that prescribed the rules to govern conduct.[1]

A statute may be so vague or threatening to constitutionally protected activity that it can be pronounced wholly unconstitutional; in other words, "unconstitutional on its face."[2] Thus, for instance, a unanimous Court in *Papachristou v. City of Jacksonville*[3] struck down as invalid on its face a vagrancy ordinance that punished "dissolute persons who go about begging, . . . common night walkers, . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, . . . persons neglecting all lawful business and habitually spending their time by frequenting house of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children . . . ."[4] The ordinance was found to be facially invalid, according to Justice William Douglas for the Court, because it did not give fair notice, it did not require specific intent to commit an unlawful act, it permitted and encouraged arbitrary and erratic arrests and convictions, it committed too much discretion to policemen, and it criminalized activities that by modern standards are normally innocent.[5]

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[1] Lanzetta v. New Jersey, 306 U.S. 451 (1939); Edelman v. California, 344 U.S. 357 (1953).

[2] Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Smith v. Goguen, 415 U.S. 566 (1974). Generally, the Court will pronounce wholly void a vague statute that regulates in the area of First Amendment guarantees. Winters v. New York, 333 U.S. 507, 509–10 (1948); Thornhill v. Alabama, 310 U.S. 88 (1940).

[3] 405 U.S. 156 (1972).

[4] 405 U.S. at 156 n.1. Similar concerns regarding vagrancy laws had been expressed previously. *See, e.g.*, Winters v. New York, 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting); Edelman v. California, 344 U.S. 357, 362 (1953) (Black, J., dissenting); Hicks v. District of Columbia, 383 U.S. 252 (1966) (Douglas, J., dissenting).

[5] Similarly, an ordinance making it a criminal offense for three or more persons to assemble on a sidewalk and conduct themselves in a manner annoying to passers-by was found impermissibly vague and void on its face because it encroached on the freedom of assembly. Coates v. City of Cincinnati, 402 U.S. 611 (1971). *See* Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965) (conviction under statute imposing penalty for failure to "move on" voided); Bouie v. City of Columbia, 378 U.S. 347 (1964) (conviction on trespass charges arising out of a sit-in at a drugstore lunch counter voided because the trespass statute did not give fair notice that it was a crime to refuse to leave private

In *FCC v. Fox Television Stations, Inc.*,[6] the Court held that the Federal Communications Commission (FCC) had violated the Fifth Amendment due process rights of Fox Television and ABC, Inc., because the FCC had not given fair notice that broadcasting isolated instances of expletives or brief nudity could lead to punishment. Although 18 U.S.C. § 1464 bans the broadcast of "any obscene, indecent, or profane language," the FCC had a long-standing policy that it would not consider "fleeting" instances of indecency to be actionable, and had confirmed such a policy by issuing industry guidance. The FCC had not announced the new policy until after the instances at issue in the case (isolated utterances of expletives during two live broadcasts aired by Fox Television, and a brief exposure of the nude buttocks of an adult female character by ABC). The Commission policy in place at the time of the broadcasts, therefore, gave the broadcasters no notice that a fleeting instance of indecency could be actionable.

On the other hand, some less vague statutes may be held unconstitutional only in application to the defendant before the Court.[7] For instance, when a statute's terms could be applied both to innocent or protected conduct (such as free speech) and unprotected conduct, but the valuable effects of the law outweigh its potential general harm, such a statute will be held unconstitutional only as applied.[8] Thus, in *Palmer v. City of Euclid*,[9] an ordinance punishing "suspicious persons" defined as "[a]ny person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself" was found void only as applied to a particular defendant. In *Palmer*, the Court found that the defendant, who had dropped off a passenger and begun talking into a two-way radio, was engaging in conduct that could not reasonably be anticipated to fit within the "without any visible or lawful business" portion of the ordinance's definition.

Loitering statutes that are triggered by failure to obey a police dispersal order are suspect, and may be struck down if they leave a police officer absolute discretion to give such orders.[10] Thus, a Chicago ordinance that required police to disperse all persons in the company of "criminal street gang members" while in a public place with "no apparent purpose," failed to meet the "requirement that a legislature establish minimal guidelines to govern law enforcement."[11] The Court noted that the phrase "no apparent purpose" was inherently subjective because its application depended on whether some purpose was "apparent" to the officer, who would presumably have the discretion to ignore such apparent purposes as engaging in idle conversation or enjoying the evening air.[12] On the other hand, when such a statute additionally required a finding that the defendant was intent on causing inconvenience, annoyance, or alarm, it was upheld against facial challenge, at least as applied to a defendant who was interfering with the police's ticketing of a car.[13]

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premises after being requested to do so); Kolender v. Lawson, 461 U.S. 352 (1983) (requirement that person detained in valid *Terry* stop provide "credible and reliable" identification was facially void as encouraging arbitrary enforcement).

[6] 567 U.S. 239, 258 (2012).

[7] When the terms of a vague statute do not threaten a constitutionally protected right, and when the conduct at issue in a particular case is clearly proscribed, then a due process "void for vagueness" challenge is unlikely to be successful. However, when the conduct in question is at the margins of an unclear statute's meaning, it may be struck down as applied. *E.g.*, United States v. National Dairy Corp., 372 U.S. 29 (1963).

[8] Palmer v. City of Euclid, 402 U.S. 544 (1971); Village of Hoffman Estates v. The Flipside, 455 U.S. 489, 494–95 (1982).

[9] 402 U.S. 544 (1971).

[10] Kolender v. Lawson, 461 U.S. 352, 358 (1983).

[11] City of Chicago v. Morales, 527 U.S. 41 (1999).

[12] 527 U.S. at 62.

[13] Colten v. Kentucky, 407 U.S. 104 (1972).

State statutes with vague standards may nonetheless be upheld if a state court has interpreted the text of the statute with sufficient clarity.[14] Thus, the civil commitment of persons of "such conditions of emotional instability . . . as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons" was upheld by the Supreme Court, based on a state court's construction of the statute as applying only to persons who, by habitual course of misconduct in sexual matters, have evidenced utter lack of power to control their sexual impulses and are likely to inflict injury. The Court viewed the underlying conditions—habitual course of misconduct in sexual matters, lack of power to control impulses, and likelihood of attack on others—as calling for evidence of past conduct pointing to probable future consequences and, therefore, as being as susceptible of proof as many of the criteria consistently applied in criminal proceedings.[15]

Amdt5.8.3 Laws that Define Criminal Offenses and Requirement of Notice

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Conceptually related to the problem of definiteness in criminal statutes is the problem of notice. Ordinarily, ignorance of the law affords no excuse, or, in other instances, the nature of the conduct may sufficiently alert a person that there are laws that he must be observe.[1] On occasion the Court has approved otherwise vague statutes because the statute forbade only "willful" violations, which the Court construed as requiring knowledge of the illegal nature of the proscribed conduct.[2] When conduct is not inherently blameworthy, however, a criminal statute may not impose a legal duty without notice.[3]

The question of notice has also arisen in the context of "judge-made" law. Although the Ex Post Facto Clause forbids retroactive application of state and federal criminal laws, no such explicit restriction applies to the courts. Thus, when a state court abrogated the common law

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[14] *See, e.g.*, McDonnell v. United States, 136 S. Ct. 2355, 2372–73 (2016) (narrowly interpreting the term "official act" to avoid a construction of the Hobbs Act and federal honest-services fraud statute that would allow public officials to be subject to prosecution without fair notice "for the most prosaic interactions" between officials and their constituents).

[15] Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940).

[1] *E.g.*, United States v. Freed, 401 U.S. 601 (1971). Persons may be bound by a novel application of a statute, not supported by Supreme Court or other "fundamentally similar" case precedent, so long as the court can find that, under the circumstance, "unlawfulness . . . is apparent" to the defendant. United States v. Lanier, 520 U.S. 259, 271–72 (1997).

[2] *E.g.*, Boyce Motor Lines v. United States, 342 U.S. 337 (1952); Colautti v. Franklin, 439 U.S. 379, 395 (1979). *Cf.* Screws v. United States, 325 U.S. 91, 101–03 (1945) (plurality opinion). The Court has upheld some statutes that did not explicitly include such a mens rea requirement. *E.g.*, Morissette v. United States, 342 U.S. 246 (1952).

[3] *See, e.g.*, Lambert v. California, 355 U.S. 225 (1957) (invalidating a municipal code that made it a crime for anyone who had ever been convicted of a felony to remain in the city for more than five days without registering.). In *Lambert*, the Court emphasized that the act of being in the city was not itself blameworthy, holding that the failure to register was quite "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community." *Id.* at 228, 229–30.

rule that a victim must die within a "year and a day" in order for homicide charges to be brought in *Rogers v. Tennessee*,[4] the question arose whether such rule could be applied to acts occurring before the court's decision. The dissent argued vigorously that, unlike the traditional common law practice of adapting legal principles to fit new fact situations, the court's decision was an outright reversal of existing law. Under this reasoning, the new "law" could not be applied retrospectively. The majority held, however, that only those holdings which were "unexpected and indefensible by reference to the law which had been express prior to the conduct in issue"[5] could not be applied retroactively. The Court cited the relatively archaic nature of the "year and a day rule," its abandonment by most jurisdictions, and its inapplicability to modern times as reasons that the defendant had fair warning of the possible abrogation of the common law rule.

Amdt5.8.4 Laws That Establish Permissible Criminal Sentences

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

With regard to statutes that fix criminal sentences,[1] the Supreme Court has explained that the law must specify the range of available sentences with "sufficient clarity."[2] For example, in *Johnson v. United States*, after years of litigation on the meaning and scope of the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA),[3] the Court concluded that the clause in question was void for vagueness.[4] In relevant part, the ACCA imposed an increased prison term upon a felon who was in possession of a firearm, if that felon had previously been convicted for a "violent felony," a term that the statute defined to include "burglary, arson, or extortion, [a crime that] involves use of explosives, or" crimes that fell within the residual clause—that is, crimes that "otherwise involve[ ] conduct that presents a serious potential risk of physical injury to another."[5] In *Johnson*, prosecutors sought an enhanced sentence for a

[4] 532 U.S. 451 (2001).

[5] Bouie v. City of Columbia, 378 U.S. 347, 354 (1964).

[1] In *United States v. Beckles*, the Supreme Court concluded that the federal sentencing guidelines "do not fix the permissible range of sentences" and, therefore, are not subject to a vagueness challenge under the Due Process Clause. *See* 137 S. Ct. 886, 892 (2017). Rather, the sentencing guidelines "merely guide the district courts' discretion." *Id.* at 894. In so concluding, the Court noted that the sentencing system that predated the use of the guidelines gave nearly unfettered discretion to judges in sentencing, and that discretion was never viewed as raising similar concerns. *Id.* Thus, the Court reasoned that it was "difficult to see how the present system of guided discretion" could raise vagueness concerns. *Id.* Moreover, the *Beckles* Court explained that "the advisory Guidelines . . . do not implicate the twin concerns underlying [the] vagueness doctrine—providing notice and preventing arbitrary enforcement." *Id.* According to the Court, the only notice that is required regarding criminal sentences is provided to the defendant by the applicable statutory range and the guidelines. Further, the guidelines, which serve to advise courts how to exercise their discretion within the bounds set by Congress, simply do not regulate any conduct that can be arbitrarily enforced against a criminal defendant. *Id.* at 895.

[2] *See* United States v. Batchelder, 442 U.S. 114, 123 (1979).

[3] *See, e.g.*, Sykes v. United States, 564 U.S. 1 (2011); Chambers v. United States, 555 U.S. 122 (2009); Begay v. United States, 553 U.S. 137 (2008); James v. United States, 550 U.S. 192 (2007).

[4] *See* Johnson v. United States, 135 S. Ct. 2551 (2015).

[5] *See* 18 U.S.C. § 924(e)(2)(B) (2012).

felon found in possession of a firearm, arguing that one of the defendant's previous crimes—unlawful possession of a short-barreled shotgun—qualified as a violent felony because the crime amounted to one that "involve[d] conduct that presents a serious potential risk of physical injury to another."[6] To determine whether a crime fell within the residual clause, the Court had previously endorsed a "categorical approach"—that is, instead of looking to whether the facts of a specific offense presented a serious risk of physical injury to another, the Supreme Court had interpreted the ACCA to require courts to consider whether the underlying crime fell within a category of crime that ordinarily would present a serious risk of physical injury.[7]

The Court in *Johnson* concluded that the residual clause was unconstitutionally vague because the clause's requirement that courts determine what an "ordinary case" of a crime entails led to "grave uncertainty" about (1) how to estimate the risk posed by the crime, and (2) how much risk was sufficient to qualify as a violent felony.[8] For example, in determining whether attempted burglary ordinarily posed serious risks of physical injury, the Court suggested that reasonable minds could differ as to whether an attempted burglary would typically end in a violent encounter, resulting in the conclusion that the residual clause provided "no reliable way" to determine what crimes fell within its scope.[9] In so holding, the Court relied heavily on the difficulties that federal courts (including the Supreme Court) have had in establishing consistent standards to judge the scope of the residual clause, noting that the failure of "persistent efforts" to establish a standard can provide evidence of vagueness.[10]

In *Sessions v. Dimaya*, the Court extended *Johnson* to conclude that a statute allowing the deportation of any alien who committed a "crime of violence" was unconstitutionally vague.[11] Similar to the statute at issue in *Johnson*, the statute at issue in *Dimaya* defined the phrase "crime of violence" by reference to a statutory "residual clause" covering felonious conduct that "involve[d] a substantial risk that physical force . . . may be used in the course of committing the offense," and lower courts had again adopted the categorical approach to determine whether any particular offense fell within the ambit of the residual clause.[12] The Court concluded that *Johnson* had "straightforward application" to the case before it,[13] because in both cases, the statutes required courts to impermissibly speculate about the "ordinary version" of an offense, and about whether that offense involved a sufficient risk of violence to fall within the ambit of the provision. In so doing, the Court rejected purported distinctions between the two residual clauses.[14] The government raised a number of textual differences between the two statutes—the *Dimaya* statute used the phrase "in the course of," while the *Johnson* statute did not; the *Dimaya* statute referenced the risk of "physical force," while the *Johnson* statute referred to "physical injury"; and the *Dimaya* statute, unlike the *Johnson*

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[6] *Johnson*, 135 S. Ct. at 2556.

[7] *See James*, 550 U.S. at 208.

[8] *Johnson*, 135 S. Ct. at 2557–58.

[9] *Id.*

[10] *See id.* at 2558–60 ("Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise.").

[11] 138 S. Ct. 1204, 1213 (2018). Justice Neil Gorsuch did not join that portion of the Court's opinion detailing how the void-for-vagueness doctrine applies in the context of non-criminal removal cases. *See id.* at 1212–13. Justice Gorsuch suggested that he believed the Due Process Clause required the same standard in both criminal and civil cases, *id.* at 1228–30 (Gorsuch, J., concurring), but he ultimately resolved the issue by citing to the relevant statute, noting that Congress had *chosen* "to extend existing forms of liberty" to certain individuals—and once it had done so, the government could take away that "liberty . . . only after affording due process." *Id.* at 1230.

[12] *Id.* at 1211 (majority opinion).

[13] *Id.* at 1216.

[14] *Id.* at 1218–19.

statute, did not include an exemplary list of covered crimes.[15] In the eyes of the Court, these were "the proverbial distinction[s] without a difference," because none related "to the pair of features—the ordinary-case inquiry and a hazy risk threshold—that *Johnson* found to produce impermissible vagueness."[16]

The Court subsequently considered the constitutionality of another residual clause in *United States v. Davis*, and as in *Johnson* and *Dimaya*, held that the clause was unconstitutionally vague.[17] The challenged federal statute created a sentence enhancement for offenders "using or carrying a firearm 'during and in relation to,' or possessing a firearm 'in furtherance of,' any federal 'crime of violence or drug trafficking crime.'"[18] The statutory definition of "crime of violence" included a residual clause stating that a felony offense would be included in the definition if, "by its nature," the offense "involve[d] a substantial risk that physical force . . . may be used in the course of committing the offense."[19] In light of *Johnson* and *Dimaya*, the government acknowledged that if this statute also used the categorical approach to determine whether a crime was a "crime of violence," the provision would be unconstitutional.[20] Instead, the government defended the provision by arguing that courts should adopt a "case-specific approach" to interpreting this statute, asking whether a defendant, through his or her "actual conduct," posed a "substantial risk of physical violence."[21] Although the Court acknowledged that this case-specific method would "avoid the vagueness problem" by focusing on the specific defendant's actual conduct, it nonetheless concluded that the statute could not be read to embrace this approach.[22] The Court emphasized that it had already interpreted very similar statutory provisions to require the categorical approach,[23] concluding that the word "offense" is "most naturally" read to "refer to a generic crime"[24] and expressing concerns about an approach that would give different meanings to the phrase "crime of violence" in different parts of the criminal code.[25] Consequently, because the statute employed a categorical approach, the Court held that the provision in *Davis*, like the ones at issue in *Johnson* and *Dimaya*, was "unconstitutionally vague."[26]

Amdt5.9 Takings

Amdt5.9.1 Overview of Takings Clause

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval*

[15] *Id.* at 1218–21.

[16] *Id.* at 1218. Nor did it matter to the Court that there were fewer lower court and Supreme Court cases wrestling with the proper meaning of the statute than had divided on the proper interpretation of the *Johnson* statute; the cases interpreting the *Dimaya* statute still demonstrated divisive problems of application. *Id.* at 1221–23.

[17] 139 S. Ct. 2319, 2323–24 (2019).

[18] *Id.* at 2324 (quoting 18 U.S.C. § 924(c)(1)(A)).

[19] *Id.* at 2324 (quoting 18 U.S.C. § 924(c)(3)). This provision was almost identical to the residual clause considered in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1211 (2018).

[20] *Davis*, 139 S. Ct. at 2327.

[21] *Id.*

[22] *Id.* at 2327–28.

[23] *Id.* at 2327–28.

[24] *Id.* at 2328 (quoting Nijhawan v. Holder, 557 U.S. 29, 33–34 (2009)) (internal quotation mark omitted).

[25] *Id.* at 2329.

[26] *Id.* at 2336.

forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fifth Amendment provision barring the Government from taking private property for public use absent just compensation has its origin in common law. In his *Commentaries on the Constitution of the United States*, Justice Joseph Story grounded the Takings Clause in "natural equity," describing it as "a principle of universal law" without which "almost all other rights would become utterly worthless."[1] The Supreme Court has recognized the government's ability to take property as inherent to its powers, stating "[t]he Fifth Amendment to the Constitution says 'nor shall private property be taken for public use, without just compensation.' This is a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power."[2]

The Fifth Amendment requirement that just compensation be paid for the taking of private property is intrinsic to the Fifth Amendment's objective of protecting citizens from government power.[3] In its 1898 decision, *Backus v. Fort Street Union Depot Co.,* the Supreme Court stated: "When . . . [the] power [of eminent domain] is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation."[4] Half a century later, in *Armstrong v. United States*, the Supreme Court explained the basis for the Fifth Amendment's just compensation guarantee further, stating that the doctrine "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[5]

In the Nation's early years, the federal power of eminent domain lay dormant as to property outside the District of Columbia.[6] It was not until the Supreme Court's 1876 decision, *Kohl v. United States*,[7] that the Court affirmed the federal government's power of eminent domain as implied by the Fifth Amendment, noting that such authority was as necessary to the National Government as it was to the states. Three years later in *Boom Co. v. Patterson*, the Court confirmed that the power of eminent domain "appertains to every independent

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[1] 3 Joseph Story, Commentaries on the Constitution of the United States § 1784 (1833). *See also* United States v. Great Falls Mfg. Co., 112 U.S. 645 (1884) (federal government must compensate private property owner for loss of property resulting from federal river project).

[2] United States v. Carmack, 329 U.S. 230, 241–42 (1946). The same is true of "just compensation" clauses in state constitutions. Boom Co. v. Patterson, 98 U.S. 403, 406 (1879).

[3] 3 Joseph Story, Commentaries on the Constitution § 1784 (1833).

[4] Backus v. Fort St. Union Depot Co., 169 U.S. 557, 573, 575 (1898).

[5] Armstrong v. United States, 364 U.S. 40, 49 (1960). The Supreme Court stated: "The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice." United States v. Cors, 337 U.S. 325, 332 (1949). There is no constitutional prohibition against confiscating enemy property, but aliens not so denominated are entitled to the protection of this clause. *Compare* United States v. Chemical Found., 272 U.S. 1, 11 (1926) *and* Stoehr v. Wallace, 255 U.S. 239 (1921), *with* Silesian-Am. Corp. v. Clark, 332 U.S. 469 (1947), Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931), *and* Guessefeldt v. McGrath, 342 U.S. 308, 318 (1952). Takings Clause protections for such aliens may be invoked, however, only "when they have come within the territory of the United States and developed substantial connections with this country." United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).

[6] Prior to this time, the Federal Government pursued condemnation proceedings in state courts and commonly relied on state law. Kohl v. United States, 91 U.S. 367, 373 (1876); United States v. Jones, 109 U.S. 513 (1883). The general statutory authority for federal condemnation proceedings in federal courts was not enacted until 1888. Act of Aug. 1, 1888, ch. 728, 25 Stat. 357. *See* 1 Nichols on Eminent Domain § 1.24[5] (Julius L. Sackman et al. eds., 2006).

[7] *Kohl*, 91 U.S. 367.

government. It requires no constitutional recognition; it is an attribute of sovereignty."[8] The federal power of eminent domain is, of course, limited by the grants of power in the Constitution, so that property may only be taken pursuant to a legitimate exercise of Constitutional authority,[9] but the ambit of national powers is broad enough to enable broad objectives.[10] This prerogative of the National Government can neither be enlarged nor diminished by a state.[11]

The Fourteenth Amendment extended the Fifth Amendment constraints on the exercise of the power of eminent domain to state governments[12] Because the Fifth Amendment's Just Compensation Clause did not explicitly apply to states,[13] the Supreme Court at first did not recognize the Due Process Clause of the Fourteenth Amendment as extending to property owners the same protection against the states as the Fifth Amendment provided against the Federal Government.[14] However, by the 1890s, the Court had rejected arguments that local law solely governed the amount of compensation to be awarded in a state eminent domain case. In *Chicago, B. & Q. R.R. Co. v. City of Chicago*, the Court ruled that, although a state "legislature may prescribe a form of procedure to be observed in the taking of private property for public use . . . it is not due process of law if provision be not made for compensation. . . . The mere form of the proceeding instituted against the owner . . . cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."[15]

While the Court has recognized the power of eminent domain to be inherent to federal and state government, federal and state governments may exercise such power only through legislation or legislative delegation. Such delegation is usually to another governmental body such as an agency or local government, although it may also be to private corporations such as public utilities, railroad companies, or bridge companies, so long as the delegation is for a valid public purpose.[16] Furthermore, legislation that delegates taking authority or authorizes an agency to take property by eminent domain does not by itself constitute a taking, as "[s]uch legislation may be repealed or modified, or appropriations may fail" before the taking itself is effectuated.[17]

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[8] 98 U.S. 403, 406 (1879).

[9] United States v. Gettysburg Elec. Ry., 160 U.S. 668, 679 (1896).

[10] *E.g.*, California v. Cent. Pac. R.R., 127 U.S. 1, 39 (1888) (highways); Luxton v. N. River Bridge Co., 153 U.S. 525 (1894) (interstate bridges); Cherokee Nation v. S. Kan. Ry., 135 U.S. 641 (1890) (railroads); Albert Hanson Lumber Co. v. United States, 261 U.S. 581 (1923) (canal); Ashwander v. TVA, 297 U.S. 288 (1936) (hydroelectric power). "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end." Berman v. Parker, 348 U.S. 26, 33 (1954).

[11] *Kohl*, 91 U.S. at 374.

[12] Green v. Frazier, 253 U.S. 233, 238 (1920) (noting that "[p]rior to the adoption of the Fourteenth Amendment," the power of eminent domain of state governments "was unrestrained by any federal authority").

[13] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[14] Davidson v. City of New Orleans, 96 U.S. 97 (1878). The Court attached most weight to the fact that both due process and just compensation were guaranteed in the Fifth Amendment while only due process was contained in the Fourteenth, and refused to equate the missing term with the present one.

[15] Chi., B. & Q. R.R. v. City of Chi., 166 U.S. 226, 233, 236–37 (1897). *See also* Sweet v. Rechel, 159 U.S. 380, 398 (1895).

[16] Noble v. Okla. City, 297 U.S. 481 (1936); Luxton v. N. River Bridge Co., 153 U.S. 525 (1894). One of the earliest examples of such delegation is *Curtiss v. Georgetown & Alexandria Turnpike Co.*, 10 U.S. (6 Cr.) 233 (1810).

[17] Danforth v. United States, 308 U.S. 271 (1939).

Amdt5.9.2 Public Use and Takings Clause

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

The Just Compensation Clause explicitly requires that the taking of private property be for a public use; the government cannot deprive anyone of their property for any reason other than a public use, even with compensation.[1] The question of whether a particular intended use is a public use is clearly a judicial one,[2] but the Court has always granted a high degree of deference to legislative determinations,[3] stating that "[t]he role of the judiciary in determining whether that power is being exercised for a public use is an extremely narrow one."[4] When state action is challenged under the Fourteenth Amendment, the Court also defers to the highest court of the state in resolving such an issue.[5] In its 1908 decision *Chicago, B. & Q. R.R. v. City of Chicago*, the Court noted that, "[n]o case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses . . . ."[6]

In a 1946 case involving federal eminent domain power, the Court cast doubt upon the power of courts to review the issue of public use, stating "[w]e think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority."[7] While there is some suggestion in *United States ex rel. TVA v. Welch* that "the scope of the judicial power to determine what is a 'public use'" may differ between Fifth and Fourteenth Amendment cases, with greater power in the latter type of cases than in the former,[8] *Welch* also cautions great judicial restraint in evaluating "public uses" more broadly.[9] Once it is admitted or determined that the taking is for a public use and is within the granted authority, the necessity or

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[1] Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158–59 (1896); Cole v. La Grange, 113 U.S. 1, 6 (1885).

[2] City of Cincinnati v. Vester, 281 U.S. 439, 444 (1930) ("It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one.").

[3] Kelo v. City of New London, 545 U.S. 469, 482 (2005). The taking need only be "rationally related to a conceivable public purpose." *Id.* at 490 (Kennedy, J., concurring).

[4] Berman v. Parker, 348 U.S. 26, 32 (1954) (federal eminent domain power in District of Columbia).

[5] Green v. Frazier, 253 U.S. 233, 240 (1920); *Vester*, 281 U.S. at 446. *See also* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (appeals court erred in applying more stringent standard to action of state legislature).

[6] Hairston v. Danville & W. Ry., 208 U.S. 598, 607 (1908). An act of condemnation was voided as not for a public use in *Mo. Pac. Ry. v. Nebraska,* 164 U.S. 403 (1896), but the Court read the state court opinion as acknowledging this fact, thus not bringing it within the literal content of this statement.

[7] United States *ex rel.* TVA v. Welch, 327 U.S. 546, 551–52 (1946). Justices Stanley Reed and Felix Frankfurter and Chief Justice Harlan Stone disagreed with this view. *Id.* at 555, 557 (concurring).

[8] *Welch*, 327 U.S. at 552.

[9] *See Berman*, 348 U.S. at 32 ("The role of the judiciary in determining whether that power [of eminent domain] is being exercised for a public purpose is an extremely narrow one.").

expediency of the particular taking is exclusively in the legislature, or the body to which the legislature has delegated the decision, and is not subject to judicial review.[10]

At an earlier time, the prevailing judicial view was that the term "public use" was synonymous with "use by the public" and that, if there was no duty upon the taker to permit the public as of right to use or enjoy the property taken, the taking was invalid. But the Court rejected this view.[11] The modern conception of public use equates it with the police power in furtherance of the public interest. No definition of the reach or limits of the power is possible, the Court has said, because such "definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. . . . Public safety, public health, morality, peace and quiet, law and order—these are some of the . . . traditional application[s] of the police power . . . ."[12] Because the legislature has authority to effectuate these matters, its power to achieve them by exercising eminent domain is established. As the Supreme Court observed, "For the power of eminent domain is merely the means to the end."[13] Subsequently, the Court added as an indicium of "public use" whether the government purpose could be validly achieved by tax or user fee.[14]

Traditionally, eminent domain has been used to facilitate transportation, the supplying of water, and the like,[15] but its use to establish public parks, to preserve places of historic interest, and to promote beautification has substantial precedent.[16] The Supreme Court has generally approved federal and state governments using the power of eminent domain in conjunction with private companies to facilitate urban renewal, destruction of slums, erection

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[10] Rindge Co. v. L.A. Cnty., 262 U.S. 700, 709 (1923); Bragg v. Weaver, 251 U.S. 57, 58 (1919); *Berman*, 348 U.S. at 33. *Midkiff*, 467 U.S. at 242–43 ("When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in federal courts.")

[11] Clark v. Nash, 198 U.S. 361 (1905); Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30, 32 (1916).

[12] *Berman*, 348 U.S. at 32.

[13] *Id.* at 32–33.

[14] Brown v. Legal Found. of Wash., 538 U.S. 216, 232 (2003). Reasonable user fees are not takings that necessitate just compensation. *See* United States v. Sperry Corp., 493 U.S. 52 (1989) (holding that a 1% user fee deducted from awards granted by an international tribunal to cover the costs of administering that tribunal did not constitute a taking).

[15] *E.g.*, Kohl v. United States, 91 U.S. 367 (1876) (public buildings); New Orleans Gas Co. v Drainage Comm'n, 197 U.S. 453 (1905) (city drainage system); Chi., M., & St. P. Ry. v. City of Minneapolis, 232 U.S. 430 (1914) (canal); Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897) (condemnation of privately owned water supply system formerly furnishing water to municipality under contract); Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30 (1916) (land, water, and water rights condemned for production of electric power by public utility); Dohany v. Rogers, 281 U.S. 362 (1930) (land taken for purpose of exchange with a railroad company for a portion of its right-of-way required for widening a highway); Del., L. & W. R.R. v. Town of Morristown, 276 U.S. 182 (1928) (establishment by a municipality of a public hack stand upon driveway maintained by railroad upon its own terminal grounds to afford ingress and egress to its patrons); Clark v. Nash, 198 U.S. 361 (1905) (right-of-way across neighbor's land to enlarge irrigation ditch for water without which land would remain valueless); Strickley v. Highland Boy Mining Co., 200 U.S. 527 (1906) (right of way across a placer mining claim for aerial bucket line). In *Mo. Pac. Ry. v. Nebraska*, 164 U.S. 403 (1896), however, the Court held that it was an invalid use when a state attempted to compel, on payment of compensation, a railroad, which had permitted the erection of two grain elevators by private citizens on its right-of-way, to grant upon like terms a location to another group of farmers to erect a third grain elevator for their own benefit.

[16] *E.g.*, Shoemaker v. United States, 147 U.S. 282 (1893) (establishment of public park in District of Columbia); Rindge Co. v. L.A. Cnty., 262 U.S. 700 (1923) (scenic highway); Brown v. United States, 263 U.S. 78 (1923) (condemnation of property near town flooded by establishment of reservoir in order to locate a new townsite, even though there might be some surplus lots to be sold); United States v. Gettysburg Elec. Ry., 160 U.S. 668 (1896), and Roe v. Kansas *ex rel.* Smith, 278 U.S. 191 (1929) (historic sites). When time is deemed to be of the essence, Congress may take land directly by statute, authorizing procedures by which owners of appropriated land may obtain just compensation. *See, e.g.*, Pub. L. No. 90- 545, § 3, 82 Stat. 931 (1968), 16 U.S.C. § 79 (c) (taking land for creation of Redwood National Park); Pub. L. No. 93-444, 88 Stat. 1304 (1974) (taking lands for addition to Piscataway Park, Maryland); Pub. L. No. 100-647, § 10002 (1988) (taking lands for addition to Manassas National Battlefield Park).

of low-cost housing in place of deteriorated housing, and promotion of aesthetic values as well as economic ones. In *Berman v. Parker*,[17] a unanimous Court observed: "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[18] For "public use," then, it may well be that "public interest" or "public welfare" is the more correct phrase.[19] In *Hawaii Housing Authority v. Midkiff*,[20] the Court applied *Berman* to uphold the Hawaii Land Reform Act as a "rational" effort to "correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly."[21] Direct transfer of land from lessors to lessees was permissible, the Court held, as there is no requirement "that government possess and use property at some point during a taking."[22] "The 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers," the Court concluded.[23]

The Court's expansive interpretation of public use in eminent domain cases may have reached its outer limit in *Kelo v. City of New London*.[24] There, a five-Justice majority upheld as a public use the government acquisition of privately owned land to be transferred to another private party for purposes of economic development, pursuant to a redevelopment plan adopted by a municipality to invigorate a depressed economy. The Court saw no principled way to distinguish economic development from the economic purposes endorsed in *Berman* and *Midkiff*, and stressed the importance of judicial deference to legislative judgment as to public needs. At the same time, the Court cautioned that condemnations of individual properties that are transferred to another private party, not as part of an "integrated development plan . . . raise a suspicion that a private purpose [is] afoot."[25] A vigorous four-Justice dissent countered that, because localities will always be able to manufacture a plausible public purpose, the majority opinion leaves the vast majority of private parcels subject to condemnation when a locality desires a higher-valued use.[26] Revisiting the Court's past endorsements in *Berman* and *Midkiff* of a public use/police power equation, the dissenters referred to the "errant language" of these decisions, which was "unnecessary" to their holdings.[27]

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[17] 348 U.S. 26, 32–33 (1954) (citations omitted). Rejecting the argument that the project was illegal because it involved the turning over of condemned property to private associations for redevelopment, the Court said:

> Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude.

Id. at 33–34 (citations omitted).

[18] *Berman*, 348 U.S. at 32–33.

[19] In 2005, the Court equated public use with "public purpose." Kelo v. City of New London, 545 U.S. 469, 480 (2005).

[20] 467 U.S. 229, 243 (1984).

[21] *Id.*.

[22] *Id.*.

[23] *Id.* at 240. *See also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984) (required data disclosure by pesticide registrants, primarily for benefit of later registrants, has a "conceivable public character").

[24] 545 U.S. 469 (2005).

[25] *Kelo*, 545 U.S. at 487.

[26] Written by Justice Sandra Day O'Connor, and joined by Justices Antonin Scalia and Clarence Thomas, and Chief Justice William Rehnquist.

[27] *Kelo*, 545 U.S. at 501.

Amdt5.9.3 Property Interests Subject to Takings Clause

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

If real property is condemned, the market value of that property must be paid to the owner. But there are many kinds of property and many uses of property which cause problems in computing just compensation. It is not only the full fee simple interest in land that is compensable "property,"[1] but also such lesser interests as easements[2] and leaseholds. If only a portion of a tract is taken, the owner's compensation includes any element of value arising out of the relation of the part taken to the entire tract.[3] Government action that does not encroach on private property does not result in a taking requiring just compensation, even if the action impairs the use of the private property.[4]

If the taking has in fact benefited the owner in some way, however, the benefit may be set off against the value of the land condemned,[5] although any supposed benefit which the owner may receive in common with all from the public use to which the property is appropriated may not be set off.[6] For example, when certain lands were condemned for park purposes, with resulting benefits set off against the value of the property taken, the Court held that the subsequent erection of a fire station on the property instead did not deprive the owner of any part of his just compensation.[7] The Supreme Court has also held that civil forfeitures do not constitute a taking even if the owner of the property is not alleged to have committed a crime, as property is considered to be the offender in forfeiture actions.[8]

The Court has made clear that the prohibition on taking property without compensation extends to Indian lands held in trust by the United States government.[9] The Court has also held that the government has a "categorical duty to pay just compensation" when it physically takes personal property, just as when it takes real property.[10] For example, in *Horne v.*

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[1] United States v. Gen. Motors Corp., 323 U.S. 373 (1945).

[2] United States v. Welch, 217 U.S. 333 (1910).

[3] Bauman v. Ross, 167 U.S. 548 (1897); Sharp v. United States, 191 U.S. 341, 351–52, 354 (1903). Where the taking of a strip of land across a farm closed a private right-of-way, an allowance was properly made for the value of the easement. *Welch*, 217 U.S. 333.

[4] Transp. Co. v. Chicago, 99 U.S. 635 (1878) (construction of a tunnel by the city that limited access to a particular dock did not amount to a taking).

[5] *Bauman*, 167 U.S. 548.

[6] Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

[7] Reichelderfer v. Quinn, 287 U.S. 315, 318 (1932).

[8] Calero-Toledo v. Pearson Yacht Leasing, 416 U.S. 663 (1974).

[9] *See, e.g.*, United States v. Creek Nation, 295 U.S. 103 (1935) (government error in surveying that carved out tribal land requires just compensation); Shoshone Tribe v. United States, 299 U.S. 476 (1937) (requiring tribe to share its land with another tribe constitutes taking); Chippewa Indians v. United States, 305 U.S. 479 (1939) (creation of national forest inside land held in trust for tribe is a taking); United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (statute that abrogated Indian land interest established by treaty constitutes a taking). *But see* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (taking of timber from Indian-occupied lands not a taking, Court found that the tribe's claims of occupancy did not amount to possession of the land and the timber).

[10] *See* Horne v. Dep't of Agric., 135 S. Ct. 2419, 2426 (2015). In deciding this case, the Court presumably intended to leave intact established exceptions when the government seizes personal property (e.g., confiscation of adulterated

Department of Agriculture, the Court held that a raisin marketing order issued under a Depression-era statute requiring raisin growers to reserve a percentage of their total crop for the federal government to dispose of in its discretion constituted "a clear physical taking" because, even though the scheme was intended to benefit growers by maintaining stable markets for raisins, the "[a]ctual raisins are transferred from the growers to the Government."[11] The Court further held the government could not avoid paying just compensation for this physical taking by providing for the return to the raisin growers of any net proceeds from the government's sale of the reserve raisins.[12] The majority also rejected the government's argument that the reserve requirement was not a physical taking because raisin growers voluntarily participated in the raisin market.[13] In so doing, the Court reasoned that selling produce in interstate commerce is not a "special government benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection."[14] In addition, the Court determined that the value of the raisins for takings purposes was their fair market value, with no deduction for the offsetting benefits of the overall statutory scheme, which was intended to maintain stable markets for raisins.[15]

Interests in intangible, as well as tangible property, are subject to protection under the Taking Clause. Thus compensation must be paid for the taking of contract rights,[16] patent rights,[17] and trade secrets.[18] The franchise of a private corporation has also been deemed property that cannot be taken for public use without compensation. For example, on

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drugs). *See, e.g.*, Bennis v. Michigan, 516 U.S. 442, 452 (1996) ("Petitioner also claims that the forfeiture in this case was a taking of private property for public use in violation of the Takings Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment. But if the forfeiture proceeding here in question did not violate the Fourteenth Amendment, the property in the automobile was transferred by virtue of that proceeding from petitioner to the State. The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.").

[11] *Horne*, 135 S. Ct. 2419, 2422 (2015).

[12] *Id.* at 2428–30.

[13] The government's argument might have carried more weight had the marketing order been viewed as a regulatory taking. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321–22 (2002) ("The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property."); Bowles v. Willingham, 321 U.S. 503, 519 (1944) (rent control cannot be a taking of premises if "[t]here is no requirement that the apartments be used for purposes which bring them under the [rent control] Act").

[14] *Horne*, 135 S. Ct. at 2430–31. Here, the Court expressly rejected the argument that the raisin growers could avoid the physical taking of their property by growing different crops, or making different uses of their grapes, by quoting its earlier decision in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 439 n.17 (1982) ("[A] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation."). The Court also distinguished the raisin reserve provisions from the requirement that companies manufacturing pesticides, fungicides, and rodenticides disclose trade secrets in order to sell those products at issue in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). It did so because the manufacturers in *Ruckelshaus* were seen to have taken part in a "voluntary exchange" of information that included their trade secrets, recognized as property under the Takings Clause, in exchange for a "valuable Government benefit" in the form of a license to sell dangerous chemicals. No such government benefit was seen to be involved with the raisin growers because they were making "basic and familiar uses" of their property.

[15] *Horne*, 135 S. Ct. at 2431–32.

[16] Omnia Com. Corp. v. United States, 261 U.S. 502, 508 (1923); Brooks-Scanlon Corp. v. United States, 265 U.S. 106 (1924); Lynch v. United States, 292 U.S. 571, 579 (1934).

[17] James v. Campbell, 104 U.S. 356, 358 (1882). *See also* Hollister v. Benedict Mfg. Co., 113 U.S. 59, 67 (1885).

[18] *Ruckelshaus*, 467 U.S. 986.

condemning a lock and dam system belonging to a navigation company, the government was required to compensate the company for taking its authority to take tolls as well as for the tangible property.[19]

Takings challenges to requisitions present their own valuation challenges for the government and the courts. The Court has held that frustrating a private contract by requisitioning the entire output of a steel manufacturer is not a taking for which compensation is required,[20] but requisitioning from a power company all the electric power which could be produced by using water diverted through its intake canal and thereby cutting off the supply of a lessee which had a right, amounting to a corporeal hereditament under state law, to draw a portion of that water, entitles the lessee to compensation for the rights taken.[21] When a ship builder defaulted and the government took title to the builder's uncompleted boats pursuant to a contract, the Court found that the builder's suppliers, who had liens under state law, had a compensable interest equal to the value the liens when the government "took" or destroyed them in perfecting its title.[22]

As a general rule, there is no property interest in the continuation of a rule of law.[23] For example, even though state participation in the social security system was originally voluntary, a state had no property interest in its right to withdraw from the program when Congress had expressly reserved the right to amend the law and the agreement with the state.[24] Similarly, there is no right to the continuation of governmental welfare benefits.[25]

Amdt5.9.4 Physical Takings

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

When government institutes condemnation proceedings directed to property, or mistakenly grants privately held property rights to third parties,[1] it "takes" such property and the Fifth Amendment requires just compensation. In contrast, where government action causes physical damage to property, limits activity on property, or otherwise deprives property of value,[2] determining whether such actions constitute "takings" in the Fifth Amendment sense is more complex.

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[19] Monongahela Navigation Co. v. United States, 148 U.S. 312, 345 (1893).

[20] *Omnia*, 261 U.S. 502.

[21] Int'l Paper Co. v. United States, 282 U.S. 399 (1931).

[22] Armstrong v. United States, 364 U.S. 40, 50 (1960).

[23] Duke Power Co. v. Carolina Envt. Study Group, 438 U.S. 59, 88 n.32 (1978).

[24] Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41 (1986).

[25] "Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level." Bowen v. Gilliard, 483 U.S. 587, 604 (1987).

[1] United States v. Creek Nation, 295 U.S. 103 (1935).

[2] There is continuing uncertainty regarding whether the actions of a court may constitute a taking. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, Justice Antonin Scalia, joined by three other Justices, recognized that a court could effect a taking through a decision that contravened established property

In early cases, the Supreme Court considered the Fifth Amendment requirement that the government pay just compensation for property taken for public use to refer only to "direct appropriation, and not to consequential injuries resulting from the exercise of lawful power."[3] Accordingly, the Supreme Court has held a variety of consequential injuries not to constitute takings, including: damage to abutting property resulting from the authorization of a railroad to erect tracts, sheds, and fences over a street;[4] lessening the circulation of light and air and impairing access to premises, resulting from the erection of an elevated viaduct over a street, or resulting from the changing of a grade in the street;[5] the forced sale of cattle due to loss of grazing land due to government flooding,[6] and a federal irrigation project that resulting in raised groundwater and lake water impacting nearby properties.[7] Nor did the Court hold the government liable for extra expenses property owners incurred addressing the consequences of governmental actions, such as expenses incurred by a railroad in planking an area condemned for a crossing, constructing gates, and posting gatemen,[8] or by a landowner in raising the height of dikes around his land to prevent their partial flooding consequent to private construction of a dam under public licensing.[9]

The Court has decided that the government can "take" land by physical invasion or occupation when it floods land permanently or recurrently, thereby triggering the just compensation requirement.[10] In its 1947 decision *United States v. Dickinson*, the Court stated that "[p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."[11] The Court thus held in *Portsmouth Harbor Land & Hotel Co. v. United States* that the government had imposed a servitude for which it must compensate the owner on land adjoining its fort when it repeatedly fired guns at the fort across the land and established a fire control service there.[12] In two cases—*United States v. Causby* and *Griggs v. Allegheny County*—the Court held that lessees or operators of airports were required to compensate owners of adjacent land when the noise, glare, and fear of injury occasioned by low

law. 560 U.S. 702 (2010). Justice Anthony Kennedy and Justice Stephen Breyer, each joined by one other Justice, wrote concurring opinions finding that the case at hand did not require the Court to determine whether, or when, a judicial decision on the rights of a property owner can violate the Takings Clause. Though all eight participating Justices agreed on the result in *Stop the Beach Renourishment, Inc.*, the viability and dimensions of a judicial takings doctrine remains unresolved.

[3] The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1871). The Fifth Amendment "has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals," the Court explained.

[4] Meyer v. City of Richmond, 172 U.S. 82 (1898).

[5] Sauer v. City of N.Y., 206 U.S. 536 (1907).

[6] Bothwell v. United States, 254 U.S. 231 (1920).

[7] John Horstmann Co. v. United States, 257 U.S. 138 (1921).

[8] Chi., B. & Q. R.R. v. City of Chi., 166 U.S. 226 (1897).

[9] Manigault v. Springs, 199 U.S. 473 (1905).

[10] Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177–78 (1872). Recurrent, temporary floodings are not categorically exempt from Takings Clause liability. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23 (2012) (downstream timber damage caused by changes in seasonal water release rates from government dam). However, the Court has found damages due to flooding caused by government efforts to prevent erosion not to constitute a taking. Bedford v. United States, 192 U.S. 217 (1904). The Court has also held that flooding resulting from the construction of a canal was not a taking unless the overflow was a "direct result of the structure" and constituted an "actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property." Sanguinetti v. United States, 246 U.S. 146, 149 (1924). The Court in *Arkansas Game & Fish* addressed the seeming inconsistency of its decision with this language in the *Sanguinetti* decision, noting that to the extent the Court "indeed meant to express a general limitation on the Takings Clause, that limitation has been superseded by subsequent developments in our jurisprudence." *Ark. Game & Fish*, 568 U.S. at 34.

[11] United States v. Dickinson, 331 U.S. 745, 748 (1947)

[12] Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922). *Cf.* Portsmouth Harbor Land & Hotel Co. v. United States, 250 U.S. 1 (1919); Peabody v. United States, 231 U.S. 530 (1913).

altitude overflights during takeoffs and landings made the land unfit for the use to which the owners had applied it.[13] The Court has also held in *Cedar Point Nursery v. Hassid* that a law requiring employers to allow union organizers to enter a business property effectuated a physical taking, and thus was unconstitutional in the absence of just compensation.[14] The term "inverse condemnation" is often used to refer to cases where the government has not instituted formal condemnation proceedings, but the property owner has instead sued for just compensation, claiming that governmental action or regulation has "taken" his property.[15]

The Fifth Amendment generally does not prohibit the government from collecting administrative and other fees incidental to conducting government business. For example, in *United States v. Sperry Corp.*, the Court held that a 1% user fee deducted from awards granted by an international tribunal to cover the costs of administering that tribunal did not constitute a taking, but simply a "user fee."[16] The Court further noted that "[t]he amount of a user fee need not be precisely calibrated to the use that a party makes of governmental services."[17] The Court, however, has found other government fees to be excessive enough to constitute a taking for which there must be just compensation.[18]

The Court's repeated holdings that riparian ownership is subject to Congress's power to regulate commerce is an important reservation to the law of liability in the taking area. When government improvements to a river's navigable capacity or to a nonnavigable river designed to affect navigability elsewhere cause damage, the Court has generally not considered such damage to be a taking of property but merely an exercise of a servitude to which the property is always subject.[19] This exception does not apply to lands above the ordinary high-water mark of a stream;[20] hence, it is inapplicable to the damage the government may do to such "fast lands" by causing overflows, by erosion, and otherwise, consequent on erection of dams or other improvements.[21] Furthermore, when previously nonnavigable waters are made navigable by

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[13] United States v. Causby, 328 U.S. 256 (1946); Griggs v. Allegheny Cnty., 369 U.S. 84 (1962). The Court held a corporation chartered by Congress to construct a tunnel and operate railway trains liable for damages when the plaintiff's property was so injured by smoke and gas forced from the tunnel as to amount to a taking. Richards v. Wash. Terminal Co., 233 U.S. 546 (1914).

[14] Cedar Point Nursery v. Hassid, No. 20-107 (U.S. June 23, 2021).

[15] Discussing the term "inverse condemnation," the Supreme Court has noted: "The phrase 'inverse condemnation' generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a 'taking' of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign's power of eminent domain have not been instituted by the government entity." San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 638 n.2 (1981) (Brennan, J., dissenting). *See also* United States v. Clarke, 445 U.S. 253, 257 (1980); Agins v. City of Tiburon, 447 U.S. 255, 258 n.2 (1980).

[16] United States v. Sperry Corp., 493 U.S. 52 (1989).

[17] *Id.* at 60–62. See also Cal. Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905) (disposal fee and designated disposal site imposed on waste generator did not constitute a taking).

[18] *See, e.g.*, Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160–65 (1980) (interest earned on interpleader fund deposited in the registry of a county court was the property of the parties just like the principal, and the government could not retain it as an administrative fee for managing the fund); Norwood v. Baker, 172 U.S. 269 (1898) (special assessment on certain property owners to pay for road construction are justified if those owners receive special benefits, but assessment exceeding value of benefit amounts to a taking).

[19] Gibson v. United States, 166 U.S. 269 (1897); Scranton v. Wheeler, 179 U.S. 141 (1900); Union Bridge Co. v. United States, 204 U.S. 364 (1907); Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82 (1913); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); Greenleaf-Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915); United States v. Appalachian Power Co., 311 U.S. 377 (1940); United States v. Commodore Park, Inc., 324 U.S. 386 (1945); United States v. Willow River Power Co., 324 U.S. 499 (1945); United States v. Twin City Power Co., 350 U.S. 222 (1956);. United States v. Rands, 389 U.S. 121 (1967).

[20] United States v. Va. Elec. & Power Co., 365 U.S. 624, 628 (1961).

[21] United States v. Lynah, 188 U.S. 445 (1903); United States v. Cress, 243 U.S. 316 (1917); Jacobs v. United States, 290 U.S. 13 (1933); United States v. Dickinson, 331 U.S. 745 (1947); United States v. Kan. City Life Ins. Co., 339 U.S. 799 (1950); *Va. Elec. & Power Co.*, 365 U.S. 624.

private investment, government may not assert a navigation servitude and direct the property owners to afford public access without paying just compensation.[22]

Amdt5.9.5 Early Jurisprudence on Regulatory Takings

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

While government may take private property, with compensation, to promote the public interest, government may also regulate property use pursuant to its police power. For years, regulation designed to secure the common welfare, especially in the area of health and safety, was not considered a "taking." [1]

Regulation, however, may deprive an owner of most or all beneficial use of his property and may destroy the values of the property for the purposes to which it is suited.[2] While early cases denied compensation for this diminution of property values,[3] the Court changed direction in its 1922 decision, *Pennsylvania Coal Co. v. Mahon*. In *Mahon*, the Court established as a general principle that "if regulation goes too far it will be recognized as a taking."[4] The majority in Mahon held unconstitutional a state statute prohibiting subsurface mining in regions where it presented a danger of subsidence for homeowners. The homeowners had purchased land, the deeds of which reserved to coal companies ownership of subsurface mining rights and held the companies harmless for damage caused by subsurface mining operations. The statute thus enriched the homeowners and deprived the coal companies of the entire value of their subsurface estates. The Court observed that "[f]or practical purposes, the right to coal consists in the right to mine," and that the statute, by making it "commercially impracticable to mine

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[22] Kaiser Aetna v. United States, 444 U.S. 164 (1979); Vaughn v. Vermillion Corp., 444 U.S. 206 (1979)

[1] Mugler v. Kansas, 123 U.S. 623, 668–69 (1887). *See also* The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1871); Chi., B. & Q. R.R. v. City of Chi., 166 U.S. 226, 255 (1897); Reinman v. Little Rock, 237 U.S. 171 (1915); Omnia Com. Co. v. United States, 261 U.S. 502 (1923); Norman v. Balt. & Ohio R.R., 294 U.S. 240 (1935).

[2] *E.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (ordinance upheld restricting owner of brick factory from continuing his use after residential growth surrounding factory made use noxious, even though value of property was reduced by more than 90%); Miller v. Schoene, 276 U.S. 272 (1928) (no compensation due owner's loss of red cedar trees ordered destroyed because they were infected with rust that threatened contamination of neighboring apple orchards: preferment of public interest in saving cash crop to property interest in ornamental trees was rational).

[3] Mugler v. Kansas, 123 U.S. 623, 668–69 (1887) (ban on manufacture of liquor greatly devalued plaintiff's plant and machinery; no taking possible simply because of legislation deeming a use injurious to public health and welfare); Welch v. Swasey, 214 U.S. 91 (1909) (state law limiting maximum height of buildings did not constitute a taking); Corn Refining Products Co. v. Eddy, 249 U.S. 427 (1919) (state law requiring companies to affix labels on product disclosing ingredients was not a taking of plaintiff's proprietary formula, because there is no constitutional right to sell goods without revealing information to purchasers); Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146 (1919) (federal statute banning domestic liquor sales during wartime was not a taking); Jacob Ruppert, Inc. v. Caffey, 251 U.S. 264 (1920) (extension of federal ban on liquor to beer sales also did not constitute a taking, despite the ban taking effect immediately); Walls v. Midland Carbon Co., 254 U.S. 300 (1920) (state ban on the use of natural gas for purposes other than heating did not constitute a taking even though it forced a plant to close, because the ban was within the state's police power to regulate consumption of natural resources).

[4] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). *See also* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (a regulation that deprives a property owner of *all* beneficial use of his property requires compensation, unless the owner's proposed use is one prohibited by background principles of property or nuisance law existing at the time the property was acquired).

certain coal," had essentially "the same effect for constitutional purposes as appropriating or destroying" the subsurface estate.[5] The regulation, therefore, in precluding the companies from exercising any mining rights whatever, went "too far."[6] However, when presented sixty-five years later with a similar restriction on coal mining, the Court upheld it, pointing out that, unlike its predecessor, the newer law identified important public interests, and that the plaintiffs had not sufficiently demonstrated diminution of their property interests.[7]

The Court had long been concerned with the government imposing on one or a few individuals the costs of furthering the public interest.[8] This issue has frequently arisen in disputes over zoning regulations. The Court's first zoning case, *Village of Euclid v. Ambler Realty Co.*, involved a real estate company's allegation that a comprehensive municipal zoning ordinance prevented development of its land for industrial purposes and thereby reduced its value from $10,000 an acre to $2,500 an acre.[9] Acknowledging that zoning was of recent origin, the Court, applying substantive due process analysis instead of takings-based analysis, observed that it must be justified by police power and evaluated by the constitutional standards applied to exercises of police power. After considering traditional nuisance law, the Court determined that the public interest was served by segregating incompatible land uses and the ordinance was thus valid on its face. Instead, a zoning regulation that diminished property values would be unconstitutional only if it were "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[10] A few years later in *Nectow v. City of Cambridge*, the Court, again relying on due process rather than takings law, invalidated application of a zoning ordinance to a tract of land, finding that the tract would be rendered nearly worthless and that exempting the tract would not impair a substantial municipal interest.[11] The Court gave additional attention to this issue in the 1970s as states and municipalities developed more comprehensive zoning techniques.[12]

As governmental regulation of property has expanded over the years—in terms of zoning and other land use controls, environmental regulations, and the like—the Court has avoided a "set formula to determine where regulation ends and taking begins."[13] The Court has observed that, "[i]n the near century since *Mahon*, the Court for the most part has refrained from elaborating this principle through definitive rules"[14] and "[t]his area of the law has been characterized by 'ad hoc, factual inquiries, designed to allow careful examination and weighing

[5] *Mahon*, 260 U.S. at 414–15.

[6] *Id.* at 415. In dissent, Justice Louis Brandeis argued that a restriction imposed to abridge the owner's exercise of his rights in order to prohibit a noxious use or to protect the public health and safety simply could not be a taking, because the owner retained his interest and his possession. *Id.* at 416.

[7] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

[8] Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935) (government may not require railroad at its own expense to separate the grade of a railroad track from that of an interstate highway). *See also* Panhandle Co. v. Highway Comm'n, 294 U.S. 613 (1935); Atchison, T. & Santa Fe Ry. v. Pub. Util. Comm'n, 346 U.S. 346 (1953). *Compare* the Court's two decisions in Ga. Ry. & Elec. Co. v. City of Decatur, 295 U.S. 165 (1935) *and* 297 U.S. 620 (1936).

[9] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[10] *Id.* at 395. *See also* Zahn v. Bd. of Pub. Works, 274 U.S. 325 (1927).

[11] Nectow v. City of Cambridge, 277 U.S. 183 (1928).

[12] Initially, the Court's return to the land-use area involved substantive due process, not takings. Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974) (sustaining single-family zoning as applied to group of college students sharing a house); Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (voiding single-family zoning so strictly construed as to bar a grandmother from living with two grandchildren of different children). *See also* City of Eastlake v. Forest City Enters., 426 U.S. 668 (1976).

[13] Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124 (1978). The phrase appeared first in *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

[14] Murr v. Wisconsin, 137 S. Ct. 1933, 1942 (2017) (rejecting the argument of the owners of two adjoining undeveloped lots that a regulatory taking occurred through the enactment of regulations that forbade improvement or separate sale of the lots).

of all the relevant circumstances.'"[15] Nonetheless, the Court has articulated general principles that guide many of its decisions in the area.[16] These principles are often referred to as the "Penn Central" framework.

Amdt5.9.6 Regulatory Takings and Penn Central Framework

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

In its 1978 decision, *Penn Central Transportation Co. v. City of New York*,[1] the Court, while cautioning that regulatory takings cases require "essentially ad hoc, factual inquiries," nonetheless provided general guidance for determining whether a regulatory taking had occurred. The Court emphasized that the degree to which a government action interfered with a property owner's interest in his property—whether the interference amounted to a "physical invasion" or only reflected an "adjusting of benefits and burdens"—indicated whether a taking had occurred. The Court explained:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are . . . relevant considerations. So too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[2]

Penn Central concerned New York City's landmarks preservation law, pursuant to which the City denied approval to construct a fifty-three-story office building atop Grand Central Terminal. The Court denied Penn Central's takings claim by applying the principles set forth above. Considering the economic impact on Penn Central, the Court noted that the company could still make a "reasonable return" on its investment by continuing to use the facility as a rail terminal with office rentals and concessions, and the City specifically permitted owners of landmark sites to transfer to other sites the right to develop those sites beyond the otherwise permissible zoning restrictions, a valuable right that mitigated the burden otherwise to be

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[15] *Id.* (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency 535 U.S. 302, 322 (2002)).

[16] While observing that the "central dynamic of the Court's regulatory takings jurisprudence . . . is its flexibility," the Court in *Murr v. Wisconsin* reiterated the "two guidelines . . . for determining when government regulation is so onerous that it constitutes a taking." *Id.* at 1942. First, with some qualifications, "'a regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause.'" *Id.* (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001)). Second, if "a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on 'a complex of factors,' including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Id.* at 1942–43 (quoting *Palazzolo*, 533 U.S. at 617).

[1] 438 U.S. 104 (1978). Justices William Rehnquist and John Paul Stevens and Chief Justice Warren Burger dissented. *Id.* at 138.

[2] *Id.* at 124 (citations omitted).

suffered by the owner. As for the character of the governmental regulation, the Court found the landmarks law to be an economic regulation rather than a governmental appropriation of property, the preservation of historic sites being a permissible goal and one that served the public interest.[3] *Penn Central*'s economic impact standard also left room for Justice Oliver Wendell Holmes's observation in *Mahon* that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every . . . change in the general law."[4] Thus, the Court has held that a mere permit requirement does not amount to a taking,[5] nor does a simple recordation requirement.[6]

Several times the Court has relied on the concept of "distinct [or, in later cases, 'reasonable'] investment-backed expectations," which it introduced in *Penn Central*, to analyze whether a taking had occurred. In *Ruckelshaus v. Monsanto Co.*,[7] the Court used this concept to determine whether the government's disclosure of trade secret information submitted with applications for pesticide registrations resulted in a taking. The Court reasoned that disclosing data that had been submitted from 1972 to 1978, a period when the statute guaranteed confidentiality and thus "formed the basis of a distinct investment-backed expectation," would have destroyed the property value of the trade secret and constituted a taking.[8] Following 1978 amendments setting forth conditions of data disclosure, applicants who voluntarily submitted data in exchange for the economic benefits of registration had no reasonable expectation of additional protections of confidentiality.[9]

Rejecting an assertion that reasonable investment backed-expectations had been upset in *Connolly v. Pension Benefit Guaranty Corp.*,[10] the Court upheld the government's retroactive imposition of liability for pension plan withdrawals. The Court reasoned that employers had at least constructive notice that Congress might buttress the legislative scheme to accomplish its legislative aim that employees receive promised benefits. However, where a statute imposes severe and "substantially disproportionate" retroactive liability based on conduct several decades earlier, on parties that could not have anticipated the liability, a taking (or violation of due process) may occur. On this rationale, the Court in *Eastern Enterprises v. Apfel*[11] enjoined applying the Coal Miner Retiree Health Benefit Act requirement that companies formerly engaged in mining pay certain miner retiree health benefits to a company that had spun off its mining operation in 1965, before collective bargaining agreements included an express

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[3] *Id.* at 124–28, 135–38.

[4] Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[5] United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) (requirement that permit be obtained for filling privately-owned wetlands is not a taking, although permit denial resulting in prevention of economically viable use of land may be).

[6] Texaco v. Short, 454 U.S. 516 (1982) (state statute deeming mineral claims lapsed upon failure of putative owners to take prescribed steps is not a taking); United States v. Locke, 471 U.S. 84 (1985) (reasonable regulation of recordation of mining claim is not a taking).

[7] 467 U.S. 986 (1984).

[8] *Id.* at 1011.

[9] *Id.* at 1006–07. Similarly, disclosure of data submitted before the confidentiality guarantee was placed in the law did not frustrate reasonable expectations, the Trade Secrets Act merely protecting against "unauthorized" disclosure. *Id.* at 1008–10.

[10] 475 U.S. 211 (1986). *Accord* Concrete Pipe & Products v. Constr. Laborers Pension Tr., 508 U.S. 602, 645–46 (1993). *See also* Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979) (involving frustration of "expectancies" developed through improvements to private land and governmental approval of permits); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980) (characterizing and distinguishing *Kaiser Aetna* as involving interference with "reasonable investment backed expectations").

[11] 524 U.S. 498 (1998). Although the plurality opinion announcing the judgment in *Eastern Enterprises* analyzed the case as a takings issue, five Justices in that case (one supporting the judgment and four dissenters) found substantive due process, not takings law, to provide the analytical framework where, as in *Eastern Enterprises*, the gravamen of the complaint is the unfairness and irrationality of the statute rather than its economic impact.

promise of lifetime benefits. In 1998, the Court, however, sustained a federal ban on selling artifacts made from eagle feathers as applied to the existing inventory of a commercial dealer in such artifacts, while not directly addressing the ban's interference with investment-backed expectations.[12] The Court merely noted that the ban served a substantial public purpose in protecting the eagle from extinction, that the owner still had viable economic uses for his holdings, such as displaying them in a museum and charging admission, and that he still had the value of possession.[13]

The Court has made plain that, in applying the economic impact and investment-backed expectations factors of *Penn Central*, courts should compare what the property owner has lost through the challenged government action with what the owner retains. Discharging this mandate requires a court to define the extent of plaintiff's property—the "parcel as a whole"—that sets the scope of analysis.[14] In *Murr v. Wisconsin*, the Court stated that, "[l]ike the ultimate question whether a regulation has gone too far, the question of the proper parcel in regulatory takings cases cannot be solved by any simple test. Courts must instead define the parcel in a manner that reflects *reasonable expectations* about the property."[15]

In *Murr*, the owners of two small adjoining lots, previously owned separately, wished to sell one of their lots and build on the other. The landowners were prevented from doing so by state and local regulations, enacted to implement a federal Act, which effectively merged the lots when they came under common ownership prior to their purchase by the plaintiffs, thereby barring the separate sale or improvement of the lots. The plaintiff landowners therefore sought just compensation, alleging a regulatory taking of their property. In ruling against the landowners, the Supreme Court set forth a flexible multi-factor test for defining "the proper unit of property" to analyze whether a regulatory taking has occurred,[16] whereby the boundaries of the parcel determine the "denominator of the fraction" of value taken from a property by a governmental regulation, which in turn can determine whether the government

[12] Andrus v. Allard, 444 U.S. 51 (1979).

[13] The Court in *Goldblatt* had pointed out that the record contained no indication that the mining prohibition would reduce the value of the property in question. 369 U.S. 590, 594 (1962). *Contrast* Hodel v. Irving, 481 U.S. 704 (1987) (finding insufficient justification for a complete abrogation of the right to pass on to heirs interests in certain fractionated property). Note as well the differing views expressed in *Irving* as to whether that case limits *Andrus v. Allard* to its facts. *Id.* at 718 (Brennan, J., concurring), 719 (Scalia, J., concurring). *See also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–28 (1992) (suggesting that *Allard* may rest on a distinction between permissible regulation of personal property, on the one hand, and real property, on the other).

[14] The "parcel as a whole" analysis refers to the precept that takings law "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 130 (1978); *see also Concrete Pipe*, 508 U.S. at 644; Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987). In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Court affirmed the established spatial dimension of the doctrine, under which the court must consider the entire relevant tract, as well as the functional dimension, under which the court must consider plaintiff's full bundle of rights. *See* 535 U.S. 302, 327 (2002). The spatial dimension is perhaps best illustrated by the analysis in *Penn Central*, wherein the Court declined to segment Grand Central Terminal from the air rights above it. 438 U.S. at 130. And the functional dimension of the parcel as a whole is demonstrated by the Court's refusal in *Andrus v. Allard* to segment one "stick" in the plaintiff's "bundle" of property rights in holding that denial of the right to sell Indian artifacts was not a taking in light of rights in the artifacts that were retained. 444 U.S. 51, 65–66 (1979). In *Tahoe-Sierra*, the Court also added a temporal dimension to the "parcel as a whole" analysis, under which a court considers the entire time span of plaintiff's property interest. Invoking this temporal dimension, the Court held that temporary land-use development moratoria do not effect a total elimination of use because use and value return in the period following the moratorium's expiration. *Tahoe-Sierra*, 535 U.S. at 327. Thus, such moratoria are to be analyzed under the ad hoc, multifactor *Penn Central* test, rather than a per se "total takings" approach.

[15] Murr v. Wisconsin, 137 S. Ct. 1933, 1950 (2017) (internal citation omitted) (emphasis added).

[16] *Id.* at 1943–46. In doing so, the Court rejected arguments for the adoption of "a formalistic rule to guide the parcel inquiry," one that would "tie the definition of the parcel to state law." *See id.* at 1946.

has "taken" private property.[17] Under this formula, regulators have an interest in a larger denominator—in the *Murr* case, combining the two adjoining lots—to reduce the likelihood of having to provide compensation, while property owners seeking to show that their property has been taken have an interest in the denominator being as small as possible. The *Murr* Court instructed that, in determining the parcel at issue in a regulatory takings case, "no single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors," including (1) "the treatment of the land under state and local law"[18]; (2) "the physical characteristics of the land"[19]; and (3) "the prospective value of the regulated land."[20]

In *Penn Central*, the Court rejected the principle that no compensation is required when regulation bans a noxious or harmful effect of land use. The principle, the City contended, followed from several earlier cases, including *Goldblatt v. Town of Hempstead*.[21] In that case, the town enacted an ordinance that in effect terminated further mining at a site owned by the plaintiff. Declaring that no compensation was owed, the Court stated that "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests."[22] In *Penn Central*, however, the Court clarified the test on which prior cases had turned, stating "These cases are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property."[23] In *Lucas v. South Carolina Coastal Council*,[24] the Court further explained "noxious use" analysis as merely an early characterization of police power measures that do not require compensation. The Court noted, "[N]oxious use logic cannot serve as a touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation."[25]

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[17] *Id.* at 1944 ("[B]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.' As commentators have noted, the answer to this question may be outcome determinative." (quoting *Keystone*, 480 U.S. at 497)).

[18] *Id.* at 1945 ("[C]ourts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law.").

[19] *Id.* ("[C]ourts must look to the physical characteristics of the landowner's property. These include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation.").

[20] *Id.* at 1945, 1946 ("[C]ourts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings.").

[21] 369 U.S. 590 (1962). *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), and, perhaps, *Miller v. Schoene*, 276 U.S. 272 (1928), also fall under this heading, although *Schoene* may also be assigned to the public peril line of cases.

[22] 369 U.S. at 593 (quoting Mugler v. Kansas, 123 U.S. 623, 668–69 (1887)). The Court posited a two-part test. First, the interests of the public required the interference, and, second, the means were reasonably necessary for the accomplishment of the purpose and were not unduly oppressive of the individual. *Id.* at 595. The test was derived from *Lawton v. Steele*, 152 U.S. 133, 137 (1894), which held that state officers properly destroyed fish nets that were banned by state law in order to preserve certain fisheries from extinction.

[23] Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 133–34 n.30 (1978).

[24] 505 U.S. 1003 (1992).

[25] *Id.* at 1026. The *Penn Central* majority also rejected the dissent's contention, 438 U.S. at 147–50, that regulation of property use constitutes a taking unless it spreads its distribution of benefits and burdens broadly so

Amdt5.9.7 Per Se Takings and Exactions

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Penn Central is not the only guide to when an inverse condemnation has occurred; other criteria have emerged from other cases before and after *Penn Central*. The Court has long recognized a per se takings rule for certain physical invasions: when government permanently[1] occupies property (or authorizes someone else to do so), the action constitutes a taking regardless of the public interests served or the extent of damage to the parcel as a whole.[2] One modern case dealt with a law that required landlords to permit a cable television company to install its cable facilities upon their buildings; although the equipment occupied only about one and a half cubic feet of space on the exterior of each building and had only a de minimis economic impact, a divided Court held that the regulation authorized a permanent physical occupation of the property and thus constituted a taking.[3] The Court further sharpened the distinction between regulatory takings and permanent physical occupations by declaring it "inappropriate" to use case law from either realm as controlling precedent in the other.[4]

A second per se taking rule is of more recent vintage. In *Agins v. City of Tiburon*, the Court stated that land use controls constitute takings if they do not "substantially advance legitimate governmental interests," *or* if they deny a property owner "economically viable use of his land."[5] The Court later erased the *Agins* "substantially advances" test, explaining that regulatory takings law concerns the magnitude, character, and distribution of burdens that a

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that each person burdened has at the same time the enjoyment of the benefit of the restraint upon his neighbors. The Court deemed it immaterial that the landmarks law has a more severe impact on some landowners than on others: "Legislation designed to promote the general welfare commonly burdens some more than others." *Id.* at 133–34.

[1] By contrast, the per se rule is inapplicable to *temporary* physical occupations of land. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428, 434 (1982); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980).

[2] The rule emerged from cases involving flooding of lands and erection of poles for telegraph lines, e.g., Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1872); City of St. Louis v. W. Union Tel. Co., 148 U.S. 92 (1893); W. Union Tel. Co. v. Pa. R.R., 195 U.S. 540 (1904).

[3] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). The Court distinguished *Loretto* in *FCC v. Florida Power Corp.,* 480 U.S. 245 (1987), holding that the regulation of the rates that utilities may charge cable companies for pole attachments does not constitute a taking without any requirement that utilities allow attachment and acquiesce in physical occupation of their property. *See also* Yee v. City of Escondido, 503 U.S. 519 (1992) (no physical occupation was occasioned by regulations in effect preventing mobile home park owners from setting rents or determining who their tenants would be; owners could still determine whether their land would be used for a trailer park and could evict tenants in order to change the use of their land); Cedar Point Nursery v. Hassid, No. 20-107 (U.S. June 23, 2021) (state law requiring agricultural employers to allow union organizers on their business properties for up to three hours per day, 120 days per year, constituted a per se taking requiring just compensation).

[4] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323 (2002). *Tahoe-Sierra*'s sharp physical-regulatory dichotomy is hard to reconcile with dicta in *Lingle v. Chevron United States Inc.*, 544 U.S. 528, 539 (2005), to the effect that the *Penn Central* regulatory takings test, like the physical occupations rule of *Loretto*, "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."

[5] 447 U.S. 255, 260 (1980).

regulation imposes on property rights.[6] The second *Agins* criterion, however, has persisted as a categorical rule: when the landowner "has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[7] The only exceptions, the Court explained in *Lucas v. South Carolina Coastal Council*, are for those restrictions that come with the property as title encumbrances or other legally enforceable limitations in place prior to acquisition of the property. Regulations "so severe" as to prohibit all economically beneficial use of land, the Court stated, "cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent land owners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate [public] nuisances . . . , or otherwise."[8]

The "or otherwise" reference, the Court explained in *Lucas*,[9] was principally directed to cases holding that in times of great public peril, such as war, spreading municipal fires, and the like, property may be taken and destroyed without necessitating compensation. Thus, in *United States v. Caltex, Inc.*,[10] the Court held owners of property destroyed by retreating United States armies in Manila during World War II were not entitled to compensation, and in *United States v. Central Eureka Mining Co.,*[11] the Court held that a federal order suspending the operations of a nonessential gold mine for the duration of the war in order to redistribute the miners, unaccompanied by governmental possession and use or a forced sale of the facility, was not a taking entitling the owner to compensation for loss of profits. Similarly, in *Juragua Iron Co. v. United States*,[12] the Court found that the destruction of a U.S. company's property within enemy territory, done to prevent the spread of yellow fever, did not constitute a taking. The Court noted that property held by domestic interests in enemy territory is considered enemy property and thus not entitled to the protections of the Constitution.[13] Finally, the Court held that when federal troops occupied several buildings during a riot in order to dislodge rioters and looters who had already invaded the buildings, the action was taken as much for the owners' benefit as for the general public benefit and the owners must bear the costs of damage inflicted on the buildings subsequent to the occupation.[14]

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[6] *Lingle*, 544 U.S. at 542 (noting that the first *Agins* test—whether land use controls "substantially advance legitimate governmental interests"—addresses the means-end efficacy of a regulation more in the nature of a due process inquiry).

[7] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992). The *Agins/Lucas* total deprivation rule does not create an all-or-nothing situation, since "the landowner whose deprivation is one step short of complete" may still be able to recover through application of the *Penn Central* economic impact and "distinct [or reasonable] investment-backed expectations" criteria. *Id.* at 1019 n.8. *See also* Palazzolo v. Rhode Island, 533 U.S. 606, 632 (2001).

[8] 505 U.S. at 1029.

[9] *Id.* at 1029 n.16.

[10] 344 U.S. 149 (1952). In dissent, Justices Hugo Black and William Douglas advocated the applicability of a test formulated by Justice Louis Brandeis in *Nashville, Chattanooga & St. Louis Railway. v. Walters,,* 294 U.S. 405, 429 (1935), a regulation case, to the effect that "when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured." *See also* United States v. Pac. R.R., 120 U.S. 227 (1887) (government did not owe property power for damage to property during Civil War, but also could not charge landowners for wartime improvements to property).

[11] 357 U.S. 155 (1958).

[12] 212 U.S. 297 (1909).

[13] *Id.* at 308.

[14] Nat'l Bd. of YMCA v. United States, 395 U.S. 85 (1969); United States v. Sponenbarger, 308 U.S. 256, 265 (1939) ("An undertaking by the government to reduce the menace from flood damages which were inevitable but for the Government's work does not constitute the Government a taker of all lands not fully and wholly protected. When

With the investment-backed expectations factor of *Penn Central*, many lower courts employed a "notice rule" under which a taking claim was absolutely barred if it was based on a restriction imposed under a regulatory regime predating plaintiff's acquisition of the property. In *Palazzolo v. Rhode Island*,[15] the Court forcefully rejected the absolute version of the notice rule. Under such a rule, it said, "[a] State would be allowed, in effect, to put an expiration date on the Takings Clause."[16] Whether any role is left for pre-acquisition regulation in the takings analysis, however, the Court's majority opinion did not say, leaving the issue to dueling concurrences from Justice Sandra Day O'Connor (who argued that prior regulation remains a factor) and Justice Antonin Scalia (who would have held that prior regulation is irrelevant). Less than a year later, Justice O'Connor's concurrence was reflected in the Court's extended dicta in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[17] though the decision failed to elucidate the factors affecting the weighting to be accorded the pre-existing regime.

A third type of inverse condemnation, in addition to regulatory and physical takings, is the exaction taking. An "exaction" is a government-imposed requirement that a project developer provide certain public benefits to offset the impacts of the project on the public. A two-part test has emerged to evaluate alleged exaction takings. The first part debuted in *Nollan v. California Coastal Commission*[18] and holds that in order not to be a taking, an exaction condition on a development permit approval must substantially advance a purpose related to the underlying permit. There must, in short, be an "essential nexus" between the two; otherwise the condition is "an out-and-out plan of extortion."[19] The second part of the exaction-takings test, announced in *Dolan v. City of Tigard*,[20] specifies that the condition, to not be a taking, must be related to the proposed development not only in nature, per *Nollan*, but also in degree. Government must establish a "rough proportionality" between the burden imposed by such conditions on the property owner and the impact of the property owner's proposed development on the community—at least in the context of adjudicated (rather than legislated) conditions. To the argument that nothing is "taken" when a permit is denied for failure to agree to a condition precedent, the Court stated that what is at stake is not whether a taking has occurred, but whether the right not to have property taken without just compensation has been burdened impermissibly.[21]

Nollan and *Dolan* occasioned considerable debate over the breadth of what became known as the "heightened scrutiny" test. Where heightened scrutiny applies, it lessens the traditional judicial deference to local police power and places the burden of proof as to rough proportionality on the government. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[22] the Court unanimously confined the *Dolan* rough proportionality test, and, by implication, the *Nollan* nexus test, to the exaction context that gave rise to those cases. The Court did not resolve in *Monterey*, however, whether *Dolan* applies to exactions of a purely monetary nature,

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undertaking to safeguard a large area from existing flood hazards, the government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect.").

[15] 533 U.S. 606 (2001).

[16] *Id.* at 627.

[17] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 335 (2002).

[18] 483 U.S. 825 (1987).

[19] *Id.* at 837.

[20] 512 U.S. 374 (1994).

[21] Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 606–07 (2013).

[22] 526 U.S. 687 (1999).

or only to physically invasive dedication conditions.[23] The Court clarified this uncertainty in *Koontz v. St. Johns River Water Management District* by holding that monetary exactions imposed under land use permitting were subject to essential nexus/rough proportionality analysis.[24]

The Court's announcement following *Penn Central* of the per se rules in *Loretto* (physical occupations), *Agins* and *Lucas* (total elimination of economic use), and *Nollan* and *Dolan* (exaction conditions) prompted speculation that the Court was replacing its ad hoc *Penn Central* approach with a more categorical takings jurisprudence. Such speculation was put to rest, however, by three decisions from 2001 to 2005 expressing distaste for categorical regulatory takings analysis. These decisions endorsed *Penn Central* as the dominant mode of analysis for inverse condemnation claims, confining the Court's per se rules to the "relatively narrow" physical occupation and total loss of value circumstances, and the "special context" of exactions.[25]

Amdt5.9.8 Calculating Just Compensation

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

The Supreme Court has held that the Fifth Amendment's just compensation requirement provides for "a full and perfect equivalent for the property taken."[1] Just compensation is measured "by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future, . . . [but] 'mere possible or imaginary uses or the speculative schemes of its proprietor, are to be excluded.'"[2] The general standard thus is the market value of the property,

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[23] A strong hint that monetary exactions are indeed outside *Nollan/Dolan* was provided in *Lingle v. Chevron United States Inc.*, 544 U.S. 528, 546 (2005), explaining that these decisions were grounded on the doctrine of unconstitutional conditions as applied to *easement* conditions that would have been per se *physical* takings if condemned directly.

[24] *Koontz*, 570 U.S. 595.

[25] *Lingle*, 544 U.S. at 538. The other decisions are *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002).

[1] Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893). The owner's loss, not the taker's gain, is the measure of such compensation. Brown v. Legal Found. of Wash., 538 U.S. 216, 236 (2003); United States *ex rel.* TVA v. Powelson, 319 U.S. 266, 281 (1943); United States v. Miller, 317 U.S. 369, 375 (1943). The value of the property to the government for its particular use is not a criterion. United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913); United States v. Twin City Power Co., 350 U.S. 222 (1956). Attorneys' fees and expenses are not embraced in the concept. Dohany v. Rogers, 281 U.S. 362 (1930).

Applying the owner's-loss standard, the Court addressed a state program requiring lawyers to deposit client funds that cannot earn net interest in a pooled account generating interest for indigent legal aid. *Brown*, 538 U.S. at 237. Assuming a taking of the client's interest, his pecuniary loss is nonetheless zero; hence, the just compensation required is likewise. Brown is in tension with the Court's earlier treatment of a similar state program, where it recognized value in the possession, control, and disposition of the interest. Phillips v. Wash. Legal Found., 524 U.S. 156, 170 (1998).

[2] Chi. B. & Q. R.R. v. City of Chi., 166 U.S. 226, 250 (1897); *See* McGovern v. City of N.Y., 229 U.S. 363, 372 (1913). *See also* Boom Co. v. Patterson, 98 U.S. 403 (1879); McCandless v. United States, 298 U.S. 342 (1936).

i.e., what a willing buyer would pay a willing seller.[3] If fair market value does not exist or cannot be calculated, resort must be had to other data which will yield a fair compensation.[4] However, the Court has resisted alternative standards, having repudiated reliance on the cost of substitute facilities.[5] Just compensation is especially difficult to compute in wartime, when enormous disruptions in supply and governmentally imposed price ceilings totally skew market conditions. In an early case concerning a takings case under the Pennsylvania constitution, the Court required that the equivalent be in money, not in kind,[6] but in its 1974 decision, *Regional Rail Reorganization Act Cases*, the Court provided for greater flexibility in the form of compensation recognized.[7]

In two postwar decisions, the Court held that the rule of market value applies even where value is measured by a government-fixed ceiling price. Thus, owners of cured pork and of black pepper could recover only the ceiling price for their commodities despite findings by the Court of Claims that the products had value in excess of their regulatory price ceilings.[8] However, the Court has also ruled that the government was not obliged to pay the market value of a tug when the present value had been greatly enhanced as a consequence of the government's wartime needs, instead requiring the government only to pay the value prior to the events that necessitated its use.[9]

The difficulties in applying the fair market standard of just compensation are illustrated by two cases decided in the same year by 5-4 votes, one in which compensation was awarded and one in which it was denied. One decision held that a company was entitled to compensation for the value of improvements on leased property for the life of the improvements and not simply for the remainder of the term of the lease that had no renewal option, because the company occupied the land for nearly fifty years and had every expectancy of continued occupancy under a new lease. Just compensation, the Court said, required taking into account the possibility that the lease would be renewed, inasmuch as a willing buyer and a willing seller would certainly have placed a value on the possibility.[10] However, when the Federal Government condemned privately owned grazing land of a rancher who had leased adjacent federally owned grazing land, it was held that the compensation owed need not include the value attributable to the proximity to the federal land. The result would have been different if the adjacent grazing land had been privately owned, but the general rule is that government need not pay for value that it itself creates.[11]

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[3] *Miller*, 317 U.S. at 374; *Powelson*, 319 U.S. at 275. *See also* United States v. New River Collieries Co., 262 U.S. 341 (1923); Olson v. United States, 292 U.S. 264 (1934); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949). Exclusion of the value of improvements made by the government under a lease was held constitutional. Old Dominion Land Co. v. United States, 269 U.S. 55 (1925).

[4] *Miller*, 317 U.S. at 374.

[5] United States v. 564.54 Acres of Land, 441 U.S. 506 (1979) (condemnation of church-run camp); United States v. 50 Acres of Land, 469 U.S. 24 (1984) (condemnation of city-owned landfill). In both cases the Court determined that market value was ascertainable.

[6] Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 315 (C.C. Pa. 1795) ("No just compensation can be made except in money."); *Miller*, 317 U.S. at 373 ("Such compensation means the full and perfect equivalent money of the property taken.").

[7] Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 150–51 (1974) ("No decision of this Court holds that compensation other than money is an inadequate form of compensation under eminent domain statutes.").

[8] United States v. Felin & Co., 334 U.S. 624 (1948); United States v. Commodities Trading Corp., 339 U.S. 121 (1950). *See also* Vogelstein & Co. v. United States, 262 U.S. 337 (1923)

[9] United States v. Cors, 337 U.S. 325 (1949). *See also* United States v. Toronto Navigation Co., 338 U.S. 396 (1949).

[10] Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973).

[11] United States v. Fuller, 409 U.S. 488 (1973).

Amdt5.9.9 Consequential Damages

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

The Fifth Amendment requires compensation for the taking of "property;" it does not require payment for losses or expenses incurred by property owners or tenants incidental to or as a consequence of the taking of real property, if those losses or expenses are not reflected in the market value of the property taken.[1] The Court has stated that when the government takes property by eminent domain it must compensate the property owner "for what is taken, not more; and [the property owner] must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress."[2] The Court held, for example, that business owners may not recoup diminution of the value of their business attributed to a taking,[3] that the government was not required to incorporate the value of an unused right to exercise eminent domain to seize neighboring acreage when taking the underlying property,[4] and that a state law barring utilities from incorporating into their rates certain costs associated with construction of non-operational nuclear power facilities did not constitute a taking.[5]

The Court has on occasion carved out exceptions of sorts to this strict rule. For example, in *Kimball Laundry Co. v. United States*, the government seized a tenant's laundry plant for the duration of the war, which turned out to be less than the full duration of the lease, and, having no other means of serving its customers, the laundry suspended business during the military occupancy. The Court narrowly held that the government must compensate for the loss in value of the business attributable to the destruction of its "trade routes," that is, for the loss of customers, whose patronage the laundry had developed over the years.[6] Another exception to the general rule occurs with a partial taking, in which the government takes less than the entire parcel of land and leaves the owner with a portion of what he had before; in such a case compensation includes any diminished value of the remaining portion ("severance damages") as well as the value of the taken portion.[7]

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[1] Mitchell v. United States, 267 U.S. 341 (1925); United States *ex rel.* TVA v. Powelson, 319 U.S. 266 (1943); United States v. Petty Motor Co., 327 U.S. 372 (1946). For consideration of the problem of fair compensation in government-supervised bankruptcy reorganization proceedings, see Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935): New Haven Inclusion Cases, 399 U.S. 392, 489–95 (1970).

[2] United States v. Gen. Motors Corp., 323 U.S. 373, 382 (1945).

[3] Mitchell v. United States, 267 U.S. 341 (1925).

[4] United States *ex rel.* TVA v. Powelson, 319 U.S. 266 (1943).

[5] Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989).

[6] 338 U.S. 1 (1949). *See also* United States v. Pewee Coal Co., 341 U.S. 114 (1951) (in temporary seizure, Government must compensate for losses attributable to increased wage payments by the Government).

[7] United States v. Miller, 317 U.S. 369, 375–76 (1943). "On the other hand," the Court added, "if the taking has in fact benefited the remainder, the benefit may be set off against the value of the land taken." *Id.*

Amdt5.9.10 Enforcing Right to Just Compensation

Fifth Amendment:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Ordinarily, the government takes property under a condemnation suit upon paying a money award, and no interest accrues.[1] If, however, the government takes property before making payment, just compensation includes an increment which, to avoid use of the term "interest," the Court has called "an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking."[2] If the owner and the government enter into a contract which stipulates the purchase price for lands to be taken, with no provision for interest, the Fifth Amendment is inapplicable and the landowner cannot recover interest even though payment of the purchase price is delayed.[3] Where property of a citizen has been mistakenly seized by the government and converted into money which is invested, the property owner is entitled to recover compensation that incorporates increases to the property value during the period of seizure.[4]

The legislature has discretion over the nature and character of the tribunal to determine compensation and may select a regular court, a special legislative court, a commission, or an administrative body.[5] The Government brings proceedings to condemn land for the benefit of the United States in the federal district court for the district in which the land is located.[6] The Fifth Amendment does not establish a right to a jury to estimate just compensation; a judge, commission, or other body may make such determinations.[7] Federal courts may appoint a commission in condemnation actions to resolve the compensation issue.[8] If a body other than a court is designated to determine just compensation, its decision must be subject to judicial review,[9] although the legislature may limit the scope of review.[10] When a state court's

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[1] Danforth v. United States, 308 U.S. 271, 284 (1939); Kirby Forest Industries v. United States, 467 U.S. 1 (1984) (no interest due in straight condemnation action for period between filing of notice of *lis pendens* and date of taking).

[2] United States v. Klamath Indians, 304 U.S. 119, 123 (1938); Jacobs v. United States, 290 U.S. 13, 17 (1933); *Kirby Forest Industries*, 467 U.S. 1 (substantial delay between valuation and payment necessitates procedure for modifying award to reflect value at time of payment).

[3] Albrecht v. United States, 329 U.S. 599 (1947).

[4] Henkels v. Sutherland, 271 U.S. 298 (1926); *see also* Phelps v. United States, 274 U.S. 341 (1927).

[5] United States v. Jones, 109 U.S. 513 (1883); Bragg v. Weaver, 251 U.S. 57 (1919).

[6] 28 U.S.C. § 1403. Inverse condemnation actions (claims that the United States has taken property without compensation) are governed by the Tucker Act, 28 U.S.C. § 1491 (a)(1), which vests the Court of Federal Claims (formerly the Claims Court) with jurisdiction over claims against the United States "founded . . . upon the Constitution." *See* E. Enters. v. Apfel, 524 U.S. 498, 520 (1998). Federal district courts may also hear inverse condemnation claims against the United States not in excess of $10,000 under the "Little Tucker Act." 28 U.S.C. § 1346(a)(2).

[7] Bauman v. Ross, 167 U.S. 548 (1897). Even when a jury determines the amount of compensation, it is the rule, at least in federal court, that the trial judge instructs the jury on the criteria, which includes determining "all issues" other than the compensation amount, so that the judge decides those matters underlying the jury's calculation. United States v. Reynolds, 397 U.S. 14 (1970).

[8] Fed. R. Civ. P. 71.1(h). These commissions have the same powers as a court-appointed master.

[9] Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893).

[10] Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897).

judgment to the amount of compensation is questioned, the Court's review is restricted. The Court has stated: "All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution."[11] The Court has also recognized that "[T]here must be something more than an ordinary honest mistake of law in the proceedings for compensation before a party can make out that the State has deprived him of his property unconstitutionally."[12] Unless, by its rulings of law, the state court prevented a complainant from obtaining substantially any compensation, the Court will not overturn the state court findings as to the amount of damages on appeal, even though, as a consequence of error therein, the property owner received less than he was entitled to.[13]

Following *Penn Central*, the Court grappled with the appropriate remedy for property owners impacted by land use regulations.[14] Regulations that go "too far" in reducing the value of property or which do not substantially advance a legitimate governmental interest present constitutional issues. Courts may invalidate such regulations as denying due process, or they may require compensation, at least for the period in which the regulation was in effect. In *First English Evangelical Lutheran Church v. County of Los Angeles*, the Court held that when land use regulation constitutes a taking, compensation is due for the period of implementation prior to the holding.[15] The Court recognized that, even though government may elect in such circumstances to discontinue regulation and thereby avoid compensation for a permanent property deprivation, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[16] Outside the land-use context, however, the Court has recognized a limited number of situations where invalidation, rather than compensation, remains the appropriate takings remedy.[17]

The applicability of the ripeness doctrine to takings claims is an area the Court has developed extensively since *Penn Central*. In *Williamson County Regional Planning Commission v. Hamilton Bank*,[18] the Court announced a two-part ripeness test for takings actions brought in federal court, although the Court subsequently overturned the second part of this test in *Knick v. Township of Scott*.[19] The *Williamson County* two-part ripeness test provided, first, for an as-applied challenge, the property owner must obtain from the regulating agency a "final, definitive position" regarding how it will apply its regulation to the owner's land[20] and, second, when suing a state or municipality, the owner must exhaust any possibilities for obtaining compensation from the state or its courts before coming to federal

[11] Backus v. Fort St. Union Depot Co., 169 U.S. 557, 569 (1898).

[12] McGovern v. City of N.Y., 229 U.S. 363, 370–71 (1913).

[13] *Id.* at 371. *See also* Provo Bench Canal Co. v. Tanner, 239 U.S. 323 (1915); Appleby v. City of Buffalo, 221 U.S. 524 (1911).

[14] *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255 (1980) (issue not reached because property owners challenging development density restrictions had not submitted a development plan); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 293–97 (1981), and Hodel v. Indiana, 452 U.S. 314, 333–36 (1981) (rejecting facial taking challenges to federal strip mining law).

[15] 482 U.S. 304 (1987).

[16] *Id.* at 321.

[17] E. Enters. v. Apfel, 524 U.S. 498 (1998) (statute imposing generalized monetary liability); Babbitt v. Youpee, 519 U.S. 234 (1997) (amended statutory requirement that small fractional interests in allotted Indian lands escheat to tribe, rather than pass on to heirs); Hodel v. Irving, 481 U.S. 704 (1987) (pre-amendment version of escheat statute).

[18] 473 U.S. 172 (1985).

[19] 139 S. Ct. 2162, 2179 (2019).

[20] *Williamson Cty.*, 473 U.S. at 191.

court.[21] Thus, in *Williamson County*, the Court found the claim unripe because the plaintiff had failed to seek a variance (first prong of the *Williamson County* test), and had not sought compensation from the state courts in question even though they recognized inverse condemnation claims (second prong of the *Williamson County* test).[22] Similarly, in *MacDonald, Sommer & Frates v. County of Yolo*,[23] the Court found a final decision lacking where the landowner was denied approval for one subdivision plan calling for intense development, but the possibility of approval for a scaled-down (though still economic) version remained. In a somewhat different context, the Court considered a taking challenge to a municipal rent control ordinance "premature" in the absence of evidence that a tenant hardship provision had been applied to reduce what would otherwise be considered a reasonable rent increase.[24]

Beginning with *Lucas* in 1992, however, the Court's ripeness determinations have displayed an impatience with formalistic reliance on the *Williamson County* "final decision" rule, while nonetheless explicitly reaffirming it. In *Palazzolo v. Rhode Island*,[25] for example, the Court did not require the landowner to apply for approval of a scaled-down development of his wetland, since the regulations at issue permitted no development of the wetland. The Court stated: "[O]nce it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened."[26] Facial challenges dispense with the *Williamson County* "final decision" prerequisite, although unless claimants have pursued administrative remedies, they often lack evidence that a statute has the requisite economic impact on his or her property.[27]

As noted previously, the Supreme Court eliminated the second prong of the *Williamson County* test, which required litigants to exhaust state remedies before bringing a federal takings claim,[28] because the "exhaustion requirement" had significant consequences for plaintiffs.[29] In *San Remo Hotel, L.P. v. City & County of San Francisco*, the plaintiffs lost an inverse condemnation claim in state court after a federal court dismissed their earlier attempt to file in federal court, citing *Williamson County*'s exhaustion requirement.[30] When the litigants attempted to return to federal court, the court dismissed their claim, holding that the legal doctrine of issue preclusion prevented the court from relitigating the claim.[31] Under common-law preclusion doctrines, which are "implemented by" the federal full faith and credit statute,[32] federal courts are, in some circumstances, required to abide by state court decisions

[21] *Id.* at 195.

[22] *Id.* at 194, 196–97.

[23] 477 U.S. 340 (1986).

[24] Pennell v. City of San Jose, 485 U.S. 1 (1988).

[25] 533 U.S. 606 (2001).

[26] *Id.* at 620. *See also* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) (taking claim ripe despite plaintiff's not having applied for sale of her transferrable development rights, because no discretion remains to agency and value of such rights is a simple issue of fact).

[27] *See, e.g.*, Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295–97 (1981) (facial challenge to surface mining law rejected); United States v. Riverside Bayview Homes, 474 U.S. 121, 127 (1985) (mere permit requirement does not itself take property); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493–502 (1987) (facial challenge to anti-subsidence mining law rejected).

[28] Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985).

[29] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2169 (2019).

[30] 545 U.S. 323, 331–32 (2005).

[31] *Id.* at 334–35.

[32] 28 U.S.C. § 1738 ("[J]udicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.").

that have already resolved the issues presently before the federal court.[33] In *San Remo*, the Supreme Court held that these preclusion doctrines barred the plaintiffs' takings claim, declining to create any special exceptions in the context of the Takings Clause.[34] Thus, as the Court later described this outcome, "[t]he adverse state court decision that . . . gave rise to a ripe federal takings claim simultaneously barred that claim."[35]

The Court overruled *Williamson County*'s exhaustion requirement in *Knick v. Township of Scott*,[36] holding that property owners have a "Fifth Amendment right to full compensation" and a concomitant right to bring a federal suit at the time the government takes their property, "regardless of post-taking remedies that may be available to the property owner."[37] The Court said its cases had long established that a right to compensation "arises at the time of the taking," and that *Williamson County*'s conclusion otherwise had rested on a misunderstanding of precedent.[38] The Supreme Court concluded that *Williamson County* was wrongly decided and that stare decisis considerations did not preclude it from overruling the exhaustion aspects of that decision.[39] In its 2021 decision, *Pakdel v. City & County of San Francisco*, the Court confirmed that property compensation need not exhaust avenues for compensation in state court prior to bringing a claim in federal court.[40]

[33] *San Remo*, 545 U.S. at 336.

[34] *Id.* at 338.

[35] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2169 (2019).

[36] *Id.* at 2179.

[37] *Id.* at 2170, 2173.

[38] *Id.* at 2170, 2173–75.

[39] *Id.* at 2177.

[40] Pakdel v. City & Cnty. of S.F., No. 20-1212 (U.S. June 28, 2021).

SIXTH AMENDMENT
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SIXTH AMENDMENT—RIGHTS IN CRIMINAL PROSECUTIONS

Amdt6.1 Overview of Sixth Amendment, Rights in Criminal Prosecutions

Like with other provisions of the Bill of Rights, the application of the Sixth Amendment evolved. In considering a bill of rights in August 1789, the House of Representatives adopted a proposal to guarantee a right to a jury trial in state prosecutions,[1] but the Senate rejected the proposal, and the 1869 case of *Twitchell v. Commonwealth* ended any doubt that the states were beyond the direct reach of the Sixth Amendment.[2] The reach of the Amendment thus being then confined to federal courts, questions arose as to its application in federally established courts not located within a state. The Court found that criminal prosecutions in the District of Columbia[3] and in incorporated territories[4] must conform to the Amendment, but those in the unincorporated territories need not.[5] Under the *Consular* cases, of which the leading case is *In re Ross*, the Court at one time held that the Sixth Amendment reached only citizens and others within the United States or brought to the United States for trial, and not to citizens residing or temporarily sojourning abroad.[6] *Reid v. Covert* made this holding inapplicable to proceedings abroad by United States authorities against American civilians.[7] Further, though not applicable to the states by the Amendment's terms, the Court has come to protect all the rights guaranteed in the Sixth Amendment against state abridgment through the Due Process Clause of the Fourteenth Amendment.[8]

The Sixth Amendment applies in criminal prosecutions. Only those acts that Congress has forbidden, with penalties for disobedience of its command, are crimes.[9] Actions to recover penalties imposed by act of Congress generally but not invariably have been held not to be criminal prosecutions,[10] nor are deportation proceedings,[11] nor appeals or post-conviction

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[1] 1 Annals of Congress 755 (August 17, 1789).

[2] 74 U.S. (7 Wall.) 321, 325–27 (1869).

[3] Callan v. Wilson, 127 U.S. 540 (1888).

[4] Reynolds v. United States, 98 U.S. (8 Otto) 145 (1879). *See also* Lovato v. New Mexico, 242 U.S. 199 (1916).

[5] Balzac v. Porto Rico, 258 U.S. 298, 304–05 (1922); Dorr v. United States, 195 U.S. 138 (1904). These holdings are, of course, merely one element of the doctrine of the *Insular Cases*, De Lima v. Bidwell, 182 U.S. 1 (1901); and Downes v. Bidwell, 182 U.S. 244 (1901), concerned with the "Constitution and the Advance of the Flag". *Cf.* Rassmussen v. United States, 197 U.S. 516 (1905).

[6] In re Ross, 140 U.S. 453 (1891) (holding that a United States citizen has no right to a jury in a trial before a United States consul abroad for a crime committed within a foreign nation).

[7] 354 U.S. 1 (1957) (holding that civilian dependents of members of the Armed Forces overseas could not constitutionally be tried by court-martial in time of peace for capital offenses committed abroad). Four Justices, Hugo Black, William Douglas, William Brennan, and Chief Justice Earl Warren, disapproved *Ross* as "resting . . . on a fundamental misconception" that the Constitution did not limit the actions of the United States Government against United States citizens abroad, *id.* at 5–6, 10–12, and evinced some doubt with regard to the *Insular Cases* as well. *Id.* at 12–14. Justices Felix Frankfurter and John Harlan, concurring, would not accept these strictures, but were content to limit *Ross* to its particular factual situation and to distinguish the *Insular Cases*. *Id.* at 41, 65. *Cf.* Middendorf v. Henry, 425 U.S. 25, 33–42 (1976) (declining to decide whether there is a right to counsel in a court-martial, but ruling that the summary court-martial involved in the case was not a "criminal prosecution" within the meaning of the Amendment).

[8] Citation is made in the sections dealing with each provision.

[9] United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32 (1812); United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816); United States v. Britton, 108 U.S. 199, 206 (1883); United States v. Eaton, 144 U.S. 677, 687 (1892).

[10] Oceanic Navigation Co. v. Stranahan, 214 U.S. 320 (1909); Hepner v. United States, 213 U.S. 103 (1909); United States v. Regan, 232 U.S. 37 (1914).

[11] United States *ex rel.* Turner v. Williams, 194 U.S. 279, 289 (1904); Zakonaite v. Wolf, 226 U.S. 272 (1912).

applications for collateral relief,[12] but contempt proceedings, which at one time were not considered criminal prosecutions, are now considered to be criminal prosecutions for purposes of the Amendment.[13]

Amdt6.2 Right to a Speedy Trial

Amdt6.2.1 Overview of Right to a Speedy Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Constitution protects against "undue delay" in criminal prosecution through a series of component measures rather than through one overarching requirement of timely prosecution.[1] These serial constitutional protections, in turn, are supplemented by statutory protections.[2] First, the Due Process Clause provides a basic safeguard against extreme government delay in bringing criminal charges against a suspect,[3] although statutes of limitations are generally thought to supply the principal protection against such delays.[4] The Speedy Trial Clause of the Sixth Amendment is the next component: as interpreted by the Supreme Court, it applies to delay between the initiation of criminal proceedings (as marked by an arrest or formal charge) and conviction (whether by trial or plea).[5] Statutory time limits bolster and, at least in the case of the federal Speedy Trial Act of 1974,[6] largely eclipse, by their greater protections, the constitutional right to a speedy trial.[7] Upon conviction, the constitutional speedy trial right detaches, leaving due process and applicable criminal procedure statutes or rules to guard against unreasonable delay in imposing a sentence.[8]

In its landmark 1972 decision *Barker v. Wingo*, the Supreme Court called the speedy trial protection a "vague concept," about which "[i]t is impossible to do more than generalize" and

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[12] *Cf.* Evitts v. Lucey, 469 U.S. 387 (1985) (right to counsel on criminal appeal a matter determined under due process analysis).

[13] *Compare* In re *Debs*, 158 U.S. 564 (1895), *with* Bloom v. Illinois, 391 U.S. 194 (1968).

[1] *See* Betterman v. Montana, 578 U.S. 437, 446–48 (2016).

[2] *See id.* at 440, 446–47.

[3] *Id.* at 446–47.

[4] United States v. Ewell, 383 U.S. 116, 122 (1966) ("[T]he applicable statute of limitations . . . is usually considered the primary guarantee against bringing overly stale criminal charges.").

[5] *Betterman*, 578 U.S. at 439 ("We hold that the [speedy trial] guarantee protects the accused from arrest or indictment through trial, but does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges.").

[6] 18 U.S.C. §§ 3161–3174. For a discussion of corresponding state provisions, see 5 Wayne R. LaFave et al., Criminal Procedure § 18.3(c) (4th ed. 2020) ("All but a few states have adopted statutes or rules of court on the subject of speedy trial.").

[7] *See* Betterman, 578 U.S. at 445 (noting that the Speedy Trial Act directs "that no more than 30 days pass between arrest and indictment, and that no more than 70 days pass between indictment and trial" and explaining that these "'more stringent'" statutory provisions "'have mooted much litigation about the requirements of the [Sixth Amendment] Speedy Trial Clause'") (quoting United States v. Loud Hawk, 474 U.S. 302, 304 n.1 (1986)) (internal citations omitted); *see also id.* at 8 & n.7 (citing "numerous state analogs" to the federal Speedy Trial Act which "similarly impose precise time limits for charging and trial").

[8] *Id.* at 2, 9.

which necessitates a "functional analysis."[9] Under Barker, to determine whether a delay between accusation and conviction violates the speedy trial right, the Supreme Court applies a balancing test that considers the following four factors: (1) the length of the delay; (2) the reason for the delay; (3) whether and to what extent the defendant asserted his speedy trial right; and (4) the prejudice to the defendant caused by the delay.[10] This balancing test requires courts to evaluate speedy trial claims on an ad hoc basis and does not prescribe rigid time limits on the length of criminal proceedings.[11] The Speedy Trial Act, in contrast, sets forth two clear time limits: an information or indictment must follow within 30 days of arrest, and a trial must begin within 70 days of indictment or arraignment.[12] The Act, however, exempts numerous types of delay from these time limits, including continuances that serve the ends of justice and delays resulting from pre-trial motions.[13]

The remedy for a violation of a defendant's Sixth Amendment speedy trial right is dismissal of the charges with prejudice.[14] Courts do not have discretion to fashion less drastic remedies after finding a violation of the Speedy Trial Clause.[15]

Amdt6.2.2 Historical Background on Right to a Speedy Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Safeguards against delay in criminal prosecution predate the Magna Carta and the abandonment of trial by ordeal in England around 1215.[1] In 1166, the Assize of Clarendon described a procedure for obtaining speedy justice for accused persons arrested in a place not

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[9] Barker v. Wingo, 407 U.S. 514, 521–22 (1972); *see also* Vermont v. Brillon, 556 U.S. 81, 89 (2009) ("The speedy-trial right is 'amorphous,' 'slippery,' and 'necessarily relative.'") (quoting *Barker*, 407 U.S. at 522).

[10] *Barker*, 407 U.S. at 530.

[11] *Id.* at 523, 530.

[12] *See Betterman*, 578 U.S. at 445 (citing 18 U.S.C. § 3161).

[13] *See* United States v. Tinklenberg, 563 U.S. 647, 650 (2011); LaFave, *supra* note 6, § 18.3(b). Many state laws contain similar provisions about time limits and exemptions. *See Betterman*, 578 U.S. at 445; LaFave, *supra* note 6.

[14] Strunk v. United States, 412 U.S. 434, 440 (1973).

[15] *Id.* at 439 (holding that remedies other than dismissal with prejudice, such as a sentencing reduction equal to the length of the unconstitutional delay, do not fully vindicate the purposes of the speedy trial protection, including protection against the stress and disruption of prolonged accusation and the "prospect of rehabilitation").

[1] Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) ("[T]he right to a speedy trial . . . has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, 'We will sell to no man, we will not deny or defer to any man either justice or right'; but evidence of recognition of the right to speedy justice in even earlier times is found in the Assize of Clarendon (1166).") (footnotes omitted); *see* Thomas Andrew Green, Verdict According to Conscience 3 (1985) ("Trial by jury, as is well known, replaced trial by ordeal after the Church in 1215 proscribed clerical participation in that 'barbaric' practice."). The ordeal was a trial procedure that sought to procure divine judgment of guilt or innocence through a physical test that, to modern eyes, resembled torture. *See* John H. Langbein et al., History of the Common Law: The Development of Anglo-American Legal Institutions 43 (2009). Two principal types of ordeal were used in England before 1215: ordeal by hot iron (in which the accused was forced to grip a hot iron and was deemed innocent if the resulting wounds resisted infection) and ordeal by cold water (in which the accused was bound and submerged into cold water on a rope and was deemed innocent if he sank). *Id.* at 44.

scheduled to receive an imminent judicial visit.[2] Later, Sir Edward Coke listed speed as one of the three essential qualities of justice in his *Institutes*, a work widely read by lawyers in the American colonies.[3] Thus, the right to a speedy trial appears to have been well-established during the colonial period, and several state constitutions already guaranteed the right at the time of the Sixth Amendment's ratification in 1791.[4]

Amdt6.2.3 When the Right to a Speedy Trial Applies

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Until 1971, the Supreme Court did not clearly delineate the stage of the criminal proceeding to which the speedy trial right applied. In the 1957 case *Pollard v. United States*,[1] the Court assumed, without deciding, that the right applied to the sentencing phase of a criminal prosecution.[2] In a series of subsequent cases over the ensuing decade, the Court articulated the primary purposes of the speedy trial right,[3] held that the right applied against the states through the Due Process Clause of the Fourteenth Amendment,[4] and determined that the right applied to defendants already serving prison sentences in another jurisdiction.[5] These cases did not, however, determine which events during a criminal prosecution trigger the speedy trial right and which events extinguish it.[6]

The Court resolved the front end of this ambiguity in the 1971 case *United States v. Marion*, where it held that the speedy trial right does not attach before the initiation of criminal proceedings against the accused through an arrest or formal charge.[7] In *Marion*, the defendants complained of a three-year delay between the commission of the charged crimes

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[2] *Klopher*, 386 U.S. at 223 n.9 (the sheriffs were to send word to the nearest justice for instructions as to where to take the accused for trial) (citing 2 English Historical Documents 408 (1953)).

[3] *Id.* at 224–25 (quoting Edward Coke, The Second Part of the Institutes of the Laws of England 55 (Brooke ed., 5th ed. 1797)).

[4] *Id.* at 225–26.

[1] 352 U.S. 354 (1957).

[2] *Id.* at 361 ("We will assume arguendo that sentence is part of the trial for purposes of the Sixth Amendment."). The Court determined that the two-year delay between conviction and sentencing at issue in the case would not have violated the defendant's right to a speedy trial even if that right applied to sentencing. *Id.* at 361–62. The Court thus found it unnecessary to decide whether the right encompassed sentencing. *Id.* at 361.

[3] United States v. Ewell, 383 U.S. 116, 120 (1966) ("This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.").

[4] Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) ("We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment.").

[5] Dickey v. Florida, 398 U.S. 30, 37 (1970) ("[O]n demand a State ha[s] a duty to make a diligent and good-faith effort to secure the presence of the accused from the custodial jurisdiction and afford him a trial."); Smith v. Hooey, 393 U.S. 374, 378 (1969) ("The [ ] demands [of the right to a speedy trial] are both aggravated and compounded in the case of an accused who is imprisoned by another jurisdiction.").

[6] *See Dickey*, 398 U.S. at 40 (Brennan, J., concurring) (observing that "the Court has as yet given scant attention to . . . questions essential to the definition of the speedy-trial guarantee," including "when during the criminal process the speedy-trial guarantee attaches").

[7] *404 U.S. 307, 313 (1971)* ("[T]he Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused' . . . ."); *id.* at 321 ("Invocation of the speedy trial provision . . . need not await indictment, information, or other formal charge. But we decline to extend th[e] reach of the amendment to the

and the issuance of an indictment against them.[8] The government apparently had knowledge of the criminal conduct during those three years but did not commence the prosecution earlier because of limited resources.[9] Although the Court recognized that pre-charge delays might cause prejudice to the defense, it determined that other considerations compelled the conclusion that the speedy trial right does not protect against such delays.[10] These considerations included the text of the Sixth Amendment itself,[11] the history of the speedy trial right and ensuing legislative interpretations of it,[12] and the right's purpose of holding in check the attendant "evils" of public accusation.[13] The Court also emphasized that other sources of law apart from the Sixth Amendment—namely, statutes of limitations and the Due Process Clause—protect against excessive pre-charge delays.[14]

Then, in the 2016 case *Betterman v. Montana*, the Court held that the speedy trial right "detaches" (i.e., no longer applies) upon conviction,[15] thereby resolving the question left open sixty years earlier in *Pollard*.[16] The defendant in *Betterman* argued that a fourteen-month delay between his conviction by guilty plea and the imposition of his sentence violated his right to a speedy trial.[17] In rejecting the claim, the Court reasoned that the speedy trial right serves primarily to safeguard the presumption of innocence and that this purpose does not comport

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period prior to arrest.") (footnote omitted). For a discussion of how the attachment rule of *Marion* applies to peculiar charging scenarios, including prosecutions initiated by sealed indictment, see 5 Wayne R. LaFave et al., Criminal Procedure § 18.1(c) (4th ed. 2020).

[8] *Marion*, 404 U.S. at 313.

[9] *Id.* at 309 (noting evidence in record, including newspaper articles and a Federal Trade Commission cease and desist order, indicating that federal prosecutors had knowledge of the criminal fraud scheme about three years before securing the indictment); *id.* at 335 (Douglas, J., concurring) ("The justifications offered [for the delay] were that the United States Attorney's office was 'not sufficiently staffed to proceed as expeditiously' as desirable and that priority had been given to other cases.") (citation omitted).

[10] *Id.* at 321–22 ("Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself. But this possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context."); *see also* Dillingham v. United States, 423 U.S. 64, 64–65 (1975) (per curiam) (holding that speedy trial right applies to time after arrest but before indictment).

[11] *Marion*, 404 U.S. at 313 ("On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution.").

[12] *Id.* at 313–14 ("Our attention is called to nothing in the circumstances surrounding the adoption of the [Sixth] Amendment indicating that it does not mean what it appears to say . . . ."); *id.* at 316 ("Legislative efforts to implement federal and state speedy trial provisions also plainly reveal the view that these guarantees are applicable only after a person has been accused of a crime.").

[13] *Id.* at 320 ("[T]he major evils protected against the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. . . . Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, . . . and create anxiety in him, his family and his friends.").

[14] *Id.* at 323 ("There is . . . no need to press the Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since statutes of limitation already perform that function."); *id.* at 324 ("[T]he Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused."). Although the Court declined, given the lack of a developed record, to conduct a complete due process analysis as to whether the pre-accusation delays in *Marion* had caused defendants actual prejudice, *id.* at 325, the Court has applied due process principles to pre-indictment delays in other cases. *See* United States v. Lovasco, 431 U.S. 783, 796 (1977) (holding that "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time," so long as the government does not delay solely to gain a tactical advantage); *see also* Fifth Amendment (discussing procedural due process rights on confessions in criminal cases).

[15] Betterman v. Montana, 578 U.S. 437, 440 (2016).

[16] *Pollard*, 352 U.S. at 361 (assuming arguendo "that sentence is part of the trial for purposes of the Sixth Amendment").

[17] *Betterman*, 578 U.S. at 440.

with applying the right to post-conviction proceedings such as sentencing.[18] The Court also noted, much as it did in *Marion*, that other sources of law protect against undue delay at the sentencing stage, including rules of criminal procedure and the constitutional right to due process.[19]

Amdt6.2.4 Early Doctrine on Right to a Speedy Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Before the 1972 *Barker v. Wingo*[1] decision, where the Supreme Court established a four-factor balancing test for determining when the speedy trial right is abridged,[2] the Court decided speedy trial cases under more general notions of the bounds of appropriate delay in prosecution. In *Pollard v. United States* in 1957, the Court held that a two-year delay between conviction and sentencing—resulting from the trial court's failure to impose a sentence in the defendant's presence at the original sentencing hearing—did not violate the Sixth Amendment because the delay was not "purposeful or oppressive."[3] The Court used a similar touchstone in the 1966 decision *United States v. Ewell*, which concerned a nineteen-month delay between initial arrest and a hearing on a second indictment.[4] The delay was caused largely by the defendants' successful motion to vacate their convictions by guilty plea.[5] The Court rejected the defendants' speedy trial claim due to a lack of "oppressive or culpable government conduct."[6] The Court also reasoned that to hold a delay caused by a successful defense appeal unconstitutional would undermine the general principle that a defendant may be "retried in the normal course" of events following the reversal of a conviction.[7]

Aspects of the reasoning in *Pollard* and *Ewell* would carry through the landmark *Barker* case and into the Supreme Court's modern speedy trial jurisprudence. In both pre-*Barker* cases, the Court emphasized that speedy trial claims required ad hoc analysis of the particular

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[18] *Id.*; *Id.* at 446 (noting arguments that the "prevalence of guilty pleas and the resulting scarcity of trials in today's justice system" have made sentencing proceedings a more significant forum for criminal dispute resolution, but concluding that this "modern reality . . . does not bear on the presumption-of-innocence protection at the heart of the Speedy Trial Clause").

[19] *Id.* at 447–48 ("The federal rule [of criminal procedure] on point directs the court to 'impose sentence without unnecessary delay.' Many States have provisions to the same effect. . . . Further, as at the prearrest stage, due process serves as a backstop against exorbitant delay.") (quoting Fed. R. Crim. P. 32(b)(1)). Because the defendant in *Betterman* did not advance a due process claim, the Court limited its due process analysis to the observation that a defendant's right to liberty after conviction, while "diminished," nonetheless encompasses "an interest in a sentencing proceeding that is fundamentally fair." *Id.* at 448–49.

[1] 407 U.S. 514 (1972).

[2] *Id.* at 530.

[3] Pollard v. United States, 352 U.S. 354, 361–62 (1957).

[4] 383 U.S. 116, 118–19 (1966).

[5] *Id.*

[6] *Id.* at 123.

[7] *Id.* at 121.

circumstances surrounding a delay in prosecution,[8] a point that *Barker* would go on to reiterate more emphatically.[9] Perhaps more importantly, the *Ewell* Court attributed three primary purposes to the Speedy Trial Clause: "to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself."[10] In subsequent cases, including *Barker*, the Court would rely on this passage as the definitive formulation of the Speedy Trial Clause's purposes.[11]

In another line of pre-*Barker* cases that remains important, the Court rejected the contention that prosecutors could, after charging a defendant, leave the charges dormant for extended periods of time free of the strictures of the Speedy Trial Clause. In *Klopfer v. North Carolina* in 1967, a state prosecutor invoked a procedure called "nolle prosequi with leave" to defer proceedings on an indictment for criminal trespass until an uncertain future date when the prosecutor might restore the case for trial.[12] The Court held that such "indefinite[ ] prolonging" of criminal prosecution violated the defendant's speedy trial right.[13] Similarly, in two cases from 1969 and 1970, the Court held that the government may not defer proceedings against a charged defendant until his release from incarceration in another jurisdiction;[14] rather, the charging authority must make a "diligent and good-faith effort to secure the presence of the accused from the custodial jurisdiction and afford him a trial" upon his request, notwithstanding the inter-jurisdictional cooperation that such a trial might require.[15] In short, the government may not evade the limitations of the Speedy Trial Clause by deferring already-filed charges until the occurrence of some later event.

Amdt6.2.5 Modern Doctrine on Right to a Speedy Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the*

[8] *See Pollard*, 352 U.S. at 361 ("Whether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances."); *Ewell*, 383 U.S. at 120 ("[T]his Court has consistently been of the view that 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends on circumstances.'") (quoting *Beavers v. Haubert*, 198 U.S. 77, 87 (1905)).

[9] *Barker*, 407 U.S. at 530 ("A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right.").

[10] *Ewell*, 383 U.S. at 120.

[11] *See*, *e.g.*, Betterman v. Montana, 578 U.S. 437, 442 (2016) ("The Speedy Trial Clause implements [the presumption of innocence] by" minimizing the likelihood of lengthy incarceration before trial, lessening the "anxiety and concern accompanying public accusation," and limiting the effect of long delay on the defense.); *Barker*, 407 U.S. at 532.

[12] 386 U.S. 213, 214, 217 (1967).

[13] *Id.* at 222.

[14] Dickey v. Florida, 398 U.S. 30, 37 (1970); Smith v. Hooey, 393 U.S. 374, 383 (1969).

[15] *Dickey*, 398 U.S. at 37.

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In *Barker v. Wingo*, the Supreme Court refined its approach to the Speedy Trial Clause by adopting a balancing test to govern claims of unconstitutional delay in prosecution.[1] Willie Mae Barker, the defendant in the case, was convicted of murder.[2] He contended that a five-year delay between his indictment and the start of his trial violated his speedy trial right.[3] The prosecution's decision to put off Barker's trial until it had obtained a conviction against his co-defendant—a necessary witness in the case against Barker—accounted for most of the delay, as it took six trials over more than four years to convict the co-defendant on all counts.[4] Barker did not object to this prosecution tactic until roughly three-and-a-half years of the eventual five-year delay had elapsed.[5]

In considering Barker's claim, the Supreme Court (in a majority opinion joined by seven justices, with the remaining two concurring and no dissents) began by acknowledging that its prior cases did not establish a clear test for determining when a delay in prosecution violated the Speedy Trial Clause.[6] The Court then rejected two proposed "rigid" approaches to applying the Clause that would have provided bright-line rules for prosecutors and lower courts. First, the Court declined to set out a time period—a "specified number of days or months"—within which a defendant must be offered a trial.[7] To establish such a rule, the Court reasoned, would have required the Court to step improperly beyond its adjudicative function and into the realm of "legislative or rulemaking activity."[8] Second, the Court rejected a so-called "demand-waiver" approach, pursuant to which a defendant's failure to demand a trial would have been construed as a waiver of the speedy trial right.[9] The Court concluded that this approach conflicted with its jurisprudence on the waiver of constitutional rights, under which a finding of waiver requires a showing of the defendant's "intentional relinquishment or abandonment of a known right" rather than a presumption based on the defendant's mere inaction.[10]

Having rejected these "rigid" approaches, the Court settled upon a "balancing test" that would consider "the conduct of both the prosecution and the defendant."[11] The test that the Court announced consists of four factors: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[12] Importantly, the Court acknowledged that this test provides only loose guidance to lower courts, which must apply and weigh the four factors "on an ad hoc basis" to resolve individual speedy trial claims.[13] The

[1] *Barker*, 407 U.S. at 530 ("The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed.").

[2] Barker v. Wingo, 407 U.S. 514, 517–18 (1972).

[3] *Id.*

[4] *Id.* at 516–17.

[5] *Id.* at 517.

[6] *Id.* at 516 ("[I]n none of these [speedy trial] cases have we attempted to set out the criteria by which the speedy trial right is to be judged.").

[7] *Id.* at 523.

[8] *Id.*

[9] *Id.* at 525 ("The demand-waiver doctrine provides that a defendant waives any consideration of his right to speedy trial for any period prior to which he has not demanded a trial. Under this rigid approach, a prior demand is a necessary condition to the consideration of the speedy trial right.").

[10] *Id.* at 525–26 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[11] *Id.* at 530.

[12] *Id.*

[13] *Id.*

balancing approach does not, in other words, offer the sort of clear rule of decision that either of the two "rigid" approaches (rejected by the *Barker* Court) would have supplied.[14]

Applying the four factors in its test to the five-year delay in Barker's case, the Court called the case "close" but held that the delay did not violate the Speedy Trial Clause.[15] The first two factors—the delay's length and the reason for it—favored Barker's claim.[16] Five years was an "extraordinary delay," the Court determined, and, in particular, the prosecution's objective of presenting the co-defendant's testimony at Barker's trial did not justify the four years it took to accomplish.[17] But the other two factors—prejudice and the defendant's assertion of the speedy trial right—went against Barker and outweighed the first two factors.[18] Barker did not claim that the delay significantly impaired his defense at trial, and the Court thus concluded that he suffered little prejudice.[19] Most important, the Court determined that Barker's failure to demand a speedy trial during most of the delay showed that "he definitely did not want to be tried" and that he had made a strategic choice to "gambl[e]" that his co-defendant would be acquitted.[20] This last consideration appeared essentially outcome-determinative: a defendant who did not want a speedy trial, the Court reasoned, would not be deemed to have suffered a deprivation of his speedy trial right absent "extraordinary circumstances," such as the receipt of incompetent legal advice.[21]

Although the Court has generally refrained from reviewing lower court applications of the ad hoc balancing analysis it prescribed in *Barker*, a group of later opinions, discussed below, clarifies *Barker*'s guidance on how to apply each of the four factors.[22]

Amdt6.2.6 Length of Delay and Right to a Speedy Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The length of delay factor works as a "triggering mechanism" for the remainder of the balancing test.[1] In *Barker*, the Court made clear that courts need not reach the other three factors absent a post-accusation delay that is long enough to be "presumptively prejudicial."[2]

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[14] *See Id.*

[15] *Id.* at 533–34.

[16] *Id.*

[17] *Id.* at 534.

[18] *Id.*

[19] *Id*. ("[P]rejudice was minimal. Of course, Barker was prejudiced to some extent by living for over four years under a cloud of suspicion and anxiety. Moreover, although he was released on bond for most of the period, he did spend 10 months in jail before trial. But there is no claim that any of Barker's witnesses died or otherwise became unavailable owing to the delay.").

[20] *Id.* at 535–36.

[21] *Id.*

[22] *See* Vermont v. Brillon, 556 U.S. 81, 91 (2009) (noting that "the balance arrived at [by lower courts under *Barker*] in close cases ordinarily would not prompt this Court's review" but deeming it necessary nonetheless to correct a state court's "fundamental error in its application of *Barker*").

[1] Barker v. Wingo, 407 U.S. 514, 530 (1972).

[2] *Id.*

The Court held that the delay in Barker's case satisfied this standard,[3] but the Court did not set a concrete time frame for presumptively prejudicial delay.[4] Rather, the Court said that the inquiry would depend upon the nature of the criminal charges.[5] The less serious the charges, the less a court should tolerate delay.[6] In later cases from 1986 and 1992, the Supreme Court held presumptively prejudicial a 90-month post-arrest delay in a prosecution for possession of firearms and explosives[7] and an eight and one-half year post-indictment delay in a prosecution for conspiracy to import and distribute cocaine.[8] In the latter case, the Court observed without comment that "the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year."[9] If a delay is presumptively prejudicial, the court must proceed to weigh its excessive length—that is, "the extent to which [it] stretches beyond the bare minimum needed to trigger" the full *Barker* analysis—along with the other three factors of the balancing test.[10]

Time that elapses between the formal dismissal and reinstatement of charges does not count toward the length of delay for speedy trial purposes, so long as the defendant is not subject to any restraint on liberty during the interim period.[11] Thus, the Supreme Court held in 1982 that the passage of four years between the dismissal of military charges and a later federal grand jury indictment for the same alleged crimes, during which time the defendant was not subject to restraints, did not support a claim for a violation of the Speedy Trial Clause.[12] Similarly, in a 1986 case where the trial court dismissed an indictment before trial, leaving the defendants free of restraints, the Supreme Court held that the duration of the government's successful appeal of the dismissal did not count towards the defendants' speedy trial claims.[13] In contrast, the duration of an interlocutory appeal[14] that proceeds while an indictment or restraints on liberty (such as bail or incarceration) remain in place does count toward the length of delay factor under *Barker*.[15]

Amdt6.2.7 Reason for Delay and Right to a Speedy Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the*

[3] *Id.* at 533–34.

[4] *Id.* at 530.

[5] *Id.* at 530–31.

[6] *Id.*

[7] United States v. Loud Hawk, 474 U.S. 302, 314 (1986).

[8] Doggett v. United States, 505 U.S. 647, 652 (1992).

[9] *Id.* at 652 n.1.

[10] *Id.* at 652.

[11] United States v. MacDonald, 456 U.S. 1, 7 (1982) ("[T]he Speedy Trial Clause has no application after the Government, acting in good faith, formally drops charges.").

[12] *Id.* at 9–10.

[13] *Loud Hawk*, 474 U.S. at 311 ("We find that after the District Court dismissed the indictment against respondents and after respondents were freed without restraint, they were 'in the same position as any other subject of a criminal investigation.'") (quoting *MacDonald*, 456 U.S. at 8–9).

[14] An interlocutory appeal is an "appeal that occurs before the trial court's final ruling on the entire case," Appeal, Black's Law Dictionary (10th ed. 2014), such as an appeal from a pre-trial order suppressing evidence. *See Loud Hawk*, 474 U.S. at 306–07, 313.

[15] *Loud Hawk*, 474 U.S. at 314 (adopting the *Barker* test "to determine the extent to which appellate time consumed in the review of pretrial motions should weigh towards a defendant's speedy trial claim").

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The *Barker* Court divided government justifications for delay into three categories and explained how each category should impact the balance of factors.[1] First, "[a] deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government."[2] Second, "[a] more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government . . . ."[3] Third, "a valid reason, such as a missing witness, should serve to justify appropriate delay."[4] The five-year delay at issue in Barker's case (caused primarily by the government's choice to postpone trial until the conclusion of proceedings against the co-defendant) appeared to fall into the second category.[5] Accordingly, the Court seemed to count the reason for delay moderately in Barker's favor, but the factor did not carry enough weight—not even when combined with the "extraordinary" length of delay—to overcome Barker's failure to assert adequately his speedy trial right and the lack of specific prejudice to his defense.[6]

In a 1992 case, the Supreme Court articulated the "reason for delay" inquiry as "whether the government or the criminal defendant is more to blame for th[e] delay."[7] Later cases also clarified the interplay between the reason for delay factor and the other *Barker* factors and indicated that, in some circumstances, the reason for delay could do much to determine the outcome of the balancing test.[8] Where the government causes delay on purpose to gain a trial advantage, a long delay will generally amount to a constitutional violation.[9] Where the government bears no blame for a long delay—not even in the "more neutral" sense of negligence or crowded dockets—a constitutional violation likely does not exist absent a showing of specific evidentiary prejudice.[10] In contrast, government negligence "falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution" and amounts to a constitutional violation, even without a showing of specific evidentiary prejudice, if it causes a delay that "far exceeds the [presumptive prejudice] threshold" and if the defendant did not exacerbate the delay through a failure to assert the

[1] Barker v. Wingo, 407 U.S. 514, 531 (1972).

[2] *Id.*

[3] *Id*; *see also* Strunk v. United States, 412 U.S. 434, 436 (1973) ("Unintentional delays caused by overcrowded court dockets or understaffed prosecutors are among the factors to be weighed less heavily than intentional delay, calculated to hamper the defense . . . .").

[4] *Barker*, 407 U.S. at 531.

[5] *Id.* at 534 ("[A] good part of [the delay] was attributable to the Commonwealth's failure or inability to try [the co-defendant] under circumstances that comported with due process.").

[6] *Id.* at 534–35.

[7] Doggett v. United States, 505 U.S. 647, 651 (1992).

[8] Vermont v. Brillon, 556 U.S. 81, 90–94 (2009); *Doggett*, 505 U.S. at 656–58.

[9] *Doggett*, 505 U.S. at 656.

[10] *Id.*

speedy trial right.[11] Finally, delays caused by defendants or their counsel—regardless of whether counsel is appointed or privately retained—weigh against defendants and generally will not support a speedy trial claim.[12]

Amdt6.2.8 Assertion of Right to a Speedy Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Supreme Court's most extensive commentary on the third balancing factor came in *Barker* itself, where the defendant's failure to assert his right to a speedy trial promptly and forcefully appeared to doom his claim in the eyes of the Court.[1] The Court made clear that a defendant's failure to assert the right is not a prerequisite to a speedy trial claim.[2] Put differently, a defendant does not waive the right by failing to assert it.[3] Moreover, the significance of a failure to assert the right depends on circumstance.[4] A failure to object to delay for a compelling reason—such as representation by "incompetent counsel"—might not undermine a speedy trial claim,[5] just as a pro forma objection will weigh less in the defendant's favor than an objection made with "frequency and force."[6] In the final analysis, however, the *Barker* Court homed in on the defendant's litigation strategy as the fulcrum of the inquiry under the third element: where the record shows that the defendant does not want a speedy trial, the Court reasoned, only on rare occasion will he be deemed to have been denied his right

[11] *Id.* at 657–58 (8.5-year delay caused by government negligence violated defendant's speedy trial right, despite lack of showing of specific prejudice, where defendant did not know of charges against him and therefore could not be blamed for not demanding a speedy trial).

[12] *Brillon*, 556 U.S. at 94 ("[A] defendant's deliberate attempt to disrupt proceedings [should] be weighted heavily against the defendant)"; *id*. ("[D]elays caused by defense counsel are properly attributed to the defendant, even where counsel is assigned."). The Court left open the possibility that a delay caused by breakdown in the public defender system could count against the government for speedy trial purposes. *Id.*

[1] Barker v. Wingo, 407 U.S. 514, 534 (1972) ("More important than the absence of serious prejudice, is the fact that Barker did not want a speedy trial.").

[2] *Id.* at 528.

[3] *Id*. ("We reject . . . the rule that a defendant who fails to demand a speedy trial forever waives his right.").

[4] *Id.* at 529 (explaining that, under the balancing test for speedy trial claims, a court may "attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay" and may also "weigh the frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection").

[5] *Id.* at 536 ("We do not hold that there may never be a situation in which an indictment may be dismissed on speedy trial grounds where the defendant has failed to object to continuances. There may be a situation in which the defendant was represented by incompetent counsel, was severely prejudiced, or even cases in which the continuances were granted ex parte.").

[6] *Id.* at 529.

to a speedy trial.[7] This analytical approach seemed to echo the Court's earlier observation in *Ewell* that delay in prosecution often benefits the defendant.[8]

In the 1992 case *Doggett v. United States*, the Court clarified that failure to demand a speedy trial does not count against defendants who are unaware of the charges against them.[9] In that case, the factual record indicated that the defendant did not know that he had been indicted on federal charges of narcotics distribution during the entirety of an eight-and-one-half year delay between the date of the indictment and the date authorities arrested him to face the charges.[10] The Supreme Court reasoned that such ignorance of the proceedings neutralized the third factor in the balancing test;[11] accordingly, the Court proceeded to find a violation of the Speedy Trial Clause based on the interplay of the other three factors alone.[12]

Amdt6.2.9 Prejudice and Right to a Speedy Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Barker instructed courts to consider prejudice in terms of the three primary purposes of the speedy trial guarantee: (1) prevention of "oppressive pretrial incarceration;" (2) minimization of the "anxiety and concern" caused by criminal accusation; and (3) protection against "the possibility that the defense will be impaired" by delay (i.e., evidentiary prejudice).[1] Generally, the Court has emphasized evidentiary prejudice as the most consequential of the three types.[2] In *Barker*, for example, where the defendant had spent ten months in pre-trial detention and endured 4.5 years under the "cloud" and "anxiety" of pending murder charges (and could therefore establish prejudice of the first two types), the Court counted the prejudice factor against the defendant because he did not show that the delay actually damaged his defense.[3]

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[7] *Id.* at 532 ("We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."); *id.* at 536 ("[B]arring extraordinary circumstances, we would be reluctant . . . to rule that a defendant was denied [the speedy trial] right on a record that strongly indicates . . . that the defendant did not want a speedy trial. We hold, therefore, that Barker was not deprived of his due process right to a speedy trial.")

[8] *See id.* at 521 ("A . . . difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic."); United States v. Ewell, 383 U.S. 116, 122–23 (1966) ("[T]he problem of delay is the Government's too, for it still carries the burden of proving the charges beyond a reasonable doubt.").

[9] 505 U.S. 647, 654 (1992).

[10] *Id.* at 653.

[11] *Id.* at 654 ("[The defendant] is not to be taxed for invoking his speedy trial right only after his arrest.").

[12] *Id.* at 656–58 (considering length of delay, reason for delay, and prejudice).

[1] Barker v. Wingo, 407 U.S. 514, 532 (1972).

[2] *Id*. ("[T]he most serious [type of prejudice] is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system."); Doggett v. United States, 505 U.S. 647, 654 (1992) (quoting *Barker* for same proposition).

[3] *Barker*, 407 U.S. at 534.

Amdt6.2.9
Prejudice and Right to a Speedy Trial

Multiple times the Court has said that a showing of evidentiary prejudice is not essential.[4] Yet on one occasion, in the 1994 case *Reed v. Farley*, the Supreme Court made a statement directly to the contrary, declaring that a showing of evidentiary prejudice "is required" to show a speedy trial violation.[5] That statement did not appear to constitute a binding holding: *Reed* dealt with the Speedy Trial Clause only in passing because the defendant did not actually press a constitutional speedy trial claim.[6] Nonetheless, even though *Reed* probably does not establish that a speedy trial claim must include a showing of evidentiary prejudice to succeed, the case does underline the Court's tendency to treat impairment to the defense as the key aspect of the prejudice prong and one of the most impactful considerations in the overall *Barker* analysis.[7]

The Supreme Court's consistent emphasis on the significance of evidentiary prejudice, however, has, from the outset, included one subtle qualification: the damage that delay causes to the defense does not always lend itself to an affirmative showing.[8] Thus, in *Doggett*, where government negligence delayed proceedings by at least six years but where the defendant failed to show any specific impairment to his defense, the Court weighed the prejudice factor in the defendant's favor based on the presumption that such a long delay had hurt the defense case in ways that neither side could demonstrate.[9] The Court stressed, however, that the presumption of evidentiary prejudice—as opposed to an affirmative showing of such prejudice—would support a speedy trial violation only in the case of particularly long delays[10] and only where other factors also favored the defendant.[11]

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[4] *Doggett*, 505 U.S. at 655 ("[A]ffirmative proof of particularized prejudice is not essential to every speedy trial claim."); Moore v. Arizona, 414 U.S. 25, 26 (1973) (per curiam) (rejecting, based on *Barker*, the "notion that an affirmative demonstration of prejudice [i]s necessary to prove a denial of the constitutional right to a speedy trial"); *Barker*, 407 U.S. at 533 ("We regard none of the four factors [in the balancing test] identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.").

[5] 512 U.S. 339, 353 (1994) ("[The defendant] does not suggest that his ability to present a defense was prejudiced by the delay [in his prosecution]. . . . A showing of prejudice is required to establish a violation of the Sixth Amendment Speedy Trial Clause, and that necessary ingredient is entirely missing here.").

[6] *Id.* at 352 (noting the defendant's concession that "his constitutional right to a speedy trial was in no way violated"). *Reed* dealt primarily with the scope of collateral review of state court convictions under 28 U.S.C. § 2254. 512 U.S. at 342 ("We hold that a state court's failure to observe the 120-day rule of [the Interstate Agreement on Detainers Act] Article IV(c) is not cognizable under § 2254 when the defendant registered no objection to the trial date at the time it was set, and suffered no prejudice attributable to the delayed commencement.").

[7] *See Id.* at 352; *Barker*, 407 U.S. at 532.

[8] *Barker*, 407 U.S. at 532 ("There is . . . prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown."); *see Doggett*, 505 U.S. at 655 ("We generally have to recognize that excessive delay presumptively compromises the reliability of a trial in way that neither party can prove or, for that matter, identify.").

[9] *Doggett*, 505 U.S. at 658 ("When the Government's negligence thus causes delay [of six years] . . . and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, . . . nor persuasively rebutted, the defendant is entitled to relief.") (footnotes omitted); *id* at 658 n.4 (emphasizing that the government "ha[d] not, and probably could not have, affirmatively proved that the delay left [defendant's] ability to defend himself unimpaired").

[10] *Id.* at 657 ("[T]o warrant granting relief, negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice.").

[11] *Id.* at 656 ("Presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria . . . .").

Amdt6.3 Right to a Public Trial

Amdt6.3.1 Overview of Right to a Public Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Sixth Amendment guarantees criminal defendants the right to be tried in public.[1] The Supreme Court has interpreted this right to apply to criminal trials and certain important pre-trial proceedings,[2] although the Court has also recognized that the right is subject to limitation where overriding interests require the exclusion of all or some members of the public from the courtroom.[3] The Sixth Amendment public trial right only protects the defendant,[4] but members of the public have the right to attend criminal proceedings under the First Amendment.[5] The Supreme Court has carefully avoided calling the First and Sixth Amendment public trial rights coextensive.[6] The Court has made clear, however, that the Sixth Amendment offers criminal defendants at least as much protection from closed proceedings as the First Amendment offers the public.[7] To a more limited extent, the Court has also determined that due process plays some role in protecting the accused from secret proceedings.[8]

Amdt6.3.2 Historical Background on Right to a Public Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Criminal trials have generally been open to the public since the origins of the Anglo-American legal system.[1] Indeed, the public nature of the criminal trial was one of the

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[1] Presley v. Georgia, 558 U.S. 209, 212 (2010). As noted elsewhere, the Court held the public trial right applicable against the states in *In re Oliver*, 333 U.S. 257, 272–73 (1948). *See* Amdt14.S1.4.1 Overview of Incorporation of the Bill of Rights (discussing the due process clause and incorporation).

[2] Waller v. Georgia, 467 U.S. 39, 46–47 (1984).

[3] *Id.* at 48.

[4] *See* Gannett Co. v. DePasquale, 443 U.S. 368, 391 (1979)

[5] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980); *see* Amdt1.9.1 Overview of Freedom of the Press to Amdt1.10.1 Historical Background on Freedoms of Assembly and Petition (discussing public trial rights).

[6] *Presley*, 558 U.S. at 212–13.

[7] *Id.*

[8] *See* Levine v. United States, 362 U.S. 610, 616 (1960); *see also* Fifth Amendment (discussing procedural due process rights on confessions in criminal cases).

[1] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564–65 (1980) (noting that community participation in criminal trials in England predated the Norman conquest and carried through into the development of the common law) (*citing* Frederick Pollock, English Law Before the Norman Conquest, *in* 1 Select Essays in Anglo-American Legal History 88, 89 (1907)); In re *Oliver*, 333 U.S. 257, 266 (1948) ("This nation's accepted practice of guaranteeing a public

principal attributes that, historically, distinguished common law "accusatorial" criminal procedure from the "inquisitorial" system that took root in so-called civil law countries (i.e., countries where the dominant legal tradition descends from Roman law)[2] in the sixteenth century under the influence of canonical law.[3] The publicity of the criminal trial has traditionally been regarded as a protection against oppressive use of the judicial power to impose punishment and as a means of safeguarding the right to a fair proceeding.[4] The most commonly-referenced outlier to the tradition of open criminal justice in Anglo-American legal history—the English Court of Star Chamber, abolished in 1641, which followed the inquisitorial practice of deciding criminal cases based on a written record of interrogations of the accused and witnesses,[5] and which may have conducted some interrogations in secret[6]—is generally considered by its infamy to have reaffirmed the paramount importance of public trials.[7] The tradition of holding public criminal trials was apparently well-established in the American colonies before the ratification of the Sixth Amendment.[8]

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trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial.").

[2] *See* John Henry Merryman & Rogelio Perez-Perdomo, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America 2–3 (3d ed. 2007) ("The traditional date of [the civil law tradition's] origin is 450 B.C., the supposed date of publication of the Twelve Tables in Rome. It is today the dominant legal tradition in Europe, all of Latin America, many parts of Asia and Africa, and even a few enclaves in the common law world (Louisiana, Quebec, and Puerto Rico).").

[3] *Id.* at 128 ("Historically, inquisitorial proceedings have tended to be secret and written rather than public and oral."). One should not confuse the historical and contemporary forms of criminal procedure in civil law countries, many of which have long since incorporated public trials into their criminal law systems. *Id.* at 131–32 (explaining that the predominant modern form of the criminal trial in civil law countries, though different in nature from the common law trial, is "a public event, which by its very publicity tends to limit the possibility of arbitrary governmental action."). Careful analysis of the differences between the modern accusatorial and inquisitorial systems does not yield simple conclusions about their comparative merit. *Id.* at 133 ("For those readers who wonder which is the more just system, the answer must be that opinion is divided. . . . The debate is clouded by . . . preconceptions that are difficult to dispel.").

[4] In re Oliver, 333 U.S. at 270 ("[T]he [public trial] guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.").

[5] *See* John H. Langbein et al., History of the Common Law: The Development of Anglo-American Legal Institutions 570 (2009) ("The cornerstone of European procedural systems, civil and criminal, as well as the . . . Star Chamber, was the ability to examine parties and witnesses under oath, preserving their responses as written evidence for the court."); Merryman & Perez-Perdomo, *supra* note 2, at 128 ("[T]he Star Chamber . . . was basically an inquisitorial tribunal. The Star Chamber was, however, exceptional in the common law tradition.").

[6] In re *Oliver*, 333 U.S. at 269 n.22 ("Some authorities have said that trials in the Star Chamber were public, but that witnesses against the accused were examined privately with no opportunity for him to discredit them. Apparently all authorities agreed that the accused himself was grilled in secret, often tortured . . . ."); *but see* John H. Langbein et al., *supra* note 5, at 575 (calling "quite false" the claim that the Star Chamber "used torture in its investigations," and suggesting that the tribunal's infamy arose instead from its "afflictive sanctions," such as amputation of the ears).

[7] *See* Gannett Co. v. DePasquale, 443 U.S. 368, 387 n.18 (1979) ("After the abolition of the Star Chamber in 1641, defendants in criminal cases began to acquire many of the rights that are presently embodied in the Sixth Amendment. . . . It was during this period that the public trial first became identified as a right of the accused."); In re *Oliver*, 333 U.S. at 268–69 ("The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet.") (footnotes omitted); Merryman & Perez-Perdomo, *supra* 2, at 128 (labeling the Star Chamber "[t]he most infamous analogue [to the secret and written criminal trial of the civil law tradition] familiar to us in the common law world").

[8] Richmond Newspapers, Inc., 448 U.S. at 567–68 ("We have found nothing to suggest that the presumptive openness of the trial, which English courts were later to call 'one of the essential qualities of a court of justice,' was not also an attribute of the judicial systems of colonial America.") (quoting Daubney v. Cooper (1829) 109 Eng. Rep. 438, 440); In re *Oliver*, 333 U.S. at 266–67; *see* Press-Enter. Co. v. Superior Ct., 464 U.S. 501, 508 (1984) ("Public jury selection thus was the common practice in America when the Constitution was adopted."). Congress did not discuss the public trial right in its debates on the Sixth Amendment. Harold Shapiro, *Right to a Public Trial*, 41 J. Crim. L. & Criminology 782, 783 (1951).

Amdt6.3.3 Right to a Public Trial Doctrine

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Supreme Court precedent establishes that the Sixth Amendment public trial right applies not only to criminal trials themselves,[1] but also to at least two types of pre-trial proceedings: hearings on motions to suppress evidence[2] and voir dire (when potential jurors are questioned during jury selection).[3] Such pre-trial proceedings, the Court has reasoned, can carry an importance commensurate with the trial itself[4] and, in the case of voir dire, were traditionally open to the public at common law.[5] Furthermore, guaranteeing a defendant's right to have such proceedings held openly vindicates the public trial right's object of harnessing the scrutiny of the community as a check against arbitrary, unfair, or irregular proceedings.[6] The Supreme Court has never considered whether the public trial right applies at sentencing.[7]

In two cases, the Court appeared to take contrasting positions as to whether the public trial right applies to one particular type of criminal proceeding: summary prosecutions for criminal contempt of court. Criminal contempt prosecutions are, in some circumstances, held as summary proceedings "to punish certain conduct committed in open court without notice, testimony or hearing."[8] In *In re Oliver*, decided in 1948, the Court held that it violated an accused's right to a public trial for a court to summarily try, convict, and sentence him in a secret grand jury proceeding (conducted by a state court judge acting as a one-man grand jury, in that case) for committing contempt by providing false and evasive testimony during the proceeding.[9] The Court seemed to ground this holding on the conclusion that the Fourteenth Amendment Due Process Clause incorporated the Sixth Amendment public trial right, making

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[1] In re *Oliver*, 333 U.S. 257, 265 (1948).

[2] Waller v. Georgia, 467 U.S. 39, 47 (1984) ("[W]e hold that under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests [governing the closure of public trials].").

[3] Presley v. Georgia, 558 U.S. 209, 213 (2010) ("[T]he Sixth Amendment right to a public trial extends to the voir dire of prospective jurors."); *see also* Weaver v. Massachusetts, No. 16-240, slip op. at 3 (U.S. June 22, 2017) ("*Presley* made it clear that the public-trial right extends to jury selection as well as to other portions of the trial."). Before *Presley*, "Massachusetts courts would often close courtrooms to the public during jury selection, in particular during murder trials.") (citation omitted).

[4] *Waller*, 467 U.S. at 46 ("[S]uppression hearings often are as important as the trial itself.").

[5] Press-Enter. Co. v. Superior Ct., 464 U.S. 501, 508 (1984).

[6] *Id.* ("[T]he sure knowledge that *anyone* is free to attend [a criminal trial] gives assurance that established procedures are being followed and that deviations will become known."); *Waller*, 467 U.S. at 46 ("The requirement of a public trial is for the benefit of the accused . . . that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . ") (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979)).

[7] 6 Wayne R. LaFave et al., Criminal Procedure § 24.1(a) (4th ed. 2020) (citing lower court opinions for the proposition that "[a]lthough the Supreme Court has not held whether the right to a public trial extends to sentencing proceedings, there is little doubt that it does").

[8] In re *Oliver*, 333 U.S. at 274.

[9] *Id.* at 272–73 ("In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.").

it applicable against the states.[10] Nonetheless, twelve years later in *Levine v. United States*, another case involving a recalcitrant grand jury witness convicted of contempt in a closed proceeding, the Court stated flatly that "[c]riminal contempt proceedings are not within 'all criminal prosecutions' to which th[e Sixth] Amendment applies."[11] *Levine*—authored by Justice Felix Frankfurter, who had dissented in *In re Oliver*—held that only the Due Process Clause, and not the Sixth Amendment (either directly or as made applicable to the states via incorporation through the Fourteen Amendment), protected an accused during a criminal contempt proceeding.[12] Further, *Levine* held that the exclusion of the public from the courtroom during the proceeding did not violate the more flexible due process protection so long as the defendant did not specifically object to the exclusion.[13]

In *Bloom v. Illinois*, decided eight years after *Levine*, the Court called *Levine* into doubt by holding that a different aspect of the Sixth Amendment—the jury trial clause—applies to some criminal contempt prosecutions.[14] Neither *Levine* nor *In re Oliver*, however, has been expressly overruled.[15] Whether the public trial right applies to criminal contempt proceedings thus remains unclear.[16]

As mentioned above, the Sixth Amendment public trial right belongs only to the criminal defendant and cannot be asserted by members of the press or public.[17] Members of the public may challenge their exclusion from a criminal trial under the First Amendment, however,[18] and as discussed in the next section, such First Amendment challenges appear to draw the same analysis as challenges to the closure of a criminal trial brought under the Sixth Amendment.[19]

Amdt6.3.4 Scope of Right to a Public Trial

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the*

[10] *See id.* (relying upon "the universal requirement of our federal and state governments that criminal trials be public" to support the conclusion that due process prohibits secret trials); Presley, 558 U.S. at 212 ("The Court in *In re Oliver* . . . made it clear that [the Sixth Amendment public trial] right extends to the States."); *but see* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 591 n.16 (1980) (Brennan, J., concurring in judgment) ("Notably, *Oliver* did not rest upon the simple incorporation of the Sixth Amendment into the Fourteenth, but upon notions intrinsic to due process . . . .").

[11] 362 U.S. 610, 616 (1960).

[12] *Id.* at 616–17 ("Inasmuch as the petitioner's claim thus derives from the Due Process Clause and not from one of the explicitly defined procedural safeguards of the Constitution, decision must turn on the particular circumstances of the case, and not upon a question-begging because abstract and absolute right to a 'public trial.'").

[13] *Id.* at 619 ("The continuing exclusion of the public in this case is not . . . deemed contrary to the requirements of the Due Process Clause without a request having been made to the trial judge to open the courtroom . . . .").

[14] *See* Bloom v. Illinois, 391 U.S. 194, 198 (1968) ("Our deliberations have convinced us . . . that serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution."). *Bloom* included a "but cf." citation to *Levine* after stating that "[i]t has . . . been recognized that the defendant in criminal contempt proceedings is entitled to a public trial before an unbiased judge." *Id.* at 205.

[15] *See*, *e.g.*, *id.* at 205 (citing *In re Oliver* with approval and acknowledging without overruling *Levine*).

[16] *See id.*

[17] *Gannett*, 443 U.S. at 391 ("[M]embers of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials.").

[18] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 at 580 (1980) ("We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment . . . ") (footnotes omitted).

[19] Amdt6.2.4 Early Doctrine on Right to a Speedy Trial to Amdt6.2.9 Prejudice and Right to a Speedy Trial (discussing scope of the right to a speedy trial).

> *nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Supreme Court has determined that the right to a public trial, like most constitutional safeguards, is not absolute but is instead subject to balancing against countervailing governmental or public interests.[1] As the Court summarized in the 2017 case of *Weaver v. Massachusetts*, "courtroom closure is to be avoided, but . . . there are some circumstances when it is justified. The problems that may be encountered by trial courts in deciding whether some closures are necessary, or even in deciding which members of the public should be admitted when seats are scarce, are difficult ones."[2] Three decades earlier, in *Waller v. Georgia*, the Court held that the test that governs First Amendment claims against the closure of criminal proceedings also governs public trial claims brought by criminal defendants under the Sixth Amendment.[3] The *Waller* Court, drawing from the First Amendment case of *Press-Enterprise Co. v. Superior Court*,[4] articulated this test as follows:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.[5]

In *Waller* and the 2010 case *Presley v. Georgia*, the Court clarified aspects of the test. First, "overriding interests" favoring closure probably do not include preventing risks inherent to all open trials (such as the risk that the jury might overhear prejudicial comments from the gallery), absent a "specific threat or incident" that aggravates a risk in a particular case.[6] Second, courts must narrowly tailor any closure of proceedings to the specific subset of the attending public and the specific portion of the proceedings that gives rise to the overriding interest in closure.[7] Thus, in the context of voir dire, an interest in protecting prospective jurors from embarrassment only justifies closure when a prospective juror requests privacy in answering a question.[8] Finally, a trial court must consider reasonable alternatives to closure before excluding the public from proceedings, even if the parties do not propose any such alternatives.[9]

On how to remedy a violation of the public trial right, the Supreme Court has held that a defendant who has suffered such a violation need not show prejudice to obtain relief,[10] so long

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[1] Presley v. Georgia, 558 U.S. 209, 213 (2010); Waller v. Georgia, 467 U.S. 39, 47–48 (1984).

[2] No. 16-240, slip op. at 8 (U.S. June 22, 2017).

[3] *Waller*, 467 U.S. at 47.

[4] 464 U.S. 501, 510 (1984).

[5] *Waller*, 467 U.S. at 48. The Court reaffirmed this formulation as the controlling test in *Presley*. 558 U.S. at 214.

[6] *Id.* at 215.

[7] *See Waller*, 467 U.S. at 49 (noting that prosecutorial concern for the privacy of individuals mentioned on tapes to be played at suppression hearing would only have justified closure of two and half hours of the seven-day hearing).

[8] Press-Enter. Co. v. Superior Ct., 464 U.S. 501, 512 (1984).

[9] *Presley*, 558 U.S. at 214 ("[T]rial courts are required to consider alternatives to closure even when they are not offered by the parties . . . "); *Waller*, 467 U.S. at 48.

[10] *Waller*, 467 U.S. at 49–50; *see also* United States v. Gonzalez-Lopez, 548 U.S. 140, 149 (2006) (citing *Waller* for the proposition that violations of the right to public trial are structural and not subject to harmless error analysis); Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (same).

as the defendant preserves the issue by objecting and raising it on direct appeal.[11] This rule of automatic relief rests on the notion that the benefits of a public trial, despite carrying enough significance to warrant express protection in the Bill of Rights, are "frequently intangible, difficult to prove, or a matter of chance."[12] Entitlement to relief for a preserved violation of the public trial right, however, does not necessarily entail entitlement to a new trial.[13] "Rather, the remedy should be appropriate to the violation."[14] In *Waller*, where the violation occurred in the form of a closed pre-trial suppression hearing, and where the defendant was thereafter convicted in an open trial, the Court ordered a new suppression hearing. The Court instructed, however, that a new trial should follow only if the public suppression hearing resulted in a material change to the scope of admissible evidence or the parties' positions.[15]

Amdt6.4 Right to Trial by Jury

Amdt6.4.1 Overview of Right to Trial by Jury

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Sixth Amendment guarantees the right to trial by jury for criminal defendants charged with non-petty offenses.[1] Article III of the Constitution also provides for jury trials in criminal cases.[2] As such, the Supreme Court has recognized that the Constitution protects the accused's right to trial by jury twice,[3] although the Court has grounded its analysis of the right primarily in the Sixth Amendment.[4]

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[11] *Weaver*, slip op. at 9. In contrast, to prevail on a claim of ineffective assistance of counsel on the ground that defense counsel incompetently failed to object to a courtroom closure, the defendant must show "either a reasonable probability of a different outcome in his or her case or . . . that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair." *Id.* at 12.

[12] *Waller*, 467 U.S. at 49 n.9; *see also Weaver*, slip op. at 9 ("[A] public-trial violation is structural . . . because of the 'difficulty of assessing the effect of the error.'") (quoting *Gonzalez-Lopez*, 548 U.S. at 149 n.4).

[13] *Id.* at 50.

[14] *Id.*

[15] *Id.*

[1] Southern Union Co. v. United States, 567 U.S. 343, 350–51 (2012); *see* Amdt6.4.3.3 Petty Offense Doctrine and Maximum Sentences Over Six Months.

[2] Art. III, § 2; *see* ArtIII.S2.C3.1 Jury Trials.

[3] Ramos v. Louisiana, No. 18-5924, slip op. at 4 (U.S. Apr. 20, 2020) (explaining that the Constitution guarantees criminal jury trials "*twice*—not only in the Sixth Amendment, but also in Article III") (emphasis in original); *see also* Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting in part) ("When this Court deals with the content of this [criminal jury trial] guarantee—the only one to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of American democracy.").

[4] *See, e.g., Ramos*, slip op. at 4, 7 (noting that both the Sixth Amendment and Article III provide for jury trials in criminal cases, but proceeding to analyze only the Sixth Amendment in holding that the right to a jury trial requires a unanimous verdict in both state and federal court); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (noting the Article III provision but grounding the analysis of whether the jury trial right applies in state court in the Sixth and Fourteenth Amendments; "we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee"); *cf.* Patton v. United States, 281 U.S. 276, 298 (1930) (reasoning that the Sixth Amendment and Article III jury trial provisions "mean substantially the same thing" and the Sixth Amendment "fairly may be regarded as reflecting the meaning of" the Article III provision).

By virtue of its incorporation through the Fourteenth Amendment Due Process Clause, the Sixth Amendment right to trial by jury applies in both federal and state court.[5] A criminal defendant may, however, waive the right and agree to a trial before a judge alone.[6] A valid waiver requires the "express and intelligent consent" of the defendant,[7] along with the consent of the court and the prosecution.[8] In a similar vein, a defendant may plead guilty in lieu of trial.[9] A valid guilty plea requires knowing and intelligent waiver of the right to trial by jury,[10] among other constitutional rights.[11]

Amdt6.4.2 Historical Background on Right to Trial by Jury

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The use of juries in criminal cases dates back to medieval England.[1] By the time of the founding, the right to trial by jury was well-recognized as a safeguard against the arbitrary

[5] *Ramos*, slip op. at 7. But the Supreme Court has yet to hold that the Fourteenth Amendment incorporates the Sixth Amendment vicinage requirement—i.e., the requirement that the jury be "of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." *See* Stevenson v. Lewis, 384 F.3d 1069, 1071 (9th Cir. 2004); Amdt6.4.7 Notice of Accusation.

[6] *Patton*, 281 U.S. at 312.

[7] *Id*. at 312–13; *see also* Adams v. United States *ex rel*. McCann, 317 U.S. 269, 278 (1942) ("There is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer.").

[8] *Patton*, 281 U.S. at 312; Singer v. United States, 380 U.S. 24, 34 (1965) (holding that the waiver of a jury trial in a criminal case "can be conditioned upon the consent of the prosecuting attorney and the trial judge"); *see* Fed. R. Crim. P. 23(a) (requiring government consent and court approval).

[9] *See* Blackledge v. Allison, 431 U.S. 63, 71 (1977) ("Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned.").

[10] Brady v. United States, 397 U.S. 742, 748 (1970) ("[T]he [guilty] plea . . . is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.").

[11] United States v. Ruiz, 536 U.S. 622, 629 (2002) (explaining that a defendant who pleads guilty "forgoes not only a fair trial, but also other accompanying constitutional guarantees" and citing precedent for the proposition that these guarantees include "the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to confront one's accusers, and the Sixth Amendment right to trial by jury"). Guilty pleas and plea bargaining practices also implicate other questions of constitutional law. *See, e.g.,* Missouri v. Frye, 566 U.S. 134, 145 (2012) ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."); Bordenkircher v. Hayes, 434 U.S. 357, 358 (1978) (considering "whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged," and holding that no due process violation occurred).

[1] John H. Langbein et al., History of the Common Law 59–60 (2009) ("When the Fourth Lateran Council of 1215 destroyed the ordeals, a different mode of proof had to be devised. Jury trial was already in use in English criminal procedure in some exceptional situations, as an option available to a defendant who wished to avoid trial by battle or by ordeal. The path of inclination for the English was thus to extend jury procedure to fill the enormous gap left by the abolition of the ordeals."); Paul Marcus et al., Rights of the Accused under the Sixth Amendment 47 (2d ed. 2016) ("In the English common law, the right to a jury trial in criminal cases developed in response to the law's need to abandon the old trials by ordeal."); *see* Duncan v. Louisiana, 391 U.S. 145, 151 (1968) ("[B]y the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta."); Francis H. Heller, The Sixth Amendment 6–7 (1951). The once-widespread notion

exercise of power.[2] William Blackstone, in eighteenth century commentary familiar to the Framers, described the right as a bedrock guarantee of English criminal procedure:

> Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown. . . . [T]he founders of the English law have, with excellent forecast, contrived, that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion.[3]

Most colonial charters protected the right to jury trial by guaranteeing colonists the enjoyment of the "liberties and immunities of Englishmen."[4] The constitutions of each of the original thirteen states also guaranteed the right.[5]

During colonial times, "[r]oyal interference with the jury trial was deeply resented."[6] Such interference took the form of numerous exceptions to the accused's right to trial by jury.[7] Many of the exceptions were for minor offenses, but some "bordered on serious felonies and were punished with appropriate severity."[8] As the Framers debated adding a Bill of Rights to the original Constitution, concerns surfaced that the jury trial provision of Article III offered the accused inadequate protection.[9] Debate focused, in particular, over whether to build out the constitutional guarantee by including, in what eventually became the Sixth Amendment, a vicinage requirement (that is, a requirement that the jury be drawn locally)[10] and language entitling the accused to strike potential jurors.[11] Criminal jury trial procedure took a variety of forms in the colonies,[12] which complicated the debate: representatives of some colonies were wary of procedural mandates that, if too specific, might clash with existing practices at home.[13] The language that was ultimately ratified as the Sixth Amendment jury trial provision

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that Magna Carta recognized the right to trial by jury in criminal cases has been discredited. *Duncan*, 391 U.S. at 151 n.16; Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 922 (1926) ("That the modern institution of trial by jury derives from Magna Carta is one of the most revered of legal fables."); *cf.* HELLER, *supra* note 1, at 15 ("Considering the almost religious veneration accorded to that document [Magna Carta] by the great majority of the people both in England and in this country, it is more important to recognize the fact that our ancestors associated trial by jury with this renowned mainspring of liberty than to insist that in so doing they were guilty of historical error.").

[2] *Duncan*, 391 U.S. at 151; Williams v. Florida, 399 U.S. 78, 87 (1970).

[3] 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769); *see* United States v. Wood, 299 U.S. 123, 138 (1936) ("Undoubtedly, as we have frequently said, the framers of the Constitution were familiar with Blackstone's Commentaries. Many copies of the work had been sold here and it was generally regarded as the most satisfactory exposition of the common law of England.").

[4] Frankfurter & Corcoran, *supra* note 1 at 934–37; HELLER, *supra* note 1, at 14.

[5] *Duncan*, 391 U.S. at 153.

[6] *Id*. at 152.

[7] Frankfurter & Corcoran, *supra* note 1 at 933 ("The settled practice in which the founders of the American colonies grew up reserved for the justices innumerable cases in which the balance of social convenience, as expressed in legislation, insisted that proceedings be concluded speedily and inexpensively.").

[8] *Id*. at 927.

[9] Williams v. Florida, 399 U.S. 78, 93 (1970); HELLER, *supra* note 1 at 25.

[10] *Williams*, 399 U.S. at 93 n.35 ("Technically, 'vicinage' means neighborhood, and 'vicinage of the jury' meant jury of the neighborhood or, in medieval England, jury of the county.").

[11] HELLER, *supra* note 1 at 25–26.

[12] *Id.* at 15 ("The jury trial of colonial days is . . . not a rigid copy of its English prototype but rather the result of variegated experiences, experimentation, and adaptation.").

[13] *Id*. at 15, 27.

represents an apparent compromise between the desire to bolster what was seen as an essential guarantee and the desire to leave the language capacious enough to embrace the range of colonial practices.[14]

Amdt6.4.3 When the Right Applies

Amdt6.4.3.1 Early Jurisprudence on Right to Trial by Jury

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Sixth Amendment, by its plain language, extends its guarantees to "all criminal prosecutions." Yet the Supreme Court has long excluded a category of minor offenses—called "petty offenses" in the doctrine, as distinct from "serious offenses"—from the reach of the right to trial by jury.[1] Considerations both historical and practical have served as justifications for this textual departure: as the Supreme Court recognized, "[s]o-called petty offenses were tried without juries both in England and in the Colonies . . . and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from . . . inexpensive nonjury adjudications."[2]

The early doctrine did not trace a neat divide between petty and serious offenses but instead based the distinction on a broad analysis of the nature of each offense.[3] This analysis considered the following factors: (1) whether the offense was triable by jury at common law; (2) whether the proscribed conduct was *malum in se* (i.e., inherently wrong)[4] or merely *malum prohibitum* (i.e., prohibited by law but not inherently wrong)[5]; and (3) the maximum statutory penalty.[6] Under this analysis, the Court held that the crime of reckless driving at excessive speed was not petty (and accordingly triggered the jury trial right), even though it carried a maximum penalty of only 30 days in jail, because the crime was indictable at common law and

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[14] *Id*. at 33–34; *cf.* Ramos v. Louisiana, No. 18-5924, slip op. at 12 (U.S. Apr. 20, 2020) (reasoning that the Senate might have deleted language about the right of challenge and other specific requirements from the original draft of the Sixth Amendment "because all this was so plainly included in the promise of a 'trial by an impartial jury' that Senators considered the language surplusage.")

[1] *See* Callan v. Wilson, 127 U.S. 540, 552 (1888) ("According to many adjudged cases, arising under constitutions which declare, generally, that the right of trial by jury shall remain inviolate, there are certain minor or petty offenses that may be proceeded against summarily, and without a jury . . . .").

[2] Duncan v. Louisiana, 391 U.S. 145, 160 (1968). For a criticism of the petty offense doctrine, see Baldwin v. New York, 399 U.S. 66, 75 (1970) (Black, J., concurring in judgment) ("The Constitution guarantees a right of trial by jury in two separate places but in neither does it hint of any difference between 'petty' offenses and 'serious' offenses. . . . Many years ago this Court, without the necessity of an amendment pursuant to Article V, decided that 'all crimes' [for purposes of Article III and the Sixth Amendment] did not mean 'all crimes,' but meant only 'all serious crimes.'").

[3] *See Callan*, 127 U.S. at 555.

[4] *Malum in se*, Black's Law Dictionary (11th ed. 2019).

[5] *Malum prohibitum*, Black's Law Dictionary (11th ed. 2019).

[6] District of Columbia v. Clawans, 300 U.S. 617, 624–25 (1937); District of Columbia v. Colts, 282 U.S. 63, 73 (1930); Schick v. United States, 195 U.S. 65, 67 (1904).

covered conduct that the Court considered *malum in se*.[7] In contrast, the crime of conducting a secondhand sales business without a license, which had a maximum statutory penalty of ninety days' imprisonment, was petty, the Court held, because it was not a crime at common law and amounted only to a breach of regulations (i.e., was *malum prohibitum*).[8] Even these early cases, however, presaged in dicta the clearer rule that constitutes the Court's current doctrine: crimes punishable by more than six months' imprisonment cannot be deemed petty and are therefore subject to the jury trial right.[9]

The Court's early doctrine on the right to jury trial also made special provision for summary trials for criminal contempt of court. In a long line of cases, the Court held consistently that the right simply did not apply to prosecutions for criminal contempt.[10] These cases reasoned that contempt in England had not been triable by jury since at least the early eighteenth century,[11] and that courts would lose power to enforce their orders effectively and maintain courtroom decorum if required to submit cases of contempt to juries for adjudication.[12] Perhaps the most historically significant of these cases was also one of the most recent. In *United States v. Barnett*, the Court held that the governor and lieutenant governor of Mississippi did not have a right to a jury trial in a contempt prosecution for obstructing state officials' compliance with federal court orders directing the University of Mississippi to admit an African-American student.[13] But while the *Barnett* Court reiterated the rule against applying the jury trial right to contempt,[14] the Court also expressed discomfort with the rule's absoluteness.[15] In *Cheff v. Schnackenberg*, decided two years later, the Court divided over the issue, with a plurality of four justices concluding that contempt did not require a jury trial so long as the actual sentence imposed did not exceed six months,[16] while two concurring justices held to the absolute rule that the Sixth Amendment does not require a jury trial for any contempt offense.[17] Criminal contempt continues to receive unique treatment under the Court's current doctrine on the jury trial right.

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[7] *Colts*, 282 U.S. at 73 ("The offense here charged is not merely malum prohibitum, but in its very nature is malum in se. . . . An automobile is, potentially, a dangerous instrumentality, as the appalling number of fatalities brought about every day by its operation bear distressing witness. To drive such an instrumentality through the public streets of a city so recklessly 'as to endanger property and individuals' is an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense.").

[8] *Clawans*, 300 U.S. at 630.

[9] *Id*. at 627–28 ("[W]e may doubt whether summary trial with punishment of more than six months' imprisonment, prescribed by some pre-Revolutionary statutes, is admissible, without concluding that a penalty of ninety days is too much.").

[10] Green v. United States, 356 U.S. 165, 183 (1958) ("The statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right.").

[11] *Id*. at 185–86.

[12] United States v. Barnett, 376 U.S. 681, 697, 700 (1964); *see also* Bloom v. Illinois, 391 U.S. 194, 196 (1968) (explaining that the Court's early cases construed "the Sixth Amendment as permitting summary trials in contempt cases because at common law contempt was tried without a jury and because the power of courts to punish for contempt without the intervention of any other agency was considered essential to the proper and effective functioning of the courts and to the administration of justice").

[13] *Id*. at 685–86, 692.

[14] *Id*. at 692 ("[I]t is urged that those charged with criminal contempt have a constitutional right to a jury trial. This claim has been made and rejected here again and again.").

[15] *Id*. at 695 n.12 ("Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses.").

[16] 384 U.S. 373, 380 ("[W]e rule . . . that sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof.").

[17] *Id*. at 381–82 (Harlan, J., concurring in the result).

Amdt6.4.3.2 Right to Trial by Jury Generally

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Supreme Court's current doctrine on the applicability of the Sixth Amendment right to jury trial comprises two major principles: (1) the right applies to prosecutions for any offense with a maximum authorized penalty that exceeds six months' imprisonment, because such offenses are not "petty";[1] and (2) the right applies to the adjudication of all elements of a criminal offense, a category that includes any fact (other than the fact of a prior conviction) that increases the minimum or maximum applicable penalty.[2] As a result of this second principle, a statutory sentencing scheme cannot constitutionally delegate determination of any penalty-increasing fact to the judge at sentencing.[3] Aside from these two major points, the Court has also established that the right to jury trial does not apply in juvenile court proceedings,[4] military cases (e.g., courts martial),[5] or proceedings to determine whether a defendant is intellectually disabled and therefore protected from capital punishment under the Eighth Amendment.[6]

Amdt6.4.3.3 Petty Offense Doctrine and Maximum Sentences Over Six Months

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Under its earlier, multi-factor approach to defining petty offenses, the Supreme Court had given close and arguably preeminent consideration to the maximum statutory penalty.[1] In

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[1] Blanton v. City of North Las Vegas, 489 U.S. 538, 542 (1989).

[2] Alleyne v. United States, 570 U.S. 99, 111 (2013) ("[A]ny 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime . . . [and] the Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt."); *id*. at 113 n.2 ("Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range *and* does so in a way that aggravates the penalty.").

[3] *Id*. at 113 n.2.

[4] McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) ("[W]e conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement.").

[5] United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 37 (1955) ("Defendants in cases arising in the armed forces, we think, are not entitled to demand trial by jury, whether the crime was committed on foreign soil or at a place within a State or previously ascertained district."); *see* Amdt5.2.3 Military Exception to Grand Jury Clause.

[6] Schriro v. Smith, 546 U.S. 6, 7 (2005); *see also* Atkins v. Virginia, 536 U.S. 304, 317 (2002).

[1] *See* Duncan v. Louisiana, 391 U.S. 145, 159–60 (1968) ("[T]he penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment."); District of Columbia v. Clawans, 300 U.S. 617, 624–25 (1937) (construing the question before it as "whether the penalty, which may be imposed for the present offense, of ninety days in a common jail, is sufficient to bring it within the class of major offenses, for the trial of which a jury may be demanded").

Baldwin v. New York, however, the Court fashioned from this criterion a bright line rule, stating: "we have concluded that no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized."[2] Robert Baldwin was charged in New York City with a pick-pocketing offense called "jostling," punishable by a maximum of one year in prison.[3] Under a New York City statute, he was not eligible for a jury trial and, over his Sixth Amendment objection, was tried and convicted before a judge instead.[4] The Supreme Court, in pronouncing its bright line rule and holding that the denial of Baldwin's request for a jury trial violated his Sixth Amendment right, relied primarily upon legislative consensus.[5] Apart from New York City, the Court observed, no jurisdiction within the United States denied criminal defendants the right to jury trial for crimes with a maximum penalty exceeding six months' imprisonment.[6] The Court reasoned that this "near-uniform" legislative judgment about when the jury trial right should apply constituted "the only objective criterion by which a line could ever be drawn—on the basis of the possible penalty alone—between offenses that are and that are not regarded as 'serious' for purposes of trial by jury."[7] In the messy business of line-drawing, in other words, legislative consensus provided the best and only mark.[8] The Court also concluded that the six-month rule struck the appropriate balance between the accused's interest in "interpos[ing] between himself and a possible prison term . . . the commonsense judgment of a jury of his peers,"[9] on the one hand, and the government's interest in efficient and inexpensive adjudications, on the other hand.[10]

Although *Baldwin* established that the right to jury trial applies whenever the maximum sentence for an offense exceeds six months, the case did not address the counter-proposition: whether the right necessarily does *not* apply when the maximum sentence for the charged offense does not exceed six months' imprisonment.[11]

The Court took up this question in *Blanton v. City of North Las Vegas*, where it established a "presumption"—but not a rule—that an offense with a maximum sentence of six months or less is petty for Sixth Amendment purposes and thus outside the reach of the jury trial right.[12] A defendant might rebut this presumption in a "rare situation" by demonstrating "that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the

[2] 399 U.S. 66, 69 (1970) (plurality opinion). A plurality of only three Justices supported the bright-line rule, but because two additional Justices concurred in the judgment on a much broader ground (that the Sixth Amendment requires a jury trial for all crimes, petty or not), the plurality opinion set the petty offense doctrine. *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 542 (1989) ("[O]ur decision in *Baldwin* established that a defendant is entitled to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of greater than six months.").

[3] *Baldwin*, 399 U.S. at 67.

[4] *Id*. at 67–68.

[5] *Id*. at 70–71.

[6] *Id*. at 71–72 ("In the entire Nation, New York City alone denies an accused the right to interpose between himself and a possible prison term of over six months, the commonsense judgment of a jury of his peers.").

[7] *Id*. at 72–73.

[8] *Id*.

[9] *Id*. at 72.

[10] *Id*. at 73–74 ("Where the accused cannot possibly face more than six months' imprisonment, we have held that the[ ] disadvantages [of criminal conviction without jury trial], onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications.").

[11] *Id*. at 69 n.6 ("In this case, we decide only that a potential sentence in excess of six months' imprisonment is sufficiently severe by itself to take the offense out of the category of 'petty.'").

[12] 489 U.S. 538, 543 (1989) ("Although we did not hold in *Baldwin* that an offense carrying a maximum prison term of six months or less automatically qualifies as a 'petty' offense, and decline to do so today, we do find it appropriate to presume for purposes of the Sixth Amendment that society views such an offense as 'petty.'").

offense in question is a 'serious' one."[13] In *Blanton*, the defendants faced charges for driving under the influence of alcohol (DUI), punishable under Nevada law by a term of imprisonment ranging from two days to six months, a fine ranging from $200 to $1,000, a ninety-day driver's license suspension, and a mandatory course on alcohol abuse.[14] As an alternative to the prison term, the statute authorized the trial court to order offenders to perform forty-eight hours of community service in garb identifying them as DUI offenders.[15] The Court held that these statutory penalties, as a package, were not sufficiently severe to rebut the petty offense presumption arising from the absence of a potential prison term exceeding six months.[16] In particular, the Court concluded that the $1,000 maximum fine fell well within the range of fines typically associated with petty offenses, and that the alternate punishment of two days of community service in DUI-offender clothing did not impose a burden or level of embarrassment commensurate with a prison sentence exceeding six months.[17]

In the wake of *Blanton*, it remained unclear what kind of alternate penalties might suffice to render an offense punishable by a maximum prison sentence of six months or less (and, accordingly, subject to the presumption of pettiness) "serious" so as to trigger a right to a trial by jury under the Sixth Amendment.[18] The Court reiterated after *Blanton*, in a case holding the jury trial right inapplicable to a federal DUI offense, that alternate, non-incarceration penalties would trigger the right only in "rare case[s]."[19] On the other side of the ledger, a more recent case acknowledged, without having to decide the issue, that a federal environmental statute providing for a fine of $50,000 for each day of an ongoing violation—and therefore capable of triggering aggregate fines into the tens of millions of dollars—imposed a punishment sufficiently serious to fall within the jury trial right.[20]

The other cases that bear most directly on the issue of when non-incarceration penalties trigger the jury trial right concern the imposition of large fines in criminal contempt prosecutions. Even before *Baldwin*, the Court had overruled its early doctrine treating contempt as a thing apart when it held that a case of "serious" contempt, like all other serious crimes, was subject to the jury trial right.[21] The test the Court ultimately adopted to distinguish petty and serious cases of contempt, however, turns on the "penalty actually imposed" rather than the maximum statutory penalty.[22] This distinction was necessary

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[13] *Id*.

[14] *Id*. at 539–40.

[15] *Id*. at 539.

[16] *Id*. at 544–45.

[17] *Id*. at 544.

[18] *See id*. at 543 (calling the standard for rebutting the petty offense presumption "somewhat imprecise" but indicating that it "should ensure the availability of a jury trial in the rare situation where a legislature" makes a serious offense punishable by "onerous penalties" other than a prison term exceeding six months).

[19] United States v. Nachtigal, 507 U.S. 1, 5 (1993).

[20] Southern Union Co. v. United States, 567 U.S. 343, 352 (2012) ("The [statute] subjects Southern Union to a maximum fine of $50,000 for each day of violation. The Government does not deny that, in light of the seriousness of that punishment, the company was properly accorded a jury trial.") (citation omitted). The corporate defendant faced a maximum potential fine of $38.1 million for a 762-day violation and was sentenced to pay a total of $18 million, *id*. at 347, but the Supreme Court held the sentence unconstitutional because a judge rather than a jury determined the duration of the violation. *Id*. at 352; Amdt6.4.3.7 Other Applications of Apprendi.

[21] Bloom v. Illinois, 391 U.S. 194, 208 (1968) ("If the right to jury trial is a fundamental matter in other criminal cases, which we think it is, it must also be extended to criminal contempt cases."); *id*. at 209 ("[M]any contempts are not serious crimes but petty offenses not within the jury trial provisions of the Constitution. When a serious contempt is at issue, considerations of efficiency must give way . . . .").

[22] Muniz v. Hoffman, 422 U.S. 454, 476 (1975) ("[C]riminal contempt, in and of itself and without regard to the punishment imposed, is not a serious offense absent legislative declaration to the contrary . . . but imprisonment for longer than six months is constitutionally impermissible unless the contemnor has been given the opportunity for a jury trial."); Taylor v. Hayes, 418 U.S. 488, 495 (1974) ("[O]ur cases hold that petty contempt like other petty criminal

because varying degrees of contempt often do not have maximum penalties fixed in statute.[23] In *Muniz v. Hoffman*, the Court held that imposing, against a labor union defendant, a $10,000 fine with no prison sentence did not render a criminal contempt prosecution serious for Sixth Amendment purposes.[24] "Imprisonment and fines are intrinsically different" in terms of the deprivation they impose on a contemnor, the Court reasoned.[25] While the Court refused to rule out the possibility that a fine by itself could trigger the jury trial right in some cases, it held that the $10,000 fine imposed on a union with 13,000 members was not "of such magnitude" as to make the contempt prosecution "serious."[26] In contrast, in *International Union, United Mine Workers of America v. Bagwell*, also involving labor union defendants, the Court held that the much larger criminal contempt fine of $52 million did trigger the jury trial right.[27] *Bagwell* and *Muniz*, although decided under the modified petty offense test that applies to criminal contempt prosecutions, together cast some light on the issue of when non-incarceration penalties cross the threshold of a "serious" offense: enormous fines like the one in *Bagwell* clearly do cross the threshold,[28] but even substantial fines like the $10,000 sum at issue in *Muniz* fall beneath the line and constitutionally may be prescribed for offenses tried without a jury.[29]

A defendant charged with multiple counts does not have a right to a jury trial based on the aggregated maximum potential sentence on all counts combined; rather, the maximum statutory penalty for each individual offense controls the analysis.[30] In *Lewis v. United States*, the defendant faced two counts of obstructing the mail, each punishable by a maximum prison term of six months.[31] The Supreme Court rejected the defendant's argument that the total potential prison term of one year triggered the jury trial right.[32] The Court reasoned that the legislative determination of the seriousness of an offense, as reflected in the maximum

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offenses may be tried without a jury and that contempt of court is a petty offense when the penalty actually imposed does not exceed six months or a longer penalty has not been expressly authorized by statute.").

[23] Frank v. United States, 395 U.S. 147, 149 (1969) ("[I]n prosecutions for criminal contempt where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense."); *Bloom*, 391 U.S. at 211.

[24] 422 U.S. 454, 476–77 (1975).

[25] *Id*. at 477.

[26] *Id*.

[27] 512 U.S. 821, 837 n.5 ("We need not answer today the difficult question where the line between petty and serious contempt fines should be drawn, since a $52 million fine unquestionably is a serious contempt sanction."). The *Bagwell* Court also addressed the antecedent question of whether a contempt penalty is civil or criminal in nature. *Id*. at 836–38 (determining the criminal or civil nature of a contempt order in light of "the character of the entire decree" and holding that the $52 million contempt fine was criminal because the defendants had no opportunity to purge the fine once imposed, the underlying misconduct occurred outside of the court's presence and consisted of "widespread" violations of a "complex injunction" resembling an "entire code of conduct," and because the fine itself was so severe). The Court has most often taken up the question of whether a proceeding is civil or criminal in the due process context. *See, e.g.,* Hicks v. Feiock, 485 U.S. 624, 637 (1988) (considering whether a contempt proceeding was criminal in nature so as to trigger the due process requirement that the government carry the burden of proof beyond a reasonable doubt).

[28] *See Bagwell*, 512 U.S. at 837 n.5; *see also* Southern Union Co. v. United States, 567 U.S. 343, 351 (2012) (stating that "not all fines are insubstantial, and not all offenses punishable by fines are petty" and citing as authority federal court judgments imposing criminal fines of $400 million, $448.5 million, and $1.195 billion).

[29] *Muniz*, 422 U.S. at 476–77; United States v. Nachtigal, 507 U.S. 1, 5 (1993) (holding that a maximum $5,000 fine and the possibility of certain "discretionary [sentencing] conditions," such as the payment of restitution or obligatory participation in a program at a community correctional facility, did not render a DUI offense with a maximum prison term of six months "serious").

[30] Lewis v. United States, 518 U.S. 322, 330 (1996) ("Where the offenses charged are petty, and the deprivation of liberty exceeds six months only as a result of the aggregation of charges, the jury trial right does not apply.").

[31] *Id*. at 324.

[32] *Id*. at 327.

authorized sentence, governs the applicability of the jury trial right.[33] The maximum potential penalty faced by particular defendants based on the circumstances of their individual prosecutions is not relevant to that legislative judgment and thus not relevant to the Sixth Amendment question, the Court determined.[34] In other words, the constitutional issue of whether the jury trial right applies turns on the statutorily-defined offense, not on the case against the defendant.[35] In reaching this holding, the *Lewis* Court distinguished its earlier opinion in *Codispoti v. Pennsylvania*—which had held that the jury trial right applied where the total sentence imposed for multiple criminal contempt violations exceeded six months (even though none of the individual violations triggered a sentence over six months)[36]—on the ground that the contempts at issue there did not have a statutory maximum penalty and therefore did not reveal a legislative judgment as to their seriousness.[37]

Amdt6.4.3.4 Increases to Minimum or Maximum Sentences and Apprendi Rule

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Since the landmark case *Apprendi v. New Jersey*,[1] decided in 2000, Supreme Court jurisprudence on the applicability of the jury trial right has focused on the constitutionality of sentencing laws that delegate to judges rather than juries the determination of certain facts that affect the range of potential sentences for a crime. Before *Apprendi*, the Court had upheld such laws on the reasoning that although the jury trial right extended to every element of a criminal offense,[2] it did not extend to "sentencing factors."[3] *Apprendi* changed this doctrine.

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[33] *Id*. ("[W]e determine whether an offense is serious by looking to the judgment of the legislature, primarily as expressed in the maximum authorized term of imprisonment.").

[34] *Id*. ("The fact that the petitioner was charged with two counts of a petty offense does not revise the legislative judgment as to the gravity of that particular offense . . . ."); *id*. at 328 ("Where we have a judgment by the legislature that an *offense* is "petty," we do not look to the potential prison term faced by a *particular defendant* who is charged with more than one such petty offense.") (emphasis in original).

[35] *Id*. at 328.

[36] 418 U.S. 506, 509, 517 (1974) ("We find unavailing respondent's . . . argument that petitioners' contempts were separate offenses and that, because no more than a six months' sentence was imposed for any single offense, each contempt was necessarily a petty offense triable without a jury.").

[37] *Lewis*, 518 U.S. at 328 ("In such a situation, where the legislature has not specified a maximum penalty, courts use the severity of the penalty actually imposed as the measure of the character of the particular offense.").

[1] 530 U.S. 466 (2000).

[2] *See* United States v. Gaudin, 515 U.S. 506, 510 (1995) (holding that the Fifth and Sixth Amendments together "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt"); *id*. at 511 ("The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality.").

[3] McMillan v. Pennsylvania, 477 U.S. 79, 85–86, 93 (1986) (upholding against due process and Sixth Amendment challenges a statutory sentencing scheme under which a judge's factual determination that the defendant "visibly possessed a firearm" during the commission of certain felonies triggered an otherwise inapplicable five-year mandatory minimum sentence) ("[T]he Pennsylvania Legislature has expressly provided that visible possession of a firearm is not an element of the crimes enumerated in the mandatory sentencing statute, but instead is a sentencing factor that comes into play only after the defendant has been found guilty of one of those crimes beyond a reasonable doubt.") (citation omitted), *overruled by* Alleyne v. United States, 570 U.S. 99, 103 (2013); *see also* Walton v. Arizona, 497

The defendant in the case was convicted of a firearms offense punishable by a maximum prison term of ten years.[4] Under a separate sentencing-enhancement statute, however, the maximum penalty increased to twenty years after a trial judge determined by a preponderance of the evidence—at a hearing held after the defendant pleaded guilty—that the defendant committed the offense with the purpose of intimidating a group of individuals due to their race.[5] The trial court sentenced the defendant to twelve years in prison for the offense, two years above the statutory maximum that would have applied absent the judge-found fact.[6]

The Supreme Court held that this sentencing procedure violated the Sixth Amendment.[7] The Court articulated its essential holding as follows: "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[8] The jury trial right serves as a bulwark against unjust loss of liberty at the hands of government tyranny or oppression, the Court reasoned.[9] Accordingly it does not comport with the Sixth Amendment to take the determination of facts that can lead to increased punishment away from the jury,[10] especially in light of the historic connection between offense and punishment in the Anglo-American legal tradition.[11]

Amdt6.4.3.5 Sentencing Guidelines

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the*

U.S. 639, 649 (1990) (upholding a statutory scheme that conditioned imposition of the death penalty upon a judge's finding of certain aggravating factors), *overruled by* Ring v. Arizona, 536 U.S. 584, 589 (2002).

[4] *Apprendi*, 530 U.S. at 468 (noting that the offense was "possession of a firearm for an unlawful purpose," punishable by imprisonment for between five and ten years).

[5] *Id*. at 468–69, 471.

[6] *Id*. at 471.

[7] *Id*. at 490.

[8] *Id*. A passage in *Jones v. United States*, decided the year before, anticipated *Apprendi*'s holding, although the Court decided *Jones* on statutory grounds and did not make a clear constitutional holding. Jones v. United States, 526 U.S. 227, 243 n.6 (1999) ("[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. . . . [O]ur prior cases suggest rather than establish this principle."). As for the exception for the fact of a prior conviction, the Court held before *Apprendi* that judges could constitutionally determine such facts. Almendarez-Torres v. United States, 523 U.S. 224, 247 (1998) ("[W]e reject petitioner's constitutional claim that his recidivism must be treated as an element of his offense."). The Court has reaffirmed that holding after *Apprendi* while carefully delimiting its scope. *See* Mathis v. United States, 136 S. Ct. 2243, 2252 (2016) ("This Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction. That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. . . . [The judge] can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.").

[9] *Id*. at 477.

[10] *Id*. at 484 ("If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.").

[11] *Id*. at 480 ("Just as the circumstances of the crime and the intent of the defendant at the time of commission were often essential elements to be alleged in the indictment [at common law], so too were the circumstances mandating a particular punishment."); *id*. at 484 (noting "the historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided [by statute]").

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The rule of *Apprendi* upended the use of binding sentencing guidelines in state and federal courts. In *Blakely v. Washington*, decided in 2004, the defendant pleaded guilty to an offense (second degree kidnapping involving domestic violence and use of a firearm) with a statutory maximum sentence of ten years in prison based on the applicable felony class.[1] The state sentencing guidelines restricted the sentence to a "standard range" of forty-nine to fifty-three months, unless the trial judge found the presence of an aggravating factor that justified an "exceptional sentence" above the standard range.[2] The trial judge did find an aggravating factor (deliberate cruelty) and imposed a sentence of ninety months—thirty-seven months above the upper limit of the "standard range" but thirty months below the ten-year maximum linked to the felony class.[3] The Supreme Court held that the imposition of the sentence violated the Sixth Amendment,[4] stating "[t]he statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."[5] The ten-year offense maximum did not matter for Sixth Amendment purposes because the binding guidelines directed the judge to impose a sentence within the much lower "standard range" absent an aggravating factor.[6] The "standard range," therefore, constituted the maximum sentence authorized "*without* any additional findings"; the fact that a judge instead of a jury made the additional finding necessary to permit a sentence above this range violated the right to jury trial.[7]

The year after *Blakely*, the Supreme Court applied *Apprendi* to federal sentencing law in the 2005 case *United States v. Booker*.[8] Since 1987, federal statute had required (with limited exception) federal district courts to impose sentences within narrow ranges calculated under the Sentencing Guidelines of the United States Sentencing Commission.[9] *Booker* produced two separate majority opinions: one majority struck down a sentence imposed under the mandatory federal guidelines as unconstitutional, but a different majority (which shared only one member, Justice Ruth Bader Ginsburg, with the first majority) set the remedy and path forward.[10] The first majority determined that the federal guidelines, like the state guidelines at issue in *Blakely*, violated the Sixth Amendment because they premised increases in the

[1] 542 U.S. 296, 298–99 (2004). The offense was a "class B felony," which under state law was punishable by a prison term not to exceed ten years. *Id*. at 299.

[2] *Id*. at 299.

[3] *Id*. at 299–300.

[4] *Id*. at 305.

[5] *Id*. at 303.

[6] *Id*.

[7] *Id*. at 303–04 (emphasis in original).

[8] 543 U.S. 220 (2005).

[9] *See* Kimbrough v. United States, 552 U.S. 85, 96 n.7 (2007) ("Congress created the Sentencing Commission and charged it with promulgating the Guidelines in the Sentencing Reform Act of 1984, but the first version of the Guidelines did not become operative until November 1987.") (citations omitted); Mistretta v. United States, 488 U.S. 361, 367 (1989) (explaining that the Sentencing Reform Act made the "guidelines binding on the courts, although [the Act] preserve[d] for the judge the discretion to depart from the guideline applicable to a particular case if the judge f[ound] an aggravating or mitigating factor present that the Commission did not adequately consider when formulating guidelines."). The *Blakely* majority avoided comment on the constitutionality of the federal guidelines, 542 U.S. at 305 n.9 ("The Federal Guidelines are not before us, and we express no opinion on them."), but dissenters pointed out that the Court's reasoning almost certainly rendered them unconstitutional. *Id*. at 325 (O'Connor, J., dissenting) (noting lack of relevant distinction between Washington and federal guidelines).

[10] *Booker*, 543 U.S. at 226–27.

maximum authorized sentence upon judicial factfinding.[11] One of the defendants in *Booker*, for instance, saw his sentencing range for a narcotics violation under the federal guidelines increase significantly (from 210–262 months to 360 months' life imprisonment) due to two factual findings made by the trial judge during the sentencing proceedings.[12] The trial court ultimately imposed a sentence of 360 months.[13] Applying *Apprendi* and *Blakely*, the first *Booker* majority held that the "need to preserve Sixth Amendment substance" and the "ancient guarantee" of the jury trial right required invalidation of that sentence.[14]

While the first *Booker* majority's holding followed ineluctably from *Blakely*,[15] the second majority's formulation of a remedy broke newer ground. It transformed the federal guidelines from mandatory to advisory in nature by severing and excising two provisions of the federal sentencing statute that required federal courts to follow the guidelines, but leaving the rest of the statute and the guidelines program it created intact.[16] In their advisory form, the guidelines no longer violated the jury trial right because, rather than requiring the court to impose a particular sentence based upon a judge-found fact, they now simply offered recommendations as to how judges should "exercise [their] broad discretion in imposing a sentence within a statutory range."[17] As modified, federal sentencing law would now "require[ ] a sentencing court to consider guidelines [sentencing] ranges, but . . . permit[ ] the court to tailor the sentence in light of other statutory concerns as well . . . ."[18] Further, the sentences imposed by district courts would be subject to appellate review only for "unreasonableness," rather than *de novo* review for compliance with the guidelines.[19] The second majority reasoned that this remedy effectuated Congress's goal of instilling uniformity in federal sentencing better than the primary alternative remedy, which would have retained the mandatory nature of the guidelines but barred sentencing courts from increasing a sentence based on a judge-found fact.[20]

After *Booker*, the Court struck down another determinate sentencing scheme in *Cunningham v. California* because, much like the guidelines schemes at issue in *Blakely* and *Booker*, the California sentencing law at issue authorized the trial court to depart upwards from a standard sentencing threshold if the court found one or more "circumstances in aggravation."[21] The defendant's offense in that case triggered a standard sentence or "middle term" of twelve years, but the trial court departed upwards and sentenced the defendant to the

[11] *Id*. at 223.

[12] *Id*. at 227, 235. The findings concerned that amount of illegal narcotics that the defendant actually possessed and the defendant's obstruction of justice. *Id*. at 227.

[13] *Id*. at 227.

[14] *Id*. at 237. The first *Booker* majority reiterated the rule of *Apprendi* as follows: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id*. at 244.

[15] *Id*. at 233.

[16] *Id*. at 245.

[17] *Id*. at 233.

[18] *Id*. (citations omitted).

[19] *Id*. at 260–61.

[20] *Id*. at 246, 253 ("Congress's basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity.").

[21] Cunningham v. California, 549 U.S. 270, 279 (2007) ("California's DSL [Determinate Sentencing Law], and the Rules governing its application, direct the sentencing court to start with [a] middle term [of imprisonment], and to move from that term only when the court itself finds and places on the record facts—whether related to the offense or the offender—beyond the elements of the charged offense.").

"upper term" of sixteen years after finding the presence of six aggravating factors.[22] The Supreme Court held this sentencing procedure unconstitutional under a straightforward application of *Apprendi*.[23]

Amdt6.4.3.6 Appellate Review of Federal Sentencing Determinations

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

A series of decisions clarified the "unreasonableness" standard of appellate review that *Booker* established for federal sentencing determinations under the now-advisory federal guidelines.[1] First, *Rita v. United States* held that "a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines."[2] In other words, if a district court calculates the defendant's sentencing range correctly and imposes a sentence within that range, it does not violate the Sixth Amendment for the appellate court to presume the reasonableness of the sentence.[3] While recognizing that such a presumption would have some tendency to encourage district courts to follow the guidelines, the Supreme Court held that the presumption nevertheless does not violate the jury trial right because it does not go so far as to "forbid" deviation from the guidelines ranges absent judicial fact-finding.[4]

Whereas *Rita* concerned appellate review of sentences within the guidelines ranges, the Court took up the matter of appellate review of sentences that deviate from the guidelines (non-guidelines sentences) in *Gall v. United States*.[5] There, the Court reaffirmed that the "unreasonableness" standard of review applies to all federal sentences, including

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[22] *Id*. at 275–76.

[23] *Id*. at 288 ("Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, the DSL violates *Apprendi*'s bright-line rule . . . .") (citation omitted).

[1] One narrow aspect of the post-*Booker* federal guidelines, concerning modifications to already-imposed sentences following a subsequent reduction in the applicable guidelines range, does remain binding. Dillon v. United States, 560 U.S. 817, 819 (2010) (holding that *Booker* does not require treating as advisory a guidelines provision that "instructs courts not to reduce a term of imprisonment below the minimum of an amended sentencing range [made retroactively applicable] except to the extent the original term of imprisonment was below the range then applicable"); *id*. at 828 ("[S]entence-modification proceedings . . . are not constitutionally compelled. We are aware of no constitutional requirement of retroactivity that entitles defendants sentenced to a term of imprisonment to the benefit of subsequent Guidelines amendments. . . . Viewed that way, [sentence-modification] proceedings . . . do not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt.").

[2] 551 U.S. 338, 347 (2007).

[3] *Id*. at 350–51.

[4] *Id*. at 352–53 ("The Sixth Amendment question . . . is whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find . . . . A nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the sentencing judge to impose that sentence. Still less does it *prohibit* the sentencing judge from imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone.") (emphasis in original).

[5] 552 U.S. 38 (2007).

non-guidelines sentences.[6] "Appellate courts may . . . consider the extent of a deviation from the Guidelines,"[7] but they may not "apply a presumption of unreasonableness" to non-guidelines sentences.[8] Nor may appellate courts apply standards of review that "come too close" to a presumption of unreasonableness, such as a rule that non-guidelines sentences must be supported by "extraordinary circumstances" or a "rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence."[9] To subject non-guidelines sentences to additional scrutiny of this sort, the Court reasoned, would too nearly resemble a requirement that sentencing judges follow the guidelines—exactly what *Booker* struck down.[10]

Two cases concerned below-guidelines sentences imposed for crack cocaine offenses. In *Kimbrough v. United States*[11] and *Spears v. United States*,[12] the Supreme Court held that district courts have authority to "vary from the crack cocaine Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case."[13] Until 2007, the federal guidelines employed a "100-to-1 ratio" that treated every gram of crack cocaine as equal to 100 grams of powder cocaine for purposes of setting sentencing ranges for cocaine offenses.[14] The Supreme Court concluded in both *Kimbrough* and *Spears* that the discretion left to district courts under the post-*Booker* advisory guidelines permits "categorical disagreement" with the crack cocaine provisions by the sentencing court and is subject only to deferential abuse-of-discretion review of the imposition of a particular sentence.[15] Accordingly, in both cases, the Court reversed appellate court decisions that treated non-guidelines sentences based on categorical disagreement with the crack cocaine guidelines as invalid per se.[16] The Supreme Court did not

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[6] *Id*. at 41. The Court equated the "unreasonableness" standard with an abuse of discretion standard. *Id*. ("[C]ourts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.").

[7] *Id*. at 47.

[8] *Id*. at 51.

[9] *Id*. at 47.

[10] *Id*. *Gall* contains perhaps the most comprehensive description of the requirements of appellate review of federal sentences under the post-*Booker* guidelines: "[The appellate court] must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [sentencing statute] factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the [sentencing statute] factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." 552 U.S. at 51.

[11] 552 U.S. 85 (2007).

[12] 555 U.S. 261 (2009).

[13] *Spears*, 555 U.S. at 843; *see also Kimbrough*, 552 U.S. at 110 ("[I]t would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve [the federal sentencing statute's] purposes, even in a mine-run case.").

[14] *Kimbrough*, 552 U.S. at 96–97. The federal guidelines drew the 100-to-1 ratio from the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, which used the ratio in setting mandatory minimum sentences for cocaine offenses. *Kimbrough*, 552 U.S. at 97.

[15] *Spears*, 555 U.S. at 264; *Kimbrough*, 552 U.S. at 110.

[16] *Spears*, 555 U.S. at 263; *Kimbrough*, 552 U.S. at 91.

clarify, however, whether its holding extended beyond the crack cocaine provisions to categorical disagreement with other guidelines provisions.[17]

Amdt6.4.3.7 Other Applications of Apprendi

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Apprendi prompted a major revision of the Court's Sixth Amendment jurisprudence concerning sentencing procedure in death penalty cases. In *Ring v. Arizona*, the Court struck down an Arizona statute (which the Court had upheld before *Apprendi*) that conditioned imposing the death penalty upon a judge's factual determinations as to the presence or absence of enumerated aggravating factors.[1] Although the statute imposed a burden on the prosecution to prove the existence of the aggravating factors beyond a reasonable doubt, the Court ruled that, under *Apprendi*, those findings must be made by a jury rather than a judge.[2] In *Hurst v. Florida*, the Court extended this holding to invalidate Florida's death penalty statute (also upheld before *Apprendi*), which used an advisory jury to make a sentencing recommendation but left the ultimate sentencing determination to "the trial judge's independent judgment about the existence of aggravating and mitigating factors."[3] In striking down the statute, the Court reiterated that the jury trial right requires the government "to base [a defendant's] death sentence on a jury's verdict, not a judge's factfinding."[4]

In a different vein, *Apprendi* applies to the factual predicates for mandatory minimum sentences. The Supreme Court held in *Alleyne v. United States* that "[a]ny fact that increases the mandatory minimum is an 'element' [of the offense] that must be submitted to the jury."[5]

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[17] In both cases, the Court mainly limited its statements of holding to the crack cocaine guidelines. *Spears*, 555 U.S. at 265–66 ("[D]istrict courts are entitled to reject and vary categorically *from the crack cocaine guidelines* . . . .") (emphasis added); *Kimbrough*, 552 U.S. at 110 (holding that district courts may disregard the "crack/powder disparity"); *but see* id. at 91 ("We hold that, under *Booker*, the cocaine guidelines, like all other Guidelines, are advisory only, and that the Court of Appeals erred in holding the crack/powder disparity effectively mandatory."). The Court also premised its reasoning partly upon considerations unique to the cocaine guidelines. *See id*. at 109–110 (concluding that the cocaine guidelines "do not exemplify the [Sentencing] Commission's exercise of its characteristic institutional role" because the Commission based those provisions upon the mandatory minimums in the 1986 Anti-Drug Abuse Act and not upon empirical data).

[1] 536 U.S. 584, 589 (2002) ("Capital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."). *Ring* overruled an earlier case that had upheld the same Arizona statute. Walton v. Arizona, 497 U.S. 639, 649 (1990) ("[W]e cannot conclude that a State is required to denominate aggravating circumstances 'elements' of the offense or permit only a jury to determine the existence of such circumstances.").

[2] *Ring*, 536 U.S. at 589, 597.

[3] 136 S. Ct. 616, 620 (2016) (quoting Blackwelder v. State, 851 So.2d 650, 653 (Fla. 2003) (per curiam)). *Hurst* overruled two earlier Supreme Court cases that upheld the Florida statute. Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam); Spaziano v. Florida, 468 U.S. 447 (1984); *see Hurst*, 136 S. Ct. at 624 ("Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.").

[4] *Hurst*, 136 S. Ct. at 624.

[5] 570 U.S. 99, 103 (2013).

Alleyne overruled one post-*Apprendi* case[6] and one pre-*Apprendi* case,[7] both of which upheld statutory schemes that premised increases in the mandatory minimum sentence upon judicial fact-finding.[8] The *Alleyne* Court rejected attempts to "distinguish facts that raise the maximum from those that increase the minimum" under *Apprendi*'s Sixth Amendment analysis;[9] both types of facts, the Court reasoned, constitute offense elements and therefore fall within the scope of the jury trial right.[10] Accordingly, "[j]uries must find any facts that increase either the statutory maximum or minimum,"[11] except for the fact of a prior conviction.[12]

In *United States v. Haymond*, a splintered majority of five Justices extended *Alleyne* to the context of supervised release.[13] *Haymond* held unconstitutional a federal statute, 18 U.S.C. § 3583(k), that required imposing a mandatory minimum term of imprisonment of five years for any violation of a condition of supervised release through the commission of certain federal crimes, such as the possession of child pornography, by defendants required to register as sex offenders.[14] The statutory scheme required judges to determine violations by a preponderance of the evidence.[15] A plurality of four Justices reasoned that punishments for supervised release violations constitute part of the overall punishment for the initial offense of conviction, and that, as such, any violation found by a judge that triggered a new mandatory minimum prison term violated the jury trial right under *Alleyne*.[16] A concurring opinion that supplied the decisive fifth vote, however, offered a narrow rationale. That opinion reasoned that supervised release proceedings generally do not implicate the jury trial right, but that the unique nature of Section 3583(k)—essentially, its requirement of a mandatory minimum prison term for enumerated offenses—rendered it "less like ordinary revocation [of supervised release] and more like punishment for a new offense, to which the jury right would typically attach."[17]

Apprendi also applies to the factual predicate for a criminal fine imposed for a non-petty offense.[18] Under the petty offense doctrine, not all criminal fines trigger the jury trial right, but "[w]here a fine is substantial enough to trigger that right, *Apprendi* applies in full."[19] As a result, it violates the Sixth Amendment for a judge to make a factual finding that increases the maximum potential fine for a serious (non-petty) offense.[20] A judge may not, for example,

[6] Harris v. United States, 536 U.S. 545, 567 (2002) ("[T]he political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings.").

[7] McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986) ("[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.").

[8] *Harris*, 536 U.S. at 567; *McMillian*, 477 U.S. at 93.

[9] *Alleyne*, 570 U.S. at 116.

[10] *Id*. at 114–15 ("As noted, the essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.").

[11] *Id*. at 113 n.2.

[12] *Id*. at 111 n.1.

[13] No. 17-1672, slip op. at 10–11 (U.S. June 26, 2019) (plurality opinion).

[14] *Id*. at 3.

[15] *Id*.

[16] *Id*. at 10–11.

[17] United States v. Haymond, No. 17-1672, slip op. at 2 (U.S. June 26, 2019) (Breyer, J., concurring).

[18] Southern Union Co. v. United States, 567 U.S. 343, 360 (2012) ("We hold that the rule of *Apprendi* applies to the imposition of criminal fines.").

[19] *Id*. at 352.

[20] *Id*.

determine the duration of ongoing criminal conduct in order to calculate the maximum potential fine under a statute prescribing penalties for each day of violation.[21]

In contrast, beyond the fact of prior conviction, at least one other type of factual determination relevant to sentencing remains unaffected by *Apprendi*. In *Oregon v. Ice*, the Supreme Court held that a state legislature may, without running afoul of the jury trial right, assign to a judge factual determinations that govern whether a defendant convicted of multiple offenses should receive consecutive rather than concurrent sentences.[22] The Court noted that juries traditionally did not take part in this decision[23] and that states take a variety of approaches to regulating how judges make the decision.[24] Accordingly, on the basis of "twin considerations—historical practice and respect for state sovereignty," the Court declined to extend *Apprendi* to the sentencing decision of whether to impose multiple sentences consecutively.[25]

Amdt6.4.4 Scope of the Right

Amdt6.4.4.1 Overview of Scope of Right to Trial by Jury

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The right to a jury trial entails the "right to have a jury make the ultimate determination of guilt."[1] As such, the criminal jury is not a "mere factfinder," but instead an adjudicative body that decides "guilt or innocence on every issue, which includes application of the law to the facts."[2] The trial court may not usurp the jury's function by directing a guilty verdict, "no matter how conclusive the evidence;"[3] nor may the trial court "attempt[ ] to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused."[4] In modern doctrine, these foundational principles regarding the scope of the jury function have had perhaps their most significant ramifications in due process jurisprudence,

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[21] *Id*. ("This is exactly what *Apprendi* guards against: judicial factfinding that enlarges the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow.").

[22] 555 U.S. 160, 163–64 (2009).

[23] *Id*. at 163.

[24] *Id*. ("Most States continue the common-law tradition: They entrust to judges' unfettered discretion the decision whether sentences for discrete offenses shall be served consecutively or concurrently. In some States, sentences for multiple offenses are presumed to run consecutively, but sentencing judges may order concurrent sentences upon finding cause therefor. Other States, including Oregon, constrain judges' discretion by requiring them to find certain facts before imposing consecutive, rather than concurrent, sentences.").

[25] *Id*. at 168.

[1] United States v. Gaudin, 515 U.S. 506, 510 (1995).

[2] *Id*. at 513–14; *see also id.* at 514 ("[T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence.").

[3] United Bhd. of Carpenters & Joiners of Am. v. United States, 330 U.S. 395, 408 (1947); *see also* Sullivan v. Louisiana, 508 U.S. 275, 277 (1993) ("[A]lthough a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence."); Sandstrom v. Montana, 442 U.S. 510, 516 n.5 (1979) ("[V]erdicts may not be directed against defendants in criminal cases.").

[4] United States v. Martin Linen Supply Co., 430 U.S. 564, 573 (1977).

where the Supreme Court has addressed claims that particular types of jury instructions unconstitutionally impinge upon or skew the jury's adjudicative task.[5] The Court's Sixth Amendment doctrine, on the other hand, has taken up three central issues of jury structure and operation: size, unanimity, and juncture (i.e., the stage of the proceedings at which the jury participates).

Amdt6.4.4.2 Size of the Jury

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Under current doctrine, a criminal jury must have at least six members.[1] The Court's early doctrine endorsed the stricter view that the Sixth Amendment required a twelve-member jury in conformity with historical practice.[2] But because the federal criminal system used a twelve-person jury,[3] the Supreme Court did not squarely confront the constitutionality of a state law providing for smaller juries until after it held in *Duncan v. Louisiana* in 1968 that the jury trial right applied against the states.[4] In the first case after *Duncan* to address such a law,

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[5] *See Sandstrom*, 442 U.S. at 523 (holding that jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violated due process because the "jurors could reasonably have concluded that they were directed to find against defendant on the element of intent" and "[t]he State was thus not forced to prove beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged") (internal quotation marks and citation omitted); *see also* Schad v. Arizona, 501 U.S. 624, 630 (1991) (rejecting under due process analysis the claim that a "conviction under [jury] instructions that did not require the jury to agree on one of the alternative theories of premeditated and felony murder is unconstitutional"); Amdt5.5.1 Overview of Due Process through Amdt5.5.2 Historical Background on Due Process. Although the Court has tended to address them in the due process context, erroneous jury instructions may implicate both the right to due process and the right to jury trial. The Supreme Court has noted that "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated," such that a jury instruction that misstates the burden of proof as something less than the reasonable doubt standard violates both constitutional requirements and constitutes a structural error not subject to harmless error analysis. *Sullivan*, 508 U.S. at 278, 281 ("[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.").

[1] Ballew v. Georgia, 435 U.S. 223, 245 (1978) (opinion of Blackmun, J.) ("[T]rial on criminal charges before a five-member jury deprive[s] [a defendant] of the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments."); *id*. at 245–46 (Powell, J., concurring in the judgment, also on the theory that five-member juries violate the right to jury trial).

[2] Thompson v. Utah, 170 U.S. 343, 353 (1898) ("[T]he word 'jury' and the words 'trial by jury' were placed in the constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument . . . [and therefore] require[ ] that [a criminal defendant] should be tried by a jury composed of not less than twelve persons."); *see also Ballew*, 435 U.S. at 230 n.8 (collecting additional cases decided between 1900 and 1930 that made the "assumption . . . that the 12-member feature was a constitutional requirement"). In *Thompson*, the Court held that application of a provision of Utah's state constitution providing for an eight-person jury in non-capital cases to prosecutions for crimes committed before Utah became a state, when as a territory it followed the federal practice of twelve-person juries, violated the *ex post facto* clause of Article I, §10 of the U.S. Constitution. *Thompson*, 170 U.S. at 355.

[3] *See*, *e.g.*, Fed. R. Crim. Proc. 23(b) advisory committee's note to 1944 adoption (explaining that the rule restated the "existing practice" of providing for twelve-member jury, absent stipulation by the parties for a smaller jury). In 1983, Rule 23(b) was amended to authorize federal courts "to permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror [after the jury has retired to deliberate]." Fed. R. Crim. Proc. 23(b)(3) advisory committee's note to 1983 amendments.

[4] *See* Burch v. Louisiana, 441 U.S. 130, 134 (1979) ("Only in relatively recent years has this Court had to consider the practices of the several States relating to jury size and unanimity. *Duncan v. Louisiana* marked the beginning of

Williams v. Florida,[5] the Court rejected the traditional, historically-based view that the jury trial right required a twelve-person jury and applied instead a functional analysis to uphold a Florida law providing for a six-person criminal jury.[6] The Supreme Court stated: "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . . [b]ut we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—particularly if the requirement of unanimity is retained."[7]

Eight years later, in *Ballew v. Georgia*,[8] the Court converted the six-person jury upheld in *Williams* into the constitutional minimum when it struck down a Georgia law providing for five-person juries in certain cases.[9] Relying on a number of academic studies about problems with small juries released after *Williams*, the leading opinion in *Ballew* concluded that "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members."[10] *Ballew* did not overturn or disavow *Williams*; instead, it simply prohibited any "further reduction" in the jury size that *Williams* upheld.[11]

Amdt6.4.4.3 Unanimity of the Jury

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Under current doctrine, jury verdicts must be unanimous to convict a defendant of a non-petty offense in both federal and state criminal trials.[1] For federal criminal trials, the Supreme Court's recognition of this unanimity requirement is long-standing, dating back at

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our involvement with such questions.") (citation omitted); Williams v. Florida, 399 U.S. 78, 90, 103 (1970) (explaining that before *Duncan*, the Court's decisions had "assumed" that the Constitution required a twelve-person jury).

[5] 399 U.S. 78 (1970).

[6] *Id*. at 86 ("We hold that the 12-man panel is not a necessary ingredient of 'trial by jury,' and that respondent's refusal to impanel more than the six members provided for by Florida law did not violate petitioner's Sixth Amendment rights as applied to the States through the Fourteenth.").

[7] *Id*. at 100.

[8] 435 U.S. 223 (1978).

[9] *Id*. at 245 (opinion of Blackmun, J.). Only Justice John Stevens joined Justice Harry Blackmun's opinion, which announced the judgment; four other Justices concurred in the judgment in opinions that also concluded that five-member juries violated the Sixth Amendment. *See id*. (White, J., concurring in judgment on ground that "a jury of fewer than six persons would fail to represent the sense of the community and hence not satisfy the fair cross-section requirement of the Sixth and Fourteenth Amendments"); *id*. at 245–46 (Powell, J., concurring in judgment on ground that "use of a jury as small as five members, with authority to convict for serious offenses, involves grave questions of fairness . . . and a line has to be drawn somewhere if the substance of jury trial is to be preserved," but disagreeing with plurality's implication that the Fourteenth Amendment fully incorporates the right to jury trial and with plurality's reliance on "numerology derived from statistical studies").

[10] *Id*. at 239 (opinion of Blackmun, J.).

[11] *Id*. ("While we adhere to, and reaffirm our holding in *Williams v. Florida*, the[ ] [academic] studies, most of which have been made since *Williams* was decided in 1970, lead us to conclude that the . . . [Constitution prohibits] a reduction in [jury] size to below six members.").

[1] Ramos v. Louisiana, No. 18-5924, slip op. at 7 (U.S. Apr. 20, 2020).

least as far as the late 1800s.[2] But for state criminal trials, it was not until 2020 that the Court held for the first time, in *Ramos v. Louisiana*, that the Sixth Amendment unanimity requirement applies by incorporation via the Fourteenth Amendment.[3]

Before *Ramos*, the unanimity requirement did not apply to state criminal trials under the splintered decision in the 1972 case *Apodaca v. Oregon*.[4] This outcome was significant for the two states—Oregon and Louisiana—that authorized non unanimous verdicts in criminal trials (the other 48 states required unanimity).[5] In *Apodaca*, the Supreme Court upheld a provision of the Oregon constitution that permitted jury verdicts by votes of 10-2 in all but first-degree murder cases.[6] A plurality of four justices concluded that the Sixth Amendment did not require unanimity. Much like the *Williams* majority that upheld the six-person Florida jury, these justices preferred functional over historical considerations when interpreting the Sixth Amendment.[7] They reasoned that a jury allowed to convict on a 10-2 vote adequately safeguarded a criminal defendant's Sixth Amendment interest in "having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him . . . ."[8] Justice Lewis Powell's narrower concurrence, however, set the doctrine on unanimity that would endure until 2020. He agreed with four dissenters on the point that "in accord both with history and precedent . . . the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial."[9] He voted to uphold the Oregon constitutional provision, however, on the ground that the Fourteenth Amendment Due Process Clause did not incorporate the unanimity component of the Sixth Amendment jury trial right, even though it incorporated the right to a jury itself.[10] As a result, under *Apodaca*, federal but not state criminal juries were constitutionally required to render unanimous verdicts.[11]

Until the Supreme Court overruled *Apodaca* in 2020, state laws that authorized small juries (as opposed to the twelve-member jury at issue in *Apodaca*) to render non-unanimous verdicts triggered special Sixth Amendment concerns. In *Burch v. Louisiana*, the Supreme

[2] *Id*. at 6 ("As early as 1898, the Court said that a defendant enjoys a 'constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons.'") (quoting Thompson v. Utah, 170 U.S. 343, 351 (1898)); Andres v. United States, 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury."); Maxwell v. Dow, 176 U.S. 581, 586 (1900) (stating that the right to jury trial "implies that there shall be an unanimous verdict of twelve jurors in all Federal courts where a jury trial is held"); *see also* Johnson v. Louisiana, 406 U.S. 366, 369–70 (1972) (Powell, J., concurring) (citing "an unbroken line of cases reaching back into the late 1800's [in which] the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of federal jury trial").

[3] *Ramos*, slip op. at 7.

[4] 406 U.S. 404 (1972).

[5] *Ramos*, slip op. at 1.

[6] 406 U.S. at 406.

[7] *Id*. at 410 ("[A]s in *Williams*, our inability to divine 'the intent of the Framers' . . . requires that in determining what is meant by a jury we must turn to other than purely historical considerations.").

[8] *Id*. at 411.

[9] *Johnson*, 406 U.S. at 371 (Powell, J., concurring in judgment). Justice Powell's concurring opinion in *Apodaca* is reported together with his concurring opinion in a companion case, Johnson v. Louisiana, 406 U.S. 356 (1972), at 406 U.S. at 366.

[10] *Johnson*, 406 U.S. at 373 (Powell, J., concurring in judgment) (reasoning that incorporation of the unanimity requirement "would give unwarranted and unwise scope to the incorporation doctrine as it applies to the due process right of state criminal defendants to trial by jury."); *see Ramos*, slip op. at 8 ("Justice Powell doubled down on his belief in 'dual-track' incorporation—the idea that a single right can mean two different things depending on whether it is being invoked against the federal or a state government.").

[11] Timbs v. Indiana, No. 17-109, slip op. at 3 n.1 (U.S. Feb. 20, 2019) (citing *Apodaca* for the proposition that "the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings").

Court held that six-person juries must convict unanimously.[12] The Court struck down, as a violation of the jury trial right, a Louisiana law permitting conviction for nonpetty offenses upon the agreement of five members of a six-person jury.[13] Just as the *Apodaca* plurality opinion followed the reasoning in *Williams* in departing from historical understandings of jury structure to afford the states more flexibility in crafting criminal procedure, the *Burch* decision followed the reasoning in *Ballew* in putting a limit on the flexibility.[14] The *Burch* Court conceded its inability to "discern *a priori* a bright line below which the number of jurors participating in the trial or the verdict"[15] would violate the Sixth Amendment and emphasized that "line-drawing . . . 'cannot be wholly satisfactory.'"[16] The Court concluded, however, that "lines must be drawn somewhere if the substance of the jury trial right is to be preserved" and that "conviction for a nonpetty offense by only five members of a six-person jury presents a . . . threat [to that preservation] and justifies . . . requiring verdicts rendered by six-person juries to be unanimous."[17] The Court "intimated no view" as to the constitutionality of nonunanimous juries with more than six but fewer than twelve members.[18]

In the 2020 *Ramos* decision, the Supreme Court overruled *Apodaca*, reaffirmed that the Sixth Amendment requires unanimity, and held that the Fourteenth Amendment incorporates the Sixth Amendment unanimity requirement against the states.[19] The Court reasoned that "*Apodaca* was gravely mistaken" and that "Justice Powell refused to follow this Court's incorporation precedents" when he determined that an alternative version of the jury trial right—one without a unanimity requirement—applied in state criminal trials.[20] In 2021, the Court held that *Ramos* did not apply retroactively to invalidate, on federal collateral review, convictions from non-unanimous verdicts that were already final at the time *Ramos* was decided.[21]

Amdt6.4.4.4 Two-Tier Trial Court Systems

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the*

[12] 441 U.S. 130, 138 (1979).

[13] *Id*. at 134 ("[C]onviction by a nonunanimous six-member jury in a state criminal trial for a nonpetty offense deprives an accused of his constitutional right to trial by jury.").

[14] *Id*. at 138 (resting decision on "much the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury").

[15] *Id*. at 137.

[16] *Id*. at 138 (quoting Duncan v. Louisiana, 391 U.S. 145, 161 (1968)).

[17] *Id*.; *see also* Brown v. Louisiana, 447 U.S. 323, 326–27 (1980) (holding that the rule of *Burch* applies to convictions still pending on direct review on the date *Burch* was decided, even where the jury was empaneled before that date).

[18] *Burch*, 441 U.S. at 138 n.11.

[19] Ramos v. Louisiana, No. 18-5924, slip op. at 7 (U.S. Apr. 20, 2020) ("There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally.").

[20] *Id*. at 21. The Court also explained that the Louisiana and Oregon laws had "racist origins": both states originally had provided for non-unanimous verdicts to "dilute" the participation of African Americans and other minorities on juries. *Id*. at 2–3.

[21] Edwards v. Vannoy, No. 19-5807, slip op. at 2 (U.S. May 17, 2021).

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Court held in *Ludwig v. Massachusetts* that the provision of a jury trial on appeal, instead of at the first level of adjudication, does not violate the right to jury trial so long as the accused does not face any undue burdens in reaching the jury trial stage.[1] *Ludwig* upheld Massachusetts's "two-tiered" system for trying certain non-petty crimes, which afforded the accused the possibility of a jury trial only after conviction in a non-jury trial at the first tier.[2] A defendant keen on a jury trial could expedite the procedure by "admitting sufficient findings of fact" at the first tier, thereby obviating most of the proceedings before the second-tier jury trial, which was de novo (i.e., not influenced by the outcome of the first tier trial).[3] The Court held that this procedure did not violate what it called the "Fourteenth Amendment right to a jury trial."[4] Because the Massachusetts system undeniably provided the accused with the opportunity for a jury trial, the real question according to the Court was whether the provision of that opportunity only at the second tier "unconstitutionally burden[ed] the exercise of that right."[5] The Massachusetts system did not impose such an unconstitutional burden, the Court concluded, because the procedure for admitting factual findings at the first tier allowed the accused to mitigate the increased financial costs and "psychological and physical hardships" of two trials.[6] The post-*Duncan* context also appeared to influence the decision: the *Ludwig* Court, like the *Williams* and *Apodaca* Courts, emphasized the need to afford the states flexibility in their manner of administering a jury trial system.[7]

Amdt6.4.5 Right to Impartial Jury

Amdt6.4.5.1 A Jury Selected from a Representative Cross-Section of the Community

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

[1] 427 U.S. 618, 630 (1976).

[2] *Id*. at 620 ("Massachusetts is one of several States having a two-tier system of trial courts for criminal cases.").

[3] *Id*. at 621.

[4] *Id*. at 626. The Court construed the defendant's claim as being that the Massachusetts system violated his jury trial right and based its decision largely on Sixth Amendment precedent. *Id*. at 624–26. The Court refrained from expressly tying its holding to the Sixth Amendment right to jury trial, however, presumably to retain Justice Powell's vote in the five-justice majority. *See id*. at 632 (Powell, J., concurring) ("I join the opinion of the Court, as I understand it to be consistent with my view that the right to a jury trial afforded by the Fourteenth Amendment is not identical to that guaranteed by the Sixth Amendment.").

[5] *Id*. at 626.

[6] *Id*. at 626–27, 628–29. The Court also rejected the argument that the "possibility of a harsher sentence at the second tier" unduly burdened exercise of the jury trial right, relying on due process cases for the proposition that the Constitution prohibits only "the vindictive imposition of an increased sentence." *Id*. at 627.

[7] *Ludwig*, 427 U.S. at 630 ("The modes of exercising federal constitutional rights have traditionally been left, within limits, to state specification. In this case, Massachusetts absolutely guarantees trial by jury to persons accused of serious crimes, and the manner it has specified for exercising this right is fair and not unduly burdensome.").

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Sixth Amendment guarantee of the right to a trial "by an impartial jury" applies in both state and federal court.[1] Other constitutional provisions, including the Due Process and Equal Protection Clauses of the Fourteenth Amendment, also bear upon impartiality. Before the Court extended the right to a jury trial to state courts in the 1968 case *Duncan v. Louisiana*,[2] the Court had established that, if a state chose to provide juries, due process required them to be impartial.[3] In the post-*Duncan* era, the Supreme Court has continued to ground the right to an impartial jury in both the Sixth Amendment and due process.[4] In addition, equal protection prohibits certain forms of discrimination in jury selection.[5]

Impartiality is a two-part requirement: the jury must be selected from a pool that represents a fair cross-section of the community[6] and the jurors must be unbiased.[7] First, "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."[8] This "fair cross-section" requirement applies only to jury panels or venires from which petit juries are chosen, and not to the composition of the petit juries themselves.[9] Describing the test for whether a prima facie violation of the fair-cross-section requirement had occurred, the Supreme Court stated:

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[1] Taylor v. Louisiana, 419 U.S. 522, 526–528 (1975); *see* Ramos v. Louisiana, No. 18-5924, slip op. at 7 (U.S. Apr. 20, 2020) (reviewing incorporation precedents concerning the Sixth Amendment right to jury trial).

[2] 391 U.S. 145, 149–50 (1968).

[3] Peters v. Kiff, 407 U.S. 493, 501–02 (1972) ("Long before this Court held that the Constitution imposes the requirement of jury trial on the States, it was well established that the Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law."); Turner v. Louisiana, 379 U.S. 466, 471 (1965); Irvin v. Dowd, 366 U.S. 717, 722–23 (1961) (overturning conviction on due process principles for lack of impartial jury); *see also* Gonzales v. Beto, 405 U.S. 1052, 1506 n.4 (1972) (Stewart, J., concurring in judgment) (describing "established case law holding that due process of law requires an impartial jury.").

[4] *See* Skilling v. United States, 561 U.S. 358, 377–78 (2010) (noting that the "Sixth Amendment secures to criminal defendants the right to trial by an impartial jury" before declaring that due process requires the trier of fact to judge a case "impartially, unswayed by outside influence"); Turner v. Murray, 476 U.S. 28, 36 n.9 (1986) ("The right to an impartial jury is guaranteed by both the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, and by principles of due process."); Ristaino v. Ross, 424 U.S. 589, 595 n.6 (1976) ("A criminal defendant in a state court is guaranteed an 'impartial jury' by the Sixth Amendment as applicable to the States through the Fourteenth Amendment. Principles of due process also guarantee a defendant an impartial jury."); *see also* Dietz v. Bouldin, 579 U.S. 40, 48 (2016) ("[T]he guarantee of an impartial jury . . . is vital to the fair administration of justice.").

[5] *See, e.g.,* Batson v. Kentucky, 476 U.S. 79, 85 (1986) ("The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors.") (citations omitted); Castaneda v. Partida, 430 U.S. 482, 494 (1977) ("[I]n order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs."); *see* Amdt14.S1.8.1.8 Peremptory Challenges.

[6] See *Taylor*, 419 U.S. at 530 ("Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . .") (quoting Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

[7] See *id.* The requirement that jurors be unbiased is discussed at Amdt6.4.2 Right to a Jury Free From Bias

[8] Taylor v. Louisiana, 419 U.S. 522, 528 (1975); *see* Glasser v. United States, 315 U.S. 60, 86 (1942) (reasoning that officials charged with choosing federal jurors "must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community"); *see also* Brown v. Allen, 344 U.S. 443, 474 (1953) (discussing fair cross-section concept in analyzing due process challenge to jury lists used in state trial, fifteen years before Duncan made the jury trial right applicable against the states).

[9] Holland v. Illinois, 493 U.S. 474, 480–81 (1990); Lockhart v. McCree, 476 U.S. 162, 173–74 (1986) ("The limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly 'representative' petit jury . . . .").

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[10]

The defendant may bring a challenge under this test even if he or she does not belong to the excluded group.[11] Once the defendant demonstrates a prima facie violation, the government faces a formidable burden: the jury selection process may be sustained under the Sixth Amendment only if those aspects of the process that result in the disproportionate exclusion of a distinctive group, such as exemption criteria, "manifestly and primarily" advance a "significant state interest."[12] Applying these standards, the Court invalidated a state selection system granting women an automatic exemption from jury service upon request.[13] In an earlier case, it voided a selection system under which no woman would be called for jury duty unless she had previously filed a written declaration of her desire to be subject to service.[14]

Amdt6.4.5.2 Jury Free from Bias

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

In addition to requiring that a petit jury be selected from a representative cross section of the community,[1] the Supreme Court has interpreted the Sixth Amendment to require assurance that the jurors chosen are unbiased—that is, the jurors must be willing to decide the

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[10] Duren v. Missouri, 439 U.S. 357, 364 (1979); *see also* Berghuis v. Smith, 559 U.S. 314, 330–32 (2010) (affirming, on habeas review, state court decision that rejected a fair cross-section claim for failure to prove systematic exclusion with particularity).

[11] *Taylor*, 419 U.S. at 526 (holding that male defendant had standing to challenge exclusion of female jurors); Peters v. Kiff, 407 U.S. 493, 500–05 (1972) (holding that White defendant had standing to bring due process challenge against exclusion of African American jurors and reasoning that "if the Sixth Amendment were applicable here, and petitioner were challenging a post-Duncan petit jury, he would clearly have standing to challenge the systematic exclusion of any identifiable group from jury service").

[12] *Duren*, 439 U.S. at 367–68.

[13] *Id*. at 359–60.

[14] Taylor v. Louisiana, 419 U.S. 522, 526–31 (1975); see also Ballard v. United States, 329 U.S. 187, 193 (1946) ("We conclude that the purposeful and systematic exclusion of women from the [federal jury] panel in this case was a departure from the scheme of jury selection which Congress adopted . . . ."); Thiel v. S. Pac. Co., 328 U.S. 217, 224–25 (1946) (exercising supervisory power over administration of justice in federal courts to grant a new trial in a civil case where day laborers were excluded from the jury lists). Before the Supreme Court held in 1968 that the Sixth Amendment right to jury trial applied against the states, the Court had rejected, in 5-to-4 decisions, Fourteenth Amendment challenges to state use of "blue ribbon" jury lists that tended to exclude women and laborers. See Fay v. New York, 332 U.S. 261, 290–93 (1947) (reasoning that not even systematic or purposeful underrepresentation of women or occupational groups violated the Fourteenth Amendment); Moore v. New York, 333 U.S. 565, 566–68 (1948) (reaffirming Fay but reasoning that the evidence did not show the systematic exclusion of African Americans from the jury lists).

[1] See Amdt6.4.2 A Jury Selected from a Representative Cross Section of the Community

case on the basis of the evidence presented.[2] The Court has held that absent a showing of actual bias, a juror's employment by the government that is prosecuting the case does not require disqualification for implicit bias.[3] By extension, absent a showing of actual bias, a federal petit jury may consist entirely of federal government employees without offending the right to an impartial jury.[4] A violation of a defendant's right to an impartial jury does occur, however, when the jury or any of its members is subjected to pressure or influence which could impair freedom of action; the trial judge should conduct a hearing in which the defense participates to determine whether impartiality has been undermined.[5] Exposure of the jury to possibly prejudicial material and disorderly courtroom activities may deny impartiality and require judicial inquiry.[6] Similarly, a trial court should not condone private communications, contact, or tampering with a jury, or the creation of circumstances raising the dangers thereof.[7] When the locality of the trial has been saturated with publicity about a defendant, so that it is unlikely that he can obtain a disinterested jury, he is constitutionally entitled to a change of venue.[8] Subjecting a defendant to trial in an atmosphere of actual or threatened mob domination also violates the right to an impartial jury.[9]

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[2] Skilling v. United States, 561 U.S. 358, 378 (2010).

[3] Dennis v. United States, 339 U.S. 162, 171–72 (1950); *see generally* United States v. Wood, 299 U.S. 123, 133 (1936) ("The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law.").

[4] Frazier v. United States, 335 U.S. 497, 509–11 (1948) ("Government employees [are] subject, as are all other persons and in the same manner, to challenge for 'actual bias' and under all ordinary circumstances only to such challenge. In that view, absent any basis for such challenge, we do not see how a right to challenge the panel as a whole can arise from the mere fact that the jury chosen by proper procedures from a properly selected panel turns out to be composed wholly of Government employees or, a fortiori, of persons in private employment."). On common-law grounds, the Court in Crawford v. United States, 212 U.S. 183 (1909), disqualified federal employees, but the Court sustained a statute removing the disqualification because of the increasing difficulty in finding jurors in the District of Columbia in United States v. Wood, 299 U.S. 123 (1936).

[5] Smith v. Phillips, 455 U.S. 209, 215 (1982) ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."); Remmer v. United States, 350 U.S. 377, 381–82 (1956) (granting new trial where hearing established that a juror was "disturbed and troubled" after having been offered a bribe and interviewed by the FBI about the incident).

[6] *E.g.*, Sheppard v. Maxwell, 384 U.S. 333, 350–51, 357 (1966); Irvin v. Dowd, 366 U.S. 717, 723–24 (1961). Exposure of the jurors to knowledge about the defendant's prior criminal record and activities is not alone sufficient to establish a presumption of reversible prejudice, but on voir dire jurors should be questioned about their ability to judge impartially. Murphy v. Florida, 421 U.S. 794, 799–800 (1975). The Court indicated that under the same circumstances in a federal trial it may have overturned the conviction pursuant to its supervisory power. *Id.* at 797–98 (citing Marshall v. United States, 360 U.S. 310 (1959)) . Essentially, the defendant must make a showing of prejudice into which the court may then inquire. Chandler v. Florida, 449 U.S. 560 (1981); *Smith*, 455 U.S. at 215–18; Patton v. Yount, 467 U.S. 1025, 1031–33 (1984).

[7] Remmer v. United States, 347 U.S. 227, 229 (1954); *see* Turner v. Louisiana, 379 U.S. 466, 473–74 (1965) (placing jury in charge of two deputy sheriffs who were principal prosecution witnesses at defendant's trial denied him his right to an impartial jury); Parker v. Gladden, 385 U.S. 363, 363–65 (1966) (influence on jury by prejudiced bailiff).

[8] Irvin v. Dowd, 366 U.S. 717, 727–28 (1961) (felony); Rideau v. Louisiana, 373 U.S. 723, 725–26 (1963) (felony); Groppi v. Wisconsin, 400 U.S. 505, 507–09 (1971) (misdemeanor). Important factors to be considered, however, include the size and characteristics of the community in which the crime occurred; whether the publicity was blatantly prejudicial; the time elapsed between the publicity and the trial; and whether the jurors' verdict supported the theory of prejudice. Skilling v. United States, 561 U.S. 358, 381–84 (2010).

[9] Frank v. Mangum, 237 U.S. 309, 335 (1915) ("We, of course, agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term."); *see also Sheppard*, 384 U.S. at 362 (recognizing, in case where media activity inside the courtroom created a "carnival atmosphere at trial," that "[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences"); *Irvin*, 366 U.S. at 728 ("With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.").

There are limits on the extent to which an inquiry can be made into whether a criminal defendant's right to a jury trial has been denied by a biased jury. The federal rules of evidence[10] and the vast majority of the states[11] forbid the "impeachment" or questioning of a verdict by inquiring into the internal deliberations of the jury—a rule of evidence that originated in English common law.[12] This "no impeachment" rule, which aims to promote "full and vigorous discussion" by jurors and to preserve the "stability" of jury verdicts, has limited the ability of criminal defendants to argue in post-conviction proceedings that a jury's internal deliberations demonstrated bias amounting to a deprivation of the right to a jury trial.[13] Indeed, the Court has held that the Sixth Amendment justifies an exception to the no impeachment rule in only the "gravest and most important cases."[14] As a result, the Court has rejected a Sixth Amendment exception to the rule when evidence existed that jurors were under the influence of alcohol and drugs during the trial.[15] In the Court's view, three safeguards—(1) the voir dire (jury selection) process, (2) the ability for the court and counsel to observe the jury during trial, and (3) the potential for jurors to report untoward behavior to the court before rendering a verdict—adequately protect Sixth Amendment interests while preserving the values underlying the no impeachment rule.[16]

In *Pena-Rodriguez v. Colorado*, the Court for the first time recognized a Sixth Amendment exception to the no impeachment rule.[17] In that case, a criminal defendant contended that his conviction by a Colorado jury for harassment and unlawful sexual contact should be overturned on constitutional grounds because evidence from two jurors revealed that a fellow juror had expressed anti-Hispanic bias toward the petitioner and his alibi witness during deliberations.[18] The Court agreed, concluding that where a juror makes a "clear statement" indicating that he relied on "racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way . . . ."[19] In so holding, the Court emphasized the "imperative to purge racial prejudice from the administration of justice" that underlies the Fourteenth Amendment, which, in turn, makes the Sixth Amendment applicable to the states.[20] Contrasting the instant case from earlier rulings that involved "anomalous behavior from a single jury—or juror—gone off course,"[21] the Court noted that racial bias in the judicial system was a "familiar and recurring evil"[22] that required the

[10] *See* FED. R. Evid. 606(b)(1) ("During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment.").

[11] *See* Peña-Rodriguez v. Colorado, No. 15–606, slip op. at 9 (U.S. May 6, 2017) (noting that 42 jurisdictions follow the federal rule).

[12] *Id*. at 2. The no-impeachment rule does have three central exceptions, allowing a juror to testify about (1) extraneous prejudicial information improperly brought to the jury's attention; (2) outside influences brought to bear on any juror; and (3) a mistake made in entering the verdict on the verdict form. *See* FED. R. Evid. 606(b)(2); *Peña-Rodriguez*, slip op. at 7–9.

[13] *See Peña-Rodriguez*, slip op. at 9.

[14] *Id*. at 8 (quoting McDonald v. Pless, 238 U.S. 264, 269 (1915)).

[15] *See* Tanner v. United States, 483 U.S. 107, 127 (1987); *see also* Warger v. Shauers, 574 U.S. 40, 44–45 (2014) (holding, in a civil case, that the no-impeachment rule barred the introduction of evidence that a juror lied during jury selection about bias against one party).

[16] *See Tanner*, 483 U.S. at 127. In addition, while the no-impeachment rule, by its very nature, prohibits testimony by jurors, evidence of misconduct *other than juror testimony* can be used to impeach the verdict. *Id.*

[17] *See* Peña-Rodriguez v. Colorado, No. 15–606, slip op. (U.S. May 6, 2017).

[18] *Id* at 3.

[19] *Id.* at 17.

[20] *Id.* at 13.

[21] *Id.* at 15.

[22] *Id.*

judiciary to prevent "systemic injury to the administration of justice."[23] Moreover, the Court emphasized "pragmatic" rationales for its holding, noting that other checks on jury bias would be unlikely to reveal racial bias.[24]

Amdt6.4.5.3 Death Penalty and Requirement of Impartial Jury

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Inquiries into jury bias have arisen in the context of the imposition of the death penalty. In *Witherspoon v. Illinois*,[1] the Court held that the exclusion in capital cases of jurors conscientiously opposed to capital punishment, without inquiring whether they could consider the imposition of the death penalty in the appropriate case, violated a defendant's constitutional right to an impartial jury. The Supreme Court stated: "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror."[2] A jury, the Court further wrote, must "express the conscience of the community on the ultimate question of life or death," and the automatic exclusion of all with generalized objections to the death penalty "stacked the deck" and made of the jury a tribunal "organized to return a verdict of death."[3] The Court has also held that a court may not refuse a defendant's request to examine potential jurors to determine whether they would vote automatically to impose the death penalty; general questions about fairness and willingness to follow the law are inadequate.[4]

In *Wainwright v. Witt*, the Court held that the proper standard for exclusion is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"[5] Thus, to be excluded, a juror need not indicate that he would "automatic[ally]" vote against the death penalty, nor need his "bias be proved with 'unmistakable clarity.'"[6] Instead, a juror may be excused for cause "where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully

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[23] *Id.* at 16.

[24] *Id.* ("[T]his Court has noted the dilemma faced by trial court judges and counsel in deciding whether to explore potential racial bias at *voir dire* . . . The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the court of juror deliberations.").

[1] 391 U.S. 510 (1968).

[2] *Id*. at 519.

[3] *Id*. at 519, 521, 523. The Court thought the problem went only to the issue of the sentence imposed and saw no evidence that a jury from which death-scrupled persons had been excluded was more prone to convict than were juries on which such person sat. *Id*. at 517–18; *cf.* Bumper v. North Carolina, 391 U.S. 543, 545 (1968). *Witherspoon* was given added significance when, in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976), the Court held mandatory death sentences unconstitutional and ruled that the jury as a representative of community mores must make the determination as guided by legislative standards. *See also* Adams v. Texas, 448 U.S. 38 (1980) (holding *Witherspoon* applicable to bifurcated capital sentencing procedures and voiding a statute permitting exclusion of any juror unable to swear that the existence of the death penalty would not affect his deliberations on any issue of fact).

[4] Morgan v. Illinois, 504 U.S. 719, 734–36 (1992).

[5] 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

[6] 469 U.S. at 424; *see also* Darden v. Wainwright, 477 U.S. 168 (1986) (appropriateness of exclusion should be determined by context, such as excluded juror's understanding based on previous questioning of other jurors).

and impartially apply the law."[7] Persons properly excludable under *Witherspoon* may also be excluded from the guilt/innocence phase of a bifurcated capital trial.[8] It had been argued that to exclude such persons from the guilt/innocence phase would result in a jury somewhat more predisposed to convict, and that this would deny the defendant a jury chosen from a fair cross-section. The Court rejected this argument, concluding that "it is simply not possible to define jury impartiality . . . by reference to some hypothetical mix of individual viewpoints."[9] Moreover, the Court noted, the state has an "entirely proper interest in obtaining a single jury that could impartially decide all of the issues in [a] case," and need not select separate panels and duplicate evidence for the two distinct but interrelated functions.[10] For the same reasons, the Court has held that there is no violation of the right to an impartial jury if a defendant for whom capital charges have been dropped is tried, along with a codefendant still facing capital charges, before a "death qualified" jury.[11]

In *Uttecht v. Brown*,[12] the Court summed up four principles that it derived from *Witherspoon* and *Witt*:

> First a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts.[13]

Exclusion of one juror qualified under *Witherspoon* constitutes reversible error, and the exclusion is not subject to harmless error analysis.[14] However, a court's error in refusing to dismiss for cause a prospective juror prejudiced in favor of the death penalty does not deprive a defendant of his right to trial by an impartial jury if he is able to exclude the juror through exercise of a peremptory challenge.[15] The relevant inquiry "must focus . . . on the jurors who ultimately sat," the Court declared, declining to extend the rule from cases concerning the

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[7] *Witt*, 469 U.S. at 425–26.

[8] Lockhart v. McCree, 476 U.S. 162, 165 (1986).

[9] *Id*. at 183.

[10] *Id*. at 180.

[11] Buchanan v. Kentucky, 483 U.S. 402, 420 (1987).

[12] 551 U.S. 1 (2007).

[13] *Id.* at 9 (citations omitted). In *Uttecht*, the Court reasoned that deference was owed to trial courts because the lower court is in a "superior position to determine the demeanor and qualifications of a potential juror." *See id.* at 22. In *White v. Wheeler*, the Court recognized that a trial judge's decision to excuse a prospective juror in a death penalty case was entitled to deference even when the judge does not make the decision to excuse the juror contemporaneously with jury selection (voir dire). *See* 577 U.S. 73, 78–80 (2015) (per curiam). The Court explained that the deference due under *Uttecht* to a trial judge's decision was not limited to the judge's evaluation of a juror's demeanor, but extended to a trial judge's consideration of "the substance of a juror's response." *See id.* at 80. When a trial judge "chooses to reflect and deliberate" over the record regarding whether to excuse a juror for a day following the questioning of the prospective juror, that judge's decision should be "commended" and is entitled to substantial deference. *See id.*

[14] Gray v. Mississippi, 481 U.S. 648, 668 (1987) ("Because the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury, and because the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless-error analysis cannot apply.") (citation omitted).

[15] Ross v. Oklahoma, 487 U.S. 81, 88 (1987) ("[W]e reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. . . . So long as the jury that sits is impartial, the

erroneous exclusion of jurors opposed to the death penalty that the focus instead should be on "'whether the composition of the *jury panel as a whole* could have been affected by the trial court's error.'"[16]

Amdt6.4.5.4 Voir Dire and Peremptory Challenges

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

It is the function of voir dire to give the defense and the prosecution the opportunity to inquire into, or have the trial judge inquire into, possible grounds of bias or prejudice that potential jurors may have, and to acquaint the parties with the potential jurors.[1] Not every opinion which a juror may entertain about a case necessarily disqualifies him.[2] The judge must determine "whether the nature and strength of the opinion . . . raise the presumption of partiality."[3] It suffices for the judge to question potential jurors about their ability to put aside what they had heard or read about the case, listen to the evidence with an open mind, and render an impartial verdict; the judge's refusal to go further and question jurors about the contents of news reports to which they had been exposed does not violate the right to an impartial jury.[4]

Under some circumstances, the Constitution may require the trial court to ask jurors whether they harbor racial bias, although the Supreme Court has sometimes grounded this requirement in "the essential fairness required by the Due Process Clause of the Fourteenth Amendment" rather than in the right to an impartial jury specifically.[5] Thus, in a situation in which a Black defendant alleged that he was being prosecuted on false charges because of his civil rights activities, the Court held that due process required the trial court to ask prospective jurors about racial prejudice. A similar rule applies in some capital trials, where the risk of racial prejudice "is especially serious in light of the complete finality of the death sentence."[6] The right to an impartial jury entitles a defendant accused of an interracial capital offense to have prospective jurors informed of the victim's race and questioned as to racial bias.[7] But in circumstances not suggesting a significant likelihood of racial prejudice infecting

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fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated."); *see also* United States v. Martinez-Salazar, 528 U.S. 304, 308 (2000) (applying the same principle in a federal criminal case).

[16] 487 U.S. at 86, 87 (quoting and distinguishing *Gray*, 481 U.S. at 665 (emphasis in original)).

[1] *See* Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981); Pointer v. United States, 151 U.S. 396, 408–09 (1894); Lewis v. United States, 146 U.S. 370, 377 (1892).

[2] Witherspoon v. Illinois, 391 U.S. 510, 520–21, 522 n.21 (1968).

[3] Reynolds v. United States, 98 U.S. 145, 155 (1879); *see Witherspoon*, 391 U.S. at 520–21, 522 n.21.

[4] Mu'Min v. Virginia, 500 U.S. 415, 431–32 (1991).

[5] Ham v. South Carolina, 409 U.S. 524, 527 (1973).

[6] Turner v. Murray, 476 U.S. 28, 35 (1986).

[7] *Id.* at 36–37.

a trial, as when the facts are merely that the defendant is Black and the victim White in a non-capital case, the Constitution is satisfied by a more generalized but thorough inquiry into impartiality.[8]

Although the government is not constitutionally obligated to allow peremptory challenges,[9] criminal trials typically provide for a system of peremptory challenges in which both prosecution and defense may, without stating any reason, excuse a certain number of prospective jurors.[10] Although racially discriminatory use of peremptory challenges violates the Equal Protection Clause under the standard of proof set forth in *Batson v. Kentucky*,[11] it does not violate the Sixth Amendment, the Court ruled in *Holland v. Illinois*.[12] The Sixth Amendment "no more forbids the prosecutor to strike jurors on the basis of race than it forbids him to strike them on the basis of innumerable other generalized characteristics."[13] To rule otherwise, the Court reasoned, "would cripple the device of peremptory challenge" and thereby undermine the Amendment's goal of "impartiality with respect to both contestants."[14]

Amdt6.4.6 Right to Local Jury

Amdt6.4.6.1 Historical Background on Local Jury Requirement

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Article III, § 2 requires that federal criminal cases be tried by jury in the state in which the offense was committed,[1] but much criticism arose over the absence of any guarantee in the

[8] Ristaino v. Ross, 424 U.S. 589, 597 (1976); *see Turner*, 476 U.S. at 33 ("[U]nder *Ristaino*, the mere fact that petitioner is black and his victim white does not constitute a 'special circumstance' of constitutional proportions. What sets this case apart from *Ristaino*, however, is that in addition to petitioner's being accused of a crime against a white victim, the crime charged was a capital offense."). In *Ristaino*, the Court noted that under its supervisory power it would require a federal court faced with the same circumstances to propound appropriate questions to identify racial prejudice if requested by the defendant. *Ristaino*, 424 U.S. at 597 n.9; *see* Aldridge v. United States, 283 U.S. 308, 311 (1931). *But see* Rosales-Lopez v. United States, 451 U.S. 182 (1981), in which the trial judge refused a defense request to inquire about possible bias against Mexicans. A plurality apparently adopted a rule that, all else being equal, the judge should necessarily inquire about racial or ethnic prejudice only in cases of violent crimes in which the defendant and victim are members of different racial or ethnic groups, *id.* at 192, a rule rejected by two concurring Justices. *Id.* at 194. Three dissenting Justices thought the judge must always ask when defendant so requested. *Id.* at 195.

[9] The Supreme Court stated: "This Court has long recognized that peremptory challenges are not of federal constitutional dimension." Rivera v. Illinois, 556 U.S. 148, 151–52 (2009) (internal quotation marks omitted) (state trial court's erroneous denial of a defendant's peremptory challenge does not warrant reversal of conviction if all seated jurors were qualified and unbiased).

[10] United States v. Martinez-Salazar, 528 U.S. 304, 311–12 (2000); *cf.* Stilson v. United States, 250 U.S. 583, 586 (1919) (holding that it is no violation of the guarantee of jury impartiality to limit the number of peremptory challenges to each defendant in a multi-party trial).

[11] 76 U.S. 79 (1986); *see* Amdt14.S1.8.1.8 Peremptory Challenges.

[12] 493 U.S. 474 (1990).

[13] *Id*. at 487.

[14] *Id*. at 484.

[1] U.S. Const. art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed.")

original Constitution that the jury be drawn from the "vicinage" or neighborhood of the crime.[2] James Madison's efforts to write into the Bill of Rights an express vicinage provision were rebuffed by the Senate, and the present language was adopted as a compromise.[3]

Amdt6.4.6.2 Local Juries and Vicinage Requirement

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

To date, the Supreme Court has applied the Sixth Amendment right to a trial before a jury of "the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law"—known as the vicinage requirement[1]—in federal prosecutions only.[2] The Court has not considered whether the requirement applies to state-level prosecutions via the Due Process Clause of the Fourteenth Amendment.[3]

Under the vicinage requirement, the "location of the commission of the criminal acts" determines the propriety of the trial venue.[4] The defendant cannot be tried in a federal district if the charged offense was not committed there.[5] Thus, a defendant could not be tried in Missouri for money-laundering when the financial transactions that constituted the charged offenses occurred entirely in Florida.[6] Although the drug trafficking activity that generated the illicit funds occurred in Missouri, the defendant was charged only in connection with the money laundering, and venue was therefore proper only in Florida.[7]

If the charged criminal acts occur in multiple districts, the trial may occur in any one of those districts.[8] In a prosecution for conspiracy, the accused may be tried in the district where

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[2] Francis H. Heller, The Sixth Amendment 25–26 (1951); *see* Williams v. Florida, 399 U.S. 78, 93 n.35 (1970) ("'[V]icinage' means neighborhood, and 'vicinage of the jury' meant jury of the neighborhood or, in medieval England, jury of the county.").

[3] *Williams*, 399 U.S. at 96 (explaining that, in the final version of the Sixth Amendment, "the 'vicinage' requirement itself had been replaced by wording that reflected a compromise between broad and narrow definitions of that term, and that left Congress the power to determine the actual size of the 'vicinage' by its creation of judicial districts.")

[1] *See* Williams v. Florida, 399 U.S. 78, 93 n.35 (1970) ("'[V]icinage' means neighborhood, and 'vicinage of the jury' meant jury of the neighborhood or, in medieval England, jury of the county.").

[2] *See, e.g.* United States v. Cabrales, 524 U.S. 1, 6 (1998); Johnston v. United States, 351 U.S. 215, 220–21 (1956); *see generally* 1 Wayne R. LaFave et al., Criminal Procedure § 2.6(b) (4th ed. 2015) (explaining that Supreme Court precedent has not "addressed the incorporation of the Sixth Amendment's vicinage requirements" and reviewing various strains of lower court caselaw on the issue).

[3] *See* Stevenson v. Lewis, 384 F.3d 1069, 1071 (9th Cir. 2004); LaFave, *supra* note 2, at § 2.6(b); *cf.* Nashville, Chicago & St. Louis Ry. v. Alabama, 128 U.S. 96, 101 (1888) (holding that the Article III, § 2 provision requiring that a criminal jury trial "shall be held in the State where the said Crimes shall have been committed" applies only in federal courts).

[4] United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999); *Cabrales*, 524 U.S. at 6–7; United States v. Cores, 356 U.S. 405, 407 (1958); Johnston v. United States, 351 U.S. 215 (1956).

[5] Salinger v. Loisel, 265 U.S. 224, 232 (1924).

[6] *Cabrales*, 524 U.S. at 3–4.

[7] *Id*. at 7.

[8] *Rodriguez-Moreno*, 526 U.S. at 281–82; United States v. Lombardo, 241 U.S. 73, 77 (1916) ("Undoubtedly where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done . . . ."); Palliser v. United States, 136 U.S. 257, 266 (1890) ("Where a crime is committed partly in one

the conspiracy was formed[9] or, more broadly, in any district where the accused or a co-conspirator carried out an overt act.[10] The offense of obtaining transportation of property in interstate commerce at less than the carrier's published rates may be tried in any district through which the forbidden transportation is conducted.[11] Similarly, where an offense consists of sending illicit material through the mail, the Sixth Amendment permits the trial to take place in any district through which the material passes, although for policy reasons Congress may limit this range of permissible venues by statute.[12]

The Sixth Amendment does not entitle the accused to a preliminary hearing before being removed for trial to the federal district in which the charged offenses are alleged to have occurred.[13] The assignment of a district judge from one district to another, pursuant to statute, does not violate the vicinage requirement—that is, such assignment does not create a new judicial district whose boundaries are undefined or subject the accused to trial in a district not established when the offense with which he is charged was committed.[14]

For offenses against federal laws not committed within any state, Congress has the sole power to prescribe the place of trial; such an offense is not local and may be tried at such place as Congress may designate.[15] The place of trial may be designated by statute after the offense has been committed.[16]

Amdt6.4.7 Notice of Accusation

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Sixth Amendment right to be "informed of the nature and cause of the accusation" guarantees criminal defendants "adequate notice of the charges against [them]."[1] To satisfy

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district and partly in another it must, in order to prevent an absolute failure of justice, be tried in either district, or in that one which the legislature may designate . . . ."); *see also* Hagner v. United States, 285 U.S. 427, 429 (1932) (reasoning that offense of scheming to defraud a corporation by mail is committed both in the place where the letter is mailed and, by virtue of a delivery presumption, also in the place to which the letter is addressed).

[9] Burton v. United States, 202 U.S. 344, 388–89 (1906).

[10] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 252–53 (1940); Brown v. Elliott, 225 U.S. 392, 401–02 (1912); Hyde v. United States, 225 U.S. 347, 367 (1912); Haas v. Henkel, 216 U.S. 462, 474 (1910).

[11] Armour Packing Co. v. United States, 209 U.S. 56, 76–77 (1908).

[12] United States v. Johnson, 323 U.S. 273, 274 (1944) ("Congress may constitutionally make the practices which led to the Federal Denture Act triable in any federal district through which an offending denture is transported.").

[13] United States ex rel. Hughes v. Gault, 271 U.S. 142, 149 (1926); *see also* Beavers v. Henkel, 194 U.S. 73, 84–85 (1904) (reasoning that the sufficiency of an indictment may be challenged in the trial venue but generally not prior to removal to that venue); *cf.* Tinsley v. Treat, 205 U.S. 20 (1907) (distinguishing *Beavers* and holding that the federal removal statute entitled the accused to at least offer evidence as to lack of probable cause).

[14] Lamar v. United States, 241 U.S. 103, 117–118 (1916).

[15] Jones v. United States, 137 U.S. 202, 211 (1890); United States v. Dawson, 56 U.S. (15 How.) 467, 488 (1853).

[16] Cook v. United States, 138 U.S. 157, 181–83 (1891) (holding that retroactive designation of the trial venue for a crime committed in federal territory did not violate the Sixth Amendment vicinage requirement, the Article III jury trial provision, or the *ex post facto* clause).

[1] Lopez v. Smith, 574 U.S. 1, 5–6 (2014). Principles of procedural due process also guarantee the accused's right to notice of the charges. *Id*. at 4 (referring to the accused's "Sixth Amendment and due process right to notice"); *see* Cole v. Arkansas, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than that

the Sixth Amendment requirement, the notice that the government provides must be specific enough to enable the defendant to prepare a defense and to protect himself or herself after judgment against a subsequent prosecution on the same charge.[2] Thus, in the prosecution of a witness for the crime of refusing to answer the questions of a congressional subcommittee about a topic that the subcommittee was investigating, the government violated the Sixth Amendment right by failing to identify the topic of the investigation.[3] Because criminal liability could attach only if the questions that the witness refused to answer related to the topic of the congressional investigation, the Court reasoned that the prosecution's failure to identify the topic left the "chief issue undefined" and therefore violated the defendant's right to know "the nature of the accusation against him."[4]

The Court has cautioned, however, that its limited precedents interpreting this constitutional provision "stand for nothing more than the general proposition" that the government must notify the defendant of the nature of the charges.[5] The Court has not established "specific rule[s]" about how this notice requirement applies in practice.[6] For example, it has not resolved whether a prosecutorial decision to switch theories of liability towards the end of trial vitiates otherwise adequate notice provided in the pleadings.[7] Federal and state rules of criminal procedure contain more detailed notice requirements.[8] The Sixth Amendment right to notice of accusation applies to the states via the Due Process Clause of the Fourteenth Amendment.[9]

Amdt6.5 Confrontation Clause

Amdt6.5.1 Early Confrontation Clause Cases

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the*

notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.").

[2] Bartell v. United States, 227 U.S. 427, 431 (1913) ("It is elementary that an indictment, in order to be good under the Federal Constitution and laws, shall advise the accused of the nature and cause of the accusation against him, in order that he may meet the accusation and prepare for his trial, and that, after judgment, he may be able to plead the record and judgment in bar of further prosecution for the same offense."); Burton v. United States, 202 U.S. 344, 372 (1906); United States v. Simmons, 96 U.S. 360, 362 (1878); United States v. Cruikshank, 92 U.S. 542, 544, 558 (1876); *cf.* United States v. Van Duzee, 140 U.S. 169, 173 (reasoning that the Sixth Amendment does not require the government to proactively give a copy of the indictment to the accused, because the accused may always request a copy from the court at government expense and often "the defendant does not desire a copy, or pleads guilty to the indictment upon its being read to him; and in such cases there in no propriety in forcing a copy upon him and charging the government with the expense").

[3] Russell v. United State, 369 U.S. 749, 766 (1962).

[4] *Id*. at 767–68.

[5] *Lopez*, 574 U.S. at 5–6.

[6] *Id*. at 6.

[7] *Id*.

[8] *See* Fed. R. Crim. P. 7(c) (governing the "nature and contents" of charging documents in federal criminal cases); 5 Wayne R. LaFave et al., Criminal Procedure § 19.2(c) (4th ed. 2020) (discussing notice requirements imposed by Rule 7 and counterpart state provisions that are more robust than Sixth Amendment requirements).

[9] *See* Gannett Company, Inc. v. DePasquale, 443 U.S. 368, 379 (1979) ("The Sixth Amendment, applicable to the States through the Fourteenth, surrounds a criminal trial with guarantees such as the rights to notice, confrontation, and compulsory process that have as their overriding purpose the protection of the accused from prosecutorial and judicial abuses."); *Lopez*, 574 U.S. at 5–6 (analyzing Sixth Amendment notice claim on collateral review of state court conviction).

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." The Clause's "primary object[ive] . . . was to prevent depositions or ex parte affidavits . . . being used against" the defendant, giving the defendant the opportunity of "testing the recollection and sifting the conscience of the witness."[1] Although the Supreme Court has long recognized this Sixth Amendment right to confront witnesses in criminal proceedings as "[o]ne of the fundamental guaranties of life and liberty,"[2] until 1965, the Court construed the right as limited to federal court proceedings.[3] As a result, in its early doctrine, the Court rejected Confrontation Clause challenges to state court proceedings.[4]

The Confrontation Clause's text, which grants the accused a right to confront the "witnesses against" him, generally is addressed to individuals who give formal testimony or its functional equivalent in a criminal proceeding.[5] The Court held that the purpose of the Sixth Amendment was "to continue and preserve" a common-law right of confrontation "having recognized exceptions."[6] For example, the Court in *Kirby v. United States* described the operation of the Clause as mandating that "a fact which can be primarily established only by witnesses" must allow the defendant to confront those witnesses "at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases."[7] Similarly, in 1911, the Court interpreted the Confrontation Clause as intended "to secure the accused the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination."[8]

In a number of early cases, the Court examined the reach and limits of the Confrontation Clause in challenges to federal court proceedings. For example, in *Delaney v. United States*,[9] the Court considered the relationship between the Confrontation Clause and the rule against hearsay evidence[10] out-of-court statements offered at trial in support of the matter they

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[1] Mattox v. United States, 156 U.S. 237, 242 (1895).

[2] Kirby v. United States, 174 U.S. 47, 55 (1899).

[3] *See* Stein v. People of State of New York, 346 U.S. 156, 195 (1953), *overruled in part by* Jackson v. Denno, 378 U.S. 368 (1964) (rejecting argument that right to confront witnesses is incorporated against the states via the Fourteenth Amendment); West v. State of Louisiana, 194 U.S. 258, 261–62 (1904), *overruled in part by* Pointer v. Texas, 380 U.S. 400 (1965) ("As to the Federal Constitution, it will be observed that there is no specific provision therein which makes it necessary in a state court that the defendant should be confronted with the witnesses against him in criminal trials. The 6th Amendment does not apply to proceedings in state courts."). In 1965, the Supreme Court overturned this rule and held that the Confrontation Clause also applies in the context of state criminal proceedings (as discussed later). *Pointer*, 380 U.S. at 403.

[4] *E.g.*, *Stein*, 346 U.S. at 195; *West*, 194 U.S. at 261–62.

[5] See, e.g., Coy v. Iowa, 487 U.S. 1012, 1016 (1988) ("We have never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.").

[6] Salinger v. United States, 272 U.S. 542, 548 (1926).

[7] Kirby v. United States, 174 U.S. 47, 55 (1899).

[8] Dowdell v. United States, 221 U.S. 325, 330 (1911)

[9] 263 U.S. 586 (1924).

[10] *Id.* at 590. In its early doctrine, the Court sometimes examined the admissibility of out of court statements without expressly deciding whether they amounted to "hearsay." S. Ry. v. Gray, 241 U.S. 333, 337 (1916) (evaluating admissibility of prior contradictory statements); Hickory v. United States, 151 U.S. 303, 309 (1894) (similar).

assert.[11] The *Delaney* Court concluded that the co-conspirator exception to the hearsay ban-which permits the admission of the acts or statement of one conspirator against a codefendant if made "during and in furtherance of the conspiracy"[12]-was consistent with the Confrontation Clause and allowed for the admission of a dead co-conspirator's out-of-court statement.[13]

The Court recognized a number of other exceptions to the Confrontation Clause in its early doctrine. For instance, the Court concluded that the right to confront witnesses does not bar the admission of dying declarations[14]-out-of-court statements by a declarant "made under a sense of impending death."[15] In addition, the Court held that an accused forfeits the right to confront witnesses who are "absent by his own wrongful procurement" and "which he has kept away."[16] However, according to the Court, if the witness was absent due "to the negligence of the prosecution," then the Confrontation Clause prohibited the admission of "the deposition or statement of" that "absent witness."[17]

Other early cases involved the extent to which the Confrontation Clause barred the use of information from one proceeding in a separate proceeding. For instance, in an 1899 opinion, the Court concluded that the Confrontation Clause bars the admission of the conviction of a defendant in one proceeding against a different defendant in a separate proceeding when used to establish material facts.[18]

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[11] *See* Krulewitch v. United States, 336 U.S. 440, 442–43 (1949) (describing as hearsay "an unsworn, out-of-court declaration of petitioner's guilt"); Bridges v. Wixon, 326 U.S. 135, 153–54 (1945) (holding that out-of-court statements offered as substantive evidence were hearsay and therefore inadmissible); *accord Hearsay*, Black's Law Dictionary (11th ed. 2019) ("In federal law, a statement (either a verbal assertion or nonverbal assertive conduct), other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

[12] *Coconspirators Exception*, Black's Law Dictionary (11th ed. 2019).

[13] *Delaney*, 263 U.S. at 590. In subsequent cases, the Court further outlined the co-conspirator exception. *See* Lutwak v. United States, 344 U.S. 604, 617–18 (1953) (concluding that co-conspirator hearsay exception does not apply to statements made after conspiracy concludes); *Krulewitch*, 336 U.S. at 442–43 (determining that "hearsay declaration attributed to the alleged co-conspirator was not admissible on the theory that it was made in furtherance of the alleged criminal transportation undertaking" where conspiracy had ended when statement was made). These subsequent cases generally arose not as Confrontation Clause questions, but rather evidentiary determinations regarding hearsay. *See Lutwak v. United States*, 344 U.S. at 617–18; *Krulewitch*, 336 U.S. at 442–43; *see also* Dutton v. Evans, 400 U.S. 74, 82 (1970) (plurality opinion) (explaining how the federal hearsay exception for coconspirator statements derived from the Court's "exercise of its rule-making power in the area of the federal law of evidence").

[14] Kirby v. United States, 174 U.S. 47, 61 (1899); Mattox v. United States, 156 U.S. 237, 243–44 (1895); *see also* Snyder v. Com. of Mass., 291 U.S. 97, 107 (1934) ("[T]he privilege of confrontation [has not] at any time been without recognized exceptions, as, for instance, dying declarations."); Robertson v. Baldwin, 165 U.S. 275, 282 (1897) ("[T]he provision that an accused person shall be confronted with the witnesses against him [does not] prevent the admission of dying declarations, or the depositions of witnesses who have died since the former trial.").

[15] Mattox v. United States, 146 U.S. 140, 151 (1892).

[16] Reynolds v. United States, 98 U.S. 145, 158 (1878). Elsewhere, the Court noted that the right to confrontation does not prohibit the admission of "the notes of testimony of [a] deceased witness," at least where "the accused has had the right of cross-examination in a former trial." Dowdell v. United States, 221 U.S. 325, 330 (1911). According to the Court, "[t]o say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent." *Mattox*, 156 U.S. at 243.

[17] Motes v. United States, 178 U.S. 458, 474 (1900).

[18] *Kirby*, 174 U.S. at 55. However, early Confrontation Clause doctrine suggested that the admission of information from one proceeding in a separate proceeding will not always violate the right to confront witnesses. *See Dowdell*, 221 U.S. at 330–31 (considering the right to confront witnesses under the Constitution of the Philippines and concluding that an appellate court did not infringe on that right by requiring lower courts to certify "certain facts regarding the course" of the underlying trial when that certification is not testimony concerning the defendant's culpability).

Amdt6.5.2 Confrontation Clause Cases During the 1960s through 1990s

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

In 1965, the Supreme Court broke from its early doctrine limiting Confrontation Clause protections to federal court proceedings and held that the right to confrontation is "fundamental" and "made obligatory on the States by the Fourteenth Amendment."[1] Alongside that pronouncement, and in the years immediately following, the Court's opinions further discussed the relationship between the confrontation right and the bar on hearsay evidence.[2] The Court seemingly associated the two concepts, concluding that a key purpose of the right to confrontation is to give criminal defendants "an opportunity to cross-examine the witnesses against him," absent an applicable hearsay exception.[3] In *Pointer v. Texas*,[4] the Court rejected the admission of testimony from a prior preliminary hearing on confrontation grounds, because no exception to the hearsay rule applied, and the testimony was taken in circumstances insufficient to secure "an adequate opportunity to cross-examine" the witness through counsel.[5] The Court further emphasized the importance of cross examination in satisfying the confrontation right in *Douglas v. Alabama*,[6] concluding that the Confrontation Clause barred the admission of the confession of an alleged accomplice who invoked his Fifth Amendment right to avoid self-incrimination, leaving the defendant unable to "cross-examine [the witness] as to the alleged confession."[7] Three years later, cross-examination was again

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[1] Pointer v. Texas, 380 U.S. 400, 403 (1965).

[2] Hearsay is "a statement (either a verbal assertion or nonverbal assertive conduct), other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay, Black's Law Dictionary (11th ed. 2019)

[3] *See Pointer*, 380 U.S. at 406–07 (explaining that although the confrontation right generally requires cross-examination, there are recognized exceptions such as dying declarations and "testimony of a deceased witness who has testified at a former trial").

[4] 380 U.S. 400, 403 (1965).

[5] *Id.* at 407.

[6] 380 U.S. 415 (1965).

[7] *Id.* at 419–20; *see also* Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987) (plurality opinion) ("The opinions of this Court show that the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination."); Barber v. Page, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness."). The Court has given weight to the importance of cross-examination for confrontation purposes in a number of other opinions. *See* Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) ("By thus cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause."); Mancusi v. Stubbs, 408 U.S. 204, 216 (1972) ("Since there was an adequate opportunity to cross-examine [the witness] at the first trial, and counsel . . . availed himself of that opportunity, the transcript of [the witness'] testimony in the first trial bore sufficient 'indicia of reliability' and afforded 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement.'" (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970) (plurality opinion)); Smith v. State of Illinois, 390 U.S. 129, 131 (1968) (concluding that trial court's refusal to permit defendant to cross-examine the "principal prosecution witness" on "either his name or where he lived" was "effectively to emasculate the right of cross-examination itself"). Notably, the Supreme Court has also observed the importance of cross-examination in the context of Constitutional due process rights. *See* Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (holding that a defendant's due process rights had been

integral to the Court's Confrontation Clause analysis in *Bruton v. United States*.[8] In *Bruton*, the Court concluded that the Confrontation Clause barred the admission of the confession of a non-testifying co-defendant in a joint jury trial, where that confession implicated another defendant.[9] According to the Court, introduction of that confession added "substantial, perhaps even critical, weight to the Government's case in a form *not subject to cross-examination*."[10]

In 1970, the Court again reexamined the relationship between the Confrontation Clause and the hearsay rule, holding that they "are generally designed to protect similar values," but that the "overlap is [not] complete" and that the Confrontation Clause is more "than a codification of the rules of hearsay and their exceptions as they existed historically at common law."[11] According to the Court, the Confrontation Clause may be violated even when the hearsay rule is not and, conversely, "evidence . . . admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied."[12] Thus, in *California v. Green*,[13] the Court held that the admission of prior statements made by a witness while in custody and in a preliminary hearing did not violate a defendant's confrontation rights, even though the statements would have been hearsay in some jurisdictions.[14] The Court reasoned that the witness was available for "full cross-examination

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violated where his ability to cross-examine witnesses on key points had been barred by state hearsay and common-law trial rules); In re *Oliver*, 333 U.S. 257, 259 (1948); Alford v. United States, 282 U.S. 687, 691 (1931) ("Cross-examination of a witness is a matter of right.").

[8] 391 U.S. 123 (1968).

[9] *Id.* In a subsequent opinion, the Court held that *Bruton* applies retroactively. Roberts v. Russell, 392 U.S. 293, 293 (1968) (per curiam). Depending on the details, the Court has reached different outcomes on the extent to which *redacted* codefendant confessions violate *Bruton*. *Compare* Richardson v. Marsh, 481 U.S. 200, 211 (1987) ("We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence."), *with* Gray v. Maryland, 523 U.S. 185, 188 (1998) (holding that "*Bruton's* protective rule" applied where the prosecution "redacted the codefendant's confession by substituting for the defendant's name in the confession a blank space or the word 'deleted.'").

[10] *Bruton*, 391 U.S. at 128 (emphasis added); *see also* Cruz v. New York, 481 U.S. 186, 193 (1987), *abrogating* Parker v. Randolph, 442 U.S. 62 (1979)("We hold that, where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant" the "Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him"); Lee v. Illinois, 476 U.S. 530, 539 (1986) (concluding that "confession of an accomplice" "was presumptively unreliable and . . . did not bear sufficient independent 'indicia of reliability' to overcome that presumption"); *but see* Tennessee v. Street, 471 U.S. 409, 410 (1985) (holding that admission of accomplice confession was permissible for "the nonhearsay purpose of rebutting respondent's testimony that his own confession was coercively derived from the accomplice's statement"); Nelson v. O'Neil, 402 U.S. 622, 629–30 (1971) ("We conclude that where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments."). In some cases, the Court concluded that *Bruton* violations amounted to harmless error where other evidence of guilt was overwhelming. *See* Schneble v. Fla., 405 U.S. 427, 432 (1972); Harrington v. California, 395 U.S. 250, 254 (1969). Under current doctrine, the confession of a non-testifying co-defendant "in a jury trial" may still be inadmissible on confrontation grounds in federal courts "if it implicates the defendant." United States v. King, 910 F.3d 320, 328 (7th Cir. 2018). However, pursuant to subsequent Supreme Court doctrine, as a threshold matter the confession must be testimonial in nature before its admission implicates the Confrontation Clause. Crawford v. Washington, 541 U.S. 36, 51 (2004); *accord* United States v. Dale, 614 F.3d 942, 956 (8th Cir. 2010) (holding that the "out-of-court statement of a co-defendant made unknowingly to a government agent is not 'testimonial'" and therefore not barred by the Confrontation Clause); United States v. Smalls, 605 F.3d 765, 768 n.2 (10th Cir. 2010) ("[T]he *Bruton* rule, like the Confrontation Clause upon which it is premised, does not apply to nontestimonial hearsay statements.").

[11] California v. Green, 399 U.S. 149, 155 (1970); *see also Dutton*, 400 U.S. at 80 ("It is not argued, nor could it be, that the constitutional right to confrontation requires that no hearsay evidence can ever be introduced. That the two evidentiary rules are not identical must be readily conceded.").

[12] *Green*, 399 U.S. at 156.

[13] *Id.*

[14] *Id.* at 164.

at trial," including for questioning into inconsistencies between his prior statement and "his present version of the events in question."[15] Similarly, in *Dutton v. Evans*,[16] a plurality of four Justices held that the admission of an out-of-court statement pursuant to Georgia's coconspirator hearsay exception did not violate the Confrontation Clause, even though the same statement would have been inadmissible hearsay under the federal rules of evidence.[17] The Court reasoned that the "limited contours" of the federal hearsay exception in conspiracy trials are not "required by the Sixth Amendment's Confrontation Clause" but rather a product of the Court's "rule-making power in the area of the federal law of evidence."[18]

Then, in its 1980 opinion *Ohio v. Roberts*, the Supreme Court again revisited the "relationship between the Confrontation Clause and the hearsay rule with its many exceptions."[19] In *Roberts*, the Court explained that the Confrontation Clause "operates in two separate ways to restrict the range of admissible hearsay."[20] First, "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable."[21] Second, if unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability.'"[22] Indicia of reliability, according to the Court, could "be inferred . . . in a case where the evidence falls within a firmly rooted hearsay exception."[23] Otherwise, reliability would require "a showing of particularized guarantees of trustworthiness."[24] The Court's focus in *Roberts* on reliability or trustworthiness became the primary lens through which the Court examined Confrontation Clause challenges involving extrajudicial statements until 2004, when the Court again changed course.[25]

Amdt6.5.3 Modern Doctrine

Amdt6.5.3.1 Admissibility of Testimonial Statements

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the*

[15] *Id.* at 164. The Court also observed that the witnesses' preliminary hearing testimony would have been admissible on confrontation grounds even without "opportunity for confrontation at the subsequent trial." *Id.* at 165. According to the Court, at the preliminary hearing the witness "was under oath" and the defendant "was represented by counsel-the same counsel in fact who later represented him at the trial." *Id.* Thus, the Court noted that "respondent had every opportunity to cross-examine [witness] as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings." *Id.*

[16] 400 U.S. at 74.

[17] *Id.* at 81. The statement was made during the concealment stage of the conspiracy, which would place it beyond the co-conspirator exception in federal courts. *Id.* at 78–79, 81.

[18] *Id.* at 82.

[19] Ohio v. Roberts, 448 U.S. 56, 62 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

[20] *Id.* at 65.

[21] *Id.* at 66; *but see* United States v. Inadi, 475 U.S. 387, 394 (1986) ("Roberts cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.").

[22] *Id.*

[23] *Roberts*, 448 U.S. at 66; *see also* Bourjaily v. United States, 483 U.S. 171, 183 (1987) ("We think that the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under this Court's holding in *Roberts*, a court need not independently inquire into the reliability of such statements.").

[24] *Roberts*, 448 U.S. at 66.

[25] Amdt6.5.3.1 Admissibility of Testimonial Statements.

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In the years following *Ohio v. Roberts*,[1] the Supreme Court applied, revisited, and narrowed the Confrontation Clause standard that *Roberts* had set forth,[2] which generally permitted the admission of out-of-court statements only if the declarant was unavailable and the statement was sufficiently reliable.[3] In 2004 the Court in *Crawford v. Washington*[4] overruled *Roberts* and introduced a new standard for determining whether an out-of-court statement implicates the Confrontation Clause.[5]

Under *Crawford*, the key to whether evidence implicates the Confrontation Clause is not its reliability, but rather whether it is *testimonial*.[6] Pursuant to *Crawford*, non-testimonial evidence does not implicate the Confrontation Clause.[7] In contrast, testimonial evidence may only be admitted consistently with the Confrontation Clause in limited circumstances.[8] Testimonial evidence may be admitted if the declarant: is available at trial for cross examination,[9] or is unavailable but the defendant previously had opportunity to cross-examine the declarant about the statement.[10] The Court in *Crawford* also recognized the existence of two common law Confrontation Clause exceptions that historically permitted the admission of testimonial statements[11]—but it did not expressly approve or disapprove of either.[12]

The *Crawford* Court expressly declined to provide a "comprehensive definition" of "testimonial."[13] However, drawing from a variety of sources, the Court offered several possible formulations of "core" testimonial statements, including "ex parte in-court testimony or its

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[1] 448 U.S. 56 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

[2] *See* Lilly v. Virginia, 527 U.S. 116, 133 (1999) ("[O]ur cases consistently have viewed an accomplice's statements that shift or spread the blame to a criminal defendant as falling outside the realm of" reliable hearsay exceptions); White v. Illinois, 502 U.S. 346, 354 (1992) (holding that unavailability "is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding"); Idaho v. Wright, 497 U.S. 805, 827 (1990) (determining that the out-of-court statements of a child to an examining pediatrician were insufficiently reliable under *Roberts* when admitted under a state's residual hearsay exception); United States v. Inadi, 475 U.S. 387, 394, 400 (1986) (affirming "the validity of the use of co-conspirator statements" and rejecting a broad reading of *Roberts* that would prohibit introduction by the government of any such "out-of-court statement[s]" absent "a showing that the declarant is unavailable"); Lee v. Illinois, 476 U.S. 530, 546 (1986) (concluding that a codefendant confession was insufficiently reliable "to overcome the weighty presumption against the admission of such uncross-examined evidence," although its content largely "interlocked" or overlapped with the defendant's own confession).

[3] *Roberts*, 448 U.S. at 66.

[4] 541 U.S. 36 (2004).

[5] *Id.* at 54, 60. In a subsequent opinion, the Court held that *Crawford* is not "retroactive to cases already final on direct review." Whorton v. Bockting, 549 U.S. 406, 409 (2007).

[6] *Crawford*, 541 U.S. at 51; *see also* Hemphill v. New York, No. 20-637, slip op. at 10–11 (U.S. Jan. 20, 2022) (explaining that if "*Crawford* stands for anything, it is that the history, text, and purpose of the Confrontation Clause bar judges from substituting their own determinations of reliability for the method the Constitution guarantees"-cross-examination).

[7] *Crawford*, 541 U.S. at 68.

[8] *Id.* at 68–69.

[9] *Id.*

[10] *Id.* Further, *Crawford* "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id*. at 59 n.9.

[11] The two potential exceptions—dying declarations and forfeiture by wrongdoing—are discussed in Amdt6.5.3.3 Dying Declarations and Forfeiture by Wrongdoing.

[12] *Crawford*, 541 U.S. at 56, n.6, 62 (recognizing the dying declarations and forfeiture by wrongdoing exceptions to the Confrontation Clause but declining to expressly adopt either).

[13] *See id.* at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

functional equivalent" such as "affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."[14] As additional possible formulations of "testimonial," the Court listed "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[15] Regardless of the exact formulation of "testimonial" the Court in *Crawford* specified that at a minimum, "testimonial" includes police interrogations and "prior testimony at a preliminary hearing, before a grand jury, or at a former trial."[16]

In subsequent opinions, the Court has further examined what it means for evidence to be "testimonial" for Confrontation Clause purposes-particularly in the context of forensic laboratory reports and analysis. For example, in *Melendez-Diaz v. Massachusetts*[17] the Court held that the admission of forensic lab analysts' affidavits—reporting that material seized from the defendant was cocaine-violated the Confrontation Clause because affidavits were testimonial and the "analysts were 'witnesses' for purposes of the Sixth Amendment."[18] In *Bullcoming v. New Mexico*[19] the Court clarified that when the government seeks to introduce laboratory reports containing testimonial certifications "made for the purpose of proving a particular fact," the "accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist."[20] Testimony by a surrogate witness who is familiar with general laboratory procedures, but otherwise uninvolved in the relevant certification, is insufficient to satisfy a defendant's constitutional right.[21]

In its 2012 opinion *Williams v. Illinois*,[22] the Court again revisited the relationship between the Confrontation Clause and laboratory analysis.[23] In *Williams*, an expert witness testified at trial regarding conclusions she drew by comparing DNA profiles, including one from an outside-laboratory that she had not participated in creating and therefore lacked personal knowledge about.[24] In her testimony and on cross-examination, the expert witness identified the source material for that outside-laboratory's DNA profile.[25] The defendant argued that by allowing the substance of a testimonial forensic laboratory report through the trial testimony of an expert witness (who took no part in the reported forensic analysis), the prosecution violated the Confrontation Clause.[26] A plurality of four Justices disagreed, and rejected the argument that because the expert was not involved in performing, observing, or certifying the creation of the outside-laboratory's DNA profile, the testimony regarding the

[14] *Id.* at 51 (citations omitted), *cited with approval in* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009).

[15] *Id.* at 52 (citations omitted), *cited with approval in* Melendez-Diaz, 557 U.S. at 310.

[16] *Id.* at 68.

[17] 557 U.S. 305 (2009).

[18] *Id.* at 308, 311.

[19] 564 U.S. 647 (2011).

[20] *Id.* at 652.

[21] *Id.*

[22] 567 U.S. 50 (2012) (plurality opinion).

[23] *Id.* at 56–58.

[24] *Id.* at 62.

[25] *Id.* at 61–62.

[26] *Id*. at 56–57.

source material for that profile ran afoul of *Melendez-Diaz* and *Bullcoming*.[27] According to the plurality, the Confrontation Clause "has no application to out-of-court statements that are not offered to prove the truth of the matter asserted."[28] The plurality concluded that the underlying DNA results were "[o]ut-of-court statements . . . related by the expert solely for the purpose of explaining" her underlying assumptions, rather than statements "offered for their truth."[29] As a result, the testimony regarding the source material of the outside-laboratory's DNA profile fell "outside the scope of the Confrontation Clause."[30]

Amdt6.5.3.2 Ongoing Emergencies and Confrontation Clause

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Statements made to police during interrogation are nontestimonial—and therefore outside the scope of the Confrontation Clause—when made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[1] In contrast, "[t]hey *are* testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[2] One relevant factor in determining whether a statement occurred during an ongoing emergency is whether the statements are made "about events as they [are] actually happening," and necessary to resolve a "present emergency, rather than simply to learn . . . what had happened in the past."[3] In *Davis v. Washington*,[4] the Court concluded that out of court statements made by the victim of domestic violence to a 911 operator were nontestimonial as they were "plainly a call for help against [a] bona fide physical threat" by someone "facing an ongoing emergency."[5] The statements' lack of formality also influenced the Court in *Davis*, as the Court emphasized that the statements were "frantic" and "provided over

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[27] *Id.* at 79–80.

[28] *Id.* at 57–58.

[29] *Id.* at 58.

[30] *Id*. The plurality in *Williams* also appeared to give weight to the fact that the underlying proceedings involved a bench trial, rather than a jury trial, and "assumed that the trial judge understood" the admissibility limits of the expert witness' testimony. *Id.* at 72–73. Further, according to the plurality, "even if the report produced by [the outside laboratory] had been admitted into evidence, there would have been no Confrontation Clause violation" because it was "produced before any suspect was identified," sought "not for the purpose of obtaining evidence to be used against petitioner . . . but for the purpose of finding a rapist who was on the loose," and was not "inherently inculpatory." *Id.* at 58.

[1] Davis v. Washington, 547 U.S. 813, 822 (2006).

[2] *Id.* (emphasis added).

[3] *Id.* at 827 (emphasis omitted).

[4] 547 U.S. 813 (2006).

[5] *Id.* at 827; see *id.* at 822 (holding that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimoninal when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution").

the phone," in an unsafe, turbulent environment.[6] However, based on similar considerations, the *Davis* Court concluded that statements made to responding officers during a separate domestic violence incident *were* testimonial.[7] The difference, according to the Court, was that the testimonial statements were made with "no emergency in progress" and "no immediate threat" to the defendant, and were instead "part of an investigation into possibly criminal past conduct."[8]

In *Michigan v. Bryant*,[9] the Court held that the ongoing emergency exception encompassed the statements of a mortally wounded man to police, identifying the eventual defendant as the person who shot him.[10] According to the Court, to determine whether an interrogation fits within the ongoing emergency exception, a court should objectively evaluate the circumstances "and the statements and actions of the parties."[11] In *Bryant*, factors considered by the Court in making this assessment included the dangerousness of the weapon involved (a gun), and the possibility of additional shootings—both of which weighed in favor of there being an ongoing emergency.[12] In addition, the Court emphasized the "informality of the situation and the interrogation," noting the "fluid and somewhat confused" nature of the questioning, which indicated that the "interrogators' primary purpose was simply to address what they perceived to be an ongoing emergency."[13]

In *Ohio v. Clark*,[14] the Court examined the contours of the ongoing emergency exception outside of the context of police interrogations.[15] *Clark* involved statements made by a child abuse victim to teachers, in which he identified the defendant as his abuser.[16] The Court held that the admission of these statements without opportunity for cross-examination did not violate the Sixth Amendment as "neither the child nor his teachers had the primary purpose of assisting in [the defendant's] prosecution."[17] According to the Court, the "statements occurred in the context of an ongoing emergency involving suspected child abuse."[18] In addition, the Court noted that the statements were made by a child, and that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause."[19] Further, the Court seemingly gave weight to the fact that the statements were made to teachers as opposed to police, although the Court declined to "adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment."[20]

[6] *Id.*
[7] *Id.* at 829–30.
[8] *Id.* at 829.
[9] Michigan v. Bryant, 562 U.S. 344 (2011).
[10] *Id.* at 349–50.
[11] *Id.* at 359.
[12] *Id.* at 372–77.
[13] *Id.* at 377.
[14] 576 U.S. 237 (2015).
[15] *Id.* at 240.
[16] *Id.* at 240–42.
[17] *Id.* at 240.
[18] *Id.* at 246.
[19] *Id.* at 247–48.
[20] *Id.* at 249.

Amdt6.5.3.3 Dying Declarations and Forfeiture by Wrongdoing

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Conceptually, the ongoing emergency exception (discussed above) places qualifying statements outside the Confrontation Clause, because they are *not* testimonial.[1] With respect to *testimonial* statements, the Court has stated that the only exceptions to Confrontation Clause requirements are those "established at the time of the founding,"[2] and "acknowledged" two such exceptions.[3] The first Confrontation Clause exception encompasses dying declarations—"declarations made by a speaker who was both on the brink of death and aware that he was dying."[4] The second exception involves statements subject to "forfeiture by wrongdoing."[5] It permits "the introduction of statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant."[6] The forfeiture by wrongdoing exception applies only to "deliberate witness tampering" where "the defendant engaged in conduct *designed* to prevent the witness from testifying."[7] In *Giles v. California*,[8] the Court examined the limits of this exception, and rejected its applicability to statements made by a victim to police three weeks before she was killed by the defendant (who claimed self-defense at trial).[9] The Court concluded that the defendant did not forfeit his right to confront the witness's statements even though she was "unavailable to testify" as a result of her "murder for which [the defendant] was on trial," absent evidence that the defendant "intended to prevent [her] from testifying."[10]

Amdt6.5.3.4 Right to Confront Witnesses Face-to-Face

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the*

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[1] Davis v. Washington, 547 U.S. 813, 822 (2006).

[2] Giles v. California, 554 U.S. 353, 358 (2008) (quoting Crawford v. Washington, 541 U.S. 36, 54 (2004)).

[3] *Id.* In *Hemphill v. New York*, the Supreme Court rejected a New York state evidentiary rule that permitted admission of evidence otherwise barred by the Confrontation Clause in order to correct a misleading impression created by the defendant, where the state conceded that its evidentiary rule was not "an exception to the right to confrontation at common law." No. 20-637, slip op. at 9 (U.S. Jan. 20, 2022).

[4] *Giles*, 554 U.S. at 358.

[5] *Id.* at 359.

[6] *Id.*

[7] *Id.* at 359, 366.

[8] 554 U.S. 353 (2008).

[9] *Id.* at 356, 377.

[10] *Id.* at 357, 361.

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Although much of the Court's Confrontation Clause doctrine has focused on the admissibility of extra-judicial evidence such as out-of-court statements or lab results,[1] in several opinions the Court has examined the extent to which the Sixth Amendment affords a right to confront witnesses in person or face-to-face. In one case, the Court considered whether the Confrontation Clause gave the defendant a right to be present for the competency hearing of two child witnesses.[2] The Court seemingly construed the issue not as one of the defendant's right to confront witnesses face-to-face, but rather to obtain effective cross-examination.[3] According to the Court, the Sixth Amendment did not require the defendant's presence in the competency hearing, because "[a]fter the trial court determined that the two children were competent to testify, they appeared and testified in open court" where they were "subject to full and complete cross-examination."[4] The next year, in *Coy v. Iowa*,[5] the Court emphasized that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[6] Therefore, the Court held that the Confrontation Clause barred the use of a "specifically designed" screen that blocked the defendant from the complaining witness's view as it was "difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter."[7] However, two years later, the Court held that the Confrontation Clause permitted the testimony, examination, and cross-examination of a child witness by "one-way closed circuit television" from a separate room.[8] Although, the child witness could not see the defendant, the Court noted the "important state interest" in protecting the child witness and observed that the closed-circuit testimony "preserve[d] all of the other elements of the confrontation right" such as "contemporaneous cross-examination" and the ability of the "judge, jury, and defendant" to view and assess the "witness as he or she testifies."[9] In addition, the Court emphasized that the judge made "individualized findings" that testifying face-to-face would cause the child witness serious emotional distress.[10]

Amdt6.5.3.5 Confrontation of Witnesses Lacking Memory

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,

[1] *Supra* Amdt6.5.3.1 Admissibility of Testimonial Statements.

[2] Kentucky v. Stincer, 482 U.S. 730, 732 (1987).

[3] *See id.* at 740 ("Instead of attempting to characterize a competency hearing as a trial or pretrial proceeding, it is more useful to consider whether excluding the defendant from the hearing interferes with his opportunity for effective cross-examination.").

[4] *Id.*

[5] 487 U.S. 1012 (1988).

[6] *Id.* at 1016. A face-to-face encounter with the witness, in and of itself, may not be fully sufficient to satisfy a defendant's right to confrontation, however, if the defendant is deprived adequate cross-examination. *See* Davis v. Alaska, 415 U.S. 308, 309, 315, 317 (1974) (concluding that trial court infringed on defendant's confrontation rights where it restricted cross examination regarding the juvenile criminal record of a witness pursuant to a protective order issued under state law, where that criminal record was relevant to the defense theory of bias on the part of the witness). The right to confront witnesses face-to-face does not shield the defendant from having his presence-and his resulting availability to "fabricate" his testimony in light of preceding witnesses-noted by the prosecution. *See* Portuondo v. Agard, 529 U.S. 61, 65 (2000).

[7] *Coy*, 487 U.S. at 1020.

[8] Maryland v. Craig, 497 U.S. 836, 851, 852 (1990).

[9] *Id.*

[10] *Id.* at 840–42.

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In one vein of cases, the Court has examined the degree to which lack of memory on the part of a testifying witness implicates the Confrontation Clause.[1] For instance, in *Delaware v. Fensterer*,[2] the Court disagreed that a defendant's confrontation rights had been violated when an expert witnesses testified but could not remember the basis of his theory, which the defendant argued deprived him of an adequate opportunity for cross-examination.[3] The Court explained that in general, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[4] The Court noted that the defendant had an opportunity to effectively cross-examine the expert witness, including into his lack of recollection.[5] In addition, according to the Court, the Confrontation Clause "includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion."[6] The Court reached a similar conclusion three years later when it rejected a Confrontation Clause challenge to testimony of a complaining witness concerning his prior identification of the defendant—the details of which he could not remember due to memory loss.[7] Citing to *Fensterer*, the Court explained that "[i]t is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even . . . the very fact that he has a bad memory."[8]

Amdt6.5.3.6 Evidence Introduced by Defendant

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Court's Sixth Amendment jurisprudence illustrates that the right to confront witnesses does not amount to a right to confront witnesses with all available evidence.[1] For instance, a defendant did not have a right to confront a rape victim with evidence of a prior sexual relationship where the defendant failed to comply with a state law conditioning

[1] In *California v. Green*, however, the Court expressly declined to consider whether the Confrontation Clause barred the introduction of prior out-of-court statements by a witness concerning events "that he could not remember" at trial. 399 U.S. at 168–69.

[2] 474 U.S. 15 (1985).

[3] *Id.* at 20–22.

[4] *Id.* at 20.

[5] *Id.* at 20.

[6] *Id.* at 21–22.

[7] United States v. Owens, 484 U.S. 564 (1988).

[8] *Id.* at 559 (citation omitted).

[1] *See* Michigan v. Lucas, 500 U.S. 145, 151 (1991) ("We have indicated that probative evidence may, in certain circumstances, be precluded when a criminal defendant fails to comply with a valid discovery rule.").

admission of such evidence on notice and hearing requirements.[2] The Court concluded that "[t]he notice-and-hearing requirement serves legitimate state interests in protecting against surprise, harassment, and undue delay."[3]

Amdt6.5.4 Right to Compulsory Process

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Sixth Amendment guarantees a criminal defendant the right "to have compulsory process for obtaining witnesses in his favor."[1] Two early nineteenth century cases illustrate the initial conceptions of the Compulsory Process Clause. Although neither is a Supreme Court case, both are notable in that they feature the analyses of then-Supreme Court Justices sitting on lower federal courts. In the first case, Justice Samuel Chase stated in the 1800 case *United States v. Cooper* that the "constitution gives to every man, charged with an offence, the benefit, of compulsory process, to secure the attendance of his witnesses."[2] In the second case, Chief Justice John Marshall "presided as trial judge" over the "treason and misdemeanor trials of Aaron Burr."[3] In an 1807 opinion subsequently described by the Supreme Court as the "first and most celebrated analysis" of compulsory process, Marshall "ruled that Burr's compulsory process rights entitled him to serve a subpoena on President Jefferson, requesting the production of allegedly incriminating evidence."[4] In addition to these two cases, another early insight into the Compulsory Process Clause may be gleaned from an 1833 treatise that suggests an apparent purpose of the provision was to make inapplicable in federal trials the common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense.[5]

The Supreme Court has since characterized the Compulsory Process Clause as one of several constitutional provisions guaranteeing defendants "a meaningful opportunity to present a complete defense."[6] There is little Supreme Court precedent examining the contours

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[2] *Id.* at 152–53.

[3] *Id.*

[1] U.S. Const. amend. VI.

[2] *U.S. v. Cooper*, 4 U.S. 341 (C.C.D. Pa. 1800).

[3] Pennsylvania v. Ritchie, 480 U.S. 39, 55 (1987); U.S. v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807).

[4] *Ritchie*, 480 U.S. at 55 (discussing *Burr*, 25 F. Cas. at 35; *see also Burr*, 25 F. Cas. at 34 (holding that the right to the accused "to the compulsory process of the court" contains "no exception whatever").

[5] 3 J. Story, Commentaries On The Constitution Of The United States 1786 (1833). In the 1851 case *United States v. Reid*, the Supreme Court concluded that a defendant was not entitled to a new trial after his witness had been barred from testifying under state law on the grounds that the witness had been tried separately for the same crime as the defendant. 53 U.S. 361, 366 (1851). In the 1918 case *Rosen v. United States*, the Court overruled *Reid*. 245 U.S. 467, 472 (1918). Although *Rosen* "rested on nonconstitutional grounds," the Court subsequently explained that "its reasoning was required by the Sixth Amendment." Washington v. Texas, 388 U.S. 14, 22 (1967). "In light of the common-law history, and in view of the recognition in the *Reid* case that the Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court, it could hardly be argued that a State would not violate the clause if it made all defense testimony inadmissible as a matter of procedural law." *Id.*

[6] *See* Holmes v. South Carolina, 547 U.S. 319, 324 (2006) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)); *accord* Faretta v. California, 422 U.S. 806, 818 (1975) ("The rights to

of the Compulsory Process Clause,[7] because the Court has generally analyzed issues involving a defendant's right to "obtain[ ] witnesses in his favor"[8] through a Due Process framework.[9] For instance, in the 1987 case *Pennsylvania v. Ritchie*, the Court indicated that requests to compel the government to reveal the identity of witnesses or produce exculpatory evidence should be evaluated under due process rather than compulsory process analysis, adding that "compulsory process provides no *greater* protections in this area than due process."[10] Thus, compulsory process rights such as the right to testify are also secured by the Due Process Clause.[11]

Despite the limited precedent, there are a few Supreme Court cases that offer insights into the Compulsory Process Clause.[12] In the 1967 case *Washington v. Texas*, the Court observed that the "right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights" and that the right amounts "in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense."[13] The Court in *Washington* further held that "[t]his right is a fundamental element of due process of law," applicable to states by way of the Fourteenth Amendment, and the right is violated by a state law that provides that co-participants in the same crime could not testify for one another.[14] As the Court explained, it is a violation of the Compulsory Process Clause if the state "arbitrarily denied [a defendant] the right to put on the stand a witness who was

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notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it."); Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense.").

[7] *See Ritchie*, 480 U.S. at 55 ("This Court has had little occasion to discuss the contours of the Compulsory Process Clause.").

[8] U.S. CONST. amend. VI. One Supreme Court case suggests that the Compulsory Process Clause may also "require the production of evidence." *See Ritchie*, 480 U.S. at 56 (discussing United States v. Nixon, 418 U.S. 683, 709 (1974)).

[9] *See* Chambers v. Mississippi, 410 U.S. 284, 294 (1973) ("The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process."); Webb v. Texas, 409 U.S. 95, 98 (1972) ("In the circumstances of this case, we conclude that the judge's threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment."); In re *Oliver*, 333 U.S. 257, 275 (1948) ("Except for a narrowly limited category of contempts, due process of law . . . requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation.").

[10] 480 U.S. at 56 (explaining that "the right to discover the identity of witnesses, or to require the government to produce exculpatory evidence" had traditionally been evaluated under the Due Process Clause of the Fourteenth Amendment, and that it need not decide "whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment").

[11] *See* Rock v. Arkansas, 483 U.S. 44, 51–53 (1987) (explaining that the right to testify is grounded in the Compulsory Process Clause and the Due Process Clause, and is also a "a necessary corollary to the Fifth Amendment's guarantee against compelled testimony"); *see generally* Amdt14.S1.4.1 Overview of Incorporation of the Bill of Rights.

[12] *Ritchie*, 480 U.S. 39, 55 (1987) ("Despite the implications of the *Burr* decision for federal criminal procedure, the Compulsory Process Clause rarely was a factor in this Court's decisions during the next 160 years."). The Court has identified a number of "pre-1967 cases that mention compulsory process" but that "do not provide an extensive analysis of the Clause." *Id*. at 55 n.12 (citing Pate v. Robinson, 383 U.S. 375, 378, n. 1 (1966); Blackmer v. United States, 284 U.S. 421, 442 (1932); United States v. Van Duzee, 140 U.S. 169, 173 (1891); Ex parte Harding, 120 U.S. 782, 7 S.Ct. 780 (1887)),

[13] 388 U.S. 14, 18–19 (1967).

[14] *Id.* at 17–19, 23.

physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."[15] The Court has also held that under the Compulsory Process Clause is "the accused's right . . . to testify himself, should he decide it is in his favor to do so."[16] The right to present witnesses is not absolute, however; a court may refuse to allow a defense witness to testify when the court finds that defendant's counsel willfully failed to identify the witness in a pretrial discovery request and thereby attempted to gain a tactical advantage.[17] In addition, a defendant "cannot establish a violation of his constitutional right to compulsory process merely by showing that deportation" of potential witnesses "deprived him of their testimony"; rather "[h]e must at least make some plausible showing of how their testimony would have been both material and favorable to his defense."[18]

Amdt6.6 Right to Counsel

Amdt6.6.1 Historical Background on Right to Counsel

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The records of neither the Congress that proposed what became the Sixth Amendment nor the state ratifying conventions elucidate the language on assistance of counsel. The development of the common-law principle in England had denied to anyone charged with a felony the right to retain counsel, while the right was afforded in misdemeanor cases. This rule was ameliorated in practice, however, by the judicial practice of allowing counsel to argue points of law and then generously interpreting the limits of "legal questions." Colonial and early state practice varied, ranging from the existent English practice to appointment of counsel in a few states where needed counsel could not be retained.[1] Contemporaneously with the proposal and ratification of the Sixth Amendment, Congress enacted two statutory provisions that seemed to indicate an understanding that the Sixth Amendment guarantee extended only to retained counsel by a defendant wishing and able to afford assistance.[2]

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[15] *Id.* at 23.

[16] *Rock*, 483 U.S. at 52.

[17] Taylor v. Illinois, 484 U.S. 400, 415 (1988); *see also* Melendez-Diaz v. Mass., 557 U.S. 305, 327 (2009) ("It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses."); United States v. Nobles, 422 U.S. 225, 241 (1975) ("The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth."). There also appear to be limits on the extent to which a party has a right to introduce other types of evidence under the Compulsory Process Clause. *See* United States v. Scheffer, 523 U.S. 303, 315 (1998) ("*Rock v. Arkansas*, *Washington v. Texas*, and *Chambers v. Mississippi*, do not support a right to introduce polygraph evidence, even in very narrow circumstances.").

[18] United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982).

[1] W. Beaney, The Right to Counsel in American Courts 8–26 (1955).

[2] Section 35 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, provided that parties in federal courts could manage and plead their own causes personally or by the assistance of counsel as provided by the rules of court. The Act of April 30, 1790, ch. 9, 1 Stat. 118, provided: "Every person who is indicted of treason or other capital crime, shall be allowed

Amdt6.6.2 Right to Have Counsel Appointed

Amdt6.6.2.1 Early Doctrine on Right to Have Counsel Appointed

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Court began to develop its doctrine on the right to have counsel in *Powell v. Alabama*,[1] a 1932 opinion in which the Court set aside the convictions of eight Black youths sentenced to death in a hastily carried-out trial without benefit of counsel.[2] The failure to afford the defendants an opportunity to retain counsel violated due process, but the Court acknowledged that as indigents the youths could not have retained counsel.[3] Noting circumstances including the "ignorance," "illiteracy," and youth of the defendants; their lack of access to friends and family; the consequences they faced; and the "public hostility" surrounding the trial, the Court concluded that the trial court's failure to make an effective appointment of counsel was "a denial of due process within the meaning of the Fourteenth Amendment."[4]

The holding in *Powell* was narrow. The Court stated that in a case in which the defendant faces the death penalty; does not have a lawyer; and is unable to mount his own defense because of intellectual disability, illiteracy, or a similar condition, "it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law."[5] Despite this narrow scope, the Court in *Powell* made some more general statements about the importance of the right to counsel. Due process, the Court said, always requires observance of certain fundamental personal rights associated with a hearing, and "the right to the aid of counsel is of this fundamental character."[6] In addition, noting the limited legal skill and training of even "the intelligent and educated layman," the Court observed that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[7] Without the "guiding hand of counsel at every step in the proceedings against him," the Court noted, even an innocent defendant "faces the danger of conviction because he does not know how to establish his innocence."[8]

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to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel not exceeding two, as he may desire, and they shall have free access to him at all reasonable hours."

[1] *See* Wheat v. United States, 486 U.S. 153, 159 (1988) (explaining that "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment," the "Sixth Amendment right to choose one's own counsel is circumscribed in several important respects").

[2] 486 U.S. 153 (1988).

[3] *Id.* at 159.

[4] *Id.*

[5] *Id.*

[6] 491 U.S. 617, 619, 626 (1989).

[7] 21 U.S.C. §§ 848, 853.

[8] *Caplin & Drysdale*, 491 U.S. at 626.

Amdt6.6.2.1
Early Doctrine on Right to Have Counsel Appointed

In 1938, the Court expanded its jurisprudence on the right to have counsel appointed in *Johnson v. Zerbst*.[9] In *Zerbst*, the Court announced an absolute rule requiring appointment of counsel for federal criminal defendants who could not afford to retain a lawyer.[10] According to the *Zerbst* Court, the right to assistance of counsel, "is necessary to insure fundamental human rights of life and liberty."[11] Without distinguishing between the right to retain counsel and the right to have counsel provided if the defendant cannot afford to hire one, the Court quoted *Powell's* invocation of the necessity of legal counsel for even the intelligent and educated layman. The Court stated: "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."[12] Any waiver, the Court ruled, must be by the intelligent choice of the defendant, will not be presumed from a silent record, and must be determined by the trial court before proceeding in the absence of counsel.[13]

In the 1942 case *Betts v. Brady*, the Supreme Court rebuffed an effort to obtain the same rule in the state courts in all criminal proceedings.[14] The Court observed that the Sixth Amendment applied only to trials in federal courts.[15] In state courts, the Due Process Clause of the Fourteenth Amendment "formulates a concept less rigid and more fluid" than those guarantees embodied in the Bill of Rights, although a state denial of a right protected in one of

[9] The statute was interpreted in United States v. Monsanto, 491 U.S. 600, 602, 607 (1989), as requiring forfeiture of all assets derived from the covered offenses, and as making no exception for assets the defendant intends to use for his defense.

[10] *See Caplin & Drysdale*, 491 U.S. at 628 ("There is no constitutional principle that gives one person the right to give another's property to a third party, even where the person seeking to complete the exchange wishes to do so in order to exercise a constitutionally protected right.").

[11] *Monsanto*, 491 U.S. at 615 ("Indeed, it would be odd to conclude that the Government may not restrain property, such as the home and apartment in respondent's possession, based on a finding of probable cause, when we have held that . . . the Government may restrain persons where there is a finding of probable cause to believe that the accused has committed a serious offense."). A subsequent case held that where a grand jury had returned an indictment based on probable cause, that conclusion was binding on a court during forfeiture proceedings and the defendants do not have a right to have such a conclusion re-examined in a separate judicial hearing in order to unfreeze the assets to pay for their counsel.

[12] 578 U.S. 5, 8–9, 12–13 (2016) (plurality opinion). The Court in *Luis* split as to the reasoning for holding that a pretrial freeze of untainted assets violates a criminal defendant's Sixth Amendment right to counsel of choice. Four Justices employed a balancing test, weighing the government's contingent future interest in the untainted assets against the interests in preserving the right to counsel—a right at the "heart of a fair, effective criminal justice system" —in concluding that the defendant had the right to use innocent property to pay a reasonable fee for assistance of counsel. *See id.* at 16–23 (Justice Stephen Breyer, joined by Chief Justice John Roberts, Justices Ruth Bader Ginsburg & Sonia Sotomayor). Justice Clarence Thomas, in providing the fifth and deciding vote, concurred in judgment only, contending that "textual understanding and history" alone suffice to "establish that the Sixth Amendment prevents the Government from freezing untainted assets in order to secure a potential forfeiture." *See id.* at 25 (Thomas, J., concurring); *see also id.* at 33 ("I cannot go further and endorse the plurality's atextual balancing analysis.").

[13] United States v. Gonzalez-Lopez, 548 U.S. 140, 144–45 (2006).

[14] *Gonzalez-Lopez*, 548 U.S. at 148–50 (citing Arizona v. Fulminante, 499 U.S. 279, 282 (1991)).

[15] 422 U.S. 806, 807, 817 (1975). Although the Court acknowledged some concern by judges that *Faretta* leads to unfair trials for defendants, in *Indiana v. Edwards* the Court declined to overrule *Faretta*. 554 U.S. 164, 178 (2008). Even if the defendant exercises his right to his detriment, the Constitution ordinarily guarantees him the opportunity to do so. *See Faretta*, 422 U.S. at 834 (explaining that "[i]t is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage," and that "although he may conduct his own defense ultimately to his own detriment, his choice must be honored"). A defendant who represents himself cannot thereafter complain that the quality of his defense denied him effective assistance of counsel. *Id.* at 834–35 n.46. The Court, however, has not addressed what state aid, such as access to a law library, might need to be made available to a defendant representing himself. Kane v. Garcia Espitia, 546 U.S. 9, 10 (2005) (per curiam). Related to the right of self-representation is the right to testify in one's own defense. *See* Rock v. Arkansas, 483 U.S. 44, 52, 62 (1987) (holding that per se rule excluding all hypnotically refreshed testimony violates right).

the first eight Amendments might "in certain circumstances" be a violation of due process.[16] The relevant question according to the Court was whether the Sixth Amendment right to appointment of counsel in federal courts "expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment."[17] Examining the common-law rules, the English practice, and the state constitutions, laws and practices, the Court concluded that it was the "considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial."[18] Want of counsel in a particular case might result in a conviction lacking in fundamental fairness and so necessitate the interposition of constitutional restriction upon state practice, but this was not the general rule.[19]

Amdt6.6.2.2 Modern Doctrine on Right to Have Counsel Appointed

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Starting in 1938, the Supreme Court recognized that in *federal* courts the Sixth Amendment requires the provision of counsel absent waiver.[1] For *state* proceedings, however, the Court instead determined that the scope of the right to have counsel appointed stemmed from the Due Process Clause of the Fourteenth Amendment,[2] and the applicability of the right depended on the circumstances facing the accused in a given case.[3] The purpose behind examining the circumstances facing the accused was to afford some certainty in the determination of when failure to appoint counsel would result in a trial lacking in

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[16] *See*, *e.g.*, Godinez v. Moran, 509 U.S. 389, 396 (1993) (explaining that a criminal defendant "may not waive his right to counsel or plead guilty unless he does so 'competently and intelligently'" (quoting Johnson v. Zerbst, 304 U.S. 458, 468 (1938)).

[17] The fact that a defendant is mentally competent to stand trial does not preclude a court from finding him not mentally competent to represent himself at trial. *Edwards*, 554 U.S. at 177–78. Mental competence to stand trial, however, is sufficient to ensure the right to waive the right to counsel in order to plead guilty. Godinez v. Moran, 509 U.S. 389, 398–99 (1993).

[18] *Faretta*, 422 U.S. at 834 n.46.

[19] Martinez v. Court of App. of Cal., Fourth App. Dist., 528 U.S. 152, 154 (2000). The Sixth Amendment itself "does not include any right to appeal." *Id.* at 160.

[1] Johnson v. Zerbst, 304 U.S. 458, 463 (1938) ("The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." (footnote omitted)); *see* Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963) ("We have construed [the Sixth Amendment] to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived."); *see also* Johnson v. United States, 352 U.S. 565, 566 (1957) (holding that a federal Court of Appeals "must, under *Johnson v. Zerbst*, afford one who challenges [the appeal certification] the aid of counsel unless he insist on being his own."); Douglas v. California, 372 U.S. 353, 356 (1963) (holding that a state must provide counsel to defendant granted a right of first appeal from a criminal conviction); *but see* Ross v. Moffitt, 417 U.S. 600, 619 (1974) (holding that defendants had no constitutional right to an appointment of counsel for discretionary appellate review); Murray v. Giarratano, 492 U.S. 1, 9–13 (1989) (holding that inmates sentenced to death do not have a constitutional right to counsel to seek postconviction relief). .

[2] Betts v. Brady, 316 U.S. 455, 461–62 (1942), *overruled by Gideon*, 372 U.S. at 342.

[3] This circumstance-dependent approach is typified by *Powell v. Alabama,* 287 U.S. 45, 71 (1932); *see also* Hawk v. Olson, 326 U.S. 271, 278 (1945) (reviewing underlying circumstances and holding that "denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment"); Tomkins v. State of Missouri, 323 U.S. 485, 488 (1945) (citing Powell and reviewing underlying

"fundamental fairness."[4] Over time, the Court developed three often-overlapping categories of circumstances that required the furnishing of assistance of counsel to satisfy due process: (1) where the personal characteristics of the defendant made it unlikely he could obtain an adequate defense of his own,[5] (2) where the charges or possible defenses to the charges were technically complex,[6] and (3) where events occurring at trial raised problems of prejudice.[7] The last characteristic especially had been used by the Court to set aside convictions occurring in the absence of counsel,[8] and the last case rejecting a claim of denial of assistance of counsel had been decided by 1950.[9]

In 1961, the Court held that in a capital case a defendant need not establish a particularized need or prejudice resulting from absence of counsel.[10] Rather, the Court concluded that assistance of counsel was a constitutional requisite in capital cases, although the Court did not expressly articulate whether its holding was based on the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment.[11] Two years later, the Court expanded the right to counsel in non-capital cases as well, holding unanimously in *Gideon v. Wainwright*[12] "that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for

circumstances of prosecution to determine if accused's deprivation of counsel violated Fourteenth Amendment); Williams v. Kaiser, 323 U.S. 471, 473–76 (1945) (same). For additional discussion of Powell, see Amdt6.5.1 Early Confrontation Clause Cases.

[4] *See Betts*, 316 U.S. at 462 ("Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.").

[5] Commonly cited characteristics of the defendant demonstrating the necessity for assistance of counsel included youth and immaturity (Moore v. Michigan, 355 U.S. 155, 164 (1957); Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116, 120–21 (1956); Uveges v. Pennsylvania, 335 U.S. 437, 442 (1948); Wade v. Mayo, 334 U.S. 672, 683–84 (1948); Marino v. Ragen, 332 U.S. 561, 562 (1947) (per curiam); De Meerleer v. Michigan, 329 U.S. 663, 665 (1947) (per curiam), limited education (*Moore*, 355 U.S. at 164), inexperience (*Uveges*, 335 U.S. at 442), and mental illness (Massey v. Moore, 348 U.S. 105, 108 (1954); Palmer v. Ashe, 342 U.S. 134, 136–37 (1951).

[6] *E.g.*, McNeal v. Culver, 365 U.S. 109, 114–16 (1961); *Moore*, 355 U.S. at 160; *Claudy*, 350 U.S. at 122; Williams v. Kaiser, 323 U.S. 471, 474–75 (1945); Rice v. Olson, 324 U.S. 786, 789 (1945).

[7] Commonly cited examples included the deliberate or careless overreaching by the court or the prosecutor (*Palmer*, 342 U.S. at 137; Gibbs v. Burke, 337 U.S. 773, 776–78 (1949); Townsend v. Burke, 334 U.S. 736, 739–741 (1948); White v. Ragen, 324 U.S. 760, 764 (1945) (per curiam), prejudicial developments during the trial (Cash v. Culver, 358 U.S. 633, 637–38 (1959); *Gibbs*, 337 U.S. at 776–78), and questionable proceedings at sentencing (*Townsend*, 334 U.S. at 739–741).

[8] In the 1960 case *Hudson v. North Carolina* the Court held that an unrepresented defendant had been prejudiced when his co-defendant's counsel plead his client guilty in the presence of the jury, the applicable state rules to avoid prejudice in such situation were unclear, and the defendant in any event had taken no steps to protect himself. 363 U.S. 697, 702–03 (1960). The *Hudson* Court explained that a "layman would hardly be aware of the fact that he was entitled to any protection from the prejudicial effect of a codefendant's plea of guilt" and would not "know the proper course to follow in order to invoke such protection." *Id.* at 1318. According to the Court, the "very uncertainty of the North Carolina law in this respect serves to underline the petitioner's need for counsel to advise him." *Id.* Two years after *Hudson*, the Court reversed a conviction because the unrepresented defendant failed to follow various advantageous procedures that a lawyer might have utilized. Carnley v. Cochran, 369 U.S. 506, 508–512 (1962). The same year, the Court found that a lawyer might have developed several defenses and adopted several tactics to defeat a charge under a state recidivist statute, and that therefore the unrepresented defendant had been prejudiced. Chewning v. Cunningham, 368 U.S. 443, 445–47 (1962).

[9] Quicksal v. Michigan, 339 U.S. 660, 666 (1950); *see also* Canizio v. New York, 327 U.S. 82, 86–7 (1946); Foster v. Illinois, 332 U.S. 134, 138–39 (1947); Gayes v. New York, 332 U.S. 145, 148–49 (1947) (plurality opinion); Bute v. Illinois, 333 U.S. 640, 675–76 (1948); Gryger v. Burke, 334 U.S. 728, 730–31 (1948); *Cf. White*, 324 U.S. at 764, 767 (1945) (acknowledging prima facie showing of constitutional violation stemming from lack of counsel but ultimately dismissing certiorari on other grounds).

[10] *See* Hamilton v. Alabama, 368 U.S. 52, 55 (1961) ("When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted.").

[11] *Id.*

[12] 372 U.S. 335 (1963).

him."[13] In a rejection of earlier precedent,[14] the Court held that the Sixth Amendment right to assistance of counsel is "fundamental" and constitutionally required by the Fourteenth Amendment in state courts.[15] *Gideon* stemmed from a felony charge, and the Court's opinion in the case did not expressly decide whether the right to assistance of counsel could be claimed by defendants charged with misdemeanors or serious misdemeanors as well as by those charged with felonies.[16] Later, however, the Court held that the right applies to any misdemeanor case in which imprisonment is imposed-indeed, no person may be sentenced to jail who was convicted in the absence of counsel, unless he validly waived his right.[17] The Court subsequently extended the right to cases where a suspended sentence or probationary period is imposed, on the theory that any future incarceration that occurred would be based on the original uncounseled conviction.[18]

The absence of counsel when a defendant is convicted or pleads guilty goes to the fairness of the proceedings and undermines the presumption of reliability that attaches to a judgment of a court. Consequently the Court has held that *Gideon* is fully retroactive, so that convictions obtained in the absence of counsel without a valid waiver are not only voidable,[19] but also may not be used subsequently either to support guilt in a new trial or to enhance punishment upon a valid conviction.[20]

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[13] *Id.* at 344.

[14] *Gideon* overruled Betts v. Brady, 316 U.S. 455 (1942). *Gideon*, 372 U.S. at 339. For a discussion of *Betts*, see *supra* Amdt6.5.1 Early Confrontation Clause Cases.

[15] 372 U.S. at 342–43, 344.

[16] *Id.* at 336, 344.

[17] In its 1979 opinion in *Scott v. Illinois*, the Court held that "the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." 440 U.S. 367, 373–74 (1979). In other words, the right to counsel hinges not on the possibility of imprisonment as authorized by the charging statute, but on the actual punishment imposed on the defendant. *Id.* Thus, *Scott* modified *Argersinger v. Hamlin*, 407 U.S. 25, 32–33, 37 (1972), which had held counsel required if imprisonment were possible. The Court has also extended the right of assistance of counsel to juvenile proceedings. *See* In re *Gault*, 387 U.S. 1, 36–37 (1967) ("[T]he assistance of counsel is . . . equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21.").

[18] Alabama v. Shelton, 535 U.S. 654, 662 (2002).

[19] Kitchens v. Smith, 401 U.S. 847, 847, 849 (1971) (per curiam); Burgett v. Texas, 389 U.S. 109, 114 (1967); *accord* Linkletter v. Walker, 381 U.S. 618, 628 n.13 (1965) ("The rule in [*Gideon*], that counsel must be appointed to represent an indigent charged with a felony, was actually applied retrospectively in that case since Gideon had collaterally attacked the prior judgment by post-conviction remedies.").

[20] Burgett v. Texas, 389 U.S. 109, 115 (1967); *see also* Loper v. Beto, 405 U.S. 473, 474, 483 (1972) (plurality opinion) (concluding that trial court should not have permitted impeachment of counseled defendant's credibility in 1947 trial by introduction of prior uncounseled convictions in the 1930s); United States v. Tucker, 404 U.S. 443, 448–49 (1972) (holding that sentencing judge improperly relied on two previous convictions stemming from proceedings where defendant was without counsel); *but see* United States v. Bryant, 579 U.S. 140, 154–55 (2016) (holding that the use of prior, uncounseled tribal-court domestic abuse convictions as the predicates for a sentence enhancement in a subsequent conviction did not violate the Sixth Amendment right to counsel, as repeat offender laws like the one at issue penalize only the last offense committed by the defendant and because the Sixth Amendment right to counsel did not apply to the underlying tribal-court convictions); Nichols v. United States, 511 U.S. 738 (1994) (holding that "an uncounseled conviction valid under [Scott v. Illinois, 440 U.S. 367 (1979)] may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment"); Lewis v. United States, 445 U.S. 55, 67 (1980) ("Use of an uncounseled felony conviction as the basis for imposing a civil firearms disability, enforceable by a criminal sanction, is not inconsistent with [Court precedent].").

Amdt6.6.3 When the Right to Counsel Applies

Amdt6.6.3.1 Overview of When the Right to Counsel Applies

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

As a result of *Gideon v. Wainwright*,[1] the Sixth Amendment right to counsel applies at criminal trials, regardless of whether a given trial is federal or state, or whether the counsel is retained or appointed.[2] As the Court in *Gideon* explained, the "right of one charged with crime to counsel" is "fundamental and essential."[3] A more complicated question is the extent to which the Sixth Amendment right to counsel applies in contexts beyond the trial itself, such as preliminary criminal proceedings. As a general matter, the Court has explained that the "the Sixth Amendment right to counsel is triggered 'at or after the time that judicial proceedings have been initiated . . . 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' "[4] In other words, the Sixth Amendment right to counsel does not begin until "the initiation of adversary judicial criminal proceedings."[5] Even once adversary judicial criminal proceedings begin, the Sixth Amendment right to counsel applies only to critical stages of criminal prosecutions.[6] In a number of cases, the Court has examined the

[1] 372 U.S. 335 (1963). For further discussion of *Gideon*, see Amdt6.6.2.2 Modern Doctrine on Right to Have Counsel Appointed.

[2] *See*, *e.g.*, Wheat v. United States, 486 U.S. 153, 158 (1988) ("[W]e have held that the Sixth Amendment secures the right to the assistance of counsel, by appointment if necessary, in a trial for any serious crime.").

[3] *Gideon*, 372 U.S. at 344.

[4] Fellers v. United States, 540 U.S. 519, 523 (2004) (quoting Brewer v. Williams, 430 U.S. 387, 398 (1977)).

[5] Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion).

[6] *See*, *e.g.*, Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (determining whether right to counsel applied in arraignment by examining whether it amounts to a "critical stage in a criminal proceeding").

extent to which the Sixth Amendment[7] right to counsel applies in contexts including pretrial judicial proceedings,[8] custodial interrogations,[9] and lineups and other identification situations,[10] among others.[11]

Amdt6.6.3.2 Pretrial Judicial Proceedings and Right to Counsel

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

While the Supreme Court has established a right to counsel,[1] it has recognized some limitations to that right. In *Rothgery v. Gillespie County*, the Court noted that the "Sixth Amendment right of the 'accused' to assistance of counsel in 'all criminal prosecutions' is limited by its terms: 'it does not attach until a prosecution is commenced.'"[2] Pretrial judicial proceedings may amount to the commencement of prosecution, and in the 2008 case *Rothgery*,[3] the Court clarified that even a preliminary hearing where no government prosecutor is present can trigger the right to counsel. In determining whether the right to counsel applies to a particular pretrial judicial proceeding, the Court generally has considered whether the proceeding amounts to a "critical stage" in a criminal prosecution.[4] This inquiry may be traced back to dicta in *Powell v. Alabama*,[5] noting that "during perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their

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[7] The Court's pre-*Gideon* cases often spoke expansively of the right to retain counsel, but as a matter of due process rather than of the Sixth Amendment. Thus, in *Chandler v. Fretag*, when a defendant appearing in court to plead guilty to house-breaking was advised for the first time that, because of three prior convictions, he could be sentenced to life imprisonment as a habitual offender, the court's denial of his request for a continuance to consult an attorney was a violation of his Fourteenth Amendment due process rights. 348 U.S. 3, 5, 10 (1954). "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified. A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth." *Id.* at 9, 10; *see also* Reynolds v. Cochran, 365 U.S. 525, 530 (1961) ("[W]e think it clear that this case must be reversed for a hearing in order to afford petitioner an opportunity to prove his allegations with regard to another constitutional claim-that he was deprived of due process by the refusal of the trial judge to grant his motion for a continuance in order that he might have the assistance of the counsel he had retained in the proceeding against him."); House v. Mayo, 324 U.S. 42, 46 (1945) (per curiam) (concluding that trial court had deprived defendant of "constitutional right to a fair trial" by "forc[ing] him to plead to the information without the aid and advice of his counsel, whose presence he requested"); Hawk v. Olson, 326 U.S. 271, 278 (1945) (determining that defendant had potentially "set out a violation of the Fourteenth Amendment" in claiming that in murder trial he (1) "had no advice of counsel prior to the calling of the jury" and (2) lacked assistance of counsel in moving "for continuance to examine the charge and consult counsel").

[8] Amdt6.6.3.2 Pretrial Judicial Proceedings and Right to Counsel.

[9] Amdt6.6.3.3 Custodial Interrogation and Right to Counsel.

[10] Amdt6.6.3.4 Lineups and Other Identification Situations and Right to Counsel.

[11] Amdt6.6.3.6 Noncriminal and Investigatory Proceedings and Right to Counsel.

[1] Amdt6.6.3.1 Overview of When the Right to Counsel Applies.

[2] Rothgery v. Gillespie Cnty., Tex., 554 U.S. 191, 198 (2008) (quoting McNeil v. Wisconsin, 501 U.S. 171, 175, (1991)).

[3] 554 U.S. at 194–95, 198 (right to appointed counsel attaches even if no public prosecutor, as distinct from a police officer, is aware of that initial proceeding or involved in its conduct).

[4] *See*, *e.g.*, Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (determining whether right to counsel applied in arraignment by examining whether it amounts to a "critical stage in a criminal proceeding").

[5] 287 U.S. 45, 57 (1932).

trial, when consultation, thorough-going investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel] during that period as at the trial itself."

The Court expanded on this language in *Hamilton v. Alabama*,[6] where the Court noted that arraignment under Alabama state law was a "critical stage." The Court reached that conclusion because in Alabama arraignment was the stage where certain defenses, pleas, and motions had to be made.[7] In *White v. Maryland*,[8] the Court set aside a conviction obtained at a trial at which the defendant's plea of guilty, entered at a preliminary hearing at which he was without counsel, was introduced as evidence against him at trial. Citing to *Hamilton*, the Court explained that "[w]hatever may be the normal function of the 'preliminary hearing' under Maryland law, it was in this case as 'critical' a state as arraignment under Alabama law" because the defendant "entered a plea before the magistrate and that plea was taken at a time when he had no counsel."[9]

Subsequently, in *Coleman v. Alabama*,[10] the Court identified a preliminary hearing as a "critical stage" necessitating counsel even though the only functions of the hearing were to determine probable cause to warrant presenting the case to a grand jury and to fix bail, and although no defense was required to be presented at that point and nothing occurring at the hearing could be used against the defendant at trial. The Court emphasized the practical difference a lawyer could have made at the preliminary hearing.[11] In particular, the Court hypothesized that a lawyer might, by skilled examination and cross-examination, expose weaknesses in the prosecution's case and thereby save the defendant from being required to face trial.[12] Further, the Court speculated that a lawyer could preserve testimony he elicited at the hearing for use in cross-examination at trial and impeachment purposes; better prepare for trial by discovering as much as possible of the prosecution's case against defendant; and influence the court in such matters as bail and psychiatric examination.[13]

Amdt6.6.3.3 Custodial Interrogation and Right to Counsel

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,*

[6] 368 U.S. at 53, 54.

[7] *Id.* (listing the defense of insanity, pleas in abatement, and motions to quash, as examples of actions tied to the arraignment stage under Alabama law).

[8] 373 U.S. 59, 59–60 (1963) (per curiam).

[9] *Id.* at 60.

[10] 399 U.S. 1, 8 (1970) (plurality opinion). Inasmuch as the role of counsel at the preliminary hearing stage does not necessarily have the same effect upon the integrity of the fact-finding process as the role of counsel at trial, *Coleman* was subsequently denied retroactive effect. Adams v. Illinois, 405 U.S. 278, 285 (1972) (plurality opinion). *Hamilton* and *White*, however, were held to be retroactive. Arsenault v. Massachusetts, 393 U.S. 5 (1968) (per curiam).

[11] In doing so, *Coleman* appears to track the logic of several pre-*Gideon* cases in which a defendant was entitled to counsel if a lawyer might have made a difference. *See* Chewning v. Cunningham, 368 U.S. 443, 447 (1962) (concluding that counsel was necessary given the complexity of issues raised in underlying prosecution and the significant "potential prejudice resulting from the absence of counsel"); Carnley v. Cochran, 369 U.S. 506, 507, 512–13 (1962) (observing that "[t]he assistance of counsel might well have materially aided the petitioner in coping with several aspects of the case" and therefore holding that "petitioner's case was one in which the assistance of counsel, unless intelligently and understandingly waived by him, was a right guaranteed him by the Fourteenth Amendment"); Hudson v. North Carolina, 363 U.S. 697, 703 (1960) (explaining the need for counsel in circumstances of underlying prosecution and finding that lack of counsel amounted to deprivation of due process under the Fourteenth Amendment).

[12] *Coleman*, 399 U.S. at 9.

[13] *Id.*

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In the context of custodial interrogations—such as police questioning of a suspect[1]—the Court's doctrine on the extent of the right to counsel has evolved to be closely related to its doctrine on the Fifth Amendment's protection against self-incrimination.[2] At first, the Court evaluated the constitutionality of custodial interrogations against a rule of "fundamental fairness," assessing whether under all the circumstances a defendant was so prejudiced by the denial of access to counsel at custodial interrogation that his subsequent trial was tainted.[3] In 1959, the Court in *Spano v. New York*[4] declined to consider whether, as a blanket rule, a "confession obtained in the absence of counsel can be used without violating the Fourteenth Amendment." Instead, the Court in *Spano* concluded that use of the confession at issue violated the Fourteenth Amendment based on the surrounding circumstances—including the defendant's limited education, the numerous denials of request for counsel, and the hours of interrogation undertaken by various officers (one of whom was a friend of the defendant).[5]

Five years later, in *Massiah v. United States*,[6] the Court began to move away from this circumstance—dependent approach rooted in the Fourteenth Amendment, holding that post—indictment interrogation in the absence of defendant's lawyer was a denial of the defendant's Sixth Amendment right to assistance of counsel.[7] The same year as *Massiah*, the Court in *Escobedo v. Illinois*[8] held that preindictment custodial interrogation violates the Sixth Amendment when "the suspect has requested and been denied an opportunity to consult with his lawyer." In 1966, the Court in *Miranda v. Arizona*[9] reaffirmed *Escobedo*, but switched from reliance on the Sixth Amendment to reliance on the Fifth Amendment's Self-Incrimination Clause in cases of pre-indictment custodial interrogation. That said,

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[1] *See*, *e.g.*, *Interrogation*, Black's Law Dictionary (11th ed. 2019) ("Police questioning of a detained person about the crime that he or she is suspected of having committed.").

[2] For further discussion of the Fifth Amendment and self-incrimination, see *supra* Amdt5.4.3 General Protections Against Self-Incrimination Doctrine and Practice.

[3] Crooker v. California, 357 U.S. 433, 439 (1958); *see also* Cicenia v. Lagay, 357 U.S. 504, 510 (1958) ("[T]his Court, in judging whether state prosecutions meet the requirements of due process, has sought to achieve a proper accommodation by considering a defendant's lack of counsel one pertinent element in determining from all the circumstances whether a conviction was attended by fundamental unfairness.").

[4] 360 U.S. 315, 320 (1959).

[5] *Id.* at 317–320.

[6] 377 U.S. 201, 205–06 (1964); *See also* McLeod v. Ohio, 381 U.S. 356 (1965) (per curiam) (citing *Massiah* and reversing *State v. McLeod*, 1 Ohio St. 2d 60 (Ohio 1964)—a state prosecution where an already-indicted defendant voluntarily made an oral confession to police); *Cf.* Hoffa v. United States, 385 U.S. 293 (1966) (declining to extend *Massiah* to require assistance of counsel for any questioning after the moment when the suspect *could* have been arrested, even if he or she was not); Milton v. Wainwright, 407 U.S. 371, 372 (1972) (passing on question of whether post-indictment questioning of suspect by officer posing as cellmate violated Sixth Amendment right to counsel pursuant to *Massiah*, because "any error in its admission was harmless beyond a reasonable doubt"). In Kansas v. Ventris, 556 U.S. 586, 592 (2009), the Court "conclude[d] that the Massiah right is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation," not merely if and when the defendant's statement is admitted into evidence.

[7] In *Massiah*, federal officers used an informer to elicit incriminating admissions from the defendant—who had already been indicted and was represented by a lawyer—which they surreptitiously listened to through a broadcasting unit. *Massiah*, 377 U.S. at 201–03.

[8] 378 U.S. 478, 485, 490–91 (1964). Subsequently, the Court limited its holding in *Escobedo* to prospective application. *See* Johnson v. New Jersey, 384 U.S. 719, 721 (1966), *abrogated by* United States v. Johnson, 457 U.S. 537 (1982) ("We hold that Escobedo affects only those cases in which the trial began after June 22, 1964, the date of that decision.").

[9] 384 U.S. 436, 441, 467 (1966).

Miranda still placed great emphasis upon police warnings of the right to counsel and foreclosed interrogation in the absence of counsel without a valid waiver by defendant.[10] However, in subsequent opinions, the Court clarified that neither *Miranda* nor *Escobedo* support the assertion that "the Sixth Amendment right, in any of its manifestations, applies *prior* to the initiation of adversary judicial proceedings."[11]

Despite *Miranda's* general reliance on the Fifth Amendment, and the Court's limitation on the scope of *Escobedo*, it has reaffirmed and in some respects expanded *Massiah*. First, in *Brewer v. Williams*,[12] the Court held that police had violated the right to counsel by eliciting from the defendant incriminating admissions not through formal questioning but rather through a series of conversational openings designed to play on the defendant's known weakness. The police conduct occurred in the post-arraignment period in the absence of defense counsel and despite assurances to defense counsel that the defendant would not be questioned in his absence.[13] Then, in *United States v. Henry*,[14] the Court held that government agents violated the Sixth Amendment right to counsel when they contacted the cellmate of an indicted defendant and promised him payment under a contingent fee arrangement if he would "pay attention" to incriminating remarks initiated by the defendant and others. The Court concluded that, even if the government agents did not intend the informant to take affirmative steps to elicit incriminating statements from the defendant in the absence of counsel, the agents must have known that that result would follow.[15]

Another issue in the custodial interrogation context involves waiver of the right to counsel where the suspect makes incriminating statements during police questioning following a request for counsel. In *Michigan v. Jackson*, the Court held that, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."[16] The Court concluded that "the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before."[17] However, in *Montejo v. Louisiana*,[18] the

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[10] *Id.* at 471–75. The different issues in Fifth and Sixth Amendment cases were summarized in Fellers v. United States, 540 U.S. 519, 524–25 (2004), which held that absence of an interrogation is irrelevant in a *Massiah*-based Sixth Amendment inquiry.

[11] Moran v. Burbine, 475 U.S. 412, 429 (1986) (emphasis added); *see also* Illinois v. Perkins, 496 U.S. 292, 299 (1990) ("In the instant case no charges had been filed on the subject of the interrogation, and our Sixth Amendment precedents are not applicable."). For a discussion of intervening precedent, which developed the concept of initiation of adversary proceedings, see Amdt6.6.3.4 Lineups and Other Identification Situations and Right to Counsel.

[12] 430 U.S. 387, 391–93 (1977). The Court later decided another similar case (involving incriminating statements made to police officers during a pre-indictment conversation in a patrol car) on self-incrimination grounds. Rhode Island v. Innis, 446 U.S. 291, 294–95, 302 (1980).

[13] *Brewer*, 430 U.S. at 391.

[14] 447 U.S. 264, 265–66, 270, 274–75 (1980); *but see* Kansas v. Ventris, 556 U.S. 586, 589, 594 (2009) (concluding that law enforcement had violated defendant's Sixth Amendment right to counsel by soliciting incriminating statements through an informant planted in defendant's cell, but holding that statements were nevertheless admissible for purposes of impeaching the defendant's "inconsistent testimony at trial"); Weatherford v. Bursey, 429 U.S. 545, 550–51 (1977) (rejecting a per se rule that, regardless of the circumstances, "if an undercover agent meets with a criminal defendant who is awaiting trial and with his attorney and if the forthcoming trial is discussed without the agent's revealing his identity, a violation of the defendant's constitutional rights has occurred . . . ").

[15] *Henry*, 447 U.S. at 271.

[16] Michigan v. Jackson, 475 U.S. 625, 636 (1986), *overruled by* Montejo v. Louisiana, 556 U.S. 778 (2009). .

[17] *Id.* at 631. The Court stated: "If an accused knowingly and intelligently" waives his Sixth Amendment right to counsel, there is "no reason why the uncounseled statements he then makes must be excluded at his trial." Patterson v. Illinois, 487 U.S. 285, 291 (1988) (internal quotation marks omitted). Moreover, although the Court "require[s] a more searching or formal inquiry before permitting an accused to waive his right to counsel at trial than [it] require[s] for a Sixth Amendment waiver during postindictment questioning," it has clarified that "whatever standards suffice for *Miranda*'s purposes will also be sufficient [for waiver of Sixth Amendment rights] in the context of postindictment

Court overruled *Jackson*, finding that the prophylactic Fifth Amendment protections created by *Miranda* and its progeny constitute sufficient protection of the right to counsel. The Court in *Montejo* was faced with the question of whether *Jackson* also barred waivers of the right where an attorney had been appointed in the absence of such an assertion.[19] In deciding to overrule *Jackson*, the Court in *Montejo* noted that "[n]o reason exists to assume that a defendant . . . who has done *nothing at all* to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present."[20] Moreover, the Court found, *Jackson* achieves little by way of preventing unconstitutional conduct.[21]

Statements obtained during custodial interrogation in violation of the Sixth Amendment right to counsel are ordinarily inadmissible at trial (a remedy known as the exclusionary rule).[22] In light of the Sixth Amendment basis for the exclusionary rule—to protect the right to a fair trial—exceptions to that rule exist where that basis is not served. For example, in *Nix v. Williams*,[23] the Court held the "inevitable discovery" exception applied to defeat exclusion of evidence obtained as a result of an interrogation violating the accused's Sixth Amendment rights. The Court in *Nix* reasoned that "[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial."[24] An exception to the Sixth Amendment exclusionary rule has also been recognized for the purpose of impeaching the defendant's trial testimony.[25]

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questioning." *Id.* at 298–99. In *McNeil v. Wisconsin*, the Court reasoned that the Sixth Amendment right is "offense-specific," and so also is "its *Michigan v. Jackson* effect of invalidating subsequent waivers in police-initiated interviews." 501 U.S. 171, 175, 177 (1991). The reason that the right is "offense-specific" is that "it does not attach until a prosecution is commenced." *Id.* Therefore, a defendant who has invoked his Sixth Amendment right to counsel with respect to the offense for which he is being prosecuted may maintain that right, but still potentially waive his *Miranda* -based right not to be interrogated about unrelated and uncharged offenses. The Court declined to recognize an exception to the offense-specific limitation for crimes that are closely related factually to a charged offense. Texas v. Cobb, 532 U.S. 162, 168 (2001). The Court instead borrowed from double-jeopardy law: if the same transaction constitutes a violation of two separate statutory provisions, the test is "whether each provision requires proof of a fact which the other does not." *Id.* at 173 (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)). Thus, where a defendant had been charged with burglary, but not murder, in connection with a fatal home invasion, the Court concluded that "the Sixth Amendment right to counsel did not bar police from interrogating [the defendant] regarding the murders, and [the defendant's] confession was therefore admissible," because "burglary and capital murder are not the same offense" under the relevant test. *Id.* at 173.

[18] 556 U.S. 778, 794 (2009).

[19] *Id.* at 782–83.

[20] *Id.* at 789.

[21] The Court reasoned that without *Jackson*, there would be "few if any" instances in which "fruits of interrogations made possible by badgering-induced involuntary waivers are ever erroneously admitted at trial" given *Miranda* and its progeny, which guarantee that "a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but 'badgering' by later requests is prohibited." *Id.* at 794–95.

[22] *See* Maine v. Moulton, 474 U.S. 159, 180 (1985) ("Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel."); Massiah v. United States, 377 U.S. 201, 205–06 (1964) ("We hold that the petitioner was denied the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."); *but see* Michigan v. Harvey, 494 U.S. 344, 345–46 (1990) (holding that the "prosecution may use a statement taken [post-arraignment] in violation of the [Sixth Amendment] . . . to impeach a defendant's false or inconsistent testimony").

[23] 467 U.S. 431, 446 (1984).

[24] *Id.*

[25] *See Harvey*, 494 U.S. at 345–46 (post-arraignment statement taken in violation of Sixth Amendment is admissible to impeach defendant's inconsistent trial testimony); Kansas v. Ventris, 556 U.S. 586, 589, 593 (2009)

Amdt6.6.3.4 Lineups and Other Identification Situations and Right to Counsel

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Whether the right to counsel applies to identification situations depends in part on the extent to which they represent a critical stage in a criminal proceeding. *United States v. Wade*,[1] in conjunction with *Gilbert v. California*,[2] held that lineups are of critical importance and in-court identification of defendants based on out-of-court lineups or show-ups without the presence of defendant's counsel is inadmissible. In reaching that conclusion, the Court observed that "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality."[3] Summarizing its Sixth Amendment doctrine in light of this context, the Court noted that "our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings . . . The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'"[4]

The Court reasoned that the presence of counsel at a lineup is constitutionally necessary because the lineup stage is filled with numerous possibilities for errors, both inadvertent and intentional, which cannot adequately be discovered and remedied at trial.[5] However, the Court concluded that there was less certainty and frequency of possible injustice stemming from lack of counsel in lineups than at trial, and the Court held that *Wade* and *Gilbert* were to be given prospective effect only; more egregious instances, where identification had been based upon lineups conducted in a manner that was unnecessarily suggestive and conducive to irreparable mistaken identification, could be invalidated under the Due Process Clause.[6] The *Wade-Gilbert* rule is inapplicable to other methods of obtaining identification and other evidentiary material relating to the defendant, such as blood samples, handwriting exemplars, and the like, because there is minimal risk that the absence of counsel might derogate from the defendant's right to a fair trial.[7]

In *United States v. Ash*,[8] the Court redefined and modified its "critical stage" analysis. According to the Court, the "core purpose" of the guarantee of counsel is to assure assistance at

(statement made to informant planted in defendant's holding cell admissible for impeachment purposes because "[t]he interests safeguarded by exclusion are 'outweighed by the need to prevent perjury and to assure the integrity of the trial process'").

[1] 388 U.S. 218, 236–37 (1967) ("Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for [the defendant] the postindictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid (of counsel). . . as at the trial itself.'" (quoting *Powell v. State of Ala.,* 287 U.S. 45, 57 (1932)).

[2] 388 U.S. 263, 271–72 (1967).

[3] *Wade*, 388 U.S. at 224.

[4] *Id.* at 224–25.

[5] *Id.* at 227–39.

[6] Stovall v. Denno, 388 U.S. 293, 299–300 (1967).

[7] Gilbert v. California, 388 U.S. 263, 265–67 (1967) (handwriting exemplars); Schmerber v. California, 384 U.S. 757, 765–66 (1966) (blood samples).

[8] 413 U.S. 300, 311–13 (1973).

trial "when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor."[9] Given developments in criminal investigation and procedure, assistance would be "less than meaningful if it were limited to the formal trial itself;" therefore, counsel is compelled at "pretrial events that might appropriately be considered to be parts of the trial itself."[10] The court explained that at these "newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both."[11] Therefore, unless the pretrial stage involves the physical presence of the accused at a trial-like confrontation at which the accused requires the guiding hand of counsel, the Sixth Amendment does not guarantee the assistance of counsel.[12] Because the defendant in *Ash* was not present when witnesses to the crime viewed photographs of possible guilty parties, the Court therefore concluded that there was no trial-like confrontation.[13] Further, because the possibilities of abuse in a photographic display are discoverable and reconstructable at trial by examining witnesses, the Court in *Ash* concluded that an indicted defendant is not entitled to have his counsel present at such a display.[14]

Another issue involves whether the right to counsel applies to lineups or identification procedures occurring before indictment. The defendants in *Wade* and *Gilbert* had already been indicted and counsel had been appointed to represent them when their lineups were conducted.[15] Subsequently in *Kirby v. Illinois*,[16] the Court held that no right to counsel exists for lineups that precede some formal act of charging a suspect. In a plurality opinion, the Court explained that the Sixth Amendment does not become operative until "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[17] Such a step is significant, the Court observed, because, "it is the starting point of our whole system of adversary criminal justice" and it is only "then that the government has committed itself to prosecute, and only then that

[9] *Id.* at 309.

[10] *Id.* at 310.

[11] *Id*. Examination of defendant by court-appointed psychiatrist to determine his competency to stand trial, after his indictment, was a "critical" stage, and he was entitled to the assistance of counsel before submitting to it. Estelle v. Smith, 451 U.S. 454, 469–71 (1981). Constructive notice is insufficient to alert counsel to psychiatric examination to assess future dangerousness of an indicted client, Satterwhite v. Texas, 486 U.S. 249, 255 (1987); see also Powell v. Texas, 492 U.S. 680, 686 (1989) (per curiam) (requiring under Sixth Amendment, notice to counsel of psychiatric examination for future dangerousness); *Cf.* Buchanan v. Kentucky, 483 U.S. 402, 425, (1987) (finding no Sixth Amendment violation where "counsel was certainly on notice that if, as appears to be the case, he intended to put on a 'mental status' defense for petitioner, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal"). Violations of the right to counsel at post-indictment psychiatric examinations of defendants are subject to harmless error analysis. *Satterwhite*, 486 U.S. at 258.

[12] *Ash*, 413 U.S. at 313.

[13] *Id.* at 317.

[14] 413 U.S. at 317–21.

[15] United States v. Wade, 388 U.S. 218, 219, 237 (1967); Gilbert v. California, 388 U.S. 263, 269, 272 (1967); *accord* Simmons v. United States, 390 U.S. 377, 382–83 (1968) ("The rationale of [*Wade* and *Gilbert*] . . . was that an accused is entitled to counsel at any 'critical stage of the prosecution,' and that a post-indictment lineup is such a 'critical stage.'").

[16] 406 U.S. 682, 689–90 (1972) (plurality opinion); *see also* Coleman v. Alabama, 399 U.S. 1, 5 (1970) (concluding under totality of the circumstances that "[i]t cannot be said on this record that the trial court erred in finding that . . . in-court identification of the petitioners did not stem from an identification procedure at the lineup 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification'" (quoting Simmons v. United States, 390 U.S. (1968)); Foster v. California, 394 U.S. 440, 443 (1969) (holding that a police lineup—where defendant was taller than other participants and "was wearing a leather jacket similar to that worn by the robber"—"so undermined the reliability of the eyewitness identification as to violate due process"); Stovall v. Denno, 388 U.S. 293, 295, 302 (1967) (determining that although "practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned," it was not a due process violation to do so in the hospital room of a stabbing victim who was "hospitalized for major surgery to save her life").

[17] *Kirby*, 406 U.S. at 689.

the adverse positions of Government and defendant have solidified."[18] Further, the Court noted, "[i]t is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[19] Therefore, the Court stated that the initiation of adversary judicial criminal proceedings "marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable."[20] *Kirby* appears to limit opinions such as *Escobedo v. Illinois*,[21] which had held that the Sixth Amendment right to counsel applies to pre-indictment custodial interrogation,[22] at least to the extent *Escobedo* suggested that the right to counsel could apply before the initiation of adversary proceedings.[23]

Amdt6.6.3.5 Post-Conviction Proceedings and Right to Counsel

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

With respect to post-conviction proceedings, the Court has held that the right to counsel applies at the sentencing stage,[1] and where sentencing was deferred after conviction and the defendant was placed on probation, he must be afforded counsel at a hearing on revocation of probation and imposition of the deferred sentence.[2] In other contexts such as state criminal appeals and prison disciplinary hearings the Court has eschewed Sixth Amendment analysis, instead delimiting the right to counsel under due process and equal protection principles.[3]

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[18] *Id.*

[19] *Id.*

[20] *Id.* at 689–90. Indictment, *Kirby* indicates, is not a necessary precondition. Any initiation of judicial proceedings suffices. *E.g.*, Brewer v. Williams, 430 U.S. 387, 399 (1977) (explaining that there was "no doubt in the present case that judicial proceedings had been initiated" where a "warrant had been issued for [the defendant's] arrest, [the defendant] had been arraigned on that warrant before a judge in a Davenport courtroom, and [the defendant] had been committed by the court to confinement in jail"); *see also* United States v. Gouveia, 467 U.S. 180, 192 (1984) (holding that placing prison inmates placed under administrative segregation during a lengthy investigation of their participation in prison crimes does not amount to an initiation of judicial proceedings for Sixth Amendment purposes).

[21] 378 U.S. 478, 490–91 (1964).

[22] Amdt6.6.3.3 Custodial Interrogation and Right to Counsel.

[23] *See* Moran v. Burbine, 475 U.S. 412, 429 (1986) (Citing to *Kirby* and explaining that "[a]t the outset, subsequent decisions foreclose any reliance on *Escobedo* . . . for the proposition that the Sixth Amendment right, in any of its manifestations, applies prior to the initiation of adversary judicial proceedings.").

[1] The seminal precedent on the applicability of the right to counsel at sentencing is the Court's 1948 opinion *Townsend v. Burke*, which concluded that the defendant was entitled to counsel at sentencing as a matter of due process under the circumstances of that particular case. 334 U.S. 736, 741 (1948). However, in a later opinion, the Court seemed to indicate *Townsend* indicates a right to counsel at sentencing as a byproduct of the Sixth Amendment, noting that the opinion "might well be considered to support by itself a holding that the right to counsel applies at sentencing." Mempa v. Rhay, 389 U.S. 128, 134 (1967).

[2] *Mempa*, 389 U.S. at 137 (applied retroactively in McConnell v. Rhay, 393 U.S. 2, 3 (1968) (per curiam)); *but see* Gagnon v. Scarpelli, 411 U.S. 778, 781, 790 (1973) (concluding that due process does not require appointment of counsel in every post-sentencing parole revocation proceeding, and instead "decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system" (citing Morrissey v. Brewer, 408 U.S. 471 (1972)).

[3] For example, the Court has not invoked the Sixth Amendment when determining applicability of the right to counsel to state criminal appeals. *See* Douglas v. California, 372 U.S. 353, 356 (1963) (concluding that defendant was

Amdt6.6.3.6 Noncriminal and Investigatory Proceedings and Right to Counsel

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Court has construed the applicability of the right to counsel, or lack thereof, in various noncriminal and investigatory proceedings as a matter of the Due Process Clause rather than the Sixth Amendment. For example, commitment proceedings that lead to the imposition of essentially criminal punishment are subject to the Due Process Clause and require the assistance of counsel.[1] However, a state administrative investigation by a fire marshal inquiring into the causes of a fire was held not to be a criminal proceeding and hence, despite the fact that the petitioners had been committed to jail for noncooperation, not the type of hearing at which counsel was requisite as a matter of Due Process.[2] In another decision, the Court refused to extend the Due Process-based right to counsel to a non-prosecutorial, fact-finding inquiry akin to a grand jury proceeding, even though the defendants in the case were subsequently prosecuted and sentenced for contempt in refusing to testify at the inquiry on the ground that their counsel were required to remain outside the hearing room.[3]

Amdt6.6.4 Right to Choose Counsel

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

Under the Sixth Amendment, there is a presumption that a defendant may retain counsel of choice, but the right to choose a particular attorney is not absolute.[1] For instance, in *Wheat v. United States*, a district court had denied a defendant's proffered waiver of conflict of interest and refused to allow representation by an attorney who represented the defendant's

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entitled to counsel in appealing conviction as a matter of equal protection); *see also* Ross v. Moffitt, 417 U.S. 600, 612 (1974) ("In this case we do not believe that the Equal Protection Clause, when interpreted in the context of these cases, requires North Carolina to provide free counsel for indigent defendants seeking to take discretionary appeals to the North Carolina Supreme Court, or to file petitions for certiorari in this Court."). In addition, using due process analysis, the Court found no constitutional right to counsel in prison disciplinary proceedings. Wolff v. McDonnell, 418 U.S. 539, 560–63, 570 (1974); *see also* Baxter v. Palmigiano, 425 U.S. 308, 314–15 (1976) (rejecting assertion that *Miranda* requires appointment of counsel in prison disciplinary hearings and declining to alter holding in *Wolff*, 418 U.S. at 560–53, 580).

[1] Specht v. Patterson, 386 U.S. 605, 608, 610 (1967).

[2] In re *Groban*, 352 U.S. 330, 332, 334–35 (1957).

[3] Anonymous v. Baker, 360 U.S. 287, 289, 290–91, 295 (1959); *see also* United States v. Williams, 504 U.S. 36, 49 (1992) ("We have twice suggested, though not held, that the Sixth Amendment right to counsel does not attach when an individual is summoned to appear before a grand jury, even if he is the subject of the investigation.") (citing *In re Groban*, 352 U.S. at 333 and United States v. Mandujano, 425 U.S. 564, 581 (1976)).

[1] *See* Wheat v. United States, 486 U.S. 153, 159 (1988) (explaining that "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment," the "Sixth Amendment right to choose one's own counsel is circumscribed in several important respects").

co-conspirators in an illegal drug enterprise.[2] Upholding the district court's discretion to disallow representation in instances of actual conflict of interests or serious potential for conflict, the Court mentioned other situations in which a defendant's choice may not be honored.[3] A defendant, for example, is not entitled to an advocate who is not a member of the bar, nor may a defendant insist on representation by an attorney who denies counsel for financial reasons or otherwise, nor may a defendant demand the services of a lawyer who may be compromised by past or ongoing relationships with the Government.[4]

The right to retain counsel of choice generally does not bar operation of asset forfeiture provisions, even if the forfeiture serves to deny to a defendant the wherewithal to employ counsel. In *Caplin & Drysdale v. United States*,[5] the Court upheld a federal statute requiring forfeiture to the government of property and proceeds derived from drug-related crimes constituting a "continuing criminal enterprise,"[6] even though a portion of the forfeited assets had been used to retain defense counsel. Although a defendant may spend his own money to employ counsel, the Court declared, "[a] defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that [the] defendant will be able to retain the attorney of his choice."[7] Because the statute vests title to the forfeitable assets in the United States at the time of the criminal act,[8] the defendant has no right to give them to a "third party" even if the purpose is to exercise a constitutionally protected right.[9] Moreover, on the same day *Caplin & Drysdale* was decided, the Court, in *United States v. Monsanto*, held that the government may, prior to trial, freeze assets that a defendant needs to hire an attorney if probable cause exists to "believe that the property will ultimately be proved forfeitable."[10] Nonetheless, in *Luis v. United States* the Court limited the holdings from *Caplin & Drysdale* and *Monsanto*, deciding that the Sixth Amendment provides criminal defendants the right to preserve *legitimate, untainted* assets unrelated to the underlying crime in order to retain counsel of their choice.[11]

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[2] 486 U.S. 153 (1988).

[3] *Id.* at 159.

[4] *Id.*

[5] 491 U.S. 617, 619, 626 (1989).

[6] 21 U.S.C. §§ 848, 853.

[7] *Caplin & Drysdale*, 491 U.S. at 626.

[8] The statute was interpreted in United States v. Monsanto, 491 U.S. 600, 602, 607 (1989), as requiring forfeiture of all assets derived from the covered offenses, and as making no exception for assets the defendant intends to use for his defense.

[9] *See Caplin & Drysdale*, 491 U.S. at 628 ("There is no constitutional principle that gives one person the right to give another's property to a third party, even where the person seeking to complete the exchange wishes to do so in order to exercise a constitutionally protected right.").

[10] *Monsanto*, 491 U.S. at 615 ("Indeed, it would be odd to conclude that the Government may not restrain property, such as the home and apartment in respondent's possession, based on a finding of probable cause, when we have held that . . . the Government may restrain persons where there is a finding of probable cause to believe that the accused has committed a serious offense."). A subsequent case held that where a grand jury had returned an indictment based on probable cause, that conclusion was binding on a court during forfeiture proceedings and the defendants do not have a right to have such a conclusion re-examined in a separate judicial hearing in order to unfreeze the assets to pay for their counsel.

[11] 578 U.S. 5, 8–9, 12–13 (2016) (plurality opinion). The Court in *Luis* split as to the reasoning for holding that a pretrial freeze of untainted assets violates a criminal defendant's Sixth Amendment right to counsel of choice. Four Justices employed a balancing test, weighing the government's contingent future interest in the untainted assets against the interests in preserving the right to counsel—a right at the "heart of a fair, effective criminal justice system"—in concluding that the defendant had the right to use innocent property to pay a reasonable fee for assistance of counsel. *See id.* at 16–23 (Justice Stephen Breyer, joined by Chief Justice John Roberts, Justices Ruth Bader Ginsburg & Sonia Sotomayor). Justice Clarence Thomas, in providing the fifth and deciding vote, concurred in judgment only, contending that "textual understanding and history" alone suffice to "establish that the Sixth

Where the right to be assisted by counsel of one's choice is wrongly denied, a Sixth Amendment violation occurs regardless of whether the alternate counsel retained was effective, or whether the denial caused prejudice to the defendant.[12] Further, because such a denial is not a "trial error" (a constitutional error that occurs during presentation of a case to the jury) but a "structural defect" (a constitutional error that affects the framework of the trial), the Court held that the decision is not subject to a "harmless error" analysis.[13]

In *Faretta v. California*, the Court held that the Sixth Amendment, in addition to guaranteeing the right to retained or appointed counsel, also guarantees a defendant the right to represent himself.[14] It is a right the defendant must adopt knowingly and intelligently;[15] under some circumstances the trial judge may deny the authority to exercise it, as when the defendant simply lacks the competence to make a knowing or intelligent waiver of counsel[16] or when his self-representation is so disruptive of orderly procedures that the judge may curtail it.[17] The right applies only at trial; there is no constitutional right to self-representation on direct appeal from a criminal conviction.[18] The Court spelled out the essential elements of self-representation in *McKaskle v. Wiggins*,[19] a case involving the self-represented defendant's rights vis-a-vis "standby counsel" appointed by the trial court. The "core of the *Faretta* right" is that the defendant "is entitled to preserve actual control over the case he chooses to present to the jury," and consequently, standby counsel's participation "should not be allowed to destroy the jury's perception that the defendant is representing himself."[20] But participation of standby counsel even in the jury's presence and over the defendant's objection does not violate the defendant's Sixth Amendment rights when serving the basic purpose of aiding the defendant in complying with routine courtroom procedures and protocols and thereby relieving the trial judge of these tasks.[21]

Amendment prevents the Government from freezing untainted assets in order to secure a potential forfeiture." *See id.* at 25 (Thomas, J., concurring); *see also id.* at 33 ("I cannot go further and endorse the plurality's atextual balancing analysis.").

[12] United States v. Gonzalez-Lopez, 548 U.S. 140, 144–45 (2006).

[13] *Gonzalez-Lopez*, 548 U.S. at 148–50 (citing Arizona v. Fulminante, 499 U.S. 279, 282 (1991)).

[14] 422 U.S. 806, 807, 817 (1975). Although the Court acknowledged some concern by judges that *Faretta* leads to unfair trials for defendants, in *Indiana v. Edwards* the Court declined to overrule *Faretta*. 554 U.S. 164, 178 (2008). Even if the defendant exercises his right to his detriment, the Constitution ordinarily guarantees him the opportunity to do so. *See Faretta*, 422 U.S. at 834 (explaining that "[i]t is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage," and that "although he may conduct his own defense ultimately to his own detriment, his choice must be honored"). A defendant who represents himself cannot thereafter complain that the quality of his defense denied him effective assistance of counsel. *Id.* at 834–35 n.46. The Court, however, has not addressed what state aid, such as access to a law library, might need to be made available to a defendant representing himself. Kane v. Garcia Espitia, 546 U.S. 9, 10 (2005) (per curiam). Related to the right of self-representation is the right to testify in one's own defense. *See* Rock v. Arkansas, 483 U.S. 44, 52, 62 (1987) (holding that per se rule excluding all hypnotically refreshed testimony violates right).

[15] *See*, *e.g.*, Godinez v. Moran, 509 U.S. 389, 396 (1993) (explaining that a criminal defendant "may not waive his right to counsel or plead guilty unless he does so 'competently and intelligently'" (quoting Johnson v. Zerbst, 304 U.S. 458, 468 (1938)).

[16] The fact that a defendant is mentally competent to stand trial does not preclude a court from finding him not mentally competent to represent himself at trial. *Edwards*, 554 U.S. at 177–78. Mental competence to stand trial, however, is sufficient to ensure the right to waive the right to counsel in order to plead guilty. Godinez v. Moran, 509 U.S. 389, 398–99 (1993).

[17] *Faretta*, 422 U.S. at 834 n.46.

[18] Martinez v. Court of App. of Cal., Fourth App. Dist., 528 U.S. 152, 154 (2000). The Sixth Amendment itself "does not include any right to appeal." *Id.* at 160.

[19] 465 U.S. 168, 170 (1984).

[20] *Id.* at 178.

[21] *Id.* at 184.

Amdt6.6.5 Right to Effective Assistance of Counsel

Amdt6.6.5.1 Overview of the Right to Effective Assistance of Counsel

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

In *McMann v. Richardson*, the Court held that "the right to counsel is the right to the effective assistance of counsel."[1] This right to effective assistance may be implicated in at least three ways.[2] First, a court's action may interfere with counsel's effectiveness if the court restricts a defense counsel in exercising his or her representational duties and prerogatives attendant to the adversarial system of justice of the United States.[3] Second, the Sixth Amendment is implicated when a court appoints a defendant's attorney to represent his co-defendant as well, where the co-defendants are known to have potentially conflicting interests.[4] Third, defense counsel may deprive a defendant of effective assistance by failing to provide competent representation that is adequate to ensure a fair trial,[5] or, more broadly, a just outcome.[6] The right to effective assistance may be implicated as early as the process for appointment of counsel.[7]

Amdt6.6.5.2 Deprivation of Effective Assistance of Counsel by Court Interference

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the*

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[1] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). The Court stated: "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel . . . ." *Id.* at 771. As a corollary, there is no Sixth Amendment right to effective assistance where there is no Sixth Amendment right to counsel. Wainwright v. Torna, 455 U.S. 586, 587–88 (1982) (per curiam) (holding that defendant may not raise ineffective assistance claim in context of proceeding in which he had no constitutional right to counsel).

[2] An additional issue is the extent to which the actions of government investigators may interfere with the effective assistance of counsel. *See* United States v. Morrison, 449 U.S. 361, 362, 364, 366 (1981) (assuming without deciding that investigators who met with defendant on another matter without knowledge or permission of counsel and who disparaged counsel and suggested she could do better without him, interfered with counsel, but holding that in absence of showing of adverse consequences to representation, dismissal of indictment was inappropriate remedy).

[3] *E.g.*, Geders v. United States, 425 U.S. 80, 91 (1976) (holding "that an order preventing [defendant] from consulting his counsel 'about anything' during a seventeen hour overnight recess between his direct and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment"); Herring v. New York, 422 U.S. 853, 864–65 (1975) (concluding that trial court denied defendant effective assistance of counsel through application of state statute to bar defense counsel from making final summation).

[4] *E.g.*, Glasser v. United States, 315 U.S. 60, 75–76 (1942) (holding that court deprived defendant of effective assistance of counsel by appointing the same counsel to represent defendant and a codefendant despite danger of divided attention and conflicts).

[5] Strickland v. Washington, 466 U.S. 668, 686 (1984).

[6] *See*, *e.g.*, Lafler v. Cooper, 566 U.S. 156, 162–63 (2012) (defense counsel deprived defendant of effective assistance of counsel through erroneous advice during plea bargaining).

[7] *Glasser*, 315 U.S. at 70 (stating that "the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests"); *see also* Powell v. Alabama, 287 U.S. 45, 71–72 (1932) (holding that as a matter of due process, the assignment of defense counsel in a capital case must be timely and made in a manner that affords "effective aid in the preparation and trial of the case").

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Restrictions on representation imposed during trial have been stricken as impermissible interference with defense counsel. For example, the Court invalidated application of a statute that empowered a judge to deny final summations before judgment in a nonjury trial; explaining that "the right to the assistance of counsel . . . ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process."[1] In *Geders v. United States*,[2] the Court held that a trial judge's order preventing a defendant from consulting his counsel during a 17-hour overnight recess between his direct and cross-examination, to prevent tailoring of testimony or "coaching," deprived the defendant of his right to assistance of counsel and was invalid.[3] The Court has treated other direct and indirect restraints upon counsel as violations of the Fourteenth Amendment right to due process.[4]

Amdt6.6.5.3 Deprivation of Effective Assistance of Counsel in Joint Representation

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In cases of joint representation of codefendants, deprivation of effective assistance of counsel may result from a lack of fidelity by the attorney to the client. For instance, in *Glasser v. United States*, the Court held a trial judge erred in appointing one defendant's attorney to also represent a codefendant in a conspiracy case, where the judge knew of potential conflicts of interest in the case, and the original defendant had earlier expressed a desire for sole representation.[1] In another case, counsel for codefendants made a timely assertion to the trial judge that continuing joint representation could pose a conflict of interest, and the Court held that the trial judge erred in not examining the assertion closely and by not permitting or appointing separate counsel, absent a finding that the risk of conflict was remote.[2] Joint

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[1] Herring v. New York, 422 U.S. 853, 858, 864–65 (1975)."[T]he right to the assistance to counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments." *Id.* at 857.

[2] 425 U.S. 80, 91 (1976).

[3] The Court distinguished *Geders* in Perry v. Leeke, 488 U.S. 272, 283–85 (1989), which upheld a trial court's order that the defendant and his counsel not consult during a fifteen-minute recess between the defendant's direct testimony and his cross-examination; see also Chandler v. Fretag, 348 U.S. 3, 10 (1954) (holding that denial of request for continuance "to employ and consult with counsel" deprived defendant of due process of law).

[4] *E.g.*, Brooks v. Tennessee, 406 U.S. 605, 612–13 (1972) (alternative holding) (statute requiring defendant to testify prior to any other witness for defense or to forfeit the right to testify denied him due process by depriving him of the tactical advice of counsel on whether to testify and when); Ferguson v. Georgia, 365 U.S. 570, 596 (1961) (concluding under the Fourteenth Amendment where Georgia statute, uniquely, barred sworn testimony by defendants, a defendant was entitled to the assistance of counsel in presenting the unsworn statement allowed him under Georgia law).

[1] 315 U.S. 60, 75–76 (1942).

[2] Holloway v. Arkansas, 435 U.S. 475, 484 (1978). Counsel had been appointed by the court. *Id.* at 477.

representation does not deny effective assistance per se, however.[3] Judges are not automatically required to initiate an inquiry into the propriety of multiple representation, and are able to assume in the absence of "special circumstances" that no conflict exists.[4] On the other hand, a defendant who objects to joint representation must be given an opportunity to make the case that potential conflicts exists.[5] Absent an objection, a defendant must later show the existence of an "actual conflict of interest [that] adversely affected his lawyer's performance."[6] Once it is established that a conflict did actively affect the lawyer's joint representation, however, a defendant need not additionally prove that the lawyer's representation was prejudicial to the outcome of the case.[7]

Amdt6.6.5.4 Deprivation of Effective Assistance of Counsel by Defense Counsel

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The Sixth Amendment's guarantee of effective assistance of counsel is not satisfied by the mere appointment of counsel regardless of the competence or fidelity of their services; indeed, the "right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance."[1] Further, the Sixth Amendment's right to effective assistance applies to counsel regardless of whether counsel is appointed or privately retained or whether the government in any way brought about the defective representation.[2] As the Court has explained, "[t]he vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection."[3]

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[3] *See* Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) ("[M]ultiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest." (citing *Holloway*, 435 U.S. at 482)).

[4] *See id.* at 346–47 ("Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist.").

[5] *Id.* at 348.

[6] *Id.*

[7] *Id.* at 348–50; *see also* Wheat v. United States, 486 U.S. 153, 162 (1988) ("[W]here a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver, and insist that defendants be separately represented."); Wood v. Georgia, 450 U.S. 261, 272–73 (1981) (concluding on due process grounds that where counsel retained by defendants' employer potentially had conflict between defendants' interests and employer's, and facts indicating potential conflict were known to trial judge, the trial judge should have inquired further). Where an alleged conflict is not premised on joint representation, but rather on a prior representation of a different client, for example, a defendant may be required to show actual prejudice in addition to a potential conflict. Mickens v. Taylor, 535 U.S. 162, 166–67, 173–74 (2002). For earlier cases presenting more direct violations of defendant's rights, see generally Glasser v. United States, 315 U.S. 60 (1942); United States v. Hayman, 342 U.S. 205 (1952); and Ellis v. United States, 356 U.S. 674 (1958).

[1] Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)

[2] See *id.* ("A proper respect for the Sixth Amendment disarms petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel.").

[3] *Id.*

The seminal test for adequate representation stems from the Court's 1984 opinion *Strickland v. Washington*.[4] There are two components to the *Strickland* test: (1) deficient representation and (2) resulting prejudice to the defense so serious as to bring the outcome of the proceeding into question.[5]

Amdt6.6.5.5 Deficient Representation Under Strickland

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

The gauge of deficient representation is an objective standard of reasonableness "under prevailing professional norms" that takes into account "all the circumstances" and evaluates conduct "from counsel's perspective at the time."[1] Providing effective assistance is not limited to a single path. No detailed rules or guidelines for adequate representation are appropriate, as "[a]ny such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions."[2]

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[4] 466 U.S. 668 (1984). In an earlier case, the Court had observed that whether defense counsel provided adequate representation, in advising a guilty plea, depended not on whether a court would retrospectively consider his advice right or wrong "but on whether that advice was within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 768–71 (1970); *see also* United States v. Agurs, 427 U.S. 97, 102 n.5 (1976) ("We think it clear, however, that counsel's failure to obtain . . . prior criminal record does not demonstrate ineffectiveness."); Tollett v. Henderson, 411 U.S. 258, 266 (1973) ("If a prisoner pleads guilty on the advice of counsel, he must demonstrate that the advice was not 'within the range of competence demanded of attorneys in criminal cases.'" (quoting *McMann*, 397 U.S. at 771)).

[5] *Strickland*, 466 U.S. at 687. The Court has emphasized that an "ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." Harrington v. Richter, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 689–90). Furthermore, ineffective assistance of counsel claims frequently are asserted in federal court to support petitions for writs of habeas corpus filed by state prisoners. *E.g.*, *Richter*, 562 U.S. at 96–97; Kimmelman v. Morrison, 477 U.S. 365 (1986). Making a successful *Strickland* claim in a habeas context, as opposed to direct review, was further complicated by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Pub. L. No. 104–132, § 104, 110 Stat. 1218–1219, amending 28 U.S.C. § 2254. *See generally*, *e.g.*, Shinn v. Martinez Ramirez, No. 20–1009, at 2, 6–22 (U.S. May 23, 2022) (reviewing and applying AEDPA to foreclose evidentiary hearing where "prisoner's state postconviction counsel negligently failed to develop the state-court record" of ineffective assistance of trial counsel). After the passage of AEDPA, one must go beyond showing that a state court applied federal law incorrectly to also show that the court misapplied established Supreme Court precedent in a manner that no fair-minded jurist could find to be reasonable. *E.g.*, *Richter*, 562 U.S. at 100–05, 106 (reviewing and applying AEDPA standards to habeas claim premised on ineffective assistance of counsel, and holding that counsel's decision to forgo inquiry into blood evidence was at least arguably reasonable); *see also* Burt v. Titlow, 571 U.S. 12, 15 (2013) (reversing Sixth Circuit decision based on "doubly deferential" standard of review for habeas claims under AEDPA and Strickland that does not "permit federal judges to . . . casually second-guess the decisions of their state-court colleagues or defense attorneys"); Cullen v. Pinholster, 563 U.S. 170, 187 (2011) (evaluating federal habeas claim premised on ineffective assistance of counsel and concluding that standard required by AEDPA had not been met).

[1] *Strickland*, 466 U.S. at 688, 689; *see also* Maryland v. Kulbicki, 577 U.S. 1, 4 (2015) (per curiam) (reversing an opinion by Maryland's highest state court, which found that counsel was ineffective because the defendant's attorneys did not question the methodology used by the state in analyzing bullet fragments, on the grounds that this methodology "was widely accepted" at the time of trial, and courts "regularly admitted [such] evidence").

[2] *Strickland*, 466 U.S. at 689. The Court in *Strickland* observed that "American Bar Association standards and the like" may reflect prevailing norms of practice, "but they are only guides." *Id.* at 688. Subsequent cases also cite ABA standards as touchstones of prevailing norms of practice. *E.g.*, Rompilla v. Beard, 545 U.S. 374, 387 (2005); Wiggins v. Smith, 539 U.S. 510, 524 (2003). But in *Bobby v. Van Hook*, the Court held that the Sixth Circuit had erred in assessing

Because even the most highly competent attorneys might choose to defend a client differently, "[j]udicial scrutiny of counsel's performance must be highly deferential."[3] Counsel's obligation is a general one: to act within the wide range of legitimate, lawful, and reasonable conduct.[4] The Court has advised that "strategic choices made after thorough investigation of [relevant] law and facts . . . are virtually unchallengeable,"[5] and the same is true of reasonable decisions that "make[ ] particular investigations unnecessary,"[6] or reasonable decisions in selecting which issues to raise on appeal.[7] In *Strickland* itself, the allegation of ineffective assistance failed; the Court held that the defense attorney's decision to forgo character and psychological evidence in a capital sentencing proceeding to avoid rebuttal evidence of the defendant's criminal history was "the result of reasonable professional judgment."[8]

On the other hand, defense counsel does have a general duty to investigate a defendant's background, and a decision to limit investigation and presentation of mitigating evidence must be supported by reasonable efforts and judgment.[9] Also, even though deference to counsel's choices may seem particularly apt in the unstructured, often style-driven arena of plea

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an attorney's conduct in the 1980s under 2003 ABA guidelines, and also noted that its holding "should not be regarded as accepting the legitimacy of a less categorical use of the [2003] Guidelines to evaluate post-2003 representation." 558 U.S. 4, 7, 8 n.1 (2009) (per curiam).

[3] *Strickland*, 466 U.S. at 689. The purpose is "not to improve the quality of legal representation, . . . [but] simply to ensure that criminal defendants receive a fair trial." *Id.*

[4] There is no obligation to assist the defendant in presenting perjured testimony, Nix v. Whiteside, 475 U.S. 157, 171, 175 (1986), and a defendant has no right to require his counsel to use peremptory challenges to exclude jurors on the basis of race. Georgia v. McCollum, 505 U.S. 42, 57 (1992). Also, "effective" assistance of counsel does not guarantee the accused a "meaningful relationship" of "rapport" with his attorney such that he is entitled to a continuance in order to change attorneys during a trial. Morris v. Slappy, 461 U.S. 1, 13–14 (1983).

[5] *Strickland*, 466 U.S. at 690; *see also Burt*, 571 U.S. at 23–24 (rejecting conclusion that a lack of evidence indicating that counsel gave "constitutionally adequate advice on whether to withdraw [a] guilty plea" justified finding counsel ineffective on Sixth Amendment grounds); Yarborough v. Gentry, 540 U.S. 1, 4–6 (2003) (per curiam) (applying deference to attorney's choice of tactics for closing argument and reversing federal appellate decision finding that counsel had deprived defendant of effective assistance of counsel).

[6] *Strickland*, 466 U.S. at 691; *see also* Schriro v. Landrigan, 550 U.S. 465, 475–77 (2007) (determining that federal district court was within its discretion to conclude that attorney's failure to present mitigating evidence made no difference in sentencing); Woodford v. Visciotti, 537 U.S. 19, 26–27 (2002) (per curiam) (determining that state courts could reasonably have concluded that failure to present mitigating evidence was outweighed by "severe" aggravating factors).

[7] There is no obligation to present on appeal all nonfrivolous issues requested by the defendant. Jones v. Barnes, 463 U.S. 745, 750–51, 754 (1983) (concluding that appointed counsel may exercise his professional judgment in determining which issues are best raised on appeal).

[8] 466 U.S. at 699; *see also* Wong v. Belmontes, 558 U.S. 15, 20, 28 (2009) (per curiam) (rejecting ineffective assistance of counsel claim based on decision not to present additional mitigating evidence); Darden v. Wainwright, 477 U.S. 168, 184–87 (1986) (similar).

[9] *See* Andrus v. Texas, No. 18–9674, slip op. at 1–2, 8 (U.S. Jun. 15, 2020) (per curiam) (concluding the defendant's counsel provided constitutionally ineffective assistance by inadequately investigating mitigating evidence, providing evidence that bolstered the state's case, and failing to scrutinize the state's aggravating evidence); Buck v. Davis, No. 15–8049, slip op. at 17 (U.S. Feb. 22, 2017) (concluding that "[n]o competent defense attorney would introduce" evidence that his client was a future danger because of his race); see also Hinton v. Alabama, 571 U.S. 263, 274 (2014) (per curiam) (holding an attorney's hiring of a questionably competent expert witness because of a mistaken belief in the legal limit on the amount of funds payable on behalf of an indigent defendant constitutes ineffective assistance); Sears v. Upton, 561 U.S. 945, 951–52, 956 (2010) (per curiam) (concluding that the "cursory nature" of a defense counsel's investigation into mitigation evidence was constitutionally ineffective); Porter v. McCollum, 558 U.S. 30, 39–40 (2009) (per curiam) (holding an attorney's failure to interview witnesses or search records in preparation for penalty phase of capital murder trial constituted ineffective assistance of counsel); Rompilla v. Beard, 545 U.S. 374, 385 (2005) (concluding that a defendant's attorneys' failure to consult trial transcripts from a prior conviction that the attorneys knew the prosecution would rely on in arguing for the death penalty was inadequate); Wiggins v. Smith, 539 U.S. 510, 526–28 (2003) (holding an attorney's failure to investigate defendant's personal history and present important mitigating evidence at capital sentencing was objectively unreasonable).

bargaining,[10] an accused, in considering a plea, is clearly entitled to advice of counsel on the prospect of conviction at trial and the extent of punishment that might be imposed. Thus, in *Lafler v. Cooper* the government conceded that the deficient representation part of the *Strickland* test was met when an attorney erroneously advised the defendant during plea negotiations that the facts in his case would not support a conviction for attempted murder.[11] In *Missouri v. Frye*,[12] the Court held that failure to communicate a plea offer to a defendant also may amount to deficient representation.

Moreover, in *Padilla v. Kentucky* the Court held that defense counsel's Sixth Amendment duty to a client considering a plea goes beyond advice on issues directly before the criminal court to reach advice on deportation.[13] Because of its severity, historical association with the criminal justice system, and increasing certainty following conviction and imprisonment, the Court found deportation to be of a "unique nature."[14] Further, the Court held that defense counsel failed to meet prevailing professional norms in representing to the defendant that he did not have to worry about deportation because of the length of his legal residency in the United States.[15] The Court emphasized that this conclusion was not based on the attorney's mistaken advice, but rather on a broader obligation to inform a noncitizen client whether a plea carries a risk of deportation.[16]

Amdt6.6.5.6 Prejudice Resulting from Deficient Representation Under Strickland

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

For deficient representation to constitute a constitutional violation, the Court established in *Strickland v. Washington* that there must be (1) deficient representation and (2) resulting prejudice to the defense so serious as to bring the outcome of the proceeding into question.[1] Meeting the second requirement of *Strickland*—whether the deficient representation resulted in prejudice—can be challenging The touchstone of "prejudice" under *Strickland* is that the defendant "must show that there is a reasonable probability that, but for counsel's

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[10] *See*, *e.g.*, Premo v. Moore, 562 U.S. 115, 123–26 (2011) (reviewing considerations when evaluating ineffective assistance claim at plea bargaining stage and noting that "[p]lea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks").

[11] 566 U.S. 156, 161, 166 (2012).

[12] 566 U.S. 134, 145 (2012) ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.").

[13] Padilla v. Kentucky, 559 U.S. 356, 368–69 (2010).

[14] *Id.* at 365–66. The Court did not address whether distinguishing between direct and collateral consequences of conviction was appropriate in bounding defense counsel's constitutional duty in a criminal case. *Id.* at 365.

[15] *Id.* at 359, 367–69.

[16] *Id.* at 369–74 (2010). On the issue of prejudice to the defendant from ineffective assistance, the Court sent the case back to lower courts for further findings. *Id.* at 369. In *Chaidez v. United States*, the Court held that *Padilla* announced a "new rule" of criminal procedure that did not apply "retroactively" during collateral review of convictions then already final. 568 U.S. 342, 358 (2013).

[1] Strickland v. Washington, 466 U.S. 668, 687 (1984).

unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[2] Defendants frequently fall short on the prejudice requirement.[3]

Beyond *Strickland*'s "reasonable probability of a different result" test for determining prejudice, there are issues of when an "outcome determinative" test alone suffices, what exceptions exist, and whether the general rule should be modified. In *Lockhart v. Fretwell*, the Court appeared to refine the *Strickland* test when it stated that an "analysis focusing solely on mere outcome determination" is "defective" unless attention is also given to whether the result was "fundamentally unfair or unreliable."[4] However, the Court subsequently characterized *Lockhart* as limited to a class of exceptions to the "outcome determinative" test and not supplanting it.[5] According to *Williams v. Taylor*, it would disserve justice in some circumstances to find prejudice premised on a likelihood of a different outcome.[6] For example, fundamental fairness precluded finding prejudice where defense counsel had failed to object to the use sentencing of an aggravating factor barred by a recent appellate case, but where that case was subsequently overturned.[7] According to the Court, finding prejudice based on defense counsel's failure to object in the narrow window where it would have been permissible based on the shifting precedent would have been nothing more than a fortuitous windfall for the

[2] *See* Strickland v. Washington, 466 U.S. 668, 694 (1984). This standard does not require that a defendant show "that counsel's deficient conduct more likely than not altered the outcome in the case." *See Id.* at 693. At the same time, the Court has concluded that the "prejudice inquiry under *See Strickland*" applies to cases beyond those in which there was only "little or no mitigation evidence" presented. Sears v. Upton, 561 U.S. 945, 954 (2010) (per curiam); Porter v. McCollum, 558 U.S. 30, 40–42 (2009) (per curiam) (evaluating the totality of mitigating evidence to conclude that there was "a reasonable probability that the advisory jury—and the sentencing judge—would have struck a different balance'" but for the counsel's deficiencies (Wiggins v. Smith, 539 U.S. 510, 537 (2003))). For an example of a criminal defendant who succeeded on the prejudice prong of the *Strickland* test, see Buck v. Davis, No. 15–8049, slip op. at 18–20 (U.S. Feb. 22, 2017) (holding that, in a case where the focus of a capital sentencing proceeding was on the defendant's likelihood of recidivism, defense counsel had been ineffective by introducing racially charged testimony about the defendant's future dangerousness, and "[r]easonable jurors might well have valued [the testimony] concerning the central question before them"). Where a defendant alleges that ineffective assistance of counsel resulted in an increased term of imprisonment, it is not necessary that the increased prison term be of significant duration. *See* Glover v. United States, 531 U.S. 198, 203 (2001) ("Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.").

[3] *E.g.*, Smith v. Spisak, 558 U.S. 139, 154–56 (2010). In *Hill v. Lockhart*, the Court applied the *Strickland* test to attorney decisions to accept a plea bargain, holding that a defendant must show a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. 474 U.S. 52, 59 (1985). As a result, the prejudice question with respect to when a counsel's deficient performance leads the defendant to accept a guilty plea rather than go to trial is not whether the trial would have resulted in a not guilty verdict. *See* Roe v. Flores-Ortega, 528 U.S. 470, 482–83 (2000). Instead, the issue is whether the defendant was prejudiced by the "denial of the entire judicial proceeding . . . to which he had a right." *Id.* at 483. As a result, prejudice may be very difficult to prove if the defendant's decision about going to trial turns on his prospects of success and those chances are affected by an attorney's error. *See* Premo v. Moore, 562 U.S. 115, 118, 123–24 (2011). However, when a defendant's choice to accept a plea bargain has nothing to do with his chances of success at trial, such as if the defendant is primarily concerned with the respective consequences of a conviction after trial or by plea, a defendant can show prejudice by providing evidence contemporaneous with the acceptance of the plea that he would have rejected the plea if not for the erroneous advice of counsel. *See* Lee v. United States, No. 16–327, slip op. at 7–10 (U.S. Mar. 28, 2017) (holding that a defendant whose fear of deportation was the determinative factor in whether to accept a plea agreement could show prejudice resulting from his attorney's erroneous advice that a felony charge would not lead to deportation even when a different result at trial was remote).

[4] 506 U.S. 364, 368–70 (1993).

[5] *See Glover*, 531 U.S. at 203 ("The Court explained last Term that our holding in *Lockhart* does not supplant the *Strickland* analysis."); Williams v. Taylor, 529 U.S. 362, 391 (2000) ("The Virginia Supreme Court erred in holding that our decision in [*Lockhart*] . . . modified or in some way supplanted the rule set down in *Strickland*.") (internal citation omitted).

[6] 529 U.S. at 391–92.

[7] *Id.* at 392–93.

defendant.[8] As another example, the Court has said it would be unjust to find legitimate prejudice in a defense attorney's interference with a defendant's perjured testimony, even if that testimony could have altered a trial's outcome.[9]

A second category of recognized exceptions to the application of the "outcome determinative" prejudice test includes the relatively limited number of cases in which prejudice is presumed. This presumption occurs when there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[10] These situations, the Court explained in *United States v. Cronic* involve some kind of "breakdown of the adversarial process," and include actual or constructive denial of counsel, denial of such basics as the right to effective cross-examination, or failure of counsel to subject the prosecution's case to meaningful adversarial testing.[11] Moreover, prejudice is presumed "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken."[12] "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show [prejudice],"[13] and consequently most claims of inadequate representation continue to be measured by the *Strickland* standard.[14]

Amdt6.6.5.7 Limits on Role of Attorney

Sixth Amendment:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

While the Sixth Amendment guarantees the right of assistance of counsel, that right does not require the defendant to surrender control entirely to his representative.[1] Defense counsel's central province is in trial management, providing assistance in deciding what arguments to make, what evidentiary objections to raise, and what evidence should be

[8] *Id.*

[9] *Id.* (citing and discussing Nix. v. Whiteside, 475 U.S. 157, 175–76 (1986)).

[10] United States v. Cronic, 466 U.S. 648, 658 (1984).

[11] *Id.* at 657–59.

[12] Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000). In *Garza v. Idaho*, the Court clarified that the presumption of prejudice that applies when counsel's deficient performance forfeits an appeal that a defendant otherwise would have taken remains even when the defendant has signed an appeal waiver, because issues may remain as to the scope or validity of the waiver and the presumption-of-prejudice rule does not depend upon the prospects of the defendant's appeal. No. 17–1026, slip op. at 3–6, 9 (U.S. Feb. 27, 2019).

[13] *Cronic*, 466 U.S. at 659 n.26.

[14] *See*, *e.g.*, Weaver v. Massachusetts, No. 16–240, slip op. at 12 (U.S. June 22, 2017) (holding that "when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically"); Florida v. Nixon, 543 U.S. 175, 189–90 (2004) (holding that a concession-of-guilt strategy in a capital trial does not automatically rank as prejudicial ineffective assistance of counsel); Bell v. Cone, 535 U.S. 685, 697–98 (2002) (concluding that *Cronic*'s rule that prejudice can be presumed when counsel "entirely fails" to subject the prosecution's case to meaningful adversarial testing does not extend to situations where counsel's failings were limited to specific points in the trial); Mickens v. Taylor, 535 U.S. 162, 173–74 (2002) (holding that, to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest, the defendant must establish that the conflict adversely affected his counsel's performance).

[1] *See* Faretta v. California, 422 U.S. 806, 819–20 (1975) (noting that counsel, by providing "assistance," no matter how expert, is "still an assistant").

submitted.[2] At the same time, the accused has the "ultimate authority to make certain fundamental decisions regarding the case," including "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."[3] Such decisions are for the criminal defendant to make notwithstanding the defendant's own inexperience or lack of professional qualifications.[4] Allowing counsel to usurp such decisions from the accused violates the Sixth Amendment's right to counsel, amounting to a structural error that obviates any need to inquire into whether the criminal defendant was prejudiced in any way.[5]

In this vein, the Court held in *McCoy v. Louisiana* that a criminal defendant's choice to maintain his innocence at the guilt phase of a capital trial was not a strategic choice for counsel to make, notwithstanding counsel's view that confessing guilt offered the best chance to avoid the death penalty.[6] Instead, the Court concluded that such a decision amounts to a fundamental choice about the client's objectives for the criminal proceeding.[7] More specifically, while acknowledging that counsel "may reasonably assess a concession of guilt as best suited to avoiding the death penalty," the Court noted that a criminal defendant may not share the objective of avoiding such a punishment and instead may wish, above all else, to avoid admitting guilt or living the rest of his life in prison.[8] Because the Sixth Amendment requires the assistance of counsel, the *McCoy* Court concluded that a lawyer cannot concede his client's guilt and must instead assist in achieving his client's express objective to maintain his innocence of the charged criminal acts.[9]

[2] *See* Gonzalez v. United States, 553 U.S. 242, 248 (2008).

[3] *See* Jones v. Barnes, 463 U.S. 745, 751 (1983).

[4] *See* McCoy v. Louisiana, No. 16–8255, slip op. at 6 (U.S. May 14, 2018).

[5] See *id.* at 11 ("Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence.").

[6] *Id.* at 1–2, 6–7.

[7] *Id*.

[8] *Id.* at 7.

[9] *Id.* at 5–8.

SEVENTH AMENDMENT
CIVIL TRIAL RIGHTS

SEVENTH AMENDMENT
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SEVENTH AMENDMENT—CIVIL TRIAL RIGHTS

Amdt7.1 Overview of Seventh Amendment, Civil Trial Rights

The Seventh Amendment guarantees a jury trial in civil cases at law in federal court and limits the circumstances under which courts may overturn a jury's findings of fact.[1] Although this right is rooted in English common law and was important during the colonial era, it was initially omitted from the Constitution. The First Congress, however, ultimately adopted the right as one of the Bill of Rights, which became effective in 1791.[2] Since then, the Supreme Court has interpreted the phrase "Suits at common law" under the Amendment as preserving the right of trial by jury in civil cases as it "existed under the English common law when the amendment was adopted."[3] This means that the Amendment does not guarantee trial by jury in cases under admiralty and maritime law and in other proceedings historically tried by a court instead of a jury, nor does it reach statutory proceedings unknown to the common law concerning the enforcement of statutory "public rights" created by Congress.[4]

The following essays in this section address in more detail the historical background of the right to jury trials in civil cases and the types of civil cases and claims requiring a jury trial. In addition, the essays also address other aspects of this right, including the circumstances under which courts may make gatekeeping juridical determinations that prevent submission of claims to a jury, the composition and functions of a jury in civil cases, and the circumstances under which courts may order the entry of a judgment contrary to a jury's verdict.[5]

Amdt7.2 Right to a Trial by a Jury in Civil Cases

Amdt7.2.1 Historical Background of Jury Trials in Civil Cases

Seventh Amendment:

> *In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*

The Seventh Amendment guarantees a jury trial in civil cases at law in federal court.[1] The Amendment traces its roots to English common law; some historians trace the origin of the English jury as far back as Ancient Greece.[2] Sir William Blackstone, in his influential treatise on English common law, called the right "the glory of the English law" and necessary for "[t]he

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[1] U.S. Const. amend. VII. The Supreme Court has not held that the Seventh Amendment's guarantee of the right to a civil trial by jury applies to the states through the Fourteenth Amendment. *See* Curtis v. Leother, 415 U.S. 189, 192 n.6 (1974); Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211 (1916). Most state constitutions, however, include this right. *See* 2 William J. Rich, Modern Constitutional Law § 22:13 (3rd ed. 2011).

[2] *See* Amdt7.2.1 Historical Background of Jury Trials in Civil Cases.

[3] Balt. & Carolina Line v. Redman, 295 U.S. 654, 657 (1935); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446–48 (1830).

[4] *See* Amdt7.2.2 Identifying Civil Cases Requiring a Jury Trial and Amdt7.2.3 Cases Combining Law and Equity.

[5] *See* Amdt7.2.4 Restrictions on the Role of the Judge through Amdt7.3.2 Appeals from State Courts to the Supreme Court.

[1] U.S. Const. amend. VII. The Supreme Court has not held that the Seventh Amendment's guarantee of the right to a civil trial by jury applies to the states through the Fourteenth Amendment. *See* Curtis v. Leother, 415 U.S. 189, 192 n.6 (1974); Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211 (1916). Most state constitutions, however, include this right. *See* William J. Rich, 2 Modern Constitutional L. § 22:13 (3rd ed.).

[2] *See* Richard S. Arnold, *Trial by Jury: the Constitutional Right to a Jury of Twelve in Civil Trials*, 22 Hofstra L. Rev. 1, 5–7 (1993).

impartial administration of justice," which, if "entirely entrusted to the magistracy, a select body of men," would be subject "frequently [to] an involuntary bias towards those of their own rank and dignity."[3]

From England, the colonists brought the right to a jury trial across the Atlantic. The civil jury played an important role during the colonial era.[4] The colonies stoutly resisted the King of England's efforts to diminish this right, and the Declaration of Independence identified the denial of "the benefits of trial by jury" as one of the grievances that led to the American Revolution.[5] Despite this right's prominence in Colonial America, however, a right to a civil jury trial was not included in the original draft of the Constitution.[6]

Records of the Philadelphia Convention show that the delegates twice raised the issue of whether the Constitution should include a right to a jury trial. On September 12, 1787, toward the end of the Convention, Hugh Williamson of North Carolina "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it."[7] Some delegates expressed support for such a provision but observed that the diversity of state courts' practices in civil trials made it impossible to draft a suitable provision.[8] This latter concern appears to have served as the basis for defeating a motion, brought by another delegate on September 15, 1787, to insert a clause in Article III, § 2, to guarantee that "a trial by jury shall be preserved as usual in civil cases."[9]

After the Convention, many opponents of the Constitution's ratification cited the omission of a right to a jury trial with such "urgency and zeal" that they almost prevented the states from ratifying the Constitution.[10] Some opponents of the Constitution claimed that the absence of a provision requiring civil jury trials in a Constitution that mandated jury trials in criminal cases[11] implied that the use of a jury was abolished in civil cases.[12] In the *Federalist Papers*, Alexander Hamilton refuted this assertion, expressing the view that the Constitution's silence on civil jury trials merely meant "that the institution [would] remain precisely in the same situation in which it is placed by the State constitutions."[13]

In ratifying the Constitution, several states urged Congress to provide a right to a jury in civil cases as one of the amendments.[14] The right was included in the list of amendments James Madison proposed to the First Congress, which adopted the right as one of the Bill of

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[3] Blackstone, Commentaries on the Laws of England 379 (1765–1769).

[4] *See* Arnold, *supra* note 2, at 13–14.

[5] *See id.* at 14.

[6] *See id.*

[7] 2 Records of the Federal Convention of 1787, at 587 (Max Farrand ed., 1937).

[8] *Id.*

[9] *Id.* at 628.

[10] 3 Joseph Story, Commentaries on the Constitution of the United States § 1757 (1833). Justice Story observed: "[I]t is a most important and valuable amendment; and places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty." *Id.* § 1762.

[11] U.S. Const. art. III, § 2.

[12] The Federalist No. 83 (Alexander Hamilton).

[13] *See id.*

[14] Jonathan Elliott, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 326 (1836) (New Hampshire); 2 *id.* at 399–414 (New York); 3 *id.* at 658 (Virginia).

Rights.[15] It does not appear that the proposed amendment's text or meaning was debated during its passage.[16] The Seventh Amendment became effective as part of the Bill of Rights in 1791.

Amdt7.2.2 Identifying Civil Cases Requiring a Jury Trial

Seventh Amendment:

> *In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*

The Seventh Amendment grants a right to a jury trial in "Suits at common law," which the Supreme Court has long interpreted as "limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law and by the appropriate modes and proceedings of courts of law."[1] The drafters of the Seventh Amendment used the term "common law" to clarify that the Amendment does not provide a right to a jury in civil suits involving the types of equitable rights and remedies that courts enforced at the time of the Amendment's framing.[2]

Two unanimous decisions, in which the Supreme Court held that civil juries were required, illustrate the Court's treatment of this distinction. In the first suit, a landlord sought to recover, based on District of Columbia statutes, possession of real property from a tenant allegedly behind on rent. The Court reasoned that whether "a close equivalent to [the statute in question] existed in England in 1791 [was] irrelevant for Seventh Amendment purposes."[3] Instead, the Court stated that its Seventh Amendment precedents "require[d] trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty."[4] The statutory cause of action, the Court found, had several analogs in the common law, all of which involved a right to trial by jury.[5]

In a second case, the plaintiff sought damages for alleged racial discrimination in the rental of housing in violation of federal law, arguing that the Seventh Amendment was inapplicable to new causes of action Congress created. The Court disagreed: "The Seventh

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[15] 1 Annals of Cong. 436 (1789). "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate." *Id.*

[16] The *Annals of Congress* note that on August 18, 1787, the House "considered and adopted" the committee version: "In suits at common law, the right of trial by jury shall be preserved." 1 Annals of Cong. 760 (1789). On September 7, the *Senate Journal* states that this provision was adopted after insertion of "where the consideration exceeds twenty dollars." 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1150 (1971).

[1] Shields v. Thomas, 59 U.S. (18 How.) 253, 262 (1856).

[2] Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830); Barton v. Barbour, 104 U.S. 126, 133 (1881). Formerly, the Amendment did not apply to cases where recovery of money damages was incidental to equitable relief even though damages might have been recovered in an action at law. Clark v. Wooster, 119 U.S. 322, 325 (1886); Pease v. Rathbun-Jones Eng'g Co., 243 U.S. 273, 279 (1917). *But see* Dairy Queen v. Wood, 369 U.S. 469 (1962) (legal claims must be tried before equitable ones).

[3] Pernell v. Southall Realty Co., 416 U.S. 363, 375 (1974).

[4] *Id.*

[5] *Id.* at 375–76.

Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."[6]

In contrast, the Court has upheld the lack of a jury provision in certain actions on the ground that the suit in question was not a suit at common law within the meaning of the Amendment, or that the issues raised were not particularly legal in nature.[7] When there is no direct historical antecedent dating to the Amendment's adoption, the court may also consider whether existing precedent and the sound administration of justice favor resolution by judges or juries.[8]

The Seventh Amendment does *not* apply to cases in admiralty and maritime jurisdiction in which the court conducts a trial without a jury.[9] Nor does it reach statutory proceedings unknown to the common law, such as an application to a court of equity to enforce an administrative body's order.[10] For example, Congress, under the Occupational Safety and Health Act, authorized an administrative agency to make findings of a workplace safety violation and to assess civil penalties related to such a violation. Under the statute, an employer that has been assessed a penalty may obtain judicial review of the administrative proceeding in a federal court of appeal.[11] The Supreme Court, in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, unanimously rejected the argument that the law violated the Seventh Amendment because it authorized penalties to be collected from an employer without a jury trial:

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[6] Curtis v. Loether, 415 U.S. 189, 194–95 (1974) (reasoning that "[a] damage action under the statute sounds basically in tort-the statute merely defines a new legal duty and authorizes the court to compensate a plaintiff for the injury caused by the defendants' wrongful breach" such that "this cause of action is analogous to a number of tort actions recognized at common law." *See also* Chauffeurs, Teamsters & Helpers Loc. 391 v. Terry, 494 U.S. 558 (1990) (suit against union for back pay for breach of duty of fair representation is a suit for compensatory damages, hence plaintiff is entitled to a jury trial); Wooddell v. Int'l Bhd. of Elec. Workers Loc. 71, 502 U.S. 93 (1991) (similar suit against union for money damages entitles union member to jury trial; a claim for injunctive relief was incidental to the damages claim); Feltner v. Columbia Pictures Television, 523 U.S. 340 (1998) (jury trial required for copyright action with close analog at common law, even though the relief sought is not actual damages but statutory damages based on what is "just").

[7] Such actions or issues include, for example: (1) enforcement of claims against the United States, McElrath v. United States, 102 U.S. 426, 440 (1880); *see also* Galloway v. United States, 319 U.S. 372, 388 (1943); (2) suit under a territorial statute authorizing a special nonjury tribunal to hear claims against a municipality having no legal obligation, but based on moral obligation only, Guthrie Nat'l Bank v. Guthrie, 173 U.S. 528, 534 (1899); *see also* United States v. Realty Co., 163 U.S. 427, 439 (1896); New Orleans v. Clark, 95 U.S. 644, 653 (1877); (3) cancellation of a naturalization certificate for fraud, Luria v. United States, 231 U.S. 9, 27 (1913); (4) reversal of an order to deport an alien, Gee Wah Lee v. United States, 25 F.2d 107 (5th Cir. 1928), *cert. denied*, 277 U.S. 608 (1928); (5) damages for patent infringement, Filer & Stowell Co. v. Diamond Iron Works, 270 F. 489 (2d Cir. 1921), *cert. denied*, 256 U.S. 691 (1921); (6) reversal of an award under the Longshoremen's and Harbor Workers' Compensation Act, Crowell v. Benson, 285 U.S. 22, 45 (1932); (7) reversal of a decision of customs appraisers on the value of imports, Auffmordt v. Hedden, 137 U.S. 310, 329 (1890); (8) a summary disposition by referee in bankruptcy of issues regarding voidable preferences as asserted and proved by the trustee, Katchen v. Landy, 382 U.S. 323 (1966); (9) a determination by a judge in calculating just compensation in a federal eminent domain proceeding of the issue as to whether the condemned lands were originally within the scope of the government's project or were adjacent lands later added to the plan, United States v. Reynolds, 397 U.S. 14 (1970); and (10) fair use determinations in copyright cases, Google v. Oracle, No. 18-956, slip op. at 20–21 (U.S. Apr. 2021).

[8] *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 389–90 (1996) (holding that patent construction is exclusively within the court's province, taking into account, among other considerations, whether "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question").

[9] Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830); Waring v. Clarke, 46 U.S. (5 How.) 441, 460 (1847); Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1959). *But see* Fitzgerald v. U.S. Lines Co., 374 U.S. 16 (1963).

[10] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937). *See also* ICC v. Brimson, 154 U.S. 447, 488 (1894); Yakus v. United States, 321 U.S. 414, 447 (1944).

[11] *See* Atlas Roofing Co. v. OSHRC, 430 U.S. 442, 445–46 (1977).

> At least in cases in which "public rights" are being litigated—*e.g.*, cases in which the government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.[12]

On the other hand, if Congress assigns such cases to Article III courts, a jury may be required. In *Tull v. United States*,[13] the Court ruled that the Seventh Amendment requires a jury to determine whether an entity is liable for civil penalties under the Clean Water Act, which authorizes the Administrator of the Environmental Protection Agency to initiate a civil action in a federal district court to enforce the Act. In the Court's view, the penal nature of the Clean Water Act's civil penalty remedy distinguishes it from restitution-based remedies available in equity courts.[14] Consequently, it is a type of remedy that only courts of law could impose.[15] However, a jury trial is not required to assess the amount of the penalty. Because the Court viewed assessment of the amount of penalty as involving neither the "substance" nor a "fundamental element" of a common-law right to trial by jury, it held permissible the Act's assignment of that task to the trial judge.

Later, the Court relied on a broadened concept of "public rights" to define the limits of congressional power to assign causes of action to tribunals in which jury trials are unavailable. As a general matter, "public rights" involve "'the relationship between the government and persons subject to its authority,'" whereas "private rights" relate to "'the liability of one individual to another.'"[16] In *Granfinanciera, S.A. v. Nordberg*,[17] the Court held that Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury." The Seventh Amendment test, the Court indicated, is the same as the Article III test for whether Congress may assign adjudication of a claim to a non-Article III tribunal.[18] Although finding room for "some debate," the Court determined that a bankruptcy trustee's

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[12] *Id*. at 450.

[13] 481 U.S. 412 (1987).

[14] *Id*. at 422–25.

[15] The statute specified only a maximum amount for the penalty; the Court derived its "punitive" characterization from indications in the legislative history that Congress desired consideration of the need for retribution and deterrence in addition to the need for restitution. *Id*. at 422–23.

[16] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51 n.8 (1989) (quoting Crowell v. Benson, 285 U.S. 22, 50, 51 (1932)). *Granfinanciera* qualified certain statements in *Atlas Roofing* and in the process refined its definition of "public rights." There are some "public rights" cases, the Court explained, in which "the Federal Government is not a party in its sovereign capacity," but which involve "statutory rights that are integral parts of a public regulatory scheme." *Id*. at 55 n.10. The Court further noted that, in cases of this nature, Congress may "dispense with juries as factfinders through its choice of an adjudicative forum." *Id*. However, Congress may not assign "initial factfinding in all cases involving controversies entirely between private parties to administrative tribunals or other tribunals not involving juries" even "if they are established as adjuncts to Article III courts." *Id*. (emphasis added).

[17] *Id*. at 33, 51–52.

[18] The *Granfinanciera* Court stated: "[I]f a statutory cause of action . . . is not a 'public right' for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking 'the essential attributes of the judicial power.' If the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties the right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Id*. at 53–54 (citation omitted). *See also* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1379 (2018) ("This Court's precedents establish that, when Congress properly assigns a matter to adjudication in a non-Article III tribunal, 'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.'" (quoting *Granfinanciera*, 492 U.S. at 53–54)).

right to recover for a fraudulent conveyance "is more accurately characterized as a private rather than a public right," at least when the defendant had not submitted a claim against the bankruptcy estate.[19]

Amdt7.2.3 Cases Combining Law and Equity

Seventh Amendment:

> *In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*

The Seventh Amendment uses the term "common law" to refer to cases in which the right to jury trial was preserved. This term's use reflected the division of the English and United States legal systems into separate law and equity jurisdictions, in which actions subject to the former but not the latter were triable to a jury. In the early federal court system, courts had jurisdiction over both suits in law and equity, but the suits occupied separate sides of a federal court's civil docket and were subject to distinct law and equity procedures, including the use or nonuse of the jury.[1]

Adoption of the *Federal Rules of Civil Procedure* in 1938 merged law and equity into a single civil jurisdiction and established uniform rules of procedure.[2] Legal and equitable claims that previously were brought as separate causes of action on different "sides" of the court could now be joined in a single action, and in some cases, such as those with compulsory counterclaims, had to be joined in one action.[3] However, the courts retained the traditional distinction between law and equity for purposes of determining when there was a constitutional right to trial by jury, which led to some difficulty.[4]

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[19] *Granfinanciera*, 492 U.S. at 55. The Court later held, however, that a creditor who submits a claim against the bankruptcy estate subjects himself to the bankruptcy court's equitable power, and is not entitled to a jury trial when subsequently sued by the bankruptcy trustee to recover preferential monetary transfers. Langenkamp v. Culp, 498 U.S. 42 (1990).

[1] *See* Kristin A. Collins, *"A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 Duke L.J. 249, 253 (2010).

[2] *See* Ross v. Bernhard, 396 U.S. 531, 539 (1970).

[3] *See* 8 Moore's Federal Practice - Civil § 38.12 (2022).

[4] Under the old equity rules, an absolute right to a trial of the facts by a jury could not be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Hipp v. Babin, 60 U.S. (19 How.) 271, 278 (1857). The Supreme Court interpreted the Seventh Amendment to prohibit the trial of equitable and legal issues in the same suit, so that aid in the federal courts had to be sought in separate proceedings. Scott v. Neely, 140 U.S. 106, 109 (1891); Bennett v. Butterworth, 52 U.S. (11 How.) 669 (1850); Lewis v. Cocks, 90 U.S. (23 Wall.) 466, 470 (1874); Killian v. Ebbinghaus, 110 U.S. 568, 573 (1884); Buzard v. Houston, 119 U.S. 347, 351 (1886). If an action at law evoked an equitable counterclaim, the trial judge would order the legal issues to be separately tried after the disposition of the equity issues. In this procedure, however, res judicata and collateral estoppel could operate so as to curtail the litigant's right to a jury finding on factual issues common to both claims. However, priority of scheduling was considered to be a matter of discretion. Federal statutes prohibiting courts of the United States from sustaining suits in equity if the remedy was complete at law served to guard the right of trial by jury and were liberally construed. Schoenthal v. Irving Trust Co., 287 U.S. 92, 94 (1932). Nor was the distinction between law and equity to be obliterated by state legislation. *See* Thompson v. Railroad Cos., 73 U.S. (6 Wall.) 134 (1868). If state law, in advance of judgment, treated the whole proceeding upon a simple contract, including determination of validity and of amount due, as an equitable proceeding, it brought the case within the federal equity jurisdiction upon removal. However, the Supreme Court determined that when an action at law in state court furnished an adequate and complete remedy, the existence of a potential cause of action in courts of equity pursuant to a separate state statute could not enlarge the federal courts' equity jurisdiction. This jurisdictional rule applies even if, under state law, the equity court could summon a jury on occasion. Whitehead v. Shattuck, 138 U.S. 146 (1891); *Buzard*, 119 U.S. 347; Greeley v. Lowe, 155 U.S. 58, 75 (1894). Furthermore, when state law provides an equitable remedy, such as to quiet title to land, the federal courts enforce it, if it does not obstruct the rights of the parties as to trial by jury.

The Supreme Court resolved the difficulty by stressing the fundamental nature of the jury trial right and protecting it against diminution through resort to equitable principles. In *Beacon Theatres v. Westover*, a plaintiff sought a declaratory judgment and an injunction barring the defendant from instituting an antitrust action against it; the defendant filed a counterclaim alleging violation of the antitrust laws and asking for treble damages.[5] The Supreme Court held that the district court erred in denying the defendant a jury trial on all issues in the antitrust controversy because the complaint for declaratory relief "presented basically equitable issues."[6] The trial court's error, in the Court's view, would compel the defendant to split its antitrust case in two, trying part to a judge and part to a jury, impermissibly delaying and subordinating its counterclaim that it was required by the *Federal Rules of Civil Procedure* to bring within the same action.[7] Long-standing equity principles, according to the Court, dictated that "only under the most imperative circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."[8]

Later, in *Dairy Queen v.Wood*, the Supreme Court reversed a district court's order striking a plaintiff's demand for jury trial.[9] There, the plaintiff-trademark owner sought several types of relief against the defendant-licensee for the licensee's alleged breach of a licensing contract, including an injunction and an accounting for money damages.[10] The Court held that, even though the claim for legal relief was characterized by the district court as "incidental" to the equitable relief sought, the Seventh Amendment required that the factual issues pertaining to

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Clark v. Smith, 38 U.S. (13 Pet.) 195 (1839); Holland v. Challen, 110 U.S. 15 (1884); Reynolds v. Crawfordsville Bank, 112 U.S. 405 (1884); Chapman v. Brewer, 114 U.S. 158 (1885); Cummings v. Nat'l Bank, 101 U.S. 153, 157 (1879); United States v. Landram, 118 U.S. 81 (1886); More v. Steinbach, 127 U.S. 70 (1888). *Cf. Ex parte* Simons, 247 U.S. 321 (1918). The transfer of cases to the other side of the court was made possible through the inclusion in the Law and Equity Act of 1915 of § 274(b) of the Judicial Code, 38 Stat. 956. The new procedure permitted legal questions arising in an equity action to be determined without sending the case to the law side. This section also permitted equitable defenses to be interposed in an action at law. The same order was preserved as under the system of separate courts. The equitable issues were disposed of first; if a legal issue remained, it was triable by a jury. Enelow v. N.Y. Life Ins. Co., 293 U.S. 379 (1935). *See also* Liberty Oil Co. v. Condon Bank, 260 U.S. 235 (1922). There was no provision for legal counterclaims in an equitable action because Equity Rule 30 required the answer to a bill in equity to state any counterclaim arising out of the same transaction, which was not intended to change the line between law and equity and was construed as referring to equitable counterclaims only. Am. Mills Co. v. Am. Sur. Co., 260 U.S. 360, 364 (1922); Stamey v. United States, 37 F.2d 188 (W.D. Wash. 1929). Equitable jurisdiction existing at the time of a bill's filing was not disturbed by the subsequent availability of legal remedies, and the scheduling was discretionary. Am. Life Ins. Co. v. Stewart, 300 U.S. 203 (1937).

[5] 359 U.S. 500, 501–04 (1959).

[6] *Id*. at 504–07.

[7] *Id*. at 509. The Supreme Court later observed, in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 334 (1979), that Beacon Theatres reflected the Court's concern that when legal and equitable claims are joined in the same action, res judicata or collateral estoppel may foreclose relitigation of an issue common to both sets of claims before a jury if such an issue was first determined by a judge. The Court explained, however, that this concern merely reflected a general prudential rule that a trial judge "has limited discretion in determining the sequence of trial and that discretion must, wherever possible, be exercised to preserve jury trial." *Parklane*, 439 U.S. at 334 (internal quotations omitted). Thus, in *Parklane*, the Court held that the plaintiff stockholders' use of offensive collateral estoppel in that case—which precluded the defendants from relitigating certain issues that had resolved adversely against them in a prior governmental enforcement action—did not violate the defendants' Seventh Amendment right to a jury trial. *Id*. at 336–37.

[8] *Beacon Theatres*, 359 U.S. at 510–11.

[9] 369 U.S. 469, 479–80 (1962).

[10] *Id*. at 475.

whether there had been a breach of contract to be tried before a jury.[11] Thus, the rule emerged that legal claims must be tried before equitable ones, and before a jury if the litigant so wished.[12]

In *Ross v. Bernhard*, the Court further held that the right to a jury trial depends on the nature of the issue to be tried, rather than the procedural framework in which it is raised.[13] The case involved a stockholder derivative action, which had always been considered to be a suit in equity.[14] The Court agreed that the action was equitable, but concluded that it involved two separable claims. The first, the stockholder's standing to sue for a corporation, was an equitable issue; the second, the corporation's claim asserted by the stockholder, may be either equitable or legal.[15] Because the *Federal Rules of Civil Procedure* merged law and equity in the federal courts, there was no longer any procedural obstacle to transferring jurisdiction to the law side once the equitable issue of standing was decided. Thus, the Court continued, if the corporation's claim that the stockholder asserted was legal in nature, it should be heard on the law side and before a jury.[16]

Amdt7.2.4 Restrictions on the Role of the Judge

Seventh Amendment:

> *In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*

One of the primary purposes of the Seventh Amendment was to preserve the historic line separating the province of the jury from that of the judge, without preventing procedural innovations that respect this boundary. In defining this line, the Supreme Court has concluded that it is constitutional for a federal judge, in the course of trial, to: (1) express his opinion upon the facts, provided that all questions of fact are ultimately submitted to the jury;[1] (2) call the

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[11] *Id*. at 479–80.

[12] If legal and equitable claims are joined, and the court erroneously dismissed the legal claims and decides common issues in the equitable action, the plaintiff cannot be collaterally estopped from relitigating those common issues in a jury trial. Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990).

[13] 396 U.S. 531 (1970).

[14] The stockholders' derivative action is a creation of equity made necessary by the traditional concept of the "corporate entity" or the "concept of separate personality." That is, the corporation is an entity distinct and separate from its shareholders. Thus, while shareholders were relieved from unlimited liability for corporate liabilities, the complementary result was that harm to the corporation did not confer any right of action upon a shareholder to sue to right that harm. However, if the harm were caused by the abuse of those who managed and controlled the corporation, the corporation naturally would not proceed against them, and the common law courts would not allow the shareholders to bring an action running to the "separate personality" of the corporation. Accordingly, equity permitted a derivative action in which the shareholder was permitted to set in motion the adjudication of a cause of action belonging to the corporation. Bert S. Prunty, *The Shareholders' Derivative Suit: Notes on Its Derivation*, 32 N.Y.U. L. Rev. 980 (1957).

[15] *Ross*, 396 U.S. at 538.

[16] *Id*. at 539–41. Justices Potter Stewart and John Marshall Harlan and Chief Justice Warren Burger dissented, arguing that the Seventh Amendment did not expand the right to a jury trial, that the *Rules* simply preserved the right as it had existed, and that it was error to think that the two could somehow "magically interact" to enlarge the right in a way that neither did alone. *Id*. at 543 (Stewart, J., dissenting).

[1] Vicksburg & Meridian R.R. v. Putnam, 118 U.S. 545, 553 (1886); United States v. Phila. & Reading R.R., 123 U.S. 113, 114 (1887). *But see* Quercia v. United States, 289 U.S. 466, 700 (1933) (holding that the trial judge exceeded "the bounds of fair comment" when he told the jury, referring to the defendant, that "'wiping' one's hands while testifying was 'almost always an indication of lying'"; in doing so, the trial judge impermissibly added to the evidence and "put his own experience, with all the weight that could be attached to it, in the scale against the accused").

jury's attention to parts of the evidence that he or she deems of special importance,[2] being careful to distinguish between matters of law and matters of opinion;[3] (3) inform the jury, when there is insufficient evidence to justify a verdict;[4] (4) require a jury to answer specific interrogatories in addition to rendering a general verdict;[5] (5) direct the jury, after the plaintiff's case is complete, to return a verdict for the defendant on the ground of the insufficiency of the evidence;[6] (6) set aside a verdict that is against the law or the evidence and order a new trial;[7] and (7) refuse the defendant a new trial on the condition, accepted by plaintiff, that the plaintiff remit a portion of the damages awarded him.[8]

In *International Terminal Operating Co. v. N.V. Nederl. Amerik Stoomv. Maats*., however, the Supreme Court held that an appellate court erred in reversing a jury's finding on the issue of the reasonableness of a stevedoring company's conduct in failing to avert an injury to one of its employees.[9] The Court of Appeals found that the stevedore acted unreasonably as a matter of law, but the Supreme Court held that, "[u]nder the Seventh Amendment, that issue should have been left to the jury's determination."[10]

Nevertheless, the Supreme Court has noted: "In numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury's judgment without violating the Seventh Amendment."[11] For example, in order to screen out frivolous complaints or defenses, Congress "has power to prescribe what must be pleaded to state the claim, just as it has the power to determine what must be proved to prevail on the merits."[12] It is, the Supreme Court observed, "the federal lawmaker's prerogative . . . to allow, disallow, or shape the contours of-including the pleading and proof requirements for-[ ] private actions."[13]

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[2] *Vicksburg & Meridian R.R.*, 118 U.S. 545 (citing Carver v. Jackson, 29 U.S. (4 Pet.) 1, 80 (1830); Magniac v. Thompson, 32 U.S. (7 Pet.) 348, 390 (1833); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 131 (1852); Transp. Line v. Hope, 95 U.S. 297, 302 (1877)).

[3] Games v. Dunn, 39 U.S. (14 Pet.) 322, 327 (1840).

[4] Sparf & Hansen v. United States, 156 U.S. 51, 99–100 (1895); Pleasants v. Fant, 89 U.S. (22 Wall.) 116, 121 (1875); Randall v. Balt. & Ohio R.R., 109 U.S. 478, 482 (1883); Meehan v. Valentine, 145 U.S. 611, 625 (1892); Coughran v. Bigelow, 164 U.S. 301 (1896).

[5] Walker v. N.M. So. Pac. R.R., 165 U.S. 593, 598 (1897).

[6] Treat Mfg. Co. v. Standard Steel & Iron Co., 157 U.S. 674 (1895); *Randall*, 109 U.S. at 482.

[7] Cap. Traction Co. v. Hof, 174 U.S. 1, 13 (1899).

[8] Ark. Cattle Co. v. Mann, 130 U.S. 69, 74 (1889). A federal judge, however, may not deny the plaintiff a new trial on the condition that the defendant consent to an increase of the damage award. Dimick v. Schiedt, 293 U.S. 474, 476–78 (1935).

[9] 393 U.S. 74, 75 (1968) (per curiam).

[10] *Id. But see* Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 322 (1967) (holding held that the Seventh Amendment does not bar an appellate court from granting a judgment notwithstanding the verdict insofar as "there is no greater restriction on the province of the jury when an appellate court enters judgment [notwithstanding the verdict] than when a trial court does." A federal appellate court may also review a district court's denial of a motion to set aside an award as excessive under an abuse of discretion standard. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996) (holding that a New York law that requires appellate courts to order a new trial when a jury award "deviates materially from what would be reasonable compensation" may be applied by a federal district court exercising diversity jurisdiction, "with appellate control of the trial court's ruling limited to review for 'abuse of discretion'").

[11] Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 327 n.8 (2007).

[12] *Id*. at 327.

[13] *Id*. at 327–28 (explaining that a "heightened pleading rule simply 'prescribes the means of making an issue,' and . . . when '[t]he issue [is] made as prescribed, the right of trial by jury accrues.'" (quoting Fid. & Deposit Co. of Md. v. United States, 187 U.S. 315, 320 (1902))).

Amdt7.2.5 Composition and Functions of a Jury in Civil Cases

Seventh Amendment:

> *In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*

Traditionally, the Supreme Court has treated the Seventh Amendment as preserving the right of trial by jury in civil cases as it "existed under the English common law when the amendment was adopted."[1] This right included "a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts and (except in acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence."[2] Decisions of the jury must be unanimous.[3]

In *Colgrove v. Battin*,[4] however, the Court held by a 5-4 vote that rules adopted in a federal district court authorizing civil juries composed of six persons were permissible under the Seventh Amendment and federal statutory law. The Amendment's reference to the "common law," in the Court's view, suggested "the Framers of the Seventh Amendment were concerned with preserving the right of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury."[5]

As discussed, one of the Seventh Amendment's primary purposes is to preserve "the common law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court."[6] The Amendment, however, "does not require the retention of old forms of procedure"; nor does it "prohibit the introduction of new methods of ascertaining what facts are in issue" or new rules of evidence.[7] According to the Court, matters that were tried by a jury in England in 1791 are to be so tried today.[8] Conversely, matters that fall under equity and admiralty and maritime jurisprudence, which were tried by the judge in England in 1791, are to be so tried today. When new rights and remedies are created, "the right of action should be analogized to

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[1] Balt. & Carolina Line v. Redman, 295 U.S. 654, 657 (1935); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446–48 (1830).

[2] Cap. Traction Co. v. Hof, 174 U.S. 1, 13 (1899).

[3] Maxwell v. Dow, 176 U.S. 581 (1900); Am. Publ'g Co. v. Fisher, 166 U.S. 464 (1897); Springville v. Thomas, 166 U.S. 707 (1897).

[4] 413 U.S. 149 (1973). Justices Marshall and Stewart dissented on constitutional and statutory grounds, *id*. at 166, while Justices Douglas and Powell relied only on statutory grounds without reaching the constitutional issue. *Id*. at 165, 188.

[5] *Id.* at 155–56. The Court did not consider what number less than six, if any, would fail to satisfy the Amendment's requirements. "What is required for a 'jury' is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community. . . . It is undoubtedly true that at some point the number becomes too small to accomplish these goals . . . ." *Id*. at 160 n.16. Application of similar reasoning has led the Court to uphold elimination of the unanimity as well as the twelve-person requirement for criminal trials. *See* Williams v. Florida, 399 U.S. 78 (1970) (jury size); Apodaca v. Oregon, 406 U.S. 404 (1972) (plurality opinion) (unanimity); and Sixth Amendment discussion, Amdt6.4.3.2 Right to Trial by Jury Generally.

[6] Balt. & Carolina Line v. Redman, 295 U.S. 654, 657 (1935); Walker v. N.M. & So. Pac. R.R., 165 U.S. 593, 596 (1897); Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 497–99 (1931); Dimick v. Schiedt, 293 U.S. 474, 476, 485–86 (1935).

[7] *Gasoline Prods. Co.*, 283 U.S. at 498; Ex parte Peterson, 253 U.S. 300, 309 (1920).

[8] Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446–47 (1830); Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 377–78 (1935); *Balt. & Carolina Line*, 295 U.S. at 657; Dimick v. Schiedt, 293 U.S. 474, 476 (1935).

its historical counterpart, at law or in equity, for the purpose of determining whether there is a right of jury trial," unless Congress has expressly prescribed the mode of trial.[9]

Amdt7.3 Reexamination Clause

Amdt7.3.1 Review of Evidentiary Record

Seventh Amendment:

> *In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*

The Seventh Amendment's Reexamination Clause prohibits reexamination in any federal court of a "fact tried by a jury" other "than according to the rules of the common law."[1] In 1913, in *Slocum v. New York Life Insurance Co.*,[2] the Supreme Court held that a federal appeals court lacked authority to order the entry of a judgment contrary to a trial court's verdict. Even though the Court agreed that the trial court should have directed a verdict for the defendant before the case was submitted to the jury, the Court reasoned that, once the trial court declined to do so and the jury found for the plaintiff contrary to the evidence, the only course open to either court was to order a new trial.[3] Although plainly in accordance with the common law as it stood in 1791, the 5-4 decision was subjected to significant criticism.[4] *Slocum*, however, was then limited, if not completely undermined, by subsequent holdings.[5]

In the first of these cases, the Court in *Baltimore & Carolina Line v. Redman*[6] held that a trial court had the right to enter a judgment for the plaintiff on the verdict of the jury after having reserved decision on the defendant's motion for directed verdict. The Court distinguished *Slocum*, noting its ruling qualified some of its assertions in *Slocum*.[7]

In *Lyon v. Mutual Benefit Ass'n*,[8] the Court sustained a district court in rejecting the defendant's motion for dismissal and in peremptorily directing a verdict for the plaintiff. The Supreme Court held that there was ample evidence to support the verdict and that the trial court, in following Arkansas's procedure in the diversity action, acted consistently with the Federal Conformity Act.[9]

In *Galloway v. United States*,[10] which involved an action against the government for benefits under a lapsed war risk insurance policy, the trial court directed a verdict for the

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[9] Luria v. United States, 231 U.S. 9, 27–28 (1913).

[1] U.S. Const. amend. VII.

[2] 228 U.S. 364 (1913).

[3] *Id*. at 399.

[4] *See, e.g.*, Fleming James, Civil Procedure 332–33 & n.8 (1965); Austin W. Scott, *The Progress of the Law, 1918–1919 Civil Procedure*, 33 Harv. L. Rev., 236, 246 (1919).

[5] *But see* Hetzel v. Prince William Cnty., 523 U.S. 208 (1998) (when an appeals court affirms liability, but orders the level of damages to be reconsidered, the plaintiff has a Seventh Amendment right either to accept the reduced award or to have a new trial).

[6] 295 U.S. 654 (1935).

[7] *Id.* at 661. Justice Willis Van Devanter authored the Court's opinions in *Redman* and *Slocum*.

[8] 305 U.S. 484 (1939).

[9] Ch. 255, § 5, 17 Stat. 197 (1872), now superseded by the Federal Rules of Civil Procedure.

[10] 319 U.S. 372, 389 (1943). The *Galloway* Court wrote: "the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure" (citing Berry v. United States, 312 U.S. 450 (1941)). In *Berry*, the Court remarked that the new rule has given "district judges, under certain circumstances, . . . the right (but not the mandatory duty) to enter a judgment contrary to the jury's verdict without granting a new trial. But that rule has not

government on the ground of insufficiency of evidence. Both the appeals court and the Supreme Court affirmed the trial court's order.[11] Justice Hugo Black, joined by Justices William Douglas and Frank Murphy asserted in dissent: "Today's decision marks a continuation of the gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment."[12] Perhaps unsurprisingly, the Court has occasionally experienced difficulty in harmonizing the historic common law covering the relations of judge and jury with the notion of a developing common law.[13]

Amdt7.3.2 Appeals from State Courts to the Supreme Court

Seventh Amendment:

> *In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*

The Seventh Amendment clause prohibiting re-examination of any fact found by a jury is not restricted in its application to suits at common law tried before juries in federal courts. It applies equally to cases tried before a jury in a state court and brought to the Supreme Court on appeal.[1] However, the Supreme Court has indicated that, in cases involving a claim of a denial of constitutional rights, it is free to examine and review the evidence upon which the lower court based its conclusions, a position that under some circumstances could conflict with the principle of jury autonomy.[2]

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taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of facts—a jury being the constitutional tribunal provided for trying facts in courts of law." *Id*. at 452–53.

[11] *See id*. at 373.

[12] *Id*. at 397 (Black, J., dissenting). Because the case involved a claim against the United States, it did not need to be tried by a jury except for to the extent that Congress had allowed.

[13] *See, e.g*., Neely v. Martin K. Eby Construction Co., Inc., 386 U.S. 317 (1967) (interpreting Rules 50(b), 50(c)(2) and 50(d) of the Federal Rules of Civil Procedure, as well as the Seventh Amendment).

[1] The Justices v. Murray, 76 U.S. (9 Wall.) 274, 278 (1870); Chi., B. & Q. R.R. v. Chicago, 166 U.S. 226, 242–46 (1897).

[2] *See* Time, Inc. v. Pape, 401 U.S. 279, 284–92 (1971).

EIGHTH AMENDMENT
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EIGHTH AMENDMENT—CRUEL AND UNUSUAL PUNISHMENT

Amdt8.1 Overview of Eighth Amendment, Cruel and Unusual Punishment

The Eighth Amendment prohibits certain types of punishment: excessive bail, excessive fines, and cruel and unusual punishments.[1] As discussed in more detail in the following essays, these prohibitions were intended to protect persons convicted of crimes from government abuses of power.[2] Viewed broadly, the Eighth Amendment responded to these historically grounded concerns about disproportionate or cruel punishments by attempting to ensure that punishment is "proportioned to both the offender and the offense."[3] What is excessive is also determined by reference to modern standards; the Supreme Court has suggested proportionality may evolve over time.[4] Out of the Eighth Amendment's three clauses, the bar on cruel and unusual punishment has been most frequently interpreted by the Supreme Court, likely in part due to inherent ambiguities in determining what qualifies as cruel or unusual.[5]

The Eighth Amendment generally applies in criminal proceedings, as the most common locus of government punishment, but the Supreme Court has held the Eighth Amendment's prohibition on excessive fines can apply in civil forfeiture proceedings, noting that the text of the amendment is not limited to "criminal" cases.[6] Instead, the Court said the relevant constitutional test is whether the government is imposing "punishment," focusing on the purpose of a sanction.[7] In addition, although the Eighth Amendment (like the rest of the Bill of Rights) was understood originally to apply only to the federal government, the Supreme Court has held its prohibitions were incorporated in the Fourteenth Amendment's Due Process Clause, making them applicable to states.[8]

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[1] Austin v. United States, 509 U.S. 602, 609 (1993) ("The purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government's power to punish."); Timbs v. Indiana, No. 17-1091, slip op. at 2 (U.S. Feb. 20, 2019) ("Like the Eighth Amendment's proscriptions of 'cruel and unusual punishment' and '[e]xcessive bail,' the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority.").

[2] *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 666 (1977); Weems v. United States, 217 U.S. 349, 372–73 (1910).

[3] Miller v. Alabama, 567 U.S. 460, 469 (2012) (quoting *Roper v. Simmons,* 543 U.S. 551, 560 (2005)) (internal quotation marks omitted). *See also, e.g.*, Atkins v. Virginia, 536 U.S. 304, 311 (2002) ("The Eighth Amendment succinctly prohibits 'excessive' sanctions.").

[4] *Atkins*, 536 U.S. at 311–12.

[5] For example, one defender of the Constitution, responding to the claim that the initial document should have included a prohibition on cruel and unusual punishments, argued that the term "'cruel and unusual' surely would have been too vague to have been of any consequence, since [it] admit[s] of no clear and precise signification." James Iredell, Marcus, Answers to Mr. Mason's Objections to the New Constitution (1788), *reprinted in* 5 The Founders' Constitution 376 (Philip B. Kurland & Ralph Lerner eds., 1987).

[6] Austin v. United States, 509 U.S. 602, 607–08 (1993).

[7] *Id.* at 610.

[8] Timbs v. Indiana, No. 17-1091, slip op. at 2–3 (U.S. Feb. 20, 2019) (noting this history and holding the prohibition against excessive fines incorporated); Schilb v. Kuebel, 404 U.S. 357, 365 (1971) (recognizing assumed incorporation of prohibition against excessive bail); Robinson v. California, 370 U.S. 660, 667 (1962) (recognizing application of prohibition on cruel and unusual punishment to states).

Amdt8.2 Excessive Bail

Amdt8.2.1 Historical Background on Excessive Bail

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

"This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[1] "The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept."[2] These two contrasting views of the "excessive bail" provision, expressed by the Court in the same Term, reflect the ambiguity inherent in the phrase and the absence of evidence regarding the intent of those who drafted and who ratified the Eighth Amendment.[3]

The history of the bail controversy in England is crucial to understanding why the ambiguity exists.[4] The Statute of Westminster the First of 1275[5] set forth a detailed enumeration of those offenses that were bailable and those that were not, and, though supplemented by later statutes, it served for something like five and a half centuries as the basic authority.[6] *Darnel's Case*,[7] in which the judges permitted the continued imprisonment of persons without bail merely upon the order of the King, was one of the moving factors in the enactment of the Petition of Right in 1628.[8] The Petition cited the Magna Carta as proscribing the kind of detention that was permitted in *Darnel's Case*. The right to bail was again subverted a half-century later by various technical subterfuges by which petitions for habeas corpus could not be presented,[9] and Parliament reacted by enacting the Habeas Corpus Act of 1679,[10] which established procedures for effectuating release from imprisonment and provided penalties for judges who did not comply with the Act. That avenue closed, the judges then set

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[1] Stack v. Boyle, 342 U.S. 1, 4 (1951). Note that, in *Bell v. Wolfish,* 441 U.S. 520, 533 (1979), the Court enunciated a narrower view of the presumption of innocence, describing it as "a doctrine that allocates the burden of proof in criminal trials," and denying that it has any "application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."

[2] Carlson v. Landon, 342 U.S. 524, 545 (1952). Justice Hugo Black in dissent accused the Court of reducing the provision "below the level of a pious admonition" by saying in effect that "the Amendment does no more than protect a right to bail which Congress can grant and which Congress can take away." *Id.* at 556.

[3] The only recorded comment of a Member of Congress during debate on adoption of the "excessive bail" provision was that of Mr. Samuel Livermore. "The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be judges?" 1 Annals of Congress 754 (1789).

[4] Still the best and most comprehensive treatment is Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 965–89 (1965), *reprinted in* Caleb Foote, Studies on Bail 181, 187–211 (1966).

[5] 3 Edw. 1, ch. 12.

[6] 1 J. Stephen, A History of the Criminal Law of England 233–43 (1833). The statute is summarized at pages 234–35.

[7] 3 How. St. Tr. 1 (1627).

[8] 3 Charles 1, ch. 1. Debate on the Petition, as precipitated by *Darnel's Case*, is reported in 3 How. St. Tr. 59 (1628). Coke especially tied the requirement that imprisonment be pursuant to a lawful cause reportable on habeas corpus to effectuation of the right to bail. *Id.* at 69.

[9] Jenkes' Case, 6 How. St. Tr. 1189, 36 Eng. Rep. 518 (1676).

[10] 31 Charles 2, ch. 2. The text is in 2 Documents on Fundamental Human Rights 327–340 (Z. Chafee ed., 1951).

bail so high that it could not be met, and Parliament responded by including in the Bill of Rights of 1689[11] a provision "[t]hat excessive bail ought not to be required." This language, along with essentially the rest of the present Eighth Amendment, was included within the Virginia Declaration of Rights,[12] was picked up in the Virginia recommendations for inclusion in a federal bill of rights by the state ratifying convention,[13] and was introduced verbatim by James Madison in the House of Representatives.[14]

Thus, in England, the right to bail generally was conferred by the basic 1275 statute, as supplemented; the procedure for assuring access to the right was conferred by the Habeas Corpus Act of 1679; and protection against abridgement through the fixing of excessive bail was conferred by the Bill of Rights of 1689. In the United States, the Constitution protected *habeas corpus* in Article 1, Section 9, but did not confer a right to bail. The question is, therefore, whether the First Congress in proposing the Bill of Rights knowingly sought to curtail excessive bail without guaranteeing a right to bail, or whether the phrase "excessive bail" was meant to be a shorthand expression of both rights.

Compounding the ambiguity is a distinctive trend in the United States that had its origin in a provision of the Massachusetts Body of Liberties of 1641:[15] guaranteeing bail to every accused person except those charged with a capital crime or contempt in open court. Copied in several state constitutions,[16] this guarantee was contained in the Northwest Ordinance in 1787,[17] along with a guarantee of moderate fines and against cruel and unusual punishments, and was inserted in the Judiciary Act of 1789,[18] enacted contemporaneously with the passage through Congress of the Bill of Rights. It appears, therefore, that Congress was aware in 1789 that certain language conveyed a right to bail and that certain other language merely protected against one means by which a pre-existing right to bail could be abridged.

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[11] I W. & M. 2, ch. 2, clause 10.

[12] 7 F. Thorpe, *The Federal and State Constitutions*, H. R. Doc. No. 357, 59th Cong., 2d Sess. 3813 (1909). "Sec. 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[13] 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Constitution 658 (2d ed. 1836).

[14] 1 Annals of Congress 438 (1789).

[15] "No mans person shall be restrained or imprisoned by any Authority what so ever, before the law hath sentenced him thereto, If he can put in sufficient securtie, bayle, or mainprise, for his appearance, and good behavior in the meane time, unlesse it be in Crimes Capitall, and Contempts in open Court, and in such cases where some expresse act of Court doth allow it." *Reprinted in* I Documents on Fundamental Human Rights 79, 82 (Z. Chafee, ed., 1951).

[16] "That all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great." 5 F. Thorpe, *The Federal and State Constitutions*, H. Doc. No. 357, 59th Congress, 2d Sess. 3061 (1909) (Pennsylvania, 1682). The 1776 Pennsylvania Constitution contained the same clause in section 28, and in section 29 was a clause guaranteeing against excessive bail. *Id.* at 3089.

[17] "All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted." Art. II, 32 Journals of the Continental Congress 334 (1787), *reprinted in* 1 Stat. 52 n.

[18] "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which case it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion herein . . . ." 1 Stat. 91 § 33 (1789).

Amdt8.2.2 Modern Doctrine on Bail

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

Bail, which is "basic to our system of law,"[1] is "excessive" in violation of the Eighth Amendment when it is set at a figure higher than an amount reasonably calculated to ensure the asserted governmental interest.[2] The issue of bail is only implicated when there is "a direct government restraint on personal liberty, be it in a criminal case or a civil deportation proceeding."[3] In *Stack v. Boyle*, the Supreme Court found a $50,000 bail to be excessive, given the defendants' limited financial resources and the lack of evidence that they were a flight risk.[4] The Court determined that "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant," and "[u]nless this right to bail before trial is preserved, the presumption of innocence . . . would lose its meaning."[5]

In *United States v. Salerno*, the Court upheld the Bail Reform Act of 1984 provisions regarding preventative detention against facial challenge under the Eighth Amendment. The function of bail, the Court explained, is limited neither to preventing flight of the defendant prior to trial nor to safeguarding a court's role in adjudicating guilt or innocence.[6] The Court held that Congress did not violate the Excessive Bail Clause by restricting bail eligibility for "compelling interests" such as public safety, and observed that the Clause "says nothing about whether bail shall be available at all" in a particular situation.[7] The Court rejected "the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release."[8] The Court explained that "[t]he only arguable substantive limitation of the Bail Clause is that the government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil."[9] The Court determined that "detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel" satisfies this requirement.[10]

The Court further explained in *Salerno* that if the only asserted interest is to guarantee that the accused will stand trial and submit to sentence if found guilty, then "bail must be set by a court at a sum designed to ensure that goal, and no more."[11] To challenge bail as excessive,

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[1] Schilb v. Kuebel, 404 U.S. 357, 484 (1971).

[2] Stack v. Boyle, 342 U.S. 1, 5 (1951). The Court explained that "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." *Id.*

[3] Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 263 n.3 (1989) (explaining that the Bail Clause guards against the potential for governmental abuse).

[4] *Id.* at 6–7.

[5] *Id.* at 4–5.

[6] United States v. Salerno, 481 U.S. 739, 754–55 (1987).

[7] *Id.* at 752–53.

[8] 481 U.S. at 753.

[9] 481 U.S. at 754.

[10] 481 U.S. at 755. The Court also ruled that there was no violation of due process, the governmental objective being legitimate and there being a number of procedural safeguards (detention applies only to serious crimes, the arrestee is entitled to a prompt hearing, the length of detention is limited, and detainees must be housed apart from criminals). *Id.*

[11] *Salerno*, 481 U.S. at 754.

the Court held that an individual must move for a reduction, and, if that motion is denied, appeal to the Court of Appeals, and, if unsuccessful, appeal to the Supreme Court Justice sitting for that circuit.[12] The Amendment is apparently inapplicable to postconviction release pending appeal, but the practice has apparently been to grant such releases.[13]

There is, however, no absolute right to bail in all cases.[14] In a civil case, the Court held that the prohibition against excessive bail does not compel the allowance of bail in deportation cases and that "the very language of the Amendment fails to say all arrests must be bailable."[15] Moreover, although the Court has not explicitly stated such, the Court has "assumed" that "the Eight Amendment's proscription of excessive bail . . . [applies] to the States through the Fourteenth Amendment."[16]

Amdt8.3 Excessive Fines

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

For years the Supreme Court had little to say about excessive fines. In an early case, it held that it had no appellate jurisdiction to revise the sentence of an inferior court, even though the excessiveness of the fines was apparent on the face of the record.[1] Justice Lewis Brandeis once contended in dissent that the denial of second-class mailing privileges to a newspaper on the basis of its past conduct, because it imposed additional mailing costs which grew day by day, amounted to an unlimited fine that was an "unusual" and "unprecedented" punishment proscribed by the Eighth Amendment.[2] The Court has elected to deal with the issue of fines levied upon indigents, resulting in imprisonment upon inability to pay, in terms of the Equal Protection Clause,[3] thus obviating any necessity to develop the meaning of "excessive fines" in relation to ability to pay. The Court has held the clause inapplicable to civil jury awards of punitive damages in cases between private parties, "when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."[4] The Court based this conclusion on a review of the history and purposes of the Excessive Fines Clause. At the time the Eighth Amendment was adopted, the Court noted, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense."[5] The Eighth Amendment itself, as were antecedents of the clause in the Virginia Declaration of Rights and in the

[12] *Boyle*, 342 U.S. at 6–7.

[13] Hudson v. Parker, 156 U.S. 277 (1895).

[14] *Id.* at 753.

[15] Carlson v. Landon, 342 U.S. 524, 544–46 (1952) (explaining that the "Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country" and "in criminal cases bail is not compulsory where the punishment may be death").

[16] Schilb v. Kuebel, 404 U.S. 357, 484 (1971); *see* Hall v. Florida, 572 U.S. 701, 707 (2014) ("The Eighth Amendment provides that 'excessive bail shall be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.' The Fourteenth Amendment applies those restrictions to the States."); Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) ("The Eighth Amendment, applicable to the States through the Fourteenth Amendment, provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'"); *see also* Schall v. Martin, 467 U.S. 253 (1984) (upholding under the Due Process Clause of the Fourteenth Amendment a state statute providing for preventive detention of juveniles).

[1] *Ex parte* Watkins, 32 U.S. (7 Pet.) 568, 574 (1833).

[2] Milwaukee Pub. Co. v. Burleson, 255 U.S. 407, 435 (1921).

[3] Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).

[4] Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

[5] *Id.* at 265.

English Bill of Rights of 1689, "clearly was adopted with the particular intent of placing limits on the powers of the new government."[6] Therefore, while leaving open the issues of whether the clause has any applicability to civil penalties or to qui tam actions, the Court determined that "the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government."[7] The Court has held, however, that the Excessive Fines Clause can be applied in civil forfeiture cases.[8]

In 1998, however, the Court injected vitality into the strictures of the clause. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[9] In *United States v. Bajakajian*,[10] the government sought to require that a criminal defendant charged with violating federal reporting requirements regarding the transportation of more than $10,000 in currency out of the country forfeit the currency involved, which totaled $357,144. The Court held that the forfeiture[11] in this particular case violated the Excessive Fines Cause because the amount forfeited was "grossly disproportionate to the gravity of defendant's offense."[12] In determining proportionality, the Court did not limit itself to a comparison of the fine amount to the proven offense, but it also considered the particular facts of the case, the character of the defendant, and the harm caused by the offense.[13]

Amdt8.4 Punishment

Amdt8.4.1 Historical Background on Cruel and Unusual Punishment

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

During congressional consideration of the Cruel and Unusual Punishments Clause one Member objected to "the import of [the words] being too indefinite" and another Member said: "No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? If a more lenient

[6] *Id.* at 266.

[7] *Id.* at 268.

[8] In *Austin v. United States,* 509 U.S. 602 (1993), the Court noted that the application of the Excessive Fines Clause to civil forfeiture did not depend on whether it was a civil or criminal procedure, but rather on whether the forfeiture could be seen as punishment. The Court was apparently willing to consider any number of factors in making this evaluation; civil forfeiture was found to be at least partially intended as punishment, and thus limited by the Clause, based on its common law roots, its focus on culpability, and various indications in the legislative histories of its more recent incarnations.

[9] United States v. Bajakajian, 524 U.S. 321, 334 (1998).

[10] *Id.*.

[11] The Court held that a criminal forfeiture, which is imposed at the time of sentencing, should be considered a fine, because it serves as a punishment for the underlying crime. *Id.* at 328. The Court distinguished this from civil forfeiture, which, as an in rem proceeding against property, would generally not function as a punishment of the criminal defendant. *Id.* at 330–32.

[12] *Id.* at 334.

[13] In *Bajakajian*, the lower court found that the currency in question was not derived from illegal activities, and that the defendant, who had grown up a member of the Armenian minority in Syria, had failed to report the currency out of distrust of the government. *Id.* at 325–26. The Court found it relevant that the defendant did not appear to be among the class of persons for whom the statute was designed; i.e., a money launderer or tax evader, and that the harm to the government from the defendant's failure to report the currency was minimal. *Id.* at 338.

mode of correcting vice and deterring others from the commission of it would be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind."[1] It is clear from some of the complaints about the absence of a bill of rights including a guarantee against cruel and unusual punishments in the ratifying conventions that tortures and barbarous punishments were much on the minds of the complainants,[2] but the English history which led to the inclusion of a predecessor provision in the Bill of Rights of 1689 indicates additional concern with arbitrary and disproportionate punishments.[3] Though few in number, the decisions of the Supreme Court interpreting this guarantee have applied it in both senses.

Amdt8.4.2 Evolving or Fixed Standard of Cruel and Unusual Punishment

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

At the end of the nineteenth century, the Supreme Court began to consider whether the standard for "cruel and unusual punishments" was fixed at the time of the framing of the Constitution or whether it was an evolving standard. In the 1878 case *Wilkerson v. Utah* and the 1890 case *In re Kemmler*, the Supreme Court weighed whether a punishment was "cruel and unusual" by examining whether the Framers would have considered the punishment or a sufficiently similar variant "cruel and unusual" in 1789.[1] In *Wilkerson*, however, the Court appeared to suggest that this standard necessarily reflected current norms, noting that while "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted," it was "safe to affirm that punishments of torture," such as drawing and quartering, disemboweling alive, beheading, public dissection, and burning alive, are "forbidden by . . . [the] Constitution."[2]

In the twentieth century, the Court began to consider the "cruel and unusual" standard more flexibly, focusing on societal standards, especially as they implicated the "wanton infliction of pain."[3] In 1910, in *Weems v. United States*,[4] the Court reasoned that the Framers had not merely intended to bar reinstituting procedures and techniques deemed unacceptable in 1789, but had intended to prevent "a coercive cruelty being exercised through other forms of

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[1] 1 Annals of Congress 754 (1789).

[2] *E.g.*, 2 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Constitution 111 (2d ed. 1836); 3 *id.* at 447–52.

[3] *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 Calif. L. Rev. 839 (1969). Disproportionality, in any event, was used by the Court in *Weems v. United States,* 217 U.S. 349 (1910). It is not clear what, if anything, the word "unusual" adds to the concept of "cruelty" (but see *Furman v. Georgia,* 408 U.S. 238, 276 n.20 (1972) (Brennan, J., concurring)), although it may have figured in *Weems*, 217 U.S. at 377, and in *Trop v. Dulles,* 356 U.S. 86, 100 n.32 (1958) (plurality opinion), and it did figure in *Harmelin v. Michigan,* 501 U.S. 957, 994–95 (1991) ("severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history").

[1] Wilkerson v. Utah, 99 U.S. 130 (1878); *In re Kemmler*, 136 U.S. 436 (1890); *cf.* Weems v. United States, 217 U.S. 349, 368–72 (1910). Chief Justice William Rehnquist subscribed to this view (*see, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 208 (1976) (dissenting)), and the views of Justices Antonin Scalia and Clarence Thomas appear to be similar. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 966–90 (1991) (Justice Antonin Scalia announcing judgment of Court) (relying on original understanding of Amendment and of English practice to argue that there is no proportionality principle in non-capital cases); and Hudson v. McMillian, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting) (objecting to Court's extension of the Amendment "beyond all bounds of history and precedent" in holding that "significant injury" need not be established for sadistic and malicious beating of shackled prisoner to constitute cruel and unusual punishment).

[2] *See Wilkerson*, 99 U.S. at 135–36.

[3] *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion); *see also* Bucklew v. Precythe, No. 17-8151, slip op. at 11–12 (U.S. Apr. 1, 2019).

punishment." The *Weems* Court viewed the Eighth Amendment to be of an "expansive and vital character."[5] In the words of the plurality opinion in the 1958 decision, *Trop v. Dulles*, this meant that the amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[6]

In the context of capital punishment, the Court has generally viewed the Eighth Amendment to prohibit punishments that "involve the unnecessary and wanton infliction of pain."[7] The Court has applied this standard to uphold the use of a firing squad[8] and electrocution.[9] In other cases, the Supreme Court held that various lethal injection protocols withstood scrutiny under the Eighth Amendment, finding that none of the challenged protocols presented a "substantial risk of serious harm" or an "objectively intolerable risk of harm."[10]

Amdt8.4.3 Proportionality in Sentencing

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Supreme Court has also held that the Eighth Amendment's prohibition against "cruel and unusual punishments" applies to punishments that are disproportionate to the offense.[1] In 1892, Justice Stephen Field argued in dissent in *O'Neil v. Vermont*,[2] that, in addition to prohibiting punishments deemed barbarous and inhumane, the Eighth Amendment also condemned "all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged." In 1910, the Court appeared to adopt Justice Stephen Field's view in *Weems v. United States*,[3] striking down a sentence imposed in the Philippine Islands for the offense of falsifying public documents that included fifteen years' incarceration at hard labor with chains on the ankles, loss of all civil rights, and perpetual surveillance. Comparing the sentence with those meted out for other offenses, the Court

[4] 217 U.S. 349 (1910).

[5] *Id.* at 376–77.

[6] Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion). This oft-quoted passage was later repeated, with the Court adding that cruel and unusual punishment "is judged not by the standards that prevailed in 1685 . . . or when the Bill of Rights was adopted, but rather by those that currently prevail." Atkins v. Virginia, 536 U.S. 304, 311–12 (2002).

[7] *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion); *see also Bucklew*, No. 17-8151, slip op. at 11–12 (declaring that "the Eighth Amendment was understood to forbid . . . forms of punishment that intensified the sentence of death" by superadding "terror, pain, or disgrace") (internal citations and quotations omitted).

[8] *Wilkerson*, 99 U.S. at 137–38.

[9] *See In re* Kemmler, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."); *see also* Louisiana *ex. rel.* Francis v. Resweber, 329 U.S. 459 (1947).

[10] *See* Baze v. Rees, 553 U.S. 35, 50 (2008) (plurality opinion) (upholding Kentucky's use of a three-drug cocktail consisting of an anesthetic (sodium thiopental), a muscle relaxant, and an agent that induced cardiac arrest); *see also Bucklew*, No. 17-8151, slip op. at 22–25 (U.S. Apr. 1, 2019) (in an as-applied challenged, concluding that the petitioner's claims that the State of Missouri's execution protocol would result in severe pain rested on "speculation unsupported, if not affirmatively contradicted, by the evidence" before the lower court); Glossip v. Gross, 576 U.S. 863, 893 (2015) (upholding Oklahoma's use of a three-drug cocktail that utilized a sedative called midazolam in lieu of sodium thiopental).

[1] *See, e.g.*, Solem v. Helm, 463 U.S. 277, 284 (1983).

[2] 144 U.S. 323, 339–40 (1892).*See also* Howard v. Fleming, 191 U.S. 126, 135–36 (1903).

[3] 217 U.S. 349 (1910). The Court was here applying not the Eighth Amendment but a statutory bill of rights applying to the Philippines, which it interpreted as having the same meaning. *Id.* at 367.

concluded: "This contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice."[4]

The Court has distinguished death penalty cases from length of sentence cases, providing greater deference to state determinations in the latter. In *Rummel v. Estelle*,[5] the Court upheld a mandatory life sentence under a recidivist statute following a third felony conviction, even though the defendant's three nonviolent felonies had netted him a total of less than $230. In its ruling, the Court reasoned that the unique quality of the death penalty rendered capital cases of limited value to cases concerning the length of a sentence.[6] The Court further distinguished *Weems* on the ground that the prison conditions and post-release denial of significant rights imposed under the particular Philippine penal code were of considerably greater concern than the length of the sentence. In order to avoid improper judicial interference with state penal systems, the Court reasoned that objective factors must inform Eighth Amendment judgments to the maximum extent possible.[7] But when a punishment is challenged based on its length rather than the seriousness of the offense, the choice is necessarily subjective. Therefore, the *Rummel* rule appears to be that states may punish any behavior properly classified as a felony with any length of imprisonment purely as a matter legislative discretion.[8] In dismissing the defendant's arguments to the contrary, the Court first noted that the nonviolent nature of the offense was not necessarily relevant to the crime's seriousness, and that determining what is a "small" amount of money, being subjective, was a legislative task. In any event, the Court opined that the state could focus on recidivism not the specific acts. Second, the Court ruled that comparing punishments imposed for the same offenses across jurisdictions was not helpful—differences and similarities being more subtle than gross—and, in any case, in a federal system, one jurisdiction would always be more severe than the rest. Third, the Court noted that comparing punishments imposed for other offenses in the same state ignored the recidivism aspect.[9]

The Court's deference to state determinations is not inviolate, however. The Court distinguished *Rummel* in *Solem v. Helm*,[10] stating unequivocally that the Cruel and Unusual Punishments Clause "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed," and that "[t]here is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences."[11] Helm, like Rummel, had been sentenced under a recidivist statute following conviction for a nonviolent felony involving a small amount of money.[12] The Court, however, viewed Helm's sentence of life imprisonment without possibility of parole to be "far more severe than the life

[4] 217 U.S. at 381.

[5] 445 U.S. 263 (1980).

[6] *Id.* at 272.

[7] *Id.* at 272–75.

[8] In *Hutto v. Davis,* 454 U.S. 370 (1982), on the authority of *Rummel*, the Court summarily reversed a decision holding disproportionate a prison term of forty years and a fine of $20,000 for defendant's possession and distribution of approximately nine ounces of marijuana said to have a street value of about $200.

[9] *Rummel*, 445 U.S. at 275–82. The dissent deemed these three factors to be sufficiently objective to apply and thought they demonstrated the invalidity of the sentence imposed. *Id.* at 285, 295–303.

[10] 463 U.S. 277 (1983). The case, like *Rummel*, was decided by a 5-4 vote.

[11] *Id.* at 284, 288.

[12] The final conviction was for uttering a no-account check in the amount of $100; previous felony convictions were also for nonviolent crimes described by the Court as "relatively minor." *Id.* at 296–97.

sentence we considered in *Rummel v. Estelle*."[13] Rummel, the Court pointed out, "was likely to have been eligible for parole within twelve years of his initial confinement," whereas Helm had only the possibility of executive clemency, characterized by the Court as "nothing more than a hope for 'an ad hoc exercise of clemency.'"[14] The *Solem* Court also identified "objective criteria" by which proportionality issues should be judged: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[15] Measured by these criteria, the Court concluded that Helm's sentence was cruel and unusual. His crime was relatively minor, yet life imprisonment without possibility for parole was the harshest penalty possible in South Dakota, reserved for such other offenses as murder, manslaughter, kidnaping, and arson. In only one other state could Helm have received so harsh a sentence, and in no other state was it mandated.[16]

Harmelin v. Michigan [17] saw a closely divided Court hold that a mandatory term of life imprisonment without possibility of parole was not cruel and unusual as applied to the crime of possession of more than 650 grams of cocaine. The Court limited its opinion to the mandatory nature of the penalty, rejecting an argument that sentencers in non-capital cases must be allowed to hear mitigating evidence.[18] As to the length of sentence, three majority Justices—Anthony Kennedy, Sandra Day O'Connor, and David Souter—recognized a narrow proportionality principle, but considered Harmelin's crime severe and by no means grossly disproportionate to the penalty imposed.[19]

Twelve years after *Harmelin*, in *Ewing v. California*,[20] the Court did not reach a consensus on a rationale for rejecting a proportionality challenge to California's "three-strikes" law, as applied to a sentence of twenty-five years to life in prison for a repeat offender who had stolen three golf clubs valued at $399 apiece. A plurality of three Justices (Sandra Day O'Connor, Anthony Kennedy, and Chief Justice William Rehnquist) determined that the sentence was "justified by the State's public safety interest in incapacitating and deterring recidivist felons, and amply supported by [the petitioner's] long, serious criminal record," and hence was not the

[13] *Id.* at 297.

[14] *Id.* at 297, 303.

[15] *Id.* at 292.

[16] For a suggestion that Eighth Amendment proportionality analysis may limit the severity of punishment possible for prohibited private and consensual homosexual conduct, see Justice Lewis Powell's concurring opinion in *Bowers v. Hardwick,* 478 U.S. 186, 197 (1986).

[17] 501 U.S. 957 (1991).

[18] "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense." 501 U.S. at 994. The Court's opinion, written by Justice Antonin Scalia, then elaborated an understanding of "unusual"—set forth elsewhere in a part of his opinion subscribed to only by Chief Justice William Rehnquist—that denies the possibility of proportionality review altogether. Mandatory penalties are not unusual in the constitutional sense because they have "been employed in various form throughout our Nation's history." This is an application of Justice Antonin Scalia's belief that cruelty and unusualness are to be determined solely by reference to the punishment at issue and without reference to the crime for which it is imposed.*See id.* at 975–78 (not opinion of Court—only Chief Justice Rehnquist joined this portion of the opinion). Because a majority of other Justices indicated in the same case that they do recognize at least a narrow proportionality principle (*see id.* at 996 (Kennedy, O'Connor, and Souter, JJ., concurring); *id.* at 1009 (White, Blackmun, and Stevens, JJ., dissenting); *id.* at 1027 (Marshall, J., dissenting)), the fact that three of those Justices (Anthony Kennedy, Sandra Day O'Connor, and David Souter) joined Justice Antonin Scalia's opinion on mandatory penalties should probably not be read as representing agreement with Justice Antonin Scalia's general approach to proportionality.

[19] Because of the "serious nature" of the crime, the three-Justice plurality asserted that there was no need to apply the other *Solem* factors comparing the sentence to sentences imposed for other crimes in Michigan, and to sentences imposed for the same crime in other jurisdictions. *Harmelin*, 501 U.S. at 1004. Dissenting Justice White, joined by Justices Blackmun and Stevens (Justice Thurgood Marshall also expressed agreement on this and most other points, *id.* at 1027), asserted that Justice Kennedy's approach would "eviscerate" *Solem*. *Id.* at 1018.

[20] 538 U.S. 11 (2003).

"rare case" of "gross disproportional[ity]."[21] The other two Justices voting in the majority were Justice Antonin Scalia, who objected that the proportionality principle cannot be intelligently applied when the penological goal is incapacitation rather than retribution,[22] and Justice Clarence Thomas, who asserted that the Cruel and Unusual Punishments Clause "contains no proportionality principle."[23] The Court also rejected a habeas corpus challenge to California's "three-strikes" law for failure to clear the statutory hurdle of establishing that the sentencing was contrary to, or an unreasonable application of, "clearly established federal law."[24] Justice Sandra Day O'Connor's opinion for a five-Justice majority explained, in understatement, that the Court's precedents in the area "have not been a model of clarity . . . that have established a clear or consistent path for courts to follow."[25]

Amdt8.4.4 Proportionality and Juvenile Offenders

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Court has distinguished the treatment of juvenile offenders in considering proportionality under the "cruel and unusual punishment" standard. In *Graham v. Florida*,[1] Justice Anthony Kennedy, writing for a five-Justice majority, declared that "[t]he concept of proportionality is central to the Eighth Amendment," in holding that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."[2] Justice Anthony Kennedy characterized proportionality cases as falling within two general types. The first type comprises challenges to the length of actual sentences imposed as being grossly disproportionate, and such challenges are resolved under approaches taken in *Solem*, *Harmelin*, and similar cases. The second type comprises challenges to particular sentencing practices as being categorically impermissible, but categorical restrictions had theretofore been limited to imposing the death penalty on those with diminished capacity. In *Graham*, Justice Anthony Kennedy broke new ground and recognized a categorical restriction on life without parole for nonhomicide offenses by juveniles, citing considerations and applying analysis similar to those used in his juvenile capital punishment opinion in *Roper v. Simmons*.[3] In considering objective indicia of a national consensus on the sentence, the *Graham* opinion looked beyond statutory authorization—thirty-seven states and the District of Columbia permitted life without parole for some juvenile nonhomicide offenders—to actual imposition, which was rare outside Florida. Justice Anthony Kennedy also found support "in the fact that, in continuing to impose life without parole sentences on

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[21] *Id.* at 29–30.

[22] *Id.* at 31.

[23] *Id.* at 32. The four dissenting Justices thought that the sentence was invalid under the *Harmelin* test used by the plurality, although they suggested that the *Solem v. Helm* test would have been more appropriate for a recidivism case. *See Ewing*, 538 U.S. at 32, n.1 (opinion of Justice Stevens).

[24] Lockyer v. Andrade, 538 U.S. 63 (2003). The three-strikes law had been used to impose two consecutive twnty-five-year-to-life sentences on a thirty-seven-year-old convicted of two petty thefts with a prior conviction.

[25] *Id.* at 72.

[1] 560 U.S. 48 (2010).

[2] *Id.* at 82. The opinion distinguished life without parole from a life sentence. An offender need not be guaranteed eventual release under the *Graham* holding, just a realistic opportunity for release based on conduct during confinement.

[3] *See* 543 U.S. 551 (2005). Concurring in the judgement in *Graham*, Chief Justice John Roberts resolved the case under a proportionality test, finding the majority's categorical restriction to be unwise and unnecessary in *Graham*'s circumstances. 560 U.S. 48 (2010) (Roberts, C.J., concurring).

juveniles who did not commit homicide, the United States adhere[d] to a sentencing practice rejected the world over."[4] After finding that a consensus had developed against the sentencing practice at issue, Justice Anthony Kennedy expressed an independent judgment that imposing life without parole on juveniles for nonhomicide offenses failed to serve legitimate penological goals adequately.[5] Factors in reaching this conclusion included the severity of the sentence, the relative culpability of juveniles, and the prospect for their rehabilitation.[6]

The concept of proportionality also drove Justice Elena Kagan's majority opinion in *Miller v. Alabama*, in which the Court held that the Eighth Amendment forbids any sentencing scheme that mandates life without parole for juveniles convicted of homicide.[7] The *Miller* Court's analysis began by recounting the factors, stated in *Roper* and *Graham*, that mark children as constitutionally different from adults for purposes of sentencing: Children have diminished capacities and greater prospects for reform.[8] In the Court's view, a process that mandates life imprisonment without parole for juvenile offenders is constitutionally flawed because it forecloses any consideration of the hallmark attributes of youth in meting out society's severest penalties.[9] Nevertheless, the majority concluded that those factors, even when coupled with the severity of a life without parole sentence, did not require a categorical bar on life without parole for juveniles in homicide cases.[10] Rather, the Court held that sentencers who consider an offender's youth and attendant characteristics may impose discretionary juvenile life without parole sentences in homicide cases.[11] Building on *Miller*, in *Montgomery v. Louisiana*, the Court held that *Miller*'s prohibition on mandatory life without parole sentences for juvenile offenders applied retroactively to convictions that were final before *Miller* was decided.[12] Justice Anthony Kennedy, joined by five other Justices, explained that *Miller* had prohibited life without parole "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."[13]

After the foregoing decisions expanded Eighth Amendment protections for juvenile offenders, the Supreme Court declined to further extend those protections in *Jones v. Mississippi*.[14] In that case, a man convicted of murder as a juvenile argued that the Eighth Amendment, as interpreted in *Miller* and *Montgomery*, prohibits sentencing juvenile homicide offenders to life without parole unless they are found to be "permanently incorrigible."[15] Justice Brett Kavanaugh's majority opinion rejected that argument, holding that "a separate factual finding of permanent incorrigibility is not required" before a juvenile may be sentenced to life without parole.[16] Rather, a state sentencing scheme that gives the sentencer discretion

[4] *Graham*, 560 U.S. at 80.

[5] For a parallel discussion in *Roper*, see 543 U.S. 551, 568–75 (2005).

[6] In dissent, Justice Clarence Thomas, joined by Justice Antonin Scalia and, in part, by Justice Samuel Alito, questioned both the basis and the reach of the majority opinion. In addition to strongly objecting to adopting any categorical rule in a nonhomicide context, Justice Clarence Thomas pointedly criticized the conclusion that the legislative and judicial records established a consensus against imposing life without parole on juvenile offenders in nonhomicide cases. He also disparaged the majority's independent judgment on the morality and justice of the sentence as wrongfully pre-empting the political process. *Graham*, 560 U.S. 48 (Thomas, J., dissenting).

[7] 567 U.S. 460, 465 (2012).

[8] *Id.* at 471.

[9] *Id.* at 477.

[10] *Id.* at 479.

[11] *Id.* at 479–80.

[12] 577 U.S. 190, 205 (2016).

[13] *Id.* at 208–09.

[14] No. 18-1259, slip op. at 1–2 (U.S. Apr. 22, 2021).

[15] *Id.* at 1.

[16] *Id.* at 5.

whether to impose a life without parole sentence for a juvenile homicide offender "is both constitutionally necessary and constitutionally sufficient."[17]

Amdt8.4.5 Limitation to Criminal Punishments

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Eighth Amendment deals only with criminal punishment, and has no application to civil processes. In holding the Amendment inapplicable to the infliction of corporal punishment upon schoolchildren for disciplinary purposes, the Court in *Ingraham v. Wright* explained that the Cruel and Unusual Punishments Clause "circumscribes the criminal process in three ways: First, it limits the kinds of punishment that government can impose on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such."[1] These limitations, the Court thought, should not be extended outside the criminal process.[2]

Amdt8.4.6 Drug and Alcohol Dependency

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

In *Robinson v. California*[1] the Court set aside a conviction under a law making it a crime to "be addicted to the use of narcotics." The statute was unconstitutional because it punished the "mere status" of being an addict without any requirement of a showing that a defendant had ever used narcotics within the jurisdiction of the state or had committed any act at all within the state's power to proscribe, and because addiction is an illness that—however it is acquired—physiologically compels the victim to continue using drugs. The case could stand for the principle, therefore, that one may not be punished for a status in the absence of some act,[2] or it could stand for the broader principle that it is cruel and unusual to punish someone for conduct that he is unable to control, which would make it a holding of far-reaching importance.[3] In *Powell v. Texas*,[4] a majority of the Justices took the latter view of *Robinson*, but the result, because of one Justice's view of the facts, was a refusal to invalidate a conviction of

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[17] *Id.*

[1] Ingraham v. Wright, 430 U.S. 651, 667 (1977) (citations omitted). Constitutional restraint on school discipline, the Court ruled, is to be found in the Due Process Clause, if at all.

[2] *Id.* at 667–69.

[1] 370 U.S. 660 (1962).

[2] A different approach to essentially the same problem was taken in *Thompson v. Louisville,* 362 U.S. 199, 206 (1960), which set aside a conviction for loitering and disorderly conduct as being supported by "no evidence whatever." *Cf.* Johnson v. Florida, 391 U.S. 596 (1968) (no evidence that the defendant was "wandering or strolling around" in violation of vagrancy law).

[3] Fully applied, the principle would raise to constitutional status the concept of *mens rea*, and it would thereby constitutionalize some form of insanity defense as well as other capacity defenses. For a somewhat different approach, see *Lambert v. California,* 355 U.S. 225 (1957) (due process denial for city to apply felon registration requirement to someone present in city but lacking knowledge of requirement). More recently, this controversy has become a due process matter, with the holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the facts necessary to constitute the crime charged, Mullaney v. Wilbur, 421 U.S. 684 (1975), raising the issue of the insanity defense and other such questions. *See* Rivera v. Delaware, 429 U.S. 877 (1976); Patterson v. New York, 432 U.S. 197, 202–05 (1977). In *Solem v. Helm,* 463 U.S. 277, 297 n.22 (1983), an Eighth Amendment proportionality case,

an alcoholic for public drunkenness. Whether either the Eighth Amendment or the Due Process Clauses will govern the requirement of the recognition of capacity defenses to criminal charges remains to be decided.

Amdt8.4.7 Conditions of Confinement

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Supreme Court stated in *Rhodes v. Chapman*, "It is unquestioned that '[c]onfinement in a prison . . . is a form of punishment subject to scrutiny under the Eighth Amendment standards.'"[1] The Court explained that "[c]onditions [in prison] must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment." According to the *Rhodes* Court, prison conditions, "alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities" and thus violate the Eighth Amendment. However "conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."[2] These general principles apply both to the treatment of individuals[3] and to the creation or maintenance of prison conditions that are inhumane to inmates generally.[4]

Ordinarily, the question of whether conditions of confinement are cruel and unusual involves both a subjective and an objective inquiry.[5] When conditions of confinement are not formally meted out as punishment by the statute or sentencing judge, such conditions cannot qualify as "cruel and unusual punishment" unless the prison officials who impose them

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the Court suggested in dictum that life imprisonment without possibility of parole of a recidivist who was an alcoholic, and all of whose crimes had been influenced by his alcohol use, was "unlikely to advance the goals of our criminal justice system in any substantial way."

[4] 392 U.S. 514 (1968). The plurality opinion by Justice Thurgood Marshall, joined by Justices Hugo Black and John Marshall Harlan and Chief Justice Earl Warren, interpreted *Robinson* as proscribing only punishment of "status," and not punishment for "acts," and expressed a fear that a contrary holding would impel the Court into constitutional definitions of such matters as *actus reus*, mens rea, insanity, mistake, justification, and duress. *Id.* at 532–37. Justice Byron White concurred, but only because the record did not show that the defendant was unable to stay out of public; like the dissent, Justice Byron White was willing to hold that if addiction as a status may not be punished neither can the yielding to the compulsion of that addiction, whether to narcotics or to alcohol. *Id.* at 548. Dissenting Justices Abe Fortas, William O. Douglas, William Brennan, and Potter Stewart wished to adopt a rule that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." That is, one under an irresistible compulsion to drink or to take narcotics may not be punished for those acts. *Id.* at 554, 567.

[1] Rhodes v. Chapman, 452 U.S. 337, 345 (1981) (quoting Hutto v. Finney, 437 U.S. 678, 685 (1978)).

[2] 452 U.S. at 347. *See also* Overton v. Bazzetta, 539 U.S. 126, 137 (2003) (rejecting a challenge to a two-year withdrawal of visitation as punishment for prisoners who commit multiple substance abuse violations, characterizing the practice as "not a dramatic departure from accepted standards for conditions of confinement," but indicating that a permanent ban "would present different considerations").

[3] *E.g.*, Estelle v. Gamble, 429 U.S. 97 (1976) (deliberate medical neglect of a prisoner violates Eighth Amendment); Helling v. McKinney, 509 U.S. 25 (1993) (prisoner who alleged exposure to secondhand "environmental" tobacco smoke stated a cause of action under the Eighth Amendment); Taylor v. Riojas, No. 19-1261, slip op. at 1 (U.S. Nov. 2, 2020) (per curiam) (four days' confinement in a cell "covered, nearly floor to ceiling, in massive amounts of feces" followed by two days in a "frigidly cold cell" where prisoner "was left to sleep naked in sewage" violated the Eighth Amendment) (internal quotes omitted). In *Erickson v. Pardus,* 551 U.S. 89 (2007) (per curiam), the Court overturned a lower court's dismissal, on procedural grounds, of a prisoner's claim of having been denied medical treatment, with life-threatening consequences.

[4] *E.g.*, Hutto v. Finney, 437 U.S. 678 (1978).

[5] *E.g.*, *Rhodes*, 452 U.S.at 346–47.

possess a culpable, "wanton" state of mind.[6] In the context of general prison conditions, this culpable state of mind is "deliberate indifference";[7] in the context of emergency actions, such as actions required to suppress a disturbance by inmates, only a malicious and sadistic state of mind suffices to violate the Eighth Amendment.[8] When excessive force is alleged, the objective standard varies depending upon whether that force was applied in a good-faith effort to maintain or restore discipline, or whether it was applied maliciously and sadistically to cause harm. In the good-faith context, there must be proof of significant injury. When, however, prison officials "maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated," and there is no need to prove that "significant injury" resulted.[9]

Beginning in 1970, federal courts found prisons or entire prison systems to violate the Cruel and Unusual Punishments Clause and imposed broad remedial orders to improve prison conditions and ameliorate prison life in more than two dozen states.[10] The Supreme Court upheld challenged portions of one of those decisions in *Hutto v. Finney*.[11] The issues before the Supreme Court in *Hutto* were limited to the appropriateness of the remedy; however, the Court expressed approval of the district court's Eighth Amendment analysis.[12] By contrast, in two subsequent cases, the Court rejected Eighth Amendment challenges to the practice of housing two inmates in the same cell.[13] Although the Court in each case reaffirmed the duty of the federal courts to protect prisoners' constitutional rights, it cautioned the courts to proceed with deference to the decisions of state legislatures and prison administrators.[14] Thus, concerns of federalism and judicial restraint apparently motivated the Court to limit federal remedies where the prevailing circumstances, given the resources states choose to devote to them,

[6] Wilson v. Seiter, 501 U.S. 294 (1991).

[7] 501 U.S. at 303. Deliberate indifference in this context means something more than disregarding an unjustifiably high risk of harm that should have been known, as might apply in the civil context. Rather, it requires the court to find that the responsible person acted in reckless disregard of a risk of which he or she was aware, as would generally be required for a criminal charge of recklessness. Farmer v. Brennan, 511 U.S. 825 (1994). In upholding capital punishment by a three-drug lethal injection protocol, despite the risk that the protocol will not be properly followed and consequently result in severe pain, a Court plurality found that, although "subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment . . . , the conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.' . . . [T]o prevail on such a claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" Baze v. Rees, 553 U.S. 35, 48–50 (2008) (emphasis added by the Court). This case is also discussed under Amdt8.4.9.10 Execution Methods.

[8] Whitley v. Albers, 475 U.S. 312 (1986) (arguably excessive force in suppressing prison uprising did not constitute cruel and unusual punishment).

[9] Hudson v. McMillian, 503 U.S. 1, 9 (1992) (beating of a shackled prisoner resulted in bruises, swelling, loosened teeth, and a cracked dental plate). *Accord* Wilkins v. Gaddy, 559 U.S. 34 (2010) (per curiam).

[10] Rhodes v. Chapman, 452 U.S. 337, 353–54 n.1 (1981) (Brennan, J., concurring) (collecting cases). *See* Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981).

[11] 437 U.S. 678 (1978).

[12] *Id.* at 685–86 ("Read in its entirety, the District Court's opinion makes it abundantly clear that the length of isolation sentences was not considered in a vacuum. In the court's words, punitive isolation 'is not necessarily unconstitutional, but it may be, depending on the duration of the confinement and the conditions thereof.'") (quoting Finney v. Hutto, 410 F. Supp. 251, 275 (E.D. Ark. 1976)).

[13] Bell v. Wolfish, 441 U.S. 520, 530–36 (1979); Rhodes v. Chapman, 452 U.S. 337, 347–50 (1981).

[14] *Bell*, 441 U.S. at 562 ("The deplorable conditions and Draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems. But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. . . . This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute."); *see also Rhodes*, 452 U.S. at 351–52.

"cannot be said to be cruel and unusual under contemporary standards."[15] Subsequent cases indicate that such concerns are relevant to Eighth Amendment analysis but are not dispositive.[16]

Congress initially authorized litigation over prison conditions in 1980 in the Civil Rights of Institutionalized Persons Act,[17] but then in 1996 added restrictions through the Prison Litigation Reform Act.[18] The Court upheld the latter law's provision for an automatic stay of prospective relief upon the filing of a motion to modify or terminate that relief, ruling that the automatic stay provision did not violate separation of powers principles.[19]

Amdt8.4.8 Divestiture of Citizenship

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Court has looked unfavorably on divestiture of citizenship as a punishment. In *Trop v. Dulles*, the Court held divestiture of the citizenship of a natural born citizen to be cruel and unusual punishment.[1] The Court viewed divestiture of citizenship as a penalty "more primitive than torture," because it entailed statelessness or "the total destruction of the individual's status in organized society."[2] The Court commented that: "The question is whether [a] penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment."[3] The Court further reasoned that a punishment must be examined "in light of the basic prohibition against inhuman treatment," and that the Eighth Amendment was intended to preserve the "basic concept . . . [of] the dignity of man" by assuring that the power to impose punishment is "exercised within the limits of civilized standards."[4]

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[15] *Rhodes*, 452 U.S. at 351–52; *See also* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1991) (allowing modification, based on a significant change in law or facts, of a 1979 consent decree that had ordered construction of a new jail with single-occupancy cells; modification was to depend upon whether the upsurge in jail population was anticipated when the decree was entered, and whether the decree was premised on the mistaken belief that single-celling is constitutionally mandated).

[16] *E.g.*, Helling v. McKinney, 509 U.S. 25, 35–37 (1993) (Holding that "[w]e cannot rule at this juncture that it will be impossible . . . to prove an Eighth Amendment violation based on exposure to ETS [environmental tobacco smoke]," and inquiry into whether prison authorities were deliberately indifferent to dangers posed by exposure to ETS "would be an appropriate vehicle to consider arguments regarding the realities of prison administration.").

[17] Pub. L. No. 96-247, 94 Stat. 349, 42 U.S.C. §§ 1997 et seq.

[18] Pub. L. No. 104-134, title VIII, 110 Stat. 1321-66–1321-77.

[19] Miller v. French, 530 U.S. 327 (2000). *See also* Porter v. Nussle, 534 U.S. 516 (2002) (applying the Act's requirement that prisoners exhaust administrative remedies).

[1] 356 U.S. 86 (1958). Again the Court was divided. Four Justices joined the plurality opinion while Justice William Brennan concurred on the ground that the requisite relation between the severity of the penalty and legitimate purpose under the war power was not apparent. *Id.* at 114. Four Justices dissented, denying that denationalization was a punishment and arguing that instead it was merely a means by which Congress regulated discipline in the armed forces. *Id.* at 121, 124–27.

[2] *Id.* at 101.

[3] *Id.* at 99.

[4] *Id.* at 100, 101 n.32. The action of prison guards in handcuffing a prisoner to a hitching post for long periods of time violated basic human dignity and constituted "gratuitous infliction of 'wanton and unnecessary pain'" prohibited by the clause. Hope v. Pelzer, 536 U.S. 730, 738 (2002).

Amdt8.4.9 Death Penalty

Amdt8.4.9.1 Overview of Death Penalty

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Supreme Court's 1972 decision in *Furman v. Georgia*,[1] finding constitutional deficiencies in the manner in which the death penalty was applied, but not holding the death penalty unconstitutional per se, was a watershed in capital punishment jurisprudence. The ruling effectively constitutionalized capital sentencing law and involved federal courts in extensive review of capital sentences.[2]

Prior to 1972, constitutional law governing capital punishment was relatively simple and straightforward. Capital punishment was constitutional, and there were few grounds for constitutional review.[3] In *Furman* and the five 1976 cases that followed, in which the Court reviewed laws[4] that states had revised in response to *Furman*, the Court reaffirmed the constitutionality of capital punishment per se, but also opened up several avenues for constitutional review.

Since 1976, the Court has issued many decisions on applying and reconciling the principles it has identified for applying the death penalty. In particular, the Court has held that sentencing discretion must be limited to preventing courts from arbitrarily imposing the death penalty. Accordingly, the Court has established that courts should follow guidelines that narrow and define the category of death-eligible defendants. Jury discretion, however, must be preserved in order for jurors to weigh the mitigating circumstances of individual defendants who fall within the death-eligible class.

Amdt8.4.9.2 Early Doctrine on Death Penalty

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

In *Trop v. Dulles*, the majority refused to consider "the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment . . . the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."[1] But a coalition of civil rights and civil liberties organizations mounted a campaign against the death penalty in the 1960s, and the Court eventually confronted the issues involved. The answers were not, it is fair to say, consistent.

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[1] 408 U.S. 238 (1972).

[2] *See* Carol S. Steiker and Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

[3] *See* McGautha v. California, 402 U.S. 183, 207 (1971) ("[W]e find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."). Justice William O. Douglas in his opinion in support of the *Furman* per curiam decision, observed, "We are now imprisoned in the *McGautha* holding . . . [that] [j]uries . . . have practically untrammeled [unguided] discretion to let an accused live or insist that he die." *Furman*, 408 U.S. at 248.

[4] Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v, Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

[1] 356 U.S. 86, 99 (1958).

Amdt8.4.9.2
Early Doctrine on Death Penalty

A series of cases testing the means by which the death penalty was imposed[2] culminated in what appeared to be a decisive rejection of the attack in *McGautha v. California*.[3]

The Court added a fourth major guideline in 2002, holding that the Sixth Amendment right to trial by jury comprehends the right to have a jury make factual determinations on which a sentencing increase is based.[4] This means that capital sentencing schemes are unconstitutional if judges are allowed to make factual findings as to the existence of aggravating circumstances that are prerequisites for imposition of a death sentence.

Amdt8.4.9.3 Furman and Moratorium on Death Penalty

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

In *Furman v. Georgia*,[1] the Supreme Court held that the death penalty, at least as administered, violated the Eighth Amendment. There was no unifying opinion of the Court in *Furman*; the five Justices in the majority each approached the matter from a different angle in separate concurring opinions. Two Justices concluded that the death penalty was "cruel and unusual" per se because the imposition of capital punishment "does not comport with human dignity"[2] or because it is "morally unacceptable" and "excessive."[3] One Justice concluded that because death is a penalty inflicted on the poor and hapless defendant but not the affluent and socially better situated defendant, it violates the implicit requirement of equality of treatment found within the Eighth Amendment.[4] Two Justices concluded that capital punishment was both "cruel" and "unusual" because it was applied in an arbitrary, "wanton," and "freakish" manner[5] and so infrequently that it served no justifying end.[6]

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[2] In *Rudolph v. Alabama,* 375 U.S. 889 (1963), Justices Arthur Goldberg, William O. Douglas, and William Brennan, dissenting from a denial of certiorari, argued that the Court should have heard the case to consider whether the Constitution permitted the imposition of death "on a convicted rapist who has neither taken nor endangered human life," and presented a line of argument questioning the general validity of the death penalty under the Eighth Amendment. The Court addressed exclusion of death-scrupled jurors in *Witherspoon v. Illinois,* 391 U.S. 510 (1968). *Witherspoon* and subsequent cases explicating it are discussed under Amdt6.4.5.1 A Jury Selected from a Representative Cross-Section of the Community.

[3] 402 U.S. 183 (1971). *McGautha* was decided in the same opinion with *Crampton v. Ohio*. McGautha raised the question whether provision for imposition of the death penalty without legislative guidance to the sentencing authority in the form of standards violated the Due Process Clause; *Crampton* raised the question whether due process was violated when both the issue of guilt or innocence and the issue of whether to impose the death penalty were determined in a unitary proceeding. Justice Harlan for the Court held that standards were not required because, ultimately, it was impossible to define with any degree of specificity which defendant should live and which die; although bifurcated proceedings might be desirable, they were not required by due process.

[4] Ring v. Arizona, 536 U.S. 584 (2002). *See also* Hurst v. Florida, 136 S. Ct. 616, 619–20 (2016).

[1] 408 U.S. 238 (1972). The change in the Court's approach was occasioned by the shift of Justices Potter Stewart and Byron White, who had voted with the majority in *McGautha v. California,* 402 U.S. 183 (1971).

[2] *Furman*, 408 U.S. at 257 (Brennan, J.).

[3] *Id.* at 314 (Marshall, J.).

[4] *Id.* at 240 (Douglas, J.).

[5] *Id.* at 306 (Stewart, J.).

[6] *Id.* at 310 (White, J.). The four dissenters, in four separate opinions, argued with different emphases that the Constitution itself recognized capital punishment in the Fifth and Fourteenth Amendments, that the death penalty was not "cruel and unusual" when the Eighth and Fourteenth Amendments were proposed and ratified, that the Court was engaging in a legislative act to strike it down now, and that even under modern standards it could not be considered "cruel and unusual." *Id.* at 375 (Burger, C.J.), 405 (Blackmun, J.), 414 (Powell, J.), 465 (Rehnquist, C.J.). Each of the dissenters joined each of the opinions of the others.

Amdt8.4.9.4 Gregg v. Georgia and Limits on Death Penalty

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

Because only two of the Justices in *Furman* thought the death penalty to be invalid in all circumstances, those who wished to reinstate the penalty concentrated upon drafting statutes that would correct the faults identified in the other three majority opinions.[1] Enactment of death penalty statutes by thirty-five states following *Furman* led to renewed litigation, but not to the elucidation one might expect from a series of opinions.[2] Instead, although the Court seemed firmly on the path to the conclusion that only criminal acts that result in the deliberate taking of human life may be punished by the state's taking of human life,[3] it chose several different paths in attempting to delineate the acceptable procedural devices that must be instituted in order that death may be constitutionally pronounced and carried out. To summarize, the Court determined that the penalty of death for deliberate murder is not per se cruel and unusual, but that mandatory death statutes leaving the jury or trial judge no discretion to consider the individual defendant and his crime are cruel and unusual, and that standards and procedures may be established for the imposition of death that would remove or mitigate the arbitrariness and irrationality found so significant in *Furman*.[4] Divisions among the Justices, however, made it difficult to ascertain the form that permissible statutory schemes may take.[5]

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[1] Collectors of judicial "put downs" of colleagues should note Justice William Rehnquist's characterization of the many expressions of faults in the system and their correction as "glossolalial." Woodson v. North Carolina, 428 U.S. 280, 317 (1976) (dissenting).

[2] Justice Felix Frankfurter once wrote of the development of the law through "the process of litigating elucidation." International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958). The Justices are firm in declaring that the series of death penalty cases failed to conform to this concept. *See, e.g.*, Chief Justice Warren Burger, Lockett v. Ohio, 438 U.S. 586, 602 (1978) (plurality opinion) ("The signals from this Court have not . . . always been easy to decipher"); Justice Byron White, *id.* at 622 ("The Court has now completed its about-face since *Furman*") (concurring in result); and Justice Rehnquist, *id.* at 629 (dissenting) ("the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed"), and *id.* at 632 ("I am frank to say that I am uncertain whether today's opinion represents the seminal case in the exposition by this Court of the Eighth and Fourteenth Amendments as they apply to capital punishment, or whether instead it represents the third false start in this direction within the past six years").

[3] On crimes not involving the taking of life or the actual commission of the killing by a defendant, *see* Coker v. Georgia, 433 U.S. 584 (1977) (rape of an adult woman); Kennedy v. Louisiana, 128 S. Ct. 2461 (2008) (rape of an eight-year-old child); Enmund v. Florida, 458 U.S. 782 (1982) (felony murder where defendant aided and abetted a robbery during which a murder was committed but did not himself kill, attempt to kill, or intend that a killing would take place). *Compare Enmund* with Tison v. Arizona, 481 U.S. 137 (1987) (death sentence upheld where defendants did not kill but their involvement in the events leading up to the murders was active, recklessly indifferent, and substantial). Those cases in which a large threat, though uneventuated, to the lives of many may have been present, as in airplane hijackings, may constitute an exception to the Court's narrowing of the crimes for which capital punishment may be imposed. The federal hijacking statute, 49 U.S.C. § 46502, imposes the death penalty only when a death occurs during commission of the hijacking. By contrast, the treason statute, 18 U.S.C. § 2381, permits the death penalty in the absence of a death, and represents a situation in which great and fatal danger might be present. But the treason statute also constitutes a crime against the state, which may be significant. In *Kennedy v. Louisiana,* 128 S. Ct. 2641, 2659 (2008), in overturning a death sentence imposed for the rape of a child, the Court wrote, "Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State."

[4] Justices William Brennan and Thurgood Marshall adhered to the view that the death penalty is per se unconstitutional. *E.g.*, *Coker*, 433 U.S. at 600; *Lockett*, 438 U.S. at 619; *Enmund*, 458 U.S. at 801.

[5] A comprehensive evaluation of the multiple approaches followed in *Furman*-era cases may be found in Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978).

Because the three Justices in the majority in *Furman* who did not altogether reject the death penalty thought the problems with the system revolved about discriminatory and arbitrary imposition,[6] legislatures turned to enactment of statutes that purported to do away with these difficulties. One approach was to provide for automatic imposition of the death penalty upon conviction for certain forms of murder. More commonly, states established special procedures to follow in capital cases, and specified aggravating and mitigating factors that the sentencing authority must consider in imposing sentence. In five cases in 1976, the Court rejected automatic sentencing but approved other statutes specifying factors for jury consideration.[7]

First, the Court concluded that the death penalty as a punishment for murder does not itself constitute cruel and unusual punishment. Although there were differences of degree among the seven Justices in the majority on this point, they all seemed to concur that reenactment of capital punishment statutes by thirty-five states precluded the Court from concluding that this form of penalty was no longer acceptable to a majority of the American people. Rather, they concluded, a large proportion of American society continued to regard it as an appropriate and necessary criminal sanction. Neither is it possible, the Court continued, to rule that the death penalty does not comport with the basic concept of human dignity at the core of the Eighth Amendment. Courts are not free to substitute their own judgments for the people and their elected representatives. A death penalty statute, just as all other statutes, comes before the courts bearing a presumption of validity that can be overcome only upon a strong showing by those who attack its constitutionality. Whether in fact the death penalty validly serves the permissible functions of retribution and deterrence, the judgments of the state legislatures are that it does, and those judgments are entitled to deference. Therefore, the infliction of death as a punishment for murder is not without justification and is not unconstitutionally severe. Nor is the punishment of death disproportionate to the crime being punished, murder.[8]

Second, however, a different majority concluded that statutes *mandating* the imposition of death for crimes classified as first degree murder violate the Eighth Amendment. A review of history, traditional usage, legislative enactments, and jury determinations led the plurality to conclude that mandatory death sentences had been rejected by contemporary standards. Moreover, mandatory sentencing precludes the individualized "consideration of the character

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[6] Thus, Justice William O. Douglas thought the penalty had been applied discriminatorily, *Furman*, 408 U.S. 238, Justice Potter Stewart thought it "wantonly and . . . freakishly imposed," *id.* at 310, and Justice Byron White thought it had been applied so infrequently that it served no justifying end. *Id.* at 313.

[7] The principal opinion was in *Gregg v. Georgia,* 428 U.S. 153 (1976) (upholding statute providing for a bifurcated proceeding separating the guilt and sentencing phases, requiring the jury to find at least one of ten statutory aggravating factors before imposing death, and providing for review of death sentences by the Georgia Supreme Court). Statutes of two other states were similarly sustained, *Proffitt v. Florida,* 428 U.S. 242 (1976) (statute generally similar to Georgia's, with the exception that the trial judge, rather than jury, was directed to weigh statutory aggravating factors against statutory mitigating factors), and *Jurek v. Texas,* 428 U.S. 262 (1976) (statute construed as narrowing death-eligible class, and lumping mitigating factors into consideration of future dangerousness), while those of two other states were invalidated, *Woodson v. North Carolina,* 428 U.S. 280 (1976), and *Roberts v. Louisiana,* 428 U.S. 325 (1976) (both mandating death penalty for first-degree murder).

[8] *Gregg*, 428 U.S. at 168–87 (Stewart, Powell, and Stevens, JJ.); *Roberts*, 428 U.S. at 350–56 (White, Blackmun, Rehnquist, JJ., and Burger, C.J.). The views summarized in the text are those in the Stewart opinion in *Gregg*. Justice Byron White's opinion basically agrees with this opinion in concluding that contemporary community sentiment accepts capital punishment, but did not endorse the proportionality analysis. Justice Byron White's *Furman* dissent and those of Chief Justice Warren Burger and Justice Blackmun show a rejection of proportionality analysis. Justices William Brennan and Thurgood Marshall dissented, reiterating their *Furman* views. *Gregg*, 428 U.S. at 227, 231.

and record of the . . . offender and the circumstances of the particular offense" that "the fundamental respect for humanity underlying the Eighth Amendment" requires in capital cases.[9]

A third principle established by the 1976 cases was that the procedure by which a death sentence is imposed must be structured so as to reduce arbitrariness and capriciousness as much as possible.[10] What emerged from the prevailing plurality opinion in these cases are requirements (1) that the sentencing authority, jury or judge,[11] be given standards to govern its exercise of discretion and be given the opportunity to evaluate both the circumstances of the offense and the character and propensities of the accused;[12] (2) that to prevent jury prejudice on the issue of guilt there be a separate proceeding after conviction at which evidence relevant to the sentence, mitigating and aggravating, be presented;[13] (3) that special forms of appellate review be provided not only of the conviction but also of the sentence, to ascertain that the sentence was fairly imposed both in light of the facts of the individual case and by comparison with the penalties imposed in similar cases.[14] The Court later ruled, however, that proportionality review is not constitutionally required.[15] *Gregg*, *Proffitt*, and *Jurek* did not

[9] *Woodson*, 428 U.S. 280; *Roberts*, 428 U.S. 325. Justices Stewart, Lewis Powell, and John Paul Stevens composed the plurality, and Justices William Brennan and Thurgod Marshall concurred on the basis of their own views of the death penalty. *Id.* at 305, 306, 336.

[10] Here adopted is the constitutional analysis of the Stewart plurality of three. "[T]he holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds," *Gregg*, 428 U.S. at 169 n.15 (1976), a comment directed to the *Furman* opinions but equally applicable to these cases and to *Lockett*. *See* Marks v. United States, 430 U.S. 188, 192–94 (1977).

[11] The Stewart plurality noted its belief that jury sentencing in capital cases performs an important social function in maintaining the link between contemporary community values and the penal system, but agreed that sentencing may constitutionally be vested in the trial judge. *Gregg*, 428 U.S. at 190. Subsequently, however, the Court issued several opinions holding that the Sixth Amendment right to a jury trial is violated if a judge makes factual findings (for example, as to the existence of aggravating circumstances) upon which a death sentence is based. Hurst v. Florida, 136 S. Ct. 616, 619–20 (2016); Ring v. Arizona, 536 U.S. 584 (2002). Notably, one Justice in both cases would have found that the Eighth Amendment—not the Sixth Amendment—requires that "a jury, not a judge, make the decision to sentence a defendant to death." *Ring*, 536 U.S. at 614 (Breyer, J., concurring in the judgment). *See also Hurst*, 136 S. Ct. at 619 (Breyer, J., concurring in the judgment).

[12] *Gregg*, 428 U.S. at 188–95. Justice Byron White seemed close to the plurality on the question of standards, *id.* at 207 (concurring), but while Chief Justice Warren Burger and Justice William Rehnquist joined the Byron White opinion "agreeing" that the system under review "comports" with *Furman*, Justice Rehnquist denied the constitutional requirement of standards in any event. *Woodson*, 428 U.S. at 319–21 (dissenting). In *McGautha v. California,* 402 U.S. 183, 207–08 (1971), the Court had rejected the argument that the absence of standards violated the Due Process Clause. On the vitiation of *McGautha*, see *Gregg*, 428 U.S. at 195 n.47, and *Lockett v. Ohio,* 438 U.S. 586, 598–99 (1978). In assessing the character and record of the defendant, the jury may be required to make a judgment about the possibility of future dangerousness of the defendant, from psychiatric and other evidence. Jurek v. Texas, 428 U.S. 262, 275–76 (1976). Moreover, testimony of psychiatrists need not be based on examination of the defendant; general responses to hypothetical questions may also be admitted. Barefoot v. Estelle, 463 U.S. 880 (1983). *But cf.* Estelle v. Smith, 451 U.S. 454 (1981) (holding Self-Incrimination and Counsel Clauses applicable to psychiatric examination, at least when a doctor testifies about his conclusions with respect to future dangerousness).

[13] *Gregg*, 428 U.S. at 163, 190–92, 195 (plurality opinion). *McGautha*, 402 U.S. 183, had rejected a due process requirement of bifurcated trials, and the *Gregg* plurality did not expressly *require* it under the Eighth Amendment. But the plurality's emphasis upon avoidance of arbitrary and capricious sentencing by juries seems to look inevitably toward bifurcation. The dissenters in *Roberts,* 428 U.S. at 358, rejected bifurcation and viewed the plurality as requiring it. All states with post-*Furman* capital sentencing statutes took the cue by adopting bifurcated capital sentencing procedures, and the Court has not been faced with the issue again. *See* Raymond J. Pascucci, et al., *Special Project, Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 Cornell L. Rev. 1129, 1224–25 (1984).

[14] *Gregg*, 428 U.S. at 195, 198 (plurality); Proffitt v. Florida, 428 U.S. 242, 250–51, 253 (1976) (plurality); *Jurek*, 428 U.S. at 276 (plurality).

[15] Pulley v. Harris, 465 U.S. 37 (1984).

require such comparative proportionality review, the Court noted, but merely suggested that proportionality review is one means by which a state may "safeguard against arbitrarily imposed death sentences."[16]

Amdt8.4.9.5 Applying the Death Penalty Fairly

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

One of the principal objections to imposition of the death penalty, voiced by Justice William O. Douglas in his concurring opinion in *Furman*, was that it was not being administered fairly—that the capital sentencing laws vesting "practically untrammeled discretion" in juries were being used as vehicles for racial discrimination, and that "discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."[1] This argument has not carried the day. Although the Court has acknowledged the possibility that the death penalty may be administered in a racially discriminatory manner, it has made proof of such discrimination quite difficult.

A measure of protection against jury bias was provided by the Court's holding that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias."[2]

Proof of prosecution bias is another matter. The Court ruled in *McCleskey v. Kemp*[3] that a strong statistical showing of racial disparity in capital sentencing cases is insufficient to establish an Eighth Amendment violation. Statistics alone do not establish racial discrimination in any particular case, the Court concluded, but "at most show only a likelihood that a particular factor entered into some decisions."[4] Just as important to the outcome, however, was the Court's application of the two overarching principles of prior capital punishment cases: that a state's system must narrow a sentencer's discretion to impose the death penalty (for example, by carefully defining "aggravating" circumstances), but must *not* constrain a sentencer's discretion to consider mitigating factors relating to the character of the defendant. Although the dissenters saw the need to narrow discretion in order to reduce the chance that racial discrimination underlies jury decisions to impose the death penalty,[5] the majority emphasized the need to preserve jury discretion not to impose capital punishment. Reliance on statistics to establish a prima facie case of discrimination, the Court feared, could undermine the requirement that capital sentencing jurors "focus their collective judgment on the unique characteristics of a particular criminal defendant"—a focus that can result in "final and unreviewable" leniency.[6]

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[16] *Id.* at 50.

[1] 408 U.S. at 248, 257.

[2] Turner v. Murray, 476 U.S. 28, 36–37 (1986).

[3] 481 U.S. 279 (1987) (5-4 decision).

[4] *Id.* at 308.

[5] *Id.* at 339–40 (Brennan, J.), 345 (Blackmun, J.), 366 (Stevens, J.).

[6] *Id.* at 311. Concern for protecting "the fundamental role of discretion in our criminal justice system" also underlay the Court's rejection of an equal protection challenge in *McCleskey*. *See also* United States v. Bass, 536 U.S. 862 (2002) (per curiam), requiring a threshold evidentiary showing before a defendant claiming selective prosecution on the basis of race is entitled to a discovery order that the government provide information on its decisions to seek the death penalty.

Amdt8.4.9.6 Role of Jury and Consideration of Evidence

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

In response to the Supreme Court's 1976 decisions on the death penalty,[1] most states narrowed sentencing authority discretion to impose the death penalty by enacting statutes spelling out "aggravating" circumstances and requiring that at least one such aggravating circumstance be found before the death penalty is imposed. The Court has required that the standards be relatively precise and instructive so as to minimize the risk of arbitrary and capricious action by the sentencer. Thus, in *Godfrey v. Georgia*, the Court invalidated a capital sentence based upon a jury finding that the murder was "outrageously or wantonly vile, horrible, and inhuman," reasoning that "a person of ordinary sensibility could fairly [so] characterize almost every murder."[2] Similarly, in *Maynard v. Cartwright*, the Court held an "especially heinous, atrocious, or cruel" aggravating circumstance to be unconstitutionally vague.[3] The "especially heinous, cruel, or depraved" standard is cured, however, by a narrowing interpretation requiring a finding of infliction of mental anguish or physical abuse before the victim's death.[4]

The proscription against a mandatory death penalty has also received elaboration. The Court invalidated statutes making death the mandatory sentence for persons convicted of first degree murder of a police officer,[5] and for prison inmates convicted of murder while serving a life sentence without possibility of parole.[6] Flaws related to those attributed to mandatory sentencing statutes were found in a state's structuring of its capital system to deny the jury the option of convicting on a lesser included offense, when doing so would be justified by the evidence.[7] Because the jury had to choose between conviction or acquittal, the statute created

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[1] Gregg v. Georgia, 428 U.S. 153 (1976) (upholding a statute providing for a bifurcated proceeding separating guilt and sentencing phases, requiring the jury to find at least one of ten statutory aggravating factors before imposing death, and providing for review of death sentences by the Georgia Supreme Court); Proffitt v. Florida, 428 U.S. 242 (1976) (a statute generally similar to Georgia's, with the exception that the trial judge, rather than the jury, was directed to weigh statutory aggravating factors against statutory mitigating factors); Jurek v. Texas, 428 U.S. 262 (1976) (a statute construed as narrowing the death-eligible class of cases, and lumping mitigating factors into consideration of dangerousness); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976) (both mandating the death penalty for first degree murder).

[2] Godfrey v. Georgia, 446 U.S. 420, 428–29 (1980) (plurality opinion).

[3] Maynard v. Cartwright, 486 U.S. 356, 363–64 (1988). *But see* Tuilaepa v. California, 512 U.S. 967 (1994) (holding that permitting capital juries to consider the circumstances of the crime, the defendant's prior criminal activity, and the age of the defendant, without further guidance, is not unconstitutionally vague).

[4] Walton v. Arizona, 497 U.S. 639 (1990). *Accord*, Lewis v. Jeffers, 497 U.S. 764 (1990). *See also* Gregg v. Georgia, 428 U.S. 153, 201 (1976) (upholding full statutory circumstance of "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"); Proffitt v. Florida, 428 U.S. 242, 255 (1976) (upholding "especially heinous, atrocious or cruel" aggravating circumstance as interpreted to include only "the conscienceless or pitiless crime which is unnecessarily torturous to the victim"); Sochor v. Florida, 504 U.S. 527 (1992) (impermissible vagueness of "heinousness" factor cured by narrowing interpretation including strangulation of a conscious victim); Arave v. Creech, 507 U.S. 463 (1993) (consistent application of narrowing construction of phrase "exhibited utter disregard for human life" to require that the defendant be a "cold-blooded, pitiless slayer" cures vagueness); Bell v. Cone, 543 U.S. 447 (2005) (presumption that state supreme court applied a narrowing construction because it had done so numerous times).

[5] Roberts v. Louisiana, 431 U.S. 633 (1977) (per curiam) (involving a different defendant from the first *Roberts v. Louisiana* case, 428 U.S. 325 (1976).

[6] Sumner v. Shuman, 483 U.S. 66 (1987).

[7] Beck v. Alabama, 447 U.S. 625 (1980). The statute made the guilt determination "depend . . . on the jury's feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision on this issue." *Id.* at 640. *Cf.* Hopper v. Evans, 456 U.S. 605 (1982). No such constitutional infirmity is present, however, if failure to instruct on lesser included offenses is due to the defendant's refusal to waive the statute

the risk that the jury would convict because it felt the defendant deserved to be punished or acquit because it believed death was too severe for the particular crime, when at that stage the jury should concentrate on determining whether the prosecution had proved defendant's guilt beyond a reasonable doubt.[8]

The overarching principle of *Furman v. Georgia*[9] and of the *Gregg v. Georgia* series of cases[10] was that the jury should not be "without guidance or direction" in deciding whether a convicted defendant should live or die. The jury's attention was statutorily "directed to the specific circumstances of the crime . . . and on the characteristics of the person who committed the crime."[11] As such, discretion was channeled and rationalized. But, in *Lockett v. Ohio*,[12] a Court plurality determined that a state law was invalid because it prevented the sentencer from giving weight to any mitigating factors other than those specified in the law. In other words, the jury's discretion was curbed too much. The *Lockett* Court stated:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[13]

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of limitations for those lesser offenses. Spaziano v. Florida, 468 U.S. 447 (1984). *See* Hopkins v. Reeves, 524 U.S. 88 (1998) (defendant charged with felony murder did not have right to instruction as to second degree murder or manslaughter, where Nebraska traditionally did not consider these lesser included offenses). *See also* Schad v. Arizona, 501 U.S. 624 (1991) (first degree murder defendant, who received instruction on lesser included offense of second degree murder, was not entitled to a jury instruction on the lesser included offense of robbery). In *Schad* the Court also upheld Arizona's characterization of first degree murder as a single crime encompassing two alternatives, premeditated murder and felony murder, and not requiring jury agreement on which alternative had occurred.

[8] Also impermissible as distorting a jury's role are prosecutor's comments or jury instructions that mislead a jury as to its primary responsibility for deciding whether to impose the death penalty. *Compare* Caldwell v. Mississippi, 472 U.S. 320 (1985) (jury's responsibility is undermined by court-sanctioned remarks by prosecutor that jury's decision is not final, but is subject to appellate review) *with* California v. Ramos, 463 U.S. 992 (1983) (jury responsibility not undermined by instruction that governor has power to reduce sentence of life imprisonment without parole). *See also* Lowenfield v. Phelps, 484 U.S. 231 (1988) (poll of jury and supplemental jury instruction on obligation to consult and attempt to reach a verdict was not unduly coercive on death sentence issue, even though consequence of failing to reach a verdict was automatic imposition of life sentence without parole); Romano v. Oklahoma, 512 U.S. 1 (1994) (imposition of death penalty after introduction of evidence that defendant had been sentenced to death previously did not diminish the jury's sense of responsibility so as to violate the Eighth Amendment); Jones v. United States, 527 U.S. 373 (1999) (court's refusal to instruct the jury on the consequences of deadlock did not violate Eighth Amendment, even though court's actual instruction was misleading as to range of possible sentences).

[9] 408 U.S. 238 (1972).

[10] Gregg v. Georgia, 428 U.S. 153 (1976) (upholding a statute providing for a bifurcated proceeding separating guilt and sentencing phases, requiring the jury to find at least one of ten statutory aggravating factors before imposing death, and providing for review of death sentences by the Georgia Supreme Court); Proffitt v. Florida, 428 U.S. 242 (1976) (a statute generally similar to Georgia's, with the exception that the trial judge, rather than the jury, was directed to weigh statutory aggravating factors against statutory mitigating factors); Jurek v. Texas, 428 U.S. 262 (1976) (a statute construed as narrowing the death-eligible class of cases, and lumping mitigating factors into consideration of dangerousness); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976) (both mandating the death penalty for first degree murder).

[11] Gregg v. Georgia, 428 U.S. 153, 197–98 (1976) (plurality).

[12] 438 U.S. 586 (1978). The plurality opinion by Chief Justice Warren Burger was joined by Justices Potter Stewart, Lewis Powell, and John Paul Stevens. Justices Harry Blackmun, Thurgood Marshall, and Byron White concurred in the result on separate and conflicting grounds. *Id.* at 613, 619, 621. Justice William Rehnquist dissented. *Id.* at 628.

[13] 438 U.S. at 604. Although, under the Eighth and Fourteenth Amendments, the state must bear the burden "to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." Walton v. Arizona, 497 U.S. 639, 650 (1990) (plurality). *A fortiori*, a statute "may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise." Kansas v. Marsh, 548 U.S. 163, 173 (2006).

Similarly, in *Woodson v. North Carolina*, a three-Justice plurality viewed North Carolina's mandatory death sentence for persons convicted of first degree murder as invalid because it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant."[14] *Lockett* and *Woodson* have since been endorsed by a Court majority.[15] Thus, a great measure of discretion was again accorded the sentencing authority, be it judge or jury, subject only to the consideration that the legislature must prescribe aggravating factors.[16]

The Court has explained this apparent contradiction as recognizing that "individual culpability is not always measured by the category of crime committed,"[17] and an attempt to pursue the "twin objectives" of "measured, consistent application" of the death penalty and "fairness to the accused."[18] The requirement that aggravating circumstances be spelled out by statute serves a narrowing purpose that helps consistency of application; absence of restrictions on mitigating evidence helps promote fairness to the accused through an "individualized" consideration of the defendant's circumstances. In the Court's words, statutory aggravating circumstances "play a constitutionally necessary function at the stage of legislative definition [by] circumscribing the class of persons eligible for the death penalty,"[19] while consideration of all mitigating evidence requires focus on "the character and record of the individual offender and the circumstances of the particular offense" consistent with "the fundamental respect for humanity underlying the Eighth Amendment."[20] As long as the

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[14] Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (opinion of Stewart, J., joined by Powell and Stevens, JJ.). *Accord*, Roberts v. Louisiana, 428 U.S. 325 (1976) (statute mandating death penalty for five categories of homicide constituting first degree murder).

[15] Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (adopting *Lockett*); Sumner v. Shuman, 483 U.S. 66 (1987) (adopting *Woodson*). The majority in *Eddings* was composed of Justices Lewis Powell, William Brennan, Thurgood Marshall, John Paul Stevens, and Sandra Day O'Connor; Chief Justice Warren Burger and Justices Byron White, Harry Blackmun, and William Rehnquist dissented. The *Shuman* majority was composed of Justices Harry Blackmun, William Brennan, Thurgood Marshall, Lewis Powell, John Paul Stevens, and Sandra Day O'Connor; dissenting were Justices Byron White and Antonin Scalia and Chief Justice William Rehnquist. *Woodson* and the first *Roberts v. Louisiana* had earlier been followed in the second *Roberts v. Louisiana,* 431 U.S. 633 (1977), a per curiam opinion from which Chief Justice Warren Burger, and Justices Harry Blackmun, Byron White, and William Rehnquist dissented.

[16] Justice Byron White, dissenting in *Lockett* from the Court's holding on consideration of mitigating factors, wrote that he "greatly fear[ed] that the effect of the Court's decision today will be to compel constitutionally a restoration of the state of affairs at the time *Furman* was decided, where the death penalty is imposed so erratically and the threat of execution is so attenuated for even the most atrocious murders that 'its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.'" 438 U.S. at 623. More recently, Justice Antonin Scalia voiced similar misgivings. "Shortly after introducing our doctrine *requiring* constraints on the sentencer's discretion to 'impose' the death penalty, the Court began developing a doctrine *forbidding* constraints on the sentencer's discretion to '*decline* to impose' it. This second doctrine—counterdoctrine would be a better word—has completely exploded whatever coherence the notion of 'guided discretion' once had. . . . In short, the practice which in *Furman* had been described as the discretion to sentence to death and pronounced constitutionally prohibited, was in *Woodson* and *Lockett* renamed the discretion not to sentence to death and pronounced constitutionally required." Walton v. Arizona, 497 U.S. 639, 661, 662 (1990) (concurring in the judgment). For a critique of these criticisms of *Lockett*, see Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. Rev. 1147 (1991).

[17] Roberts v. Louisiana, 428 U.S. 325, 333 (1976) (plurality opinion of Justices Potter Stewart, Lewis Powell, and John Paul Stevens) (quoting Furman v. Georgia, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting)).

[18] Eddings v. Oklahoma, 455 U.S. 104, 110–11 (1982).

[19] Zant v. Stephens, 462 U.S. 862, 878 (1983). This narrowing function may be served at the sentencing phase or at the guilt phase; the fact that an aggravating circumstance justifying capital punishment duplicates an element of the offense of first degree murder does not render the procedure invalid. Lowenfield v. Phelps, 484 U.S. 231 (1988).

[20] Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion)).

defendant's crime falls within the statutorily narrowed class, the jury may then conduct "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime."[21]

The Court has given states greater leeway in fashioning procedural rules that have the effect of controlling how juries may use mitigating evidence that must be admitted and considered.[22] States may also cure some constitutional errors on appeal through operation of "harmless error" rules and reweighing of evidence by the appellate court.[23] Also, the Court has constrained the use of federal habeas corpus to review state court judgments. As a result, the Court recognized a significant degree of state autonomy in capital sentencing in spite of its rulings on substantive Eighth Amendment law.[24]

While maintaining the *Lockett* requirement that sentencers be allowed to consider all mitigating evidence,[25] the Court has upheld state statutes that control the relative weight that the sentencer may accord to aggravating and mitigating evidence.[26] In *Blystone v. Pennsylvania*, the Court stated: "The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence"[27]; there is no additional requirement that the jury be allowed to weigh the severity of an aggravating circumstance in the absence of any mitigating factor.[28] The legislature may specify the consequences of the jury's finding an aggravating circumstance; it may mandate that a death sentence be imposed if the jury unanimously finds at least one aggravating circumstance and

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[21] Zant v. Stephens, 462 U.S. 862, 879 (1983).

[22] *See, e.g.*, Johnson v. Texas, 509 U.S. 350 (1993) (consideration of youth as a mitigating factor may be limited to jury estimation of probability that defendant would commit future acts of violence).

[23] Richmond v. Lewis, 506 U.S. 40 (1992) (no cure of trial court's use of invalid aggravating factor where appellate court fails to reweigh mitigating and aggravating factors).

[24] As such, the Court has opined that it is not the role of the Eighth Amendment to establish a special "federal code of evidence" governing "the admissibility of evidence at capital sentencing proceedings." *See* Romano v. Oklahoma, 512 U.S. 1, 11–12 (1994). Instead, the test for a constitutional violation attributable to evidence improperly admitted at a capital sentencing proceeding is whether the evidence "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." *Id.* at 12. As a consequence, the Court found nothing constitutionally impermissible with a state having joint sentencing proceedings for two defendants whose underlying conviction arose from the same single chain of events. *See* Kansas v. Carr, 577 U.S. 108, 123 (2016) (rejecting the argument that joinder of two defendants was fundamentally unfair because evidence that one defendant unduly influenced another defendant's conduct may have "infected" the jury's decision making). Indeed, the Court approvingly noted that joint proceedings before a single jury for defendants that commit the same crimes are "not only permissible but are often preferable" in order to avoid the "wanto[n] and freakis[h]" imposition of the death sentence. *See id.* at 646 (citing Gregg v. Georgia, 428 U.S. 153, 206–07 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.)).

[25] *See, e.g.*, Hitchcock v. Dugger, 481 U.S. 393 (1987) (instruction limiting jury to consideration of mitigating factors specifically enumerated in statute is invalid); Penry v. Lynaugh, 492 U.S. 302 (1989) (holding that a sentencing jury must be permitted to consider the defendant's mitigating evidence concerning his intellectual disability and history of childhood abuse separately from its findings on the defendant's personal culpability, future dangerousness, and the reasonableness of the defendant's response to a victim's provocation.); Skipper v. South Carolina, 476 U.S. 1 (1986) (exclusion of evidence of defendant's good conduct in jail denied defendant his *Lockett* right to introduce all mitigating evidence); Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007) (holding that a sentencing jury must be permitted to consider the defendant's mitigating evidence concerning his intellectual disability and history of childhood abuse separately from its findings on the defendant's personal culpability, future dangerousness, and the reasonableness of the defendant's response to a victim's provocation); Brewer v. Quarterman, 550 U.S. 286 (2007) (same). *But cf.* Franklin v. Lynaugh, 487 U.S. 164 (1988) (consideration of defendant's character as revealed by jail behavior may be limited to context of assessment of future dangerousness).

[26] "Neither [*Lockett* nor *Eddings*] establishes the weight which must be given to any particular mitigating evidence, or the manner in which it must be considered; they simply condemn any procedure in which such evidence has no weight at all." Barclay v. Florida, 463 U.S. 939, 961 n.2 (1983) (Stevens, J., concurring in judgment).

[27] Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990).

[28] *Id.*

no mitigating circumstance,[29] or if the jury finds that aggravating circumstances outweigh mitigating circumstances.[30] And a court may instruct that the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling," because in essence the instruction merely cautions the jury not to base its decision "on factors not presented at the trial."[31] However, a jury instruction that can be interpreted as requiring jury unanimity on the existence of each mitigating factor before that factor may be weighed against aggravating factors is invalid as it allows one juror to veto consideration of any and all mitigating factors. Instead, each juror must be allowed to give effect to what he or she believes to be established mitigating evidence.[32] Due process is also a consideration; if the state argues for the death penalty based on the defendant's future dangerousness, due process requires that the jury be informed if the alternative to a death sentence is a life sentence without possibility of parole.[33]

One issue the Court had to consider was how a death sentence is impacted if an "eligibility factor" (a factor making the defendant eligible for the death penalty) or an "aggravating factor" (a factor to be weighed against mitigating factors in determining whether a defendant who is eligible for the death penalty should receive it) is found invalid. In *Brown v. Sanders*, the Court announced "An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances."[34]

Appellate review under a harmless error standard can preserve a death sentence based in part on a jury's consideration of an aggravating factor later found to be invalid,[35] or on a trial

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[29] *Id.*

[30] Boyde v. California, 494 U.S. 370 (1990). A court is not required to give a jury instruction expressly directing the jury to consider mitigating circumstance, as long as the instruction actually given affords the jury the discretion to take such evidence into consideration. Buchanan v. Angelone, 522 U.S. 269 (1998). In this vein, the Court has held that capital sentencing courts are not obliged to inform the jury affirmatively that mitigating circumstances lack the need for proof beyond a reasonable doubt. *See* Kansas v. Carr, 136 S. Ct. 633, 642–43 (2016) (noting that ambiguity in capital sentencing instructions gives rise to constitutional error only if there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents consideration of constitutionally relevant evidence). By the same token, a court did not offend the Constitution by directing the jury's attention to a specific paragraph of a constitutionally sufficient instruction in response to the jury's question about proper construction of mitigating circumstances. Weeks v. Angelone, 528 U.S. 225 (2000). Nor did a court offend the Constitution by instructing the jury to consider "[a]ny other circumstance *of the crime* which extenuates the gravity of the crime," without specifying that such circumstance need not be a circumstance *of the crime*, but could include "some likelihood of future good conduct." Ayers v. Belmontes, 549 U.S. 7, 10, 15 (2006). This was because the jurors had heard "extensive forward-looking evidence," and it was improbable that they would believe themselves barred from considering it. *Id.* at 16.

[31] California v. Brown, 479 U.S. 538, 543 (1987).

[32] Mills v. Maryland, 486 U.S. 367 (1988); McKoy v. North Carolina, 494 U.S. 433 (1990). *Compare* Smith v. Spisak, 558 U.S. 139, 143–49 (2010) (distinguishing jury instructions in *Mills* from instructions directing each juror to independently assess any mitigating factors before jury as a whole balanced the weight of mitigating evidence against each aggravating factor, with unanimity required before balance in favor of an aggravating factor may be found).

[33] Simmons v. South Carolina, 512 U.S. 154 (1994). *See also* Lynch v. Arizona, 136 S. Ct. 1818, 1820 (2016) (holding that the possibility of clemency and the potential for future "legislative reform" does not justify a departure from the rule of *Simmons*); Kelly v. South Carolina, 534 U.S. 246, 252 (2002) (concluding that a prosecutor need not express an intent to rely on future dangerousness; logical inferences may be drawn); Shafer v. South Carolina, 532 U.S. 36, 40 (2001) (holding that an amended South Carolina law still runs afoul of *Simmons*).

[34] 546 U.S. 212, 220 (2006). In some states, "the only aggravating factors permitted to be considered by the sentencer [are] the specified eligibility factors." *Id.* at 217. These are known as weighing states; non-weighing states, by contrast, are those that permit "the sentencer to consider aggravating factors different from, or in addition to, the eligibility factors." *Id.* Prior to *Brown v. Sanders*, in weighing states, the Court deemed "the sentencer's consideration of an invalid eligibility factor" to require "reversal of the sentence (unless a state appellate court determined the error was harmless or reweighed the mitigating evidence against the valid aggravating factors)." *Id.*

[35] Zant v. Stephens, 462 U.S. 862 (1983).

judge's consideration of improper aggravating circumstances.[36] In each case, the sentencing authority had found other aggravating circumstances justifying imposing capital punishment. For instance, in *Zant*, evidence relating to the invalid factor was nonetheless admissible on another basis.[37] Even in states that require the jury to weigh statutory aggravating and mitigating circumstances (and even in the absence of written findings by the jury), the appellate court may preserve a death penalty through harmless error review or through reweighing the aggravating and mitigating evidence.[38] By contrast, where there is a possibility that the jury's reliance on a "totally irrelevant" factor (defendant had served time pursuant to an invalid conviction subsequently vacated) may have been decisive in balancing aggravating and mitigating factors, a death sentence may not stand notwithstanding the presence of other aggravating factors.[39]

In *Oregon v. Guzek*, the Court could "find nothing in the Eighth or Fourteenth Amendments that provides a capital defendant a right to introduce," *at sentencing*, new evidence, available to him at the time of trial, "that shows he was not present at the scene of the crime."[40] The *Guzek* Court observed that although "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," such evidence is a traditional concern of sentencing because it tends to show "*how*, not *whether*," the defendant committed the crime.[41] Alibi evidence, by contrast, concerns "whether the defendant committed the basic crime," and "thereby attacks a previously determined matter in a proceeding [i.e., sentencing] at which, in principle, that matter is not at issue."[42]

The Court's focus on the character and culpability of the defendant led the Court, initially, to hold that the Eighth Amendment "prohibits a capital sentencing jury from considering victim impact evidence" that does not "relate directly to the circumstances of the crime."[43] Four years later, the Court largely overruled[44] these decisions, however, holding that the Eighth Amendment does allow the jury to consider "'victim impact' evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family."[45] The Court reasoned that the admissibility of victim impact evidence was necessary to restore

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[36] Barclay v. Florida, 463 U.S. 939 (1983).

[37] In Eighth Amendment cases as in other contexts involving harmless constitutional error, the court must find that error was "'harmless beyond a reasonable doubt in that it did not contribute to the [sentence] obtained.'" Sochor v. Florida, 504 U.S. 527, 540 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). Thus, where psychiatric testimony was introduced regarding an invalid statutory aggravating circumstance, and where the defendant was not provided the assistance of an independent psychiatrist in order to develop rebuttal testimony, the lack of rebuttal testimony might have affected how the jury evaluated another aggravating factor. Consequently, the reviewing court erred in reinstating a death sentence based on this other valid aggravating factor. Tuggle v. Netherland, 516 U.S. 10 (1995).

[38] *See* Clemons v. Mississippi, 494 U.S. 738, 741 (1990) (authorizing appellate reassessment of a death sentence on an improper aggravating circumstance); *see also* McKinney v. Arizona, 140 S. Ct. 702, 706–07 (2020) (extending *Clemons* review so that a reassessment could occur when a trial court improperly ignored a mitigating circumstance).

[39] Johnson v. Mississippi, 486 U.S. 578 (1988).

[40] 546 U.S. 517, 523 (2006).

[41] 546 U.S. at 524, 526 (Court's emphasis deleted in part).

[42] 546 U.S. at 526.

[43] *See* Booth v. Maryland, 482 U.S. 496, 501–02 (1987); *see also* South Carolina v. Gathers, 490 U.S. 805, 811 (1989) (concluding that *Booth* extended to a prosecutor's statements about a victim's personal qualities).

[44] The Court has refrained from overturning *Booth*'s holding that the admission of a victim's family members' characterizations and opinions about the "underlying crime, the defendant, and the appropriate sentence" violate the Eighth Amendment. *See* Bosse v. Oklahoma, 137 S. Ct. 1, 1 (2016) (per curiam). Instead, the Court has overruled *Booth*'s central holding that "evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing." *See* Payne v. Tennessee, 501 U.S. 808, 830 n.2 (1991).

[45] *See Payne*, 501 U.S. at 817.

balance to capital sentencing. In the Court's view, exclusion of such evidence "unfairly weighted the scales in a capital trial" because there are no corresponding limits on "relevant mitigating evidence a capital defendant may introduce concerning his own circumstances."[46]

Amdt8.4.9.7 Cognitively Disabled and Death Penalty

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Supreme Court has grappled with several cases involving application of the death penalty to persons of diminished capacity. The first such case involved a defendant whose competency at the time of his offense, at trial, and at sentencing had not been questioned, but who subsequently developed a mental disorder. The Court held in *Ford v. Wainwright*[1] that the Eighth Amendment prohibits the state from carrying out the death penalty on an individual who has a severe mental illness and that properly raised issues of the individual's mental health at the time of execution must be determined in a proceeding satisfying the minimum requirements of due process.[2] The *Ford* Court noted that execution of persons with severe mental illness had been considered cruel and unusual at common law and at the time of adoption of the Bill of Rights, and continued to be so viewed.[3] And, although no states purported to permit the execution of persons with severe mental illness, Florida and some others left the determination to the Governor. Florida's procedures, the *Ford* Court held, violated due process because the decision was vested in the Governor without the defendant's having the opportunity to be heard, the Governor's decision being based on reports of three state-appointed psychiatrists.[4]

The Court in *Panetti v. Quarterman* clarified when a prisoner's current mental state can bar his execution under the *Ford* rule.[5] Relying on the understanding that the execution of a prisoner who cannot comprehend the reasons for his punishment offends both moral values and serves "no retributive purpose," the Court concluded that the operative test was whether a prisoner can "reach a rational understanding for the reason for his execution."[6] Under *Panetti*, if a prisoner's mental state is so distorted by mental illness that he cannot grasp the execution's "meaning and purpose" or the "link between [his] crime and its punishment," he

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[46] *Id.* at 822.

[1] 477 U.S. 399 (1986).

[2] There was an opinion of the Court only on the first issue: that the Eighth Amendment creates a right not to be executed while suffering severe mental illness. The Court's opinion did not attempt to define the mental illnesses that make a person ineligible for the death penalty. Justice Lewis Powell's concurring opinion would have held the prohibition applicable only for "those who are unaware of the punishment they are about to suffer and why they are to suffer it." 477 U.S. at 422.

[3] *Id.* at 406–408.

[4] The Court had no opinion on the issue of procedural requirements. Justice Thurgood Marshall, joined by Justices William Brennan, Harry Blackmun, and John Paul Stevens, would hold that "the ascertainment of a prisoner's sanity . . . calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." 477 U.S. at 411–12. Concurring Justice Lewis Powell thought that due process might be met by a proceeding "far less formal than a trial," that the state "should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel." *Id.* at 427. Concurring Justice Sandra Day O'Connor, joined by Justice Byron White, emphasized Florida's denial of the opportunity to be heard, and did not express an opinion on whether the state could designate the governor as decisionmaker. Thus Justice Powell's opinion, requiring the opportunity to be heard before an impartial officer or board, set forth the Court's holding.

[5] 551 U.S. 930 (2007).

[6] *Id.* at 957–58.

cannot be executed.[7] Furthermore, once a death row inmate has made "a substantial showing that his current mental state would bar his execution" due process entitles him to a hearing at which he may present "evidence and argument from the prisoner's counsel, including expert psychiatric evidence" in his support of his claim of incompetence and in rebuttal of any state-offered evidence.[8]

Twelve years after *Panetti*, the Court further clarified two aspects of the *Ford-Panetti* inquiry in *Madison v. Alabama*.[9] First, *Ford-Panetti* stands for the proposition, the Court declared, that a prisoner cannot be executed for a capital offense if his "'concept of reality' is 'so impair[ed]' that he cannot grasp the execution's 'meaning or purpose' or the link between [his] crime and its punishment.'"[10] The Court explained that a prisoner challenging his execution on the ground of a mental disability cannot prevail "merely because he cannot remember committing his crime."[11] Instead, a prisoner's memory loss may be a factor in determining whether the prisoner has a rational understanding of the reason for his execution.[12] Second, the *Madison* Court concluded that while *Ford* and *Panetti* pertained to prisoners suffering from psychotic delusions, the logic of those opinions extended to a prisoner who suffered from dementia.[13]

In 1989, when first confronted with the issue of whether execution of the persons with intellectual disabilities is constitutional, the Court found "insufficient evidence of a national consensus" against executing such people.[14] In 2002, however, the Court determined in *Atkins v. Virginia*[15] that "much ha[d] changed" since 1989, that the practice had become "truly unusual," and that it was "fair to say" that a "national consensus" had developed against it.[16] In 1989, only two states and the Federal Government prohibited execution of persons with intellectual disabilities while allowing executions generally.[17] By 2002, an additional sixteen states had prohibited execution of persons with intellectual disabilities, and no states had reinstated the power.[18] But the important element of consensus, the Court explained, was "not so much the number" of states that had acted, but instead "the consistency of the direction of change."[19] The Court's own evaluation of the issue reinforced the consensus. Neither of the two generally recognized justifications for the death penalty—retribution and deterrence—applies

[7] *Id.* at 957.

[8] *Id.* at 950.

[9] 139 S. Ct. 718 (2019).

[10] *Id.* at 723 (quoting *Panetti*, 551 U.S. at 958).

[11] *Id.* at 726–27.

[12] *Id.* at 727. In so holding, The Court noted that evidence that a prisoner has difficulty preserving any memories may contribute to a finding that the prisoner may not rationally understand the reasons doe his death sentence.

[13] *Panetti*'s "standard focuses on whether a mental disorder has had a particular *effect*: an inability to rationally understand why the State is seeking execution. Conversely, that standard has no interest in establish any precise *cause*: Psychosis or dementia, delusions or overall cognitive decline are all the same under *Panetti*, so long as they produce the requisite lack of comprehension." *Id.* at 728.

[14] Penry v. Lynaugh, 492 U.S. 302, 335 (1989). Although unwilling to conclude that execution of a person with an intellectual disability is "categorically prohibited by the Eighth Amendment," *id.* at 335, the Court noted that, because of the requirement of individualized consideration of culpability, a defendant with such a disability is entitled to an instruction that the jury may consider and give mitigating effect to evidence of intellectual disability or a background of abuse. *Id.* at 328. *See also* Tennard v. Dretke, 542 U.S. 274 (2004) (evidence of low intelligence should be admissible for mitigating purposes without being screened on basis of severity of disability).

[15] 536 U.S. 304 (2002).

[16] 536 U.S. at 314, 316.

[17] 536 U.S. at 314.

[18] *Id.*

[19] 536 U.S. at 315.

with full force to offenders with intellectual disabilities.[20] "With respect to retribution—the interest in seeing that the offender gets his 'just desserts'—necessarily depends on the culpability of the offender."[21] Yet reduced intellectual capacity reduces culpability. Deterrence is premised on the ability of offenders to control their behavior. Yet reduced intellectual capacity makes it less likely that an offender will associate his conduct with prospect of the death penalty.[22]

Once again, the Court left to the states "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."[23] In *Schriro v. Smith*, the Court again quoted this language, determining that the Ninth Circuit exceeded its authority in holding that Arizona courts were required to conduct a jury trial to resolve a defendant's claim that he was ineligible for the death penalty because of intellectual disability.[24] States, the Court added, are entitled to "adopt[ ] their own measures" for adjudicating claims of intellectual disability though "those measures might, in their application, be subject to constitutional challenge."[25]

In *Hall v. Florida*,[26] however, the Court limited the states' ability to define intellectual disability by invalidating Florida's "bright line" cutoff based on Intelligence Quotient (IQ) test scores. A Florida statute stated that anyone with an IQ above 70 was prohibited from offering additional evidence of mental disability and was thus subject to capital punishment.[27] The Court invalidated this rigid standard, observing that "[i]ntellectual disability is a condition, not a number."[28] The majority found that, although IQ scores are helpful in determining mental capabilities, they are imprecise in nature and may only be used as a factor of analysis in death penalty cases.[29] This reasoning was buttressed by a consensus of mental health professionals who concluded that an IQ test score should be read not as a single fixed number, but as a range.[30]

Building on *Hall*, in *Moore v. Texas* the Supreme Court rejected the standards used by Texas state courts to evaluate whether a death row inmate was intellectually disabled, concluding that the standards created an "unacceptable risk that persons with intellectual disability will be executed."[31] First, Justice Ruth Bader Ginsburg, on behalf of the Court, held that a Texas court's conclusion that a prisoner with an IQ score of 74 could be executed was "irreconcilable with *Hall*" because the state court had failed to consider standard errors that are inherent in assessing intellectual disability.[32] Second, the *Moore I* Court determined that Texas deviated from prevailing clinical standards respecting the assessment of a death row inmate's intellectual capabilities by (1) emphasizing the petitioner's perceived adaptive

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[20] 536 U.S. at 318.

[21] 536 U.S. at 319.

[22] 536 U.S. at 319–20. The Court also noted that reduced capacity both increases the risk of false confessions and reduces a defendant's ability to assist counsel in making a persuasive showing of mitigation.

[23] 536 U.S. at 317 (citation omitted) (quoting Ford v. Wainwright, 477 U.S. 399, 416–17 (1986)).

[24] 546 U.S. 6, 7 (2005) (per curiam).

[25] 546 U.S. at 7.

[26] 572 U.S. 701 (2014).

[27] Cherry v. State, 959 So.2d 702, 712–13 (Fla. 2007) (per curiam) (construing Fla. Stat. § 921.137 (2013)).

[28] *Hall*, 572 U.S. at 701, 703

[29] *Id.*

[30] This range, referred to as a "standard error or measurement" or "SEM," is used by many states in evaluating the existence of intellectual disability. *Hall*, 572 U.S. 701, 723 (2014)

[31] 137 S. Ct. 1039, 1044 (2017) [hereinafter *Moore I*].

[32] *Id.* at 1049.

strengths and his behavior in prison;[33] (2) dismissing several traumatic experiences from the petitioner's past;[34] and (3) requiring the petitioner to show that his adaptive deficits were not due to a personality disorder or a mental health issue.[35] Third, the *Moore I* Court criticized the prevailing standard used in Texas courts for assessing intellectual disability in death penalty cases, which had favored the "'consensus of Texas citizens' on who 'should be exempted from the death penalty,'" with regard to those with "mild" intellectual disabilities in the state's capital system, concluding that those with even "mild" levels of intellectual disability could not be executed under *Atkins*.[36] Finally, *Moore* rejected the Texas courts' skepticism of professional standards for assessing intellectual disability, standards that the state courts had viewed as being "exceedingly subjective."[37] The Supreme Court instead held that "lay stereotypes" (and not established professional standards) on an individual's intellectual capabilities should "spark skepticism."[38] As a result, following *Hall* and *Moore*, while the states retain "some flexibility" in enforcing *Atkins*, the medical community's prevailing standards appear to "supply" a key constraint on the states in capital cases.[39]

Amdt8.4.9.8 Minors and Death Penalty

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Court's conclusion that execution of juveniles constitutes cruel and unusual punishment evolved in much the same manner. Initially, a closely divided Court invalidated one statutory scheme that permitted capital punishment to be imposed for crimes committed before age sixteen, but upheld other statutes authorizing capital punishment for crimes committed by sixteen- and seventeen-year-olds. Important to resolution of the first case was the fact that Oklahoma set no minimum age for capital punishment, but by separate provision allowed juveniles to be treated as adults for some purposes.[1] Although four Justices favored a flat ruling that the Eighth Amendment barred the execution of anyone younger than sixteen at

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[33] *Id.* at 1050 ("[T]he medical community focuses the adaptive-functioning inquiry on adaptive deficits."); *see also id.* at 1050 ("Clinicians, however, caution against reliance on adaptive strengths developed in a controlled setting, as prison surely is.") (internal citations and quotations omitted).

[34] *Id.* at 1051 ("Clinicians rely on such factors as cause to explore the prospect of intellectual disability further, not to counter the case for a disability determination.").

[35] *Id.* ("The existence of a personality disorder or mental-health issue, in short, is not evidence that a person does not also have intellectual disability.") (internal citations and quotations omitted).

[36] *Id.*. In so concluding, the Court noted that "[m]ild levels of intellectual disability . . . nevertheless remain intellectual disabilities," and "States may not execute anyone in the *entire* category of intellectually disabled offenders." *Id.* (internal citations and quotations omitted).

[37] *See Ex parte* Briseno, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004).

[38] *See Moore I*, 137 S. Ct. at 1052.

[39] *Id.* at 1052–53. Two years after *Moore I*, the case returned to the High Court, where, in a per curiam opinion, the Court again reversed the Court of Criminal Appeals of Texas. *See* Moore v. Texas, 139 S. Ct. 666, 667 (2019) (per curiam) [hereinafter *Moore II*]. That court had concluded that the prisoner did not have an intellectual disability and was, therefore, eligible for the death penalty. *Id.* Finding that the lower court's opinion "repeat[ed] the analysis" the Supreme Court "previously found wanting" in its 2017 opinion, *Moore II* criticized the Texas court's (1) reliance on the petitioner's adaptive strengths in lieu of his adaptive deficits; (2) emphasis on the petitioner's adaptive improvements made in prison; (3) tendency to consider the petitioner's social behavior to be caused by "emotional problems," instead of his general mental abilities; and (4) continued reliance on the *Briseno* case the Court had previously criticized in *Moore I*. *Id.* at 670–72. Ultimately, the Court concluded that the record from the trial court demonstrated that the petitioner was "a person with intellectual disability," reversing the lower court's judgment and remanding the case. *Id.* at 672.

[1] Thompson v. Oklahoma, 487 U.S. 815 (1988).

the time of his offense, concurring Justice Sandra Day O'Connor found Oklahoma's scheme defective as not having necessarily resulted from the special care and deliberation that must attend decisions to impose the death penalty. The following year Justice Sandra Day O'Connor again provided the decisive vote when the Court in *Stanford v. Kentucky* held that the Eighth Amendment does not categorically prohibit imposition of the death penalty for individuals who commit crimes at age sixteen or seventeen. Like Oklahoma, neither Kentucky nor Missouri[2] directly specified a minimum age for the death penalty. To Justice Sandra Day O'Connor, however, the critical difference was that there clearly was no national consensus forbidding imposition of capital punishment on sixteen- or seventeen-year-old murderers, whereas there was such a consensus against execution of fifteen-year-olds.[3]

Although the Court in *Atkins v. Virginia* contrasted the national consensus said to have developed against executing persons with intellectual disabilities with what it saw as a lack of consensus regarding execution of juvenile offenders over age fifteen,[4] less than three years later the Court held that such a consensus had developed. The Court's decision in *Roper v. Simmons*[5] drew parallels with *Atkins*. A consensus had developed, the Court held, against the execution of juveniles who were age sixteen or seventeen when they committed their crimes. Since *Stanford*, five states had eliminated authority for executing juveniles, and no states that formerly prohibited it had reinstated the authority. In all, thirty states prohibited execution of juveniles: twelve that prohibited the death penalty altogether, and eighteen that excluded juveniles from its reach. This meant that twenty states did not prohibit execution of juveniles, but the Court noted that only five of these states had actually executed juveniles since *Stanford*, and only three had done so in the ten years immediately preceding *Roper*. Although the pace of change was slower than had been the case with execution of persons with intellectual disabilities, the consistent direction of change toward abolition was deemed more important.[6]

As in *Atkins*, the Court in *Roper* relied on its "own independent judgment" in addition to its finding of consensus among the states.[7] Three general differences between juveniles and adults make juveniles less morally culpable for their actions. Because juveniles lack maturity and have an underdeveloped sense of responsibility, they often engage in "impetuous and

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[2] *Wilkins v. Missouri* was decided along with *Stanford*.

[3] *Compare Thompson*, 487 U.S. at 849 (O'Connor, J., concurring) (two-thirds of all state legislatures had concluded that no one should be executed for a crime committed at age fifteen, and no state had "unequivocally endorsed" a lower age limit) *with Stanford*, 492 U.S. at 370 (fifteen of thirty-seven states permitting capital punishment decline to impose it on sixteen-year-old offenders; twelve decline to impose it on seventeen-year-old offenders).

[4] 536 U.S. at 314, n.18.

[5] 543 U.S. 551 (2005). The case was decided by 5-4 vote. Justice Anthony Kennedy wrote the Court's opinion, and was joined by Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer. Justice Sandra Day O'Connor, who had joined the Court's 6-3 majority in *Atkins*, wrote a dissenting opinion, as did Justice Antonin Scalia, who was joined by Chief Justice William Rehnquist and Justice Clarence Thomas.

[6] Dissenting in *Roper*, Justice Sandra Day O'Connor disputed the consistency of the trend, pointing out that since *Stanford* two states had passed laws reaffirming the permissibility of executing sixteen- and seventeen-year-old offenders. 543 U.S. at 596.

[7] 543 U.S. at 564. The *Stanford* Court had been split over the appropriate scope of inquiry in cruel and unusual punishment cases. Justice Antonin Scalia's plurality would have focused almost exclusively on an assessment of what the state legislatures and Congress have done in setting an age limit for application of capital punishment. 492 U.S. at 377 ("A revised national consensus so broad, so clear and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved."). The *Stanford* dissenters would have broadened this inquiry with a proportionality review that considers the defendant's culpability as one aspect of the gravity of the offense, that considers age as one indicator of culpability, and that looks to other statutory age classifications to arrive at a conclusion about the level of maturity and responsibility that society expects of juveniles. 492 U.S. at 394–96. The *Atkins* majority adopted the approach of the *Stanford* dissenters, conducting a proportionality review that brought their own "evaluation" into play along with their analysis of consensus on the issue of executing persons with intellectual disabilities.

ill-considered actions and decisions." Juveniles are also more susceptible than adults to "negative influences" and peer pressure. Finally, the character of juveniles is not as well formed, and their personality traits are "more transitory, less fixed."[8] For these reasons, irresponsible conduct by juveniles is "not as morally reprehensible," they have "a greater claim than adults to be forgiven," and "a greater possibility exists that a minor's character deficiencies will be reformed."[9] Because of the diminished culpability of juveniles, the penological objectives of retribution and deterrence do not provide adequate justification for imposition of the death penalty. The majority preferred a categorical rule over individualized assessment of each offender's maturity, explaining that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[10]

The *Roper* Court found confirmation for its holding in "the overwhelming weight of international opinion against the juvenile death penalty."[11] Although "not controlling," the rejection of the juvenile death penalty by other nations and by international authorities was "instructive," as it had been in earlier cases, for Eighth Amendment interpretation.[12]

Amdt8.4.9.9 Non-Homicide Offenses and Death Penalty

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Supreme Court has considered whether, based on the nature of the underlying offense, imposing capital punishment may be inappropriate. In *Kennedy v. Louisiana*, the Court stated:

> [T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.' Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that 'currently prevail.' The Amendment 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.'[1]

However, in a dissenting opinion, Justice Samuel Alito opined that the "Court has . . . made it clear that '[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling States from giving effect to altered beliefs and responding to changed social conditions.'"[2]

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[8] 543 U.S. at 569, 570.

[9] 543 U.S. at 570.

[10] 543 U.S. at 572–573. Strongly disagreeing, Justice Sandra Day O'Connor wrote that "an especially depraved juvenile offender may . . . be just as culpable as many adult offenders considered bad enough to deserve the death penalty. . . . [E]specially for 17-year-olds . . . the relevant differences between 'adults' and 'juveniles' appear to be a matter of degree, rather than of kind." *Id.* at 600.

[11] 543 U.S. at 578 (noting "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty," *id.* at 575).

[12] 543 U.S. at 577, 578. Citing as precedent Trop v. Dulles, 356 U.S. 86, 102–03 (1958) (plurality opinion); *Atkins*, 536 U.S. at 317 n.21; Enmund v. Florida, 458 U.S. 782, 796–97, n.22 (1982), Thompson v. Oklahoma, 487 U.S. 815, 830–31 & n.31 (1988) (plurality opinion); and Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (plurality opinion).

[1] Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

[2] 554 U.S. at 406 (Alito, J., dissenting) (quoting Harmelin v. Michigan, 501 U.S. 957, 990 (1991)).

In *Coker v. Georgia*,[3] the Court held that the state may not impose a death sentence upon a rapist who did not take a human life. In *Kennedy v. Louisiana*,[4] the Court held that this was true even when the rape victim was a child.[5] In *Coker*, the Court announced that the standard under the Eighth Amendment was that punishments are barred when they "are 'excessive' in relation to the crime committed."[6] The Court stated:

> Under *Gregg v. Georgia*, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground. Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.[7]

Although the *Coker* Court thought that the death penalty for rape passed the first test ("it may measurably serve the legitimate ends of punishment"),[8] it found that it failed the second test (proportionality).[9] Georgia was the sole state providing for death for the rape of an adult woman, and juries in at least nine out of ten cases refused to impose death for rape. Aside from this view of public perception, the Court independently concluded that death is an excessive penalty for an offender who rapes but does not kill; rape cannot compare with murder "in terms of moral depravity and of the injury to the person and to the public."[10]

In *Kennedy v. Louisiana*, the Court concluded on the basis of the "teaching of [its] precedents" and the "evolving standards of decency," evidenced by legislative activity on the issue and the want of related executions, that the Eighth Amendment precludes the death penalty for a person who rapes a child.[11]

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[3] 433 U.S. 584 (1977). Justice Byron White's opinion was joined only by Justices Potter Stewart, Harry Blackmun, and John Paul Stevens. Justices William Brennan and Thurgood Marshall concurred on their view that the death penalty is per se invalid, *id.* at 600, and Justice Lewis Powell concurred on a more limited basis than Justice White's opinion. *Id.* at 601. Chief Justice Warren Burger and Justice William Rehnquist dissented. *Id.* at 604.

[4] 554 U.S. 407. Justice Anthony Kennedy's opinion was joined by Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer. Justice Samuel Alito filed a dissenting opinion, in which Chief Justice John Roberts and Justices Antonin Scalia and Clarence Thomas joined.

[5] The Court noted, however, that "[o]ur concern here is limited to crimes against individual persons [where a victim's life is not taken]. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State." 554 U.S. at 437.

[6] Coker v. Georgia, 433 U.S. 584, 592 (1976).

[7] *Id.*

[8] 433 U.S. at 593 n.4.

[9] *Id.* at 597.

[10] *Id.* at 598.

[11] 554 U.S. 407, 438 (2008). The Court noted that since *Gregg*, it had "spent more than 32 years articulating limiting factors that channel the jury's discretion to avoid the death penalty's arbitrary imposition in the case of murder. Though that practice remains sound, beginning the same process for crimes for which no one has been executed in more than 40 years would require experimentation in an area where a failed experiment would result in the execution of individuals undeserving of the death penalty. Evolving standards of decency are difficult to reconcile with a regime that seeks to expand the death penalty to an area where standards to confine its use are indefinite and obscure." *Id.* at 440–41.

Amdt8.4.9.10 Execution Methods

Eighth Amendment:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

Throughout the history of the United States, various methods of execution have been deployed by the states in carrying out the death penalty. In the early history of the Nation, hanging was the "nearly universal form of execution."[1] In the late nineteenth century and continuing into the twentieth century, the states began adopting electrocution as a substitute for hanging based on the "well-grounded belief that electrocution is less painful and more humane than hanging."[2] And by the late 1970s, following *Gregg*, states began adopting statutes allowing for execution by lethal injection, perceiving lethal injection to be a more humane alternative to electrocution or other popular pre-*Gregg* means of carrying out the death penalty, such as firing squads or gas chambers.[3] Today the overwhelming majority of the states that allow for the death penalty use lethal injection as the "exclusive or primary method of execution."[4]

Despite a national evolution over the past two hundred years with respect to the methods deployed in carrying out the death penalty, the choice to adopt arguably more humane means of capital punishment has not been the direct result of a decision from the Supreme Court. Citing public understandings from the time of the Framing, the Court has articulated some limits to the methods that can be employed in carrying out death sentences, such as those that "superadd" terror, pain, or disgrace to the penalty of death,[5] for example by torturing someone to death.[6]

Nonetheless, the Supreme Court has "never invalidated a State's chosen procedure" for carrying out the death penalty as a violation of the Eighth Amendment.[7] In 1878, the Court, relying on a long history of using firing squads in carrying out executions in military tribunals, held that the "punishment of shooting as a mode of executing the death penalty" did not constitute a cruel and unusual punishment.[8] Twelve years later, the Court upheld the use of the newly created electric chair, deferring to the judgment of the New York state legislature and finding that it was "plainly right" that electrocution was not "inhuman and barbarous."[9] Fifty-seven years later, a plurality of the Court concluded that it would not be "cruel and unusual" to execute a prisoner whose first execution failed due to a mechanical malfunction, as an "unforeseeable accident" did not amount to the "wanton infliction of pain" barred by the Eighth Amendment.[10]

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[1] Baze v. Rees, 553 U.S. 35, 41 (2008) (quoting Campbell v. Wood, 511 U.S. 1119, 1119 (1994) (Blackmun, J., dissenting from the denial of certiorari)).

[2] *See* Malloy v. South Carolina, 237 U.S. 180, 185 (1915).

[3] *See Baze*, 553 U.S. at 42.

[4] *Id.*

[5] *See* Bucklew v. Precythe, No. 17–8151, slip op. at 9–10 (U.S. Apr. 1, 2019) (citing 4 W. Blackstone, Commentaries on the Laws of England 370 (1769)).

[6] *See* Wilkerson v. Utah, 99 U.S. 130, 135–36 (1879) (noting in dicta that certain forms of torture, such as drawing and quartering, disemboweling alive, beheading, public dissection, and burning alive, are "forbidden by . . . [the] Constitution"); *see also Bucklew*, slip op. at 9–10 (similar).

[7] *See Baze*, 553 U.S. at 48 (plurality opinion).

[8] *See Wilkerson*, 99 U.S. at 134–35.

[9] *See In re* Kemmler, 136 U.S. 436, 447 (1890).

[10] *See* Louisiana *ex. rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947) (plurality opinion). Justice Felix Frankfurter concurred in judgment, providing the fifth vote for the Court's judgment. *Id.* at 466 (Frankfurter, J.,

The declaration in *Trop v. Dulles* that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"[11] and the continued reliance on that declaration by a majority of the Court in several key Eighth Amendment cases[12] set the stage for potential "method of execution" challenges to the newest mode for the death penalty: lethal injection. Following several decisions clarifying the proper procedural mechanism to raise challenges to methods of execution,[13] the Court, in *Baze v. Rees*, rejected a method of execution challenge to Kentucky's lethal injection protocol, a three-drug protocol consisting of (1) an anesthetic that would render a prisoner unconscious; (2) a muscle relaxant; and (3) an agent that would induce cardiac arrest.[14] A plurality opinion, written by Chief Justice John Roberts and joined by Justices Anthony Kennedy and Samuel Alito, concluded that to constitute cruel and unusual punishment, a particular method for carrying out the death penalty must present a "substantial" or "objectively intolerable" risk of harm.[15] In so concluding, the plurality opinion rejected the view that a prisoner could succeed on an Eighth Amendment method of execution challenge by merely demonstrating that a "marginally" safer alternative existed, because such a standard would "embroil" the courts in ongoing scientific inquiries and force courts to second guess the informed choices of state legislatures respecting capital punishment.[16] As a result, the plurality reasoned that to address a "substantial risk of serious harm" effectively, the prisoner must propose an alternative method of execution that is feasible, can be readily implemented, and can significantly reduce a substantial risk of severe pain.[17] Given the "heavy burden" that the plurality placed on those pursuing an Eighth Amendment method of execution claim, the plurality upheld Kentucky's protocol in light of (1) the consensus of state lethal injection procedures; (2) the safeguards Kentucky put in place to protect against any risks of harm; and (3) the lack of any feasible, safer alternative to the three-drug protocol.[18] Four other Justices, for varying reasons, concurred in the judgment of the Court.[19]

Seven years later, in a seeming reprise of the *Baze* litigation, a majority of the Court in *Glossip v. Gross* formally adopted the *Baze* plurality's reasoning with respect to Eighth Amendment claims involving methods of execution, resulting in the rejection of a challenge to Oklahoma's three-drug lethal injection protocol.[20] Following *Baze*, anti-death penalty

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concurring). He grounded his decision on whether the Eighth Amendment had been incorporated against the states through the Fourteenth Amendment, ultimately concluding that Louisiana's choice of execution cannot be said to be "repugnant to the conscience of mankind." *Id.* at 471.

[11] *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

[12] *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 419 (2008); Hudson v. McMillian, 503 U.S. 1, 8 (1992); Rhodes v. Chapman, 452 U.S. 337, 346 (1981); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion).

[13] *See, e.g.*, Hill v. McDonough, 547 U.S. 573 (2006) (ruling that a challenge to the constitutionality of an execution method could be brought as a civil rights claim under 42 U.S.C. § 1983, rather than under the anti-delay provisions governing a habeas corpus petition).

[14] 553 U.S. 35, 44 (2008).

[15] *Id.* at 50.

[16] *Id.* at 51.

[17] *Id.* at 52.

[18] *Id.* at 53–61.

[19] Justice John Paul Stevens, while announcing his skepticism regarding the constitutionality of the death penalty as a whole, concluded that, based on existing precedent, the petitioners' evidence failed to prove a violation of the Eighth Amendment. *Id.* at 71–87 (Stevens, J., concurring). Justice Clarence Thomas, on behalf of himself and Justice Antonin Scalia, rejected the idea that the Court had the capacity to adjudicate claims involving methods of execution properly and instead argued that an execution method violates the Eighth Amendment only if it is deliberately designed to inflict pain. *Id.* at 94–107 (Thomas, J., concurring). Justice Stephen Breyer concluded that insufficient evidence in either the record or in available medical literature demonstrated that Kentucky's lethal injection method created significant risk of unnecessary suffering. *Id.* at 107–13 (Breyer, J., concurring).

[20] *See* 576 U.S. 863 (2015).

advocates successfully persuaded pharmaceutical companies to stop providing states with the anesthetic that constituted the first of the three drugs used in the protocol challenged in the 2008 case, resulting in several states, including Oklahoma, substituting a sedative called midazolam in the protocol.[21] In *Glossip*, the Court held that Oklahoma's use of midazolam in its execution protocol did not violate the Eighth Amendment, because the challengers had failed to present a known and available alternative to midazolam and did not adequately demonstrate that the drug was ineffective in rendering a prisoner insensate to pain.[22]

Four years after *Glossip*, the Court further clarified its method-of-execution jurisprudence in *Bucklew v. Precythe*.[23] In that case, a death row inmate challenged the State of Missouri's use of the drug pentobarbital in executions because, regardless of its effect on *other inmates*, the drug would result in him experiencing "severe pain" due to his "unusual medical condition."[24] The Court, in an opinion by Justice Neil Gorsuch, began by framing the *Baze-Glossip* test as fundamentally asking whether a state's chosen method of execution is one that "cruelly superadds pain to the death sentence" relative to an alternative method of execution.[25] With this framework in mind, the Court first rejected the petitioner's argument that *Baze* and *Glossip*, which involved facial challenges, did not govern his as-applied challenge.[26] Justice Neil Gorsuch reasoned that determining whether the state is cruelly "superadding" pain to a punishment necessarily requires comparing that method with a viable alternative, an inquiry that simply does not hinge on whether a death row inmate's challenge rests on facts unique to his particular medical condition.[27] In so concluding, the Court clarified that an inmate seeking to identify an alternative method of execution is not limited to choosing a method that the state *currently* authorizes and can instead point, for example, to a well-established protocol in another state.[28]

Applying the *Baze-Glossip* framework, the Court then rejected the petitioner's proposed alternative of using the lethal gas, nitrogen hypoxia, because (1) the proposal was insufficiently detailed to permit a finding that the state could carry out the execution easily

[21] *Id.* at 869–71.

[22] *Id.* at 881–93.

[23] 139 S. Ct. 1112 (2019).

[24] *Id.* at 1120. Specifically, the petitioner argued that the state's protocol would cause him severe pain because he suffered from a disease that causes vascular tumors, which could rupture upon being injected with the drug that Missouri used in its death penalty protocol. *Id.*

[25] *Id.* at 1125 (observing that *Baze* and *Glossip* "teach[ ]" that a prisoner must show a "feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason.").

[26] *Id.* at 1126.

[27] *Id.* (concluding that the argument that the Constitution categorically forbids some particular methods of execution was foreclosed by *Baze* and *Glossip*, as well as the "original and historical understanding" of the Eighth Amendment, which rejected ancient and barbaric methods of execution only because, in comparison to alternatives available at the Founding, they went far beyond what was necessary to carry out a death sentence). In so concluding, the Court rejected the argument that the comparator in an as-applied challenge should be a typical execution. *Id.* at 1127. For the Court, this argument rested on the assumption that executions must be carried out painlessly, a standard the Court "has rejected time and time again." *Id*. Instead, to determine whether the state is cruelly "superadding" pain, *Bucklew* concluded that a death row inmate must show that the state had some other "feasible and readily available method" to carry out the execution that would have "significantly reduced a substantial risk of pain."*Id.* Justice Neil Gorsuch also saw other problems with the petitioner's distinction between an as-applied challenge and a facial challenge. Viewing this distinction as simply a question of the breadth of the remedy afforded the petitioner, the Court concluded that the meaning of the Constitution should not hinge on the particular remedy being sought. *Id.* at 1128. Moreover, the Court raised the concern that creating a distinction based on the nature of the petitioner's preferred remedy would result in "pleading games" over the labels a petitioner assigned to his complaint. *Id.*

[28] *Id.* at 1128.

and quickly;[29] (2) the proposed alternative was an "untried and untested" method of execution;[30] and (3) the underlying record showed that any risks created by pentobarbital and mitigated by nitrogen hypoxia were speculative in nature.[31]

As a result of *Baze*, *Glossip*, and *Bucklew*, it appears that only those modes of the death penalty that demonstrably result in substantial risks of harm for the prisoner relative to viable alternatives can be challenged as unconstitutional.[32] This standard appears to result in the political process (as opposed to the judicial process) being the primary means of making wholesale changes to a particular method of execution.[33]

[29] *Id.* at 1129.

[30] *Id.* at 1130.

[31] *Id.* at 1131–33 (noting (1) evidence in the record that the state was making accommodations to further reduce any risks to the petitioner and (2) insufficient evidence indicating that pentobarbital would create risks of severe pain and that nitrogen hypoxia would not carry the same risks).

[32] *Id.* at 1130.

[33] *Id.* at 1134 ("Under our Constitution, the question of capital punishment belongs to the people and their representatives, not the courts, to resolve. The proper role of courts is to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously."); *see also* Barr v. Lee, 140 S. Ct. 2590, 2590–94 (2020) (per curiam) (relying on *Bucklew*'s views on the proper role of the judiciary with respect to method-of-execution challenges to reject a challenge raised "hours before" execution concerning the safety of using pentobarbital to carry out the death penalty).

NINTH AMENDMENT
UNENUMERATED RIGHTS

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NINTH AMENDMENT—UNENUMERATED RIGHTS

Amdt9.1 Overview of Ninth Amendment, Unenumerated Rights

The Ninth Amendment provides that the enumeration of certain rights in the Constitution should not be construed to mean that the Constitution does not protect rights that are not enumerated. The Amendment was included in the Bill of Rights to address fears that expressly protecting certain rights might be misinterpreted implicitly to sanction the infringement of others.[1]

Few Supreme Court cases offer significant analysis of the Ninth Amendment. Prior to 1965, litigants occasionally invoked the Amendment, often along with the Tenth Amendment or other provisions of the Bill of Rights, to challenge the constitutionality of government actions, but the Court consistently rejected those claims.[2] In 1965, in *Griswold v. Connecticut*, a majority of the Court cited the Ninth Amendment, along with the substantive rights protected by the First, Third, Fourth, and Fifth Amendments, and held that the Constitution protects "penumbral rights of 'privacy and repose'" that bar a state from prohibiting the use of contraception by married couples.[3] By contrast, in the 1973 case *Roe v. Wade*, the Court grounded a constitutional right to abortion in the Fourteenth Amendment rather than the Ninth.[4]

Overall, the Court has generally treated the Ninth Amendment as a rule of construction for the Constitution rather than a freestanding guarantee of any substantive rights. Thus, in *Richmond Newspapers v. Virginia*, a plurality of the Court referred to the Amendment as a "sort of constitutional 'saving clause,' which, among other things, would serve to foreclose application to the Bill of Rights of the maxim that the affirmation of particular rights implies a negation of those not expressly defined."[5]

Amdt9.2 Historical Background on Ninth Amendment

Ninth Amendment:

> *The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*

The Ninth Amendment is a part of the Bill of Rights, and its purpose is best understood in the context of the debate around the express enumeration of protected rights at and soon after the Founding. As originally drafted and ratified, the Constitution did not include a bill of rights. A proposal to include a bill of rights was rejected late in the Constitutional Convention.[1] The Federalists argued that because the national government had limited and enumerated powers, there was no need to protect individual rights expressly. As Alexander Hamilton wrote

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[1] *See* Amdt9.2 Historical Background on Ninth Amendment The Tenth Amendment responded to related concerns that including a list of rights in the Constitution might be misunderstood to imply that the national government had powers beyond those enumerated. U.S. CONST. amend. X; *see also* Tenth Amendment.

[2] *See generally* Amdt9.3 Ninth Amendment Doctrine.

[3] 381 U.S. 479, 481–85 (1965).

[4] 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Organization, No. 19-1392, slip op. (U.S. June 2022).

[5] 448 U.S. 555, 579–80 & n.15 (1980); *cf.* Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (The Ninth Amendment's "refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people.").

[1] 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 341–42, 587–88, 617–618 (1911) [hereinafter Farrand's Records].

in the *Federalist Papers*, "Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given [in the Constitution] by which restrictions may be imposed?"[2] The Federalists contended that including a list of rights in the Constitution could be "dangerous" because it might be misunderstood to imply that the national government had powers beyond those enumerated, or that rights not expressly identified for protection were not in fact protected.[3]

In contrast to the prevailing delegates to the Convention, many state conventions considering whether to ratify the Constitution preferred to include a bill of rights. Several states ratified the Constitution on the understanding that a bill of rights would be added.[4] The first Congress accordingly proposed twelve constitutional amendments, ten of which were ratified by the requisite number of states and became the Bill of Rights.[5]

In contrast to the first eight amendments to the Constitution, which protect substantive rights, the Ninth Amendment sought to address Federalist fears that expressly protecting certain rights might implicitly sanction the infringement of other rights.[6] James Madison responded to that argument in presenting his proposed amendments to the House of Representatives:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights into this system.[7]

Madison suggested, however, that that concern "may be guarded against" by the text that became the Ninth Amendment.[8]

Madison's statement and the text of the Ninth Amendment both indicate that the Amendment itself does not guarantee any substantive rights.[9] Instead, it states a rule of construction, making clear that the Bill of Rights may not be construed to limit rights in areas not enumerated. As Justice Joseph Story explained, the "clause was manifestly introduced to

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[2] *See* The Federalist No. 84 (Alexander Hamilton).

[3] *Id.* For the Antifederalists, the absence of a bill of rights was a reason to oppose ratification of the Constitution. *See, e.g.*, George Mason, Objections to this Constitution of Government (1787), *reprinted in* 2 Farrand's Records, *supra* note 1, at 637–38 ("There is no Declaration of Rights.").

[4] *See generally* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 568–70 (1985) (Powell, J., dissenting) (reviewing this history and noting that "eight States voted for the Constitution only after proposing amendments to be adopted after ratification").

[5] *See* Intro.3.2 Bill of Rights (First Through Tenth Amendments).

[6] The Tenth Amendment responded to related concerns that including a list of rights in the Constitution might be misunderstood to imply that the national government had powers beyond those enumerated. U.S. Const. amend. X; *see also* Tenth Amendment.

[7] 1 Annals of Congress 439 (1789). *See also* 3 J. Story, Commentaries on the Constitution of the United States 1898 (1833).

[8] *Id.*

[9] *But compare* Griswold v. Connecticut, 381 U.S. 479, 491 (1965) (Goldberg, J., concurring) ("[A] judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment.") *with* Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (The Ninth Amendment's "refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people.").

prevent any perverse, or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others."[10]

Amdt9.3 Ninth Amendment Doctrine

Ninth Amendment:

> *The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*

Supreme Court cases from before 1965 contain little analysis of the Ninth Amendment. Litigants in earlier cases occasionally invoked the Amendment, often along with the Tenth Amendment or other provisions of the Bill of Rights, to challenge the constitutionality of various government actions. The Court dismissed those claims, usually with limited discussion.[1] For example, in the 1947 case *United Public Workers v. Mitchell*, the Court rejected Ninth and Tenth Amendment challenges to the Hatch Political Activity Act.[2] The Court explained,

> The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.[3]

Concluding that Congress had the authority to enact the Hatch Act and the Act did not violate any of the prohibitions in the Bill of Rights, the Court upheld the statute.[4]

Several members of the Court examined the Ninth Amendment in greater depth in the 1965 case *Griswold v. Connecticut*.[5] In *Griswold*, the Court held that a statute prohibiting use of contraceptives unconstitutionally infringed on the right of marital privacy. Justice William O. Douglas, writing for the Court, asserted that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[6] The majority cited the Ninth Amendment along with the substantive rights protected by the First, Third, Fourth, and Fifth Amendments while discussing the "penumbral rights of 'privacy and repose.'"[7] Although a right to privacy is not expressly mentioned in the Constitution, the Court concluded that banning contraceptive use by married couples impermissibly intruded on "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[8]

Justice Arthur Goldberg, concurring, devoted several pages to the Ninth Amendment. He opined,

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[10] 3 Joseph Story, Commentaries on the Constitution of the United States § 1893 (1833).

[1] *See* Ashwander v. TVA, 297 U.S. 288, 330–31 (1936); Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 143–44 (1939); Roth v. United States 354 U.S. 476, 492–93 (1957); Singer v. United States 380 U.S. 24, 26 (1965).

[2] 330 U.S. 75 (1947).

[3] *Id.* at 95–96.

[4] *Id.* at 96–104.

[5] 381 U.S. 479 (1965).

[6] *Id.* at 484.

[7] *Id.* at 481–85.

[8] *Id.* at 485.

Amdt9.3
Ninth Amendment Doctrine

> The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments. . . . [A] judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment.[9]

Justice Goldberg disclaimed any belief "that the Ninth Amendment constitutes an independent source of right protected from infringement by either the states or the Federal Government." Rather, he explained, the Amendment "shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive."[10]

In the 1973 case *Roe v. Wade*, the Supreme Court held that the Constitution limited the ability of the states to prohibit abortion before fetal viability.[11] The district court in *Roe* held that the Ninth Amendment protected the right to abortion. On appeal, the Supreme Court instead held that the right was "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action," but cited both the majority opinion in *Griswold* and Justice Goldberg's concurrence among opinions that "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[12] In the 2022 case *Dobbs v. Jackson Women's Health Organization*, the Court overruled *Roe* but emphasized that its decision should not cast doubt on precedents not involving abortion, including *Griswold*.[13]

[9] *Id.* at 487–91 (Goldberg, J., concurring).

[10] *Id.* at 492. Justices Hugo Black and Potter Stewart dissented. Justice Black wrote, "I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law." *Id.* at 522 (Black, J., dissenting). Justice Stewart contended, "The Ninth Amendment, like its companion the Tenth, . . . 'states but a truism that all is retained which has not been surrendered.'" *Id.* at 529 (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).

[11] 410 U.S. 113 (1973).

[12] *Id.* at 152–53.

[13] No. 19-1392, slip op. (U.S. June 2022).

TENTH AMENDMENT
RIGHTS RESERVED TO THE STATES AND THE PEOPLE

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TENTH AMENDMENT—RIGHTS RESERVED TO THE STATES AND THE PEOPLE

Amdt10.1 Overview of Tenth Amendment, Rights Reserved to the States and the People

Because the Tenth Amendment concerns the relationship between the federal government's powers and those powers reserved to the states, it is sometimes invoked—implicitly or explicitly—in cases exploring the limits of Congress's various enumerated powers.[1] These decisions are primarily addressed elsewhere in the *Constitution Annotated* under the particular enumerated federal power at issue.[2]

The key issue in Tenth Amendment doctrine, as such, is whether the Amendment imposes affirmative limitations on federal power beyond the limits inherent in the various enumerated powers themselves. In other words, assuming that an enumerated power supports congressional action in a particular area, may the Tenth Amendment (or the federalism principles it confirms[3]) nonetheless render the legislation beyond federal power? And, if so, what are the contours of the limitations that the Tenth Amendment imposes?

The Supreme Court's jurisprudence on these questions has not followed a straight line.[4] At times, the Court has stated that the Tenth Amendment lacks substantive constitutional content and "does not operate as a limitation upon the powers, express or implied, delegated to the national government."[5] At other times, the Court has found affirmative federalism limitations in the Amendment, invalidating federal statutes "not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment."[6]

The Supreme Court's Tenth Amendment jurisprudence has gone through several cycles over its history. In the nineteenth century, Chief Justice John Marshall's landmark opinion in *McCulloch v. Maryland* rejected the notion that the Tenth Amendment denied implied or incidental powers to the federal government, adopting an approach to assessing congressional power focused not on the Tenth Amendment itself, but the larger constitutional context.[7]

In the early twentieth century, the Court relied on the Tenth Amendment to strike down various economic regulations as invasive of the police power reserved to the states by the Amendment.[8] Beginning in the late 1930s, many of these decisions were overruled or limited

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[1] *See, e.g.*, United States v. Morrison, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.").

[2] *See, e.g.*, ArtI.S8.C1.1.1 Overview of Taxing Clause; ArtI.S8.C1.2.1 Overview of Spending Clause; ArtI.S8.C3.6.1 United States v. Lopez and Interstate Commerce Clause.

[3] *See* New York v. United States, 505 U.S. 144, 156 (1992) (finding that the Tenth Amendment "restrains the power of Congress . . . but this limit is not derived from the text of the Tenth Amendment itself").

[4] *Id.* at 160 ("The Court's [Tenth Amendment jurisprudence] has traveled an unsteady path."); *Morrison*, 529 U.S. at 645 (Souter, J., dissenting) ("[H]istory seems to be recycling, for the theory of traditional state concern as grounding a limiting principle [based on the Tenth Amendment] has been rejected previously, and more than once.").

[5] Fernandez v. Wiener, 326 U.S. 340, 362 (1945); *accord* United States v. Darby, 312 U.S. 100, 124 (1941).

[6] Reno v. Condon, 528 U.S. 141, 149 (2000); *accord New York*, 505 U.S. at 157, 166 ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.").

[7] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819) ("[The Tenth Amendment] thus leav[es] the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole [Constitution].").

[8] *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 274 (1918) (invalidating federal prohibition on interstate trafficking in goods produced by child labor as invading "the local power always existing and carefully reserved to the

as the Court embraced a broader conception of Congress's Commerce Clause power, along with the view that the Tenth Amendment does not bar federal action that is necessary and proper to the exercise of federal power.[9]

Tenth Amendment doctrine then laid largely dormant until the mid-1970s. In *National League of Cities v Usery*, the Court relied on the Amendment to hold that Congress may not use its commerce power to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."[10] Less than a decade later in *Garcia v. San Antonio Metropolitan Transit Authority*, however, the Court overruled *National League of Cities* as "unworkable" and "inconsistent with established principles of federalism,"[11] while implying that the Tenth Amendment lacked any judicially enforceable protections for state sovereignty.[12]

In the 1990s, the Court changed course again, holding in *New York v. United States* that the Tenth Amendment prohibits Congress from "commandeering" the states—that is, directly compelling them to enact or enforce a federal regulatory program.[13] The resulting "anti-commandeering" doctrine has been the subject of a line of Supreme Court cases continuing to the present.[14]

Amdt10.2 Historical Background on Tenth Amendment

Tenth Amendment:

> *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

The Tenth Amendment confirms "the understanding of the people at the time the Constitution was adopted"[1] that the powers not delegated to the federal government by the Constitution are "reserved to the States respectively, or to the people."[2] In this sense, the Amendment is merely declaratory—a "truism" that "all is retained which has not been surrendered."[3] Justice Joseph Story characterizes it as a "mere affirmation" of "a necessary rule of interpreting" the Constitution:

> Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities, if invested by their constitutions of government respectively in them; and if not so in vested, it is retained BY THE PEOPLE, as a part of their residuary sovereignty.[4]

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states in the Tenth Amendment to the Constitution."), *overruled by Darby*, 312 U.S. at 117; United States v. Butler, 297 U.S. 1, 68 (1936) (relying on Tenth Amendment to hold tax provision in Agricultural Adjustment Act unconstitutional because it "invades the reserved rights of the states").

[9] *See, e.g.*, *Darby*, 312 U.S. at 124 ("From the beginning and for many years the [Tenth] amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.") (citing *McCulloch*, 17 U.S. at 405–06).

[10] Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[11] *Garcia*, 469 U.S. at 531.

[12] *Id.* at 549–52.

[13] 505 U.S. 144, 161 (1992) (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

[14] *See, e.g.*, Murphy v. NCAA, No. 16-476 (U.S. May 14, 2018); Printz v. United States, 521 U.S. 898 (1997).

[1] United States v. Sprague, 282 U.S. 716, 733 (1931).

[2] U.S. Const. amend. X.

[3] New York v. United States, 505 U.S. 144, 156 (1992) (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).

[4] 3 Joseph Story, Commentaries on the Constitution of the United States § 1900 (1833).

The Tenth Amendment's purpose should be understood in the context of the Bill of Rights, of which it is a part. As originally drafted, the Constitution did not include a bill of rights, which was rejected when proposed late in the Constitutional Convention.[5] The Federalists argued that because the national government had limited and enumerated powers, there was no need to protect individual rights expressly: "Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given [in the Constitution] by which restrictions may be imposed?"[6] On this view, including a list of rights in the Constitution could be "dangerous" because it might be misunderstood to imply that the national government had powers beyond those enumerated.[7]

The argument against including a bill of rights did not persuade many state ratifying conventions, however, and several states assented to the Constitution on the understanding and expectation that a bill of rights would quickly be added.[8] The first Congress accordingly proposed twelve amendments, ten of which were ratified by the requisite number of states and became the Bill of Rights.[9]

The last of these first ten amendments addressed the Federalists' concern that a list of rights might imply the federal government had powers beyond those enumerated. The Tenth Amendment thus served to "allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers."[10]

Unlike the analogous provision in the Articles of Confederation,[11] both houses of Congress refused to insert the word "expressly" before the word "delegated" in the Tenth Amendment.[12] James Madison's remarks during the congressional debate on the Amendment are also notable: "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitutions of the States."[13]

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[5] 2 Max Farrand, Records of the Federal Convention of 1787, at 341–42, 587–88, 617–618 (1911) [hereinafter Farrand's Records].

[6] *See* The Federalist No. 84 (Alexander Hamilton).

[7] *Id.* For the Antifederalists, of course, the absence of a bill of rights was a primary reason to oppose ratification of the Constitution. *See, e.g.*, George Mason, Objections to this Constitution of Government (1787), *reprinted in* 2 Farrand's Records, *supra* note 5, at 637–38 ("There is no Declaration of Rights . . . .").

[8] *See generally* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 568–70 (1985) (Powell, J., dissenting) (reviewing this history and noting that "eight States voted for the Constitution only after proposing amendments to be adopted after ratification").

[9] *See* Intro.3.2 Bill of Rights (First Through Tenth Amendments).

[10] United States v. Darby, 312 U.S. 100, 124 (1941).

[11] Articles of Confederation, art. II ("Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.").

[12] Annals of Cong. 767–68 (1789) (defeated in House 17 to 32); 2 B. Schwartz, The Bill of Rights: A Documentary History 1150–51 (1971) (defeated in Senate by unrecorded vote).

[13] 2 Annals of Cong. 1897 (1791).

Amdt10.3 Development of Doctrine

Amdt10.3.1 Early Tenth Amendment Jurisprudence

Tenth Amendment:

> *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

In *McCulloch v. Maryland*,[1] Chief Justice John Marshall famously adopted a broad interpretation of the Necessary and Proper Clause[2] to counter the argument that the federal government lacked power to establish a national bank. The opinion also rejected a Tenth Amendment argument, urged by Luther Martin as counsel for the State of Maryland, that the power to create corporations was reserved by that Amendment to the states.[3] Martin noted that the Amendment was added to assuage concerns, expressed by opponents of the Constitution's ratification, that the document would invade states' rights.[4]

Stressing the fact that the Tenth Amendment, unlike the Articles of Confederation, omitted the word "expressly" as a qualification of granted powers, *McCulloch* concluded that nothing in the Constitution "excludes incidental or implied powers."[5] The effect of the Tenth Amendment, rather, was to leave the question "whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend upon a fair construction of the whole instrument."[6]

Apart from some tax immunity decisions,[7] and a notable mention in the *Civil Rights Cases*,[8] the Tenth Amendment was infrequently invoked by the Court until the early twentieth century.[9]

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[1] 17 U.S. (4 Wheat.) 316 (1819).

[2] *See* ArtI.S8.C18.3 Necessary and Proper Clause Early Doctrine and McCulloch v. Maryland.

[3] *McCulloch*, 17 U.S. (4 Wheat.) at 372–74 (argument of counsel).

[4] *Id.* at 372.

[5] *Id.* at 406 (opinion of Marshall, C.J.).

[6] *Id.* The Court later relied on this passage of *McCulloch* to state that "[f]rom the beginning . . . the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." United States v. Darby, 312 U.S. 100, 124 (1941).

[7] *See infra* Amdt10.2.5 Federal Power to Tax and the Tenth Amendment (discussing Collector v. Day, 78 U.S. (11 Wall.) 113 (1871), *overruled by* Graves v. New York *ex rel*. O'Keefe, 306 U.S. 466, 486 (1939), and related intergovernmental tax immunity cases).

[8] *Civil Rights Cases*, 109 U.S. 3, 14–15 (1883) (arguing that allowing federal regulation of racial discrimination by private actors via the Fourteenth Amendment "steps into the domain of local jurisprudence" and would be "repugnant to the Tenth Amendment of the Constitution"). The discussion of state sovereignty in *Lane County v. Oregon* also indirectly refers to the Tenth Amendment:

> [I]n many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved.

Lane Cnty. v. Oregon, 74 U.S. 71, 76 (1868) (Salmon, C.J.); *accord* Slaughter-House Cases, 83 U.S. 36, 62–63 (1872); Mayor of City of New York v. Miln, 36 U.S. 102, 139 (1837).

[9] There are a handful of invocations of the Tenth Amendment in nineteenth century Supreme Court cases not involving taxation. These are usually in dissent or in passing reference. *See, e.g.*, Taylor v. Beckham, 178 U.S. 548, 595 (1900) (Harlan, J., dissenting); *Legal Tender Cases*, 110 U.S. 421, 466 (1884) (Field, J., dissenting); *Ex parte* Virginia, 100 U.S. 339, 358 (1879) (Field, J., dissenting); Fong Yue Ting v. United States, 149 U.S. 698, 758 (1893) (Field, J., dissenting); Leisy v. Hardin, 135 U.S. 100, 127 (1890) (Gray, J. dissenting); Veazie Bank v. Fenno, 75 U.S. 533, 550 (1869) (Nelson, J., dissenting); Bank of Augusta v. Earle, 38 U.S. 519, 606 (1839) (McKinley, J. dissenting); Gibbons v. Ogden, 22 U.S. 1, 198 (1824); Thurlow v. Massachusetts, 46 U.S. 504, 587 (1847) (opinion of McLean, J.), *overruled by* Leisy v. Hardin, 135 U.S. 100 (1890).

Amdt10.3.2 State Police Power and Tenth Amendment Jurisprudence

Tenth Amendment:

> *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

In the first few decades of the twentieth century, the Supreme Court relied on the Tenth Amendment—alongside a narrow (by modern standards) understanding of the Interstate Commerce Clause[1]—to invalidate a variety of federal laws regulating economic activity because they invaded the states' reserved police powers to regulate public welfare and morality. Exemplary of this line of cases is *Hammer v. Dagenhart*,[2] which invalidated a federal law that prohibited the transportation in interstate commerce of goods produced through child labor.[3] Invoking the Tenth Amendment, the Court concluded that the Child Labor Law was an unwarranted invasion of the states' reserved powers,[4] reasoning:

> In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. . . . To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character . . . .[5]

Following similar logic, the Court in the 1920s and 1930s invoked the Tenth Amendment to invalidate a series of congressional economic regulations as invasive of state police powers, including: taxes on the sale of grain futures in markets that violated federal regulations;[6] taxes on the profits of factories in which child labor was used;[7] regulations and taxes on the production and manufacture of coal;[8] regulations of state building and loan associations;[9] and regulations and taxes on agricultural production.[10] In *A.L.A. Schechter Poultry Corp. v. United States*,[11] the Court, after holding that the commerce power did not extend to intrastate sales of poultry, relied on the Tenth Amendment to rebut the argument that the existence of an economic emergency (the Great Depression) could justify the legislation.[12]

Even during this period, however, not all federal statutes relating to objectives that could be characterized as traditional state responsibilities were held invalid. For example, in

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[1] *See* ArtI.S8.C3.6.1 United States v. Lopez and Interstate Commerce Clause.

[2] 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

[3] *Id.* at 268 n.1.

[4] *Id.* at 274.

[5] *Id.* at 275–76 (citations omitted).

[6] Hill v. Wallace, 259 U.S. 44 (1922); *see also* Trusler v. Crooks, 269 U.S. 475 (1926).

[7] *Child Labor Tax Case*, 259 U.S. 20, 26, 38 (1922).

[8] Carter v. Carter Coal Co., 298 U.S. 238, 294 (1936).

[9] Hopkins Fed. Sav. & Loan Ass'n v. Cleary, 296 U.S. 315, 337 (1935).

[10] United States v. Butler, 297 U.S. 1, 68 (1936) ("The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government.")

[11] 295 U.S. 495 (1935).

[12] *Id.* at 528–29 ("Extraordinary conditions do not create or enlarge constitutional power . . . . Such assertions of extraconstitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment.").

Hamilton v. Kentucky Distilleries Co.,[13] a unanimous Court upheld a wartime prohibition on distilled spirits with reasoning reminiscent of *McCulloch*:

> That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is nonetheless true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power.[14]

In a series of cases in apparent tension with *Hammer v. Dagenhart*, the Court in this period sustained federal laws penalizing the interstate transportation of lottery tickets;[15] of women for immoral purposes;[16] of stolen automobiles;[17] and of tick-infected cattle.[18] In a case upholding a federal law that prohibited the killing or selling of migratory birds, enacted as implementing legislation for a treaty between the United States and Great Britain, Justice Oliver Wendell Holmes rejected the notion that "invisible radiation from the general terms of the Tenth Amendment" invalidated the statute.[19]

Amdt10.3.3 Tenth Amendment and Darby

Tenth Amendment:

> *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

Beginning in 1937, in its decisions sustaining the Social Security Act[1] and the National Labor Relations Act,[2] the Supreme Court retreated from the conception of the Tenth Amendment embraced in *Hammer v. Dagenhart*. Following this so-called "switch in time that saved nine,"[3] the Court generally upheld federal economic regulation as supported by the Commerce Clause, without regard to whether the object of the legislation might be said to intrude upon traditional state authority.

United States v. Darby,[4] which overruled *Hammer v. Dagenhart*, is perhaps the clearest expression of this view of the Tenth Amendment. In upholding Congress's power to enact the Fair Labor Standards Act, Chief Justice Harlan Stone wrote for a unanimous court:

> It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attended the exercise of the police power of the states. . . . Our conclusion is unaffected by the Tenth Amendment which . . . states but a truism that all is retained which has not been surrendered. There is

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[13] 251 U.S. 146 (1919).

[14] *Id.* at 156 (citations omitted) (Brandeis, J.).

[15] Champion v. Ames, 188 U.S. 321 (1903); *see also* United States v. Ferger, 250 U.S. 199 (1919) (upholding law punishing the forgery of bills of lading in interstate and foreign commerce).

[16] Hoke v. United States, 227 U.S. 308 (1913).

[17] Brooks v. United States, 267 U.S. 432 (1925).

[18] Thornton v. United States, 271 U.S. 414 (1926).

[19] Missouri v. Holland, 252 U.S. 416, 434 (1920).

[1] Steward Mach. Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).

[2] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); *see* ArtI.S8.C3.5.8 National Labor Relations Act of 1935.

[3] *See* John R. Vile, *Truism, Tautology or Vital Principle? The Tenth Amendment Since United States v. Darby*, 27 Cumb. L. Rev. 445, 457–58 (1997) (reviewing this history with respect to the Tenth Amendment).

[4] 312 U.S. 100 (1941); *accord* United States v. Carolene Prods. Co., 304 U.S. 144, 147 (1938).

> nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution.[5]

A few years after *Darby*, the Court stated directly that "the Tenth Amendment 'does not operate as a limitation upon the powers, express or implied, delegated to the national government.'"[6] From the 1940s through the 1970s, the Court followed *Darby* and its progeny to summarily dismiss Tenth Amendment challenges based on the argument that otherwise valid federal laws intruded upon state police power over local matters reserved to the states through the Tenth Amendment.[7]

Amdt10.3.4 State Sovereignty and Tenth Amendment

Tenth Amendment:

> *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

Beginning in the mid-1970s, the Supreme Court relied on the Tenth Amendment to analyze congressional enactments alleged to intrude not upon state police power, but upon state sovereignty—such as whether Congress may apply general economic regulations to states and state instrumentalities.

In 1976, the Court revived the Tenth Amendment as an independent constitutional constraint in *National League of Cities v. Usery*.[1] The Court conceded that the legislation at issue—the Fair Labor Standards Act's minimum wages and maximum hours requirements (the same law upheld in *Darby*, but applied to state and local governmental employees)—was "undoubtedly within the scope of the Commerce Clause."[2] But the Court found that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[3] The Court concluded that the "power to determine the wages which shall be paid to those whom [states] employ in order to carry out their governmental functions" was such an area of inviolable state sovereignty.[4] As a result, as applied to certain state employees, the law was "not within the authority granted Congress."[5] *National League of Cities* implied that the

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[5] *Darby*, 312 U.S. at 114, 123–24. For cases anticipating *Darby*'s holding, see Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 516–17 (1938); Tenn. Elec. Power Co. v. TVA, 306 U.S. 118, 143–44 (1939); United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940) ("So long as the things done within the states by the United States are valid under [Commerce Clause power], there can be no interference with the sovereignty of the state.").

[6] Case v. Bowles, 327 U.S. 92, 102 (1946) (quoting Fernandez v. Wiener, 326 U.S. 340, 362 (1945)).

[7] *See, e.g.*, Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 534 (1941); Nw. Elec. Co. v. Fed. Power Comm'n, 321 U.S. 119, 125 (1944); Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127, 143 (1947); United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75, 95–96 (1947); Granville-Smith v. Granville-Smith, 349 U.S. 1, 27 (1955); Roth v. United States, 354 U.S. 476, 492–93 (1957); Reina v. United States, 364 U.S. 507, 511 (1960); United States v. Oregon, 366 U.S. 643, 649 (1961); Sperry v. Florida *ex rel.* Fla. Bar, 373 U.S. 379, 403 (1963); Perez v. United States, 402 U.S. 146, 151 (1971); Fry v. United States, 421 U.S. 542, 547 n.7 (1975).

[1] 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[2] *Id.* at 841.

[3] *Id.* at 845.

[4] *Id.*

[5] *Id.* at 832.

Tenth Amendment was the source of its protections for state sovereignty,[6] distinguishing *Darby*'s dismissal of the Tenth Amendment as a "truism."[7]

Following *National League of Cities* (itself a 5-4 decision), the Court applied the doctrine in a series of opinions, many closely divided, over roughly a decade.[8] Although much of this law does not survive the subsequent overturning of *National League of Cities*, some of the Court's holdings in these cases may have continuing application. In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, for instance, the Court clarified that Tenth Amendment protections apply only when Congress regulates "States as States," and not merely the activities of private individuals or business.[9] In *Bell v. New Jersey*, the Court held that state sovereignty protections under the Tenth Amendment did not apply to "obligations voluntarily assumed as a condition of federal funding."[10] Several decisions also held that *National League of Cities* did not apply to congressional power under the Reconstruction Amendments.[11]

In 1985, the Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*.[12] Justice Harry Blackmun's opinion for the Court concluded that *National League of Cities*' test, focusing on state authority over its "traditional governmental functions," had proven "both impractical and doctrinally barren."[13] With only passing reference to the Tenth Amendment, the Court in effect reverted to the Madisonian view of the Amendment reflected in *United States v. Darby*.[14]

Under *Garcia*, states retain their sovereign authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[15] *Garcia* therefore held that application of the Fair Labor Standards Act's minimum wage and overtime provisions to state employees was within Congress's power under the Commerce Clause.

Taking a restrained view of judicial authority to invalidate federal laws, *Garcia* stated that the principal limits on congressional exercise of the commerce power against states are not judicial, but instead found in the federal government's structure and the political process.[16]

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[6] *Id.* at 843 ("The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." (quoting Fry v. United States, 421 U.S. 542, 547 n. 7 (1975)).

Although *National League of Cities* is not entirely clear that the Tenth Amendment is the basis for its doctrine, the dissent in that case, as well as subsequent Court decisions, treat the opinion as based on the Tenth Amendment. *Id.* at 862 (Justice William Brennan, dissenting); FERC v. Mississippi, 456 U.S. 742, 776 (1982) (Justice Sandra Day O'Connor, dissenting); EEOC v. Wyoming, 460 U.S. 226, 235 (1983) (referring to "the doctrine of Tenth Amendment immunity articulated in National League of Cities v. Usery").

[7] *Nat'l League of Cities*, 426 at 842–43 ("[The Tenth Amendment] is not without significance." (quoting *Fry*, 421 U.S. at 547 n.7)).

[8] *See, e.g.*, *FERC*, 456 U.S. 742; *EEOC*, 460 U.S. 226; *see also* United Transp. Union v. LIRR, 455 U.S. 678 (1982).

[9] 452 U.S. 264, 287 (1981); *accord* Hodel v. Indiana, 452 U.S. 314, 330 (1981).

[10] 461 U.S. 773, 790 (1983). *Cf.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577–82 (2012) (plurality opinion).

[11] Fitzpatrick v. Bitzer, 427 U.S. 445, 452–56 (1976); Milliken v. Bradley, 433 U.S. 267, 291 (1977); Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 690 n.54 (1978); City of Rome v. United States, 446 U.S. 156, 178–79 (1980); Fullilove v. Klutznick, 448 U.S. 448, 476–78 (1980) (plurality opinion of Burger, C.J.). *Cf.* Shelby Cnty. v. Holder, 570 U.S. 529, 543–45 (2013).

[12] 469 U.S. 528 (1985). The issue was again decided by a 5-4 vote, with Justice Harry Blackmun's qualified acceptance of the *National League of Cities* approach having changed to a rejection.

[13] *Id.* at 557.

[14] 312 U.S. 100, 124 (1941); *see* Amdt10.3.3 Tenth Amendment and Darby. Madison's views were quoted by the Court in *Garcia*, 469 U.S. at 549.

[15] 469 U.S. at 549.

[16] *Id.* at 550–51.

Garcia did allow that there might be some "affirmative limits the constitutional structure might impose on federal action affecting the States," but concluded that "[t]hese cases do not require us to identify or define" them.[17]

Amdt10.3.5 Federal Power to Tax and Tenth Amendment

Tenth Amendment:

> *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

In a distinct line of cases beginning in the nineteenth century, the Supreme Court relied on the Tenth Amendment to find that states (and related parties) were immune from certain federal taxes.[1] For example, in *Collector v. Day*, the Court held that an otherwise valid income tax could not, consistent with the Tenth Amendment, be levied upon the official salaries of state officers.[2]

In the twentieth century, the Supreme Court overturned *Collector v Day*[3] and limited much of this doctrine, although it may retain some vitality as to federal taxes directly imposed on states.[4] (The doctrine of intergovernmental tax immunity is explained within the *Constitution Annotated*'s discussion of Congress's taxing power.[5])

Amdt10.4 Modern Doctrine

Amdt10.4.1 Modern Tenth Amendment Jurisprudence Generally

Tenth Amendment:

> *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

After reaching an ebb in *Garcia v. San Antonio Metropolitan Transit Authority*,[1] the Tenth Amendment reemerged as a source of constitutional limits on congressional power in the 1990s. These modern cases rely less on the Amendment's text than on the constitutional system of federalism it embodies and confirms.[2]

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[17] *Id.* at 556. Beginning in the 1990s, the Court began to identify and define these affirmative limitations. *See* Amdt10.4.2 Anti-Commandeering Doctrine.

[1] This "intergovernmental tax immunity" doctrine traces its origin to the holding in *McCulloch v. Maryland* that the Supremacy Clause barred Maryland from taxing the Second Bank of the United States. *See* 17 U.S. (4 Wheat.) 316, 436 (1819); *see also* Massachusetts v. United States, 435 U.S. 444, 454 (1978).

[2] 78 U.S. (11 Wall.) 113, 124 (1871), *overruled by* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 486 (1939); *see also, e.g.*, Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429 (1895), *overruled by* South Carolina v. Baker, 485 U.S. 505 (1988); New York v. United States, 326 U.S. 572 (1946).

[3] *Graves*, 306 U.S. at 486.

[4] *See generally Baker*, 485 U.S. at 523–24 (summarizing modern doctrine).

[5] *See* ArtI.S8.C1.1.5 Intergovernmental Tax Immunity Doctrine.

[1] 469 U.S. 528 (1985).

[2] *See* New York v. United States, 505 U.S. 144, 157–58 (1992) (finding protection for state sovereignty against commandeering was "not derived from the text of the Tenth Amendment itself" but in how it "confirms that the power of the Federal Government is subject to limits"); *accord* Murphy v. NCAA, No. 16-476, slip op. at 15–16 (U.S. May 14, 2018). At times, the Court has described its anti-commandeering doctrine as an interpretation of the word "proper" under the Necessary and Proper Clause. *See* Printz v. United States, 521 U.S. 898, 923–24 (1997); *Murphy*, slip op. at 2 (Thomas, J., concurring); *see generally* ArtI.S8.C18.6 Meaning of Proper.

Amdt10.4.1
Modern Tenth Amendment Jurisprudence Generally

The following essays review three lines of case law. The first concerns the "anti-commandeering" principle of *New York v. United States*.[3] Under that doctrine, the federal government may not directly compel states "to enact and enforce a federal regulatory program."[4] Second, the Court has relied on the "fundamental principle of equal sovereignty" in recent voting rights cases.[5] Although the precise textual basis for the doctrine is unclear, the equal sovereignty doctrine is at least arguably founded on Tenth Amendment principles.[6] Finally, although the Court's modern Commerce Clause doctrine is primarily discussed elsewhere in *Constitution Annotated*,[7] this section briefly discusses those cases' invocations of the Tenth Amendment.

Amdt10.4.2 Anti-Commandeering Doctrine

Tenth Amendment:

> *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

In *Garcia v. San Antonio Metropolitan Transit Authority*,[1] the Supreme Court adopted a narrow conception of states' reserved powers under the Tenth Amendment. Following *Garcia*, the Court adopted a "clear statement" rule requiring an unambiguous statement of congressional intent to displace state authority, a rule first articulated in *Gregory v. Ashcroft*.[2] After noting the serious constitutional issues that would be raised by interpreting the Age Discrimination in Employment Act to apply to appointed state judges, *Gregory* explained that, because *Garcia* "constrained" consideration of "the limits that the state-federal balance places on Congress's powers," a plain statement rule was all the more necessary.[3] The Court stated: "[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress's Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise."[4]

The Court's 1992 decision in *New York v. United States*[5] signaled a continuing retreat from the narrow conception of state power adopted in *Garcia* and the genesis of the Supreme Court's "anti-commandeering" doctrine. The *New York* holding that Congress may not "commandeer" state regulatory processes by ordering states to enact or administer a federal regulatory program limited congressional power previously recognized in dictum.[6]

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[3] 505 U.S. 144 (1992).

[4] *Id.* at 170 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

[5] Shelby Cnty. v. Holder, 570 U.S. 529, 544 (2013).

[6] *See* Leah M. Litman, *Inventing Equal Sovereignty*, 114 Mich. L. Rev. 1207, 1232 (2016).

[7] *See* ArtI.S8.C3.6.1 United States v. Lopez and Interstate Commerce Clause.

[1] 469 U.S. 528 (1985).

[2] 501 U.S. 452 (1991).

[3] The Court left no doubt that it considered the constitutional issue to be serious: "[T]he authority of the people of the States to determine the qualifications of their most important government officials . . . is an authority that lies at 'the heart of representative government' [and] is a power reserved to the States under the Tenth Amendment and guaranteed them by [the Guarantee Clause]." *Id.* at 463. In the latter context, the Court's opinion by Justice Sandra Day O'Connor cited Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1 (1988) and Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484 (1987) (also cited by the Court); and Van Alystyne, *The Second Death of Federalism*, 83 Mich. L. Rev. 1709 (1985).

[4] 501 U.S. at 464.

[5] 505 U.S. 144 (1992).

[6] *See, e.g.*, Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981); FERC v. Mississippi, 456 U.S. 742, 765 (1982); South Carolina v. Baker, 485 U.S. 505, 513–15 (1988).

Language in *New York* seems more reminiscent of *National League of Cities v. Usery*[7] than of the Court's later *Garcia* decision. First, Justice Sandra Day O'Connor's opinion declared that it makes no difference whether federalism constraints derive from the Tenth Amendment, or instead from a lack of power delegated to Congress under Article I: "the Tenth Amendment . . . directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power."[8] Second, the Court, without reference to *Garcia*, thoroughly repudiated *Garcia*'s "structural" approach requiring states to look primarily to the political processes for protection. In rejecting arguments that New York's sovereignty could not have been infringed because its representatives participated in developing the compromise legislation and consented to its enactment, the Court declared: "The Constitution does not protect the sovereignty of States for the benefit of the States or State governments, [but instead] for the protection of individuals." Consequently, the Court reasoned, "State officials cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution."[9] The Court thus appeared to contemplate relaxation of *Garcia*'s obstacles to federalism-based challenges.

Extending the principle applied in *New York*, the Court in *Printz v. United States*[10] held that Congress may not "circumvent" the prohibition on commandeering a state's regulatory processes "by conscripting the State's officers directly."[11] *Printz* struck down interim provisions of the Brady Handgun Violence Protection Act that required state and local law enforcement officers to conduct background checks on prospective handgun purchasers. In *Printz*, the Court noted:

> The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.[12]

In *Reno v. Condon*,[13] the Court distinguished *New York* and *Printz* in upholding the Driver's Privacy Protection Act of 1994 (DPPA), a federal law that restricted the disclosure and resale of personal information contained in the records of state motor vehicles departments. The Court returned to a principle articulated in *South Carolina v. Baker* that distinguished between laws that improperly seek to control the manner in which states regulate private parties, and those that merely regulate state activities directly.[14]

In *Condon*, the Court found that the DPPA did "not require the States in their sovereign capacities to regulate their own citizens," but rather "regulate[d] the States as the owners of

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[7] 426 U.S. 833 (1976).

[8] 505 U.S. at 157. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States . . . ." *Id.* at 156 (quoted with approval in Watters v. Wachovia Bank, N.A., 550 U.S. 1, 22 (2007) (holding a national bank's state-chartered subsidiary real estate lending business is subject to federal, not state, law)).

[9] 505 U.S. at 181, 182.

[10] 521 U.S. 898 (1997).

[11] *Id.* at 935.

[12] *Id.*

[13] 528 U.S. 141 (2000).

[14] 485 U.S. 505, 514–15 (1988).

databases."[15] The Court saw no need to decide whether a federal law may regulate the states exclusively, because the DPPA was a law of general applicability that regulated private resellers of information as well as states.[16]

The Supreme Court's anti-commandeering cases have recognized parallels—as well as distinctions—between commandeering state legislatures and requiring states to implement policies as a condition of federal funding.[17] In both *New York* and *Printz*, the Court observed that Congress may attach conditions to federal funds disbursed under its Spending Clause power and thereby avoid anti-commandeering problems.[18] The Court's decision in *National Federation of Independent Business v. Sebelius (NFIB)* explored the limits of this power, holding that a federal spending condition unconstitutionally "coerced" state legislatures to adopt a federal regulatory program.[19]

In *NFIB*, which involved constitutional challenges to the Patient Protection and Affordable Care Act (ACA),[20] several states challenged a provision that would have terminated a state's Medicaid funding if the state failed to expand Medicaid coverage as directed by the Act.[21] The Court held that the ACA's Medicaid expansion was an unconstitutional exercise of Congress's spending power.[22] Though his opinion analyzed the ACA's Medicaid expansion under the Spending Clause, Chief Justice John Roberts made repeated reference to the commandeering issues raised in *New York* and *Printz*.[23] While those two decisions both recognized the government's power to attach conditions to funds, Chief Justice Roberts averred that the distinction between permissible conditions and impermissible commandeering collapses "when the state has no choice" in whether to accept the conditions.[24] The states argued—and the Court agreed—that the Medicaid expansion's condition on noncompliance did not offer the states a true choice and was therefore akin to the types of coercion forbidden in *New York* and *Printz*.[25]

NFIB was not the first Supreme Court case to scrutinize federal spending conditions,[26] but the case was the only instance in which the Supreme Court has invalidated an exercise of Congress's Spending Clause power. Several factors played a role in Chief Justice Roberts's analysis. First, as both the Chief Justice and the dissenters observed, states faced losing a substantial part of their budgets.[27] Second, the Chief Justice concluded that the ACA's Medicaid expansion represented "a shift in kind, not merely degree" that states could not have

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[15] *Condon*, 528 U.S. at 151.

[16] *Id.*

[17] *See* ArtI.S8.C1.2.1 Overview of Spending Clause.

[18] New York v. United States, 505 U.S. 144, 167 (1992); Printz v. United States, 521 U.S. 898, 917 (1997).

[19] 567 U.S. 519, 580 (2012) (plurality opinion of Roberts, C.J.).

[20] Pub. L. No. 111–148, 124 Stat. 119 (2010).

[21] *See* 46 U.S.C. §§ 1396a (setting forth Medicaid requirements), 1396c (permitting the Secretary of the Department of Health and Human Services to withhold Medicaid payments).

[22] *NFIB*, 567 U.S. at 580 (plurality opinion). Chief Justice Roberts's opinion with respect to the Medicaid expansion was joined by only three members of the Court, though four other Justices agreed that the ACA's Medicaid expansion was unconstitutionally coercive. *See id.* at 681 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

[23] *Id.* at 577 (plurality opinion of Roberts, C.J.).

[24] *Id.* at 578.

[25] *Id.* at 579–80.

[26] *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).

[27] *NFIB*, 567 U.S. at 581–82 (plurality opinion of Roberts, C.J.); *id.* at 682 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

anticipated when they agreed to participate in Medicaid initially, despite Congress's express reservation of "the right to alter, amend, or repeal"[28] any aspect of Medicaid.[29]

Though *NFIB* explored the limits of Congress's power under the Spending Clause, the decision may be relevant to the development of anti-commandeering doctrine because it identifies a potential limit on what *New York* and *Printz* recognized as a constitutional alternative to commandeering.[30] Reframing an otherwise impermissible act of commandeering as a spending condition may be subject to challenge as unconstitutionally coercive, following the reasoning of Chief Justice Roberts and the four dissenting Justices.

The Supreme Court's most recent consideration of the anti-commandeering principle occurred in 2018 in *Murphy v. NCAA*.[31] In *Murphy*, Justice Samuel Alito, writing on behalf of the Court, invalidated on anti-commandeering grounds a provision in the Professional and Amateur Sports Protection Act (PASPA) that prohibited states from authorizing sports gambling schemes.[32] Noting the rule from *New York* and *Printz* that Congress lacks "the power to issue orders directly to the States,"[33] the Court concluded that PASPA's prohibition of state authorization of sports gambling violated the anti-commandeering rule by putting state legislatures under the "direct control of Congress."[34] In so concluding, Justice Alito rejected the argument that the anti-commandeering doctrine only applies to "affirmative" congressional commands, as opposed to when Congress prohibits certain state action.[35] Finding the distinction between affirmative requirements and prohibitions "empty," the Court held that both types of commands equally intrude on state sovereign interests.[36]

In holding that Congress cannot command a state legislature to refrain from enacting a law, the *Murphy* Court reconciled its holding with two related doctrines.[37] First, the Court noted that while cases like *Garcia*, *Baker*, and *Condon* establish that the anti-commandeering doctrine "does not apply when Congress evenhandedly regulates activity in which both States and private actors engage,"[38] PASPA's anti-authorization provision was, in contrast, solely directed at the activities of state legislatures.[39] Second, the Court rejected the argument that PASPA constituted a "valid preemption provision" under the Supremacy Clause.[40] While acknowledging that the "language used by Congress and this Court" with respect to preemption is sometimes imprecise,[41] Justice Alito viewed "every form of preemption" to be

[28] 42 U.S.C. § 1304.

[29] *NFIB*, 567 U.S. at 583 (plurality opinion of Roberts, C.J.).

[30] New York v. United States, 505 U.S. 144, 167 (1992); Printz v. United States, 521 U.S. 898, 917 (1997).

[31] Murphy v. NCAA, No. 16-476, slip op. at 17–24 (U.S. May 14, 2018).

[32] *See* Pub. L. No. 102–559, § 2(a), 106 Stat. 4227, 4228 (1992) (codified at 28 U.S.C. § 3702).

[33] *See Murphy*, No.16-476, slip op. at 17–18. *Murphy* offered three justifications for the anti-commandeering rule: (1) to protect liberty by ensuring a "healthy balance of power" between the states and the federal government; (2) to promote political accountability by the United States avoiding the blurring of which government is to credit or blame for a particular policy; (3) to prevent Congress from shifting the costs of regulation to the states. *Id.* at 17–18.

[34] *Id.* at 18.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 17–18.

[38] *Id.* at 18.

[39] *Id.* at 18–19. The Court also distinguished two other cases, Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), and FERC v. Mississippi, 456 U.S. 742 (1982), in which the Court rejected anti-commandeering challenges to federal statutes. *See Murphy*, No. 16-476, slip op. at 17–19.

[40] *See Murphy*, No. 16-476, slip op. *Murphy* identified two requirements for a preemption provision to be deemed valid: (1) the provision must represent an exercise of power conferred on Congress by the Constitution; (2) the provision must regulate private actors and not the states. *Id.*

[41] *Id.* at 1480–81.

based on a federal law that regulates the conduct of private actors—either by directly regulating private entities or by conferring a federal right to be free from state regulation.[42] In contrast, PASPA's anti-authorization provision did not "confer any federal rights on private actors interested in conducting sports gambling operations" or "impose any federal restrictions on private actors."[43] As a result, the *Murphy* Court viewed the challenged provision to be a direct command to the states in violation of the anti-commandeering rule.[44]

Amdt10.4.3 Equal Sovereignty Doctrine

Tenth Amendment:

> *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

In two recent voting rights cases, the Supreme Court has invoked "the fundamental principle of equal sovereignty" as a limitation on congressional power.[1] Because the United States "was and is a union of states, equal in power, dignity and authority,"[2] the equal sovereignty principle limits Congress's ability to enact legislation that subjects different states to unequal burdens, at least without a sufficient justification.[3]

Whether the equal sovereignty principle is based on the Tenth Amendment, or some other constitutional provision, is unclear from the Court's cases. Although the Constitution explicitly mandates equal treatment of states in some particular contexts,[4] no provision of the Constitution explicitly requires Congress to treat states equally as a general matter.[5] In cases involving the admission of new states, the Supreme Court in the nineteenth century developed the "equal footing" doctrine,[6] which generally requires that Congress admit new states on equal terms with the original states.[7] It thus forbids Congress from imposing "restrictions upon a new state which deprive it of equality with other members of the Union."[8] Until recently, the applicability of that doctrine outside the state admission context was

[42] *Id.* at 1481.

[43] *Id.* (noting that if a private actor started a sports gambling operation, either with or without state authorization, PASPA's anti-authorization provision would not be violated).

[44] *Id.* The Court ultimately invalidated PASPA in its entirety, holding that other provisions of the law that regulated private conduct were inseverable from the anti-authorization provision and therefore could not exist independently from the unconstitutional provision. *See id.* at 1481–84.

[1] Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009); Shelby Cnty. v. Holder, 570 U.S. 529, 544 (2013).

[2] *Shelby Cnty.*, 570 U.S. at 544 (citing Coyle v. Smith, 221 U.S. 559, 567 (1911)).

[3] *Id.* at 542 ("[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." (quoting *Nw. Austin*, 557 U.S. at 203)).

[4] *See, e.g.*, U.S. Const. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State . . . ."); U.S. Const. art. I, § 8, cl. 1 (requiring "Duties, Imposts, and Excises" to be "uniform throughout the United States"); U.S. Const. art. I, § 8, cl. 4 (requiring "an uniform Rule of Naturalization" and "uniform Laws on the subject of Bankruptcies throughout the United States"); U.S. Const. art. I, § 9, cl. 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another.").

[5] *See generally* Leah M. Litman, *Inventing Equal Sovereignty*, 114 Mich. L. Rev. 1207, 1230–32 (2016); Thomas Colby, *In Defense of the Equal Sovereignty Principle*, 65 Duke L.J. 1087, 1099 (2016).

[6] *See* ArtIV.S3.C1.1 Overview of Admissions (New States) Clause.

[7] Lessee of Pollard v. Hagan, 44 U.S. 212, 223 (1845).

[8] Coyle v. Smith, 221 U.S. 559, 567 (1911).

questionable, as *South Carolina v. Katzenbach* observed that "[t]he doctrine of the equality of States . . . applies only to the terms upon which States are admitted to the Union."[9]

In *Northwest Austin Municipal Utility District Number One v. Holder*[10] and *Shelby County v. Holder*,[11] however, the Court applied the equal sovereignty principle more broadly. Both cases concerned the constitutionality of Sections 4 and 5 of the Voting Rights Act of 1965 (VRA). To remedy the racial discrimination in voting endemic during the Jim Crow era, Section 4 of the VRA contained a "coverage formula" identifying jurisdictions with a history of racial discrimination against voters, while Section 5 required those jurisdictions to obtain "preclearance" from the Department of Justice or a federal court before changing their voting procedures.[12] As a result, jurisdictions covered by Section 4 were subject to more stringent requirements when seeking to change their voting laws, compared to other states.

Although the Court upheld the constitutionality of this arrangement in *Katzenbach*,[13] *Northwest Austin* observed that the VRA's preclearance requirements and coverage formula impose "substantial federalism costs"[14] that have become tougher to justify given improved conditions since 1965.[15] The Court observed that the coverage formula, by differentiating between the states, departs from "the fundamental principle of equal sovereignty," and raises "serious constitutional questions."[16] Ultimately, however, the Court resolved *Northwest Austin* on statutory grounds.[17]

Four years later, *Shelby County* resolved the constitutional question left open in *Northwest Austin*, relying on the equal sovereignty principle to strike down the VRA's coverage formula as unconstitutional.[18] Under the test used in *Shelby County*, "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[19] The Court observed that in the nearly fifty years since the VRA was first upheld in *Katzenbach*, "things have changed dramatically," pointing to increases in African-American voter registration rates and turnout in covered jurisdictions.[20] As a result, and in contrast to the "exceptional conditions" present in *Katzenbach*, current conditions did not justify applying the preclearance formula to only certain states and counties.[21]

As the Court has not decided an equal sovereignty challenge since *Shelby County*, it remains unclear whether and how the doctrine will apply outside of the voting rights context.

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[9] South Carolina v. Katzenbach, 383 U.S. 301, 328–29 (1966) (citing *Coyle*, 221 U.S. 559).

[10] 557 U.S. 193, 203 (2009).

[11] 570 U.S. 529, 544 (2013).

[12] *Id.* at 537–38.

[13] 383 U.S. at 328–83; *accord* Georgia v. United States, 411 U.S. 526 (1973); City of Rome v. United States, 446 U.S. 156 (1980); Lopez v. Monterey Cnty., 525 U.S. 266 (1999).

[14] *Nw. Austin*, 557 U.S. at 202 (quoting *Lopez*, 525 U.S. at 282).

[15] *Id.* at 202 ("Things have changed in the South."), 203 ("[T]he statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.").

[16] *Id.* at 203–04.

[17] *Id.* at 206–11.

[18] Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013).

[19] *Id.* at 542 (quoting *Nw. Austin*, 557 U.S. at 203).

[20] *Id.* at 547–48.

[21] *Id.* at 557.

Amdt10.4.4 Commerce Clause and Tenth Amendment

Tenth Amendment:

> *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

In 1995, the Court in *United States v. Lopez*[1] struck down a federal statute prohibiting possession of a gun at or near a school, rejecting an argument that possession of firearms in school zones can be punished under the Commerce Clause because of its economic effects.[2] Accepting that rationale, the Court said, would eliminate the "distinction between what is truly national and what is truly local," would convert Congress's commerce power into a general police power of the sort retained by the states, and would undermine the first principle that the federal government is one of enumerated and limited powers.[3]

Application of the same principle led five years later to the Court's decision in *United States v. Morrison*[4] invalidating a provision of the Violence Against Women Act (VAWA) that created a federal cause of action for victims of gender-motivated violence. The Court concluded that Congress may not regulate "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[5] "[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."[6]

In contrast to *Lopez* and *Morrison*, the Court in *Gonzales v. Raich* upheld Congress's authority under the Commerce Clause to prohibit the intrastate cultivation and use of medical marijuana, based on its aggregate effect on interstate commerce.[7] *Raich* distinguished *Lopez* and *Morrison* as regulations of noneconomic activity,[8] relying mainly on older Commerce Clause precedents.[9] The majority in *Raich* referenced the Tenth Amendment only obliquely through a citation to *United States v. Darby*,[10] while the dissenters did so more directly, arguing this application of federal law unconstitutionally encroached on state police powers.[11]

In the 2012 case *National Federation of Independent Business v. Sebelius*, the Court held that Congress's Commerce Clause power could not be used to compel individuals to engage in commercial activity.[12] As a result, the "individual mandate" of the Patient Protection and Affordable Care Act, which required most uninsured individuals to buy health insurance or pay a penalty,[13] was beyond Congress's Commerce Clause power.[14] On route to this holding, the

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[1] 514 U.S. 549 (1995).

[2] *Id.* at 564–65.

[3] *Id.* at 552, 567–68.

[4] 529 U.S. 598 (2000).

[5] *Id.* at 617.

[6] *Id.* at 618.

[7] 545 U.S. 1, 22 (2005).

[8] *Id.* at 25.

[9] *Id.* at 17–21 (discussing Wickard v. Filburn, 317 U.S. 111 (1942)).

[10] *Id.* at 29 ("[S]tate action cannot circumscribe Congress's plenary commerce power." (citing United States v. Darby, 312 U.S. 100, 114 (1941))).

[11] *Id.* at 50 (O'Connor, J., dissenting) ("It will not do to say that Congress may regulate noncommercial activity simply because it may have an effect on the demand for commercial goods . . . . We have already rejected the result that would follow—a federal police power." (citing *Lopez*, 514 U.S. at 564)); *id.* at 66 (Thomas, J., dissenting) ("Here, Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens.").

[12] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 552 (2012) (plurality opinion of Roberts, C.J.).

[13] *Id.* at 539.

Court noted that Congress's enumerated powers "must be read carefully to avoid creating a general federal authority akin to the police power," invoking the Tenth Amendment and related federalism principles.[15]

[14] *Id.* at 558. The Court ultimately upheld the individual mandate under Congress's taxing power. *Id.* at 561–63.

[15] *Id.* at 535–36.

ELEVENTH AMENDMENT SUITS AGAINST STATES

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ELEVENTH AMENDMENT—SUITS AGAINST STATES

Amdt11.1 Overview of Eleventh Amendment, Suits Against States

The Eleventh Amendment is a vital element of federal jurisdiction that "go[es] to the very heart of [the] federal system and affect[s] the allocation of power between the United States and the several states."[1] It prevents federal courts from construing their judicial power to allow states to be sued by citizens of another state or by foreign states or their citizens or subjects. The Eleventh Amendment was adopted in response to the Supreme Court's 1793 decision in *Chisholm v. Georgia*[2] in which the court allowed a suit by a citizen of South Carolina to proceed against the State of Georgia. The Eleventh Amendment resolved uncertainty over the reach of federal judicial power, which had arisen during the Constitution's ratification.

Amdt11.2 Historical Background on Eleventh Amendment

Eleventh Amendment:

> *The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.*

During the ratification debates, opponents of the proposed Constitution expressed concern that Article III, Section 2, Clause 1—"The judicial Power shall extend . . . to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the citizens thereof, and foreign States, Citizens, or Subjects"[1]—could subject a state to suits in federal courts without the state's consent. These concerns were met with conflicting responses—some agreeing and others stating that the provision only applied when a state was the plaintiff.[2]

In 1789, Congress, enacted the Judiciary Act, providing the Supreme Court original jurisdiction over suits between states and citizens of other states.[3] Alexander Chisholm, a citizen of South Carolina, sued the state of Georgia under the Act to recover under a contract for supplies executed with Georgia during the Revolution. In the Supreme Court's 1793 decision, *Chisholm v. Georgia,*[4] four of the five Justices agreed that a state could be sued under the Article III jurisdictional provision and that the Supreme Court properly had original

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[1] C. Wright, The Law of Federal Courts § 48 at 286 (4th ed. 1983).

[2] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

[1] U.S. Const. art. III, § 2, cl. 1.

[2] The Convention adopted this provision largely as it came from the Committee on Detail, without recorded debate. 2 The Records of the Federal Convention of 1787, at 423–25 (Max Farrand ed., 1937). In the Virginia ratifying convention, George Mason, who had refused to sign the proposed Constitution, objected to making states subject to suit, 3 Jonathan Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 526–27 (1836), but both James Madison and John Marshall (the latter had not been a delegate at Philadelphia) denied states could be made party defendants, *id.* at 533, 555–56, while Edmund Randolph (who had been a delegate, as well as a member of the Committee of Detail) granted that states could be and ought to be subject to suit. *Id.* at 573. James Wilson, a delegate and member of the Committee on Detail, seemed to say in the Pennsylvania ratifying convention that states would be subject to suit. 2 *id.* at 491. Hamilton, in The Federalist No. 81 (Alexander Hamilton), also denied state suability.

[3] Ch. 20, § 13, 1 Stat. 80 (1789). For a thorough consideration of passage of the Act itself, *see* Julius Goebel, History of the Supreme Court of the United States, Antecedents and Beginnings to 1801, at 457–508 (1971).

[4] Chishom v.Georgia, 2 U.S. (2 Dall.) 419 (1793).

jurisdiction of the case pursuant to section 13 of the Judiciary Act.[5] The fifth, Justice James Iredell, reasoned that, as the common law barred suits against a sovereign, this principle applied to the states in their capacity as sovereigns and, consequently, states could not be subject to suit without their consent.[6]

By construing the Constitution to provide for a state to be sued by a citizen of another state in *Chisholm*,[7] the Supreme Court led Georgia and the other states to amend the Constitution. As a result, at the first meeting of Congress following the decision, the Eleventh Amendment was proposed by an overwhelming vote of both Houses and ratified with "vehement speed."[8] As proposed by Congress and ratified by the states, the Eleventh Amendment was directed at overturning the result in *Chisholm* and preventing suits against states by citizens of other states or by citizens or subjects of foreign jurisdictions.[9] It did not, as other possible versions of the Amendment might have done, altogether bar suits against states in the federal courts.[10] That is, the Eleventh Amendment barred suits against states with reference to their status as a plaintiff but did not address suits potentially based on subject matter.[11]

Amdt11.3 Early Jurisprudence on Eleventh Amendment

Eleventh Amendment:

> *The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.*

Early Supreme Court decisions examined the Eleventh Amendment, although oftentimes in dictum.[1] In *Cohens v. Virginia*,[2] Chief Justice John Marshall, writing for the Court, ruled that prosecution of a writ of error to review a state court judgment alleged to violate the Constitution or laws of the United States did not commence or prosecute a suit against the

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[5] Goebel, *supra* note 3, at 726–34.

[6] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 435 (1793) (Iredell, J.) ("No other part of the common law of *England*, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. Every State in the *Union* in every instance where its sovereignty has not been delegated to the *United States,* I consider to be completely sovereign, as the *United States* are in respect to the power surrendered."). Justice James Iredell noted that the only circumstance under which the common law allowed such suits to proceed was when the sovereign consented to the suit. He said: "Thus, it appears, that in *England* even in case of a private debt contracted by the *King,* in his own person, there is no remedy but by petition, which must receive his express sanction, otherwise, there can be no proceeding upon it." *Id.* at 445.

[7] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

[8] The phrase is Justice Felix Frankfurter's, from *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 708 (1949) (dissenting), a federal sovereign immunity case. The amendment was proposed on March 4, 1794, when it passed the House and it was ratified on February 7, 1795, when the twelfth state acted, there then being fifteen states in the Union.

[9] Hollingsworth, et al. v. Virginia, 3 U.S. (3 Dall.) 378 (1798) ("[T]he [Eleventh] amendment being constitutionally adopted, there could not be exercised in any jurisdiction, in any case, past or future, in which a State was sued by the citizens of another State or by citizens or subjects of any foreign state.").

[10] Goebel, *supra* note 3, at 736.

[11] Party status is one part of the Article III grant of jurisdiction, as in diversity of citizenship of the parties; subject matter jurisdiction is the other part, as in federal question or admiralty jurisdiction.

[1] Justice Bushrod Washington, on Circuit, held in United States v. Bright, 24 F. Cas. 1232 (No. 14647) (C.C.D. Pa. 1809), that the Eleventh Amendment's reference to "any suit in law or equity" excluded admiralty cases, so that states were subject to suits in admiralty. During this period, the Court did not rule on this understanding, *see* Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110, 124 (1828); 3 Joseph Story, Commentaries on the Constitution of the United States 560–61 (1833); United States v. Peters, 9 U.S. 115 (1809); Ex parte Madrazo, 32 U.S. (7 Pet.) 627 (1833). In 1921, the Court held it to be in error in *Ex parte New York (No. 1),* 256 U.S. 490 (1921).

[2] 19 U.S. (6 Wheat.) 264 (1821).

state. Instead, it merely continued a suit that the state had commenced, and thus could be brought in federal court under section 25 of the Judiciary Act.[3] In his *Cohens* opinion, the Chief Justice attributed the Eleventh Amendment's adoption to concerns about creditors being able to sue states in federal courts for payment rather than general objections about states being subject to suit without their consent.[4] He further stated his view that the Eleventh Amendment did not bar suits against states under federal question jurisdiction[5] or reach suits against a state by its own citizens.[6]

Marshall further developed his Eleventh Amendment jurisprudence in *Osborn v. Bank of the United States*.[7] *Osborn* concerned whether a state had authority to tax the Bank of the United States and whether federal courts could hear a suit against state officers seeking to collect a state tax from the bank notwithstanding the Eleventh Amendment.[8] In resolving the dispute in favor of the bank, Marshall distinguished between suits against states and suits against state officers, ruling that the Eleventh Amendment barred suits where the state was the party of record rather than suits where the state merely had an interest in the result.[9] Marshall further reasoned that a state officer cannot violate the Constitution under the cover of carrying out a state function.[10] Consequently, Marshall's *Osborn* ruling embodied two

[3] 1 Stat. 73, 85.

[4] *Cohens*, 19 U.S. at 406. Justice Marshall stated: "It is a part of our history that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. . . . That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases: and in these, a state may still be sued. . . . Those who were inhibited from commencing a suit against a state, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states." 19 U.S. at 406–07.

[5] *Id.* Justice John Marshall stated: "The powers of the Union, on the great subjects of war, peace and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered, in many instances, where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the constitution . . . .[A]re we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case." 19 U.S. at 382–83.

[6] Justice John Marshall stated: "If this writ of error be a suit, in the sense of the eleventh amendment, it is not a suit commenced or prosecuted 'by a citizen of another state, or by a citizen or subject of any foreign state.' It is not, then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties." 19 U.S. at 412 (citations omitted).

[7] 22 U.S. (9 Wheat.) 738 (1824)

[8] The Bank of the United States was initially treated as if it were a private citizen, rather than as the United States itself, and hence a suit by it was a diversity suit by a corporation, as if it were a suit by the individual shareholders. Bank of the United States v. Deveaux, 9 U.S. (5 Cr.) 61 (1809).

[9] Osborn v. Bank of the United States, 22 U.S. 738, 857 (1824) ("[T]he eleventh amendment, which restrains the jurisdiction granted by the constitution over suits against States, is, of necessity, limited to those suits in which a State is a party of record.").

[10] *Id.* at 868. For cases following *Osborn*, see Davis v. Gray, 16 Wall 203, 220 (1872) ("In deciding who are parties to the suit the court will not look beyond the record. Making a state officer a party does not make the State a party, although her law may have prompted his action and the State may stand behind him as the real party in interest."); McComb v. Board of Liquidation, 92 U.S. 531 540, (1875) ("A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive

principles, one of which the Court soon abandoned and one of which has survived. The former holding was that a suit is not against a state unless the state is a named party of record.[11] The latter holding provides that a state official possesses no official capacity when acting illegally and consequently can derive no protection from suit when acting under an unconstitutional state statute.[12]

Amdt11.4 Postbellum Jurisprudence on Eleventh Amendment

Eleventh Amendment:

> *The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.*

Following the Civil War, the Supreme Court refined Chief Justice John Marshall's understanding of the scope of the Eleventh Amendment articulated in *Osborn*. In 1875, Congress effectively gave federal courts general federal question jurisdiction,[1] at a time when a large number of states in the South were defaulting on their revenue bonds in violation of the Contract Clause of the Constitution.[2] As bondholders sought relief in federal courts, the Supreme Court further developed its Eleventh Amendment jurisprudence in a series of cases, finding that the Eleventh Amendment precluded states from being sued by citizens of other states or by citizens or subjects of foreign states even if the case had arisen under the Constitution or laws of the United States.[3] The Court further found that the Eleventh Amendment barred suits that were filed against state officers, rather than the state itself, if the state was indispensable to the suit.

While Chief Justice John Marshall's 1821 *Osborn* decision had permitted the Bank of the United States to sue the officers of the state rather than the state itself and thereby avoided

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official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. . . . In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void.").

[11] 22 U.S. at 850–58. For a reassertion of the Chief Justice's view of the limited effect of the Amendment, *see id.* at 857–58. *But compare id.* at 849. The holding was repudiated in *Governor of Georgia v. Madrazo*, wherein Marshall conceded that the suit had been brought against the governor solely in his official capacity and with the design of forcing him to exercise his official powers. Georgia v. Madrazo, 26 U.S. 110, 124 (1828) ("[W]here the chief magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the State itself may be considered as a party on the record."). In determining whether a suit is prosecuted against a state "the Court will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit." In re *Ayers*, 123 U.S. 443, 487 (1887). *See also* Poindexter v. Greenhow, 114 U.S. 270, 287 (1885) ("[T]he question whether a suit is within the prohibition of the eleventh Amendment is not always determined by reference to the nominal parties on the record.").

[12] 22 U.S. (9 Wheat.) 738 (1824).

[1] Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470 ("That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states; of all suits of a civil nature at common law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority."). Article III, Section 2, Clause 1, of the Constitution provides "the judicial power of the United States shall extend to all cases in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority," federal courts have jurisdiction over cases concerning the Constitution or federal law. *See* discussion under "Development of Federal Question Jurisdiction," *supra*.

[2] *See, e.g.*, J.V. Orth, *The Eleventh Amendment and the North Carolina State Debt*, 59 N.C. L. Rev. 747 (1981); J.V. Orth, *The Fair Fame and Name of Louisiana: The Eleventh Amendment and the End of Reconstruction*, 2 Tul. Law. 2 (1980); J. V. Orth, *The Virginia State Debt and the Judicial Power of the United States*, in Ambivalent Legacy: a Legal History of the South 106 (D. Bodenhamer & J. Ely eds., 1983).

[3] U.S. Const. Art. III Sec. 2, Clause 1 "(The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .").

the Eleventh Amendment proscription, the postbellum Court adopted a more nuanced approach to the problem. In *Louisiana v Jumel*,[4] and *Hagood v. Southern,*[5] the Court held that plaintiffs could not seek relief from a state's bond default by suing the state's officers in federal court. In these cases, the Court reasoned that the party was, to all extents and purposes, the state and not the officers who acted on its behalf. In *Hans v. Louisiana*, the Court summarized its findings in these cases, stating "This court held that the suits were virtually against the States themselves and were consequently violative of the Eleventh Amendment of the Constitution and could not be maintained. It was not denied that they presented cases arising under the Constitution, but, notwithstanding that, they were held to be prohibited by the amendment referred to."[6] The *Jumel* Court noted, however, that the outcome would have been different had the state agreed to the federal court's jurisdiction.[7] Similarly, in *Cunningham v. Macon & Brunswick Railroad*, the Court found that if a state was an indispensable party to a suit, the Court could not take the case even if the state itself was not sued.[8]

In *In re Ayres*, a federal court cited the Attorney General of Virginia for contempt when he disobeyed a federal court's restraining order barring him from complying with a state law to pursue judgment against the Baltimore and Ohio Railroad, which had sought to pay its state taxes with possibly spurious state-issued coupons. The Court granted a writ of habeas corpus filed by the Attorney General and concluded that the proceeding, which had resulted in his imprisonment, was effectively a suit against the State and thus a federal court did not have jurisdiction to entertain it.[9] In dicta, however, the Court clarified that suits could be pursued against officers of a state when their action violated the Constitution or federal law. The Court stated:

> Nor need it be apprehended that the construction of the eleventh Amendment, applied in this case, will in anywise embarrass or obstruct the execution of the laws of the United States in cases where officers of a State are guilty of acting in violation of them under color of its authority . . . .Nothing can be interposed between the individual and the obligation he owes to the Constitution and the laws of the United States, which can shield or defend him from their just authority . . . . If therefore, an individual acting under the assumed authority of a State, as one of its officers, and under color of its

[4] 107 U.S. 711, 721 (1882) ("The question, then, is whether the contract can be enforced, notwithstanding the Constitution, by coercing the agents and officers of the State, whose authority has been withdraw in violation of the contract, without the State itself in its political capacity being a party to the proceedings.") .

[5] 117 U.S. 52, 67 (1886) ("Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject-matter of the suit, and defending only as representing the State . . . . The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the eleventh amendment . . . .")

[6] Hans v. Louisiana, 134 U.S. 1, 10 (1890).

[7] Louisiana v. Jumel, 107 U.S. 711, 728 (1882) ("When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; . . . But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State.").

[8] Cunningham v. Macon and Brunswick R.R. 109 U.S. 446, 451 (1883) ("[W]henever it can be clearly seen that the State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction.")

[9] 123 U.S. 443, 505 (1887) ("[B]y virtue of the eleventh Amendment to the Constitution, there being no remedy by a suit against the State, the contract is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion.").

laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct.[10]

Amdt11.5 Modern Doctrine

Amdt11.5.1 General Scope of State Sovereign Immunity

Eleventh Amendment:

> *The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.*

In its 1890 decision, *Hans v. Louisiana*, the Supreme Court adopted Justice James Iredell's position in *Chisholm v. Georgia*, that the states, as sovereigns, were immune from suit by their citizens under long-standing principles grounded in the common law.[1] In *Hans v. Louisiana*,[2] a resident of Louisiana brought a suit against that state in federal court under federal question jurisdiction, alleging a violation of the Contract Clause in the state's repudiation of its obligation to pay interest on certain bonds. Admitting that the Amendment on its face prohibited only entertaining a suit against a state by citizens of another state, or citizens or subjects of a foreign state, the Court reasoned that the scope of the Eleventh Amendment was informed by the scope of Article III, Section 2, Clause 1, which provided federal courts jurisdiction over suits between a state and citizens of another state and foreign States, citizens or subjects. The court noted that the Eleventh Amendment was a result of the "shock of surprise throughout the country" at the *Chisholm* decision, which contravened long-established common law precedent that a sovereign cannot be sued absent its consent, and reflected the general consensus that the decision was wrong, and that federal jurisdiction did not extend to making defendants of unwilling states in lawsuits brought by individuals.[3]

In the *Hans* Court's view, the Eleventh Amendment reversed an erroneous decision and restored the proper interpretation of the Constitution. Delivering the Court's opinion, Justice Joseph Bradley stated: "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. The suability of a State without its consent was a thing unknown to the law."[4] The Court reasoned that the Eleventh Amendment's silence on whether a citizen of a state could sue that state should not be construed as permitting such suits. Instead "the manner in which [*Chisholm*] was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing,"[5] led the Court unanimously to hold that states could not be sued by their own citizens on grounds arising under the Constitution and laws of the United States.

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[10] Ex parte *Ayers*, 123 U.S. 443, 507 (1887).

[1] 134 U.S. 1 (1890).

[2] *Id.* at 11.

[3] *Id*. at 13–14.

[4] *Id.* at 15, 16.

[5] 134 U.S. at 18. The Court acknowledged that Chief Justice John Marshall's opinion in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 382–83, 406–07, 410–12 (1821), was to the contrary, but observed that the language was unnecessary to the decision and thus dictum, "and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion." 134 U.S. at 20.

In line with *Hans*, the Court held, in *Ex parte New York (No. 1)*,[6] that, absent its consent, a state was immune to suit in admiralty, the Eleventh Amendment's reference to "any suit in law or equity" notwithstanding. Writing for the Court, Justice Mahlon Pitney stated: "That a State may not be sued without its consent is a fundamental rule of jurisprudence . . . of which the Amendment is but an exemplification . . . . It is true the Amendment speaks only of suits in law or equity; but this is because the Amendment was the outcome of a purpose to set aside the effect of the decision of this court in *Chisholm v. Georgia* from which it naturally came to pass that the language of the Amendment was particularly phrased so as to reverse the construction adopted in that case."[7] Just as *Hans v. Louisiana* had demonstrated the "impropriety of construing the Amendment" so as to permit federal question suits against a state, Justice Mahlon Pitney reasoned, "it seems to us equally clear that it cannot with propriety be construed to leave open a suit against a State in the admiralty jurisdiction by individuals, whether its own citizens or not."[8]

The Court has continued to rely on *Hans*[9] although support for it has not been universal.[10] In 1996, the Court further solidified *Hans* in *Seminole Tribe of Florida v. Florida*,[11] holding that Congress lacks power under Article I to abrogate state immunity under the Eleventh Amendment. And, in 1999, the Court ruled in *Alden v. Maine*[12] that the broad principle of sovereign immunity reflected in the Eleventh Amendment bars suits against states in *state* courts as well as federal.

Having previously reserved the question of whether federal statutory rights could be enforced in state courts,[13] the Court in *Alden v. Maine*[14] held that states could also assert Eleventh Amendment "sovereign immunity" in their own courts. Recognizing that the application of the Eleventh Amendment, which limits only the federal courts, was a "misnomer"[15] as applied to state courts, the Court nonetheless concluded that the principles of common law sovereign immunity applied absent "compelling evidence" that the states had surrendered such by ratifying the Constitution. Although this immunity is subject to the same limitations as apply in federal courts, the Court's decision effectively limited applying

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[6] 256 U.S. 490 (1921).

[7] *Id.* at 497–98.

[8] *Id.* at 498. *See also* Florida Dep't of State v. Treasure Salvors, 458 U.S. 670 (1982); Welch v. Texas Dep't of Highways and Transp., 483 U.S. 468 (1987).

[9] *E.g.*, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 97–103 (1984) (opinion of the Court by Justice Lewis Powell); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 237–40, 243–44 n.3 (1985) (opinion of the Court by Justice Lewis Powell); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472–74, 478–95 (1987) (plurality opinion of Justice Lewis Powell); Pennsylvania v. Union Gas Co., 491 U.S. 1, 29 (1989) (Justice Antonin Scalia concurring in part and dissenting in part); Dellmuth v. Muth, 491 U.S. 223, 227–32 (1989) (opinion of the Court by Justice Anthony Kennedy); Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 101 (1989) (plurality opinion of Justice Byron White); *id.* at 105 (concurring opinions of Justices Sandra Day O'Connor and Antonin Scalia); Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990) (opinion of the Court by Justice Sandra Day O'Connor).

[10] *E.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985) (dissenting); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 496 (1987) (dissenting); Dellmuth v. Muth, 491 U.S. 223, 233 (1989) (dissenting); Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 309 (1990) (concurring). Joining Justice William Brennan were Justices Thurgood Marshall, Harry Blackmun, and John Stevens. *See also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 23 (1989) (Justice Stevens concurring).

[11] 517 U.S. 44 (1996).

[12] 527 U.S. 706 (1999).

[13] Employees of the Dep't of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279, 287 (1973). 16. 527 U.S. 706 (1999).

[14] 527 U.S. 706 (1999).

[15] 527 U.S. at 713.

significant portions of federal law to state governments.[16] Both *Seminole Tribe* and *Alden* were 5-4 decisions with four dissenting Justices maintaining that *Hans* was wrongly decided.

This split continued with *Federal Maritime Commission v. South Carolina State Ports Authority*,[17] which held that state sovereign immunity also applies to quasi-judicial proceedings in federal agencies. In this case, the operator of a cruise ship devoted to gambling had been denied entry to the Port of Charleston, and subsequently filed a complaint with the Federal Maritime Commission, alleging a violation of the Shipping Act of 1984.[18] Justice Stephen Breyer, writing for the four dissenting Justices, emphasized the executive (as opposed to judicial) nature of such agency adjudications, noting that the ultimate enforcement of such proceedings in federal court was exercised by a federal agency (as is allowed under the doctrine of sovereign immunity). The majority, however, while admitting to a "relatively barren historical record," presumed that when a proceeding was "unheard of" at the time of the founding of the Constitution, it could not subsequently be applied in derogation of a "State's dignity" within our system of federalism.[19]

Amdt11.5.2 Nature of States' Immunity

Eleventh Amendment:

> *The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.*

Hans v. Louisiana and *Ex parte New York* note that *Chisholm* was erroneously decided and that the Amendment's intent was to restore the "original understanding" that a state could not be sued without its consent, and that nothing in the Constitution, including Article III's grants of federal court jurisdiction, was intended to provide otherwise. In *Edelman v. Jordan*,[1] the Court held that a state could properly raise its Eleventh Amendment defense on appeal after having defended and lost on the merits in the trial court. The Court stated: "[I]t has been well settled . . . that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."[2] But that the bar is not wholly jurisdictional seems established as well.[3]

Moreover, if under Article III there is no jurisdiction of suits against states, the settled principle that states may consent to suit[4] becomes conceptually difficult, as jurisdiction may

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[16] Note, however, that at least one subsequent decision has seemingly enhanced the applicability of federal law to the states themselves. In *PennEast Pipeline Co. v New Jersey* (595 U.S. —), the Court held that a private company that was granted authority to exercise eminent domain by the federal government could exercise that authority to take possession of property interests owned by a state.

[17] 535 U.S. 743 (2002). Justice Breyer's dissenting opinion describes a need for "continued dissent" from the majority's sovereign immunity holdings. 535 U.S. at 788.

[18] 46 U.S.C. §§ 40101 et seq.

[19] 535 U.S. at 755, 760.

[1] 415 U.S. 651 (1974).

[2] 415 U.S. at 678. The Court relied on *Ford Motor Co. v. Department of Treasury of Indiana,* 323 U.S. 459 (1945), where the issue was whether state officials who had voluntarily appeared in federal court had authority under state law to waive the state's immunity. *Edelman* has been followed in *Sosna v. Iowa,* 419 U.S. 393, 396 n.2 (1975); *Mt. Healthy City Bd. of Educ. v. Doyle,* 429 U.S. 274, 278 (1977), with respect to the Court's responsibility to raise the Eleventh Amendment jurisdictional issue on its own motion.

[3] *See* Patsy v. Florida Board of Regents, 457 U.S. 496, 515–16 n.19 (1982), in which the Court bypassed the Eleventh Amendment issue, which had been brought to its attention, because of the interest of the parties in having the question resolved on the merits. *See id.* at 520 (Justice Lewis Powell dissenting).

[4] Clark v. Barnard, 108 U.S. 436 (1883).

not be conferred if the state refuses its consent.[5] And Article III jurisdiction exists for some suits against states, such as those brought by the United States or by other states.[6] Furthermore, Congress is able, in some instances, to legislate away state immunity,[7] although it may not enlarge Article III jurisdiction.[8] The Court has declared that "the principle of sovereign immunity [reflected in the Eleventh Amendment] is a constitutional limitation on the federal judicial power established in Art. III," while acknowledging that "[a] sovereign's immunity may be waived."[9]

Another explanation of the Eleventh Amendment is that it merely recognized the continued vitality of the doctrine of sovereign immunity as established prior to the Constitution: a state was not subject to suit without its consent.[10] Modern case law supports this view. In the 1999 *Alden v. Maine* decision, the Court stated: "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today"[11] The Court, in dealing with questions of governmental immunity from suit, has traditionally treated precedents dealing with state immunity and those dealing with Federal Governmental immunity interchangeably.[12] Viewing the Amendment and Article III this way explains consent to suit as a waiver.[13] The limited effect of the doctrine in federal courts arises from the fact that traditional sovereign immunity arose in a unitary state, barring unconsented suit against a sovereign in its own courts or the courts of another sovereign. But upon entering the Union the states surrendered their sovereignty to some undetermined and changing degree to the national government, a sovereign that does not have plenary power over them but that is more than their coequal.[14]

Within the area of federal court jurisdiction, the issue becomes the extent to which the states, upon entering the Union, ceded their immunity to suit in federal court. *Chisholm* held—and the Eleventh Amendment reversed —that the states had given up their immunity to suit in diversity cases based on common law or state law causes of action; *Hans v. Louisiana* and subsequent cases held that the Amendment, in effect, recognized state immunity to suits based on federal causes of action.[15] Other cases have held that states ceded their immunity to suits by the United States or by other states.[16]

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[5] *E.g.*, People's Band v. Calhoun, 102 U.S. 256, 260–61 (1880). *See* Justice Lewis Powell's explanation in Patsy v. Florida Board of Regents, 457 U.S. 496, 528 n.13 (1982) (dissenting) (no jurisdiction under Article III of suits against *unconsenting* states).

[6] *See, e.g.*, the Court's express rejection of the Eleventh Amendment defense in these cases. United States v. Texas, 143 U.S. 621 (1892); South Dakota v. North Carolina, 192 U.S. 286 (1904).

[7] *E.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

[8] The principal citation is Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).

[9] Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98, 99 (1984).

[10] As Justice Oliver Holmes explained, the doctrine is based "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). Of course, when a state is sued in federal court pursuant to federal law, the Federal Government, not the defendant state, is "the authority that makes the law" creating the right of action. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 154 (1996) (Souter, J., dissenting). For the history and jurisprudence, see Lewis J. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

[11] Alden v. Maine, 527 U.S. 706, 713 (1999).

[12] *See, e.g.*, United States v. Lee, 106 U.S. 196, 210–14 (1882); Belknap v. Schild, 161 U.S. 10, 18 (1896); Hopkins v. Clemson Agricultural College, 221 U.S. 636, 642–43, 645 (1911).

[13] A sovereign may consent to suit. *E.g.*, United States v. Sherwood, 312 U.S. 584, 586 (1941); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 514 (1940).

[14] *See* Fletcher, *supra*.

[15] For a while only Justice William Brennan advocated this view, Parden v. Terminal Ry., 377 U.S. 184 (1964); Emps. of the Dep't of Pub. Health and Welfare v. Dep't of Pub. Health and Welfare, 411 U.S. 279, 298 (1973)

Still another view of the Eleventh Amendment is that it embodies a state sovereignty principle limiting the Federal Government's power.[17] In this respect, the federal courts may not act without congressional guidance in subjecting states to suit, and Congress, which can act to the extent of its granted powers, is constrained by judicially created doctrines requiring it to be explicit when it legislates against state immunity.[18]

Questions regarding the constitutional dimensions of sovereign immunity have arisen in the context of *interstate* sovereign immunity when a private party institutes an action against a state in another state's court. In the now-overturned 1979 decision of *Nevada v. Hall*, the Court held that while states are free as a matter of comity "to accord each other immunity or to respect any established limits on liability," the Constitution does not compel a state to grant another state immunity in its courts.[19] In *Hall*, California residents who were severely injured in a car crash with a Nevada state university employee on official business sued the university and the State of Nevada in California court.[20] After considering the scope of sovereign immunity as it existed prior to and "in the early days of independence," the doctrine's effect on "the framing of the Constitution," and specific "aspects of the Constitution that qualify the sovereignty of the several States," such as the Full Faith and Credit Clause,[21] the Court concluded that "[n]othing in the Federal Constitution authorizes or obligates this Court to frustrate" California's policy of "full compensation in its courts for injuries on its highways resulting from the negligence" of state or non-state actors "out of enforced respect for the sovereignty of Nevada."[22]

Forty years later, the Court overruled *Hall* in *Franchise Tax Board of California v. Hyatt* (*Franchise Tax Board III*), holding that "States retain their sovereign immunity from private suits brought in the courts of other States."[23] *Franchise Tax Board III* involved a tort action by a private party against a California state agency in Nevada's courts.[24] The "sole question" before the Court was whether to overrule *Nevada v. Hall*, a question over which the Court divided in 2016.[25] As the majority in *Franchise Tax Board III* read the historical record, although interstate sovereign immunity may have existed as a voluntary practice of comity at

(dissenting), but in time he was joined by three others. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985) (Justice William Brennan, joined by Justices Thurgood Marshall, Harry Blackmun, and John Stevens, dissenting).

[16] *E.g.*, United States v. Texas, 143 U.S. 621 (1892); South Dakota v. North Carolina, 192 U.S. 286 (1904). *See* Kansas v. Colorado, 533 U.S. 1 (2001) (state may seek damages from another state, including damages to its citizens, provided it shows that the state has an independent interest in the proceeding).

[17] *E.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); Quern v. Jordan, 440 U.S. 332, 337 (1979).

[18] *See* Hutto v. Finney, 437 U.S. 678 (1978), in which the various opinions differ among themselves as to the degree of explicitness required. *See also* Quern v. Jordan, 440 U.S. 332, 343–45 (1979). As noted in the previous section, later cases stiffened the rule of construction. The parallelism of congressional power to regulate and to legislate away immunity is not exact. Thus, in Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279 (1973), the Court strictly construed congressional provision of suits as not reaching states, while in Maryland v. Wirtz, 392 U.S. 183 (1968), it had sustained the constitutionality of the substantive law.

[19] 440 U.S. 410, 426 (1979), *overruled by* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1492 (2019) [hereinafter *Franchise Tax Bd. III*.] 40. *Id.* at 411–12.

[20] *Id.* at 411–12.

[21] *Id.* at 414–18.

[22] *Id.* at 426. In the Court's view, for a federal court to infer "from the structure of our Constitution and nothing else, that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the States—and the power of the people—in our Union." *Id.* at 426–27.

[23] *Franchise Tax Bd. III*, 139 S. Ct. 1485, 1492 (2019).

[24] *Id.* at 1490–91.

[25] *Id.* at 1491; *see also* Franchise Tax Bd. of Cal. v. Hyatt, 136 S. Ct. 1277, 1279 (2016) ("The Court is equally divided on this question, and we consequently affirm the Nevada courts' exercise of jurisdiction over California."); *Franchise Tax Bd. III*, 139 S. Ct. at 1490–91 (explaining that the two prior *Franchise Tax Board* decisions centered on interpretations of the Full Faith and Credit Clause of Article IV of the Constitution).

the time of the Founding, the Constitution "fundamentally adjust[ed] the States' relationship with each other and curtail[ed] their ability, as sovereigns, to decline to recognize each other's immunity."[26] The Court reiterated the view embraced in several of its decisions since *Hall* that in proposing the Eleventh Amendment in response to *Chisholm v. Georgia*, "Congress acted not to change but to restore the original constitutional design."[27] Accordingly, the Court explained, the "sovereign immunity of the States . . . neither derives from, nor is limited by, the terms of the Eleventh Amendment."[28] Moreover, the Court reasoned, "[n]umerous provisions" in the Constitution support the view that interstate sovereign immunity is "embe[dded] . . . within the constitutional design."[29] Among other provisions, the Court cited Article I insofar as it "divests the States of the traditional diplomatic and military tools that foreign sovereigns possess" and Article IV's Full Faith and Credit Clause, which requires that "state-court judgments be accorded full effect in other States and preclude[s] States from 'adopt[ing] any policy of hostility to the public Acts' of other States."[30] Accordingly, because sovereign immunity was inherent in the constitutional design, the Court concluded that the State of California could not be sued in Nevada absent the former state's consent.[31]

Amdt11.5.3 Suits Against States

Eleventh Amendment:

> *The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.*

Despite the apparent limitations of the Eleventh Amendment, individuals may, under certain circumstances, bring constitutional and statutory cases against states. In some of these cases, the state's sovereign immunity has either been waived by the state (either explicitly or implicitly as a product of their consent to the plan of the Constitutional Convention) or abrogated by Congress. In other cases, the Eleventh Amendment does not apply because the procedural posture is such that the Court does not view them as being against a state. As discussed below, this latter doctrine is most often seen in suits to enjoin state officials. However, it has also been invoked in bankruptcy and admiralty cases, where the res, or property in dispute, is in fact the legal target of a dispute.[1]

The application of this last exception to the bankruptcy area has become less relevant, because even when a bankruptcy case is not focused on a particular res, the Court has held that a state's sovereign immunity is not infringed by being subject to an order of a bankruptcy court. In *Central Virginia Community College v. Katz*, the Court noted that "[t]he history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both

[26] Franchise Tax Bd. III, 139 S. Ct. at 1493, 1497.

[27] *Id.* at 1496 (quoting Alden v. Maine, 527 U.S. 706, 722 (1999)).

[28] *Id.* (quoting *Alden*, 527 U.S. at 713). 49. *Id.* at 1497.

[29] *Id.* at 1497.

[30] *Id.* (citation omitted).

[31] *Id.* at 1499. The Court reasoned that *stare decisis* did not compel it to follow *Hall* even though "some plaintiffs, such as Hyatt" relied on that decision in litigation against states. *Id.* at1499. In the Court's view, *Hall* "failed to account for the historical understanding of state sovereign immunity" and stood "as an outlier in [the Court's] sovereign immunity jurisprudence." *Id.*

[1] *See* Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 446–48 (2004) (exercise of bankruptcy court's in rem jurisdiction over a debtor's estate to discharge a debt owed to a state does not infringe the state's sovereignty); California v. Deep Sea Research, Inc., 523 U.S. 491, 507–08 (1998) (despite state claims over shipwrecked vessel, the Eleventh Amendment does not bar federal court in rem admiralty jurisdiction where the res is not in the possession of the sovereign).

proposed and enacted under its auspices immediately following ratification of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena."[2] Thus, where a federal law authorized a bankruptcy trustee to recover "preferential transfers" made to state educational institutions,[3] the court held that the state's sovereign immunity was not infringed despite the fact that the issue was "ancillary" to a bankruptcy court's in rem jurisdiction.[4]

Because Eleventh Amendment sovereign immunity inheres in states and not their subdivision or establishments, a state agency that wishes to claim state sovereign immunity must establish that it is acting as an arm of the state. In *Lake County Estates v. Tahoe Regional Planning Agency*, the Court stated: "[A]gencies exercising state power have been permitted to invoke the [Eleventh] Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself."[5] In evaluating such a claim, courts will examine state law to determine the nature of the entity and whether to treat it as an arm of the state.[6] The Supreme Court has consistently refused to extend Eleventh Amendment sovereign immunity to counties, cities, or towns,[7] even though such political subdivisions exercise a "slice of state power."[8] Even when such entities enjoy immunity from suit under state law, they do not have Eleventh Amendment immunity in federal court and states may not confer it.[9] Similarly, entities created pursuant to interstate compacts (and subject to congressional approval) are not immune from suit, absent a showing that the entity was structured so as to take advantage of the state's constitutional protections.[10]

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[2] Central Virginia Community College v. Katz, 546 U.S. 356, 362–63 (2006). The Court has cautioned, however, that *Katz's* analysis is limited to the context of the Bankruptcy Clause. Specifically, the Court has described the Clause as "sui generis" or "unique" among Article I's grants of authority, and, unlike other such grants, the Bankruptcy Clause itself abrogated state sovereign immunity in bankruptcy proceedings. *See* Allen v. Cooper, 140 S.Ct. 994, 1002–03 (2020) (observing that *Katz* "points to a good-for-one-clause-only holding" and does not cast further doubt on Seminole Tribe's "general rule that Article I cannot justify haling a State into federal court").

[3] A "preferential transfer" was defined as the transfer of a property interest from an insolvent debtor to a creditor, which occurred on or within ninety days before the filing of a bankruptcy petition, and which exceeds what the creditor would have been entitled to receive under such bankruptcy filing. 11 U.S.C. § 547(b). 55. 546 U.S. at 373.

[4] 546 U.S. at 373.

[5] Lake County Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 400–01 (1979), *citing* Edelman v. Jordan, 415 U.S. 651 (1974), and Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945). The fact that a state agency can be indemnified for the costs of litigation does not divest the agency of its Eleventh Amendment immunity. Regents of the University of California v. Doe, 519 U.S. 425 (1997).

[6] *See, e.g.*, Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) (local school district not an arm of the state based on (1) its designation in state law as a political subdivision, (2) the degree of supervision by the state board of education, (3) the level of funding received from the state, and (4) the districts' empowerment to generate their own revenue through the issuance of bonds or levying taxes.

[7] Northern Insurance Company of New York v. Chatham County, 547 U.S. 189, 193 (2006) (counties have neither Eleventh Amendment immunity nor residual common law immunity). *See* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Moor v. County of Alameda, 411 U.S. 693 (1973); Workman v. City of New York, 179 U.S. 552 (1900); Lincoln County v. Luning, 133 U.S. 529 (1890). In contrast to their treatment under the Eleventh Amendment, the Court has found that state immunity from federal regulation under the Tenth Amendment extends to political subdivisions as well. *See* Printz v. United States, 521 U.S. 898 (1997).

[8] Lake County Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 400–01 (1979) (quoting earlier cases).

[9] Chicot County v. Sherwood, 148 U.S. 529 (1893).

[10] Lake County Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959).

Amdt11.6 Exceptions

Amdt11.6.1 Waiver of State Sovereign Immunity

Eleventh Amendment:

> *The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.*

The immunity of a state from suit is a privilege which it may waive at its pleasure. Historically, the conclusion that a state has consented or waived its immunity has not been lightly inferred; the Court strictly construes statutes alleged to consent to suit. Thus, a state may waive its immunity in its own courts without consenting to suit in federal court,[1] and a general authorization "to sue and be sued" is ordinarily insufficient to constitute consent.[2] A statutory waiver of state Eleventh Amendment immunity is effective "only where stated in the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction."[3]

Thus, in *Port Authority Trans-Hudson Corp. v. Feeney*,[4] an expansive consent "to suits, actions, or proceedings of any form or nature at law, in equity or otherwise" was deemed too "ambiguous and general" to waive immunity in federal court, because it might be interpreted to reflect only a state's consent to suit in its own courts. But, when combined with language specifying that consent was conditioned on venue being laid "within a county or judicial district, established by one of said States or by the United States, and situated wholly or partially within the Port of New York District," waiver was effective.[5]

There are, however, a few cases in which the Court has found a waiver by implication. For example, in *Parden v. Terminal Railway*,[6] the Court ruled that employees of a state-owned railroad could sue the state for damages under the Federal Employers' Liability Act (FELA). One of the two primary grounds for finding lack of immunity was that by taking control of a railroad which was subject to the FELA, enacted some twenty years previously, the state had effectively accepted the imposition of the Act and consented to suit.[7] Distinguishing *Parden* as involving a proprietary activity,[8] the Court later refused to find any implied consent to suit by states participating in federal spending programs; participation was insufficient, and only

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[1] Smith v. Reeves, 178 U.S. 436 (1900); Murray v. Wilson Distilling Co., 213 U.S. 151, 172 (1909); Graves v. Texas Co., 298 U.S. 393, 403–04 (1936); Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).

[2] Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959); Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981). *Compare* Patsy v. Florida Bd. of Regents, 457 U.S. 496, 519 n.* (1982) (Justice White concurring), *with id.* at 522 and n.5 (Justice Lewis Powell dissenting).

[3] Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305–06 (1990) (internal citations omitted; emphasis in original). 5. 495 U.S. 299 (1990).

[4] 495 U.S. 299 (1990).

[5] 495 U.S. at 306–07. *But see* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985).

[6] 377 U.S. 184 (1964). The alternative but interwoven ground had to do with Congress's power to withdraw immunity. *See also* Petty v. Tennessee- Missouri Bridge Comm'n, 359 U.S. 275 (1959).

[7] The implied waiver issue aside, *Parden* subsequently was overruled, a plurality of the Court emphasizing that Congress had failed to abrogate state immunity unmistakably. Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468 (1987). Justice Lewis Powell's plurality opinion was joined by Chief Justice William Rehnquist and by Justices Byron White and Sandra Day O'Connor. Justice Antonin Scalia, concurring, thought *Parden* should be overruled because it must be assumed that Congress enacted the FELA and other statutes with the understanding that *Hans v. Louisiana* shielded states from immunity. *Id.* at 495.

[8] Edelman v. Jordan, 415 U.S. 651, 671–72 (1974). For the same distinction in the Tenth Amendment context, see National League of Cities v. Usery, 426 U.S. 833, 854 n.18 (1976).

when waiver has been "stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction," will it be found.[9] Further, even if a state becomes amenable to suit under a statutory condition on accepting federal funds, remedies, especially monetary damages, may be limited, absent express language to the contrary.[10]

Another form of waiver by implication is the waiver by consent to the plan of the Constitutional Convention; that is, that states waived sovereign immunity to litigation on certain matters when they ratified the Constitution. A recent decision seems to have expanded the scope of these sort of implicit waivers. In *PennEast Pipeline Co. v. New Jersey*,[11] the Court heard an appeal related to an interstate pipeline approved by the federal government. Under the Natural Gas Act (NGA), parties who receive certificates to construct and operate interstate natural gas pipelines are authorized to exercise eminent domain in order to obtain the necessary rights-of-way to construct and operate the pipeline along the approved route.[12] In this instance, the approved route included lands owned by the State of New Jersey. The certificate holders brought an action in federal district court seeking to condemn those state-owned parcels, and the state responded by asserting its sovereign immunity under the eleventh Amendment. The lower courts sided with the state, rejecting the argument that the federal government had delegated its authority to sue states in the NGA and the certificate proceeding, but the Supreme Court disagreed. Writing for the 5-4 majority, Chief Justice John Roberts noted that "[t]he 'plan of the Convention' includes certain waivers of sovereign immunity to which all States implicitly consented at the founding."[13] The Court concluded that it would be "untenable" to find that this waiver did not extend to private parties authorized by the federal government to exercise eminent domain authority.[14] In addition, because the waiver of sovereign immunity was based on the states' implicit consent via the "plan of the Convention" rather than abrogation or explicit waiver, there was no need to find that the NGA clearly authorized such suits.[15] The Court's decision in *PennEast* is one of the only Supreme Court decisions relying on the "plan of convention" as a basis for consent or waiver, so its impact outside of federal legislation delegating eminent domain power remains to be seen.

A state may also waive its immunity by initiating or participating in litigation. In *Clark v. Barnard*,[16] the state had filed a claim for disputed money deposited in a federal court, and the Court held that the state could not thereafter complain when the court awarded the money to another claimant. However, the Court is loath to find a waiver simply because an official or an attorney representing the state decided to litigate the merits of a suit, so that a state may at any point in litigation raise a claim of immunity based on whether that official has the authority under state law to make a valid waiver.[17] However, this argument is only available when the state is brought into federal court involuntarily. If a state voluntarily agrees to

[9] Edelman v. Jordan, 415 U.S. 651 (1974) (quoting *id.* at 673, Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)); Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981). Of the four *Edelman* dissenters, Justices Thurgood Marshall and Harry Blackmun found waiver through knowing participation, 415 U.S. at 688. In *Florida Dep't*, Justice John Stevens noted he would have agreed with them had he been on the Court at the time but that he would now adhere to *Edelman*. *Id.* at 151.

[10] Sossamon v. Texas, 131 S. Ct. 1651 (2011).

[11] No. 19-1039 (U.S. June 29, 2021).

[12] 15 U.S.C. § 717f(h).

[13] *Alden*, 527 U.S. at 755–56.

[14] Id.

[15] Id.

[16] 108 U.S. 436 (1883).

[17] Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 466–467 (1945); Edelman v. Jordan, 415 U.S. 651, 677–678 (1974).

removal of a state action to federal court, the Court has held it may not then invoke a defense of sovereign immunity and thereby gain an unfair tactical advantage.[18]

Amdt11.6.2 Abrogation of State Sovereign Immunity

Eleventh Amendment:

> *The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.*

The Constitution grants Congress power to regulate state action by legislation. In some instances when Congress does so, it may subject states to suit by individuals to implement the legislation. The clearest example arises from the Civil War Amendments, which directly restrict state powers and expressly authorize Congress to enforce these restrictions through appropriate legislation.[1] Thus, in *Fitzpatrick v. Bitzer*, the Court stated: "the Eleventh Amendment and the principle of state sovereignty which it embodies . . . are necessarily limited, by the enforcement provisions of § 5 of the Fourteenth Amendment."[2] The power to enforce the Civil War Amendments is substantive, however, not being limited to remedying judicially cognizable violations of the amendments, but extending as well to measures that in Congress's judgment will promote compliance.[3] The principal judicial brake on this power to abrogate state immunity in legislation enforcing the Civil War Amendments is the rule requiring that congressional intent to subject states to suit be clearly stated.[4]

In the 1989 case of *Pennsylvania v. Union Gas Co.*,[5] the Court—temporarily at least—ended years of uncertainty by holding expressly that Congress acting pursuant to its

[18] Lapides v. Board of Regents, 535 U.S. 613 (2002).

[1] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Hutto v. Finney, 437 U.S. 678 (1978); City of Rome v. United States, 446 U.S. 156 (1980). More recent cases affirming Congress's Section 5 powers include Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985); and Dellmuth v. Muth, 491 U.S. 223, 227 (1989).

[2] Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (under the Fourteenth Amendment, Congress may "provide for private suits against States or state officials which are constitutionally impermissible in other contexts.").

[3] In *Maher v. Gagne*, 448 U.S. 122 (1980), the Court found that Congress could validly authorize imposition of attorneys' fees on the state following settlement of a suit based on both constitutional and statutory grounds, even though settlement had prevented determination that there had been a constitutional violation. *Maine v. Thiboutot*, 448 U.S. 1 (1980), held that § 1983 suits could be premised on federal statutory as well as constitutional grounds. Other cases in which attorneys' fees were awarded against states are *Hutto v. Finney*, 437 U.S. 678 (1978); and *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980). *See also* Frew v. Hawkins, 540 U.S. 431 (2004) (upholding enforcement of consent decree).

[4] Even prior to the tightening of the clear statement rule over the past several decades to require express legislative language (*see* note and accompanying text, *infra*), application of the rule curbed congressional enforcement. Fitzpatrick v. Bitzer, 427 U.S. 445 451–53 (1976); Hutto v. Finney, 437 U.S. 678, 693–98 (1978). Because of its rule of clear statement, the Court in *Quern v. Jordan*, 440 U.S. 332 (1979), held that in enacting 42 U.S.C. § 1983, Congress had not intended to include states within the term "person" for the purpose of subjecting them to suit. The question arose after *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658 (1978), reinterpreted "person" to include municipal corporations. *Cf.* Alabama v. Pugh, 438 U.S. 781 (1978). The Court has reserved the question of whether the Fourteenth Amendment itself, without congressional action, modifies the Eleventh Amendment to permit suits against states, Milliken v. Bradley, 433 U.S. 267, 290 n.23 (1977), but the result in *Milliken*, holding that the Governor could be enjoined to pay half the cost of providing compensatory education for certain schools, which would come from the state treasury, and in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), permitting imposition of damages upon the governor, which would come from the state treasury, is suggestive. *But see* Rabinovitch v. Nyquist, 433 U.S. 901 (1977). The Court declined in *Ex parte Young,* 209 U.S. 123, 150 (1908), to view the Eleventh Amendment as modified by the Fourteenth.

[5] 491 U.S. 1 (1989). The Justice William Brennan wrote the Court's plurality opinion and was joined by the three other Justices who believed *Hans* was incorrectly decided. *See id.* at 23 (Justice Stevens concurring). Justice Byron White provided the fifth vote *id.* at 45, 55–56 (Justice Byron White concurring), although he believed *Hans* was correctly decided and ought to be maintained although he did not believe Congress had acted with sufficient clarity in the statutes before the Court to abrogate immunity. Justice Antonin Scalia thought the statutes were express enough

Article I powers (as opposed to its Fourteenth Amendment powers) may abrogate the Eleventh Amendment immunity of the states, so long as it does so with sufficient clarity. Twenty-five years earlier the Court had stated that same principle,[6] but only as an alternative holding, and a later case had set forth a more restrictive rule.[7] The premises of *Union Gas* were that by consenting to ratification of the Constitution, with its Commerce Clause and other clauses empowering Congress and limiting the states, the states had implicitly authorized Congress to divest them of immunity, that the Eleventh Amendment was a restraint upon the courts and not similarly upon Congress, and that the exercises of Congress's powers under the Commerce Clause and other clauses would be incomplete without the ability to authorize damage actions against the states to enforce congressional enactments. The dissenters disputed each of these strands of the argument, and, while recognizing the Fourteenth Amendment abrogation power, took the position that no such power existed under Article I.

Pennsylvania v. Union Gas lasted less than seven years before the Court overruled it in *Seminole Tribe of Florida v. Florida*.[8] Chief Justice William Rehnquist, writing for a 5-4 majority, concluded that *Union Gas* had deviated from a line of cases, tracing back to *Hans v. Louisiana*,[9] which viewed the Eleventh Amendment as implementing the "fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Article III."[10] Because "the Eleventh Amendment restricts the judicial power under Article III, . . . Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[11] Subsequent cases have upheld this interpretation.[12]

Section 5 of the Fourteenth Amendment, of course, is another matter. *Fitzpatrick v. Bitzer*,[13] which held, in part, that the Fourteenth Amendment "operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment," remains good law.[14] This ruling led to a number of cases that examined whether a statute that might be applied against non-state actors under an Article I power could also, under section 5 of the Fourteenth Amendment, be applied against the states.[15]

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but that Congress simply lacked the power. *Id.* at 29. Chief Justice William Rehnquist and Justices Sandra Day O'Connor and Anthony Kennedy joined relevant portions of both opinions finding lack of power and lack of clarity.

[6] Parden v. Terminal Railway, 377 U.S. 184, 190–92 (1964). *See also* Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 283, 284, 285–86 (1973).

[7] Edelman v. Jordan, 415 U.S. 651, 672 (1974).

[8] 517 U.S. 44 (1996) (invalidating a provision of the Indian Gaming Regulatory Act authorizing an Indian tribe to sue a state in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact).

[9] 134 U.S. 1 (1890).

[10] 517 U.S. at 64 (quoting Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 97–98 (1984).

[11] 517 U.S. at 72–73. Justice David Souter's dissent undertook a lengthy refutation of the majority's analysis, asserting that the Eleventh Amendment is best understood, in keeping with its express language, as barring only suits based on diversity of citizenship, and as having no application to federal question litigation. Moreover, Justice Souter contended, the state sovereign immunity that the Court mistakenly recognized in *Hans v. Louisiana* was a common law concept that "had no constitutional status and was subject to congressional abrogation." 517 U.S. at 117. The Constitution made no provision for wholesale adoption of the common law, but, on the contrary, was premised on the view that common law rules would always be subject to legislative alteration. This "imperative of legislative control grew directly out of the Framers' revolutionary idea of popular sovereignty." *Id.* at 160.

[12] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (the Trademark Remedy Clarification Act, an amendment to the Lanham Act, did not validly abrogate state immunity); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (amendment to patent laws abrogating state immunity from infringement suits is invalid); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (abrogation of state immunity in the Age Discrimination in Employment Act is invalid); Allen v. Cooper, 140 S. Ct. 994 (2020) (the Copyright Remedy Clarification Act of 1990 did not validly abrogate state sovereign immunity).

[13] 427 U.S. 445 (1976).

[14] *Seminole Tribe*, 517 U.S. at 65–66.

[15] *See* Fourteenth Amendment, Congressional Definition of Fourteenth Amendment Rights, *infra*.

In another line of cases, a different majority of the Court focused on language Congress used to overcome immunity rather than the authority underlying the action. Henceforth, the Court held in a 1985 decision, and even with respect to statutes that were enacted prior to promulgation of this judicial rule of construction, "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear *in the language of the statute*" itself.[16]

At one time, a plurality of the Court appeared to take the position that Congress had to refer specifically to state sovereign immunity and the Eleventh Amendment for its language to be unmistakably clear.[17] Thus in 1985 the Court held in *Atascadero State Hospital v. Scanlon* that general language subjecting to suit in federal court by "any recipient of Federal assistance" under the Rehabilitation Act was insufficient to satisfy this test, not because of any question about whether states are "recipients" within the meaning of the provision but because "given their constitutional role, the states are not like any other class of recipients of federal aid."[18] As a result of these rulings, Congress began to use words the Court had identified.[19] Since then, however, the Court has accepted less precise language,[20] and in at least one context, has eliminated the requirement of specific abrogation language altogether.[21]

Even before the *Alden v. Maine* decision,[22] when the Court believed that Eleventh Amendment sovereign immunity did not apply to suits in state courts, the Court applied its rule of strict construction to require "unmistakable clarity" by Congress in order to subject states to suit.[23] Although the Court was willing to recognize exceptions to the clear statement rule when the issue involved subjection of states to suit in state courts, the Court also suggested the need for "symmetry" so that states' liability or immunity would be the same in both state and federal courts.[24]

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[16] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (emphasis added).

[17] Justice Anthony Kennedy for the Court in *Dellmuth*, 491 U.S. at 231, expressly noted that the statute before the Court did not demonstrate abrogation with unmistakable clarity because, inter alia, it "makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity." Justice Antonin Scalia, one of four concurring Justices, expressed an "understanding" that the Court's reasoning would allow for clearly expressed abrogation of immunity "without explicit reference to state sovereign immunity or the Eleventh Amendment." *Id.* at 233.

[18] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985). *See also* Dellmuth v. Muth, 491 U.S. 223 (1989).

[19] In 1986, following *Atascadero*, Congress provided that states were not to be immune under the Eleventh Amendment from suits under several laws barring discrimination by recipients of federal financial assistance. Pub. L. No. 99-506, § 1003, 100 Stat. 1845 (1986), 42 U.S.C. § 2000d-7. Following *Dellmuth*, Congress amended the statute to insert the explicit language. Pub. L. No. 101-476, § 103, 104 Stat. 1106 (1990), 20 U.S.C. § 1403. *See also* the Copyright Remedy Clarification Act, Pub. L. 101-553, § 2, 104 Stat. 2749 (1990), 17 U.S.C. § 511 (making states and state officials liable in damages for copyright violations).

[20] Kimel v. Florida Board of Regents, 528 U.S. 62, 74–78 (2000). In *Kimel*, statutory language authorized age discrimination suits "against any employer (including a public agency)," and a "public agency" was defined to include "the government of a State or political subdivision thereof." The Court found this language to be sufficiently clear evidence of intent to abrogate state sovereign immunity. The relevant portion of the opinion was written by Justice Sandra Day O'Connor, and joined by Chief Justice William Rehnquist and Justices John Stevens, Antonin Scalia, David Souter, Ruth Bader Ginsburg, Stephen Breyer and John Stevens. *But see* Raygor v. Regents of the University of Minnesota, 534 U.S. 533 (2002) (federal supplemental jurisdiction statute which tolls limitations period for state claims during pendency of federal case not applicable to claim dismissed on the basis of Eleventh Amendment immunity).

[21] Central Virginia Community College v. Katz, 546 U.S. 356, 363 (2006) (abrogation of state sovereign immunity under the Bankruptcy Clause was effectuated by the Constitution, so it need not additionally be done by statute); *id.* at 383 (Justice Clarence Thomas dissenting).

[22] 527 U.S. 706 (1999).

[23] Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) (holding that states and state officials sued in their official capacity could not be made defendants in § 1983 actions in state courts).

[24] Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 206 (1991) (interest in "symmetry" is outweighed by *stare decisis*, the FELA action being controlled by *Parden v. Terminal Ry.*).

Amdt11.6.3 Officer Suits and State Sovereign Immunity

Eleventh Amendment:

> *The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.*

Courts may provide relief from government wrongs under the doctrine that sovereign immunity does not prevent suits to restrain individual government officials.[1] The doctrine is built upon a double fiction: that for purposes of the sovereign's immunity, a suit against an official is not a suit against the government, but for the purpose of finding state action to which the Constitution applies, the official's conduct is that of the state.[2] The doctrine is often associated with the decision in *Ex parte Young*.[3]

Young arose when a state legislature passed a law reducing railroad rates and providing severe penalties for any railroad that failed to comply with the law. Plaintiffs brought a federal action to enjoin Young, the state attorney general, from enforcing the law, alleging that it was unconstitutional and that they would suffer irreparable harm if he were not prevented from acting. An injunction was granted forbidding Young from acting on the law, an injunction he violated by bringing an action in state court against noncomplying railroads; for this action he was adjudged in contempt.

In deciding *Young*, the Court faced inconsistent lines of cases, including numerous precedents for permitting suits against state officers. Chief Justice John Marshall had begun the process in *Osborn* by holding that suit was barred only when the state was formally named a party.[4] He modified his position to preclude suit when an official, the governor of a state, was sued in his official capacity,[5] but relying on *Osborn* and reading *Madrazo* narrowly, the Court later held in a series of cases that an official of a state could be sued to prevent him from executing a state law in conflict with the Constitution or a law of the United States, and the fact that the officer may be acting on behalf of the state or in response to a state statutory obligation did not make the suit one against the state.[6] Subsequently the Court developed another more functional, less formalistic concept of the Eleventh Amendment and sovereign

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[1] *See, e.g.* Larson v. Domestic and Foreign Corp., 337 U.S. 682 (1949). It should be noted, however, that as a threshold issue in lawsuits against state employees or entities, courts must look to whether the sovereign is the real party in interest to determine whether state sovereign immunity bars the suit. *See* Hafer v. Melo, 502 U.S. 21, 25 (1991). Court must determine "whether the remedy sought is truly against the sovereign," and if an "action is in essence against a State even if the State is not a named party, then the State is the real party in interest and is entitled to invoke the Eleventh Amendment's protections." *See* Lewis v. Clarke, 137 S. Ct. 1285, 1290–91 (2017). As a result, arms of the state, such as a state university, enjoy sovereign immunity. *Id.* at 6. Likewise, lawsuits brought against employees in their official capacity "may also be barred by sovereign immunity." *Id.*

[2] C. Wright, The Law of Federal Courts § 48 (4th ed. 1983). 3. 209 U.S. 123 (1908).

[3] 209 U.S. 23 (1908).

[4] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

[5] Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828).

[6] Davis v. Gray, 83 U.S. (16 Wall.) 203 (1872); Board of Liquidation v. McComb, 92 U.S. 531 (1876); Allen v. Baltimore & Ohio R.R., 114 U.S. 311 (1885); Rolston v. Missouri Fund Comm'rs, 120 U.S. 390 (1887); Pennoyer v. McConnaughy, 140 U.S. 1 (1891); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894); Smyth v. Ames, 169 U.S. 466 (1898); Scranton v. Wheeler, 179 U.S. 141 (1900).

immunity, which evidenced an increasing wariness toward affirmatively ordering states to relinquish state-controlled property[7] and culminated in the broad reading of Eleventh Amendment immunity in *Hans v. Louisiana*.[8]

Two of the leading cases concerned suits to prevent Southern states from defaulting on bonds.[9] In *Louisiana v. Jumel*,[10] a Louisiana citizen sought to compel the state treasurer to apply a sinking fund that had been created under the earlier constitution for the payment of the bonds after a subsequent constitution had abolished this provision for retiring the bonds. The proceeding was held to be a suit against the state.[11] Then, *In re Ayers*[12] purported to supply a rationale for cases on the issuance of mandamus or injunctive relief against state officers that would have severely curtailed federal judicial power. Suit against a state officer was not barred when his action, aside from any official authority claimed as its justification, was a wrong simply as an individual act, such as a trespass, but if the act of the officer did not constitute an individual wrong and was something that only a state, through its officers, could do, the suit was in actuality a suit against the state and was barred.[13] That is, the unconstitutional nature of the state statute under which the officer acted did not itself constitute a private cause of action. For that, one must be able to point to an independent violation of a common law right.[14]

Although *Ayers* was in all relevant points on all fours with *Young*,[15] the *Young* Court held that the court had properly issued the injunction against the state attorney general, even though the state was in effect restrained as well. The Court stated that "[t]he act to be enforced is alleged to be unconstitutional, and, if it be so, the use of the name of the State to enforce an

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[7] Judicial reluctance to confront government officials over government-held property did not extend in like manner in a federal context, as was evident in *United States v. Lee*, the first case in which the sovereign immunity of the United States was claimed and rejected. United States v. Lee, 106 U.S. 196 (1882). *See* Article III, "Suits Against United States Officials." However, the Court sustained the suit against the federal officers by only a 5-4 vote, and the dissent presented the arguments that were soon to inform Eleventh Amendment cases.

[8] 134 U.S. 1 (1890).

[9] *See* J. J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1968–2003 (1983); J. V. Orth, *The Interpretation of the Eleventh Amendment, 1798–1908: A Case Study of Judicial Power*, 1983 U. ILL. L. REV. 423.

[10] 107 U.S. 711 (1882).

[11] "The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared that it shall not be done." 107 U.S. at 721. *See also* Christian v. Atlantic & N.C. R.R., 133 U.S. 233 (1890).

[12] 123 U.S. 443 (1887).

[13] 123 U.S. at 500–01, 502.

[14] *Ayers* sought to enjoin state officials from bringing suit under an allegedly unconstitutional statute purporting to overturn a contract between the state and the bondholders to receive the bond coupons for tax payments. The Court asserted that the state's contracts impliedly contained the state's immunity from suit, so that express withdrawal of a supposed consent to be sued was not a violation of the contract; but, in any event, because any violation of the assumed contract was an act of the state, to which the officials were not parties, their actions as individuals in bringing suit did not breach the contract. 123 U.S. at 503, 505–06. The rationale had been asserted by a four-Justice concurrence in Antoni v. Greenhow, 107 U.S. 769, 783 (1883). *See also* Cunningham v. Macon & Brunswick R.R., 109 U.S. 446 (1883); Hagood v. Southern, 117 U.S. 52 (1886); North Carolina v. Temple, 134 U.S. 22 (1890); In re Tyler, 149 U.S. 164 (1893); Baltzer v. North Carolina, 161 U.S. 240 (1896); Fitts v. McGhee, 172 U.S. 516 (1899); Smith v. Reeves, 178 U.S. 436 (1900).

[15] *Ayers* "would seem to be decisive of the Young litigation." C. WRITE, THE LAW OF FEDERAL COURTS § 48 at 288 (4th ed. 1983). The *Young* Court purported to distinguish and to preserve *Ayers* but on grounds that either were irrelevant to *Ayers* or that had been rejected in the earlier case. Ex parte Young, 209 U.S. 123, 151, 167 (1908). Similarly, in a later case, the Court continued to distinguish *Ayers* but on grounds that did not in fact distinguish it from the case before the Court, in which it permitted a suit against a state revenue commissioner to enjoin him from collecting allegedly unconstitutional taxes. Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952).

unconstitutional act to the injury of the complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity."[16] Rather, the Court noted, "[i]t is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subject in his person to the consequences of his individual conduct."[17] Justice John Harlan was the only dissenter, arguing that in law and fact the suit was one only against the state and that the suit against the individual was a mere "fiction."[18]

Justice John Harlan's "fiction" remains a mainstay of Eleventh Amendment jurisprudence.[19] It accounts for much of the litigation brought by individuals to challenge the execution of state policies. Suits against state officers alleging that they are acting pursuant to an unconstitutional statute are the standard device by which the validity of state legislation in federal courts is tested prior to enforcement and thus interpretation by state courts.[20] Similarly, suits to restrain state officials from contravening federal statutes[21] or to compel undertaking affirmative obligations imposed by the Constitution or federal laws[22] are common.

For years, the accepted rule was that the Eleventh Amendment did not preclude suits prosecuted against state officers in federal courts upon grounds that they are acting in excess of *state* statutory authority[23] or that they are not doing something required by state law.[24]

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[16] *Ex parte* Young, 209 U.S. 123, 159–60 (1908). The opinion did not address the issue of how an officer "stripped of his official . . . character" could violate the Constitution, in that the Constitution restricts only "state action," but the double fiction has been expounded numerous times since. Thus, for example, it is well settled that an action unauthorized by state law is state action for purposes of the Fourteenth Amendment. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913). The contrary premise of *Barney v. City of New York*, 193 U.S. 430 (1904), though eviscerated by *Home Tel. & Tel.* was not expressly disavowed until *United States v. Raines*, 362 U.S. 17, 25–26 (1960).

[17] *Ex parte* Young, 209 U.S. 123, 159–60 (1908).

[18] *Ex parte* Young, 209 U.S. 123, 173–74 (1908) (Harlan, J., dissenting). In the process of limiting application of *Young*, a Court majority referred to "the Young fiction." Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 281 (1997).

[19] *E.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151, 156 n.6 (1978) (rejecting request of state officials being sued to restrain enforcement of state statute as preempted by federal law that *Young* be overruled); Florida Dep't of State v. Treasure Salvors, 458 U.S. 670, 685 (1982).

[20] *See, e.g.*, Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913); Truax v. Raich, 239 U.S. 33 (1915); Cavanaugh v. Looney, 248 U.S. 453 (1919); Terrace v. Thompson, 263 U.S. 197 (1923); Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925); Massachusetts State Grange v. Benton, 272 U.S. 525 (1926); Hawks v. Hamill, 288 U.S. 52 (1933). *See also* Graham v. Richardson, 403 U.S. 365 (1971) (enjoining state welfare officials from denying welfare benefits to otherwise qualified recipients because they were aliens); Goldberg v. Kelly, 397 U.S. 254 (1970) (enjoining city welfare officials from following state procedures for termination of benefits); Milliken v. Bradley, 433 U.S. 267 (1977) (imposing half the costs of mandated compensatory education programs upon state through order directed to governor and other officials). On injunctions against governors, *see* Continental Baking Co. v. Woodring, 286 U.S. 352 (1932); Sterling v. Constantin, 287 U.S. 378 (1932). Applicable to suits under this doctrine are principles of judicial restraint—constitutional, statutory, and prudential—discussed under Article III.

[21] *E.g.*, Edelman v. Jordan, 415 U.S. 651, 664–68 (1974); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).

[22] *E.g.*, Whole Woman's Health v. Jackson, No. 21-463 (2021) (citing *Ex Parte Young* in refusing to enjoin state court clerks and judges from enforcement of a state law); Milliken v. Bradley, 433 U.S. 267 (1977); Edelman v. Jordan, 415 U.S. 651, 664–68 (1974); Quern v. Jordan, 440 U.S. 332, 346–49 (1979).

[23] *E.g.*, Pennoyer v. McConnaughy, 140 U.S. 1 (1891); Scully v. Bird, 209 U.S. 481 (1908); Atchison, T. & S. F. Ry. v. O'Connor, 223 U.S. 280 (1912); Greene v. Louisville & Interurban R.R., 244 U.S. 499 (1917); Louisville & Nashville R.R. v. Greene, 244 U.S. 522 (1917). Property held by state officials on behalf of the state under claimed state authority may be recovered in suits against the officials, although the court may not conclusively resolve the state's claims against it in such a suit. South Carolina v. Wesley, 155 U.S. 542 (1895); Tindal v. Wesley, 167 U.S. 204 (1897); Hopkins v. Clemson College, 221 U.S. 636 (1911). *See also* Florida Dep't of State v. Treasure Salvors, 458 U.S. 670 (1982), in which the eight Justices who agreed that the Eleventh Amendment applied divided 4-4 over the proper interpretation.

However, in *Pennhurst State School & Hospital v. Halderman*,[25] the Court held that *Young* did not permit suits in federal courts against state officers alleging violations of state law. In the Court's view, *Young* was necessary to promote the supremacy of federal law, a basis that disappears if the violation alleged is of state law. The Court also still adheres to the doctrine, first pronounced in *Governor of Georgia v. Madrazo*,[26] that some suits against officers are actually suits against the state[27] and are barred by the state's immunity, such as when the suit involves state property or asks for relief which clearly calls for the exercise of official authority.[28]

For example, a suit to prevent tax officials from collecting death taxes arising from the competing claims of two states as being the last domicile of the decedent foundered upon the conclusion that there could be no credible claim of a constitutional or federal law violation; state law imposed the obligation upon the officials and "in reality" the action was against the state.[29] Suits against state officials to recover taxes have also been made increasingly difficult to maintain. Although the Court long ago held that the state sovereign immunity prevented a suit to recover money in the state treasury,[30] the Court also held that a suit would lie against a revenue officer to recover tax moneys illegally collected and still in his possession.[31] Beginning, however, with *Great Northern Life Insurance Co. v. Read*,[32] the Court has held that this kind of suit cannot be maintained unless the state expressly consents to suits in federal courts. In this case, the state statute provided for payment of taxes under protest and for suits afterward against state tax collection officials for recovery of taxes illegally collected, which revenues were required to be kept segregated.[33]

In *Edelman v. Jordan*,[34] the Court appeared to begin to adopt new restrictive interpretations of what the Eleventh Amendment proscribed. The Court announced in dictum that a suit "seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."[35] The Court held, however, that it was permissible for federal courts to require state officials to comply *in the future* with claims

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[24] *E.g.*, Rolston v. Missouri Fund Comm'rs, 120 U.S. 390 (1887); Atchison, T. & S. F. Ry. v. O'Connor, 223 U.S. 280 (1912); Johnson v. Lankford, 245 U.S. 541, 545 (1918); Lankford v. Platte Iron Works Co., 235 U.S. 461, 471 (1915); Davis v. Wallace, 257 U.S. 478, 482–85 (1922); Glenn v. Field Packing Co., 290 U.S. 177, 178 (1933); Lee v. Bickell, 292 U.S. 415, 425 (1934).

[25] 465 U.S. 89 (1984).

[26] Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828).

[27] *E.g.*, Ford Motor Co. v. Department of the Treasury, 323 U.S. 459, 464 (1945).

[28] In *Frew v. Hawkins*, 540 U.S. 431 (2004), Texas, which was under a consent decree regarding its state Medicaid program, attempted to extend the reasoning of *Pennhurst*, arguing that unless an actual violation of federal law had been found by a court, then such court would be without jurisdiction to enforce such decree. The Court, in a unanimous opinion, declined to so extend the Eleventh Amendment, noting, among other things, that the principles of federalism were served by giving state officials the latitude and discretion to enter into enforceable consent decrees. *Id.* at 442.

[29] Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937). *See also* Old Colony Trust Co. v. Seattle, 271 U.S. 426 (1926). *Worcester County* remains viable. Cory v. White, 457 U.S. 85 (1982). The actions were under the Federal Interpleader Act, 49 Stat. 1096 (1936), 28 U.S.C. § 1335, under which other actions against officials have been allowed. *E.g.*, Treines v. Sunshine Mining Co., 308 U.S. 66 (1939) (joinder of state court judge and receiver in interpleader proceeding in which state had no interest and neither judge nor receiver was enjoined by final decree). *See also* Missouri v. Fiske, 290 U.S. 18 (1933).

[30] Smith v. Reeves, 178 U.S. 436 (1900).

[31] Atchison, T. & S. F. Ry. v. O'Connor, 223 U.S. 280 (1912).

[32] 322 U.S. 47 (1944).

[33] *See also* Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Kennecott Copper Corp. v. Tax Comm'n, 327 U.S. 573 (1946). States may confine to their own courts suits to recover taxes. Smith v. Reeves, 178 U.S. 436 (1900); Murray v. Wilson Distilling Co., 213 U.S. 151 (1909); Chandler v. Dix, 194 U.S. 590 (1904).

[34] 415 U.S. 651 (1974).

[35] 415 U.S. at 663.

payment provisions of the welfare assistance sections of the Social Security Act, but that they were not permitted to hear claims seeking, or issue orders directing, payment of funds found to be wrongfully withheld.[36] Conceding that some of the characteristics of prospective and retroactive relief would be the same in their effects upon the state treasury, the Court nonetheless believed that retroactive payments were equivalent to imposing liabilities which must be paid from public funds in the treasury, and that this was barred by the Eleventh Amendment. The spending of money from the state treasury by state officials shaping their conduct in accordance with a prospective-only injunction is "an ancillary effect" which "is a permissible and often an inevitable consequence" of *Ex parte Young*, whereas "payment of state funds . . . as a form of compensation" to those wrongfully denied the funds in the past "is in practical effect indistinguishable in many aspects from an award of damages against the State."[37]

That *Edelman,* in many instances, may be a formal rather than an actual restriction is illustrated by *Milliken v. Bradley*,[38] in which state officers were ordered to spend money from the state treasury to finance remedial educational programs to counteract effects of past school segregation; the decree, the Court said, "fits squarely within the prospective-compliance exception reaffirmed by *Edelman*."[39] Although the payments were a result of past wrongs, the Court did not view them as "compensation," inasmuch as they were not to be paid to victims of past discrimination but rather used to better conditions either for them or their successors.[40] The Court also applied *Edelman* in *Papasan v. Allain*,[41] holding that a claim against a state for payments representing a continuing obligation to meet trust responsibilities stemming from a nineteenth century grant of public lands for the benefit of educating the Chickasaw Indian Nation is barred by the Eleventh Amendment as indistinguishable from an action for past loss of trust corpus, but that an Equal Protection claim for present unequal distribution of school land funds is the type of ongoing violation for which the Eleventh Amendment does not bar redress.

In *Idaho v. Coeur d'Alene Tribe of Idaho*,[42] the Court further narrowed *Ex parte Young*. The implications of the case are difficult to predict, because of the narrowness of the Court's holding, the closeness of the vote (5-4), and the inability of the majority to agree on a rationale. The Court held that the Tribe's suit against state officials for a declaratory judgment and injunction to establish the Tribe's ownership and control of the submerged lands of Lake Coeur d'Alene is barred by the Eleventh Amendment. The Tribe's claim was based on federal

[36] 415 U.S. at 667–68. Where the money at issue is not a state's, but a private party's, then the distinction between retroactive and prospective obligations is not important. In Verizon Md. Inc. v. Public Serv. Comm'n of Md., 535 U.S. 635 (2002), the Court held that a challenge to a state agency decision regarding a private party's past and future contractual liabilities does not violate the Eleventh Amendment. *Id.* at 648. In fact, three justices questioned whether the Eleventh Amendment is even implicated where there is a challenge to a state's determination of liability between private parties. *Id.* at 649 (Justice David Souter, concurring).

[37] 415 U.S. at 668. *See also* Quern v. Jordan, 440 U.S. 332 (1979) (reaffirming *Edelman*, but holding that state officials could be ordered to notify members of the class that had been denied retroactive relief in that case that they might seek back benefits by invoking state administrative procedures; the order did not direct the payment but left it to state discretion to award retroactive relief). *But cf.* Green v. Mansour, 474 U.S. 64 (1985). "Notice relief" permitted under *Quern v. Jordan* is consistent with the Eleventh Amendment only insofar as it is ancillary to valid prospective relief designed to prevent ongoing violations of federal law. Thus, where Congress has changed the AFDC law and the state is complying with the new law, an order to state officials to notify claimants that past payments may have been inadequate conflicts with the Eleventh Amendment.

[38] 433 U.S. 267 (1977).

[39] 433 U.S. at 289.

[40] 433 U.S. at 290 n.22. *See also* Hutto v. Finney, 437 U.S. 678, 690–91 (1978) (affirming order to pay attorney's fees out of state treasury as an "ancillary" order because of state's bad faith).

[41] 478 U.S. 265 (1986).

[42] 521 U.S. 261 (1997).

law—Executive Orders issued in the 1870s, prior to Idaho statehood. The portion of Justice Anthony Kennedy's opinion that represented the Court's opinion concluded that the Tribe's "unusual" suit was "the functional equivalent of a quiet title action which implicates special sovereignty interests."[43] The case was "unusual" because state ownership of submerged lands traces to the Constitution through the "equal footing doctrine," and because navigable waters "uniquely implicate sovereign interests."[44] This was therefore no ordinary property dispute in which the state would retain regulatory control over land regardless of title. Rather, grant of the "far-reaching and invasive relief" sought by the Tribe "would diminish, even extinguish, the State's control over a vast reach of lands and waters long . . . deemed to be an integral part of its territory."[45]

The Supreme Court faced a novel question related to state sovereign immunity in the 2021 case *Whole Woman's Health v. Jackson*.[46] That case involved a challenge to a Texas state law known as the Texas Heartbeat Act or S.B. 8, which allowed private citizens to sue healthcare providers and others who perform or abet abortions after a fetal heartbeat is detected. Because S.B. 8 banned some pre-viability abortions, it appeared to conflict with the Supreme Court's abortion jurisprudence at the time it was enacted. However, because the statute was enforced through private civil suits, rather than by state actors, it was not clear whether people challenging the law could bring suit under *Ex parte Young* to prevent its enforcement. Some opponents of S.B. 8 brought suit under *Young* against the Texas attorney general, clerks and judges of Texas state courts that could hear S.B. 8 claims, and certain state medical licensing officials. The Supreme Court held that the suit could not proceed against state court judges or clerks because judicial officers are not subject to suit under *Young*,[47] and that the plaintiffs could not sue the Texas attorney general because he lacked the power to enforce S.B. 8.[48] The Court allowed the suit to proceed against the state medical licensing officials, however, concluding that those officials had some authority to enforce S.B. 8.[49] *Whole Woman's Health* did not fully resolve questions about the extent to which states can enact legislation that limits the exercise of constitutional rights but evades federal judicial review under *Young*.[50]

Thus, as with the cases dealing with suits facially against the states themselves, the Court's greater attention to state immunity in the context of suits against state officials has

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[43] 521 U.S. at 281.

[44] 521 U.S. at 284.

[45] 521 U.S. at 282.

[46] 142 S. Ct. 522 (2021).

[47] 142 S. Ct. 522 (2021).

[48] *Id.* at 531–34.

[49] *Id.* at 534–35. In addition to their claims against state officials under *Young*, the S.B. 8 challengers sued a private individual who had threatened to sue under S.B. 8; the Court held that claim could not proceed because the private defendant later disclaimed any intent to sue under S.B. 8. *Id.* at 537.

[50] *Id.* at 535–37; *id.* at 544 (Roberts, C.J, dissenting); *id.* at 545 (Sotomayor, J., dissenting).

Following remand and certification of a state law question to the Texas Supreme Court, the state court ruled that Texas law did not authorize state medical licensing officials to enforce S.B. 8, Whole Woman's Health v. Jackson, 642 S.W. 3d 569 (Tex. 2022), and the U.S. Court of Appeals for the Fifth Circuit dismissed the claims against those officials, Whole Woman's Health v. Jackson, 31 F.4th 1004 (Mem) (5th Cir. 2022). The U.S. Supreme Court later overruled key abortion precedents that applied when it decided *Whole Woman's Health*, removing the main substantive basis for constitutional challenges to S.B. 8. Dobbs v. Jackson Women's Health Organization, No. 19-1392, 2022 WL 2276808 (June 24, 2022). The procedural issues presented in *Whole Woman's Health* remain unresolved, as legislation based on S.B. 8 may u *See* J. J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1968–2003 (1983); J. V. Orth, *The Interpretation of the Eleventh Amendment, 1798–1908: A Case Study of Judicial Power*, 1983 U. ILL. L. REV. 423.

resulted in a mixed picture, of some new restrictions, of the lessening of others. But a number of Justices have increasingly turned to the Eleventh Amendment as a means to reduce federal-state judicial conflict.[51]

Amdt11.6.4 Tort Actions Against State Officials

Eleventh Amendment:

> *The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.*

In *Tindal v. Wesley*,[1] the Court adopted the rule of *United States v. Lee*,[2] a tort suit against federal officials, to permit a tort action against state officials to recover real property held by them and claimed by the state and to obtain damages for the period of withholding. State immunity afforded by the Eleventh Amendment has long been held not to extend to actions against state officials for damages arising out of willful and negligent disregard of state laws.[3] The reach of the rule is evident in *Scheuer v. Rhodes*,[4] in which the Court held that plaintiffs were not barred by the Eleventh Amendment or other immunity doctrines from suing the governor and other officials of a state alleging that they deprived plaintiffs of federal rights under color of state law and seeking damages, when it was clear that plaintiffs were seeking to impose individual and personal liability on the officials. There was no "executive immunity" from suit, the Court held; rather, the immunity of state officials is qualified and varies according to the scope of discretion and responsibilities of the particular office and the circumstances existing at the time the challenged action was taken.[5]

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[51] 142 S. Ct. 522 (2021).

[1] 167 U.S. 204 (1897).

[2] 106 U.S. 196 (1882).

[3] Johnson v. Lankford, 245 U.S. 541 (1918); Martin v. Lankford, 245 U.S. 547 (1918).

[4] 416 U.S. 232 (1974).

[5] These suits, like suits against local officials and municipal corporations, are typically brought pursuant to 42 U.S.C. § 1983 and typically involve all the decisions respecting liability and immunities thereunder. On the scope of immunity of federal officials, *see* Article III, "Suits Against United States Officials," *supra*.

TWELFTH AMENDMENT
ELECTION OF PRESIDENT

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TWELFTH AMENDMENT—ELECTION OF PRESIDENT

Amdt12.1 Overview of Twelfth Amendment, Election of President

Ratified in 1804, the Twelfth Amendment superseded Article II, Section 1, Clause 3 of the Constitution. Under Article II as originally ratified, the Electoral College did not vote separately for President and Vice President. Instead, each elector voted for two candidates for President. If one candidate received votes from a majority of the electors, he became President, while the candidate with the second-highest number of votes became Vice President.[1] However, if two candidates received votes from a majority of electors, or if no candidate received a majority, the House of Representatives was to choose the President. Problems arose under the original system in the election of 1800, when Thomas Jefferson and Aaron Burr received the same number of votes in the Electoral College, sending the selection of a President to the House of Representatives, despite the fact that the electors had intended Jefferson to be President and Burr to be Vice President.[2]

The Twelfth Amendment was designed to avoid a repetition of the events of 1800 by having the electors vote separately for President and Vice President, with each elector casting one vote for each office. The Constitution's original system at times could result, as it did in the election of 1796, in the selection of a President and Vice President with different political alignments, while the Twelfth Amendment simplified the process for selecting a President and Vice President from the same political party. The Supreme Court has thus stated that the Amendment "both acknowledg[ed] and facilitat[ed] the Electoral College's emergence as a mechanism not for deliberation but for party-line voting."[3]

Since the Twelfth Amendment was ratified, Congress and the states have made other changes to presidential elections. Following the disputed election of 1876, Congress enacted a statute providing that if a state's vote is not certified by the governor under seal, it shall not be counted unless both Houses of Congress concur.[4] In addition, in 1933, the Twentieth Amendment superseded some provisions of the Twelfth Amendment.[5]

Amdt12.2 Twelfth Amendment Generally

Twelfth Amendment:

> *The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;–the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;–The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as*

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[1] U.S. Const. art. II, § 1, cl. 3.

[2] Cunningham, *Election of 1800*, in 1 History of American Presidential Elections 101 (A. Schlesinger ed., 1971).

[3] Chiafalo v. Washington, 140 S. Ct. 2316, 2327 (2020).

[4] 3 U.S.C. § 15.

[5] U.S. Const. amend. XX; *see also* Amendment XX.

President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.–The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

The Supreme Court has had few occasions to interpret the Twelfth Amendment. In 1976, in *Buckley v. Valeo*, the Court upheld in part and struck down in part the Federal Election Campaign Act of 1971.[1] With respect to the Twelfth Amendment, the Court held that the Amendment did not authorize Congress to appoint members of the Federal Election Commission without following the requirements of the Appointments Clause.[2]

The Court has twice considered whether the Twelfth Amendment limits measures intended to ensure that electors vote for their parties' nominees. In the 1952 case *Ray v. Blair*, the Court held that the Amendment did not bar a state political party from requiring candidates for presidential elector to pledge to support the national party's nominees for President and Vice President.[3] Similarly, in the 2020 case *Chiafalo v. Washington*, the Court held that the Amendment does not bar a state from penalizing an elector who breaks such a pledge and votes for someone other than the presidential candidate who won the state's popular vote.[4]

[1] 424 U.S. 1 (1976).

[2] *Id.* at 133–34. For further discussion of *Buckley*'s analysis of the Appointments Clause, see ArtII.S2.C2.3.10 Officer and Non-Officer Appointments. *Buckley* also involved a First Amendment challenge to campaign contribution and spending limitations in the Federal Election Campaign Act. *See* Amdt1.7.11.1 Overview of Campaign Finance.

[3] 343 U.S. 214 (1952).

[4] 140 S. Ct. 2316 (2020).

THIRTEENTH AMENDMENT
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THIRTEENTH AMENDMENT—ABOLITION OF SLAVERY

Amdt13.1 Overview of Thirteenth Amendment, Abolition of Slavery

The Thirteenth Amendment prohibits slavery and involuntary servitude in all places subject to U.S. jurisdiction, except when imposed as punishment for a crime for which a person has been duly convicted.[1] Proposed by Congress and ratified by the states in the wake of the Civil War, the Thirteenth Amendment was the first of the three Reconstruction Amendments.[2] Together, these amendments aimed to safeguard the rights of newly emancipated slaves and ensure that states accorded due process and equal protection of the laws to all persons.[3] Unlike the other Reconstruction Amendments—the Fourteenth and Fifteenth Amendments and, indeed, the rest of the Constitution—the Thirteenth Amendment's prohibitions apply directly to private individuals in addition to government actors.[4]

The states' ratification of the Thirteenth Amendment abolishing slavery effectively negated two of the Constitution's original provisions: (1) the so-called "Fugitive Slave Clause," which granted a slave owner the right to seize and repossess the slave in another state, regardless of that state's laws;[5] and (2) the Three-Fifths Clause, a compromise among the Founders that counted three-fifths of a state's slave population for the purposes of apportioning seats in the House of Representatives and levying certain types of taxes.[6]

Because the Thirteenth Amendment was self-executing, its prohibitions on slavery and involuntary servitude became effective upon ratification without the need for further government action.[7] Nonetheless, Section 2 of the Thirteenth Amendment grants Congress the power to enforce the prohibitions in Section 1 by enacting "appropriate legislation."[8] The Supreme Court has long held that Congress may use its enforcement power to remove or remedy burdens on individuals that constitute the "badges" or "incidents" of slavery.[9]

Questions about the scope of Congress's Section 2 enforcement power have played a central role in the Supreme Court's Thirteenth Amendment jurisprudence. After the Civil War, newly

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[1] U.S. Const. amend. XIII, § 1.

[2] The other two Reconstruction Amendments were the Fourteenth Amendment, which, among other things, requires states to accord due process and equal protection of the laws to all persons, and the Fifteenth Amendment, which prohibits the federal and state governments from denying or abridging the right to vote based on "race, color, or previous condition of servitude." For more on the Fourteenth Amendment, see Amdt14.1 Overview of Fourteenth Amendment, Equal Protection and Rights of Citizens through Amdt14.S5.4 Modern Doctrine on Enforcement Clause. For more on the Fifteenth Amendment, see Amdt15.1 Overview of Fifteenth Amendment, Right of Citizens to Vote through Amdt15.S2.2 Federal Remedial Legislation.

[3] *See supra* note 2. Congress proposed the Thirteenth Amendment in January 1865, shortly before the end of the Civil War. The states ratified the Amendment in December 1865, seven months after the war ended. *See* Intro.3.1 Ratification of Amendments to the Constitution Generally.

[4] George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 Va. L. Rev. 1367, 1370 (2008) ("The Thirteenth Amendment stands out in the Constitution as the only provision currently in effect that directly regulates private action. The Eighteenth Amendment, imposing Prohibition, applied directly to private individuals, but its repeal by the Twenty-First Amendment eliminated that instance of direct constitutional regulation of private conduct.").

[5] U.S. Const. art. IV, § 2, cl. 3. *See also* ArtIV.S2.C3.1 Fugitive Slave Clause.

[6] U.S. Const. art. I, § 2, cl. 3. *See also* ArtI.S2.C3.1 Enumeration Clause and Apportioning Seats in the House of Representatives. Subsequently, the Fourteenth Amendment explicitly repealed the Three-Fifths Clause. U.S. Const. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.").

[7] The Civil Rights Cases, 109 U.S. 3, 20 (1883) ("This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances.").

[8] U.S. Const. amend. XIII, § 2.

[9] The Civil Rights Cases, 109 U.S. at 20.

freed slaves faced various forms of state-sanctioned and private discrimination. For example, some states enforced Black Codes that denied African Americans equal rights under the law, including the rights to vote, hold property, and use public facilities.[10] Some states codified the practice of peonage, enabling individuals to use the threat of force or legal action to compel African Americans to perform services to satisfy a financial obligation.[11] In addition, some operators of public accommodations, such as hotels and restaurants, sought to prevent African Americans from patronizing their businesses.[12] In response, beginning in 1866, Congress enacted civil rights legislation that sought to ensure that people of all races would have equal rights to make and enforce contracts and hold property, among other fundamental rights.[13]

Despite these legislative efforts, for more than a century after the states ratified the Thirteenth Amendment, the Supreme Court determined that Congress could not use its power to legislate against the "badges" and "incidents" of slavery to protect African Americans from many forms of private racial discrimination or state-sanctioned segregation.[14] However, the Court's view of the scope of Congress's enforcement power changed significantly with its 1968 decision in *Jones v. Alfred H. Mayer Co*.[15] In that case, the Court adopted a more deferential approach toward Congress's enforcement power, determining that Congress may play a significant role in determining the scope of that power through the enactment of legislation.[16] Although the Court has since upheld Congress's power to enforce the Thirteenth Amendment by enacting laws to combat some of the harms of private racial discrimination, the precise scope of Congress's Thirteenth Amendment power remains unclear.[17]

The following essays examine the Thirteenth Amendment's prohibitions on slavery and involuntary servitude beginning with an overview of the Amendment's historical background. The essays then examine relevant Supreme Court decisions and historical practices related to the scope of the Amendment's prohibitions and its exception for criminal punishment. The essays conclude by discussing the extent of Congress's power to enforce the Thirteenth Amendment through the enactment of legislation.

[10] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 426–37 (1968); Bell v. Maryland, 378 U.S. 226, 288, 303 (1964) (Goldberg, J., concurring).

[11] *See* Peonage Cases, 123 F. 671, 673–74 (M.D. Ala. 1903).

[12] *See, e.g.*, The Civil Rights Cases, 109 U.S. at 8–10, 23.

[13] *See, e.g.*, Act of April 9, 1866, ch. 31,14 Stat. 27. *See also* 42 U.S.C. §§ 1981–1982.

[14] *See* Amdt13.S2.2 Early Doctrine on Enforcement Clause of Thirteenth Amendment. *See also* Plessy v. Ferguson, 163 U.S. 537, 542–43 (1896) (upholding the constitutionality of a Louisiana law mandating racial segregation in railway cars).

[15] 392 U.S. 409 (1968).

[16] *Id.* at 440.

[17] *See* Amdt13.S2.2 Early Doctrine on Enforcement Clause of Thirteenth Amendment.

Amdt13.2 Slavery and Civil War

Thirteenth Amendment:

> *Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation.*
>
> *Congress shall have power to enforce this article by appropriate legislation.*

During the Federal Convention of 1787, the Constitution's Framers vigorously debated the role that slavery would play in the newly created United States.[1] Conflicts over slavery, which had been practiced in the British colonies of North America for over a century often pitted delegates from southern states that relied heavily on slave labor against northern states whose inhabitants increasingly opposed the practice on moral grounds.[2] Despite fervent disagreement over the issue of slavery at the Convention, the Constitution's original text did not specifically refer to slavery. For example, the so-called "Fugitive Slave Clause" did not employ the term "slave" but instead granted the owner of a "person held to service or labor" the right to seize and repossess him in another state, regardless of that state's laws.[3] Moreover, the Three-Fifths Clause, a cornerstone of the Great Compromise[4] among the Founders, counted three-fifths of "all other Persons"—a term that included slaves—for the purposes of apportioning seats in the House of Representatives and levying certain types of taxes.[5]

In 1808, two decades after the Constitution's ratification, Congress prohibited importing slaves from other countries.[6] Although northern states had already abolished (or begun to abolish) slavery within their jurisidictions,[7] the domestic slave trade continued to flourish in the South.

In the decades leading up to the Civil War, political tensions simmered as abolitionists and proponents of slavery argued over whether new U.S. territories would be admitted to the union as "slave" or "free" states.[8] Initially, Congress resolved some of these disagreements. For example, in the Missouri Compromise of 1820, Congress admitted Maine as a free state and

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[1] *See, e.g.*, 2 The Records of the Federal Convention of 1787, at 364–65 (Max Farrand ed., 1911) (Madison's notes, Aug. 21, 1787) (recording a debate over banning the importation of slaves); *id.* at 369–74 (Madison's notes, Aug. 22, 1787).

[2] *See id.*

[3] U.S. Const. art. IV, § 2, cl. 3. *See also* ArtIV.S2.C3.1 Fugitive Slave Clause.

[4] The delegates to the Federal Convention devised the Great Compromise to address the states' fear of an imbalance of power in Congress by providing for a bicameral legislature with proportional representation based on a state's population for one chamber and equal state representation in the other. 1 The Records of The Federal Convention of 1787 at 524 (Max Farrand ed., 1911). *See also* Max Farrand, The Framing of the Constitution of the United States 104–07 (1913).

[5] U.S. Const. art. I, § 2, cl. 3. In addition, Article V, while not mentioning slavery specifically, prohibited amendments prior to 1808 that would have affected the Constitution's limitations on Congress's power to (1) restrict the slave trade, or (2) levy certain taxes on land or slaves. *Id.* art. V. *See also id.* art. I, § 9, cls. 1, 4.

[6] Act of March 2, 1807, ch. 22, 2 Stat. 426.

[7] *See* George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 Va. L. Rev. 1367, 1373 & n.23 (2008).

[8] The 1787 ordinance that the Confederation Congress enacted to govern the newly acquired Northwest Territory prohibited slavery and involuntary servitude, except as punishment for a crime. *An ordinance for the government of the territory of the United States, North-west of the river Ohio*, Libr. of Cong., https://www.loc.gov/resource/bdsdcc.22501/?st=gallery. The Northwest Ordinance, however, allowed for the "reclaiming" of slaves who escaped into the territory. *See id.* The Ordinance established the Ohio River as the boundary between newly admitted, northern territories that forbade slavery and southern territories that permitted slavery. *Id.*

Missouri as a slave state.[9] In addition, Congress sought to achieve additional understandings on the issue of slavery in the five Acts that made up the Compromise of 1850.[10] Despite these early efforts, compromises on the issue of slavery began to unravel during the 1850s. The Kansas-Nebraska Act of 1854 repealed the Missouri Compromise, allowing each territory's population to decide whether to permit slavery.[11] This led to an outbreak of violence between abolitionists and proponents of slavery in Kansas.[12] The Supreme Court's 1857 decision in *Dred Scott v. Sandford* exacerbated tensions by declaring the Missouri Compromise to have been an unconstitutional deprivation of slaveholders' property.[13] Disagreements over slavery and President Abraham Lincoln's election to the presidency were the primary causes of the Civil War, which erupted when the Confederate army fired on Fort Sumter on April 12, 1861.[14]

After almost two years of war, President Lincoln issued the "Emancipation Proclamation" by exercising his executive war powers.[15] The Proclamation declared that, as of January 1, 1863, "all persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free."[16] The Proclamation did not apply to slaves that resided in "loyal" states that had not seceded from the Union.[17] Nor did it apply to slaves in portions of southern states under Union control.[18] However, it applied to slaves in most of the rest of the core Confederate states' territory.[19]

As the nation approached the end of the Civil War, questions arose about the legal authority for the Emancipation Proclamation; Congress's power to ban slavery by enacting legislation; and the future status of slaves and freedmen throughout the United States.[20]

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[9] *Missouri Compromise: Primary Documents in American History*, Libr. of Cong., https://guides.loc.gov/missouri-compromise. The compromise also limited the geographic expansion of slavery westward into newly acquired territories. *Id.*

[10] *Compromise of 1850: Primary Documents in American History*, Libr. of Cong., https://guides.loc.gov/compromise-1850. The compromise strengthened federal judicial officials' obligations to capture and return fugitive slaves; abolished the slave trade in Washington, D.C.; admitted California as a free state; and allowed New Mexico and Utah to decide whether to join the United States as free states or slaves states. *Id.*

[11] *Kansas-Nebraska Act: Primary Documents in American History*, Libr. of Cong., https://guides.loc.gov/kansas-nebraska-act.

[12] *Id.*

[13] 60 U.S. (19 How.) 393, 451–52 (1857), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

[14] *Battle of Fort Sumter, April 1861*, Nat'l Park Serv., https://www.nps.gov/articles/battle-of-fort-sumter-april-1861.htm.

[15] *The Emancipation Proclamation*, Nat'l Archives, https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation. On September 22, 1862, President Lincoln issued the preliminary Emancipation Proclamation, which announced his intention to issue the Emancipation Proclamation on January 1, 1863. *See Preliminary Emancipation Proclamation*, Nat'l Archives, https://www.archives.gov/exhibits/american_originals_iv/sections/preliminary_emancipation_proclamation.html. Although President Lincoln issued the Proclamation in 1863, some slaves in the South did not attain freedom until much later. For example, slaves in Texas attained freedom when Major General Gordon Granger and Union troops arrived in Galveston, Texas on June 19, 1865. *Juneteenth*, Lib. of Cong., https://www.loc.gov/loc/lcib/9908/juneteenth.html.

[16] *See* sources cited *supra* note 15. In 1861 and 1862, Congress enacted legislation known as the "Confiscation Acts" that freed slaves who came within Union lines and had been under Confederate masters, but this legislation was ineffective. President Lincoln was initially reluctant to enforce these laws strictly because of concerns that it would cause border states to secede from the Union. *See* Cong. Globe, 38th Cong., 1st Sess. 1313 (1864); Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 Sup. Ct. Rev. 349, 367–70 (2008). Congress abolished slavery in the District of Columbia in 1862 via the District of Columbia Compensated Emancipation Act. Act of Apr. 16, 1862, 37 Cong. ch. 54, 12 Stat. 376 . Congress abolished slavery in the territories in the Abolition of Slavery Act (Territories), 37 Cong. ch. 111, 12 Stat. 432 (1862).

[17] Sources cited *supra* notes 15–16.

[18] *Id.*

[19] *Id.*

[20] *See* Cong. Globe, 38th Cong., 1st Sess. 1313–14 (1864).

These questions played a prominent role in debates over Congress's consideration of the joint resolution that would become the Thirteenth Amendment.[21]

Amdt13.3 Drafting of Thirteenth Amendment

Thirteenth Amendment:

> *Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation.*
>
> *Congress shall have power to enforce this article by appropriate legislation.*

The drafters of the Thirteenth Amendment drew upon earlier efforts to abolish slavery within various U.S. states and territories. Before the Civil War, several states had banned slavery in their jurisdictions through various means, including by adopting language in their state constitutions.[1] In addition, Article 6 of the 1787 federal ordinance governing the Northwest Territory banned slavery in that territory.[2] That ordinance, which the Framers of the Thirteenth Amendment drew upon directly, provided: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes whereof the party shall have been duly convicted."[3]

On January 13, 1864, more than a year before the end of the Civil War, Senator John Henderson introduced a joint resolution proposing an amendment to the Constitution to abolish slavery and involuntary servitude.[4] Representatives James Ashley and James Wilson had introduced similar resolutions in the House a month earlier.[5] The Senate Judiciary Committee favorably reported a joint resolution that drew upon these drafts.[6]

Early in 1864, the Senate debated the resolution proposing the Thirteenth Amendment. Senator Lyman Trumbull blamed slavery as the cause of the war and argued that the nation's Founders intended for the practice to end.[7] A constitutional amendment was necessary, he argued, because of uncertainty over Congress's power to prohibit slavery in the United States through legislation, and the need to prevent future majorities in Congress or state legislatures from reinstituting the practice.[8] The intent of the amendment, in his view, was to take the question of slavery "entirely away from the politics of the country."[9] Proponents of the

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[21] *See, e.g.*, *id.*

[1] *See e.g.*, Ohio Const. of 1802, art. VIII, § 2; Mich. Const. of 1835, art. XI, § 1; Wis. Const. of 1848, art. I, § 2. *See also* George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 Va. L. Rev. 1367, 1373 & n.23 (2008).

[2] *An ordinance for the government of the territory of the United States, North-west of the river Ohio*, Libr. of Cong., https://www.loc.gov/resource/bdsdcc.22501/?st=gallery.

[3] *Id.* At least one commentator has noted, however, that as "interpreted and applied . . . the Ordinance effected less than a complete abolition of slavery." George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 Va. L. Rev. 1367, 1373 (2008)

[4] Cong. Globe, 38th Cong., 1st Sess. 145 (1864). Senator Charles Sumner unsuccessfully proposed a different formulation of the Thirteenth Amendment: "All persons are equal before the law, so that no person can hold another as a slave; and the Congress shall have power to make all laws necessary and proper to carry this declaration into effect everywhere in the United States." *Id.* at 1482.

[5] *Id.* at 19, 21 (1863).

[6] *See id.* at 1313 (1864).

[7] *Id.*

[8] *Id.* at 1314.

[9] *Id.*

Thirteenth Amendment also argued passionately that slavery was wrong on moral grounds.[10] Opponents of the Thirteenth Amendment generally argued that it would allow the federal government to intrude on property rights and other areas traditionally viewed as the exclusive domain of state authority.[11]

The Senate passed the joint resolution proposing the Thirteenth Amendment on April 8, 1864.[12] The House considered the resolution in June 1864 but initially rejected it.[13] In his State of the Union speech in December 1864, President Lincoln urged Congress to enact the joint resultion proposing the Thirteenth Amendment as soon as possible.[14] After the Lincoln Administration engaged in a sustained effort to secure the necessary votes,[15] the House passed the joint resolution on January 31, 1865.[16]

President Lincoln signed the joint resolution proposing the Thirteenth Amendment even though his signature was unnecessary for proposal or ratification of the Amendment.[17] The Amendment was then submitted to the states for ratification.[18]

Amdt13.4 Ratification of Thirteenth Amendment

Thirteenth Amendment:

> *Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation.*
>
> *Congress shall have power to enforce this article by appropriate legislation.*

Congress submitted the Thirteenth Amendment to the states for their consideration only a few months before the end of the Civil War.[1] On April 14, 1865, President Abraham Lincoln, one of the Amendment's foremost proponents, was assassinated.[2] Vice President Andrew Johnson succeeded to the presidency and successfully pressured several southern states to ratify the Thirteenth Amendment as a condition of rejoining the Union.[3] Secretary of State William Seward proclaimed the states' ratification of the Thirteenth Amendment on December 18, 1865.[4]

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[10] *Id.* at 1320.

[11] *Id.* at 1366.

[12] *Id.* at 1490.

[13] *Id.* at 2995.

[14] Cong. Globe, 38th Cong., 2nd Sess. app'x at 3 (1864).

[15] *See* Rebecca E. Zietlow, *James Ashley, the Great Strategist of the Thirteenth Amendment*, 15 Geo. J. L. & Pub. Pol'y 265, 300–01 (2017).

[16] Cong. Globe, 38th Cong., 2nd Sess. 531 (1865).

[17] *13th Amendment to the U.S. Constitution: Abolition of Slavery (1865)*, Nat'l Archives, https://www.ourdocuments.gov/document_data/pdf/doc_040.pdf.

[18] A Resolution Submitting to the Legislatures of the Several States a Proposition to Amend the Constitution of the United States, https://memory.loc.gov/cgi-bin/ampage? collId=llsl&fileName=013/llsl013.db&recNum=596.

[1] A Resolution Submitting to the Legislatures of the Several States a Proposition to Amend the Constitution of the United States, https://memory.loc.gov/cgi-bin/ampage? collId=llsl&fileName=013/llsl013.db&recNum=596.

[2] Rebecca E. Zietlow, *James Ashley, the Great Strategist of the Thirteenth Amendment*, 15 Geo. J. L. & Pub. Pol'y 265, 301 (2017).

[3] Bruce Ackerman, *Constitutional Politics / Constitutional Law*, 99 Yale L.J. 453, 503–04 (1989).

[4] Proclamation No. 52, 13 Stat. 774, 775 (1865) (proclamation by Secretary of State William H. Seward of December 18, 1865). The Amendment attained the threshold for ratification and entry into force on December 6, 1865.

Although the Thirteenth Amendment abolished slavery, state governments and private individuals continued to discriminate against African Americans and deny them equal rights under the law.[5] Concerns that the Thirteenth Amendment did not sufficiently protect African Americans from various forms of discrimination led the Reconstruction-era Congress to enact civil rights legislation and propose the language that became the Fourteenth and Fifteenth Amendments to the Constitution.[6]

Section 1—Prohibition on Slavery and Involuntary Servitude

Amdt13.S1.1 Prohibition Clause

Thirteenth Amendment, Section 1:

> *Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.*

Section 1 of the Thirteenth Amendment prohibits slavery and involuntary servitude in all places subject to U.S. jurisdiction.[1] Since the states ratified the Amendment in 1865, the Supreme Court has decided cases interpreting the Prohibition Clause and applying it to various forms of government or private action. In particular, the Court has examined: (1) whether particular burdens imposed on individuals constitute prohibited "badges" or "incidents" of slavery;[2] and (2) the meaning of "involuntary servitude."[3]

Amdt13.S1.2 Defining Badges and Incidents of Slavery

Thirteenth Amendment, Section 1

> *Neither slavery nor involuntary servitude, shall exist within the United States, or any place subject to their jurisdiction.*

The Supreme Court has often addressed the scope of the Thirteenth Amendment's prohibitions when considering the extent of Congress's power to enforce the Thirteenth

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Although slavery had already been abolished in most U.S. jurisdictions by the time of ratification, the Thirteenth Amendment freed some slaves in Delaware and Kentucky. Eric Foner, *Abraham Lincoln, the Thirteenth Amendment, and the Problem of Freedom*, 15 Geo. J.L. & Pub. Pol'y 59, 62 (2017).

[5] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 426–37 (1968); Bell v. Maryland, 378 U.S. 226, 288, 303 (1964) (Goldberg, J., concurring); The Civil Rights Cases, 109 U.S. 3, 8–10, 23 (1883); Peonage Cases, 123 F. 671, 673–74 (M.D. Ala. 1903).

[6] *See, e.g.*, Act of April 9, 1866, ch. 31, 14 Stat. 27. The Fourteenth Amendment was enacted, in part, because of concerns about the civil rights of African Americans after the Civil War. *See Bell*, 378 U.S. at 293 (Goldberg, J., concurring) ("A review of the relevant congressional debates reveals that the concept of civil rights which lay at the heart both of the contemporary legislative proposals and of the Fourteenth Amendment encompassed the right to equal treatment in public places—a right explicitly recognized to be a 'civil' rather than a 'social' right."). *See also* Amdt14.S1.1.1 Historical Background on Citizenship Clause through Amdt14.S1.1.2 Citizenship Clause Doctrine; Amdt15.1 Overview of Fifteenth Amendment, Right of Citizens to Vote through Amdt15.S2.2 Federal Remedial Legislation.

[1] U.S. Const. amend. XIII, § 1. The Thirteenth Amendment prohibits the enslavement of all races of people. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1872).

[2] *See, e.g.,* The Civil Rights Cases, 109 U.S. 3, 20–22 (1883). In a pair of cases decided shortly after ratification of the Thirteenth Amendment, the Supreme Court concluded that, although the Amendment freed slaves from bondage, it did not annul contracts that private parties had entered into for the sale of slaves before ratification. Boyce v. Tabb, 85 U.S. (18 Wall.) 546, 548 (1873); Osborn v. Nicholson, 80 U.S. (18 Wall.) 654, 662–63 (1872).

[3] *See, e.g.*, Clyatt v. United States, 197 U.S. 207, 215 (1905).

Amendment by enacting legislation.[1] For example, in 1883, the Supreme Court considered the scope of the Amendment's Prohibition Clause in cases that implicated Congress's power to criminalize the racially discriminatory denial of a person's access to public accommodations.[2] In the consolidated *Civil Rights Cases*, the Court held that the Thirteenth Amendment prohibited "slavery and its incidents."[3] However, the Court determined that the Thirteenth Amendment's concept of prohibited "badges" and "incidents" of slavery did not encompass private racial discrimination that denied a person access to accommodations.[4] Instead, the Court explained, the "badges and incidents" of slavery included: (1) compulsory service for another's benefit; (2) restrictions on freedom of movement; (3) the inability to hold property or enter into contracts; and (4) the incapacity to have standing in court or testify against a White person.[5]

Although the Supreme Court's decision in the *Civil Rights Cases* rested on its interpretation of the prohibitions in Section 1 of the Thirteenth Amendment, the Court implied that Congress's enforcement power under Section 2 did not authorize Congress to prohibit the private racial discrimination at issue.[6] Subsequently, in *Plessy v. Ferguson*, the Court held that state-sanctioned segregation in railway cars did not violate Section 1 of the Thirteenth Amendment, writing that a "statute which implies merely a legal distinction between the white and [African American] races . . . has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude."[7]

During the Civil Rights Era of the 1960s, the Supreme Court's views shifted significantly. The Court held that Congress may play an important role in determining the scope of its enforcement power through the enactment of legislation.[8] The Court also held that Congress's power may enable it to forbid some forms of private racial discrimination that might not fall within the prohibitions of Section 1 of the Thirteenth Amendment, but, in Congress's view, amount to "badges" or "incidents" of slavery.[9]

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[1] For more on Congress's enforcement power under Section 2 of the Thirteenth Amendment, see Amdt13.S2.1 Overview of Enforcement Clause of Thirteenth Amendment.

[2] The Civil Rights Cases, 109 U.S. 3, 8–9 (1883).

[3] *Id.* at 23.

[4] *Id.* at 25. *See also* Corrigan v. Buckley, 271 U.S. 323, 327, 330–32 (1926) (holding that the Thirteenth Amendment did not prohibit the Supreme Court of the District of Columbia from enforcing a covenant among private individuals that forbade the lease, sale, or occupancy of real estate by African Americans for twenty-one years).

[5] *The Civil Rights Cases*, 109 U.S. at 22.

[6] *Id.* at 24–25.

[7] Plessy v. Ferguson, 163 U.S. 537, 542–43 (1896) (upholding the constitutionality of a Louisiana law mandating racial segregation in railway cars), *overruled* by Brown v. Bd. of Educ., 347 U.S. 483 (1954). For an example of another case involving state action in which the Supreme Court interpreted the Thirteenth Amendment's prohibition on slavery without addressing the scope of Congress's Section 2 enforcement power, see Palmer v. Thompson, 403 U.S. 217, 226–27 (1971) (holding that a city's closing of swimming pools to all persons, even if done with the intent to prevent African Americans and Whites from swimming together, did not amount to a "badge or incident" of slavery prohibited under the Thirteenth Amendment).

[8] For a discussion of the relevant cases, see Amdt13.S2.3 Scope of Enforcement Clause of Thirteenth Amendment.

[9] *See id.*

Amdt13.S1.3 Defining Involuntary Servitude

Amdt13.S1.3.1 Scope of the Prohibition

Thirteenth Amendment, Section 1

> *Neither slavery nor involuntary servitude, shall exist within the United States, or any place subject to their jurisdiction.*

In addition to interpreting the scope of the term "slavery" in the Thirteenth Amendment, the Supreme Court has also examined the meaning of the Amendment's prohibition on "involuntary servitude." This form of servitude generally involves compulsion of a person's labor through the use of physical force, legal action, or threats thereof.[1] Even after the Thirteenth Amendment's ratification, some states subjected African Americans and other racial groups to involuntary servitude by enacting peonage laws.[2] These laws often used the threat of force or legal action to compel individuals to perform services to satisfy a real or concocted debt or obligation.[3] The Court had acknowledged that the Thirteenth Amendment prohibited peonage[4] and, in the 1905 case *Clyatt v. United States*, it later held that the Thirteenth Amendment authorized Congress to prohibit this practice.[5] In doing so, the Court distinguished peonage from the legally permissible situation in which a person voluntarily performs services to pay off a debt, which does not involve the use of law or force to compel "performance or a continuance of the service."[6]

In the 1911 case *Bailey v. Alabama*, the Supreme Court clarified that the Thirteenth Amendment prohibits states from compelling a person to perform a contract for personal services through the use of criminal sanctions.[7] In *Bailey*, an Alabama law created a statutory presumption that a worker intended to commit criminal fraud if he did not perform a labor contract and did not return property he had already received as compensation to his employer.[8] Under the statute, fraud was punishable by a fine or, alternatively, "hard labor."[9] The Court held that the law indirectly compelled workers to perform labor in violation of the Thirteenth Amendment's prohibition on involuntary servitude and federal laws prohibiting peonage.[10]

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[1] *See* United States v. Kozminski, 487 U.S. 931, 942–44 (1988), *superseded by statute*, 18 U.S.C. § 1589; Clyatt v. United States, 197 U.S. 207, 215 (1905).

[2] *See, e.g.*, Peonage Cases, 123 F. 671, 673–74, 682 (M.D. Ala. 1903).

[3] *See id.*

[4] The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1873). In these cases, the Supreme Court also indicated that the Thirteenth Amendment prohibited slavery and involuntary servitude when imposed on people of any racial group. *Id.* Congress also enacted several laws prohibiting peonage and activities in support thereof pursuant to its Thirteenth Amendment enforcement power. *See, e.g.*, 18 U.S.C. § 1581; *id.* § 1584; 42 U.S.C. § 1994. *See also* United States v. Gaskin, 320 U.S. 527, 527–28 (1944).

[5] *Clyatt*, 197 U.S. at 218.

[6] *Id.* at 215–16.

[7] 219 U.S. 219, 244 (1911) ("The State may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt.").

[8] *Id.* at 227. The Court also noted that, under the Alabama Rules of Evidence, the accused worker was unable to rebut this presumption by testifying about his "uncommunicated motives, purpose or intention." *Id.* at 228.

[9] *Id.* at 231.

[10] *Id.* at 243–45. The Court defined a "peon" as "one who is compelled to work for his creditor until his debt is paid" and stated that the "fact that [the worker] contracted to perform the labor which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the [peonage laws]." *Id.* at 242. *See also* Pollock v. Williams, 322 U.S. 4, 7, 25 (1944) (holding unconstitutional and in violation of federal peonage laws a Florida law that considered a worker's failure to perform labor after obtaining an advance *prima facie* evidence of intent to defraud); Taylor v. Georgia, 315 U.S. 25, 26, 29 (1942) (holding violative of the Thirteenth Amendment a Georgia law that punished a person who had received an advance on a contract for services, did not repay the advance, and was "bound

Amdt13.S1.3.1
Scope of the Prohibition

Much later in the twentieth century, the Supreme Court had occasion to consider whether the use of psychological coercion to compel work could constitute prohibited "involuntary servitude."[11] In *United States v. Kozminksi*, the operators of a dairy farm were indicted for allegedly using physical and psychological coercion to compel two persons with mental disabilities to perform work on the farm.[12] The alleged means of psychological coercion included subjecting the individuals to "substandard living conditions" and "isolation from others."[13] The district court instructed the jury that a person could be kept in a condition of involuntary servitude through the use of physical, legal, or "other coercion."[14]

On appeal, the Supreme Court examined whether the concept of "involuntary servitude" in relevant provisions of federal criminal law encompassed the use of psychological coercion to compel labor.[15] Because one of these statutes—18 U.S.C. § 241—prohibited "conspiracy to interfere with an individual's Thirteenth Amendment right to be free from involuntary servitude," the Court examined the scope of the Thirteenth Amendment's prohibition on involuntary servitude under the Court's precedents.[16] The Court had never adopted the view that a person could be subject to involuntary servitude through the use of psychological coercion.[17] However, the Court suggested that Congress could legislatively expand the definition of "involuntary servitude" to include psychological coercion.[18] Because Congress had not done so at the time of its decision in 1988, the Court reversed the convictions and remanded the case for a new trial.[19]

After the Supreme Court decided *Kozminski*, Congress enacted legislation to broaden the definition of "involuntary servitude" for purposes of federal criminal law.[20] In the Victims of Trafficking and Violence Protection Act of 2000, Congress referenced *Kozminski* and clarified that "involuntary servitude" included servitude maintained through nonviolent coercion.[21] Congress's legislative response to the *Kozminksi* decision is an example of the exercise of its Thirteenth Amendment enforcement powers.[22]

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by the threat of penal sanction to remain at his employment until the debt [had] been discharged"); United States v. Reynolds, 235 U.S. 133, 149–50 (1914) (holding that a person convicted of a crime is held in a condition of peonage when he faces arrest for violating a contract to perform services for a surety that payed fines resulting from his conviction to the state).

[11] United States v. Kozminski, 487 U.S. 931, 935–36 (1988), *superseded by statute*, 18 U.S.C. § 1589.

[12] *Id.* at 934.

[13] *Id.* at 936.

[14] *Id.* at 937 (explaining that the district court had instructed the jury that "[involuntary servitude] may also include situations involving either physical and other coercion, or a combination thereof, used to detain persons in employment").

[15] *Id.* at 939.

[16] *Id.* at 934, 941 (internal quotation marks omitted). The other provision, 18 U.S.C. § 1584, criminalized knowingly and willfully holding another person "to involuntary servitude" but did not specifically mention the Thirteenth Amendment. *See id.* at 934.

[17] *Id.* at 944 ("The guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion. We draw no conclusions from this historical survey about the potential scope of the Thirteenth Amendment.").

[18] *Id.* at 952.

[19] *Id.* at 952–53 ("The District Court's instruction on involuntary servitude, which encompassed other means of coercion, may have caused the Kozminskis to be convicted for conduct that does not violate either statute. Accordingly, we agree with the Court of Appeals that the convictions must be reversed and the case remanded for a new trial.").

[20] 22 U.S.C. § 7102(8).

[21] *Id.* §§ 7101(b)(13), 7102(8).

[22] For additional examples, see Amdt13.S2.1 Overview of Enforcement Clause of Thirteenth Amendment.

Amdt13.S1.3.2 Historical Exceptions

Thirteenth Amendment, Section 1

> *Neither slavery nor involuntary servitude, shall exist within the United States, or any place subject to their jurisdiction.*

The Supreme Court has recognized several limited historical exceptions to the Thirteenth Amendment's prohibition on involuntary servitude. The Court has held that some forms of involuntary service do not violate the Thirteenth Amendment because they implicate public duties that a citizen owes to his government.[1] These duties include compelled military service in a war that Congress has declared;[2] mandatory road work required under state law;[3] and, likely, jury service.[4] The Court has indicated that the common law may also furnish exceptions to the Thirteenth Amendment's prohibition on involuntary servitude.[5] For example, the Court upheld federal laws requiring a sailor to serve on a ship in accordance with his contract because the common law had long recognized this duty.[6]

Amdt13.S1.4 Exceptions Clause

Thirteenth Amendment, Section 1

> *. . . except as a punishment for crime whereof the party shall have been duly convicted, . . .*

Although the Supreme Court has long recognized limited historical exceptions to the Thirteenth Amendment's ban on involuntary servitude,[1] the Amendment also contains a specific, textual exception that permits the government to compel a person convicted of a crime

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[1] Butler v. Perry, 240 U.S. 328, 332–33 (1916) ("[The Thirteenth Amendment] certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers." (citations omitted)).

[2] Selective Draft Law Cases, 245 U.S. 366, 390 (1918) ("[W]e are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, [and thus] we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.").

[3] *Butler*, 240 U.S. at 332–33.

[4] United States v. Kozminski, 487 U.S. 931, 943–44 (1988) (stating, in dicta, that the Thirteenth Amendment does not prevent the state or federal governments from compelling jury service by threatening criminal sanctions), *superseded by statute*, 18 U.S.C. § 1589; Hurtado v. United States, 410 U.S. 578, 589 n.11 (1973) (stating that the federal government's $1-per-day payment to an incarcerated material witness before trial was not "so low as to impose involuntary servitude prohibited by the Thirteenth Amendment"); *Butler*, 240 U.S. at 332–33 (suggesting, in dicta, that the Thirteenth Amendment was not meant to prohibit mandatory jury service). *See also* Int'l Union v. Wis. Emp. Relations Bd., 336 U.S. 245, 251–52 (1949) (holding that, as applied, a Wisconsin statute authorizing the State Employment Relations Board to order employees of a labor union to cease unannounced work stoppages did not violate the Thirteenth Amendment), *overruled* by Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Rels. Comm'n, 427 U.S. 132 (1976); United States v. Petrillo, 332 U.S. 1, 12–13 (1947) (rejecting a facial Thirteenth Amendment challenge to a federal statute that criminalized coercing a communications licensee to employ more persons than necessary to conduct his business); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 199 (1921) (determining that a state law did not violate the Thirteenth Amendment by making it a misdemeanor for a lessor or his agent to fail intentionally to furnish water, heat, light, and other essential services to tenants because the law did not compel the provision of personal services but rather services "attached to land").

[5] Robertson v. Baldwin, 165 U.S. 275, 282–83 (1897) (determining that federal laws requiring a sailor to serve on a ship in accordance with his contract did not violate the Thirteenth Amendment because historically the "contract of the sailor has been treated as an exceptional one [involving] to a certain extent, the surrender of his personal liberty during the life of the contract").

[6] *Id. See also* Patterson v. Bark Eudora, 190 U.S. 169, 174–75 (1903).

[1] *See* Amdt13.S1.3.2 Historical Exceptions.

to perform labor.[2] The Thirteenth Amendment's drafters borrowed this exception from Article 6 of the 1787 ordinance governing the Northwest Territory.[3] That ordinance provided that "[t]here shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes whereof the party shall have been duly convicted."[4]

In the 1911 case *Bailey v. Alabama*, the Supreme Court clarified that the Thirteenth Amendment's exception for criminal punishment does not permit a state to compel a person to perform a contract for personal services by imposing criminal sanctions for nonperformance.[5] In *Bailey*, an Alabama law established a presumption that a worker intended to commit criminal fraud if he did not perform a labor contract and failed to return property he had received as compensation to his employer.[6] Under the statute, fraud was punishable by a fine or, alternatively, "hard labor."[7] The Court held that the law indirectly compelled workers to perform labor in violation of the Thirteenth Amendment's prohibition on involuntary servitude and federal laws prohibiting peonage.[8]

Section 2—Enforcement

Amdt13.S2.1 Overview of Enforcement Clause of Thirteenth Amendment

Thirteenth Amendment, Section 2

Congress shall have power to enforce this article by appropriate legislation.

Because the Thirteenth Amendment is self-executing, its prohibitions on slavery and involuntary servitude became effective upon ratification without the need for further government action.[1] Nonetheless, Section 2 of the Amendment grants Congress the power to enforce the Amendment's prohibitions by enacting "appropriate legislation."[2] Congress may use its enforcement power to address specific circumstances and provide remedies for violations of the Thirteenth Amendment's prohibitions.[3] Because the Thirteenth Amendment's Prohibitions Clause extends to private conduct as well as government action, the Supreme

[2] U.S. Const. amend. XIII, § 1.

[3] *An ordinance for the government of the territory of the United States, North-west of the river Ohio*, Libr. of Cong., https://www.loc.gov/resource/bdsdcc.22501/?st=gallery.

[4] *Id.*

[5] 219 U.S. 219, 244 (1911) ("The State may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt.").

[6] *Id.* at 227. The Court also noted that, under the Alabama Rules of Evidence, the accused worker was unable to rebut this presumption by testifying about his "uncommunicated motives, purpose or intention" for ceasing to perform work and keeping the compensation already paid to him. *Id.* at 228.

[7] *Id.* at 231.

[8] *Id.* at 243–44. *See also* United States v. Reynolds, 235 U.S. 133, 149–50 (1914) (holding that a person convicted of a crime is held in a condition of peonage when he faces arrest for violating a contract to perform services for a surety that payed fines resulting from his conviction to the state).

[1] The Civil Rights Cases, 109 U.S. 3, 20 (1883) ("This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances.").

[2] U.S. Const. amend. XIII, § 2.

[3] The Civil Rights Cases, 109 U.S. at 20. The Fourteenth and Fifteenth Amendments contain similar enforcement language. For more information on Congress's power to enforce the Fourteenth Amendment, see Amdt14.S5.2 Who Congress May Regulate. For more information on Congress's power to enforce the Fifteenth Amendment, see Amdt15.S2.2 Federal Remedial Legislation.

Court has long held that Congress may enforce the Amendment through legislation that directly regulates private individuals' activities.[4]

After the Civil War, newly freed slaves faced various forms of state-sanctioned and private discrimination. For example, some states enforced Black Codes that denied African Americans equal rights under the law, including the rights to vote, hold property, and use public facilities.[5] Some states codified the practice of peonage, enabling individuals to use the threat of force or legal action to compel African Americans to perform services to satisfy a financial obligation.[6] In addition, some operators of public accommodations, such as hotels and restaurants, sought to prevent African Americans from patronizing their businesses.[7] In response, beginning in 1866, Congress enacted civil rights legislation that sought to ensure that people of all races would have equal rights to make and enforce contracts and hold property, among other fundamental rights.[8] In various cases, individuals challenged the constitutionality of these laws, arguing that Congress's Thirteenth Amendment enforcement power did not authorize it to enact such laws.

For more than a century after the states ratified the Thirteenth Amendment, the Supreme Court determined that Congress's power to legislate against the "badges" and "incidents" of slavery did not authorize it to enact legislation that broadly sought to protect African Americans from private racial discrimination.[9] However, the Court's views on Congress's enforcement power changed significantly with its 1968 decision in *Jones v. Alfred H. Mayer Co*.[10] In that case, the Court adopted a more deferential approach toward Congress's enforcement power, determining that Congress may play a significant role in determining the scope of its power through the enactment of legislation.[11] Although the Court has since upheld Congress's power to enforce the Thirteenth Amendment by enacting laws to combat some forms of private racial discrimination, Congress's power to combat harms beyond racial discrimination is less clear.[12]

Amdt13.S2.2 Early Doctrine on Enforcement Clause of Thirteenth Amendment

Thirteenth Amendment, Section 2

Congress shall have power to enforce this article by appropriate legislation.

For more than a century after the states ratified the Thirteenth Amendment, the Supreme Court adopted a narrow view of the scope of Congress's power to enforce the Amendment's prohibitions. In an early decision, the Court considered the extent of Congress's enforcement power in cases that addressed equality of access to public accommodations (e.g., hotels and restaurants).[1] In the consolidated 1883 *Civil Rights Cases*, the federal government indicted several defendants for violating the Civil Rights Act of 1875[2] by denying African Americans

[4] Clyatt v. United States, 197 U.S. 207, 217 (1905) (citing The Civil Rights Cases, 109 U.S. at 20, 23).

[5] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 426–37 (1968); Bell v. Maryland, 378 U.S. 226, 288, 303 (1964) (Goldberg, J., concurring).

[6] *See* Peonage Cases, 123 F. 671, 673–74 (M.D. Ala. 1903).

[7] *See, e.g.*, The Civil Rights Cases, 109 U.S. at 8–10, 23.

[8] *See, e.g.*, Act of April 9, 1866, 39 Cong. ch. 31, 14 Stat. 27, 27–30. *See* also 42 U.S.C. §§ 1981–1982.

[9] *See* Amdt13.S2.2 Early Doctrine on Enforcement Clause of Thirteenth Amendment.

[10] 392 U.S. 409 (1968).

[11] *Id.* at 440.

[12] *See* Amdt13.S2.3 Scope of Enforcement Clause of Thirteenth Amendment.

[1] The Civil Rights Cases, 109 U.S. 3, 8–11 (1883).

[2] *See* Act of March 1, 1875, ch. 114, 18 Stat. 335.

equal access to accommodations.[3] The defendants argued that the Court should quash their indictments because Congress lacked the constitutional authority to enact the Act's provisions the government alleged they violated.[4]

The Supreme Court acknowledged that the Thirteenth Amendment authorized Congress to enact laws that directly addressed some forms of private conduct.[5] However, when addressing the government's argument that the Thirteenth Amendment authorized Congress to enact the disputed provisions of the Act, the Supreme Court wrote that Congress's enforcement power extended only to the subject of "slavery and its incidents."[6] The Court defined these "badges and incidents" of slavery to include: (1) compulsory service for another's benefit; (2) restrictions on freedom of movement; (3) the inability to hold property or enter into contracts; and (4) the incapacity to have standing in court or testify against a White person.[7]

In the *Civil Rights Cases*, the Court held that racial discrimination by private individuals in the context of access to accommodations did not amount to a badge or incident of slavery as prohibited under the Thirteenth Amendment.[8] Consequently, Congress lacked the power to outlaw such practices pursuant to its Thirteenth Amendment enforcement power. Accordingly, the provisions of the Civil Rights Act of 1875 at issue were unconstitutional.[9]

During the early twentieth century, the Supreme Court again adopted a narrow interpretation of Congress's power under the Thirteenth Amendment's Enforcement Clause. The Court considered whether Congress could punish conspiracies that sought to interfere with labor contracts entered into by African Americans.[10] In *Hodges v. United States*, a group of White men threatened African Americans who worked at a lumber mill, seeking to prevent the workers from performing their jobs.[11] The defendants were convicted under federal laws that criminalized conspiracies to deprive American citizens of their constitutional rights, which included the right to enter into contracts.[12] Appealing their convictions, the defendants argued that Congress lacked the authority to enact legislation criminalizing such conspiracies.[13] The Court, after determining that Congress lacked such power over private contracts under the Constitution's original text, reviewed the Reconstruction Amendments to decide whether they authorized Congress to enact the legislation.[14]

The Supreme Court first determined that neither the Fourteenth nor Fifteenth Amendments authorized Congress to enact the laws at issue because these Amendments

[3] The Civil Rights Cases, 109 U.S. at 26.

[4] *See id.* at 8–9.

[5] *Id.* at 20 ("And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.").

[6] *Id.* at 23.

[7] *Id.* at 22.

[8] *Id.* at 24.

[9] *Id.* at 26. The Supreme Court also held that Congress lacked the power to legislate the relevant provisions of the Act under the Fourteenth Amendment because that Amendment authorized Congress to enact corrective legislation negating state laws that violated Fourteenth Amendment guarantees and not to legislate new federal laws prohibiting private discrimination. *Id.* at 11–13. *See also Ex parte* Virginia, 100 U.S. 339, 344–46 (1879) (determining that the Thirteenth, Fourteenth, and Fifteenth Amendments authorized Congress to enact civil rights legislation prohibiting racial discrimination in jury selection because such discrimination implicated state action).

[10] Hodges v. United States, 203 U.S. 1, 14–20 (1906), *overruled* by Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 n.78 (1968).

[11] The Supreme Court's opinion in *Hodges* does not provide much detail as to the case's background. *See Jones*, 392 U.S. at 441 n.78 (discussing the facts of *Hodges*).

[12] *Id.*

[13] *See id.*

[14] *Hodges*, 203 U.S. at 14–15.

restricted state action, not private action.[15] However, because the Thirteenth Amendment applied to private action, the Court considered whether Congress could enact the laws as an exercise of its power to enforce that Amendment.[16] Ultimately, the Court answered this question in the negative, holding that private interference with an individual's freedom to contract did not subject an individual to slavery or involuntary servitude within the Thirteenth Amendment's meaning.[17] The Court held that the federal government lacked jurisdiction over the conduct at issue and set aside the convictions.[18] In so holding, the Court adopted a narrow view of the Thirteenth Amendment's prohibitions on involuntary servitude, determining that, while the Amendment prohibited slavery, it did not protect many other individual rights of African Americans.[19]

Amdt13.S2.3 Scope of Enforcement Clause of Thirteenth Amendment

Thirteenth Amendment, Section 2

Congress shall have power to enforce this article by appropriate legislation.

For more than a century after the states ratified the Thirteenth Amendment, the Supreme Court determined that Congress's power to legislate against the "badges" and "incidents" of slavery did not authorize it to enact legislation that sought to protect African Americans from some forms of private racial discrimination.[1] However, the Court significantly changed course with its 1968 decision in *Jones v. Alfred H. Mayer Co.*[2] In that case, the Court overruled its earlier decision in *Hodges v. United States* and adopted a much more deferential approach, determining that Congress may play a significant role in determining the scope of its enforcement power by enacting legislation.[3]

In *Jones*, the Supreme Court held that Congress had authority to enact a provision in the Civil Rights Act of 1866 that barred private racial discrimination in the sale or rental of property.[4] Overruling its earlier decision in *Hodges*, the Court held that Congress could prohibit private acts that interfered with African Americans' "fundamental rights which are the essence of civil freedom," including the right to lease or purchase real property, so long as Congress had a rational basis for doing so.[5] The Court wrote that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective

[15] *Id.*

[16] *Id*

[17] *Id.* at 18–19.

[18] *Id.* at 20. *See also* United States v. Harris, 106 U.S. 629, 642–43 (1883) (declaring that Congress lacked power under the Thirteenth Amendment to enact a law criminalizing conspiracies of two or more persons that sought to deprive another person of equal protection of the laws because upholding the law would "accord to Congress the power to punish every crime by which the right of any person to life, property, or reputation is invaded").

[19] *Id.* The Court later determined that judicial enforcement of such covenants violated the Fourteenth Amendment's Equal Protection Clause. Shelley v. Kraemer, 334 U.S. 1, 23 (1948). In a separate case, the Court determined that enforcement of such covenants in the District of Columbia, which is not subject to the Fourteenth Amendment, violated federal law and policy. Hurd v. Hodge, 334 U.S. 24, 32–36 (1948).

[1] *See* Amdt13.S2.2 Early Doctrine on Enforcement Clause of Thirteenth Amendment.

[2] 392 U.S. 409 (1968).

[3] *Id.* at 440–42 & 441 n.78. The Supreme Court has confirmed that Congress's power to address private racial discrimination is not limited to discrimination against African Americans, but encompasses all races. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 288 n.18 (1976) (citing Hodges v. United States, 203 U.S. 1, 16–17 (1906)), *overruled* by Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 n.78 (1968).

[4] *Jones*, 392 U.S. at 417–22, 440–44.

[5] *Id.* at 440, 441 & n.78.

legislation."[6] Thus, in *Jones*, the Court adopted a more deferential approach toward Congress's enforcement power, determining that legislation could prohibit practices, such as the discriminatory refusal to engage in real estate transactions with African Americans, that did not amount to slavery but retained the vestiges of some of its "badges" or "incidents."[7]

After deciding *Jones*, the Supreme Court held that Congress's Thirteenth Amendment enforcement power allowed it to prohibit private racial discrimination in a variety of other contexts.[8] For example, the Court confirmed that Congress's enforcement power authorized it to enact laws barring racial discrimination in making and enforcing contracts, which prohibited racially discriminatory admissions policies for private schools.[9] In addition, the Court held that Congress could enact remedial laws that granted individuals a statutory remedy against private persons that allegedly conspired to violate their civil rights because of their race.[10]

The Court has suggested, however, that the Congress that proposed the Thirteenth Amendment did not intend to prohibit practices that lacked discriminatory *intent* and merely had a disparate negative *impact* on African Americans.[11] As a result, it is unclear whether Congress's Thirteenth Amendment enforcement power extends to prohibiting such practices.

[6] *Id.* at 440.

[7] In this case, those vestiges were private acts that interfered with African Americans' rights to hold property or enter into contracts. *See id.* at 441. The Court did not address whether the Thirteenth Amendment's Prohibition Clause would itself have prohibited the practices at issue in the case without Congress's enactment of legislation. Palmer v. Thompson, 403 U.S. 217, 226–27 (1971) (holding that a city's closing of swimming pools to all persons, even if done with the intent to prevent African Americans and Whites from swimming together, did not amount to a "badge or incident" of slavery directly prohibited under the Thirteenth Amendment). In *Palmer*, however, the Court noted that Congress had not enacted a federal law barring this practice. *Id.*

[8] In the 1960s, the Supreme Court also upheld congressional enactments against private racial discrimination in public accommodations that served interstate travelers as a proper exercise of Congress's Commerce Clause power. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 250–51, 261–62 (1964). The Court rejected the notion that such enactments violated the Thirteenth Amendment as applied to the businesses furnishing public accommodations. *See id*. *See also* Katzenbach v. McClung, 379 U.S. 294, 304–05 (1964).

[9] Runyon v. McCrary, 427 U.S. 160, 179 (1976) (evaluating Section 1 of the Civil Rights Act of 1866, which provided that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens"), *superseded* by 42 U.S.C.§ 1981(c). *See also* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 235–40 (1969) (confirming that 42 U.S.C. § 1982, which Congress enacted pursuant to its Thirteenth Amendment enforcement power, prohibited private individuals from excluding an African American lessee, on the basis of race, from using community recreational facilities).

[10] Griffin v. Breckenridge, 403 U.S. 88, 105 (1971). Nonetheless, the Supreme Court cautioned that the federal statute at issue in *Griffin*, 42 U.S.C. § 1985, was not a source of "general federal tort law" and that a successful claim required a showing of "invidiously discriminatory animus behind the conspirators' action." *Id.* at 102.

[11] City of Memphis v. Greene, 451 U.S. 100, 126–29 (1981) (holding that a city's closing of one end of a street to reduce the flow of traffic and increase safety, even if it disproportionately inconvenienced African American citizens, was not a "badge" of slavery prohibited under the Thirteenth Amendment). *See also* Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 387–89 (1982) (determining that the Congress that proposed the Thirteenth Amendment was not concerned with practices that had a disparate negative impact on African Americans but lacked a discriminatory purpose). For a discussion of how the Fourteenth Amendment's guarantee of equal protection applies to facially neutral laws that have a disparate negative impact on a racial minority but lack discriminatory intent, see Amdt14.S1.8.5 Facially Neutral Laws Implicating Racial Minorities.

Amdt13.S2.4 Use of Enforcement Clause Power Beyond Harms of Racial Discrimination

Thirteenth Amendment, Section 2

Congress shall have power to enforce this article by appropriate legislation.

The scope of Congress's power to enforce the Thirteenth Amendment to combat harms beyond racial discrimination is unclear.[1] Questions about the scope of Congress's Thirteenth Amendment enforcement power arose when the 111th Congress enacted the Hate Crimes Prevention Act of 2009. The Act criminalized conduct that willfully caused, or attempted to cause, bodily injury to individuals because of their actual or perceived race, color, religion, or national origin.[2] The prohibition did not require that such criminal offenses involve state action or have a nexus to interstate commerce, prompting questions as to whether Congress's Thirteenth Amendment enforcement power authorized its criminalization of privately inflicted harms.[3]

Although the Supreme Court has not yet considered the 2009 Act's constitutionality, the Department of Justice's Office of Legal Counsel (OLC) opined that Congress could rely on its Thirteenth Amendment enforcement power to enact the legislation. The OLC advised that the Act was constitutional at least "insofar as the violence is directed at members of those religions or national origins that would have been considered races at the time of the adoption of the Thirteenth Amendment."[4] The OLC reasoned that Congress could punish private, racially motivated violence "as part of a reasonable legislative effort to extinguish the relics, badges and incidents of slavery."[5] The OLC noted that race-based violence had been used in the past to maintain slavery and involuntary servitude.[6] In determining that Congress's Thirteenth Amendment enforcement power authorized legislation protecting certain religious and

[1] Some commentators have argued that the Thirteenth Amendment prohibits practices that do not involve racial discrimination but are allegedly comparable to slavery or involuntary servitude. For example, some scholars have argued that the Amendment prohibits parents from abusing their children or prevents the government from banning abortion. *See, e.g.*, Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1365–66 (1992) (contending that the Thirteenth Amendment prohibits certain forms of child abuse); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U.L. REV. 480, 484 (1990) ("When women are compelled to carry and bear children, they are subjected to 'involuntary servitude' in violation of the thirteenth amendment."). The Supreme Court has never applied the Prohibition Clause in Section 1 of the Thirteenth Amendment to child abuse or abortion bans. Moreover, the Court has not addressed whether Congress could use its Section 2 enforcement power to address these issues. *See generally* George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1403 (2008) ("Congress, unlike the courts, has the capacity to select the elements associated with slavery for prohibition or regulation and to reflect the political support necessary to curtail or eliminate those elements of servitude. By contrast, under Section 1, the judiciary can only go so far in finding that otherwise justifiable relationships, such as that between parent and child, can be regulated when they take on pathological forms equivalent to involuntary servitude.").

[2] 18 U.S.C. § 249(a)(1).

[3] *See* Constitutionality of the Matthew Shepard Hate Crimes Prevention Act, 33 Op. O.L.C. 240 (2009), https://www.justice.gov/olc/file/2009-06-16-hate-crimes/download. Another section of the Hate Crimes Prevention Act prohibits offenses committed because of a person's actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability. *See* 18 U.S.C. § 249(a)(2). However, this prohibition requires a nexus between the offense and interstate commerce. *See id*. Thus, Congress's Commerce Clause power arguably provided the requisite authority for the criminal prohibition.

[4] 33 Op. O.L.C. 240 (2009). The OLC did not evaluate whether Congress's Commerce Clause power or Fourteenth Amendment enforcement power might authorize the law. *See id.* at 242 n.3.

[5] *Id.* at 242.

[6] *Id.*

Amdt13.S2.4
Use of Enforcement Clause Power Beyond Harms of Racial Discrimination

national origin groups, the OLC relied on a series of Supreme Court opinions holding that such groups would have been considered races at the time that Congress debated, and the states ratified, the Thirteenth Amendment.[7]

Uncertainty over whether the Thirteenth Amendment authorizes legislation prohibiting private forms of violence against certain groups illustrates that much remains unclear about the scope of Congress's enforcement power. One major unresolved question involves the extent to which Congress, when enacting legislation to enforce the Thirteenth Amendment, has the power to define the specific forms of government or private action that the Amendment prohibits.[8]

[7] *Id.* at 242–43. *See also* Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617–18 (1987) (suggesting that Jews are a race in this context); Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610–13 (1987) (holding that Arabs were considered a racial group at the time the states ratified the Thirteenth Amendment); Hodges v. United States, 203 U.S. 1, 17 (1906) ("Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon are as much within its compass as slavery or involuntary servitude of the African."). The OLC suggested that Congress's authority to protect other groups under the legislation could derive from its Commerce Clause power. *See Constitutionality of the Matthew Shepard Hate Crimes Prevention Act*, 33 Op. O.L.C. 240 (2009), https://www.justice.gov/olc/file/2009-06-16-hate-crimes/download.

[8] *See* G. Sidney Buchanan, *The Thirteenth Amendment and the Badge of Slavery Concept: A Projection of Congressional Power*, 12 Hous. L. Rev. 1070, 1070 (1975); Rutherglen, *supra* note 1, at 1403–04.

FOURTEENTH AMENDMENT
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FOURTEENTH AMENDMENT—EQUAL PROTECTION AND OTHER RIGHTS

Amdt14.1 Overview of Fourteenth Amendment, Equal Protection and Rights of Citizens

Amendment of the Constitution during the post-Civil War Reconstruction period resulted in a fundamental shift in the relationship between the Federal Government and the states. The Civil War had been fought over issues of states' rights, particularly the right to control the institution of slavery.[1] In the wake of the war, the Congress submitted, and the states ratified the Thirteenth Amendment (making slavery illegal), the Fourteenth Amendment (defining and granting broad rights of national citizenship), and the Fifteenth Amendment (forbidding racial discrimination in elections). The Fourteenth Amendment was the most controversial and far-reaching of these three "Reconstruction Amendments."

Amdt14.2 State Action Doctrine

The Fourteenth Amendment, by its terms, limits discrimination only by governmental entities, not by private parties.[1] As the Court has noted, "the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."[2] Although state action requirements also apply to other provisions of the Constitution[3] and to federal governmental actions,[4] the doctrine is most often associated with the application of the Equal Protection Clause to the states.[5]

Certainly, an act passed by a state legislature that directs a discriminatory result is state action and would violate the first section of the Fourteenth Amendment.[6] In addition, acts by

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[1] "Since the 1950s most professional historians have come to agree with Abraham Lincoln's assertion that slavery 'was, somehow, the cause of the war.'" James M. McPherson, *Southern Comfort*, The New York Review of Books (Apr. 12, 2001), quoting Lincoln's second inaugural address.

[1] The Amendment provides that "[n]o State" and "nor shall any State" engage in the proscribed conduct. There are, of course, numerous federal statutes that prohibit discrimination by private parties. *See, e.g.*, Civil Rights Act of 1964, Title II, 78 Stat. 241, 243, 42 U.S.C. §§ 2000a et seq. These statutes, however, are generally based on Congress's power to regulate commerce. *See* Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

[2] Shelley v. Kraemer, 334 U.S. 1, 13 (1948). "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws." Civil Rights Cases, 109 U.S. 3, 11 (1883).

[3] The doctrine applies to other rights protected of the Fourteenth Amendment, such as privileges and immunities and failure to provide due process. It also applies to Congress's enforcement powers under Section 5 of the Amendment. For discussion of the latter, *see* Amdt14.S5.1 Overview of Enforcement Clause to Amdt14.S5.4 Modern Doctrine on Enforcement Clause. Several other constitutional rights are similarly limited—the Fifteenth Amendment (racial discrimination in voting), the Nineteenth Amendment (sex discrimination in voting), and the Twenty-Sixth Amendment (voting rights for eighteen-year-olds)—although the Thirteenth Amendment, banning slavery and involuntary servitude, is not.

[4] The scope and reach of the "state action" doctrine is the same whether a state or the National Government is concerned. *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

[5] Recently, however, because of broadening due process conceptions and the resulting litigation, issues of state action have been raised with respect to the Due Process Clause. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982).

[6] United States v. Raines, 362 U.S. 17, 25 (1960). A prime example is the statutory requirement of racially segregated schools condemned in *Brown v. Board of Education*, 347 U.S. 483 (1954). *See also* Peterson v. City of Greenville, 373 U.S. 244 (1963), holding that trespass convictions of African Americans "sitting-in" at a lunch counter

other branches of government "by whatever instruments or in whatever modes that action may be taken" can result in a finding of "state action."[7] But the difficulty for the Court has been when the conduct complained of is not so clearly the action of a state. For instance, is it state action when a minor state official's act was not authorized or perhaps was even forbidden by state law? What if a private party engages in discrimination while in a special relationship with governmental authority? "The vital requirement is State responsibility," Justice Felix Frankfurter once wrote, "that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme" to deny protected rights.[8]

The state action doctrine is not just a textual interpretation of the Fourteenth Amendment, but may also serve the purposes of federalism. Thus, following the Civil War, when the Court sought to reassert states' rights, it imposed a rather rigid state action standard, limiting the circumstances under which discrimination suits could be pursued. During the civil rights movement of the 1950s and 1960s, however, when almost all state action contentions were raised in a racial context, the Court generally found the presence of state action. As it grew more sympathetic to federalism concerns in the late 1970s and 1980s, the Court began to reassert a strengthened state action doctrine, primarily but hardly exclusively in nonracial cases.[9] "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order."[10]

Operation of the state action doctrine was critical in determining whether school systems were segregated unconstitutionally by race. The original *Brown* cases as well as many subsequent cases arose in the context of statutorily mandated separation of the races, and therefore the finding of state action occasioned no controversy.[11] In the South, the aftermath of the case more often involved disputes over which remedies were needed to achieve a unitary system than it did the requirements of state action.[12] But if racial segregation is not the result

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over the objection of the manager cannot stand because of a local ordinance commanding such separation, irrespective of the manager's probable attitude if no such ordinance existed.

[7] *Ex parte* Virginia, 100 U.S. 339, 346 (1880). "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." *Id.* at 346–47

[8] Terry v. Adams, 345 U.S. 461, 473 (1953) (concurring) (concerning the Fifteenth Amendment).

[9] The history of the state action doctrine makes clear that the Court has considerable discretion and that the weighing of the opposing values and interests will lead to substantially different applications of the tests. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

[10] Lugar v. Edmondson Oil Co., 457 U.S. 922, 936–37 (1982). "Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden in the name of equality, if the structures of the amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority." Peterson v. City of Greenville, 373 U.S. 244, 250 (1963) (Harlan, J., concurring).

[11] Brown v. Board of Education, 347 U.S. 483 (1954).

[12] *See* Brown's Aftermath, *supra*.

of state action in some aspect, then its existence is not subject to constitutional remedy.[13] Distinguishing between the two situations has occasioned much controversy.

For instance, in a case arising from a Denver, Colorado school system in which no statutory dual system had ever been imposed, the Court restated the obvious principle that de jure racial segregation caused by "intentionally segregative school board actions" is to be treated as if it had been mandated by statute, and is to be distinguished from de facto segregation arising from actions not associated with the state.[14] In addition, when it is proved that a meaningful portion of a school system is segregated as a result of official action, the responsible agency must then bear the burden of proving that other school segregation within the system is adventitious and not the result of official action.[15] Moreover, the Court has also apparently adopted a rule that if it can be proved that at some time in the past a school board has purposefully maintained a racially separated system, a continuing obligation to dismantle that system can devolve upon the agency so that subsequent facially neutral or ambiguous school board policies can form the basis for a judicial finding of intentional discrimination.[16]

Different results follow, however, when inter-district segregation is an issue. Disregard of district lines is permissible by a federal court in formulating a desegregation plan only when it finds an inter-district violation. "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district, have been a substantive cause of inter-district segregation."[17] The de jure/de facto distinction is thus well established in school cases and is firmly grounded upon the "state action" language of the Fourteenth Amendment.

It has long been established that the actions of state officers and agents are attributable to the state. Thus, application of a federal statute imposing a criminal penalty on a state judge who excluded black citizens from jury duty was upheld as within congressional power under the Fourteenth Amendment; the judge's action constituted state action even though state law did not authorize him to select the jury in a racially discriminatory manner.[18] The fact that the "state action" category is not limited to situations in which state law affirmatively authorizes discriminatory action was made clearer in *Yick Wo v. Hopkins*,[19] in which the Court found unconstitutional state action in the discriminatory administration of an ordinance that was

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[13] *Compare* Washington v. Seattle School Dist., 458 U.S. 457 (1982), *with* Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982).

[14] "[T]he differentiating factor between de jure segregation and so-called de facto segregation . . . is *purpose* or *intent* to segregate." Keyes v. Denver School District, 413 U.S. 189, 208 (1973) (emphasis by Court). *See also* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 457 n.5 (1979).

[15] It is not the responsibility of complainants to show that each school in a system is de jure segregated to be entitled to a system-wide desegregation plan. 413 U.S. at 208–13. The continuing validity of the *Keyes* shifting-of-the-burden principle, after *Washington v. Davis*, 426 U.S. 229 (1976), and *Dayton Bd. of Educ. v. Brinkman,* 433 U.S. 406 (1977), was asserted in *Columbus Bd. of Educ. v. Penick,* 443 U.S. 449, 455–458 & n.7, 467–68 (1979), and *Dayton Bd. of Educ. v. Brinkman,* 443 U.S. 526, 540–42 (1979).

[16] Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458–61 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534–40 (1979).

[17] Milliken v. Bradley, 418 U.S. 717, 744–45 (1974).

[18] *Ex parte* Virginia, 100 U.S. 339 (1880). Similarly, the acts of a state governor are state actions, Cooper v. Aaron, 358 U.S. 1, 16–17 (1958); Sterling v. Constantin, 287 U.S. 378, 393 (1932), as are the acts of prosecuting attorneys, Mooney v. Holohan, 294 U.S. 103, 112, 113 (1935), state and local election officials, United States v. Classic, 313 U.S. 299 (1941), and law enforcement officials. Griffin v. Maryland, 378 U.S. 130 (1964); Monroe v. Pape, 365 U.S. 167 (1961); Screws v. United States, 325 U.S. 91 (1945). One need not be an employee of the state to act "under color of" state law; mere participation in an act with state officers suffices. United States v. Price, 383 U.S. 787 (1966).

[19] 118 U.S. 356 (1886).

fair and non-discriminatory on its face. Not even the fact that the actions of the state agents are illegal under state law makes the action unattributable to the state for purposes of the Fourteenth Amendment."Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[20] When the denial of equal protection is not commanded by law or by administrative regulation but is nonetheless accomplished through police enforcement of "custom"[21] or through hortatory admonitions by public officials to private parties to act in a discriminatory manner,[22] the action is state action. In addition, when a state clothes a private party with official authority, that private party may not engage in conduct forbidden the state.[23]

Beyond this are cases where a private individual discriminates, and the question is whether a state has encouraged the effort or has impermissibly aided it.[24] Of notable importance and a subject of controversy since it was decided is *Shelley v. Kraemer*.[25] There, property owners brought suit to enforce a racially restrictive covenant, seeking to enjoin the sale of a home by White sellers to Black buyers. The covenants standing alone, Chief Justice Fred Vinson said, violated no rights protected by the Fourteenth Amendment. "So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." However, this situation is to be distinguished from where "the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements."[26] Establishing that the precedents were to the effect that judicial action of state courts was state action, the Court continued to find that judicial enforcement of these covenants was forbidden. "The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desire to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. . . ."[27]

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[20] United States v. Classic, 313 U.S. 299, 326 (1941). *See also* Screws v. United States, 325 U.S. 91, 109 (1945) (citation omitted); Williams v. United States, 341 U.S. 97 (1951); United States v. Price, 383 U.S. 787 (1966). *See also* United States v. Raines, 362 U.S. 17, 25 (1960). As Justice Louis Brandeis noted in *Iowa-Des Moines Nat'l Bank v. Bennett,* 284 U.S. 239, 246 (1931), "acts done 'by virtue of public position under a State government . . . and . . . in the name and for the State' . . . are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the state law." Note that, for purposes of being amenable to suit in federal court, however, the immunity of the states does not shield state officers who are alleged to be engaging in illegal or unconstitutional action. *Ex parte* Young, 209 U.S. 123 (1908). *Cf.* Screws v. United States, 325 U.S. at 147–48. .

[21] *Cf.* Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

[22] Lombard v. Louisiana, 373 U.S. 267 (1963). No statute or ordinance mandated segregation at lunch counters, but both the mayor and the chief of police had recently issued statements announcing their intention to maintain the existing policy of separation. Thus, the conviction of Black and White protesters for trespass because they refused to leave a segregated lunch counter was voided.

[23] Griffin v. Maryland, 378 U.S. 130 (1964). Guard at private entertainment ground was also deputy sheriff; he could not execute the racially discriminatory policies of his private employer. *See also* Williams v. United States, 341 U.S. 97 (1951).

[24] Examples already alluded to include *Lombard v. Louisiana*, 373 U.S. 267 (1963), in which certain officials had advocated continued segregation, *Peterson v. City of Greenville*, 373 U.S. 244 (1963), in which there were segregation-requiring ordinances and customs of separation, and *Robinson v. Florida*, 378 U.S. 153 (1964), in which health regulations required separate restroom facilities in any establishment serving both races.

[25] 334 U.S. 1 (1948).

[26] 334 U.S. at 13–14.

[27] "These are not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell." 334 U.S. at 19. In *Hurd v. Hodge*, 334 U.S. 24 (1948), the Court outlawed judicial

Arguments about the scope of *Shelley* began immediately. Did the rationale mean that no private decision to discriminate could be effectuated in any manner by action of the state, as by enforcement of trespass laws or judicial enforcement of discrimination in wills? Or did it rather forbid the action of the state in interfering with the willingness of two private parties to deal with each other? Disposition of several early cases possibly governed by *Shelley* left this issue unanswered.[28] But the Court has experienced no difficulty in finding that state court enforcement of common-law rules in a way that has an impact upon speech and press rights is state action and triggers the application of constitutional rules.[29]

It may be that the substantive rule that is being enforced is the dispositive issue, rather than the mere existence of state action. Thus, in *Evans v. Abney*,[30] a state court, asked to enforce a discriminatory stipulation in a will that property devised to a city for use as a public park could be used only by "white people," ruled that the city could not operate the park in a segregated fashion. Instead of striking the segregation requirement from the will, however, the court instead ordered return of the property to the decedent's heirs, inasmuch as the trust had failed. The Supreme Court held the decision permissible, inasmuch as the state court had merely carried out the testator's intent with no racial motivation itself, and distinguished *Shelley* on the basis that African Americans were not discriminated against by the reversion, because everyone was deprived of use of the park.[31]

The case of *Reitman v. Mulkey*[32] was similar to *Shelley* in both its controversy and the uncertainty of its rationale. In *Reitman*, the Court struck down an amendment to the California Constitution that prohibited the state and its subdivisions and agencies from forbidding racial discrimination in private housing. The Court, finding the provision to deny equal protection of the laws, appeared to ground its decision on either of two lines of reasoning. First was that the provision constituted state action to impermissibly encourage private racial discrimination. Second was that the provision made discriminatory racial practices immune from the ordinary legislative process, and thus impermissibly burdened minorities in the achievement of legitimate aims.[33] In a subsequent case, *Hunter v. Erickson*,[34] the latter

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enforcement of restrictive covenants in the District of Columbia as violating civil rights legislation and public policy. Barrows v. Jackson, 346 U.S. 249 (1953), held that damage actions for violations of racially restrictive covenants would not be judicially entertained.

[28] Rice v. Sioux City Memorial Park Cemetery, 245 Iowa 147, 60 N.W. 2d 110 (1953), *aff'd by an equally divided Court*, 348 U.S. 880 (1954), rehearing granted, judgment vacated and certiorari dismissed, 349 U.S. 70 (1955); Black v. Cutter Laboratories, 351 U.S. 292 (1956). The central issue in the "sit-in" cases, whether state enforcement of trespass laws at the behest of private parties acting on the basis of their own discriminatory motivations, was evaded by the Court, in finding some other form of state action and reversing all convictions. Individual Justices did elaborate, however. *Compare* Bell v. Maryland, 378 U.S. 226, 255–60 (1964) (opinion of Justice Douglas), *with id.* at 326 (Black, Harlan, and White, J.J., dissenting).

[29] In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and progeny, defamation actions based on common-law rules were found to implicate First Amendment rights, and the Court imposed varying limitations on such rules. *See id.* at 265 (finding state action). Similarly, in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), a civil lawsuit between private parties, the application of state common-law rules to assess damages for actions in a boycott and picketing was found to constitute state action. *Id.* at 916 n.51.

[30] 396 U.S. 435 (1970). The matter had previously been before the Court in *Evans v. Newton*, 382 U.S. 296 (1966).

[31] 396 U.S. at 445. Note the use of the same rationale in another context in *Palmer v. Thompson*, 403 U.S. 217, 226 (1971). On a different result in the "Girard College" will case, see Pennsylvania v. Board of Trustees, 353 U.S. 230 (1957), discussed *infra*.

[32] 387 U.S. 369 (1967). The decision was 5-4, Justices John Marshall Harlan, Hugo Black, Tom Clark, and Potter Stewart dissenting. *Id.* at 387.

[33] *See, e.g.*, 387 U.S. at 377 (language suggesting both lines of reasoning). *But see* City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003) (ministerial acts associated with a referendum repealing a low-income housing ordinance did not constitute state action, as the referendum process was facially neutral, and the potentially discriminatory repeal was never enforced).

[34] 393 U.S. 385 (1969).

rationale was used in a unanimous decision voiding an Akron ordinance, which suspended an "open housing" ordinance and provided that any future ordinance regulating transactions in real property "on the basis of race, color, religion, national origin or ancestry" must be submitted to a vote of the people before it could become effective.[35]

Two later decisions involving state referenda on busing for integration confirm that the condemning factor of *Mulkey* and *Hunter* was the imposition of barriers to racial amelioration legislation.[36] Both cases agree that "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification."[37] It is thus not impermissible merely to overturn a previous governmental decision, or to defeat the effort initially to arrive at such a decision, simply because the state action may conceivably encourage private discrimination.

In other instances in which the discrimination is being practiced by private parties, the question essentially is whether there has been sufficient state involvement to bring the Fourteenth Amendment into play.[38] There is no clear formula. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[39] State action has been found in a number of circumstances. The "White Primary" was outlawed by the Court not because the party's discrimination was commanded by statute but because the party operated under the authority of the state and the state prescribed a general election ballot made up of party nominees chosen in the primaries.[40] Although the City of Philadelphia was acting as trustee in administering and carrying out the will of someone who had left money for a college, admission to which was stipulated to be for white boys only, the City was held to be engaged in forbidden state action in discriminating against black applicants in admission.[41] When state courts on petition of interested parties removed the City of Macon as trustees of a segregated park that had been left in trust for such

[35] In contrast, other ordinances would become effective when passed, except that petitions could be submitted to revoke those ordinances by referendum. 393 U.S. at 389–90 (1969). In *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971), New York enacted a statute prohibiting the assignment of students or the establishment of school districts for the purpose of achieving racial balance in attendance, unless with the express approval of a locally elected school board or with the consent of the parents, a measure designed to restrict the state education commissioner's program to ameliorate de facto segregation. The federal court held the law void, relying on *Mulkey* to conclude that the statute encouraged racial discrimination *and* that by treating educational matters involving racial criteria differently than it treated other educational matters it made more difficult a resolution of the de facto segregation problem.

[36] Washington v. Seattle School Dist., 458 U.S. 457 (1982); Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982). A 5-4 majority in *Seattle* found the fault to be a racially based structuring of the political process making it more difficult to undertake actions designed to improve racial conditions than to undertake any other educational action. An 8-1 majority in *Crawford* found that repeal of a measure to bus to undo de facto segregation, without imposing any barrier to other remedial devices, was permissible.

[37] Crawford, 458 U.S. at 539, quoted in *Seattle*, 458 U.S. at 483. *See also* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 414 (1977).

[38] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (private discrimination is not constitutionally forbidden "unless to some significant extent the State in any of its manifestations has been found to have become involved in it").

[39] 365 U.S. at 722.

[40] Smith v. Allwright, 321 U.S. 649, 664 (1944).

[41] Pennsylvania v. Board of Trustees, 353 U.S. 230 (1957). On remand, the state courts substituted private persons as trustees to carry out the will. *In re* Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844 *cert. denied*, 357 U.S. 570 (1958). This expedient was, however, ultimately held unconstitutional. Brown v. Pennsylvania, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968).

use in a will, and appointed new trustees in order to keep the park segregated, the Court reversed, finding that the City was still inextricably involved in the maintenance and operation of the park.[42]

In a significant case in which the Court explored a lengthy list of contacts between the state and a private corporation, it held that the lessee of property within an off-street parking building owned and operated by a municipality could not exclude African Americans from its restaurant. The Court emphasized that the building was publicly built and owned, that the restaurant was an integral part of the complex, that the restaurant and the parking facilities complemented each other, that the parking authority had regulatory power over the lessee, and that the financial success of the restaurant benefited the governmental agency. The "degree of state participation and involvement in discriminatory action," therefore, was sufficient to condemn it.[43]

The question arose, then, what degree of state participation was "significant"? Would licensing of a business clothe the actions of that business with sufficient state involvement? Would regulation? Or provision of police and fire protection? Would enforcement of state trespass laws be invalid if it effectuated discrimination? The "sit-in" cases of the early 1960s presented all these questions and more but did not resolve them.[44] The basics of an answer came in *Moose Lodge No. 107 v. Irvis*,[45] in which the Court held that the fact that a private club was required to have a liquor license to serve alcoholic drinks and did have such a license did not bar it from excluding Black patrons. It denied that private discrimination became constitutionally impermissible "if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever," since any such rule would eviscerate the state action doctrine. Rather, "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discrimination.'"[46] Moreover, although the state had extensive powers to regulate in detail the liquor dealings of its licensees, "it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise."[47] And there was nothing in the licensing relationship here that approached "the symbiotic relationship between lessor and lessee" that the Court had found in *Burton*.[48]

The Court subsequently made clear that governmental involvement with private persons or private corporations is not the critical factor in determining the existence of "state action." Rather, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[49] Or, to quote Judge Henry Friendly, who first enunciated the test this way, the "essential point" is "that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action,

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[42] Evans v. Newton, 382 U.S. 296 (1966). Justices Black, Harlan, and Stewart dissented. *Id.* at 312, 315. For the subsequent ruling in this case, see Evans v. Abney, 396 U.S. 435 (1970).

[43] Burton v. Wilmington Parking Authority, 365 U.S. 715, 724 (1961).

[44] *See, e.g.*, the various opinions in Bell v. Maryland, 378 U.S. 226 (1964).

[45] 407 U.S. 163 (1972). One provision of the state law was, however, held unconstitutional. That provision required a licensee to observe all its by-laws and therefore mandated the Moose Lodge to follow the discrimination provision of its by-laws. *Id.* at 177–79.

[46] 407 U.S. at 173.

[47] 407 U.S. at 176–77.

[48] 407 U.S. at 174–75.

[49] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) (under the Due Process Clause).

must be the subject of the complaint."[50] Therefore, the Court found no such nexus between the state and a public utility's action in terminating service to a customer. Neither the fact that the business was subject to state regulation, nor that the state had conferred in effect a monopoly status upon the utility, nor that in reviewing the company's tariff schedules the regulatory commission had in effect approved the termination provision (but had not required the practice, had "not put its own weight on the side of the proposed practice by ordering it")[51] operated to make the utility's action the state's action.[52] Significantly tightening the standard further against a finding of "state action," the Court asserted that plaintiffs must establish not only that a private party "acted under color of the challenged statute, but also that its actions are properly attributable to the State. . . ."[53] And the actions are to be attributable to the state apparently only if the state compelled the actions and not if the state merely established the process through statute or regulation under which the private party acted.

Thus, when a private party, having someone's goods in his possession and seeking to recover the charges owned on storage of the goods, acts under a permissive state statue to sell the goods and retain his charges out of the proceeds, his actions are not governmental action and need not follow the dictates of the Due Process Clause.[54] Or, where a state workers' compensation statute was amended to allow, but not require, an insurer to suspend payment for medical treatment while the necessity of the treatment was being evaluated by an independent evaluator, this action was not fairly attributable to the state, and thus pre-deprivation notice of the suspension was not required.[55] In the context of regulated nursing home situations, in which the homes were closely regulated and state officials reduced or withdrew Medicaid benefits paid to patients when they were discharged or transferred to institutions providing a lower level of care, the Court found that the actions of the homes in discharging or transferring were not thereby rendered the actions of the government.[56]

In a few cases, the Court has indicated that discriminatory action by private parties may be precluded by the Fourteenth Amendment if the particular party involved is exercising a "public function."[57] For instance, in *Marsh v. Alabama*,[58] a Jehovah's Witness had been convicted of trespass after passing out literature on the streets of a company-owned town, but

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[50] Powe v. Miles, 407 F.2d. 73, 81 (2d Cir. 1968). *See also* NCAA v. Tarkanian, 488 U.S. 179 (1988) (where individual state has minimal influence over the National College Athletic Association's activities, the application of association rules leading to a state university's suspending its basketball coach could not be ascribed to the state.). *But see* Brentwood Academy v. Tennessee Secondary School Athletic Assoc., 531 U.S. 288 (2001) (where statewide public school scholastic association is "overwhelmingly" composed of public school officials for that state, this "entwinement" is sufficient to ascribe actions of association to state).

[51] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974). In dissent, Justice Thurgood Marshall protested that the quoted language marked "a sharp departure" from precedent, "that state authorization and approval of 'private' conduct has been held to support a finding of state action." *Id.* at 369. In *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the plurality opinion used much the same analysis to deny antitrust immunity to a utility practice merely approved but not required by the regulating commission, but most of the Justices were on different sides of the same question in the two cases.

[52] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351–58 (1974). On the due process limitations on the conduct of public utilities, see Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).

[53] Flagg Bros. v. Brooks, 436 U.S. 149, 156 (1978) (due process).

[54] 436 U.S. at 164–66. If, however, a state officer acts with the private party in securing the property in dispute, that is sufficient to create the requisite state action and the private party may be subjected to suit if the seizure does not comport with due process. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

[55] American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).

[56] Blum v. Yaretsky, 457 U.S. 991 (1982).

[57] This rationale is one of those that emerges from various opinions in *Terry v. Adams*, 345 U.S. 461 (1953) (holding that a political association limited to White voters that held internal elections to designate which of its member would run in the Texas Democratic primaries was acting as part of the state-established electoral system).

[58] 326 U.S. 501 (1946).

the Court reversed. It is not entirely clear from the Court's opinion what it was that made the privately owned town one to which the Constitution applied. In essence, it appears to have been that the town "had all the characteristics of any other American town" and that it was "like" a state. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[59] A subsequent attempt to extend *Marsh* to privately owned shopping centers was at first successful, but was soon turned back, resulting in a sharp curtailment of the "public function" doctrine.[60]

Attempts to apply this theory to other kinds of private conduct, such as operation of private utilities,[61] use of permissive state laws to secure property claimed to belong to creditors,[62] maintaining schools for "problem" children referred by public institutions,[63] provision of workers' compensation coverage by private insurance companies,[64] and operation of nursing homes in which patient care is almost all funded by public resources,[65] proved unavailing. The question is not "whether a private group is serving a 'public function.'. . . That a private entity performs a function which serves the public does not make its acts state action."[66] The "public function" doctrine is to be limited to a delegation of "a power 'traditionally exclusively reserved to the State.'"[67]

Public function did play an important part, however, in the Court's finding state action in the exercise of peremptory challenges in jury selection by non-governmental parties. Using tests developed in an earlier case involving garnishment and attachment,[68] the Court found state action in the racially discriminatory use of such challenges during voir dire in a civil case.[69] The Court first asked "whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority," and then "whether the private party charged with the deprivation could be described in all fairness as a state actor." In answering the second question, the Court considered three factors: "the extent to which the actor relies on governmental assistance and benefits, whether the actor is performing a traditional governmental function, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority."[70] There was no question that the exercise of peremptory challenges derives from governmental authority (either state or federal, as the case may be); exercise of peremptory challenges is authorized by law, and the number is limited. Similarly, the Court easily concluded that private parties exercise peremptory challenges with the "overt" and "significant" assistance of the court.

In addition, jury selection was found to be a traditional governmental function: the jury "is a quintessential governmental body, having no attributes of a private actor," and it followed, so

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[59] 326 U.S. at 506.

[60] *See* Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), *limited in* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), and *overruled in* Hudgens v. NLRB, 424 U.S. 507 (1976). The *Marsh* principle is good only when private property has taken on *all* the attributes of a municipality. *Id.* at 516–17.

[61] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974).

[62] Flagg Bros. v. Brooks, 436 U.S. 149, 157–59 (1978).

[63] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

[64] American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).

[65] Blum v. Yaretsky, 457 U.S. 991, 1011–12 (1982).

[66] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

[67] Flagg Bros. v. Brooks, 436 U.S. 149, 157 (1978) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974)).

[68] Lugar v. Edmondson Oil Corp., 457 U.S. 922 (1982).

[69] Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

[70] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620–22 (1991) (citations omitted).

the Court majority believed, that selection of individuals to serve on that body is also a governmental function whether or not it is delegated to or shared with private individuals.[71] Finally, the Court concluded that "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself."[72] Dissenting Justice Sandra Day O'Connor complained that the Court was wiping away centuries of adversary practice in which "unrestrained private choice" has been recognized in exercise of peremptory challenges; "[i]t is antithetical to the nature of our adversarial process," the Justice contended, "to say that a private attorney acting on behalf of a private client represents the government for constitutional purposes."[73]

The Court soon applied these same principles to hold that the exercise of peremptory challenges by the defense in a criminal case also constitutes state action,[74] even though in a criminal case it is the government and the defendant who are adversaries. The same generalities apply with at least equal force: there is overt and significant governmental assistance in creating and structuring the process, a criminal jury serves an important governmental function and its selection is also important, and the courtroom setting intensifies harmful effects of discriminatory actions. An earlier case[75] holding that a public defender was not a state actor when engaged in general representation of a criminal defendant was distinguished, with the Court emphasizing that "exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant's defense," because it involves selection of persons to wield governmental power.[76]

Previously, the Court's decisions with respect to state "involvement" in the private activities of individuals and entities raised the question whether financial assistance and tax benefits provided to private parties would so clothe them with state action that discrimination by them and other conduct would be subject to constitutional constraints. Many lower courts had held state action to exist in such circumstances.[77] However the question might have been answered under prior Court holdings, it is evident that the more recent cases would not generally support a finding of state action in these cases. In *Rendell-Baker v. Kohn*,[78] a private school received "problem" students referred to it by public institutions, it was heavily regulated, and it received between 90% and 99% of its operating budget from public funds. In

[71] 500 U.S. at 624, 625.

[72] 500 U.S. at 628.

[73] 500 U.S. at 639, 643.

[74] Georgia v. McCollum, 505 U.S. 42 (1992). It was, of course, beyond dispute that a prosecutor's exercise of peremptory challenges constitutes state action. *See* Swain v. Alabama, 380 U.S. 202 (1965); Batson v. Kentucky, 476 U.S. 79 (1986).

[75] Polk County v. Dodson, 454 U.S. 512 (1981).

[76] 505 U.S. at 54. Justice Sandra Day O'Connor, again dissenting, pointed out that the Court's distinction was inconsistent with *Dodson's* declaration that public defenders are not vested with state authority "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Id.* at 65–66. Justice Antonin Scalia, also dissenting again, decried reduction of *Edmonson* "to the terminally absurd: A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state." *Id.* at 69–70. Chief Justice William Rehnquist, who had dissented in *Edmonson*, concurred in *McCollum* in the belief that it was controlled by *Edmonson*, and Justice Clarence Thomas, who had not participated in *Edmonson*, expressed similar views in a concurrence.

[77] On funding, *see* Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945); Christhilf v. Annapolis Emergency Hosp. Ass'n, 496 F.2d 174 (4th Cir. 1974). *But cf.* Greco v. Orange Mem. Hosp. Corp., 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975). On tax benefits, *see* Green v. Connally, 330 F. Supp. 1150 (D.D.C.) (three-judge court), *aff'd. sub nom.* Coit v. Green, 404 U.S. 997 (1971);McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972); Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974). *But cf.* New York City Jaycees v. United States Jaycees, 512 F.2d 856 (2d Cir. 1976); Greenya v. George Washington Univ., 512 F.2d 556 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975).

[78] 457 U.S. 830 (1982).

Blum v. Yaretsky,[79] a nursing home had practically all of its operating and capital costs subsidized by public funds and more than 90% of its residents had their medical expenses paid from public funds; in setting reimbursement rates, the state included a formula to assure the home a profit. Nevertheless, in both cases the Court found that the entities remained private, and required plaintiffs to show that as to the complained of actions the state was involved, either through coercion or encouragement.[80] "That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business."[81]

In the social welfare area, the Court has drawn a sharp distinction between governmental action subject to substantive due process requirements, and governmental inaction, not so constrained. There being "no affirmative right to governmental aid," the Court announced in *DeShaney v. Winnebago County Social Services Department*[82] that "as a general matter, . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." Before there can be state involvement creating an affirmative duty to protect an individual, the Court explained, the state must have taken a person into its custody and held him there against his will so as to restrict his freedom to act on his own behalf. Thus, although the Court had recognized due process violations for failure to provide adequate medical care to incarcerated prisoners,[83] and for failure to ensure reasonable safety for involuntarily committed mental patients,[84] no such affirmative duty arose from the failure of social services agents to protect an abused child from further abuse from his parent. Even though possible abuse had been reported to the agency and confirmed and monitored by the agency, and the agency had done nothing to protect the child, the Court emphasized that the actual injury was inflicted by the parent and "did not occur while [the child] was in the State's custody."[85] Although the state may have incurred liability in tort through the negligence of its social workers, "[not] every tort committed by a state actor [is] a constitutional violation."[86] "[I]t is well to remember . . . that the harm was inflicted not by the State of Wisconsin, but by [the child's] father."[87]

Judicial inquiry into the existence of "state action" may lead to different results depending on what remedy is sought to be enforced. While cases may be brought against a private actor to compel him to halt his discriminatory action, one could just as readily bring suit against the government to compel it to cease aiding the private actor in his discriminatory conduct. Enforcing the latter remedy might well avoid constitutional issues that an order directed to

[79] 457 U.S. 991 (1982).

[80] The rules developed by the Court for general business regulation are that (1) the "mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment," Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) *quoting* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974); *Cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), and (2) "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be deemed to be that of the State." Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). To the latter point, see Flagg Bros. v. Brooks, 436 U.S. 149, 166 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974).

[81] 457 U.S. at 1011.

[82] 489 U.S. 189, 197 (1989).

[83] Estelle v. Gamble, 429 U.S. 97 (1976).

[84] Youngberg v. Romeo, 457 U.S. 307 (1982).

[85] 489 U.S. at 201.

[86] 489 U.S. at 202.

[87] 489 U.S. at 203.

the private party would raise.[88] In either case, however, it must be determined whether the governmental involvement is sufficient to give rise to a constitutional remedy. In a suit against the private party it must be determined whether he is so involved with the government as to be subject to constitutional restraints, while in a suit against the government agency it must be determined whether the government's action "impermissibly fostered" the private conduct.

Thus, in *Norwood v. Harrison*,[89] the Court struck down the provision of free textbooks by a state to racially segregated private schools (which were set up to avoid desegregated public schools), even though the textbook program predated the establishment of these schools. "[A]ny tangible state assistance, outside the generalized services government might provide to private segregated schools in common with other schools, and with all citizens, is constitutionally prohibited if it has 'a significant tendency to facilitate, reinforce, and support private discrimination.'. . . The constitutional obligation of the State requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discriminations."[90] And in a subsequent case, the Court approved a lower court order that barred the city from permitting exclusive temporary use of public recreational facilities by segregated private schools because that interfered with an outstanding order mandating public school desegregation. But it remanded for further factfinding with respect to permitting nonexclusive use of public recreational facilities and general government services by segregated private schools so that the district court could determine whether such uses "involve government so directly in the actions of those users as to warrant court intervention on constitutional grounds."[91] The lower court was directed to sift facts and weigh circumstances on a case-by-case basis in making determinations.[92]

It should be noted, however, that, without mentioning these cases, the Court has interposed a potentially significant barrier to use of the principle set out in them. In a 1976 decision, which it has since expanded, it held that plaintiffs, seeking disallowal of governmental tax benefits accorded to institutions that allegedly discriminated against complainants and thus involved the government in their actions, must show that revocation of the benefit would cause the institutions to cease the complained-of conduct.[93]

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[88] For example, if a Court finds a relationship between the state and a discriminating private group (which may have rights of association protected by the First Amendment), a remedy directed against the relationship might succeed, where a direction to such group to eliminate such discrimination might not. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179–80 (1972) (Douglas, J., dissenting); Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974); Norwood v. Harrison, 413 U.S. 455, 470 (1973). The right can be implicated as well by affirmative legislative action barring discrimination in private organizations. *See* Runyon v. McCrary, 427 U.S. 160, 175–79 (1976).

[89] 413 U.S. 455 (1973).

[90] Gilmore v. City of Montgomery, 417 U.S. 556, 568–69 (1974) (quoting Norwood v. Harrison, 413 U.S. 455, 466, 467 (1973)).

[91] Gilmore v. City of Montgomery, 417 U.S. 556, 570 (1974).

[92] Unlike the situation in which private club discrimination is attacked directly, "the question of the existence of state action centers in the extent of the city's involvement in discriminatory actions by private agencies using public facilities. . . ." Receipt of just any sort of benefit or service at all does not by the mere provision—electricity, water, and police and fire protection, access generally to municipal recreational facilities—constitute a showing of state involvement in discrimination and the lower court's order was too broad because not predicated upon a proper finding of state action. "If, however, the city or other governmental entity rations otherwise freely accessible recreational facilities, the case for state action will naturally be stronger than if the facilities are simply available to all comers without condition or reservation." 417 U.S. at 573–74. *See also* Blum v. Yaretsky, 457 U.S. 991 (1982) (plaintiffs unsuccessfully sued public officials, objecting not to regulatory decision made by the officials as to Medicaid payments, but to decisions made by the nursing home in discharging and transferring patients).

[93] Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). *See id.* at 46, 63–64 (Brennan, J., concurring and dissenting).

SECTION 1—RIGHTS

Amdt14.S1.1 Citizenship

Amdt14.S1.1.1 Historical Background on Citizenship Clause

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The citizenship provisions of the Fourteenth Amendment may be seen as a repudiation of one of the more politically divisive cases of the nineteenth century. Under common law, free persons born within a state or nation were citizens thereof. In the *Dred Scott* case,[1] however, Chief Justice Roger Taney, writing for the Court, ruled that this rule did not apply to freed slaves. The Court held that United States citizenship was enjoyed by only two classes of people: (1) White persons born in the United States as descendants of "persons, who were at the time of the adoption of the Constitution recognised as citizens in the several States, [and who] became also citizens of this new political body," the United States of America, and (2) those who, having been "born outside the dominions of the United States," had migrated thereto and been naturalized therein.[2] Freed slaves fell into neither of these categories.

The Court further held that, although a state could confer state citizenship upon whomever it chose, it could not make the recipient of such status a citizen of the United States. Even a free man descended from a former slave residing as a free man in one of the states at the date of ratification of the Constitution was held ineligible for citizenship.[3] Congress subsequently repudiated this concept of citizenship, first in section 1[4] of the Civil Rights Act of 1866[5] and then in Section 1 of the Fourteenth Amendment. In doing so, Congress set aside the *Dred Scott* holding, and restored the traditional precepts of citizenship by birth.[6]

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[1] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). The controversy, political as well as constitutional, that this case stirred and still stirs is exemplified and analyzed in the material collected in S. KUTLER, THE DRED SCOTT DECISION: LAW OR POLITICS? (1967). *See also* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); M. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006); EARL M. MALTZ, DRED SCOTT AND THE POLITICS OF SLAVERY (2007); Symposium, *150th Anniversary of the Dred Scott Decision*, 82 CHI.-KENT L. REV. 1–455 (2007).

[2] 60 U.S. (19 How.) at 406, 418.

[3] 60 U.S. (19 How.) at 404–06, 417–18, 419–20 (1857).

[4] The proposed amendment as it passed the House contained no such provision, and it was decided in the Senate to include language like that finally adopted. CONG. GLOBE, 39th Cong., 1st Sess. 2560, 2768–69, 2869 (1866). The sponsor of the language said: "This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is . . . a citizen of the United States." *Id.* at 2890. The legislative history is discussed at some length in *Afroyim v. Rusk,* 387 U.S. 253, 282–86 (1967) (Harlan, J., dissenting).

[5] "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right[s] . . . ." Ch. 31, 14 Stat. 27.

[6] United States v. Wong Kim Ark, 169 U.S. 649, 688 (1898).

Amdt14.S1.1.2 Citizenship Clause Doctrine

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Based on the first sentence of Section 1,[1] the Court has held that a child born in the United States of Chinese parents who were ineligible to be naturalized themselves is nevertheless a citizen of the United States entitled to all the rights and privileges of citizenship.[2] The requirement that a person be "subject to the jurisdiction thereof," however, excludes its application to children born of diplomatic representatives of a foreign state, children born of alien enemies in hostile occupation,[3] or children of members of Indian tribes subject to tribal laws.[4] In addition, the citizenship of children born on vessels in United States territorial waters or on the high seas has generally been held by the lower courts to be determined by the citizenship of the parents.[5] Citizens of the United States within the meaning of this Amendment must be natural and not artificial persons; a corporate body is not a citizen of the United States.[6]

Amdt14.S1.1.3 Loss of Citizenship

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

In *Afroyim v. Rusk*,[1] a divided Court extended the force of this first sentence beyond prior holdings, ruling that it withdrew from the Government of the United States the power to

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[1] "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

[2] United States v. Wong Kim Ark, 169 U.S. 649 (1898).

[3] 169 U.S. at 682 (these are recognized exceptions to the common-law rule of acquired citizenship by birth).

[4] 169 U.S. at 680–82; Elk v. Wilkins, 112 U.S. 94, 99 (1884).

[5] United States v. Gordon, 25 F. Cas. 1364 (No. 15231) (C.C.S.D.N.Y. 1861) ; *In re* Look Tin Sing, 21 F. 905 (C.C.Cal. 1884); Lam Mow v. Nagle, 24 F.2d 316 (9th Cir. 1928).

[6] Insurance Co. v. New Orleans, 13 F. Cas. 67 (C.C.D. La. 1870). Not being citizens of the United States, corporations accordingly have been declared unable to claim the protection of that clause of the Fourteenth Amendment that secures the privileges and immunities of citizens of the United States against abridgment by state legislation. Orient Ins. Co. v. Daggs, 172 U.S. 557, 561 (1869). This conclusion was in harmony with the earlier holding in *Paul v. Virginia,* 75 U.S. (8 Wall.) 168 (1869), to the effect that corporations were not within the scope of the Privileges and Immunities Clause of state citizenship set out in Article IV, § 2. *See also* Selover, Bates & Co. v. Walsh, 226 U.S. 112, 126 (1912); Berea College v. Kentucky, 211 U.S. 45 (1908); Liberty Warehouse Co. v. Burley Growers' Coop. Marketing Ass'n,, 276 U.S. 71, 89 (1928); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).

[1] 387 U.S. 253 (1967). Though the Court had previously upheld the involuntary expatriation of a woman citizen of the United States during her marriage to a foreign citizen in *Mackenzie v. Hare,* 239 U.S. 299 (1915), the subject first received extended judicial treatment in *Perez v. Brownell,* 356 U.S. 44 (1958), in which the Court, by a 5-4 decision, upheld a statute denaturalizing a native-born citizen for having voted in a foreign election. For the Court, Justice Felix

expatriate United States citizens against their will for any reason. "[T]he Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other government unit."[2] In a subsequent decision, however, the Court held that persons who were statutorily naturalized by being born abroad of at least one American parent could not claim the protection of the first sentence of Section 1 and that Congress could therefore impose a reasonable and non-arbitrary condition subsequent upon their continued retention of United States citizenship.[3] Between these two decisions is a tension that should call forth further litigation efforts to explore the meaning of the citizenship sentence of the Fourteenth Amendment.

Amdt14.S1.2 Privileges or Immunities

Amdt14.S1.2.1 Privileges or Immunities of Citizens and the Slaughter-House Cases

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Unique among constitutional provisions, the clause prohibiting state abridgement of the "privileges or immunities" of United States citizens was rendered a "practical nullity" by a single decision of the Supreme Court issued within five years of its ratification. In the *Slaughter-House Cases*,[1] the Court evaluated a Louisiana statute that conferred a monopoly upon a single corporation to engage in the business of slaughtering cattle. In determining whether this statute abridged the "privileges" of other butchers, the Court frustrated the aims of the most aggressive sponsors of the privileges or immunities Clause. According to the Court, these sponsors had sought to centralize "in the hands of the Federal Government large powers hitherto exercised by the States" by converting the rights of the citizens of each state at the time of the adoption of the Fourteenth Amendment into protected privileges and immunities of United States citizenship. This interpretation would have allowed business to develop unimpeded by state interference by limiting state laws "abridging" these privileges.

According to the Court, however, such an interpretation would have "transfer[red] the security and protection of all the civil rights . . . to the Federal Government, . . . to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States," and would "constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not

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Frankfurter reasoned that Congress's power to regulate foreign affairs carried with it the authority to sever the relationship of this country with one of its citizens to avoid national implication in acts of that citizen which might embarrass relations with a foreign nation. *Id.* at 60–62. Three of the dissenters denied that Congress had any power to denaturalize. *See* discussion of ArtI.S8.C4.1.6.1 Expatriation (Termination of Citizenship) Generally to ArtI.S8.C4.1.6.5 Judicial Limits on Congress's Expatriation Power under Article I. In the years before *Afroyim*, a series of decisions had curbed congressional power.

[2] Afroyim v. Rusk, 387 U.S. 253, 262–63 (1967).

[3] Rogers v. Bellei, 401 U.S. 815 (1971). This, too, was a 5-4 decision, with Justices Blackmun, Harlan, Stewart, and White, and Chief Justice Burger in the majority, and Justices Black, Douglas, Brennan, and Marshall dissenting.

[1] 83 U.S. (16 Wall.) 36, 71, 77–78 (1873).

approve as consistent with those rights, as they existed at the time of the adoption of this amendment. . . . [The effect of] so great a departure from the structure and spirit of our institutions . . . is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character . . . . We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them," and that the "one pervading purpose" of this and the other War Amendments was "the freedom of the slave race."

Based on these conclusions, the Court held that none of the rights alleged by the competing New Orleans butchers to have been violated were derived from the butchers' national citizenship; insofar as the Louisiana law interfered with their pursuit of the business of butchering animals, the privilege was one that "belong to the citizens of the States as such." Despite the broad language of this Clause, the Court held that the privileges and immunities of state citizenship had been "left to the State governments for security and protection" and had not been placed by the clause "under the special care of the Federal government." The only privileges that the Fourteenth Amendment protected against state encroachment were declared to be those "which owe their existence to the Federal Government, its National character, its Constitution, or its laws."[2] These privileges, however, had been available to United States citizens and protected from state interference by operation of federal supremacy even prior to the adoption of the Fourteenth Amendment. The *Slaughter-House Cases*, therefore, reduced the Privileges or Immunities Clause to a superfluous reiteration of a prohibition already operative against the states.

Amdt14.S1.2.2 Modern Doctrine on Privileges or Immunities Clause

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Although the Court in the *Slaughter-House Cases* expressed a reluctance to enumerate those privileges and immunities of United States citizens that are protected against state encroachment, it nevertheless felt obliged to suggest some. Among those that it identified were the right of access to the seat of government and to the seaports, subtreasuries, land officers, and courts of justice in the several states, the right to demand protection of the Federal Government on the high seas or abroad, the right of assembly, the privilege of habeas corpus, the right to use the navigable waters of the United States, and rights secured by treaty.[1] In *Twining v. New Jersey*,[2] the Court recognized "among the rights and privileges" of national citizenship the right to pass freely from state to state,[3] the right to petition Congress for a

[2] 83 U.S. at 78, 79.

[1] 83 U.S. at 79–80.

[2] 211 U.S. 78, 97 (1908).

[3] Citing Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868). It was observed in *United States v. Wheeler,* 254 U.S. 281, 299 (1920), that the statute at issue in *Crandall* was actually held to burden directly the performance by the United States of its governmental functions. *Cf.* Passenger Cases (Smith v. Turner), 48 U.S. (7 How.) 283, 491–92 (1849) (Taney, C.J., dissenting). Four concurring Justices in *Edwards v. California,* 314 U.S. 160, 177, 181 (1941), would have grounded a right of interstate travel on the Privileges or Immunities Clause. More recently, the Court declined to

redress of grievances,[4] the right to vote for national officers,[5] the right to enter public lands,[6] the right to be protected against violence while in the lawful custody of a United States marshal,[7] and the right to inform the United States authorities of violation of its laws.[8] Earlier, in a decision not mentioned in *Twining*, the Court had also acknowledged that the carrying on of interstate commerce is "a right which every citizen of the United States is entitled to exercise."[9]

In modern times, the Court has continued the minor role accorded to the Clause, only occasionally manifesting a disposition to enlarge the restraint that it imposes upon state action.[10] In *Hague v. CIO*,[11] two and perhaps three justices thought that the freedom to use municipal streets and parks for the dissemination of information concerning provisions of a federal statute and to assemble peacefully therein for discussion of the advantages and opportunities offered by such act was a privilege and immunity of a United States citizen, and, in *Edwards v. California*,[12] four Justices were prepared to rely on the Clause.[13] In many other respects, however, claims based on this Clause have been rejected.[14]

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ascribe a source but was content to assert the right to be protected. United States v. Guest, 383 U.S. 745, 758 (1966); Shapiro v. Thompson, 394 U.S. 618, 629–31 (1969). Three Justices ascribed the source to this clause in *Oregon v. Mitchell,* 400 U.S. 112, 285–87 (1970) (Stewart and Blackmun, J.J., and Burger, C.J., concurring in part and dissenting in part).

[4] Citing United States v. Cruikshank, 92 U.S. 542 (1876).

[5] Citing *Ex parte* Yarbrough, 110 U.S. 651 (1884); Wiley v. Sinkler, 179 U.S. 58 (1900). Note Justice William O. Douglas's reliance on this clause in *Oregon v. Mitchell,* 400 U.S. 112, 149 (1970) (concurring in part and dissenting in part).

[6] Citing United States v. Waddell, 112 U.S. 76 (1884).

[7] Citing Logan v. United States, 144 U.S. 263 (1892).

[8] Citing *In re* Quarles and Butler, 158 U.S. 532 (1895).

[9] Crutcher v. Kentucky, 141 U.S. 47, 57 (1891).

[10] Colgate v. Harvey, 296 U.S. 404 (1935), which was overruled five years later, *see* Madden v. Kentucky, 309 U.S. 83, 93 (1940), represented the first attempt by the Court since adoption of the Fourteenth Amendment to convert the Privileges or Immunities Clause into a source of protection of other than those "interests growing out of the relationship between the citizen and the national government." In *Harvey*, the Court declared that the right of a citizen to engage in lawful business in other states, such as by entering into contracts or by lending money, was a privilege of national citizenship, and this privilege was abridged by a state income tax law which excluded interest received on money from loans from taxable income only if the loan was made within the state.

[11] 307 U.S. 496, 510–18 (1939) (Justices Roberts and Black; Chief Justice Hughes may or may not have concurred on this point. *Id.* at 532). Justices Harlan Stone and Stanley Reed preferred to base the decision on the Due Process Clause. *Id.* at 518.

[12] 314 U.S. 160, 177–83 (1941).

[13] *See also* Oregon v. Mitchell, 400 U.S. 112, 149 (1970) (Justice Douglas); *id.* at 285–87 (Justices Stewart and Blackmun and Chief Justice Burger).

[14] *E.g.*, Holden v. Hardy, 169 U.S. 366, 380 (1898) (statute limiting hours of labor in mines); Williams v. Fears, 179 U.S. 270, 274 (1900) (statute taxing the business of hiring persons to labor outside the state); Wilmington Mining Co. v. Fulton, 205 U.S. 60, 73 (1907) (statute requiring employment of only licensed mine managers and examiners and imposing liability on the mine owner for failure to furnish a reasonably safe place for workmen); Heim v. McCall, 239 U.S. 175 (1915); Crane v. New York, 239 U.S. 195 (1915) (statute restricting employment on state public works to citizens of the United States, with a preference to citizens of the state); Missouri Pac. Ry. v. Castle, 224 U.S. 541 (1912) (statute making railroads liable to employees for injuries caused by negligence of fellow servants and abolishing the defense of contributory negligence); Western Union Tel. Co. v. Milling Co., 218 U.S. 406 (1910) (statute prohibiting a stipulation against liability for negligence in delivery of interstate telegraph messages); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1873); *In re* Lockwood, 154 U.S. 116 (1894) (refusal of state court to license a woman to practice law); Kirtland v. Hotchkiss, 100 U.S. 491, 499 (1879) (law taxing a debt owed a resident citizen by a resident of another state and secured by mortgage of land in the debtor's state); Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1874); Mugler v. Kansas, 123 U.S. 623 (1887); Crowley v. Christensen, 137 U.S. 86, 91 (1890); Giozza v. Tiernan, 148 U.S. 657 (1893) (statutes regulating the manufacture and sale of intoxicating liquors); *In re* Kemmler, 136 U.S. 436 (1890) (statute regulating the method of capital punishment); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (statute regulating the franchise to male citizens); Pope v. Williams, 193 U.S. 621 (1904) (statute requiring persons coming into a state to make a declaration of intention to become citizens and residents thereof before being permitted to register as voters);

Amdt14.S1.2.2
Modern Doctrine on Privileges or Immunities Clause

In *Oyama v. California*,[15] the Court, in a single sentence, agreed with the contention of a native-born youth that a state Alien Land Law that resulted in the forfeiture of property purchased in his name with funds advanced by his parent, a Japanese alien ineligible for citizenship and precluded from owning land, deprived him "of his privileges as an American citizen." The right to acquire and retain property had previously not been set forth in any of the enumerations as one of the privileges protected against state abridgment, although a federal statute enacted prior to the proposal and ratification of the Fourteenth Amendment did confer on all citizens the same rights to purchase and hold real property as White citizens enjoyed.[16]

In a doctrinal shift of uncertain significance, the Court will apparently evaluate challenges to durational residency requirements, previously considered as violations of the right to travel derived from the Equal Protection Clause,[17] as a potential violation of the Privileges or Immunities Clause. Thus, where a California law restricted the level of welfare benefits available to Californians who have been residents for less than a year to the level of benefits available in the state of their prior residence, the Court found a violation of the right of newly arrived citizens to be treated the same as other state citizens.[18] Despite suggestions that this opinion will open the door to "guaranteed equal access to all public benefits,"[19] it seems more likely that the Court is protecting the privilege of being treated immediately as a full citizen of the state one chooses for permanent residence.[20]

Amdt14.S1.3 Due Process Generally

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

Ferry v. Spokane, P. & S. Ry., 258 U.S. 314 (1922) (statute restricting dower, in case wife at time of husband's death is a nonresident, to lands of which he died seized); Walker v. Sauvinet, 92 U.S. 90 (1876) (statute restricting right to jury trial in civil suits at common law); Presser v. Illinois, 116 U.S. 252, 267 (1886) (statute restricting drilling or parading in any city by any body of men without license of the governor); Maxwell v. Dow, 176 U.S. 581, 596, 597–98 (1900) (provision for prosecution upon information, and for a jury (except in capital cases) of eight persons); New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 71 (1928) (statute penalizing the becoming or remaining a member of any oathbound association—other than benevolent orders, and the like—with knowledge that the association has failed to file its constitution and membership lists); Palko v. Connecticut, 302 U.S. 319 (1937) (statute allowing a state to appeal in criminal cases for errors of law and to retry the accused); Breedlove v. Suttles, 302 U.S. 277 (1937) (statute making the payment of poll taxes a prerequisite to the right to vote); Madden v. Kentucky, 309 U.S. 83, 92–93 (1940), (overruling Colgate v. Harvey, 296 U.S. 404, 430 (1935)) (statute whereby deposits in banks outside the state are taxed at 50¢ per $100); Snowden v. Hughes, 321 U.S. 1 (1944) (the right to become a candidate for state office is a privilege of state citizenship, not national citizenship); MacDougall v. Green, 335 U.S. 281 (1948) (Illinois Election Code requirement that a petition to form and nominate candidates for a new political party be signed by at least 200 voters from each of at least fifty of the 102 counties in the State, notwithstanding that 52% of the voters reside in only one county and 87% in the forty-nine most populous counties); New York v. O'Neill, 359 U.S. 1 (1959) (Uniform Reciprocal State Law to secure attendance of witnesses from within or without a state in criminal proceedings); James v. Valtierra, 402 U.S. 137 (1971) (a provision in a state constitution to the effect that low-rent housing projects could not be developed, constructed, or acquired by any state governmental body without the affirmative vote of a majority of those citizens participating in a community referendum).

[15] 332 U.S. 633, 640 (1948).

[16] Civil Rights Act of 1866, ch. 31, 14 Stat. 27, now 42 U.S.C. § 1982, as amended.

[17] *See* Amdt14.S1.8.13.1 Overview of Fundamental Rights to Amdt14.S1.8.13.2 Interstate Travel as a Fundamental Right.

[18] Saenz v. Roe, 526 U.S. 489 (1999).

[19] 526 U.S. at 525 (Thomas, J., dissenting).

[20] The right of United States citizens to choose their state of residence is specifically protected by the first sentence of the Fourteenth Amendment "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourteenth Amendment's Due Process Clause provides that no state may "deprive any person of life, liberty, or property, without due process of law."[1] The Supreme Court has applied the Clause in two main contexts. First, the Court has construed the Clause to provide protections that are similar to those of the Fifth Amendment's Due Process Clause except that, while the Fifth Amendment applies to federal government actions, the Fourteenth Amendment binds the states.[2] The Fourteenth Amendment's Due Process Clause guarantees "procedural due process," meaning that government actors must follow certain procedures before they may deprive a person of a protected life, liberty, or property interest.[3] The Court has also construed the Clause to protect "substantive due process," holding that there are certain fundamental rights that the government may not infringe even if it provides procedural protections.[4]

Second, the Court has construed the Fourteenth Amendment's Due Process Clause to render many provisions of the Bill of Rights applicable to the states.[5] As originally ratified, the Bill of Rights restricted the actions of the federal government but did not limit the actions of state governments. However, following ratification of the Reconstruction Amendment, the Court has interpreted the Fourteenth Amendment's Due Process Clause to impose on the states many of the Bill of Rights' limitations, a doctrine sometimes called "incorporation" against the states through the Due Process Clause. Litigants bringing constitutional challenges to state government action often invoke the doctrines of procedural or substantive due process or argue that state action violates the Bill of Rights, as incorporated against the states. The Due Process Clause of the Fourteenth Amendment has thus formed the basis for many high-profile Supreme Court cases.[6]

The Fourteenth Amendment prohibits states from depriving "any person" of life, liberty, or property without due process of law. The Supreme Court has held that this protection extends to all natural persons (i.e., human beings), regardless of race, color, or citizenship.[7] The Court has also considered multiple cases about whether the word "person" includes "artificial persons," meaning entities such as corporations. As early as the 1870s, the Court appeared to accept that the Clause protects corporations, at least in some circumstances. In the 1877 *Granger Cases*, the Court upheld various state laws without questioning whether a corporation could raise due process claims.[8] In a roughly contemporaneous case arising under the Fifth Amendment, the Court explicitly declared that the United States "equally with the States . . . are prohibited from depriving persons or corporations of property without due process of law."[9] Subsequent decisions of the Court have held that a corporation may not be

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[1] U.S. Const. amend. XIV.

[2] For discussion of the Fifth Amendment's Due Process Clause, see Amdt5.5.1 Overview of Due Process.

[3] *See* Amdt14.S1.5.1 Overview of Procedural Due Process to Amdt14.S1.5.8.2 Protective Commitment and Due Process.

[4] *See* Amdt14.S1.6.1 Overview of Substantive Due Process to Amdt14.S1.6.5.3 Civil Commitment and Substantive Due Process.

[5] *See* Amdt14.S1.4.1 Overview of Incorporation of the Bill of Rights.

[6] Among numerous other examples, *see, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Gideon v. Wainwright, 372 U.S. 335 (1963); Griswold v. Connecticut, 381 U.S. 479 (1965); McDonald v. Chicago, 561 U.S. 742 (2010).

[7] Yick Wo v. Hopkins, 118 U.S. 356 (1886); Terrace v. Thompson, 263 U.S. 197, 216 (1923). *See* Hellenic Lines v. Rhodetis, 398 U.S. 306, 309 (1970).

[8] Munn v. Illinois, 94 U.S. 113 (1877).

[9] Sinking Fund Cases, 99 U.S. 700, 718–19 (1879).

deprived of its property without due process of law.[10] By contrast, in multiple cases involving the liberty interest, the Court has held that the Fourteenth Amendment protects the liberty of natural, not artificial, persons.[11] Nevertheless, the Court has at times allowed corporations to raise claims not based on the property interest. For instance, in a 1936 case, a newspaper corporation successfully argued that a state law deprived it of liberty of the press.[12]

A separate question concerns the ability of government officials to invoke the Due Process Clause to protect the interests of their office. Ordinarily, the mere official interest of a public officer, such as the interest in enforcing a law, does not enable him to challenge the constitutionality of a law under the Fourteenth Amendment.[13] Moreover, municipal corporations lack standing "to invoke the provisions of the Fourteenth Amendment in opposition to the will of their creator," the state.[14] However, the Court has acknowledged that state officers have an interest in resisting "an endeavor to prevent the enforcement of statutes in relation to which they have official duties," even if the officials have not sustained any "private damage."[15] State officials may therefore ask federal courts "to review decisions of state courts declaring state statutes, which [they] seek to enforce, to be repugnant to" the Fourteenth Amendment.[16]

Amdt14.S1.4 Incorporation of Bill of Rights

Amdt14.S1.4.1 Overview of Incorporation of the Bill of Rights

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[10] Smyth v. Ames, 169 U.S. 466, 522, 526 (1898); Kentucky Co. v. Paramount Exch., 262 U.S. 544, 550 (1923); Liggett Co. v. Baldridge, 278 U.S. 105 (1928).

[11] Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906); Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

[12] Grosjean v. American Press Co., 297 U.S. 233, 244 (1936) ("a corporation is a 'person' within the meaning of the equal protection and due process of law clauses"). In *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), faced with the validity of state restraints upon expression by corporations, the Court did not determine that corporations have First Amendment liberty rights—and other constitutional rights—but decided instead that expression was protected, irrespective of the speaker, because of the interests of the listeners. *See id.* at 778 n.14. In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Court held that the First Amendment prohibits banning political speech based on the speaker's corporate identity. While *Citizens United* involved federal regulation, it overruled a prior case that had upheld a related state regulation, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

[13] Pennie v. Reis, 132 U.S. 464 (1889); Taylor and Marshall v. Beckham (No. 1), 178 U.S. 548 (1900); Tyler v. Judges of Court of Registration, 179 U.S. 405, 410 (1900); Straus v. Foxworth, 231 U.S. 162 (1913); Columbus & Greenville Ry. v. Miller, 283 U.S. 96 (1931).

[14] City of Pawhuska v. Pawhuska Oil Co., 250 U.S. 394 (1919); City of Trenton v. New Jersey, 262 U.S. 182 (1923); Williams v. Mayor of Baltimore, 289 U.S. 36 (1933). *But see* Madison School Dist. v. WERC, 429 U.S. 167, 175 n.7 (1976) (reserving question whether municipal corporation as an employer has a First Amendment right assertable against a state).

[15] Coleman v. Miller, 307 U.S. 433, 442, 445 (1939); Boynton v. Hutchinson Gas Co., 291 U.S. 656 (1934); South Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938).

[16] *Coleman*, 307 U.S. at 442–43. The converse is not true, however, and the interest of a state official in vindicating the Constitution provides no legal standing to attack the constitutionality of a state statute in order to avoid compliance with it. Smith v. Indiana, 191 U.S. 138 (1903); Braxton County Court v. West Virginia, 208 U.S. 192 (1908); Marshall v. Dye, 231 U.S. 250 (1913); Stewart v. Kansas City, 239 U.S. 14 (1915). See also Coleman v. Miller, 307 U.S. 433, 437–46 (1939).

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Bill of Rights, comprising the first ten amendments to the Constitution, protects certain rights belonging to individuals and states against infringement by the federal government. While some provisions of the Constitution expressly prohibit the states from taking certain actions,[1] the Bill of Rights does not explicitly bind the states,[2] and the Supreme Court in early cases declined to apply the Bill of Rights to the states directly.[3] However, following the ratification of the Fourteenth Amendment, the Supreme Court has interpreted the Fourteenth Amendment's Due Process Clause to impose on the states many of the Bill of Rights' limitations, a doctrine sometimes called "incorporation" against the states through the Due Process Clause.

In the early years of the Republic, both Congress and the Supreme Court appear to have believed that the Bill of Rights restricted only the federal government, not the states. When Congress was considering the constitutional amendments that later became the Bill of Rights, the Senate rejected an amendment that would have applied to the states, which read: "The equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases shall not be infringed by any State."[4] Beginning with Chief Justice John Marshall's opinion in the 1833 case *Barron v. Baltimore*, a number of nineteenth century Supreme Court decisions rejected arguments that the first eight amendments to the Constitution should limit the states' ability to restrict protected rights.[5]

Following the ratification of the Fourteenth Amendment in 1868, the Court changed course and held that the Due Process Clause of the Fourteenth Amendment prohibits the states from depriving their citizens of certain privileges and protections contained in the Bill of Rights.[6] Subsequent decisions of the Court have held that many provisions of the Bill of Rights bind the states; however, there are some Bill of Rights provisions that the Court has not applied to the states.[7]

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[1] *See, e.g.*, U.S. Const. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.").

[2] The First Amendment provides that "Congress shall make no law" contrary to its protections. U.S. Const. amend. I. Other Bill of Rights Amendments provide that certain rights "shall not be infringed," U.S. Const. amend. II, or "shall not be violated," U.S. Const. amend. IV, or otherwise require or prohibit certain government actions without specifying the relevant government entity, *e.g.*, U.S. Const. amends. III, V, VI, VII, VIII.

[3] *See, e.g.*, Barron v. Baltimore 32 U.S. (7 Pet.) 243 (1833).

[4] 1 Annals of Congress 755 (August 17, 1789). James Madison declared the rejected amendment to be "the most valuable of the whole list." *Id.*

[5] 32 U.S. (7 Pet.) 243 (1833). *See also* Livingston's Lessee v. Moore, 32 U.S. (7 Pet.) 469 (1833); Permoli v. Municipality No. 1, 44 U.S. (3 How.) 589, 609 (1845); Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); Withers v. Buckley, 61 U.S. (20 How.) 84 (1858); Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475 (1867); Twitchell v. Commonwealth, 74 U.S. (7 Wall.) 321 (1869). The Ninth and Tenth Amendments do not enumerate separate substantive rights for protection. *See* Amdt9.1 Overview of Ninth Amendment, Unenumerated Rights; Amdt10.1 Overview of Tenth Amendment, Rights Reserved to the States and the People.

[6] *See* Amdt14.S1.4.2 Early Doctrine on Incorporation of the Bill of Rights.

[7] *See* Amdt14.S1.4.3 Modern Doctrine on Selective Incorporation of Bill of Rights.

Amdt14.S1.4.2 Early Doctrine on Incorporation of the Bill of Rights

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Following the ratification of the Fourteenth Amendment, litigants challenging state laws and policies pursued several different strategies to raise constitutional challenges under the Fourteenth Amendment. In early litigation, plaintiffs unsuccessfully invoked the Fourteenth Amendment's Privileges or Immunities Clause to challenge state regulations.[1] Litigants in other cases argued that the Due Process Clause of the Fourteenth Amendment guarantees certain fundamental and essential rights, but did not specifically argue that the Amendment incorporated the Bill of Rights to restrict state government action.[2]

Beginning in the 1880s, some litigants contended that, although the Bill of Rights as originally ratified did not limit the states, to the extent the Bill of Rights secured and recognized fundamental rights, those rights were rights, privileges, or immunities of citizens of the United States and were now protected against state abridgment by the Fourteenth Amendment. In the 1887 decision *Spies v. Illinois*, the Court resolved one such case on other grounds.[3] In a series of subsequent cases, the Court confronted the argument and rejected it.[4] The elder Justice John Marshall Harlan and other Justices dissented in some of these cases, arguing that the Fourteenth Amendment in effect incorporated the Bill of Rights such that its guarantees also restrain the states.[5]

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[1] Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); *see also* Amdt14.S1.2.1 Privileges or Immunities of Citizens and the Slaughter-House Cases.

[2] Walker v. Sauvinet, 92 U.S. 90 (1876); United States v. Cruikshank, 92 U.S. 542 (1876); Hurtado v. California, 110 U.S. 516 (1884); Presser v. Illinois, 116 U.S. 252 (1886).

[3] Spies v. Illinois, 123 U.S. 131 (1887).

[4] *In re* Kemmler, 136 U.S. 436 (1890); McElvaine v. Brush, 142 U.S. 155 (1891); O'Neil v. Vermont, 144 U.S. 323 (1892); Palko v. Connecticut, 302 U.S. 319, 323 (1937), ("We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the Federal Government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule."). *See* Felix Frankfurter, *Memorandum on 'Incorporation,' of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 Harv. L. Rev. 746 (1965).

[5] Dissenting in *O'Neil v. Vermont*, 144 U.S. 323, 370 (1892), Justice Harlan argued that "since the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier Amendments of the Constitution." Justice Stephen Field took the same position, writing: "While therefore, the ten Amendments, as limitations on power, and so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the Federal government and not to the States, yet, so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon state power by ordaining that no State shall make or enforce any law which shall abridge them." *Id.* at 363. Justice Harlan reasserted this view in *Maxwell v. Dow*, 176 U.S. 581, 605 (1900) (dissenting opinion), and in *Twining v. New Jersey*, 211 U.S. 78, 114 (1908) (dissenting opinion). According to Justice William Douglas, ten Justices who served between the ratification of the Fourteenth Amendment and the 1960s believed that the Amendment incorporated the Bill of Rights, but those Justices never constituted a majority of the Court. Gideon v. Wainwright, 372 U.S. 335, 345–47 (1963) (concurring opinion). *See also* Malloy v. Hogan, 378 U.S. 1, 4 n.2 (1964). Justice Arthur Goldberg was not included on Justice Douglas's list, but also expressed this view. Pointer v. Texas, 380 U.S. 400, 410–14 (1965) (concurring opinion).

In 1947, in *Adamson v. California*, a minority of four Justices would have held that the Fourteenth Amendment "was intended to, and did make the [Fifth Amendment] prohibition against compelled testimony applicable to trials in state courts."[6] Justice Hugo Black, joined by three others, stated that his research into the history of the Fourteenth Amendment left him in no doubt "that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights."[7] Justice Black's analysis prompted scholarly debate over whether those who drafted and ratified the Fourteenth Amendment intended for the Amendment to apply the Bill of Rights to the states.[8] Against that background, beginning at the end of the nineteenth century, the Court issued a series of decisions that imposed restrictions on state governments that were either similar to or directly derived from restrictions the Bill of Rights imposes on the federal government.

Early due process cases did not hold that the Fourteenth Amendment incorporated the Bill of Rights against the states directly but instead held that the Bill of Rights and the Fourteenth Amendment's Due Process Clause each separately enshrined certain fundamental rights. Thus, in an 1897 case, the Court held that the Fourteenth Amendment's Due Process Clause forbade the taking of private property without just compensation but did not mention the Just Compensation Clause of the Fifth Amendment.[9] In 1908, in *Twining v. New Jersey*, the Court observed,

> [I]t is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. . . . If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such nature that they are included in the conception of due process of law.[10]

In the 1925 case *Gitlow v. New York*, the Court said in dictum: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[11] In two opinions from the 1930s, Justice Benjamin Cardozo summarized the doctrine of this period by observing that the Fourteenth Amendment's Due Process Clause might proscribe a certain state action, not because the proscription was spelled out in one of the first eight amendments, but because certain proscriptions were "implicit in the concept of ordered 'liberty,'"[12] such that state government action that violates them "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[13] As late as 1958, Justice Harlan opined that a state practice violated the

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[6] 332 U.S. 46, 68 (1947) (Black, J., dissenting).

[7] *Id.* at 74.

[8] *Compare* I. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5 (1949) *with* Graham,*Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 Wisc. L. Rev. 479, 610; Graham, *Our 'Declaratory' Fourteenth Amendment*, 7 Stan. L. Rev. 3 (1954); J. tenBroek, Equal Under Law (1965 enlarged ed.).

[9] Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897).

[10] 211 U.S. 78, 99 (1908). *See also* Powell v. Alabama, 287 U.S. 45, 67–68 (1932) (quoting *Twining* and stating that "a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character").

[11] 268 U.S. 652, 666 (1925).

[12] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[13] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). Justice Frankfurter embraced this approach to the Fourteenth Amendment's Due Process Clause, *e.g.*, Rochin v. California, 342 U.S. 165 (1952); Adamson v. California,

Fourteenth Amendment because "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[14]

In contrast to the foregoing approach of holding that the Bill of Rights and the Due Process Clause separately protect some of the same rights, the doctrine of incorporation holds that the Due Process Clause renders provisions of the Bill of Rights directly applicable to the states. The practice of looking to the Bill of Rights to identify rights protected by the Fourteenth Amendment emerged in Supreme Court cases in the first half of the twentieth century.[15] Some Justices advocated for a doctrine of total incorporation, which would have held that the Fourteenth Amendment's Due Process Clause applied the Bill of Rights to the states in its entirety.[16] Others preferred the doctrine of selective incorporation, which would apply certain fundamental provisions of the Bill of Rights to the states on a case-by-case basis.[17] A majority of the Court never embraced total incorporation. Over time, the doctrine of selective incorporation gained prominence, coming to dominate Fourteenth Amendment due process jurisprudence by the 1960s. Thus, in the 1964 case *Malloy v. Hogan*, Justice William Brennan wrote:

> We have held that the guarantees of the First Amendment, the prohibition of unreasonable searches and seizures of the Fourth Amendment, and the right to counsel guaranteed by the Sixth Amendment, are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.[18]

Similarly, in a 1963 case, Justice Thomas Clark wrote that "this Court has decisively settled that the First Amendment's mandate that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof' has been made wholly applicable to the States by the Fourteenth Amendment."[19]

Amdt14.S1.4.3 Modern Doctrine on Selective Incorporation of Bill of Rights

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or*

332 U.S. 46, 59 (1947) (concurring opinion), as did Justice Harlan, *e.g.*, Benton v. Maryland, 395 U.S. 784, 801 (1969) (dissenting opinion); Williams v. Florida, 399 U.S. 78, 117 (1970) (concurring in part and dissenting in part). For early applications of these principles to void state practices, *see* Moore v. Dempsey, 261 U.S. 86 (1923); Meyer v. Nebraska, 262 U.S. 390 (1923); Tumey v. Ohio, 273 U.S. 510 (1927); Powell v. Alabama, 287 U.S. 45 (1932); Mooney v. Holohan, 294 U.S. 103 (1935); Brown v. Mississippi, 297 U.S. 278 (1936); Rochin v. California, 342 U.S. 165 (1952).

[14] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

[15] *E.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment."); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (discussing "the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment"); *cf. Gitlow*, 268 U.S. at 666.

[16] *See, e.g.*, Adamson v. California, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting); O'Neil v. Vermont, 144 U.S. 323, 370 (1892) (Harlan, J., dissenting).

[17] *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 326 (1937); *Adamson*, 332 U.S. at 57 (1947) (Frankfurter, J., concurring).

[18] 378 U.S. 1, 10 (1964) (citations omitted).

[19] Abington School Dist. v. Schempp, 374 U.S. 203, 215 (1963). Similar formulations for the Speech and Press Clauses appeared early. *E.g.*, *Barnette*, 319 U.S. at 639; Schneider v. Irvington, 308 U.S. 147, 160 (1939). In *Griffin v. California*, 380 U.S. 609, 615 (1965), Justice Douglas stated that "the Fifth Amendment, in its direct application to the Federal Government, and, in its bearing on the States by reason of the Fourteenth Amendment, forbids" the state practice at issue.

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Modern Supreme Court doctrine embraces the doctrine of selective incorporation of the Bill of Rights against the states, meaning that the Court has held on a case-by-case basis that many of the provisions of the Bill of Rights limit state government action. Numerous Supreme Court decisions hold that particular provisions of the Bill of Rights have been applied to the states through the Fourteenth Amendment's Due Process Clause.[1] Primarily through the doctrine of selective incorporation, the Court has held that most provisions of the Bill of Rights apply to the states.[2]

The Court has applied to the states the First Amendment's[3] guarantee of free exercise of religion,[4] the prohibition on government establishment of religion,[5] the rights of freedom of speech,[6] freedom of the press,[7] and freedom of assembly,[8] and the right to petition the government.[9] The Court has also incorporated against the states the Second Amendment right to keep and bear arms[10] and the Fourth Amendment right to be free from unreasonable searches and seizures.[11] Numerous Supreme Court cases have applied provisions of the Fifth[12]

[1] *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Klopfer v. North Carolina, 386 U.S. 213 (1967); Duncan v. Louisiana, 391 U.S. 145 (1968); Ashe v. Swenson, 397 U.S. 436 (1970); Baldwin v. New York, 399 U.S. 66 (1970).

[2] In some cases, particularly earlier cases, the Court held that certain rights applied against the states because the rights at issue were fundamental and not merely because they were named in the Bill of Rights and incorporated by the Fourteenth Amendment. *E.g.*, Powell v. Alabama, 287 U.S. 45, 67–68 (1932). For additional discussion of this distinction, see Amdt14.S1.4.2 Early Doctrine on Incorporation of the Bill of Rights. Whichever formulation was originally used, the Court now generally uses the language of incorporation. *See* Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

[3] *See* Amdt1.1 Overview of First Amendment, Fundamental Freedoms.

[4] Hamilton v. Regents, 293 U.S. 245, 262 (1934); Cantwell v. Connecticut, 310 U.S. 296, 300, 303 (1940).

[5] Everson v. Bd. of Educ., 330 U.S. 1, 3, 7, 8 (1947); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948).

[6] Gitlow v. New York, 268 U.S. 652, 666 (1925); Fiske v. Kansas, 274 U.S. 380 (1927); Stromberg v. California, 283 U.S. 359 (1931).

[7] Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 701 (1931).

[8] DeJonge v. Oregon, 299 U.S. 353 (1937).

[9] DeJonge v. Oregon, 299 U.S. at 364, 365; Hague v. CIO, 307 U.S. 496 (1939); Bridges v. California, 314 U.S. 252 (1941).

[10] McDonald v. Chicago, 561 U.S. 742 (2010); *see also* Amdt2.1 Overview of Second Amendment, Right to Bear Arms.

[11] Wolf v. Colorado, 338 U.S. 25 (1949); Mapp v. Ohio, 367 U.S. 643 (1961); *see also* Amdt4.2 Historical Background on Fourth Amendment to Amdt4.7.4 Good Faith Exception to Exclusionary Rule.

[12] Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy); Ashe v. Swenson, 397 U.S. 436 (1970) (collateral estoppel); Malloy v. Hogan, 378 U.S. 1 (1964) (self-incrimination); Griffin v. California, 380 U.S. 609 (1965) (same); Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897) (just compensation); *see also* Amdt5.2.1 Historical Background on Grand Jury Clause to Amdt5.9.10 Enforcing Right to Just Compensation.

and Sixth Amendments[13] to restrict state government action. In addition, the Court has applied to the states the Eighth Amendment's[14] restrictions on excessive bail,[15] excessive fines,[16] and cruel and unusual punishments.[17]

By contrast, the Court has declined to apply to the states the Fifth Amendment's right to a grand jury indictment[18] and the Seventh Amendment's guarantee of a jury trial in civil cases in which the amount in controversy exceeds twenty dollars.[19] The Court has had no occasion to decide whether the states must comply with the Third Amendment's limitations on quartering troops in homes.[20] The Ninth and Tenth Amendments do not expressly enumerate separate substantive rights for protection,[21] though the Court has cited the Ninth Amendment in litigation against a state.[22]

In deciding whether the Fourteenth Amendment incorporated a specific right against the states, the Court asks whether the right at issue is "both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'"[23] A majority of the Court has consistently held that, if a provision of the Bill of Rights is incorporated against the states, the provision imposes the same substantive limitations on the states and the federal government.[24] The Court has thus "rejected the notion that the Fourteenth Amendment applies to the State only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'"[25]

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[13] Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); *In re* Oliver, 333 U.S. 257 (1948) (public trial); Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trial); Irvin v. Dowd, 366 U.S. 717 (1961) (impartial jury); Turner v. Louisiana, 379 U.S. 466 (1965) (same); *In re* Oliver, 333 U.S. 257 (1948) (notice of charges); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation); Douglas v. Alabama, 380 U.S. 415 (1965) (same); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process); Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel); Gideon v. Wainwright, 372 U.S. 335 (1963) (same); *see also* Amdt6.1 Overview of Sixth Amendment, Rights in Criminal Prosecutions.

[14] *See* Amdt8.1 Overview of Eighth Amendment, Cruel and Unusual Punishment.

[15] McDonald v. City of Chicago, 561 U.S. 742, 764 n.12 (2010); Schilb v. Kuebel, 404 U.S. 357, 365 (1971).

[16] Timbs v. Indiana, No. 17-1091, slip op. at 2 (2019).

[17] Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947); Robinson v. California, 370 U.S. 660 (1962).

[18] Hurtado v. California, 110 U.S. 516 (1884); *see also* Amdt5.2.1 Historical Background on Grand Jury Clause to Amdt5.2.3 Military Exception to Grand Jury Clause.

[19] *Cf.* Adamson v. California, 332 U.S. 46, 64–65 (1947) (Frankfurter, J., concurring). See Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211 (1916); *see also* Amdt7.2.1 Historical Background of Jury Trials in Civil Cases to Amdt7.3.2 Appeals from State Courts to the Supreme Court.

[20] *See* Amdt3.1 Overview of Third Amendment, Quartering Soldiers.

[21] *See* Amdt9.1 Overview of Ninth Amendment, Unenumerated Rights; Amdt10.1 Overview of Tenth Amendment, Rights Reserved to the States and the People.

[22] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

[23] Timbs v. Indiana, No. 17-1091, slip op. at 7 (2019) (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).

[24] Malloy v. Hogan, 378 U.S. 1, 10–11 (1964); Ker v. California, 374 U.S. 23 (1963); Griffin v. California, 380 U.S. 609 (1965); Baldwin v. New York, 399 U.S. 66 (1970); Williams v. Florida, 399 U.S. 78 (1970); Ballew v. Georgia, 435 U.S. 223 (1978); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 780 n.16 (1978) (specifically the First Amendment Speech and Press Clauses); Crist v. Bretz, 437 U.S. 28 (1978); Burch v. Louisiana, 441 U.S. 130 (1979).

[25] Williams v. Florida, 399 U.S. 78, 106–107 (1970) (Black, J., concurring in part and dissenting in part), quoting *Malloy*, 378 U.S. at 10–11 (1964). Some Justices have argued for the application of a dual-standard test of due process for the Federal Government and the states. Justice Harlan first took this position in *Roth v. United States*, 354 U.S. 476, 496 (1957) (concurring in part and dissenting in part). *See also* Ker v. California, 374 U.S. 23, 45–46 (1963) (Harlan, J., concurring); Williams v. Florida, 399 U.S. 78, 143–45 (1970) (Stewart, J. concurring in part and dissenting in part); Duncan v. Louisiana, 391 U.S. 145, 173–83 (1968) (Harlan, J., dissenting); Bloom v. Illinois, 391 U.S. 194, 211 (1968) (Fortas, J., concurring); Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (Powell, J., concurring); Crist v. Bretz, 437 U.S. 28, 52–53 (1978) (Powell, J., dissenting); Buckley v. Valeo, 424 U.S. 1, 290 (1976) (Rehnquist, J., concurring in part and dissenting in part); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 822 (1978) (Rehnquist, J., dissenting). Those

Amdt14.S1.5 Procedural Due Process

Amdt14.S1.5.1 Overview of Procedural Due Process

Fourteenth Amendment:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[1] The Supreme Court has construed the Fourteenth Amendment's Due Process Clause to impose the same procedural due process limitations on the states as the Fifth Amendment does on the Federal Government.[2] Broadly speaking, procedural due process requires state actors to provide certain procedural protections before they deprive a person of any protected life, liberty, or property interest.[3] Unless one of those protected interests is at stake, the Due Process Clause does not apply.[4]

When considering whether a protected interest is at stake, the Supreme Court traditionally looked to the common understanding of the terms "life," "liberty," and "property," as embodied in the common law. The Court has always accepted that the liberty interest includes the interest in freedom from physical restraint[5] and the property interest attaches to the ownership of personal and real property.[6] In the 1960s and 1970s, the Court adopted more expansive views of the liberty and property interests, holding that the Due Process Clause protects some non-traditional interests such as conditional property rights and liberty and property rights created by statute.[7] In modern cases involving alleged property interests, the Court has often decided whether a property interest exists by considering whether a law or government policy created an "entitlement"—a reasonable expectation that a government-provided benefit would continue.[8] Modern cases have found protected liberty

Justices rejected incorporation and also argued that, if the same limitations were to apply, the standards previously developed for the Federal Government would have to be diluted in order to give the states more leeway in the operation of their criminal justice systems.

[1] U.S. Const. amend. XIV.

[2] *Cf.* Arnett v. Kennedy, 416 U.S. 134 (1974); *see also* Amdt5.6.1 Overview of Due Process Procedural Requirements to Amdt5.6.3 Military Proceedings and Procedural Due Process.

[3] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[4] Board of Regents v. Roth, 408 U.S. 564, 569–71 (1972) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.").

[5] *E.g.*, Allgeyer v. Louisiana, 165 U.S. 578, 588 (1897).

[6] *E.g.*, McMillen v. Anderson, 95 U.S. 37, 40 (1877) ("The revenue laws of a State may be in harmony with the Fourteenth Amendment to the Constitution of the United States, which declares that no State shall deprive any person of life, liberty, or property without due process of law.").

[7] *E.g.*, Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring); Fuentes v. Shevin, 407 U.S. 67 (1972); Wolff v. McDonnell, 418 U.S. 539 (1974).

[8] *E.g.*, *Roth*, 408 U.S. at 577.

interests in the exercise of constitutional rights[9] and where state laws create an expectation related to individual liberty.[10] The scope of the life interest has not been the subject of significant litigation.[11]

When a protected interest is at stake, due process generally requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to the arbitrary exercise of government power.[12] However, the specific procedures needed to satisfy due process vary depending on the circumstances.[13] One key consideration in determining what procedures are required is whether the government conduct at issue is a part of a criminal or civil proceeding.[14] The Court has held that the "appropriate framework" for due process analysis of criminal procedures is a narrow inquiry into whether a procedure is offensive to the concept of fundamental fairness.[15] In the civil context, by contrast, the Court applies a balancing test that evaluates the government's chosen procedure in light of the private interest affected, the risk of erroneous deprivation of that interest under the chosen procedure, and the government interest at stake.[16]

Historical practice is often relevant in due process cases, as the Court analyzes the requirements of due process in part by examining the settled usages and modes of proceedings of the common and statutory law of England during pre-colonial times and in the early years of the Republic.[17] This means that the Court may be more likely to uphold legal procedures with a long historical pedigree. However, it does not necessarily follow that a procedure that was accepted in British law and adopted in this country is, or remains, an essential element of due process of law. If that were so, the Court has cautioned, the procedures of the first half of the seventeenth century would be "fastened upon American jurisprudence like a strait jacket, only to be unloosed by constitutional amendment."[18] Thus, the Constitution does not obligate the states to use any particular practice and procedure that existed at common law. Rather, as long

[9] *E.g.*, *id.* at 572.

[10] *E.g.*, Vitek v. Jones, 445 U.S. 480, 483 (1980); Wisconsin v. Constantineau, 400 U.S. 433 (1971).

[11] Some due process cases involving questions of life and death are brought based on a claimed liberty interest. *See, e.g.*, Cruzan v. Director, Missouri Dept. of Health Supreme Court of the United States, 497 U.S. 261 (1990) (liberty interest in refusing medical treatment); Washington v. Glucksberg, 521 U.S. 702 (1997) (no liberty interest in assisted suicide).

[12] Thus, where a litigant had the benefit of a "full and fair trial" in the state courts, and "her rights are measured, not by laws made to affect her individually, but by general provisions of law applicable to all those in like condition," she is not deprived of property without due process of law, even if she can be regarded as deprived of property by an adverse result. Marchant v. Pennsylvania R.R., 153 U.S. 380, 386 (1894).

[13] Hagar v. Reclamation Dist., 111 U.S. 701, 708 (1884) ("Due process of law is [process which], following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law.") *Accord* Hurtado v. California, 110 U.S. 516, 537 (1884).

[14] *See* Medina v. California, 505 U.S. 437, 443 (1992).

[15] *Id.*

[16] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see also* Nelson v. Colorado, No. 15-1256, slip op. at 1, 5 (Apr. 19, 2017) (holding that the *Mathews* test controls when evaluating state procedures governing the continuing deprivation of property after a criminal conviction has been reversed or vacated, with no prospect of reprosecution).

[17] Twining v. New Jersey, 211 U.S. 78, 101 (1908); Brown v. New Jersey, 175 U.S. 172, 175 (1899); *see also* Hurtado v. California, 110 U.S. 516, 529 (1884) ("A process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and this country.").

[18] *Twining*, 211 U.S. at 101.

as the states comply with due process requirements, they may learn from and build on the country's past experiences to make changes they deem to be necessary.[19]

The government often provides due process in the form of civil or criminal judicial proceedings but, in some contexts, the government may deprive a person of a protected interest without instituting judicial proceedings.[20] For instance, administrative and executive proceedings are not judicial in nature, yet they may satisfy the requirements of the Due Process Clause.[21] The Due Process Clause does not require de novo judicial review of agency proceedings, and in some circumstances may not require judicial review of agency decisions at all.[22]

While the Constitution requires separation between the three Branches of the Federal Government, states enjoy greater flexibility, and it is up to a state to determine to what extent its legislative, executive, and judicial powers should be kept distinct and separate.[23] Thus, the Due Process Clause does not prohibit a state from conferring judicial functions upon non-judicial bodies, or from delegating powers to a court that are legislative in nature.[24]

Amdt14.S1.5.2 Liberty Deprivations and Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The traditional conception of "liberty" refers to freedom from physical restraint or confinement. Freedom from confinement is one aspect of the liberty interest that the Due Process Clause protects, but the Supreme Court has also construed the liberty interest to include other common law and statutory rights.[1]

A number of cases involving claimed liberty interests relate to prisoners' rights. In those cases, the Court has often, but not always, been reluctant to find that a protected liberty

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[19] Hurtado v. California, 110 U.S. 516, 529 (1884); Brown v. New Jersey, 175 U.S. 172, 175 (1899); Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 244 (1944).

[20] Ballard v. Hunter, 204 U.S. 241, 255 (1907); Palmer v. McMahon, 133 U.S. 660, 668 (1890).

[21] For instance, proceedings to raise revenue by levying and collecting taxes are not necessarily judicial proceedings, but that does not impair their validity. McMillen v. Anderson, 95 U.S. 37, 41 (1877).

[22] *See, e.g.*, Moore v. Johnson, 582 F.2d 1228, 1232 (9th Cir. 1978) (upholding the preclusion of judicial review of decisions of the Veterans Administration regarding veterans' benefits).

[23] Carfer v. Caldwell, 200 U.S. 293, 297 (1906).

[24] For instance, state statutes vesting in a parole board certain judicial functions, Dreyer v. Illinois, 187 U.S. 71, 83–84 (1902), or conferring discretionary power upon administrative boards to grant or withhold permission to carry on a trade, New York *ex rel.* Lieberman v. Van De Carr, 199 U.S. 552, 562 (1905), or vesting in a probate court authority to appoint park commissioners and establish park districts, Ohio v. Akron Park Dist., 281 U.S. 74, 79 (1930), are not in conflict with the Due Process Clause and present no federal question. By contrast, constitutional separation-of-powers principles and the limitations on the federal judiciary laid out in Article III prohibit similar arrangements at the federal level. *See* ArtIII.S1.5.3 Imposing Non-Adjudicatory Functions on Courts.

[1] *E.g.*, Allgeyer v. Louisiana, 165 U.S. 578, 588 (1897) ("The 'liberty' mentioned in [the Fourteenth] amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.").

interest exists unless the claim is based on a statutory right. For example, in *Meachum v. Fano*, the Court held that a state prisoner was not entitled to a fact-finding hearing when he was transferred to a different prison in which the conditions were substantially less favorable to him, because his initial valid conviction satisfied the due process requirement for depriving him of liberty and no state law guaranteed him the right to remain in the prison to which he was initially assigned.[2] As a prisoner could be transferred for any reason or for no reason under state law, the decision of prison officials was not dependent upon any set of facts, and no hearing was required. By contrast, in *Vitek v. Jones*, a state statute permitted transfer of a prisoner to a state mental hospital for treatment, but the transfer could be effectuated only upon a designated physician or psychologist finding that the prisoner "suffers from a mental disease or defect" and "cannot be given treatment in [the transferor] facility."[3] Because the transfer was conditioned upon a "cause," the Court held that fair procedures must be used to establish the facts necessary to show cause. The *Vitek* Court also held that the prisoner had a "residuum of liberty" in being free from the different confinement and from the stigma of involuntary commitment for mental disease, which the Due Process Clause protected.[4] Similarly, in cases involving revocation of parole or probation, the Court has recognized a liberty interest that is separate from a statutory entitlement and that can be taken away only through proper procedures.[5]

By contrast, in cases involving possible grants of parole, commutation of a sentence, or other proceedings that might expedite a prisoner's release, the Court has held that, in the absence of some form of positive entitlement, a prisoner may be turned down without observance of procedures.[6] Summarizing its prior holdings, the Court concluded in a 1989 case that two requirements must be present before a liberty interest is created in the prison context: a statute or regulation must contain "substantive predicates" limiting the exercise of official discretion, and there must be explicit "mandatory language" requiring a particular outcome if the substantive predicates are found.[7] In subsequent cases, the Court limited the application of this test to circumstances where a state's restraint on a prisoner's freedom creates an "atypical and significant hardship."[8]

Outside the criminal context, the Court has expanded the concept of "liberty" beyond freedom from physical restraint to include various other protected interests, some statutorily created and some not.[9] Thus, in *Ingraham v. Wright*, the Court unanimously agreed that school children had a liberty interest in freedom from wrongful or excessive corporal punishment,

[2] 427 U.S. 215 (1976). *See also* Montanye v. Haymes, 427 U.S. 236 (1976).

[3] 445 U.S. 480, 483 (1980).

[4] *Id.* at 491–93.

[5] Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[6] Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981); Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998); Jago v. Van Curen, 454 U.S. 14 (1981). *See also* Wolff v. McDonnell, 418 U.S. 539 (1974) (due process applies to forfeiture of good-time credits and other positively granted privileges of prisoners).

[7] Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 459–63 (1989) (prison regulations listing categories of visitors who may be excluded, but not creating a right to have a visitor admitted, contain substantive predicates but lack mandatory language).

[8] Sandin v. Conner, 515 U.S. 472, 484 (1995) (thirty-day solitary confinement not atypical in relation to the ordinary incidents of prison life); Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (assignment to SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an atypical and significant hardship).

[9] These procedural liberty interests are distinct from substantive liberty interests, which may not be infringed through any process absent a sufficient governmental interest. *See* Amdt14.S1.6.1 Overview of Substantive Due Process.

whether or not such interest was protected by statute.[10] The Court explained that the liberty interest protected by the Due Process Clause "included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' . . . Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security."[11]

In some cases, the Court also appeared to expand the notion of liberty to include the right to be free from official stigmatization, finding that the threat of such stigmatization could in and of itself require due process.[12] Thus, in the 1971 case *Wisconsin v. Constantineau*, the Court invalidated a statutory scheme in which persons could be labeled "excessive drinkers" without any opportunity for a hearing and rebuttal, and could then be barred from places where alcohol was served.[13] Without discussing the source of the entitlement, the Court noted that the governmental action at issue impugned the individual's "reputation, honor, or integrity."[14]

By contrast, in the 1976 case *Paul v. Davis*, the Court appeared to retreat from recognizing damage to reputation alone, holding instead that the liberty interest extended only to those situations where loss of one's reputation also resulted in the loss of a statutory entitlement.[15] In *Davis*, the police had included plaintiff's photograph and name on a list of "active shoplifters" circulated to merchants without an opportunity for notice or hearing. The Court rejected the constitutional challenge, holding that state law "does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather, his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of [that] interest by means of damage actions."[16] Thus, it appears that unless the government's official defamation has a specific negative effect on an entitlement, such as the denial of the right to obtain alcohol that occurred in *Constantineau*, there is no protected liberty interest that would require due process.

Amdt14.S1.5.3 Property Deprivations and Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or*

[10] 430 U.S. 651 (1977).

[11] *Id.* at 673. Cases involving the family-related liberties discussed under substantive due process, as well as associational and privacy rights, may also involve liberty interests that require procedural due process protections. *See* Armstrong v. Manzo, 380 U.S. 545 (1965) (natural father, with visitation rights, must be given notice and opportunity to be heard with respect to impending adoption proceedings); Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father could not be presumed unfit to have custody of his children because his interest in his children warrants deference and protection). *See also* Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Little v. Streater, 452 U.S. 1 (1981); Lassiter v. Department of Social Services, 452 U.S. 18 (1981); Santosky v. Kramer, 455 U.S. 745 (1982).

[12] Board of Regents v. Roth, 408 U.S. 564, 569–70 (1972); Goss v. Lopez, 419 U.S. 565 (1975).

[13] 400 U.S. 433 (1971).

[14] *Id.* at 437. *But see* Connecticut Department of Public Safety v. Doe, 538 U.S. 1 (2003) (posting of accurate information regarding sex offenders on state internet website does not violate due process as the site does not purport to label the offenders as presently dangerous).

[15] 424 U.S. 693 (1976).

[16] *Id.* at 701–10. The Court distinguished *Constantineau* as being a "reputation-plus" case. That is, it not only stigmatized an individual but also "deprived the individual of a right previously held under state law—the right to purchase or obtain liquor in common with the rest of the citizenry." *Id.* at 708. *See also* Board of Regents v. Roth, 408 U.S. 564, 573 (1972); Siegert v. Gilley, 500 U.S. 226 (1991); Paul v. Davis, 424 U.S. 693, 711–12 (1976). In a later case, the Court looked to decisional law and the existence of common-law remedies as establishing a protected property interest. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9–12 (1978).

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Like the liberty interest,[1] the concept of property rights has expanded beyond its common law roots, reflecting the Supreme Court's recognition that certain interests that fall short of traditional property rights are nonetheless important parts of people's economic well-being. For instance, in a case where household goods were sold under an installment contract and the seller retained title, the Court deemed the possessory interest of the buyer sufficiently important to require procedural due process before repossession could occur.[2] In another case, the Court held that the loss of the use of garnished wages between the time of garnishment and final resolution of the underlying suit was a sufficient property interest to require some form of determination that the garnisher was likely to prevail.[3] The Court has also ruled that the continued possession of a driver's license, which may be essential to one's livelihood, is a protected property interest.[4]

A more fundamental shift in the concept of property occurred with recognition of society's growing economic reliance on government benefits, employment, and contracts.[5] Another relevant factor was the decline of the distinction between rights and privileges. Justice Oliver Wendell Holmes summarized the distinction in dismissing a suit by a policeman who had been fired from his job for political activities: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[6] Under that theory, a finding that a litigant had no "vested property interest" in government employment,[7] or that some form of public assistance was "only" a privilege rather than a right,[8] meant that no procedural due process was required before depriving a person of that interest.[9] The reasoning was that, if the government was under no obligation to provide some benefit, it could choose to provide that benefit subject to whatever conditions or procedures it deemed appropriate.

There was some tension between the position that the government was free to attach conditions to benefits and another line of cases holding that the government could not require the diminution of constitutional rights as a condition for receiving benefits. That line of thought, referred to as the "unconstitutional conditions" doctrine, held that, "even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, it may not do so on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[10]

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[1] *See* Amdt14.S1.5.2 Liberty Deprivations and Due Process.

[2] Fuentes v. Shevin, 407 U.S. 67 (1972) (invalidating replevin statutes which authorized the authorities to seize goods simply upon the filing of an ex parte application and the posting of bond).

[3] Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring).

[4] Bell v. Burson, 402 U.S. 535 (1971) (holding that a license should not be suspended after an accident for failure to post a security for the amount of damages claimed by an injured party without affording the driver an opportunity to raise the issue of liability). *Compare* Dixon v. Love, 431 U.S. 105 (1977), *with* Mackey v. Montrym, 443 U.S. 1 (1979). *But see* American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999) (no liberty interest in worker's compensation claim where reasonableness and necessity of particular treatment had not yet been resolved).

[5] *See* Laurence Tribe, American Constitutional Law 685 (2d. ed) (1988).

[6] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E.2d 517, 522 (1892).

[7] Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided court*, 314 U.S. 918 (1951); Adler v. Board of Educ., 342 U.S. 485 (1952).

[8] Flemming v. Nestor, 363 U.S. 603 (1960).

[9] Barsky v. Board of Regents, 347 U.S. 442 (1954).

[10] Perry v. Sindermann, 408 U.S. 593, 597 (1972). *See* Speiser v. Randall, 357 U.S. 513 (1958).

Nonetheless, the two doctrines coexisted in an unstable relationship until the 1960s, when Court largely abandoned the right-privilege distinction.[11] By 1972, the Court declared that it had "fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."[12]

Concurrently with the decline of the "right-privilege" distinction, the Court embraced a mode of analysis known as the "entitlement" doctrine, under which the Court erected procedural protections against erroneous deprivation of benefits the government had granted on a discretionary basis.[13] Previously, the Court had limited due process protections to constitutional rights, traditional rights, common law rights, and "natural rights." Under a new "positivist" approach, the Court might find a protected property or liberty interest based on any positive statute or governmental practice that gave rise to a legitimate expectation. This positivist doctrine can be seen in the 1970 case *Goldberg v. Kelly*, where the Court held that the government must provide an evidentiary hearing before terminating welfare benefits because such termination may deprive an eligible recipient of the means of livelihood.[14] In reaching that conclusion, the Court found that welfare benefits "are a matter of statutory entitlement for persons qualified to receive them."[15] Thus, where the loss or reduction of a benefit or privilege was conditioned upon specified grounds, the Court found that the recipient had a property interest entitling him to proper procedure before termination or revocation.

At first, the Court's emphasis on the importance of statutory rights to the claimant led some lower courts to apply the Due Process Clause by weighing the interests involved and the harm done to a person deprived of a benefit. However, the Court held that this approach was inappropriate. It explained, "[W]e must look not to the 'weight' but to the nature of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property."[16] To have a property interest in the constitutional sense, the Court held, it was not enough for a person to have an abstract need or desire for a benefit or a unilateral expectation. He must rather "have a legitimate claim of entitlement" to the benefit.[17] The Court further explained that property interests "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[18]

Consequently, in *Board of Regents v. Roth*, the Court held that a public university's refusal to renew a teacher's contract upon expiration of his one-year term implicated no due process values because there was nothing in the university's contract, regulations, or policies that

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[11] *See* William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). A number of early cases involved the imposition of conditions on admitting corporations into a state. *Cf.* Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 656–68 (1981)) (reviewing the cases). Some more recent cases have continued to apply the right-privilege distinction. *See* Buckley v. Valeo, 424 U.S. 1, 108–09 (1976) (sustaining as qualification for public financing of campaign agreement to abide by expenditure limitations otherwise unconstitutional); Wyman v. James, 400 U.S. 309 (1971).

[12] Board of Regents v. Roth, 408 U.S. 564, 571 (1972).

[13] The limitations were procedural and not substantive, meaning that Congress or a state legislature could still simply take away part or all of the benefit. Richardson v. Belcher, 404 U.S. 78 (1971); United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 174 (1980); Logan v. Zimmerman Brush Co., 455 U.S. 422, 432–33 (1982).

[14] 397 U.S. 254 (1970).

[15] *Id.* at 261–62. *See also* Mathews v. Eldridge, 424 U.S. 319 (1976) (Social Security benefits).

[16] Bd. of Regents v. Roth, 408 U.S. 564, 569–71 (1972).

[17] *Id.* at 577.

[18] *Id.*

"created any legitimate claim" to reemployment.[19] By contrast, in *Perry v. Sindermann*, a professor employed for several years at a public college was found to have a protected interest, even though his employment contract had no tenure provision and there was no statutory assurance of it.[20] The Court deemed "existing rules or understandings" to have the characteristics of tenure, and thus to provide a legitimate expectation independent of any contract provision.[21]

The Court has also found "legitimate entitlements" in situations besides employment. In *Goss v. Lopez*, an Ohio statute provided for free education to all residents between five and twenty-one years of age and required school attendance; thus, the Court held that the state had obligated itself to provide students some due process hearing rights prior to suspending them.[22] The Court explained, "Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred."[23] The Court is highly deferential, however, to school dismissal decisions based on academic grounds.[24]

The more an interest differs from the traditional understanding of "property," the more difficult it is to establish a due process claim based on entitlements. In *Town of Castle Rock v. Gonzales*, the Court considered whether police officers violated a constitutionally protected property interest by failing to enforce a restraining order an estranged wife obtained against her husband, despite having probable cause to believe the order had been violated.[25] While noting statutory language that required that officers either use "every reasonable means to enforce [the] restraining order" or "seek a warrant for the arrest of the restrained person," the Court resisted equating this language with the creation of an enforceable right, noting a long-standing tradition of police discretion coexisting with apparently mandatory arrest statutes.[26] The Court also questioned whether finding that the statute contained mandatory language would have created a property right, as the wife, with no criminal enforcement authority herself, was merely an indirect recipient of the benefits of the governmental enforcement scheme.[27]

In *Arnett v. Kennedy*, a majority of the Court rebuffed an attempt to limit the expansion of due process with respect to entitlements.[28] The case involved a federal law that provided that

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[19] *Id.* at 576–78.

[20] 408 U.S. 593 (1972). *See* Leis v. Flynt, 439 U.S. 438 (1979) (finding no practice or mutually explicit understanding creating interest).

[21] *Id.* at 601.

[22] 419 U.S. 565 (1975). *Cf.* Carey v. Piphus, 435 U.S. 247 (1978) (measure of damages for violation of procedural due process in school suspension context). *See also* Bd. of Curators v. Horowitz, 435 U.S. 78 (1978) (whether liberty or property interest implicated in academic dismissals and discipline, as contrasted to disciplinary actions).

[23] *Id.* at 574. *See also* Barry v. Barchi, 443 U.S. 55 (1979) (horse trainer's license); O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980) (statutory entitlement of nursing home residents protecting them in the enjoyment of assistance and care).

[24] Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985). Although the Court "assume[d] the existence of a constitutionally protectible property interest in . . . continued enrollment" in a state university, it held that right is violated only by a showing that dismissal resulted from "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.* at 225.

[25] 545 U.S. 748 (2005).

[26] *Id.* at 759. The Court also noted that the law did not specify the precise means of enforcement required; nor did it guarantee that, if a warrant were sought, it would be issued. The Court stated that such indeterminacy is not the "hallmark of a duty that is mandatory." *Id.* at 763.

[27] *Id.* at 764–65.

[28] 416 U.S. 134 (1974).

employees could not be discharged except for cause. A minority of three Justices acknowledged that due process rights could be created through statutory grants of entitlements, but observed that the statute at issue specifically withheld the procedural protections the employee sought. Because "the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest,"[29] the employee would have to "take the bitter with the sweet."[30] Thus, the minority would have held that Congress (and by analogy state legislatures) could qualify the conferral of an interest by limiting the process that might otherwise be required. The other six Justices, although disagreeing among themselves in other respects, rejected that reasoning. "This view misconceives the origin of the right to procedural due process," Justice Lewis Powell wrote. "That right is conferred not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."[31]

By contrast, in *Bishop v. Wood*, the Court accepted a district court's finding that a policeman held his position at will, despite language setting forth conditions for discharge.[32] Although the majority opinion was couched in terms of statutory construction, the majority appeared to come close to adopting the three-Justice *Arnett* position, and the dissenters accused the majority of having repudiated the majority position of the six Justices in *Arnett*.

Subsequently, however, the Court held that, because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse action."[33] The Court applied this analysis in *Logan v. Zimmerman Brush Co.*, in which a state anti-discrimination law required the enforcing agency to convene a fact-finding conference within 120 days of the filing of the complaint.[34] The commission inadvertently scheduled the hearing after the expiration of the 120 days, and the state courts held the requirement to be jurisdictional, requiring dismissal of the complaint. The Supreme Court noted that various older cases had clearly established that causes of action were property, and, in any event, the claim at issue was an entitlement grounded in state law and thus could only be removed "for cause." That property interest existed independently of the 120-day period and could not be taken away by agency action or inaction.[35]

Amdt14.S1.5.4 Civil Cases

Amdt14.S1.5.4.1 Overview of Procedural Due Process in Civil Cases

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[29] *Id.* at 155 (Rehnquist and Stewart, JJ., and Burger, C.J.).

[30] *Id.* at 154.

[31] *Id.* at 167 (Powell, J., and Blackmun, J., concurring). *See id.* at 177 (White, J., concurring and dissenting); *id.* at 203 (Douglas, J., dissenting); *id.* at 206 (Marshall, Douglas, and Brennan, JJ., dissenting).

[32] 426 U.S. 341 (1976).

[33] Vitek v. Jones, 445 U.S. 480, 491 (1980). *See also* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

[34] 455 U.S. 422 (1982).

[35] *Id.* at 428–33. A different majority of the Court also found a denial of equal protection. *Id.* at 438.

Amdt14.S1.5.4.1
Overview of Procedural Due Process in Civil Cases

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

If a state seeks to deprive a person of a protected life, liberty, or property interest, the Fourteenth Amendment's Due Process Clause requires that the state first provide certain procedural protections.[1] The Supreme Court has construed the Fourteenth Amendment's Due Process Clause to impose the same procedural due process limitations on the states as the Fifth Amendment does on the Federal Government.[2] Fifth Amendment due process case law is therefore relevant to the interpretation of the Fourteenth Amendment.[3]

The Court first addressed due process in the 1855 Fifth Amendment case *Murray's Lessee v. Hoboken Land and Improvement Co.*[4] In *Murray's Lessee*, the Court held that it would determine (independently from Congress) whether the government had provided due process by evaluating whether the statutory process conflicted with the Constitution and, if not, whether it comported with "those settled usages and modes of proceedings existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."[5] In the 1884 Fourteenth Amendment case *Hurtado v. California*, the Court held that a process could be judged based on whether it had attained "the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law."[6] To hold that only historical, traditional procedures can constitute due process, the Court said, would render the law "incapable of progress or improvement."[7] The Supreme Court articulated the modern test for what process is required before the government may invade a protected interest in the 1976 case *Mathews v. Eldridge*.[8]

As a general matter, the Supreme Court has held that the constitutional requirement of procedural due process allows for variances in procedure "appropriate to the nature of the case."[9] Nonetheless, the Court's decisions have identified key goals and requirements of procedural due process that apply in many circumstances. The Court has explained that "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."[10] Thus, the required

[1] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[2] *Cf.* Arnett v. Kennedy, 416 U.S. 134 (1974); *see also* Amdt5.6.1 Overview of Due Process Procedural Requirements to Amdt5.6.3 Military Proceedings and Procedural Due Process.

[3] For additional discussion of pre-modern cases construing the Fifth Amendment's Due Process Clause, see Amdt5.5.2 Historical Background on Due Process; *see also* Amdt5.6.1 Overview of Due Process Procedural Requirements.

[4] 59 U.S. (18 How.) 272 (1855).

[5] *Id.* at 277. The Court took a similar approach to Fourteenth Amendment due process interpretation in *Davidson v. City of New Orleans*, 96 U.S. 97 (1878), and *Munn v. Illinois*, 94 U.S. 113 (1877).

[6] 110 U.S. 516, 528 (1884).

[7] *Id.* at 529.

[8] 424 U.S. 319, 335 (1976); *see also* Amdt14.S1.5.4.2 Due Process Test in Mathews v. Eldridge.

[9] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

[10] Carey v. Piphus, 435 U.S. 247, 259 (1978). "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." *Mathews*, 424 U.S. at 344.

elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a state proposes to deprive them of protected interests.[11]

The core requirements of procedural due process are notice[12] and a hearing[13] before an impartial tribunal,[14] though specific requirements in each case vary based on the particular interests at stake.[15] Due process may also require other procedural protections such as an opportunity for confrontation and cross-examination, discovery, a decision based on the record, or the opportunity to be represented by counsel.[16] As long as the states provide adequate procedural protections, they possess significant discretion to structure courts and regulate state judicial proceedings,[17] set statutes of limitations,[18] and specify burdens of proof or evidentiary presumptions.[19] Except as otherwise noted, the following essays focus on procedural due process requirements in civil and administrative proceedings. Later essays discuss procedural due process requirements in criminal cases.[20]

Amdt14.S1.5.4.2 Due Process Test in Mathews v. Eldridge

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The requirements of due process depend on the nature of the interest at stake and the weight of that interest balanced against the opposing government interests.[1] The Supreme

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[11] Fuentes v. Shevin, 407 U.S. 67, 81 (1972). At times, the Court has also stressed the dignitary importance of procedural rights, the worth of being able to defend one's interests even if one cannot change the result. Carey v. Piphus, 435 U.S. 247, 266–67 (1978); Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); Nelson v. Adams, 529 U.S. 460 (2000) (amendment of judgment to impose attorney's fees and costs to sole shareholder of liable corporate structure invalid without notice or opportunity to dispute).

[12] *See* Amdt14.S1.5.4.3 Notice of Charge and Due Process.

[13] *See* Amdt14.S1.5.4.4 Opportunity for Meaningful Hearing.

[14] *See* Amdt14.S1.5.4.5 Impartial Decision Maker.

[15] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."). Due process does not require notice and a hearing for all possible deprivations of protected interests. *See, e.g.*, Amdt14.S1.5.7.1 State Taxes and Due Process Generally.

[16] *See* Amdt14.S1.5.4.6 Additional Requirements of Procedural Due Process.

[17] *See* Amdt14.S1.5.4.7 Power of States to Regulate Procedures.

[18] *See* Amdt14.S1.5.4.8 Statutes of Limitations and Procedural Due Process.

[19] *See* Amdt14.S1.5.4.9 Burdens of Proof and Presumptions.

[20] *See* Amdt14.S1.5.5.1 Overview of Procedural Due Process in Criminal Cases; Amdt14.S1.5.6.1 Overview of Criminal Cases and Post-Trial Due Process.

[1] The Court stated: "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970), (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 894–95 (1961).

Court articulated the current standard for determining what process is required before the government may impair a protected interest in the 1976 case *Mathews v. Eldridge*.[2] The *Mathews* Court explained:

> Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[3]

Application of this standard is highly fact-dependent, as *Mathews* itself demonstrated. *Mathews* concerned termination of Social Security benefits. The *Mathews* Court compared the process required in the case before it with what was required in an earlier case involving termination of welfare benefits, *Goldberg v. Kelly*.[4] The termination of welfare benefits in *Goldberg*, which affected "persons on the very margin of subsistence" and could have resulted in the challenger's loss of food and shelter, had required a pre-deprivation hearing. By contrast, the Court held, the termination of Social Security benefits in *Mathews* required less protection because disability benefits are not based on financial need and a terminated recipient could apply for welfare if needed.[5] Moreover, while the Court had found a significant risk of erroneous deprivation in *Goldberg*, it found that the determination of ineligibility for Social Security benefits more often turns on routine and uncomplicated evaluations of data, reducing the likelihood of error. Finally, the Court noted that the administrative burden and other societal costs involved in giving Social Security recipients a pre-termination hearing would be high. Therefore, the Court concluded that due process was satisfied by a post-termination hearing with full retroactive restoration of benefits if the claimant prevails.[6]

While more recent cases often cite *Mathews* for the test the Court announced in that case, other roughly contemporaneous cases also show changes in the Court's approach to procedural due process in the 1970s. For instance, in cases involving debtors and installment buyers, the Court shifted its approach around the time of the *Mathews* decision, generally requiring less process before money or property could be seized. Earlier cases had focused upon the interests of the holders of the property in not being unjustly deprived of goods and funds in their possession and had thus leaned toward requiring pre-deprivation hearings. By contrast, newer cases look to the interests of creditors as well. In one 1974 case, the Court explained: "The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well."[7]

To illustrate, the 1969 case *Sniadach v. Family Finance Corp.* mandated pre-deprivation hearings before wages could be garnished.[8] The Court appears to have limited *Sniadach* to instances when wages, and perhaps certain other basic necessities, are at issue and the

[2] 424 U.S. 319 (1976).

[3] *Id.* at 335.

[4] 397 U.S. 254 (1970).

[5] *Mathews*, 424 U.S. at 340–41.

[6] *Id.* at 339–49.

[7] Mitchell v. W.T. Grant Co., 416 U.S. 600, 604 (1974).

[8] 395 U.S. 337 (1969).

consequences of deprivation would be severe.[9] The 1972 case *Fuentes v. Shevin* struck down a replevin statute that authorized the seizure of household goods purchased on an installment contract upon the filing of an ex parte application and the posting of bond.[10] The Court has also limited that case, holding that an appropriately structured ex parte judicial determination before seizure is sufficient to satisfy due process.[11] Thus, laws authorizing sequestration, garnishment, or other seizure of property of an alleged defaulting debtor need only require that (1) the creditor furnish adequate security to protect the debtor's interest, (2) the creditor make a specific factual showing before a neutral officer or magistrate, not a clerk or other such functionary, of probable cause to believe that he is entitled to the relief requested, and (3) an opportunity be assured for an adversary hearing promptly after seizure to determine the merits of the controversy, with the burden of proof on the creditor.[12]

The Court has applied *Mathews* in a broad range of contexts. Applying the standard in the context of government employment, the Court considered the interest of an employee in retaining his job, the governmental interest in the expeditious removal of unsatisfactory employees, the avoidance of administrative burdens, and the risk of an erroneous termination and concluded that due process requires some minimum pre-termination notice and opportunity to respond, followed by a full post-termination hearing, including an award of back pay if the employee is successful.[13] Where an adverse employment action does not rise to the level of termination of employment, the governmental interest is significant, and reasonable grounds for such action have been established separately, the Court has held that a prompt hearing held after the adverse action may be sufficient.[14]

In *Brock v. Roadway Express, Inc.*, a plurality of the Court applied a similar analysis to governmental regulation of private employment, determining that an agency may order an employer to reinstate a whistleblower employee without an opportunity for a full evidentiary hearing, but that the employer is entitled to be informed of the substance of the employee's charges and to have an opportunity for informal rebuttal.[15] The principal difference from the *Mathews* test was that the Court acknowledged two conflicting private interests to weigh in

[9] North Georgia Finishing v. Di-Chem, 419 U.S. 601, 611 n.2 (1975) (Powell, J., concurring). The majority opinion draws no such express distinction, instead emphasizing that *Sniadach-Fuentes* do require observance of some due process procedural guarantees. *See id.* at 605–06. *But see* Mitchell v. W.T. Grant Co., 416 U.S. 600, 614 (1974) (opinion of the Court by Justice Byron White emphasizing the wages aspect of the earlier case).

[10] 407 U.S. 67 (1972).

[11] Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); North Georgia Finishing v. Di-Chem, 419 U.S. 601 (1975). More recently, the Court has applied a variant of the *Mathews* formula in holding that Connecticut's prejudgment attachment statute, which "fail[ed] to provide a preattachment hearing without at least requiring a showing of some exigent circumstance," operated to deny equal protection. Connecticut v. Doehr, 501 U.S. 1, 18 (1991).

[12] *Mitchell*, 416 U.S. at 615–18 (1974). Efforts to litigate challenges to seizures in actions involving two private parties may be thwarted by finding that the case involves no state action, but there often is sufficient participation by state officials in transferring possession of property to constitute state action and implicate due process. *Compare* Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (no state action in warehouseman's sale of goods for nonpayment of storage, as authorized by state law), *with* Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (state officials' joint participation with private party in effecting prejudgment attachment of property), *and* Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478 (1988) (probate court was sufficiently involved with actions activating time bar in nonclaim statute).

[13] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (discharge of state government employee). In *Barry v. Barchi*, 443 U.S. 55 (1979), the Court held that the state interest in assuring the integrity of horse racing carried on under its auspices justified an interim suspension without a hearing once it established the existence of certain facts, provided that a prompt judicial or administrative hearing would follow suspension at which the issues could be determined was assured. *See also* FDIC v. Mallen, 486 U.S. 230 (1988) (strong public interest in the integrity of the banking industry justifies suspension of indicted bank official with no pre-suspension hearing, and with ninety-day delay before decision resulting from post-suspension hearing).

[14] Gilbert v. Homar, 520 U.S. 924 (1997) (no hearing required prior to suspension without pay of tenured police officer arrested and charged with a felony).

[15] 481 U.S. 252 (1987).

the equation: that of the employer "in controlling the makeup of its workforce," and that of the employee in not being discharged for whistleblowing.[16]

In other cases, the government may dispense with hearings providing even minimum procedures when establishing grounds for a deprivation of a protected interest is so pro forma or routine that the likelihood of error is very small.[17] In a case dealing with state agency's negligent failure to observe a procedural deadline, the Court held that the claimant was entitled to a hearing with the agency to pass upon the merits of his claim prior to dismissal of his action.[18]

A delay in retrieving money paid to the government is unlikely to rise to the level of a violation of due process. In *City of Los Angeles v. David*, a citizen paid a $134.50 impoundment fee to retrieve an automobile that had been towed by the City.[19] When he subsequently sought to challenge the imposition of the impoundment fee, he was unable to obtain a hearing until 27 days after his car had been towed. The Court held that the delay was reasonable, as the private interest affected—the temporary loss of the use of the money—could be compensated by the addition of an interest payment to any refund of the fee. The Court also considered the fact that a thirty-day delay was unlikely to create a risk of significant factual errors, and that shortening the delay significantly would impose an administrative burden on the city.

In another context, the Supreme Court applied the *Mathews* test to strike down a provision in Colorado's Exoneration Act.[20] That statute required individuals whose criminal convictions had been invalidated to prove their innocence by clear and convincing evidence in order to recoup any fines, penalties, court costs, or restitution paid to the state as a result of the conviction. The Court, noting that "[a]bsent conviction of crime, one is presumed innocent,"[21] concluded that all three considerations under *Mathews* "weigh[ed] decisively against Colorado's scheme."[22] Specifically, the Court reasoned that (1) those affected by the Colorado statute have an "obvious interest" in regaining their funds;[23] (2) the burden of proving one's innocence by clear and convincing evidence unacceptably risked erroneous deprivation of those funds;[24] and (3) the state had "no countervailing interests" in withholding money to which it had "zero claim of right."[25] As a result, the Court held that the state could not impose "anything more than minimal procedures" for the return of funds that occurred as a result of a conviction that was subsequently invalidated.[26]

In other areas, the balancing standard of *Mathews* has resulted in states having greater flexibility in determining what process is required. For instance, when a state alters previously

[16] *Id.* at 263.

[17] *E.g.*, Dixon v. Love, 431 U.S. 105 (1977) (when suspension of driver's license is automatic upon conviction of a certain number of offenses, no hearing is required because there can be no dispute about facts).

[18] Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

[19] 538 U.S. 715 (2003).

[20] Nelson v. Colorado, No. 15-1256, slip op. (April 19, 2017).

[21] *Id.* at 1.

[22] *Id.* at 4.

[23] *Id.* In so concluding, the Court rejected Colorado's argument that the money in question belonged to the State because the criminal convictions were in place at the time the funds were taken. *Id.* The Court reasoned that after a conviction has been reversed, the criminal defendant is presumed innocent and any funds provided to the State as a result of the conviction rightfully belong to the person who was formerly subject to the prosecution. *Id.* at 5 ("Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions.").

[24] *Id.* at 5–6. In particular, the Court noted that when a defendant seeks to recoup small amounts of money under the Exoneration Act, the costs of mounting a claim and retaining a lawyer "would be prohibitive," amounting to "no remedy at all" for any minor assessments under the Act. *Id.* at 9.

[25] *Id.* at 6.

[26] *Id.*

existing law, no hearing is required if a state affords the claimant an adequate alternative remedy, such as a judicial action for damages or breach of contract.[27] Thus, in considering corporal punishment in public schools, the Court held that the existence of common-law tort remedies for wrongful or excessive punishment, plus the context in which the punishment was administered (i.e., the ability of the teacher to observe directly the infraction in question, the openness of the school environment, the visibility of the confrontation to other students and faculty, and the likelihood of parental reaction to unreasonable punishment), reasonably assured the probability that a child would not be punished without cause or excessively.[28] The Court did not, however, inquire about the availability of judicial remedies for such violations in the state in which the case arose.[29]

The Court has required greater due process protection against property deprivations resulting from operation of established state procedures than those resulting from random and unauthorized acts of state employees.[30] Thus, the Court has held that post-deprivation procedures would not satisfy due process if it is the state system itself that destroys a complainant's property interest.[31] Although the Court briefly entertained the theory that a negligent (i.e., non-willful) action by a state official was sufficient to invoke due process, and that a post-deprivation hearing regarding such loss was required,[32] the Court subsequently overruled this holding, stating that "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property."[33]

In rare and extraordinary situations where summary action is necessary to prevent imminent harm to the public and the private interest infringed is reasonably deemed to be of less importance, the Court has held that the government can take action with no notice and no opportunity to defend, subject to a later full hearing.[34] Examples—most of which predate

[27] *See, e.g.*, Lujan v. G & G Fire Sprinklers, Inc., 523 U.S. 189 (2001) (breach of contract suit against state contractor who withheld payment to subcontractor based on state agency determination of noncompliance with Labor Code sufficient for due process purposes).

[28] Ingraham v. Wright, 430 U.S. 651, 680–82 (1977).

[29] *Id.* In *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19–22 (1987), involving cutoff of utility service for non-payment of bills, the Court rejected the argument that common-law remedies were sufficient to obviate the pre-termination hearing requirement.

[30] Logan v. Zimmerman Brush Co., 455 U.S. 422, 435–36 (1982). The Court emphasized that a post-deprivation hearing regarding harm inflicted by a state procedure would be inadequate. "That is particularly true where, as here, the State's only post-termination process comes in the form of an independent tort action. Seeking redress through a tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely whole." 455 U.S. 422, 436–37 (1982).

[31] *Id.* at 436.

[32] More expressly adopting the tort remedy theory, the Court in *Parratt v. Taylor*, 451 U.S. 527 (1981), held that the loss of a prisoner's mail-ordered goods through the negligence of prison officials constituted a deprivation of property, but that the state's post-deprivation tort-claims procedure afforded adequate due process. When a state officer or employee acts negligently, the Court recognized, there is no way that the state can provide a pre-termination hearing; the real question, therefore, is what kind of post-deprivation hearing is sufficient. When the action complained of is the result of the unauthorized failure of agents to follow established procedures and there is no contention that the procedures themselves are inadequate, the Due Process Clause is satisfied by the provision of a judicial remedy that the claimant must initiate. *Id.* at 541, 543–44. It should be noted that *Parratt* was a property loss case, and thus may be distinguished from liberty cases, where a tort remedy, by itself, may not provide adequate process. *See Ingraham*, 430 U.S. at 680–82.

[33] Daniels v. Williams, 474 U.S. 327, 328 (1986) (involving negligent acts by prison officials). Hence, there is no requirement for procedural due process stemming from such negligent acts and no resulting basis for suit under 42 U.S.C. § 1983 for deprivation of rights deriving from the Constitution. Prisoners may resort to state tort law in such circumstances, but neither the Constitution nor § 1983 provides a federal remedy.

[34] Board of Regents v. Roth, 408 U.S. 564, 570 n.7 (1972); Bell v. Burson, 402 U.S. 535, 542 (1971). *See* Parratt v. Taylor, 451 U.S. 527, 538–40 (1981). A person may waive his due process rights though, as with other constitutional rights, the waiver must be knowing and voluntary. D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972). *See also* Fuentes v. Shevin, 407 U.S. 67, 94–96 (1972).

Mathews—include seizure of contaminated foods or drugs or other such commodities to protect the consumer,[35] collection of governmental revenues,[36] and the seizure of enemy property in wartime.[37] Citing national security interests, in a 1961 case the Court upheld an order issued without notice and an opportunity to be heard that excluded a short-order cook employed by a concessionaire from a Naval Gun Factory.[38] While the Court was ambivalent about a right-privilege distinction, it contrasted the limited interest of the cook—barred from the base, she was still free to work at a number of the concessionaire's other premises—with the government's interest in conducting a high-security program.[39] In the 1979 case *Mackey v. Montrym*, the Court applied the *Mathews* test and upheld a Massachusetts statute that mandated suspension of a driver's license because he refused to take a breath-analysis test upon arrest for drunk driving.[40] The Court cited pre-*Mathews* cases involving health and safety measures for the proposition that the Court has "traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety."[41]

Amdt14.S1.5.4.3 Notice of Charge and Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The Supreme Court has explained that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[1] The notice requirement may include an obligation to take "reasonable followup measures" that may be available upon learning that an attempt at notice has failed.[2] In addition, notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest.[3] Ordinarily, service of notice must be reasonably structured to assure that the person

[35] North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908); Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950). *See also* Fahey v. Mallonee, 332 U.S. 245 (1947). *Cf.* Mackey v. Montrym, 443 U.S. 1, 17–18 (1979).

[36] Phillips v. Commissioner, 283 U.S. 589, 597 (1931).

[37] Central Union Trust Co. v. Garvan, 254 U.S. 554, 566 (1921).

[38] Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961).

[39] *Id.* at 896–98. *See* Goldberg v. Kelly, 397 U.S. 254, 263 n.10 (1970); Board of Regents v. Roth, 408 U.S. 564, 575 (1972); Arnett v. Kennedy, 416 U.S. 134, 152 (1974) (plurality opinion), and 416 U.S. at 181–183 (White, J., concurring in part and dissenting in part).

[40] 443 U.S. 1.

[41] *Id.* at 17–18.

[1] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). *See also* Richards v. Jefferson County, 517 U.S. 793 (1996) (res judicata may not apply where taxpayer who challenged a county's occupation tax was not informed of prior case and where taxpayer interests were not adequately protected).

[2] Jones v. Flowers, 547 U.S. 220, 235 (2006) (state's certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked unclaimed; the state should have taken additional reasonable steps to notify the property owner, as it would have been practicable for it to have done so).

[3] Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970).

to whom it is directed receives it.[4] However, the notice need not describe the legal procedures necessary to protect one's interest if the procedures are otherwise set out in published, generally available public sources.[5]

While due process often requires the government to provide a person with notice and an opportunity for a hearing before depriving the person of a protected interest,[6] there are some circumstances in which the Court has held those procedural protections are not required.[7] For instance, persons adversely affected by a law cannot challenge the law's validity on the ground that the legislative body that enacted it gave no notice of proposed legislation, held no hearings at which the person could have presented his arguments, and gave no consideration to particular points of view.[8] Similarly, when an administrative agency engages in a legislative function, for example by drafting regulations of general application, it need not hold a hearing prior to promulgation.[9] On the other hand, if a regulation affects an identifiable class of persons, the Court employs a multi-factor analysis to determine whether notice and hearing is required and, if so, whether it must precede such action.[10]

Amdt14.S1.5.4.4 Opportunity for Meaningful Hearing

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

As a general matter, procedural due process requires an opportunity for a meaningful hearing to review a deprivation of a protected interest.[1] The Supreme Court has held that "some form of hearing is required before an individual is finally deprived of a property [or liberty] interest."[2] This right is a "basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment."[3]

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[4] Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Robinson v. Hanrahan, 409 U.S. 38 (1972); Greene v. Lindsey, 456 U.S. 444 (1982).

[5] City of West Covina v. Perkins, 525 U.S. 234 (1999).

[6] *E.g.*, Twining v. New Jersey, 211 U.S. 78, 11 (1908) (stating that those requirements "seem to be universally prescribed in all systems of law established by civilized countries"); Jacob v. Roberts, 223 U.S. 261, 265 (1912).

[7] Notice and a hearing is not always needed before collection of taxes. *See* Amdt14.S1.5.7.1 State Taxes and Due Process Generally.

[8] Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915). *See also* Bragg v. Weaver, 251 U.S. 57, 58 (1919). *Cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422, 432–33 (1982).

[9] United States v. Florida East Coast Ry., 410 U.S. 224 (1973).

[10] *Id.* at 245 (distinguishing between rule-making, at which legislative facts are in issue, and adjudication, at which adjudicative facts are at issue, requiring a hearing in latter proceedings but not in the former). *See* Londoner v. City of Denver, 210 U.S. 373 (1908). One factor the Court considers in this analysis is whether agency action is subject to later judicial scrutiny. Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 246–47 (1944).

[1] *E.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

[2] Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Parties whose rights are to be affected are entitled to be heard. Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863).

[3] Fuentes v. Shevin, 407 U.S. 67, 80–81 (1972). *See* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170–71 (1951) (Frankfurter, J., concurring).

Amdt14.S1.5.4.4
Opportunity for Meaningful Hearing

Thus, the notice of hearing and the opportunity to be heard must be granted at a meaningful time and in a meaningful manner.[4] However, the type of hearing required, and when the hearing must occur, depend on the specific circumstances at issue.

The Court has held that it is a violation of due process for a state to enforce a judgment against a party to a proceeding without having given him an opportunity to be heard sometime before final judgment is entered.[5] However, due process does not necessarily require affording a party the opportunity to present every available defense before entry of judgment. A person may be remitted to other actions initiated by him,[6] or an appeal may suffice. Accordingly, in one case the Court held that a company objecting to the entry of a judgment against it without notice and an opportunity to be heard on the issue of liability was not denied due process where the state provided the opportunity for a hearing on appeal from the judgment.[7] Nor could the company show a denial of due process based on the fact that it lost the opportunity for a hearing by inadvertently pursuing the wrong procedure in the state courts.[8] On the other hand, where a state appellate court reversed a trial court and entered a final judgment for the defendant, the Supreme Court held that the plaintiff was denied due process because he did not have an opportunity to introduce evidence in rebuttal to testimony that the trial court deemed immaterial but the appellate court considered material.[9]

In interpreting the analogous Due Process clause of the Fifth Amendment, the Court has held that due process does not require a trial-type hearing in every conceivable case of governmental impairment of private interest. For instance, the Court held that the summary exclusion on security grounds of a concessionaire's cook at the Naval Gun Factory, without hearing or advice as to the basis for the exclusion, did not violate due process.[10] In *Hannah v.*

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[4] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[5] Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 476 (1918); Baker v. Baker, Eccles & Co., 242 U.S. 394, 403 (1917); Louisville & Nashville R.R. v. Schmidt, 177 U.S. 230, 236 (1900).

[6] Lindsey v. Normet, 405 U.S. 56, 65–69 (1972). However, if a person would suffer too severe an injury "between the doing and the undoing," he may avoid the alternative means. Stanley v. Illinois, 405 U.S. 645, 647 (1972).

[7] American Surety Co. v. Baldwin, 287 U.S. 156 (1932).

[8] *Id.* Cf. Logan v. Zimmerman Brush Co., 455 U.S. 422, 429–30, 432–33 (1982).

[9] Saunders v. Shaw, 244 U.S. 317 (1917).

[10] Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961). In so holding, the Court considered the historical power of a commanding officer summarily to exclude civilians from the area of his command and applicable Navy regulations that confirm that authority, together with a stipulation in the contract between the restaurant concessionaire and the Naval Gun Factory forbidding employment on the premises of any person not meeting security requirements.

Manifesting a disposition to adjudicate on non-constitutional grounds employee dismissals under the Federal Loyalty Program, in *Peters v. Hobby*, 349 U.S. 331 (1955), the Court invalidated, as in excess of delegated authority, a Loyalty Review Board's finding of reasonable doubt as to the petitioner's loyalty that reopened his case on its own initiative after it had twice cleared him.

In *Cole v. Young*, 351 U.S. 536 (1956), also decided on the basis of statutory interpretation, the Court intimated that grave due process issues would be raised by applying to federal employees, not occupying sensitive positions, a measure which authorized, in the interest of national security, summary suspensions and unreviewable dismissals of allegedly disloyal employees by agency heads. In *Service v. Dulles*, 354 U.S. 363 (1957), and *Vitarelli v. Seaton*, 359 U.S. 535 (1959), the Court nullified dismissals for security reasons by invoking an established administrative law rule that an administrator must comply with procedures outlined in applicable agency regulations, notwithstanding that such regulations conform to more rigorous substantive and procedural standards than Congress required or that the agency action is discretionary. In both of the last cited decisions, the Court set aside dismissals of employees as security risks because the employing agency failed to conform the dismissal to its established security regulations. *See* Accardi v. Shaughnessy, 347 U.S. 260 (1954).

Again avoiding constitutional issues, in *Greene v. McElroy*, 360 U.S. 474 (1959), the Court invalidated the security clearance procedure the Defense Department required from defense contractors as being unauthorized either by law or presidential order. However, the Court suggested that it would condemn, on grounds of denial of due process, any enactment or Executive Order that sanctioned a comparable department security clearance program, under which a defense contractor's employee could have his security clearance revoked without a hearing at which he had the right to confront and cross-examine witnesses. Justices Felix Frankfurter, John Marshall Harlan, and Charles Whittaker

Larche, the Court upheld rules of procedure adopted by the Civil Rights Commission, under which state electoral officials and others accused of discrimination were not apprised of the identity of their accusers or accorded a right to confront and cross-examine witnesses or accusers testifying at such hearings.[11] In upholding the procedures, the Court opined that the Commission acts solely as an investigative and fact-finding agency and makes no adjudications. It further noted that additional procedural protections have not been granted by grand juries, congressional committees, or administrative agencies conducting purely fact-finding investigations that do not determine private rights.

With respect to actions taken by administrative agencies, the Court has held that the demands of due process do not require a hearing at the initial stage, or at any particular point in the proceeding, so long as a hearing is held before a final order becomes effective.[12] In *Bowles v. Willingham*, the Court sustained orders fixing maximum rents issued without a hearing at any stage, saying that "where Congress has provided for judicial review after the regulations or orders have been made effective it has done all that due process under the war emergency requires."[13] But in another case where the National Labor Relations Board undertook to void an agreement between an employer and a union after consideration of charges brought against the employer by an independent complaining union, the Court held that the union that formed the agreement was entitled to notice and an opportunity to participate in the proceedings.[14] Although a taxpayer must be afforded a fair opportunity for a hearing in connection with the assessment of taxes,[15] collection of taxes through summary administrative proceedings is lawful if the taxpayer is later afforded a hearing.[16]

When the Constitution requires a hearing, it requires a fair one, held before a tribunal that meets currently prevailing standards of impartiality.[17] A party must be given an opportunity not only to present evidence, but also to know the claims of the opposing party and to respond to them.[18] In administrative proceedings, a variance between the initial charges and the

concurred without passing on the validity of such procedure, if authorized. Justice Tom Clark dissented. See also the dissenting opinions of Justices William O. Douglas and Hugo Black in *Beard v. Stahr*, 370 U.S. 41, 43 (1962), and in *Williams v. Zuckert*, 371 U.S. 531, 533 (1963).

[11] 363 U.S. 420, 493, 499 (1960). Congress subsequently amended the law to require that any person who is defamed, degraded, or incriminated by evidence or testimony presented to the Commission be afforded the opportunity to appear and be heard in executive session, with a reasonable number of additional witnesses requested by him, before the Commission can make public such evidence or testimony. Further, any such person, before the evidence or testimony is released, must be afforded an opportunity to appear publicly to state his side and to file verified statements with the Commission which it must release with any report or other document containing defaming, degrading, or incriminating evidence or testimony. Pub. L. 91-521, § 4, 84 Stat. 1357 (1970), 42 U.S.C. § 1975a(e). *Cf.* Jenkins v. McKeithen, 395 U.S. 411 (1969).

[12] Opp Cotton Mills v. Administrator, 312 U.S. 126, 152, 153 (1941).

[13] 321 U.S. 503, 521 (1944).

[14] Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).

[15] Central of Georgia Ry. v. Wright, 207 U.S. 127 (1907); Lipke v. Lederer, 259 U.S. 557 (1922).

[16] Phillips v. Commissioner, 283 U.S. 589 (1931). *Cf.* Springer v. United States, 102 U.S. 586, 593 (1881); Passavant v. United States, 148 U.S. 214 (1893). The collection of taxes is, however, very nearly a wholly unique area. *See* Perez v. Ledesma, 401 U.S. 82, 127 n.17 (1971) (Brennan, J., concurring in part and dissenting in part). On the limitations on private prejudgment collection, see Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

[17] Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950). *See also* Amdt14.S1.5.4.5 Impartial Decision Maker.

[18] Margan v. United States, 304 U.S. 1, 18–19 (1938). The Court has applied this principle with differing results to administrative hearings and subsequent review in selective service cases. *Compare* Gonzales v. United States, 348 U.S. 407 (1955) (conscientious objector contesting his classification before appeals board must be furnished copy of recommendation submitted by Department of Justice; only by being appraised of the arguments and conclusions upon which recommendations were based would he be enabled to present his case effectively), *with* United States v. Nugent, 346 U.S. 1 (1953) (in auxiliary hearing that culminated in a Justice Department report and recommendation, it is sufficient that registrant be provided with resume of adverse evidence in FBI report because the "imperative needs of mobilization and national vigilance" mandate a minimum of "litigious interruption"), *and* Gonzales v. United States, 364 U.S. 59 (1960) (finding no due process violation when petitioner at departmental proceedings was not permitted to

agency's ultimate findings will not invalidate the proceedings where the record shows that there was no misunderstanding as to the basis of the complaint.[19] The admission of evidence that would be inadmissible in judicial proceedings does not vitiate the order of an administrative agency.[20] An administrative hearing may consider hearsay evidence, and hearsay may constitute by itself substantial evidence in support of an agency determination, provided that there are assurances of the underlying reliability and probative value of the evidence and the claimant before the agency had the opportunity to subpoena the witnesses and cross-examine them.[21] However, a provision that an administrative body shall not be controlled by rules of evidence does not justify the issuance of orders without a foundation in evidence having rational probative force. Although the Court has recognized that in some circumstances a "fair hearing" implies a right to oral argument,[22] it has refused to lay down a general rule that would cover all cases.[23]

Amdt14.S1.5.4.5 Impartial Decision Maker

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The Due Process Clause requires that the decision to deprive a person of a protected interest be entrusted to an impartial decision maker. This rule applies to both criminal and civil cases.[1] The Supreme Court has explained that the "neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law" and "preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."[2]

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rebut statements attributed to him by his local board, because the statements were in his file and he had opportunity to rebut both before hearing officer and appeal board; likewise finding no violation where petitioner at trial was denied access to hearing officer's notes and report, because he failed to show any need and did have Department recommendations).

[19] NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 349–50 (1938).

[20] Western Chem. Co. v. United States, 271 U.S. 268 (1926). *See also* United States v. Abilene & So. Ry., 265 U.S. 274, 288 (1924).

[21] Richardson v. Perales, 402 U.S. 389 (1971).

[22] Londoner v. Denver, 210 U.S. 373 (1908).

[23] FCC v. WJR, 337 U.S. 265, 274–77 (1949). *See also* Inland Empire Council v. Millis, 325 U.S. 697, 710 (1945). *See* Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C §§ 1001–1011. *Cf.* Link v. Wabash R.R., 370 U.S. 626, 637, 646 (1962), in which the majority rejected Justice Black's dissenting thesis that the dismissal with prejudice of a damage suit without notice to the client and grounded upon the dilatory tactics of his attorney, and the latter's failure to appear at a pre-trial conference, amounted to a taking of property without due process of law.

[1] Tumey v. Ohio, 273 U.S. 510 (1927); *In re* Murchison, 349 U.S. 133 (1955); Goldberg v. Kelly, 397 U.S. 254, 271 (1970). *See also* Amdt14.S1.5.5.2 Impartial Judge and Jury.

[2] Marshall v. Jerrico, 446 U.S. 238, 242 (1980); Schweiker v. McClure, 456 U.S. 188, 195 (1982). Thus, a showing of bias or of strong implications of bias was deemed made where a state optometry board, made up of only private practitioners, was proceeding against other licensed optometrists for unprofessional conduct because they were employed by corporations. Since success in the board's effort would redound to the personal benefit of private practitioners, the Court thought the interest of the board members to be sufficient to disqualify them. Gibson v.

There is a "presumption of honesty and integrity in those serving as adjudicators," so the burden is on an objecting party to show a conflict of interest or some other reason for disqualification of a specific officer or for disapproval of an adjudicatory system as a whole. The Court has held that combining functions within an agency, such as by allowing members of a State Medical Examining Board to both investigate and adjudicate a physician's suspension, may raise substantial concerns, but does not by itself establish a violation of due process.[3] The Court has also held that the official or personal stake that school board members had in a decision to fire teachers who had engaged in a strike against the school system in violation of state law was not sufficient to disqualify them.[4]

Sometimes, to ensure an impartial tribunal, the Due Process Clause requires a judge to recuse himself from a case. In the 2009 case *Caperton v. A. T. Massey Coal Co.*, the Court noted that "most matters relating to judicial disqualification [do] not rise to a constitutional level," and that "matters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion."[5] The Court added, however, that "the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has 'a direct, personal, substantial, pecuniary interest' in a case."[6] In addition, although "[p]ersonal bias or prejudice 'alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause,'" there are "circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable.'"[7] Those circumstances include "where a judge had a financial interest in the outcome of a case" or "a conflict arising from his participation in an earlier proceeding."[8]

In judicial recusal cases, the Court has explained, "[t]he inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"[9] In *Caperton*, a company appealed a jury verdict of $50 million, and its chairman spent $3 million to elect a justice to the Supreme Court of Appeals of West Virginia at a time when "[i]t was reasonably foreseeable . . . that the pending case would be before the newly elected justice."[10] The justice was elected, declined to recuse himself, and joined a 3-2 decision overturning the jury verdict. The Supreme Court, in a 5-4 opinion written by Justice Anthony Kennedy, concluded that there was "a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a

Berryhill, 411 U.S. 564 (1973). Similarly, the Court has held that the conduct of deportation hearings by a person who, while he had not investigated the case, was also an investigator who must judge the results of others' investigations just as one of them would some day judge his, raised a substantial problem. The Court resolved the issue through statutory construction. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

[3] Withrow v. Larkin, 421 U.S. 35 (1975). Where an administrative officer is acting in a prosecutorial, rather than judicial or quasi-judicial role, a lower standard of impartiality applies. Marshall v. Jerrico, 446 U.S. 238, 248–50 (1980) (regional administrator assessing fines for child labor violations, with penalties going into fund to reimburse cost of system of enforcing child labor laws). But "traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law." *Id.* at 249.

[4] Hortonville Joint School Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976).

[5] 556 U.S. 868, 876 (2009) (citations omitted).

[6] *Id.* (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)).

[7] *Id.*

[8] *Id.* at 877.

[9] *Id.* at 881.

[10] *Id.* at 886.

significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."[11]

Subsequently, in the 2016 case *Williams v. Pennsylvania*, the Court found that the right of due process was violated when a judge on the Pennsylvania Supreme Court who participated in a case denying post-conviction relief to a prisoner convicted of first-degree murder and sentenced to death had, in his former role as a district attorney, given approval to seek the death penalty in the prisoner's case.[12] Relying on *Caperton*, which the Court viewed as having set forth an "objective standard" that requires recusal when the likelihood of bias on the part of the judge is "too high to be constitutionally tolerable,"[13] the *Williams* Court held that there is an impermissible risk of actual bias when a judge had previously had a "significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case."[14] The Court based its holding, in part, on earlier cases that had found impermissible bias occurs when the same person serves as both "accuser" and "adjudicator" in a case.[15] It reasoned that authorizing another person to seek the death penalty represents "significant personal involvement" in a case,[16] and took the view that the involvement of multiple actors in a case over many years "only heightens"—rather than mitigates—the "need for objective rules preventing the operation of bias that otherwise might be obscured."[17] As a remedy, the Court remanded the case for reevaluation by the reconstituted Pennsylvania Supreme Court. Notwithstanding the fact that the judge in question did not cast the deciding vote, the *Williams* Court viewed the judge's participation in the multi-member panel's deliberations as sufficient to taint the public legitimacy of the underlying proceedings and constitute reversible error.[18]

Amdt14.S1.5.4.6 Additional Requirements of Procedural Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[11] *Id.* at 884.

[12] 136 S. Ct. 1899, 1903 (2016).

[13] *Id.* (internal quotations omitted).

[14] *Id.* at 1905.

[15] *Id.* at 1905 (citing *In re* Murchison, 349 U.S. 133, 136–37 (1955)). The Court also noted that "[n]o attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision." *Id.* at 1906.

[16] *Id.* at 1907. *See also id.* at 1907–08 (noting that the judge in this case had highlighted the number of capital cases in which he participated when campaigning for judicial office).

[17] *Id.* at 1907.

[18] *Id.* at 1909–10. Likewise, the Court rejected the argument that remanding the case would not cure the underlying due process violation because the disqualified judge's views might still influence his former colleagues, as an "inability to guarantee complete relief for a constitutional violation . . . does not justify withholding a remedy altogether." *Id.* at 1910.

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Beyond the requirements of notice and a hearing before an impartial decision maker,[1] due process may also require other procedural protections such as an opportunity for confrontation and cross-examination of witnesses, discovery, a decision based on the record, or the opportunity to be represented by counsel.

With respect to confrontation and cross-examination of witnesses, the Supreme Court has held that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[2] Where the "evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealously," a party's right to show that it is untrue depends on the rights of confrontation and cross-examination. The Court has thus "been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."[3]

With respect to discovery, the Court has held that criminal defendants have a due process right to discover exculpatory evidence held by the government[4] but has not directly confronted the questions of whether and when due process requires discovery in civil or administrative proceedings. However, in one case the Court observed in dictum that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."[5] Some federal agencies have adopted discovery rules modeled on the Federal Rules of Civil Procedure, and the Administrative Conference of the United States has recommended that all do so.[6] There appear to be no cases, however, holding that they must.[7]

The Supreme Court has also held that due process requires decisions to be based on the record before the decision maker. Although this issue arises principally in the area of administrative law, it applies generally.[8] The Court has explained that a decision maker's conclusion "must rest solely on the legal rules and evidence adduced at the hearing. . . . [T]he decision maker should state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law."[9]

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[1] *See* Amdt14.S1.5.4.3 Notice of Charge and Due Process; Amdt14.S1.5.4.4 Opportunity for Meaningful Hearing; Amdt14.S1.5.4.5 Impartial Decision Maker.

[2] Goldberg v. Kelly, 397 U.S. 254, 269 (1970). *See also* ICC v. Louisville & Nashville R.R., 227 U.S. 88, 93–94 (1913). *Cf.* § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d).

[3] Greene v. McElroy, 360 U.S. 474, 496–97 (1959). *But see* Richardson v. Perales, 402 U.S. 389 (1971) (where authors of documentary evidence are known to petitioner and he did not subpoena them, he may not complain that agency relied on that evidence). *Cf.* Mathews v. Eldridge, 424 U.S. 319, 343–45 (1976).

[4] Brady v. Maryland, 373 U.S. 83 (1963); *see also* Amdt14.S1.5.5.6 Evidentiary Requirements in Criminal Cases.

[5] Greene v. McElroy, 360 U.S. 474, 496 (1959), *quoted with approval in* Goldberg v. Kelly, 397 U.S. 254, 270 (1970).

[6] Recommendations and Reports of the Administrative Conference of the United States 571 (1968–1970).

[7] At least one federal appeals court has held that federal agencies cannot adopted discovery rules absent congressional authorization. FMC v. Anglo-Canadian Shipping Co., 335 F.2d 255 (9th Cir. 1964).

[8] The exclusiveness of the record is fundamental in administrative law. *See* Section 7(d) of the Administrative Procedure Act, 5 U.S.C. § 556(e). To succeed on a challenge on this ground, a person must show not only that the agency used ex parte evidence but also it caused prejudice. Market Street R.R. v. Railroad Comm'n, 324 U.S. 548 (1945) (agency decision supported by evidence in record, its decision sustained, disregarding ex parte evidence).

[9] Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (citations omitted).

In some civil and administrative cases, due process requires that a party have the option to be represented by counsel.[10] In the 1970 case *Goldberg v. Kelly*, the Court held that a government agency must permit a welfare recipient who has been denied benefits to be represented by and assisted by counsel.[11] In a subsequent case, the Court established a presumption that an indigent litigant does not have the right to appointed counsel unless his "physical liberty" is threatened.[12] The Court has also held the fact that an indigent litigant may have a right to appointed counsel in some civil proceedings where incarceration is threatened does not mean that counsel must be made available in all such cases. Rather, the Court considers the circumstances in individual cases, and may hold that appointment of counsel is not required if the state provides appropriate alternative safeguards.[13]

Amdt14.S1.5.4.7 Power of States to Regulate Procedures

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

In general, as long as parties receive sufficient notice,[1] an opportunity to defend their protected interests,[2] and any other required procedural safeguards,[3] the Due Process Clause of the Fourteenth Amendment does not specify the particular forms of procedure to be used in state courts.[4] The states may regulate the manner in which rights may be enforced and wrongs remedied,[5] and may create courts and endow them with such jurisdiction as, in the judgment of their legislatures, seems appropriate.[6] Whether legislative action in such matters is deemed to be wise or proves efficient, whether it causes hardship for a particular litigant, or perpetuates or supplants ancient forms of procedure, are issues that ordinarily do not implicate the

[10] In contrast to the procedural due process requirements for civil and administrative proceedings discussed in this section, criminal defendants have a right to counsel under the Sixth Amendment as applied to the states by the Fourteenth Amendment. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

[11] 397 U.S. 254, 270–71 (1970).

[12] Lassiter v. Department of Social Services, 452 U.S. 18 (1981).

[13] Turner v. Rogers, 564 U.S. 431 (2011) (denying an indigent defendant appointed counsel in a civil contempt proceeding to enforce a child support order, even though the defendant faced incarceration unless he showed an inability to pay the arrearages, but reversing the contempt order because the procedures followed remained inadequate).

[1] *See* Amdt14.S1.5.4.3 Notice of Charge and Due Process.

[2] *See* Amdt14.S1.5.4.4 Opportunity for Meaningful Hearing.

[3] *See* Amdt14.S1.5.4.5 Impartial Decision Maker; Amdt14.S1.5.4.6 Additional Requirements of Procedural Due Process.

[4] Holmes v. Conway, 241 U.S. 624, 631 (1916); Louisville & Nashville R.R. v. Schmidt, 177 U.S. 230, 236 (1900). A state "is free to regulate procedure of its courts in accordance with it own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); West v. Louisiana, 194 U.S. 258, 263 (1904); Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897); Jordan v. Massachusetts, 225 U.S. 167, 176, (1912). The power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them and to deny access to its courts is also subject to restrictions imposed by the Contract, Full Faith and Credit, and Privileges and Immunities Clauses of the Constitution. Angel v. Bullington, 330 U.S. 183 (1947).

[5] Insurance Co. v. Glidden Co., 284 U.S. 151, 158 (1931); Iowa Central Ry. v. Iowa, 160 U.S. 389, 393 (1896); Honeyman v. Hanan, 302 U.S. 375 (1937). *See also* Lindsey v. Normet, 405 U.S. 56 (1972).

[6] Cincinnati Street Ry. v. Snell, 193 U.S. 30, 36 (1904).

Fourteenth Amendment. The Supreme Court has explained that the function of the Fourteenth Amendment is negative rather than affirmative[7] and in no way obligates the states to adopt specific measures of reform.[8]

A state may impose certain conditions on the right to institute litigation. However, foreclosure of all access to the courts through imposition of financial barriers is subject to constitutional scrutiny and must be justified by a state interest of suitable importance. Thus, the Court has upheld a state law that denied access to the courts to persons instituting stockholders' derivative actions unless reasonable security for the costs and fees incurred by the corporation is first tendered.[9] The Court has also held that a state, as the price of opening its tribunals to a nonresident plaintiff, may impose the condition that the nonresident stand ready to answer all cross actions filed and accept any in personam judgments obtained by a resident defendant through service of process or appropriate pleading upon the plaintiff's attorney of record.[10] For similar reasons, the Court did not deem arbitrary or unreasonable a requirement for a chemical analysis as a condition precedent to a suit to recover for damages to crops from allegedly deficient fertilizers, where other evidence was also allowed.[11] By contrast, where a state has monopolized the avenues for settling disputes between persons by prescribing judicial resolution, and where a dispute involves a fundamental interest, such as marriage and its dissolution, the state may not deny access to persons unable to pay its fees.[12]

Just as a state may condition the right to institute litigation, it may also establish terms for raising certain defenses. For instance, the Court has held that a state may validly provide that a person sued in a possessory action cannot bring an action to try title until after judgment is rendered and he has paid the judgment.[13] A state may limit available defenses in an action to evict tenants for nonpayment of rent to the issue of payment and leave the tenants to other remedial actions at law on a claim that the landlord had failed to maintain the premises.[14] A state may also provide that the doctrines of contributory negligence, assumption of risk, and fellow servant do not bar recovery in certain employment-related accidents; the

[7] The Court has, however, imposed some restrictions on state procedures that require substantial reorientation of process. While this is more generally true in the context of criminal cases, in which the appellate process and post-conviction remedial process have been subject to considerable revision in the treatment of indigents, some requirements have also been imposed in civil cases. Boddie v. Connecticut, 401 U.S. 371 (1971); Lindsey v. Normet, 405 U.S. 56, 74–79 (1972); Santosky v. Kramer, 455 U.S. 745 (1982). Review has been restrained with regard to details. *See, e.g.*, Lindsey v. Normet, 405 U.S. at 64–69.

[8] Ownbey v. Morgan, 256 U.S. 94, 112 (1921). Thus the Fourteenth Amendment does not constrain the states to accept modern doctrines of equity, or adopt a combined system of law and equity procedure, or dispense with all necessity for form and method in pleading, or give untrammeled liberty to amend pleadings. Note that the Supreme Court did once grant review to determine whether due process required the states to provide some form of post-conviction remedy to assert federal constitutional violations, a review that was mooted when the state enacted such a process. Case v. Nebraska, 381 U.S. 336 (1965). When a state, however, through its legal system exerts a monopoly over the pacific settlement of private disputes, as with the dissolution of marriage, due process may well impose affirmative obligations on that state. Boddie v. Connecticut, 401 U.S. 371, 374–77 (1971).

[9] Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Nor did the retroactive application of this statutory requirement to actions pending at the time of its adoption violate due process as long as no new liability for expenses incurred before enactment was imposed thereby and the only effect thereof was to stay such proceedings until the security was furnished.

[10] Young Co. v. McNeal-Edwards Co., 283 U.S. 398 (1931); Adam v. Saenger, 303 U.S. 59 (1938).

[11] Jones v. Union Guano Co., 264 U.S. 171 (1924).

[12] Boddie v. Connecticut, 401 U.S. 371 (1971). *See also* Little v. Streater, 452 U.S. 1 (1981) (state-mandated paternity suit); Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (parental status termination proceeding); Santosky v. Kramer, 455 U.S. 745 (1982) (permanent termination of parental custody).

[13] Grant Timber & Mfg. Co. v. Gray, 236 U.S. 133 (1915).

[14] Lindsey v. Normet, 405 U.S. 56, 64–69 (1972). *See also* Bianchi v. Morales, 262 U.S. 170 (1923) (upholding mortgage law providing for summary foreclosure of a mortgage without allowing any defense except payment).

Court has held that no person has a vested right in such defenses.[15] Similarly, a nonresident defendant in a suit begun by foreign attachment cannot challenge the validity of a statute that requires him to give bail or security for the discharge of the seized property before permitting him an opportunity to appear and defend, even if he has no resources or credit other than the property attached.[16]

Once a suit is underway, the amendment of pleadings is largely within the discretion of the trial court and, absent a gross abuse of discretion, there is no ground for reversal. Thus, in one case, the Court found no denial of due process in rendition of a foreclosure decree without leave to file a supplementary answer that sought to raise a meritless defense.[17]

The Due Process Clause allows states significant discretion in whether to provide for jury trials or appeals in civil cases. Unlike in criminal trials,[18] the Court has not deemed jury trials essential to due process in state civil proceedings, and has not interpreted the Fourteenth Amendment to restrain the states in retaining or abolishing civil juries.[19] Thus, the Court has upheld state laws abolishing juries in proceedings to enforce liens,[20] mandamus[21] and quo warranto[22] actions, and eminent domain[23] and equity proceedings.[24] States are also free to adopt innovations respecting selection and number of jurors. States may allow verdicts to be rendered by ten out of twelve jurors rather than a unanimous jury,[25] and may establish petit juries containing eight jurors rather than the conventional twelve.[26]

If a full and fair trial on the merits is provided, due process does not require a state to provide appellate review.[27] But, if an appeal is afforded, the state must not structure it so as to arbitrarily deny to some persons the right or privilege available to others.[28]

State legislatures and state courts have substantial discretion to allocate the costs of litigation and impose awards of damages or financial penalties. The Supreme Court has held that it is up to courts to determine what costs are allowed by law, and an erroneous judgment of what the law allows does not deprive a party of property without due process of law.[29] Nor does a statute providing for the recovery of reasonable attorney's fees in actions on small claims subject unsuccessful defendants to any unconstitutional deprivation.[30]

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[15] Bowersock v. Smith, 243 U.S. 29, 34 (1917); Chicago, R.I. & P. Ry. v. Cole, 251 U.S. 54, 55 (1919); Herron v. Southern Pacific Co., 283 U.S. 91 (1931). *See also* Martinez v. California, 444 U.S. 277, 280–83 (1980) (state interest in fashioning its own tort law permits it to provide immunity defenses for its employees and thus defeat recovery).

[16] Ownbey v. Morgan, 256 U.S. 94 (1921).

[17] Sawyer v. Piper, 189 U.S. 154 (1903).

[18] Duncan v. Louisiana, 391 U.S. 145 (1968). *See also* Amdt6.4.1 Overview of Right to Trial by Jury.

[19] Walker v. Sauvinet, 92 U.S. 90 (1876); New York Central R.R. v. White, 243 U.S. 188, 208 (1917).

[20] Marvin v. Trout, 199 U.S. 212, 226 (1905).

[21] *In re* Delgado, 140 U.S. 586, 588 (1891).

[22] Wilson v. North Carolina, 169 U.S. 586 (1898); Foster v. Kansas, 112 U.S. 201, 206 (1884).

[23] Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 694 (1897).

[24] Montana Co. v. St. Louis M. & M. Co., 152 U.S. 160, 171 (1894).

[25] *See* Jordan v. Massachusetts, 225 U.S. 167, 176 (1912).

[26] *See* Maxwell v. Dow, 176 U.S. 581, 602 (1900).

[27] Lindsey v. Normet, 405 U.S. 56, 77 (1972) (citing cases).

[28] *Id.* at 74–79 (conditioning appeal in eviction action upon tenant posting bond, with two sureties, in twice the amount of rent expected to accrue pending appeal, is invalid when no similar provision is applied to other cases). *Cf.* Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) (assessment of 15% penalty on party who unsuccessfully appeals from money judgment meets rational basis test under equal protection challenge, since it applies to plaintiffs and defendants alike and does not single out one class of appellants).

[29] Ballard v. Hunter, 204 U.S. 241, 259 (1907).

[30] Missouri, Kansas & Texas Ry. v. Cade, 233 U.S. 642, 650 (1914). Congress may, however, severely restrict attorney's fees in an effort to keep an administrative claims proceeding informal. Walters v. National Ass'n of

The Court has also upheld against due process challenge a statutory procedure whereby a prosecutor is adjudged liable for costs, and committed to jail in default of payment thereof, when the court or jury finds that he instituted the prosecution without probable cause and from malicious motives.[31] Also, a state may permit harassed litigants to recover penalties in the form of attorney's fees or damages as a reasonable incentive for prompt settlement without suit of just demands of a class receiving special legislative treatment, such as common carriers and insurance companies together with their patrons.[32]

By virtue of its plenary power to prescribe the character of the sentence which shall be awarded against those found guilty of crime, a state may provide that a public officer embezzling public money shall be imprisoned and also pay a fine equal to double the amount embezzled, which shall operate as a judgment for the use of persons whose money was embezzled, even if the defendant has made restitution.[33] The Court has explained that, whether the fine is understood as a penalty or punishment or a civil judgment, the convict is required to pay it as the result of his or her crime. On the other hand, when an appellant was held in contempt for frustrating enforcement of a judgment against it by refusing to surrender certain assets, the Court held that dismissal of an appeal from the original judgment was not a penalty for the contempt, but merely a reasonable method for sustaining the effectiveness of the state's judicial process.[34]

To deter careless destruction of human life, a state may allow punitive damages in actions against employers for deaths caused by the negligence of their employees,[35] and may also allow punitive damages for fraud perpetrated by employees.[36] Also constitutional is the traditional common law approach for measuring punitive damages, granting the jury wide but not unlimited discretion to consider the gravity of the offense and the need to deter similar offenses.[37] Although the Excessive Fines Clause of the Eighth Amendment "does not apply to awards of punitive damages in cases between private parties,"[38] the Court has indicated that a "grossly excessive" award of punitive damages violates substantive due process, as the Due Process Clause limits the amount of punitive damages to what is "reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence."[39] A court may determine the applicable limits by examining the degree of reprehensibility of the act, the ratio

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Radiation Survivors, 473 U.S. 305 (1985) (limitation of attorneys' fees to $10 in veterans benefit proceedings does not violate claimants' Fifth Amendment due process rights absent a showing of probability of error in the proceedings that presence of attorneys would sharply diminish). *See also* United States Dep't of Labor v. Triplett, 494 U.S. 715 (1990) (upholding regulations under the Black Lung Benefits Act prohibiting contractual fee arrangements).

[31] Lowe v. Kansas, 163 U.S. 81 (1896). Consider, however, the possible bearing of *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966) (statute allowing jury to impose costs on acquitted defendant, but containing no standards to guide discretion, violates due process).

[32] Yazoo & Miss. R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912); Chicago & Northwestern Ry. v. Nye Schneider Fowler Co., 260 U.S. 35, 43–44 (1922); Hartford Life Ins. Co. v. Blincoe, 255 U.S. 129, 139 (1921); Life & Casualty Co. v. McCray, 291 U.S. 566 (1934).

[33] Coffey v. Harlan County, 204 U.S. 659, 663, 665 (1907).

[34] National Union v. Arnold, 348 U.S. 37 (1954) (the judgment debtor had refused to post a supersedeas bond or to comply with reasonable orders designed to safeguard the value of the judgment pending decision on appeal).

[35] Pizitz Co. v. Yeldell, 274 U.S. 112, 114 (1927).

[36] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

[37] *Id.* (finding sufficient constraints on jury discretion in jury instructions and in post-verdict review). *See also* Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (striking down a provision of the Oregon Constitution limiting judicial review of the amount of punitive damages awarded by a jury).

[38] Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 260 (1989).

[39] BMW of North America, Inc. v. Gore, 517 U.S. 559, 568 (1996) (holding that a $2 million judgment for failing to disclose to a purchaser that a new car had been repainted was grossly excessive in relation to the state's interest, as only a few of the 983 similarly repainted cars had been sold in that same state); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (holding that a $145 million judgment for refusing to settle an insurance claim was

between the punitive award and plaintiff's actual or potential harm, and the legislative sanctions provided for comparable misconduct.[40] In addition, the Due Process Clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties."[41]

Amdt14.S1.5.4.8 Statutes of Limitations and Procedural Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

A statute of limitations is a law that imposes a time limit for bringing a case; once the statute of limitations expires, a person cannot pursue even an otherwise valid claim. The Supreme Court has imposed few due process limits on state laws that create, alter, or eliminate statutes of limitations for civil suits.[1]

The Court has held that a statute of limitations does not deprive a person of property without due process of law, unless it applies to an existing right of action in a way that unreasonably limits the opportunity to enforce the right by suit. By the same token, a state may shorten an existing statute of limitations, provided that the state allows a reasonable time for bringing an action after the passage of the statute and before the bar takes effect. What constitutes a reasonable period depends on the nature of the right and the particular circumstances.[2]

A state may also extend the time in which civil suits may be brought in its courts and may even entirely remove a statutory bar to the commencement of litigation. The Court has held that the repeal or extension of a statute of limitations does not impose an unconstitutional

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excessive as it included consideration of conduct occurring in other states). *But see* TXO Corp. v. Alliance Resources, 509 U.S. 443 (1993) (punitive damages of $10 million for slander of title does not violate the Due Process Clause even though the jury awarded actual damages of only $19,000).

[40] *BMW*, 517 U.S. at 574–75 (1996). The Court has suggested that awards exceeding a single-digit ratio between punitive and compensatory damages would be unlikely to pass scrutiny under due process, and that the greater the compensatory damages, the less this ratio should be. *Campbell*, 538 U.S. at 424 (2003).

[41] Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (punitive damages award overturned because trial court had allowed jury to consider the effect of defendant's conduct on smokers who were not parties to the lawsuit).

[1] By contrast, the Supreme Court has held that a legislature may not retroactively reimpose criminal liability after it the limitations period has lapsed. *See* ArtI.S9.C3.3.6 Imposing Criminal Liability and Ex Post Facto Laws.

[2] Wheeler v. Jackson, 137 U.S. 245, 258 (1890); Kentucky Union Co. v. Kentucky, 219 U.S. 140, 156 (1911). *Cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982) (discussing discretion of states in erecting reasonable procedural requirements for triggering or foreclosing the right to an adjudication). Thus, in a 1911 case, the Court held that where a receiver for property is appointed 13 years after the disappearance of the owner and notice is made by publication, it is not a violation of due process to bar actions relative to that property one year after such appointment. Blinn v. Nelson, 222 U.S. 1 (1911). The Court likewise found no constitutional violation when a state enacted a law prohibiting all actions to contest tax deeds that had been of record for two years unless such actions were brought within six months after passage of the law. Turner v. New York, 168 U.S. 90, 94 (1897). In another case, the Court upheld a statute providing that, when a person had been in possession of wild lands under a recorded deed continuously for twenty years and paid taxes thereon, while the former owner paid nothing, no action to recover such land shall be entertained unless commenced within 20 years, or before the expiration of five years following enactment of said provision. Soper v. Lawrence Brothers, 201 U.S. 359 (1906). Similarly, an amendment to a workmen's compensation act, limiting to three years the time within which a case may be reopened for readjustment of compensation on account of aggravation of a disability, does not deny due process to one who sustained his injury at a time when the statute contained no limitation. Mattson v. Department of Labor, 293 U.S. 151, 154 (1934).

deprivation of property on a debtor-defendant who previously might have invoked the statute as a defense. The Court explained, "A right to defeat a just debt by the statute of limitation . . . [is not] a vested right" protected by the Constitution.[3] Accordingly, the Court has upheld against Fourteenth Amendment challenges to the revival of an action on an implied obligation to pay a child for the use of her property,[4] a suit to recover the purchase price of securities sold in violation of a Blue Sky Law,[5] and a right of an employee to seek an additional award out of a state-administered fund on account of the aggravation of a former injury.[6]

However, when a right of action to recover property has been barred by a statute of limitations and title as well as real ownership have become vested in the possessor, the Court has held that any later act removing or repealing the statute of limitations would be void as attempting an arbitrary transfer of title.[7] The Court has also held unconstitutional the application of a statute of limitation to extend a period that parties to a contract agreed should limit their right to remedies under the contract.[8]

Amdt14.S1.5.4.9 Burdens of Proof and Presumptions

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

State legislatures have the authority to establish presumptions and rules respecting the burden of proof in litigation.[1] However, the Supreme Court has held that the Due Process Clause forbids the deprivation of liberty or property upon application of a standard of proof too lax to ensure reasonably accurate fact-finding. The Court has opined that "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact-finding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"[2] With respect to presumptions, the Court has held that a presumption does not violate the Due Process Clause as long as it is not unreasonable and is not conclusive. A statute creating a presumption that is entirely arbitrary and operates to deny a fair opportunity to rebut it or to

[3] Campbell v. Holt, 115 U.S. 620, 623, 628 (1885).

[4] *Id.*

[5] Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945).

[6] Gange Lumber Co. v. Rowley, 326 U.S. 295 (1945).

[7] *Campbell*, 115 U.S. at 623. *See also* Stewart v. Keyes, 295 U.S. 403, 417 (1935).

[8] Home Ins. Co. v. Dick, 281 U.S. 397, 398 (1930). ("When the parties to a contract have expressly agreed upon a time limit on their obligation, a statute which invalidates . . . [said] agreement and directs enforcement of the contract after . . . [the agreed] time has expired unconstitutionally imposes a burden in excess of that contracted.").

[1] Hawkins v. Bleakly, 243 U.S. 210, 214 (1917); James-Dickinson Co. v. Harry, 273 U.S. 119, 124 (1927). Congress's power to provide rules of evidence and standards of proof in the federal courts stems from its power to create such courts. Vance v. Terrazas, 444 U.S. 252, 264–67 (1980); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 31 (1976). In the absence of congressional guidance, the Court has determined the evidentiary standard in certain statutory actions. Nishikawa v. Dulles, 356 U.S. 129 (1958); Woodby v. INS, 385 U.S. 276 (1966).

[2] Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

present facts pertinent to a defense is void.[3] On the other hand, the Court has sustained legislation declaring that the proof of one fact or group of facts shall constitute prima facie evidence of a main or ultimate fact if there is a rational connection between what is proved and what is inferred.[4]

Applying the test laid out in *Mathews v. Eldridge* to determine what process is due in a particular situation,[5] the Court has held that a standard at least as stringent as "clear and convincing" evidence is required in a civil proceeding to commit an individual involuntarily to a state mental hospital for an indefinite period.[6] Similarly, because parents' interest in retaining custody of their children is fundamental, the state may not terminate parental rights by a preponderance of the evidence—the burden of proof to award money damages in an ordinary civil action—but must prove that parents are unfit by clear and convincing evidence.[7] Furthermore, parental unfitness must be established affirmatively and may not be assumed based on some characteristic of the parent.[8]

For a time, the Court used what it called the "irrebuttable presumption doctrine" to curb legislative efforts to confer a benefit or to impose a detriment based on presumed characteristics of a person.[9] In *Stanley v. Illinois*, the Court found invalid a construction of the state statute that presumed unmarried fathers to be unfit parents and prevented them from objecting to state wardship.[10] The Court likewise struck down mandatory maternity leave rules requiring pregnant teachers to take unpaid maternity leave at a set time prior to the date of the expected births of their babies based on a conclusive presumption that every pregnant teacher who reaches a particular point of pregnancy becomes physically incapable of teaching.[11]

In another case, the Court opined that a state may require that nonresidents pay higher tuition charges at state colleges than residents and assumed that a durational residency requirement would be permissible as a prerequisite to qualify for the lower tuition, but held it was impermissible for the state to presume conclusively that because the legal address of a student was outside the state at the time of application or at some point during the preceding year he was a nonresident as long as he remained a student. Instead, the Due Process Clause required that the student have the opportunity to show that he is or has become a bona fide

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[3] Presumptions were voided in Bailey v. Alabama, 219 U.S. 219 (1911) (anyone breaching personal services contract guilty of fraud); Manley v. Georgia, 279 U.S. 1 (1929) (every bank insolvency deemed fraudulent); Western & Atlantic R.R. v. Henderson, 279 U.S. 639 (1929) (collision between train and auto at grade crossing constitutes negligence by railway company); Carella v. California, 491 U.S. 263 (1989) (conclusive presumption of theft and embezzlement upon proof of failure to return a rental vehicle).

[4] Presumptions sustained include Hawker v. New York, 170 U.S. 189 (1898) (person convicted of felony unfit to practice medicine); Hawes v. Georgia, 258 U.S. 1 (1922) (person occupying property presumed to have knowledge of still found on property); Bandini Co. v. Superior Court, 284 U.S. 8 (1931) (release of natural gas into the air from well presumed wasteful); Atlantic Coast Line R.R. v. Ford, 287 U.S. 502 (1933) (rebuttable presumption of railroad negligence for accident at grade crossing). *See also* Morrison v. California, 291 U.S. 82 (1934).

[5] Mathews v. Eldridge, 424 U.S. 319 (1976); *see also* Amdt14.S1.5.4.2 Due Process Test in Mathews v. Eldridge.

[6] Addington v. Texas, 441 U.S. 418 (1979).

[7] Santosky v. Kramer, 455 U.S. 745 (1982). The Court has upheld application of the traditional preponderance of the evidence standard in paternity actions. Rivera v. Minnich, 483 U.S. 574 (1987).

[8] Stanley v. Illinois, 405 U.S. 645 (1972) (presumption that unwed fathers are unfit parents). *Cf.* Michael H. v. Gerald D., 491 U.S. 110 (1989) (statutory presumption that a child born to a married woman living with her husband is the child of the husband defeats the right of the child's biological father to establish paternity).

[9] The approach was not unprecedented, some older cases having voided tax legislation that presumed conclusively an ultimate fact. Schlesinger v. Wisconsin, 270 U.S. 230 (1926) (deeming any gift made by decedent within six years of death to be a part of estate denies estate's right to prove gift was not made in contemplation of death); Heiner v. Donnan, 285 U.S. 312 (1932); Hoeper v. Tax Comm'n, 284 U.S. 206 (1931).

[10] 405 U.S. 645 (1972).

[11] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

resident entitled to the lower tuition.[12] Similarly, the Court invalidated a food stamp program provision making ineligible any household with a member age eighteen or over who was claimed as a dependent for federal income tax purposes the prior tax year by a person not himself eligible for stamps, holding that the provision created a conclusive presumption that fairly often could be shown to be false if evidence could be presented.[13] The rule that emerged from these cases was that the legislature may not presume the existence of a decisive characteristic based on a given set of facts, unless it can be shown that the defined characteristics do in fact encompass all persons and only those persons that the legislature intended to reach.[14]

The Court limited the irrebuttable presumption doctrine in the 1975 case *Weinberger v. Salfi*, upholding a Social Security provision requiring that the spouse of a covered wage earner must have been married to the wage earner for at least nine months prior to his death in order to receive benefits as a spouse.[15] Purporting to approve but distinguish prior cases, the Court imported traditional equal protection analysis into considerations of due process challenges to statutory classifications.[16] The Court opined that extension of the prior cases to government entitlement classifications, such as the Social Security Act qualification standard before it, would "turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution."[17]

There is some uncertainty about the viability and scope of the irrebuttable presumption doctrine since *Salfi*, and the doctrine has rarely appeared on the Court's docket in recent years.[18] In *Turner v. Department of Employment Security*, decided after *Salfi*, the Court invalidated a statute making pregnant women ineligible for unemployment compensation for a period extending from twelve weeks before the expected birth until six weeks after childbirth.[19] By contrast, in *Usery v. Turner Elkhorn Mining Co.*, the Court held that a provision granting benefits to miners "irrebuttably presumed" to be disabled is merely a way of giving benefits to all those with the condition triggering the presumption.[20]

Amdt14.S1.5.5 Criminal Cases

Amdt14.S1.5.5.1 Overview of Procedural Due Process in Criminal Cases

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or*

[12] Vlandis v. Kline, 412 U.S. 441 (1973).

[13] Department of Agriculture v. Murry, 413 U.S. 508 (1973).

[14] The doctrine in effect afforded the Court the opportunity to choose between resort to the Equal Protection Clause or to the Due Process Clause in judging the validity of certain classifications. Thus, on the same day the Court decided *Murry*, it struck down a similar food stamp qualification on equal protection grounds. Department of Agriculture v. Moreno, 413 U.S. 528 (1973).

[15] 422 U.S. 749 (1975).

[16] *Id.* at 768–70, 775–77, 785.

[17] *Id.* at 772.

[18] *Cf.* Elkins v. Moreno, 435 U.S. 647, 660–61 (1978) (declining to reach the question of whether to overrule or further limit Vlandis v. Kline, 412 U.S. 441 (1973), in light of *Salfi*, pending resolution of potentially dispositive state law issue).

[19] 423 U.S. 44 (1975)

[20] 428 U.S. 1 (1976); *see also* Califano v. Boles, 443 U.S. 282, 284–85 (1979) (Congress must fix general categorization; case-by-case determination would be prohibitively costly).

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Overview of Procedural Due Process in Criminal Cases

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourteenth Amendment's guarantee of procedural due process affects procedures in state criminal cases in two ways. First, through the doctrine of incorporation, the Supreme Court has held that the Due Process Clause applies to the states nearly all the criminal procedural guarantees of the Bill of Rights, including those of the Fourth, Fifth, Sixth, and Eighth Amendments.[1] Second, the Court has held that the Due Process Clause prohibits government practices and policies that violate precepts of fundamental fairness, even if they do not violate specific guarantees of the Bill of Rights.[2] The procedural due process protections of the Fourteenth Amendment are comparable in scope to the limitations that the Fifth Amendment imposes on federal criminal proceedings.[3]

The Court has explained, "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. . . . What is fair in one set of circumstances may be an act of tyranny in others."[4] In assessing whether a challenged criminal procedure denies a person procedural due process, the Court generally considers whether the practice violates "a fundamental principle of liberty and justice which inheres in the very idea of a free government and is the inalienable right of a citizen of such government."[5] The Court has also held that, "as applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice," and that to find a denial of due

[1] Those provisions guarantee rights of criminal suspects and prisoners including the right to counsel, the right to speedy and public trial, the right to be free from use of unlawfully seized evidence and unlawfully obtained confessions, and the right not to be subjected to cruel and unusual punishments. *See* Amdt14.S1.4.3 Modern Doctrine on Selective Incorporation of Bill of Rights.

[2] For instance, *In re* Winship, 397 U.S. 358 (1970), held that, despite the absence of a specific constitutional provision requiring proof beyond a reasonable doubt in criminal cases, such proof is required by due process. *See also, e.g.*, United States v. Bryant, 136 S. Ct. 1954, 1966 (2016) (holding that principles of due process did not prevent a defendant's prior uncounseled convictions in tribal court from being used as the basis for a sentence enhancement, as those convictions complied with the Indian Civil Rights Act, which itself contained requirements that ensure the reliability of tribal-court convictions); Hicks v. Oklahoma, 447 U.S. 343 (1980) (where sentencing enhancement scheme for habitual offenders found unconstitutional, defendant's sentence cannot be sustained, even if sentence falls within range of unenhanced sentences); Sandstrom v. Montana, 442 U.S. 510 (1979) (conclusive presumptions in jury instruction may not be used to shift burden of proof of an element of crime to defendant); Kentucky v. Whorton, 441 U.S. 786 (1979) (fairness of failure to give jury instruction on presumption of innocence evaluated under totality of circumstances); Taylor v. Kentucky, 436 U.S. 478 (1978) (requiring, upon defense request, jury instruction on presumption of innocence); Patterson v. New York, 432 U.S. 197 (1977) (defendant may be required to bear burden of affirmative defense); Henderson v. Kibbe, 431 U.S. 145 (1977) (sufficiency of jury instructions); Estelle v. Williams, 425 U.S. 501 (1976) (a state cannot compel an accused to stand trial before a jury while dressed in identifiable prison clothes); Mullaney v. Wilbur, 421 U.S. 684 (1975) (defendant may not be required to carry the burden of disproving an element of a crime for which he is charged); Wardius v. Oregon, 412 U.S. 470 (1973) (defendant may not be held to rule requiring disclosure to prosecution of an alibi defense unless defendant is given reciprocal discovery rights against the state); Chambers v. Mississippi, 410 U.S. 284 (1973) (defendant may not be denied opportunity to explore confession of third party to crime for which defendant is charged).

[3] While the following essays focus primarily on Supreme Court litigation challenging state criminal procedures, some of the cases cited discuss federal criminal procedures. *See also* Amdt5.6.1 Overview of Due Process Procedural Requirements. The doctrine of incorporation applies only to state government action in criminal cases, because the Bill of Rights applies directly to the federal government without any need for incorporation.

[4] Snyder v. Massachusetts, 291 U.S. 97, 116, 117 (1934). *See also* Buchalter v. New York, 319 U.S. 427, 429 (1943).

[5] Twining v. New Jersey, 211 U.S. 78, 106 (1908). The Court has also phrased the question as whether a claimed right is "implicit in the concept of ordered liberty," whether it "partakes of the very essence of a scheme of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), or whether it "offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses," Rochin v. California, 342 U.S. 165, 169 (1952).

process the Court "must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."[6]

Procedural due process analysis contains a historical component, as Supreme Court cases "have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country."[7] The Court thus asks "whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty."[8]

Amdt14.S1.5.5.2 Impartial Judge and Jury

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Bias or prejudice either inherent in the structure of a trial system or imposed by external events can infringe a person's right to a fair trial. Thus, as in the civil context,[1] procedural due process requires criminal cases to be overseen by an unbiased judge and decided by an impartial jury.

For instance, in *Tumey v. Ohio*, the Supreme Court held that it violated due process for a judge to receive compensation out of fines imposed on convicted defendants, and no compensation (beyond his salary) "if he does not convict those who are brought before him."[2] In other cases, the Court has found that contemptuous behavior in court may affect the impartiality of the presiding judge, so as to disqualify the judge from citing and sentencing the contemnors.[3]

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[6] Lisenba v. California, 314 U.S. 219, 236 (1941).

[7] Duncan v. Louisiana, 391 U.S. 145, 149–50 n.14 (1968).

[8] *Id.*

[1] *See* Amdt14.S1.5.4.5 Impartial Decision Maker.

[2] 273 U.S. 510, 520 (1927). *See also* Ward v. Village of Monroeville, 409 U.S. 57 (1972). *But see* Dugan v. Ohio, 277 U.S. 61 (1928). Similarly, in *Rippo v. Baker*, the Supreme Court vacated the Nevada Supreme Court's denial of a convicted petitioner's application for post-conviction relief based on the trial judge's failure to recuse himself. 137 S. Ct. 905 (2017). During Rippo's trial, the trial judge was the target of a federal bribery probe by the same district attorney's office that was prosecuting Rippo. Rippo moved for the judge's disqualification under the Fourteenth Amendment's Due Process Clause, arguing the "judge could not impartially adjudicate a case in which one of the parties was criminally investigating him." *Id.* at 906. After the judge was indicted on federal charges, a different judge subsequently assigned to the case denied Rippo's motion for a new trial. In vacating the Nevada Supreme Court's decision, the Supreme Court noted that "[u]nder our precedents, the Due Process Clause may sometimes demand recusal even when a judge 'ha[s] no actual bias.' Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." *Id.* at 907 (quoting Aetna Life Ins. Co. v. LaVoie, 475 U.S. 813, 825 (1986); Withrow v. Larkin, 421 U.S. 35 (1975)). Bias or prejudice of an appellate judge can also deprive a litigant of due process. Aetna Life Ins. Co. v. LaVoie, 475 U.S. 813 (1986) (failure of state supreme court judge with pecuniary interest—a pending suit on an indistinguishable claim—to recuse).

[3] Mayberry v. Pennsylvania, 400 U.S. 455, 464 (1971) ("it is generally wise where the marks of unseemly conduct have left personal stings [for a judge] to ask a fellow judge to take his place"); Taylor v. Hayes, 418 U.S. 488, 503 (1974) (where "marked personal feelings were present on both sides," a different judge should preside over a contempt hearing). *But see* Ungar v. Sarafite, 376 U.S. 575 (1964) ("We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to authority."). In the context of alleged contempt before a

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The Court has also found due process violations when a biased or otherwise partial juror participated in a criminal trial, although there is no presumption that all jurors with a potential bias are in fact prejudiced.[4] Public hostility toward a defendant that intimidates a jury is a classic due process violation.[5] More recently, concern with the impact of prejudicial publicity upon jurors and potential jurors has caused the Court to instruct trial courts that they should be vigilant to guard against such prejudice and to curb both the publicity and the jury's exposure to it.[6] For instance, the Supreme Court has raised concerns about the impact on a jury of televising trials, though ultimately the Court has held that the Constitution does not altogether preclude televising state criminal trials.[7]

The way a criminal defendant appears in court may also raise due process concerns about jury impartiality. The Court has held that it violates due process when the accused is compelled to stand trial before a jury while dressed in identifiable prison clothes, because it may impair the presumption of innocence in the minds of the jurors.[8] Likewise, Court has held that the use of visible physical restraints, such as shackles, leg irons, or belly chains, in front of a jury, raises due process concerns. In *Deck v. Missouri*, the Court noted a rule dating back to British common law against bringing a defendant to trial in irons, and a modern day recognition that such measures should be used "only in the presence of a special need."[9] The Court found that the use of visible restraints during the guilt phase of a trial undermines the presumption of innocence, limits the ability of a defendant to consult with counsel, and

judge acting as a one-man grand jury, the Court reversed criminal contempt convictions, saying: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re* Murchison, 349 U.S. 133, 136 (1955).

[4] Ordinarily, the proper avenue of relief is a hearing at which the juror may be questioned and the defense afforded an opportunity to prove actual bias. Smith v. Phillips, 455 U.S. 209 (1982) (juror had job application pending with prosecutor's office during trial). *See also* Remmer v. United States, 347 U.S. 227 (1954) (bribe offer to sitting juror); Dennis v. United States, 339 U.S. 162, 167–72 (1950) (government employees on jury). But, a trial judge's refusal to question potential jurors about the contents of news reports to which they had been exposed did not violate the defendant's right to due process, it being sufficient that the judge on voir dire asked the jurors whether they could put aside what they had heard about the case, listen to the evidence with an open mind, and render an impartial verdict. Mu'Min v. Virginia, 500 U.S. 415 (1991). Nor is it a denial of due process for the prosecution, after a finding of guilt, to call the jury's attention to the defendant's prior criminal record, if the jury has been given a sentencing function to increase the sentence that would otherwise be given under a recidivist statute. Spencer v. Texas, 385 U.S. 554 (1967). For discussion of the requirements of jury impartiality about capital punishment, see discussion under Sixth Amendment, *supra*.

[5] Frank v. Mangum, 237 U.S. 309 (1915); Moore v. Dempsey, 261 U.S. 86 (1923).

[6] Sheppard v. Maxwell, 384 U.S. 333 (1966); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); *But see* Stroble v. California, 343 U.S. 181 (1952); Murphy v. Florida, 421 U.S. 794 (1975).

[7] Initially, the Court struck down televising of certain trials on the grounds that the harmful potential effect on the jurors was substantial, the testimony presented at trial may be distorted by the multifaceted influence of television upon the conduct of witnesses, the judge's ability to preside over the trial and guarantee fairness is considerably encumbered to the possible detriment of fairness, and the defendant is likely to be harassed by his television exposure. Estes v. Texas, 381 U.S. 532 (1965). Subsequently, however, in part because of improvements in technology that caused much less disruption of the trial process and in part because of the lack of empirical data showing that the mere presence of the broadcast media in the courtroom necessarily has an adverse effect on the process, the Court has held that due process does not entirely preclude the televising of state criminal trials. Chandler v. Florida, 449 U.S. 560 (1981).

[8] Estelle v. Williams, 425 U.S. 501 (1976). The convicted defendant was denied habeas relief, however, because of failure to object at trial. *But cf.* Holbrook v. Flynn, 475 U.S. 560 (1986) (presence in courtroom of uniformed state troopers serving as security guards was not the same sort of inherently prejudicial situation); Carey v. Musladin, 549 U.S. 70 (2006) (effect on defendant's fair-trial rights of private actors' courtroom conduct—in this case, members of victim's family wearing buttons with the victim's photograph—has never been addressed by the Supreme Court and therefore 18 U.S.C. § 2254(d)(1) precludes habeas relief).

[9] 544 U.S. 622, 626 (2005). In *Illinois v. Allen*, 397 U.S. 337, 344 (1970), the Court stated, in dictum, that "no person should be tried while shackled and gagged except as a last resort."

"affronts the dignity and decorum of judicial proceedings."[10] The Court in *Deck* disapproved of the routine use of visible restraints when a defendant has already been found guilty and a jury is considering the application of the death penalty. The Court explained that such restraints can be used only in special circumstances, such as where a judge has made particularized findings that security or flight risk requires it.[11]

Amdt14.S1.5.5.3 Identification in Pre-Trial Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

In criminal trials, the jury usually decides the reliability and weight to be accorded an eyewitness identification, guided by instructions from the trial judge and subject to judicial authority under the rules of evidence to exclude overly prejudicial or misleading evidence. At times, however, a defendant alleges that an out-of-court identification in the presence of police is so flawed that it is inadmissible as a matter of fundamental justice under the Due Process Clause.[1] These cases most commonly challenge police-arranged procedures such as lineups, showups, and photographic displays,[2] but some challenge identifications with less police involvement.[3]

The Court generally disfavors judicial suppression of eyewitness identifications on due process grounds in lieu of having identification testimony tested in the normal course of the adversarial process.[4] Two elements are required for due process-based suppression. First, law enforcement officers must have participated in an identification process that was both suggestive and unnecessary.[5] Second, the identification procedures must have created a substantial prospect for misidentification. Determination of these elements is made by

[10] *Id.* at 630, 631 (internal quotation marks omitted).

[11] *Id.* at 633.

[1] A hearing by the trial judge on whether an eyewitness identification should be barred from admission is not constitutionally required to be conducted out of the presence of the jury. Watkins v. Sowders, 449 U.S. 341 (1981).

[2] *E.g.*, Manson v. Brathwaite, 432 U.S. 98, 114–17 (1977) (only one photograph provided to witness); Neil v. Biggers, 409 U.S. 188, 196–201 (1972) (showup in which police walked defendant past victim and ordered him to speak); Coleman v. Alabama, 399 U.S. 1 (1970) (lineup); Foster v. California, 394 U.S. 440 (1969) (two lineups, in one of which the suspect was sole participant above average height, and arranged one-on-one meeting between eyewitness and suspect); Simmons v. United States, 390 U.S. 377 (1968) (series of group photographs each of which contained suspect); Stovall v. Denno, 388 U.S. 293 (1967) (suspect brought to witness's hospital room).

[3] Perry v. New Hampshire, 565 U.S. 228 (2012) (prior to being approached by police for questioning, witness by chance happened to see suspect standing in parking lot near police officer; no manipulation by police alleged).

[4] *See Perry*, 565 U.S. at 237–38, 245–47.

[5] The Court stated; "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." *Neil*, 409 U.S. at 198. An identification process can be found to be suggestive regardless of police intent. *Perry*, 565 U.S. at 232 & n.1 (circumstances of identification found to be suggestive but not contrived; no due process relief). The necessity of using a particular procedure depends on the circumstances. *E.g.*, *Stovall*, 388 U.S. 293 (suspect brought handcuffed to sole witness's hospital room where it was uncertain whether witness would survive her wounds).

examining the "totality of the circumstances" of a case.[6] The Court has not recognized any per se rule for excluding an eyewitness identification on due process grounds.[7] Defendants have had difficulty meeting the Court's standards: Only one challenge has been successful.[8]

Amdt14.S1.5.5.4 Plea Bargaining in Pre-Trial Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

A criminal defendant may elect to plead guilty instead of requiring that the prosecution prove him guilty. Often, a defendant who pleads guilty does so as part of a "plea bargain" with the prosecution, where the defendant is guaranteed a lighter sentence or is allowed to plead guilty to a lesser offense.[1] The Supreme Court has held that the government may not structure its system to coerce a guilty plea.[2] However, the Court has upheld guilty pleas that are entered voluntarily, knowingly, and understandingly, even if the defendant pled guilty to obtain an advantage.[3]

The guilty plea and the often concomitant plea bargain are important components of the criminal justice system,[4] and it is permissible for a prosecutor negotiating a plea bargain to require a defendant to forgo his right to a trial in return for escaping additional charges that

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[6] *Neil*, 409 U.S. at 196–201; *Manson*, 432 U.S. at 114–17. The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the suspect at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the suspect, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *See also Stovall*, 388 U.S. 293.

[7] The Court eschewed a per se exclusionary rule in due process cases at least as early as *Stovall*, 388 U.S. at 302. In *Manson*, the Court evaluated application of a per se rule versus the more flexible, ad hoc "totality of the circumstances" rule, and found the latter to be preferable in the interests of deterrence and the administration of justice. 432 U.S. at 111–14. The rule in due process cases differs from the per se exclusionary rule adopted in the *Wade-Gilbert* line of cases on denial of the right to counsel under the Sixth Amendment in post-indictment lineups. Cases refining the *Wade-Gilbert* holdings include *Kirby v. Illinois*, 406 U.S. 682 (1972) (right to counsel inapplicable to post-arrest police station identification made before formal initiation of criminal proceedings; due process protections remain available) and *United States v. Ash*, 413 U.S. 300 (1973) (right to counsel inapplicable at post-indictment display of photographs to prosecution witnesses out of defendant's presence; record insufficient to assess possible due process claim).

[8] Foster v. California, 394 U.S. 440 (1969) ("[T]he pretrial confrontations [between the witness and the defendant] clearly were so arranged as to make the resulting identifications virtually inevitable."). In a limited class of cases, pretrial identifications have been found to be constitutionally objectionable on a basis other than due process. *See* Amdt6.6.3.4 Lineups and Other Identification Situations and Right to Counsel.

[1] There are a number of other reasons why a defendant may be willing to plead guilty. For instance, there may be overwhelming evidence against him.

[2] United States v. Jackson, 390 U.S. 570 (1968). Release-dismissal agreements, pursuant to which the prosecution agrees to dismiss criminal charges in exchange for the defendant's agreement to release his right to file a civil action for alleged police or prosecutorial misconduct, are not per se invalid. Town of Newton v. Rumery, 480 U.S. 386, 394 (1987).

[3] *See* Tollett v. Henderson, 411 U.S. 258, 265–66 (1973); North Carolina v. Alford, 400 U.S. 25, 38 (1970); Parker v. North Carolina, 397 U.S. 790, 795 (1970); McMann v. Richardson, 397 U.S. 759, 771 (1970); Brady v. United States, 397 U.S. 742, 758 (1970).

[4] Blackledge v. Allison, 431 U.S. 63, 71 (1977).

are likely upon conviction to result in a more severe penalty.[5] A defendant who pleads guilty gives up the right to challenge most aspects of the proceeding against him. However, some constitutional challenges may survive a plea if they go to "'the very power of the State' to prosecute the defendant."[6] Moreover, a prosecutor denies due process if he penalizes the assertion of a right or privilege by the defendant by charging more severely or recommending a longer sentence.[7]

In accepting a guilty plea, a court must inquire whether the defendant is pleading voluntarily, knowingly, and understandingly.[8] The Court has also held that "the adjudicative element" inherent in accepting a guilty plea must include safeguards "to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that, when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."[9]

Amdt14.S1.5.5.5 Guilt Beyond a Reasonable Doubt

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[5] Bordenkircher v. Hayes, 434 U.S. 357 (1978); *see also* United States v. Goodwin, 457 U.S. 368 (1982) (after defendant was charged with a misdemeanor, refused to plead guilty and sought a jury trial in district court, the government obtained a four-count felony indictment and conviction).

[6] Class v. United States, 138 S. Ct. 798, 809 (2018) (quoting Blackledge v. Perry, 417 U.S. 21, 30 (1974)) (holding guilty plea did not bar defendant from challenging the constitutionality of the statute of conviction on direct appeal). *See also* Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (per curiam) (holding guilty plea did not waive defendant's claim on direct appeal that double jeopardy prohibited his prosecution); Blackledge v. Perry, 417 U.S. 21, 31 (1974). (holding guilty plea did not foreclose defendant in habeas challenge from arguing that due process prohibited his prosecution). The state can permit pleas of guilty in which the defendant reserves the right to raise constitutional questions on appeal, and federal habeas courts will honor that arrangement. Lefkowitz v. Newsome, 420 U.S. 283, 293 (1975).

[7] Blackledge v. Perry, 417 U.S. 21. The defendant in *Blackledge* was convicted in an inferior court of a misdemeanor. He had a right to a de novo trial in superior court, but when he exercised the right the prosecutor obtained a felony indictment based upon the same conduct. The distinction the Court drew between this case and *Bordenkircher* and *Goodwin* is that of pretrial conduct, in which vindictiveness is not likely, and post-trial conduct, in which vindictiveness is more likely and is not permitted. *Accord*, Thigpen v. Roberts, 468 U.S. 27 (1984). The distinction appears to represent very fine line drawing, but it appears to be one the Court is committed to.

[8] Boykin v. Alabama, 395 U.S. 238 (1969). In *Henderson v. Morgan*, 426 U.S. 637 (1976), the Court held that a defendant charged with first degree murder who elected to plead guilty to second degree murder had not voluntarily, in the constitutional sense, entered the plea because neither his counsel nor the trial judge had informed him that an intent to cause the death of the victim was an essential element of guilt in the second degree; consequently no showing was made that he knowingly was admitting such intent. The Court stated: "A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving . . . or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Id.* at 645 n.13. However, this does not mean that a court accepting a guilty plea must explain all the elements of a crime, as it may rely on counsel's representations to the defendant. Bradshaw v. Stumpf, 545 U.S. 175 (2005) (where defendant maintained that shooting was done by someone else, guilty plea to aggravated manslaughter was still valid, as such charge did not require defendant to be the shooter). *See also* Blackledge v. Allison, 431 U.S. 63 (1977) (defendant may collaterally challenge guilty plea where defendant had been told not to allude to existence of a plea bargain in court, and such plea bargain was not honored).

[9] Santobello v. New York, 404 U.S. 257, 262 (1971). Defendant and a prosecutor reached agreement on a guilty plea in return for no sentence recommendation by the prosecution. At the sentencing hearing months later, a different prosecutor recommended the maximum sentence, and that sentence was imposed. The Court vacated the judgment, holding that the prosecutor's entire staff was bound by the promise. Prior to the plea, however, the prosecutor may withdraw his first offer, and a defendant who later pled guilty after accepting a second, less attractive offer has no right to enforcement of the first agreement. Mabry v. Johnson, 467 U.S. 504 (1984).

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Absent a guilty plea,[1] the Due Process Clause requires proof beyond a reasonable doubt before a person may be convicted of a crime. The reasonable doubt standard is closely related to the rule that a defendant is presumed innocent unless proven guilty.[2] These rules help to ensure a defendant a fair trial[3] and require that a jury consider a case solely on the evidence.[4] The Supreme Court has explained:

> The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."[5]

For many years, the Court presumed that "reasonable doubt" was the proper standard for criminal cases.[6] However, because the standard was so widely accepted, it was not until 1970 that the Court expressly held that due process required the standard. That year, the Court held in *In re Winship* that the Due Process Clauses of the Fifth and Fourteenth Amendments

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[1] *See* Amdt14.S1.5.5.4 Plea Bargaining in Pre-Trial Process.

[2] The presumption of innocence has been central to a number of Supreme Court cases. Under some circumstances, it is a violation of due process and reversible error to fail to instruct the jury that the defendant is entitled to a presumption of innocence, although the defendant bears a heavy burden to show that an erroneous instruction or the failure to give a requested instruction tainted his conviction. Taylor v. Kentucky, 436 U.S. 478 (1978). However, an instruction on the presumption of innocence need not be given in every case. Kentucky v. Whorton, 441 U.S. 786 (1979) (reiterating that courts must look to the totality of the circumstances in order to determine if failure to so instruct denied due process). The circumstances emphasized in *Taylor* included skeletal instructions on burden of proof combined with the prosecutor's remarks in his opening and closing statements inviting the jury to consider the defendant's prior record and his indictment in the present case as indicating guilt. *See also* Sandstrom v. Montana, 442 U.S. 510 (1979) (instructing jury trying person charged with "purposely or knowingly" causing victim's death that "law presumes that a person intends the ordinary consequences of his voluntary acts" denied due process because jury could have treated the presumption as conclusive or as shifting burden of persuasion and in either event state would not have carried its burden of proving guilt). *See also* Cupp v. Naughten, 414 U.S. 141 (1973); Henderson v. Kibbe, 431 U.S. 145, 154–55 (1977). For other cases applying *Sandstrom*, see Francis v. Franklin, 471 U.S. 307 (1985) (contradictory but ambiguous instruction not clearly explaining state's burden of persuasion on intent does not erase *Sandstrom* error in earlier part of charge); Rose v. Clark, 478 U.S. 570 (1986) (*Sandstrom* error can in some circumstances constitute harmless error under principles of Chapman v. California, 386 U.S. 18 (1967)); Middleton v. McNeil, 541 U.S. 433 (2004) (state courts could assume that an erroneous jury instruction was not reasonably likely to have misled a jury where other instructions made correct standard clear). Similarly, improper arguments by a prosecutor do not necessarily constitute "plain error," and a reviewing court may consider in the context of the entire record of the trial the trial court's failure to redress such error in the absence of contemporaneous objection. United States v. Young, 470 U.S. 1 (1985).

[3] *E.g.*, Deutch v. United States, 367 U.S. 456, 471 (1961). *See also* Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam) (jury instruction that explains "reasonable doubt" as doubt that would give rise to a "grave uncertainty," as equivalent to a "substantial doubt," and as requiring a "moral certainty," suggests a higher degree of certainty than is required for acquittal, and therefore violates the Due Process Clause). *But see* Victor v. Nebraska, 511 U.S. 1 (1994) (considered as a whole, jury instructions that define "reasonable doubt" as requiring a "moral certainty" or as equivalent to "substantial doubt" did not violate due process because other clarifying language was included.)

[4] Holt v. United States, 218 U.S. 245 (1910); Agnew v. United States, 165 U.S. 36 (1897). These cases overturned *Coffin v. United States*, 156 U.S. 432, 460 (1895), in which the Court held that the presumption of innocence was evidence from which the jury could find a reasonable doubt.

[5] *In re* Winship, 397 U.S. 358, 363 (1970) (quoting *Coffin*, 156 U.S. at 453). Justice John Marshall Harlan's concurrence in *Winship* proceeded on the basis that, because there is likelihood of error in any system of reconstructing past events, the error of convicting the innocent should be reduced to the greatest extent possible through the use of the reasonable doubt standard. *Id.* at 368.

[6] Miles v. United States, 103 U.S. 304, 312 (1881); Davis v. United States, 160 U.S. 469, 488 (1895); *Holt*, 218 U.S. at 253; Speiser v. Randall, 357 U.S. 513, 525–26 (1958).

protect the accused against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[7]

The Court had long held under the Due Process Clause that it must set aside convictions that are supported by no evidence at all.[8] However, the holding in *Winship* left open the question of whether appellate courts reviewing criminal convictions should weigh the sufficiency of trial evidence. In the 1979 case *Jackson v. Virginia*, the Court held that federal courts, on direct appeal of federal convictions or collateral review of state convictions, must satisfy themselves that the evidence on the record could reasonably support a finding of guilt beyond a reasonable doubt.[9] The appropriate inquiry is not whether the reviewing court itself believes the evidence at the trial established guilt beyond a reasonable doubt, but whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[10]

Due process requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged.[11] Thus, the Court held in *Mullaney v. Wilbur* that it was unconstitutional to require a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation" in order to reduce his offense from homicide to manslaughter.[12] The Court indicated that a balancing-of-interests test should be used to determine when the Due Process Clause required the prosecution to carry the burden of proof and when some part of the burden might be shifted to the defendant. The decision called into question practices in many states under which some burdens of persuasion were borne by the defense, and raised the prospect that the prosecution must bear all burdens of persuasion—a significant task given the large numbers of affirmative defenses.[13]

In a subsequent case, however, the Court rejected the argument that *Mullaney* means that the prosecution must negate an insanity defense.[14] Later, in *Patterson v. New York*, the Court upheld a state statute that required a defendant asserting extreme emotional disturbance as

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[7] *Winship*, 397 U.S. at 364. *See* Estelle v. Williams, 425 U.S. 501, 503 (1976); Henderson v. Kibbe, 431 U.S. 145, 153 (1977); Ulster County Court v. Allen, 442 U.S. 140, 156 (1979); Sandstrom v. Montana, 442 U.S. 510, 520–24 (1979). *See also* Sullivan v. Louisiana, 508 U.S. 275 (1993) (Sixth Amendment guarantee of trial by jury requires a jury verdict of guilty beyond a reasonable doubt). On the interrelationship of the reasonable doubt burden and defendant's entitlement to a presumption of innocence, see Taylor v. Kentucky, 436 U.S. 478, 483–86 (1978), and Kentucky v. Whorton, 441 U.S. 786 (1979).

[8] Thompson v. City of Louisville, 362 U.S. 199 (1960); Garner v. Louisiana, 368 U.S. 157 (1961); Taylor v. Louisiana, 370 U.S. 154 (1962); Barr v. City of Columbia, 378 U.S. 146 (1964); Johnson v. Florida, 391 U.S. 596 (1968). *See also* Chessman v. Teets, 354 U.S. 156 (1957).

[9] 443 U.S. 307 (1979).

[10] 443 U.S. at 316, 18–19. *See also* Musacchio v. United States, 136 S. Ct. 709 (2016) ("When a jury finds guilt after being instructed on all elements of the charged crime plus one more element, the fact that the government did not introduce evidence of the additional element—which was not required to prove the offense, but was included in the erroneous jury instruction—does not implicate the principles that sufficiency review protects."); Griffin v. United States, 502 U.S. 46 (1991) (general guilty verdict on a multiple-object conspiracy need not be set aside if the evidence is inadequate to support conviction as to one of the objects of the conviction, but is adequate to support conviction as to another object).

[11] Bunkley v. Florida, 538 U.S. 835 (2003); Fiore v. White, 528 U.S. 23 (1999). These cases both involved defendants convicted under state statutes that were subsequently interpreted in a way that would have precluded their conviction. The Court remanded the cases to determine if the new interpretation was in effect at the time of the previous convictions, in which case the convictions would violate due process.

[12] 421 U.S. 684 (1975). *See also* Sandstrom v. Montana, 442 U.S. 510, 520–24 (1979).

[13] The general notion of "burden of proof" can be divided into the "burden of production" (providing probative evidence on a particular issue) and the "burden of persuasion" (persuading the factfinder with respect to an issue by a standard such as proof beyond a reasonable doubt). *Mullaney*, 421 U.S. at 695 n.20.

[14] Rivera v. Delaware, 429 U.S. 877 (1976) (dismissing as not presenting a substantial federal question an appeal from a holding that *Mullaney* did not prevent a state from placing on the defendant the burden of proving insanity by a preponderance of the evidence). *See* Patterson v. New York, 432 U.S. 197, 202–05 (1977) (explaining the import of *Rivera*). Justice William Rehnquist and Chief Justice Warren Burger, concurring in *Mullaney*, had argued that the

an affirmative defense to murder to prove the defense by a preponderance of the evidence.[15] According to the Court, the constitutional deficiency in *Mullaney* was that the statute made malice an element of the offense, permitted malice to be presumed upon proof of the other elements, and then required the defendant to prove the absence of malice. In *Patterson*, by contrast, the statute obligated the state to prove each element of the offense (including death, intent to kill, and causation) beyond a reasonable doubt, while allowing the defendant to prove by preponderance of the evidence an affirmative defense that would reduce the degree of the offense.[16]

Another distinction that can substantially affect the prosecution's burden is whether a fact to be proven in a criminal trial is an element of a crime or a factor in determining a convicted offender's sentence. Although a criminal conviction is generally established by a jury using the "beyond a reasonable doubt" standard, sentencing factors are generally evaluated by a judge using few evidentiary rules and under the more lenient "preponderance of the evidence standard." The Court has taken a formalistic approach to this issue, allowing states to designate which facts fall under which of these two categories. For instance, the Court has held that a state may designate as a sentencing factor the question whether a defendant "visibly possessed a gun" during a crime, allowing a judge to resolve the question based on the preponderance of evidence.[17]

Although the Court has generally deferred to the legislature's characterizations in this area, it limited that principle in *Apprendi v. New Jersey*, holding that a sentencing factor cannot be used to increase the maximum penalty imposed for the underlying crime.[18] The Court subsequently overruled conflicting prior case law that had held constitutional the use of aggravating sentencing factors by judges when imposing capital punishment.[19] These holdings are subject to at least one exception, however, as the *Apprendi* Court held that its limitation does not apply to sentencing enhancements based on recidivism.[20] Legislatures might also

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case did not require any reconsideration of the holding in *Leland v. Oregon*, 343 U.S. 790 (1952), that the defense may be required to prove insanity beyond a reasonable doubt. 421 U.S. at 704, 705.

[15] 432 U.S. 197 (1977). Proving the defense would reduce a murder offense to manslaughter.

[16] *See also* Dixon v. United States, 548 U.S. 1 (2006) (requiring defendant in a federal firearms case to prove her duress defense by a preponderance of evidence did not violate due process). Justice Lewis Powell criticized the distinction in *Patterson* as formalistic, as the legislature can shift burdens of persuasion between prosecution and defense easily through the statutory definitions of the offenses. Dissenting in *Patterson*, Justice Powell argued that the two statutes were functional equivalents that should be treated alike constitutionally. He would hold that as to those facts that historically have made a substantial difference in the punishment and stigma flowing from a criminal act the state always bears the burden of persuasion but that new affirmative defenses may be created and the burden of establishing them placed on the defendant. 432 U.S. at 216. The Court followed *Patterson* in *Martin v. Ohio*, 480 U.S. 228 (1987) (state need not disprove defendant acted in self-defense based on honest belief she was in imminent danger, when offense is aggravated murder, an element of which is "prior calculation and design"). Justice Powell, again dissenting, urged a distinction between defenses that negate an element of the crime and those that do not. *Id.* at 236, 240.

[17] McMillan v. Pennsylvania, 477 U.S. 79 (1986). These types of cases may also implicate the Sixth Amendment, as the right to a jury extends to all facts establishing the elements of a crime, while sentencing factors may be evaluated by a judge. *See* Amdt6.6.3.1 Overview of When the Right to Counsel Applies.

[18] 530 U.S. 466, 490 (2000) (interpreting New Jersey's hate crime law). Prior to its decision in *Apprendi*, the Court had held that sentencing factors determinative of minimum sentences could be decided by a judge. McMillan v. Pennsylvania, 477 U.S. 79 (1986). Although the vitality of *McMillan* was put in doubt by *Apprendi*, the Court subsequently reaffirmed *McMillan* in *Harris v. United States*, 536 U.S. 545 (2002).

[19] Walton v. Arizona, 497 U.S. 639 (1990), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).

[20] 530 U.S. at 490. As enhancement of sentences for repeat offenders is traditionally considered a part of sentencing, establishing the existence of previous valid convictions may be made by a judge, despite its resulting in a significant increase in the maximum sentence available. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (deported alien reentering the United States subject to a maximum sentence of two years, but upon proof of felony

evade these limitations by revising criminal provisions to increase maximum penalties, then providing for mitigating factors that could reduce sentences within the newly established sentencing ranges.

An issue related to the burden of proof involves statutory presumptions, where proof of a "presumed fact" that is a required element of a crime is established through proof of another fact, known as the "basic fact."[21] In *Tot v. United States*, the Court held that a statutory presumption was valid under the Due Process Clause only if it met a "rational connection" test.[22] In that case, the Court struck down a presumption that a person possessing an illegal firearm had shipped, transported, or received the firearm in interstate commerce. "Under our decisions," it explained, "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience."[23]

In *Leary v. United States*, the Court applied a more stringent due process test to require that, for a "rational connection" to exist, it must "at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[24] The *Leary* Court struck down a provision that permitted a jury to infer from a defendant's possession of marijuana his knowledge of its illegal importation. A lengthy canvass of factual materials established to the Court's satisfaction that, although the greater part of marijuana consumed in the United States was of foreign origin, there was still a significant amount produced domestically, and there was no way to assure that the majority of those possessing marijuana have any reason to know whether their marijuana is imported.[25] The Court left open the question of whether a presumption that survived the "rational connection" test "must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use."[26]

In a later case, a closely divided Court drew a distinction between mandatory presumptions, which a jury must accept, and permissive presumptions, which may be presented to the jury as part of all the evidence to be considered. With respect to mandatory presumptions, "since the prosecution bears the burden of establishing guilt, it may not rest its

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record, is subject to a maximum of twenty years). *See also* Parke v. Raley, 506 U.S. 20 (1992) (where prosecutor has burden of establishing a prior conviction, a defendant can be required to bear the burden of challenging the validity of such a conviction).

[21] *See, e.g.*, Yee Hem v. United States, 268 U.S. 178 (1925) (upholding statute that proscribed possession of smoking opium that had been illegally imported and authorized jury to presume illegal importation from fact of possession); Manley v. Georgia, 279 U.S. 1 (1929) (invalidating statutory presumption that every insolvency of a bank shall be deemed fraudulent).

[22] 319 U.S. 463, 467–68 (1943). *Compare* United States v. Gainey, 380 U.S. 63 (1965) (upholding presumption from presence at site of illegal still that defendant was "carrying on" or aiding in "carrying on" its operation), *with* United States v. Romano, 382 U.S. 136 (1965) (voiding presumption from presence at site of illegal still that defendant had possession, custody, or control of still).

[23] 319 U.S. at 467.

[24] 395 U.S. 6, 36 (1969).

[25] 395 U.S. at 37–54. The Court disapproved some of the reasoning in *Yee Hem*, *supra*, but factually distinguished that case as involving users of "hard" narcotics.

[26] 395 U.S. at 36 n.64. The matter was also left open in *Turner v. United States*, 396 U.S. 398 (1970) (judged by either "rational connection" or "reasonable doubt," a presumption that the possessor of heroin knew it was illegally imported was valid, but the same presumption with regard to cocaine was invalid under the "rational connection" test because a great deal of the substance was produced domestically), and in *Barnes v. United States*, 412 U.S. 837 (1973) (under either test a presumption that possession of recently stolen property, if not satisfactorily explained, is grounds for inferring possessor knew it was stolen satisfies due process).

case entirely on a presumption, unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt."[27] But, with respect to permissive presumptions,

> the prosecution may rely on all of the evidence in the record to meet the reasonable doubt standard. There is no more reason to require a permissive statutory presumption to meet a reasonable-doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted. As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in *Leary*.[28]

Applying that analysis, the Court concluded that a statute providing that the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle did not violate due process.[29]

Amdt14.S1.5.5.6 Evidentiary Requirements in Criminal Cases

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Beyond the general rule that the prosecution must prove a criminal defendant's guilt beyond a reasonable doubt,[1] the Due Process Clause also imposes certain limitations on specific evidentiary matters in criminal trials. For instance, a court may not restrict the basic due process right to testify in one's own defense by automatically excluding hypnotically refreshed testimony.[2] And, though a state may require a defendant to give pretrial notice of an intention to rely on an alibi defense and to furnish the names of supporting witnesses, due process calls for reciprocal discovery in such circumstances, requiring the state to give the defendant pretrial notice of its rebuttal evidence on the alibi issue.[3]

In evaluating whether certain procedures satisfy due process, the Court may consider how separate procedures interact. The combination of otherwise acceptable rules of criminal procedure may in some instances deny a defendant due process. Thus, in one case, the Court found that a defendant was denied his constitutional right to present his defense in a meaningful way by the combination of two rules that (1) denied the defendant the right to cross-examine his own witness in order to elicit exculpatory evidence and (2) denied him the right to introduce the testimony of witnesses about matters told to them out of court on the

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[27] Ulster County Court v. Allen, 442 U.S. 140, 167 (1979).

[28] 442 U.S. at 167.

[29] 442 U.S. at 142. The majority thought that possession was more likely than not the case from the circumstances, while the four dissenters disagreed. 442 U.S. at 168. *See also* Estelle v. McGuire, 502 U.S. 62 (1991) (upholding a jury instruction that, in the view of dissenting Justices O'Connor and Stevens, *id.* at 75, seemed to direct the jury to draw the inference that evidence that a child had been "battered" in the past meant that the defendant, the child's father, had necessarily done the battering).

[1] *See* Amdt14.S1.5.5.5 Guilt Beyond a Reasonable Doubt.

[2] Rock v. Arkansas, 483 U.S. 44 (1987).

[3] Wardius v. Oregon, 412 U.S. 470 (1973).

ground that the testimony would be hearsay.[4] Conversely, a questionable procedure may be saved by its combination with another. Thus, in another case, the Court held that it does not deny a defendant due process to subject him to trial before a non-lawyer police court judge when he can obtain a later trial de novo in the state's court system.[5]

The government violates the Due Process Clause when it obtains a conviction by presenting testimony the prosecuting authorities know was perjured. In one case, the Court stated in dictum that the clause

> cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance . . . is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.[6]

The Court has applied that principle to require state officials to controvert allegations that knowingly false testimony had been used to convict[7] and to overturn convictions found to have been so procured.[8] Extending the principle, the Court in *Miller v. Pate* overturned a conviction obtained after the prosecution had represented to the jury that a pair of men's shorts found near the scene of a crime belonged to the defendant and that they were stained with blood; the defendant showed in a habeas corpus proceeding that no evidence connected him with the shorts, the shorts were not in fact bloodstained, and the prosecution had known those facts.[9]

This line of reasoning has also required disclosure to the defense of information that the prosecution did not rely on at trial.[10] In *Brady v. Maryland*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due

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[4] Chambers v. Mississippi, 410 U.S. 284 (1973). *See also* Davis v. Alaska, 415 U.S. 308 (1974) (refusal to permit defendant to examine prosecution witness about his adjudication as juvenile delinquent and status on probation at time, in order to show possible bias, was due process violation, although general principle of protecting anonymity of juvenile offenders was valid); Crane v. Kentucky, 476 U.S. 683 (1986) (exclusion of testimony as to circumstances of a confession can deprive a defendant of a fair trial when the circumstances bear on the credibility as well as the voluntariness of the confession); Holmes v. South Carolina, 547 U.S. 319 (2006) (overturning rule that evidence of third-party guilt can be excluded if there is strong forensic evidence establishing defendant's culpability). *But see* Montana v. Egelhoff, 518 U.S. 37 (1996) (state may bar defendant from introducing evidence of intoxication to prove lack of mens rea).

[5] North v. Russell, 427 U.S. 328 (1976).

[6] Mooney v. Holohan, 294 U.S. 103, 112 (1935).

[7] Pyle v. Kansas, 317 U.S. 213 (1942); White v. Ragen, 324 U.S. 760 (1945). *See also* New York *ex rel.* Whitman v. Wilson, 318 U.S. 688 (1943); *Ex parte* Hawk, 321 U.S. 114 (1914). *But see* Hysler v. Florida, 315 U.S. 411 (1942); Lisenba v. California, 314 U.S. 219 (1941).

[8] Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957). In the former case, the principal prosecution witness was the defendant's accomplice, and he testified that he had received no promise of consideration in return for his testimony. In fact, the prosecutor had promised him consideration, but did nothing to correct the false testimony. *See also* Giglio v. United States, 405 U.S. 150 (1972) (same). In the latter case, involving a husband's killing of his wife because of her infidelity, a prosecution witness testified at the habeas corpus hearing that he told the prosecutor that he had been intimate with the woman but that the prosecutor had told him to volunteer nothing of it, so that at trial he had testified his relationship with the woman was wholly casual. In both cases, the Court deemed it irrelevant that the false testimony had gone only to the credibility of the witness rather than to the defendant's guilt. *Cf.* Durley v. Mayo, 351 U.S. 277 (1956). *But see* Smith v. Phillips, 455 U.S. 209, 218–21 (1982) (prosecutor's failure to disclose that one of the jurors has a job application pending before him, thus rendering him possibly partial, does not go to fairness of the trial and due process is not violated).

[9] 386 U.S. 1 (1967).

[10] The Constitution does not require the government, prior to entering into a binding plea agreement with a criminal defendant, to disclose impeachment information relating to any informants or other witnesses against the defendant. United States v. Ruiz, 536 U.S. 622 (2002). Nor has it been settled whether inconsistent prosecutorial theories in separate cases can be the basis for a due process challenge. Bradshaw v. Stumpf, 545 U.S. 175 (2005) (Court

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[11] In that case, the prosecution had suppressed an extrajudicial confession of defendant's accomplice that he had actually committed the murder.[12] In a subsequent case, the Court described the "heart of the holding in *Brady*" as concerning

> the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence.[13]

In *United States v. Agurs*, the Court summarized and expanded the prosecutor's obligation to disclose exculpatory evidence to the defense, even in the absence of a request by the defendant, or upon a general request.[14] The *Agurs* Court laid out three due process principles that apply to the use of evidence in criminal cases. First, if the prosecutor knew or should have known that testimony given during the trial was perjured, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.[15] Second, as established in *Brady*, if the defense specifically requested certain evidence and the prosecutor withheld it, the conviction must be set aside if the suppressed evidence might have affected the outcome of the trial.[16] Third, as the Court held for the first time in *Agurs*, if the defense did not make a request at all, or simply asked for "all *Brady* material" or for "anything exculpatory," the prosecution has a duty to reveal to the defense obviously exculpatory evidence.[17] Under the third prong, if the prosecutor did not reveal

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remanded case to determine whether death sentence was based on defendant's role as shooter because subsequent prosecution against an accomplice proceeded on the theory that, based on new evidence, the accomplice had done the shooting).

[11] 373 U.S. 83, 87 (1963). In *Jencks v. United States*, 353 U.S. 657 (1957), in the exercise of its supervisory power over the federal courts, the Court held that the defense was entitled to obtain, for impeachment purposes, statements that had been made to government agents by government witnesses during the investigatory stage. *Cf.* Scales v. United States, 367 U.S. 203, 257–58 (1961). A subsequent statute modified but largely codified the decision and was upheld by the Court. Palermo v. United States, 360 U.S. 343 (1959), sustaining 18 U.S.C. § 3500.

[12] Although the state court in *Brady* had allowed a partial retrial so that the accomplice's confession could be considered in the jury's determination of whether to impose capital punishment, it had declined to order a retrial of the guilt phase of the trial. The Court rejected the defendant's appeal of the latter decision. As the Court saw it, the issue was whether the state court could have excluded the defendant's confessed participation in the crime on evidentiary grounds, as the defendant had confessed to facts sufficient to establish grounds for the crime charged.

[13] Moore v. Illinois, 408 U.S. 786, 794–95 (1972) (finding *Brady* inapplicable because the evidence withheld was not material and not exculpatory). *See also* Wood v. Bartholomew, 516 U.S. 1 (1995) (per curiam) (holding no due process violation where prosecutor's failure to disclose the result of a witness' polygraph test would not have affected the outcome of the case). The Court has not extended *Brady* toward a general requirement of criminal discovery. *See* Giles v. Maryland, 386 U.S. 66 (1967). In *Cone v. Bell*, 556 U.S. 449, 472, 476 (2009), the Court emphasized the distinction between the materiality of the evidence with respect to guilt and the materiality of the evidence with respect to punishment, and concluded that, although the evidence that had been suppressed was not material to the defendant's conviction, the lower courts had erred in failing to assess its effect with respect to the defendant's capital sentence.

[14] 427 U.S. 97 (1976).

[15] 427 U.S. at 103–04; *cf.* Mooney v. Holohan, 294 U.S. 103 (1935).

[16] 427 U.S. at 104–06; *cf.* Brady v. Maryland, 373 U.S. 83 (1963). A statement by the prosecution that it will "open its files" to the defendant appears to relieve the defendant of his obligation to request such materials. *See* Strickler v. Greene, 527 U.S. 263, 283–84 (1999); Banks v. Dretke, 540 U.S. 668, 693 (2004).

[17] 427 U.S. at 106–07.

relevant information, reversal of a conviction may be required, but only if the undisclosed evidence creates a reasonable doubt as to the defendant's guilt.[18]

Agurs left open questions about how courts should evaluate the materiality of undisclosed evidence. The Court addressed those questions in the 1985 case *United States v. Bagley*.[19] In *Bagley*, the Court established a uniform test for materiality, holding that evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different.[20] That materiality standard, also found in contexts outside of *Brady* inquiries,[21] applies not only to exculpatory material, but also to material that would be relevant to the impeachment of witnesses.[22] Thus, in a case where inconsistent earlier statements by a witness to an abduction were not disclosed, the Court weighed the specific effect that impeachment of the witness would have had on establishing the required elements of the crime and the punishment, concluding that there was no reasonable probability that the jury would have reached a different result.[23]

The Supreme Court has also held that "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor'," and that "'the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.'"[24]

Amdt14.S1.5.5.7 Competency for Trial

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[18] 427 U.S. at 106–14. This was the *Agurs* fact situation. There is no obligation that law enforcement officials preserve breath samples that have been used in a breath-analysis test; to meet the *Agurs* materiality standard, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S. 479, 489 (1984). *See also* Arizona v. Youngblood, 488 U.S. 51 (1988) (negligent failure to refrigerate and otherwise preserve potentially exculpatory physical evidence from sexual assault kit does not violate a defendant's due process rights absent bad faith on the part of the police); Illinois v. Fisher, 540 U.S. 544 (2004) (per curiam) (the routine destruction of a bag of cocaine eleven years after an arrest, the defendant having fled prosecution during the intervening years, does not violate due process).

[19] 473 U.S. 667 (1985).

[20] 473 U.S. at 682. Put differently, a *Brady* violation requires a showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Kyles v. Whitley, 514 U.S. 419, 435 (1995). *Accord* Smith v. Cain, 565 U.S. 73 (2012) (prior inconsistent statements of sole eyewitness withheld from defendant; state lacked other evidence sufficient to sustain confidence in the verdict independently).

[21] *See* United States v. Malenzuela-Bernal, 458 U.S. 858 (1982) (testimony made unavailable by Government deportation of witnesses); Strickland v. Washington, 466 U.S. 668 (1984) (incompetence of counsel).

[22] 473 U.S. at 676–77. *See also* Wearry v. Cain, 136 S. Ct. 1002, 1007 (2016) (per curiam) (finding that a state post-conviction court had improperly (1) evaluated the materiality of each piece of evidence in isolation, rather than cumulatively; (2) emphasized reasons jurors might disregard the new evidence, while ignoring reasons why they might not; and (3) failed to consider the statements of two impeaching witnesses).

[23] Strickler v. Greene, 527 U.S. 263, 296 (1999); *see also* Turner v. United States, 137 S. Ct. 1885, 1894 (2017) (holding that, when considering the withheld evidence in the context of the entire record, the evidence was "too little, too weak, or too distant" from the central evidentiary issues in the case to meet *Brady*'s standards for materiality).

[24] Youngblood v. West Virginia, 547 U.S. 867, 869–70 (2006) (per curiam) (quoting Kyles v. Whitley, 514 U.S. 419, 438, 437 (1995)).

Amdt14.S1.5.5.7
Competency for Trial

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Supreme Court has held that it is a denial of due process to try or sentence a defendant who is "insane" or incompetent to stand trial.[1] When it becomes evident during the trial that a defendant is or has become "insane" or incompetent, the court on its own initiative must conduct a hearing on the issue.[2] There is no constitutional requirement that the state assume the burden of proving a defendant competent, though the state must provide the defendant with a chance to prove that he is incompetent to stand trial. Thus, a statutory presumption that a criminal defendant is competent to stand trial or a requirement that the defendant bear the burden of proving incompetence by a preponderance of the evidence does not violate due process.[3]

A person found incompetent for trial may be committed to a psychiatric institution, but a state cannot indefinitely commit a person charged with a criminal offense based on a finding of incompetence to stand trial. Rather, a court has the power to commit the accused for a period no longer than is necessary to determine whether there is a substantial probability that he will attain his capacity in the foreseeable future. If it is determined that he will not, the state must either release the defendant or institute the ordinary civil commitment proceeding that would be required to commit any other citizen.[4]

When a defendant is found competent to stand trial, the state has significant discretion in how it takes account of any mental illness or defect that affected the defendant at the time of the offense in determining criminal responsibility.[5] The Court has identified several tests that states use in varying combinations to assess insanity defenses: the *M'Naghten* test (cognitive incapacity or moral incapacity),[6] volitional incapacity,[7] and the irresistible-impulse test.[8] Based on these varying tests, the Court has opined that "it is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice."[9] To illustrate, in

[1] Pate v. Robinson, 383 U.S. 375, 378 (1966) (citing Bishop v. United States, 350 U.S. 961 (1956)). The standard for competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960) (per curiam), cited with approval in Indiana v. Edwards, 128 S. Ct. 2379, 2383 (2008). The fact that a defendant is mentally competent to stand trial does not preclude a court from finding him not mentally competent to represent himself at trial. *Edwards*, 128 S. Ct. 2379.

[2] *Pate*, 383 U.S. at 378; *see also* Drope v. Missouri, 420 U.S. 162, 180 (1975) (noting the relevant circumstances that may require a trial court to inquire into the mental competency of the defendant). In *Ake v. Oklahoma*, the Court established that, when an indigent defendant's mental condition is both relevant to the punishment and seriously in question, the state must provide the defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense." 470 U.S. 68, 83 (1985). While the Court has not decided whether *Ake* requires that the state provide a qualified mental health expert who is available exclusively to the defense team, *see* McWilliams v. Dunn, 137 S. Ct. 1790, 1799 (2017), a state nevertheless deprives an indigent defendant of due process when it provides a competent psychiatrist only to examine the defendant without also requiring that an expert provide the defense with help in evaluating, preparing, and presenting its case, *id.* at 1800.

[3] Medina v. California, 505 U.S. 437 (1992). It is a violation of due process, however, for a state to require that a defendant prove competence to stand trial by clear and convincing evidence. Cooper v. Oklahoma, 517 U.S. 348 (1996).

[4] Jackson v. Indiana, 406 U.S. 715 (1972).

[5] Clark v. Arizona, 548 U.S. 735 (2006).

[6] M'Naghten's Case, 8 Eng. Rep. 718 (1843), states that "to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." 8 Eng. Rep., at 722.

[7] *See* Queen v. Oxford, 173 Eng. Rep. 941, 950 (1840) ("If some controlling disease was, in truth, the acting power within [the defendant] which he could not resist, then he will not be responsible.").

the 2020 case *Kahler v. Kansas*, the Court held that the Due Process Clause does not require a state to adopt *M'Naghten*'s moral-incapacity test as a complete insanity defense resulting in an acquittal.[10] The Court stated that "[d]efining the precise relationship between criminal culpability and mental illness," because it involves "hard choices" among competing values and evolving understandings of mental health, "is a project for state governance, not constitutional law."[11]

Despite the requirement that states prove each element of a criminal offense,[12] criminal trials generally proceed with a presumption that the defendant does not have a severe mental illness, and states may limit the evidence that a defendant may present to challenge that presumption. In *Clark v. Arizona*, the Court considered a rule adopted by the Supreme Court of Arizona that prohibited the use of expert testimony regarding mental disease or mental capacity to show lack of mens rea, ruling that the use of such evidence could be limited to an insanity defense.[13] The *Clark* Court weighed competing interests to hold that such evidence could be "channeled" to the issue of insanity due to "the controversial character of some categories of mental disease," the "potential of mental disease evidence to mislead," and the "danger of according greater certainty to such evidence than experts claim for it."[14]

If a criminal defendant is acquitted by reason of insanity, due process does not bar commitment of the defendant to a mental hospital, and the period of confinement may extend beyond the period for which he could have been sentenced to prison if convicted.[15] The Court has explained that the purpose of confinement is not punishment, but treatment, and therefore the length of a possible criminal sentence is "irrelevant to the purposes of . . . commitment."[16] Thus, a defendant acquitted by reason of insanity may be confined for treatment "until such time as he has regained his sanity or is no longer a danger to himself or society."[17] However, a state may not indefinitely confine an insanity defense acquittee who is no longer mentally ill but who has an untreatable personality disorder that may lead to criminal conduct.[18]

Substantive due process issues may arise if the government seeks to compel the medication of a person found to be incompetent to stand trial. In *Washington v. Harper*, the Court had found that an individual has a significant "liberty interest" in avoiding the

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[8] *See* State v. Jones, 50 N.H. 369 (1871) ("If the defendant had a mental disease which irresistibly impelled him to kill his wife—if the killing was the product of mental disease in him—he is not guilty; he is innocent—as innocent as if the act had been produced by involuntary intoxication, or by another person using his hand against his utmost resistance.").

[9] *Clark*, 548 U.S. at 752. In *Clark*, the Court considered an Arizona statute, based on *M'Naghten*, that was amended to eliminate the defense of cognitive incapacity. The Court noted that, despite the amendment, proof of cognitive incapacity could still be introduced as it would be relevant (and sufficient) to prove the remaining moral incapacity test. *Id.* at 753.

[10] 140 S. Ct. 1021, 1027, 1037 (2020).

[11] *Id.* at 1037. *Cf.* Atkins v. Virginia, 536 U.S. 304, 317 (2002) (holding that the Eighth Amendment prohibits the states from executing certain persons with an intellectual disability, but "leav[ing] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.").

[12] *See* Amdt14.S1.5.5.5 Guilt Beyond a Reasonable Doubt.

[13] 548 U.S. 735 (2006).

[14] 548 U.S. at 770, 774.

[15] Jones v. United States, 463 U.S. 354 (1983). The fact that the affirmative defense of insanity need only be established by a preponderance of the evidence, while civil commitment requires the higher standard of clear and convincing evidence, does not render the former invalid; proof beyond a reasonable doubt of commission of a criminal act establishes dangerousness justifying confinement and eliminates the risk of confinement for mere "idiosyncratic behavior." *Id.* at 367.

[16] 463 U.S. at 368.

[17] 463 U.S. at 370.

[18] Foucha v. Louisiana, 504 U.S. 71 (1992).

unwanted administration of antipsychotic drugs.[19] In *Sell v. United States*, the Court found that this liberty interest could in "rare" instances be outweighed by the government's interest in bringing an incompetent individual to trial.[20] First, however, the government must engage in a fact-specific inquiry as to whether that interest is important in a particular case.[21] Second, the court must find that the treatment is likely to render the defendant competent to stand trial without resulting in side effects that will interfere with the defendant's ability to assist counsel. Third, the court must find that less intrusive treatments are unlikely to achieve substantially the same results. Finally, the court must conclude that administration of the drugs is in the patient's best medical interests.[22]

Amdt14.S1.5.5.8 Due Process Rights of Juvenile Offenders

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

All fifty states and the District of Columbia have specialized laws to deal with juvenile offenders outside the criminal justice system for adult offenders.[1] Juvenile justice systems handle both offenses that would be criminal if committed by an adult and delinquent behavior not recognizable under laws dealing with adults, such as habitual truancy, conduct endangering the morals or health of the juvenile or others, or disobedience making the juvenile uncontrollable by his parents. Reforms during the early part of the twentieth century provided for separating juveniles from adult offenders in adjudication, detention, and correctional facilities, but they also dispensed with the substantive and procedural rules that due process required in criminal trials. The justification for this lack of constitutional protections was that juvenile courts were deemed to be civil, not criminal, and that the state was acting as parens patriae for juvenile offenders and was not their adversary.[2]

In the 1960s, however, the Supreme Court imposed substantial restriction of these elements of juvenile jurisprudence. After tracing in much detail this history of juvenile courts, the Court held in *In re Gault* that the application of due process to juvenile proceedings would not endanger the good intentions vested in the system nor diminish the beneficial features of the system—emphasis upon rehabilitation rather than punishment, a measure of informality, avoidance of the stigma of criminal conviction, and low visibility of the process—but that the consequences of the absence of due process standards made their application necessary.[3]

Thus, the Court in *Gault* required notice of charges in time for the juvenile to prepare a defense, a hearing in which the juvenile could be represented by retained or appointed counsel,

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[19] 494 U.S. 210 (1990) (prison inmate could be drugged against his will if he presented a risk of serious harm to himself or others).

[20] 539 U.S. 166 (2003).

[21] For instance, if the defendant is likely to remain civilly committed absent medication, this diminishes the government's interest in prosecution. 539 U.S. at 180.

[22] 539 U.S. at 181.

[1] For analysis of the state laws and application of constitutional principles to juveniles, see Samuel M. Davis, Rights of Juveniles: The Juvenile Justice System (2d ed. 2006).

[2] *In re* Gault, 387 U.S. 1, 12–29 (1967).

[3] 387 U.S. 1.

observance of the rights of confrontation and cross-examination, and protections against self-incrimination.[4] The Court also held that before a juvenile could be "waived" to an adult court for trial, there had to be a hearing and findings of reasons.[5] Subsequently, the Court held that the "essentials of due process and fair treatment" required that a juvenile could be adjudged delinquent only on evidence beyond a reasonable doubt when the offense charged would be a crime if committed by an adult.[6] However, the Court has also held that jury trials are not constitutionally required in juvenile proceedings.[7]

On a few occasions, the Court has considered whether juveniles must be afforded the rights guaranteed to adults during investigation of crimes. In one such case, the Court ruled that a juvenile undergoing custodial interrogation by police had not invoked a *Miranda* right to remain silent by requesting permission to consult with his probation officer, since a probation officer could not be equated with an attorney, but also indicated that a juvenile's waiver of *Miranda* rights was to be evaluated under the same totality-of-the-circumstances approach applicable to adults. That approach requires "inquiry into all the circumstances surrounding the interrogation . . . includ[ing] evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him."[8] In another case, the Court ruled that, although the Fourth Amendment applies to searches of students by public school authorities, neither the warrant requirement nor the probable cause standard is appropriate.[9] Instead, a simple reasonableness standard governs searches of students' persons and effects by school authorities.[10]

In *Schall v. Martin*, the Court ruled that preventive detention of juveniles does not offend due process when it serves the legitimate state purpose of protecting society and the juvenile from potential consequences of pretrial crime, the terms of confinement serve those legitimate purposes and are nonpunitive, and applicable procedures provide sufficient protection against erroneous and unnecessary detentions.[11] The Court found that a statute authorizing pretrial detention of accused juvenile delinquents upon a finding of "serious risk" that the juvenile

[4] 387 U.S. at 31–35.

[5] An earlier case had reached the same result based on statutory interpretation; the *Gault* Court apparently reached it on constitutional grounds. *Gault*, 387 U.S. at 30–31 (citing Kent v. United States, 383 U.S. 541 (1966)). The *Gault* Court did not rule on the right of appeal or the failure to make transcripts of hearings.

[6] *In re* Winship, 397 U.S. 358 (1970).

[7] McKeiver v. Pennsylvania, 403 U.S. 528 (1971). No opinion won the support of a majority of the Justices. Justice Harry Blackmun's opinion of the Court, which was joined by Chief Justice Warren Burger and Justices Potter Stewart and Byron White, reasoned that a juvenile proceeding was not "a criminal prosecution" within the terms of the Sixth Amendment, so jury trials were not automatically required; instead, the prior cases had proceeded on a "fundamental fairness" approach and in that regard a jury was not a necessary component of fair fact-finding and its use would have serious repercussions on the rehabilitative and protection functions of the juvenile court. Justice White also submitted a brief concurrence emphasizing the differences between adult criminal trials and juvenile adjudications. *Id.* at 551. Justice William Brennan concurred in one case and dissented in another because, in his view, open proceedings would operate to protect juveniles from oppression in much the same way a jury would. *Id.* at 553. Justice John Marshall Harlan concurred because he did not believe jury trials were constitutionally mandated in state courts. *Id.* at 557. Justices William O. Douglas, Hugo Black, and Thurgood Marshall dissented. *Id.* at 557.

[8] Fare v. Michael C., 442 U.S. 707, 725 (1979).

[9] New Jersey v. T.L.O., 469 U.S. 325 (1985) (upholding the search of a student's purse to determine whether the student possessed cigarettes in violation of school rule; evidence of drug activity held admissible in a prosecution under the juvenile laws). In *Safford Unified School District #1 v. Redding*, 557 U.S. 364 (2009), the Court found unreasonable a strip search of a thirteen-year-old girl suspected of possessing ibuprofen. *See also* Amdt4.6.6.6 School Searches.

[10] This single rule, the Court explained, permits school authorities "to regulate their conduct according to the dictates of reason and common sense." 469 U.S. at 343. Rejecting the suggestion of dissenting Justice John Paul Stevens, the Court was "unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules." 469 U.S. at 342 n.9.

[11] 467 U.S. 253 (1984).

would commit crimes prior to trial, providing for expedited hearings, and guaranteeing a formal, adversarial probable cause hearing satisfied those requirements.

Amdt14.S1.5.6 Criminal Cases Post-Trial

Amdt14.S1.5.6.1 Overview of Criminal Cases and Post-Trial Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The Supreme Court has struck down criminal sentences on due process grounds when the sentencing judge relied on inaccurate information[1] or the sentencing jurors considering invalid factors.[2] Aside from those circumstances, procedural due process imposes few limits on criminal sentencing.[3] *In Williams v. New York*, the Court upheld the imposition of the death penalty, despite a jury's recommendation of mercy, where the judge acted based on information in a presentence report not shown to the defendant or his counsel.[4] The Court opined that it was undesirable to restrict judicial discretion in sentencing by requiring adherence to rules of evidence that would exclude highly relevant and informative material. Further, disclosure of such information to the defense could dry up sources who feared retribution or embarrassment. Thus, hearsay and rumors can be considered in sentencing. In *Gardner v. Florida*, however, the Court limited the application of *Williams* to capital cases.[5]

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[1] In *Townsend v. Burke*, 334 U.S. 736, 740–41 (1948) the Court overturned a sentence imposed on an uncounseled defendant by a judge who in reciting defendant's record from the bench made several errors and facetious comments. "[W]hile disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." *Id.*

[2] In *Hicks v. Oklahoma*, 447 U.S. 343 (1980), the jury had been charged in accordance with a habitual offender statute that if it found defendant guilty of the offense charged, which would be a third felony conviction, it should assess a punishment of 40 years' imprisonment. The jury convicted and gave the defendant 40 years. Subsequently, in another case, the habitual offender statute under which Hicks had been sentenced was declared unconstitutional, but Hicks' conviction was affirmed on the basis that his sentence was still within the permissible range open to the jury. The Supreme Court reversed, holding that Hicks was denied due process because he was statutorily entitled to the exercise of the jury's discretion and could have been given a sentence as low as ten years. That the jury might still have given the stiffer sentence was only conjectural. On other due process restrictions on the determination of the applicability of recidivist statutes to convicted defendants, *see* Chewning v. Cunningham, 368 U.S. 443 (1962); Oyler v. Boles, 368 U.S. 448 (1962); Spencer v. Texas, 385 U.S. 554 (1967); Parke v. Raley, 506 U.S. 20 (1992).

[3] Due process does not impose any limitation on the sentence that a legislature may affix to any offense; such restrictions come from the Eighth Amendment. Williams v. Oklahoma, 358 U.S. 576, 586–87 (1959). *See also* Collins v. Johnston, 237 U.S. 502 (1915). On recidivist statutes, see Graham v. West Virginia, 224 U.S. 616, 623 (1912); Ughbanks v. Armstrong, 208 U.S. 481, 488 (1908), and, under the Eighth Amendment, Rummel v. Estelle, 445 U.S. 263 (1980).

[4] 337 U.S. 241 (1949). *See also* Williams v. Oklahoma, 358 U.S. 576 (1959).

[5] 430 U.S. 349 (1977). In *Gardner*, the jury had recommended a life sentence upon convicting defendant of murder, but the trial judge sentenced the defendant to death, relying in part on a confidential presentence report that he did not characterize or make available to defense or prosecution. Justices John Paul Stevens, Potter Stewart, and Lewis Powell found that because death was significantly different from other punishments and because sentencing procedures were subject to higher due process standards than when *Williams* was decided, the report must be made part of the record for review so that the factors motivating imposition of the death penalty may be known, and ordinarily must be made available to the defense. 430 U.S. at 357–61. All but one of the other Justices joined the result on various other bases. Justice William Brennan thought the result was compelled by due process, *id.* at 364, while Justices Byron White and Harry Blackmun thought the result was necessitated by the Eighth Amendment, *id.* at 362, 364, as did Justice Thurgood Marshall, *id.* at 365. Chief Justice Warren Burger concurred only in the result, *id.* at 362,

In *United States v. Grayson*, a noncapital case, the Court relied heavily on *Williams* in holding that a sentencing judge may properly consider his belief that the defendant was untruthful in his trial testimony in deciding to impose a more severe sentence than he would otherwise have imposed.[6] The Court declared that the judge must be free to consider the broadest range of information in assessing the defendant's prospects for rehabilitation, and the defendant's truthfulness, as assessed by the trial judge from his own observations, is relevant information.[7]

There are some sentencing proceedings, however, that so implicate substantial rights that additional procedural protections are required.[8] In *Specht v. Patterson*, a defendant had been convicted of taking indecent liberties, which carried a maximum sentence of ten years, but was sentenced under a sex offender statute to an indefinite term of one day to life.[9] The sex offender law, the Court observed, did not make the commission of the particular offense the basis for sentencing. Instead, by triggering a new hearing to determine whether the convicted person was a public threat, a habitual offender, or mentally ill, the law in effect constituted a new charge that must be accompanied by procedural safeguards. In *Mempa v. Rhay*, the Court held that, when sentencing is deferred subject to probation and the convicted defendant is later returned for sentencing following an alleged probation violation, the sentencing is a point in the process where substantial rights of the defendant may be affected, so the defendant must be represented by counsel.[10]

A state may also violate due process if it attempts to withhold relevant information from the sentencing jury. For instance, in *Simmons v. South Carolina*, the Court held that due process requires that if prosecutor makes an argument for the death penalty based on the future dangerousness of the defendant to society, the jury must then be informed if the only alternative to a death sentence is a life sentence without possibility of parole.[11] But, in *Ramdass v. Angelone*, the Court refused to apply the reasoning of *Simmons* because the defendant was not technically parole ineligible at time of sentencing.[12]

Due process prohibits penalizing a defendant for exercising a right to appeal. Thus, it is a denial of due process for a judge to sentence a convicted defendant on retrial to a longer sentence than he received after the first trial, if the object of the sentence is to punish the defendant for having successfully appealed his first conviction or to discourage similar appeals

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and Justice William Rehnquist dissented, *id.* at 371. *See also* Lankford v. Idaho, 500 U.S. 110 (1991) (due process denied where judge sentenced defendant to death after judge's and prosecutor's actions misled defendant and counsel into believing that death penalty would not be at issue in sentencing hearing).

[6] 438 U.S. 41 (1978).

[7] 438 U.S. at 49–52. *See also* United States v. Tucker, 404 U.S. 443, 446 (1972); Chaffin v. Stynchcombe, 412 U.S. 17, 32 (1973). *Cf.* 18 U.S.C. § 3577.

[8] *See, e.g.*, Kent v. United States, 383 U.S. 541, 554, 561, 563 (1966), where the Court required that before a juvenile court decided to waive jurisdiction and transfer a juvenile to an adult court it must hold a hearing and permit defense counsel to examine the probation officer's report that formed the basis for the court's decision. *Kent* was ambiguous whether it was based on statutory interpretation or constitutional analysis. *In re* Gault, 387 U.S. 1 (1967), however, appears to have constitutionalized the language.

[9] 386 U.S. 605 (1967).

[10] 389 U.S. 128 (1967).

[11] 512 U.S. 154 (1994). *See also* Lynch v. Arizona, 136 S. Ct. 1818, 1820 (2016) (holding that the possibility of clemency and the potential for future legislative reform does not justify a departure from the rule of *Simmons*); Kelly v. South Carolina, 534 U.S. 246, 252 (2002) (concluding that a prosecutor need not express intent to rely on future dangerousness; logical inferences may be drawn); Shafer v. South Carolina, 532 U.S. 36 (2001) (amended South Carolina law still runs afoul of *Simmons*).

[12] 530 U.S. 156 (2000).

by others.[13] If the judge imposes a longer sentence the second time, he must justify it on the record by showing, for example, the existence of new information meriting a longer sentence.[14] By contrast, the Court has declined to apply the requirement of justifying a more severe sentence upon resentencing to jury sentencing, at least in the absence of a showing that the jury knew of the prior vacated sentence, reasoning that the possibility of vindictiveness in jury resentencing is de minimis.[15] The presumption of vindictiveness is also inapplicable if the first sentence was imposed following a guilty plea, as a trial may afford the court insights into the nature of the crime and the character of the defendant that were not available following the initial guilty plea.[16]

Amdt14.S1.5.6.2 Criminal Appeals and Procedural Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Procedural due process does not require states to allow appeals from criminal convictions, but does impose some requirements on appeals if a state chooses to authorize them. In an 1894 case, the Supreme Court opined,

> An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review.[1]

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[13] North Carolina v. Pearce, 395 U.S. 711 (1969). *Pearce* was held not to be retroactive in *Michigan v. Payne*, 412 U.S. 47 (1973). When a state provides a two-tier court system in which the accused may have an expeditious and somewhat informal trial in an inferior court with an absolute right to trial de novo in a court of general criminal jurisdiction if convicted, the second court is not bound by the rule in *Pearce*, because the potential for vindictiveness and inclination to deter is not present. Colten v. Kentucky, 407 U.S. 104 (1972). *But see* Blackledge v. Perry, 417 U.S. 21 (1974).

[14] An intervening conviction on other charges for acts committed prior to the first sentencing may justify imposition of an increased sentence following a second trial. Wasman v. United States, 468 U.S. 559 (1984).

[15] Chaffin v. Stynchcombe, 412 U.S. 17 (1973). The Court concluded that the possibility of vindictiveness was so low because normally the jury would not know of the result of the prior trial or the sentence imposed, nor would it feel either the personal or the institutional interests of judges leading to efforts to discourage the seeking of new trials. The presumption that an increased, judge-imposed second sentence represents vindictiveness is also inapplicable if the second trial came about because the trial judge herself concluded that a retrial was necessary due to prosecutorial misconduct before the jury in the first trial. Texas v. McCullough, 475 U.S. 134 (1986).

[16] Alabama v. Smith, 490 U.S. 794 (1989).

[1] McKane v. Durston, 153 U.S. 684, 687 (1894). *See also* Andrews v. Swartz, 156 U.S. 272 (1895); Murphy v. Massachusetts, 177 U.S. 155, 158 (1900); Reetz v. Michigan, 188 U.S. 505, 508 (1903).

The Court has since reaffirmed that holding.[2] However, it has also held that, when a state does provide appellate review, it may not so condition the privilege as to deny it irrationally to some persons, such as indigents.[3]

While states may decline to allow traditional criminal appeals, they are not free to have no corrective process in which defendants may pursue remedies for federal constitutional violations. In *Frank v. Mangum*, the Court held that a conviction obtained in a mob-dominated trial violated due process: "if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law."[4] The Court has stated numerous times that the Fourteenth Amendment requires some form of corrective process when a convicted defendant alleges a federal constitutional violation.[5] To burden that process, such as by limiting the right to petition for a writ of habeas corpus, violates the defendant's constitutional rights.[6]

The government has discretion to determine the means by which defendants can vindicate federal constitutional rights after conviction. The Court has explained that "[w]ide discretion must be left to the States" in this area:

> A State may decide whether to have direct appeals in such cases, and if so under what circumstances. . . . A State may provide that the protection of rights granted by the Federal Constitution be sought through the writ of habeas corpus or coram nobis . . . or it may afford remedy by a simple motion brought either in the court of original conviction or at the place of detention. . . . So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated.[7]

If a state provides a mode of redress, a defendant must first exhaust that remedy. If he is unsuccessful, or if a state does not provide an adequate mode of redress, then the defendant may petition a federal court for relief through a writ of habeas corpus.[8]

When a state provides appellate or other corrective process, that process is subject to scrutiny for alleged unconstitutional deprivations of life or liberty like any other part of a criminal case. At first, the Court appeared to assume that, when a state appellate process formally appeared to be sufficient to correct constitutional errors committed by the trial court, the affirmance of a trial court's sentence of execution was ample assurance that life would not be forfeited without due process of law.[9] But, in *Moore v. Dempsey*, the Court directed a federal district court considering a petition for a writ of habeas corpus to make an independent investigation of the facts alleged by the petitioners, notwithstanding that the state appellate

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[2] Griffin v. Illinois, 351 U.S. 12, 18 (1956); Ross v. Moffitt, 417 U.S. 600 (1974).

[3] The line of cases begins with *Griffin v. Illinois*, 351 U.S. 12 (1956), in which it was deemed to violate both the Due Process and the Equal Protection Clauses for a state to deny to indigent defendants free transcripts of the trial proceedings, which would enable them adequately to prosecute appeals from convictions.

[4] 237 U.S. 309, 335 (1915).

[5] Moore v. Dempsey, 261 U.S. 86, 90, 91 (1923); Mooney v. Holohan, 294 U.S. 103, 113 (1935); New York *ex rel.* Whitman v. Wilson, 318 U.S. 688, 690 (1943); Young v. Ragan, 337 U.S. 235, 238–39 (1949).

[6] *Ex parte* Hull, 312 U.S. 546 (1941); White v. Ragen, 324 U.S. 760 (1945).

[7] Carter v. Illinois, 329 U.S. 173, 175–76 (1946).

[8] In *Case v. Nebraska*, 381 U.S. 336 (1965) (per curiam), the Court granted review in a case that raised the issue of whether a state could simply omit any corrective process for hearing and determining claims of federal constitutional violations, but it dismissed the case when the state in the interim enacted provisions for such process. Justices Thomas Clark and William Brennan each wrote a concurring opinion. For additional discussion of habeas review of state criminal convictions, see ArtIII.S1.6.9 Habeas Review.

[9] Frank v. Mangum, 237 U.S. 309 (1915).

court had ruled against the legal sufficiency of the same allegations.[10] In *Moore* and a subsequent case, *Brown v. Mississippi*,[11] the Court declined to defer to decisions of state appellate tribunals holding that proceedings in a trial court were fair.

In a 2009 case, the Court held that the Due Process Clause does not provide convicted persons a right to post-conviction access to the state's evidence for DNA testing.[12] Chief Justice John Roberts, in a 5-4 decision, noted that forty-six states had enacted statutes dealing specifically with access to DNA evidence, and that the Federal Government had enacted a statute allowing federal prisoners to move for court-ordered DNA testing under specified conditions. Even the states that had not enacted statutes dealing specifically with access to DNA evidence must, under the Due Process Clause, provide adequate post-conviction relief procedures. The Court, therefore, saw "no reason to constitutionalize the issue."[13]

Amdt14.S1.5.6.3 Probation, Parole, and Procedural Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Sometimes convicted defendants are not sentenced to imprisonment, but instead are placed on probation subject to incarceration if they violate the conditions that are imposed; others who are incarcerated may qualify for release on parole before completing their sentence, subject to reincarceration if they violate imposed conditions. The Court has deemed both parole and probation to be statutory privileges granted by the government, and thus early cases assumed that the government did not have to provide procedural due process in granting or revoking either.[1] Under modern doctrine, however, both granting and revocation of parole and probation are subject to due process analysis.

In *Morrissey v. Brewer*, a unanimous Court held that parole revocations must comply with due process hearing and notice requirements.[2] The Court explained,

> [T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocation . . . [But] the liberty of a parolee, although indeterminate, includes many of

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[10] 261 U.S. 86 (1923).

[11] 297 U.S. 278 (1936).

[12] District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. 52 (2009).

[13] 557 U.S. at 55. The Court also expressed concern that "[e]stablishing a freestanding right to access DNA evidence for testing would force us to act as policymakers . . . . We would soon have to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested. If so, for how long? Would it be different for different types of evidence? Would the State also have some obligation to gather such evidence in the first place? How much, and when?" *Id.* at 74 (citation omitted).

[1] *Ughbanks v. Armstrong*, 208 U.S. 481 (1908), held that parole is not a constitutional right but instead is a "present" from government to the prisoner. In *Escoe v. Zerbst*, 295 U.S. 490 (1935), the Court's premise was that the parolee was being granted a privilege as a matter of grace and that he should neither expect nor seek due process. Then-Judge Warren Burger in *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir.), cert. denied, 375 U.S. 957 (1963), reasoned that due process was inapplicable because the parole board's function was to assist the prisoner's rehabilitation and restoration to society and that there was no adversary relationship between the board and the parolee.

[2] 408 U.S. 471 (1972).

> the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege." By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.[3]

The Court held that what process is due depended on the state's interests. The state's principal interest was that, having once convicted a defendant, imprisoned him, and, at some risk, released him for rehabilitation purposes, it should be "able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole. Yet, the state has no interest in revoking parole without some informal procedural guarantees," inasmuch as such guarantees will not interfere with its reasonable interests.[4]

The *Morrissey* Court held that minimal due process dictates that at both stages of the parole revocation process—the arrest of the parolee and the formal revocation—the parolee is entitled to certain rights. Promptly following arrest of the parolee, there should be an informal hearing to determine whether reasonable grounds exist for revocation of parole.[5] The parolee should be given adequate notice that the hearing will take place and what violations are alleged; the parolee should be able to appear and speak on his or her own behalf and produce other evidence and should be allowed to examine those who have given adverse evidence against him or her unless it is determined that the identity of such informant should not be revealed. In addition, the hearing officer should prepare a digest of the hearing and base his or her decision upon the evidence adduced at the hearing.[6]

Prior to the final decision on revocation, there should be a more formal revocation hearing involving a final evaluation of any contested relevant facts and consideration whether the facts as determined warrant revocation. The hearing must take place within a reasonable time after the parolee is taken into custody, and he or she must be enabled to controvert the allegations or offer evidence in mitigation. The procedural details of such hearings are for the states to develop, but the Court specified minimum requirements of due process, including

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole.[7]

Ordinarily, the written statement need not indicate that the sentencing court or review board considered alternatives to incarceration,[8] but a sentencing court must consider such

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[3] 408 U.S. at 480, 482.

[4] 408 U.S. at 483.

[5] The preliminary hearing should be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available, and should be conducted by someone not directly involved in the case, though it need not be a judicial officer. 408 U.S. at 485–86.

[6] 408 U.S. at 484–87.

[7] 408 U.S. at 489.

[8] Black v. Romano, 471 U.S. 606 (1985).

alternatives if the probation violation consists of the failure of an indigent probationer, through no fault of his own, to pay a fine or restitution.[9]

The Court has applied a flexible due process standard to the provision of counsel in parole or probation revocation proceedings. The Court has not always required provision of counsel in such proceedings. However, it has held that the state should provide the assistance of counsel where an indigent person may have difficulty in presenting his or her version of disputed facts without cross-examination of witnesses or presentation of complicated documentary evidence. Presumptively, counsel should be provided where the person requests counsel and makes a timely and colorable claim that he or she has not committed the alleged violation, or if there are reasons in justification or mitigation that might make revocation inappropriate.[10] In *Mempa v. Rhay*, the Court held that a criminal defendant was entitled to counsel at a deferred sentencing hearing conducted after he violated the conditions of his probation.[11]

The Court analyzed of the Due Process Clause's requirements with respect to granting parole in *Greenholtz v. Nebraska Penal Inmates*.[12] The Court rejected the theory that the mere possibility of parole was sufficient to create a liberty interest entitling any prisoner meeting the general standards of eligibility to be dealt with in any particular way. On the other hand, the Court recognized that a parole statute could create an expectancy of release entitled to some measure of constitutional protection, although a determination would need to be made on a case-by-case basis,[13] and the full panoply of due process guarantees is not required.[14] However, when state statutes and regulations impose no obligation on the pardoning authority and thus create no legitimate expectancy of release, the prisoner may not demonstrate such a legitimate expectancy by showing that others have been granted release. The power of the executive to pardon or grant clemency is a matter of grace and is rarely subject to judicial review.[15]

Amdt14.S1.5.6.4 Prisoners and Procedural Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[9] Bearden v. Georgia, 461 U.S. 660, 672 (1983).

[10] Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[11] 389 U.S. 128 (1967).

[12] 442 U.S. 1 (1979).

[13] Following *Greenholtz*, the Court held in *Board of Pardons v. Allen*, 482 U.S. 369 (1987), that a liberty interest was created by a Montana statute providing that a prisoner shall be released upon certain findings by a parole board. *Accord* Swarthout v. Cooke, 562 U.S. 216 (2011) (per curiam).

[14] The Court in *Greenholtz* held that procedures designed to elicit specific facts were inappropriate under the circumstances, and minimizing the risk of error should be the prime consideration. That goal may be achieved by the board's largely informal methods; eschewing formal hearings, notice, and specification of particular evidence in the record. The inmate in this case was afforded an opportunity to be heard, and when parole was denied he was informed in what respects he fell short of qualifying. That afforded the process that was due. *Accord Id.*

[15] Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998). The mere existence of purely discretionary authority and the frequent exercise of it creates no entitlement. Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981) (involving commutation of a life sentence, which was necessary to become eligible for parole); Jago v. Van Curen, 454 U.S. 14 (1981).

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In an 1871 case, the Supreme Court embraced a narrow view of prisoners' due process rights, stating that a prisoner "has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state."[1] However, that view is not currently the law.[2] In 1948, the Court declared that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights," suggesting that some rights and privileges may remain.[3] Subsequent cases make clear that the Due Process and Equal Protection Clauses apply to prisoners to some extent.[4]

The Court described its role in protecting the constitutional rights of prisoners in a 1972 case:

> Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' which include prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the government for redress of grievances.[5]

While the Court has affirmed that federal courts have the responsibility to scrutinize prison practices alleged to violate the Constitution, concerns of federalism and judicial restraint have caused the Court to emphasize the necessity of deference to the judgments of prison officials and others responsible for administering such systems.[6]

Aside from challenges to conditions of confinement of pretrial detainees,[7] the Court has normally analyzed constitutional challenges to general prison conditions under the Cruel and Unusual Punishments Clause of the Eighth Amendment,[8] while challenges to particular

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[1] Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

[2] *Cf. In re* Bonner, 151 U.S. 242 (1894).

[3] Price v. Johnston, 334 U.S. 266, 285 (1948).

[4] "There is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

[5] Cruz v. Beto, 405 U.S. 319, 321 (1972). *See also* Procunier v. Martinez, 416 U.S. 396, 404–05 (1974) (invalidating state prison mail censorship regulations).

[6] Bell v. Wolfish, 441 U.S. 520, 545–548, 551, 555, 562 (1979) (federal prison); Rhodes v. Chapman, 452 U.S. 337, 347, 351–352 (1981).

[7] *See Wolfish*, 441 U.S.at 535–40. Persons not yet convicted of a crime may be detained by the government upon the appropriate determination of probable cause, and the government is entitled to "employ devices that are calculated to effectuate [a] detention." *Id.* at 537. Nonetheless, the Court has held that the Due Process Clause protects a pretrial detainee from being subject to conditions that amount to punishment. *See Wolfish*, 441 U.S. at 538, 561. More recently, the Court clarified the standard by which the due process rights of pretrial detainees are adjudged with respect to excessive force claims. Specifically, in *Kingsley v. Hendrickson*, the Court held that, in order for a pretrial detainee to prove an excessive force claim in violation of his due process rights, a plaintiff must show that an officer's use of force was objectively unreasonable, depending on the facts and circumstances from the perspective of a reasonable officer on the scene, aligning the due process excessive force analysis with the standard for excessive force claims brought under the Fourth Amendment. 135 S. Ct. 2466, 2473–74 (2015); *cf.* Graham v. Connor, 490 U.S. 386, 388 (1989) (holding that a "free citizen's claim that law enforcement officials used excessive force . . . [is] properly analyzed under the Fourth Amendment's 'objective reasonableness' standard"). Liability for actions taken by the government in the context of a pretrial detainee due process lawsuit does not, therefore, turn on whether a particular officer subjectively knew that the conduct being taken was unreasonable. *See Kingsley*, 135 S. Ct. at 2470.

[8] *See* Amdt8.4.7 Conditions of Confinement.

incidents and practices proceed under the Due Process Clause[9] or other provisions such as the First Amendment's speech and religion clauses.[10] Prior to formulating its current approach, the Court recognized several rights of prisoners. The Court has held that prisoners have the right to petition for redress of grievances, which includes access to the courts for purposes of presenting their complaints,[11] and to bring actions in federal courts to recover for damages wrongfully caused by prison administrators.[12] They also have a right, circumscribed by legitimate prison administration considerations, to fair and regular treatment during their incarceration. Prisoners have a right to be free of racial segregation in prisons, except for the necessities of prison security and discipline.[13]

In *Turner v. Safley*, the Court announced a general standard for measuring prisoners' claims of deprivation of constitutional rights: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[14] The Court indicated that several considerations are appropriate in determining the reasonableness of a prison regulation. First, there must be a rational relation to a legitimate, content-neutral objective, such as prison security. Availability of other avenues for exercise of an inmate's right supports a finding of reasonableness.[15] A regulation is also more likely to be deemed reasonable if accommodation would have a negative effect on the liberty or safety of guards, other inmates,[16] or visitors.[17] On the other hand, "if an inmate claimant can point to an alternative that fully accommodated the prisoner's rights at *de minimis* cost to valid penological interests," it suggests the regulation is unreasonable.[18]

The Court has held that Fourth Amendment protection is incompatible with "the concept of incarceration and the needs and objectives of penal institutions"; hence, a prisoner has no reasonable expectation of privacy in his or her prison cell protecting him from "shakedown"

[9] *E.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974); Baxter v. Palmigiano, 425 U.S. 308 (1976); Vitek v. Jones, 445 U.S. 480 (1980); Washington v. Harper, 494 U.S. 210 (1990) (prison inmate has liberty interest in avoiding the unwanted administration of antipsychotic drugs).

[10] *E.g.*, Procunier v. Martinez, 416 U.S. 396 (1974); Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977). On religious practices and ceremonies, see Cooper v. Pate, 378 U.S. 546 (1964); Cruz v. Beto, 405 U.S. 319 (1972).

[11] *Ex parte* Hull, 312 U.S. 546 (1941); White v. Ragen, 324 U.S. 760 (1945). Prisoners must have reasonable access to a law library or to persons trained in the law. Younger v. Gilmore, 404 U.S. 15 (1971); Bounds v. Smith, 430 U.S. 817 (1977). Establishing a right of access to law materials, however, requires an individualized demonstration of an inmate having been hindered in efforts to pursue a legal claim. *See* Lewis v. Casey, 518 U.S. 343 (1996) (no requirement that the state "enable [a] prisoner to discover grievances, and to litigate effectively").

[12] Haines v. Kerner, 404 U.S. 519 (1972); Preiser v. Rodriguez, 411 U.S. 475 (1973).

[13] Lee v. Washington, 390 U.S. 333 (1968). There was some question as to the standard to be applied to racial discrimination in prisons after *Turner v. Safley*, 482 U.S. 78 (1987) (prison regulations upheld if "reasonably related to legitimate penological interests"). In *Johnson v. California*, 543 U.S. 499 (2005), however, the Court held that discriminatory prison regulations would continue to be evaluated under a "strict scrutiny" standard, which requires that regulations be narrowly tailored to further compelling governmental interests. *Id.* at 509–13 (striking down a requirement that new or transferred prisoners at the reception area of a correctional facility be assigned a cellmate of the same race for up to sixty days before they are given a regular housing assignment).

[14] 482 U.S. 78, 89 (1987) (upholding a Missouri rule barring inmate-to-inmate correspondence, but striking down a prohibition on inmate marriages absent compelling reason such as pregnancy or birth of a child). *See* Overton v. Bazzetta, 539 U.S. 126 (2003) (upholding restrictions on prison visitation by unrelated children or children over which a prisoner's parental rights have been terminated and visitation where a prisoner has violated rules against substance abuse).

[15] For instance, limiting who may visit prisoners is ameliorated by the ability of prisoners to communicate through other visitors, by letter, or by phone. *Bazzetta*, 539 U.S. at 135.

[16] 482 U.S. at 90, 92.

[17] Hudson v. Palmer, 468 U.S. 517, 526 (1984).

[18] 482 U.S. at 91.

searches designed to root out weapons, drugs, and other contraband.[19] The Court has not totally blocked redress "for calculated harassment unrelated to prison needs," as inmates may still seek protection under the Eighth Amendment or state tort law.[20] Existence of "a meaningful postdeprivation remedy" for unauthorized, intentional deprivation of an inmate's property by prison personnel protects the inmate's due process rights.[21] The Court has held that negligent deprivation of life, liberty, or property by prison officials does not implicate due process at all.[22]

A change to a prisoner's housing conditions, including one imposed as a matter of discipline, may implicate a protected liberty interest if such a change imposes an "atypical and significant hardship" on the inmate.[23] In *Wolff v. McDonnell*, the Court articulated due process standards to govern prisoner discipline.[24] The Court held that due process applies but, because prison disciplinary proceedings are not part of a criminal prosecution, the full panoply of defendant rights is not available. Rather, the analysis must proceed by identifying the interest in "liberty" that the Due Process Clause protects. Thus, where the state provides good-time credit or other privileges and further provides for forfeiture of these privileges only for serious misconduct, the interest of the prisoner in this degree of liberty entitles him to the minimum procedures appropriate under the circumstances.[25] What the minimum procedures consist of is to be determined by balancing the prisoner's interest against the valid interest of the prison in maintaining security and order in the institution, in protecting guards and prisoners against retaliation by other prisoners, and in reducing prison tensions.

The Court in *Wolff* held that a prison must afford the subject of a disciplinary proceeding "advance written notice of the claimed violation and a written statement of the factfindings as to the evidence relied upon and the reasons for the action taken."[26] In addition, "an inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals."[27] Confrontation and cross-examination of adverse witnesses is not required inasmuch as these would threaten valid institutional interests. Ordinarily, an inmate has no right to representation by retained or appointed counsel. Finally, only a limited right to an impartial tribunal was recognized, with the Court ruling that imposing limitations on the discretion of a committee of prison officials sufficed for this purpose.[28] Revocation of good time credits, the Court later ruled, must be supported by "some evidence in the record," but an amount that "might be characterized as meager" is constitutionally sufficient.[29]

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[19] *Hudson*, 468 U.S. at 526; Block v. Rutherford, 468 U.S. 576 (1984) (holding also that needs of prison security support a rule denying pretrial detainees contact visits with spouses, children, relatives, and friends).

[20] *Hudson*, 468 U.S. at 530.

[21] *Hudson*, 468 U.S. at 533 (holding that state tort law provided adequate post-deprivation remedies). *But see* Zinermon v. Burch, 494 U.S. 113 (1990) (availability of post-deprivation remedy is inadequate when deprivation is foreseeable, pre-deprivation process was possible, and official conduct was not "unauthorized").

[22] Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986).

[23] Sandin v. Conner, 515 U.S. 472, 484 (1995) (thirty-day solitary confinement not atypical "in relation to the ordinary incidents of prison life").

[24] 418 U.S. 539 (1974).

[25] *Id.* at 557.

[26] *Id.* at 563.

[27] *Id.* at 566. However, the Court later ruled that the reasons for denying an inmate's request to call witnesses need not be disclosed until the issue is raised in court. Ponte v. Real, 471 U.S. 491 (1985).

[28] 418 U.S. at 561–72. The Court continues to adhere to its refusal to require appointment of counsel. Vitek v. Jones, 445 U.S. 480, 496–97 (1980); *id.* at 497–500 (Powell, J., concurring); Baxter v. Palmigiano, 425 U.S. 308 (1976).

[29] Superintendent v. Hill, 472 U.S. 445, 454, 457 (1985).

Determination of whether due process requires a hearing before a prisoner is transferred from one institution to another requires analysis of the applicable statutes and regulations as well as consideration of the particular harm suffered by the transferee. In one case, the Court found that no hearing needed to be held prior to transferring a prisoner from one prison to another prison in which the conditions were substantially less favorable. Because the state had not conferred any right to remain in the facility to which the prisoner was first assigned, prison officials had unfettered discretion to transfer any prisoner for any reason or for no reason at all.[30] The same principles govern interstate prison transfers.[31]

By contrast, transfer of a prisoner to a high security facility, with an attendant loss of the right to parole, gave rise to a liberty interest, although the due process requirements to protect this interest are limited.[32] The Court has also held that transfer of a prisoner to a mental hospital pursuant to a statute authorizing transfer if the inmate suffers from a "mental disease or defect" must be preceded by a hearing. The Court first noted that the statute in that case gave the inmate a liberty interest, because it presumed that he would not be moved absent a finding that he was suffering from a mental disease or defect. Second, unlike transfers from one prison to another, transfer to a mental institution was not within the range of confinement covered by the prisoner's sentence, and, moreover, imposed a stigma constituting a deprivation of a liberty interest.[33]

Another case, *Washington v. Harper*, concerned the kind of hearing that is required before a state may force a mentally ill prisoner to take antipsychotic drugs against his will.[34] The Court held that a judicial hearing was not required. Instead, the inmate's substantive liberty interest (derived from the Due Process Clause as well as from state law) was adequately protected by an administrative hearing before independent medical professionals, at which the inmate had the right to a lay advisor but not an attorney.

Amdt14.S1.5.7 State Taxes

Amdt14.S1.5.7.1 State Taxes and Due Process Generally

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The Due Process Clause imposes some limits on states' assessment and collection of taxes, which vary based on the type of tax at issue. With respect to imposition of special taxes (taxes collected from property owners to fund local government plans such as infrastructure projects), the Court has held that "notice to the owner at some stage of the proceedings, as well as an

[30] Meachum v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236 (1976).

[31] Olim v. Wakinekona, 461 U.S. 238 (1983).

[32] Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (assignment to Ohio SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an "atypical and significant hardship"). In *Wilkinson*, the Court upheld Ohio's multi-level review process, despite the fact that a prisoner was provided only summary notice as to the allegations against him, a limited record was created, the prisoner could not call witnesses, and reevaluation of the assignment only occurred at one thirty-day review and then annually. *Id.* at 219–20.

[33] Vitek v. Jones, 445 U.S. 480 (1980).

[34] 494 U.S. 210 (1990).

opportunity to defend, is essential."[1] By contrast, it has ruled that laws for assessment and collection of general taxes stand upon a different footing and are to be "construed with the utmost liberality," and that no notice is necessary.[2]

As applied to taxation, due process does not require judicial process.[3] Nor does due process in tax proceedings require the same kind of notice as is required in a suit at law or in proceedings for taking private property under the power of eminent domain.[4] Due process is satisfied if a taxpayer is given an opportunity to test the validity of a tax at any time before it is final, whether before a board having a quasi-judicial character, or before a tribunal provided by the state for such purpose.[5]

When no other remedy is available, a judgment of a state court withholding a decree in equity to enjoin collection of a discriminatory tax violates due process.[6] The Court has also found due process violations in a statute that limited a taxpayer's right to challenge an assessment to cases of fraud or corruption,[7] and when a state tribunal prevented the recovery of unlawful taxes under a state law that allowed suits to recover taxes alleged to have been assessed illegally only if the taxes had been paid at the time and in the manner provided.[8] In a case involving a tax held unconstitutional as a discrimination against interstate commerce and not invalidated in its entirety, Court held that the state had several alternatives for equalizing incidence of the tax: it could pay a refund equal to the difference between the tax paid and the tax that would have been due under rates afforded to in-state competitors, assess and collect back taxes from those competitors, or combine the two approaches.[9]

Under the doctrine of laches, persons who fail to exercise an opportunity to object and be heard cannot thereafter complain that a tax assessment is arbitrary and unconstitutional.[10] Likewise, a company that failed to report its gross receipts, as required by statute, had no further right to contest the state comptroller's estimate of those receipts and his adding to his estimate the 10% penalty permitted by law.[11]

Due process and state taxation issues include due process requirements for the assessment,[12] notice,[13] and collection[14] of state taxes.

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[1] Turpin v. Lemon, 187 U.S. 51, 58 (1902).

[2] Glidden v. Harrington, 189 U.S. 255 (1903).

[3] McMillen v. Anderson, 95 U.S. 37, 42 (1877).

[4] Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 239 (1890).

[5] Hodge v. Muscatine County, 196 U.S. 276 (1905).

[6] Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930).

[7] Central of Georgia Ry. v. Wright, 207 U.S. 127 (1907).

[8] Carpenter v. Shaw, 280 U.S. 363 (1930). *See also* Ward v. Love County, 253 U.S. 17 (1920). As in other areas, the state must provide procedural safeguards against imposition of an unconstitutional tax. These procedures need not apply pre-deprivation, but a state that denies a pre-deprivation remedy by requiring that tax payments be made before objections are heard must provide a post-deprivation remedy. McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18 (1990). *See also* Reich v. Collins, 513 U.S. 106 (1994) (violation of due process to hold out a post-deprivation remedy for unconstitutional taxation and then, after the disputed taxes had been paid, to declare that no such remedy exists); Newsweek, Inc. v. Florida Dep't of Revenue, 522 U.S. 442 (1998) (per curiam) (violation of due process to limit remedy to one who pursued pre-payment of tax, where litigant reasonably relied on apparent availability of post-payment remedy).

[9] *Carpenter*, 280 U.S. 363.

[10] Farncomb v. Denver, 252 U.S. 7 (1920).

[11] Pullman Co. v. Knott, 235 U.S. 23 (1914).

[12] *See* Amdt14.S1.5.7.2 Assessment of State Taxes and Due Process.

[13] *See* Amdt14.S1.5.7.3 Notice of State Taxes and Due Process.

[14] *See* Amdt14.S1.5.7.4 Collection of State Taxes and Due Process.

Amdt14.S1.5.7.2 Assessment of State Taxes and Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

In the 1884 case *Hagar v. Reclamation District No, 108*, the Court distinguished between the due process requirements for fixed taxes and taxes assessed based on the value of specific property.[1] The *Hagar* Court noted that "there is a vast number [of taxes] of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things, or persons, or occupations."[2] With respect to these taxes, where "there is nothing the owner can do which can affect the amount to be collected from him," the Court held that no notice or hearing was required. By contrast, "where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially."[3] The Court noted that most states provided procedures "for the correction of errors" in such assessments, and concluded, "The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceedings by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."[4]

The Court has never considered it necessary that a taxpayer shall have been present, or had an opportunity to be present, in a tribunal when liability was assessed.[5] Nor is there any constitutional command that notice of an assessment and an opportunity to contest it be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal during a suit to collect the tax and before the demand of the state for remittance becomes final.[6]

However, when a political subdivision, taxing board, or court makes assessments based on enjoyment of a special benefit, the property owner is entitled to a hearing on the amount of the assessment and its determination.[7] The hearing need not amount to a judicial inquiry,[8] but a

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[1] 111 U.S. 701 (1884).

[2] 111 U.S. at 709.

[3] 111 U.S. at 710.

[4] 111 U.S. at 710.

[5] McMillen v. Anderson, 95 U.S. 37, 42 (1877). Where a law fixes when a tax board sits and its sessions are not secret, no obstacle prevents any one from appearing before it to assert a right or redress a wrong and this is sufficient for tax assessment purposes. State Railroad Tax Cases, 92 U.S. 575, 610 (1876).

[6] Nickey v. Mississippi, 292 U.S. 393, 396 (1934). *See also* Clement Nat'l Bank v. Vermont, 231 U.S. 120 (1913). Rehearings and new trials are not essential to due process of law provided there is a hearing before judgment, with full opportunity to submit evidence and arguments. Pittsburgh C.C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894). One hearing is sufficient to constitute due process, Michigan Central R.R. v. Powers, 201 U.S. 245, 302 (1906), and the requirements of due process are also met if a taxpayer, who had no notice of a hearing, does receive notice of the decision reached there and is allowed to appeal it and present evidence and be heard on the valuation of his property. Pittsburgh C.C. & St. L. Ry. v. Board of Pub. Works, 172 U.S. 32, 45 (1898).

[7] St. Louis & K.C. Land Co. v. Kansas City, 241 U.S. 419, 430 (1916); Paulsen v. Portland, 149 U.S. 30, 41 (1893); Bauman v. Ross, 167 U.S. 548, 590 (1897).

[8] Tonawanda v. Lyon, 181 U.S. 389, 391 (1901).

mere opportunity to submit objections in writing, without the right of personal appearance, is not sufficient.[9] Generally, if an assessment for a local improvement is made in accordance with a fixed rule prescribed by legislative act, property owners are not entitled to be heard in advance on the extent to which the improvement benefits their property.[10] On the other hand, if the area of the assessment district was not determined by the legislature, a landowner has the right to be heard respecting benefits to his or her property before it can be included in the improvement district and assessed; but, in the absence of actual fraud or bad faith, due process is not denied if the decision of the agency vested with the initial determination of benefits is made final.[11] The owner has no constitutional right to be heard in opposition to the launching of a project that may result in an assessment, and once his or her land has been duly included within a benefit district, the only privilege the owner thereafter enjoys is a hearing upon the apportionment—that is, the amount of the tax he or she has to pay.[12] Where the mode of assessment for a tax resolves itself into a mere mathematical calculation, there is no necessity for a hearing.[13]

Amdt14.S1.5.7.3 Notice of State Taxes and Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Notice of tax assessments or liabilities, insofar as it is required, may be either personal, by publication, by statute fixing the time and place of hearing,[1] or by delivery to a statutorily designated agent.[2] With regard to land, when a state intends to sell land "for taxes upon

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[9] Londoner v. City of Denver, 210 U.S. 373 (1908).

[10] Withnell v. Ruecking Constr. Co., 249 U.S. 63, 68 (1919); Browning v. Hooper, 269 U.S. 396, 405 (1926). Likewise, committing to a board of county supervisors the authority to determine, without notice or hearing, when repairs to an existing drainage system are necessary cannot be said to deny due process of law to landowners in the district, who, by statutory requirement, are assessed for the cost thereof in proportion to the original assessment. Breiholz v. Bd. of Supervisors, 257 U.S. 118 (1921).

[11] Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 168, 175 (1896); Browning v. Hooper, 269 U.S. 396, 405 (1926).

[12] Utley v. Petersburg, 292 U.S. 106, 109 (1934); French v. Barber Asphalt Paving Co., 181 U.S. 324, 341 (1901). *See also* Soliah v. Heskin, 222 U.S. 522 (1912). Nor can a taxpayer rightfully complain because a statute renders conclusive, after a hearing, the determination as to apportionment by the same body that levied the assessment. Hibben v. Smith, 191 U.S. 310, 321 (1903).

[13] Hancock v. Muskogee, 250 U.S. 454, 458 (1919). Likewise, a taxpayer does not have a right to a hearing before a state board of equalization before issuance of an order increasing the valuation of all property in a city by 40%. Bi-Metallic Co. v. Colorado, 239 U.S. 441 (1915). Statutes and ordinances providing for the paving and grading of streets, the cost thereof to be assessed on the front foot rule, do not, by their failure to provide for a hearing or review of assessments, generally deprive a complaining owner of property without due process of law. City of Detroit v. Parker, 181 U.S. 399 (1901). In contrast, when an attempt is made to cast upon particular property a certain proportion of the construction cost of a sewer not calculated by any mathematical formula, the taxpayer has a right to be heard. Paulsen v. Portland, 149 U.S. 30, 38 (1893).

[1] Londoner v. City of Denver, 210 U.S. 373 (1908). *See also* Kentucky Railroad Tax Cases, 115 U.S. 321, 331 (1885); Winona & St. Peter Land Co. v. Minnesota, 159 U.S. 526, 537 (1895); Merchants Bank v. Pennsylvania, 167 U.S. 461, 466 (1897); Glidden v. Harrington, 189 U.S. 255 (1903).

[2] A state statute may designate a corporation as the agent of a nonresident stockholder to receive notice and to represent the stockholder in proceedings for correcting assessment. Corry v. Baltimore, 196 U.S. 466, 478 (1905).

proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court," and may provide due process through "a notice which permits all interested, who are 'so minded,' to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not."[3] Compliance with statutory notice requirements combined with actual notice to owners of land can be sufficient in an in rem case, even if there are technical defects in the notice.[4]

Whether statutorily required notice is sufficient may vary depending on the circumstances. Thus, where a taxpayer was not legally competent, no guardian had been appointed, and town officials were aware of these facts, notice of a foreclosure was defective, even though the tax delinquency was mailed to her, published in local papers, and posted in the town post office.[5] On the other hand, due process was not denied to persons who were unable to avert foreclosure on certain trust lands because their own bookkeeper failed to inform them of the receipt of mailed notices.[6]

Amdt14.S1.5.7.4 Collection of State Taxes and Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

States may employ a variety of methods to collect taxes. For instance, collection of an inheritance tax may be expedited by a statute requiring safe deposit boxes to be sealed for at least ten days after a renter's death and obliging the lessor to retain assets found therein sufficient to pay the tax that may be due the state.[1] A state may compel retailers to collect gasoline taxes from consumers and, under penalty of a fine for delinquency, to remit monthly the amounts thus collected.[2] In collecting personal income taxes, most states require employers to deduct and withhold the tax from employees' wages.[3]

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[3] Leigh v. Green, 193 U.S. 79, 92–93 (1904).

[4] Thus, the Court will sustain an assessment for taxes and a notice of sale when such taxes are delinquent as long as there is a description of the land and the owner knows that the property so described is his, even if the description is not technically correct. Ontario Land Co. v. Yordy, 212 U.S. 152 (1909). Where tax proceedings are in rem, owners are bound to take notice thereof, and to pay taxes on their property, even if the land is assessed to unknown or other persons. Thus, an owner who stands by and sees his property sold for delinquent taxes is not thereby wrongfully deprived of property. *Id. See also* Longyear v. Toolan, 209 U.S. 414 (1908).

[5] Covey v. Town of Somers, 351 U.S. 141 (1956).

[6] Nelson v. New York City, 352 U.S. 103 (1956). This conclusion was not affected by the disparity between the value of the land taken and the amount owed to the city. The Court held that, having issued appropriate notices, the city could not be held responsible for the negligence of the bookkeeper and the managing trustee in overlooking arrearages on tax bills, nor was it obligated to inquire why appellants regularly paid real estate taxes on their property.

[1] National Safe Deposit Co. v. Stead, 232 U.S. 58 (1914).

[2] Pierce Oil Corp. v. Hopkins, 264 U.S. 137 (1924). Likewise, a tax on the tangible personal property of a nonresident owner may be collected from the custodian or possessor of such property, and the latter, as an assurance of reimbursement, may be granted a lien on such property. Carstairs v. Cochran, 193 U.S. 10 (1904); Hannis Distilling Co. v. Baltimore, 216 U.S. 285 (1910).

[3] The duty thereby imposed on the employer has never been viewed as depriving him of property without due process of law, nor has the adjustment of his system of accounting been viewed as an unreasonable regulation of the conduct of business. Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 75, 76 (1920).

States may also use various procedures to collect taxes from prior tax years. To reach property that has escaped taxation, a state may tax estates of decedents for a period prior to death and grant proportionate deductions for all prior taxes that the personal representative can prove to have been paid.[4] In addition, the Court found no violation of property rights when a state asserts a prior lien against trucks repossessed by a vendor from a carrier (1) accruing from the operation by the carrier of trucks not sold by the vendors, either before or during the time the carrier operated the vendors' trucks, or (2) arising from assessments against the carrier, after the trucks were repossessed, but based upon the carrier's operations preceding such repossession. Such lien need not be limited to trucks owned by the carrier because the wear on the highways occasioned by the carrier's operation is in no way altered by the vendor's retention of title.[5]

A state may provide in advance that taxes will accrue interest from the time they become due, and may with equal validity stipulate that taxes that have become delinquent will bear interest from the time the delinquency commenced. A state may also adopt new remedies for the collection of taxes and apply these remedies to taxes already delinquent.[6] After a taxpayer's liability has been fixed by appropriate procedure, collection of a tax by distress and seizure of his person does not deprive him of liberty without due process of law.[7] Nor is a foreign insurance company denied due process of law when its personal property is distrained to satisfy unpaid taxes.[8]

The requirements of due process are fulfilled by a statute which, in conjunction with affording an opportunity to be heard, provides for the forfeiture of titles to land for failure to list and pay taxes thereon for certain specified years.[9] No less constitutional, as a means of facilitating collection, is an in rem proceeding, to which the land alone is made a party, whereby tax liens on land are foreclosed and all preexisting rights or liens are eliminated by a sale under a decree.[10] On the other hand, although the conversion of an unpaid special assessment into both a personal judgment against the owner as well as a charge on the land is consistent with the Fourteenth Amendment,[11] a judgment imposing personal liability against a nonresident taxpayer over whom the state court acquired no jurisdiction is void.[12]

Amdt14.S1.5.8 Other Contexts

Amdt14.S1.5.8.1 Parental and Children's Rights and Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[4] Bankers Trust Co. v. Blodgett, 260 U.S. 647 (1923).

[5] International Harvester Corp. v. Goodrich, 350 U.S. 537 (1956).

[6] League v. Texas, 184 U.S. 156, 158 (1902). *See also* Straus v. Foxworth, 231 U.S. 162 (1913).

[7] Palmer v. McMahon, 133 U.S. 660, 669 (1890).

[8] Scottish Union & Nat'l Ins. Co. v. Bowland, 196 U.S. 611 (1905).

[9] King v. Mullins, 171 U.S. 404 (1898); Chapman v. Zobelein, 237 U.S. 135 (1915).

[10] Leigh v. Green, 193 U.S. 79 (1904).

[11] Davidson v. City of New Orleans, 96 U.S. 97, 107 (1878).

[12] Dewey v. City of Des Moines, 173 U.S. 193 (1899).

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Supreme Court has applied the Due Process Clause to require certain procedural protections in cases involving parental rights. In a case arising from a state proceeding to terminate the parental rights of an indigent without providing her counsel, the Court recognized the parent's interest as "an extremely important one."[1] However, the Court also noted the state's strong interest in protecting the welfare of children. Thus, as the interest in correct fact-finding was strong on both sides, the proceeding was relatively simple, no features were present raising a risk of criminal liability, no expert witnesses were present, and no "specially troublesome" substantive or procedural issues had been raised, the litigant did not have a right to appointed counsel.[2] In other due process cases involving parental rights, the Court has held that due process requires special state attention to parental rights.[3]

Amdt14.S1.5.8.2 Protective Commitment and Due Process

Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Like juvenile offenders,[1] several other classes of persons may be subject to confinement by court processes deemed civil rather than criminal. This category of "protective commitment" includes involuntary commitments for treatment of mental illness or mental disability, alcoholism, narcotics addiction, or sexual psychopathy. In *O'Connor v. Donaldson*, the Court held that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[2] The Court declined to resolve questions including "when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to ensure his own survival or

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[1] Lassiter v. Department of Social Services of Durham County, N.C., 452 U.S. 18, 31 (1981).

[2] 452 U.S. at 32.

[3] *See, e.g.*, Little v. Streater, 452 U.S. 1 (1981) (indigent entitled to state-funded blood testing in a state-mandated paternity action); Santosky v. Kramer, 455 U.S. 745 (1982) (imposition of higher standard of proof in case involving state termination of parental rights).

[1] *See* Amdt14.S1.5.5.8 Due Process Rights of Juvenile Offenders.

[2] 422 U.S. 563, 576 (1975). The jury had found that Donaldson was not dangerous to himself or to others, and the Court ruled that he had been unconstitutionally confined. *Id.* at 576–77. The Court remanded to allow the trial court to determine whether Donaldson should recover personally from his doctors and others for his confinement, under standards formulated under 42 U.S.C. § 1983. *See* Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974). Prior to *O'Connor v. Donaldson*, only in Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940), had the Court considered the issue. Other cases reflected the Court's concern with the rights of convicted criminal defendants and generally required due process procedures or that the commitment of convicted criminal defendants follow the procedures required for civil commitments. Specht v. Patterson, 386 U.S. 605 (1967); Baxstrom v. Herold, 383 U.S. 107 (1966); Lynch v. Overholser, 369 U.S. 705 (1962); Humphrey v. Cady, 405 U.S. 504 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); McNeil v. Director, 407 U.S. 245 (1972). *Cf.* Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972).

safety, or to alleviate or cure his illness"[3] and the confined person's right, if any, to receive treatment for the illness. In another case, the Court held that, to conform to due process requirements, procedures for voluntary admission should recognize the possibility that persons in need of treatment may not be competent to give informed consent; this is not a situation where availability of a meaningful post-deprivation remedy can cure the due process violation.[4]

Procedurally, an individual's liberty interest in being free from unjustifiable confinement and from the adverse social consequences of being labeled mentally ill requires the government to assume a greater share of the risk of error in proving the existence of such illness as a precondition to confinement. Thus, the standard of a "preponderance of the evidence," normally used in litigation between private parties, is constitutionally inadequate in commitment proceedings. On the other hand, the criminal standard of "beyond a reasonable doubt" is not necessary because the state's aim is not punitive and because some or even much of the consequence of an erroneous decision not to commit may fall upon the individual. Moreover, the criminal standard addresses an essentially factual question, whereas interpretative and predictive determinations must also be made in reaching a conclusion on commitment. The Court therefore imposed a standard of "clear and convincing" evidence.[5]

In *Parham v. J.R.*, the Court considered due process requirements in the context of commitment of children to an institution for treatment of mental illness by their parents or by the state, when such children are wards of the state.[6] Under the challenged laws, there were no formal preadmission hearings, but psychiatric and social workers interviewed parents and children and reached some form of independent determination that commitment was called for. The Court acknowledged the potential for abuse but balanced it against factors including the responsibility of parents for the care and nurture of their children and the legal presumption that parents usually act in behalf of their children's welfare, the independent role of medical professionals in deciding to accept the children for admission, and the real possibility that the institution of an adversary proceeding would both deter parents from acting in good faith to institutionalize children needing care and interfere with the ability of parents to assist with the care of institutionalized children.[7] The same concerns, reflected in the statutory obligation of the state to care for children in its custody, caused the Court to apply the same standards to involuntary commitment by the government.[8]

Amdt14.S1.6 Substantive Due Process

Amdt14.S1.6.1 Overview of Substantive Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[3] O'Connor v. Donaldson, 422 U.S. 563, 573 (1975).

[4] Zinermon v. Burch, 494 U.S. 113 (1990).

[5] Addington v. Texas, 441 U.S. 418 (1979). *See also* Vitek v. Jones, 445 U.S. 480 (1980) (transfer of prison inmate to mental hospital).

[6] 442 U.S. 584 (1979). *See also* Secretary of Public Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979).

[7] 442 U.S. at 598–617.

[8] 442 U.S. at 617–20. The Court left open the question of the due process requirements for post-admission review of the necessity for continued confinement. *Id.* at 617.

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Supreme Court has interpreted the Fifth and Fourteenth Amendments' Due Process Clause—which prohibits the government from depriving "any person of life, liberty, or property without due process of law"—to protect certain fundamental constitutional rights from government interference, regardless of the procedures that the government follows when enforcing the law. These protected rights, though not listed in the Constitution, are deemed so fundamental that courts must subject government actions infringing on them to closer scrutiny. The Fourteenth Amendment, in particular, adopted as one of the Reconstruction Amendments after the Civil War, protects individuals from interference by state actions.[1]

Although the Court, in the immediate years following the Fourteenth Amendment's ratification, declined to interpret the Due Process Clause as placing a substantive constraint on state actions, it went on to apply to robust notion of substantive due process to economic legislation prior to the Great Depression Era. During this period, the Court, recognizing "liberty of contract" as an interest protected by the Due Process Clause, struck down a variety of economic regulations as unconstitutional. The Court, however, ultimately retreated from the doctrine of economic substantive due process as the *laissez-faire* approach to economic regulation receded with the Great Depression.[2]

In contrast to the Court's shift away from economic substantive due process, the Court continued to develop the doctrine of noneconomic due process during the twentieth century, invalidating several governmental actions as impermissibly infringing upon certain fundamental rights, including the right to use contraceptives, to marry, and to engage in certain adult consensual intimate conduct. Since the 1980s, however, the Court—with the exception of two cases involving the right of same-sex couples—has generally declined to invalidate government actions on substantive due process grounds. In 2022, the Court further signaled a potential retreat from noneconomic substantive due process when it reversed the position it had held for nearly five decades to hold that the right to abortion is not a constitutionally protected fundamental right.[3]

Amdt14.S1.6.2 Economic

Amdt14.S1.6.2.1 Overview of Economic Substantive Due Process

Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

[1] The Fifth Amendment's Due Process Clause protects individuals from federal government interference. For more about the substantive due process under the Fifth Amendment see Amdt5.7.1 Overview of Substantive Due Process Requirements.

[2] *See* Amdt14.S1.6.2.1 Overview of Economic Substantive Due Process to Amdt14.S1.6.2.3 Laws Regulating Working Conditions and Wages.

[3] *See* Amdt14.S1.6.3.1 Overview of Noneconomic Substantive Due Process to Amdt14.S1.6.5.3 Civil Commitment and Substantive Due Process.

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

For approximately the first third of the twentieth century, the Supreme Court applied a doctrine known as economic substantive due process, which recognized "liberty of contract" as an interest protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, to strike down a variety of economic regulations unconstitutional.[1] In the years immediately following the adoption of the the Fourteenth Amendment in the late nineteeth century, however, there was little indication of the Due Process Clause's potential to serve as a substantive restraint on state action.[2] Long before the Fourteenth Amendment's passage, the Court had recognized the Due Process Clause of the Fifth Amendment as a restraint upon the federal government, but only in the narrow sense that a legislature needed to provide procedural "due process" when enforcing law.[3]

Early invocations of a "substantive" economic due process right were unsuccessful. In the *Slaughter-House Cases*,[4] a group of butchers challenged a Louisiana statute conferring the exclusive privilege of butchering cattle in New Orleans to one corporation. In reviewing the validity of this monopoly, the Court noted that the prohibition against a deprivation of property without due process "has been in the Constitution since the adoption of the Fifth Amendment, as a restraint upon the Federal power."[5] Nearly all state constitutions, the Court observed, also included a similar restraint on state power.[6] In upholding the state law, the Court stated that "under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision."[7]

Four years later, in *Munn v. Illinois*,[8] the Court reviewed the constitutionality of a state law that regulated the maximum rates private companies can charge for transporting and warehousing grain, and again refused to interpret the Due Process Clause as invalidating substantive state legislation. Rejecting contentions that such legislation effected an unconstitutional deprivation of property by preventing the owner from earning a reasonable compensation for its services and by transferring an interest in a private enterprise to the public, Chief Justice Morrison Waite took a broad view of the state's police power and concluded that states may regulate the use of private property "when such regulation becomes

[1] For a discussion of the economic substantive due process as applied to federal actions, see Amdt14.S1.6.2.1 Overview of Economic Substantive Due Process.

[2] In the years following the Fourteenth Amendment's ratification, the Supreme Court often observed that the Due Process Clause "operates to extend . . . the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment," Hibben v. Smith, 191 U.S. 310, 325 (1903), and that "ordinarily if an act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth," Carroll v. Greenwich Ins. Co., 199 U.S. 401, 410 (1905). *See also* French v. Barber Asphalt Paving Co., 181 U.S. 324, 328 (1901). There is support for the notion, however, that the proponents of the Fourteenth Amendment envisioned a more expansive substantive interpretation of that Amendment than had developed under the Fifth Amendment. See Akhil Reed Amar, The Bill of Rights 181–197 (1998).

[3] The conspicuous exception to this was the holding in the *Dred Scott* case that former slaves, as non-citizens, could not claim the protections of the clause. 60 U.S. (19 How.) 393, 450 (1857)

[4] 83 U.S. (16 Wall.) 36 (1873).

[5] *Id.* at 80–81.

[6] *Id.*

[7] 83 U.S. (16 Wall.) at 80–81.

[8] 794 U.S. 113, 134 (1877).

Amdt14.S1.6.2.1
Overview of Economic Substantive Due Process

necessary for the common good."[9] While Chief Justice Waite acknowledged that state legislatures may abuse rate regulation, he emphasized that such possibility is "no argument against its existence," for the people "must resort to the polls, not to the courts" for protection against abuses by legislatures.[10]

A year later, in *Davidson v. New Orleans*,[11] the Court similarly upheld a special assessment on certain real estate properties for drainage purposes. Writing for the Court, Justice Samuel Miller counseled against departing from the then-conventional applications of due process but acknowledged the difficulty of arriving at a precise, all-inclusive definition of the clause. "It is not a little remarkable," he observed, "that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, . . . this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion."[12] But only a few years after due process became part of the Constitution as a restraint upon the states through the ratification of the Fourteenth Amendment, he noted, "the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law."[13] Justice Miller opined that "no more useful construction could be furnished by this or any other court" than to define "what it is for a State to deprive a person of life, liberty, or property without due process of law."[14] But such construction, he continued, should be fleshed out "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."[15]

Just six years later, however, in *Hurtado v. California*,[16] the Court indicated it was modifying its views. Justice Stanley Mathews, speaking for the Court, noted that due process under the United States Constitution differed from due process in British common law in that the latter applied only to executive and judicial acts, whereas the former also applied to legislative acts. Consequently, the limits of due process under the Fourteenth Amendment could not be appraised solely in terms of the "sanction of settled usage" under common law.[17] The Court then declared that "[a]rbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law" and that the constitutional limits placed on the action of both state and federal governments "are essential to the preservation of public and private rights."[18] "The enforcement of these limitations by judicial process," Justice Mathews continued, "is the device of self-governing communities to protect the rights of individuals and minorities."[19] By this language, the states were put on notice that all types of state legislation, whether dealing with procedural or substantive rights, were now subject to the scrutiny of the Court when questions of essential justice were raised.

As the Court expanded the scope of the Due Process Clause over the next twenty years, two strands of reasoning developed to support this expansion. The first was a view advanced by

[9] *Id.* at 124.
[10] *Id.* at 134.
[11] 96 U.S. 97, 103–04 (1878).
[12] *Id.* at 104.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] 9110 U.S. 516, 528, 532, 536 (1884).
[17] *See id.* at 528.
[18] *Id.* at 536.
[19] *Id.*

Justice Johnson Field in a dissent in *Munn v. Illinois*.[20] According to Justice Field, the state police power is limited to preventing injury to the "peace, good order, morals, and health of the community."[21] The second strand, which Justice Joseph Bradley espoused in his dissent in the *Slaughter-House Cases*,[22] tentatively transformed ideas embodying the social compact and natural rights into constitutionally enforceable limitations upon government.[23] Under this view, not only were states limited to exercising their police powers to further only those purposes of health, morals, and safety that the Court had enumerated, but states could also only employ means that do not unreasonably interfere with fundamental natural rights of liberty and property.[24] As articulated by Justice Bradley, these rights were equated with freedom to pursue a lawful calling and to make contracts for that purpose.[25]

As more Justices endorsed Justice Bradley's view,[26] and as the laissez-faire approach to economic regulation became dominant,[27] the Court also began to deviate from presuming a state statute to be valid unless clearly shown to be otherwise, by examining whether facts justified a particular law.[28] In earlier cases such as *Munn v. Illinois*,[29] the Court had upheld state laws by presuming that facts justifing the legislation "actually did exist when the statute now under consideration was passed." Ten years later, however, in *Mugler v. Kansas*,[30] the Court upheld a statewide anti-liquor law because the Court was aware of the deleterious social effects caused by excessive use of alcoholic liquors,[31] thereby establishing precedent for the Court to appraise independently the facts inducing legislatures to enact statutes.[32]

Mugler was significant because it implied that, unless the Court found facts justifying a state law, the Court would invalidate the law as an improper exercise of the state's police power because the law lacked a reasonable or adequate relation to promoting public health, morals, or safety.[33] The Court used this approach when challenged legislation involved potential

[20] 94 U.S. 113, 141–48 (1877).

[21] *Id.* 94 U.S. 145–46.

[22] 83 U.S. (16 Wall.) 36, 113–14, 116, 122 (1873).

[23] *See* Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 662–63 (1875) (noting that "[t]here are . . . rights in every free government beyond the control of the State" and "limitations on [governmental power] which grow out of the essential nature of all free governments," and that the social compact "could not exist" without such "[i]mplied reservations of individual rights").

[24] *See id.*

[25] *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 116, 122 (1873) (Bradley, J., dissenting) ("This right to choose one's calling is an essential part of that [fundamental] liberty which it is the object of government to protect; and a calling, when chosen, is a man's property right. . . . A law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law.").

[26] *See* Budd v. New York, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting) (declaring "[t]he paternal theory of government" to be "odious" and expressing the view that "[t]he utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government").

[27] *See* Dobbs v. Jackson Women's Health Org., No. 19-1392, slip. op 44 (U.S. June 24, 2022) (Kagan, J., dissenting) (noting the "*laissez-faire* approach" to economic regulation that had dominated prior to the Great Depression).

[28] *See* Fletcher v. Peck, 10 U.S. (6 Cr.) 87, 128 (1810).

[29] 94 U.S. 113, 123, 182 (1877).

[30] 123 U.S. 623 (1887).

[31] *Id.* at 662. ("We cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact . . . that . . . pauperism, and crime . . . are, in some degree, at least, traceable to this evil.").

[32] The following year the Court, addressed an act restricting sales oleomargarine, of which the Court could not claim a like measure of common knowledge, briefly retreated to the doctrine of presumed validity, declaring that "it does not appear upon the face of the statute, or from any of the facts of which the Court must take judicial cognizance, that it infringes rights secured by the fundamental law." Powell v. Pennsylvania, 127 U.S. 678, 685 (1888).

[33] *See Mugler*, 123 U.S. at 662–63.

governmental interference in economic relations. In these cases, the Court tended to shift the burden of proof from litigants challenging the legislation to the state seeking enforcement.[34] Thus, the state had to demonstrate that the Constitution authorized, rather than did not expressly prohibit, a statute that interfered with a natural right of liberty or property. Applying this approach from the turn of the century through the mid-1930s, the Court struck down numerous laws that it saw as restricting economic liberties.

During the Great Depression, however, the laissez-faire approach to economic regulation lost favor to New Deal approaches.[35] Thus, in 1934, the Court in *Nebbia v. New York*[36] discarded its prior approach to evaluating economic legislation. The Court's modern approach is exemplified by its 1955 decision, *Williamson v. Lee Optical Co.*,[37] which upheld a statutory scheme regulating sales of eyeglasses that favored ophthalmologists and optometrists in private professional practice and disadvantaged opticians and those employed by or using space in business establishments. As the Court stated, "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[38] "For protection against abuses by legislatures," the Court emphasized, "the people must resort to the polls, not to the courts."[39]

Amdt14.S1.6.2.2 Liberty of Contract and Lochner v. New York

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The doctrine of economic substantive due process is grounded in the concept that "liberty of contract" is a right protected by the Due Process Clause. This idea, originally advanced by Justices Joseph Bradley and Stephen Field in dissent in the *Slaughter-House Cases*,[1] later

[34] *See* Amdt14.S1.6.2.2 Liberty of Contract and Lochner v. New York.

[35] *See* Dobbs v. Jackson Women's Health Org., No. 19-1392, slip. op 44 (U.S. June 24, 2022) (Kagan, J., dissenting) (noting that after the Great Depression brought "unparalleled economic despair" and "undermined . . . the assumption that a wholly unregulated market could meet basic human needs," the "laissez-faire approach" "was recognized everywhere outside the Court to be dead" (internal quotations omitted)).

[36] 291 U.S. 502 (1934).

[37] 348 U.S. 483 (1955).

[38] *Id.* at 488.

[39] *Id.* The Court generally applies a "hands-off" standard of judicial review, whether of congressional or state legislative efforts to structure and accommodate the burdens and benefits of economic life. Such economic regulation is generally accorded the traditional presumption of validity and "upheld absent proof of arbitrariness or irrationality on the part of Congress." Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 83–84 (1978). That the accommodation among interests which the legislative branch has struck "may have profound and far-reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational." *Id. See also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14–20 (1976); Hodel v. Indiana, 452 U.S. 314, 333 (1981); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 106–08 (1978); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124–25 (1978); Brotherhood of Locomotive Firemen v. Chicago, R.I. & P. R.R., 393 U.S. 129 (1968); Ferguson v. Skrupa, 372 U.S. 726, 730, 733 (1963).

[1] *See* 183 U.S. (16 Wall.) 36, 83–111 (1873) (Field, J., dissenting); *id.* at 111–124 (Bradley, J., dissenting).

became accepted doctrine in *Allgeyer v. Louisiana*,[2] in which the Court invalidated a state law that prohibited out-of-state insurance corporations from conducting business in the state without maintaining a place of business and authorized agent there. In concluding that the state law violated the Due Process Clause, the Court held that "[t]he liberty mentioned in that [Fourteenth] amendment . . . embrace[s] the right of the citizen to . . . earn his livelihood by any lawful calling[,] to pursue any livelihood or avocation," and to enter all contracts necessary to fulfill those purposes.[3] The Court subsequently applied this doctrine repeatedly through the early part of the twentieth century to strike down both state and federal economic regulations.

The Court, however, upheld some labor regulations and acknowledged that freedom of contract was "a qualified and not an absolute right."[4] Liberty, according to the Court, "implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." Thus, with respect to labor regulations, the Court reasoned the legislature has a "wide field of discretion" to impose regulations suitable to protect "health and safety" and "designed to insure wholesome conditions of work and freedom from oppression."[5]

Still, the Court was committed to the principle that freedom of contract is the general rule and that legislative efforts to abridge it could be justified only by exceptional circumstances. To serve this end, the Court intermittently shifted the burden of proof in a manner best illustrated by comparing the early cases of *Holden v. Hardy*[6] and *Lochner v. New York*.[7] In *Holden v. Hardy*,[8] the Court considered the constitutionality of a state law that limited the number of work hours for underground miners and smelters. In upholding the state law, the Court presumed the law's validity and allowed the burden of proof to remain with those attacking the law.[9] Recognizing that mining had long been the subject of state regulation due to the associated health and safety risks, the Court registered its willingness to sustain a law that the state legislature had determined to be "necessary for the preservation of health of employees," and for which there were "reasonable grounds for believing that . . . [it was] supported by the facts."[10]

Seven years later, however, a different Court found in *Lochner v. New York*[11] that a state law restricting employment in bakeries to ten hours per day and sixty hours per week was a labor regulation rather than a true health measure, and thus unconstitutionally interfered with the right of adult laborers to contract for their means of livelihood. Denying that the Court was substituting its own judgment for that of the legislature, Justice Rufus Peckham, writing for the Court, nevertheless maintained that whether the act was within the police power of the state was a question the Court must answer.[12] Notwithstanding the medical evidence proffered—and implicitly shifting the burden of proof onto the state seeking to

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[2] 165 U.S. 578, 589 (1897); *see also* Coppage v. Kansas, 236 U.S. 1, 14 (1915) (stating that "[i]ncluded in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property," "including for personal employment, and that [i]f this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense").

[3] *Allgeyer*, 165 U.S. at 589.

[4] Chicago, B. & Q. R.R. v. McGuire, 219 U.S. 549, 567 (1911).

[5] *Id.* at 570. *See also* Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 534 (1923).

[6] 169 U.S. 366 (1898).

[7] 198 U.S. 45 (1905).

[8] 169 U.S. at 398.

[9] *See id.* 393–98.

[10] *Id.* at 398.

[11] 198 U.S. 45 (1905).

[12] *Id.* at 57.

enforce the law—the Justice questioned whether the proffered statistics adequately demonstrated the trade of a baker to be "an unhealthy one."[13]

In dissent, Justice John Harlan argued that the law was a health regulation, noting the abundance of medical testimony in the record showing that the life expectancy of bakers was below average, that their capacity to resist diseases was low, and that they were peculiarly prone to suffer irritations of the eyes, lungs, and bronchial passages.[14] In his view, the existence of such evidence left the reasonableness of the measure open to discussion and thus within the discretion of the legislature.[15]

A second dissenting opinion, written by Justice Oliver Wendell Holmes, did not reject the basic concept of substantive due process, but rather the Court's categorical presumption against economic regulation based on a particular economic theory.[16] In his view, "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez-faire."[17] Rather, he continued, "it is made for people of fundamentally differing views."[18] Thus, according to Justice Holmes, "the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion," i.e., a duly enacted state law, unless the law "would infringe fundamental principles as they have been understood by the traditions of our people and our law."[19] As such, in Justice Holmes' view, presuming the validity of state laws—including those that regulate economic regulation—was the better approach.

Following Justice Holmes's dissent, *Muller v. Oregon*[20] and *Bunting v. Oregon*[21] upheld state regulations that limited work hours in certain industries. The Court reached these results by concluding that the regulations were supported by evidence despite the shift in the burden of proof.[22] As a result of these decisions, counsel defending the constitutionality of similar legislation developed the practice of submitting voluminous factual briefs, known as "Brandeis Briefs,"[23] replete with medical or other scientific data intended to establish beyond question a substantial relationship between the challenged statute and public health, safety, or morals.[24]

While the Court generally approved regulating work hours as permissible health measures, it rejected minimum wage law as unlawfully interfering with the freedom of

[13] *Id.* at 59.

[14] *See id.* at 69–72.

[15] *See id.* at 73–74 (Harlan, J., dissenting) ("No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. . . . [L]egislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution.").

[16] *See id.* at 75–76.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] 208 U.S. 412 (1908).

[21] 243 U.S. 426 (1917).

[22] *See Muller*, 208 U.S. at 419–20; *Bunting*, 243 U.S. at 438–39.

[23] Named for attorney (later Justice) Louis Brandeis, who presented voluminous documentation to support regulating women's working hours in *Muller v. Oregon*, 208 U.S. 412 (1908).

[24] *See Muller*, 208 U.S. at 419 (referencing the Brandeis brief filed in the case as containing a "very copious collection" of relevant factual support for the state regulation).

contract.[25] Over objections that regulating wages were just as relevant to workers' health and morals as regulating work hours,[26] the Court held that a minimum wage regulation is a "price-fixing" law that bore no reasonable connection to the objectives of health or safety.[27]

During the Great Depression, however, the laissez-faire tenet of self-help was replaced by the belief that a government role is to help those who are unable to help themselves.[28] To sustain such remedial legislation, the Court had to revisit its concepts of liberty under the Due Process Clause. Thus, in *West Coast Hotel v. Parrish*,[29] the Court expressly overturned its precedents to uphold a Washington minimum wage law, taking into account the "unparalleled demands for relief" resulting from the Great Depression. In so holding, the Court reiterated that freedom of contract is "a qualified and not an absolute right" that may be restricted in furtherance of public interest.[30]

Amdt14.S1.6.2.3 Laws Regulating Working Conditions and Wages

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Even when the *Lochner*-era Supreme Court recognized "liberty of contract" as a substantive right protected by the Due Process Clause, the Court still construed the Clause as permitting certain labor regulations, including maximum hours laws applicable to women workers,[1] other workers in specified lines of employment,[2] and those working on public projects.[3] The Court likewise upheld regulation of *how* wages were to be paid, including the

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[25] The Court first considered the validity of minimum wage laws in the context of a Distict of Columbia statute in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). Because the Fifth and not the Fourteenth Amendment applies to the District of Columbia, the Court analyzed the statute under the Fifth Amendment's Due Process Clause but incorporated the relevant case law it had developed under the Fourteenth Amendment with respect to state laws. *See id.* at 545–50. The Court later applied *Adkins* to strike down a New York minimum wage law in Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936).

[26] *See Adkins*, 261 U.S. at 565–66 (Taft, C.J., dissenting) ("If I am right in thinking that the legislature can find as much support in experience for the view that a sweating wage has as great and as direct a tendency to bring about an injury to the health and morals of workers, as for the view that long hours injure their health, then I respectfully submit that *Muller v. Oregon*, 208 U.S. 412, controls this case."); *id.* at 569–70.

[27] *Id.* at 554–59.

[28] *See* Dobbs v. Jackson Women's Health Org., No. 19-1392, slip. op 44 (U.S. June 24, 2022) (Kagan, J., dissenting) (noting that after the Great Depression brought "unparalleled economic despair" and "undermined . . . the assumption that a wholly unregulated market could meet basic human needs," the "laissez-faire approach" "was recognized everywhere outside the Court to be dead" (internal quotations omitted)).

[29] 300 U.S. 379, 395–99 (1937).

[30] *See id.* at 392.

[1] *See, e.g.*, Miller v. Wilson, 236 U.S. 373 (1915) (statute limiting work to eight hours per day, 48 hours/week); Bosley v. McLaughlin, 236 U.S. 385 (1915) (same restrictions for women working as pharmacists or student nurses). *See also* Muller v. Oregon, 208 U.S. 412 (1908) (ten hours per day as applied to work in laundries); Riley v. Massachusetts, 232 U.S. 671 (1914) (violation of lunch hour required to be posted).

[2] *See, e.g.*, Holden v. Hardy, 169 U.S. 366 (1898) (statute limiting work in mines and smelters to eight hours per day); Bunting v. Oregon, 243 U.S. 426 (1917) (statute limiting to ten hours per day, with the possibility of three hours per day of overtime at time-and-a-half pay, work in any mill, factory, or manufacturing establishment).

[3] *See* Atkin v. Kansas, 191 U.S. 207 (1903).

form of payment,[4] its frequency,[5] and how such payment was to be calculated.[6] In addition, the Court upheld a state law that prohibited the employment of persons under 16 years of age in dangerous occupations and required employers to ascertain whether their employees were in fact below that age.[7]

During that era, the Court also recognized the states had the power to regulate mines. Acknowledging that such health and safety regulation was clearly within a state's police power, the Court upheld various mining regulations, including state laws that required the inspection of coal mines (paid for by mine owners),[8] required the employment of licensed mine managers and mine examiners, and imposed liability upon mine owners for failing to furnish a reasonably safe place for workmen.[9] Other similar regulations that the Court sustained included laws requiring that underground passageways meet or exceed a minimum width,[10] that boundary pillars be installed between adjoining coal properties as a protection against flood in case of abandonment,[11] and that wash houses be provided for employees.[12]

Until 1937, however, the Court interpreted economic substantive due process to generally preclude states from regulating how much wages employers were to pay employees.[13] According to the Court, such "price-fixing" laws did not bear a reasonable connection to the states' health and safety objectives and unlawfully interfered with the freedom to contract.[14] In 1937, however, the Court in *West Coast Hotel v. Parrish*[15] expressly overruled these precedents and allowed states to set minimum wages for employees. This decision reflected a larger shift in the Court's approach to economic regulations as it increasingly deferred to state legislation. As the Court explained in *Day-Brite Lighting, Inc. v. Missouri*,[16] its decisions since *West Coast Hotel* "make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." While the legislative power has limits, the Court emphasized that "state legislatures have constitutional authority to experiment with new techniques" and "may within extremely broad limits control practices in the business-labor field, so long as specific constitutional

[4] Statute requiring redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages did not violate liberty of contract. *See* Knoxville Iron Co. v. Harbison, 183 U.S. 13 (1901); Dayton Coal and Iron Co. v. Barton, 183 U.S. 23 (1901); Keokee Coke Co. v. Taylor, 234 U.S. 224 (1914).

[5] Laws that required railroads to pay their employees semimonthly, Erie R.R. v. Williams, 233 U.S. 685 (1914), or to pay them on the day of discharge, without abatement or reduction, any funds due them, St. Louis, I. Mt. & S.P. Ry. v. Paul, 173 U.S. 404 (1899), did not violate due process.

[6] Rail Coal Co. v. Ohio Industrial Comm'n, 236 U.S. 338 (1915) (upholding requirement that miners, whose compensation was fixed on the basis of weight, be paid according to coal in the mine car rather than at a certain price per ton for coal screened after it has been brought to the surface, and conditioned such payment on the presence of no greater percentage of dirt or impurities than that ascertained as unavoidable by the State Industrial Commission). *See also* McLean v. Arkansas, 211 U.S. 539 (1909).

[7] Sturges & Burn v. Beauchamp, 231 U.S. 320 (1913).

[8] St. Louis Consol. Coal Co. v. Illinois, 185 U.S. 203 (1902).

[9] Wilmington Mining Co. v. Fulton, 205 U.S. 60 (1907).

[10] Barrett v. Indiana, 229 U.S. 26 (1913).

[11] Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914).

[12] Booth v. Indiana, 237 U.S. 391 (1915).

[13] *See, e.g.*, Adkins v. Children's Hospital, 261 U.S. 525 (1923); Stettler v. O'Hara, 243 U.S. 629 (1917); Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936).

[14] *See, e.g.*, *Adkins*, 261 U.S. at 554–59.

[15] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling Adkins v. Children's Hospital, 261 U.S. 525 (1923) and Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936)).

[16] 342 U.S. 421, 423 (1952).

prohibitions are not violated and so long as conflicts with valid and controlling federal laws."[17] Debatable issues of "business, economic, and social affairs," the Court states, are generally subject to legislative decisions.[18]

Amdt14.S1.6.3 Noneconomic

Amdt14.S1.6.3.1 Overview of Noneconomic Substantive Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

After the Supreme Court retreated from the doctrine of economic substantive due process, it continued to develop and recognize, in disparate lines of cases, certain noneconomic substantive rights protected by the Due Process Clause. These protected rights are not explicitly listed in the Constitution, but they are deemed so fundamental that the courts must subject any legislation infringing on them to closer scrutiny. This analysis, criticized by some for being based on extra-constitutional precepts of natural law,[1] serves as the basis for some of the most significant constitutional holdings in the modern era. For instance, the application of the Bill of Rights to the states, seemingly uncontroversial today, is based not on constitutional text, but on noneconomic substantive due process and the incorporation of fundamental rights.[2] Other noneconomic due process holdings, however, such as the recognition of the right of a woman to have an abortion and the later reversal of this recognition, are controversial.[3]

A question confronting the Court is how to define the parameters of these abstract rights once they have been established. For instance, after recognizing the constitutional protections afforded to marriage, family, and procreation in *Griswold v. Connecticut*,[4] the Court extended the protection to apply to unmarried couples.[5] However, in *Bowers v. Hardwick*,[6] the Court majority rejected a challenge to a Georgia sodomy law despite the fact that it prohibited types

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[17] *Id.*

[18] *Id.* at 424–25. *See also* Dean v. Gadsden Times Pub. Co., 412 U.S. 543 (1973) (sustaining state statute providing that employee excused for jury duty should be entitled to full compensation from employer, less jury service fee).

[1] *See, e.g.*, Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (Cambridge 1977).

[2] *See also* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (noting that legislation that "appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth" would be subject to closer juridical scrutiny).

[3] *Compare* Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. 6 (U.S. June 24, 2022) (stating that the Court's decision in Roe v. Wade, 410 U.S. 113 (1973) to recognize the right to abortion as a fundamental right was "egregiously wrong from the start"), *with id.* at 4 (Breyer, J., dissenting) (stating that a "certain" result of *Dobbs*' overruling of *Roe* is "the curtailment of women's rights, and of their status as free and equal citizens").

[4] 381 U.S. 479 (1965).

[5] See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. . . . If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

[6] 5478 U.S. 186 (1986).

of intimate activities engaged in by married as well as unmarried couples.[7] Then, in *Lawrence v. Texas*,[8] the Supreme Court reversed itself, holding that a Texas statute making it a crime for two persons of the same sex to engage in intimate sexual conduct violates the Due Process Clause.

More broadly, the Court has not clearly articulated whether and how much to rely on history and tradition in defining a protected liberty interest. In *Washington v. Glucksberg*, the Court, in an effort to guide and restrain a court's determination of the scope of substantive due process rights, held that the concept of liberty protected under the Due Process Clause should first be understood to protect only those rights that are deeply rooted in this Nation's history and tradition.[9] Moreover, the Court in *Glucksberg* required a careful description of fundamental rights that would be grounded in specific historical practices and traditions that serve as crucial guideposts for responsible decisionmaking.[10] However, the Court, in *Obergefell v. Hodges* largely departed from *Glucksberg*'s formulation for assessing fundamental rights in holding that the Due Process Clause required states to license and recognize marriages between two people of the same sex.[11] Instead, the *Obergefell* Court recognized that fundamental rights do not come from ancient sources alone and instead must be viewed in light of evolving social norms and in a comprehensive manner.[12]

For the *Obergefell* Court, the two-part test relied on in *Glucksberg*—relying on history as a central guide for constitutional liberty protections and requiring a careful description of the right in question—was inconsistent with the approach taken in cases discussing certain fundamental rights, including the rights to marriage and intimacy, and would result in rights becoming stale, as received practices could serve as their own continued justification and new groups could not invoke rights once denied.[13] In *Dobbs v. Jackson Women's Health Organization*, however, the Court—in overruling its prior decisions that recognized a constitutionally protected right to abortion—again applied a history-focused analysis.[14]

Similar disagreement over reliance on history and tradition was also evident in *Michael H. v. Gerald D.*, involving the rights of a biological father to establish paternity and associate with a child born to the wife of another man.[15] While recognizing the protection traditionally afforded a father, Justice Antonin Scalia, joined only by Chief Justice William Rehnquist in this part of the plurality decision, rejected the argument that a non-traditional familial connection (i.e. the relationship between a father and the offspring of an adulterous relationship) qualified for constitutional protection.[16] In his view, courts should limit consideration to "the most

[7] The Court upheld the statute only as applied to the plaintiffs, who were homosexuals *See id.* at 188. In so concluded, the Court rejected an argument that there is a fundamental right of homosexuals to engage in acts of consensual intimate activities. *Id.* at 192–93. In a dissent, Justice Harry Blackmun indicated that he would have evaluated the statute as applied to both homosexual and heterosexual conduct, and thus would have resolved the broader issue not addressed by the Court—whether there is a general right to privacy and autonomy in matters of sexual intimacy. *Id.* at 199–203 (Blackmun, J., dissenting).

[8] 539 U.S. 558 (2003) (overruling *Bowers*).

[9] *See* 521 U.S. 702, 720–21 (1997).

[10] *See id.* at 721 (internal citations and quotations omitted).

[11] *See* 576 U.S. 644, 671–72 (2015).

[12] *See id.*

[13] *Id.* at 671.

[14] *See* No. 19-1392, slip op. at 23–25 (U.S. June 24, 2022) (reasoning that a right to abortion "is not deeply rooted in the Nation's history and traditions," and thus not a constitutionally protected right, because abortion was, for instance, prohibited in three-quarters of the states when the Fourteenth Amendment was adopted, and thirty states still prohibited the procedure when *Roe* was decided).

[15] 491 U.S. 110 (1989) (plurality). Five Justices agreed that a liberty interest was implicated, but the Court ruled that California's procedures for establishing paternity did not unconstitutionally impinge on that interest.

[16] 491 U.S. at 128 n.6.

specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[17] Dissenting Justice William Brennan, joined by two others, rejected the emphasis on tradition, and argued instead that the Court should "ask whether the specific parent-child relationship under consideration is close enough to the interests that we already have protected [as] an aspect of 'liberty.'"[18]

Another question for the Court is what standard of review to apply in reviewing infringements on the fundamental rights it has recognized. In *Poe v. Ullman*, Justice John Marshall Harlan in a dissent advocated for the application of a standard of reasonableness—the same standard he would have applied to test economic legislation.[19] In *Griswold*, however, the Court seemingly concluded that the relevant privacy right was protected from government intrusions with little or no consideration to the governmental interests that might justify such an intrusion.[20] On the other hand, in the abortion line of cases, the Court, during the period when it recognized a constitutional right to abortion, came to apply a specific "undue burden" standard that balanced the government's interest in potential life with a woman's right to decide to terminate her pregnancy.[21] In *Lawrence*, the Court struck down the relevant state law after concluding it "further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[22] While this language is suggestive of rational basis review, a typically lenient form of review,[23] the Court was noticeably silent on the standard of review it applied. In his dissent, Justice Antonin Scalia commented on this silence, opining that the Court "appl[ied] an unheard-of form of rational-basis review" in invalidating the state law.[24] Consequently, questions remain concerning the applicable standard of review and how it should be applied with respect to specific fundamental rights.

Amdt14.S1.6.3.2 Historical Background on Noneconomic Substantive Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[17] *Id.*

[18] *Id.* at 142 (Brennan, J., dissenting).

[19] 367 U.S. 497 542–43 (1961) (Harlan, J., dissenting). *Poe* concerned a Connecticut statute banning the use of contraceptives, even by married couples. *Id.* at 522, 538–45. The Court dismissed as the case as non-justiciable without reaching the merits. *See id.*

[20] *See Griswold*, 381 U.S. at 486 (holding that the law banning the use of contraceptives cannot stand in light of the principle that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms" (internal quotations omitted)).

[21] *See* Amdt14.S1.6.4.1 Abortion, Roe v. Wade, and Pre-Dobbs Doctrine.

[22] *Lawrence*, 539 U.S. at 578.

[23] *See id.* at 579 (O'Connor, J., concurring) (noting that "[l]aws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster").

[24] *See Id.* at 586 (Scalia, J., dissenting). *See also id.* at 580 (O'Connor, J., concurring) (expressing the view that state law would be better analyzed under the Equal Protection Clause, subject to "a more searching form of rational basis review" because the law targets a politically unpopular group).

> *States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

One of the earliest formulations of noneconomic substantive due process was the right to privacy. In an 1890 Harvard Law Review article, Samuel Warren and Louis Brandeis first proposed this right as a unifying theme to various common law protections of the "right to be left alone," including the developing laws of nuisance, libel, search and seizure, and copyright.[1] According to the authors,

> This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.[2]

The concepts advanced in this article, which appeared to relate as much to private intrusions on persons as to intrusions by government, reappeared years later in a 1928 dissenting opinion by Louis Brandeis, by then a Supreme Court Justice, regarding the Fourth Amendment.[3] In the same decade, during the heyday of economic substantive due process, the Court also ruled in two cases that, although characterized in part as involving the protection of property, foreshadowed the rise of the protection of noneconomic interests.

In *Meyer v. Nebraska*, the Court struck down a state law that prohibited schools from teaching any language other than English to grade school children.[4] Two years later, in *Pierce v. Society of Sisters*, the Court declared it unconstitutional to require public school education of children aged eight to sixteen.[5] The Court characterized the rights at issue in each case as certain economic rights.[6] In *Meyer*, the Court found that the statute at issue interfered in part with the property interest of the plaintiff, a German teacher, in pursuing his occupation.[7] In *Pierce*, the Court found that the public school requirement threatened the private school plaintiffs with destruction of their businesses and the values of their properties.[8] Yet in both cases the Court also permitted the plaintiffs to represent the interests of parents in the assertion of other noneconomic forms of "liberty" protected by the Due Process Clause. In particular, in *Meyer*, the Court also recognized "the power of parents to control the education of

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[1] Samuel Warren & Louis Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193, 193–207 (1890).

[2] *Id.*

[3] *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (arguing against the admissibility in criminal trials of secretly taped telephone conversations). In *Olmstead*, Justice Brandeis expressed the view that the Framers "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations." *Id.* Accordingly, Justice Brandeis reasoned that the Framers "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Id.* Thus, he continued, "[t]o protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." *Id.*

[4] 262 U.S. 390, 400–01 (1923).

[5] 268 U.S. 510, 534–35 (1925).

[6] *See Meyer*, 262 U.S. at 400.

[7] *See id.* at 401.

[8] *See Pierce*, 268 U.S. 531, 533–34. The Court has subsequently made clear that these cases dealt with a complete prohibition of the right to engage in a calling, holding that a brief interruption did not constitute a constitutional violation. Conn v. Gabbert, 526 U.S. 286, 292 (1999) (holding that search warrant served on attorney that prevented attorney from assisting client appearing before a grand jury did not violate the attorney's Fourteenth Amendment right to practice one's calling).

their own" as a protected liberty interest.[9] Relying on this part of *Meyer*, the Court in *Pierce* also held that the public school requirement "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[10]

Although the Supreme Court after *Pierce* continued to describe noneconomic liberty broadly in dicta,[11] the doctrine had little practical impact in the ensuing decades.[12] In 1965, however, the Court in *Griswold v. Connecticut* held that a state law banning the use of contraceptives violated the right of marital privacy, but concluded that the right stemmed not from the Due Process Clause, but from the "penumbras" of several amendments of the Bill of Rights.[13] In *Roe v. Wade*, the Court, while leaving open the possibility this privacy right may be rooted in the Ninth Amendment's reservation of rights to the people, characterized the right as one "founded in the Fourteenth Amendment's concept of personal liberty."[14] From then on, the Court has generally recognized this protected privacy interest as stemming in large part from the Due Process Clause and encompassing, for instance, the right of same-sex couples to engage in adult consensual intimate activities,[15] and for nearly five decades, the right to abortion.[16]

Amdt14.S1.6.3.3 Informational Privacy, Confidentiality, and Substantive Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The Supreme Court has at times suggested that the privacy right protected by the Constitution encompasses a right to informational privacy or confidentiality. The Court first indicated the existence of this protected interest in *Whalen v. Roe*.[1] There, a group of patients and doctors sued to challenge a state law that required the state to record, in a centralized

[9] *See Meyer*, 262 U.S. at 401.

[10] *See Pierce*, 268 U.S. at 534–35. Some Justices have expressed the view that *Meyer* and *Pierce* are more appropriately resolved on First Amendment grounds. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (Douglas, J., concurring). In both *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968), concerning a state law that prohibited the teaching of evolution, and *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506–07 (1969), concerning a school policy prohibiting the wearing of armbands, the Court approvingly noted the due process basis of *Meyer* and *Pierce* but decided both cases on First Amendment grounds.

[11] *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (describing marriage and procreation are among "the basic civil rights of man"); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (stating that care and nurture of children by the family are within "the private realm of family life which the state cannot enter").

[12] *See, e.g.*, Buck v. Bell, 274 U.S. 200 (1927) (allowing sexual sterilization of inmates of state institutions found to be afflicted with hereditary forms of mental illness or intellectual disability); Minnesota v. Probate Court *ex rel.* Pearson, 309 U.S. 270 (1940) (allowing institutionalization of habitual sexual offenders as psychopathic personalities).

[13] Griswold v. Connecticut, 381 U.S. 479, 481–84 (1965).

[14] Roe v. Wade, 410 U.S. 113, 152–53 (1973).

[15] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 564–65 578–79 (2003).

[16] For a more detailed discussion of the evolution of the Court's analysis of the right to abortion, see Amdt14.S1.6.4.1 Abortion, Roe v. Wade, and Pre-Dobbs Doctrine to Amdt14.S1.6.4.3 Abortion, Dobbs v. Jackson Women's Health Organization, and Post-Dobbs Doctrine.

[1] 429 U.S. 589 (1977).

computer file, the names and addresses of all persons who have been prescribed certain drugs with abuse potential.[2] The plaintiffs argued that the law impermissibly invaded two protected privacy interests: (1) the individual interest in avoiding disclosure of personal matters; and (2) the autonomy interest in making certain health decisions about what medication to use.[3]

The Court assumed that both interests are protected, but held that the law on its face did not "pose a sufficiently grievous threat to either interest."[4] The record system, the Court observed, included extensive security protection that limited disclosure to that necessary to achieve the purpose of curtailing misuse of certain prescription drugs, nor did the law interfere with the decision to prescribe or use the relevant drugs.[5] Following *Whalen*, some lower courts have questioned whether the case established a "fundamental" right to informational privacy or confidentiality.[6]

More than two decades after *Whalen*, the Court, in *NASA v. Nelson*, declined to rule on whether such a privacy right exists.[7] In *Nelson*, a group of NASA workers sued to challenge the extensive background checks required to work at NASA facilities as violating their constitutional privacy rights.[8] Ruling unanimously in favor of the agency, the Court again assumed without deciding that a right to informational privacy could be protected by the Constitution.[9] The Court, however, held that the right does not prevent the government from asking reasonable questions in light of its interest as an employer and in light of the statutory protections that provide meaningful checks against unwarranted disclosures.[10] Consequently, questions remain concerning whether and to what extent a right to informational privacy or confidentiality exists.

Amdt14.S1.6.3.4 Family Autonomy and Substantive Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[2] *Id.* at 591, 595–96.

[3] *Id.* at 599–600.

[4] *Id.* at 600.

[5] *Id.* at 600–04. The Court cautioned that it did not decide the privacy implications of the accumulation and disclosure of vast amounts of information in data banks, but it noted that a duty to safeguard such information collected for public purposes from disclosure arguably "has its roots in the Constitution," at least in some circumstances. *Id.* at 605. In *Nixon v. Adm'r. of Gen. Servs.*, 433 U.S. 425 (1977), however, the Court rejected President Richard Nixon's assertion that the Presidential Recordings and Materials Preservation Act, which directed the Administrator of General Services to take custody of over 42 million pages of documents and over 800 tape recordings of President Nixon, invaded his constitutionally protected privacy interest. *Id.* at 455–65. While recognizing that President Nixon had a legitimate expectation of privacy in at least some of the materials that were personal in nature, the Court balanced that interest against the relevant public interests—including that the disclosure would be limited to archivists for screening purposes—and upheld the law. *See id.*

[6] *See, e.g.*, Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978) (noting that the Supreme Court in *Whalen* and *Nixon* considered "the confidentiality strand of privacy" and applying a "balancing test" to evaluate a claim that certain state public disclosure requirements on elected officials violated their privacy interest).

[7] 562 U.S. 134 (2011).

[8] *See id.* at 148–56.

[9] *See id.*

[10] *Id.* For additional discussion on right to information privacy in the context of federal laws and actions, see Amdt5.7.7 Informational Privacy and Substantive Due Process.

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In addition to recognizing a fundamental right to marry,[1] the Supreme Court has also recognized several other family-related fundamental rights related to childrearing and family autonomy. In the early twentieth century, for instance, the Court in *Myer v. Nebraska* struck down a state law that prohibited schools from teaching any language other than English to grade school children.[2] While recognizing that the state had power to make "reasonable regulations for all schools, including a requirement that they shall give instructions in English," the Court held that the law's prohibition materially interfered with "the power of parents to control the education of their own" in violation of the Due Process Clause.[3] Two years later, in *Pierce v. Society of Sisters*,[4] the Court struck down an Oregon law that required parents and guardians in the state to send children between the ages of eight and sixteen to public schools.[5] The Court held that the law "unreasonably interefere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[6]

Since then, the Supreme Court has considered the rights of parenthood on several occasions, at times touching upon the complex questions raised by possible conflicts between parental rights and children's rights. In *Prince v. Massachusetts*, for instance, the Court upheld a state law that prohibited minors from selling any periodicals or other articles of merchandise in public places.[7] In so concluding, the Court reasoned that while there is a "private realm of family life which the state cannot enter," the state "has wide range of power for limiting parental freedom and authority in things affecting the child's welfare," including requiring school attendance, regulating child labor, and requiring vaccination as a condition of school entry.[8]

In other instances, however, the Court has reiterated parents' "fundamental liberty interest in the care, custody, and management of their children."[9] In *Troxel v. Granville*, the Court evaluated a Washington State law that allowed any person to petition a court at any time to obtain visitation rights whenever visitation may serve the best interests of a child.[10] There, a child's grandparents were awarded more visitation with a child against the wishes of the sole surviving parent.[11] A majority of the Court agreed that the statute was invalid, with a plurality of Justices concluding that the law's lack of deference to the parent's wishes infringed upon the parent's fundamental right and contravened the traditional presumption that a fit

[1] *See* Amdt14.S1.6.3.5 Marriage and Substantive Due Process.

[2] 262 U.S. 390 (1923).

[3] *Id.* at 400–01.

[4] 268 U.S. 510 (1925).

[5] *Id.* at 534–35.

[6] *Id.*

[7] 321 U.S. 158 (1944).

[8] *Id.* at 166–67. Before the Court overruled *Roe v. Wade*, 410 U.S. 113 (1973) in 2022, it struck down, in *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) a state law provision requiring physicians to obtain parental consent before performing an abortion on a women under eighteen. *Danforth*, 418 U.S. at 72. In so concluding, the Court reasoned at the time that "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." *Id.* at 75.

[9] Troxel v. Granville, 530 U.S. 57, 61 (2000).

[10] *Id.* at 60.

[11] *Id.* at 60–61.

parent will act in the best interests of a child.[12] In *Parham v. J.R.*, the Court likewise upheld a state's voluntary civil commitment procedures that allowed minors to be committed to state mental hospitals by their parents without an adversarial hearing before an impartial tribunal.[13] Such a hearing, according to the Court, would create an unacceptable intrusion into the parent-child relationship, and would be inconsistent with the traditional presumption of parental competence and good intentions.[14]

In addition to parental rights, the Supreme Court has also indicated that there may be a constitutional right to live together as a family,[15] and that this right may not be limited to the nuclear family.[16] In *Moore v. City of East Cleveland*, for instance, a plurality of Justices concluded that a local housing ordinance that zoned a neighborhood for single-family occupancy and defined "family" in a way that excluded a grandmother from living with two grandchildren who were cousins, violated the Due Process Clause as an "intrusive regulation of the family" without accruing any tangible state interest.[17] The Court has further suggested that the concept of family may extend beyond biological relationships to the situation of foster families, although the Court acknowledged that such a claim raises complex and novel questions, and that the relevant liberty interests may be limited.[18] On the other hand, the Court has upheld a state law that presumes a child born to a married woman living with her husband to be the husband's child, defeating the right of the child's biological father to establish paternity and visitation rights.[19]

Amdt14.S1.6.3.5 Marriage and Substantive Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[12] *See id.* 68–69.

[13] 442 U.S. 584, 597–98 (1979).

[14] *See id.* at 610.

[15] *See* Smith v. Organization of Foster Families, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring) ("If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'").

[16] *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality). Unlike the liberty interest in property, which derives from early statutory law, these liberties spring instead from natural law traditions, as they are "intrinsic human rights." *Smith*, 431 U.S. at 845.

[17] *Id.* at 499–500. The fifth vote, decisive to the invalidity of the ordinance, was on other grounds. *See id.* at 513 (Stevens, J., concurring) (expressing the view that the ordinance was invalid because it constituted a taking of property without just compensation).

[18] *See Smith*, 431 U.S. at 842–47. As the Court noted, the rights of a biological family arise independently of statutory law, whereas the ties that develop between a foster parent and a foster child arise as a result of state-ordered arrangement. *See id.* As these latter liberty interests arise from positive law, they are subject to the limited expectations and entitlements provided under those laws. *See id.* Further, in some cases, such liberty interests may not be recognized without derogation of the substantive liberty interests of the biological parents parents. *See id.* In *Smith*, the Court, without defining the specific liberty interst of foster parents, upheld certain state procedures that allowed a foster child to be removed from a foster home without a pre-removal hearing. *See id.* at 855–56.

[19] Michael H. v. Gerald D., 491 U.S. 110 (1989). There was no opinion of the Court in *Michael H.* A majority of Justices (William Brennan, Thurgood Marshall, Harry Blackmun, John Paul Stevens, Byron White) was willing to recognize that the biological father has a liberty interest in a relationship with his child, but Justice Stevens voted with the plurality (Antonin Scalia, William Rehnquist, Sandra Day O'Connor, Anthony Kennedy) because he believed that the statute at issue adequately protected that interest.

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In several decisions, the Supreme Court recognized the right to marry as a fundamental right protected by the Due Process Clause,[1] such that only "reasonable regulations that do not significantly interfere with the decisions to enter the marital relationship" may be imposed.[2] In striking down a state anti-miscegenation law that criminalized interracial marriage, for instance, the Court in *Loving v. Virginia* held that the law violated due process by depriving individuals of their "freedom to marry"—"one of the basic civil rights of man, fundamental to our very existence and survival"—based on the "unsupportable basis" of racial classification.[3]

Based on the recognition of this fundamental right, the Court has struck down several state laws that restricted the ability of certain individuals to marry. In *Zablocki v. Redhail*, for instance, the Court considered a state law that prohibited any resident under an obligation to pay child support from marrying without a court order, which could only be obtained upon a showing that the resident is incompliance with his or her support obligation and that the children were not and were not likely to become public charges.[4] Finding that the law "interfere[d] directly and substantially" with the fundamental right to marry and thus required a "critical examination," the Court held that the restriction was not "closely tailored" to effectuate the relevant state interest of incentivizing compliance with support obligations.[5] In the Court's view, alternative devices to collect payment existed, and the restriction simply prevented marriage without delivering any money to the affected children.[6] Similarly, in *Turner v. Safley*, the Court concluded that a state regulation impermissibly burdened prison inmates' the right to marry, when it prohibited inmates from marrying unless the prison superintendent has approved the marriage after finding that there were compelling reasons for doing so.[7]

In *Obergefell v. Hodges*, the Supreme Court further clarified that the "right to marry" applies with "equal force" to same-sex couples, as it does to opposite-sex couples, holding that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state.[8] In so holding, the Court recognized marriage as being an institution of "both continuity and change," and, as a consequence, recent shifts in public attitudes respecting gay individuals and more specifically same-sex marriage necessarily informed the Court's conceptualization of the right to marry.[9]

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[1] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974); Zablocki v. Redhail, 434 U.S. 374, 383–87 (1978).

[2] Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

[3] 388 U.S. 1, 12 (1967).

[4] 434 U.S. 374, 376 (1978).

[5] *Id.* at 387–88.

[6] *Id.* 388–89. While the *Zablocki* Court held that the law violated the Equal Protection Clause, the Court applied must of the principles developed in the substantive due process context. *See* Obergefell v. Hodges, 576 U.S. 644, 673 (2015) (noting that *Zablocki*'s equal protection analysis "depended in central part on the Court's holding that the law burdened a right of fundamental importance" (internal quotations omitted)).

[7] 482 U.S. 78, 94–99.

[8] 576 U.S. 644, 665 (2015).

[9] *See id.* at 659–63. *But see* Dobbs v. Jackson Women's Health Organization No. 19-1392, slip op. at 23–25 (U.S. June 24, 2022) (evaluating whether right to abortion is a constitutionally protected right based on whether it is "deeply rooted in the Nation's history and tradition").

More broadly, the *Obergefell* Court recognized that the right to marry is grounded in four "principles and traditions."[10] These involve the concepts that (1) marriage (and choosing whom to marry) is inherent to individual autonomy protected by the Constitution; (2) marriage is fundamental to supporting a union of committed individuals; (3) marriage safeguards children and families;[11] and (4) marriage is essential to the nation's social order, because it is at the heart of many legal benefits.[12] With this conceptualization of the right to marry in mind, the Court found no difference between same- and opposite-sex couples with respect to any of the right's four central principles, concluding that a denial of marital recognition to same-sex couples ultimately "demean[ed]" and "stigma[tized]" those couples and any children resulting from such partnerships.[13] Given this conclusion, the Court held that, while limiting marriage to opposite-sex couples may have once seemed "natural," such a limitation was inconsistent with the right to marriage inherent in the "liberty" of the person as protected by the Fourteenth Amendment.[14]

In the context of federal Social Security benefits, the Court has approved certain benefits restrictions related to the incidents or prerequisites for marriage.[15] In these cases, the Court generally found that the regulations at issue did not substantially interfere with the decision to enter into marriage and at most had an indirect impact on that decision.[16]

Amdt14.S1.6.3.6 Sexual Activity, Privacy, and Substantive Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Since the 1960s, the Supreme Court has considered the constitutionality of several governmental actions aimed at regulating aspects of sexual conduct. These actions have included efforts to regulate the use of contraceptives; the possession or distribution of obscene materials; and individuals' engagement in same-sex intimate activities. To the extent that the Court has invalidated certain governmental actions in this context, it has often relied on the existence of a right to privacy in the Constitution. However, the manner in which the Court has interpreted this privacy right has evolved over time.

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[10] *Id.* at 665–69.

[11] In *Pavan v. Smith*, the Court reviewed an Arkansas law providing that when a married woman gives birth, her husband must be listed as the second parent on the child's birth certificate, including when he is not the child's genetic parent. No. 16-992, slip op. 1 (U.S. June 26, 2017) (per curiam). The lower court had interpreted the law to not require the state to extend the rule to similarly situated same-sex couples. *Id.* Relying on *Obergefell*, the Court struck down the law, noting that the "differential treatment of the Arkansas rules infringes *Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage.'" *Id.* (quoting *Obergefell*, 576 U.S. at 670).

[12] *See Obergefell*, 576 U.S. at 665–69.

[13] *See id.* at 672.

[14] *See id.* at 670–71.

[15] *See, e.g.*, Califano v. Jobst, 434 U.S. 47, 54 (1977); Matthews v. De Castro, 429 U.S. 181 (1976); Califano v. Boles, 443 U.S. 282 (1979).

[16] *See* Zablocki v. Redhail, 434 U.S. 374, 391 (1978) (Burger, J., concurring) (noting that "[u]nlike the intentional and substantial interference with the right to marry effected by the Wisconsin statute at issue [in *Zablocki*], the Social Security Act provisions challenged in *Jobst* . . . at most[ ] had an indirect impact on [the] decision [to marry]"). For additional discussion of these cases, see Amdt5.7.5 Marriage and Substantive Due Process.

In 1965, the Court, in *Griswold v. Connecticut*, first recognized a protected right of marital privacy when it struck down a state law that banned the use of contraceptives.[1] The law, in the Court's view, "operate[d] directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation" and impermissibly intruded upon the fundamental right of privacy surrounding the marriage relationship.[2] At the time, the Court concluded that this privacy right stemmed not from the Fourteenth Amendment's Due Process Clause, but from the "penumbras" of the Bill of Rights.[3] In *Eisenstadt v. Baird*, through the application of equal protection principles, the Court effectively extended the right to use contraceptives to unmarried couples.[4]

After *Griswold*, the Court considered the right of privacy in a different context in *Stanley v. Georgia*. In that case, the Court struck down a state criminal law that banned the possession of "obscene matter."[5] The defendant in *Stanley* was charged under the state law after the authorities executed a warrant at his home in connection with an unrelated investigation and uncovered three reels of eight-millimeter film deemed to be "obscene."[6] In holding that both the First and Fourteenth Amendments "prohibit making mere private possession of obscene material a crime," the Court found that the mere categorization of the films as "obscene" was insufficient to justify "such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments."[7] In so concluding, the Court seemingly suggested that certain personal activities that were otherwise unprotected could obtain some level of constitutional protection by being performed in particular private locations, such as the home.[8] This broad conception of a privacy right could potentially protect even illegal personal activities if they are practiced in the privacy of one's home.

In a series of subsequent cases addressing both federal and state law regulating obscene materials, however, the Court upheld those laws and largely confined *Stanley* to its facts.[9] In *Paris Adult Theatre I v. Slaton*, the Court, in upholding a state-sought injunction prohibiting the showing of allegedly obscene films by two theaters, further rejected the argument "that individual 'free will' must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books."[10] In the Court's view, "[t]otally unlimited play for free will . . . is not allowed in our or any other society."[11]

Ultimately, the idea that acts should be protected not because of what they are, but because of where they are performed, may have begun and ended with *Stanley*. Instead, the Court has

[1] Griswold v. Connecticut, 381 U.S. 479, 481–84 (1965).

[2] *Id.* at 482, 485–86.

[3] *Id.*

[4] 405 U.S. 438, 443 (1972).

[5] Stanley v. Georgia, 394 U.S. 557, 568 (1969).

[6] *Id.* at 558.

[7] *Id.*at 565, 568.

[8] *See id.* at 565 (stating that "[w]hatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home" and that "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch").

[9] *See, e.g.*, United States v. Reidel, 402 U.S. 351, 354–56 (1971) (finding no right to distribute obscene material for private use); United States v. Thirty-seven Photographs, 402 U.S. 363, 375–76 (1971) (finding no right to import obscene material for private use); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973) (finding no right to acquire obscene material for private use); Osborne v. Ohio, 495 U.S. 103, 109–111 (1990) (finding no right to possess child pornography in the home).

[10] 413 U.S. 49, 63–64 (1973).

[11] *Id.* at 64.

recognized, in sometimes disparate lines of cases, a right of personal privacy "deemed fundamental or implicit in the concept of ordered liberty."[12] Describing its pre-1973 precedents, the Court in *Roe v. Wade* stated that this guarantee of personal privacy encompasses "activities related to marriage, procreation, contraception, family relationships, and child rearing and education."[13] *Roe* itself recognized this privacy right, "founded in the Fourteenth Amendment's concept of personal liberty," to extend to the right to obtain an abortion—a recognition that the Court would later retreat from almost five decades later.[14] In *Carey v. Population Services International*, the Court further deemed the protected right of privacy to encompass "[t]he decision whether or not to beget or bear child" in striking down a state law that banned the distribution of contraceptives to adults except by licensed pharmacists and that forbade any person to sell or distribute contraceptives to a minor under 16.[15]

Until 2003, *Bowers v. Hardwick* largely defined the outer limits of the right to privacy. In that case, the Court upheld a state law that criminalized sodomy and in doing so, rejected the suggestion that its prior privacy cases protecting "family, marriage, or procreation" extended protection to private consensual homosexual sodomy.[16] The Court also rejected the broader claim that the privacy cases "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."[17] In so concluding, the Court relied significantly on the fact that prohibitions on sodomy have "ancient roots," and on the fact that half of the states still prohibited the practice.[18] Finding that the privacy of the home does not protect all behavior from state regulation, the Court determined that it was "unwilling to start down [the] road" of immunizing voluntary sexual conduct between consenting adults.[19]

In 2003, however, the Court overruled *Bowers* in *Lawrence v. Texas*, relying again on the right of privacy.[20] Citing its privacy cases starting with *Griswold*, the Court found that sodomy laws directed at homosexuals impermissibly "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[21] The Court concluded that the state law furthered "no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[22] Although the Court seemed to recognize that a state may have an interest in regulating personal relationships where there is a threat of "injury to a person or abuse of an institution the law protects,"[23] it seemed to reject reliance on historical notions of

[12] Roe v. Wade, 410 U.S. 113, 152 (1973) (internal quotations omitted).

[13] *Id.* (internal citations omitted).

[14] *Id.* at 153–154. For a more detailed discussion of the evolution of the Court's analysis of the right to abortion, see Amdt14.S1.6.4.1 Abortion, Roe v. Wade, and Pre-Dobbs Doctrine to Amdt14.S1.6.4.3 Abortion, Dobbs v. Jackson Women's Health Organization, and Post-Dobbs Doctrine.

[15] 431 U.S. 678, 684–91 (1977).

[16] *See* Bowers v. Hardwick, 478 U.S. 186, 190–91 (1986).

[17] *Id.* at 191.

[18] *Id.* at 191–92.

[19] The Court voiced concern that "it would be difficult . . . to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." *Id.* at 195–96. Dissenting Justices Harry Blackmun and John Paul Stevens, on the other hand, suggested that these crimes are readily distinguishable. *See id.* at 209 (Blackmun, J., dissenting), 217–18 (Stevens, J., dissenting).

[20] Lawrence v. Texas, 539 U.S. 558, 564 (2003)

[21] *See id.* at 564–67.

[22] *Id.* at 578.

[23] *Id.* at 567.

morality as guides to what personal relationships are to be protected.[24] Consequently, the outer limits of this privacy right, as it relates to regulation of sexual activity, remain unclear.[25]

Amdt14.S1.6.4 Abortion

Amdt14.S1.6.4.1 Abortion, Roe v. Wade, and Pre-Dobbs Doctrine

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

In 1973, the Court concluded in *Roe v. Wade* that the U.S. Constitution protects a woman's decision to terminate her pregnancy.[1] The Court's decision dramatically increased judicial oversight of legislation under the privacy line of cases, striking down aspects of abortion-related laws in numerous states, the District of Columbia, and the territories. In reaching its decision, the Court conducted a lengthy historical review of medical and legal views regarding abortion, finding that modern prohibitions on the procedure were of relatively recent vintage and thus lacked the historical foundation that might have preserved them from constitutional review.[2]

The *Roe* Court ruled that states may not categorically proscribe abortions by making their performance a crime.[3] The constitutional basis for the decision rested upon the conclusion that the right of privacy embraces a woman's decision to carry a pregnancy to term.[4] With regard to the scope of that privacy right, the Court stated that it includes "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty'" and bears some extension to activities related to marriage, procreation, contraception, family relationships, child rearing, and education.[5] Such a right, the Court concluded, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[6]

With respect to protecting the right to an abortion against state interference, the Court held that because the right of privacy is a fundamental right, only a "compelling state interest" could justify its limitation by a state.[7] Thus, while it recognized the legitimacy of a state interest in protecting maternal health and preserving a fetus's potential life, as well as the

[24] *See id.* at 577–78 (noting with approval Justice Stevens' dissenting opinion in *Bowers* stating "that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack").

[25] In *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 n.17 (1977), for instance, a plurality of Justices noted that the Court has not considered the extent to which the government may regulate the sexual activities of minors.

[1] 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. June 24, 2022).

[2] *Id.* at 129–47.

[3] *Id.* at 164–65.

[4] *Id.* at 153.

[5] *Id.* at 152–53.

[6] *Id.* at 153.

[7] *Id.* at 155.

existence of a rational connection between these two interests and a state's abortion restrictions, the Court held these interests insufficient to justify an absolute ban on abortions.[8]

Instead, the Court emphasized the durational nature of pregnancy and found the state's interests in maternal health and fetal life to be sufficiently compelling at only certain stages of pregnancy to permit the regulation or prohibition of the procedure. Finding that an abortion is no more dangerous to maternal health than childbirth in the first trimester of pregnancy, the Court concluded that the compelling point for regulating abortion to further a state's interest in maternal health was at approximately the end of the first trimester.[9] Until that point, the abortion decision and its effectuation was to be left exclusively to the medical judgment of the pregnant woman's doctor in consultation with the patient.[10] After the end of the first trimester, however, the state could promote its interest in maternal health by regulating the abortion procedure in ways reasonably related to maternal health.[11]

The compelling point with respect to the state's other interest in potential life was at viability, which the Court described as the point at which the fetus is "potentially able to live outside the mother's womb."[12] Following viability, the state's interest permitted it to regulate and even proscribe an abortion except when necessary, in appropriate medical judgment, for the preservation of the life or health of the woman.

In a companion case, *Doe v. Bolton*, the Court extended *Roe* by warning that just as states may not restrict abortion by making its performance a crime, they may not make abortions unreasonably difficult to obtain by prescribing elaborate procedural barriers.[13] In *Doe*, the Court struck down Georgia's requirements that abortions be performed in licensed hospitals; that abortions be approved beforehand by a hospital committee; and that two physicians concur in the abortion decision.[14]

Following *Roe*, as states adopted new abortion regulations, the Court settled questions involving a variety of related topics, including informed consent for the woman seeking an abortion, mandatory waiting periods before the procedure could be performed, and spousal consent requirements.[15] In 1983, in *City of Akron v. Akron Center for Reproductive Health*, the Court expressly reaffirmed *Roe* before invalidating several provisions of an Akron, Ohio abortion ordinance.[16] Acknowledging the Court's role in defining the limits of a state's authority to regulate abortion, the Court in *City of Akron* maintained that the doctrine of stare

[8] *Id.* at 164–65.

[9] *Id.* at 163.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 160. *See also id.* (identifying viability as "usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks").

[13] 410 U.S. 179, 201 (1973).

[14] *Id.* at 193–200.

[15] *See, e.g.*, *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 450 (1983) (invalidating Akron ordinance requiring 24-hour waiting period between signing of consent form and performance of abortion because city "failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period"), *overruled in part by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Bellotti v. Baird, 443 U.S. 622 (1979) (invalidating parental consent requirement for minors seeking abortions); Colautti v. Franklin, 439 U.S. 379 (1979) (finding Pennsylvania law imposing standard of care on abortion providers upon viability determination unconstitutionally vague); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (upholding Missouri informed consent requirement, but invalidating spousal consent requirement); Singleton v. Wulff, 428 U.S. 106 (1976) (finding standing for physicians to bring suit on behalf of patients seeking Medicaid-funded abortions); Connecticut v. Menillo, 423 U.S. 9 (1975) (state law prohibiting attempted abortion by "any person" was not unconstitutional as applied to nonphysician).

[16] *City of Akron*, 462 U.S. at 419–20.

decisis "while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law."[17]

In 1986, the Court again reaffirmed *Roe* in *Thornburgh v. American College of Obstetricians and Gynecologists*.[18] Reviewing several provisions of Pennyslvania's Abortion Control Act, the Court observed that the constitutional principles that guided its decisions in *Roe* and *Doe v. Bolton* "still provide the compelling reason for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy."[19]

In 1989, however, a plurality of the Court questioned the continued use of *Roe*'s trimester framework to evaluate abortion regulations. In *Webster v. Reproductive Health Services*, the Court upheld two Missouri abortion regulations: a restriction on the use of public employees and facilities for the performance of abortions; and a requirement that a physician ascertain a fetus's viability before performing an abortion, if the physician had reason to believe that a woman was twenty or more weeks pregnant.[20] Although the Court did not overrule *Roe* in *Webster*, a plurality of Justices indicated that it was willing to apply a less stringent standard of review to abortion regulations.[21] In separate concurring opinions, two Justices also criticized *Roe* and the trimester framework.[22]

In 1992, a plurality of the Court rejected *Roe*'s trimester framework in a case involving Pennsylvania's Abortion Control Act.[23] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the plurality explained that "in its formulation [the framework] misconceives the pregnant woman's interest . . . and in practice it undervalues the State's interest in potential life[.]"[24] In its place, the plurality adopted a new "undue burden" standard, maintaining that this standard recognized the need to reconcile the government's interest in potential life with a woman's right to decide to terminate her pregnancy.[25] The plurality indicated that an undue burden exists if the purpose or effect of an abortion regulation is "to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[26]

In adopting the new undue burden standard, *Casey* nonetheless reaffirmed the essential holding of *Roe*, which the plurality described as having three parts.[27] First, a woman has a right to choose to have an abortion prior to viability without undue interference from the state.[28] Second, the state has a right to restrict abortions after viability so long as the regulation provides an exception for pregnancies that endanger a woman's life or health.[29] Third, the state has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus.[30]

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[17] *Id.*

[18] Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986), *overruled in part by Casey*, 505 U.S. 833.

[19] *Id.* at 759.

[20] 492 U.S. 490 (1989).

[21] *Id.* at 516–22.

[22] *Id.* at 522 (O'Connor, J., concurring in part and concurring in the judgment), 532 (Scalia, J., concurring in part and concurring in the judgment).

[23] *Casey*, 505 U.S. 833, *overruled by* Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. June 24, 2022).

[24] *Id.* at 873.

[25] *Id.* at 876.

[26] *Id.* at 878.

[27] *Id.* at 846.

[28] *Id.*

[29] *Id.*

[30] *Id.*

Amdt14.S1.6.4.1
Abortion, Roe v. Wade, and Pre-Dobbs Doctrine

Following *Casey*, the Court applied the undue burden standard in two cases involving the so-called "partial-birth" abortion procedure.[31] In *Stenberg v. Carhart*, the Court concluded that a Nebraska statute that prohibited the performance of partial-birth abortions was unconstitutional because it failed to include an exception to protect the health of the mother and because the language defining the prohibited procedure was too vague. In *Gonzales v. Carhart*, the Court applied the undue burden standard to the federal Partial-Birth Abortion Ban Act of 2003.[32] Distinguishing the act from the Nebraska statute at issue in *Stenberg*, the Court concluded that the federal law did not impose an undue burden on a woman's ability to obtain an abortion and was not unconstitutionally vague.[33]

In *Gonzales*, the Court also concluded that the federal law was not unconstitutionally vague because it provides doctors with a reasonable opportunity to know what conduct is prohibited.[34] Unlike the Nebraska statute, which prohibited the delivery of a "substantial portion" of the fetus, the federal law includes "anatomical landmarks" that identify when an abortion procedure will be subject to the act's prohibitions.[35] The Court observed: "[I]f an abortion procedure does not involve the delivery of a living fetus to one of these 'anatomical landmarks'—where, depending on the presentation, either the fetal head or the fetal trunk past the navel is outside the body of the mother—the prohibitions of the Act do not apply."[36]

In 2016, the Court provided further guidance on applying the undue burden standard in *Whole Woman's Health v. Hellerstedt*.[37] In *Whole Woman's Health*, the Court invalidated two Texas requirements that applied to abortion providers and physicians who perform the procedure: a requirement that physicians who perform or induce abortions have admitting privileges at a hospital within thirty miles from the location where the abortion was performed or induced; and a requirement that abortion facilities satisfy the same standards as ambulatory surgical centers.[38] In applying the undue burden standard, the Court in *Whole Woman's Health* emphasized that reviewing courts must consider "the burdens a law imposes on abortion access together with the benefits those laws confer."[39] The Court also indicated that considerable weight should be given to the evidence and arguments presented in judicial proceedings when evaluating the constitutionality of abortion regulations.[40]

In 2020, the Court invalidated a Louisiana law that required physicians who performed abortions to have admitting privileges at a hospital within thirty miles of the location where the procedure was performed. In *June Medical Services v. Russo*, a majority of the Court concluded that the law imposed an undue burden on a woman's ability to obtain an abortion.[41] Justice Stephen Breyer authored an opinion, joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, that relied heavily on *Whole Woman's Health*.[42] Justice Breyer maintained that the laws being reviewed in *June Medical Services* and *Whole Woman's Health* were "nearly identical," and that the Louisiana law "must consequently reach a similar

[31] Stenberg v. Carhart, 530 U.S. 914 (2000); Gonzales v. Carhart, 550 U.S. 124 (2007).

[32] *Gonzales*, 550 U.S. at 150.

[33] *Id.* at 168.

[34] *Id.* at 149.

[35] *See id.* at 148; *see also* Neb. Rev. Stat. Ann. § 28-326(9) (Supp. 1999); 18 U.S.C. § 1531(b)(1)(A).

[36] *Gonzales*, 550 U.S. at 148.

[37] No. 15-274, slip op. at 21 (U.S. June 27, 2016).

[38] *Id.* at 1–2.

[39] *Id.* at 19–20.

[40] *Id.* at 20.

[41] No. 18-1323, slip op. at 3 (U.S. June 29, 2020).

[42] *Id.* at 1.

conclusion."[43] In a separate opinion, Chief Justice John Roberts concurred in the judgment, emphasizing that the legal doctrine of stare decisis required *June Medical Services* to be decided like *Whole Woman's Health*.[44]

Applying the undue burden standard in *June Medical Services*, Justice Breyer reiterated that the standard requires balancing an abortion regulation's benefits against any burdens it imposes.[45] The plurality maintained that the district court faithfully engaged in this balancing, concluding that the closure of abortion facilities and a reduction in the number of physicians performing abortions outweighed the fact that the admitting privileges requirement provided no significant health benefit.[46]

Concurring in the judgment, Chief Justice Roberts agreed that the Louisiana law and the Texas law at issue in *Whole Woman's Health* were nearly identical.[47] Although he dissented in *Whole Woman's Health* and indicated in his concurrence that the Texas case was wrongly decided, he nevertheless maintained that stare decisis required the invalidation of the Louisiana law.[48] Despite his concurrence in the judgment, however, Chief Justice Roberts questioned how the undue burden standard is now applied as a result of *Whole Woman's Health*.[49] Discussing the balancing of an abortion regulation's benefits and burdens, the Chief Justice contended that nothing in *Casey* suggested that courts should engage in this kind of weighing of factors.[50] According to the Chief Justice, *Casey* focused on the existence of a substantial obstacle as sufficient to invalidate an abortion regulation and did not "call for consideration of a regulation's benefits[.]"[51] Reviewing the burdens imposed by the Louisiana law, such as fewer abortion providers and facility closures, the Chief Justice agreed with the plurality that "the determination in *Whole Woman's Health* that Texas's law imposed a substantial obstacle requires the same determination about Louisiana's law."[52] Nevertheless, the Chief Justice further observed that "the discussion of benefits in *Whole Woman's Health* was not necessary to its holding."[53]

Amdt14.S1.6.4.2 Restrictions on Abortion Funding

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

In three related 1977 decisions, the Court ruled on whether Title XIX of the Social Security Act, which establishes the Medicaid program, or the Constitution requires the government to

[43] *Id.* at 40.
[44] *Id.* at 2 (Roberts, C.J., concurring in the judgment).
[45] *Id.* at 16–17.
[46] *Id.* at 17–38.
[47] *Id.* at 2 (Roberts, C.J., concurring in the judgment).
[48] *Id.* at 2–4.
[49] *Id.* at 6.
[50] *Id.*
[51] *Id.* at 11.
[52] *Id.*
[53] *Id.* at 12 n.3.

pay for nontherapeutic or elective abortions sought by indigent women. In *Beal v. Doe*, the Court held that nothing in the language or legislative history of the Medicaid statute requires a participating state to fund every medical procedure falling within delineated categories of medical care.[1] The Court determined that it was not inconsistent with the statute's goals to refuse to fund unnecessary medical services.[2] Nevertheless, the Court also indicated that the statute permits a state to include coverage for nontherapeutic abortions "if it so desires."[3]

In *Maher v. Roe*, the Court concluded that the Equal Protection Clause does not require a state participating in the Medicaid program to pay expenses incident to nontherapeutic abortions simply because the state has made a policy choice to pay expenses incident to childbirth.[4] The Court determined that Connecticut's policy of favoring childbirth over abortion did not impinge on the right to abortion recognized in *Roe*.[5] Distinguishing the policy from the Texas law at issue in *Roe* and other abortion restrictions it previously invalidated, the Court explained that the policy "places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion."[6]

Finally, in *Poelker v. Doe*, the Court upheld a St. Louis, Missouri regulation that denied indigent pregnant women nontherapeutic abortions at city-owned public hospitals.[7] Citing *Maher*, the Court explained that the constitutional question presented in *Poelker* was "identical in principle," and that the city's decision to provide publicly financed hospital services for childbirth, but not nontherapeutic abortions, was permissible.[8] *Poelker* addressed only the performance of abortions at public hospitals and did not consider the authority of private hospitals to prohibit abortion services.

The Court's decisions in *Beal*, *Maher*, and *Poelker* left unresolved the question whether the government could prohibit the use of federal or state funds for therapeutic or medically necessary abortions. In 1980, the Court upheld the Hyde Amendment, an annual appropriations provision that restricts the use of federal funds to pay for abortions provided through the Medicaid program.[9] The Court found that the Hyde Amendment did not violate the Due Process, the Equal Protection guarantees of the Fifth Amendment, or the Establishment Clause of the First Amendment.[10] The Court also recognized the right of a state participating in the Medicaid program to fund only those medically necessary abortions for which it received federal reimbursement.[11] In a companion case raising similar issues, the Court held that an Illinois statutory funding restriction comparable to the Hyde Amendment also did not violate the Equal Protection Clause.[12] As a result of the Court's decisions, neither the states nor the federal government have a statutory or constitutional obligation to fund all medically necessary abortions.

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[1] 432 U.S. 438 (1977).

[2] *Id.* at 444–45.

[3] *Id.* at 447.

[4] 432 U.S. 464 (1977).

[5] *Id.* at 474.

[6] *Id.*

[7] 432 U.S. 519 (1977) (per curiam).

[8] *Id.* at 521.

[9] Harris v. McRae, 448 U.S. 297 (1980). For further discussion on the Hyde Amendment, see Amdt5.7.6 Abortion and Substantive Due Process.

[10] *Harris*, 448 U.S. at 326.

[11] *Id.* at 310.

[12] *See* Williams v. Zbaraz, 448 U.S. 358 (1980).

Amdt14.S1.6.4.3 Abortion, Dobbs v. Jackson Women's Health Organization, and Post-Dobbs Doctrine

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

In 2022, a majority of the Court overruled the Court's prior decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, determining that the Constitution does not confer a right to an abortion. In *Dobbs v. Jackson Women's Health Organization*, the Court maintained that it was returning the regulation of abortion to the people and their elected reprentatives.[1] Writing for the Court in *Dobbs*, Justice Samuel Alito described *Roe* as "egregiously wrong from the start" because the Constitution makes no reference to abortion and a right to the procedure is not implicitly protected by any constitutional provision.[2]

While the Court in *Roe* and *Casey* determined that a right of privacy derived from the Fourteenth Amendment's concept of personal liberty under the Due Process Clause was broad enough to encompass a right to abortion, the *Dobbs* Court characterized these earlier decisions as "remarkably loose in [their] treatment of the constitutional text"[3] and "hav[ing] enflamed debate and deepened division."[4] The majority explained that, in evaluating whether the Constitution confers a right to an abortion, the Due Process Clause can guarantee some rights not explicitly mentioned in the Constitution. It indicated, however, that substantive due process rights, like a right to abortion, may be found only when they are deeply rooted in the Nation's history and tradition, and are implicit in the concept of ordered liberty.

Reviewing common law and statutory restrictions on abortion before and after the Fourteenth Amendment's ratification, the majority maintained that the "inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions."[5] The majority emphasized, for example, that abortion was prohibited in three-quarters of the states when the Fourteenth Amendment was adopted, and thirty states still prohibited the procedure when *Roe* was decided.[6] Thus, the Court held that the Fourteenth Amendment does not protect the right to an abortion.

The Court further considered whether the doctrine of stare decisis, which generally directs courts to adhere to precedent, should guide it to uphold *Roe* and *Casey*. Acknowledging that the doctrine promotes evenhanded decisionmaking and protects those who have relied on past decisions, the majority nevertheless observed that "in appropriate circumstances [it] must be willing to reconsider and, if necessary, overrule constitutional decisions."[7] The majority indicated that five factors, derived from its prior cases, strongly favored overruling *Roe* and *Casey*: the nature of their error (i.e., the Court's erroneous interpretation of the Constitution in those decisions); the quality of their reasoning (i.e., the Court's reasoning in *Roe* "stood on

[1] Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 79 (U.S. June 24, 2022).

[2] *Id.* at 6.

[3] *Id.* at 9.

[4] *Id.* at 6.

[5] *Id.* at 25.

[6] *Id.* at 23–24.

[7] *Id.* at 40.

exceptionally weak grounds"); the "workability" of the rules they imposed on the country (i.e., the unworkability of *Casey*'s undue burden standard for evaluating abortion regulations); their disruptive effect on other areas of the law (i.e., the prior decisions' distortion of other legal doctrines involving standing, severability, and other principles); and the absence of concrete reliance (i.e., abortions are generally unplanned and reproductive planning can be quickly adjusted).[8] In light of these factors, the majority concluded that, under traditional stare decisis factors, continued adherence to *Roe* and *Casey* was inappropriate. This conclusion, the majority observed, should not be affected by concerns that the Court was acting in response to social and political pressure.[9] The majority maintained that the Court cannot exceed the scope of its authority under the Constitution and cannot allow its decisions "to be affected by any extraneous influences such as concern about the public's reaction[.]"[10]

By overruling *Roe* and *Casey*, the *Dobbs* Court not only held that the Constitution does not guarantee a right to abortion, but also determined that abortion restrictions will not be subject to the viability and undue burden standards established by those decisions. If challenged, abortion restrictions will now be evaluated under rational basis review, a judicial review standard that is generally deferential to lawmakers.[11] The majority explained that under rational basis review, a law regulating abortion "must be sustained if there is a rational basis on which the legislature could have thought it would serve legitimate state interests."[12] The majority indicated that these interests may include protecting prenatal life, the mitigation of fetal pain, and preserving the medical profession's integrity.[13] Applying rational basis review in *Dobbs* to a Mississippi law that prohibits abortion once a fetus's gestational age is greater than fifteen weeks, the majority contended that these legitimate interests justify such a law.[14]

Amdt14.S1.6.5 Medical Care

Amdt14.S1.6.5.1 Right to Refuse Medical Treatment and Substantive Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

In multiple decisions, the Supreme Court has recognized that the Due Process Clause subsumes a constitutionally protected right to refuse medical care.[1] The Court has maintained, however, that this right must be balanced against relevant state interests, including protection of public health, safety, and human life.[2] In *Jacobson v. Massachusetts*, the Court upheld a Massachusetts law allowing local public health officials to require vaccination

[8] *Id.* at 43–66.

[9] *Id.* at 66–67.

[10] *Id.* at 67.

[11] *Id.* at 77.

[12] *Id.*

[13] *Id.* at 78.

[14] *Id.*

[1] *See, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990). For a discussion of due process rights and physician-assisted death, see Amdt14.S1.6.5.2 Physician Assisted-Death and Substantive Due Process.

[2] *See generally Cruzan*, 497 U.S. at 279 (citing Youngberg v. Romeo, 457 U.S. 307, 321 (1982)).

against smallpox.[3] While the petitioner in *Jacobson* argued that the compulsory vaccination law infringed upon his right "to care for his own body and health in such way as to him seems best," the Court explained that the state's interest in protecting communities against the spread of disease was "of paramount necessity."[4]

The Supreme Court has also addressed the scope of an incarcerated individual's right to reject antipsychotic medication.[5] For instance, in *Washington v. Harper*, the Court considered an inmate petitioner's constitutional challenge to a state prison policy that, under certain conditions, permitted involuntary psychotropic drug treatment for inmates with mental illness.[6] While acknowledging the petitioner's "significant liberty interest" in refusing these drugs under the Fourteenth Amendment's Due Process Clause, the Court's majority nevertheless concluded that the policy was constitutional.[7] Relying on a "standard of reasonableness" articulated in earlier cases involving prisoner rights, the Court explained that the policy conformed with substantive due process requirements, as the state had a legitimate interest in prison safety and security, and the state's forced medication policy was a rational means of advancing these penological interests.[8] The Court further held, in light of the requirements of a prison setting, the Due Process Clause "permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest."[9]

In *Cruzan v. Director, Missouri Department of Health*, the Court considered whether an incompetent individual has a constitutional right to decline lifesaving nutrition and hydration.[10] The case involved the substantive due process rights of a woman in a persistent vegetative state and her parents' request to terminate use of the feeding and hydration equipment that kept her alive.[11] At issue before the Court was whether it was constitutional for Missouri to require the family members to provide "clear and convincing evidence" of the woman's desire to withdraw life support before honoring the family's request.[12]

Although a majority of Supreme Court Justices signaled that the Due Process Clause protects a competent person's right to refuse life-sustaining medical interventions, the Court, in a 5-4 decision, upheld the state's imposition of evidentiary requirements under the

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[3] 197 U.S. 11, 35 (1905).

[4] *Id.* at 26–27. *See also* Zucht v. King, 260 U.S. 174 (1922) (local ordinance requiring vaccinations for schoolchildren held constitutional). Additionally, various federal, state, and private entities instituted Coronavirus Disease 2019 (COVID-19) vaccination requirements that have generated numerous legal challenges. For analysis of these requirements and related litigation, see Wen W. Shen, Cong. Rsch. Serv., R46745, State and Federal Authority to Mandate COVID-19 Vaccination (2022), https://crsreports.congress.gov/product/pdf/R/R46745.

[5] The Supreme Court has also examined the due process rights of patients with mental illnesses to refuse antipsychotic medications in the context of civil commitment. *See, e.g.*, Mills v. Rogers, 457 U.S. 291 (1982).

[6] 494 U.S. 210 (1990).

[7] *Harper*, 494 U.S. at 221–22. *See also* Vitek v. Jones, 445 U.S. 480, 487–94 (1980) (prisoner's involuntary commitment to a mental illness hospital and mandatory behavior modification treatment implicated liberty interests under Fourteenth Amendment's Due Process Clause).

[8] *See Harper*, 494 U.S. at 223–27 (citing Turner v. Safley, 482 U.S. 78 (1987); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987)).

[9] *Id*. at 227. Relying in part on the *Harper* decision, the Supreme Court has concluded that in limited circumstances, the Constitution permits a state government's forced administration of antipsychotic drugs to render a mentally ill criminal defendant competent to stand trial for serious criminal charges. *See* Sell v. United States, 539 U.S. 166 (2003); *Gomes v. United States*, 539 U.S. 939 (2003) (judgment vacated and case remanded to appellate court in light of *Sell*). *See also* Riggins v. Nevada, 504 U.S. 127 (1992).

[10] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269 (1990).

[11] *Id.* at 266–68.

[12] *Id.* at 277, 280.

circumstances presented in the case.[13] In its majority opinion, the Court emphasized the legitimacy of the state's interest in preserving human life and concluded that Missouri was not required to follow the family's judgment or "anyone but the patient" in making this health care treatment decision.[14]

Amdt14.S1.6.5.2 Physician Assisted-Death and Substantive Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The Supreme Court recognized in *Cruzan v. Missouri Department of Health* that the Due Process Clause includes the constitutionally protected right to refuse life-sustaining medical treatment, including nutrition and hydration.[1] While refusing medical interventions may ultimately lead to a patient's death, the Court unanimously held in a subsequent case, *Washington v. Glucksberg*, that this right does not extend to more active forms of medical intervention to assist terminally ill patients in ending their lives.[2]

In *Glucksberg*, terminally ill patients, physicians, and a nonprofit organization challenged a long-standing Washington state law that criminalized "knowingly caus[ing] or aid[ing] another person to attempt suicide."[3] The plaintiffs argued that the Supreme Court's decisions in *Cruzan* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* suggested that the Due Process clause broadly includes protections for "basic and intimate exercises of personal autonomy."[4] In reviewing this question, the Court began by "carefully formulating" the liberty interest in question.[5] Although the lower courts and litigants had variously defined the question as a "right to die," the Court provided a narrower characterization as whether the Due Process Clause's protection of liberty included a right to assistance in committing suicide.[6]

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[13] In *Cruzan*, the Court's majority opinion did not directly analyze the scope of an individual's liberty interest in rejecting life-sustaining treatment, but rather "assume[d]" that "a competent person [has] a constitutionally protected right to refuse lifesaving hydration and nutrition." *Id*. at 279. However, in concurring and dissenting opinions, a majority of the Justices declared that such a liberty interest exists. *See id.* at 287 (O'Connor, J., concurring) ("I agree that a protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions . . . and that the refusal of artificially delivered food and water is encompassed within that liberty interest."); *id.* at 302 (Brennan, Marshall, and Blackmun, JJ., dissenting) ("Nancy Cruzan has a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not outweighed by any interests of the State."); *id.* at 331 (Stevens, J., dissenting) ("[A] competent individual's decision to refuse life-sustaining medical procedures is an aspect of liberty protected by the Due Process Clause of the Fourteenth Amendment.").

[14] *Id.* at 280–82, 286.

[1] *See* 497 U.S. 261, 278–79 (1990). *See* Amdt14.S1.6.5.1 Right to Refuse Medical Treatment and Substantive Due Process.

[2] 521 U.S. 702 (1997). In the companion case of *Vacco v. Quill,* 521 U.S. 793 (1997), the Court also rejected an argument that a state that prohibited assisted suicide, but which allowed termination of medical treatment resulting in death, unreasonably discriminated against the terminally ill in violation of the Fourteenth Amendment's Equal Protection Clause.

[3] *Glucksberg*, 521 U.S. at 707.

[4] *Id.* at 724 (citing *Cruzan*, 497 U.S. at 278–79; *Casey*, 505 U.S. 833, 847 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 79 (U.S. June 24, 2022)).

[5] *Id.* at 722.

[6] *Id.*

The Court next examined the country's history, legal traditions, and practices with respect to that narrowly defined right.[7] The Court first noted the long history of criminalizing both suicide and assistance in suicide as distinguishing this case from its decision in *Cruzan*, which had relied on the long history of the right to refuse medical treatment.[8] The Court also rejected the plaintiffs' reliance upon *Casey*, noting that while many of the interests protected by the Due Process Clause involve personal autonomy, not all important, intimate, and personal decisions are so protected.[9] While the Court's decision in *Glucksberg* would appear to preclude constitutional protection for medical interventions intended to cause death, the question of whether there is a protected right to palliative or pain-relieving care during the dying process may remain an open question.[10]

Amdt14.S1.6.5.3 Civil Commitment and Substantive Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The Supreme Court has recognized, under the Due Process Clause, certain substantive liberty rights of people with mental disabilities who are involuntarily committed to public institutions. While a state has a substantial interest in institutionalizing persons in need of care, both for the protection of such people themselves and for the protection of others, it generally cannot constitutionally confine "a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[1]

Once committed, an individual also "enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests."[2] In determining what is "reasonable," however, the Court instructs that "courts must show deference to the judgment exercised by a qualified professional," such that liability may be imposed "only when decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the

[7] *Id.* at 723–26.

[8] *Id.* at 723.

[9] *Id.* at 727–28.

[10] *Id.* at 737 (O'Connor, J., concurring) ("[T]here is no need to address the question whether suffering patients have a constitutionally cognizable interest in obtaining relief from the suffering that they may experience in the last days of their lives."). Since *Glucksberg*, the Court has not revisited the question of whether assisted suicide is protected under the Due Process Clause, but the Court has addressed the statutory question as to the interaction of the federal Controlled Substances Act with state laws authorizing medicated-assisted suicide. Gonzales v. Oregon, 546 U.S. 243 (2006). The Court has also cited *Glucksberg* in a decision upholding a federal partial-birth abortion ban for the proposition that the government has an interest in "protecting the integrity and ethics of the medical profession." Gonzalez v. Carhart, 550 U.S. 124, 157 (2007).

[1] O'Connor v. Donaldson, 422 U.S. 563, 576 (1975). *See also* Jackson v. Indiana, 406 U.S. 715 (1972); Vitek v. Jones, 445 U.S. 480, 491–94 (1980).

[2] Youngberg v. Romeo, 457 U.S. 307, 324 (1982). The Court in *Youngberg* noted that "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Id.* at 316 (quoting Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part).

decision on such a judgment."[3] The Court has also stated that due process requires that the conditions and duration of civil commitment bear "some reasonable relation" to the purpose for which a person is committed.[4]

States may have more latitude to civilly confine certain individuals predisposed to engage in specific criminal behaviors. In *Kansas v. Hendricks*, for instance, the Court upheld a Kansas law that authorized the state to civilly commit individuals likely to engage in "predatory acts of sexual violence" due to do a "mental abnormality" or a "personality disorder," thus permitting a defendant diagnosed as a pedophile to be civilly committed after his release from prison.[5] In *Kansas v. Crane*, the Court clarified that while civil commitment under the same law did not require a finding of total lack of control by the defendant, there must be "proof of serious difficulty in controlling behavior" to support the civil commitment.[6] The Constitution, the Court held, does not permit civil commitment of "the type of dangerous sexual offender considered in *Hendricks* without *any* lack-of-control determination."[7] Such "lack of control" finding is necessary "to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case."[8]

Amdt14.S1.7 Due Process Limits on State Action

Amdt14.S1.7.1 Personal Jurisdiction

Amdt14.S1.7.1.1 Overview of Personal Jurisdiction and Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

"Personal jurisdiction" or in personam jurisdiction refers to a court's power over a person (or entity) who is a party to, or involved in, a case or controversy before the court, including its power to render judgments affecting that person's rights.[1] Prior to the states' ratification of the Fourteenth Amendment and the Supreme Court's 1877 decision in *Pennoyer v. Neff*, a nonresident who received an adverse judgment from one state court would often wait until the winning party sought to obtain enforcement of the judgment[2] in the nonresident's state before challenging the issuing court's exercise of personal jurisdiction over the nonresident.[3] State

[3] *Id.* at 322–23.

[4] Seling v. Young, 531 U.S. 250, 265 (2001). *See also* Foucha v. Louisiana, 504 U.S. 71, 79 (1992); Jackson v. Indiana, 406 U.S. 715. 738 (1972).

[5] 521 U.S. 346, 350 (1997).

[6] 534 U.S. 407, 412–13 (2002).

[7] *Id.* at 412 (emphasis in original).

[8] *Id.* at 413.

[1] *Personal Jurisdiction*, Black's Law Dictionary (10th ed. 2014).

[2] In this context, "enforcement" of a judgment referred to a court's action "to compel a person to comply with the terms of a judgment" of another state's courts after determining that the foreign state's judgment should be recognized as a judgment of the domestic court. *Enforcement*, Black's Law Dictionary, *supra* note 1.

[3] Stephen E. Sachs, Pennoyer *Was Right*, 95 Tex. L. Rev. 1249, 1270 (2017) ("States that wanted to exercise broad jurisdiction would do so, and would execute judgments within their borders on as much of the defendant's property as

(and, in some cases, federal)[4] courts considering whether such judgments were enforceable would typically resolve such jurisdictional challenges on the basis of general, customary law principles[5] that had been shaped by the rules for recognition of foreign judgments under international law.[6]

However, since the Supreme Court's decision in *Pennoyer*, the Court has interpreted the Due Process Clause of the Fourteenth Amendment[7] to limit the power of state courts to render judgments affecting the personal rights of defendants[8] who do not reside within the state's territory.[9] *Pennoyer* converted the issue of personal jurisdiction into a question of federal constitutional law, allowing a party to obtain direct review of a state court's judgment in federal court (i.e., review of the judgment on appeal) on the grounds that the state court lacked personal jurisdiction over the party.[10] Under the Supreme Court's interpretation of the

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they could find. These state judgments, unlike foreign ones, could claim the benefit of the Full Faith and Credit Clause and the 1790 Act. But these provisions were read to leave the law of personal jurisdiction alone. So when American courts were presented with the judgment of another tribunal, whether from Michigan or Mexico, they used the same approach to determining personal jurisdiction. The judgment was the product of a separate sovereign, which was expected to comply with international rules.").

[4] *Id.* at 1279 (noting that "federal courts did hear actions involving the recognition of other courts' judgments, giving them opportunities to comment on the general rules" in diversity cases or cases raising questions under federal statutes regulating judicial procedure). *See, e.g.*, Flower v. Parker, 9 F. Cas. 323, 324 (C.C.D. Mass. 1823) (No. 4891) (Story, C.J.) (evaluating a Massachusetts state court's exercise of personal jurisdiction over a Louisiana defendant in a Massachusetts federal court case seeking the enforcement of the state court's judgment). A "diversity case" is one in which a federal court exercises "authority over a case involving parties who are citizens of different states and an amount in controversy greater than a statutory minimum." *Diversity Jurisdiction*, Black's Law Dictionary, *supra* note 1.

[5] "Customary law" refers to law "consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws." *Customary Law*, Black's Law Dictionary, *supra* note 1.

[6] Sachs, *supra* note 3, at 1270 ("The Constitution's role here was largely indirect—letting defendants remove their cases into federal court or challenge enforcement through diversity suits."). *See also* Hall v. Williams, 23 Mass. (6 Pick.) 232, 238 (1828) (stating that the "principles of the common law" applicable "to judgments of the tribunals of foreign countries" also applied "to the judgments of the courts of the several States when sought to be enforced by the judiciary power of any State other than that in which they were rendered").

[7] U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

[8] Although the bulk of the Supreme Court's jurisprudence concerns the constitutionality of courts' exercise of personal jurisdiction over *defendants*, the Court has addressed personal jurisdiction over *plaintiffs* in at least one case. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985) (upholding a Kansas trial court's assertion of personal jurisdiction over nonresident class-action plaintiffs based on the mailing of an "opt-out notice" to the plaintiffs even though their contacts with the forum might not have been sufficient to satisfy the demands of due process had they been defendants in a lawsuit).

[9] *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) ("The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant.") (citing Kulko v. Superior Court, 436 U.S. 84, 91 (1978)). "A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere." *Id.* As discussed elsewhere in the *Constitution Annotated*, see Amdt14.S1.5.4.3 Notice of Charge and Due Process, the Due Process Clause also requires that a defendant receive adequate notice that a lawsuit has been brought against him and have the opportunity to respond. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313–14 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). In addition to complying with the requirements of the Federal Constitution, state courts must also have authority under state law in order to exercise personal jurisdiction over a nonresident defendant. Oftentimes, states have enacted "long-arm" statutes that grant their courts jurisdiction over nonresidents. *See, e.g.*, Cal. Civ. Proc. Code § 410.10 ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."); N.C. Gen. Stat. § 1-75.4 (specifying situations in which the exercise of jurisdiction comports with state law).

[10] Sachs, *supra* note 3, at 1253 ("The Fourteenth Amendment remade this picture simply by changing the route for appeal. A judgment without jurisdiction was void; its execution took away property (or, less commonly, liberty) without due process of law. That turned the presence or absence of jurisdiction, full stop, into a matter of constitutional

Fourteenth Amendment, a state court that issued a judgment affecting a nonresident without jurisdiction had violated the constitutional rights of that person by depriving the individual of property without due process of law.[11]

Over the years, the Supreme Court has offered three main justifications for the constitutional constraints on a court's assertion of personal jurisdiction over nonresident persons and corporations. First, each state's status as a "co-equal sovereign" in a federal system of government implies at least some limits on the power of its courts to render judgments affecting the rights of entities outside of that state's boundaries.[12] Second, constitutional limits on personal jurisdiction attempt to address concerns about the unfairness of subjecting defendants to litigation in a distant or inconvenient forum.[13] Finally, constitutional limits on the exercise of personal jurisdiction recognize that the Due Process Clause protects defendants from being deprived of life, liberty, or property by a tribunal without lawful power.[14]

The Supreme Court's jurisprudence addressing the doctrine of personal jurisdiction as applied in state courts spans a period of American history that has witnessed a significant expansion of interstate and global commerce, as well as major technological advancements in transportation and communication.[15] These changes produced a fundamental shift in the Court's views concerning the doctrine.[16] Although the Court initially considered the defendant's physical presence within the forum state to be the touchstone of the exercise of

concern."). "Execution" of a judgment refers to judicial enforcement of a money judgment, often "by seizing and selling the judgment debtor's property." *Execution*, Black's Law Dictionary, *supra* note 1.

[11] Sachs, *supra* note 3, at 1253. "Due process" generally refers to the "conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case." *Due Process*, Black's Law Dictionary, *supra* note 1.

[12] *See* Bristol-Myers Squibb Co. v. Superior Court, No. 16-466, slip op. at 6 (U.S. June 19, 2017) ("As we have put it, restrictions on personal jurisdiction 'are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.'") (quoting Hanson v. Denckla, 357 U.S. 235, 251 (1958)); *World-Wide Volkswagen*, 444 U.S. at 292 (stating that the requirement that a defendant have minimum contacts with the forum "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system"); *id.* at 293 ("The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.").

[13] *World-Wide Volkswagen*, 444 U.S. at 292 (stating that the requirement that a defendant have minimum contacts with the forum "protects the defendant against the burdens of litigating in a distant or inconvenient forum"); *Hanson*, 357 U.S. at 251 (acknowledging that limits on personal jurisdiction are, in part, "a guarantee of immunity from inconvenient or distant litigation"). The Supreme Court has stated that the doctrine of personal jurisdiction makes it easier for defendants to structure their conduct in a manner that will avoid subjecting them to lawsuits in a particular forum. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985).

[14] J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 879 (2011) (plurality opinion) ("The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power. This is no less true with respect to the power of a sovereign to resolve disputes through judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere.") (internal citations omitted); *Burger King*, 471 U.S. at 471–72 ("The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations.") (citation and internal quotation marks omitted); Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982) (declaring that the restriction on state power to exercise personal jurisdiction over a nonresident is "ultimately a function of the individual liberty interest preserved by the Due Process Clause").

[15] *See* Hanson v. Denckla, 357 U.S. 235, 250–51 (1958) ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome.").

[16] *Id.*

personal jurisdiction over him or her,[17] it later rejected strict adherence to this rule in favor of a more flexible standard that examines a nonresident defendant's contacts with the forum state to determine whether those contacts make it reasonable to require him to respond to a lawsuit there.[18]

The Supreme Court's opinions in *International Shoe Co. v. Washington* and subsequent cases have established a two-part test for determining when a state court's exercise of personal jurisdiction over each nonresident defendant sued by a plaintiff comports with due process: (1) the defendant must have established minimum contacts with the forum state that demonstrate an intent to avail itself of the benefits and protections of state law; and (2) it must be reasonable to require the defendant to defend the lawsuit in the forum.[19] Since that fundamental shift, much of the Court's jurisprudence addressing the limits that the Constitution places on state courts' exercise of personal jurisdiction has addressed the quality and nature of the "minimum contacts" among the defendant, the forum, and litigation that the Constitution requires before a court may exercise jurisdiction over the defendant.[20] Questions over personal jurisdiction have become one of the most frequent constitutional issues resolved by lower federal courts,[21] and are the basis for a dismissal of complaints in a considerable number of cases lodged in both federal and state court.[22]

When determining whether a defendant has minimum contacts with the court in which the action is initially filed, the Court has distinguished the types of contacts sufficient for a court's exercise of "specific" personal jurisdiction over the defendant from those contacts sufficient for its exercise, alternatively, of "general" jurisdiction. A court's exercise of *specific* jurisdiction may be constitutional when the defendant: (1) "purposefully avails itself of the privilege of conducting activities" within the forum state; and (2) the defendant's contacts with the forum give rise to, or are related to, the plaintiff's claims.[23] By contrast, a court's exercise of *general* jurisdiction over a nonresident defendant for any claim—even if all the incidents underlying the claim occurred in a different state—may be constitutional when the defendant's activities in the forum state are so substantial that it is reasonable to require it to

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[17] *See* Pennoyer v. Neff, 95 U.S. 714, 720 (1877) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum . . . [an] illegitimate assumption of power, and be resisted as mere abuse."), *overruled in part by*, Shaffer v. Heitner, 433 U.S. 186 (1977).

[18] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) ("[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.").

[19] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) ("[A] state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State.") (citing *Int'l Shoe Co.*, 326 U.S. at 316); *id.* at 292 ("[T]he defendant's contacts with the forum State must be such that maintenance of the suit 'does not offend traditional notions of fair play and substantial justice.'" (quoting *Int'l Shoe Co.*, 326 U.S. at 316)). *See also Burger King*, 471 U.S. at 476 ("So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.").

[20] *See* discussion *infra* Amdt14.S1.7.1.4 Minimum Contact Requirements for Personal Jurisdiction.

[21] *See* Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. Rev. 1735, 1755 (2006) (describing the "constitutionality of exercising personal jurisdiction" as "probably the most common constitutional question that courts decide").

[22] *See* Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 Tul. L. Rev. 1, 23–38 (1998) (noting in a study of nearly 1,000 cases addressing the issue personal jurisdiction decided by state supreme courts and federal appeals courts between and 1970 and 1994, including 148 products liability cases, that personal jurisdiction was a successful defense in nearly 41% of the cases in which the defense was raised).

[23] Ford Motor Co. v. Mont. Eighth Judicial Dist. Court, No. 19-368, slip op. at 5–6 (U.S. March 25, 2021). *See also* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 n.8 (1984) (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1144–64 (1966)).

defend a lawsuit that did not arise out of its activities in the forum state and is unrelated to those activities.[24] In more recent years, the Court has significantly limited the types of activities or affiliations of the defendant in the forum state sufficient for general jurisdiction, holding that those contacts must be so substantial as to render the defendant "essentially at home" in the forum state.[25] The Court has clarified that, absent exceptional circumstances, a corporate defendant is "at home" when it is incorporated in the forum state or maintains its principal place of business there (e.g., the corporation is headquartered in the state).[26]

Although the Supreme Court has adopted a more flexible standard for evaluating a state court's assertion of personal jurisdiction, it has also confirmed that several traditional bases for the exercise of judicial power over a nonresident defendant for claims against him enjoy a presumption of constitutionality without requiring an independent inquiry into the contacts among the defendant, the forum, and the litigation. These traditional bases include: a defendant who is domiciled in the forum;[27] a defendant who has consented to jurisdiction;[28] and a defendant who is a natural person (i.e., not a business or governmental entity) and is served with process while physically present within the forum.[29] The Court has also indicated

[24] *See Helicopteros*, 466 U.S. at 414 n.9 ("When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant."); *see also id.* at 416 (holding that a Texas court could not exercise general personal jurisdiction over a foreign corporation that did not have a place of business in Texas and had only limited contacts with the state involving in-state purchases and training trips); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438, 415, 445 (1952) (holding that an Ohio court could subject a Philippine mining corporation to personal jurisdiction even though the "cause of action sued upon did not arise in Ohio and d[id] not relate to the corporation's activities there" because of the corporation's substantial activities within the state, including "directors' meetings, business correspondence, banking, stock transfers, payment of salaries, [and] purchasing of machinery").

[25] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) ("A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."). *See also* Daimler AG v. Bauman, 571 U.S. 117, 139 (2014) (holding that Daimler Chrysler, a German public stock company, could not be subject to suit in California with respect to acts taken in Argentina by an Argentinian subsidiary of Daimler, notwithstanding the fact that Daimler Chrysler had a U.S. subsidiary that did business in California).

[26] *Goodyear*, 564 U.S. at 924 (noting an individual's domicile and a corporation's place of incorporation or principal place of business as "paradigm" bases for general jurisdiction) (citation omitted); *id.* at 930 n.6 ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.").

[27] Milliken v. Meyer, 311 U.S. 457, 462–63 (1940) ("Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service . . . . The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties."); Blackmer v. United States, 284 U.S. 421, 438 (1932) (holding that the United States retains in personam jurisdiction over its citizens living abroad). A person's "domicile" is generally the "place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." *Domicile*, Black's Law Dictionary, *supra* note 1. "Substituted service of process" refers to any "method of service allowed by law in place of personal service, such as service by mail." *Substituted Service*, Black's Law Dictionary, *supra* note 1.

[28] "Consent" may be express or implied. *See, e.g.*, Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 318 (1964) (holding that defendant lessee's contractual appointment of an agent to receive service of process on the lessee's behalf amounted to consent to the personal jurisdiction of the courts of New York when the agent was served with process and notified the lessee); Hess v. Pawloski, 274 U.S. 352, 355–56 (1927) (upholding a state court's exercise of personal jurisdiction over a nonresident defendant based on a theory of implied consent when the defendant drove a vehicle on a public highway in the state and was involved in an accident there). "Service of process" refers to the "formal delivery of a writ, summons, or other legal process, pleading, or notice to a litigant or other party interested in litigation; the legal communication of a judicial process." *Service*, Black's Law Dictionary, *supra* note 1.

[29] Burnham v. Superior Court, 495 U.S. 604, 619 (1990) (plurality opinion) ("[J]urisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"). Providing the fifth and deciding vote

that a state court may adjudicate the personal status of a plaintiff in relation to the defendant (e.g., marital status) without considering whether personal jurisdiction over the defendant is constitutionally valid.[30]

Although the Supreme Court has decided several cases addressing the Fourteenth Amendment's limits on state courts' exercise of personal jurisdiction, it has generally declined to resolve questions about the extent to which the Fifth Amendment[31] may place similar jurisdictional limitations on federal courts. For example, the Supreme Court has declined to rule on whether it is constitutional for Congress to authorize nationwide service of process so that any federal court may exercise personal jurisdiction over a foreign defendant who has, in the aggregate, substantial contacts with the United States.[32] Consequently, this essay focuses on the Court's cases addressing the Fourteenth Amendment, which imposes due process requirements on actions by *state* governments.[33] However, it is important to note that the Federal Rules of Civil Procedure give federal district courts power to assert personal jurisdiction over a defendant to the same extent that a state court in the state where the federal district court is located may assert that power, meaning the same Fourteenth Amendment limits on personal jurisdiction generally apply to federal courts.[34]

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in *Burnham*, Justice White, in a concurring opinion, argued that a particular basis for jurisdiction could not be constitutionally valid merely because of its historical pedigree, and that fairness to the defendant must also be considered. *Id.* at 628 (White, J., concurring).

[30] Pennoyer v. Neff, 95 U.S. 714, 734 (1877) ("[W]e do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident."), *overruled in part by*, Shaffer v. Heitner, 433 U.S. 186 (1977).

[31] U.S. Const. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law.").

[32] Congress has provided for nationwide service of process in a handful of federal statutes. *See, e.g.*, 15 U.S.C. § 78aa (Securities Exchange Act of 1934);18 U.S.C. §§ 1961–1968 (Racketeer Influenced and Corrupt Organizations Act (RICO)). But federal courts "ordinarily follow state law in determining the bounds of their jurisdiction over persons." Daimler AG v. Bauman, 571 U.S. 117, 125 (2014). This practice, which involves federal courts in analyzing the reach of a state's long-arm statute and the defendant's contacts with the state in which the court sits, stems from the Federal Rules of Civil Procedure. Fed. R. Civ. P. 4(k)(1)(A) (linking federal courts' power to assert personal jurisdiction over a defendant to service of process on the defendant according to the laws of the state in which the federal district court is located). *See, e.g.*, Wilson v. Belin, 20 F.3d 644, 646–47 (5th Cir. 1994) ("In a diversity suit, a federal court has personal jurisdiction over a nonresident defendant to the same extent that a state court in that forum has such jurisdiction. The reach of this jurisdiction is delimited by: (1) the state's long-arm statute; and (2) the Due Process Clause of the Fourteenth Amendment to the federal Constitution.") (citation omitted).

Although the Supreme Court has decided several cases addressing the Fourteenth Amendment's limits on state courts' exercise of personal jurisdiction, it has generally declined to resolve questions about the extent to which the Fifth Amendment, *see* U.S. Const. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law."), may place similar jurisdictional limitations on federal courts. *See* Bristol-Myers Squibb Co. v. Superior Court, No. 16-466, slip op. at 12 (U.S. June 19, 2017) ("In addition, since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."); Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 102 n.5 (1987) (declining to consider whether "a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant's contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits"); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116 n. (1987) (plurality opinion) ("We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits."). As a result, the majority of this essay focus on the limits imposed by the Fourteenth Amendment on the jurisdiction of state courts (and, through the Federal Rules of Civil Procedure, federal courts, as well).

[33] U.S. Const. amend XIV, § 1 ("[N]or shall any *State* deprive any person of life, liberty, or property, without due process of law.") (emphasis added).

[34] *Supra* note 32.

Amdt14.S1.7.1.2 Personal Jurisdiction from Founding Era to 1945

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Prior to ratification of the Fourteenth Amendment and the Supreme Court's 1877 decision in *Pennoyer v. Neff*, a defendant that objected to the plaintiff's state court exercising personal jurisdiction over him would typically wait to object to such exercise of jurisdiction until the plaintiff sought to have the defendant's state court recognize and enforce the first court's judgment.[1] State (and, in some cases, federal)[2] courts considering whether such judgments were enforceable would resolve such jurisdictional challenges on the basis of general, customary law principles derived from English common law and international law addressing the recognition of foreign judgments rather than by applying the federal Constitution.[3] However, in *Pennoyer*, the Supreme Court stated that the Fourteenth Amendment's Due Process Clause imposes constitutional limits on state courts' exercise of personal jurisdiction over nonresident defendants.[4] *Pennoyer* converted the issue of personal jurisdiction into a question of federal constitutional law, allowing a party to obtain direct review of a state court's judgment in a federal court that was not bound to apply state statutes or judicial precedent when deciding whether the issuing court had personal jurisdiction over the parties.[5]

In *Pennoyer*, the Court indicated that, absent a defendant's consent, a state court's jurisdiction generally extends only to persons or property within its territory.[6] The Court grounded this "physical presence" approach in principles of federalism: each state of the union is a coequal and independent sovereign in the federal system, and thus possesses exclusive

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[1] Stephen E. Sachs, Pennoyer *Was Right*, 95 Tex. L. Rev. 1249, 1270 (2017).

[2] *Id.* at 1279.

[3] *Id.* ("The Constitution's role here was largely indirect—letting defendants remove their cases into federal court or challenge enforcement through diversity suits."). In the 1851 case *D'Arcy v. Ketchum*, decided prior to *Pennoyer*, in which an individual sought to enforce a New York judgment in a Louisiana federal court, the Supreme Court stated that "countries foreign to our own disregard a judgment merely against the person, where he has not been served with process nor had a day in court," and that such proceedings are "deemed an illegitimate assumption of power, and resisted as mere abuse." 52 U.S. (11 How.) 165, 174 (1851).

[4] Pennoyer v. Neff, 95 U.S. 714 (1878) ("Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."), *overruled in part by*, Shaffer v. Heitner, 433 U.S. 186 (1977).

[5] Sachs, *supra* note 1, at 1253, 1288 ("The Fourteenth Amendment remade this picture simply by changing the route for appeal. A judgment without jurisdiction was void; its execution took away property (or, less commonly, liberty) without due process of law. That turned the presence or absence of jurisdiction, full stop, into a matter of constitutional concern.").

[6] *Pennoyer*, 95 U.S. at 720 ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum . . . [an] illegitimate assumption of power, and be resisted as mere abuse."); *id.* at 722 ("[N]o State can exercise direct jurisdiction and authority over persons or property [outside of] its territory."). The *Pennoyer* Court recognized that a tribunal had authority to exercise personal jurisdiction over a non-resident served with process while in the forum. *Id.* at 724 ("Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him.") (internal citations and quotation marks omitted). *See also* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person."); McDonald v. Mabee, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power.").

authority over persons and property within its domain.[7] Although the Court's decision in *Pennoyer* addressed personal jurisdiction over natural persons or people, the Court's early jurisprudence following the 1877 case established that state courts could potentially exercise jurisdiction over foreign corporations doing business in the state because the law presumed that those corporations had implicitly consented to personal jurisdiction, or could be deemed "present" within the state, based on their in-state activities.[8]

The *Pennoyer* Court's "physical presence" test established the constitutional foundation for strict limits on state courts' authority to exercise in personam jurisdiction over a nonresident defendant—that is, to render judgments concerning that defendant's personal rights and obligations.[9] Thus, for example, service upon a defendant by publishing notice of the lawsuit in a newspaper circulating in the forum state was insufficient to confer jurisdiction on a court to adjudicate the personal liability of a defendant who had left the state and did not intend to return.[10] Nevertheless, even in the absence of a nonresident defendant's physical presence or consent, courts could still attain jurisdiction over the defendant indirectly through the attachment (i.e., seizure) of the defendant's property interests within the forum and the provision of notice to the defendant.[11] In particular, a state court could exercise in rem jurisdiction[12] over a nonresident defendant's property interest in the state in order to adjudicate all of the rights or claims in a piece of property.[13] It could also exercise quasi in rem jurisdiction[14] over a nonresident defendant by adjudicating a plaintiff's claim to the property in relation to the defendant or to satisfy the claims of its own citizens against the defendant personally.[15] However, judgments resting upon the exercise of in rem or quasi in rem jurisdiction would not personally bind the defendant to an extent greater than the value of the property.[16]

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[7] *Pennoyer*, 95 U.S. at 722 ("[E]very state possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . . The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others . . . . [N]o tribunal established by [a state] can extend its process beyond that territory so as to subject either persons or property to its decisions.").

[8] Shaffer v. Heitner, 433 U.S. 186, 201 (1977) ("[The *Pennoyer*] opinion approved the practice of considering a foreign corporation doing business in a State to have consented to being sued in that State. This basis for in personam jurisdiction over foreign corporations was later supplemented by the doctrine that a corporation doing business in a State could be deemed 'present' in the State, and so subject to service of process under the rule of *Pennoyer*.") (internal citations omitted). *See also, e.g.*, Int'l Harvester Co. v. Kentucky, 234 U.S. 579, 586 (1914) ("This course of conduct of authorized agents within the state in our judgment constituted a doing of business there in such [manner] that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the state."); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 408 (1856) ("Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to the condition upon which alone such business could be there transacted by them; that condition being, that an agent, to make contracts, should also be the agent of the corporation to receive service of process in suits on such contracts.").

[9] Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958) ("A judgment in personam imposes a personal liability or obligation on one person in favor of another."); *Pennoyer*, 95 U.S. at 727.

[10] *McDonald*, 243 U.S. at 92 ("[I]t appears to us that an advertisement in a local newspaper is not sufficient notice to bind a person who has left a state, intending not to return.").

[11] *Pennoyer*, 95 U.S. at 723 ("But as contracts made in one State may be enforceable only in another State, and property may be held by non-residents, the exercise of the jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property [outside of] it.").

[12] *In Rem Jurisdiction*, Black's Law Dictionary (10th ed. 2014) (defining "in rem jurisdiction" as a "court's power to adjudicate the rights to a given piece of property, including the power to seize and hold it").

[13] *Hanson*, 357 U.S. at 246 n.12 ("A judgment in rem affects the interests of all persons in designated property.").

[14] *Quasi-in-rem Jurisdiction*, Black's Law Dictionary, *supra* note 12 (defining "quasi-in-rem jurisdiction" as jurisdiction "over a person but based on that person's interest in property located within the court's territory").

[15] *Hanson*, 357 U.S. at 246 n.12 ("A judgment quasi in rem affects the interests of particular persons in designated property."). *See also Pennoyer*, 95 U.S. at 723 ("Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens."); *id.* at 728 ("[T]he jurisdiction of the court to inquire into and

Amdt14.S1.7.1.3 Modern Doctrine on Personal Jurisdiction

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Although *Pennoyer*'s physical presence test informed the Supreme Court's jurisprudence related to jurisdiction for several decades, a significant expansion of the U.S. economy in the mid-twentieth century altered that focus. As commerce and travel among the states and between the states and foreign countries increased,[1] corporations expanded the geographical scope of their activities.[2] A more interconnected, global economy meant that a corporation's activities had greater potential to cause harm in distant jurisdictions, but also meant that businesses could more easily defend lawsuits arising from that harm in distant fora.[3] Faced with these new realities, the Court reconsidered the nature of the due process limitations on the jurisdiction of state courts over non-resident individuals and corporations that conducted activities in the states.[4] In the 1945 case *International Shoe Co. v. Washington*, the Court

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determine [the defendant's] obligations at all is only incidental to its jurisdiction over the property."). For example, in *Harris v. Balk*, the Supreme Court held that a Maryland court had properly exercised quasi in rem jurisdiction over a North Carolina resident (Balk) who owed a debt to a Maryland resident (Epstein) because Epstein could attach the debt of a third party (Harris) that was owed to Balk while Harris was physically present in Maryland. 198 U.S. 215, 223 (1905). *Harris* was eventually overruled by *Shaffer v. Heitner*, 433 U.S. 186 (1977). *See id.* at 216–17 (holding that a state court could not exercise quasi in rem jurisdiction over a nonresident defendant by attaching the defendant's property interests in the state without inquiring separately into whether these property interests and any other connections between the defendant, forum, and litigation established sufficient minimum contacts to satisfy the first prong of the *International Shoe* test).

[16] *See Pennoyer*, 95 U.S. at 723–24 (stating that a judgment resting on in rem or quasi in rem jurisdiction binds the defendant only to the extent of the property's value). As discussed below, the Court subsequently held that a tribunal may not exercise quasi in rem jurisdiction over a nonresident defendant by attaching the defendant's property interests in the state without inquiring separately into whether these property interests and any other connections establish sufficient contacts between the defendant, forum, and litigation. Rush v. Savchuk, 444 U.S. 320, 328 (1980) ("We held in *Shaffer* that the mere presence of property in a State does not establish a sufficient relationship between the owner of the property and the State to support the exercise of jurisdiction over an unrelated cause of action. The ownership of property in the State is a contact between the defendant and the forum, and it may suggest the presence of other ties. Jurisdiction is lacking, however, unless there are sufficient contacts to satisfy the fairness standard of *International Shoe*.") (citing Shaffer v. Heitner, 433 U.S. 186, 209 (1977)). As a result, it appears that plaintiffs rely upon quasi in rem jurisdiction instead of in personam jurisdiction in some cases in which a state's "long-arm statute" does not provide for the exercise of in personam jurisdiction over the defendant. *See* Michael B. Mushlin, *The New Quasi In Rem Jurisdiction: New York's Revival of a Doctrine Whose Time Has Passed*, 55 Brook. L. Rev. 1059, 1063 (1990) ("Courts have explained that the new theory of quasi in rem jurisdiction is necessary to fill gaps in the state's long arm statute.").

[1] *See Hanson*, 357 U.S. at 250–51 ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome."); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1957) (noting a "clearly discernible" trend "toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents" that was "attributable to the fundamental transformation of our national economy over the years").

[2] *See supra* note 1.

[3] *See supra* note 1.

[4] *See supra* note 1. The Supreme Court has not drawn a bright line between its jurisprudence addressing persons and its cases addressing corporations. However, some commentators have argued that the Court's recent opinions have been more solicitous toward corporate defendants. *See, e.g.*, Judy M. Cornett & Michael H. Hoffheimer, *Good-bye Significant Contacts: General Personal Jurisdiction After* Daimler AG v. Bauman, 76 Ohio St. L.J. 101, 107 (2015) ("[T]he Court has moved too far, too fast towards limiting the traditional powers of states to require nonresident

explained its rejection of a strict adherence to the physical presence test, holding that a state could authorize its courts to subject an out-of-state entity to in personam jurisdiction, consistent with due process, and thus require it to defend a lawsuit, if that entity had "certain minimum contacts" with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[5] The Court rested its holding in part on the notion that an entity conducting activities in a state benefits from the protections of state law, and thus should have to respond to legal complaints arising out of its actions in the forum even if it is not "physically present" in the state.[6]

Thus, the Supreme Court's opinions in *International Shoe* and subsequent cases have established a more flexible two-part test for determining when a court's exercise of personal jurisdiction over a nonresident defendant sued by a plaintiff comports with due process: (1) the defendant has established minimum contacts with the forum state that demonstrate an intent to avail itself of the benefits and protections of state law; and (2) it is reasonable to require the defendant to defend the lawsuit in the forum.[7]

Nevertheless, as noted, the Court has confirmed that several traditional bases for exercising judicial power over a nonresident defendant continue to enjoy a presumption of constitutionality without requiring an independent inquiry into the contacts among the defendant, the forum, and the litigation. Specifically, the traditional bases for jurisdiction include if: (1) the defendant is domiciled in the forum state (e.g., a defendant who is a natural person intends to establish a permanent home in the forum or a corporation intends to

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corporations to answer lawsuits in their courts."); Thomas C. Arthur & Richard D. Freer, *Be Careful What You Wish For:* Goodyear, Daimler, *and the Evisceration of General Jurisdiction*, 64 Emory L.J. Online 2001, 2002 (2014) ("[T]he Court's decisions in these two cases leave a large gap in the appropriate scope of state adjudicatory jurisdiction, putting some plaintiffs at risk of being unable to bring a defendant to justice in an American court."). On the other hand, other commentators have defended the recent change in the Court's decisions, asserting that it will bring more clarity and cohesion to the doctrine of personal jurisdiction and reduce unfairness to defendants. *E.g.*, William Grayson Lambert, *The Necessary Narrowing of General Personal Jurisdiction*, 100 Marq. L. Rev. 375, 378 (2016) ("Contrary to the weight of this body of scholarship on the 'at home' rule of *Goodyear* and *Daimler AG*, I argue that this new rule is a welcome change to general personal jurisdiction for two reasons. First, the 'at home' rule is clear. It provides an easy-to-apply rule that will minimize resources expended litigating an issue other than the merits of a case. Second, the 'at home' rule is more logically coherent because it promotes internal consistency in personal jurisdiction decisions. No matter which justification of personal jurisdiction one adopts from among the myriad justifications that the Supreme Court has offered, the 'at home' rule fits neatly within that framework."); Case Comment, *Personal Jurisdiction—General Jurisidiction—* Daimler AG v. Bauman, 128 Harv. L. Rev. 291, 316 (2014) ("Closer examination of *Daimler*, however, reveals that Justice Ginsburg is not operating from formalist or ideological conceptions of when jurisdiction ought to be exercised. Rather, she has adopted a different philosophical framework, drawn from the pioneering work of von Mehren and Trautman, that focuses fundamentally on fairness to both parties. Starting with her opinions in *Goodyear* and *Nicastro*, Justice Ginsburg has consistently applied this framework.").

[5] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citation and internal quotation marks omitted). The Court deemed a corporation's "presence" in the forum state to result from those activities of the corporation or its agents in the state "which courts will deem to be sufficient to satisfy the demands of due process." *Id.* at 317. The Court wrote that the concept of constitutional due process did "not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Id.* at 319.

[6] *Id.* ("[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.").

[7] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) ("[A] state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State.") (citing *Int'l Shoe Co.*, 326 U.S. at 316); *id.* at 292 ("[T]he defendant's contacts with the forum State must be such that maintenance of the suit 'does not offend traditional notions of fair play and substantial justice.'") (quoting *Int'l Shoe Co.*, 326 U.S. at 316). *See also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) ("So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.").

establish a permanent headquarters);[8] (2) the defendant has consented to jurisdiction;[9] or (3) a defendant who is a natural person is served with process while he is physically present—even temporarily—within the forum.[10] The Court has also indicated that a state court may adjudicate the personal status of a plaintiff in relation to the defendant (e.g., marital status) without considering whether personal jurisdiction over the defendant is constitutionally valid.[11]

Amdt14.S1.7.1.4 Minimum Contact Requirements for Personal Jurisdiction

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Since its 1945 decision in *International Shoe*, the Supreme Court has elaborated on the nature and quality of the minimum contacts that a defendant must have with the forum in order for a court to subject him or her to personal jurisdiction in that forum consistent with due process. When determining whether a defendant has minimum contacts with the forum, the Court has distinguished the types of contacts sufficient for a court's exercise of "specific" personal jurisdiction over the defendant from those contacts sufficient for its exercise, alternatively, of "general" jurisdiction.

A court's exercise of *specific* jurisdiction may be constitutional when the defendant: (1) "purposefully avails itself of the privilege of conducting activities" within the forum state; and

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[8] Milliken v. Meyer, 311 U.S. 457, 462–63 (1940) ("Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service . . . . The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties."); Blackmer v. United States, 284 U.S. 421, 438 (1932) (holding that the United States retains in personam jurisdiction over its citizens living abroad) (citation omitted).

[9] "Consent" may be express or implied. *See, e.g.*, Nat'l Equip. Rental v. Szukhent, 375 U.S. 311, 318 (1964) (holding that defendant lessee's contractual appointment of an agent to receive service of process on the lessee's behalf amounted to consent to the personal jurisdiction of the courts of New York when the agent was served with process and notified the lessee); Hess v. Pawloski, 274 U.S. 352, 355–56 (1927) (upholding service of process on a nonresident defendant under a state law providing that a person who drove a vehicle on a public highway in the state implicitly consented to the appointment of a state official as agent for service of process for lawsuits arising outside of accidents attending such operation). *See also* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594–95 (1991) (holding that plaintiffs' notice and acceptance of a forum-selection clause in a contract for passage on a cruise ship constituted consent to the exercise of personal jurisdiction by Florida courts over the plaintiffs in a personal injury action); Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972) (determining that a forum-selection clause in a contract that selected a foreign court for the resolution of disputes between the parties could not deprive a U.S. court of jurisdiction, but that the U.S. court should nonetheless enforce the clause by dismissing the case unless the clause was unreasonable, unfair, or unjust).

[10] Burnham v. Superior Court, 495 U.S. 604, 619 (1990) (plurality opinion) ("[J]urisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"). Providing the fifth and deciding vote in *Burnham*, Justice White, in an opinion concurring in the judgment, argued that a particular basis for jurisdiction could not be constitutionally valid merely because of its historical pedigree, and that fairness to the defendant must also be considered. *Id.* at 629 (White, J., concurring).

[11] Pennoyer v. Neff, 95 U.S. 714, 734 (1877) ("[W]e do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident."), *overruled in part by*, Shaffer v. Heitner, 433 U.S. 186 (1977).

(2) the defendant's contacts with the forum give rise to, or are related to, the plaintiff's claims.[1] A defendant's contacts with the forum may "relate" to the plaintiff's claims even in the absence of a "strict causal relationship" between the contacts and claims.[2] However, when there is "no such connection [between the forum and the particular claims at issue], specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State."[3]

By contrast, a state court's exercise of *general* jurisdiction over a nonresident defendant for any claim—even if all the incidents underlying the claim occurred in a different state—may be constitutional when the defendant's activities in the forum state are so substantial that it is reasonable to require it to defend a lawsuit that did not arise out of its activities in the forum state and is unrelated to those activities.[4] Perhaps in order to ensure greater predictability for defendants attempting to discern where they may be subject to suits on claims arising anywhere in the world,[5] in more recent years, the Court has significantly limited the types of activities or affiliations of the defendant in the forum state sufficient for general jurisdiction, holding that those contacts must be so substantial as to render the defendant "essentially at home" in the forum state.[6] The Court has clarified that, absent exceptional circumstances, a corporate defendant is "at home" when it is incorporated in the forum state or maintains its principal place of business there.[7] Insubstantial in-state business, in and of itself, does not suffice to permit an assertion of jurisdiction over claims that are unrelated to any activity

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[1] Ford Motor Co. v. Mont. Eighth Judicial Dist. Court, No. 19-368, slip op. at 5–6 (U.S. March 25, 2021). *See also* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 n.8 (1984) (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144–64 (1966)).

[2] *Ford Motor Co.*, slip op. at 8–9, 18 (concluding that Minnesota and Montana state courts could exercise specific personal jurisdiction over Ford Motor Company in product liability cases stemming from allegedly defective Ford automobiles involved in accidents in the forum states because Ford had "extensively promoted, sold, and serviced" the same vehicle models in the forum states, even if the particular vehicles involved in the accidents were designed, manufactured, and first sold in other states).

[3] Bristol-Myers Squibb Co. v. Superior Court, No. 16-466, slip op. at 7 (U.S. June 19, 2017) (concluding that the California Supreme Court erred in employing a "relaxed" approach to personal jurisdiction by holding that a state court could exercise *specific* jurisdiction over a corporate defendant who was being sued by non-state residents for out-of-state activities solely because the defendant had "extensive forum contacts" unrelated to the claims in question).

[4] *See Helicopteros*, 466 U.S. at 414 n.9 ("When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant."); *see also id.* at 416 (holding that a Texas court could not exercise general personal jurisdiction over a foreign corporation that did not have a place of business in Texas and had only limited contacts with the state involving in-state purchases and training trips); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438, 415, 445 (1952) (holding that an Ohio court could subject a Philippine mining corporation to personal jurisdiction even though the "cause of action sued upon did not arise in Ohio and d[id] not relate to the corporation's activities there" because of the corporation's substantial activities within the state, including "directors' meetings, business correspondence, banking, stock transfers, payment of salaries, [and] purchasing of machinery.").

[5] Daimler AG v. Bauman, 571 U.S. 117 (2014) ("If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'") (quoting *Burger King*, 471 U.S. at 472)).

[6] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919, 924 (2011) (holding that foreign subsidiaries of Goodyear USA lacked sufficient contacts with the state of North Carolina that would support the exercise of general personal jurisdiction over them because the subsidiaries were not incorporated in California and did not have their principal place of business there). *See also Daimler AG*, 571 U.S. at 139 (holding that Daimler Chrysler, a German public stock company, could not be subject to suit in California with respect to acts taken in Argentina by an Argentinian subsidiary of Daimler, notwithstanding the fact that Daimler Chrysler had a U.S. subsidiary that did business in California, because Daimler was not incorporated in California and did not have its principal place of business there).

[7] *Goodyear*, 564 U.S. at 924 (noting an individual's domicile and a corporation's place of incorporation or principal place of business as "paradigm" bases for general jurisdiction) (citation omitted); *id.* at 930 n.6 ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.").

occurring in a state.[8] For example, the Court in 2017 held in *BNSF Railway v. Tyrrell* that Montana courts could not exercise general jurisdiction over a railroad company that had over 2,000 miles of track and more than 2,000 employees in the state because the company was not incorporated or headquartered in Montana and the overall activity of the company in Montana was not "so substantial" as compared to its activities throughout all of the jurisdictions in which it conducted business so as to render the corporation "at home" in the state.[9]

Although the Supreme Court has decided only a few cases that explore the scope of general personal jurisdiction since its opinion in *International Shoe*, leaving the bulk of such determinations to lower federal and state courts, it has decided several cases elaborating on the quality and nature of the defendant's contacts with the forum and litigation necessary for a court's exercise of specific jurisdiction over the defendant.[10] A common theme throughout many of these decisions is that "unilateral activity" in the forum state by a person who has some family, business, or other relationship with a nonresident defendant will not suffice to establish a defendant's minimum contacts with the forum.[11] In other words, jurisdiction is not proper merely because the defendant could have foreseen that a third party with which it has a family or business relationship (for example, a defendant's family member or customer of a defendant corporation) would have contacts with the forum.[12] Rather, the defendant must "purposefully avail" itself "of the privilege of conducting activities within the forum State," thus invoking the benefits and protections of its laws.[13] The defendant must have reasonably anticipated being haled into court there—a standard that potentially allows a defendant to predict where it will be subject to suit and plan the geographic scope of its activities or insure against the risk of being sued in a distant forum accordingly.[14] The Court has also emphasized that the minimum contacts inquiry should not focus on the location of the resulting injury to the plaintiff; instead, the proper question is whether the defendant's conduct connects him to the forum in a meaningful way.[15]

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[8] *See* BNSF Ry. v. Tyrrell, No. 16-405, slip op. at 11–12 (U.S. May 30, 2017).

[9] *Id.*

[10] *Goodyear*, 564 U.S. at 924 ("Since *International Shoe*, this Court's decisions have elaborated primarily on circumstances that warrant the exercise of specific jurisdiction, particularly in cases involving 'single or occasional acts' occurring or having their impact within the forum State."). The Supreme Court has not yet specifically addressed the extent to which Congress might intervene through the enactment of legislation to provide that certain activities of a foreign defendant constitute sufficient minimum contacts for the exercise of personal jurisdiction over a foreign defendant.

[11] Rep. of Arg. v. Weltover, Inc., 504 U.S. 607, 619–20 (1992) (holding that a foreign country defendant had minimum contacts with the United States when it unilaterally rescheduled the maturity dates of bonds it had issued because the bonds were denominated in U.S. dollars, the bonds were payable in New York, and the country had appointed a financial agent in that city); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 287 (1980) (holding that New York residents' car accident in Oklahoma involving a car they purchased in New York was insufficient by itself to establish contacts with Oklahoma of nonresident automobile retailer and wholesale distributor in products-liability action); Hanson v. Denckla, 357 U.S. 235, 253–54 (1958) (holding, in a case involving the validity of a trust agreement, that the settlor of a trust's exercise of her power of appointment in Florida was insufficient to establish nonresident trustees' contacts with, and purposeful availment of, that forum).

[12] *World-Wide Volkswagen Corp.*, 444 U.S. at 295 ("Yet 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.").

[13] Kulko v. Superior Court, 436 U.S. 84, 94 (1978) (holding that a New York resident sending his daughter to live with her mother in California, contrary to the requirements of a separation agreement, did not establish the defendant's minimum contacts with that state supporting the exercise of personal jurisdiction over him as he did not purposefully derive benefits from that activity).

[14] *World-Wide Volkswagen Corp.*, 444 U.S. at 297–98 (offering the example of a state court properly asserting personal jurisdiction over a company "that delivers its products into the stream of commerce with the expectation that they will be purchased . . . in the forum State").

[15] Walden v. Fiore, 571 U.S. 277, 284–87 (2014) (concluding that a federal court in Nevada lacked personal jurisdiction over a federal law enforcement officer in a lawsuit stemming from an incident at an airport in Atlanta involving Nevada residents).

Since the Supreme Court decided *International Shoe* in 1945, many of its decisions on the minimum contacts test have addressed specific categories of contacts between the defendant and forum, such as the alleged tortious conduct of the defendant in the forum state; a contract between the defendant and an entity in the forum state; a business relationship between the defendant and a party in the forum state; and property interests of the defendant in the forum state. For example, in cases in which the plaintiff alleged that a nonresident had committed the tort of libel causing harm in the forum state, the Court upheld the exercise of specific personal jurisdiction over a defendant that intentionally targeted the state with publication of allegedly libelous material.[16] The Court determined that regularly publishing a widely circulated magazine with knowledge that harm could occur to the state's residents amounted to a sufficient contact between the defendant, the forum, and the litigation.[17] As a result, the Court has recognized that, provided there is a sufficient connection between the defendant and the forum, states have a "significant interest" in permitting their courts to exercise jurisdiction over defendants in order to redress harm that occurs within state boundaries.[18]

Particularly since the 1980s, there has been disagreement among the Supreme Court Justices, however, as to when a nonresident corporation whose product causes injury within the forum state has "purposefully availed" itself of the privilege of conducting business within the state, and should therefore be subject to personal jurisdiction in that state in a tort action for products liability. In the 1987 case *Asahi Metal Industry Co. v. Superior Court*, four Justices agreed that a nonresident defendant's awareness that a product it manufactured would end up in the forum state through its intentional placement of the product in the stream of commerce outside of the forum did not by itself constitute an act directed at the forum sufficient for specific personal jurisdiction.[19] Writing for a plurality of the Court, Justice Sandra Day O'Connor maintained that a tribunal lacked the authority to exercise personal jurisdiction over a defendant that had not performed additional actions in the forum state that demonstrated an intent to serve that state's market.[20] According to her plurality opinion, because the defendant did not have clear notice that it could be subject to suit in California, it

[16] Calder v. Jones, 465 U.S. 783, 788–91 (1984) (concluding that a California court had jurisdiction over a suit involving an alleged libelous article written and edited by defendants in Florida with calls to sources in California that allegedly caused harm to plaintiff California resident's reputation in that state because of the magazine's wide circulation in that state); Keeton v. Hustler Mag., Inc., 465 U.S. 770, 773–74 (1984) ("Respondent's regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine."). *See also* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880 (2011) (plurality opinion) ("[I]n some cases, as with an intentional tort, the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws.").

[17] *E.g.*, *Keeton*, 465 U.S. at 773–74.

[18] *Id.* at 776 (noting that false publications in a state injure the subject of the false statements and mislead consumers residing in the state and declaring that "it is beyond dispute that New Hampshire has a significant interest in redressing injuries that actually occur within the State").

[19] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 105 (1987) ("This case presents the question whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutions 'minimum contacts' between the defendant and the forum State such that the exercise of jurisdiction 'does not offend traditional notions of fair play and substantial justice.'"); *id.* at 112 (plurality opinion) ("The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.").

[20] *See id.* at 110–13 ("Assuming, *arguendo*, that respondents have established Asahi's awareness that some of the valves sold to Cheng Shin would be incorporated into tire tubes sold in California, respondents have not demonstrated any action by Asahi to purposefully avail itself of the California market. Asahi does not do business in California. It has no office, agents, employees, or property in California. It does not advertise or otherwise solicit business in California. It did not create, control, or employ the distribution system that brought its valves to California. There is no evidence

would have been unfair to subject the defendant to suit there.[21] However, another four Justices would have held that the defendant's intentional placement of a product into the stream of commerce by itself was sufficient for personal jurisdiction because the defendant could foresee being sued in any state in which the product was regularly sold and marketed.[22] Those Justices would have grounded this result in the benefits that defendants derive from the regular retail sale of their products in the forum and the protections of state law.[23]

The Justices' disagreement over when a nonresident corporation whose product causes injury within the forum state has "purposefully availed" itself of the privilege of conducting business within the state, and should therefore be subject to personal jurisdiction in that state in a tort action for products liability, appears to remain unresolved after a 2011 case. In *J. McIntyre Machinery, Ltd. v. Nicastro*, a plurality of the Court indicated that a foreign manufacturer of a product cannot be subject to the jurisdiction of a state court based on its mere expectation that the products it manufactures in its home country and ships to an independent U.S. distributor might be distributed in the forum state.[24] Instead, according to the plurality written by Justice Anthony Kennedy and joined by Chief Justice John Roberts, Justice Antonin Scalia, and Justice Clarence Thomas, the defendant must have directly targeted the individual state with its goods, thereby "purposefully availing" itself of the privilege of conducting in-state business.[25] However, the plurality's view did not command a majority of the Court, and a narrower concurring opinion authored by Justice Stephen Breyer and joined by Justice Samuel Alito would have found jurisdiction lacking under any of the various tests for personal jurisdiction articulated in the Justices' opinions in *Asahi* because the shipment of products into, or their sale in, the forum state did not occur regularly, and there was no additional sales-related conduct (for example, marketing) by the defendant in the forum.[26]

In addition to addressing cases involving a defendant's alleged tortious conduct, the Supreme Court has also addressed minimum contacts in the context of out-of-state defendants reaching out to a forum state to establish a continuing business relationship in that state. For example, the Court upheld a California court's exercise of specific personal jurisdiction over a Texas mail order insurance company that had no office or agent in California because the Texas company mailed an offer of insurance to the plaintiff's son in California.[27] The son

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that Asahi designed its product in anticipation of sales in California. On the basis of these facts, the exertion of personal jurisdiction over Asahi by the Superior Court of California exceeds the limits of due process.") (footnote and internal citations omitted).

[21] *Id.*

[22] *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment) ("The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise."). Justice John Paul Stevens authored a concurring opinion in which he maintained that the plurality's minimum contacts analysis was unnecessary but suggested that the Court should have included in its analysis an examination of the "volume," "value," and "hazardous character" of the products at issue to determine whether the defendant had purposefully availed itself of the forum. *Id.* at 121–22 (Stevens, J., concurring in part and concurring in the judgment).

[23] *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment).

[24] *Nicastro*, 564 U.S. at 882 (plurality opinion) ("The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State."). In *Nicastro*, a metal-shearing machine manufactured in England by a company incorporated there allegedly caused injury to a person in New Jersey. *Id.* at 878. The company that made the machine, J. McIntyre Machinery, had relied upon an independent U.S. company to distribute the machine in the United States. *Id.*

[25] *Id.*

[26] *Id.* at 889 (Breyer, J., concurring in the judgment).

[27] McGee v. Int'l Life Ins. Co., 355 U.S. 220, 221–22 (1957).

accepted the offer and continued to send the company premium payments through the mail to Texas from California until the son died in California.[28] The Court noted that the suit arose from a contract that had a "substantial connection" with California, holding that the state had a significant interest in providing redress for its residents in cases in which insurance companies refuse to pay claims.[29] Similarly, when a nonresident defendant establishes an office in a state to conduct business through agents in the state, he may have to answer a lawsuit related to those business activities when an agent is served in the forum, regardless of whether he consented to service of process through his agent.[30]

Another context in which the Supreme Court has addressed the minimum contacts test involves contractual disputes between the parties to a lawsuit. Thus, when a franchisor headquartered in Florida brought suit in a local federal court against Michigan franchisees for the alleged breach of a franchise agreement to make required payments in Florida, the Court held that specific jurisdiction over defendants was proper based on the specific circumstances surrounding the contractual relationship.[31] The Court stated that a contract between an out-of-state party and an individual in the forum state is insufficient by itself to establish personal jurisdiction if the contract lacks a substantial connection to the state as established by, among other things, an (1) examination of the parties' prior negotiations (for example, whether the defendant reached into the forum to negotiate the contract); (2) the terms of the contract (for example, where payments were to be made and which state's law was to govern); and (3) the course of dealing (for example, whether the defendant established a "substantial and continuing relationship" in the forum state).[32]

The Court has also opined on when a defendant's property interests in the forum may serve as a contact for purposes of personal jurisdiction. In *Shaffer v. Heitner*, the Supreme Court held that a state court could not exercise quasi in rem jurisdiction over a nonresident defendant by attaching the defendant's property interests in the state without inquiring separately into whether these property interests and any other connections between the defendant, forum, and litigation established sufficient minimum contacts to satisfy the first prong of the *International Shoe* test.[33] Thus, a Delaware court could not subject nonresident officers and directors of a Delaware corporation to personal jurisdiction for the alleged breach of duties to the corporation based solely on the court's attachment of their stock and stock options in the corporation.[34] The Court noted that jurisdiction over property must in fact have a direct effect on the interests of the defendant in that property and therefore affect its personal rights.[35] However, the Court also noted that in some cases, such as cases establishing title to real property, ownership of the property itself may establish sufficient contacts among the defendant, forum, and litigation.[36]

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[28] *Id.*

[29] *Id.* at 223.

[30] Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 625, 628 (1935).

[31] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 464, 479 (1985).

[32] *Id.* at 478–87.

[33] Shaffer v. Heitner, 433 U.S. 186, 189, 216–17 (1977).

[34] *Id.* at 189–92, 216–17.

[35] *Id.* at 207, 212 ("The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.").

[36] *Id.* at 207–08.

Amdt14.S1.7.1.5 Reasonableness Test for Personal Jurisdiction

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Even if a nonresident defendant has minimum contacts with the forum, the Supreme Court has, at times, considered whether a state court's exercise of personal jurisdiction over him would comport with due process by examining the reasonableness of the exercise of jurisdiction.[1] In *International Shoe* and its subsequent opinions, the Court has established a multi-factor test that seeks to ensure that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[2] The Court has subsequently clarified that in applying this test to evaluate the reasonableness of the exercise of jurisdiction in light of the defendant's contacts with the forum and litigation, it will examine several factors, including: (1) "the burden on the defendant"; (2) "the forum State's interest in adjudicating the dispute"; (3) "the plaintiff's interest in obtaining convenient and effective relief"; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; (5) and the "shared interest of the several States in furthering fundamental substantive social policies."[3]

Although the Supreme Court has addressed the reasonableness prong of the *International Shoe* test for personal jurisdiction only in *Asahi* and *Daimler*, it has provided some guidance as to when courts may deem it reasonable to subject a defendant to suit. Thus, the Justices have, for example, suggested that courts should remain cautious about exercising personal jurisdiction over corporations domiciled abroad, particularly when most of the conduct at issue occurred overseas.[4] Courts may therefore evaluate the risks that subjecting a foreign corporation to suit in the United States for overseas conduct would have on international relations between the United States and its trading partners.[5] In a case involving the exercise of personal jurisdiction over a foreign corporation, moreover, the policies of other nations are relevant and must be carefully considered.[6]

In addition, when considering the burden on the defendant of litigating the case in the forum state, the Court may consider it a heavy burden for a company domiciled abroad to travel from its foreign headquarters to have a dispute with another foreign corporation litigated in U.S. courts.[7] This concern may stem in part from the notion that the interests of the plaintiff and forum are minimal when the claim is based on overseas transactions, the plaintiff

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[1] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) ("We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors.").

[2] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citations and internal quotation marks omitted).

[3] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (citation omitted).

[4] *Asahi*, 480 U.S. at 114.

[5] Daimler AG v. Bauman, 571 U.S. 117, 142 (2014) ("Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the 'fair play and substantial justice' due process demands.").

[6] *Asahi*, 480 U.S. at 115–16.

[7] *Id.* at 114.

is not a resident of the United States, and the allegedly tortious conduct could be deterred by subjecting companies over which the court has lawful judicial power to suit.[8]

Amdt14.S1.7.2 State Taxation

Amdt14.S1.7.2.1 State Taxing Power

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

It was not contemplated that the adoption of the Fourteenth Amendment would restrain or cripple the taxing power of the states.[1] When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers,[2] and the Court will refrain from condemning a tax solely on the ground that it is excessive.[3] Nor can the constitutionality of taxation be made to depend upon the taxpayer's enjoyment of any special benefits from use of the funds raised by taxation.[4]

Theoretically, public moneys cannot be expended for other than public purposes. Some early cases applied this principle by invalidating taxes judged to be imposed to raise money for purely private rather than public purposes.[5] However, modern notions of public purpose have expanded to the point where the limitation has little practical import.[6] Whether a use is public or private, although ultimately a judicial question, "is a practical question addressed to the law-making department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court."[7]

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[8] *Id.* at 114–15 (noting that the lawsuit involved an indemnification claim brought by a Taiwanese tire manufacturer against a Japanese valve assembly manufacturer).

[1] Tonawanda v. Lyon, 181 U.S. 389 (1901); Cass Farm Co. v. Detroit, 181 U.S. 396 (1901). Rather, the purpose of the amendment was to extend to the residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as was afforded against Congress by the Fifth Amendment. Southwestern Oil Co. v. Texas, 217 U.S. 114, 119 (1910).

[2] Fox v. Standard Oil Co., 294 U.S. 87, 99 (1935).

[3] Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935). *See also* Kelly v. City of Pittsburgh, 104 U.S. 78 (1881); Chapman v. Zobelein, 237 U.S. 135 (1915); Alaska Fish Co. v. Smith, 255 U.S. 44 (1921); Magnano Co. v. Hamilton, 292 U.S. 40 (1934); City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

[4] Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937). A taxpayer, therefore, cannot contest the imposition of an income tax on the ground that, in operation, it returns to his town less income tax than he and its other inhabitants pay. Dane v. Jackson, 256 U.S. 589 (1921).

[5] Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1875) (voiding tax employed by city to make a substantial grant to a bridge manufacturing company to induce it to locate its factory in the city). *See also* City of Parkersburg v. Brown, 106 U.S. 487 (1882) (private purpose bonds not authorized by state constitution).

[6] Taxes levied for each of the following purposes have been held to be for a public use: a city coal and fuel yard, Jones v. City of Portland, 245 U.S. 217 (1917), a state bank, a warehouse, an elevator, a flour mill system, homebuilding projects, Carmichael v. Southern Coal & Coke Co., 300 U.S. 495 (1937), a society for preventing cruelty to animals (dog license tax), Nicchia v. New York, 254 U.S. 228 (1920), a railroad tunnel, Milheim v. Moffat Tunnel Dist., 262 U.S. 710 (1923), books for school children attending private as well as public schools, Cochran v. Louisiana Bd. of Educ., 281 U.S. 370 (1930), and relief of unemployment, Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 515 (1937).

[7] In applying the Fifth Amendment Due Process Clause the Court has said that discretion as to what is a public purpose "belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." Helvering v. Davis, 301 U.S. 619, 640 (1937); United States v. Butler, 297 U.S. 1, 67 (1936). That payment may be made to private individuals is now irrelevant. *Carmichael*, 301 U.S. at 518. *Cf.* Usery v. Turner Elkhorn Mining

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The authority of states to tax income is "universally recognized."[8] Years ago the Court explained that "[e]njoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. . . . A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits."[9] Also, a tax on income is not constitutionally suspect because it is retroactive. The routine practice of making taxes retroactive for the entire year of the legislative session in which the tax is enacted has long been upheld,[10] and there are also situations in which courts have upheld retroactive application to the preceding year or two.[11]

A state also has broad tax authority over wills and inheritance. A state may apply an inheritance tax to the transmission of property by will or descent, or to the legal privilege of taking property by devise or descent,[12] although such tax must be consistent with other due process considerations.[13] Thus, an inheritance tax law, enacted after the death of a testator but before the distribution of his estate, constitutionally may be imposed on the shares of legatees, notwithstanding that under the law of the state in effect on the date of such enactment, ownership of the property passed to the legatees upon the testator's death.[14] Equally consistent with due process is a tax on an *inter vivos* transfer of property by deed intended to take effect upon the death of the grantor.[15]

The taxation of entities that are franchises within the jurisdiction of the governing body raises few concerns. Thus, a city ordinance imposing annual license taxes on light and power companies does not violate the Due Process Clause merely because the city has entered the power business in competition with such companies.[16] Nor does a municipal charter authorizing the imposition upon a local telegraph company of a tax upon the lines of the company within its limits at the rate at which other property is taxed but upon an arbitrary valuation per mile, deprive the company of its property without due process of law, inasmuch as the tax is a mere franchise or privilege tax.[17]

Co., 428 U.S. 1 (1976) (sustaining tax imposed on mine companies to compensate workers for black lung disabilities, including those contracting disease before enactment of tax, as way of spreading cost of employee liabilities).

[8] New York *ex rel.* Cohn v. Graves, 300 U.S. 308, 313 (1937).

[9] 300 U.S. at 313. *See also* Shaffer v. Carter, 252 U.S. 37, 49–52 (1920); and Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920) (states may tax the income of nonresidents derived from property or activity within the state).

[10] *See, e.g.*, Stockdale v. Insurance Companies, 87 U.S. (20 Wall.) 323 (1874); United States v. Hudson, 299 U.S. 498 (1937); United States v. Darusmont, 449 U.S. 292 (1981).

[11] Welch v. Henry, 305 U.S. 134 (1938) (upholding imposition in 1935 of tax liability for 1933 tax year; due to the scheduling of legislative sessions, this was the legislature's first opportunity to adjust revenues after obtaining information of the nature and amount of the income generated by the original tax). Because "[t]axation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract," the Court explained, "its retroactive imposition does not necessarily infringe due process." *Id.* at 146–47.

[12] Stebbins v. Riley, 268 U.S. 137, 140, 141 (1925).

[13] When remainders indisputably vest at the time of the creation of a trust and a succession tax is enacted thereafter, the imposition of the tax on the transfer of such remainder is unconstitutional. Coolidge v. Long, 282 U.S. 582 (1931). The Court has noted that insofar as retroactive taxation of vested gifts has been voided, the justification therefor has been that "the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the [retroactive] statute later made the taxable event . . . . Taxation . . . of a gift which . . . [the donor] might well have refrained from making had he anticipated the tax . . . [is] thought to be so arbitrary . . . as to be a denial of due process." Welch v. Henry, 305 U.S. 134, 147 (1938). But where the remaindermen's interests are contingent and do not vest until the donor's death subsequent to the adoption of the statute, the tax is valid. Stebbins v. Riley, 268 U.S. 137 (1925).

[14] Cahen v. Brewster, 203 U.S. 543 (1906).

[15] Keeney v. New York, 222 U.S. 525 (1912).

[16] Puget Sound Co. v. Seattle, 291 U.S. 619 (1934).

[17] New York Tel. Co. v. Dolan, 265 U.S. 96 (1924).

States have significant discretion in how to value real property for tax purposes. Thus, assessment of properties for tax purposes over real market value is allowed as merely another way of achieving an increase in the rate of property tax, and does not violate due process.[18] Likewise, land subject to mortgage may be taxed for its full value without deduction of the mortgage debt from the valuation.[19]

A state also has wide discretion in how to apportion real property tax burdens. Thus, a state may defray the entire expense of creating, developing, and improving a political subdivision either from funds raised by general taxation, by apportioning the burden among the municipalities in which the improvements are made, or by creating (or authorizing the creation of) tax districts to meet sanctioned outlays.[20] Or, where a state statute authorizes municipal authorities to define the district to be benefited by a street improvement and to assess the cost of the improvement upon the property within the district in proportion to benefits, their action in establishing the district and in fixing the assessments on included property, cannot, if not arbitrary or fraudulent, be reviewed under the Fourteenth Amendment upon the ground that other property benefited by the improvement was not included.[21]

On the other hand, when the benefit to be derived by a railroad from the construction of a highway will be largely offset by the loss of local freight and passenger traffic, an assessment upon such railroad violates due process,[22] whereas any gains from increased traffic reasonably expected to result from a road improvement will suffice to sustain an assessment thereon.[23] Also the fact that the only use made of a lot abutting on a street improvement is for a railway right of way does not make invalid, for lack of benefits, an assessment thereon for grading, curbing, and paving.[24] However, when a high and dry island was included within the boundaries of a drainage district from which it could not be benefited directly or indirectly, a tax imposed on the island land by the district was held to be a deprivation of property without due process of law.[25] Finally, a state may levy an assessment for special benefits resulting from an improvement already made[26] and may validate an assessment previously held void for want of authority.[27]

Amdt14.S1.7.2.2 State Jurisdiction to Tax

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or*

[18] Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940).

[19] Paddell v. City of New York, 211 U.S. 446 (1908).

[20] Hagar v. Reclamation Dist., 111 U.S. 701 (1884).

[21] Butters v. City of Oakland, 263 U.S. 162 (1923). It is also proper to impose a special assessment for the preliminary expenses of an abandoned road improvement, even though the assessment exceeds the amount of the benefit which the assessors estimated the property would receive from the completed work. Missouri Pacific R.R. v. Road District, 266 U.S. 187 (1924). *See also* Roberts v. Irrigation Dist., 289 U.S. 71 (1933) (an assessment to pay the general indebtedness of an irrigation district is valid, even though in excess of the benefits received). Likewise a levy upon all lands within a drainage district of a tax of twenty-five cents per acre to defray preliminary expenses does not unconstitutionally take the property of landowners within that district who may not be benefited by the completed drainage plans. Houck v. Little River Dist., 239 U.S. 254 (1915).

[22] Road Dist. v. Missouri Pac. R.R., 274 U.S. 188 (1927).

[23] Kansas City Ry. v. Road Dist., 266 U.S. 379 (1924).

[24] Louisville & Nashville R.R. v. Barber Asphalt Co., 197 U.S. 430 (1905).

[25] Myles Salt Co. v. Iberia Drainage Dist., 239 U.S. 478 (1916).

[26] Wagner v. Baltimore, 239 U.S. 207 (1915).

[27] Charlotte Harbor Ry. v. Welles, 260 U.S. 8 (1922).

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The operation of the Due Process Clause as a jurisdictional limitation on the taxing power of the states has been an issue in a variety of different contexts, but most involve one of two basic questions. First, is there a sufficient relationship between the state exercising taxing power and the object of the exercise of that power? Second, is the degree of contact sufficient to justify the state's imposition of a particular obligation? Illustrative of the factual settings in which such issues arise are 1) determining the scope of the business activity of a multi-jurisdictional entity that is subject to a state's taxing power; 2) application of wealth transfer taxes to gifts or bequests of nonresidents; 3) allocation of the income of multi-jurisdictional entities for tax purposes; 4) the scope of state authority to tax income of nonresidents; and 5) collection of state use taxes.

The Court's opinions in these cases have often discussed Due Process and Dormant Commerce Clause issues as if they were indistinguishable.[1] A later decision, *Quill Corp. v. North Dakota*,[2] however, used a two-tier analysis that found sufficient contact to satisfy Due Process but not Dormant Commerce clause requirements. In *Quill*,[3] the Court struck down a state statute requiring an out-of-state mail order company with neither outlets nor sales representatives in the state to collect and transmit use taxes on sales to state residents, but did so based on Commerce Clause rather than due process grounds. In 2018, the Court, however, reversed course in *South Dakota v. Wayfair*, overturning *Quill*'s Commerce Clause holding and upholding a South Dakota law that required certain large retailers that lacked a physical presence in the state to collect and remit sales taxes from retail sales to South Dakota residents.[4] In so holding, the *Wayfair* Court concluded that while the Due Process and Commerce Clause standards "may not be identical or coterminous," they are "closely related," and there are "significant parallels" between the two standards.[5]

Amdt14.S1.7.2.3 Real Property and Tangible Personalty

Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Even prior to the ratification of the Fourteenth Amendment, it was a settled principle that a state could not tax land situated beyond its limits. Subsequently elaborating upon that principle, the Court has said that, "we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action

[1] For discussion of the relationship between the taxation of interstate commerce and the Dormant Commerce Clause, *see* ArtI.S8.C3.7.11.1 Overview of State Taxation and Dormant Commerce Clause to ArtI.S8.C3.7.11.7 Benefit Prong of Complete Auto Test for Taxes on Interstate Commerce.

[2] 504 U.S. 298 (1992).

[3] 504 U.S. 298 (1992).

[4] 138 S. Ct. 2080, 2099 (2018).

[5] *Id.* at 2093.

has been defended by a court."[1] Insofar as a tax payment may be viewed as an exaction for the maintenance of government in consideration of protection afforded, the logic sustaining this rule is self-evident.

A state may tax tangible property located within its borders (either directly through an ad valorem tax or indirectly through death taxes) irrespective of the residence of the owner.[2] By the same token, if tangible personal property makes only occasional incursions into other states, its permanent situs remains in the state of origin, and, subject to certain exceptions, is taxable only by the latter.[3] The ancient maxim, *mobilia sequuntur personam*, which originated when personal property consisted in the main of articles appertaining to the person of the owner, yielded in modern times to the "law of the place where the property is kept and used." The tendency has been to treat tangible personal property as "having a situs of its own for the purpose of taxation, and correlatively to . . . exempt [it] at the domicile of its owner."[4]

Thus, when rolling stock is permanently located and used in a business outside the boundaries of a domiciliary state, the latter has no jurisdiction to tax it.[5] Further, vessels that merely touch briefly at numerous ports never acquire a taxable situs at any one of them, and are taxable in the domicile of their owners or not at all.[6] Thus, where airplanes are continually in and out of a state during the course of a tax year, the entire fleet may be taxed by the domicile state.[7]

Conversely, a nondomiciliary state, although it may not tax property belonging to a foreign corporation that has never come within its borders, may levy a tax on movables that are regularly and habitually used and employed in that state. Thus, although the fact that cars are loaded and reloaded at a refinery in a state outside the owner's domicile does not fix the situs of the entire fleet in that state, the state may nevertheless tax the number of cars that on the

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[1] Union Transit Co. v. Kentucky, 199 U.S. 194, 204 (1905). *See also* Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385 (1903).

[2] Carstairs v. Cochran, 193 U.S. 10 (1904); Hannis Distilling Co. v. Baltimore, 216 U.S. 285 (1910); Frick v. Pennsylvania, 268 U.S. 473 (1925); Blodgett v. Silberman, 277 U.S. 1 (1928).

[3] New York *ex rel.* New York Cent. R.R. v. Miller, 202 U.S. 584 (1906).

[4] Wheeling Steel Corp. v. Fox, 298 U.S. 193, 209–10 (1936); Union Transit Co. v. Kentucky, 199 U.S. 194, 207 (1905); Johnson Oil Co. v. Oklahoma, 290 U.S. 158 (1933).

[5] Union Transit Co. v. Kentucky, 199 U.S. 194 (1905). Justice Black, in *Central R.R. v. Pennsylvania,* 370 U.S. 607, 619–20 (1962), had his "doubts about the use of the Due Process Clause to strike down state tax laws. The modern use of due process to invalidate state taxes rests on two doctrines: (1) that a State is without 'jurisdiction to tax' property beyond its boundaries, and (2) that multiple taxation of the same property by different States is prohibited. Nothing in the language or the history of the Fourteenth Amendment, however, indicates any intention to establish either of these two doctrines. . . . And in the first case [Railroad v. Jackson, 74 U.S. (7 Wall.) 262 (1869)] striking down a state tax for lack of jurisdiction to tax after the passage of that Amendment neither the Amendment nor its Due Process Clause . . . was even mentioned." He also maintained that Justice Oliver Wendell Holmes shared this view in *Union Transit Co. v. Kentucky*, 199 U.S. at 211.

[6] Southern Pacific Co. v. Kentucky, 222 U.S. 63 (1911). Ships operating wholly on the waters within one state, however, are taxable there and not at the domicile of the owners. Old Dominion Steamship Co. v. Virginia, 198 U.S. 299 (1905).

[7] Noting that an entire fleet of airplanes of an interstate carrier were "never continuously without the [domiciliary] State during the whole tax year," that such airplanes also had their "home port" in the domiciliary state, and that the company maintained its principal office therein, the Court sustained a personal property tax applied by the domiciliary state to all the airplanes owned by the taxpayer. Northwest Airlines v. Minnesota, 322 U.S. 292, 294–97 (1944). No other state was deemed able to accord the same protection and benefits as the taxing state in which the taxpayer had both its domicile and its business situs. Union Transit Co. v. Kentucky, 199 U.S. 194 (1905), which disallowed the taxing of tangibles located permanently outside the domicile state, was held to be inapplicable. 322 U.S. at 295 (1944). Instead, the case was said to be governed by New York *ex rel.* New York Cent. R.R. v. Miller, 202 U.S. 584, 596 (1906). As to the problem of multiple taxation of such airplanes, which had in fact been taxed proportionately by other states, the Court declared that the "taxability of any part of this fleet by any other state, than Minnesota, in view of the taxability of the entire fleet by that state, is not now before us." Justice Jackson, in a concurring opinion, would treat Minnesota's right to tax as exclusively of any similar right elsewhere.

average are found to be present within its borders.[8] But no property of an interstate carrier can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state.[9] Or, a state property tax on railroads, which is measured by gross earnings apportioned to mileage, is constitutional unless it exceeds what would be legitimate as an ordinary tax on the property valued as part of a going concern or is relatively higher than taxes on other kinds of property.[10]

Amdt14.S1.7.2.4 Intangible Personalty

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

To determine whether a state may tax intangible personal property, the Court has applied the fiction *mobilia sequuntur personam* (movable property follows the person) and has also recognized that such property may acquire, for tax purposes, a permanent business or commercial situs. The Court, however, has never clearly disposed of the issue whether multiple personal property taxation of intangibles is consistent with due process. In the case of corporate stock, however, the Court has obliquely acknowledged that the owner thereof may be taxed at his own domicile, at the commercial situs of the issuing corporation, and at the latter's domicile. Constitutional lawyers speculated whether the Court would sustain a tax by all three jurisdictions, or by only two of them. If the latter, the question would be which two—the state of the commercial situs and of the issuing corporation's domicile, or the state of the owner's domicile and that of the commercial situs.[1]

Thus far, the Court has sustained the following personal property taxes on intangibles: (1) a debt held by a resident against a nonresident, evidenced by a bond of the debtor and secured by a mortgage on real estate in the state of the debtor's residence;[2] (2) a mortgage owned and kept outside the state by a nonresident but on land within the state;[3] (3) investments, in the form of loans to a resident, made by a resident agent of a nonresident creditor;[4] (4) deposits of a resident in a bank in another state, where he carries on a business and from which these

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[8] Johnson Oil Co. v. Oklahoma, 290 U.S. 158 (1933). Moreover, in assessing that part of a railroad within its limits, a state need not treat it as an independent line valued as if it was operated separately from the balance of the railroad. The state may ascertain the value of the whole line as a single property and then determine the value of the part within on a mileage basis, unless there be special circumstances which distinguish between conditions in the several states. Pittsburgh C.C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894).

[9] Wallace v. Hines, 253 U.S. 66 (1920). For example, the ratio of track mileage within the taxing state to total track mileage cannot be employed in evaluating that portion of total railway property found in the state when the cost of the lines in the taxing state was much less than in other states and the most valuable terminals of the railroad were located in other states. *See also* Fargo v. Hart, 193 U.S. 490 (1904); Union Tank Line Co. v. Wright, 249 U.S. 275 (1919).

[10] Great Northern Ry. v. Minnesota, 278 U.S. 503 (1929). If a tax reaches only revenues derived from local operations, the fact that the apportionment formula does not result in mathematical exactitude is not a constitutional defect. Illinois Cent. R.R. v. Minnesota, 309 U.S. 157 (1940).

[1] Howard, *State Jurisdiction to Tax Intangibles: A Twelve Year Cycle*, 8 Mo. L. Rev. 155, 160–62 (1943); Rawlins, *State Jurisdiction to Tax Intangibles: Some Modern Aspects*, 18 Tex. L. Rev. 196, 314–15 (1940).

[2] Kirtland v. Hotchkiss, 100 U.S. 491, 498 (1879).

[3] Savings Society v. Multnomah County, 169 U.S. 421 (1898).

[4] Bristol v. Washington County, 177 U.S. 133, 141 (1900).

deposits are derived, but belonging absolutely to him and not used in the business;[5] (5) membership owned by a nonresident in a domestic exchange, known as a chamber of commerce;[6] (6) membership by a resident in a stock exchange located in another state;[7] (7) stock held by a resident in a foreign corporation that does no business and has no property within the taxing state;[8] (8) stock in a foreign corporation owned by another foreign corporation transacting its business within the taxing state;[9] (9) shares owned by nonresident shareholders in a domestic corporation, the tax being assessed on the basis of corporate assets and payable by the corporation either out of its general fund or by collection from the shareholder;[10] (10) dividends of a corporation distributed ratably among stockholders regardless of their residence outside the state;[11] (11) the transfer within the taxing state by one nonresident to another of stock certificates issued by a foreign corporation;[12] and (12) promissory notes executed by a domestic corporation, although payable to banks in other states.[13]

The following personal property taxes on intangibles have been invalidated: (1) debts evidenced by notes in safekeeping within the taxing state, but made and payable and secured by property in a second state and owned by a resident of a third state;[14] (2) a tax, measured by income, levied on trust certificates held by a resident, representing interests in various parcels of land (some inside the state and some outside), the holder of the certificates, though without a voice in the management of the property, being entitled to a share in the net income and, upon sale of the property, to the proceeds of the sale.[15]

The Court also invalidated a property tax sought to be collected from a life beneficiary on the corpus of a trust composed of property located in another state and as to which the

[5] These deposits were allowed to be subjected to a personal property tax in the city of his residence, regardless of whether or not they are subject to tax in the state where the business is carried on. Fidelity & Columbia Trust Co. v. Louisville, 245 U.S. 54 (1917). The tax is imposed for the general advantage of living within the jurisdiction (benefit-protection theory), and may be measured by reference to the riches of the person taxed.

[6] Rogers v. Hennepin County, 240 U.S. 184 (1916).

[7] Citizens Nat'l Bank v. Durr, 257 U.S. 99, 109 (1921). "Double taxation" the Court observed "by one and the same State is not" prohibited "by the Fourteenth Amendment; much less is taxation by two States upon identical or closely related property interest falling within the jurisdiction of both, forbidden."

[8] Hawley v. Malden, 232 U.S. 1, 12 (1914). The Court attached no importance to the fact that the shares were already taxed by the State in which the issuing corporation was domiciled and might also be taxed by the State in which the stock owner was domiciled, or at any rate did not find it necessary to pass upon the validity of the latter two taxes. The present levy was deemed to be tenable on the basis of the benefit-protection theory, namely, "the economic advantages realized through the protection at the place . . . [of business situs] of the ownership of rights in intangibles. . . ." The Court also added that "undoubtedly the State in which a corporation is organized may . . . [tax] all of its shares whether owned by residents or nonresidents."

[9] First Bank Corp. v. Minnesota, 301 U.S. 234, 241 (1937). The shares represent an aliquot portion of the whole corporate assets, and the property right so represented arises where the corporation has its home, and is therefore within the taxing jurisdiction of the state, notwithstanding that ownership of the stock may also be a taxable subject in another state.

[10] Schuylkill Trust Co. v. Pennsylvania, 302 U.S. 506 (1938).

[11] The Court found that all stockholders were the ultimate beneficiaries of the corporation's activities within the taxing State, were protected by the latter, and were thus subject to the State's jurisdiction. International Harvester Co. v. Department of Taxation, 322 U.S. 435 (1944). This tax, though collected by the corporation, is on the transfer to a stockholder of his share of corporate dividends within the taxing State and is deducted from said dividend payments. Wisconsin Gas Co. v. United States, 322 U.S. 526 (1944).

[12] New York *ex rel.* Hatch v. Reardon, 204 U.S. 152 (1907).

[13] Graniteville Mfg. Co. v. Query, 283 U.S. 376 (1931). These taxes, however, were deemed to have been laid, not on the property, but upon an event, the transfer in one instance, and execution in the latter which took place in the taxing state.

[14] Buck v. Beach, 206 U.S. 392 (1907).

[15] Senior v. Braden, 295 U.S. 422 (1935).

beneficiary had neither control nor possession, apart from the receipt of income therefrom.[16] However, a personal property tax may be collected on one-half of the value of the corpus of a trust from a resident who is one of the two trustees thereof, not withstanding that the trust was created by the will of a resident of another state in respect of intangible property located in the latter state, at least where it does not appear that the trustee is exposed to the danger of other ad valorem taxes in another state.[17] The first case, *Brooke v. Norfolk*,[18] is distinguishable by virtue of the fact that the property tax therein voided was levied upon a resident beneficiary rather than upon a resident trustee in control of nonresident intangibles. Also different is *Safe Deposit & Trust Co. v. Virginia*,[19] where a property tax was unsuccessfully demanded of a nonresident trustee with respect to nonresident intangibles under its control. Likewise, the more recent case of *North Carolina Department of Revenue v. Kimberly Rice Kaestner 1992 Family Trust*, which saw the Court invalidating a state tax imposed on trust income of an in-state beneficiary, appears to be limited to its facts, where the beneficiaries (1) had not received any trust income, (2) had no right to demand that income, and (3) were uncertain to ever receive that income.[20]

A state in which a foreign corporation has acquired a commercial domicile and in which it maintains its general business offices may tax the corporation's bank deposits and accounts receivable even though the deposits are outside the state and the accounts receivable arise from manufacturing activities in another state. Similarly, a nondomiciliary state in which a foreign corporation did business can tax the "corporate excess" arising from property employed and business done in the taxing state.[21] On the other hand, when the foreign corporation transacts only interstate commerce within a state, any excise tax on such excess is void, irrespective of the amount of the tax.[22]

Also a domiciliary state that imposes no franchise tax on a stock fire insurance corporation may assess a tax on the full amount of paid-in capital stock and surplus, less deductions for liabilities, notwithstanding that such domestic corporation concentrates its executive, accounting, and other business offices in New York, and maintains in the domiciliary state only a required registered office at which local claims are handled. Despite "the vicissitudes which the so-called 'jurisdiction-to-tax' doctrine has encountered," the presumption persists that intangible property is taxable by the state of origin.[23]

A property tax on the capital stock of a domestic company, however, the appraisal of which includes the value of coal mined in the taxing state but located in another state awaiting sale,

[16] Brooke v. City of Norfolk, 277 U.S. 27 (1928).

[17] Greenough v. Tax Assessors, 331 U.S. 486, 496–97 (1947).

[18] 277 U.S. 27 (1928).

[19] 280 U.S. 83 (1929).

[20] *See* N.C. Dept. of Revenue v. Kimberly Rice Kaestner 1992 Family Trust, 139 S. Ct. 2213, 2221 (2019).

[21] Adams Express Co. v. Ohio, 165 U.S. 194 (1897).

[22] Alpha Cement Co. v. Massachusetts, 268 U.S. 203 (1925). A domiciliary state, however, may tax the excess of market value of outstanding capital stock over the value of real and personal property and certain indebtedness of a domestic corporation even though this "corporate excess" arose from property located and business done in another state and was there taxable. Moreover, this result follows whether the tax is considered as one on property or on the franchise. Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936). *See also* Memphis Gas Co. v. Beeler, 315 U.S. 649, 652 (1942).

[23] Newark Fire Ins. Co. v. State Board, 307 U.S. 313, 324 (1939). Although the eight Justices affirming this tax were not in agreement as to the reasons to be assigned in justification of this result, the holding appears to be in line with the dictum uttered by Chief Justice John Harlan Stone in *Curry v. McCanless,* 307 U.S. 357, 368 (1939), to the effect that the taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles.

deprives the corporation of its property without due process of law.[24] Also void for the same reason is a state tax on the franchise of a domestic ferry company that includes in the valuation of the tax the worth of a franchise granted to the company by another state.[25]

Amdt14.S1.7.2.5 Transfer (Inheritance, Estate, Gift) Taxes

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

As a state has authority to regulate transfer of property by wills or inheritance, it may base its succession taxes upon either the transmission or receipt of property by will or by descent.[1] But whatever may be the justification of their power to levy such taxes, since 1905 the states have consistently found themselves restricted by the rule in *Union Transit Co. v. Kentucky*,[2] which precludes imposition of transfer taxes upon tangible which are permanently located or have an actual situs outside the state.

In the case of intangibles, however, the Court has oscillated in upholding, then rejecting, and again sustaining the levy by more than one state ,of death taxes upon intangibles. Until 1930, transfer taxes upon intangibles by either the domiciliary or the situs (but nondomiciliary) state, were with rare exceptions approved. Thus, in *Bullen v. Wisconsin*,[3] the domiciliary state of the creator of a trust was held competent to levy an inheritance tax on an out-of-state trust fund consisting of stocks, bonds, and notes, as the settlor reserved the right to control disposition and to direct payment of income for life. The Court reasoned that such reserved powers were the equivalent to a fee in the property. It took cognizance of the fact that the state in which these intangibles had their situs had also taxed the trust.[4]

On the other hand, the mere ownership by a foreign corporation of property in a nondomiciliary state was held insufficient to support a tax by that state on the succession to shares of stock in that corporation owned by a nonresident decedent.[5] Also against the trend

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[24] Delaware, L. & W.P.R.R. v. Pennsylvania, 198 U.S. 341 (1905).

[25] Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385 (1903).

[1] Stebbins v. Riley, 268 U.S. 137, 140–41 (1925).

[2] 199 U.S. 194 (1905) (property taxes). The rule was subsequently reiterated in 1925 in *Frick v. Pennsylvania,* 268 U.S. 473 (1925). *See also* Treichler v. Wisconsin, 338 U.S. 251 (1949); City Bank Farmers' Trust Co. v. Schnader, 293 U.S. 112 (1934). In *State Tax Comm'n v. Aldrich,* 316 U.S. 174, 185 (1942), however, Justice Jackson, in dissent, asserted that a reconsideration of this principle had become timely.

[3] 240 U.S. 635, 631 (1916). A decision rendered in 1926 which is seemingly in conflict was *Wachovia Bank & Trust Co. v. Doughton,* 272 U.S. 567 (1926), in which North Carolina was prevented from taxing the exercise of a power of appointment through a will executed therein by a resident, when the property was a trust fund in Massachusetts created by the will of a resident of the latter state. One of the reasons assigned for this result was that by the law of Massachusetts the property involved was treated as passing from the original donor to the appointee. However, this holding was overruled in *Graves v. Schmidlapp,* 315 U.S. 657 (1942).

[4] Levy of an inheritance tax by a nondomiciliary state was also sustained on similar grounds in *Wheeler v. New York,* 233 U.S. 434 (1914) wherein it was held that the presence of a negotiable instrument was sufficient to confer jurisdiction upon the State seeking to tax its transfer.

[5] Rhode Island Trust Co. v. Doughton, 270 U.S. 69 (1926).

was *Blodgett v. Silberman*,[6] in which the Court defeated collection of a transfer tax by the domiciliary state by treating coins and bank notes deposited by a decedent in a safe deposit box in another state as tangible property.[7]

In the course of about two years following the Depression, the Court handed down a group of four decisions that placed the stamp of disapproval upon multiple transfer taxes and—by inference—other multiple taxation of intangibles.[8] The Court found that "practical considerations of wisdom, convenience and justice alike dictate the desirability of a uniform rule confining the jurisdiction to impose death transfer taxes as to intangibles to the State of the [owner's] domicile."[9] Thus, the Court proceeded to deny the right of nondomiciliary states to tax intangibles, rejecting jurisdictional claims founded upon such bases as control, benefit, protection or situs. During this interval, 1930–1932, multiple transfer taxation of intangibles came to be viewed, not merely as undesirable, but as so arbitrary and unreasonable as to be prohibited by the Due Process Clause.

The Court has expressly overruled only one of these four decisions condemning multiple succession taxation of intangibles. In 1939, in *Curry v. McCanless*, the Court announced a departure from "[t]he doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one state . . . ."[10] Taking cognizance of the fact that this doctrine had never been extended to the field of income taxation or consistently applied in the field of property taxation, the Court declared that a correct interpretation of constitutional requirements would dictate the following conclusions: "From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. . . . But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains . . . . [However], the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax . . . ."[11]

In accordance with this line of reasoning, the domicile of a decedent (Tennessee) and the state where a trust received securities conveyed from the decedent by will (Alabama) were both allowed to impose a tax on the transfer of these securities. "In effecting her purposes, the testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other state by making her domicile there. She necessarily invoked the aid of the law of both states, and her legatees, before they can secure and enjoy the benefits of succession, must invoke the law of both."[12]

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[6] 277 U.S. 1 (1928).

[7] The Court conceded, however, that the domiciliary state could tax the transfer of books and certificates of indebtedness found in that safe deposit box as well as the decedent's interest in a foreign partnership.

[8] First Nat'l Bank v. Maine, 284 U.S. 312 (1932); Beidler v. South Carolina Tax Comm'n, 282 U.S. 1 (1930); Baldwin v. Missouri, 281 U.S. 586 (1930); Farmers Loan Co. v. Minnesota, 280 U.S. 204 (1930).

[9] First National Bank v. Maine, 284 U.S. 312, 330–31 (1932).

[10] 307 U.S. 357, 363 (1939).

[11] 307 U.S. at 366, 367, 368.

[12] 307 U.S. at 372. These statements represented a belated adoption of the views advanced by Chief Justice John Harlan Stone in dissenting or concurring opinions that he filed in three of the four decisions during 1930–1932. By the line of reasoning taken in these opinions, if protection or control was extended to, or exercised over, intangibles or the person of their owner, then as many states as afforded such protection or were capable of exerting such dominion should be privileged to tax the transfer of such property. On this basis, the domiciliary state would invariably qualify

On the authority of *Curry v. McCanless*, the Court, in *Pearson v. McGraw*,[13] sustained the application of an Oregon transfer tax to intangibles handled by an Illinois trust company, although the property was never physically present in Oregon. Jurisdiction to tax was viewed as dependent, not on the location of the property in the state, but on the fact that the owner was a resident of Oregon. In *Graves v. Elliott*,[14] the Court upheld the power of New York, in computing its estate tax, to include in the gross estate of a domiciled decedent the value of a trust of bonds managed in Colorado by a Colorado trust company and already taxed on its transfer by Colorado, which trust the decedent had established while in Colorado and concerning which he had never exercised any of his reserved powers of revocation or change of beneficiaries. It was observed that "the power of disposition of property is the equivalent of ownership. It is a potential source of wealth and its exercise in the case of intangibles is the appropriate subject of taxation at the place of the domicile of the owner of the power. The relinquishment at death, in consequence of the non-exercise in life, of a power to revoke a trust created by a decedent is likewise an appropriate subject of taxation."[15]

The costliness of multiple taxation of estates comprising intangibles can be appreciably aggravated if one or more states find that the decedent died domiciled within its borders. In such cases, contesting states may discover that the assets of the estate are insufficient to satisfy their claims. Thus, in *Texas v. Florida*,[16] the State of Texas filed an original petition in the Supreme Court against three other states who claimed to be the domicile of the decedent, noting that the portion of the estate within Texas alone would not suffice to discharge its own tax, and that its efforts to collect its tax might be defeated by adjudications of domicile by the other states. The Supreme Court disposed of this controversy by sustaining a finding that the decedent had been domiciled in Massachusetts, but intimated that thereafter it would take jurisdiction in like situations only in the event that an estate was valued less than the total of the demands of the several states, so that the latter were confronted with a prospective inability to collect.

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as a state competent to tax as would a nondomiciliary state, so far as it could legitimately exercise control or could be shown to have afforded a measure of protection that was not trivial or insubstantial.

[13] 308 U.S. 313 (1939).

[14] 307 U.S. 383 (1939).

[15] 307 U.S. at 386. Consistent application of the principle enunciated in *Curry v. McCanless* is also discernible in two later cases in which the Court sustained the right of a domiciliary state to tax the transfer of intangibles kept outside its boundaries, notwithstanding that "in some instances they may be subject to taxation in other jurisdictions, to whose control they are subject and whose legal protection they enjoy." Graves v. Schmidlapp, 315 U.S. 657, 661 (1942). In this case, an estate tax was levied upon the value of the subject of a general testamentary power of appointment effectively exercised by a resident donee over intangibles held by trustees under the will of a nonresident donor of the power. Viewing the transfer of interest in the intangibles by exercise of the power of appointment as the equivalent of ownership, the Court quoted the statement in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 429 (1819), that the power to tax "is an incident of sovereignty, and is coextensive with that to which it is an incident." 315 U.S. at 660. Again, in *Central Hanover Bank Co. v. Kelly,* 319 U.S. 94 (1943), the Court approved a New Jersey transfer tax imposed on the occasion of the death of a New Jersey grantor of an irrevocable trust despite the fact that it was executed in New York, the securities were located in New York, and the disposition of the corpus was to two nonresident sons.

[16] 306 U.S. 398 (1939). Resort to the Supreme Court's original jurisdiction was necessary because in *Worcester County Co. v. Riley,* 302 U.S. 292 (1937), the Court, proceeding on the basis that inconsistent determinations by the courts of two states as to the domicile of a taxpayer do not raise a substantial federal constitutional question, held that the Eleventh Amendment precluded a suit by the estate of the decedent to establish the correct state of domicile. In *California v. Texas,* 437 U.S. 601 (1978), a case on all points with *Texas v. Florida*, the Court denied leave to file an original action to adjudicate a dispute between the two states about the actual domicile of Howard Hughes, a number of Justices suggesting that *Worcester County* no longer was good law. Subsequently, the Court reaffirmed *Worcester County*, Cory v. White, 457 U.S. 85 (1982), and then permitted an original action to proceed, California v. Texas, 457 U.S. 164 (1982), several Justices taking the position that neither *Worcester County* nor *Texas v. Florida* was any longer viable.

Amdt14.S1.7.2.6 Corporate Privilege Taxes

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

A domestic corporation may be subjected to a privilege tax graduated according to paid-up capital stock, even though the stock represents capital not subject to the taxing power of the state, because the tax is levied not on property but on the privilege of doing business in corporate form.[1] However, a state cannot tax property beyond its borders under the guise of taxing the privilege of doing an intrastate business. Therefore, a license tax based on the authorized capital stock of an out-of-state corporation is void,[2] even though there is a maximum fee,[3] unless the tax is apportioned based on property interests in the taxing state.[4] On the other hand, a fee collected only once as the price of admission to do intrastate business is distinguishable from a tax and accordingly may be levied on an out-of-state corporation based on the amount of its authorized capital stock.[5]

A municipal license tax imposed on a foreign corporation for goods sold within and without the state, but manufactured in the city, is not a tax on business transactions or property outside the city and therefore does not violate the Due Process Clause.[6] But a state lacks jurisdiction to extend its privilege tax to the gross receipts of a foreign contracting corporation for fabricating equipment outside the taxing state, even if the equipment is later installed in the taxing state. Unless the activities that are the subject of the tax are carried on within its territorial limits, a state is not competent to impose such a privilege tax.[7]

Amdt14.S1.7.2.7 Individual Income Taxes

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[1] Kansas City Ry. v. Kansas, 240 U.S. 227 (1916); Kansas City, M. & B.R.R. v. Stiles, 242 U.S. 111 (1916). Similarly, the validity of a franchise tax, imposed on a domestic corporation engaged in foreign maritime commerce and assessed upon a proportion of the total franchise value equal to the ratio of local business done to total business, is not impaired by the fact that the total value of the franchise was enhanced by property and operations carried on beyond the limits of the state. Schwab v. Richardson, 263 U.S. 88 (1923).

[2] Western Union Tel. Co. v. Kansas, 216 U.S. 1 (1910); Pullman Co. v. Kansas, 216 U.S. 56 (1910); Looney v. Crane Co., 245 U.S. 178 (1917); International Paper Co. v. Massachusetts, 246 U.S. 135 (1918).

[3] Cudahy Co. v. Hinkle, 278 U.S. 460 (1929).

[4] An example of such an apportioned tax is a franchise tax based on such proportion of outstanding capital stock as is represented by property owned and used in business transacted in the taxing state.St. Louis S.W. Ry. v. Arkansas, 235 U.S. 350 (1914).

[5] Atlantic Refining Co. v. Virginia, 302 U.S. 22 (1937).

[6] American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919). Nor does a state license tax on the production of electricity violate the due process clause because it may be necessary, to ascertain, as an element in its computation, the amounts delivered in another jurisdiction. Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932). A tax on chain stores, at a rate per store determined by the number of stores both within and without the state is not unconstitutional as a tax in part upon things beyond the jurisdiction of the state.

[7] James v. Dravo Contracting Co., 302 U.S. 134 (1937).

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A state may tax annually the entire net income of resident individuals from whatever source received,[1] as jurisdiction is founded upon the rights and privileges incident to domicile. A state may also tax the portion of a nonresident's net income that derives from property owned by him within its borders, and from any business, trade, or profession carried on by him within its borders.[2] This state power is based upon the state's dominion over the property he owns, or over activity from which the income derives, and from the obligation to contribute to the support of a government that secures the collection of such income. Accordingly, a state may tax residents on income from rents of land located outside the state; from interest on bonds physically outside the state and secured by mortgage upon lands physically outside the state;[3] and from a trust created and administered in another state and not directly taxable to the trustee.[4] Further, the fact that another state has lawfully taxed identical income in the hands of trustees operating in that state does not necessarily destroy a domiciliary state's right to tax the receipt of income by a resident beneficiary.[5]

Amdt14.S1.7.2.8 Corporate Income Taxes and Foreign Corporations

Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A tax based on the income of a foreign corporation may be determined by allocating to the state a proportion of the total,[1] unless the income attributed to the state is out of all appropriate proportion to the business transacted in the state.[2] Thus, a franchise tax on a foreign corporation may be measured by income, not just from business within the state, but also on net income from interstate and foreign business.[3] Because the privilege granted by a

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[1] Lawrence v. State Tax Comm'n, 286 U.S. 276 (1932).

[2] Shaffer v. Carter, 252 U.S. 37 (1920); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920).

[3] New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937).

[4] Maguire v. Trefy, 253 U.S. 12 (1920).

[5] Guaranty Trust Co. v. Virginia, 305 U.S. 19, 23 (1938). Likewise, even though a nonresident does no business in a state, the state may tax the profits realized by the nonresident upon his sale of a right appurtenant to membership in a stock exchange within its borders. New York *ex rel.* Whitney v. Graves, 299 U.S. 366 (1937).

[1] Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920); Bass, Ratcliff & Gretton Ltd. v. Tax Comm'n, 266 U.S. 271 (1924). The Court has recently considered and expanded the ability of the states to use apportionment formulae to allocate to each state for taxing purposes a fraction of the income earned by an integrated business conducted in several states as well as abroad. Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978); Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980); Exxon Corp. v. Department of Revenue, 447 U.S. 207 (1980). *Exxon* refused to permit a unitary business to use separate accounting techniques that divided its profits among its various functional departments to demonstrate that a state's formulary apportionment taxes extraterritorial income improperly. *Moorman Mfg. Co. v. Bair*, 437 U.S. at 276–80, implied that a showing of actual multiple taxation was a necessary predicate to a due process challenge but might not be sufficient.

[2] Evidence may be submitted that tends to show that a state has applied a method that, although fair on its face, operates so as to reach profits that are in no sense attributable to transactions within its jurisdiction.Hans Rees' Sons v. North Carolina, 283 U.S. 123 (1931).

[3] Matson Nav. Co. v. State Board, 297 U.S. 441 (1936).

state to a foreign corporation of carrying on business supports a tax by that state, it followed that a Wisconsin privilege dividend tax could be applied to a Delaware corporation despite its having its principal offices in New York, holding its meetings and voting its dividends in New York, and drawing its dividend checks on New York bank accounts. The tax could be imposed on the "privilege of declaring and receiving dividends" out of income derived from property located and business transacted in Wisconsin, equal to a specified percentage of such dividends, the corporation being required to deduct the tax from dividends payable to resident and nonresident shareholders.[4]

Amdt14.S1.7.2.9 Insurance Company Taxes

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

A privilege tax on the gross premiums received by a foreign life insurance company at its home office for business written in the state does not deprive the company of property without due process,[1] but such a tax is invalid if the company has withdrawn all its agents from the state and has ceased to do business there, merely continuing to receive the renewal premiums at its home office.[2] Also violating due process is a state insurance premium tax imposed on a nonresident firm doing business in the taxing jurisdiction, where the firm obtained the coverage of property within the state from an unlicensed out-of-state insurer that consummated the contract, serviced the policy, and collected the premiums outside that taxing jurisdiction.[3] However, a tax may be imposed upon the privilege of entering and engaging in business in a state, even if the tax is a percentage of the "annual premiums to be paid throughout the life of the policies issued." Under this kind of tax, a state may continue to collect even after the company's withdrawal from the state.[4]

A state may lawfully extend a tax to a foreign insurance company that contracts with an automobile sales corporation in a third state to insure customers of the automobile sales corporation against loss of cars purchased through the automobile sales corporation, insofar as the cars go into the possession of a purchaser within the taxing state.[5] On the other hand, a foreign corporation admitted to do a local business, which insures its property with insurers in other states who are not authorized to do business in the taxing state, cannot constitutionally

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[4] Wisconsin v. J.C. Penney Co., 311 U.S. 435, 448–49 (1940). Dissenting, Justice John Roberts, along with Chief Justice Charles Evans Hughes and Justices James McReynolds and Stanley Reed, stressed the fact that the use and disbursement by the corporation at its home office of income derived from operations in many states does not depend on and cannot be controlled by, any law of Wisconsin. The act of disbursing such income as dividends, he contended is "one wholly beyond the reach of Wisconsin's sovereign power, one which it cannot effectively command, or prohibit or condition." The assumption that a proportion of the dividends distributed is paid out of earnings in Wisconsin for the year immediately preceding payment is arbitrary and not borne out by the facts. Accordingly, "if the exaction is an income tax in any sense it is such upon the stockholders (many of whom are nonresidents) and is obviously bad." *See also* Wisconsin v. Minnesota Mining Co., 311 U.S. 452 (1940).

[1] Equitable Life Society v. Pennsylvania, 238 U.S. 143 (1915).

[2] Provident Savings Ass'n v. Kentucky, 239 U.S. 103 (1915).

[3] State Bd. of Ins. v. Todd Shipyards, 370 U.S. 451 (1962).

[4] Continental Co. v. Tennessee, 311 U.S. 5, 6 (1940).

[5] Palmetto Ins. Co. v. Connecticut, 272 U.S. 295 (1926).

be subjected to a 5% tax on the amount of premiums paid for such coverage.[6] Likewise a Connecticut life insurance corporation, licensed to do business in California, which negotiated reinsurance contracts in Connecticut, received payment of premiums on such contracts in Connecticut, and was liable in Connecticut for payment of losses claimed under such contracts, cannot be subjected by California to a privilege tax measured by gross premiums derived from such contracts, notwithstanding that the contracts reinsured other insurers authorized to do business in California and protected policies effected in California on the lives of California residents. The tax cannot be sustained whether as laid on property, business done, or transactions carried on, within California, or as a tax on a privilege granted by that state.[7]

Amdt14.S1.7.3 Void for Vagueness

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The Supreme Court has invalidated both federal and state criminal statutes that lack sufficient definiteness or specificity as "void for vagueness." Such legislation "may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."[1] A statute may also be unconstitutionally vague because the statute is worded in a standardless way that invites arbitrary enforcement or so broadly as to threaten constitutionally protected activity.

With respect to state and local actions, the Supreme Court has, for instance, voided for vagueness a state criminal law that subjects a "gangster" to fine or imprisonment, where neither common law nor the statute gave the words "gang" or "gangster" definite meaning;[2] an ordinance that required police to disperse all persons in the company of "criminal street gang members" while in a public place with "no apparent purpose";[3] and an ordinance that punished, among others, "persons wandering or strolling around from place without any lawful purpose or object."[4]

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[6] St. Louis Compress Co. v. Arkansas, 260 U.S. 346 (1922).

[7] Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938). When policy loans to residents are made by a local agent of a foreign insurance company, in the servicing of which notes are signed, security taken, interest collected, and debts are paid within the State, such credits are taxable to the company, notwithstanding that the promissory notes evidencing such credits are kept at the home office of the insurer. Metropolitan Life Ins. Co. v. City of New Orleans, 205 U.S. 395 (1907). But when a resident policyholder's loan is merely charged against the reserve value of his policy, under an arrangement for extinguishing the debt and interest thereon by deduction from any claim under the policy, such credit is not taxable to the foreign insurance company. Orleans Parish v. New York Life Ins. Co., 216 U.S. 517 (1910). Premiums due from residents on which an extension has been granted by foreign companies also are credits on which the latter may be taxed by the state of the debtor's domicile. Liverpool & L. & G. Ins. Co. v. Orleans Assessors, 221 U.S. 346 (1911). The mere fact that the insurers charge these premiums to local agents and give no credit directly to policyholders does not enable them to escape this tax.

[1] Musser v. Utah, 333 U.S. 95, 97 (1948).

[2] Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[3] City of Chicago v. Morales, 527 U.S. 41 (1999).

[4] Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). For more discussion of the void for vagueness doctrine, see Amdt5.8.1 Overview of Void for Vagueness Doctrine.

Amdt14.S1.8 Equal Protection

Amdt14.S1.8.1 Race-Based Classifications Generally

Amdt14.S1.8.1.1 Overview of Race-Based Classifications

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

When the government legislates or acts on the basis of a "suspect" classification, the Court sets aside the traditional standard of equal protection review and exercises a heightened standard of review referred to as "strict scrutiny."[1] Paradigmatic of "suspect" categories is classification by race. Under the strict scrutiny standard, the government must demonstrate a compelling interest; usually little or no presumption favoring the classification is to be expected from courts. In addition, the government must demonstrate that its use or reliance on a racial classification is narrowly tailored to further that compelling interest.[2] Both prongs of the Court's strict scrutiny standard involve the case-by-case analysis of multiple factors.

Before settling on strict scrutiny for evaluating racial classifications for equal protection purposes, the Supreme Court's jurisprudence on racial classifications went through significant change over the years. In its 1944 decision *Korematsu v. United States*,[3] for example, the Court adjudicated the wartime forced removal of Japanese-Americans from the West Coast. In that case, the Court said that because government action targeted only a single ethnic-racial group it was "immediately suspect" and subject to "rigid scrutiny."[4] In the context of striking down state laws prohibiting interracial marriage or cohabitation in the late 1960s, the Court stated in its 1967 decision *Loving v. Virginia* that racial classifications "bear a far heavier burden of justification" than other classifications and that these state laws were invalid because no "overriding statutory purpose"[5] was shown and they were not necessary to some "legitimate overriding purpose."[6]

Meanwhile, not all racial classifications harm a particular group, and the Justices debated which standard to apply to racial classifications motivated by a "benign" interest to help or assist a particular racial group. The Court ultimately concluded in its 1995 decision *Adarand Constructors v. Pena*, that one standard—strict scrutiny—applies to evaluate all racial

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[1] *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).

[2] *See, e.g.,* Fisher v. Univ. of Tex., 570 U.S. 297, 309–12 (2013).

[3] 323 U.S. 214, 216 (1944), *overruled by* Trump v. Hawaii, No. 17-965, slip op. at 38 (U.S. June 26, 2018). In applying "rigid scrutiny," however, the Court was deferential to the judgment of military authorities, and to congressional judgment in exercising its war powers.

[4] *Korematsu*, 323 U.S. at 216.

[5] McLaughlin v. Florida, 379 U.S. 184, 192, 194 (1964)

[6] Loving v. Virginia, 388 U.S. 1, 11 (1967). In *Lee v. Washington*, 390 U.S. 333 (1968), the Court said that preservation of discipline and order in a jail might justify the use of racial classifications if shown to be necessary. *Accord* Johnson v. California, 543 U.S. 499, 512 (2005).

classifications.[7] Thus, government actions that use a racial classification to remedy or ameliorate conditions resulting from intentional discrimination must also undergo strict scrutiny.[8]

Amdt14.S1.8.1.2 Equal Protection and Rational Basis Review Generally

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Every draft leading up to the final version of Section 1 of the Fourteenth Amendment contained a guarantee of equal protection of the laws.[1] The Amendment's sponsors aimed to provide a firm constitutional basis for already-enacted civil rights legislation[2] and to ensure that equal protection could not be repealed by a simple majority in a future Congress.[3] There were, however, conflicting interpretations of the phrase "equal protection" among sponsors and supporters, and the legislative history does little to clarify whether any sort of consensus was accomplished, and if so, what it was.[4] Although the Court early recognized that African Americans were the primary intended beneficiaries of the new constitutional protections thus adopted,[5] the Amendment's language is not limited to any one racial or other group. Though efforts to argue for an expansive interpretation met with little initial success,[6] the equal protection standard ultimately came to apply to all classifications by legislative and other official bodies. Now, the Equal Protection Clause looms large in the fields of civil rights and fundamental liberties with regard to differential treatment of persons and classes.

While the traditional standard of review for equal protection challenges to government classifications developed largely, though not entirely, in the context of economic regulation,[7] it

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[7] 515 U.S. 200, 227 (1995).

[8] *Adarand*, 515 U.S. at 226; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

[1] The story is recounted in Joseph B. James, The Framing of the Fourteenth Amendment (1956). *See also* The Journal of the Joint Committee of Fifteen on Reconstruction (Benjamin B. Kendrick ed., 1914). The floor debates are collected in 1 Statutory History of the United States: Civil Rights 181 (Bernard Schwartz ed., 1970).

[2] Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (now in part 42 U.S.C. §§ 1981, 1982). *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422–37 (1968).

[3] Much of the legislation which survived challenge in the courts was repealed in 1894 and 1909. 28 Stat. 36 (1894); 35 Stat. 1088 (1909). *See* Robert K. Carr, Federal Protection of Civil Rights: Quest for a Sword 45–46 (1947).

[4] Jacobus tenBroek, Equal Under Law (rev. ed., 1965); John P. Frank & Robert F. Munro, *The Original Understanding of 'Equal Protection of the Laws'*, 50 Colum. L. Rev. 131 (1950); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955); *see also* the essays collected in Howard J. Graham, Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the "Conspiracy Theory," and American Constitutionalism (1968). In calling for reargument in *Brown v. Board of Education*, the Court asked for and received extensive analysis of the legislative history of the Amendment with no conclusive results. 347 U.S. 483, 489–90 (1954).

[5] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873).

[6] In *Buck v. Bell*, Justice Oliver Wendell Holmes characterized the Equal Protection Clause as "the usual last resort of constitutional arguments." 274 U.S. 200, 208 (1927).

[7] *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (discrimination against Chinese on the West Coast).

appears in many other contexts as well,[8] including so-called "class-of-one" challenges to the government's alleged mistreatment of an individual.[9] The mere fact of classification will not void legislation,[10] because, in exercising its powers, a legislature has considerable discretion in recognizing differences between and among persons and situations.[11] The Court has observed: "[S]tatutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution."[12]

To determine whether a classification is permissible or invidious courts must first identify the characteristic used to classify.[13] For most classifications that do not involve an inherently suspect characteristic (such as sex or race) or a fundamental right (such as a personal constitutional right), the Court applies rational basis review.[14] This standard generally differentiates between permissible and impermissible classifications by asking whether "the statute is rationally related to a legitimate state interest."[15] Applying a presumption that legislation is valid, the Court has held that "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude."[16] Recognizing that a classification may be overinclusive or underinclusive and pass rational basis review, the Court has stated: "If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality."[17]

Amdt14.S1.8.1.3 Marriage and Facially Non-Neutral Laws

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[8] *See, e.g.,* Vacco v. Quill, 521 U.S. 793 (1997) (assisted suicide prohibition does not violate Equal Protection Clause by distinguishing between terminally ill patients on life-support systems who are allowed to direct the removal of such systems and patients who are not on life support systems and are not allowed to hasten death by self-administering prescribed drugs).

[9] The Supreme Court has recognized successful equal protection claims brought by a class-of-one, where a plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for that difference. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam) (village's demand for an easement as a condition of connecting the plaintiff's property to the municipal water supply was irrational and wholly arbitrary). However, the class-of-one theory, which applies with respect to legislative and regulatory action, does not apply in the public employment context. Engquist v. Or. Dep't of Agric., 553 U.S. 591, 595 (2008) (allegation that plaintiff was fired not because she was a member of an identified class but simply for "arbitrary, vindictive, and malicious reasons" does not state an equal protection claim). In *Engquist*, the Court noted that "the government as employer indeed has far broader powers than does the government as sovereign," *id.* at 598 (quoting Waters v. Churchill, 511 U.S. 661, 671 (1994), and that it is a "common-sense realization" that government offices could not function if every employment decision became a constitutional matter. *Id.* at 599, 607.

[10] Atchison, T. & Santa Fe R.R. v. Matthews, 174 U.S. 96, 106 (1899). From the same period, see also Orient Ins. Co. v. Daggs, 172 U.S. 557 (1899); Bachtel v. Wilson, 204 U.S. 36 (1907); Watson v. Maryland, 218 U.S. 173 (1910). For later cases, see Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552 (1947); Goesaert v. Cleary, 335 U.S. 464 (1948), *overruled by* Craig v. Boren, 429 U.S. 190, 210 n.23 (1976); McGowan v. Maryland, 366 U.S. 420 (1961); Schilb v. Kuebel, 404 U.S. 357 (1971); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980); Schweiker v. Wilson, 450 U.S. 221 (1981).

[11] Barrett v. Indiana, 229 U.S. 26 (1913).

[12] Ferguson v. Skrupa, 372 U.S. 726, 732 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

[13] City of Cleburne. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439–42 (1985), *superseded by statute*, Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1620 (codified at 42 U.S.C. § 3604).

[14] *Id.* at 440.

[15] *Id.* (holding disability status is not a suspect classification).

[16] *Id.*

[17] City of Dallas v. Stanglin, 490 U.S. 19, 26 (1989) (internal quotation marks omitted).

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes that forbid the contracting of marriage between persons of different races are unconstitutional,[1] as are statutes that penalize interracial cohabitation.[2] Nor may a court deny custody of a child based on a parent's remarriage to a person of another race and the presumed "best interests of the child" to be free from the prejudice and stigmatization that might result.[3]

Amdt14.S1.8.1.4 Judicial System and Facially Non-Neutral Laws

Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Segregation in courtrooms is unlawful and may not be enforced through contempt citations for disobedience[1] or through other means. Treatment of parties to or witnesses in judicial actions based on their race is impermissible.[2] Jail inmates have a right not to be segregated by race unless there is some overriding necessity arising out of the process of keeping order.[3]

Amdt14.S1.8.1.5 Public Designation and Facially Non-Neutral Laws

Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is unconstitutional to designate candidates on the ballot by race,[1] and apparently, any sort of designation by race on public records is suspect, although not necessarily unlawful.[2]

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[1] Loving v. Virginia, 388 U.S. 1 (1967).

[2] McLaughlin v. Florida, 379 U.S. 184 (1964).

[3] Palmore v. Sidoti, 466 U.S. 429 (1984).

[1] Johnson v. Virginia, 373 U.S. 61 (1963).

[2] Hamilton v. Alabama, 376 U.S. 650 (1964) (reversing contempt conviction of witness who refused to answer questions so long as prosecutor addressed her by her first name).

[3] Lee v. Washington, 390 U.S. 333 (1968); Wilson v. Kelley, 294 F. Supp. 1005 (N.D.Ga.), *aff'd*, 393 U.S. 266 (1968).

[1] Anderson v. Martin, 375 U.S. 399 (1964).

[2] Tancil v. Woolls, 379 U.S. 19 (1964) (summarily affirming lower court rulings sustaining law requiring that every divorce decree indicate race of husband and wife, but voiding laws requiring separate lists of White and Black citizens in voting, tax, and property records).

Amdt14.S1.8.1.6 Public Accommodations and Facially Non-Neutral Laws

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Whether discrimination practiced by operators of retail selling and service establishments gave rise to a denial of constitutional rights occupied the Court's attention considerably in the early 1960s, but it avoided finally deciding one way or the other, generally finding forbidden state action in some aspect of the situation.[1] Passage of the Civil Rights Act of 1964 obviated any necessity to resolve the issue.[2]

Amdt14.S1.8.1.7 Political Process Doctrine

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The Court has also analyzed equal protection challenges to voter referenda approving restrictions or prohibitions on methods of addressing racial segregation.[1] In such cases, the Court must consider if a measure that changes how desegregation is implemented "distorts the political process for racial reasons."[2] In a 1982 case, *Washington v. Seattle School District*, the Court addressed circumstances in which Washington voters, following the Seattle school board's implementation of a mandatory busing program to reduce the racial isolation of minority students, approved an initiative banning school boards from assigning students to any but the nearest or next nearest school offering the students' course of study. The voter initiative included many exceptions that allowed the school board to assign students beyond nearby schools for various reasons, but notably had no exception that allowed the school board to bus students for desegregation purposes.[3] That same year, the Court addressed a California case, in which California state courts had interpreted the California constitution to require school systems to eliminate both de jure and de facto segregation. In that case, *Crawford v. Los Angeles Board of Education*, voters approved an initiative that prohibited state courts from

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[1] *E.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Turner v. City of Memphis, 369 U.S. 350 (1962); Peterson v. City of Greenville, 373 U.S. 244 (1963); Lombard v. Louisiana, 373 U.S. 267 (1963); Robinson v. Florida, 378 U.S. 153 (1964).

[2] Title II, 78 Stat. 243, 42 U.S.C. §§ 2000a to 2000a–6. *See* Hamm v. City of Rock Hill, 379 U.S. 306 (1964). On the various positions of the Justices on the constitutional issue, *see* the opinions in *Bell v. Maryland,* 378 U.S. 226 (1964).

[1] Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); Crawford v. Bd. of Educ. of L.A., 458 U.S. 527 (1982). The decisions were in essence an application of *Hunter v. Erickson*, 393 U.S. 385 (1969).

[2] *Crawford*, 458 U.S. at 541. Justice Harry Blackmun characterized, as violating the political process doctrine, "classifications that threaten the ability of minorities to involve themselves in the process of self-government," including "reallocat[ing] decisionmaking authority." 458 U.S. at 546 (Blackmun, J., concurring).

[3] *Washington*, 458 U.S. at 462–63. *See also id.* at 471 (noting the district court's finding that "the text of the initiative was carefully tailored to interfere only with desegregative busing.").

ordering busing unless the school segregation violated the Fourteenth Amendment, and a federal judge would have power to order busing under Supreme Court precedent.[4]

By a 5-4 margin, the Court held that the Washington measure was unconstitutional, but upheld the California measure with near unanimity of result if not of reasoning. The Court held that the Washington measure was unconstitutional because it imposed a different and more severe burden on school boards to address racial desegregation through busing than it imposed on any other educational policy.[5] While local school boards could make education policy on a range of matters, they required state level approval to bus students for desegregation purposes.[6] By imposing these greater burdens on school boards, the voters had expressly and knowingly enacted a law that had an intentional impact on a minority.[7]

By contrast, the Court found no such racially discriminatory differences[8] or motive in the California measure. There, the Court described the voter initiative as a simple repeal of a desegregation remedy that the federal Constitution did not require.[9] "It would be paradoxical," the Court observed, "to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it."[10] Having previously gone beyond the requirements of the federal Constitution, the Court concluded that the state was free to "pull back" to a standard that conformed to federal requirements.[11] In addition, the lower court found no evidence indicating that voters were motivated by a discriminatory purpose in enacting the measure.[12] "In sum," the Court stated, "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification."[13] Concurring in the result, Justice Harry Blackmun, joined by Justice William Brennan, distinguished the California measure because it merely repealed "the right to invoke a judicial busing remedy."[14] Because

[4] *Crawford*, 458 U.S. at 535–40 (1982).

[5] *Washington*, 458 U.S. at 474–81. *See id.* at 474 ("The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decision-making body, in such a way as to burden minority interests.").

[6] *Id.* at 480 ("By placing power over desegregative busing at the state level, then, Initiative 350 plainly 'differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area.'") (citation omitted).

[7] *Washington*, 458 U.S. at 470–82 (1982). Justice Harry Blackmun wrote the opinion of the Court, which Justices William Brennan, Byron White, Thurgood Marshall, and John Paul Stevens joined. Justices Lewis Powell, William Rehnquist, Sandra Day O'Connor, and Chief Justice Warren Burger dissented, essentially arguing that because the state was ultimately entirely responsible for all educational decisions, its choice to take back power it had delegated was permissible. *Id.* at 488. The Court reviewed an arguably analogous referendum measure (a state constitutional amendment) in *Romer v. Evans*, but declined to extend the political process doctrine beyond the context of race. 517 U.S. 620, 627 (1996). The provision barred state and local entities from applying antidiscrimination protections based on sexual orientation. The state supreme court concluded that the measure infringed on the rights of gays and lesbians to participate in the political process. While the United States Supreme Court found an equal protection violation because the law "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies," it did not rely on the political process doctrine. *See Romer*, 517 U.S. at 627, 640 n.1 (Scalia, J., dissenting) (stating that the majority "implicitly rejects" the rationale that the amendment denied equal participation "in the political process").

[8] *Crawford*, 458 U.S. at 536–37.

[9] *Id.* at 539, 542.

[10] *Id.* at 535.

[11] *Id.* at 542.

[12] *Id.* at 545.

[13] *Id.* at 539.

[14] *Id.* at 546 (Blackmun, J., concurring).

legislatures, and not courts, create laws, in his view the measure did not reallocate decision making authority in constitutionally meaningful way.[15]

In its 2014 *Schuette v. Coalition to Defend Affirmative Action* decision,[16] the Court considered the constitutionality of an amendment to the Michigan Constitution, approved by the state's voters, to prohibit admissions preferences at state universities based on race, color, ethnicity, national origin, or sex.[17] Six Justices agreed that the Michigan amendment did not violate the Equal Protection Clause, but *Schuette* produced no majority opinion on the legal rationale for that conclusion.[18] A three-Justice plurality of the *Schuette* Court construed its earlier precedent to invalidate state voter initiatives on equal protection grounds only where the state action "had the serious risk, if not purpose, of causing specific injuries on account of race."[19] Finding no similar risks of injury with regard to the Michigan amendment and no similar allegations of past discrimination in the Michigan university system,[20] the plurality ultimately concluded there was no basis to set aside the state amendment.[21] The plurality opinion questioned and rejected aspects of the Court's analysis in *Washington v. Seattle School District*,[22] while two other Justices argued that that decision, and *Hunter v. Erickson*, 393 U.S. 385 (1969), should be overturned in their entirety.[23]

Amdt14.S1.8.1.8 Peremptory Challenges

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Following its 1880 *Strauder v. West Virginia* decision that a law that discriminates in selecting jurors based on their color violates the Fourteenth Amendment's Equal Protection Clause,[1] the Court recognized that excluding a defendant's racial or ethnic group from the

[15] *Id.*

[16] 572 U.S. 291 (2014).

[17] *Id.* at 299.

[18] Justice Anthony Kennedy wrote the plurality opinion, which Chief Justice John Roberts and Justice Samuel Alito joined. Justice Antonin Scalia authored an opinion concurring in the judgment, which Justice Clarence Thomas joined. *Id.* at 316 (Scalia, J., concurring in judgment). Justice Stephen Breyer also wrote an opinion concurring in the judgment that the Michigan amendment did not violate the Equal Protection Clause. Specifically, Justice Stephen Breyer noted that (1) the amendment forbid racial preferences aimed at achieving diversity in education (as opposed to remedying past discrimination); (2) the amendment was aimed at ensuring that the democratic process (as opposed to the university administration) controlled with respect to affirmative action policy; and (3) individual school administrations, rather than elected officials, had adopted the underlying racial preference policy. *Id.* at 336 (Breyer, J., concurring in judgment). Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg, dissented. *Id.* at 341, 357–58 (Sotomayor, J., dissenting). Justice Elena Kagan recused herself.

[19] *Id.* at 305.

[20] *Id.* at 310.

[21] *Id.* at 314.

[22] *Id.* at 307–10.

[23] *Id.* at 322 (Scalia, J., concurring in judgment).

[1] 100 U.S. 303 (1880). *Cf.* Virginia v. Rives, 100 U.S. 313 (1880). Discrimination on the basis of race, color, or previous condition of servitude in jury selection has also been statutorily illegal since enactment of § 4 of the Civil Rights Act of 1875, 18 Stat. 335, 18 U.S.C. § 243. *See Ex parte* Virginia, 100 U.S. 339 (1880), *superseded by statute,* 42 U.S.C. § 1981. In *Hernandez v. Texas,* 347 U.S. 475 (1954), the Court found jury discrimination against

grand jury[2] that indicts them or the petit jury[3] that tries them, or from both,[4] denies the defendant equal protection of the laws and requires reversing the conviction or dismissing the indictment.[5] Even if the defendant's race differs from that of the excluded jurors, the Court has held, the defendant has third-party standing to assert the rights of jurors excluded on the basis of race.[6] Indeed, people categorically excluded from jury service may seek affirmative relief to outlaw discrimination in the procedures a jurisdiction uses to call and qualify jurors, as the Court has held that "[d]efendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection."[7] The Court has further noted that "[p]eople excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion."[8]

A plaintiff can make out a prima facie case of deliberate and systematic exclusion by showing that no Black citizens have served on juries for a period of years[9] or that the number of Black jurors who served was grossly disproportionate to the percentage of Black citizens eligible for jury service.[10] Once this prima facie showing has been made, the Court has held that the burden is upon the jurisdiction to prove that it had not practiced discrimination and testimony by jury selection official that they did not discriminate is not sufficient.[11] Although the Court, in cases with great racial disparities, has voided certain practices that facilitated discrimination,[12] it has not outlawed discretionary jury selection pursuant to general standards of educational attainment and character that can be administered fairly.[13]

Mexican-Americans to be a denial of equal protection, a ruling it reiterated in *Castaneda v. Partida,* 430 U.S. 482 (1977), finding proof of discrimination by statistical disparities, even though Mexican-surnamed individuals constituted a governing majority of the county and a majority of the selecting officials were Mexican-American.

[2] Bush v. Kentucky, 107 U.S. 110 (1883), *superseded by statute as stated in* Georgia v. Rachel, 384 U.S. 780 (1966); Carter v. Texas, 177 U.S. 442 (1900); Rogers v. Alabama, 192 U.S. 226 (1904); Pierre v. Louisiana, 306 U.S. 354 (1939); Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Cassell v. Texas, 339 U.S. 282 (1950); Reece v. Georgia, 350 U.S. 85 (1955); Eubanks v. Louisiana, 356 U.S. 584 (1958); Arnold v. North Carolina, 376 U.S. 773 (1964); Alexander v. Louisiana, 405 U.S. 625 (1972).

[3] Hollins v. Oklahoma, 295 U.S. 394 (1935); Avery v. Georgia, 345 U.S. 559 (1953).

[4] Neal v. Delaware, 103 U.S. 370 (1881); Martin v. Texas, 200 U.S. 316 (1906); Norris v. Alabama, 294 U.S. 587 (1935); Hale v. Kentucky, 303 U.S. 613 (1938); Patton v. Mississippi, 332 U.S. 463 (1947); Coleman v. Alabama, 377 U.S. 129 (1964); Whitus v. Georgia, 385 U.S. 545 (1967); Jones v. Georgia, 389 U.S. 24 (1967); Sims v. Georgia, 385 U.S. 538 (1967).

[5] Even if there is no discrimination in the selection of the petit jury which convicted him, a defendant who shows discrimination in the selection of the grand jury which indicted him is entitled to a reversal of his conviction. *Cassell*, 339 U.S. 282; Alexander v. Louisiana, 405 U.S. 625; Vasquez v. Hillery, 474 U.S. 254 (1986) (habeas corpus remedy).

[6] Powers v. Ohio, 499 U.S. 400, 415 (1991). Campbell v. Louisiana, 523 U.S. 392 (1998) (grand jury). *See also* Peters v. Kiff, 407 U.S. 493 (1972) (defendant entitled to have his conviction or indictment set aside if he proves such exclusion). The Court in 1972 was substantially divided with respect to the reason for rejecting the "same class" rule—that the defendant be of the excluded class—but in *Taylor v. Louisiana*, involving a male defendant and exclusion of women, the Court ascribed the result to the fair-cross-section requirement of the Sixth Amendment, which would have application across-the-board. 419 U.S. 522 (1975).

[7] Carter v. Jury Comm'n, 396 U.S. 320, 329 (1970)

[8] *Id.*; Turner v. Fouche, 396 U.S. 346 (1970).

[9] *Norris*, 294 U.S. 587; *Patton*, 332 U.S. 463; Hill v. Texas, 316 U.S. 400 (1942).

[10] Pierre v. Louisiana, 306 U.S. 354 (1939); *Cassell*, 339 U.S. 282; Eubanks v. Louisiana, 356 U.S. 584 (1958); Whitus v. Georgia, 385 U.S. 545 (1967); *Alexander*, 405 U.S. 625. For a discussion of statistical proof, see Castaneda v. Partida, 430 U.S. 482 (1977).

[11] *Norris*, 294 U.S. 587; *Whitus*, 385 U.S. 545; Sims v. Georgia, 389 U.S. 404 (1967); *Fouche*, 396 U.S. at 360–361.

[12] Avery v. Georgia, 345 U.S. 559 (1953) (names of White and Black citizens listed on differently colored paper for drawing for jury duty); *Whitus*, 385 U.S. 545 (jurors selected from county tax books, in which names of African Americans were marked with a "c").

[13] *Carter*, 396 U.S. at 331–37, and cases cited.

Similarly, the Court declined to rule that African Americans must be included on all-White jury commissions that administer jury selection laws in some states.[14]

In its 1965 *Swain v. Alabama* decision,[15] the Court examined a circumstance where African Americans regularly appeared on jury venires but no African American had actually served on a petite jury in fifteen years.[16] The reason no Black jurors served in defendant's case, the Court found, was that attorneys used peremptory challenges—which allow them to remove a certain number of potential jurors without justification—to eliminate potential African American jurors.[17] Nevertheless, the Court refused to set aside the conviction. The Court held the prosecution could use peremptory challenges to exclude African Americans in this particular case, regardless of motive, but indicated that consistent use of such challenges to remove African Americans across many cases would violate equal protection.[18] Because the record did not show that the prosecution was solely responsible for African Americans' absence from the jury and suggested the defense requested some exclusions, the Court rejected the defendant's claims.[19]

In *Batson v. Kentucky*, however, the Court overruled *Swain*'s holding as to the evidentiary standard, ruling that "a defendant may establish a prima facie case of purposeful [racial] discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's [own] trial."[20] To rebut this showing, the Court explained, the prosecutor "must articulate a neutral explanation related to the particular case," but the explanation "need not rise to the level justifying exercise of a challenge for cause."[21] The Court further stated: "Although the prosecutor must present a comprehensible reason, '[t]he [rebuttal] does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices."[22] After such a rebuttal, the Court noted: "the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but the 'ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the

[14] *Carter*, 396 U.S. at 340–41.

[15] 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

[16] *Id.* at 205, 223.

[17] *Id.* at 210.

[18] *Id.* at 223.

[19] *Id.* at 224.

[20] *Batson*, 476 U.S. at 96. A prima facie case of purposeful discrimination can be established by "showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Id.* at 93–94. A state, however, cannot require that a defendant prove a prima facie case under a "more likely than not" standard, as the function of the *Batson* test is to create an inference and shift the burden to the state to offer race-neutral reasons for the peremptory challenges. Only then does a court weigh the likelihood that racial discrimination occurred. Johnson v. California, 543 U.S. 499 (2005).

[21] *Batson*, 476 U.S. at 98. The principles were applied in *Trevino v. Texas*, holding that a criminal defendant's allegation of a state's pattern of historical and habitual use of peremptory challenges to exclude members of racial minorities was sufficient to raise an equal protection claim under *Swain* as well as *Batson*. 503 U.S. 562 (1992). In *Hernandez v. New York*, a prosecutor was held to have sustained his burden of providing a race-neutral explanation for using peremptory challenges to strike bilingual Latino jurors; the prosecutor had explained that, based on the answers and demeanor of the prospective jurors, he had doubted whether they would accept the interpreter's official translation of trial testimony by Spanish-speaking witnesses. 500 U.S. 352 (1991).

[22] Rice v. Collins, 546 U.S. 333, 338 (2006) (citation omitted). The holding of the case was that, in a habeas corpus action, the Ninth Circuit "panel majority improperly substituted its evaluation of the record for that of the state trial court." *Id.* at 337–38. Justice Stephen Breyer, joined by Justice David Souter, concurred but suggested "that legal life without peremptories is no longer unthinkable" and "that we should reconsider Batson's test and the peremptory challenge system as a whole." *Id.* at 344.

strike.'"[23] The Court also noted deference due to the trial court's determination of discriminatory intent, commenting: "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous."[24]

Notably, on more than one occasion, the Supreme Court has reversed trial courts' findings of no discriminatory intent.[25] Indeed, in post-*Batson* review, the Court has closely reviewed transcripts of jurors' pretrial voir dire questioning, applying a "comparative juror analysis."[26] In this analysis, the Court considers the minority jurors the prosecution struck and the reasons it gave for each strike at the *Batson* hearing before trial.[27] Then the Court will see if there were similar, White jurors the prosecution did not strike. Inconsistencies could show that the alleged race-neutral reasons for striking minority jurors are pretextual.[28] The Court has also extended *Batson* to apply to racially discriminatory use of peremptory challenges by private litigants in civil litigation,[29] and by a defendant in a criminal case,[30] as peremptory challenges always encompass state action, and cannot be considered mere private conduct.[31]

Discrimination in selecting grand jury foremen presents a closer question, the answer to which depends in part on the responsibilities of a foreman in the particular system challenged. Thus, the Court "assume[d] without deciding" that a judge's discrimination in selecting foremen for state grand juries would violate equal protection in a system in which the foreman served as a thirteenth voting juror and exercised significant powers.[32] The Court did not reach

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[23] *Rice*, 546 U.S. at 338 (citations omitted). *See also* Snyder v. Louisiana, 522 U.S. 472, 485 (2008) (citation omitted) ("[O]nce it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative. We have not previously applied this rule in a Batson case, and we need not decide here whether that standard governs in this context. . . . [Nevertheless,] a peremptory strike shown to have been motivated in substantial part by a discriminatory intent could not be sustained based on any lesser showing by the prosecution.").

To rule on a *Batson* objection based on a prospective juror's demeanor during voir dire, it is not necessary that the ruling judge have observed the juror personally. That a judge who observed a prospective juror should take those observations into account, among other things, does not mean that a demeanor-based explanation for a strike must be rejected if the judge did not observe or cannot recall the juror's demeanor. Thaler v. Haynes, 559 U.S. 43 (2010).

[24] Federal courts are especially deferential to state court decisions on discriminatory intent when conducting federal habeas review. Felkner v. Jackson, 562 U.S. 594, 598 (2011) (per curiam) (citation omitted).

[25] *See, e.g.*, Flowers v. Mississippi, No. 17-9572, slip op. at 2–3 (U.S. June 21, 2019) (reasoning that "[f]our critical facts" when "taken together" established the trial court's "clear error" in concluding that the state's exercise of a peremptory strike was not "motivated in substantial part by discriminatory intent": (1) the state's use of "peremptory challenges to strike 41 of the 42 black prospective jurors" over the course of the defendant's six trials; (2) the state's exercise of "peremptory strikes against five of the six black prospective jurors" at the sixth trial; (3) the "dramatically disparate questioning of black and white prospective jurors"; and (4) the state's use of a peremptory strike against one black prospective juror who was "similarly situated to white prospective jurors who were not struck" (internal quotation marks omitted)); Foster v. Chatman, 578 U.S. 488, 499–511 (2016) (applying the three-step process set forth in *Batson* to allow a death row inmate to pursue an appeal on the grounds that the state court's conclusion that the defendant had not shown purposeful discrimination during voir dire was clearly erroneous given that the prosecution's justifications for striking Black jurors, while seeming "reasonable enough," had "no grounding in fact," were contradicted by the record, and had shifted over time); *Snyder*, 552 U.S. at 483 (finding the prosecution's race-neutral explanation for its peremptory challenge of a Black juror to be implausible, and that this "implausibility" was "reinforced by the prosecutor's acceptance of white jurors" whom the prosecution could have challenged for the same reasons that it claimed to have challenged the Black juror); Miller-El v. Dretke, 545 U.S. 231, 240–41 (2005) (finding discrimination in the use of peremptory strikes based on various factors, including the high ratio of African Americans struck from the venire panel, some of whom were struck on grounds that "appeared equally on point as to some white jurors who served").

[26] *Miller-El*, 545 U.S. at 241.

[27] *Id.*

[28] *Id. See also Flowers*, slip op. at 17–18.

[29] Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

[30] Georgia v. McCollum, 505 U.S. 42 (1992).

[31] *Edmonson*, 500 U.S. at 622.

[32] Rose v. Mitchell, 443 U.S. 545, 551 n.4 (1979).

the same result, however, in a decision on a due process challenge to the federal system, where the foreman's responsibilities were "essentially clerical" and where the judge chose the foreman from among the members of an already chosen jury.[33]

In its 1987 decision *McCleskey v. Kemp*[34] the Court rejected an equal protection claim based on statistical evidence of systemic racial discrimination in sentencing, declining to extend the jury selection rules. The defendant, a Black man who received a death sentence after being convicted for murdering a White victim, presented a statistical study showing that defendants charged with murdering White people were more than four times likely to receive a death sentence in the state than defendants charged with killing Black people.[35] The Court distinguished *Batson v. Kentucky* by characterizing capital sentencing as "fundamentally different" from jury venire selection; consequently, relying on statistical proof of discrimination is less appropriate.[36] The Court stated: "Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."[37] Also, the Court noted, there is not the same opportunity to rebut a statistical inference of discrimination because jurors deciding sentencing issues may not be required to testify to their motives unlike attorneys selecting jurors.[38]

Amdt14.S1.8.2 Segregation in Education

Amdt14.S1.8.2.1 Brown v. Board of Education

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Cases decided soon after ratification of the Fourteenth Amendment may be read as precluding any state-imposed distinction based on race,[1] but the Court in *Plessy v. Ferguson*[2] adopted a principle first propounded in litigation attacking racial segregation in the schools of

[33] Hobby v. United States, 468 U.S. 339 (1984). In this limited context where injury to the defendant is largely conjectural, the Court seemingly revived the same class rule, holding that a White defendant challenging excluding Black people and women from being a grand jury foreperson on due process grounds could not rely on equal protection principles protecting Black defendants from "the injuries of stigmatization and prejudice" associated with discrimination. *Id.* at 347.

[34] 481 U.S. 279 (1987). The decision was 5-4. Justice Lewis Powell's opinion for the Court was joined by Chief Justice William Rehnquist and Justices Byron White, Sandra Day O'Connor, and Antonin Scalia. Justices William Brennan, Harry Blackmun, John Paul Stevens, and Thurgood Marshall dissented.

[35] *Id.* at 320 (Brennan, J., dissenting).

[36] *Id.* at 294. Dissenting Justices William Brennan, Harry Blackmun and John Paul Stevens challenged this position as inconsistent with the Court's usual approach to capital punishment, in which greater scrutiny is required. *Id.* at 340, 347–48, 366.

[37] *Id.* at 297. Discretion is especially important to the role of a capital sentencing jury, which must be allowed to consider any mitigating factor relating to the defendant's background or character, or the nature of the offense. The Court also cited the "traditionally 'wide discretion'" accorded decisions of prosecutors. *Id.* at 296.

[38] The Court distinguished *Batson* by suggesting that the death penalty challenge would require a prosecutor "to rebut a study that analyzes the past conduct of scores of prosecutors" whereas the peremptory challenge inquiry would focus only on the prosecutor's own acts. *Id.* at 296 n.17.

[1] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 67–72 (1873); Strauder v. West Virginia, 100 U.S. 303, 307–08 (1880); Virginia v. Rives, 100 U.S. 313, 318 (1880); *Ex parte* Virginia, 100 U.S. 339, 344–45 (1880).

[2] 163 U.S. 537 (1896).

Boston, Massachusetts.[3] *Plessy* concerned not schools but a state law requiring "equal but separate" facilities for rail transportation and requiring the separation of "white and colored" passengers. "The object of the [Fourteenth] [A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in exercise of their police power."[4] The Court observed that a common instance of this type of law was the separation by race of children in school, which had been upheld, it was noted, "even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."[5]

Subsequent cases following *Plessy* that actually concerned school segregation did not expressly question the doctrine and the Court's decisions assumed its validity. It held, for example, that a Chinese student was not denied equal protection by being classified with African Americans and sent to school with them rather than with white students,[6] and it upheld the refusal of an injunction to require a school board to close a White high school until it opened a high school for African Americans.[7] And no violation of the Equal Protection Clause was found when a state law prohibited a private college from teaching White and Black students together.[8]

In 1938, the Court began to move away from "separate but equal." It held that a state that operated a law school open to White students only violated a Black applicant's right to equal protection, even though the state offered to pay his tuition at an out-of-state law school. The requirement of the clause was for equal facilities within the state.[9] When Texas established a law school for African Americans after the plaintiff had applied and been denied admission to the school maintained for Whites, the Court held the action to be inadequate, finding that the nature of law schools and the associations possible in the White school necessarily meant that the separate school was unequal.[10] Equally objectionable was the fact that when Oklahoma admitted an African American law student to its only law school it required him to remain physically separate from the other students.[11]

"Separate but equal" was formally abandoned in *Brown v. Board of Education*,[12] which involved challenges to segregation per se in the schools of four states in which the lower courts

[3] Roberts v. City of Boston, 59 Mass. 198, 206 (1849).

[4] Plessy v. Ferguson, 163 U.S. 537, 543–44 (1896). "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.* at 552, 559.

[5] 163 U.S. at 544–45. The act of Congress in providing for separate schools in the District of Columbia was specifically noted. Justice John Harlan's well-known dissent contended that the purpose and effect of the law in question was discriminatory and stamped black students with a badge of inferiority. "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* at 552, 559.

[6] Gong Lum v. Rice, 275 U.S. 78 (1927).

[7] Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899).

[8] Berea College v. Kentucky, 211 U.S. 45 (1908).

[9] Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938). *See also* Sipuel v. Board of Regents, 332 U.S. 631 (1948).

[10] Sweatt v. Painter, 339 U.S. 629 (1950).

[11] McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

[12] 347 U.S. 483 (1954). Segregation in the schools of the District of Columbia was held to violate the due process clause of the Fifth Amendment in *Bolling v. Sharpe,* 347 U.S. 497 (1954).

had found that the schools provided were equalized or were in the process of being equalized. Though the Court had asked for argument on the intent of the framers, extensive research had proved inconclusive, and the Court asserted that it could not "turn the clock back to 1867. . . or even to 1896," but must rather consider the issue in the context of the vital importance of education in 1954. The Court reasoned that denial of opportunity for an adequate education would often be a denial of the opportunity to succeed in life, that separation of the races in the schools solely on the basis of race must necessarily generate feelings of inferiority in the disfavored race adversely affecting education as well as other matters, and therefore that the Equal Protection Clause was violated by such separation. "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[13]

After hearing argument on what remedial order should issue, the Court remanded the cases to the lower courts to adjust the effectuation of its mandate to the particularities of each school district. "At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis." The lower courts were directed to "require that the defendants make a prompt and reasonable start toward full compliance," although "[o]nce such a start has been made," some additional time would be needed because of problems arising in the course of compliance and the lower courts were to allow it if on inquiry delay were found to be "in the public interest and [to be] consistent with good faith compliance . . . to effectuate a transition to a racially nondiscriminatory school system." In any event, however, the lower courts were to require compliance "with all deliberate speed."[14]

Amdt14.S1.8.2.2 Aftermath of Brown v. Board of Education

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Following its decisions in *Brown I* and *II*, the Supreme Court addressed numerous states' and localities' refusals to comply with its mandates. Four years after *Brown I*, for example, the Court in *Cooper v. Aaron* described various actions taken by Arkansas state authorities, including amending the state constitution to direct the Arkansas state legislature to "oppose" the Supreme Court's *Brown* decisions.[1] The issue before the Court in *Cooper* concerned the first stage of an Arkansas local school board's desegregation plan—admitting nine Black students to a high school of over 2,000 students in Little Rock, Arkansas.[2] The Governor had

[13] Brown v. Board of Education, 347 U.S. 483, 489–90, 492–95 (1954).

[14] Brown v. Board of Education, 349 U.S. 294, 300–01 (1955).

[1] Cooper v. Aaron, 358 U.S. 1, 8–9 (1958). *See also id.* at 4 ("As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. . . . Specifically it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown v. Board of Education*").

[2] *Id.* at 9. *See also id.* at 8 ("While the School Board was thus going forward with its preparation for desegregating the Little Rock school system, other state authorities, in contrast, were actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation which this Court had held violated the Fourteenth Amendment.").

ordered the Arkansas National Guard to block their attendance,[3] and after the Guard withdrew under court order, the President of the United States sent federal troops to facilitate the admission of the nine students in late September of 1957.[4] Following these actions, the local school board petitioned to postpone all further steps to desegregate and withdraw the Black students already admitted to the high school,[5] pointing to the continued public hostility which the school board alleged had been provoked by other state authorities.[6] A unanimous Supreme Court affirmed the lower court's denial of that petition,[7] stating: "The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature."[8]

While racial segregation in public education is commonly associated with K-12 schools, numerous public institutions of higher education—such as public colleges, law schools, and doctoral programs—had White-only admissions policies that barred Black students from matriculating solely because of their race.[9] After *Brown*, the Court weighed in on circumstances like those in *Cooper v. Aaron* in the higher education context as well, this time involving the state legislature and Governor of Mississippi's efforts to block the admission of the first Black student to the University of Mississippi.[10] Ultimately, the University admitted the student, James Meredith, upon federal court order, under the escort of United States Marshals.[11]

In addition to cases involving public confrontation by state authorities, the Supreme Court, in the early 1960s,[12] also ruled on various other state and local practices designed to

[3] *Id.* at 9–11.

[4] *Id.* at 12.

[5] *Id.* at 12–13.

[6] *Id.* at 12 ("Their position in essence was that because of extreme public hostility, which they stated had been engendered largely by the official attitudes and actions of the Governor and the Legislature, the maintenance of a sound educational program at Central High School, with the Negro students in attendance, would be impossible.").

[7] *Id.* at 14.

[8] *Id.* at 16.

[9] *See generally*, *e.g.*, United States v. Fordice, 505 U.S. 717, 721 (1992) (discussing the historical background of Mississippi's public higher education system; stating that "Mississippi launched its public university system in 1848 by establishing . . . an institution dedicated to the higher education exclusively of white persons"); Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631, 632 (1948) (analyzing an equal protection claim concerning a Black student who was "concededly qualified" for admission to Oklahoma's only public law school, but had been denied admission "solely because of her color"); Knight v. Alabama, 14 F.3d 1534, 1538 (11th Cir. 1994) ("In very broad terms, for more than a century following its admission to the Union in 1819, Alabama denied blacks all access to college-level public higher education and did so for the purpose of maintaining the social, economic, and political subordination of black people in the state. . . . Following Reconstruction, blacks were excluded from the universities attended by whites, relegated instead only to vastly inferior institutions that did not even begin to offer college-level courses until required to do so by a 1938 Supreme Court decision."). For more information, see Christine J. Back & JD S. Hsin, Cong. Rsch. Serv., R45481, "Affirmative Action" and Equal Protection in Higher Education (2019), https://crsreports.congress.gov/product/pdf/R/R45481.

[10] *See* United States v. Barnett, 376 U.S. 681, 683–86 (1964).

[11] *See id.* at 686. For further discussion, see also Meredith v. Fair, 313 F.2d 532 (5th Cir. 1962) (per curiam) and Meredith v. Fair, 313 F.2d 534 (5th Cir. 1962) (per curiam), *cert. denied in both cases*, 372 U.S. 916 (1963).

[12] Around this time, the Court repeatedly expressed concern over delays in racial desegregation. *See, e.g.*, Bradley v. Sch. Bd. of Richmond, 382 U.S. 103, 105 (1965) (stating that "more than a decade has passed since we directed desegregation of public school facilities 'with all deliberate speed,'" and "[d]elays in desegregating school systems are no longer tolerable.") (citations omitted); Watson v. City of Memphis, 373 U.S. 526, 529–33 (1963) (reversing lower court judgment inviting city to submit "a plan calling for an even longer delay in effecting desegregation"; observing that it "is now more than 9 years since" the Court's *Brown* decision and stating that "*Brown* never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools, let alone other public facilities not involving the same physical problems or comparable conditions").

evade or delay school desegregation, such as school closings[13] and minority transfer plans.[14] Numerous jurisdictions also adopted "pupil placement laws," which automatically reassigned students to the segregated school they had previously attended, unless a state entity changed that assignment at its discretion.[15] While some lower courts had held that parents and students could not challenge such practices in federal court unless they had exhausted state law procedures,[16] the Supreme Court rejected such arguments.[17] "The right alleged," the Court explained, "is as plainly federal in origin and nature as those vindicated in *Brown v. Board of Education*," and not "in any way entangled in a skein of state law that must be untangled before the federal case can proceed."[18]

Various jurisdictions also implemented "freedom of choice" plans[19] which generally provided that each child in a school district could choose which school to attend each year. In its

[13] In *Griffin v. Prince Edward County School Board*, the Court addressed a Virginia county's closing its public schools in 1959, in response to a federal court's desegregation order. 377 U.S. 218, 222–23 (1964). A private foundation was formed to operate private schools exclusively for White children in the county, and the state and county enacted tuition grants for children to attend private schools and tax concessions for those who made financial contributions to private schools. *Id.* at 223–24. Discussing these state actions, the Court observed that the segregated schools "although designated as private, are beneficiaries of county and state support." *Id.* at 230–31. The evidence, the Court concluded, "could not be clearer" that the public school closure and private school operations put in place were "to ensure, through measures taken by the county and the State, that white and colored children . . . would not, under any circumstances, go to the same school." *Id.* at 231. The Court concluded that enjoining the state and county from paying tuition grants and giving tax credits was "appropriate and necessary" while public schools remained closed and further stated that the district court could require state authorities to levy taxes to raise funds adequate for reopening and maintaining a desegregated school system, "if necessary to prevent further racial discrimination." *Id.* at 232–33. The lower court could also issue an order to reopen schools "if required to assure these petitioners that their constitutional rights will no longer be denied them." *Id.* at 233–34. "The time for mere 'deliberate speed' has run out." *Id.* at 234. On other school closing legislation, see Bush v. Orleans Parish Sch. Bd., 187 F. Supp. 42, 188 F. Supp. 916 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961); Hall v. St. Helena Parish Sch. Bd., 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962).

[14] In *Goss v. Knoxville Bd. of Educ.*, the Court addressed the transfer plans of two Tennessee localities that allowed students to transfer from a school where they would be in the racial minority to a school where they would be in the racial majority. 373 U.S. 683, 684–87 (1963). "Here," the Court observed, "the right of transfer . . . is a one-way ticket leading to but one destination, *i.e.*, the majority race of the transferee and continued segregation." *Id.* at 687. The Court further noted that race was the only factor for the transfer, with no "provision whereby a student might with equal facility transfer from a segregated to a desegregated school," which "underscores the purely racial character and purpose of the transfer provisions. We hold that the transfer plans promote discrimination and are therefore invalid." *Id.* at 688. *See also* Monroe v. Bd. of Com'rs of Jackson, 391 U.S. 450, 458 (1968) (holding that a "free transfer" plan "does not meet respondent's 'affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'") (quoting Green v. Cnty. Sch. Bd., 391 U.S. 430, 437–38 (1968). A grade-a-year plan was implicitly disapproved in *Calhoun v. Latimer,* 377 U.S. 263 (1964), *vacating and remanding* 321 F.2d 302 (5th Cir. 1963).

[15] *See Green*, 391 U.S. at 433 (describing Virginia's Pupil Placement Act, which had divested local school boards of the authority to assign children to schools, and automatically reassigned children to the school they had previously attended unless a state board, upon a student's application, assigned them to another school at its discretion). *See also*, *e.g.*, Northcross v. Bd. of Educ. of Memphis, 302 F.2d 818, 820–21, 823 (6th Cir. 1962) (describing the Tennessee Pupil Assignment Law, enacted in 1957, which among other things, assigned "all children who had previously been enrolled in the schools to the same schools that they had attended under the constitutional and statutory separate racial system" until graduation, unless both parents requested a transfer); Holt v. Raleigh City Bd. of Educ., 265 F.2d 95, 98 (4th Cir. 1959); Gibson v. Bd. of Pub. Instruction, 272 F.2d 763, 765–66 (5th Cir. 1959).

[16] *See*, *e.g.*, Covington v. Edwards, 264 F.2d 780, 781–83 (4th Cir. 1959) (affirming the dismissal of the plaintiffs' desegregation claims because they had failed to exhaust the state law's administrative procedures for seeking review and remedy relating to school assignments), *cert. denied*, 361 U.S. 840 (1959); Parham v. Dove, 271 F.2d 132, 137–39 (8th Cir. 1959) (concluding that the plaintiffs were required, among other things, to exhaust state law procedures for challenging racially segregating school assignments before filing suit in federal court).

[17] McNeese v. Cahokia Bd. of Educ., 373 U.S. 668, 669–71, 674 (1963) (where plaintiffs brought a legal challenge under 42 U.S.C. § 1983 alleging intentional racial segregation in Illinois public schools, rejecting the argument that plaintiffs were required to exhaust administrative remedies under an Illinois statute before filing suit in federal court).

[18] *Id.* at 674.

[19] *See generally* United States v. Jefferson Cnty. Bd. of Educ., 372 F.2d 836, 878 (5th Cir. 1966) (describing the actions of school boards located throughout the Fifth Circuit Court of Appeals and stating that school boards first failed to take action "that might be considered a move toward integration," then adopted Pupil Placement Laws "likely

1968 decision *Green v. School Board of New Kent County*,[20] the Court addressed whether a Virginia county school district's "freedom of choice" plan was sufficient to satisfy the mandate of *Brown II*.[21] The county's two schools—one formerly designated only for White students and the other for Black students[22]—remained segregated by race through 1964.[23] Under the county's 1965 "freedom of choice" plan, each student chose between those two schools each year, and if no choice was made, students were assigned to the school previously attended.[24] The school board argued that its plan satisfied its constitutional obligations, and asserted that for the Court to rule otherwise would read the Fourteenth Amendment to require "compulsory integration."[25] The Court rejected that argument as "ignor[ing] the thrust of *Brown II*," which requires "the dismantling of well-entrenched dual systems."[26] *Brown II*, the Court stated, "clearly charged [public entities] with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[27] Emphasizing the county's "deliberate perpetuation" of a racially segregated school system well after its *Brown* decisions,[28] the Court concluded that the county's plan "cannot be accepted as a sufficient step" to transition to a unitary school system[29] and held that a "freedom of choice" plan "is not an end in itself" in the context dismantling a dual school system.[30] In the three years under the county's plan, the Court further observed that the system remained racially segregated and "burden[ed] children and their parents with a responsibility which *Brown II* placed squarely on the School Board."[31] The Court ordered the Board to create a new plan and "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."[32] The Court in other cases further held that school desegregation encompassed not only eliminating dual systems as they relate to student assignments, but also the merging of faculty,[33] staff, and services into one system.[34]

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to lead to no more than a little token desegregation," and stating that "[n]ow they turn to freedom of choice plans," which "as now administered, necessarily promotes resegregation"). Other lower courts had first approved such plans, subject to the reservation that they be fairly administered. *See, e.g.*, Bradley v. Sch. Bd. of Richmond, 345 F.2d 310 (4th Cir. 1965), *rev'd on other grounds*, 382 U.S. 103 (1965); Bowman v. Cnty. Sch. Bd., 382 F.2d 326 (4th Cir. 1967), *vacated*, 391 U.S. 430 (1968).

[20] 391 U.S. 430 (1968).

[21] *Id.* at 431–32.

[22] *Id.* at 432.

[23] *Id.* at 433.

[24] *Id.* at 434.

[25] *Id.* at 437.

[26] *Id.*

[27] *Id.* at 435–38.

[28] *Id.* at 438.

[29] *Id.* at 441.

[30] *Id.* at 440.

[31] *Id.* at 441–42.

[32] *Id.* at 442. *See also* Raney v. Bd. of Educ. of Gould Sch. Dist., 391 U.S. 443, 444–48 (1968) (addressing a "freedom of choice" plan and holding that it was inadequate to convert the state-imposed segregated school system into a "unitary, nonracial school system").

[33] Bradley v. Sch. Bd. of Richmond, 382 U.S. 103 (1965) (faculty desegregation is integral part of any pupil desegregation plan); United States v. Montgomery Cnty. Bd. of Educ., 395 U.S. 225 (1969) (upholding district court order establishing a minimum racial ratio for faculty and staff so that at each school in the district had a substantially similar ratio of Black and White teachers and staff).

[34] More generally, the enactment of Title VI of the Civil Rights Act of 1964 and enforcement of that statute by the U.S. Department of Health, Education, and Welfare (HEW) also influenced the analysis of federal courts. *See*, *e.g.*, Davis v. Bd. of Sch. Comm'rs, 364 F.2d 896 (5th Cir. 1966); Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965). HEW's guidelines were also references for state and local officials.

Amdt14.S1.8.2.3 Implementing School Desegregation

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Following its 1968 decision *Green v. County School Board of New Kent County*,[1] the Court continued to encounter school districts' refusals to comply with its *Brown* decisions.[2] In another case involving the forty-third largest school system in the United States at the time, the Court thus undertook to define "in more precise terms" the duty of school authorities and federal courts to implement "*Brown I* and the mandate to eliminate dual systems and establish unitary systems at once."[3] Observing that lower courts "have struggled in hundreds of cases with a multitude and variety of problems" to implement its directives,[4] the Court in its 1971 decision *Swann v. Charlotte-Mecklenburg Board of Education* sought to address "with more particularity the responsibilities of school authorities in desegregating a state-enforced dual school system in light of the Equal Protection Clause."[5]

In *Charlotte-Mecklenburg*, the Court stated that the "first remedial responsibility of school authorities is to eliminate invidious racial distinctions"—not only in student assignment, but also in other areas such as transportation, faculty and staff, extracurricular activities, building maintenance and equipment.[6] The Court emphasized that apart from the racial composition of a school's student body, if it is "possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities," such features were indicative that a school district had failed to satisfy its constitutional obligations to dismantle its dual system and continued to deprive Black students of their rights to equal protection.[7] Although "the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law,"[8] where a proposed desegregation plan "contemplates the continued existence" of such schools, school authorities must "satisfy the court that their racial composition is not the result of present or past discriminatory action on their part."[9]

When school authorities fail in their obligations to dismantle state-sponsored racial segregation, the Court has held that a district court has "broad power to fashion a remedy that

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[1] 391 U.S. 430 (1968).

[2] *See generally* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 14 (1971) (observing that "the 1969 Term of Court brought fresh evidence of the dilatory tactics of many school authorities"). *See, e.g.,* Alexander v. Holmes Cnty. Bd. of Educ., 396 U.S. 19, 20 (1969) (per curiam) ("The question presented is one of paramount importance, involving as it does the denial of fundamental rights to many thousands of school children, who are presently attending Mississippi schools under segregated conditions contrary to the applicable decisions of this Court.").

[3] *Charlotte-Mecklenburg*, 402 U.S. at 6.

[4] *Id.*

[5] *Id.* at 18.

[6] *Id.*

[7] *Id.* (stating that "a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown" where such racial identifiability remains).

[8] *Id.* at 26.

[9] *Id.*

will assure a unitary school system,"[10] with "the nature of the violation determin[ing] the scope of the remedy."[11] For "a system that has been deliberately constructed and maintained to enforce racial segregation," the Court explained, a court may, and sometimes must, order race-based student assignments to desegregate.[12] As the Court elaborated in a subsequent case, *McDaniel v. Barresi*,[13] "steps will almost invariably require that students be assigned 'differently because of their race'" in this remedial context, as "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes."[14]

The Court in *Charlotte-Mecklenburg* specifically laid out several methods for undoing dual systems, such as set ratios for redistributing faculty and students to desegregated schools,[15] the race-conscious redrawing of school districts and attendance zones,[16] considering desegregation in new school construction,[17] and transporting students through busing.[18] Considering faculty reassignments, the Court rejected arguments "that the Constitution prohibits district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation"[19] and upheld a district court order setting a minimum ratio of Black to White faculty assigned to each school.[20] The Court similarly upheld a court-ordered minimum ratio of Black to White students in various schools, describing the district court's use of ratios in that case as "no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement."[21] The Court also emphasized that the district court's remedy came after the local authorities had undisputedly continued their dual school system at least fifteen years after the Court's *Brown* decision,[22] and "had totally defaulted" in presenting "an acceptable [desegregation] plan."[23] If the district court, however, had required, "as a matter of substantive constitutional right, any particular degree of racial balance or mixing," the Court observed that it would have reversed such an

[10] *Id.* at 16.

[11] *Id.*

[12] *See id.* at 28. *Contra* the Court's decision in *Bazemore v. Friday*, in which the Court held that the adoption of "a wholly neutral admissions policy" for voluntary membership in state-sponsored 4-H Clubs was sufficient even though single race clubs continued to exist under that policy. 478 U.S. 385 (1986) (per curiam). There is no constitutional requirement that states in all circumstances pursue affirmative remedies to overcome past discrimination, the Court concluded; the voluntary nature of the clubs, unrestricted by state definition of attendance zones or other decisions affecting membership, presented a "wholly different milieu" from public schools. *Id.* at 408 (White, J., concurring opinion endorsed by the Court's per curiam opinion).

[13] 402 U.S. 39 (1971).

[14] *Id*. at 41. *See also* N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971) ("Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.").

[15] *Charlotte-Mecklenburg*, 402 U.S at 18–20, 22–25.

[16] *Id.* at 27–29.

[17] *Id.* at 20–21.

[18] *Id.* at 29–31.

[19] *Id.* at 19–20.

[20] *Id.*

[21] *Id.* at 25.

[22] *Id.* at 24–25 ("As the voluminous record in this case shows, the predicate for the District Court's use of the 71%–29% ratio was twofold: first, its express finding, approved by the Court of Appeals and not challenged here, that a dual school system had been maintained by the school authorities at least until 1969").

[23] *Id.* at 24.

order, as the constitutional requirement to dismantle dual systems "does not mean that every school in every community must always reflect the racial composition of the school system as a whole."[24]

The Court in *Charlotte-Mecklenburg* also held that courts and school authorities not only may, but sometimes must, alter attendance boundaries and group or pair noncontiguous school attendance zones to desegregate dual systems and undo past official action.[25] Describing the "gerrymandering of school districts and attendance zones" as "one of the principal tools" to break up a dual system, the Court acknowledged that while the zones "are neither compact nor contiguous," such "awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems."[26] Transporting students to and from school through busing is also a permissible tool of educational and desegregation policy, particularly in circumstances such as those in *Swann* where assigning children "to the school nearest their home . . . would not produce an effective dismantling of the dual system."[27] Discussing specific features of the busing plan ordered by the district court in *Swann*, the Court upheld the lower court's remedial decree, stating that "[d]esegregation plans cannot be limited to the walk-in school." [28] More generally, the Court stated that when valid objections are raised to transporting students, such as when "the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process," lower courts must "weigh the soundness of any transportation plan" in light of various factors including other features of the desegregation plan at issue.[29]

Finally, the Court stated, neither "school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system."[30]

Amdt14.S1.8.2.4 Scope of Remedial Desegregation Orders and Ending Court Supervision

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Following *Swann v. Charlotte-Mecklenburg Board of Education*, the Court addressed other legal challenges to district court desegregation orders, and continued to affirm the broad authority of federal courts to order remedial actions[1] while also modifying or reversing court

[24] *Id.*

[25] *Id.* at 27–28.

[26] *Id.*

[27] *Id.* at 30.

[28] *Id.*

[29] *Id.* at 30–31.

[30] *Id.* at 32.

[1] 402 U.S. 1 (1971). Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977) ("Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional

orders that it found were unwarranted or excessive given the evidence at issue.[2] In *Milliken v. Bradley*,[3] for example, the Court set aside a court-ordered desegregation plan spanning the city of Detroit and fifty-three adjacent suburban school districts. The Court held that such a broad remedy could only be implemented to cure an interdistrict constitutional violation if state officials and officials in those suburban school districts were responsible, at least in part, for the segregation between the districts, through either discriminatory actions affecting the larger Detroit area or constitutional violations within one of the school districts that had produced a substantial segregative effect in another district.[4] The Court in *Milliken* found the evidence insufficient to support an interdistrict remedy in that case.[5] The Court stated: "[W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy".[6]

Especially during the 1970s, courts and Congress grappled with the appropriateness of various remedies for de jure, or state-sanctioned, racial separation in public schools across the country. Among these remedial methods, busing created a great amount of controversy, though the Court in *Charlotte-Mecklenburg* sanctioned it as a permissible desegregation tool.[7] Around that time, Congress enacted several provisions, either permanent statutes or annual appropriations limits, attempting to restrict the power of federal courts and administrative agencies to order or to require busing, but these proved largely ineffectual.[8] Stronger proposals, for statutes or for constitutional amendments, were introduced in Congress, but none were enacted.[9]

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violation.'"); Milliken v. Bradley, 418 U.S. 717, 744 (1974) ("The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation."). *See also* Hills v. Gautreaux, 425 U.S. 284, 294 n.11 (1976) ("[T]he Court's decision in *Milliken* was premised on a controlling principle governing the permissible scope of federal judicial power.").

[2] *See*, *e.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434–36 (1976) (holding that the district court had exceeded its authority when it required local authorities to readjust, indefinitely, its student attendance zones every year to avoid the creation of a majority of any minority in any public school in the city, "though subsequent changes in the racial mix in the Pasadena schools might be caused by factors for which the defendants could not be considered responsible" and the local authorities had already instituted a race-neutral student assignment plan). In *Hills*, the Court wrote that it had rejected the metropolitan order because of "fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities." 425 U.S. at 293. In other places, the Court stressed the absence of interdistrict violations and in still others paired the two reasons. *Id.* at 294, 296. In *Spallone v. United States*, the Court held that a district court had abused its discretion in imposing contempt sanctions directly on members of a city council for refusing to vote to implement a consent decree designed to remedy housing discrimination. 493 U.S. 265 (1990). Instead, the court should have proceeded first against the city alone, and should have proceeded against individual council members only if the sanctions against the city failed to produce compliance.

[3] 418 U.S. 717 (1974).

[4] *Id.* at 745.

[5] *Id.* While the Court found the evidence insufficient to support an interdistrict remedy, the four dissenters contended, among other things, that pervasive state involvement warranted an interdistrict order; that only an interdistrict order would fulfill the State's obligation to establish a unitary system; and that the Court's decision "cripple[d] the ability of the judiciary" to effectively desegregate large metropolitan areas. *Id.* at 762–81 (White, Douglas, Brennan, and Marshall, JJ., dissenting).

[6] *Id.* at 745. More generally, in a series of cases, the Court disallowed disparate impact analysis in constitutional interpretation and adopted an apparently strengthened intent requirement. Washington v. Davis, 426 U.S. 229 (1976); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977), *superseded by statute,* Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973; Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979). This principle applies in the school context. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 419 (1977).

[7] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30–31 (1971).

[8] *E.g.*, Civil Rights Act of 1964 § 407(a), 78 Stat. 248 (codified at 42 U.S.C. § 2000c-6), construed to cover only de facto segregation in *Charlotte-Mecklenburg*, 402 U.S. at 17–18; Education Amendments of 1972, § 803, 86 Stat. 372 (codified at 20 U.S.C. § 1653) (expired), interpreted in Drummond v. Acree, 409 U.S. 1228 (1972) (Powell, J., in chambers), and the Equal Educational Opportunities and Transportation of Students Act of 1974, 88 Stat. 514 (codified at 20 U.S.C. §§ 1701–1758), *see especially* § 1714, interpreted in Morgan v. Kerrigan, 530 F.2d 401, 411–15 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976), and United States v. Tex. Educ. Agency, 532 F.2d 380, 394 n.18 (5th Cir. 1976),

Amdt14.S1.8.2.4
Scope of Remedial Desegregation Orders and Ending Court Supervision

With many desegregation decrees in operation across the country, the Court also considered how a school district must comply to free itself of continuing court supervision. In a 1991 case involving Oklahoma City public schools, the Court in *Oklahoma City Board of Education v. Dowell*[10] stated that a desegregation decree may be lifted upon a showing that the purposes of the litigation have been "fully achieved"—that is, that the school district has been operating "in compliance with the commands of the Equal Protection Clause" "for a reasonable period of time," and that it is "unlikely" to return to its former violations.[11] The Court instructed that a lower court assessing whether to lift a desegregation order "should look not only at student assignments, but 'to every facet of school operations—faculty, staff, transportation, extra-curricular activities and facilities.'"[12] On remand, the trial court was directed to determine "whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past [de jure] discrimination had been eliminated to the extent practicable."[13]

The Court also held that a federal court may incrementally withdraw its supervision over a school district upon a showing of compliance in particular areas of the system, such as student assignment and physical facilities, while retaining jurisdiction over other areas in which the system had not demonstrated full compliance. In its 1992 decision *Freeman v. Pitts*,[14] the Court stated that a federal court "has the discretion to order an incremental or partial withdrawal of its supervision and control,"[15] and may "relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations."[16]

Amdt14.S1.8.2.5 Remaining Vestiges of Unconstitutional Racial Segregation

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Public institutions of higher education were also segregated by race, and the Court addressed desegregation efforts in that context as well. In its 1992 decision *United States v.*

vacated on other grounds sub nom. Austin Indep. Sch. Dist. v. United States, 429 U.S. 990 (1976); and a series of annual appropriations riders, first passed as riders to the 1976 and 1977 Labor-HEW bills, § 208, 90 Stat. 1434 (1976), and § 101, 91 Stat. 1460 (codified at 42 U.S.C. § 2000d), upheld against facial attack in *Brown v. Califano*, 627 F.2d 1221 (D.C. Cir. 1980).

[9] *See, e.g.*, *14th Amendment and School Busing: Hearings Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong., 1st Sess. (1982); and *School Desegregation: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong., 1st Sess. (1982).

[10] 498 U.S. 237 (1991).

[11] *Id*. at 247–48 (stating that "a finding by the District Court that [a school district] was being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely that the school board would return to its former ways, would be a finding that the purposes of the desegregation litigation had been fully achieved"; also referring to a school board's compliance with a desegregation order "for a reasonable period of time" before dissolving the desegregation order). *See also id.* at 248.

[12] *Id.* at 250 (quoting Green v. Cnty. Sch. Bd., 391 U.S. 439, 435 (1968)).

[13] *Dowell*, 498 U.S. at 249–50.

[14] 503 U.S. 467 (1992).

[15] *Id.* at 489.

[16] *Id.* at 490–91.

Fordice,[1] the Court determined that Mississippi had not, by adopting race-neutral admissions policies, eliminated all vestiges of its prior de jure, racially segregated higher education system.[2] The Court held that the Equal Protection Clause requires that a state, to the extent practicable and consistent with sound educational practices, must eradicate policies and practices that are traceable to its dual system and that continue to have segregative effects.[3] The Court identified several surviving aspects of Mississippi's prior dual system that were constitutionally suspect and that had to be justified or eliminated, including the widespread duplication of programs throughout the public university system, which was a remnant of the dual "separate-but-equal" system; institutional mission classifications that made three formerly White-only schools and no formerly Black-only schools the flagship "comprehensive" universities with the most expansive academic offerings; and the retention and operation of all eight schools rather than the possible merger of some.[4]

Amdt14.S1.8.3 Segregation in Other Contexts

Amdt14.S1.8.3.1 Overview of Segregation in Other Contexts

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

While school desegregation cases are perhaps the best known examples of the Supreme Court's treatment of racial segregation under the Equal Protection Clause, the Court has struck down forced separation based on race in many other contexts. Indeed, the Court struck down several segregation laws before its landmark 1954 decision in *Brown v. Board of Education*, which effectively brought to a close the "separate but equal" precedent the Court had established in its 1896 decision *Plessy v. Ferguson*.[1] In most of these racial segregation cases, the parties disputed whether various levels of state involvement in private discrimination amounted to state action.

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[1] 505 U.S. 717 (1992).

[2] *Id.* at 729 ("We do not agree with the Court of Appeals or the District Court . . . that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system."). *See also id.* at 733 (stating that "there are several surviving aspects of Mississippi's prior dual system which are constitutionally suspect; for even though such policies may be race neutral on their face, they substantially restrict a person's choice of which institution to enter, and they contribute to the racial identifiability of the eight public universities. Mississippi must justify these policies or eliminate them.").

[3] *Id.* at 729–31.

[4] *Id.* at 733–42. For further discussion, see Christine J. Back & JD S. Hsin, Cong. Rsch. Serv., R45481, "Affirmative Action" and Equal Protection in Higher Education (2019), https://crsreports.congress.gov/product/pdf/R/R45481.

[1] While *Brown v. Board of Education,* 347 U.S. 483 (1954), is frequently described as having overruled *Plessy v. Ferguson,* 163 U.S. 537 (1896), *Brown*'s language is more limited, providing only that "We conclude that, in the field of public education, the doctrine of 'separate but equal' has no place." *Brown*, 347 U.S. at 495. In *Brown*, the Court distinguished potentially conflicting case law as not addressing *Brown*'s ultimate holding, stating: "[I]n Cumming v. County Board of Education, 175 U.S. 528 (1899), and Gong Lum v. Rice, 275 U.S. 78 (1927), the validity of the doctrine [of 'separate but equal' in public education] itself was not challenged." *Id.* at 491. Instead, the Court addressed *Plessy* expressly in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), recognizing *Brown*'s significance for *Plessy*. The *Bob Jones* Court stated: "But there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice. Prior to 1954, public education in many places still was conducted under the pall of *Plessy v. Ferguson*, 163 U.S. 537 (1896); racial segregation in primary and secondary education prevailed in many parts of the country. . . . This Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), signalled an

Amdt14.S1.8.3.2 Housing and Segregation

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

In the housing context, the Court addressed legal challenges to city ordinances, private covenants, and state constitutional amendments that imposed various racial restrictions. In 1917, for example, the Court in *Buchanan v. Warley*[1] invalidated an ordinance that prohibited "colored people" from occupying houses in blocks where the greater number of houses were occupied by any "white person," and prohibited "white people" from living on blocks where the greater number of houses were occupied by "colored people." The Court declined to apply *Plessy v. Ferguson* because, in *Buchanan*, the statute barred the plaintiff landowner from living on his property.[2] While it had approved the doctrine of "separate but equal" treatment of racial minorities in transportation and education, the Court said, the Fourteenth Amendment would not allow the state to interfere with property rights based on race.[3] In 1948, the Court extended *Buchanan* to invalidate restrictive covenants—private title conditions that barred property transfer based on race. The Court held that although these private arrangements did not themselves violate the Equal Protection Clause, the judicial enforcement of them, either by injunctive relief or through damage actions, did.[4]

In its 1967 case, *Reitman v. Mulkey*,[5] the Court again considered potential state involvement in private housing discrimination. It reviewed the referendum passage of a California state constitutional amendment that repealed a "fair housing" law and declared that a property seller could turn away any buyer for any reason. The Court held the amendment unconstitutional, pointing out that it aimed to repeal anti-discrimination measures and "intended to authorize, and does authorize, racial discrimination in the housing market."[6] The Court acknowledged it had no "infallible test" for determining when state involvement in private discrimination was unconstitutional.[7] But, deferring to the state supreme court decision invalidating the amendment, it agreed that this provision effectively immunized private discrimination. "Those practicing racial discriminations need no longer rely solely on their personal choice," the Court noted. "They could now invoke express constitutional authority . . ."[8] In contrast, the Court, in its 1971 decision *James v. Valtierra*, held that a California constitutional requirement singling out low-rent housing projects for

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end to that era. Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education. An unbroken line of cases following *Brown* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals." *Bob Jones*, 461 U.S. at 592–93.

[1] 245 U.S. 60 (1917). *See also* Harmon v. Tyler, 273 U.S. 668 (1927); Richmond v. Deans, 281 U.S. 704 (1930).

[2] *Buchanan*, 245 U.S. at 73, 79.

[3] *Id.* at 79–81.

[4] Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

[5] 387 U.S. 369 (1967).

[6] *Id.* at 381.

[7] *Id.* at 378.

[8] *Id.* at 377.

special referendum approval did not violate the Equal Protection Clause.[9] The Court did not see the measure as drawing any racial distinctions, ruling that it was race-neutral in its terms and not racially motivated.[10] The Court has also held that provision of publicly assisted housing must be nondiscriminatory, ordering the federal Department of Housing and Urban Development to remedy segregative practices.[11]

Amdt14.S1.8.3.3 Transportation and Segregation

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

In 1896, the Supreme Court endorsed the "separate but equal" doctrine in the transportation context in *Plessy v. Ferguson*,[1] but after the Court dismissed the doctrine's applicability in education in *Brown v. Board of Education*, the Court revisited the doctrine in transportation.[2] Even before *Brown*, the Court had found that a state statute that permitted carriers to provide sleeping and dining cars for White persons only violated equal protection;[3] held that a carrier's provision of unequal, or nonexistent, first class accommodations to Black travelers violated the Interstate Commerce Act;[4] and voided state-required segregation on interstate carriers as a burden on commerce.[5] In 1960, the Court in *Boynton v. Virginia* overturned a trespass conviction of an interstate Black bus passenger who had refused to leave a restaurant.[6] The Court determined that the restaurant, essential to the facilities devoted to interstate commerce, fell under the Interstate Commerce Act.

Amdt14.S1.8.3.4 Public Facilities and Segregation

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or*

[9] 402 U.S. 137 (1971).

[10] *Id.* at 141.

[11] Hills v. Gautreaux, 425 U.S. 284, 297 (1976). Meanwhile, apart from legal challenges based on the Equal Protection Clause, two federal statutes prohibit private racial discrimination in the sale or rental of housing. Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1982, *see* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), and Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act), 82 Stat. 73, 42 U.S.C. §§ 3601 et seq. The Fair Housing Act, as construed by the Court, reaches some actions that, while not made with discriminatory intent, have a disparate impact based on race. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Comtys. Project, Inc., 576 U.S. 519 (2015).

[1] Plessy v. Ferguson, 163 U.S. 537 (1896).

[2] Brown v. Bd. of Educ., 347 U.S. 483 (1954); Gayle v. Browder, 352 U.S. 903 (1956), *aff'g* 142 F. Supp. 707 (M.D. Ala.) (statute requiring segregation on buses is unconstitutional). In *Bailey v. Patterson*, the Court stated: "We have settled beyond question that no State may require racial segregation of interstate transportation facilities. This question is no longer open; it is foreclosed as a litigable issue." 369 U.S. 31, 33 (1962).

[3] McCabe v. Atchison, Topeka & Santa Fe Ry., 235 U.S. 151 (1914). The Court did not enjoin the state statute, however, concluding that plaintiffs lacked standing. *Id.*

[4] Mitchell v. United States, 313 U.S. 80 (1941); *see also* Henderson v. United States, 339 U.S. 816 (1950) (holding railroad's segregation policies violated the Interstate Commerce Act.

[5] Morgan v. Virginia, 328 U.S. 373 (1946); Henderson v. United States, 339 U.S. 816 (1950).

[6] 364 U.S. 454 (1960).

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Beginning in the 1950s, the Court also struck down the segregation of publicly provided or supported facilities and functions, summarily vacating and remanding a long series of cases for reconsideration under *Brown*.[1] In 1963, the Court held segregated courtroom seating a "manifest violation" of equal protection.[2] That same year, the Court held that neither expense nor potential public unrest warranted granting Memphis more time for "gradual desegregation" of its parks.[3] It also held that a municipality could not operate a racially segregated park, even though a private party, in bequeathing the park to the city, had imposed a Whites-only rule.[4] As the Court saw it, "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[5] Such was the case with the park, which the city maintained even after private trustees were appointed.[6] Rather than desegregate the park, however, the Court ruled that a state court could hold that the trust had failed and hand the park over to the decedent's heirs.[7] Similarly, the Court held in 1971 that a municipality under court order to desegregate its publicly owned swimming pools could comply by closing the pools instead, so long as it completely stopped operating them.[8]

Amdt14.S1.8.3.5 Private Businesses and Segregation

Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

While the Constitution does not reach private discrimination, the Court will act if "to some significant extent the State in any of its manifestations has been found to have become involved in it."[1] After *Brown*, the Court decided several cases finding state participation in

[1] *E.g.*, Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (city lease of park facilities); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (public parks and golf courses); State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (statute requiring segregated athletic contests); Turner v. City of Memphis, 369 U.S. 350 (1962) (administrative regulation requiring segregation in airport restaurant); Schiro v. Bynum, 375 U.S. 395 (1964) (ordinance requiring segregation in municipal auditorium).

[2] Johnson v. Virginia, 373 U.S. 61, 62 (1963).

[3] Watson v. City of Memphis, 373 U.S. 526, 528, 535, 539 (1963). The Court declined to hold that delays tolerated in post-*Brown* school desegregation authorized delays in other public services. *Id.*

[4] Evans v. Newton, 382 U.S. 296 (1966). State courts had removed the city as trustee. *Id.*

[5] *Id.* at 299.

[6] *Id.* at 301.

[7] Evans v. Abney, 396 U.S. 435 (1970). The Court thought that in carrying out the testator's intent in the fashion best permitted by the Fourteenth Amendment, the state courts engaged in no action violating the Equal Protection Clause. *Id.*

[8] Palmer v. Thompson, 403 U.S. 217 (1971). The Court found that there was no official encouragement of discrimination through the act of closing the pools and that there was no unlawful discrimination because both White and Black citizens were deprived of the use of the pools. *Id.*

[1] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

segregating private businesses. Thus, the Court reversed trespass convictions for Black boys and girls who sat at a "Whites only" lunch counter, given that a city ordinance required separate dining facilities.[2] Extending this holding, the Court reversed convictions of patrons who refused a manager's instructions to leave a "Whites only" restaurant, noting that the Florida state board of health required racially separate toilet facilities in restaurants.[3] Even though Florida did not explicitly bar integrated dining spaces, the Court held that the segregation regulations "embody a state policy putting burdens upon any restaurant which serves both races, burdens bound to discourage the serving of the two races together."[4] This degree of state involvement violated equal protection. So did New Orleans city officials' statements, even with no ordinance or regulation, that they would not tolerate "sit-in demonstrations."[5] Based on this official endorsement of local segregation customs, the Court overturned convictions for Black patrons who refused a manager's order to leave a segregated lunch counter.[6] The Court also found state action, and a constitutional violation, when a Delaware restaurant leasing city property refused to serve a Black patron.[7] The Court held that the state, "[b]y its inaction" in permitting discriminatory uses of its property, "has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination."[8]

Amdt14.S1.8.4 Facially Non-Neutral Laws Benefiting Racial Minorities

Amdt14.S1.8.4.1 Early Doctrine on Appropriate Scrutiny

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Of critical importance in equal protection litigation is the degree to which government is permitted to take race or another suspect classification into account when formulating and implementing a remedy to overcome the effects of past discrimination. Often the issue is framed in terms of "reverse discrimination," in that the governmental action deliberately favors members of one class and consequently may adversely affect nonmembers of that class.[1] Although the Court had previously accepted the use of suspect criteria such as race to

[2] Peterson v. City of Greenville, 373 U.S. 244, 247 (1963).

[3] Robinson v. Florida, 378 U.S. 153, 156 (1964).

[4] *Id.* at 156.

[5] Lombard v. Louisiana, 373 U.S. 267, 270 (1963).

[6] *Id.* at 273–74.

[7] Burton v. Wilmington Parking Auth., 365 U.S. 715, 717 (1961).

[8] *Id.* at 725.

[1] While the emphasis is upon governmental action, private affirmative actions may implicate statutory bars to uses of race. *E.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), held, not in the context of an affirmative action program, that White people were as entitled as any group to protection of federal laws banning racial discrimination in employment. The Court emphasized that it was not passing at all on the permissibility of affirmative action programs. *Id.* at 280 n.8. In *United Steelworkers v. Weber,* 443 U.S. 193 (1979), the Court held that title VII did not prevent employers from instituting voluntary, race-conscious affirmative action plans. *Accord*, Johnson v. Transportation Agency, 480 U.S. 616 (1987). Nor does title VII prohibit a court from approving a consent decree providing broader relief than the court would be permitted to award. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). And, court-ordered relief pursuant to title VII may benefit persons not themselves the victims of discrimination. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).

formulate remedies for specific instances of past discrimination[2] and had allowed preferences for members of certain non-suspect classes that had been the object of societal discrimination,[3] it was not until the late 1970s that the Court gave plenary review to programs that expressly used race as the primary consideration for awarding a public benefit.[4]

In *United Jewish Organizations v. Carey*,[5] New York State had drawn a plan that consciously used racial criteria to create districts with "nonwhite" populations in order to comply with the Voting Rights Act and to obtain the United States Attorney General's approval for a redistricting law. These districts were drawn large enough to permit the election of nonwhite candidates in spite of the lower voting turnout of nonwhite citizens. In the process a Hasidic Jewish community previously located entirely within one senate and one assembly district was divided between two senate and two assembly districts, and members of that community sued, alleging that the value of their votes had been diluted solely for the purpose of achieving a racial quota. The Supreme Court approved the districting, although the fragmented majority of seven concurred in no majority opinion.[6]

Justice Byron White, delivering the judgment of the Court, based the result on alternative grounds. First, because the redistricting took place pursuant to the administration of the Voting Rights Act, Justice Byron White argued that compliance with the Act necessarily required states to be race conscious in the drawing of lines so as not to dilute minority voting strength. Justice Byron White noted that this requirement was not dependent upon a showing of past discrimination and that the states retained discretion to determine just what strength minority voters needed in electoral districts in order to assure their proportional representation. Moreover, the creation of the certain number of districts in which minorities were in the majority was reasonable under the circumstances.[7]

Second, Justice Byron White wrote that, irrespective of what the Voting Rights Act may have required, what the state had done did not violate either the Fourteenth or the Fifteenth Amendment. This was so because the plan, even though it used race in a purposeful manner, represented no racial slur or stigma with respect to White citizens or any other race; the plan did not operate to minimize or unfairly cancel out white voting strength, because as a class White citizens would be represented in the legislature in accordance with their proportion of the population in the jurisdiction.[8]

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[2] *E.g.*, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 22–25 (1971).

[3] Programs to overcome past societal discriminations against women have been approved, Kahn v. Shevin, 416 U.S. 351 (1974); Schlesinger v. Ballard, 419 U.S. 498 (1975); Califano v. Webster, 430 U.S. 313 (1977), but gender classifications are not as suspect as racial ones. Preferential treatment for American Indians was approved, Morton v. Mancari, 417 U.S. 535 (1974), but on the basis that the classification was political rather than racial.

[4] The constitutionality of a law school admissions program in which minority applicants were preferred for a number of positions was before the Court in *DeFunis v. Odegaard,* 416 U.S. 312 (1974), but the Court did not reach the merits.

[5] 430 U.S. 144 (1977). Chief Justice Warren Burger dissented, *id.* at 180, and Justice Thurgood Marshall did not participate.

[6] For a detailed discussion of the use of racial considerations in apportionment and districting by the states, see Amendment 14: Section 1: Rights Guaranteed: Fundamental Interests: The Political Process: Apportionment and Districting.

[7] 430 U.S. at 155–65. Joining this part of the opinion were Justices William Brennan, Harry Blackmun, and John Paul Stevens.

[8] 430 U.S. at 165–68. Joining this part of the opinion were Justices John Paul Stevens and William Rehnquist. In a separate opinion, Justice William Brennan noted that preferential race policies were subject to several substantial arguments: (1) they may disguise a policy that perpetuates disadvantageous treatment; (2) they may serve to stimulate society's latent race consciousness; (3) they may stigmatize recipient groups as much as overtly discriminatory practices against them do; (4) they may be perceived by many as unjust. The presence of the Voting Rights Act and the Attorney General's supervision made the difference to him in this case. *Id.* at 168. Justices Potter

It was anticipated that *Regents of the University of California v. Bakke*[9] would shed further light on the constitutionality of affirmative action. Instead, the Court again fragmented. In *Bakke*, the Davis campus medical school admitted 100 students each year. Of these slots, the school set aside sixteen of those seats for disadvantaged minority students, who were qualified but not necessarily as qualified as those winning admission to the other eighty-four places. Twice denied admission, Bakke sued, arguing that had the sixteen positions not been set aside he could have been admitted. The state court ordered him admitted and ordered the school not to consider race in admissions. By two 5-4 votes, the Supreme Court affirmed the order admitting Bakke but set aside the order forbidding the consideration of race in admissions.[10]

Four Justices, in an opinion by Justice William Brennan, argued that racial classifications designed to further remedial purposes were not foreclosed by the Constitution under appropriate circumstances. Even ostensibly benign racial classifications, however, could be misused and produce stigmatizing effects; therefore, they must be searchingly scrutinized by courts to ferret out these instances. But benign racial preferences, unlike invidious discriminations, need not be subjected to strict scrutiny; instead, an intermediate scrutiny would do. As applied, then, this review would enable the Court to strike down a remedial racial classification that stigmatized a group, that singled out those least well represented in the political process to bear the brunt of the program, or that was not justified by an important and articulated purpose.[11]

Justice Lewis Powell, however, argued that all racial classifications are suspect and require strict scrutiny. Because none of the justifications asserted by the college met this high standard of review, he would have invalidated the program. But he did perceive justifications for a less rigid consideration of race as one factor among many in an admissions program; diversity of student body was an important and protected interest of an academy and would justify an admissions set of standards that made affirmative use of race. Ameliorating the effects of past discrimination would justify the remedial use of race, the Justice thought, when the entity itself had been found by appropriate authority to have discriminated, but the college could not inflict harm upon other groups in order to remedy past societal discrimination.[12] Justice Lewis Powell thus agreed that Bakke should be admitted, but he joined the four justices who sought to allow the college to consider race to some degree in its admissions.[13]

The Court then began a circuitous route toward disfavoring affirmative action, at least when it occurs outside the education context. At first, the Court seemed inclined to extend the

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Stewart and Lewis Powell concurred, agreeing with Justice Byron White that there was no showing of a purpose on the legislature's part to discriminate against White voters and that the effect of the plan was insufficient to invalidate it. *Id.* at 179.

[9] 438 U.S. 265 (1978).

[10] Four Justices did not reach the constitutional question. In their view, Title VI of the Civil Rights Act of 1964, which bars discrimination on the ground of race, color, or national origin by any recipient of federal financial assistance, outlawed the college's program and made unnecessary any consideration of the Constitution. *See* 78 Stat. 252, 42 U.S.C. §§ 2000d to 2000d–7. These Justices would have admitted Bakke and barred the use of race in admissions. 438 U.S. at 408–21 (Stevens, Stewart, and Rehnquist, JJ., and Burger, C.J.). The remaining five Justices agreed among themselves that Title VI, on its face and in light of its legislative history, proscribed only what the Equal Protection Clause proscribed. 438 U.S. at 284–87 (Powell, J.,), 328–55 (Brennan, White, Marshall, and Blackmun, JJ.). They thus reached the constitutional issue.

[11] 438 U.S. at 355–79 (Brennan, White, Marshall, and Blackmun, JJ.). The intermediate standard of review adopted by the four Justices is that formulated for gender cases. "Racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" *Id.* at 359.

[12] 438 U.S. at 287–320.

[13] *See* 438 U.S. at 319–20 (Powell, J.).

result in *Bakke*. In *Fullilove v. Klutznick*,[14] the Court, still lacking a majority opinion, upheld a federal statute requiring that at least 10% of public works funds be set aside for minority business enterprises. A series of opinions by six Justices all recognized that alleviation and remediation of past societal discrimination was a legitimate goal and that race was a permissible classification to use in remedying the present effects of past discrimination. Chief Judge Burger issued the judgment, which emphasized Congress's preeminent role under the Commerce Clause and the Fourteenth Amendment to determine the existence of past discrimination and its continuing effects and to implement remedies that were race conscious in order to cure those effects. The principal concurring opinion by Justice Thurgood Marshall applied the Brennan analysis in *Bakke*, using middle-tier scrutiny to hold that the race conscious set-aside was "substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past discrimination."[15]

Taken together, the opinions established that, although Congress had the power to make the findings that will establish the necessity to use racial classifications in an affirmative way, these findings need not be extensive nor express and may be collected in many ways.[16] Moreover, although the opinions emphasized the limited duration and magnitude of the set-aside program, they appeared to attach no constitutional significance to these limitations, thus leaving open the way for programs of a scope sufficient to remedy all the identified effects of past discrimination.[17] But the most important part of these opinions rested in the clear sustaining of race classifications as permissible in remedies and in the approving of some forms of racial quotas. The Court rejected arguments that minority beneficiaries of such programs are stigmatized, that burdens are placed on innocent third parties, and that the program is overinclusive, so as to benefit some minority members who had suffered no discrimination.[18]

Despite these developments, the Court remained divided in its response to constitutional challenges to affirmative action plans.[19] As a general matter, authority to apply racial classifications was found to be at its greatest when Congress was acting pursuant to Section 5 of the Fourteenth Amendment or other of its remedial powers, or when a court is acting to remedy proven discrimination. But a countervailing consideration was the impact of such discrimination on disadvantaged non-minorities. Two cases illustrate the latter point. In *Wygant v. Jackson Board of Education*,[20] the Court invalidated a provision of a collective bargaining agreement giving minority teachers a preferential protection from layoffs. In

[14] 448 U.S. 448 (1980). Justice Stewart Potter, joined by Justice William Rehnquist, dissented in one opinion, *id.* at 522, while Justice John Paul Stevens dissented in another. *Id.* at 532.

[15] 448 U.S. at 517.

[16] Whether federal agencies or state legislatures and state agencies have the same breadth and leeway to make findings and formulate remedies was left unsettled, but that they have some such power seems evident. 448 U.S. at 473–80. The program was an exercise of Congress's spending power, but the constitutional objections raised had not been previously resolved in that context. The plurality therefore turned to Congress's regulatory powers, which in this case undergirded the spending power, and found the power to lie in the Commerce Clause with respect to private contractors and in Section 5 of the Fourteenth Amendment with respect to state agencies. The Marshall plurality appeared to attach no significance in this regard to the fact that Congress was the acting party.

[17] 448 U.S. at 484–85, 489 (Burger, C.J.), 513–15 (Powell, J.).

[18] 448 U.S. at 484–89 (Burger, C.J.), 514–15 (Powell, J.), 520–21 (Marshall, J.).

[19] Guidance on constitutional issues is not necessarily afforded by cases arising under Title VII of the Civil Rights Act, the Court having asserted that "the *statutory* prohibition with which the employer must contend was not intended to extend as far as that of the Constitution," and that "voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace." Johnson v. Transportation Agency, 480 U.S. 616, 628 n.6, 630 (1987) (upholding a local governmental agency's voluntary affirmative action plan predicated upon underrepresentation of women rather than upon past discriminatory practices by that agency). The constitutionality of the agency's plan was not challenged. *See id.* at 620 n.2.

[20] 476 U.S. 267 (1986).

United States v. Paradise,[21] the Court upheld as a remedy for past discrimination a court-ordered racial quota in promotions. Justice Byron White, concurring in *Wygant*, emphasized the harsh, direct effect of layoffs on affected non-minority employees.[22] By contrast, a plurality of Justices in *Paradise* viewed the remedy in that case as affecting non-minorities less harshly than did the layoffs in *Wygant*, because the promotion quota would merely delay promotions of those affected, rather than cause the loss of their jobs.[23]

Amdt14.S1.8.4.2 Modern Doctrine on Appropriate Scrutiny

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

A clear distinction was then drawn between federal and state power to apply racial classifications. In *City of Richmond v. J.A. Croson Co.*,[1] the Court invalidated a minority set-aside requirement that holders of construction contracts with the City subcontract at least 30% of the dollar amount to minority business enterprises. Applying strict scrutiny, the Court found Richmond's program to be deficient because it was not tied to evidence of past discrimination in the City's construction industry. By contrast, the Court in *Metro Broadcasting, Inc. v. FCC*[2] applied a more lenient standard of review in upholding two racial preference policies used by the FCC in the award of radio and television broadcast licenses. The FCC policies, the Court explained, are "benign, race-conscious measures" that are "substantially related" to the achievement of an "important" governmental objective of broadcast diversity.[3]

In *Croson*, the Court ruled that the City had failed to establish a "compelling" interest in the racial quota system because it failed to identify past discrimination in its construction industry. Mere recitation of a "benign" or remedial purpose will not suffice, the Court concluded, nor will reliance on the disparity between the number of contracts awarded to minority firms and the minority population of the city. "[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating exclusion must be the

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[21] 480 U.S. 149 (1987).

[22] 476 U.S. at 294. A plurality of Justices in *Wygant* thought that past societal discrimination alone is insufficient to justify racial classifications; they would require some convincing evidence of past discrimination by the governmental unit involved.476 U.S. at 274–76 (opinion of Powell, J., joined by Burger, C.J., and by Rehnquist and O'Connor, JJ.).

[23] 480 U.S. at 182–83 (opinion of Brennan, J., joined by Marshall, Blackmun, and Powell, JJ.). A majority of Justices emphasized that the egregious nature of the past discrimination by the governmental unit justified the ordered relief. 480 U.S. at 153 (Brennan, J.), *id.* at 189 (Stevens, J.).

[1] 488 U.S. 469 (1989). *Croson* was decided by a 6-3 vote. The portions of Justice Sandra Day O'Connor's opinion adopted as the opinion of the Court were joined by Chief Justice William Rehnquist and by Justices Byron White, John Paul Stevens, and Anthony Kennedy. The latter two Justices joined only part of Justice Sandra Day O'Connor's opinion; each added a separate concurring opinion. Justice Antonin Scalia concurred separately; Justices Thurgood Marshall, William Brennan, and Harry Blackmun dissented.

[2] 497 U.S. 547 (1990). This was a 5-4 decision, Justice William Brennan's opinion of the Court being joined by Justices Byron White, Thurgood Marshall, Harry Blackmun, and John Paul Stevens. Justice Sandra Day O'Connor wrote a dissenting opinion joined by the Chief Justice and by Justices Antonin Scalia and Anthony Kennedy, and Justice Anthony Kennedy added a separate dissenting opinion joined by Justice Antonin Scalia.

[3] 497 U.S. at 564–65.

number of minorities qualified to undertake the particular task."[4] The Court also said that because the ordinance defined "minority group members" to include "citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts," this expansive definition "impugn[ed] the city's claim of remedial motivation," there having been "no evidence" of any past discrimination against non-Black racial minorities in the Richmond construction industry.[5] It followed that Richmond's set-aside program also was not "narrowly tailored" to remedy the effects of past discrimination in the city: an individualized waiver procedure made the quota approach unnecessary, and a minority entrepreneur "from anywhere in the country" could obtain an absolute racial preference.[6]

At issue in *Metro Broadcasting* were two minority preference policies of the FCC, one recognizing an "enhancement" for minority ownership and participation in management when the FCC considers competing license applications, and the other authorizing a "distress sale" transfer of a broadcast license to a minority enterprise. These racial preferences—unlike the set-asides at issue in *Fullilove*—originated as administrative policies rather than statutory mandates. Because Congress later endorsed these policies, however, the Court was able to conclude that they bore "the imprimatur of longstanding congressional support and direction."[7]

Metro Broadcasting was noteworthy for several other reasons as well. The Court rejected the dissent's argument—seemingly accepted by a *Croson* majority—that Congress's more extensive authority to adopt racial classifications must trace to Section 5 of the Fourteenth Amendment, and instead ruled that Congress also may rely on race-conscious measures in exercise of its commerce and spending powers.[8] This meant that the governmental interest furthered by a race-conscious policy need not be remedial, but could be a less focused interest such as broadcast diversity. Secondly, as noted above, the Court eschewed strict scrutiny analysis: the governmental interest need only be "important" rather than "compelling," and the means adopted need only be "substantially related" rather than "narrowly tailored" to furthering the interest.

The distinction between federal and state power to apply racial classifications, however, proved ephemeral. The Court ruled in *Adarand Constructors, Inc. v. Pena*[9] that racial classifications imposed by federal law must be analyzed by the same strict scrutiny standard that is applied to evaluate state and local classifications based on race. The Court overruled *Metro Broadcasting* and, to the extent that it applied a review standard less stringent than strict scrutiny, *Fullilove v. Klutznick*. Strict scrutiny is to be applied regardless of the race of those burdened or benefited by the particular classification; there is no intermediate standard applicable to "benign" racial classifications. The underlying principle, the Court explained, is that the Fifth and Fourteenth Amendments protect persons, not groups. It follows, therefore,

[4] 488 U.S. at 501–02.

[5] 488 U.S. at 506.

[6] 488 U.S. at 508.

[7] 497 U.S. at 600. Justice Sandra Day O'Connor's dissenting opinion contended that the case "does not present 'a considered decision of the Congress and the President.'" *Id.* at 607 (quoting *Fullilove*, 448 U.S. at 473).

[8] 497 U.S. at 563 & n.11. For the dissenting views of Justice Sandra Day O'Connor *see id.* at 606–07. *See also Croson*, 488 U.S. at 504 (opinion of Court).

[9] 515 U.S. 200 (1995). This was a 5-4 decision. Justice Sandra Day O'Connor's opinion for Court was joined by Chief Justice William Rehnquist, and by Justices Anthony Kennedy, Clarence Thomas, and—to the extent not inconsistent with his own concurring opinion—Antonin Scalia. Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer dissented.

that classifications based on the group characteristic of race "should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection . . . has not been infringed."[10]

By applying strict scrutiny, the Court was in essence affirming Justice Lewis Powell's individual opinion in *Bakke*, which posited a strict scrutiny analysis of affirmative action. There remained the question, however, whether Justice Lewis Powell's suggestion that creating a diverse student body in an educational setting was a compelling governmental interest that would survive strict scrutiny analysis. It engendered some surprise, then, that the Court essentially reaffirmed Justice Lewis Powell's line of reasoning in the cases of *Grutter v. Bollinger*[11] and *Gratz v. Bollinger*.[12]

In *Grutter*, the Court considered the admissions policy of the University of Michigan Law School, which requires admissions officials to evaluate each applicant based on all the information available in their file (for example, grade point average, Law School Admissions Test score, personal statement, recommendations) and on "soft" variables (for example, strength of recommendations, quality of undergraduate institution, difficulty of undergraduate courses). The policy also considered "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans . . . ." Although, the policy did not limit the seeking of diversity to "ethnic and racial" classifications, it did seek a "critical mass" of minorities so that those students would not feel isolated.[13]

The *Grutter* Court found that student diversity provided significant benefits, not just to the students who might have otherwise not been admitted, but also to the student body as a whole. These benefits include "cross-racial understanding," the breakdown of racial stereotypes, the improvement of classroom discussion, and the preparation of students to enter a diverse workforce. Further, the Court emphasized the role of education in developing national leaders. Thus, the Court found that such efforts were important to "cultivate a set of leaders with legitimacy in the eyes of the citizenry."[14] As the university did not rely on quotas, but rather relied on "flexible assessments" of a student's record, the Court found that the university's policy was narrowly tailored to achieve the substantial governmental interest of achieving a diverse student body.[15]

The law school's admission policy in *Grutter*, however, can be contrasted with the university's undergraduate admission policy. In *Gratz*, the Court evaluated the undergraduate program's "selection index," which assigned applicants up to 150 points based on a variety of factors similar to those considered by the law school. Applicants with scores over 100 were generally admitted, while those with scores of less than 100 fell into categories that could result in either admittance, postponement, or rejection. Of particular interest to the Court was

[10] 515 U.S. at 227 (emphasis original).

[11] 539 U.S. 306 (2003).

[12] 539 U.S. 244 (2003).

[13] 539 U.S. at 316.

[14] 539 U.S. at 335.

[15] *Grutter*, 539 U.S. at 315. While an educational institution will receive deference in its judgment as to whether diversity is essential to its educational mission, the courts must closely scrutinize the means by which this goal is achieved. Thus, the institution will receive no deference regarding the question of the necessity of the means chosen and will bear the burden of demonstrating that "each applicant is evaluated as an individual and not in a way that an applicant's race or ethnicity is the defining feature of his or her application." Fisher v. Univ. of Tex. at Austin (Fisher I), 570 U.S. 297, 298 (2013) (citation omitted). In its 2013 decision in *Fisher*, the Court did not rule on the substance of the challenged affirmative action program and instead remanded the case so that the reviewing appellate court could apply the correct standard of review. However, the Court issued a subsequent decision in *Fisher* addressing the Texas program directly. *See* Fisher v. Univ. of Tex. at Austin (Fisher II), 136 S. Ct. 2198 (2016).

that an applicant would be entitled to twenty points based solely upon his or her membership in an underrepresented racial or ethnic minority group. The policy also included the "flagging" of certain applications for special review, and underrepresented minorities were among those whose applications were flagged.[16]

The Court in *Gratz* struck down this admissions policy, relying again on Justice Lewis Powell's decision in *Bakke*. Although Justice Lewis Powell had thought it permissible that "race or ethnic background . . . be deemed a 'plus' in a particular applicant's file,"[17] the system he envisioned involved individualized consideration of all elements of an application to ascertain how the applicant would contribute to the diversity of the student body. According to the majority opinion in *Gratz*, the undergraduate policy did not provide for such individualized consideration. Instead, by automatically distributing twenty points to every applicant from an "underrepresented minority" group, the policy effectively admitted every qualified minority applicant. Although it acknowledged that the volume of applications could make individualized assessments an "administrative challenge," the Court found that the policy was not narrowly tailored to achieve respondents' asserted compelling interest in diversity.[18]

The Court subsequently revisited the question of affirmative action in undergraduate education in its 2016 decision in *Fisher v. University of Texas at Austin*, upholding the University of Texas at Austin's (UT's) use of "scores" based, in part, on race in filling approximately 25% of the slots in its incoming class that were not required by statute to be awarded to Texas high school students who finished in the top 10% of their graduating class (Top Ten Percent Plan or TTPP).[19] The Court itself suggested that the "sui generis" nature of the UT program,[20] coupled with the "fact that this case has been litigated on a somewhat artificial basis" because the record lacked information about the impact of Texas's TTPP,[21] may limit the decision's value for "prospective guidance."[22] Nonetheless, certain language in the Court's decision, along with its application of the three "controlling factors" set forth in the Court's 2013 decision in *Fisher*,[23] seem likely to have some influence, as they represent the Court's most recent jurisprudence on whether and when institutions of higher education may take race into consideration in their admission decisions. Specifically, the 2016 *Fisher* decision began and ended with broad language recognizing constraints on the implementation of affirmative action programs in undergraduate education, including language that highlights the university's "continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances"[24] and emphasized that "[t]he Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy

[16] 539 U.S. at 272–73.

[17] 438 U.S. at 317.

[18] 438 U.S. at 284–85.

[19] *Fisher II*, 136 S. Ct. at 2206.

[20] *Id.* at 2208.

[21] *Id.* at 2209.

[22] *Id.*

[23] Fisher v. Univ. of Tex. at Austin (Fisher I), 570 U.S. 297, 298 (2013). The first of these principles is that strict scrutiny requires the university to demonstrate with clarity that its "purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose." *Id.* at 309. The second principle is that the decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an "academic judgment" to which "some, but not complete, judicial deference is proper." *Id.* at 310. The third is that no deference is owed in determining whether the use of race is narrowly tailored; rather, the university bears burden of proving a non-racial approach would not promote its interests "about as well" and "at tolerable administrative expense." *Id.* at 312.

[24] *Fisher II*, 136 S. Ct. at 2209–10.

without refinement."[25] Nonetheless, while citing these constraints, the 2016 *Fisher* decision held that the challenged UT program did not run afoul of the Fourteenth Amendment. In particular, the Court concluded that the state's compelling interest in the case was not in enrolling a certain number of minority students, but in obtaining the educational benefits that flow from student body diversity, noting that the state cannot be faulted for not specifying a particular level of minority enrollment.[26] The Court further concurred with UT's view that the alleged "critical mass" of minority students achieved under the 10% plan was not dispositive, as the university had found that it was insufficient,[27] and that UT had found other means of promoting student-body diversity were unworkable.[28] In so concluding, the Court held that the university had met its burden in surviving strict scrutiny by providing sworn affidavits from UT officials and internal assessments based on months of studies, retreats, interviews, and reviews of data that amounted, in the view of the Court, to a "reasoned, principled explanation" of the university's interests and its efforts to achieve those interests in a manner that was no broader than necessary.[29] The Court refused to question the motives of university administrators and did not further scrutinize the underlying evidence relied on by the respondents, which may indicate that there are some limits to the degree in which the Court will evaluate a race-conscious admissions policy once the university has provided sufficient support for its approach.[30]

While institutions of higher education were striving to increase racial diversity in their student populations, state and local governments were engaged in a similar effort with respect to elementary and secondary schools. Whether this goal could be constitutionally achieved after *Grutter* and *Gratz*, however, remained unclear, especially as the type of individualized admission considerations found in higher education are less likely to have useful analogies in the context of public school assignments. Thus, for instance, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[31] the Court rejected plans in both Seattle, Washington and Jefferson County, Kentucky, that, in order reduce what the Court found to be "de facto" racial imbalance in the schools, used "racial tiebreakers" to determine school assignments.[32] As in *Bakke*, numerous opinions by a fractured Court led to an uncertain resolution of the issue.

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[25] *Id.*

[26] *Id.* at 2210–11. On the other hand, the Court emphasized that the university cannot claim educational benefits in "diversity writ large." *Id.* at 2211. "A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them." *Id.* The Court also noted that the asserted goals of UT's affirmative action program "mirror" those approved in earlier cases (for example, ending stereotypes and promoting cross-racial understanding). *Id.* at 2211.

[27] *Id.* at 2211–13. The Court further emphasized that the fact that race allegedly plays a minor role in UT admissions, given that approximately 75% of the incoming class is admitted under the 10% plan, shows that the challenged use of race in determining the composition of the rest of the incoming class is narrowly tailored, not that it is unconstitutional. *Id.* at 2212.

[28] *Id.* at 2212–14.

[29] *Id.* at 2211 ("Petitioner's contention that the University's goal was insufficiently concrete is rebutted by the record").

[30] *Id.* at 2211–12.

[31] 551 U.S. 701 (2007). Another case involving racial diversity in public schools, *Meredith v. Jefferson County Board of Education*, was argued separately before the Court on the same day, but the two cases were subsequently consolidated and both were addressed in the cited opinion.

[32] In Seattle, students could choose among ten high schools in the school district, but, if an oversubscribed school was not within 10 percentage points of the district's overall White/non-White racial balance, the district would assign students whose race would serve to bring the school closer to the desired racial balance. 127 S. Ct. at 2747. In Jefferson County, assignments and transfers were limited when such action would cause a school's Black enrollment to fall below 15% or exceed 50%. *Id.* at 2749.

In an opinion by Chief Justice John Roberts, a majority of the Court in *Parents Involved in Community Schools* agreed that the plans before the Court did not include the kind of individualized considerations that had been at issue in the university admissions process in *Grutter*, but rather focused primarily on racial considerations.[33] Although a majority of the Court found the plans unconstitutional, only four Justices (including the Chief Justice) concluded that alleviating "de facto" racial imbalance in elementary and secondary schools could never be a compelling governmental interest. Justice Anthony Kennedy, while finding that the school plans at issue were unconstitutional because they were not narrowly tailored,[34] suggested in separate concurrence that relieving "racial isolation" could be a compelling governmental interest. The Justice even envisioned the use of plans based on individual racial classifications "as a last resort" if other means failed.[35] As Justice Anthony Anthony Kennedy's concurrence appears to represent a narrower basis for the judgment of the Court than does Justice John Roberts' opinion, it appears to represent, for the moment, the controlling opinion for the lower courts.[36]

Amdt14.S1.8.5 Facially Neutral Laws Implicating Racial Minorities

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

A classification made expressly upon the basis of race triggers strict scrutiny and ordinarily results in its invalidation; similarly, a classification that facially makes a distinction on the basis of sex, or alienage, or whether a person was born out of wedlock triggers the level of scrutiny appropriate to it. A classification that is ostensibly neutral but is an obvious pretext for racial discrimination or for discrimination on some other forbidden basis is subject to heightened scrutiny and ordinarily invalidation.[1] But when it is contended that a law, which is

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[33] 127 S. Ct. at 2753–54. The Court also noted that, in *Grutter*, the Court had relied upon "considerations unique to institutions of higher education." *Id.* at 2574 (finding that, as stated in *Grutter*, 539 U.S. at 329, because of the "expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition").

[34] In his analysis of whether the plans were narrowly tailored to the governmental interest in question, Justice Anthony Kennedy focused on a lack of clarity in the administration and application of Kentucky's plan and the use of the "crude racial categories" of "white" and "non-white" (which failed to distinguish among racial minorities) in the Seattle plan. 127 S. Ct. at 2790–91.

[35] 127 S. Ct. at 2760–61. Some other means suggested by Justice Anthony Kennedy (which by implication could be constitutionally used to address racial imbalance in schools) included strategic site selection for new schools, the redrawing of attendance zones, the allocation of resources for special programs, the targeted recruiting of students and faculty, and the tracking of enrollments, performance, and other statistics by race.

[36] Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds . . . .'").

[1] *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Guinn v. United States, 238 U.S. 347 (1915); Lane v. Wilson, 307 U.S. 268 (1939); Gomillion v. Lightfoot, 364 U.S. 339 (1960). A law may be unconstitutional even if it does not facially discriminate on the basis of race, if it "uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities." Washington v. Seattle School Dist., 458 U.S. 457, 470 (1982).

in effect neutral, has a disproportionately adverse effect upon a racial minority or upon another group particularly entitled to the protection of the Equal Protection Clause, a much more difficult case is presented.

In *Washington v. Davis*, the Court held that is necessary that one claiming harm based on the disparate or disproportionate impact of a facially neutral law prove intent or motive to discriminate.[2] For a time, in reliance upon a prior Supreme Court decision that had seemed to eschew motive or intent and to pinpoint effect as the key to a constitutional violation, lower courts had questioned this proposition.[3] Further, the Court had considered various civil rights statutes which provided that when employment practices are challenged for disqualifying a disproportionate number of Black applicants, discriminatory purpose need not be proved and that demonstrating a rational basis for the challenged practices was not a sufficient defense.[4] Thus, the lower federal courts developed a constitutional "disproportionate impact" analysis under which, absent some justification going substantially beyond what would be necessary to validate most other classifications, a violation could be established without regard to discriminatory purpose by showing that a statute or practice adversely affected a class.[5] These cases were disapproved in *Davis*, but the Court noted that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it be true, that the law bears more heavily on one race than another. It is also not infrequently true

[2] 426 U.S. 229, 242 (1976) ("[A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.") A classification having a differential impact, absent a showing of discriminatory purpose, is subject to review under the lenient, rationality standard. *Id.* at 247–48; Rogers v. Lodge, 458 U.S. 613, 617 n.5 (1982). The Court has applied the same standard to a claim of selective prosecution allegedly penalizing exercise of First Amendment rights. Wayte v. United States, 470 U.S. 598 (1985) (no discriminatory purpose shown). *See also* Bazemore v. Friday, 478 U.S. 385 (1986) (existence of single-race, state-sponsored 4-H Clubs is permissible, given wholly voluntary nature of membership).

[3] The principal case was *Palmer v. Thompson,* 403 U.S. 217 (1971), in which a 5-4 majority refused to order a city to reopen its swimming pools closed allegedly to avoid complying with a court order to desegregate them. The majority opinion strongly warned against voiding governmental action upon an assessment of official motive, *id.* at 224–26, but it also drew the conclusion (and the *Davis* Court read it as actually deciding) that, because the pools were closed for everyone, not just Black residents, there was no discrimination. The city's avowed reason for closing the pools—to avoid violence and economic loss—could not be impeached by allegations of a racial motive. *See also* Wright v. Council of City of Emporia, 407 U.S. 451 (1972).

[4] Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The *Davis* Court adhered to this reading of Title VII, merely refusing to import the statutory standard into the constitutional standard. Washington v. Davis, 426 U.S. 229, 238–39, 246–48 (1976). Subsequent cases involving gender discrimination raised the question of the vitality of *Griggs*, General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), but the disagreement among the Justices appears to be whether *Griggs* applies to each section of the antidiscrimination provision of Title VII. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977); Furnco Const. Co. v. Waters, 438 U.S. 567 (1978). *But see* General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) (unlike Title VII, under 42 U.S.C. § 1981, derived from the Civil Rights Act of 1866, proof of discriminatory intent is required).

[5] *See* Washington v. Davis, 426 U.S. 229, 244 n.12 (1976) (listing and disapproving cases). Cases that the Court did not cite include those in which the Fifth Circuit wrestled with the distinction between de facto and de jure segregation. In *Cisneros v. Corpus Christi Indep. School Dist.,* 467 F.2d 142, 148–50 (5th Cir. 1972) (en banc), *cert. denied*, 413 U.S. 920 (1973), the court held that motive and purpose were irrelevant and the "de facto and de jure nomenclature" to be "meaningless." After the distinction was reiterated in *Keyes v. Denver School District,* 413 U.S. 189 (1973), the Fifth Circuit adopted the position that a decision-maker must be presumed to have intended the probable, natural, or foreseeable consequences of his decision and therefore that a school board decision that results in segregation is intentional in the constitutional sense, regardless of its motivation. United States v. Texas Educ. Agency, 532 F.2d 380 (5th Cir. 1976), *vacated and remanded for reconsideration in light of* Washington v. Davis, 426 U.S. 229 (1976), *modified and adhered to*, 564 F.2d 162, *reh. denied*, 579 F.2d 910 (5th Cir. 1977–78), *cert denied*, 443 U.S. 915 (1979). *See also* United States v. Texas Educ. Agency, 600 F.2d 518 (5th Cir. 1979). This form of analysis was, however, substantially cabined in *Massachusetts Personnel Adm'r v. Feeney,* 442 U.S. 256, 278–80 (1979), although foreseeability as one kind of proof was acknowledged by *Columbus Bd. of Educ. v. Penick,* 443 U.S. 449, 464–65 (1979).

that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds."[6]

The application of *Davis* in the following Terms led to both elucidation and not a little confusion. Looking to a challenged zoning decision of a local board that had a harsher impact upon Black and low-income persons than upon others, the Court in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*[7] explained in some detail how inquiry into motivation would work. First, a plaintiff is not required to prove that an action rested solely on discriminatory purpose; establishing "a discriminatory purpose" among permissible purposes shifts the burden to the defendant to show that the same decision would have resulted absent the impermissible motive.[8] Second, determining whether a discriminatory purpose was a motivating factor "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Impact provides a starting point and "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face," but this is a rare case.[9] In the absence of such a stark pattern, a court will look to such factors as the "historical background of the decision," especially if there is a series of official discriminatory actions. The specific sequence of events may shed light on purpose, as would departures from normal procedural sequences or from substantive considerations usually relied on in the past to guide official actions. Contemporary statements of decision-makers may be examined, and "[i]n some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege."[10] In most circumstances, a court is to look to the totality of the circumstances to ascertain intent.

Strengthening of the intent standard was evidenced in a decision sustaining against a sex discrimination challenge a state law giving an absolute preference in civil service hiring to veterans. Veterans who obtain at least a passing grade on the relevant examination may exercise the preference at any time and as many times as they wish and are ranked ahead of all non-veterans, no matter what their score. The lower court observed that the statutory and administrative exclusion of women from the armed forces until the recent past meant that virtually all women were excluded from state civil service positions and held that results so clearly foreseen could not be said to be unintended. Reversing, the Supreme Court found that the veterans preference law was not overtly or covertly gender-based; too many men are non-veterans to permit such a conclusion, and some women are veterans. That the preference implicitly incorporated past official discrimination against women was held not to detract from the fact that rewarding veterans for their service to their country was a legitimate public purpose. Acknowledging that the consequences of the preference were foreseeable, the Court pronounced this fact insufficient to make the requisite showing of intent. "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . .

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[6] *Washington v. Davis*, 426 U.S. at 242 (1976).

[7] 429 U.S. 252 (1977).

[8] 429 U.S. at 265–66, 270 n.21. *See also* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 284–87 (1977) (once plaintiff shows defendant acted from impermissible motive in not rehiring him, burden shifts to defendant to show result would have been same in the absence of that motive; constitutional violation not established merely by showing of wrongful motive); Hunter v. Underwood, 471 U.S. 222 (1985) (circumstances of enactment made it clear that state constitutional amendment requiring disenfranchisement for crimes involving moral turpitude had been adopted for purpose of racial discrimination, even though it was realized that some poor White people would also be disenfranchised thereby).

[9] *Arlington Heights*, 429 U.S. at 266.

[10] *Arlington Heights*, 429 U.S. at 267–68.

It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[11]

Moreover, in *City of Mobile v. Bolden*[12] a plurality of the Court apparently attempted to do away with the totality of circumstances test and to separately evaluate each of the factors offered to show a discriminatory intent. At issue was the constitutionality of the use of multi-member electoral districts to select the city commission. A prior decision had invalidated a multi-member districting system as discriminatory against Black and Hispanic citizens by listing and weighing a series of factors which in totality showed invidious discrimination, but the Court did not consider whether its ruling was premised on discriminatory purpose or adverse impact.[13] But in the plurality opinion in *Mobile*, each of the factors, viewed "alone," was deemed insufficient to show purposeful discrimination.[14] Moreover, the plurality suggested that some of the factors thought to be derived from its precedents and forming part of the totality test in opinions of the lower federal courts—such as minority access to the candidate selection process, governmental responsiveness to minority interests, and the history of past discrimination—were of quite limited significance in determining discriminatory intent.[15] But, contemporaneously with Congress's statutory rejection of the *Mobile* plurality standards,[16] the Court, in *Rogers v. Lodge*,[17] appeared to disavow much of *Mobile* and to permit the federal courts to find discriminatory purpose on the basis of "circumstantial evidence"[18] that is more reminiscent of pre-*Washington v. Davis* cases than of the more recent decisions.

Rogers v. Lodge was also a multimember electoral district case brought under the Equal Protection Clause[19] and the Fifteenth Amendment. The fact that the system operated to cancel

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[11] Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979). This case clearly established the application of *Davis* and *Arlington Heights* to all nonracial classifications attacked under the Equal Protection Clause. *But compare* Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979), *and* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979), in the context of the quotation in the text. These cases found the *Davis* standard satisfied on a showing of past discrimination coupled with foreseeable impact in the school segregation area.

[12] 446 U.S. 55 (1980). Also decided by the plurality was that discriminatory purpose is a requisite showing to establish a violation of the Fifteenth Amendment and of the Equal Protection Clause in the "fundamental interest" context, vote dilution, rather than just in the suspect classification context.

[13] *White v. Regester,* 412 U.S. 755 (1973), was the prior case. *See also* Whitcomb v. Chavis, 403 U.S. 124 (1971). Justice Byron White, the author of *Register*, dissented in *Mobile*, 446 U.S. at 94, on the basis that "the totality of the facts relied upon by the District Court to support its inference of purposeful discrimination is even more compelling than that present in *White v. Register*." Justice Harry Blackmun, *id.* at 80, and Justices William Brennan and Thurgood Marshall, agreed with him as alternate holdings, *id.* at 94, 103.

[14] 446 U.S. at 65–74.

[15] 446 U.S. at 73–74. The principal formulation of the test was in *Zimmer v. McKeithen,* 485 F.2d 1297, 1305 (5th Cir. 1973), *aff'd on other grounds sub nom. East Carroll Parish School Bd. v. Marshall,* 424 U.S. 636 (1976), and its components are thus frequently referred to as the *Zimmer* factors.

[16] By the Voting Rights Act Amendments of 1982, P.L. 97-205, 96 Stat. 131, 42 U.S.C. § 1973 (as amended), *see* S. Rep. No. 417, 97th Congress, 2d Sess. 27–28 (1982), Congress proscribed a variety of electoral practices "which results" in a denial or abridgment of the right to vote, and spelled out in essence the *Zimmer* factors as elements of a "totality of the circumstances" test.

[17] 458 U.S. 613 (1982). The decision, handed down within days of final congressional passage of the Voting Rights Act Amendments, was written by Justice Byron White and joined by Chief Justice Warren Burger and Justices William Brennan, Thurgood Marshall, Harry Blackmun, and Sandra Day O'Connor. Justices Lewis Powell and William Rehnquist dissented, *id.* at 628, as did Justice John Paul Stevens. *Id.* at 631.

[18] 458 U.S. at 618–22 (describing and disagreeing with the *Mobile* plurality, which had used the phrase at 446 U.S. 74). The *Lodge* Court approved the prior reference that motive analysis required an analysis of "such circumstantial and direct evidence" as was available. *Id.* at 618 (quoting *Arlington Heights*, 429 U.S. at 266).

[19] The Court confirmed the *Mobile* analysis that the "fundamental interest" side of heightened equal protection analysis requires a showing of intent when the criteria of classification are neutral and did not reach the Fifteenth Amendment issue in this case. 458 U.S. at 619 n.6.

out or dilute the votes of black citizens, standing alone, was insufficient to condemn it; discriminatory intent in creating or maintaining the system was necessary. But direct proof of such intent is not required. "[A]n invidious purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."[20] Turning to the lower court's enunciation of standards, the Court approved the *Zimmer* formulation. The fact that no Black person had ever been elected in the county, in which Black citizens were a majority of the population but a minority of registered voters, was "important evidence of purposeful exclusion."[21] Standing alone this fact was not sufficient, but a historical showing of past discrimination, of systemic exclusion of Black citizens from the political process as well as educational segregation and discrimination, combined with continued unresponsiveness of elected officials to the needs of the Black community, indicated the presence of discriminatory motivation. The Court also looked to the "depressed socio-economic status" of the Black population as being both a result of past discrimination and a barrier to Black citizens' access to voting power.[22] As for the district court's application of the test, the Court reviewed it under the deferential "clearly erroneous" standard and affirmed it.

The Court in a jury discrimination case also seemed to allow what it had said in *Davis* and *Arlington Heights* it would not permit.[23] Noting that disproportion alone is insufficient to establish a violation, the Court nonetheless held that the plaintiff's showing that 79% of the county's population was Spanish-surnamed, whereas jurors selected in recent years ranged from 39% to 50% Spanish-surnamed, was sufficient to establish a *prima facie* case of discrimination. Several factors probably account for the difference. First, the Court has long recognized that discrimination in jury selection can be inferred from less of a disproportion than is needed to show other discriminations, in major part because if jury selection is truly random any substantial disproportion reveals the presence of an impermissible factor, whereas most official decisions are not random.[24] Second, the jury selection process was "highly subjective" and thus easily manipulated for discriminatory purposes, unlike the process in *Davis* and *Arlington Heights*, which was regularized and open to inspection.[25] Thus, jury cases are likely to continue to be special cases and, in the usual fact situation, at least where the process is open, plaintiffs will bear a heavy and substantial burden in showing discriminatory racial and other animus.

In *Department of Homeland Security v. Regents of the University of California*, a four-Justice plurality rejected an equal protection challenge to the Department of Homeland Security's decision to rescind the Deferred Action for Childhood Arrivals (DACA) program.[26] The DACA program offered "immigration relief" in the form of "favorable treatment" for

[20] 458 U.S. at 618 (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

[21] 458 U.S. at 623–24.

[22] 458 U.S. at 624–27. The Court also noted the existence of other factors showing the tendency of the system to minimize the voting strength of Black citizens, including the large size of the jurisdiction and the maintenance of majority vote and single-seat requirements and the absence of residency requirements.

[23] Castaneda v. Partida, 430 U.S. 482 (1977). The decision was 5-4, Justice Harry Blackmun writing the opinion of the Court and Chief Justice Warren Burger and Justices Potter Stewart, Lewis Powell, and William Rehnquist dissenting. *Id.* at 504–07.

[24] 430 U.S. at 493–94. This had been recognized in *Washington v. Davis,* 426 U.S. 229, 241 (1976), and *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 266 n.13 (1977).

[25] Castaneda v. Partida, 430 U.S. 482, 494, 497–99 (1977).

[26] 140 S. Ct. 1891, 1915 (2020) (plurality opinion). A majority of the Court held that the Department's decision to rescind DACA was "arbitrary and capricious" under the Administrative Procedure Act and remanded the case so the Department could "consider the problem anew." *Id.* at 1914, 1916 (majority opinion). Four Justices who dissented from this aspect of the Court's decision concurred in the judgment rejecting the equal protection claim. *Id.* at 1919 (Thomas, J., concurring in the judgment in part and dissenting in part); *id.* at 1935–36 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

certain people who arrived in the United States as children.[27] The plaintiffs argued that the rescission decision violated equal protection guarantees because it was motivated by impermissible animus, "evidenced by (1) the disparate impact of the rescission on Latinos from Mexico, who represent 78% of DACA recipients; (2) the unusual history behind the rescission," which included shifting positions about whether to continue the program; "and (3) pre- and post-election statements by President Trump" that were critical of Latinos.[28] With respect to the first factor, the plurality found that this disparate impact was "expected" based on the fact that "Latinos make up a large share of the unauthorized alien population."[29] On the second factor, the plurality said the Administration's "decision to reevaluate DACA . . . was a natural response" to new concerns about the program's legality.[30] And finally, the plurality concluded that the President's statements, "remote in time and made in unrelated contexts," were not probative of other Executive officials' decision to rescind the program.[31]

Amdt14.S1.8.6 Voting Rights

Amdt14.S1.8.6.1 Voting Rights Generally

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The Supreme Court's equal protection jurisprudence as applied to voting laws has most prominently been developed in the context of redistricting. The Supreme Court has interpreted the Constitution to require that electoral districts within a redistricting map contain an approximately equal number of persons, which is known as the *equality standard* or the principle of *one person, one vote*.[1] In 1964, the Court interpreted provisions of the Constitution stating that Representatives are to be chosen "by the People of the several States"[2] and "apportioned among the several States . . . according to their respective Numbers"[3] to require that "as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's."[4] Later that year, the Court extended the equality standard to apply to state legislative redistricting under the Equal Protection Clause, requiring all participants in

[27] *Id.* at 1901 (majority opinion).

[28] *Id.* at 1915 (plurality opinion).

[29] *Id.* at 1915–16.

[30] *Id.* at 1916.

[31] *Id.*

[1] *See* Gray v. Sanders, 372 U.S. 368, 381 (1963) (holding that the conception of political equality means one person, one vote).

[2] U.S. Const. art. I, § 2, cl. 1. *See* ArtI.S2.C1.1 Congressional Districting.

[3] U.S. Const. amend. XIV, § 2. cl. 1.

[4] Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964).

an election "to have an equal vote."[5] In a series of rulings since 1964, the Supreme Court has described the extent to which precise or ideal mathematical population equality among electoral districts is required.[6]

The issue of partisan gerrymandering, which is "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power,"[7] has been litigated before the Supreme Court over the last three decades. In 1986, the Court ruled that partisan gerrymandering in state legislative redistricting was justiciable under the Equal Protection Clause, but a majority of the Justices could not agree on a test for ascertaining a violation.[8] In 2019, the Court held that there were no judicially "discernible and manageable standards" for ascertaining violations.[9]

While the denial of the franchise on the basis of race or color violates the Fifteenth Amendment, election laws that treat voters differently based on race can also violate the guarantee of equal protection under the Fourteenth Amendment.[10] Hence, under certain circumstances, redistricting maps that dilute and weaken Black and other minority voting strength may be held unconstitutional.[11] Much of the Supreme Court's redistricting jurisprudence has been prompted by disputes concerning the interplay between the requirements of the Voting Rights Act (VRA) and the constitutional standards of equal protection.[12] That is, under certain circumstances, the VRA may require the creation of one or more majority-minority districts in a congressional redistricting plan in order to prevent the denial or abridgement of the right to vote based on race, color, or membership in a language minority.[13] A *majority-minority district* is one in which a racial or language minority group comprises a voting majority.[14] The creation of such districts can avoid minority vote dilution by helping ensure that racial or language minority groups are not submerged into the majority and, thereby, denied an equal opportunity to elect candidates of their choice.[15] However,

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[5] Reynolds v. Simms, 377 U.S. 533, 557–58 (1964). *See also* Connor v. Johnson, 402 U.S. 690 (1971); Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187 (1972); White v. Weiser, 412 U.S. 783 (1973).

[6] *See* Amdt14.S1.8.6.4 Equality Standard and Vote Dilution.

[7] Ariz. State Leg. v. Ariz. Independent Redistricting Comm'n, 576 U.S. 787, 791 (2015).

[8] Davis v. Bandemer, 478 U.S. 109 (1986).

[9] Rucho v. Common Cause, No. 18–422, slip op. at 20 (2019). *See* Amdt14.S1.8.6.3 Partisan Gerrymandering. *See also* North Carolina v. Covington, No. 17–1364, slip op. at 9–10 (2018) (per curiam) ("[S]tate legislatures have primary jurisdiction over legislative reapportionment and a legislature's 'freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands' of federal law. A district court is 'not free . . . to disregard the political program of' a state legislature on other bases.").

[10] *See, e.g.,* Hunt v. Cromartie, 526 U.S. 541 (1999); Hunter v. Underwood, 471 U.S. 222 (1985); Richardson v. Ramirez, 418 U.S. 24 (1974); Wright v. Rockefeller, 376 U.S. 52 (1964).

[11] *See, e.g.,* Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960) (finding that, if proven, appellants' claim that a city-wide redistricting map will discriminate based on race will constitute a violation of the Fourteenth and Fifteenth Amendments to the Constitution); *see also* Rogers v. Lodge, 458 U.S. 613 (1982); City of Mobile, Alabama v. Bolden, 446 U.S. 55 (1980); Wise v. Lipscomb, 437 U.S. 535 (1978); United Jewish Orgs. v. Carey, 430 U.S. 144 (1977); White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Kilgarlin v. Hill, 386 U.S. 120 (1967); Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965).

[12] In a 1993 ruling, *Shaw v. Reno*, the Supreme Court first recognized a claim of racial gerrymandering, holding that the challengers to a redistricting plan had stated a claim under the Equal Protection Clause of the Constitution. *See* Shaw v. Reno, 509 U.S. 630, 639–52 (1993) (*Shaw I*). *See* Amdt14.S1.8.6.6 Racial Vote Dilution and Racial Gerrymandering.

[13] 52 U.S.C. §§ 10301, 10303(f). *See also* Upham v. Seamon, 456 U.S. 37, 41 (1982) (per curiam) (emphasizing that the drawing of legislative districts "is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so") (internal quotation marks omitted).

[14] *See* Bartlett v. Strickland, 556 U.S. 1, 13 (2009).

[15] *See* Thornburg v Gingles, 478 U.S. 30, 46–47 (1986).

congressional redistricting plans must also conform with standards of equal protection under the Fourteenth Amendment to the Constitution.[16] According to the Supreme Court, if race is the predominant factor in the drawing of district lines, above other traditional redistricting considerations—including compactness, contiguity, and respect for political subdivision lines—then a "strict scrutiny" standard of review is to be applied.[17] To withstand strict scrutiny in this context, the state must demonstrate that it had a compelling governmental interest in creating a majority-minority district and the redistricting plan was narrowly tailored to further that compelling interest.[18] These cases are often referred to as "racial gerrymandering" claims because the plaintiffs argue that race was improperly used in the drawing of district boundaries.[19]

The Supreme Court has applied principles of equal protection to various types of requirements for voting and elections. According to the Supreme Court, "[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. . . absent of course the discrimination which the Constitution condemns."[20] For example, in examining voter qualification laws, the Court invalidated excessive durational residency requirements[21] and poll tax requirements,[22] but upheld a requirement that voters present government-issued photo identification.[23] With regard to ballot access requirements, which establish prerequisites for a candidate's name to appear on the ballot, the Court determined that if the requirements impose only "reasonable, nondiscriminatory restrictions" on ballot access, they will trigger a "less exacting review," but if the requirements are considered to be "severe," they "must be be narrowly tailored and advance a compelling state interest."[24]

According to the Supreme Court, once a geographical unit is established from which a representative is elected, the Equal Protection Clause requires all who vote in the election "to have an equal vote."[25] In the 2000 presidential election contest, the Court determined that the Florida Supreme Court violated the Equal Protection Clause by not identifying and mandating uniform standards among counties for counting ballots.[26] Once the right to vote is granted equally, the state cannot later, by "arbitrary and disparate treatment, value one person's vote

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[16] Miller v. Johnson, 515 U.S. 900, 912–15 (1995). *See also* Cooper v. Harris, No. 15–1262, slip op. (2017) (holding that two congressional districts constituted unconstitutional racial gerrymanders).

[17] *See id.* at 916; *see also, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 348 (2004) (listing traditional redistricting criteria to include contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains).

[18] *Miller*, 515 U.S. at 916.

[19] *See, e.g., Shaw I*, 509 U.S. at 641 ("Our focus is on appellants' claim that the State engaged in unconstitutional racial gerrymandering.") *See also* North Carolina v. Covington, No. 17–1364, slip op. (2018) (per curiam).

[20] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50–51 (1959). *See also* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978); Hill v. Stone, 421 U.S. 289, 297 (1975); Kramer v. Union Free School Dist., 395 U.S. 621, 626–28 (1969).

[21] *See* Dunn v. Blumstein, 405 U.S. 330, 342 (1972).

[22] *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966).

[23] *See* Crawford v. Marion Co. Election Bd., 553 U.S. 181, 198 (2008) (plurality opinion) (distinguishing photo identification requirement from a poll tax or fee and determining that the photo identification requirement did not constitute a substantial burden). *See* Amdt14.S1.8.6.2 Voter Qualifications.

[24] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997). *See also* Hadnott v. Amos, 394 U.S. 358 (1971). See Amdt14.S1.8.6.7 Ballot Access.

[25] Gray v. Sanders, 372 U.S. 368, 379 (1963). *See* Amdt14.S1.8.6.4 Equality Standard and Vote Dilution.

[26] *See* Bush v. Gore, 531 U.S. 98, 110 (2000) (per curiam) ("Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work.").

over that of another," the Court announced.[27] However, the Court limited its holding to "the present circumstances," where "a state court with the power to assure uniformity" fails to provide "minimal procedural safeguards."[28]

Amdt14.S1.8.6.2 Voter Qualifications

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The Supreme Court has determined that, under the Fourteenth Amendment's Equal Protection Clause, states may require a duration of residency as a qualification to vote, but such requirements will be held unconstitutional unless the state can show that the requirement is necessary to serve a compelling interest.[1] According to the Court in *Dunn v. Blumstein*, "[t]his exacting test" applies because the right to vote is "a fundamental political right . . . preservative of all rights," and because a "durational residence requirement directly impinges on the exercise of a second fundamental personal right, the right to travel."[2] While acknowledging that states have "a legitimate and compelling interest" in preventing fraud by voters, in *Dunn*, the Court determined that a one-year residency requirement in a state and a three-month residency requirement in a county was not necessary to further "a compelling governmental interest."[3] In contrast, the Court in *Marston v. Lewis* upheld a fifty-day durational residency and voter registration requirement, determining that the law was necessary to serve "the State's important interest in accurate voter lists."[4]

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[27] *Id.* at 104–05 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. at 665).

[28] *Id.* at 109.

[1] *See* Dunn v. Blumstein, 405 U.S. 330, 342 (1972).

[2] *Id.* at 336, 338. *See also* Purcell v. Gonzalez, 549 U.S. 1, 2 (2006) (per curiam) (vacating an injunction against "requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day," but not addressing its constitutionality).

[3] *Dunn*, 405 U.S. at 360. The Court observed that with the Voting Rights Act Amendments of 1970, 84 Stat. 316, codified at 52 U.S.C. § 10502, "Congress outlawed state durational residence requirements for presidential and vice-presidential elections, and prohibited the States from closing registration more than 30 days before such elections." *Dunn*, 405 U.S. at 344.

[4] 410 U.S. 679, 681 (1973). Among other things, the Court observed that the state had shown that the fifty-day residency requirement was needed because voter registration in the state was conducted by volunteer workers who made statistically significant errors requiring additional time for correction. *See id.* at 680–81. *See also* Burns v. Fortson, 410 U.S. 686, 686–87 (1973) (affirming a district court ruling that upheld a fifty-day voter registration deadline "to promote . . . the orderly, accurate, and efficient administration of state and local elections, free from fraud"); Rosario v. Rockefeller, 410 U.S. 752 (1973) (upholding a requirement that voters enroll in their political party of choice thirty days prior to the general election to be eligible to vote in the next party primary, reasoning that the law did not impose a prohibition upon voting); Rodriguez v. Popular Dem. Party, 457 U.S. 1, 14 (1982) (upholding statute authorizing an incumbent legislator's political party to designate, upon the legislator's death or resignation, a successor in office until the next general election, determining that the Constitution does not mandate how legislative vacancies are to be filled); Fortson v. Morris, 385 U.S. 231 (1966) (holding that legislature could select governor from two candidates having highest number of votes cast when no candidate received majority); Sailors v. Bd. of Elections, 387 U.S. 105, 111 (1967) (upholding appointment, rather than election, of county school board). *But see* Kusper v. Pontikes, 414 U.S. 51, 61 (1973) (invalidating a prohibition on a individual voting in a party primary if the individual voted in another party's primary within the prior twenty-three months); Tashjian v. Repub. Party of Conn., 479 U.S. 208, 229 (1986) (invalidating a "closed primary" system, finding insufficient justification for a state preventing a political party from allowing independents to vote in its primary).

In a landmark case, *Harper v. Virginia State Board of Elections*, the Supreme Court in 1966 held that restricting voting qualifications to those citizens who had paid a poll tax constituted invidious discrimination under the Fourteenth Amendment Equal Protection Clause.[5] While underscoring that states have the limited power to establish qualifications for voting, the Court observed that "[w]ealth, like race, creed, or color is not germane to one's ability to participate intelligently in the electoral process."[6] Extending this ruling, the Court held that the eligibility to vote in local school elections may not be limited to persons owning property in the district or who have children in school,[7] and denied states the right to restrict the vote to property owners in elections on the issuance of revenue bonds[8] or general obligation bonds.[9] By contrast, the Court upheld a statute that required voters to present a government-issued photo identification in order to vote, as the state had not "required voters to pay a tax or a fee to obtain a new photo identification."[10] The Court added that, although obtaining a government-issued photo identification is an "inconvenience" to voters, it "surely does not qualify as a substantial burden."[11]

The Court has also evaluated challenges under the Equal Protection Clause to voter qualification laws in other contexts. For instance, the Court has determined that a state that exercised general criminal, taxing, and other jurisdiction over residents of a federal enclave within the state could not treat these persons as nonresidents for voting purposes because the residents of the enclave "have a stake equal to that of other" "residents of the state."[12] In that vein, the Court invalidated a state constitutional provision prohibiting any member of the military, who entered military service outside the state, from establishing a voting residence within the state during the duration of their military service because it imposed an "invidious discrimination in violation of the Fourteenth Amendment."[13] Although the Court acknowledged the "special problems" presented to the state "in determining whether servicemen have actually acquired a new domicile in a State for franchise purposes," the Court determined that the constitutional provision "goes beyond such rules."[14] With regard to prisoners, in a case applying rational basis scrutiny, the Court held that the failure of a state to provide for absentee balloting by unconvicted jail inmates, when absentee ballots were

[5] *See* 383 U.S. 663, 670 (1966) (overruling Breedlove v. Suttles, 302 U.S. 277 (1937) and Butler v. Thompson, 341 U.S. 937 (1951)).

[6] *Id.* at 668.

[7] *See* Kramer v. Union Free Sch. Dist., 395 U.S. 621, 632 (1969).

[8] *See* Cipriano v. City of Houma, 395 U.S. 701, 706 (1969).

[9] *See* City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970). *See also* Hill v. Stone, 421 U.S. 289, 300–01 (1975) (invalidating restrictions on the right to vote on a general obligation bond issue to persons who have "rendered" or listed real, mixed, or personal property for taxation in the election district).

[10] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (plurality opinion).

[11] *Id.* at 198.

[12] Evans v. Cornman, 398 U.S. 419, 426 (1970).

[13] Carrington v. Rash, 380 U.S. 89, 96 (1965).

[14] *Id. But see* Salyer Land Co. v. Tulare Water Storage Dist., 410 U.S. 719, 734–35 (1973) (upholding a voter qualification permitting only landowners to vote in a water storage district election because the landowners "were to bear the entire burden of the district's costs"). *Id.* at 731; Associated Enters. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973) (upholding a voter qualification limiting the franchise to property owners in the creation and maintenance of a watershed improvement district); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 734–35 (1973) (upholding a voter qualification limiting the franchise to landowners, reasoning that a water storage district was a specialized and limited form to which its general franchise rulings did not apply); Ball v. James, 451 U.S. 355, 371 (1981) (upholding a voter qualification limiting the franchise to landowners in a water reclamation district), *but cf.* Quinn v. Millsap, 491 U.S. 95, 109 (1989) (invalidating a state constitutional provision requiring that members of a "board of freeholders," which considered the reorganization of local governments, be landowners, reasoning that the board had a mandate "far more encompassing" than land use issues, as its recommendations "affect[ ] all citizens . . . regardless of land ownership."

available to other classes of voters, did not deny equal protection when it was not shown that the inmates could not vote in any other way.[15] Subsequently, however, the Court held unconstitutional a statute denying absentee registration and voting rights to persons confined awaiting trial or serving misdemeanor sentences.[16]

Amdt14.S1.8.6.3 Partisan Gerrymandering

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Partisan political gerrymandering, "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power,"[1] is an issue that has vexed the federal courts for more than three decades.[2] Prior to the 1960s, the Supreme Court had determined that challenges to redistricting plans presented nonjusticiable political questions that were most appropriately addressed by the political branches of government, not the judiciary.[3] In 1962, the Supreme Court held in the landmark ruling of *Baker v. Carr* that a constitutional challenge to a redistricting plan is justiciable, identifying factors for determining when a case presents a nonjusticiable political question, including "a lack of [a] judicially discoverable and manageable standard[ ] for resolving it."[4] In the years that followed, while invalidating redistricting maps on equal protection grounds for other reasons—inequality of population among districts[5] or racial gerrymanding[6]—the Court did not nullify a map based on a determination of partisan gerrymandering.[7]

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[15] *See* McDonald v. Bd. of Election Comm'rs, 394 U.S. 802 (1969); *see also* Richardson v. Ramirez, 418 U.S. 24, 54–56 (1974) (holding that California's constitutional provisions disenfranchising convicted felons who have completed their sentences and paroles did not violate the Equal Protection Clause); *but see* Goosby v. Osser, 409 U.S. 512 (1973) (determining that *McDonald* does not preclude a challenge to an absolute prohibition on voting).

[16] *See* O'Brien v. Skinner, 414 U.S. 524 (1974). *See also* Am. Party of Texas v. White, 415 U.S. 767, 794–95 (1974), Hunter v. Underwood, 471 U.S. 222, 225 (1985) (holding that Alabama's constitutional provision disenfranchising persons convicted of crimes involving moral turpitude violated equal protection).

[1] Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015).

[2] *See* Gaffney v. Cummings, 412 U.S. 735, 751, 754 (1973) (upholding a redistricting plan, acknowledging it was drawn with the intent to achieve a rough approximation of the statewide political strengths of the two parties and stating "we have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States"); WMCA, Inc. v. Lomenzo, 238 F. Supp. 916 (S.D.N.Y. 1965) (three-judge court), *aff'd,* 382 U.S. 4 (1965); Sincock v. Gately, 262 F. Supp. 739 (D. Del. 1967) (three-judge court).

[3] *See, e.g.,* Colegrove v. Green, 328 U.S. 549, 552 (1946) (characterizing the case, which involved state legislative districting, as one that presents the Court with "what is beyond its competence to grant" because the issue is "of a peculiarly political nature and therefore not meet for judicial determination.")

[4] 369 U.S. 186, 217 (1962).

[5] *See* Amdt14.S1.8.6.4 Equality Standard and Vote Dilution.

[6] *See* Amdt14.S1.8.6.6 Racial Vote Dilution and Racial Gerrymandering.

[7] *See, e.g., Gaffney*, 412 U.S. at 752 (rejecting an argument that a redistricting map violated equal protection principles "because it attempted to reflect the relative strength of the parties in locating and defining election districts").

In the 1986 case of *Davis v. Bandemer*, the Court ruled that partisan gerrymandering in state legislative redistricting is justiciable under the Equal Protection Clause.[8] Although the vote was 6-3 in favor of justiciability, a majority of the Justices could not agree on the proper test for determining whether the particular gerrymandering in this case was unconstitutional and reversed the lower court's holding of unconstitutionality by a vote of 7-2.[9] Hence, as a result of *Bandemer*, the Court left open the possibility that claims of unconstitutional partisan gerrymandering could be judicially reviewable, but did not ascertain a discernible and manageable standard for adjudicating such claims.[10]

Similarly, following *Bandemer*, the Supreme Court could not reach a consensus for several years on the proper test for adjudicating claims of unconstitutional partisan gerrymandering. First, in the 2004 ruling, *Vieth v. Jubelirer*, a four-Justice plurality would have overturned *Bandemer* to hold that "political gerrymandering claims are nonjusticiable."[11] Justice Anthony Kennedy, casting the deciding vote and concurring in the Court's judgment, agreed that the challengers before the Court had not yet articulated "comprehensive and neutral principles for drawing electoral boundaries" or any rules that would properly "limit and confine judicial intervention."[12] Nonetheless, Justice Anthony Kennedy held out hope that in some future case, the Court could find "some limited and precise rationale" to adjudicate other partisan gerrymandering claims, thereby leaving *Bandemer* intact.[13] In 2006, in *League of United Latin American Citizens v. Perry*, a splintered Court again failed to adopt a standard for adjudicating political gerrymandering claims, but did not overrule *Bandemer* by deciding such claims were nonjusticiable.[14] Likewise, in 2018, the Court considered claims of partisan gerrymandering, but ultimately issued narrow rulings on procedural grounds specific to those cases.[15]

Ultimately, in the 2019 case, *Rucho v. Common Cause*, the Supreme Court held that there were no judicially "discernible and manageable standards" by which courts could adjudicate claims of unconstitutional partisan gerrymandering, thereby implicitly overruling

[8] 478 U.S. 109 (1986). The vote on justiciability was 6-3, with Justice Byron White's opinion for the Court joined by Justices William Brennan, Thurgood Marshall, Harry Blackmun, Lewis Powell, and John Paul Stevens. This represented an apparent change of view by three of the majority Justices, who just two years earlier had denied that "the existence of noncompact or gerrymandered districts is by itself a constitutional violation." Karcher v. Daggett, 466 U.S. 910, 917 (1983) (Brennan, J., joined by White and Marshall, J., dissenting from denial of stay in challenge to district court's rejection of a remedial districting plan on the basis that it contained "an intentional gerrymander").

[9] Only Justices Lewis Powell and John Paul Stevens viewed the Indiana redistricting plan as void; Justice Byron White, joined by Justices William Brennan, Thurgood Marshall, and Harry Blackmun, thought the record inadequate to demonstrate continuing discriminatory impact, and Justice Sandra Day O'Connor, joined by Chief Justice Warren Burger and Justice William Rehnquist, would have ruled that partisan gerrymandering is a nonjusticiable political question not susceptible to manageable judicial standards.

[10] *See Bandemer*, 478 U.S. at 127 (agreeing with the district court in this case that to establish an equal protection violation, plaintiffs needed "to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group").

[11] 541 U.S. 267, 281 (2004).

[12] *Id.* at 306–07.

[13] *Id.* at 306.

[14] 548 U.S. 399, 414 (2006) (declining to "revisit [the *Bandemer*] justiciability holding"); *see also id.* at 417 (Kennedy, J.) (rejecting proposed test for adjudicating partisan gerrymandering claims); *id.* at 492 (Roberts, J., concurring in part) (agreeing that proposed test was not a reliable standard for adjudicating partisan gerrymandering claims); *id.* at 512 (Scalia, J., dissenting) (arguing that claims of unconstitutional partisan gerrymandering are nonjusticiable).

[15] *See* Gill v. Whitford, No. 16-1161, slip op. at 21 (U.S. June 18, 2018) (ruling that to establish standing to sue upon a claim of unconstitutional partisan gerrymandering on the basis of vote dilution, challengers must allege injuries to their interests as voters in individual districts); Benisek v. Lamone, No. 17-333, slip op. at 5 (U.S. June 18, 2018) (per curiam) (holding that a district court did not abuse its discretion by denying a preliminary injunction to challengers claiming that a Maryland congressional district was an unconstitutional partisan gerrymander).

Bandemer.[16] According to the Court, the federal courts "are not equipped to apportion political power as a matter of fairness" and "it is not even clear what fairness looks like in this context."[17] As a result of *Rucho*, claims of unconstitutional partisan gerrymandering are not subject to federal court review because they present nonjusticiable political questions.[18] Writing for the Court, Chief Justice John Roberts acknowledged that excessive partisan gerrymandering "reasonably seem[s] unjust," stressing that the ruling "does not condone" it, but reiterated that "the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause."[19]

Amdt14.S1.8.6.4 Equality Standard and Vote Dilution

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The Supreme Court has interpreted the Constitution to require that electoral districts within a redistricting map contain an approximately equal number of persons.[1] This requirement is referred to as the "equality standard" or the principle of "one person, one vote."[2] In 1964, the Court in *Wesberry v. Sanders*[3] interpreted provisions of the Constitution stating that Representatives are to be chosen "by the People of the several States"[4] and "apportioned among the several States . . . according to their respective Numbers"[5] to require that "as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's."[6] Later in 1964, the Court in *Reynolds v. Sims*[7] extended the equality standard to apply to state legislative redistricting under the Equal Protection Clause, requiring all participants in an election "to have an equal vote."[8]

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[16] Rucho v. Common Cause, No. 18-422, slip op. at 20 (U.S. June 27, 2019).

[17] *Id.* at 17.

[18] *See id.* at 30 ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts."). *Id.*

[19] *Id.* at 32–33.

[1] Prior to the 1960s, the Supreme Court determined that constitutional challenges to redistricting plans presented nonjusticiable political questions that were most appropriately addressed by the political branches of government. *See, e.g.,* Colegrove v. Green, 328 U.S. 549, 552 (1946) (characterizing the dispute as presenting the Court with "what is beyond its competence to grant" because the issue is "of a peculiarly political nature and therefore not meet for judicial determination."); Smiley v. Holm, 285 U.S. 355 (1932); Wood v. Broom, 287 U.S. 1 (1932); *Green*, 328 U.S. 549, Cook v. Fortson, 329 U.S. 675 (1946); Colegrove v. Barrett, 330 U.S. 804 (1947); MacDougall v. Green, 335 U.S. 281 (1948); South v. Peters, 339 U.S. 276 (1950); and Hartsfield v. Sloan, 357 U.S. 916 (1958). In 1962, the Court held such challenges justiciable. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

[2] *See* Gray v. Sanders, 372 U.S. 368, 381 (1963) (holding that the conception of political equality means one person, one vote).

[3] 376 U.S. 1 (1964).

[4] U.S. Const. art. I, § 2, cl. 1. *See* ArtI.S2.C1.1 Congressional Districting.

[5] U.S. Const. amend. XIV, § 2. cl. 1.

[6] *Wesberry*, 376 U.S. at 7–8.

[7] 377 U.S. 533 (1964).

[8] *Id.* at 557–58. *See also* WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); Donis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Forty-Fourth

In a series of rulings since 1964, the Supreme Court has described the extent to which precise or ideal mathematical population equality among electoral districts is required.[9] Ideal or precise equality is the average population that each district would contain if a state population were evenly distributed across all districts; and the total or "maximum population deviation" refers to the percentage difference from the ideal population between the most populated district and the least populated district in a redistricting map.[10] In 1967, the Court announced that while "[*d*]*e minimis* deviations are unavoidable, . . . variations of 30% among [state legislative] senate districts and 40% among [state legislative] house districts can hardly be deemed *de minimis*," emphasizing that none of the Court's prior case law has approved of such large differences.[11] By contrast, evaluating the principle of equal protection in the context of a county governing body, the Court approved of a population disparity among districts of 11.9% because of a "long tradition of overlapping functions and dual personnel" in the county government and because the map did not intrinsically contain "bias tending to favor particular political interests or geographic areas."[12]

Nine years after deciding *Reynolds v. Sims*, the Court continued to clarify the population equality requirement. Underscoring that less deviation from precise population equality is permissible for congressional districts than is permissible for state legislative districts, in 1973, the Court upheld a state legislative redistricting map that contained a total population percentage deviation of 16.4%.[13] The Court reached its decision by determiing, in part, that the challenged map "may reasonably be said to advance the rational state policy of respecting the boundaries of political subdivisions."[14] In 1975, in holding that a 20% population deviation did not comport with standards of equal protection, the Court observed that a deviation of such "magnitude" cannot be constitutionally permissible without "significant state policies or other

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Gen. Assembly of Colorado, 377 U.S. 713, 736 (1964) (holding that "[a]n individual's constitutionally protected right to cast an equally weighed vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause.").

[9] *See also* Sailors v. Bd. of Educ. of the Cnty. of Kent, 387 U.S. 105, 111 (1967) (holding that, as a threshold issue, the Equal Protection Clause did not apply to a state law whereby residents elected local school boards, which in turn, through delegates, appointed members to county school boards without regard to the population represented because the county school board members were not elected and the board functions were nonlegislative); Avery v. Midland Cnty., 390 U.S. 474, 481 (1968) (holding that when a state delegates lawmaking power to a local government, providing for election by districts, the districts are subject to the principle of equal protection because there is "little difference . . . between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns, and counties."); Hadley v. Junior Coll. Dist., 397 U.S. 50, 56 (1970) (holding that whenever a state chooses to vest "governmental functions" in a body and to elect the members of that body from districts, the districts are subject to the principle of equal protection). In *Hadley*, the Court acknowledged distinguishable cases "in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups" that the principle of equal protection does not apply. *Id.* at 56. *See, e.g.,* Salyer Land Co. v. Tulare Water Storage Dist., 410 U.S. 719 (1973); Associated Enters. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973); Ball v. James, 451 U.S. 355 (1981); in the context of judicial districts, *see, e.g.,* Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972) (three-judge court), *aff'd,* 409 U.S. 1095 (1973) (per curiam).

[10] *See, e.g.,* Brown v. Thomson, 462 U.S. 835, 842–43 (1983). *See also, e.g.,* Gaffney v. Cummings, 412 U.S. 735 (1973) (upholding a Connecticut legislative redistricting plan with a total maximum population deviation of 7.83%). *But see* Cox v. Larios, 542 U.S. 947 (2004) (upholding the invalidation of a state legislative redistricting plan with a total maximum population deviation of 9.98%).

[11] Swann v. Adams, 385 U.S. 440, 444 (1967). *See also* Connor v. Williams, 404 U.S. 549, 550 (1972) (distinguishing between the standards of population equality applicable to state legislative districts and congressional districts); Kilgarlin v. Hill, 386 U.S. 120 (1967); Duddleston v. Grills, 385 U.S. 455 (1967).

[12] Abate v. Mundt, 403 U.S. 182, 187 (1971). *But see* Bd. of Estimate of N.Y. v. Morris, 489 U.S. 688 (1989) (invalidating a redistricting map providing for representation in each of New York City's five boroughs on the New York City Board of Estimate that contained a higher population disparity).

[13] *See* Mahan v. Howell, 410 U.S. 315, 319, 332–33 (1973). *See also* White v. Regester, 412 U.S. 755, 763–64 (1973) (upholding a state legislative redistricting map with a total maximum deviation of 9.9% among house districts and an average deviation of 1.82%); Connor v. Finch, 431 U.S. 407, 417–18 (1977) (invalidating a state legislative redistricting map with a maximum population deviation in the senate districts of 16.5% and in the house districts of 19.3%).

[14] *Mahan*, 410 U.S. at 328.

acceptable considerations that require adoption of a plan with so great a variance."[15] In 2016, the Court held that challengers to maps with a "minor" deviation of less than 10% must show that it is "more probable than not" that the deviation "reflects the predominance of illegitimate reapportionment factors," concluding "that attacks on deviations under 10% will succeed only rarely, in unusual cases."[16] Also in 2016, the Court rejected the argument that the Equal Protection Clause prohibits states from using total population, instead of total voting population, in drawing state legislative redistricting maps.[17]

Amdt14.S1.8.6.5 Inequalities Within a State and Vote Dilution

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Invoking the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court effectively ended the 2000 presidential election contest. In *Bush v. Gore*, the Court determined that the Florida Supreme Court violated the Equal Protection Clause by not identifying and mandating uniform standards among counties for counting ballots.[1] The Florida court had ordered a partial manual recount of the Florida vote for presidential electors, requiring the counting of all ballots that contained a "clear indication of the intent of the voter," but allowing the relevant counties to determine the physical characteristics of a ballot that would satisfy this test.[2]

According to the Supreme Court, the recount process approved by the Florida Supreme Court "is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter."[3] Once the right to vote is granted equally, the state cannot later, by "arbitrary and disparate treatment, value one person's vote over that of another," the Court announced.[4] While acknowledging that local jurisdictions can implement different election systems, the Court underscored that it was remedying a state court ruling that failed to provide "at least some assurance that the rudimentary requirements of equal treatment and

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[15] Chapman v. Meier, 420 U.S. 1, 24 (1975). *See also* Summers v. Cenarrusa, 413 U.S. 906 (1973). (vacating and remanding for further consideration the approval of a 19.4% deviation). *But see* Voinovich v. Quilter, 507 U.S. 146 (1993) (vacating and remanding for further consideration the rejection of a deviation in excess of 10% intended to preserve political subdivisions).

[16] Harris v. Ariz. Indep. Redistricting Comm'n, 578 U.S. 253, 259 (2016).

[17] *See* Evenwel v. Abbott, 578 U.S. 54, 74 (2016). The Court declined, however, to determine that redistricting based on total population is constitutionally required, noting that the Court has upheld the use of districts based on voting population. *See id.* at 60 (citing Burns v. Richardson, 384 U.S. 73, 93–94 (1966) (upholding a Hawaii redistricting map that was based on the registered-voter population)).

[1] 531 U.S. 98, 110 (2000) (per curiam). ("Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work.")

[2] *Id.* at 102.

[3] *Id.* at 109.

[4] *Id.* at 104–05 (citing Harper v. Va. Bd. Of Elections, 383 U.S. 663, 665 (1966)). The Court stated: "Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 105.

fundamental fairness are satisfied."[5] However, the Court in *Bush v. Gore* limited its holding to "the present circumstances," where "a state court with the power to assure uniformity" fails to provide "minimal procedural safeguards."[6] Citing the "many complexities" of application of equal protection "in election processes generally," the Court distinguished the many situations where disparate treatment of votes results from different standards being applied by different local jurisdictions.[7]

Once a geographical unit is established from which a representative is elected, the Equal Protection Clause requires all who vote in the election "to have an equal vote."[8] In *Gray v. Sanders*, the Supreme Court invalidated a Georgia county unit system as a basis for tabulating votes whereby, based on population, each county was allocated a number of county-unit votes: "Counties with from 0 to 15,000 people were allotted two units; an additional one unit was allotted for the next 5,000 persons; an additional unit for the next 10,000 persons; another unit for each of the next two brackets of 15,000 persons; and, thereafter, two more units for each increase of 30,000 persons."[9] Although each qualified voter was provided one vote in the statewide election under the "county unit system," the Court observed that the "end result weights the rural vote more heavily than the urban vote and weights some small rural counties heavier that other larger rural counties."[10] In striking down the law, the Court emphasized that standards of equal protection require that "[o]nce the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit."[11] Further, the Court in *Gray* characterized analogies drawn between this case and the electoral college, redistricting, and "other phases of the problems of representation in state or federal legislatures or conventions" as "inapposite," observing that the Constitution expressly contemplates those processes and this "case is only a voting case."[12]

By contrast, in *Gordon v. Lance*, the Court approved a 60% affirmative vote requirement in a referendum election before constitutionally prescribed limits on bonded indebtedness or tax rates could be exceeded.[13] Distinguishing its ruling in *Gray v. Sanders*, the Court pointed out that the equal protection violation found there was based on denying or diluting "voting power because of group characteristics-geographic location and property ownership-that bore no valid relation to the interest of those groups in the subject matter of the election . . . [and] was imposed irrespective of how members of those groups actually voted."[14] Further, while acknowledging that the requirement departed from strict majority rule, the Court pointed out that the Constitution did not prescribe majority rule, but instead, proscribed discrimination through dilution of voting power or denial of the franchise because of some class

[5] *Id.* at 109 ("The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards.")

[6] *Id.*

[7] *Id.*

[8] Gray v. Sanders, 372 U.S. 368, 379 (1963).

[9] *Id.* at 372.

[10] *Id.* at 379.

[11] *Id.*

[12] *Id.* at 378.

[13] 403 U.S. 1, 7–8 (1971).

[14] *Id.* at 4.

characteristic-race, urban residency, or the like-and the provision at issue in this case was neither directed to nor affected any identifiable class.[15]

Amdt14.S1.8.6.6 Racial Vote Dilution and Racial Gerrymandering

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Much of the Supreme Court's redistricting jurisprudence has been prompted by disputes concerning the interplay between the requirements of the Voting Rights Act (VRA) and the constitutional standards of equal protection.[1] That is, under certain circumstances, the VRA may require the creation of one or more "majority-minority" districts in a congressional redistricting plan in order to prevent the denial or abridgement of the right to vote based on race, color, or membership in a language minority.[2] A majority-minority district is one in which a racial or language minority group comprises a voting majority. The creation of such districts can avoid minority vote dilution by helping ensure that racial or language minority groups are not submerged into the majority and, thereby, denied an equal opportunity to elect candidates of their choice.

In its landmark 1986 decision *Thornburg v. Gingles*, the Supreme Court established a three-pronged test for proving vote dilution under Section 2 of the VRA.[3] Under this test, (1) the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group must be able to show that it is politically cohesive; and (3) the minority must be able to demonstrate that the majority votes sufficiently as a bloc to enable the majority to defeat the minority group's preferred candidate absent special circumstances, such as the minority candidate running unopposed.[4] Further interpreting the *Gingles* three-pronged test, in *Bartlett v. Strickland*, the Supreme Court ruled that the first prong of the test-requiring a minority group to be geographically compact enough to constitute a majority in a district-can only be satisfied if the minority group would constitute more than 50% of the voting population in a single-member district.[5]

In addition to the VRA, however, congressional redistricting plans must also conform with standards of equal protection under the Fourteenth Amendment to the Constitution. According to the Supreme Court, if race is the predominant factor in the drawing of district lines, above other traditional redistricting considerations-including compactness, contiguity,

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[15] *See id.* at 6–7.

[1] In a 1993 ruling, *Shaw v. Reno*, the Supreme Court first recognized a claim of racial gerrymandering, holding that the challengers to a redistricting plan had stated a claim under the Equal Protection Clause of the Constitution. *See* 509 U.S. 630, 639–52 (1993) [hereinafter *Shaw I*].

[2] 52 U.S.C. §§ 10301, 10303(f).

[3] 478 U.S. 30 (1986).

[4] *Id.* at 50–51 (citation omitted). The three requirements set forth in *Thornburg v. Gingles* for a Section 2 claim apply to single-member districts as well as to multi-member districts. *See* Growe v. Emison, 507 U.S. 25, 40–41 (1993) ("It would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single-member district.").

[5] 556 U.S. 1, 25–26 (2009) (plurality opinion).

and respect for political subdivision lines-then a "strict scrutiny" standard of review is to be applied.[6] To withstand strict scrutiny in this context, the state must demonstrate that it had a compelling governmental interest in creating a majority-minority district and the redistricting plan was narrowly tailored to further that compelling interest.[7] These cases are often referred to as "racial gerrymandering" claims because the plaintiffs argue that race was improperly used in the drawing of district boundaries.[8] Case law in this area has revealed that there can be tension between compliance with the VRA and conformance with standards of equal protection.[9]

In a series of cases, the Supreme Court has clarified the standards for ascertaining a racial gerrymandering claim under the Equal Protection Clause. For example, the Court has determined that successful claims of racial gerrymandering require plaintiffs to prove that racial considerations were "dominant and controlling" in the creation of the districts at issue.[10] The Court has also held that in determining whether race is a predominant factor in the redistricting process, and thereby triggering strict scrutiny, a court must engage in a district-by-district analysis instead of analyzing the state as an undifferentiated whole.[11] Further, according to the Court, plaintiffs challenging a state legislative redistricting plan on racial gerrymandering grounds need not prove, as a threshold matter, that the plan conflicts with traditional redistricting criteria.[12] Nonetheless, the Court has held that plaintiffs need "to overcome the presumption of legislative good faith" by demonstrating that a legislature drew a redistricting map "with invidious intent."[13]

Amdt14.S1.8.6.7 Ballot Access

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

State laws that specify prerequisites for the names of candidates to appear on election ballots are known as ballot access requirements. Generally, states enact ballot access requirements to prevent ballot overcrowding, voter confusion, election fraud, and to facilitate

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[6] *See* Miller v. Johnson, 515 U. S. 900, 916 (1995). *See also, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 348 (2004) (listing traditional redistricting criteria to include contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains).

[7] *Miller*, 515 U.S. at 916.

[8] *See, e.g., Shaw I*, 509 U.S. at 641 ("Our focus is on appellants' claim that the State engaged in unconstitutional racial gerrymandering.")

[9] *See, e.g., id.* at 653–57 (holding that if district lines are drawn for the purpose of separating voters based on race, a court must apply strict scrutiny review); *Miller*, 515 U.S. at 912–13 (holding that strict scrutiny applies when race is the predominant factor and traditional redistricting principles have been subordinated); Bush v. Vera, 517 U.S. 952, 958–65 (1996) (holding that departing from sound principles of redistricting defeats the claim that districts are narrowly tailored to address the effects of racial discrimination).

[10] *See* Easley v. Cromartie, 532 U.S. 234 (2001).

[11] *See* Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 262 (2015).

[12] *See* Bethune-Hill v. Va. State Bd. of Elections, No. 15-680, slip op. at 10 (U.S. Mar. 1, 2017) (holding that "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering.").

[13] Abbott v. Perez, No. 17-586, slip op. at 23 (U.S. June 25, 2018).

election administration.[1] Supreme Court case law demonstrates how ballot access requirements must comport with principles of equal protection under the Fourteenth Amendment.

While reasonable ballot access requirements are likely to be upheld, the Supreme Court has determined that the Constitution will not permit laws that impermissibly restrict or completely prohibit third-party and independent candidates from qualifying for the ballot.[2] According to the Court, on the condition that ballot access requirements do not "unfairly or unnecessarily burden" new party or independent candidates (that is, candidates not affiliated with a political party), it may be constitutional for states to provide different requirements based on whether a candidate is a nominee of a major political party, a minor or new party, or an independent candidate.[3]

In a series of ballot access cases, the Court has applied and refined this analysis. For instance, in the 1971 case of *Jenness v. Fortson*, the Court upheld ballot access requirements whereby candidates belonging to any political party that obtained 20% or more of the vote in the previous gubernatorial or presidential elections could obtain ballot access in the general election by winning the party's primary election while independent or candidates of other parties were required to obtain signatures of at least 5% of those registered to vote at the last election for the office sought.[4] According to the Court, from the perspective of a candidate, the ballot access requirement did not violate the Equal Protection Clause because neither of the prescribed methods "can be assumed to be inherently more burdensome than the other."[5] While recognizing that from the perspective of a political party, "the situation is somewhat different," the Court nonetheless determined that by providing separate mechanisms for obtaining ballot access for new and established political parties, the state was simply acknowledging the differences between the two types of parties.[6] As the Court explained, in enacting the ballot access requirements, the state "surely [had] an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."[7]

In the 1974 case, *Storer v. Brown*, the Court was faced with a ballot access requirement that independent candidates "file a petition signed by voters not less in number than 5% of the total votes cast in California at the last general election."[8] However, the law did not permit

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[1] *See, e.g.,* Storer v. Brown, 415 U.S. 724 (1974).

[2] Lubin v. Panish, 415 U.S. 709, 719 (1974) ("[B]allot access must be genuinely open to all, subject to reasonable requirements."). *See also* McCarthy v. Briscoe, 429 U.S. 1317 (1976); Bullock v. Carter, 405 U.S. 134, 145 (1972) (holding that in the absence of reasonable alternative means of ballot access, a state may not disqualify an indigent candidate unable to pay filing fees); Moore v. Ogilvie, 394 U.S. 814, 818–19 (1969) (overruling MacDougall v. Green, 335 U.S. 281 (1948) and holding that a requirement that independent candidates obtain 25,000 signatures, including 200 signatures from each of at least 50 of the state's 102 counties, violated the Equal Protection Clause); Williams v. Rhodes, 393 U.S. 23, 24 (1968) (invalidating a ballot access law that rendered it "virtually impossible" for new political party candidates or candidates from an "old party, which has a very small number of members" to appear on a ballot). "[T]he totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause." *Id.* at 34.

[3] *Lubin*, 415 U.S. at 716 (1974). *See also* Quinn v. Millsap, 491 U.S. 95 (1989); Clements v. Fashing, 457 U.S. 957 (1982); Chappelle v. Greater Baton Rouge Airport Dist., 431 U.S. 159 (1977); Turner v. Fouche, 396 U.S. 346 (1970); Snowden v. Hughes, 321 U.S. 1 (1944).

[4] 403 U.S. 431, 432–33 (1971).

[5] *Id.* at 441.

[6] *Id.* at 441–42.

[7] *Id.* at 442.

[8] 415 U.S. 724, 738 (1974). *See also* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 175 (1979) (invalidating a ballot access requirement whereby a new party or independent candidate running for mayor

registered voters who voted in the primary election to sign an independent candidate's petition.[9] In addition, the law prohibited an independent candidate from ballot access if the candidate voted in the preceding primary or had a registered affiliation with a political party "within one year prior to the immediately preceding primary."[10] According to the Court in *Storer*, "to comply with the First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot."[11] Acknowledging that "no litmus-paper test" exists for determining which requirements pass constitutional muster, the Court emphasized that is "very much a matter of 'consider[ing] the facts and circumstances behind the law, the interest which the State claims to be protecting, and the interest of those who are disadvantaged by the classification.'"[12]

In the 1997 case *Timmons v. Twin Cities Area New Party*, the Supreme Court announced that when evaluating whether a state election law comports with the First and Fourteenth Amendments, courts will weigh the "'character and magnitude' of the burden" imposed by the restrictions against the government's asserted interests, considering "the extent to which the State's concerns make the burden necessary."[13] In *Timmons*, the Court held that if ballot access requirements impose only "reasonable, nondiscriminatory restrictions" on ballot access, they will trigger a "less exacting review" whereby "important regulatory interests" asserted by the state will typicially be sufficient "to justify 'reasonable, nondiscriminatory restrictions.'"[14] However, if restrictions are considered to be "severe," the Court held that they "must be narrowly tailored and advance a compelling state interest."[15]

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would need to obtain "substantially more signatures" than a candidate would need for a statewide office). "The signature requirements for independent candidates and new political parties seeking offices in Chicago are plainly not the least restrictive means of protecting the State's objectives." *Id.* at 186; Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974) (invalidating, under the First and Fourteenth Amendments, a ballot access requirement prohibiting the names of candidates affiliated with new political parties from appearing on the ballot until filing an affidavit indicating that its officers did not advocate violent government overthrow). In *Whitcomb*, Justice Lewis Powell wrote a concurrence, joined by Chief Justice Warren Burger, and Justices Harry Blackmun and William Rehnquist, concurring in the result, but arguing that "no colorable justification has been offered for placing on appellants burdens not imposed on the two established parties. It follows that the appellees' discriminatory application of the Indiana statute denied appellants equal protection under the Fourteenth Amendment." *Id.* at 451–52 (Powell, J., concurring).

[9] *See Storer*, 415 U.S. at 739.

[10] *Id.* at 726.

[11] *Id.* at 746.

[12] 415 U.S. at 730 (quoting Williams v. Rhodes, 393 U.S. 23, 30 (1968); Dunn v. Blumstein, 405 U.S. 330, 335 (1972)). *See also* Munro v. Socialist Workers Party, 479 U.S. 189, 199 (1986) (determining that a state may limit access to the general election ballot to candidates who received at least 1% of the primary votes cast for the particular office); Am. Party of Tex. v. White, 415 U.S. 767,795 (1974) (upholding, against an equal protection challenge, a state ballot access law requiring, among other things, that to appear on the general election ballot, a new political party must meet certain requirements).

[13] 520 U.S. 351, 358 (1997) (citing Burdick v. Takushi, 504 U.S. 428, 434 (1992) quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)). In *Anderson v. Celebrezze*, the Court noted "[i]n this case, we base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis. We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment. These cases, applying the 'fundamental rights' strand of equal protection analysis, have identified the First and Fourteenth Amendment rights implicated by restrictions on the eligibility of voters and candidates, and have considered the degree to which the State's restrictions further legitimate state interests." 460 U.S. at 786, n. 7 (citing, e.g., Williams v. Rhodes, 393 U.S. 23 (1968); Bullock v. Carter, 405 U.S. 134 (1972); Lubin v. Panish, 415 U.S. 709 (1974); Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 175 (1979)).

[14] *Timmons*, 520 U.S. at 358.

[15] *Id.*

Amdt14.S1.8.7 Non-Race Based Classifications

Amdt14.S1.8.7.1 Overview of Non-Race Based Classifications

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Toward the end of the Warren Court, there emerged a trend to treat classifications on the basis of nationality or alienage as suspect,[1] to accord sex classifications a somewhat heightened traditional review while hinting that a higher standard might be appropriate if such classifications passed lenient review,[2] and to decide cases concerning statutory and administrative treatments of children born out of wedlock inconsistently.[3] Language in a number of opinions appeared to suggest that poverty was a suspect condition, so that treating the poor adversely might call for heightened equal protection review.[4]

However, in a major evaluation of equal protection analysis early in this period, the Court reaffirmed a two-tier approach, determining that where the interests involved that did not occasion strict scrutiny, the Court would decide the case on minimum rationality standards. Justice Lewis Powell, writing for the Court in *San Antonio School Dist. v. Rodriguez*,[5] decisively rejected the contention that a de facto wealth classification, with an adverse impact on the poor, was either a suspect classification or merited some scrutiny other than the traditional basis,[6] a holding that has several times been strongly reaffirmed by the Court.[7] But the Court's rejection of some form of intermediate scrutiny did not long survive.

Without extended consideration of the issue of standards, the Court more recently adopted an intermediate level of scrutiny, perhaps one encompassing several degrees of intermediate scrutiny. Thus, gender classifications must, in order to withstand constitutional challenge, "serve important governmental objectives and must be substantially related to achievement of those objectives."[8] And classifications that disadvantage persons born out of wedlock are

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[1] Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

[2] Reed v. Reed, 404 U.S. 71 (1971); for the hint, *see* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972).

[3] *See* Levy v. Louisiana, 391 U.S. 68 (1968) (strict review); Labine v. Vincent, 401 U.S. 532 (1971) (lenient review); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (modified strict review).

[4] *Cf.* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969); Bullock v. Carter, 405 U.S. 134 (1972). *See* Shapiro v. Thompson, 394 U.S. 618, 658–59 (1969) (Harlan, J., dissenting). *But cf.* Lindsey v. Normet, 405 U.S. 56 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

[5] San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[6] 411 U.S. at 44–45. The Court asserted that only when there is an absolute deprivation of some right or interest because of inability to pay will there be strict scrutiny. *Id.* at 20.

[7] *E.g.*, United States v. Kras, 409 U.S. 434 (1973); Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

[8] Craig v. Boren, 429 U.S. 190, 197 (1976). Justice Lewis Powell noted that he agreed the precedents made clear that gender classifications are subjected to more critical examination than when "fundamental" rights and "suspect classes" are absent, *id.* at 210 (concurring), and added: "As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the 'two-tier' approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach—with its narrowly limited 'upper tier'—now has substantial precedential support. As has been true of *Reed* and its progeny, our decision today will be viewed by some as a 'middle-tier' approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor

subject to a similar though less exacting scrutiny of purpose and fit.[9] This period also saw a withdrawal of the Court from the principle that alienage is always a suspect classification, so that some discriminations against aliens based on the nature of the political order, rather than economics or social interests, need pass only the lenient review standard.[10]

The Court has so far resisted further expansion of classifications that must be justified by a standard more stringent than rational basis. For example, the Court has held that age classifications are neither suspect nor entitled to intermediate scrutiny.[11] Although the Court resists the creation of new suspect or "quasi-suspect" classifications, it may still, on occasion, apply the *Royster Guano* rather than the *Lindsley* standard of rationality.[12]

Amdt14.S1.8.7.2 Alienage Classification

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

An alien, whether present lawfully, unlawfully, temporarily, or permanently, is a "person" within the meaning of the Equal Protection Clause and receives its protection.[1] One of the

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compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases." *Id.* at 210, n.*. Justice Stevens wrote that in his view the two-tiered analysis does not describe a method of deciding cases "but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion." *Id.* at 211, 212. Chief Justice Warren Burger and Justice William Rehnquist would employ the rational basis test for gender classification. *Id.* at 215, 217 (dissenting). Occasionally, because of the particular subject matter, the Court has appeared to apply a rational basis standard in fact if not in doctrine, *E.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (military); Michael M. v. Superior Court, 450 U.S. 464 (1981) (application of statutory rape prohibition to boys but not to girls). Four Justices in *Frontiero v. Richardson,* 411 U.S. 677, 684–87 (1973), were prepared to find sex a suspect classification, and in *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 724 n.9 (1982), the Court appeared to leave open the possibility that at least some sex classifications may be deemed suspect.

[9] Mills v. Habluetzel, 456 U.S. 91, 99 (1982); Parham v. Hughes, 441 U.S. 347 (1979); Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977). In *Mathews v. Lucas,* 427 U.S. 495, 506 (1976), the Court commented that discrimination against children born out of wedlock had not historically "approached the severity or pervasiveness" of discrimination against women and Black people. *Lucas* sustained a statutory scheme virtually identical to the one struck down in *Califano v. Goldfarb,* 430 U.S. 199 (1977), except that the latter involved sex while the former involved a classification generally based on whether a child was born out of wedlock.

[10] Applying strict scrutiny, *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); Nyquist v. Mauclet, 432 U.S. 1 (1977). Applying lenient scrutiny in cases involving restrictions on alien entry into the political community, *see* Foley v. Connelie, 435 U.S. 291 (1978); Ambach v. Norwick, 441 U.S. 68 (1979); Cabell v. Chavez-Salido, 454 U.S. 432 (1982). *See also* Plyler v. Doe, 457 U.S. 202 (1982).

[11] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (upholding mandatory retirement at age 50 for state police); Vance v. Bradley, 440 U.S. 93 (1979) (mandatory retirement at age 60 for foreign service officers); Gregory v. Ashcroft, 501 U.S. 452 (1991) (mandatory retirement at age seventy for state judges). *See also* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985) (holding that a lower court erred in holding that intellectual disability was a quasi-suspect classification meriting "a more exacting standard of judicial review than is normally accorded economic and social legislation").

[12] City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); *see* discussion, *supra*.

[1] Plyler v. Doe, 457 U.S. 202, 210–16 (1982) (emphasizing that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments"); Graham v. Richardson, 403 U.S. 365, 371 (1971); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); *see also* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

earliest equal protection decisions, *Yick Wo v. Hopkins*,[2] involved the constitutionality of a municipal ordinance that granted officials absolute and unrestrained authority to grant licenses for laundries.[3] The Supreme Court found the officials were employing their authority to deny permission to resident Chinese aliens.[4] The Court struck down the facially neutral city ordinance as an equal protection violation, stating that the distinction was based on "no reason . . . except hostility to the race and nationality. . . ."[5]

In many subsequent cases after *Yick Wo* until 1948, the Court allowed less favorable treatment of aliens whenever the alienage classification related to a "special public interest."[6] In particular, the Court upheld state laws forbidding aliens from taking possession of natural resources, citing a state's significant legitimate interest in reserving use of these resources for its citizens.[7] The Court also sustained laws prohibiting the ownership of land by aliens and the indirect control of lands by aliens.[8] By contrast, in *Truax v. Reich*,[9] the Court struck down an Arizona law that required employers with more than five employees to hire at least 80% qualified voters or native-born citizens.[10] According to the Court, "No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment."[11]

The Court eroded the "special interest" doctrine in the 1948 decision *Takahashi v. Fish & Game Commission*,[12] which involved a challenge brought by a Japanese alien (then ineligible for U.S. citizenship under federal law) to a state statute barring issuance of commercial fishing licenses to persons "ineligible to citizenship."[13] The Court struck down the California law under the Fourteenth Amendment, holding that "'ownership' [of fish] is inadequate to justify California in excluding any or all aliens who are lawful residents of the state from making a living by fishing in the ocean off its shore while permitting all others to do so."[14] Writing for the

[2] 118 U.S. 356 (1886).

[3] *Id.* at 367–68.

[4] *Id.* at 374.

[5] *Id.*

[6] Heim v. McCall, 239 U.S. 175, 194 (1915) (upholding New York law that prohibited the employment of aliens on public works contracts for the construction of subways); Crane v. New York, 239 U.S. 195, 198 (1915) (affirming New York law that made it a crime to employ aliens on public works contracts).

[7] *See* Patsone v. Pennsylvania, 232 U.S. 138 (1914) (killing of wild game); McCready v. Viriginia, 94 U.S. 391, 396 (1876) (planting of oysters).

[8] Terrace v. Thomason, 263 U.S. 197, 217 (1923) (finding that aliens were distinguishable as to land ownership and use for reasons other than hostility to race); Porterfield v. Webb, 263 U.S. 225, 232–33 (1923) (sustaining California statute prohibiting the use of land by 'ineligible' aliens); Webb v. O'Brien, 263 U.S. 313, 322 (1923) (validating law prohibiting food crop contracts with aliens); Frick v. Webb, 263 U.S. 326, 334 (1923) (approving of law restricting transfer to aliens of shares of a land owning corporation).

[9] 239 U.S. 33 (1915).

[10] *Id.* at 40–43. The Court also extended the "special public interest" doctrine to exclude aliens from receiving occupational licenses. *See* Clarke v. Deckebach, 274 U.S. 392, 396–97 (1927) (ruling that states could prevent aliens from being licensed to operate pool halls).

[11] *Truax*, 239 U.S. at 43. The Court partially relied on preemption principles, citing the federal government's authority to control immigration. The Court stated that "[t]he assertion of an authority to deny to aliens the opportunity to earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode." *Id.* at 42.

[12] 334 U.S. 410 (1948).

[13] *Id.* at 413–14.

[14] *Id.* at 421. The *Takahashi* decision was preceded by *Oyama v. California,* 332 U.S. 633 (1948), in which the majority seemingly questioned in dicta a distinction between citizens and aliens in the application of a land law under the Fourteenth Amendment, but ultimately declined to fully address the equal protection arguments. *See id.* at 646–47. Justice Hugo Black concurred, and would have decided the case "on the broader grounds that the basic provisions of the California Alien Land Law violate the equal protection clause of the Fourteenth Amendment and

Court, Justice Hugo Black reasoned that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."[15]

The Court began applying a more explicitly rigorous standard of review to alienage classification statutes in the 1970s. In the 1971 decision *Graham v. Richardson*,[16] the Supreme Court struck down state statutes that either wholly disqualified resident aliens for welfare assistance or imposed a lengthy durational residency requirement on eligibility.[17] The Court announced that it would apply strict scrutiny to alienage classifications, reasoning that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close scrutiny."[18]

Other decisions applying strict scrutiny soon followed. In the 1973 decision *Sugarman v. Dougall*,[19] the Court voided a state law making citizenship a requirement for any position in the competitive class of a state civil service system.[20] According to the Court, a state's power "to preserve the basic conception of a political community" enables it to prescribe the qualifications of its officers and voters,[21] and this power would extend "to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government."[22] However, a flat ban on alien employees for much of the state's career public service, including both policy-making and nonpolicy-making jobs, ran afoul of the requirement that, in achieving a valid interest through the use of a suspect classification, the state must employ means that are precisely drawn in light of the valid purpose.[23] In *In re Griffiths*,[24] the Court struck down a state law that excluded aliens from being licensed as attorneys.[25] The Court reaffirmed that strict scrutiny was the proper test for distinctions based on alienage and reasoned that it was impermissible under the Fourteenth Amendment for states to require citizenship as a condition of practicing law.[26] Likewise, the Court in *Examining Board v. Flores de Otero*[27] invalidated a Puerto Rico

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conflict with federal laws and treaties governing the immigration of aliens and their rights after arrival in this country." *Id.* at 647 (Black, J., concurring, joined by Douglas, J.).

[15] *Takahashi*, 334 U.S. at 420. As in *Truax*, the Court in part relied upon principles of preemption, explaining that "[s]tate Laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with the constitutionally derived power to regulate immigration." *Id.* at 419.

[16] 403 U.S. 365 (1971).

[17] *Id.* at 372.

[18] *Id.* at 371–72. Citing *Takahashi*, the *Graham* court also held that the law was invalid because it interfered with the federal government's exclusive authority over immigration. *Id.* at 378 (affirming that "state laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to Federal Government"). In other words, once the federal government allows an alien to enter the United States, a state cannot discriminate against those present.

[19] 413 U.S. 634 (1973).

[20] *Id.* at 646.

[21] *Id.* at 647–49.

[22] *Id.* at 647.

[23] *Id.* at 646–47. The majority held the "special public interest" doctrine had no applicability in this case, but it did not invalidate the doctrine as a general matter. *Id.* at 643–45. In his dissenting opinion, Justice William Rehnquist argued that the proper inquiry was "whether any rational justification exists for prohibiting aliens from employment in the competitive civil service and from admission to a state bar," and would have rejected the notion of alienage as a suspect classification triggering close judicial scrutiny on the basis that the Fourteenth Amendment was intended "to prohibit states from invidiously discriminating by reason of race." *Id.* at 649, 658 (Rehnquist, J., dissenting).

[24] 413 U.S. 717 (1973).

[25] *Id.* at 729.

[26] *Id.* at 721–22.

[27] 426 U.S. 572 (1976).

statute that barred licensing aliens to practice engineering.[28] Additionally, in *Nyquist v. Mauclet*,[29] the Supreme Court applied strict scrutiny to invalidate a New York law that restricted the receipt of scholarships and similar financial support to U.S. citizens, those who had applied for citizenship, and those who declared an intent to apply for citizenship as soon as they became eligible.[30]

In the following Term, however, the Supreme Court held that not every exclusion of aliens was subject to strict scrutiny, "because to do so would 'obliterate all the distinctions between citizens and aliens, and thus deprecate the historic values of citizenship.'"[31] Accordingly, the Court has carved out an exception and applies rational basis review to alienage classifications related to self-government and the democratic process. In *Foley v. Connelie*,[32] the Court upheld a state law that excluded aliens from appointment as members of the state police force.[33] The Court reasoned that the police function discharged "a most fundamental obligation of government to its constituency" and necessarily cloaked the police with substantial discretionary powers.[34] Continuing to enlarge the exception, the Court in *Ambach v. Norwick*[35] sustained a state law barring resident aliens who had not manifested an intention to apply for citizenship from employment as public school teachers.[36] The Court applied *Foley*, declaring that rational basis review was appropriate.[37] Teachers, the Court observed, perform a task that "go[es] to the heart of representative government" because of the role of public education in cultivating civic values, as well as the responsibility and discretion they have in fulfilling that role.[38]

Then, in *Cabelle v. Chavez-Salido*,[39] the Supreme Court sustained a state law imposing a citizenship requirement upon all positions designated as "peace officers" as it applied to employment as a probation officer.[40] Applying rational basis review, the Court reasoned that probation officers both serve as law enforcement and perform an educational function for those they supervise.[41] In *Bernal v. Fainter*,[42] however, the Supreme Court invalidated a Texas law that required U.S. citizenship to become a notary public.[43] The Court declined to apply the exception and instead reviewed the law under strict scrutiny. The Court distinguished notaries

[28] *Id.* at 601. Because the statute was enacted by Puerto Rico, the Court considered whether the Fifth or Fourteenth Amendments should govern, but ultimately deemed the question immaterial as the same result would be achieved under either amendment. *Id.*

[29] 432 U.S. 1 (1977).

[30] *Id.* at 7–12.

[31] Foley v. Connelie, 435 U.S. 291, 295 (1978).

[32] *Foley*, 436 U.S. 291

[33] *Id.* at 299–300.

[34] *Id.* at 297.

[35] 441 U.S. 68 (1979).

[36] *Id.* at 80–81

[37] *Id.* at 74–75.

[38] *Id.* at 76–80 (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)) (internal quotation marks omitted).

[39] 454 U.S. 432 (1982).

[40] *Id.* at 443–44. In a dissenting opinion, Justice Harry Blackmun would have applied strict scrutiny review instead of rational basis review. *Id.* at 454. He stated, "[A] state statute that bars aliens from political positions lying squarely within the political community nevertheless violates the Equal Protection Clause if it excludes aliens from other public jobs in an unthinking or haphazard manner. The statutes at issue here represent just such an unthinking and haphazard exercise of state power." *Id.*

[41] *Id.* at 445–46 ("[T]hey, like the state troopers in *Foley*, sufficiently partake of the sovereign's power to exercise coercive force over the individual that they may be limited to citizens.").

[42] 467 U.S. 216 (1984).

[43] *Id.* at 225.

from employees who "are invested either with policymaking responsibility or broad discretion in the execution of public policy that requires the routine exercise of authority over individuals."[44]

Thus, the Court has so far made three distinctions when analyzing equal protection challenges based on alienage. First, it has disapproved of the earlier line of cases that allowed aliens to be treated in a less favorable manner whenever the classification is based on a "special public interest," and now would foreclose attempts by the states to retain certain economic benefits, primarily employment and opportunities for livelihood, exclusively for citizens. Second, subject to a limited exception, classifications with an adverse impact on aliens will generally be subject to strict scrutiny and usually fail. Third, some alienage classifications related to self-government and the democratic process need only satisfy rational basis review, but typically only when those classifications relate to positions that involve policy-making responsibility or the exercise of authority over others.

The Supreme Court has addressed one instance involving the application of the Equal Protection Clause in the more specific context of unlawfully present aliens. In *Plyler v. Doe*,[45] the Court considered a Texas education law that withheld from local school districts any state funds for the education of children not "legally admitted" to the country and authorized local school districts to deny enrollment to these children.[46] The Court did not explicitly articulate a level of scrutiny but rejected the application of strict scrutiny, stating that "[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a constitutional irrelevancy. Nor is education a fundamental right."[47] Instead, the Court appeared to apply intermediate scrutiny in evaluating discrimination against unlawfully present alien children in regard to education.[48] The Court held the Texas law unconstitutional under the Equal Protection Clause, rejecting Texas's purported interests in preserving limited resources for its lawful residents, deterring an influx of unlawfully present aliens, avoiding the special burden imposed by these children, and serving children who were more likely to remain in the state and contribute to its welfare.[49] The total denial of an education, according to the Court, would stamp the children with an "enduring disability" that would permanently harm both them and the state.[50]

Amdt14.S1.8.7.3 Out of Wedlock Births

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or*

[44] *Id.* at 226.

[45] 457 U.S. 202 (1982).

[46] *Id.* at 205.

[47] *Id.* at 223.

[48] *See id.* at 223–224 (explaining that "the discrimination contained in [the challenged law] can hardly be considered rational unless it furthers some substantial goal of the state"); *see also id.* at 237 (Powell, J, concurring) (stating that "[o]ur review in a case such as these is properly heightened," and citing to *Craig v. Boren*, 429 U.S. 1980 (1976), which articulated the intermediate scrutiny standard). *But see id.* at 252–53 (Burger, C.J., dissenting) (arguing that rational basis review and not heightened scrutiny was appropriate because there was no suspect classification and no fundamental right).

[49] *Id.* at 227–30.

[50] *Id.* at 230 (remarking that "[i]t is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime"); *see also id.* at 238–39 (Powell, J., concurring) (emphasizing the blamelessness of the children who were being denied an education because of the misconduct of their parents).

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

After wrestling in a number of cases with the question of the permissibility of governmental classifications disadvantaging persons born out of wedlock and the standard for determining which classifications are sustainable, the Court arrived at a standard difficult to state and even more difficult to apply.[1] Although the Court has determined that a person's status as having been born out of wedlock "is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations," the analogy is "not sufficient to require 'our most exacting scrutiny.'" The scrutiny to which it is entitled is intermediate, "not a toothless [scrutiny]," but somewhere between that accorded race and that accorded ordinary economic classifications. Basically, the standard requires a determination of a legitimate legislative aim and a careful review of how well the classification serves, or "fits," the aim.[2] The common rationale of all the cases involving state action that distinguishes among people based on whether they were born out of wedlock is not clear, is in many respects not wholly consistent,[3] but the theme that seems to be imposed on them by the more recent cases is that so long as the challenged statute does not so structure its conferral of rights, benefits, or detriments so that some children born out of wedlock who would otherwise qualify in terms of the statute's legitimate purposes are disabled from participation, the imposition of greater burdens upon children born out of wedlock or some classes of children born out of wedlock (for example, those not acknowledged by their fathers) than upon children born to married parents is permissible.[4]

The issue of intestate succession rights for children born out of wedlock has divided the Court over the entire period. At first adverting to the broad power of the states over descent of

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[1] The first cases set the stage for the lack of consistency. *Compare* Levy v. Louisiana, 391 U.S. 68 (1968), *and* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), invalidating laws that precluded wrongful death actions in cases involving the child or the mother when the child was born out of wedlock, in which scrutiny was strict, *with* Labine v. Vincent, 401 U.S. 532 (1971), involving intestate succession, in which scrutiny was rational basis, *and* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), involving a workers' compensation statute distinguishing between unacknowledged children born out of wedlock and those born to wedded parents, in which scrutiny was intermediate.

[2] Mathews v. Lucas, 427 U.S. 495, 503–06 (1976); Trimble v. Gordon, 430 U.S. 762, 766–67 (1977); Lalli v. Lalli, 439 U.S. 259, 265 (1978). Scrutiny in previous cases had ranged from negligible, Labine v. Vincent, 401 U.S. 532 (1971), to something approaching strictness, Jiminez v. Weinberger, 417 U.S. 628, 631–632 (1974). *Mathews* itself illustrates the uncertainty of statement, suggesting at one point that the *Labine* standard may be appropriate, 401 U.S. at 506, and at another that the standard appropriate to sex classifications is to be used, *id.* at 510, while observing a few pages earlier that classifications based on whether a person was born out of wedlock are entitled to less exacting scrutiny than either race *or* sex. *Id.* at 506. *Trimble* settles on intermediate scrutiny but does not assess the relationship between its standard and the sex classification standard. *See* Parham v. Hughes, 441 U.S. 347 (1979), and Caban v. Mohammed, 441 U.S. 380 (1979) (cases involving classifications based both on the sex of a parent and whether a child was born out of wedlock).

[3] The major inconsistency arises from three 5-4 decisions. *Labine v. Vincent,* 401 U.S. 532 (1971), was largely overruled by *Trimble v. Gordon,* 430 U.S. 762 (1977), which itself was substantially limited by *Lalli v. Lalli,* 439 U.S. 259 (1978). Justice Lewis Powell was the swing vote for different disposition of the latter two cases. Thus, while four Justices argued for stricter scrutiny and usually invalidation of such classifications, *Lalli v. Lalli*, 439 U.S. at 277 (Brennan, White, Marshall, and Stevens, JJ., dissenting), and four favor relaxed scrutiny and usually sustaining the classifications, *Trimble v. Gordon*, 430 U.S. at 776, 777 (Burger, C.J., and Stewart, Blackmun, and Rehnquist, JJ., dissenting), Justice Lewis Powell applied his own intermediate scrutiny and selectively voided and sustained. *See Lalli v. Lalli* (Powell, J., plurality opinion).

[4] A classification that absolutely distinguishes between children born to married parents and children born to unmarried parents is not alone subject to such review; one that distinguishes among classes of children born out of wedlock (e.g., those children born out wedlock and whose parents did not intermarry or who were not acknowledged by their fathers) is also subject to it, Trimble v. Gordon, 430 U.S. 762, 774 (1977), as indeed are classifications based on other factors. *E.g.*, Nyquist v. Mauclet, 432 U.S. 1, 9 (1977) (alienage).

real property, the Court employed relaxed scrutiny to sustain a law denying children born out of wedlock the right to share equally with children born to married parents in the estate of their common father, who had acknowledged the children born out of wedlock (but not "legitimated" them) and who had died intestate.[5] *Labine* was strongly disapproved, however, and virtually overruled in *Trimble v. Gordon*,[6] which found an equal protection violation in a statute allowing children born out of wedlock to inherit by intestate succession from their mothers but from their fathers only if the father had "acknowledged" the child and the child had been "legitimated" by the marriage of the parents. The father in *Trimble* had not acknowledged his child, and had not married the mother, but a court had determined that he was in fact the father and had ordered that he pay child support. Carefully assessing the purposes asserted to be the basis of the statutory scheme, the Court found all but one to be impermissible or inapplicable and that one not served closely enough by the restriction. First, it was impermissible to attempt to influence the conduct of adults not to engage in illicit sexual activities by visiting the consequences upon the offspring.[7] Second, the assertion that the statute mirrored the assumed intent of decedents, in that, knowing of the statute's operation, they wold have acted to counteract it through a will or otherwise, was rejected as unproved and unlikely.[8] Third, the argument that the law presented no insurmountable barrier to children born out of wedlock inheriting since a decedent could have left a will, married the mother, or taken steps to "legitimate" the child, was rejected as inapposite.[9] Fourth, the statute did address a substantial problem, a permissible state interest, presented by the difficulties of proving paternity and avoiding spurious claims. However, the court thought the means adopted, total exclusion, did not approach the "fit" necessary between means and ends to survive the scrutiny appropriate to this classification. The state court was criticized for failing "to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of children born out of wedlock to intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws."[10] Because the state law did not follow a reasonable middle ground, it was invalidated.

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[5] Labine v. Vincent, 401 U.S. 532 (1971). *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 170 (1972), had confined the analysis of *Labine* to the area of state inheritance laws in expanding review of classifications based on whether a person was born out of wedlock.

[6] 430 U.S. 762 (1977). Chief Justice Warren Burger and Justices Potter Stewart, Harry Blackmun, and William Rehnquist dissented, finding the statute "constitutionally indistinguishable" from the one sustained in *Labine*. *Id.* at 776. Justice William Rehnquist also dissented separately. *Id.* at 777.

[7] 430 U.S. at 768–70. Although this purpose had been alluded to in *Labine v. Vincent,* 401 U.S. 532, 538 (1971), it was rejected as a justification in *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 173, 175 (1972). Visiting consequences upon the parent appears to be permissible. Parham v. Hughes, 441 U.S. 347, 352–53 (1979).

[8] Trimble v. Gordon, 430 U.S. 762, 774–76 (1977). The Court cited the failure of the state court to rely on this purpose and its own examination of the statute.

[9] 430 U.S. at 773–74. This justification had been prominent in *Labine v. Vincent,* 401 U.S. 532, 539 (1971), and its absence had been deemed critical in *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 170–71 (1972). The *Trimble* Court thought this approach "somewhat of an analytical anomaly" and disapproved it. However, the degree to which one could conform to the statute's requirements and the reasonableness of those requirements in relation to a legitimate purpose are prominent in Justice Lewis Powell's reasoning in subsequent cases. Lalli v. Lalli, 439 U.S. 259, 266–74 (1978); Parham v. Hughes, 441 U.S. 347, 359 (1979) (concurring). *See also* Nyquist v. Mauclet, 432 U.S. 1 (1977) (alienage); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 n.8 (1982) (sex); *c.f. id.* at 736 (Powell, J., dissenting).

[10] Trimble v. Gordon, 430 U.S. 762, 770–73 (1977). The result is in effect a balancing one, the means-ends relationship must be a substantial one in terms of the advantages of the classification as compared to the harms of the classification means. Justice William Rehnquist's dissent is especially critical of this approach. *Id.* at 777, 781–86. Also not interfering with orderly administration of estates is application of *Trimble* in a probate proceeding ongoing at the time *Trimble* was decided; the fact that the death had occurred prior to *Trimble* was irrelevant. Reed v. Campbell, 476 U.S. 852 (1986).

Amdt14.S1.8.7.3
Out of Wedlock Births

A reasonable middle ground was discerned, at least by Justice Lewis Powell, in *Lalli v. Lalli*,[11] concerning a statute that permitted children born to married parents to inherit automatically from both their parents, while children born out of wedlock generally could inherit automatically only from their mothers, and could inherit from their intestate fathers only if a court of competent jurisdiction had, during the father's lifetime, entered an order declaring paternity. The child tendered evidence of paternity, including a notarized document in which the putative father, in consenting to his marriage, referred to him as "my son" and several affidavits by persons who stated that the elder Lalli had openly and frequently acknowledged that the younger Lalli was his child. In the prevailing view, the single requirement of entry of a court order during the father's lifetime declaring the child as his met the "middle ground" requirement of *Trimble*; it was addressed closely and precisely to the substantial state interest of seeing to the orderly disposition of property at death by establishing proof of paternity of children born out of wedlock and avoiding spurious claims against intestate estates. To be sure, some children born out of wedlock who were unquestionably established as children of the deceased would be disqualified because of failure of compliance, but individual fairness is not the test. The test rather is whether the requirement is closely enough related to the interests served to meet the standard of rationality imposed. Also, although the state's interest could no doubt have been served by permitting other kinds of proof, that too is not the test of the statute's validity. Hence, the balancing necessitated by the Court's promulgation of standards in such cases caused it to come to different results on closely related fact patterns, making predictability quite difficult but perhaps manageable.[12]

The Court's difficulty in arriving at predictable results has extended outside the area of descent of property. Thus, a Texas child support law affording children born to married parents a right to judicial action to obtain support from their fathers while not affording the right to children born out of wedlock denied the latter equal protection. "[A] State may not invidiously discriminate against [children born out of wedlock] by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers *there is no constitutionally sufficient justification* for denying such an essential right to a child simply because its natural father has not married its mother."[13]

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[11] 439 U.S. 259 (1978). The four *Trimble* dissenters joined Justice Lewis Powell in the result, although only two joined his opinion. Justices Harry Blackmun and William Rehnquist concurred because they thought *Trimble* wrongly decided and ripe for overruling. *Id.* at 276. The four dissenters, who had joined the *Trimble* majority with Justice Lewis Lewis Powell, thought the two cases were indistinguishable. *Id.* at 277.

[12] Illustrating the difficulty are two cases in which the fathers of children born out of wedlock challenged statutes treating them differently than mothers of such children were treated. In *Parham v. Hughes,* 441 U.S. 347 (1979), the majority viewed the distinction as a gender-based one rather than one based on whether a child was born out of wedlock and sustained a bar to a wrongful death action by the father of a child born out of wedlock who had not "legitimated" him; in *Caban v. Mohammed,* 441 U.S. 380 (1979), again viewing the distinction as a gender-based one, the majority voided a state law permitting the mother but not the father of a child born out of wedlock to block his adoption by refusing to consent. Both decisions were 5-4.

[13] Gomez v. Perez, 409 U.S. 535, 538 (1978) (emphasis added). Following the decision, Texas authorized children born out of wedlock to obtain support from their fathers. But the legislature required as a first step that paternity must be judicially determined, and imposed a limitations period within which suit must be brought of one year from birth of the child. If suit is not brought within that period the child could never obtain support at any age from his father. No limitation was imposed on the opportunity of a natural child to seek support, up to age eighteen. In *Mills v. Habluetzel,* 456 U.S. 91 (1982), the Court invalidated the one-year limitation. Although a state has an interest in avoiding stale or fraudulent claims, the limit must not be so brief as to deny such children a reasonable opportunity to show paternity. Similarly, a two-year statute of limitations on paternity and support actions was held to deny equal protection to certain children born out of wedlock in *Pickett v. Brown,* 462 U.S. 1 (1983), and a six-year limit was struck down in *Clark v. Jeter,* 486 U.S. 456 (1988). In both cases the Court pointed to the fact that increasingly sophisticated genetic tests are minimizing the "lurking problems with respect to proof of paternity" referred to in *Gomez*, 409 U.S. at

Similarly, the Court struck down a federal Social Security provision that made eligible for benefits, because of an insured parent's disability, all children born to that parent while he or she was married as well as those children born out of wedlock to that parent who were capable of inheriting personal property from the wage-earning parent under state intestacy law; children who were deemed to be born out of wedlock only because of a nonobvious defect in their parents' marriage; and children born out of wedlock who had been "legitimated" in accordance with state law, but that made other children born out of wedlock eligible only if they were born prior to the onset of disability and if they were dependent upon the parent, or lived with the parent, prior to the onset of disability. The Court deemed the purpose of the benefits to be to aid all children and rejected the argument that the burden on children born out of wedlock was necessary to avoid fraud.[14]

However, in a second case, an almost identical program, providing benefits to children of a deceased insured, was sustained because its purpose was found to be to give benefits to children who were dependent upon the deceased parent and the classifications served that purpose. Presumed dependent were all children born to the deceased and his or her spouse while he or she was married, as well as those children born out of wedlock who were able to inherit under state intestacy laws, who were deemed to be born out of wedlock only because of the technical invalidity of the parent's marriage, who had been acknowledged in writing by the father, who had been declared to be the father's by a court decision, or who had bwho held entitled to the father's support by a court. Children born out of wedlock that were not covered by these presumptions had to establish that they were living with the insured parent or were being supported by him when the parent died. According to the Court, all the presumptions constituted an administrative convenience, which was a permissible device because those children born out of wedlock who were entitled to benefits because they were in fact dependent would receive benefits upon proof of the fact, and it was irrelevant that other children not dependent in fact also received benefits.[15]

Amdt14.S1.8.8 Gender-Based Classifications

Amdt14.S1.8.8.1 Doctrine on Gender Classifications from 1870s to 1960s

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or*

538. Also, the state's interest in imposing the two-year limit was undercut by exceptions (e.g., for children born out of wedlock receiving public assistance), and by different treatment for minors generally; similarly, the importance of imposing a six-year limit was belied by that state's more recent enactment of a non-retroactive eighteen-year limit for paternity and support actions.

[14] Jiminez v. Weinberger, 417 U.S. 628 (1974). *But cf.* Califano v. Boles, 443 U.S. 282 (1979). *See also* New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (limiting welfare assistance to households in which parents are ceremonially married and they have at least one child who is born to both parents while they were married; born to one parent and adopted by the other; or adopted by both denied children born out of wedlock equal protection); Richardson v. Davis, 409 U.S. 1069 (1972), *aff'g* 342 F. Supp. 588 (D. Conn.) (three-judge court), and Richardson v. Griffin, 409 U.S. 1069 (1972), *aff'g* 346 F. Supp. 1226 (D. Md.) (three-judge court) (Social Security provision entitling certain children born out of wedlock to monthly benefit payments only to extent that payments to widow and children born to the deceased parent while he or she was married do not exhaust benefits allowed by law denies children born out of wedlock equal protection).

[15] Mathews v. Lucas, 427 U.S. 495 (1976). It can be seen that the only difference between *Jiminez* and *Lucas* is that in the former the Court viewed the benefits as owing to all children and not just to dependents, while in the latter the benefits were viewed as owing only to dependents and not to all children. But it is not clear that in either case the purpose determined to underlie the provision of benefits was compelled by either statutory language or legislative history. For a particularly good illustration of the difference such a determination of purpose can make and the way the majority and dissent in a 5-4 decision read the purpose differently, *see* Califano v. Boles, 443 U.S. 282 (1979).

Amdt14.S1.8.8.1
Doctrine on Gender Classifications from 1870s to 1960s

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Shortly after ratification of the Fourteenth Amendment, the refusal of Illinois to license a woman to practice law was challenged before the Supreme Court, and the Court rejected the challenge in tones that prevailed well into the twentieth century. For example, the Court stated in 1873 that "[t]he civil law, as well as nature itself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."[1] On the same premise, a statute restricting the franchise to men was sustained.[2]

The greater number of cases involved legislation aimed to protect women from oppressive working conditions, as by prescribing maximum hours[3] or minimum wages[4] or by restricting some of the things women could be required to do.[5] A 1961 decision upheld a state law that required jury service of men but that gave women the option of serving or not. "We cannot say that it is constitutionally impermissible for a State acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities."[6] Another type of protective legislation for women that was sustained by the Court is that premised on protection of morals, as by forbidding the sale of liquor to women.[7] In a highly controversial ruling, the Court sustained a state law that forbade the licensing of any female bartender, except for the wives or daughters of male owners. The Court purported to view the law as one for the protection of the health and morals of women generally, with the exception being justified by the consideration that such women would be under the eyes of a protective male.[8]

A wide variety of sex discrimination by governmental and private parties, including sex discrimination in employment and even the protective labor legislation previously sustained, is now proscribed by federal law. In addition, federal law requires equal pay for equal work.[9]

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[1] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873).

[2] Minor v. Happersett, 88 U.S. (21 Wall) 162 (1874) (privileges and immunities).

[3] Muller v. Oregon, 208 U.S. 412 (1908); Dominion Hotel v. Arizona, 249 U.S. 265 (1919).

[4] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[5] *E.g.*, Radice v. New York, 264 U.S. 292 (1924) (prohibiting night work by women in restaurants). A similar restriction set a maximum weight that women could be required to lift.

[6] Hoyt v. Florida, 368 U.S. 57, 62 (1961).

[7] Cronin v. Adams, 192 U.S. 108 (1904).

[8] Goesaert v. Cleary, 335 U.S. 464 (1948).

[9] Thus, title VII of the Civil Rights Act of 1964, 80 Stat. 662, 42 U.S.C. §§ 2000e et seq., bans discrimination against either sex in employment. *See, e.g.*, Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971); Dothard v. Rawlinson, 433 U.S. 321 (1977); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); Arizona Governing Comm. for Tax Deferred Plans v. Norris, 463 U.S. 1073 (1983) (actuarially based lower monthly retirement benefits for women employees violates Title VII); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) ("hostile environment" sex harassment claim is actionable). Reversing rulings that pregnancy discrimination is not reached by the statutory bar on sex discrimination, General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), Congress enacted the Pregnancy Discrimination Act, Pub. L. No. 95-555 (1978), 92 Stat. 2076, amending 42 U.S.C. § 2000e. The Equal Pay Act, 77 Stat. 56 (1963), amending the Fair Labor Standards Act, 29 U.S.C. § 206(d), generally applies to wages paid for work requiring "equal skill, effort, and responsibility." *See* Corning Glass Works v.

Some states have followed suit.[10] While the proposed Equal Rights Amendment was before the states and ultimately failed to be ratified,[11] the Supreme Court undertook a major evaluation of sex classification doctrine, first applying a "heightened" traditional standard of review (with bite) to void a discrimination and then, after coming within a vote of making sex a suspect classification, settling upon an intermediate standard. These standards continue, with some uncertainties of application and some tendencies among the Justices both to lessen and to increase the burden of governmental justification of sex classifications.

Amdt14.S1.8.8.2 Doctrine on Gender Classifications During the 1970s

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

In *Reed v. Reed*,[1] the Court held invalid a state probate law that gave males preference over females when both were equally entitled to administer an estate. Because the statute "provides that different treatment be accorded to the applicants on the basis of their sex," Chief Justice Burger wrote, "it thus establishes a classification subject to scrutiny under the Equal Protection Clause." The Court proceeded to hold that under traditional equal protection standards—requiring a classification to be reasonable and not arbitrarily related to a lawful objective—the classification made was an arbitrary way to achieve the objective the state advanced in defense of the law, that is, to reduce the area of controversy between otherwise equally qualified applicants for administration. Thus, the Court used traditional analysis but the holding seems to go somewhat further to say that not all lawful interests of a state may be advanced by a classification based solely on sex.[2]

Amdt14.S1.8.8.3 General Approach to Gender Classifications

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

It is now established that sex classifications, in order to withstand equal protection scrutiny, "must serve important governmental objectives and must be substantially related to

Brennan, 417 U.S. 188 (1974). On the controversial issue of "comparable worth" and the interrelationship of title VII and the Equal Pay Act, *see* County of Washington v. Gunther, 452 U.S. 161 (1981).

[10] *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984) (state prohibition on gender discrimination in aspects of public accommodation, as applied to membership in a civic organization, is justified by compelling state interest).

[11] *See* Amdt14.S1.4.1 Overview of Incorporation of the Bill of Rights.

[1] 404 U.S. 71 (1971).

[2] 404 U.S. at 75–77. *Cf.* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972). A statute similar to that in *Reed* was before the Court in *Kirchberg v. Feenstra,* 450 U.S. 455 (1981) (invalidating statute giving husband unilateral right to dispose of jointly owned community property without wife's consent).

achievement of those objectives."[1] Thus, after several years in which sex distinctions were more often voided than sustained without a clear statement of the standard of review,[2] a majority of the Court has arrived at the intermediate standard that many had thought it was applying in any event.[3] The Court first examines the statutory or administrative scheme to determine if the purpose or objective is permissible and, if it is, whether it is important. Then, having ascertained the actual motivation of the classification, the Court engages in a balancing test to determine how well the classification serves the end and whether a less discriminatory one would serve that end without substantial loss to the government.[4]

Some sex distinctions were seen to be based solely upon "old notions," no longer valid if ever they were, about the respective roles of the sexes in society, and those distinctions failed to survive even traditional scrutiny. Thus, a state law defining the age of majority as eighteen for females and twenty-one for males, entitling the male child to support by his divorced father for three years longer than the female child, was deemed merely irrational, grounded as it was in the assumption of the male as the breadwinner, needing longer to prepare, and the female as suited for wife and mother.[5] Similarly, a state jury system that in effect excluded almost all

[1] Craig v. Boren, 429 U.S. 190, 197 (1976); Califano v. Goldfarb, 430 U.S. 199, 210–11 (1977) (plurality opinion); Califano v. Webster, 430 U.S. 313, 316–317 (1977); Orr v. Orr, 440 U.S. 268, 279 (1979); Caban v. Mohammed, 441 U.S. 380, 388 (1979); Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979); Califano v. Westcott, 443 U.S. 76, 85 (1979); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723–24 (1982). *But see* Michael M. v. Superior Court, 450 U.S. 464, 468–69 (1981) (plurality opinion); *id.* at 483 (Blackmun, J., concurring); Rostker v. Goldberg, 453 U.S. 57, 69–72 (1981). The test is the same whether women or men are disadvantaged by the classification, *Orr v. Orr*, 440 U.S. at 279; *Caban v. Mohammed*, 441 U.S. at 394; *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 724, although Justice William Rehnquist and Chief Justice Warren Burger strongly argued that when males are disadvantaged only the rational basis test is appropriate. *Craig v. Boren*, 429 U.S. at 217, 218–21; *Califano v. Goldfarb*, 430 U.S. at 224. That adoption of a standard has not eliminated difficulty in deciding such cases should be evident by perusal of the cases following.

[2] In *Frontiero v. Richardson,* 411 U.S. 677 (1973), four Justices were prepared to hold that sex classifications are inherently suspect and must therefore be subjected to strict scrutiny. *Id.* at 684–87 (Brennan, Douglas, White, and Marshall, JJ.). Three Justices, reaching the same result, thought the statute failed the traditional test and declined for the moment to consider whether sex was a suspect classification, finding that inappropriate while the Equal Rights Amendment was pending. *Id.* at 691 (Powell and Blackmun, JJ., and Burger, C.J.). Justice Potter Stewart found the statute void under traditional scrutiny and Justice William Rehnquist dissented. *Id.* at 691. In *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 724 n.9 (1982), Justice Sandra Day O'Connor for the Court expressly reserved decision whether a classification that survived intermediate scrutiny would be subject to strict scrutiny.

[3] Although their concurrences in *Craig v. Boren,* 429 U.S. 190, 210, 211 (1976), indicate some reticence about express reliance on intermediate scrutiny, Justices Lewis Powell and John Paul Stevens have since joined or written opinions stating the test and applying it. *E.g.*, Caban v. Mohammed, 441 U.S. 380, 388 (1979) (Powell, J., writing the opinion of the Court); Parham v. Hughes, 441 U.S. 347, 359 (1979) (Powell, J., concurring); Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (Stevens, J., concurring); *Caban v. Mohammed*, 441 U.S. at 401 (Stevens, J., dissenting). Chief Justice Warren Burger and Justice William Rehnquist had not clearly stated a test, although their deference to legislative judgment approaches the traditional scrutiny test. *But see Califano v. Westcott*, 443 U.S. at 93 (joining Court on substantive decision). *And cf.* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 734–35 (1982) (Blackmun, J., dissenting).

[4] The test is thus the same as is applied to classifications based on whether a person was born out of wedlock, although with apparently more rigor when sex is involved.

[5] Stanton v. Stanton, 421 U.S. 7 (1975). *See also* Stanton v. Stanton, 429 U.S. 501 (1977). Assumptions about the traditional roles of the sexes afford no basis for support of classifications under the intermediate scrutiny standard. *E.g.*, Orr v. Orr, 440 U.S. 268, 279–80 (1979); Parham v. Hughes, 441 U.S. 347, 355 (1979); Kirchberg v. Feenstra, 450 U.S. 455 (1981). Justice John Paul Stevens in particular was concerned whether legislative classifications by sex simply reflect traditional ways of thinking or are the result of a reasoned attempt to reach some neutral goal, *e.g.*, Califano v. Goldfarb, 430 U.S. 199, 222–23 (1977) (concurring), and he would sustain some otherwise impermissible distinctions if he found the legislative reasoning to approximate the latter approach. Caban v. Mohammed, 441 U.S. 380, 401 (1979) (dissenting).

women was deemed to be based upon an overbroad generalization about the role of women as a class in society, and the administrative convenience served could not justify it.[6]

Even when the negative "stereotype" that is evoked is that of a stereotypical male, the Court has evaluated this as potential gender discrimination. In *J. E. B. v. Alabama ex rel. T. B.*,[7] the Court addressed a paternity suit where men had been intentionally excluded from a jury through peremptory strikes. The Court rejected as unfounded the argument that men, as a class, would be more sympathetic to the defendant, the putative father. The Court also determined that gender-based exclusion of jurors would undermine the litigants' interest by tainting the proceedings, and in addition would harm the wrongfully excluded juror.

Assumptions about the relative positions of the sexes, however, are not without some basis in fact, and sex may sometimes be a reliable proxy for the characteristic, such as need, with which it is the legislature's actual intention to deal. But heightened scrutiny requires evidence of the existence of the distinguishing fact and its close correspondence with the condition for which sex stands as proxy. Thus, in the case that first expressly announced the intermediate scrutiny standard, the Court struck down a state statute that prohibited the sale of "non-intoxicating" 3.2 beer to males under twenty-one and to females under eighteen.[8] Accepting the argument that traffic safety was an important governmental objective, the Court emphasized that sex is an often inaccurate proxy for other, more germane classifications. Taking the statistics offered by the state as of value, while cautioning that statistical analysis is a "dubious" business that is in tension with the "normative philosophy that underlies the Equal Protection Clause," the Court thought the correlation between males and females arrested for drunk driving showed an unduly tenuous fit to allow the use of sex as a distinction.[9]

Invalidating an Alabama law imposing alimony obligations upon males but not upon females, the Court in *Orr v. Orr* acknowledged that assisting needy spouses was a legitimate and important governmental objective. Ordinarily, therefore, the Court would have considered whether sex was a sufficiently accurate proxy for dependency, and, if it found that it was, then it would have concluded that the classification based on sex had "a fair and substantial relation to the object of the legislation."[10] However, the Court observed that the state already conducted individualized hearings with respect to the need of the wife, so that with little if any additional burden needy males could be identified and helped. The use of the sex standard as a proxy, therefore, was not justified because it needlessly burdened needy men and advantaged financially secure women whose husbands were in need.[11]

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[6] Taylor v. Louisiana, 419 U.S. 522 (1975). The precise basis of the decision was the Sixth Amendment right to a representative cross section of the community, but the Court dealt with and disapproved the reasoning in *Hoyt v. Florida,* 368 U.S. 57 (1961), in which a similar jury selection process was upheld against due process and equal protection challenge.

[7] 511 U.S. 127 (1994).

[8] Craig v. Boren, 429 U.S. 190 (1976).

[9] 429 U.S. at 198, 199–200, 201–04.

[10] 440 U.S. 268, 281 (1979).

[11] 440 U.S. at 281–83. An administrative convenience justification was not available, therefore. *Id.* at 281 & n.12. Although such an argument has been accepted as a sufficient justification in at least some cases involving state action that distinguishes among people based on whether they were born out of wedlock, Mathews v. Lucas, 427 U.S. 495, 509 (1976), it has neither wholly been ruled out nor accepted in sex cases. In *Lucas*, 427 U.S. at 509–10, the Court interpreted *Frontiero v. Richardson,* 411 U.S. 677 (1973), as having required a showing at least that for every dollar lost to a recipient not meeting the general purpose qualification a dollar is saved in administrative expense. In *Wengler v. Druggists Mutual Ins. Co.,* 446 U.S. 142, 152 (1980), the Court said that "[i]t may be that there are levels of administrative convenience that will justify discriminations that are subject to heightened scrutiny . . . , but the requisite showing has not been made here by the mere claim that it would be inconvenient to individualize

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General Approach to Gender Classifications

Various forms of discrimination between unwed mothers and unwed fathers received different treatments based on the Court's perception of the justifications and presumptions underlying each. A New York law permitted the unwed mother but not the unwed father of a child born out of wedlock to block his adoption by withholding consent. Acting in the instance of one who acknowledged his parenthood and who had maintained a close relationship with his child over the years, the Court could discern no substantial relationship between the classification and some important state interest. Promotion of adoption of children born out of wedlock and their consequent "legitimation" was important, but the assumption that all unwed fathers either stood in a different relationship to their children than did the unwed mother or that the difficulty of finding the fathers would unreasonably burden the adoption process was overbroad, as the facts of the case revealed. No barrier existed to the state dispensing with consent when the father or his location is unknown, but disqualification of all unwed fathers may not be used as a shorthand for that step.[12]

On the other hand, the Court sustained a Georgia statute that permitted the mother of a child born out of wedlock to sue for the wrongful death of the child but that allowed the father to sue only if he had "legitimated" the child and there is no mother.[13] Similarly, the Court let stand, under the Fifth Amendment, a federal statute that required that, in order for a child born out of wedlock overseas to gain citizenship, a citizen father, unlike a citizen mother, must acknowledge or "legitimate" the child before the child's eighteenth birthday.[14] The Court emphasized the ready availability of proof of a child's maternity as opposed to paternity, but the dissent questioned whether such a distinction was truly justified under strict scrutiny considering the ability of modern techniques of DNA paternity testing to settle concerns about parentage.

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determinations about widows as well as widowers." Justice John Paul Stevens apparently would demand a factual showing of substantial savings. Califano v. Goldfarb, 430 U.S. 199, 219 (1977) (concurring).

[12] Caban v. Mohammed, 441 U.S. 380 (1979). Four Justices dissented. *Id.* at 394 (Stewart, J.), 401 (Stevens and Rehnquist, JJ., and Burger, C.J.). For the conceptually different problem of classification between different groups of women on the basis of marriage or absence of marriage to a wage earner, *see* Califano v. Boles, 443 U.S. 282 (1979).

[13] Parham v. Hughes, 441 U.S. 347, 361 (1979). There was no opinion of the Court, but both opinions making up the result emphasized that the objective of the state—to avoid difficulties in proving paternity—was an important one and was advanced by the classification. The plurality opinion determined that the statute did not invidiously discriminate against men as a class; it was no overbroad generalization but proceeded from the fact that only men could "legitimate" children by unilateral action. The sexes were not similarly situated, therefore, and the classification recognized that. As a result, all that was required was that the means be a rational way of dealing with the problem of proving paternity. *Id.* at 353–58. Justice Lewis Powell found the statute valid because the sex-based classification was substantially related to the objective of avoiding problems of proof in proving paternity. He also emphasized that the father had it within his power to remove the bar by "legitimating" the child. *Id.* at 359. Justices Byron White, William Brennan, Thurgood Marshall, and Harry Blackmun, who had been in the majority in *Caban*, dissented.

[14] Nguyen v. INS, 533 U.S. 53 (2001).*See also* Miller v. Albright, 523 U.S. 420, 424 (1998) (opinion of Stevens, J.) (concluding that a requirement in a citizenship statute that children born abroad and out of wedlock to citizen fathers, but not to citizen mothers, obtain formal proof of paternity by age eighteen does not violate the equal protection component of the Fifth Amendment's Due Process Clause). Importantly, however, the Court in *Sessions v. Morales-Santana* distinguished *Nguyen* and *Miller* in ruling that a derivative citizenship statute for children born abroad and out of wedlock to a U.S. citizen and foreign national violated equal protection principles because the statute imposed lengthier physical presence requirements on citizen fathers than citizen mothers. *See* 137 S. Ct. 1678, 1694 (2017). Specifically, the *Morales-Santana* Court held that unlike the statute at issue in *Nguyen* and *Miller*, the physical presence requirement being challenged in *Morales-Santana* did nothing to demonstrate the parent's tie to the child and was not a "minimal" burden on the citizen parent. *Id.* at 1694. The *Morales-Santana* Court also concluded that, while the Court in *Fiallo v. Bell,* 430 U.S. 787 (1977), had applied a very deferential standard when reviewing gender-based distinctions in the context of alien admission preferences, a more "exacting standard of review" was appropriate when assessing the permissibility of such distinctions in the application of derivative citizenship statutes. *Id.* at 1693–95 (describing the *Fiallo* Court's ruling as being supported by the "extremely broad power to admit or exclude aliens" and concluding that heightened scrutiny was appropriate in the review of gender-based distinctions made by a derivative citizenship statute, which did not touch upon the "entry preference for aliens" governed by *Fiallo*).

The issue of sex qualifications for the receipt of governmental financial benefits has divided the Court and occasioned close distinctions. A statutory scheme under which a serviceman could claim his spouse as a "dependent" for allowances while a servicewoman's spouse was not considered a "dependent" unless he was shown in fact to be dependent upon her for more than one half of his support was held an invalid dissimilar treatment of similarly situated men and women, not justified by the administrative convenience rationale.[15] In *Weinberger v. Wiesenfeld*,[16] the Court struck down a Social Security provision that gave survivor's benefits based on the insured's earnings to the widow and minor children but gave such benefits only to the children and not to the widower of a deceased woman worker. Focusing not only upon the discrimination against the widower but primarily upon the discrimination visited upon the woman worker whose earnings did not provide the same support for her family that a male worker's did, the Court saw the basis for the distinction resting upon the generalization that a woman would stay home and take care of the children while a man would not. Because the Court perceived the purpose of the provision to be to enable the surviving parent to choose to remain at home to care for minor children, the sex classification ill-fitted the end and was invidiously discriminatory.

But, when, in *Califano v. Goldfarb*,[17] the Court was confronted with a Social Security provision structured much as the benefit sections struck down in *Frontiero* and *Wiesenfeld*, even in the light of an express heightened scrutiny, no majority of the Court could be obtained for the reason for striking down the statute. The section provided that a widow was entitled to receive survivors' benefits based on the earnings of her deceased husband, regardless of dependency, but payments were to go to the widower of a deceased wife only upon proof that he had been receiving at least half of his support from her. The plurality opinion treated the discrimination as consisting of disparate treatment of women wage-earners whose tax payments did not earn the same family protection as male wage earners' taxes. Looking to the purpose of the benefits provision, the plurality perceived it to be protection of the familial unit rather than of the individual widow or widower and to be keyed to dependency rather than need. The sex classification was thus found to be based on an assumption of female dependency that ill-served the purpose of the statute and was an ill-chosen proxy for the underlying qualification. Administrative convenience could not justify use of such a questionable proxy.[18] Justice John Paul Stevens, concurring, accepted most of the analysis of the dissent but nonetheless came to the conclusion of invalidity. His argument was essentially that while either administrative convenience or a desire to remedy discrimination against female spouses could justify use of a sex classification, neither purpose was served by the sex classification actually used in this statute.[19]

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[15] Frontiero v. Richardson, 411 U.S. 677 (1973).

[16] 420 U.S. 636 (1975).

[17] 430 U.S. 199 (1977). The dissent argued that whatever the classification used, social insurance programs should not automatically be subjected to heightened scrutiny but rather only to traditional rationality review. *Id.* at 224 (Rehnquist, Stewart, and Blackmun, JJ., with Burger, C.J.). In *Wengler v. Druggists Mutual Ins. Co.,* 446 U.S. 142 (1980), voiding a state workers' compensation provision identical to that voided in *Goldfarb*, only Justice William Rehnquist continued to adhere to this view, although the others may have yielded only to precedent.

[18] 430 U.S. at 204–09, 212–17 (Brennan, White, Marshall, and Powell, JJ.). Congress responded by eliminating the dependency requirement but by adding a pension offset provision reducing spousal benefits by the amount of various other pensions received. Continuation in this context of the *Goldfarb* gender-based dependency classification for a five-year "grace period" was upheld in *Heckler v. Mathews,* 465 U.S. 728 (1984), as directly and substantially related to the important governmental interest in protecting against the effects of the pension offset the retirement plans of individuals who had based their plans on unreduced pre-*Goldfarb* payment levels.

[19] 430 U.S. at 217. Justice John Paul Stevens adhered to this view in *Wengler v. Druggists Mutual Ins. Co.,* 446 U.S. 142, 154 (1980). Note the unanimity of the Court on the substantive issue, although it was divided on remedy, in

Again, the Court divided closely when it *sustained* two instances of classifications claimed to constitute sex discrimination. In *Rostker v. Goldberg*,[20] rejecting presidential recommendations, Congress provided for registration only of males for a possible future military draft, excluding women altogether. The Court discussed but did not explicitly choose among proffered equal protection standards, but it apparently applied the intermediate test of *Craig v. Boren*. However, it did so in the context of its often-stated preference for extreme deference to military decisions and to congressional resolution of military decisions. Evaluating the congressional determination, the Court found that it has not been "unthinking" or "reflexively" based upon traditional notions of the differences between men and women; rather, Congress had extensively deliberated over its decision. It had found, the Court asserted, that the purpose of registration was the creation of a pool from which to draw combat troops when needed, an important and indeed compelling governmental interest, and the exclusion of women was not only "sufficiently but closely" related to that purpose because they were ill-suited for combat, could be excluded from combat, and registering them would be too burdensome to the military system.[21]

In *Michael M. v. Superior Court*,[22] the Court expressly adopted the *Craig v. Boren* intermediate standard, but its application of the test appeared to represent a departure in several respects from prior cases in which it had struck down sex classifications. *Michael M.* involved the constitutionality of a statute that punished males, but not females, for having sexual intercourse with a nonspousal person under eighteen years of age. The plurality and the concurrence generally agreed, but with some difference of emphasis, that, although the law was founded on a clear sex distinction, it was justified because it served an important governmental interest—the prevention of teenage pregnancies. Inasmuch as women may become pregnant and men may not, women would be better deterred by that biological fact, and men needed the additional legal deterrence of a criminal penalty. Thus, the law recognized that, for purposes of this classification, men and women were not similarly situated, and the statute did not deny equal protection.[23]

In a 1996 case, the Court required that a state demonstrate "exceedingly persuasive justification" for gender discrimination. When a female applicant challenged the exclusion of women from the historically male-only Virginia Military Institute (VMI), the State of Virginia defended the exclusion of females as essential to the nature of training at the military school.[24] The state argued that the VMI program, which included rigorous physical training, deprivation of personal privacy, and an "adversative model" that featured minute regulation of

voiding in *Califano v. Westcott,* 443 U.S. 76 (1979), a Social Security provision giving benefits to families with dependent children who have been deprived of parental support because of the unemployment of the father but giving no benefits when the mother is unemployed.

[20] 453 U.S. 57 (1981). Joining the opinion of the Court were Justices William Rehnquist, Potter Stewart, Harry Blackmun, Lewis Powell, and John Paul Stevens, and Chief Justice Warren Burger. Dissenting were Justices Byron White, Thurgood Marshall, and William Brennan. *Id.* at 83, 86.

[21] 453 U.S. at 69–72, 78–83. The dissent argued that registered persons would fill noncombat positions as well as combat ones and that drafting women would add to women volunteers providing support for combat personnel and would free up men in other positions for combat duty. Both dissents assumed without deciding that exclusion of women from combat served important governmental interests. *Id.* at 83, 93. The majority's reliance on an administrative convenience argument, it should be noted, *id.* at 81, was contrary to recent precedent.

[22] 450 U.S. 464 (1981). Joining the opinion of the Court were Justices William Rehnquist, Potter Stewart, and Lewis Powell, and Chief Justice Warren Burger, constituting only a plurality. Justice Harry Blackmun concurred in a somewhat more limited opinion. *Id.* at 481. Dissenting were Justices William Brennan, Byron White, Thurgood Marshall, and John Paul Stevens. *Id.* at 488, 496.

[23] 450 U.S. at 470–74, 481. The dissents questioned both whether the pregnancy deterrence rationale was the purpose underlying the distinction and whether, if it was, the classification was substantially related to achievement of the goal. *Id.* at 488, 496.

[24] United States v. Virginia, 518 U.S. 515 (1996).

behavior, would need to be unacceptably modified to facilitate the admission of women. While recognizing that women's admission would require accommodation such as different housing assignments and physical training programs, the Court found that the reasons set forth by the state were not "exceedingly persuasive," and thus the state did not meet its burden of justification. The Court also rejected the argument that a parallel program established by the state at a private women's college served as an adequate substitute, finding that the program lacked the military-style structure found at VMI, and that it did not equal VMI in faculty, facilities, prestige, or alumni network.

The Court in *Sessions v. Morales-Santana* applied the "exceedingly persuasive justification" test to strike down a gender-based classification found in a statute that allowed for the acquisition of U.S. citizenship by a child born abroad to an unwed couple if one of the parents was a U.S. citizen.[25] The law at issue in *Morales-Santana*, which had been enacted many decades earlier, conditioned the grant of citizenship on the U.S. citizen parent's physical presence in the United States prior to the child's birth, providing a shorter presence requirement for an unwed U.S. citizen mother relative to the unwed U.S. citizen father.[26] According to the majority, such a classification "must substantially serve an important government interest *today*,"[27] and the law in question was based on "two once habitual, but now untenable, assumptions": (1) that marriage presupposes that the husband is dominant and the wife is subordinate; (2) an unwed mother is the natural and sole guardian of a non-marital child.[28] Having found that the law was an "overbroad generalization[ ]" about males and females and was based on the "obsolescing view" about unwed fathers,[29] the Court concluded that the citizenship provision's "discrete duration-of-residency requirements for unwed mothers and fathers who have accepted parental responsibility [was] stunningly anachronistic."[30]

In response to what the lower court had described as the "most vexing problem" in the case,[31] the *Morales-Santana* Court, in crafting a remedy for the equal protection violation, deviated from the presumption that "extension, rather than nullification" of the denied benefit is generally the "proper course."[32] The Court observed that Congress had established

[25] *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1683 (2017) (holding that "the gender line Congress drew is incompatible with the requirement that the Government accord to all persons 'the equal protection of the laws.'").

[26] *Id.* at 1687–88 (describing 8 U.S.C. §§ 1401 & 1409 (1958 ed.)).

[27] *Id.* at 9 (citing Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015)).

[28] *Id.* at 1690–91.

[29] *Id.* at 1692.

[30] *Id.* at 1693. In so holding, the *Morales-Santana* Court rejected the government's argument that the challenged law's gender distinction helped ensure that the child born abroad and out of wedlock to a U.S. citizen and foreign national would have a strong connection with the United States. *Id.* at 1694–95. The government argued that an unwed alien mother, on account of being the only legally recognized parent, would have a "competing national influence" upon the child that warranted the requirement that the U.S. father have a longer physical connection with the United States. *Id.* The Court concluded that the argument was based on the assumption that an alien father of a nonmarital child would not accept parental responsibility, a "[l]ump characterization" about gender roles that did not pass equal protection inspection. *Id.* at 1695. Moreover, even assuming that an interest in ensuring a connection to the United States could support the law, the Court held that the law's gender-based means could not serve the desired end because the law allowed for an individual with no ties whatsoever to the United States to become a citizen if his U.S. citizen mother lived in the country for a year prior to his birth. *Id.* at 1695–96.

The Court also rejected the government's argument that Congress wished to reduce the risk of "statelessness" for the foreign-born child of a U.S. citizen mother; an argument premised on the belief that countries are more likely to grant citizenship to the child of a citizen mother than to the child of a citizen father. *Id.* at 1696. The Court noted there was little evidence that a statelessness concern prompted the physical presence requirements, *id.* at 1696–97, and the Court also was skeptical that the risk of statelessness in actuality disproportionately endangered the children of unwed U.S. citizen mothers. *Id.* at 1697–98.

[31] *See* Morales-Santana v. Lynch, 804 F.3d 521, 535 (2d Cir. 2015).

[32] *See Morales-Santana*, slip op. at 25 (quoting Califano v. Westcott, 443 U.S. 76, 89 (1979)).

derivative citizenship rules that varied depending upon whether one or both parents were U.S. citizens and whether the child was born in or outside marriage.[33] Justice Ruth Bader Ginsburg writing for the majority concluded that extending the much-shorter physical presence requirement applicable to unwed U.S. citizen mothers to unwed U.S. citizen fathers would run significantly counter to Congress's intentions when it established this statutory scheme, because such a remedy would result in a longer physical presence requirement for a *married* U.S. citizen who had a child abroad than for a similarly situated *unmarried* U.S. citizen.[34] As a result, the Court held that the longer physical presence requirement for unwed U.S. citizen fathers governed, as that is the remedy that "Congress likely would have chosen had it been apprised of the constitutional infirmity."[35]

Another area presenting some difficulty is that of the relationship of pregnancy classifications to gender discrimination. In *Cleveland Board of Education v. LaFleur*,[36] which was decided upon due process grounds, two school systems requiring pregnant school teachers to leave work four and five months respectively, before the expected childbirths were found to have acted arbitrarily and irrationally in establishing rules not supported by anything more weighty than administrative convenience buttressed with some possible embarrassment of the school boards in the face of pregnancy. On the other hand, the exclusion of pregnancy from a state financed program of payments to persons disabled from employment was upheld against equal protection attack as supportable by legitimate state interests in the maintenance of a self-sustaining program with rates low enough to permit the participation of low-income workers at affordable levels.[37] The absence of supportable reasons in one case and their presence in the other may well have made the significant difference.

Amdt14.S1.8.8.4 Facially Non-Neutral Laws Benefiting Women

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Cases of "benign" discrimination, that is, statutory classifications that benefit women and disadvantage men in order to overcome the effects of past societal discrimination against women, have presented the Court with some difficulty. Although the first two cases were reviewed under apparently traditional rational basis scrutiny, the more recent cases appear to subject these classifications to the same intermediate standard as any other sex classification.

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[33] *Id.* at 2–4, 26.

[34] *Id.* at 26 ("For if [the] one-year dispensation were extended to unwed citizen fathers, would it not be irrational to retain the longer term when the U.S. citizen parent is married?").

[35] *Id.* at 27 (internal citations and quotations omitted).

[36] 414 U.S. 632 (1974). Justice Lewis Powell concurred on equal protection grounds. *Id.* at 651. *See also* Turner v. Department of Employment Security, 423 U.S. 44 (1975).

[37] Geduldig v. Aiello, 417 U.S. 484 (1974). The Court denied that the classification was based upon "gender as such." Classification was on the basis of pregnancy, and while only women can become pregnant, that fact alone was not determinative. "The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." *Id.* at 496 n.20. For a rejection of a similar attempted distinction, *see* Nyquist v. Mauclet, 432 U.S. 1, 9 (1977); and Trimble v. Gordon, 430 U.S. 762, 774 (1977). *See also* Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971). The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), now extends protection to pregnant women.

Kahn v. Shevin[1] upheld a state property tax exemption allowing widows but not widowers a $500 exemption. In justification, the state had presented extensive statistical data showing the substantial economic and employment disabilities of women in relation to men. The provision, the Court found, was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden."[2] And, in *Schlesinger v. Ballard*,[3] the Court sustained a provision requiring the mandatory discharge from the Navy of a male officer who has twice failed of promotion to certain levels, which in Ballard's case meant discharge after nine years of service, whereas women officers were entitled to thirteen years of service before mandatory discharge for want of promotion. The difference was held to be a rational recognition of the fact that male and female officers were dissimilarly situated and that women had far fewer promotional opportunities than men had.

Although in each of these cases the Court accepted the proffered justification of remedial purpose without searching inquiry, later cases caution that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[4] Rather, after specifically citing the heightened scrutiny that all sex classifications are subjected to, the Court looks to the statute and to its legislative history to ascertain that the scheme does not actually penalize women, that it was actually enacted to compensate for past discrimination, and that it does not reflect merely "archaic and overbroad generalizations" about women in its moving force. But where a statute is "deliberately enacted to compensate for particular economic disabilities suffered by women," it serves an important governmental objective and will be sustained if it is substantially related to achievement of that objective.[5]

Many of these lines of cases converged in *Mississippi University for Women v. Hogan*,[6] in which the Court stiffened and applied its standards for evaluating claimed benign distinctions benefitting women and additionally appeared to apply the intermediate standard itself more strictly. The case involved a male nurse who wished to attend a female-only nursing school located in the city in which he lived and worked; if he could not attend this particular school he would have had to commute 147 miles to another nursing school that did accept men, and he would have had difficulty doing so and retaining his job. The state defended on the basis that the female-only policy was justified as providing "educational affirmative action for females." Recitation of a benign purpose, the Court said, was not alone sufficient. "[A] State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification."[7] But women did not lack opportunities to obtain training in nursing; instead they dominated the field. In the Court's view, the state policy did not compensate for discriminatory barriers facing women, but it perpetuated the stereotype of nursing as a

[1] 416 U.S. 351 (1974).

[2] 416 U.S. at 355.

[3] 419 U.S. 498 (1975).

[4] Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975); Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977); Orr v. Orr, 440 U.S. 268, 280–82 (1979); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150–52 (1980). In light of the stiffened standard, Justice John Paul Stevens called for overruling *Kahn*, *Califano v. Goldfarb*, 430 U.S. at 223–24, but Justice Harry Blackmun would preserve that case. Orr v. Orr, 440 U.S. at 284. *Cf.* Regents of the Univ. of California v. Bakke, 438 U.S. 265, 302–03 (1978) (Justice Lewis Powell; less stringent standard of review for benign sex classifications).

[5] Califano v. Webster, 430 U.S. 313, 316–18, 320 (1977). There was no doubt that the provision sustained in *Webster* had been adopted expressly to relieve past societal discrimination. The four *Goldfarb* dissenters concurred specially, finding no difference between the two provisions. *Id.* at 321.

[6] 458 U.S. 718 (1982).

[7] 458 U.S. at 728.

woman's job. "[A]lthough the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification."[8] Even if the classification was premised on the proffered basis, the Court concluded, it did not substantially and directly relate to the objective, because the school permitted men to audit the nursing classes and women could still be adversely affected by the presence of men.[9]

Amdt14.S1.8.9 Non-Suspect Classifications

Amdt14.S1.8.9.1 Meaning of Person in the Equal Protection Clause

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

In the case in which it was first called upon to interpret this clause, the Court doubted whether this provision could apply to state actions that were not directed at newly freed slaves, arguing that this Amendment was "clearly a provision for that race" and intended to remedy discriminatory laws directed at freed slaves.[1] Nonetheless, in deciding the *Granger Cases* shortly thereafter, the Justices, as with the Due Process Clause, seemingly entertained no doubt that the railroad corporations were entitled to invoke the protection of the Clause.[2] Nine years later, Chief Justice Morrison Waite announced from the bench that the Court would not hear argument on the question whether the Equal Protection Clause applied to corporations. "We are all of the opinion that it does."[3] The word has been given the broadest possible meaning. "These provisions are universal in their application, to all persons within the

[8] 458 U.S. at 730. In addition to obligating the state to show that in fact there was existing discrimination or effects from past discrimination, the Court also appeared to take the substantial step of requiring the state "to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination." *Id.* at 730 n.16. A requirement that the proffered purpose be the actual one and that it must be shown that the legislature actually had that purpose in mind would be a notable stiffening of equal protection standards.

[9] In the major dissent, Justice Lewis Powell argued that only a rational basis standard ought to be applied to sex classifications that would "*expand* women's choices," but that the exclusion here satisfied intermediate review because it promoted diversity of educational opportunity and was premised on the belief that single-sex colleges offer "distinctive benefits" to society. *Id.* at 735, 740 (emphasis by Justice), 743. The Court noted that, because the state maintained no other single-sex public university or college, the case did not present "the question of whether States can provide 'separate but equal' undergraduate institutions for males and females," *id.* at 720 n.1, although Justice Lewis Powell thought the decision did preclude such institutions. *Id.* at 742–44. *See* Vorchheimer v. School Dist. of Philadelphia, 532 F. 2d 880 (3d Cir. 1976) (finding no equal protection violation in maintenance of two single-sex high schools of equal educational offerings, one for males, one for females), *aff'd by an equally divided Court*, 430 U.S. 703 (1977) (Justice Rehnquist not participating).

[1] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873). *Cf.* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 177 (1972) (Justice Rehnquist dissenting).

[2] Chicago, B. & Q. R.R. v. Iowa, 94 U.S. 155 (1877); Peik v. Chicago & N.W. Ry., 94 U.S. 164 (1877); Chicago, M. & St. P. R.R. v. Ackley, 94 U.S. 179 (1877); Winona & St. Peter R.R. v. Blake, 94 U.S. 180 (1877).

[3] Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886). The background and developments from this utterance are treated in H. Graham, Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism chs. 9, 10, and pp. 566–84 (1968). Justice Hugo Black, in *Connecticut Gen. Life Ins. Co. v. Johnson,* 303 U.S. 77, 85 (1938), and Justice William O. Douglas, in *Wheeling Steel Corp. v. Glander,* 337 U.S. 562, 576 (1949), have disagreed that corporations are persons for equal protection purposes.

territorial jurisdiction, without regard to any differences of race, of color, or of nationality. . . ."[4] The only qualification is that a municipal corporation cannot invoke the clause against its state.[5]

Amdt14.S1.8.9.2 Meaning of Within Its Jurisdiction in the Equal Protection Clause

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Persons "within its jurisdiction" are entitled to equal protection from a state. Largely because Article IV, Section 2, has from the beginning guaranteed the privileges and immunities of citizens in the several states, the Court has rarely construed the phrase in relation to natural persons.[1] As to business entities, it was first held that a foreign corporation that was not doing business in a state in a manner that subjected it to the process of a state's courts was not "within the jurisdiction" of the state and could not complain that resident creditors were given preferences in the distribution of assets of an insolvent corporation.[2] This holding was subsequently qualified, however, with the Court holding that a foreign corporation seeking to recover possession of property wrongfully taken in one state, but suing in another state in which it was not licensed to do business, was "within the jurisdiction" of the latter state, so that unequal burdens could not be imposed on the maintenance of the suit.[3] The test of amenability to service of process within the state was ignored in a later case dealing with discriminatory assessment of property belonging to a nonresident individual.[4] On the other hand, if a state has admitted a foreign corporation to do business within its borders, that corporation is entitled to equal protection of the laws, but not necessarily to identical treatment with domestic corporations.[5]

Amdt14.S1.8.9.3 Police Power Classifications and Equal Protection Clause

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

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[4] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). For modern examples, *see* Levy v. Louisiana, 391 U.S. 68, 70 (1968); Graham v. Richardson, 403 U.S. 365, 371 (1971).

[5] City of Newark v. New Jersey, 262 U.S. 192 (1923); Williams v. Mayor of Baltimore, 289 U.S. 36 (1933).

[1] *But see* Plyler v. Doe, 457 U.S. 202, 210–16 (1982) (explicating meaning of the phrase in the context of holding that aliens unlawfully present in a state are "within its jurisdiction" and may thus raise equal protection claims).

[2] Blake v. McClung, 172 U.S. 239, 261 (1898); Sully v. American Nat'l Bank, 178 U.S. 289 (1900).

[3] Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U.S. 544 (1923).

[4] Hillsborough v. Cromwell, 326 U.S. 620 (1946).

[5] Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949); Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1926). *See also* Philadelphia Fire Ass'n v. New York, 119 U.S. 110 (1886).

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Justice Oliver Wendell Holmes' characterization of the Equal Protection Clause as the "usual last refuge of constitutional arguments"[1] was no doubt made with the practice in mind of contestants tacking on an equal protection argument to a due process challenge of state economic regulation. Few police regulations have been held unconstitutional on this ground.

"[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[2] The Court has made it clear that only the totally irrational classification in the economic field will be struck down,[3] and it has held that legislative classifications that impact severely upon some businesses and quite favorably upon others may be saved through stringent deference to legislative judgment.[4] So deferential is the classification that it denies the challenging party any right to offer evidence to seek to prove that the legislature is wrong in its conclusion that its classification will serve the purpose it has in mind, so long as the question is at least debatable and the legislature "*could rationally have decided*" that its classification would foster its goal.[5] The Court has condemned a variety of statutory classifications as failing

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[1] Buck v. Bell, 274 U.S. 200, 208 (1927).

[2] McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

[3] City of New Orleans v. Dukes, 427 U.S. 297 (1976). Upholding an ordinance that banned all pushcart vendors from the French Quarter, except those in continuous operation for more than eight years, the Court summarized its method of decision here. "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. . . . Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step-by-step . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or undesirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . ; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *Id.* at 303–04.

[4] The "grandfather" clause upheld in *Dukes* preserved the operations of two concerns that had operated in the Quarter for twenty years. The classification was sustained on the basis of (1) the City Council proceeding step-by-step and eliminating vendors of more recent vintage, (2) the Council deciding that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Quarter, and (3) the Council believing that both "grandfathered" vending interests had themselves become part of the distinctive character and charm of the Quarter. 427 U.S. at 305–06. *See also* Friedman v. Rogers, 440 U.S. 1, 17–18 (1979); United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4, 6 (1970).

[5] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461–70 (1981). The quoted phrase is at 466 (emphasis by Court). Purporting to promote the purposes of resource conservation, easing solid waste disposal problems, and conserving energy, the legislature had banned plastic nonreturnable milk cartons but permitted all other nonplastic nonreturnable containers, such as paperboard cartons. The state court had thought the distinction irrational, but the Supreme Court thought the legislature could have believed a basis for the distinction existed. Courts will receive evidence that a distinction is wholly irrational. United States v. Carolene Products Co., 304 U.S. 144, 153–54 (1938).

Classifications under police regulations have been held valid as follows:

Advertising: discrimination between billboard and newspaper advertising of cigarettes, Packer Corp. v. Utah, 285 U.S. 105 (1932); prohibition of advertising signs on motor vehicles, except when used in the usual business of the owner and not used mainly for advertising, Fifth Ave. Coach Co. v. New York, 221 U.S. 467 (1911); prohibition of advertising on

motor vehicles except notices or advertising of products of the owner, Railway Express Agency v. New York, 336 U.S. 106 (1949); prohibition against sale of articles on which there is a representation of the flag for advertising purposes, except newspapers, periodicals and books, Halter v. Nebraska, 205 U.S. 34 (1907).

Amusement: prohibition against keeping billiard halls for hire, except in case of hotels having twenty-five or more rooms for use of regular guests. Murphy v. California, 225 U.S. 623 (1912).

Attorneys: Kansas law and court regulations requiring resident of Kansas, licensed to practice in Kansas and Missouri and maintaining law offices in both States, but who practices regularly in Missouri, to obtain local associate counsel as a condition of appearing in a Kansas court. Martin v. Walton, 368 U.S. 25 (1961). Two dissenters, Justices William O. Douglas and Hugo Black, would sustain the requirement, if limited in application to an attorney who practiced only in Missouri.

Cable Television: exemption from regulation under the Cable Communications Policy Act of facilities that serve only dwelling units under common ownership. FCC v. Beach Communications, 508 U.S. 307 (1993). Regulatory efficiency is served by exempting those systems for which the costs of regulation exceed the benefits to consumers, and potential for monopoly power is lessened when a cable system operator is negotiating with a single-owner.

Cattle: a classification of sheep, as distinguished from cattle, in a regulation restricting the use of public lands for grazing. Bacon v. Walker, 204 U.S. 311 (1907). *See also* Omaechevarria v. Idaho, 246 U.S. 343 (1918).

Cotton gins: in a State where cotton gins are held to be public utilities and their rates regulated, the granting of a license to a cooperative association distributing profits ratably to members and nonmembers does not deny other persons operating gins equal protection when there is nothing in the laws to forbid them to distribute their net earnings among their patrons. Corporation Comm'n v. Lowe, 281 U.S. 431 (1930).

Debt adjustment business: operation only as incident to legitimate practice of law. Ferguson v. Skrupa, 372 U.S. 726 (1963).

Eye glasses: law exempting sellers of ready-to-wear glasses from regulations forbidding opticians to fit or replace lenses without prescriptions from ophthalmologist or optometrist and from restrictions on solicitation of sale of eye glasses by use of advertising matter. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

Fish processing: stricter regulation of reduction of fish to flour or meal than of canning. Bayside Fish Co. v. Gentry, 297 U.S. 422 (1936).

Food: bread sold in loaves must be of prescribed standard sizes, Schmidinger v. Chicago, 226 U.S. 578 (1913); food preservatives containing boric acid may not be sold, Price v. Illinois, 238 U.S. 446 (1915); lard not sold in bulk must be put up in containers holding 1, 3, or 5 pounds or some whole multiple thereof, Armour & Co. v. North Dakota, 240 U.S. 510 (1916); milk industry may be placed in a special class for regulation, Lieberman v. Van De Carr, 199 U.S. 552 (1905); vendors producing milk outside city may be classified separately, Adams v. Milwaukee, 228 U.S. 572 (1913); producing and nonproducing vendors may be distinguished in milk regulations, St. John v. New York, 201 U.S. 633 (1906); different minimum and maximum milk prices may be fixed for distributors and storekeepers, Nebbia v. New York, 291 U.S. 502 (1934); price differential may be granted for sellers of milk not having a well advertised trade name, Borden's Farm Products Co. v. Ten Eyck, 297 U.S. 251 (1936); oleomargarine colored to resemble butter may be prohibited, Capital City Dairy Co. v. Ohio, 183 U.S. 238 (1902); table syrups may be required to be so labeled and disclose identity and proportion of ingredients, Corn Products Ref. Co. v. Eddy, 249 U.S. 427 (1919)

Geographical discriminations: legislation limited in application to a particular geographical or political subdivision of a state, Ft. Smith Co. v. Paving Dist., 274 U.S. 387, 391 (1927); ordinance prohibiting a particular business in certain sections of a municipality, Hadacheck v. Sebastian, 239 U.S. 394 (1915); statute authorizing a municipal commission to limit the height of buildings in commercial districts to 125 feet and in other districts to 80 to 100 feet, Welch v. Swasey, 214 U.S. 91 (1909); ordinance prescribing limits in city outside of which no woman of lewd character shall dwell, L'Hote v. New Orleans, 177 U.S. 587, 595 (1900). *See also* North v. Russell, 427 U.S. 328, 338 (1976).Geographic distinctions in regulatory laws

Hotels: requirement that keepers of hotels having over fifty guests employ night watchmen. Miller v. Strahl, 239 U.S. 426 (1915).

Insurance companies: regulation of fire insurance rates with exemption for farmers mutuals, German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914); different requirements imposed upon reciprocal insurance associations than upon mutual companies, Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943); prohibition against life insurance companies or agents engaging in undertaking business, Daniel v. Family Ins. Co., 336 U.S. 220 (1949).

Intoxicating liquors: exception of druggist or manufacturers from regulation. Lloyd v. Dollison, 194 U.S. 445 (1904); Eberle v. Michigan, 232 U.S. 700 (1914).

Landlord-tenant: requiring trial no later than 6 days after service of complaint and limiting triable issues to the tenant's default, provisions applicable in no other legal action, under procedure allowing landlord to sue to evict tenants for nonpayment of rent, inasmuch as prompt and peaceful resolution of the dispute is proper objective and tenants have other means to pursue other relief. Lindsey v. Normet, 405 U.S. 56 (1972).

Lodging houses: requirement that sprinkler systems be installed in buildings of nonfireproof construction is valid as applied to such a building which is safeguarded by a fire alarm system, constant watchman service and other safety arrangements. Queenside Hills Co. v. Saxl, 328 U.S. 80 (1946).

Markets: prohibition against operation of private market within six squares of public market. Natal v. Louisiana, 139 U.S. 621 (1891).

Medicine: a uniform standard of professional attainment and conduct for all physicians, Hurwitz v. North, 271 U.S. 40 (1926); reasonable exemptions from medical registration law. Watson v. Maryland, 218 U.S. 173 (1910); exemption of persons who heal by prayer from regulations applicable to drugless physicians, Crane v. Johnson, 242 U.S. 339 (1917);

the rational basis test, although some of the cases are of doubtful vitality today and some have been questioned. Thus, the Court invalidated a statute that forbade stock insurance companies to act through agents who were their salaried employees but permitted mutual companies to operate in this manner.[6] A law that required private motor vehicle carriers to obtain

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exclusion of osteopathic physicians from public hospitals, Hayman v. Galveston, 273 U.S. 414 (1927); requirement that persons who treat eyes without use of drugs be licensed as optometrists with exception for persons treating eyes by use of drugs, who are regulated under a different statute, McNaughton v. Johnson, 242 U.S. 344 (1917); a prohibition against advertising by dentists, not applicable to other professions, Semler v. Dental Examiners, 294 U.S. 608 (1935).

Motor vehicles: guest passenger regulation applicable to automobiles but not to other classes of vehicles, Silver v. Silver, 280 U.S. 117 (1929); exemption of vehicles from other states from registration requirement, Storaasli v. Minnesota, 283 U.S. 57 (1931); classification of driverless automobiles for hire as public vehicles, which are required to procure a license and to carry liability insurance, Hodge Co. v. Cincinnati, 284 U.S. 335 (1932); exemption from limitations on hours of labor for drivers of motor vehicles of carriers of property for hire, of those not principally engaged in transport of property for hire, and carriers operating wholly in metropolitan areas, Welch Co. v. New Hampshire, 306 U.S. 79 (1939); exemption of busses and temporary movements of farm implements and machinery and trucks making short hauls from common carriers from limitations in net load and length of trucks, Sproles v. Binford, 286 U.S. 374 (1932); prohibition against operation of uncertified carriers, Bradley v. Public Utility Comm'n, 289 U.S. 92 (1933); exemption from regulations affecting carriers for hire, of persons whose chief business is farming and dairying, but who occasionally haul farm and dairy products for compensation, Hicklin v. Coney, 290 U.S. 169 (1933); exemption of private vehicles, street cars, and omnibuses from insurance requirements applicable to taxicabs, Packard v. Banton, 264 U.S. 140 (1924).

Peddlers and solicitors: a state may classify and regulate itinerant vendors and peddlers, Emert v. Missouri, 156 U.S. 296 (1895); may forbid the sale by them of drugs and medicines, Baccus v. Louisiana, 232 U.S. 334 (1914); prohibit drumming or soliciting on trains for business for hotels, medical practitioners, and the like, Williams v. Arkansas, 217 U.S. 79 (1910); or solicitation of employment to prosecute or collect claims, McCloskey v. Tobin, 252 U.S. 107 (1920). And a municipality may prohibit canvassers or peddlers from calling at private residences unless requested or invited by the occupant to do so. Breard v. City of Alexandria, 341 U.S. 622 (1951).

Property destruction: destruction of cedar trees to protect apple orchards from cedar rust, Miller v. Schoene, 276 U.S. 272 (1928).

Railroads: prohibition on operation on a certain street, Railroad v. Richmond, 96 U.S. 521 (1878); requirement that fences and cattle guards and allow recovery of multiple damages for failure to comply, Missouri Pacific Ry. v. Humes, 115 U.S. 512 (1885); Minneapolis & St. L. Ry. v. Beckwith, 129 U.S. 26 (1889); Minneapolis & St. L. Ry. v. Emmons, 149 U.S. 364 (1893); assessing railroads with entire expense of altering a grade crossing, New York & N.E. R.R. v. Bristol, 151 U.S. 556 (1894); liability for fire communicated by locomotive engines, St. Louis & S.F. Ry. v. Mathews, 165 U.S. 1 (1897); required weed cutting; Missouri, Kan., & Tex. Ry. v. May, 194 U.S. 267 (1904); presumption against a railroad failing to give prescribed warning signals, Atlantic Coast Line R.R. v. Ford, 287 U.S. 502 (1933); required use of locomotive headlights of a specified form and power, Atlantic Coast Line Ry. v. Georgia, 234 U.S. 280 (1914); presumption that railroads are liable for damage caused by operation of their locomotives, Seaboard Air Line Ry. v. Watson, 287 U.S. 86 (1932); required sprinkling of streets between tracks to lay the dust, Pacific Gas Co. v. Police Court, 251 U.S. 22 (1919). State "full-crew" laws do not violate the Equal Protection Clause by singling out the railroads for regulation and by making no provision for minimum crews on any other segment of the transportation industry, Firemen v. Chicago, R.I. & P. Ry. 393 U.S. 129 (1968).

Sales in bulk: requirement of notice of bulk sales applicable only to retail dealers. Lemieux v. Young, 211 U.S. 489 (1909).

Secret societies: regulations applied only to one class of oath-bound associations, having a membership of twenty or more persons, where the class regulated has a tendency to make the secrecy of its purpose and membership a cloak for conduct inimical to the personal rights of others and to the public welfare. New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928).

Securities: a prohibition on the sale of capital stock on margin or for future delivery which is not applicable to other objects of speculation, *e.g.*, cotton, grain. Otis v. Parker, 187 U.S. 606 (1903).

Sunday closing law: notwithstanding that they prohibit the sale of certain commodities and services while permitting the vending of others not markedly different, and, even as to the latter, frequently restrict their distribution to small retailers as distinguished from large establishments handling salable as well as nonsalable items, such laws have been upheld. Despite the desirability of having a required day of rest, a certain measure of mercantile activity must necessarily continue on that day and in terms of requiring the smallest number of employees to forego their day of rest and minimizing traffic congestion, it is preferable to limit this activity to retailers employing the smallest number of workers; also, it curbs evasion to refuse to permit stores dealing in both salable and nonsalable items to be open at all. McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961). *See also* Soon Hing v. Crowley, 113 U.S. 703 (1885); Petit v. Minnesota, 177 U.S. 164 (1900).

Telegraph companies: a statute prohibiting stipulation against liability for negligence in the delivery of interstate messages, which did not forbid express companies and other common carriers to limit their liability by contract. Western Union Telegraph Co. v. Milling Co., 218 U.S. 406 (1910).

[6] Hartford Ins. Co. v. Harrison, 301 U.S. 459 (1937).

certificates of convenience and necessity and to furnish security for the protection of the public was held invalid because of the exemption of carriers of fish, farm, and dairy products.[7] The same result befell a statute that permitted mill dealers without well-advertised trade names the benefit of a price differential but that restricted this benefit to such dealers entering the business before a certain date.[8] In a decision since overruled, the Court struck down a law that exempted by name the American Express Company from the terms pertaining to the licensing, bonding, regulation, and inspection of "currency exchanges" engaged in the sale of money orders.[9]

Amdt14.S1.8.10 Economic Regulation and Taxing Power

Amdt14.S1.8.10.1 Overview of Economic Regulation and Taxing Power

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

At the outset, the Court did not regard the Equal Protection Clause as having any bearing on taxation.[1] It soon, however, entertained cases assailing specific tax laws under this provision,[2] and in 1890 it cautiously conceded that "clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."[3] The Court observed, however, that the Equal Protection Clause "was not intended to compel the State to adopt an iron rule of equal taxation" and propounded some conclusions that remain valid today.[4] In succeeding years the Clause has been invoked but sparingly to invalidate state levies. In the field of property taxation, inequality has been condemned only in two classes of cases: (1) discrimination in assessments, and (2) discrimination against foreign corporations. In addition, there are a handful of cases invalidating, because of inequality, state laws imposing income, gross receipts, sales and license taxes.

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[7] Smith v. Cahoon, 283 U.S. 553 (1931).

[8] Mayflower Farms v. Ten Eyck, 297 U.S. 266 (1936). *See* United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4, 7 n.2 (1970) (reserving question of case's validity, but interpreting it as standing for the proposition that no showing of a valid legislative purpose had been made).

[9] Morey v. Doud, 354 U.S. 457 (1957), *overruled by* City of New Orleans v. Dukes, 427 U.S. 297 (1976), where the exemption of one concern had been by precise description rather than by name.

[1] Davidson v. City of New Orleans, 96 U.S. 97, 106 (1878).

[2] Philadelphia Fire Ass'n v. New York, 119 U.S. 110 (1886); Santa Clara County v. Southern Pacific R.R., 118 U.S. 394 (1886).

[3] Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 237 (1890).

[4] The state "may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution." 134 U.S. at 237. *See* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973); Kahn v. Shevin, 416 U.S. 351 (1974); and City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

Amdt14.S1.8.10.2 Classifications for State Taxes

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The power of the state to classify for purposes of taxation is "of wide range and flexibility."[1] A state may adjust its taxing system in such a way as to favor certain industries or forms of

[1] Louisville Gas Co. v. Coleman, 227 U.S. 32, 37 (1928). Classifications for purpose of taxation have been held valid in the following situations:

Banks: a heavier tax on banks which make loans mainly from money of depositors than on other financial institutions which make loans mainly from money supplied otherwise than by deposits. First Nat'l Bank v. Tax Comm'n, 289 U.S. 60 (1933).

Bank deposits: a tax of 50 cents per $100 on deposits in banks outside a state in contrast with a rate of 10 cents per $100 on deposits in the state. Madden v. Kentucky, 309 U.S. 83 (1940).

Coal: a tax of two and one-half percent on anthracite but not on bituminous coal. Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922).

Gasoline: a graduated severance tax on oils sold primarily for their gasoline content, measured by resort to Baume gravity. Ohio Oil Co. v. Conway, 281 U.S. 146 (1930); Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (prohibition on pass-through to consumers of oil and gas severance tax).

Chain stores: a privilege tax graduated according to the number of stores maintained, Tax Comm'rs v. Jackson, 283 U.S. 527 (1931); Fox v. Standard Oil Co., 294 U.S. 87 (1935); a license tax based on the number of stores both within and without the state, Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412 (1937) (distinguishing Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933)).

Electricity: municipal systems may be exempted, Puget Sound Co. v. Seattle, 291 U.S. 619 (1934); that portion of electricity produced which is used for pumping water for irrigating lands may be exempted, Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932).

Gambling: slot machines on excursion riverboats are taxed at a maximum rate of 20%, while slot machines at a racetrack are taxed at a maximum rate of 36%. Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (2003).

Insurance companies: license tax measured by gross receipts upon domestic life insurance companies from which fraternal societies having lodge organizations and insuring lives of members only are exempt, and similar foreign corporations are subject to a fixed and comparatively slight fee for the privilege of doing local business of the same kind. Northwestern Life Ins. Co. v. Wisconsin, 247 U.S. 132 (1918).

Oleomargarine: classified separately from butter. Magnano Co. v. Hamilton, 292 U.S. 40 (1934).

Peddlers: classified separately from other vendors. Caskey Baking Co. v. Virginia, 313 U.S. 117 (1941).

Public utilities: a gross receipts tax at a higher rate for railroads than for other public utilities, Ohio Tax Cases, 232 U.S. 576 (1914); a gasoline storage tax which places a heavier burden upon railroads than upon common carriers by bus, Nashville C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933); a tax on railroads measured by gross earnings from local operations, as applied to a railroad which received a larger net income than others from the local activity of renting, and borrowing cars, Illinois Cent. R.R. v. Minnesota, 309 U.S. 157 (1940); a gross receipts tax applicable only to public utilities, including carriers, the proceeds of which are used for relieving the unemployed, New York Rapid Transit Corp. v. New York, 303 U.S. 573 (1938).

Wine: exemption of wine from grapes grown in the State while in the hands of the producer, Cox v. Texas, 202 U.S. 446 (1906).

Laws imposing miscellaneous license fees have been upheld as follows:

Cigarette dealers: taxing retailers and not wholesalers. Cook v. Marshall County, 196 U.S. 261 (1905).

Commission merchants: requirements that dealers in farm products on commission procure a license, Payne v. Kansas, 248 U.S. 112 (1918).

Elevators and warehouses: license limited to certain elevators and warehouses on right-of-way of railroad, Cargill Co. v. Minnesota, 180 U.S. 452 (1901); a license tax applicable only to commercial warehouses where no other commercial warehousing facilities in township subject to tax, Independent Warehouses v. Scheele, 331 U.S. 70 (1947).

Laundries: exemption from license tax of steam laundries and women engaged in the laundry business where not more than two women are employed. Quong Wing v. Kirkendall, 223 U.S. 59 (1912).

Merchants: exemption from license tax measured by amount of purchases, of manufacturers within the state selling their own product. Armour & Co. v. Virginia, 246 U.S. 1 (1918).

Sugar refineries: exemption from license applicable to refiners of sugar and molasses of planters and farmers grinding and refining their own sugar and molasses. American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900).

Theaters: license graded according to price of admission. Metropolis Theatre Co. v. Chicago, 228 U.S. 61 (1913).

industry[2] and may tax different types of taxpayers differently, despite the fact that they compete.[3] It does not follow, however, that because "some degree of inequality from the nature of things must be permitted, gross inequality must also be allowed."[4] Classification may not be arbitrary. It must be based on a real and substantial difference[5] and the difference need not be great or conspicuous,[6] but there must be no discrimination in favor of one as against another of the same class.[7] Also, discriminations of an unusual character are scrutinized with special care.[8] A gross sales tax graduated at increasing rates with the volume of sales,[9] a heavier license tax on each unit in a chain of stores where the owner has stores located in more than one country,[10] and a gross receipts tax levied on corporations operating taxicabs, but not on individuals,[11] have been held to be a repugnant to the Equal Protection Clause. But it is not the function of the Court to consider the propriety or justness of the tax, to seek for the motives and criticize the public policy which prompted the adoption of the statute.[12] If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied.[13]

One not within the class claimed to be discriminated against cannot challenge the constitutionality of a statute on the ground that it denies equal protection of the law.[14] If a tax applies to a class that may be separately taxed, those within the class may not complain because the class might have been more aptly defined or because others, not of the class, are taxed improperly.[15]

Amdt14.S1.8.10.3 Foreign Corporations, Nonresidents, and State Taxes

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

Wholesalers of oil: occupation tax on wholesalers in oil not applicable to wholesalers in other products. Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910).

[2] Quong Wing v. Kirkendall, 223 U.S. 59, 62 (1912). *See also* Hammond Packing Co. v. Montana, 233 U.S. 331 (1914); Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959); Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (2003).

[3] Puget Sound Co. v. Seattle, 291 U.S. 619, 625 (1934). *See* City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

[4] Colgate v. Harvey, 296 U.S. 404, 422 (1935).

[5] Southern Ry. v. Greene, 216 U.S. 400, 417 (1910); Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 400 (1928).

[6] Keeney v. New York, 222 U.S. 525, 536 (1912); Tax Comm'rs v. Jackson, 283 U.S. 527, 538 (1931).

[7] Giozza v. Tiernan, 148 U.S. 657, 662 (1893).

[8] Louisville Gas Co. v. Coleman, 227 U.S. 32, 37 (1928). *See also* Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 237 (1890).

[9] Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935). *See also* Valentine v. Great Atlantic & Pacific Tea Co., 299 U.S. 32 (1936).

[10] Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933).

[11] Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928). This case was formally overruled in *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973).

[12] Tax Comm'rs v. Jackson, 283 U.S. 527, 537 (1931).

[13] Colgate v. Harvey, 296 U.S. 404, 422 (1935).

[14] Darnell v. Indiana, 226 U.S. 390, 398 (1912); Farmers Bank v. Minnesota, 232 U.S. 516, 531 (1914).

[15] Morf v. Bingaman, 298 U.S. 407, 413 (1936).

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Equal Protection Clause does not require identical taxes upon all foreign and domestic corporations in every case.[1] In 1886, a Pennsylvania corporation previously licensed to do business in New York challenged an increased annual license tax imposed by that state in retaliation for a like tax levied by Pennsylvania against New York corporations. This tax was held valid on the ground that the state, having power to exclude entirely, could change the conditions of admission for the future and could demand the payment of a new or further tax as a license fee.[2] Later cases whittled down this rule considerably. The Court decided that "after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind,"[3] and that where it has acquired property of a fixed and permanent nature in a state, it cannot be subjected to a more onerous tax for the privilege of doing business than is imposed on domestic corporations.[4] A state statute taxing foreign corporations writing fire, marine, inland navigation and casualty insurance on net receipts, including receipts from casualty business, was held invalid under the Equal Protection Clause where foreign companies writing only casualty insurance were not subject to a similar tax.[5] Later, the doctrine of *Philadelphia Fire Association v. New York* was revived to sustain an increased tax on gross premiums which was exacted as an annual license fee from foreign but not from domestic corporations.[6] Even though the right of a foreign corporation to do business in a state rests on a license, the Equal Protection Clause is held to ensure it equality of treatment, at least so far as ad valorem taxation is concerned.[7] The Court, in *WHYY Inc. v. Glassboro*,[8] held that a foreign nonprofit corporation licensed to do business in the taxing state is denied equal protection of the law where an exemption from state property taxes granted to domestic corporations is denied to a foreign corporation solely because it was organized under the laws of a sister state and where there is no greater administrative burden in evaluating a foreign corporation than a domestic corporation in the taxing state.

State taxation of insurance companies, insulated from Commerce Clause attack by the McCarran-Ferguson Act, must pass similar hurdles under the Equal Protection Clause. In *Metropolitan Life Ins. Co. v. Ward*,[9] the Court concluded that taxation favoring domestic over foreign corporations "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." Rejecting the assertion that it was merely imposing "Commerce Clause rhetoric in equal protection clothing," the Court explained that the emphasis is different even though the result in some cases will be the same: the Commerce Clause measures the effects which otherwise valid state enactments have on interstate

[1] Baltic Mining Co. v. Massachusetts, 231 U.S. 68, 88 (1913). *See also* Cheney Brothers Co. v. Massachusetts, 246 U.S. 147, 157 (1918).

[2] Philadelphia Fire Ass'n v. New York, 119 U.S. 110, 119 (1886).

[3] Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 511 (1926).

[4] Southern Ry. v. Green, 216 U.S. 400, 418 (1910).

[5] Concordia Ins. Co. v. Illinois, 292 U.S. 535 (1934).

[6] Lincoln Nat'l Life Ins. Co. v. Read, 325 U.S. 673 (1945). This decision was described as "an anachronism" in *Western & Southern Life Ins. Co. v. State Bd. Of Equalization,* 451 U.S. 648, 667 (1981), the Court reaffirming the rule that taxes discriminating against foreign corporations must bear a rational relation to a legitimate state purpose.

[7] Wheeling Steel Corp. v. Glander, 337 U.S. 562, 571, 572 (1949).

[8] 393 U.S. 117 (1968).

[9] 470 U.S. 869, 878 (1985). The vote was 5-4, with Justice Lewis Powell's opinion for the Court joined by Chief Justice Warren Burger and by Justices Byron White, Harry Blackmun, and John Paul Stevens. Justice Sandra Day O'Connor's dissent was joined by Justices William Brennan, Thurgood Marshall, and William Rehnquist.

commerce, while the Equal Protection Clause merely requires a rational relation to a valid state purpose.[10] However, the Court's holding that the discriminatory purpose was invalid under equal protection analysis would also be a basis for invalidation under a different strand of Commerce Clause analysis.[11]

Amdt14.S1.8.10.4 State Income Taxes

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

A state law that taxes the entire income of domestic corporations that do business in the state, including that derived within the state, while exempting entirely the income received outside the state by domestic corporations that do no local business, is arbitrary and invalid.[1] In taxing the income of a nonresident, there is no denial of equal protection in limiting the deduction of losses to those sustained within the state, although residents are permitted to deduct all losses, wherever incurred.[2] A retroactive statute imposing a graduated tax at rates different from those in the general income tax law, on dividends received in a prior year that were deductible from gross income under the law in effect when they were received, does not violate the Equal Protection Clause.[3]

Amdt14.S1.8.10.5 State Inheritance Taxes

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

There is no denial of equal protection in prescribing different treatment for lineal relations, collateral kindred, and unrelated persons, or in increasing the proportionate burden of the tax progressively as the amount of the benefit increases.[1] A tax on life estates where the remainder passes to lineal heirs is valid despite the exemption of life estates where the

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[10] 470 U.S. at 880.

[11] The first level of the Court's "two-tiered" analysis of state statutes affecting commerce tests for virtual per se invalidity. "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986).

[1] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). *See also* Walters v. City of St. Louis, 347 U.S. 231 (1954), sustaining a municipal income tax imposed on gross wages of employed persons but only on net profits of the self-employed, of corporations, and of business enterprises.

[2] Shaffer v. Carter, 252 U.S. 37, 56, 57 (1920); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 75, 76 (1920).

[3] Welch v. Henry, 305 U.S. 134 (1938).

[1] Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 288, 300 (1898).

remainder passes to collateral heirs.[2] There is no arbitrary classification in taxing the transmission of property to a brother or sister, while exempting that to a son-in-law or daughter-in-law.[3] Vested and contingent remainders may be treated differently.[4] The exemption of property bequeathed to charitable or educational institutions may be limited to those within the state.[5] In computing the tax collectible from a nonresident decedent's property within the state, a state may apply the pertinent rates to the whole estate wherever located and take that proportion thereof which the property within the state bears to the total; the fact that a greater tax may result than would be assessed on an equal amount of property if owned by a resident, does not invalidate the result.[6]

Amdt14.S1.8.10.6 Motor Vehicle Taxes

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

In demanding compensation for the use of highways, a state may exempt certain types of vehicles, according to the purpose for which they are used, from a mileage tax on carriers.[1] A state maintenance tax act, which taxes vehicle property carriers for hire at greater rates than it taxes similar vehicles carrying property not for hire, is reasonable, because the use of roads by one hauling not for hire generally is limited to transportation of his own property as an incident to his occupation and is substantially less extensive than that of one engaged in business as a common carrier.[2] A property tax on motor vehicles used in operating a stage line that makes constant and unusual use of the highways may be measured by gross receipts and be assessed at a higher rate than are taxes on property not so employed.[3] Common motor carriers of freight operating over regular routes between fixed termini may be taxed at higher rates than other carriers, common and private.[4] A fee for the privilege of transporting motor vehicles on their own wheels over the highways of the state for purpose of sale does not violate the Equal Protection Clause as applied to cars moving in caravans.[5] The exemption from a tax for a permit to bring cars into the state in caravans of cars moved for sale between zones in the state is not an unconstitutional discrimination where it appears that the traffic subject to the tax places a much more serious burden on the highways than that which is exempt from the tax.[6] Also sustained as valid have been exemptions of vehicles weighing less than 3,000 pounds from graduated registration fees imposed on carriers for hire, notwithstanding that the

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[2] Billings v. Illinois, 188 U.S. 97 (1903).

[3] Campbell v. California, 200 U.S. 87 (1906).

[4] Salomon v. State Tax Comm'n, 278 U.S. 484 (1929).

[5] Board of Educ. v. Illinois, 203 U.S. 553 (1906).

[6] Maxwell v. Bugbee, 250 U.S. 525 (1919).

[1] Continental Baking Co. v. Woodring, 286 U.S. 352 (1932).

[2] Dixie Ohio Express Co. v. State Revenue Comm'n, 306 U.S. 72, 78 (1939).

[3] Alward v. Johnson, 282 U.S. 509 (1931).

[4] Bekins Van Lines v. Riley, 280 U.S. 80 (1929).

[5] Morf v. Bingaman, 298 U.S. 407 (1936).

[6] Clark v. Paul Gray, Inc., 306 U.S. 583 (1939).

exempt vehicles, when loaded, may outweigh those taxed;[7] and exemptions from vehicle registration and license fees levied on private carriers operating a motor vehicle in the business of transporting persons or property for hire, the exemptions including one for vehicles hauling people and farm products exclusively between points not having railroad facilities and not passing through or beyond municipalities having railroad facilities.[8]

Amdt14.S1.8.10.7 Property Taxes

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The state's latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemption on the grounds of policy,[1] whether the exemption results from the terms of the statute itself or the conduct of a state official implementing state policy.[2] A provision for the forfeiture of land for nonpayment of taxes is not invalid because the conditions to which it applies exist only in a part of the state.[3] Also, differences in the basis of assessment are not invalid where the person or property affected might properly be placed in a separate class for purposes of taxation.[4]

Early cases drew the distinction between intentional and systematic discriminatory action by state officials in undervaluing some property while taxing at full value other property in the same class—an action that could be invalidated under the Equal Protection Clause—and mere errors in judgment resulting in unequal valuation or undervaluation—actions that did not support a claim of discrimination.[5] Subsequently, however, the Court in *Allegheny Pittsburgh Coal Co. v. Webster County Comm'n*,[6] found a denial of equal protection to property owners whose assessments, based on recent purchase prices, ranged from eight to thirty-five times higher than comparable neighboring property for which the assessor failed over a ten-year period to readjust appraisals.

Then, only a few years later, the Court upheld a California ballot initiative that imposed a quite similar result: property that is sold is appraised at purchase price, whereas assessments on property that has stayed in the same hands since 1976 may rise no more that 2% per year.[7] *Allegheny Pittsburgh* was distinguished, the disparity in assessments being said to result from administrative failure to implement state policy rather than from implementation of a

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[7] Carley & Hamilton v. Snook, 281 U.S. 66 (1930).

[8] Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n, 295 U.S. 285 (1935).

[1] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[2] Missouri v. Dockery, 191 U.S. 165 (1903).

[3] Kentucky Union Co. v. Kentucky, 219 U.S. 140, 161 (1911).

[4] Charleston Fed. S. & L. Ass'n v. Alderson, 324 U.S. 182 (1945); Nashville C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940).

[5] Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350 (1918); Raymond v. Chicago Traction Co., 207 U.S. 20, 35, 37 (1907); Coutler v. Louisville & Nashville R.R., 196 U.S. 599 (1905). *See also* Chicago, B. & Q. Ry. v. Babcock, 204 U.S. 585 (1907).

[6] 488 U.S. 336 (1989).

[7] Nordlinger v. Hahn, 505 U.S. 1 (1992).

coherent state policy.[8] California's acquisition-value system favoring those who hold on to property over those who purchase and sell property was viewed as furthering rational state interests in promoting "local neighborhood preservation, continuity, and stability," and in protecting reasonable reliance interests of existing homeowners.[9]

Allegheny Pittsburgh was similarly distinguished in *Armour v. City of Indianapolis*,[10] where the Court held that Indianapolis, which had abandoned one method of assessing payments against affected lots for sewer projects for another, could forgive outstanding assessments payments without refunding assessments already paid. In *Armour*, owners of affected lots had been given the option of paying in one lump sum, or of paying in a ten, twenty or thirty-year installment plan. Despite arguments that the forgiveness of the assessment resulted in a significant disparity in the assessment paid by similarly situated homeowners, the Court found that avoiding the administrative burden of continuing to collect the outstanding fees was a rational basis for the City's decision.[11]

An owner aggrieved by discrimination is entitled to have his assessment reduced to the common level.[12] Equal protection is denied if a state does not itself remove the discrimination; it cannot impose upon the person against whom the discrimination is directed the burden of seeking an upward revision of the assessment of other members of the class.[13] A corporation whose valuations were accepted by the assessing commission cannot complain that it was taxed disproportionately, as compared with others, if the commission did not act fraudulently.[14]

Amdt14.S1.8.10.8 Special Assessments

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

A special assessment is not discriminatory because apportioned on an ad valorem basis, nor does its validity depend upon the receipt of some special benefit as distinguished from the general benefit to the community.[1] Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality.[2] A special highway assessment against railroads based on real property, rolling stock, and other personal property is unjustly discriminatory when other assessments for the same improvement are

[8] 505 U.S. at 14–15.

[9] 505 U.S. at 12–13.

[10] 566 U.S. 673 (2012).

[11] 566 U.S. at 682–84.

[12] Sioux City Bridge v. Dakota County, 260 U.S. 441, 446 (1923).

[13] Hillsborough v. Cromwell, 326 U.S. 620, 623 (1946); Allegheny Pittsburgh Coal Co. v. Webster County Comm'n, 488 U.S. 336 (1989).

[14] St. Louis-San Francisco Ry v. Middlekamp, 256 U.S. 226, 230 (1921).

[1] Memphis & Charleston Ry. v. Pace, 282 U.S. 241 (1931).

[2] Kansas City So. Ry. v. Road Improv. Dist. No. 6, 256 U.S. 658 (1921); Thomas v. Kansas City So. Ry., 261 U.S. 481 (1923).

based on real property alone.[3] A law requiring the franchise of a railroad to be considered in valuing its property for apportionment of a special assessment is not invalid where the franchises were not added as a separate personal property value to the assessment of the real property.[4] In taxing railroads within a levee district on a mileage basis, it is not necessarily arbitrary to fix a lower rate per mile for those having fewer than twenty-five miles of main line within the district than for those having more.[5]

Amdt14.S1.8.11 Sexual Orientation-Based Classifications

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

In its 1996 decision *Romer v. Evans*,[1] the Supreme Court struck down a state constitutional amendment that both overturned local ordinances prohibiting discrimination against homosexuals, lesbians, or bisexuals, and prohibited any state or local governmental action to either remedy discrimination or to grant preferences based on sexual orientation. The Court declined to adopt the analysis of the Supreme Court of Colorado, which had held that the amendment infringed on gays' and lesbians' fundamental right to participate in the political process.[2] The Court also declined to apply the heightened standard reserved for suspect classes to classifications based on sexual orientation, and assessed only whether the legislative classification had a rational relation to a legitimate end.

The Court concluded that the amendment failed even this restrained review. Animus against a class of persons, in the court's view, was not a legitimate government goal: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[3] The Court rejected arguments that the state amendment protected the freedom of association rights of landlords and employers, or would conserve resources for fighting discrimination against other groups. The Court found the law unnecessarily broad for these stated purposes, and concluded that no other legitimate rationale existed for such a restriction.[4]

In the 2013 decision of *United States v. Windsor*,[5] the Court struck down Section 3 of the Defense of Marriage Act (DOMA), which restricted federal recognition of same-sex marriages by specifying that, for any federal statute, ruling, regulation, or interpretation by an administrative agency, the word "spouse" would mean a husband or wife of the opposite sex.[6] In *Windsor*, the petitioner had married her same-sex spouse in Canada and lived in New York where the marriage was recognized. After her partner died, the petitioner sought to claim a

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[3] Road Improv. Dist. v. Missouri Pacific R.R., 274 U.S. 188 (1927).

[4] Branson v. Bush, 251 U.S. 182 (1919).

[5] Columbus & Greenville Ry. v. Miller, 283 U.S. 96 (1931).

[1] 517 U.S. 620 (1996).

[2] Evans v. Romer, 854 P.2d 1270 (Colo. 1993).

[3] *Romer*, 517 U.S. at 634 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

[4] *Id.* at 635.

[5] 570 U.S. 744 (2013).

[6] Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7).

federal estate tax exemption for surviving spouses.[7] DOMA precluded her claim for an exemption. In examining the federal statute, the Court initially noted Section 3 of DOMA took the "unusual" step of departing from the "history and tradition of reliance on state law to define marriage" in order to alter the reach of over 1,000 federal laws and limit the scope of federal benefits.[8] Citing *Romer*, the Court noted that discrimination of "unusual character" warranted more careful scrutiny.[9]

Noting New York's recognition of petitioner's marriage, the Court said, the state conferred a "dignity and status of immense import,"[10] and the federal government, with Section 3 of DOMA, was aiming to impose "restrictions and disabilities" on and "injure the very class" New York sought to protect.[11] Accordingly, the Court concluded that improper animus or purpose motivated Section 3 of DOMA because the law's avowed "purpose and practical" effect was to "impose a . . . stigma upon all who enter into same-sex marriages made lawful" by the states.[12] Determining that "no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity,"[13] the Court held that Section 3 of DOMA violates "basic due process and equal protection principles applicable to the Federal Government."[14] In striking down Section 3, the Court did not expressly set out what test the government must meet to justify laws calling for differentiated treatment based on sexual orientation.

Two years after *Windsor*, the Court, in *Obergefell v. Hodges* invalidated several state laws limiting the licensing and recognition of marriage to two people of the opposite sex.[15] While the decision primarily rested on substantive due process grounds,[16] the Court noted that the "right of same sex couples to marry" is "derived, too," from the Fourteenth Amendment's Equal Protection Clause.[17] The Court characterized the Due Process Clause and the Equal Protection Clause as being closely related, and ruled that the Equal Protection Clause prevents states from excluding same-sex couples from civil marriage on the same terms and conditions as opposite sex couples.[18] In reaching that conclusion, the Court noted that, just as evolving societal norms inform the liberty rights of same-sex couples, so too do "new insights and societal understandings" about homosexuality reveal "unjustified inequality" with respect to traditional concepts of the institution of marriage.[19] The Court viewed marriage laws

[7] Section 3 also provided that "marriage" would mean only a legal union between one man and one woman.

[8] *Windsor*, 570 U.S. at 767–68.

[9] *Id.* at 768 (citing *Romer*, 517 U.S. at 633).

[10] *Id.*

[11] *Id.* at 768–70.

[12] *Id.* at 770.

[13] *Id.* at 775.

[14] *Id.* at 769–70. Because the case was decided under the Due Process Clause of the Fifth Amendment, which comprehends both substantive due process and equal protection principles (as incorporated through the Fourteenth Amendment), this statement leaves unclear precisely how each of these doctrines bears on the presented issue.

[15] *See* No. 14-556, slip op. at 2, 28 (U.S. June 26, 2015).

[16] *Id.* at 10–19.

[17] *Id.* at 19.

[18] *Id.* at 23. However, the *Obergefell* Court did not apply any traditional equal protection analysis assessing the nature of the classification, the underlying justifications, or the fit between the classification and its purpose. Instead, the *Obergefell* Court concluded that state classifications distinguishing between opposite- and same-sex couples violated equal protection principles on their face and therefore were unconstitutional. *Id.* at 21–22; *see also* Amdt14.S1.8.13.1 Overview of Fundamental Rights.

[19] *See Obergefell*, slip op. at 19–21.

prohibiting the licensing and recognition of same-sex marriages as working a grave and continuing harm to same-sex couples, serving to "disrespect and subordinate them."[20]

Amdt14.S1.8.12 Wealth-Based Distinctions

Amdt14.S1.8.12.1 Overview of Wealth-Based Distinctions and Equal Protection

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Whatever may be the status of wealth distinctions per se as a suspect classification,[1] there is no doubt that when the classification affects some area characterized as or considered to be fundamental in nature in the structure of our polity—the ability of criminal defendants to obtain fair treatment throughout the system, the right to vote, to name two examples—then the classifying body bears a substantial burden in justifying what it has done. The cases begin with *Griffin v. Illinois*,[2] surely one of the most seminal cases in modern constitutional law. There, the state conditioned full direct appellate review—review to which all convicted defendants were entitled—on the furnishing of a bill of exceptions or report of the trial proceedings, in the preparation of which the stenographic transcript of the trial was usually essential. Only indigent defendants sentenced to death were furnished free transcripts; all other convicted defendants had to pay a fee to obtain them. "In criminal trials," Justice Hugo Black wrote in the plurality opinion, "a State can no more discriminate on account of poverty than on account of religion, race, or color." Although the state was not obligated to provide an appeal at all, when it does so it may not structure its system "in a way that discriminates against some convicted defendants on account of their poverty." The system's fault was that it treated defendants with money differently from defendants without money. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[3]

The principle of *Griffin* was extended in *Douglas v. California*,[4] in which the court held to be a denial of due process and equal protection a system whereby in the first appeal as of right from a conviction counsel was appointed to represent indigents only if the appellate court first examined the record and determined that counsel would be of advantage to the appellant. "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of

[20] *Id.* at 22.

[1] San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[2] 351 U.S. 12 (1956).

[3] 351 U.S. at 17, 18, 19. Although Justice Hugo Black was not explicit, it seems clear that the system was found to violate both the Due Process and Equal Protection Clauses. Justice Felix Frankfurter's concurrence dealt more expressly with the premise of the Black opinion. "It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal, and that it is not Illinois that is responsible for disparity in material circumstances. Of course, a State need not equalize economic conditions. . . . But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed." *Id.* at 23.

[4] 372 U.S. 353 (1963). Justice Thomas Clark dissented, protesting the Court's "new fetish for indigency," *id.* at 358, 359, and Justices John Harlan and Potter Stewart also dissented. *Id.* at 360.

the law, and marshaling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself."[5]

From the beginning, Justice John Harlan opposed reliance on the Equal Protection Clause at all, arguing that a due process analysis was the proper criterion to follow. "It is said that a State cannot discriminate between the 'rich' and the 'poor' in its system of criminal appeals. That statement of course commands support, but it hardly sheds light on the true character of the problem confronting us here. . . . All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action." A fee system neutral on its face was not a classification forbidden by the Equal Protection Clause. "[N]o economic burden attendant upon the exercise of a privilege bears equally upon all, and in other circumstances the resulting differentiation is not treated as an invidious classification by the State, even though discrimination against 'indigents' by name would be unconstitutional."[6] As he protested in *Douglas*: "The States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' *as such* in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not eliminating them entirely."[7]

Due process furnished the standard, Justice John Harlan felt, for determining whether fundamental fairness had been denied. Where an appeal was barred altogether by the imposition of a fee, the line might have been crossed to unfairness, but on the whole he did not see that a system that merely recognized differences between and among economic classes, which as in *Douglas* made an effort to ameliorate the fact of the differences by providing appellate scrutiny of cases of right, was a system that denied due process.[8]

The Court has reiterated that both due process and equal protection concerns are implicated by restrictions on indigents' exercise of the right of appeal. "In cases like *Griffin* and *Douglas*, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal protection concerns were involved because the State treated a class of defendants—indigent ones—differently for purposes of offering them a meaningful appeal."[9]

Amdt14.S1.8.12.2 Criminal Procedures, Sentences, and Poverty

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[5] 372 U.S. at 357–58.

[6] Griffin v. Illinois, 351 U.S. 12, 34, 35 (1956).

[7] Douglas v. California, 372 U.S. 353, 361 (1963).

[8] 372 U.S. at 363–67.

[9] Evitts v. Lucey, 469 U.S. 387, 405 (1985) (holding that due process requires that counsel provided for appeals as of right must be effective).

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"[I]t is now fundamental that, once established, . . . avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."[1] "In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds. . . ."[2] No state may condition the right to appeal[3] or the right to file a petition for habeas corpus[4] or other form of postconviction relief upon the payment of a docketing fee or some other type of fee when the petitioner has no means to pay. Similarly, although the states are not required to furnish full and complete transcripts of their trials to indigents when excerpted versions or some other adequate substitute is available, if a transcript is necessary to adequate review of a conviction, either on appeal or through procedures for postconviction relief, the transcript must be provided to indigent defendants or to others unable to pay.[5] This right may not be denied by drawing a felony-misdemeanor distinction or by limiting it to those cases in which confinement is the penalty.[6] A defendant's right to counsel is to be protected as well as the similar right of the defendant with funds.[7] The right to counsel on appeal necessarily means the right to *effective* assistance of counsel.[8]

But, deciding a point left unresolved in *Douglas*, the Court held that neither the Due Process nor the Equal Protection Clause requires a state to furnish counsel to a convicted defendant seeking, after he had exhausted his appeals of right, to obtain discretionary review of his case in the state's higher courts or in the United States Supreme Court. Due process does not require that, after an appeal has been provided, the state must always provide counsel to indigents at every stage. "Unfairness results only if indigents are singled out by the State and denied meaningful access to that system because of their poverty." That essentially equal protection issue was decided against the defendant in the context of an appellate system in

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[1] Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

[2] Draper v. Washington, 372 U.S. 487, 496 (1963).

[3] Burns v. Ohio, 360 U.S. 252 (1959); Douglas v. Green, 363 U.S. 192 (1960).

[4] Smith v. Bennett, 365 U.S. 708 (1961).

[5] Griffin v. Illinois, 351 U.S. 12 (1956); Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958) (unconstitutional to condition free transcript upon trial judge's certification that "justice will thereby be promoted"); Draper v. Washington, 372 U.S. 487 (1963) (unconstitutional to condition free transcript upon judge's certification that the allegations of error were not "frivolous"); Lane v. Brown, 372 U.S. 477 (1963) (unconstitutional to deny free transcript upon determination of public defender that appeal was in vain); Long v. District Court, 385 U.S. 192 (1966) (indigent prisoner entitled to free transcript of his habeas corpus proceeding for use on appeal of adverse decision therein); Gardner v. California, 393 U.S. 367 (1969) (on filing of new habeas corpus petition in appellate court upon an adverse nonappealable habeas ruling in a lower court where transcript was needed, one must be provided an indigent prisoner). *See also* Rinaldi v. Yeager, 384 U.S. 305 (1966). For instances in which a transcript was held not to be needed, *see* Britt v. North Carolina, 404 U.S. 266 (1971); United States v. MacCollom, 426 U.S. 317 (1976).

[6] Williams v. Oklahoma City, 395 U.S. 458 (1969); Mayer v. City of Chicago, 404 U.S. 189 (1971).

[7] Douglas v. California, 372 U.S. 353 (1963); Swenson v. Bosler, 386 U.S. 258 (1967); Anders v. California, 386 U.S. 738 (1967); Entsminger v. Iowa, 386 U.S. 748 (1967). A rule requiring a court-appointed appellate counsel to file a brief explaining reasons why he concludes that a client's appeal is frivolous does not violate the client's right to assistance of counsel on appeal. McCoy v. Court of Appeals, 486 U.S. 429 (1988). The right is violated if the court allows counsel to withdraw by merely certifying that the appeal is "meritless" without also filing an *Anders* brief supporting the certification. Penson v. Ohio, 488 U.S. 75 (1988). *But see* Smith v. Robbins, 528 U.S. 259 (2000) (upholding California law providing that appellate counsel may limit his or her role to filing a brief summarizing the case and record and requesting the court to examine record for non-frivolous issues). On the other hand, since there is no constitutional right to counsel for indigent prisoners seeking postconviction collateral relief, there is no requirement that withdrawal be justified in an *Anders* brief if a state has provided counsel for postconviction proceedings. Pennsylvania v. Finley, 481 U.S. 551 (1987) (counsel advised the court that there were no arguable bases for collateral relief).

[8] Evitts v. Lucey, 469 U.S. 387 (1985).

which one appeal could be taken as of right to an intermediate court, with counsel provided if necessary, and in which further appeals might be granted not primarily upon any conclusion about the result below but upon considerations of significant importance.[9] Not even death row inmates have a constitutional right to an attorney to prepare a petition for collateral relief in state court.[10]

This right to legal assistance, especially in the context of the constitutional right to the writ of habeas corpus, means that in the absence of other adequate assistance, as through a functioning public defender system, a state may not deny prisoners legal assistance of another inmate,[11] and it must make available certain minimal legal materials.[12]

A convicted defendant may not be imprisoned solely because of his indigency. *Williams v. Illinois*[13] held that it was a denial of equal protection for a state to extend the term of imprisonment of a convicted defendant beyond the statutory maximum provided because he was unable to pay the fine that was also levied upon conviction. And *Tate v. Short*[14] held that, in situations in which no term of confinement is prescribed for an offense but only a fine, the court may not jail persons who cannot pay the fine, unless it is impossible to develop an alternative, such as installment payments or fines scaled to ability to pay. Willful refusal to pay may, however, be punished by confinement.

Amdt14.S1.8.12.3 Access to Courts, Wealth, and Equal Protection

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

In *Boddie v. Connecticut*,[1] Justice John Harlan carried a majority of the Court with him in using a due process analysis to evaluate the constitutionality of a state's filing fees in divorce actions that a group of welfare assistance recipients attacked as preventing them from obtaining divorces. The Court found that, when the state monopolized the avenues to a pacific settlement of a dispute over a fundamental matter such as marriage—only the state could terminate the marital status—then it denied due process by inflexibly imposing fees that kept some persons from using that avenue. Justice John Harlan's opinion averred that a facially neutral law or policy that did in fact deprive an individual of a protected right would be held invalid even though as a general proposition its enforcement served a legitimate governmental

[9] Ross v. Moffitt, 417 U.S. 600 (1974). *See also* Fuller v. Oregon, 417 U.S. 40 (1974) (statute providing, under circumscribed conditions, that indigent defendant, who receives state-compensated counsel and other assistance for his defense, who is convicted, and who subsequently becomes able to repay costs, must reimburse state for costs of his defense in no way operates to deny him assistance of counsel or the equal protection of the laws).

[10] Murray v. Giarratano, 492 U.S. 1 (1989) (upholding Virginia's system under which "unit attorneys" assigned to prisons are available for some advice prior to the filing of a claim, and a personal attorney is assigned if an inmate succeeds in filing a petition with at least one non-frivolous claim).

[11] Johnson v. Avery, 393 U.S. 483 (1969).

[12] Younger v. Gilmore, 404 U.S. 15 (1971); Bounds v. Smith, 430 U.S. 817 (1977).

[13] 399 U.S. 235 (1970).

[14] 401 U.S. 395 (1971). The Court has not yet treated a case in which the permissible sentence is "$30 or 30 days" or some similar form where either confinement or a fine will satisfy the state's penal policy.

[1] 401 U.S. 371 (1971).

interest. The opinion concluded with a cautioning observation that the case was not to be taken as establishing a general right to access to the courts.

The *Boddie* opinion left unsettled whether a litigant's interest in judicial access to effect a pacific settlement of some dispute was an interest entitled to some measure of constitutional protection as a value of independent worth or whether a litigant must be seeking to resolve a matter involving a fundamental interest in the only forum in which any resolution was possible. Subsequent decisions established that the latter answer was the choice of the Court. In *United States v. Kras*,[2] the Court held that the imposition of filing fees that blocked the access of an indigent to a discharge of his debts in bankruptcy denied the indigent neither due process nor equal protection. The marital relationship in *Boddie* was a fundamental interest, the Court said, and upon its dissolution depended associational interests of great importance; however, an interest in the elimination of the burden of debt and in obtaining a new start in life, while important, did not rise to the same constitutional level as marriage. Moreover, a debtor's access to relief in bankruptcy had not been monopolized by the government to the same degree as dissolution of a marriage; one may, "in theory, and often in actuality," manage to resolve the issue of his debts by some other means, such as negotiation. While the alternatives in many cases, such as *Kras*, seem barely likely of successful pursuit, the Court seemed to be suggesting that absolute preclusion was a necessary element before a right of access could be considered.[3]

Subsequently, on the initial appeal papers and without hearing oral argument, the Court summarily upheld the application to indigents of filing fees that in effect precluded them from appealing decisions of a state administrative agency reducing or terminating public assistance.[4]

The continuing vitality of *Griffin v. Illinois*, however, is seen in *M.L.B. v. S.L.J.*,[5] where the Court considered whether a state seeking to terminate the parental rights of an indigent must pay for the preparation of the transcript required for pursuing an appeal. Unlike in *Boddie*, the state, Mississippi, had afforded the plaintiff a trial on the merits, and thus the "monopolization" of the avenues of relief alleged in *Boddie* was not at issue. As in *Boddie*, however, the Court focused on the substantive due process implications of the state's limiting "[c]hoices about marriage, family life, and the upbringing of children,"[6] while also referencing cases establishing a right of equal access to criminal appellate review. Noting that even a petty offender had a right to have the state pay for the transcript needed for an effective appeal,[7] and

[2] 409 U.S. 434 (1973).

[3] 409 U.S. at 443–46. The equal protection argument was rejected by using the traditional standard of review, bankruptcy legislation being placed in the area of economics and social welfare, and the use of fees to create a self-sustaining bankruptcy system being considered to be a rational basis. Dissenting, Justice Potter Stewart argued that *Boddie* required a different result, denied that absolute preclusion of alternatives was necessary, and would have evaluated the importance of an interest asserted rather than providing that it need be fundamental. *Id.* at 451. Justice Marshall's dissent was premised on an asserted constitutional right to be heard in court, a constitutional right of access regardless of the interest involved. *Id.* at 458. Justices William O. Douglas and William Brennan concurred in Justice Potter Stewart's dissent, as indeed did Justice Thurgood Marshall.

[4] Ortwein v. Schwab, 410 U.S. 656 (1973). The division was the same 5-4 that prevailed in *Kras*. *See also* Lindsey v. Normet, 405 U.S. 56 (1972). But cases involving the *Boddie* principle do continue to arise. Little v. Streater, 452 U.S. 1 (1981) (in paternity suit that state required complainant to initiate, indigent defendant entitled to have state pay for essential blood grouping test); Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (recognizing general right of indigent parent to appointed counsel when state seeks to terminate parental status, but using balancing test to determine that right was not present in this case).

[5] 519 U.S. 102 (1996).

[6] 519 U.S. at 106. *See* Boddie v. Connecticut, 401 U.S. 371 (1971).

[7] Mayer v. Chicago, 404 U.S. 189 (1971).

that the forced dissolution of parental rights was "more substantial than mere loss of money,"[8] the Court ordered Mississippi to provide the plaintiff the court records necessary to pursue her appeal.

Amdt14.S1.8.12.4 Educational Opportunity, Wealth, and Equal Protection

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Making even clearer its approach in de facto wealth classification cases, the Court in *San Antonio School District v. Rodriguez*[1] rebuffed an intensive effort with widespread support in lower court decisions to invalidate the system prevalent in forty-nine of the fifty states of financing schools primarily out of property taxes, with the consequent effect that the funds available to local school boards within each state were widely divergent. Plaintiffs had sought to bring their case within the strict scrutiny—compelling state interest doctrine of equal protection review by claiming that under the tax system there resulted a de facto wealth classification that was "suspect" or that education was a "fundamental" right and the disparity in educational financing could not therefore be justified. The Court held, however, that there was neither a suspect classification nor a fundamental interest involved, that the system must be judged by the traditional restrained standard, and that the system was rationally related to the state's interest in protecting and promoting local control of education.[2]

Important as the result of the case is, the doctrinal implications are far more important. The attempted denomination of wealth as a suspect classification failed on two levels. First, the Court noted that plaintiffs had not identified the "class of disadvantaged 'poor'" in such a manner as to further their argument. That is, the Court found that the existence of a class of poor persons, however defined, did not correlate with property-tax-poor districts; neither as an absolute nor as a relative consideration did it appear that tax-poor districts contained greater numbers of poor persons than did property-rich districts, except in random instances. Second, the Court held, there must be an absolute deprivation of some right or interest rather than merely a relative one before the deprivation because of inability to pay will bring into play strict scrutiny. "The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[3] No such class had been identified here and more importantly no one was being absolutely denied an education; the argument was that it was a lower quality education than that available in other districts. Even assuming that to be the case, however, it did not create a suspect classification.

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[8] 519 U.S. at 121 (quoting Santosky v. Kramer, 455 U.S. 745, 756 (1982)).

[1] 411 U.S. 1 (1973). The opinion by Justice Lewis Powell was concurred in by the Chief Justice and Justices Potter Stewart, Harry Blackmun, and William Rehnquist. Justices William O. Douglas, William Brennan, Byron White, and Thurgood Marshall dissented. *Id.* at 62, 63, 70.

[2] 411 U.S. at 44–55. Applying the rational justification test, Justice Byron White would have found that the system did not use means rationally related to the end sought to be achieved. *Id.* at 63.

[3] 411 U.S. at 20. *But see id.* at 70, 117–24 (Marshall and Douglas, JJ., dissenting).

Education is an important value in our society, the Court agreed, being essential to the effective exercise of freedom of expression and intelligent utilization of the right to vote. But a right to education is not expressly protected by the Constitution, continued the Court, nor should it be implied simply because of its undoubted importance. The quality of education increases the effectiveness of speech or the ability to make informed electoral choice but the judiciary is unable to determine what level of quality would be sufficient. Moreover, the system under attack did not deny educational opportunity to any child, whatever the result in that case might be; it was attacked for providing relative differences in spending and those differences could not be correlated with differences in educational quality.[4]

Rodriguez clearly promised judicial restraint in evaluating challenges to the provision of governmental benefits when the effect is relatively different because of the wealth of some of the recipients or potential recipients and when the results, what is obtained, vary in relative degrees. Wealth or indigency is not a per se suspect classification but it must be related to some interest that is fundamental, and *Rodriguez* doctrinally imposed a considerable barrier to the discovery or creation of additional fundamental interests. As the decisions reviewed earlier with respect to marriage and the family reveal, that barrier has not held entirely firm, but within a range of interests, such as education,[5] the case remains strongly viable. Relying on *Rodriguez* and distinguishing *Plyler*, the Court in *Kadrmas v. Dickinson Public Schools*[6] rejected an indigent student's equal protection challenge to a state statute permitting school districts to charge a fee for school bus service, in the process rejecting arguments that either "strict" or "heightened" scrutiny is appropriate. Moreover, the Court concluded, there is no constitutional obligation to provide bus transportation, or to provide it for free if it is provided at all.[7]

Amdt14.S1.8.12.5 Abortion, Public Assistance, and Equal Protection

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Rodriguez furnished the principal analytical basis for the Court's subsequent decision in *Maher v. Roe*,[1] holding that a state's refusal to provide public assistance for abortions that were not medically necessary under a program that subsidized all medical expenses otherwise associated with pregnancy and childbirth did not deny to indigent pregnant women equal protection of the laws. As in *Rodriguez*, the Court held that the indigent are not a suspect class.[2] Again, as in *Rodriguez* and in *Kras*, the Court held that, when the state has not

[4] 411 U.S. at 29–39. *But see id.* at 62 (Brennan, J., dissenting), 70, 110–17 (Marshall and Douglas, JJ., dissenting).

[5] *Cf.* Plyler v. Doe, 457 U.S. 202 (1982). The case is also noted for its proposition that there were only two equal protection standards of review, a proposition even the author of the opinion has now abandoned.

[6] 487 U.S. 450 (1988). This was a 5-4 decision, with Justice Sanra Day O'Connor's opinion of the Court being joined by Chief Justice William Rehnquist and Justices Byron White, Antonin Scalia, and Anthony Kennedy, and with Justices Thurgood Marshall, William Brennan, John Paul Stevens, and Harry Blackmun dissenting.

[7] 487 U.S. at 462. The plaintiff child nonetheless continued to attend school, so the requirement was reviewed as an additional burden but not a complete obstacle to her education.

[1] 432 U.S. 464 (1977).

[2] 432 U.S. at 470–71.

monopolized the avenues for relief and the burden is only relative rather than absolute, a governmental failure to offer assistance, while funding alternative actions, is not undue governmental interference with a fundamental right.[3] Expansion of this area of the law of equal protection seems especially limited.

Amdt14.S1.8.13 Fundamental Rights

Amdt14.S1.8.13.1 Overview of Fundamental Rights

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The other phase of active review of classifications holds that when certain fundamental liberties and interests are involved, government classifications which adversely affect them must be justified by a showing of a compelling interest necessitating the classification and by a showing that the distinctions are required to further the governmental purpose. The effect of applying the test, as in the other branch of active review, is to deny to legislative judgments the deference usually accorded them and to dispense with the general presumption of constitutionality usually given state classifications.[1]

It is thought[2] that the "fundamental right" theory had its origins in *Skinner v. Oklahoma ex rel. Williamson*,[3] in which the Court subjected to "strict scrutiny" a state statute providing for compulsory sterilization of habitual criminals, such scrutiny being thought necessary because the law affected "one of the basic civil rights." In the apportionment decisions, Chief Justice Earl Warren observed that, "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[4] A stiffening of the traditional test could be noted in the opinion of the Court striking down certain restrictions on voting eligibility[5] and the phrase "compelling state interest" was used several times in Justice William Brennan's opinion in *Shapiro v. Thompson*.[6] Thereafter, the phrase was used in several voting cases in which restrictions were voided, and the doctrine was asserted in other cases.[7]

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[3] 432 U.S. at 471–74. *See also* Harris v. McRae, 448 U.S. 297, 322–23 (1980). Total deprivation was the theme of *Boddie* and was the basis of concurrences by Justices Potter Stewart and Lewis Powell in *Zablocki v. Redhail,* 434 U.S. 374, 391, 396 (1978), in that the State imposed a condition indigents could not meet and made no exception for them. The case also emphasized that *Dandridge v. Williams*, 397 U.S. 471 (1970), imposed a rational basis standard in equal protection challenges to social welfare cases. *But see* Califano v. Goldfarb, 430 U.S. 199 (1977), where the majority rejected the dissent's argument that this should always be the same.

[1] Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

[2] *Shapiro*, 394 U.S. at 660 (Harlan, J., dissenting).

[3] 316 U.S. 535, 541 (1942).

[4] Reynolds v. Sims, 377 U.S. 533, 562 (1964).

[5] Carrington v. Rash, 380 U.S. 89 (1965); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Williams v. Rhodes, 393 U.S. 23 (1968).

[6] 394 U.S. 618, 627, 634, 638 (1969).

[7] Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Dunn v. Blumstein, 405 U.S. 330 (1972).

Although no opinion of the Court attempted to delineate the process by which certain "fundamental" rights were differentiated from others,[8] it was evident from the cases that the right to vote,[9] the right of interstate travel,[10] the right to be free of wealth distinctions in the criminal process,[11] and the right of procreation[12] were at least some of those interests that triggered active review when de jure or de facto official distinctions were made with respect to them. In *Rodriguez*,[13] the Court also sought to rationalize and restrict this branch of active review, as that case involved both a claim that de facto wealth classifications should be suspect and a claim that education was a fundamental interest, so that providing less of it to people because they were poor triggered a compelling state interest standard. The Court readily agreed that education was an important value in our society. "But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. . . . [T]he answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[14] A right to education is not expressly protected by the Constitution, continued the Court, and it was unwilling to find an implied right because of its undoubted importance.

But just as *Rodriguez* did not ultimately prevent the Court's adoption of a "three-tier" or "sliding-tier" standard of review, Justice Lewis Powell's admonition that only interests expressly or impliedly protected by the Constitution should be considered "fundamental" did not prevent the expansion of the list of such interests. The difficulty was that Court decisions on the right to vote, the right to travel, the right to procreate, as well as other rights, premise the constitutional violation to be of the Equal Protection Clause, which does not itself guarantee the right but prevents the differential governmental treatment of those attempting to exercise the right.[15] Thus, state limitation on the entry into marriage was soon denominated an incursion on a fundamental right that required a compelling justification.[16] Although denials of public funding of abortions werebecause only poor held to implicate no fundamental interest—abortion's being a fundamental interest—and no suspect classification—because only poor women needed public funding[17] other denials of public assistance because of alienage, sex, or whether a person was born out of wedlock have been deemed to be governed by the same standard of review as affirmative harms imposed on those grounds.[18] And, in *Plyler v. Doe*,[19] the complete denial of education to the children of unlawfully present aliens was found subject to intermediate scrutiny and invalidated.

An open question after *Obergefell v. Hodges*, the 2015 case finding the right to same-sex marriage is protected by the Constitution, is the extent to which the Court is reconceptualizing

[8] This indefiniteness has been a recurring theme in dissents. *E.g.*, Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Harlan, J.); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 177 (1972) (Rehnquist, J.).

[9] *E.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972).

[10] *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

[11] *E.g.*, Tate v. Short, 401 U.S. 395 (1971).

[12] Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

[13] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[14] 411 U.S. at 30, 33–34. *But see id.* at 62 (Brennan, J., dissenting), 70, 110–17 (Marshall and Douglas, J.J., dissenting).

[15] Zobel v. Williams, 457 U.S. 55, 60 & n.6 (1982), and *id.* at 66–68 (Brennan, J., concurring), 78–80 (O'Connor, J., concurring) (travel).

[16] Zablocki v. Redhail, 434 U.S. 374 (1978).

[17] Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

[18] *E.g.*, Jiminez v. Weinberger, 417 U.S. 628 (1974) (whether a person was born to married parents); Nyquist v. Mauclet, 432 U.S. 1 (1977) (alienage); Califano v. Goldfarb, 430 U.S. 199 (1977) (sex).

[19] 457 U.S. 202 (1982).

equal protection analysis.[20] In *Obergefell*, the Court concluded that state laws that distinguished between marriages between same- and opposite-sex married couples violated the Equal Protection Clause.[21] However, in lieu of more traditional equal protection analysis, the *Obergefell* Court did not identify whether the base classification made by the challenged state marriage laws was "suspect." Nor did the *Obergefell* Court engage in a balancing test to determine whether the purpose of the state classification was tailored to or fit the contours of the classification. Instead, the Court merely declared that state laws prohibiting same-sex marriage "abridge[d] central precepts of equality."[22] It remains to be seen whether *Obergefell* signals a new direction for the Court's equal protection jurisprudence or is merely an anomaly that indicates the fluctuating nature of active review, as the doctrine has been subject to shifting majorities and varying degrees of concern about judicial activism and judicial restraint. Nonetheless, as will be more fully reviewed below, the sliding scale of review underlies many of the Court's most recent equal protection cases, even if the jurisprudence and its doctrinal basis have not been fully elucidated or consistently endorsed by the Court.

Amdt14.S1.8.13.2 Interstate Travel as a Fundamental Right

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The doctrine of the "right to travel" actually encompasses three separate rights, of which two have been notable for the uncertainty of their textual support. The first is the right of a citizen to move freely between states, a right venerable for its longevity, but still lacking a clear doctrinal basis.[1] The second, expressly addressed by the first sentence of Article IV, provides a citizen of one state who is temporarily visiting another state the "Privileges and Immunities" of a citizen of the latter state.[2] The third is the right of a new arrival to a state, who establishes citizenship in that state, to enjoy the same rights and benefits as other state citizens. This right is most often invoked in challenges to durational residency requirements, which require that persons reside in a state for a specified period before taking advantage of the benefits of that state's citizenship.

Amdt14.S1.8.13.3 Residency Requirements and Interstate Travel

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or*

[20] *See* 135 S. Ct. 2584 (2015).

[21] *Id.* at 2590–91.

[22] *Id.*

[1] Saenz v. Roe, 526 U.S. 489 (1999). "For the purposes of this case, we need not identify the source of [the right to travel] in the text of the Constitution. The right of 'free ingress and regress to and from' neighboring states which was expressly mentioned in the text of the Articles of Confederation, may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'" *Id.* at 501 (citations omitted).

[2] Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869) ("without some provision . . . removing from citizens of each State the disabilities of alienage in other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.").

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Challenges to durational residency requirements have traditionally been made under the Equal Protection Clause of the Fourteenth Amendment. In 1999, however, the Court approved a doctrinal shift, so that state laws that distinguished between their own citizens, based on how long they had been in the state, would be evaluated instead under the Privileges or Immunities Clause of the Fourteenth Amendment.[1] The Court did not, however, question the continuing efficacy of the earlier cases.

A durational residency requirement creates two classes of persons: those who have been within the state for the prescribed period and those who have not.[2] But persons who have moved recently, at least from state to state,[3] have exercised a right protected by the Constitution, and the durational residency classification either deters the exercise of that right or penalizes those who have exercised it.[4] Any such classification is invalid "unless shown to be necessary to promote a *compelling* governmental interest."[5] The constitutional right to travel has long been recognized,[6] but it is only relatively recently that the strict standard of equal protection review has been applied to nullify durational residency requirements.

Thus, in *Shapiro v. Thompson*,[7] durational residency requirements conditioning eligibility for welfare assistance on one year's residence in the state[8] were voided. If the purpose of the requirements was to inhibit migration by needy persons into the state or to bar the entry of those who came from low-paying states to higher-paying ones in order to collect greater benefits, the Court said, the purpose was impermissible.[9] If, on the other hand, the purpose was to serve certain administrative and related governmental objectives—the facilitation of the planning of budgets, the provision of an objective test of residency, minimization of opportunity

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[1] Saenz v. Roe, 526 U.S. 489, 502–03 (1999).

[2] Dunn v. Blumstein, 405 U.S. 330, 334 (1972). Because the right to travel is implicated by state distinctions between residents and nonresidents, the relevant constitutional provision is the Privileges and Immunities Clause, Article IV, § 2, cl. 1.

[3] Intrastate travel is protected to the extent that the classification fails to meet equal protection standards in some respect. *Compare* Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970) (three-judge court), *aff'd. per curiam*, 405 U.S. 1035 (1972), *with* Arlington County Bd. v. Richards, 434 U.S. 5 (1977). The same principle applies in the Commerce Clause cases, in which discrimination may run against in-state as well as out-of-state concerns. *Cf.* Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

[4] Shapiro v. Thompson, 394 U.S. 618, 629–31, 638 (1969); Dunn v. Blumstein, 405 U.S. 330, 338–42 (1972); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Jones v. Helms, 452 U.S. 412, 420–21 (1981). *See also* Oregon v. Mitchell, 400 U.S. 112, 236–39 (1970) (Brennan, White, and Marshall, JJ.), and *id.* at 285–92 (Stewart and Blackmun, JJ., and Burger, C.J.).

[5] Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis by Court); Graham v. Richardson, 403 U.S. 365, 375–76 (1971).

[6] Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); Edwards v. California, 314 U.S. 160 (1941) (both cases in context of direct restrictions on travel). The source of the right to travel and the reasons for reliance on the Equal Protection Clause are questions puzzled over and unresolved by the Court. United States v. Guest, 383 U.S. 745, 758, 759 (1966), and *id.* at 763–64 (Harlan, J., concurring and dissenting), *id.* at 777 n.3 (Brennan, J., concurring and dissenting); Shapiro v. Thompson, 394 U.S. 618, 629–31 (1969), and *id.* at 671 ((Harlan, J., dissenting); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 31–32 (1973); Jones v. Helms, 452 U.S. 412, 417–19 (1981); Zobel v. Williams, 457 U.S. 55, 60 & n.6 (1982), and *id.* at 66–68 (Brennan, J., concurring), 78–81 (O'Connor, J., concurring).

[7] 394 U.S. 618 (1969).

[8] The durational residency provision established by Congress for the District of Columbia was also voided. 394 U.S. at 641–42.

[9] 394 U.S. at 627–33. Gaddis v. Wyman, 304 F. Supp. 717 (N.D.N.Y. 1969), *aff'd sub nom.* Wyman v. Bowens, 397 U.S. 49 (1970), struck down a provision construed so as to bar only persons who came into the state solely to obtain welfare assistance.

for fraud, and encouragement of early entry of new residents into the labor force—then the requirements were rationally related to the purpose but they were not *compelling* enough to justify a classification that infringed a fundamental interest.[10] In *Dunn v. Blumstein*,[11] where the durational residency requirements denied the franchise to newcomers, such administrative justifications were found constitutionally insufficient to justify the classification.[12] The Privileges or Immunities Clause of the Fourteenth Amendment was the basis for striking down a California law that limited welfare benefits for California citizens who had resided in the state for less than a year to the level of benefits that they would have received in the state of their prior residence.[13]

However, a state one-year durational residency requirement for the initiation of a divorce proceeding was sustained in *Sosna v. Iowa*.[14] Although it is not clear what the precise basis of the ruling is, it appears that the Court found that the state's interest in requiring that those who seek a divorce from its courts be genuinely attached to the state and its desire to insulate divorce decrees from the likelihood of collateral attack justified the requirement.[15] Similarly, durational residency requirements for lower in-state tuition at public colleges have been held constitutionally justifiable, again, however, without a clear statement of reason.[16] More recently, the Court has attempted to clarify these cases by distinguishing situations where a state citizen is likely to "consume" benefits within a state's borders (such as the provision of welfare) from those where citizens of other states are likely to establish residency just long enough to acquire some portable benefit, and then return to their original domicile to enjoy them (such as obtaining a divorce decree or paying the in-state tuition rate for a college education).[17]

A state scheme for returning to its residents a portion of the income earned from the vast oil deposits discovered within Alaska foundered upon the formula for allocating the dividends; that is, each adult resident received one unit of return for each year of residency subsequent to 1959, the first year of Alaska's statehood. The law thus created fixed, permanent distinctions between an ever-increasing number of classes of bona fide residents based on how long they had been in the state. The differences between the durational residency cases previously

[10] 394 U.S. at 633–38. *Shapiro* was reaffirmed in *Graham v. Richardson,* 403 U.S. 365 (1971) (striking down durational residency requirements for aliens applying for welfare assistance), and in *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974) (voiding requirement of one year's residency in county as condition to indigent's receiving nonemergency hospitalization or medical care at county's expense). When Connecticut and New York reinstituted the requirements, pleading a financial emergency as the compelling state interest, they were summarily rebuffed. Rivera v. Dunn, 329 F. Supp. 554 (D. Conn. 1971), *aff'd per curiam*, 404 U.S. 1054 (1972); Lopez v. Wyman, Civ. No. 1971-308 (W.D.N.Y. 1971), *aff'd per curiam*, 404 U.S. 1055 (1972). The source of the funds, state or federal, is irrelevant to application of the principle. Pease v. Hansen, 404 U.S. 70 (1971).

[11] 405 U.S. 330 (1972). *But see* Marston v. Lewis, 410 U.S. 679 (1973), and Burns v. Fortson, 410 U.S. 686 (1973). Durational residency requirements of five and seven years respectively for candidates for elective office were sustained in *Kanapaux v. Ellisor,* 419 U.S. 891 (1974), and *Sununu v. Stark,* 420 U.S. 958 (1975).

[12] For additional discussion of durational residence as a qualification to vote, see Amdt14.S1.8.6.2 Voter Qualifications.

[13] Saenz v. Roe, 526 U.S. 489, 505 (1999).

[14] 419 U.S. 393 (1975). Justices Thurgood Marshall and William Brennan dissented on the merits. *Id.* at 418.

[15] 419 U.S. at 409. But the Court also indicated that the plaintiff was not absolutely barred from the state courts, but merely required to wait for access (which was true in the prior cases as well and there held immaterial), and that possibly the state interests in marriage and divorce were more exclusive and thus more immune from federal constitutional attack than were the matters at issue in the previous cases. The Court also did not indicate whether it was using strict or traditional scrutiny.

[16] Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd per curiam*, 401 U.S. 985 (1971). *Cf.* Vlandis v. Kline, 412 U.S. 441, 452 & n.9 (1973), and *id.* at 456, 464, 467 (dicta). In *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 256 (1974), the Court, noting the results, stated that "some waiting periods . . . may not be penalties" and thus would be valid.

[17] *Saenz v. Roe*, 526 U.S. at 505.

decided did not alter the bearing of the right to travel principle upon the distribution scheme, but the Court's decision went off on the absence of any permissible purpose underlying the apportionment classification and it thus failed even the rational basis test.[18]

Still unresolved are issues such as durational residency requirements for occupational licenses and other purposes.[19] But this line of cases does not apply to state residency requirements themselves, as distinguished from durational provisions,[20] and the cases do not inhibit the states when, having reasons for doing so, they bar travel by certain persons.[21]

Section 2—Apportionment of Representation

Amdt14.S2.1 Overview of Apportionment of Representation

Fourteenth Amendment, Section 2:

> *Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.*

With the abolition of slavery by the Thirteenth Amendment, enslaved persons and their descendants, who formerly counted as three-fifths of a person, would be fully counted in the apportionment of seats in the House of Representatives, increasing as well the electoral vote, and there appeared the prospect that the readmitted Southern states would gain a political advantage in Congress when combined with Democrats from the North. Because the South was adamantly opposed to African American suffrage, all the congressmen would be elected by White voters. Many wished to provide for the enfranchisement of African Americans and proposals to this effect were voted on in both the House and the Senate, but only a few Northern states permitted African Americans to vote, and a series of referenda on the question in Northern states revealed substantial White hostility to the proposal. Therefore, a compromise was worked out to effect a reduction in the representation of any state that discriminated against males in the franchise.[1]

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[18] Zobel v. Williams, 457 U.S. 55 (1982). Somewhat similar was the Court's invalidation on equal protection grounds of a veterans preference for state employment limited to persons who were state residents when they entered military service; four Justices also thought the preference penalized the right to travel. Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986).

[19] La Tourette v. McMaster, 248 U.S. 465 (1919), upholding a two-year residence requirement to become an insurance broker, must be considered of questionable validity. Durational periods for admission to the practice of law or medicine or other professions have evoked differing responses by lower courts.

[20] *E.g.*, McCarthy v. Philadelphia Civil Service Comm'n, 424 U.S. 645 (1976) (ordinance requiring city employees to be and to remain city residents upheld). *See* Memorial Hospital v. Maricopa County, 415 U.S. 250, 255 (1974). *See also* Martinez v. Bynum, 461 U.S. 321 (1983) (bona fide residency requirement for free tuition to public schools).

[21] Jones v. Helms, 452 U.S. 412 (1981) (statute made it a misdemeanor to abandon a dependent child but a felony to commit the offense and then leave the state).

[1] *See generally* J. James, The Framing of the Fourteenth Amendment (1956).

Amdt14.S2.1
Overview of Apportionment of Representation

No serious effort was ever made in Congress to effectuate Section 2, and the only judicial attempt was rebuffed.[2] With subsequent constitutional amendments adopted and the use of federal coercive powers to enfranchise persons, the section is little more than a historical curiosity.[3]

However, in *Richardson v. Ramirez*,[4] the Court relied upon the implied approval of disqualification upon conviction of crime to uphold a state law disqualifying convicted felons for the franchise even after the service of their terms. It declined to assess the state interests involved and to evaluate the necessity of the rule, holding rather that because of Section 2 the Equal Protection Clause was simply inapplicable.

Section 3—Disqualification from Holding Office

Amdt14.S3.1 Overview of Disqualification Clause

Fourteenth Amendment, Section 3:

> *No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.*

The right to remove disabilities imposed by this Section was exercised by Congress at different times on behalf of enumerated individuals.[1] In 1872, the disabilities were removed, by a blanket act, from all persons "except Senators and Representatives of the Thirty-sixth and Thirty-seventh Congresses, officers in the judicial, military and naval service of the United States, heads of departments, and foreign ministers of the United States."[2] Twenty-six years later, Congress enacted that "the disability imposed by section 3 . . . incurred heretofore, is hereby removed."[3]

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[2] Saunders v. Wilkins, 152 F.2d 235 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946).

[3] The Section did furnish a basis to Justice John Harlan to argue that inasmuch as Section 2 recognized a privilege to discriminate subject only to the penalty provided, the Court was in error in applying Section 1 to questions relating to the franchise. *Compare* Oregon v. Mitchell, 400 U.S. 112, 152 (1970) (Harlan, J., concurring and dissenting), *with id.* at 229, 250 (Brennan, J., concurring and dissenting). The language of the Section recognizing 21 as the usual minimum voting age no doubt played some part in the Court's decision in *Oregon v. Mitchell* as well. It should also be noted that the provision relating to "Indians not taxed" is apparently obsolete now in light of an Attorney General ruling that all Indians are subject to taxation. 39 Op. Att'y Gen. 518 (1940).

[4] 418 U.S. 24 (1974). Justices Thurgood Marshall, William O. Douglas, and William Brennan dissented. *Id.* at 56, 86.

[1] *E.g.*, and notably, the Private Act of December 14, 1869, ch.1, 16 Stat. 607.

[2] Ch. 193, 17 Stat. 142.

[3] Act of June 6, 1898, ch. 389, 30 Stat. 432. Legislation by Congress providing for removal was necessary to give effect to the prohibition of Section 3, and until removed in pursuance of such legislation persons in office before promulgation of the Fourteenth Amendment continued to exercise their functions lawfully. Griffin's Case, 11 F. Cas. 7 (C.C.D.Va. 1869) (No. 5815). Nor were persons who had taken part in the Civil War and had been pardoned by the President before the adoption of this Amendment precluded by this Section from again holding office under the United States. 18 Op. Att'y Gen. 149 (1885). On the construction of "engaged in rebellion," *see* United States v. Powell, 27 F. Cas. 605 (No. 16079) (C.C.D.N.C. 1871).

Section 4—Public Debt

Amdt14.S4.1 Overview of Public Debt Clause

Fourteenth Amendment, Section 4:

> *The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.*

Although Section 4 "was undoubtedly inspired by the desire to put beyond question the obligations of the government issued during the Civil War, its language indicates a broader connotation. . . . '[T]he validity of the public debt'. . . [embraces] whatever concerns the integrity of the public obligations," and applies to government bonds issued after as well as before adoption of the Amendment.[1]

Section 5—Enforcement

Amdt14.S5.1 Overview of Enforcement Clause

Fourteenth Amendment, Section 5:

> *The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.*

In the aftermath of the Civil War, Congress, in addition to proposing to the states the Thirteenth, Fourteenth, and Fifteenth Amendments, enacted seven statutes designed in a variety of ways to implement the provisions of these Amendments.[1] Several of these laws were general civil rights statutes that broadly attacked racial and other discrimination on the part of private individuals and groups as well as by the states, but the Supreme Court declared unconstitutional or rendered ineffective practically all of these laws over the course of several years.[2] In the end, Reconstruction was abandoned and with rare exceptions no cases were brought under the remaining statutes until fairly recently.[3] Beginning with the Civil Rights Act of 1957, however, Congress generally acted pursuant to its powers under the Commerce Clause[4] until Supreme Court decisions indicated an expansive concept of congressional power

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[1] Perry v. United States, 294 U.S. 330, 354 (1935), in which the Court concluded that the Joint Resolution of June 5, 1933, insofar as it attempted to override the gold-clause obligation in a Fourth Liberty Loan Gold Bond "went beyond the congressional power." On a Confederate bond problem, *see* Branch v. Haas, 16 F. 53 (C.C.M.D. Ala. 1883) (citing Hanauer v. Woodruff, 82 U.S. (15 Wall.) 439 (1873), and Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1869)). *See also* The Pietro Campanella, 73 F. Supp. 18 (D. Md. 1947).

[1] Civil Rights Act of 1866, ch. 31, 14 Stat. 27; the Enforcement Act of 1870, ch. 114, 16 Stat. 140; Act of February 28, 1871, ch. 99, 16 Stat. 433; the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13; Civil Rights Act of 1875; 18 Stat. 335. The modern provisions surviving of these statutes are 18 U.S.C. §§ 241, 242, 42 U.S.C. §§ 1981–83, 1985–1986, and 28 U.S.C. § 1343. Two lesser statutes were the Slave Kidnaping Act of 1866, ch. 86, 14 Stat. 50, and the Peonage Abolition Act, ch. 187, 14 Stat. 546, 18 U.S.C. §§ 1581–88, and 42 U.S.C. § 1994.

[2] *See generally* R. Carr, Federal Protection of Civil Rights: Quest for a Sword (1947).

[3] For cases under 18 U.S.C. §§ 241 and 242 in their previous codifications, *see* United States v. Mosley, 238 U.S. 383 (1915); United States v. Gradwell, 243 U.S. 476 (1917); United States v. Bathgate, 246 U.S. 220 (1918); United States v. Wheeler, 254 U.S. 281 (1920). The resurgence of the use of these statutes began with United States v. Classic, 313 U.S. 299 (1941), and Screws v. United States, 325 U.S. 91 (1945).

[4] The 1957 and 1960 Acts primarily concerned voting; the public accommodations provisions of the 1964 Act and the housing provisions of the 1968 Act were premised on the commerce power.

under the Civil War Amendments,[5] which culminated in broad provisions against private interference with civil rights in the 1968 legislation.[6]

Amdt14.S5.2 Who Congress May Regulate

Fourteenth Amendment, Section 5:

> *The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.*

In enforcing by appropriate legislation the Fourteenth Amendment guarantees against state denials, Congress has the discretion to adopt remedial measures, such as authorizing persons being denied their civil rights in state courts to remove their cases to federal courts,[1] and to provide criminal[2] and civil[3] liability for state officials and agents[4] or persons associated with them[5] who violate protected rights. These statutory measures designed to eliminate discrimination "under color of law"[6] present no problems of constitutional foundation, although there may well be other problems of application.[7] But the Reconstruction Congresses did not stop with statutory implementation of rights guaranteed against state infringement, moving as well against private interference.

Thus, in the Civil Rights Act of 1875[8] Congress had proscribed private racial discrimination in the admission to and use of inns, public conveyances, theaters, and other places of public amusement. The *Civil Rights Cases*[9] found this enactment to be beyond Congress's power to enforce the Fourteenth Amendment. The Court observed that Section 1 prohibited only state action and did not reach private conduct. Therefore, Congress's power under Section 5 to enforce Section 1 by appropriate legislation was held to be similarly limited. "It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the

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[5] United States v. Guest, 383 U.S. 745 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966). The development of congressional enforcement powers in these cases was paralleled by a similar expansion of the enforcement powers of Congress with regard to the Thirteenth Amendment, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[6] 82 Stat. 73, 18 U.S.C. § 245.

[1] Section 3 of the Civil Rights Act of 1866, 14 Stat. 27, 28 U.S.C. § 1443. *See* Virginia v. Rives, 100 U.S. 313, 318 (1880); Strauder v. West Virginia, 100 U.S. 303 (1880). The statute is of limited utility because of the interpretation placed on it almost from the beginning. *Compare* Georgia v. Rachel, 384 U.S. 780 (1966), *with* City of Greenwood v. Peacock, 384 U.S. 808 (1966).

[2] 18 U.S.C. §§ 241, 242. *See* Screws v. United States, 325 U.S. 91 (1945); Williams v. United States, 341 U.S. 97 (1951); United States v. Guest, 383 U.S. 745 (1966); United States v. Price, 383 U.S. 787 (1966); United States v. Johnson, 390 U.S. 563 (1968).

[3] 42 U.S.C. § 1983. *See* Monroe v. Pape, 365 U.S. 167 (1961); *see also* 42 U.S.C. § 1985(3), construed in Griffin v. Breckenridge, 403 U.S. 88 (1971).

[4] *Ex parte* Virginia, 100 U.S. 339 (1880).

[5] United States v. Price, 383 U.S. 787 (1966).

[6] Both 18 U.S.C. § 242 and 42 U.S.C. § 1983 contain language restricting application to deprivations under color of state law, whereas 18 U.S.C. § 241 lacks such language. The newest statute, 18 U.S.C. § 245, contains, of course, no such language. On the meaning of "custom" as used in the "under color of" phrase, *see* Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

[7] *E.g.*, the problem of "specific intent" in *Screws v. United States,* 325 U.S. 91 (1945), and *Williams v. United States,* 341 U.S. 97 (1951), and the problem of what "right or privilege" is "secured" to a person by the Constitution and laws of the United States, which divided the Court in *United States v. Williams,* 341 U.S. 70 (1951), and which was resolved in *United States v. Price,* 383 U.S. 787 (1966).

[8] 18 Stat. 335, §§ 1, 2.

[9] 109 U.S. 3 (1883). The Court also rejected the Thirteenth Amendment foundation for the statute, a foundation revived by *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968).

regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment."[10] The holding in this case had already been preceded by *United States v. Cruikshank*[11] and by *United States v. Harris*[12] in which the Federal Government had prosecuted individuals for killing and injuring African Americans. The Amendment did not increase the power of the Federal Government vis-a-vis individuals, the Court held, only with regard to the states themselves.[13]

Cruikshank did, however, recognize a small category of federal rights that Congress could protect against private deprivation, rights that the Court viewed as deriving particularly from one's status as a citizen of the United States and that Congress had a general police power to protect.[14] These rights included the right to vote in federal elections, general and primary,[15] the right to federal protection while in the custody of federal officers,[16] and the right to inform federal officials of violations of federal law.[17] The right of interstate travel is a basic right derived from the Federal Constitution, which Congress may protect.[18] In *United States v. Williams*,[19] in the context of state action, the Court divided 4-4 over whether the predecessor of 18 U.S.C. § 241 in its reference to a "right or privilege secured . . . by the Constitution or laws of the United States" encompassed rights guaranteed by the Fourteenth Amendment, or was restricted to those rights "which Congress can beyond doubt constitutionally secure against interference by private individuals." This issue was again reached in *United States v. Price*[20] and *United States v. Guest*,[21] again in the context of state action, in which the Court concluded that the statute included within its scope rights guaranteed by the Due Process and Equal Protection Clauses.

Because the Court found that both *Price* and *Guest* concerned sufficient state action, it did not then have to reach the question of Section 241's constitutionality when applied to private action that interfered with rights not the subject of a general police power. But Justice William Brennan, responding to what he apparently intepreted as language in the Court's opinion construing Congress's power under Section 5 of the Fourteenth Amendment to be limited by the state action requirement, appended a lengthy statement, which a majority of the Justices joined, arguing that Congress's power was broader.[22] "Although the Fourteenth Amendment

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[10] 109 U.S. at 11. Justice John Harlan's dissent reasoned that Congress had the power to protect rights secured by the Fourteenth Amendment against invasion by both state and private action, but also viewed places of public accommodation as serving a quasi-public function that satisfied the state action requirement in any event. *Id.* at 46–48, 56–57.

[11] 92 U.S. 542 (1876). The action was pursuant to § 6 of the 1870 Enforcement Act, ch. 114, 16 Stat. 140, the predecessor of 18 U.S.C. § 241.

[12] 106 U.S. 629 (1883). The case held unconstitutional a provision of § 2 of the 1871 Act, ch. 22, 17 Stat. 13.

[13] *See also* Baldwin v. Franks, 120 U.S. 678 (1887); Hodges v. United States, 203 U.S. 1 (1906); United States v. Wheeler, 254 U.S. 281 (1920). Under the Fifteenth Amendment, *see* James v. Bowman, 190 U.S. 127 (1903).

[14] United States v. Cruikshank, 92 U.S. 542, 552–53, 556 (1876). The rights that the Court assumed the United States could protect against private interference were the right to petition Congress for a redress of grievances and the right to vote free of interference on racial grounds in a federal election.

[15] *Ex parte* Yarbrough, 110 U.S. 651 (1884); United States v. Classic, 313 U.S. 299 (1941).

[16] Logan v. United States, 144 U.S. 263 (1892).

[17] *In re* Quarles and Butler, 158 U.S. 532 (1895). *See also* United States v. Waddell, 112 U.S. 76 (1884) (right to homestead).

[18] United States v. Guest, 383 U.S. 745 (1966); Griffin v. Breckenridge, 403 U.S. 88 (1971).

[19] 341 U.S. 70 (1951).

[20] 383 U.S. 787 (1966) (Due Process Clause).

[21] 383 U.S. 745 (1966) (Equal Protection Clause).

[22] Justice William Brennan's opinion, 383 U.S. at 774, was joined by Chief Justice Earl Warren and Justice William O. Douglas. His statement that "[a] majority of the members of the Court expresses the view today that § 5

itself . . . 'speaks to the State or to those acting under the color of its authority,' legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, Section 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection."[23] The Justice throughout the opinion refers to "Fourteenth Amendment rights," by which he meant rights that, in the words of 18 U.S.C. § 241, are "secured . . . by the Constitution," that is, by the Fourteenth Amendment through prohibitory words addressed only to governmental officers. Thus, the Equal Protection Clause commands that all "public facilities owned or operated by or on behalf of the State," be available equally to all persons; that access is a right granted by the Constitution, and Section 5 is viewed "as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens." Within this discretion is the "power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals" who would deny such access.[24]

The Court, however, ultimately rejected this expansion of the powers of Congress in *United States v. Morrison*.[25] In *Morrison*, the Court invalidated a provision of the Violence Against Women Act[26] that established a federal civil remedy for victims of gender-motivated violence. The case involved a university student who brought a civil action against other students who allegedly raped her. The argument was made that there was a pervasive bias against victims of gender-motivated violence in state justice systems, and that the federal remedy would offset and deter this bias. The Court first reaffirmed the state action requirement for legislation passed under the Fourteenth Amendment,[27] dismissing the dicta in *Guest*, and reaffirming the precedents of the *Civil Rights Cases* and *United States v. Harris*. The Court also rejected the assertion that the legislation was "corrective" of bias in the courts, as the suits are not directed at the state or any state actor, but rather at the individuals committing the criminal acts.[28]

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empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy," *id.* at 782 (emphasis by the Justice), was based upon the language of Justice Thomas Clark, joined by Justices Hugo Black and Abe Fortas, *id.* at 761, that, because Justice William Brennan had reached the issue, the three Justices were also of the view "that there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." *Id.* at 762. In the opinion of the Court, Justice Potter Stewart disclaimed any intention of speaking of Congress's power under Section 5. *Id.* at 755.

[23] 383 U.S. at 782.

[24] 383 U.S. at 777–79, 784.

[25] 529 U.S. 598 (2000).

[26] Pub. L. No. 103-322, § 40302, 108 Stat. 1941, 42 U.S.C. § 13981.

[27] 529 U.S. at 621 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948), for the proposition that the Amendment "erects no shield against merely private conduct, however discriminatory or wrongful").

[28] This holding may have broader significance for federal civil rights law. For instance, 42 U.S.C. § 1985(3) (a civil statute paralleling the criminal statute held unconstitutional in *United States v. Harris*) lacks a "color of law" requirement. Although the requirement was read into it in *Collins v. Hardyman,* 341 U.S. 651 (1951), to avoid constitutional problems, it was read out again in *Griffin v. Breckenridge,* 403 U.S. 88, 97 (1971) (although it might be "difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons . . . there is nothing inherent in the phrase that requires the action working the deprivation to come from the State"). What the unanimous Court held in *Griffin* was that an "intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102. As so construed, the statute was held constitutional as applied in the complaint before the Court on the basis of the Thirteenth Amendment and the right to travel; there was no necessity therefore, to consider Congress's powers under Section 5 of the Fourteenth Amendment. *Id.* at 107.

Amdt14.S5.3 Pre-Modern Doctrine on Enforcement Clause

Fourteenth Amendment, Section 5:

> *The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.*

In the *Civil Rights Cases*,[1] the Court observed that "the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation," that is, laws to counteract and overrule those state laws that Section 1 forbids the states to adopt. The Court was quite clear that, under its responsibilities of judicial review, it was the body that would determine that a state law was impermissible and that a federal law passed pursuant to Section 5 was necessary and proper to enforce Section 1.[2] But, in *United States v. Guest*,[3] Justice William Brennan protested that this view "attributes a far too limited objective to the Amendment's sponsors," that in fact "the primary purpose of the Amendment was to augment the power of Congress, not the judiciary."

In *Katzenbach v. Morgan*,[4] Justice William Brennan, this time speaking for the Court, in effect overrode the limiting view and posited a doctrine by which Congress was to define the substance of what the legislation enacted pursuant to Section 5 must be appropriate to. That is, in upholding the constitutionality of a provision of the Voting Rights Act of 1965[5] barring the application of English literacy requirements to a certain class of voters, the Court rejected a state argument "that an exercise of congressional power under § 5 . . . that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce."[6] Because the Court had previously upheld an English literacy requirement under equal protection challenge,[7] acceptance of the argument would have doomed the federal law. But, said Justice William Brennan, Congress itself might have questioned the justifications put forward by the state in defense of its law and might have concluded that, instead of being supported by acceptable reasons, the requirements were unrelated to those justifications and discriminatory in intent and effect. The Court would not evaluate the competing considerations that might have led Congress to its conclusion; because Congress "brought a specially informed legislative competence" to an appraisal of voting requirements, "it was Congress's prerogative to weigh" the considerations and the Court would sustain the

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The lower courts have been quite divided with respect to what constitutes a non-racial, class-based animus, and what constitutional protections must be threatened before a private conspiracy can be reached under § 1985(3). *See, e.g.*, Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971); Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972); Great American Fed. S. & L. Ass'n v. Novotny, 584 F.2d 1235 (3d Cir. 1978) (en banc), *rev'd*, 442 U.S. 366 (1979); Scott v. Moore, 680 F.2d 979 (5th Cir. 1982) (en banc). The Court's decision in *Morrison*, however, appears to preclude the use of § 1985(3) in relation to Fourteenth Amendment rights absent some state action.

[1] 109 U.S. 3, 13–14 (1883).

[2] *Cf.* Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).

[3] 383 U.S. 745, 783 and n.7 (1966) (concurring and dissenting).

[4] 384 U.S. 641 (1966). Besides the ground of decision discussed here, *Morgan* also advanced an alternative ground for upholding the statute. That is, Congress might have overridden the state law not because the law itself violated the Equal Protection Clause but because being without the vote meant the class of persons was subject to discriminatory state and local treatment and giving these people the ballot would afford a means of correcting that situation. The statute therefore was an appropriate means to enforce the Equal Protection Clause under "necessary and proper" standards. *Id.* at 652–653. A similar "necessary and proper" approach underlay *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), under the Fifteenth Amendment's Enforcement Clause.

[5] 79 Stat. 439, 42 U.S.C. § 1973b(e).

[6] 384 U.S. at 648.

[7] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

conclusion if "we perceive a basis upon which Congress might predicate a judgment" that the requirements constituted invidious discrimination.[8]

In dissent, Justice John Harlan protested that "[i]n effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 'discretion' by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court."[9] Justice William Brennan rejected this reasoning: "We emphasize that Congress's power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."[10] Congress responded, however, in both fashions. On the one hand, in the 1968 Civil Rights Act it relied on *Morgan* in expanding federal powers to deal with private violence that is racially motivated, and to some degree in outlawing most private housing discrimination;[11] on the other hand, it enacted provisions of law purporting to overrule the Court's expansion of the self-incrimination and right-to-counsel clauses of the Bill of Rights, expressly invoking *Morgan*.[12]

Congress's power under *Morgan* returned to the Court's consideration when several states challenged congressional legislation[13] lowering the voting age in all elections to eighteen and prescribing residency and absentee voting requirements for the conduct of presidential elections. In upholding the latter provision and in dividing over the former, the Court revealed that *Morgan*'s vitality was in some considerable doubt, at least with regard to the reach that many observers had previously seen.[14] Four Justices accepted *Morgan* in full,[15] while one Justice rejected it totally[16] and another would have limited it to racial cases.[17] The other three Justices seemingly restricted *Morgan* to its alternate rationale in passing on the age reduction provision, but the manner in which they dealt with the residency and absentee voting provision afforded Congress some degree of discretion in making substantive decisions about what state action is discriminatory above and beyond the judicial view of the matter.[18]

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[8] Katzenbach v. Morgan, 384 U.S. 641, 653–56 (1966).

[9] 384 U.S. at 668. Justice Potter Stewart joined this dissent.

[10] 384 U.S. at 651 n.10. Justice Sandra Day O'Connor for the Court quoted and reiterated Justice William Brennan's language in *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 731–33 (1982).

[11] 82 Stat. 73, 18 U.S.C. § 245. *See* S. Rep. No. 721, 90th Congress, 1st Sess. 6–7 (1967). *See also* 82 Stat. 81, 42 U.S.C. §§ 3601 et seq.

[12] Title II, Omnibus Safe Streets and Crime Control Act, 82 Stat. 210, 18 U.S.C. §§ 3501, 3502. *See* S. Rep. No. 1097, 90th Congress, 2d Sess. 53–63 (1968). The cases that were subjects of the legislation were *Miranda v. Arizona,* 384 U.S. 436 (1966), and *United States v. Wade,* 388 U.S. 218 (1967), insofar as federal criminal trials were concerned.

[13] Titles II and III of the Voting Rights Act Amendments of 1970, 84 Stat. 316, 42 U.S.C. §§ 1973aa–1, 1973bb.

[14] Oregon v. Mitchell, 400 U.S. 112 (1970).

[15] 400 U.S. at 229, 278–81 (Brennan, White, and Marshall, JJ.), *id.* at 135, 141–44 (Douglas, J.).

[16] 400 U.S. at 152, 204–09 (Harlan, J.).

[17] 400 U.S. at 119, 126–31 (Black, J.).

[18] The age reduction provision could be sustained "only if Congress has the power not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the Clause, and what state interests are 'compelling.'" 400 U.S. at 296 (Stewart and Blackmun, JJ., and Burger, C.J.). In their view, Congress did not have that power and *Morgan* did not confer it. But in voting to uphold the residency and absentee provision, the Justices concluded that "Congress could rationally conclude that the imposition of durational residency requirements unreasonably burdens and sanctions the privilege of taking up residence in another State" without reaching an independent determination of their own that the requirements did in fact have that effect. *Id.* at 286.

More recent decisions read broadly Congress's power to make determinations that appear to be substantive decisions with respect to constitutional violations.[19] Acting under both the Fourteenth and Fifteenth Amendments, Congress has acted to reach state electoral practices that "result" in diluting the voting power of minorities, although the Court apparently requires that it be shown that electoral procedures must have been created or maintained with a discriminatory animus before they may be invalidated under the two Amendments.[20] Moreover, movements have been initiated in Congress by opponents of certain of the Court's decisions, notably the abortion rulings, to use Section 5 powers to curtail the rights the Court has derived from the Due Process Clause and other provisions of the Constitution.[21]

Amdt14.S5.4 Modern Doctrine on Enforcement Clause

Fourteenth Amendment, Section 5:

> *The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.*

City of Boerne v. Flores[1] illustrates that the Court will not always defer to Congress's determination as to what legislation is appropriate to "enforce" the provisions of the Fourteenth Amendment. In *Flores*, the Court held that the Religious Freedom Restoration Act,[2] which expressly overturned the Court's narrowing of religious protections under *Employment Division v. Smith*,[3] exceeded congressional power under Section of the Fourteenth Amendment. Although the Court allowed that Congress's power to legislate to deter or remedy constitutional violations may include prohibitions on conduct that is not itself unconstitutional, the Court also held that there must be "a congruence and proportionality" between the means adopted and the injury to be remedied.[4] Unlike the pervasive suppression of the African American vote in the South that led to the passage of the Voting Rights Act, there was no similar history of religious persecution constituting an "egregious predicate" for the far-reaching provision of the Religious Freedom Restoration Act. Also, unlike the Voting Rights Act, the Religious Freedom Restoration Act contained no geographic restrictions or termination dates.[5]

A reinvigorated Eleventh Amendment jurisprudence has led to a spate of decisions applying the principles the Court set forth in *Boerne*, as litigants precluded from arguing that

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[19] *See* discussion of City of Rome v. United States, 446 U.S. 156, 173–83 (1980), under the Fifteenth Amendment. *See also* Fullilove v. Klutznick, 448 U.S. 448, 476–78 (1980) (plurality opinion of Burger, C.J.,), and *id.* at 500–02 (Powell, J., concurring).

[20] The Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, amending 42 U.S.C. § 1973, were designed to overturn *City of Mobile v. Bolden,* 446 U.S. 55 (1980). A substantial change of direction in *Rogers v. Lodge,* 458 U.S. 613 (1982), handed down coextensively with congressional enactment, seems to have brought Congress and the Court into essential alignment, thereby avoiding a possible constitutional conflict.

[21] *See The Human Life Bill: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers*, 97th Congress, lst Sess. (1981). An elaborate constitutional analysis of the bill appears in Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed 'Human Life' Legislation*, 68 VA. L. REV. 333 (1982).

[1] 521 U.S. 507 (1997).

[2] Pub. L. No. 103-141, 107 Stat. 1488, 42 U.S.C. §§ 2000bb et seq.

[3] 494 U.S. 872 (1990).

[4] 521 U.S. at 533.

[5] 521 U.S. at 532–33. The Court found that the Religious Freedom Restoration Act was "so far out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.*

a state's sovereign immunity has been abrogated under Article I congressional powers[6] seek alternative legislative authority in Section 5. For instance, in *Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank*,[7] a bank that had patented a financial method designed to guarantee investors sufficient funds to cover the costs of college tuition sued the State of Florida for administering a similar program, arguing that the state's sovereign immunity had been abrogated by Congress in exercise of its Fourteenth Amendment enforcement power. The Court, however, held that application of the federal patent law to the states was not properly tailored to remedy or prevent due process violations. The Court noted that Congress had identified no pattern of patent infringement by the states, nor a systematic denial of state remedy for such violations such as would constitute a deprivation of property without due process.[8]

A similar result was reached regarding the application of the Age Discrimination in Employment Act (ADEA) to state agencies in *Kimel v. Florida Bd. of Regents*.[9] In determining that the Act did not meet the "congruence and proportionality" test, the Court focused not just on whether state agencies had engaged in age discrimination, but on whether states had engaged in unconstitutional age discrimination. This was a particularly difficult test to meet, as the Court has generally rejected constitutional challenges to age discrimination by states, finding that there is a rational basis for states to use age as a proxy for other qualities, abilities, and characteristics.[10] Noting the lack of a sufficient legislative record establishing broad and unconstitutional state discrimination based on age, the Court found that the ADEA, as applied to the states, was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to or designed to prevent unconstitutional behavior."[11]

Despite what was considered by many to be a better developed legislative record, the Court in *Board of Trustees of Univ. of Ala. v. Garrett*[12] also rejected the recovery of money damages against states, this time under of the Americans with Disabilities Act of 1990 (ADA).[13] Title I of the ADA prohibits employers, including states, from "discriminating against a qualified individual with a disability"[14] and requires employers to "make reasonable accommodations [for] . . . physical or mental limitations . . . . unless [to do so]. . . would impose an undue hardship on the . . . business."[15] Although the Court had previously overturned discriminatory

[6] Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (Article I powers may not be used to abrogate a state's Eleventh Amendment immunity, but *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976), holding that Congress may abrogate Eleventh Amendment immunity in exercise of Fourteenth Amendment enforcement power, remains good law). *See* discussion pp. 1533–37.

[7] 527 U.S. 627 (1999).

[8] 527 U.S. at 639–46; *see also* Allen v. Cooper, 140 S. Ct. 994, 1005–07 (2020) (holding that evidence of unconstitutional state-copyright infringement was not materially different than the record for state-patent infringement at issue in *Florida Prepaid*); *cf.* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673–75 (1999) (concluding that Congress, by subjecting states to suits for false advertisement, exceeded its powers under the Fourteenth Amendment because the statute did not implicate property interests protected by the Due Process Clause).

[9] 528 U.S. 62 (2000). Again, the issue of the Congress's power under Section 5 of the Fourteenth Amendment arose because sovereign immunity prevents private actions against states from being authorized under Article I powers such as the Commerce Clause.

[10] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452 (1991) (applying rational basis test to uphold mandatory retirement age of 70 for state judges).

[11] 528 U.S. at 86, quoting *City of Boerne*, 521 U.S. at 532.

[12] 531 U.S. 356 (2001).

[13] 42 U.S.C. §§ 12111–12117.

[14] 42 U.S.C. § 12112(a).

[15] 42 U.S.C. § 12112(b)(5)(A).

legislative classifications based on disability in *City of Cleburne v. Cleburne Living Center*,[16] the Court had held that determinations of when states had violated the Equal Protection Clause in such cases were to be made under the relatively deferential standard of rational basis review. Thus, failure of an employer to provide the kind of "reasonable accommodations" required under the ADA would not generally rise to the level of a violation of the Fourteenth Amendment, and instances of such failures did not qualify as a "history and pattern of unconstitutional employment discrimination."[17] Thus, according to the Court, not only did the legislative history developed by the Congress not establish a pattern of unconstitutional discrimination against the disabled by states,[18] but the requirements of the ADA would be out of proportion to the alleged offenses.

The Court's more recent decisions in this area, however, seem to de-emphasize the need for a substantial legislative record when the class being discriminated against is protected by heightened scrutiny of the government's action. In *Nevada Department of Human Resources v. Hibbs*,[19] the Court considered the recovery of monetary damages against states under the Family and Medical Leave Act. This Act provides, among other things, that both male and female employees may take up to twelve weeks of unpaid "family care" leave to care for a close relative with a serious health condition. Noting that Section 5 could be used to justify prophylactic legislation, the Court accepted the argument that the Act was intended to prevent gender-based discrimination in the workplace tracing to the historic stereotype that women are the primary caregivers. Congress had documented historical instances of discrimination against women by state governments, and had found that women were provided maternity leave more often than were men.

Although there was a relative absence of proof that states were still engaged in wholesale gender discrimination in employment, the Court distinguished *Garrett* and *Kimel*, which had held Congress to a high standard for justifying legislation attempting to remedy classifications subject only to rational basis review. "Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational basis test . . . it was easier for Congress to show a pattern of state constitutional violations."[20] Consequently, the Court upheld an across-the-board, routine employment benefit for all eligible employees as a congruent and proportional response to the "state-sanctioned" gender stereotypes.

Nine years after *Hibbs*, the Court returned to the Family and Medical Leave Act (FMLA), this time to consider the Act's "self care" (personal medical) leave provisions. There, in *Coleman v. Court of Appeals of Md.*, a four-Justice plurality, joined by concurring Justice Antonin Scalia, found the self care provisions too attenuated from the gender protective roots of the family care provisions to merit heightened consideration.[21] According to the plurality, the self care provisions were intended to ameliorate discrimination based on illness, not sex. The plurality observed that paid sick leave and disability protection were almost universally available to state employees without intended or incidental gender bias. The addition of unpaid self care

[16] 473 U.S. 432 (1985).

[17] 531 U.S. at 368.

[18] As Justice Stephen Breyer pointed out in the dissent, however, the Court seemed determined to accord Congress a degree of deference more commensurate with review of an agency action, discounting portions of the legislative history as based on secondary source materials, unsupported by evidence and not relevant to the inquiry at hand.

[19] 538 U.S. 721 (2003).

[20] 538 U.S. at 736. Statutory classifications that distinguish between males and females are subject to heightened scrutiny, Craig v. Boren, 429 U.S. 190, 197–199 (1976), so they must be substantially related to the achievement of important governmental objectives, United States v. Virginia, 518 U.S. 515, 533 (1996).

[21] 566 U.S. ___, No. 10-1016, slip op. (2012) (male state employee denied unpaid sick leave).

leave to this state benefit might help some women suffering pregnancy related illness, but the establishment of a broad self care leave program under the FMLA was not a proportional or congruent remedy to protect any constitutionally based right under the circumstances.[22]

The Court in *Tennessee v. Lane*[23] held that Congress could authorize damage suits against a state for failing to provide disabled persons physical access to its courts. Title II of the Americans with Disabilities Act (ADA) provides that no qualified person shall be excluded or denied the benefits of a public program by reason of a disability,[24] but since disability is not a suspect class, the application of Title II against states would seem questionable under the reasoning of *Garrett*.[25] Here, however, the Court evaluated the case as a limit on access to court proceedings, which, in some instances, has been held to be a fundamental right subject to heightened scrutiny under the Due Process Clause.[26]

Reviewing the legislative history of the ADA, the Court found that Title II, as applied, was a congruent and proportional response to a Congressional finding of "a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."[27] Rather, in an indication of a more robust approach where protection of fundamental rights is at issue, the majority also relied more broadly on a history of state limitations on the rights of the disabled in areas such as marriage or voting, and on limitations of access to public services beyond the use of courts.[28]

Congress's authority under Section 5 of the Fourteenth Amendment to abrogate states' Eleventh Amendment immunity is strongest when a state's conduct at issue in a case is alleged to have actually violated a constitutional right. In *United States v. Georgia*,[29] a disabled state prison inmate who used a wheelchair for mobility alleged that his treatment by the State of Georgia and the conditions of his confinement violated, among other things, Title II of the ADA and the Eighth Amendment (as incorporated by the Fourteenth Amendment). A unanimous Court found that, to the extent that the prisoner's claims under Title II for money damages were based on conduct that independently violated the provisions of the Fourteenth Amendment, they could be applied against the state. In doing so, the Court declined to apply the congruent and proportional response test, distinguishing the cases applying that standard (discussed above) as not generally involving allegations of direct constitutional violations.[30]

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[22] Justice Ruth Bader Ginsburg, writing for herself and three others, extensively reviewed the historical and legislative record and concluded that the family care and the self care provisions were of the same cloth. Both provisions grew out of concern for discrimination against pregnant workers, and, the FMLA's leave provisions were not, in the dissent's opinion, susceptible to being rent into separate pieces for analytical purposes.

[23] 541 U.S. 509 (2004).

[24] 42 USCS § 12132.

[25] 531 U.S. 356 (2001).

[26] *See, e.g.*, Faretta v. California, 422 U.S. 806, 819, n.15 (1975) (a criminal defendant has a right to be present at all stages of a trial where his absence might frustrate the fairness of the proceedings).

[27] 541 U.S. at 524.

[28] 541 U.S. at 524–25. Justice William Rehnquist, in dissent, disputed the reliance of the Congress on evidence of disability discrimination in the provision of services administered by local, not state, governments, as local entities do not enjoy the protections of sovereign immunity. *Id.* at 542–43. The majority, in response, noted that local courts are generally treated as arms of the state for sovereign immunity purposes, Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977), and that the action of non-state actors had previously been considered in such pre-*Boerne* cases as *South Carolina v. Katzenbach,* 383 U.S. 301, 312–15 (1966).

[29] 546 U.S. 151 (2006).

[30] "While the Members of this Court have disagreed regarding the scope of Congress's 'prophylactic' enforcement powers under § 5 of the Fourteenth Amendment, no one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions." 546 U.S. at 158 (citations omitted).

FIFTEENTH AMENDMENT
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FIFTEENTH AMENDMENT
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FIFTEENTH AMENDMENT—RIGHT OF CITIZENS TO VOTE

Amdt15.1 Overview of Fifteenth Amendment, Right of Citizens to Vote

The Fifteenth Amendment is the last of the three Civil War Amendments,[1] adopted in response to the end of the American Civil War with the intent to grant the federal government additional powers to address the lingering remnants of slavery.[2] The Fifteenth Amendment addresses the right of suffrage,[3] providing in Section 1 that the right of U.S. citizens to vote may not be abridged by the government "on account of race, color, or previous condition of servitude."[4] The Supreme Court recognized as early as 1872 that although the Civil War and responsive Amendments may have been primarily focused on "African slavery," the protections granted by that text were not limited to those "of African descent."[5] Describing this provision simply shortly after its adoption, the Supreme Court said "[i]f citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be."[6] The Court early on also struck down a state law that, although it contained "no word of discrimination on account of race or color," had the effect of "inherently" making a prior condition of servitude "the controlling and dominant test of the right of suffrage."[7]

Unlike the guarantees in the original Bill of Rights, the Fifteenth Amendment expressly constrains both "the United States" and "any State" from abridging these rights.[8] The Fifteenth Amendment, with the other Civil War Amendments, thus helped to "fundamentally alter[ ]" the "balance of the pressures of localism and nationalism" by making "civil rights a national concern."[9] Further, while Section 1's prohibitions are "self-executing,"[10] Section 2 of the Fifteenth Amendment gives Congress the additional power to pass laws to enforce this guarantee.[11] As the Supreme Court explained in a 2009 opinion, "[t]he first century of congressional enforcement of the Amendment, however, can only be regarded as a failure."[12] Although federal laws were adopted to enforce the Amendment shortly after ratification,

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[1] *See* Intro.3.4 Civil War Amendments (Thirteenth, Fourteenth, and Fifteenth Amendments). These are sometimes also known as the Reconstruction Amendments.

[2] *See, e.g.*, Slaughter-House Cases, 83 U.S. 36, 67–68, 71 (1872).

[3] *See id.* at 71 (noting that former slaves were "denied the right of suffrage" even after the abolishment of the institution of slavery).

[4] U.S. CONST. amdt. XV, § 1.

[5] *Slaughter-House Cases*, 83 U.S. at 71–72. *See also* Rice v. Cayetano, 528 U.S. 495, 499 (2000) (holding that a law limiting the right to vote for certain state trustees to "Hawaiians" violated the Fifteenth Amendment); *id.* at 512 (saying the Amendment "goes beyond" its original objective and "grants protection to all persons, not just members of a particular race").

[6] United States v. Reese, 92 U.S. 214, 218 (1875).

[7] Guinn v. United States, 238 U.S. 347, 364–65 (1915). This case is discussed in Amdt15.S1.2 Grandfather Clauses.

[8] U.S. CONST. amdt. XV, § 1.

[9] Younger v. Harris, 401 U.S. 37, 61 (1971) (Douglas, J., dissenting); *see also* Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (plurality opinion) ("The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race.").

[10] Guinn v. United States, 238 U.S. 347, 363 (1915).

[11] U.S. CONST. amdt. XV, § 1.

[12] Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 197 (2009).

enforcement was "spotty and ineffective,"[13] and ultimately those early laws were "repealed with the rise of Jim Crow."[14] Finally, Congress adopted the Voting Rights Act of 1965, discussed in more detail in a subsequent essay.[15]

Amdt15.2 Historical Background on Fifteenth Amendment

Fifteenth Amendment:

> *The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude–The Congress shall have the power to enforce this article by appropriate legislation.*

In the second session of the Thirty-ninth Congress, Congress extended the right to vote to African American men by statute in the District of Columbia and the territories, and in the seceded states, as a condition of readmission, the states had to guarantee Black men suffrage.[1] Following the election of President Ulysses S. Grant, the "lame duck" third session of the Fortieth Congress passed the amendment on February 26, 1869, and sent the proposed Fifteenth Amendment to the states for ratification. The struggle was intense because Congress was divided into roughly three factions: those who opposed any federal constitutional guarantee of Black male suffrage, those who wanted to go beyond a limited guarantee and enact universal male suffrage, including abolition of all educational and property-holding tests, and those who wanted or who were willing to settle for an amendment merely proscribing racial qualifications in determining who could vote under any other standards the states wished to have.[2] The latter group ultimately prevailed, and the Fifteenth Amendment was ratified by the states on February 3, 1870.[3]

Section 1—Right to Vote

Amdt15.S1.1 Right to Vote Clause Generally

Fifteenth Amendment, Section 1:

> *The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude–*

In its initial interpretations of the Fifteenth Amendment, the Supreme Court emphasized its aspect as a right exempting individuals from voter discrimination, rather than conferring a right to vote. "The Fifteenth Amendment," it announced, did "not confer the right of suffrage upon any one," but merely "invested the citizens of the United States with a new constitutional right which is . . . exemption from discrimination in the exercise of the elective franchise on

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[13] *See* South Carolina v. Katzenbach, 383 U.S. 301, 310 (1966) (discussing the Enforcement Act of 1870).

[14] *Nw. Austin*, 557 U.S. at 197.

[15] Amdt15.S2.2 Federal Remedial Legislation.

[1] W. Gillette, The Right to Vote: Politics and The Passage of The Fifteenth Amendment 29–31 (1965); Act of Jan. 8, 1867, ch. 6, 14 Stat. 375 (District of Columbia); Act of Jan. 25, 1867, ch. 15, 14 Stat. 379 (territories); Act of Feb. 9, 1867, ch. 36, 14 Stat. 391 (admission of Nebraska to statehood upon condition of guaranteeing against racial qualifications in voting); Act of Mar. 2, 1867, ch. 153, 14 Stat. 428 (First Reconstruction Act).

[2] Gillette, *supra* note 1, at 46–78. The congressional debate is set forth at 1 B. Schwartz, Statutory History of The United States: Civil Rights 372 (1971)

[3] *See* Amdt14.S2.1 Overview of Apportionment of Representation. The Equal Protection Clause has been extensively used by the Court to protect the right to vote. *See* Amdt14.S1.8.6.1 Voting Rights Generally.

account of race, color, or previous condition of servitude."[1] In subsequent cases, however, the Court, while conceding that the Amendment may have been originally construed as having been "designed primarily to prevent discrimination," professed to be able "to see that under some circumstances it may operate as the immediate source of a right to vote."[2]

Although "the immediate concern of the Amendment was to guarantee to the emancipated slaves the right to vote," the Court has stated that the Amendment "is cast in fundamental terms, terms transcending the particular controversy," and "grants protection to all persons, not just members of a particular race."[3] The Court has construed "race" broadly to include classifications based on ancestry as well as those based on race.[4]

Amdt15.S1.2 Grandfather Clauses

Fifteenth Amendment, Section 1:

> *The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude–*

The history of the Fifteenth Amendment has often been a record of belated judicial condemnation of various state efforts to disenfranchise African Americans, either overtly through statutory enactment or covertly through inequitable administration of electoral laws and toleration of discriminatory practices.[1] One of the first devices declared unconstitutional by the Court was the "grandfather clause."[2] Beginning in 1895, several states enacted laws in which persons who had been voters or descendants of voters before the ratification of the Fourteenth and Fifteenth Amendments could be registered without meeting any literacy requirement. Black voters were therefore unable to avail themselves of the grandfather clause, and then kept from voting on grounds of illiteracy or through discriminatory administration of literacy tests. Meanwhile, illiterate White citizens could register without taking any literacy tests. With the achievement of the intended result, most states permitted these laws to lapse, but the State of Oklahoma's grandfather clause had been enacted as a permanent amendment to the state constitution.[3] A unanimous Court in the 1915 case *Guinn v. United States* condemned the device as recreating and perpetuating "the very conditions which the [Fifteenth] Amendment was intended to destroy."[4]

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[1] United States v. Reese, 92 U.S. 214, 217–18 (1876) ("The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race . . . as it was on account of age, property, or education. Now it is not."); *See also*, United States v. Cruikshank, 92 U.S. 542, 555–56 (1876) ("[T[he right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race . . . is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the lat[ter] has been.").

[2] *Ex parte* Yarbrough, 110 U.S. 651, 665 (1884) (recognizing that in former slave-holding state constitutions where skin color was a qualification for voting, the Fifteenth Amendment in effect conferred the right to vote on an African American voter because "it annulled the discriminating word 'white,' and thus left him in the enjoyment of the same right as white persons"); Neal v. Delaware, 103 U.S. 370 (1881).

[3] Rice v. Cayetano, 528 U.S. 495, 512 (2000).

[4] *Id.* at 514 (2000) (acknowledging that "[a]ncestry can be a proxy for race").

[1] *See e.g.*, *Neal*, 103 U.S. at 388–89 (holding a state constitution that limited the franchise to White males unconstitutional).

[2] Guinn v. United States, 238 U.S. 347, 359 (1915).

[3] *Id.*

[4] *Id.* at 360.

Amdt15.S1.2
Grandfather Clauses

The Court voided a subsequent Oklahoma statute providing that persons who were qualified to vote in 1916, but who failed to register between April 30 and May 11, 1916, should be perpetually disenfranchised.[5] The effect of this statute was that Black voters only had a twenty-day registration opportunity to avoid permanent disenfranchisement by virtue of the invalidated grandfather clause in *Guinn*. In striking down the law, Justice Felix Frankfurter declared for the Court that the Fifteenth Amendment nullified "sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."[6]

Amdt15.S1.3 Exclusion from Primaries and Literacy Tests

Fifteenth Amendment, Section 1:

> *The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude–*

During the same period, the Court faced the exclusion of African Americans from participation in primary elections. While the Court did rule in 1927 that a State of Texas law violated the Equal Protection Clause by prohibiting Black voters from participating in a party primary, it did not hold at first that primary contests were elections to which federal constitutional guarantees applied.[1] Instead, the Court found that when an exclusion was perpetuated by political parties not acting in obedience to any statutory command, the discrimination did not constitute state action and was therefore not prohibited.[2] This holding was reversed nine years later in *Smith v. Allwright* when the Court declared that, where the selection of candidates for public office is entrusted by statute to political parties, a political party is acting as a state entity and must abide by the Fifteenth Amendment.[3] A severely divided Court was later faced with the exclusion of African Americans by a private organization that, independently of state law or the use of state election funds, monopolized access to Democratic nominations for local office. The exclusionary policy was struck down as unconstitutional but there was no opinion of the Court.[4]

In 1898, the Court held that literacy tests that apply to all voters equally are fair on their face, and in the absence of proof of discriminatory enforcement could not be said to deny equal protection.[5] The Court did, however, affirm striking down a literacy test in the State of Alabama's constitutional amendment, the legislative history of which disclosed that its intent was to disenfranchise Black voters in violation of the Fifteenth Amendment.[6] After the passage

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[5] Lane v. Wilson, 307 U.S. 268 (1939).

[6] *Id.* at 275.

[1] Nixon v. Herndon, 273 U.S. 536, 541 (1927) ("We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth."). *See also* Nixon v. Condon, 286 U.S. 73 (1932).

[2] Grovey v. Townsend, 295 U.S. 45 (1935).

[3] Smith v. Allwright, 321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299 (1941) (holding that Section 4 of Article I of the Constitution, the Elections Clause, authorizes Congress to regulate primary as well as general elections).

[4] Terry v. Adams, 345 U.S. 461 (1953).

[5] Williams v. Mississippi, 170 U.S. 213 (1898); *Cf.* Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45 (1959).

[6] Davis v. Schnell, 81 F. Supp. 872 (M.D. Ala. 1949), *aff'd*, 336 U.S. 933 (1949).

of the Voting Rights Act of 1965,[7] when Congress amended the Act to suspend literacy tests throughout the Nation, the Court unanimously sustained the action as a valid measure to enforce the Fifteenth Amendment.[8]

Amdt15.S1.4 Racial Gerrymandering and Right to Vote Clause

Fifteenth Amendment, Section 1:

> *The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude–*

The Court has held that racially-based redistricting in order to dilute minority voting power is unconstitutional under the Fifteenth Amendment.[1] In *Gomillion v. Lightfoot*, the Court found a violation of the Fifteenth Amendment in the redrawing of a 1957 municipal boundary line in Tuskegee, Alabama, from a square into a twenty-eight-sided figure that excluded from municipal elections all but a few of its 400 Black voters but no White voters.[2]

In the 1980 case *City of Mobile v. Bolden*, in a considerably divided decision with respect to the requirement of discriminatory intent,[3] a plurality of the Court sought to restrict the Fifteenth Amendment to cases in which there is direct denial or abridgment of the right to register and vote, and to exclude dilution claims, such as the challenge to an at-large electoral system at issue.[4] Three Justices in separate opinions disagreed with the plurality's basis for putting aside the Fifteenth Amendment and suggested they would have applied the Amendment to the vote dilution claim.[5]

Subsequent decisions have largely adopted the view of Justice Charles Whitaker's concurrence[6] in *Gomillion* to resolve allegations of racial gerrymandering under the Equal Protection Clause of the Fourteenth Amendment.[7] Despite the Court's acknowledgments that racial gerrymandering may violate the purpose of the Fifteenth Amendment, the Fourteenth Amendment continues to be the predominant constitutional authority in such cases.[8]

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[7] For discussion of the Voting Rights Act of 1965 and cases related to enforcement of federal statutes passed under the Fifteenth Amendment, *see* Amdt15.S2.1 State Action Doctrine and Enforcement Clause through Amdt15.S2.2 Federal Remedial Legislation.

[8] Oregon v. Mitchell, 400 U.S. 112 (1970).

[1] Gomillion v. Lightfoot, 364 U.S. 339 (1960).

[2] 364 U.S. 339 (1960); Wright v. Rockefeller, 376 U.S. 52 (1964) (extending the reasoning of *Gomillion* to congressional districting but finding insufficient evidence of discriminatory intent).

[3] 446 U.S. 55, 61–65 (1980) (rejecting race-based redistricting Fifteenth Amendment claim on the basis that "action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose"); *Id.* at 125 (Marshall, J., dissenting, adhering to the view that discriminatory effect is sufficient). *But see* Thornburg v. Gingles, 478 U.S. 30, 35 (1986) (reassessing Voting Rights Act Section 2, currently codified at 52 U.S.C. § 10301, after 1982 Voting Rights Act amendment establishing "results" language in response to *City of Mobile v. Bolden*).

[4] 446 U.S. at 65. *See also*, Rogers v. Lodge, 458 U.S. 613, 619 n.6 (1982) (recounting the split opinions in *City of Mobile* but "express[ing] no view on the application of the Fifteenth Amendment to this case").

[5] *City of Mobile*, 446 U.S. 84–85 (Stevens, J., concurring), 102 (White, J., dissenting), 125–35 (Marshall, J., dissenting).

[6] *Gomillion*, 364 U.S. 349. (Whitaker, J., concurring).

[7] *E.g.*, Shaw v. Reno, 509 U.S. 630, 645 (1993) ("This Court's subsequent reliance on *Gomillion* in other Fourteenth Amendment cases suggests the correctness of Justice Whittaker's view."). *See also* Cooper v. Harris, 137 S. Ct. 1455 (2017); White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971).

[8] Miller v. Johnson, 515 U.S. 900 (1995) (citing *Shaw*, 509 U.S. at 657, and stating "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of

SECTION 2—ENFORCEMENT

Amdt15.S2.1 State Action Doctrine and Enforcement Clause

Fifteenth Amendment, Section 2:

The Congress shall have the power to enforce this article by appropriate legislation.

The Fifteenth Amendment prohibits denial of rights guaranteed "by the United States or by any State," giving rise to the "state action" doctrine.[1] Nevertheless, the Supreme Court's early interpretations of legislation passed to enforce the Fifteenth Amendment pursuant to Section 2 implied that Congress could protect Constitutional rights against deprivations from private, not just official or state-authorized, sources.[2] In the 1903 case *James v. Bowman*, however, the Court held that the Enforcement Act of 1870's prohibition on private as well as official interference with the right to vote on racial grounds was unconstitutional.[3]

The Court began moving away from that interpretation by the 1940s.[4] In *Smith v. Allwright*, the exclusion of African Americans from political parties without the compulsion or sanction of state law was held to violate the Fifteenth Amendment because the political parties were acting in effect as agents of the state.[5] Then, in *Terry v. Adams*, the Court considered a powerful but private political organization that was not regulated by the state and selected its candidates for the Democratic primary election by its own processes.[6] The Court held that the exclusion of Black voters by the organization violated the Fifteenth Amendment, although a majority of the Justices did not agree on a rationale for the holding.[7]

In the 1960 case *United States v. Raines*, State of Georgia election officials challenged their own charges under the Civil Rights Act by alleging that the statute was unconstitutional as applied to private actors.[8] The Court did not rule on the argument, holding that the statute could constitutionally be applied to the defendants and it would not hear their contention that it would be void when applied to others.[9]

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a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.") (citations omitted). *See* Amdt14.S1.8.6.6 Racial Vote Dilution and Racial Gerrymandering.

[1] Terry v. Adams, 345 U.S. 461, 473 (1953) (Frankfurter, J., concurring) ("The State . . . must mean not private citizens but those clothed with the authority and influence which official position affords . . . [State Action] gives rise to a false direction in that it implies some impressive machinery or deliberative conduct normally associated with what orators call a sovereign state. The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored.")

[2] *Ex parte* Yarbrough, 110 U.S. 651, 665–66 (1884) ("The reference to cases in this court in which the power of congress under the first section of the fourteenth amendment has been held to relate alone to acts done under state authority can afford petitioners no aid in the present case. For, while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a state, or which are not committed by any one exercising its authority, are not within the scope of that amendment, it is quite a different matter when congress undertakes to protect the citizen in the exercise of rights conferred by the constitution of the United States"). *See also*, United States v. Cruikshank, 92 U.S. 542, 555–56 (1876).

[3] 190 U.S. 127 (1903).

[4] *E.g.*, United States v. Classic, 313 U.S. 299, 315 (1941); United States v. Williams, 341 U.S. 70, 77 (1951).

[5] 321 U.S. 649 (1944).

[6] 345 U.S. 461 (1953).

[7] *See* Amdt15.S1.1 Right to Vote Clause Generally through Amdt15.S1.4 Racial Gerrymandering and Right to Vote Clause.

[8] United States v. Raines, 362 U.S. 17 (1960).

[9] *See* Amdt14.2 State Action Doctrine.

Amdt15.S2.2 Federal Remedial Legislation

Fifteenth Amendment, Section 2:

The Congress shall have the power to enforce this article by appropriate legislation.

Federal remedial legislation related to the Fifteenth Amendment[1] culminated in the passage of the Voting Rights Act of 1965 and its amendments.[2] Pursuant to the Voting Rights Act, Congress provided, among other things, that if the Attorney General determined that any state or political subdivision maintained any test or device, such as literacy tests, and that less than 50% of the voting age population in that jurisdiction was registered to vote or voted in the previous presidential election, such tests or devices were to be suspended for five years and no person could be denied the right to vote on that basis, and prescribed which states and jurisdictions with a history of discrimination were required to obtain "preclearance" before changing any voting law.[3]

Upholding the constitutionality of the Voting Rights Act a year later in *South Carolina v. Katzenbach*, the Court sketched the broad outlines of Congress's power to enforce the Fifteenth Amendment.[4] The Court held that Congress could "enforce" the guarantee of the right to vote by any rational means at its disposal.[5] Congress was therefore justified in deciding that certain areas of the Nation were the primary locations of voting discrimination and in directing its remedial legislation to those areas.[6] The *Katzenbach* decision affirmed Congress's power to enact measures designed to enforce the Fifteenth Amendment through broad affirmative prescriptions rather than through proscriptions of specific practices. Subsequent decisions of the Burger Court confirmed the reach of this power.[7] When Congress suspended literacy tests throughout the Nation in 1970, the Court unanimously sustained the action as a valid measure under the Fifteenth and Fourteenth Amendments.[8]

In the 1980 case *City of Rome v. United States*, the City had sought to exit the preclearance requirements of the Voting Rights Act by showing that it had not used any discriminatory practices within the prescribed period.[9] The lower court found that the City had engaged in practices without any discriminatory motive, but that its practices had a discriminatory impact.[10] The City thus argued that, because the Fifteenth Amendment reached only purposeful discrimination, the Act went beyond Congress's power.[11] The Court held, however,

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[1] In *Giles v. Harris*, 189 U.S. 475 (1903), the Court refused to order the registration of 6,000 Black voters who alleged that they were being wrongly denied the franchise, suggesting that the petitioners apply to Congress or the President for relief. The passage of the 1957 Civil Rights Act authorized the Attorney General of the United States to seek injunctive relief to prevent interference with the voting rights of citizens. The 1960 Civil Rights Act and its amendments expanded on this authorization by permitting the Attorney General to seek a court finding of "pattern or practice" of discrimination in any particular jurisdiction.

[2] Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437.

[3] 52 U.S.C. §§ 10303(a), 10303(b).

[4] 383 U.S. 301 (1966).

[5] *Id.* at 325–26.

[6] *Id.* at 330–31.

[7] *See* Gaston Cty. v. United States, 395 U.S. 285 (1969) (holding that that evidence of past discrimination in the educational opportunities available to Black children precluded a North Carolina county from reinstituting a literacy test). *See also*, Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Perkins v. Matthews, 400 U.S. 379 (1971); Georgia v. United States, 411 U.S. 526 (1973); Dougherty County Bd. of Educ. v. White, 439 U.S. 32 (1978); United States v. Board of Comm'rs of Sheffield, 435 U.S. 110 (1978).

[8] Oregon v. Mitchell, 400 U.S. 112 (1970) (splitting 5-4 on whether Congress could set voting age requirements).

[9] 446 U.S. 156, 172 (1980).

[10] *Id.*

[11] *Id.* at 173.

that, even if discriminatory intent was a prerequisite to finding a violation of Section 1 of the Fifteenth Amendment,[12] Congress still had authority to proscribe electoral devices that have a discriminatory impact or effect.[13] The Court stated:

> It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are "appropriate," as that term is defined in *McCulloch v. Maryland* and *Ex parte Virginia* . . . . Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.[14]

However, just as the Court showed the Voting Rights Act's reach in *City of Rome*, it almost simultaneously set limitations in *City of Mobile v. Bolden* that same year. As enacted in 1965, another section of the Voting Rights Act, Section 2, largely tracked the language of Section 1 of the Fifteenth Amendment.[15] In *City of Mobile v. Bolden*, a majority of the Court agreed that the Fifteenth Amendment and the Act were coextensive, but the Justices did not agree on the meaning to be ascribed to the statute.[16] A plurality believed that because the constitutional provision reached only purposeful discrimination, Section 2 of the Voting Rights Act was similarly limited. A major purpose of Congress's 1982 amendments to the Act,[17] therefore, was to put aside this possible interpretation and to provide that any electoral practice "which results in a denial or abridgement" of the right to vote on account of race or color will violate the Act.[18]

The Court in *Shelby County v. Holder*,[19] however, emphasized the limits to the enforcement power of the Fifteenth Amendment in striking down Section 4 of the Act, which provided the formula that determined which states or electoral districts are required to submit electoral changes to the Department of Justice or a federal court for preclearance under Section 5 of the Act.[20] In *Shelby County*, the Court described the section 5 preclearance process as an "extraordinary departure from the traditional course of relations between the States and the Federal Government"[21] and violating the "fundamental principle of equal sovereignty" among

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[12] *Cf.* City of Mobile v. Bolden, 446 U.S. 55, 60–61 (1980).

[13] *See City of Rome*, 446 U.S. at 173.

[14] City of Rome v. United States, 446 U.S. 156, 177 (1980). *See also* Lopez v. Monterey Cty., 525 U.S. 266 (1999).

[15] Codified as amended at 52 U.S.C. §§s 10301, 10303(f)

[16] 446 U.S. 55 (1980). *See id.* at 60–61 (Burger, C.J., Stewart, Powell, Rehnquist, JJ.); *id.* at 105 n.2 (Marshall, J., dissenting).

[17] *See* Thornburg v. Gingles, 478 U.S. 30, 80 (1986) (applying the amended language in the Voting Rights Act in the context of multimember districting).

[18] The 1982 amendments also changed the result in *Beer v. United States*, 425 U.S. 130 (1976), in which the Court had held that a covered jurisdiction was precluded from altering a voting practice covered by the Act only if the change would lead to a retrogression in the position of racial minorities. The 1982 amendments provide that the change may also not be approved if it would "perpetuate voting discrimination," in effect applying the new Section 2 "results test" to preclearance procedures. S. Rep. No. 97–417, at 12 (1982); H.R. Rep. No. 97–227, at 28 (1981).

[19] 570 U.S. 529 (2013).

[20] In 2006, Congress had reauthorized the Act for twenty-five years and provided that the preclearance requirement extended to jurisdictions that had a voting test and less than 50% voter registration or turnout as of 1972. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King, Voting Rights Act Reauthorization and Amendments Act, Pub. L. No. 109–246, 120 Stat. 577 (2006).

[21] *Shelby Cnty.*, 570 U.S. at 545.

states.[22] While the Court acknowledged that the disparate treatment of states under Section 4 could be justified by "unique circumstances," such as those before Congress at the time of enactment of the Voting Rights Act,[23] the Court held that Congress could no longer "distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story" with respect to racial discrimination in covered jurisdictions.[24] The Court added, however, that Congress could "draft another formula [for preclearance] based on current conditions" that demonstrate "that exceptional conditions still exist justifying such an 'exceptional departure from the traditional course of relations between the States and the Federal Government."[25]

In the 2021 case *Brnovich v. Democratic National Committee*, the Court continued to set limits on the Fifteenth Amendment's enforcement power as applied through the Voting Rights Act by narrowing the circumstances through which a successful challenge can be brought under Section 2.[26] The Court, noting that the decision was its first interpreting a state's "generally applicable time, place or manner voting rules" under Section 2, distinguished the case from previous challenges brought in the redistricting contexts.[27] In upholding two State of Arizona election provisions, restrictions on out-of-precinct voting and third-party ballot collection[28] that were challenged as disproportionately burdening minority voters, the Court applied a new version of the "totality of circumstances" test from *Thornberg v. Gingles*, 478 U.S. 30 (1986), with emphasis on the requirement that an alleged violation of Section 2 show there is not "equal openness" of participation in the election process.[29] The Court also provided new "guideposts" that take the form of five specific, but nonexhaustive, circumstances for courts to consider.[30]

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[22] *Id.* at 542 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)). The significance of the principle of equal sovereignty as enunciated in *Coyle v. Smith* had been considered by the Court in a previous challenge to the Act. *See* South Carolina v. Katzenbach, 383 U.S. 301, 328–29 (1966). *Coyle*, while based on the theory that the United States "was and is a union of States, equal in power, dignity and authority," 221 U.S. at 580, was distinguished by the Court in *Katzenbach* as concerning only the admission of new states and not remedies for actions occurring subsequent to that event. The Court in *Shelby County* held, however, that a broader principle regarding equal sovereignty "remains highly pertinent in assessing subsequent disparate treatment of States." *Shelby County*, 570 U.S. at 544 (citing *Nw. Austin*, 557 U.S. at 203).

[23] *Shelby Cnty.*, 570 U.S. at 545–46 (quoting *Katzenbach*, 383 U.S. at 334–335).

[24] *Id.* at 546–47, 556.

[25] *Id.* at 545 (quoting Presley v. Etowah Cty. Comm'n, 502 U.S. 491, 500–01 (1992)).

[26] 141 S. Ct. 2321 (2021).

[27] *Id.* at 2333 ("In the years since *Gingles*, we have heard a steady stream of § 2 vote-dilution cases, but until today, we have not considered how § 2 applies to generally applicable time, place, or manner voting rules.")

[28] Ariz. Rev. Stat. Ann. §§ 16–122, 16–135; § 16–1005(H, I).

[29] 52 U.S.C. 10301(b); *See Brnovich*, 141 S. Ct. at 2338 ("The core of § 2(b) is the requirement that voting be 'equally open.' The statute's reference to equal 'opportunity' may stretch that concept to some degree to include consideration of a person's ability to use the means that are equally open. But equal openness remains the touchstone.")

[30] *Brnovich*, 141 S. Ct. at 2338–40 (listing "nonexhaustive" circumstances to consider including: (1) the size of the burden imposed by a challenged voting rule, (2) the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982, (3) the size of any disparities in a rule's impact on members of different racial or ethnic groups, (4) the opportunities provided by a state's entire system of voting, and (5) the strength of the state interests served by a challenged voting rule); *Contra id.* at 2362 (Kagan, J., dissenting)

SIXTEENTH AMENDMENT
INCOME TAX

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SIXTEENTH AMENDMENT—INCOME TAX

Amdt16.1 Overview of Sixteenth Amendment, Income Tax

The Sixteenth Amendment, ratified in 1913, expanded on Congress's taxing power. Article I grants Congress authority to collect taxes,[1] but requires direct taxes to be imposed proportional to the population of the states.[2] The Sixteenth Amendment clarified that Congress has the power to collect an income tax without apportionment among the states, and without regard to population.[3] As discussed in the following essays, the Amendment was adopted in response to a Supreme Court decision that invalidated a federal income tax after holding it was a direct tax that was not properly apportioned.[4] Accordingly, the Sixteenth Amendment essentially creates an income tax exception to the requirement in Article I that direct taxes must be apportioned based on states' population.[5] This has raised the question—again, discussed in the following essays—of what counts as "income," and whether any given federal tax extends beyond income.[6] The Court has stated the test generally as whether the law taxes payments that qualify as "profits or gains,"[7] although this applies "regardless of whether the particular transaction results in net profit."[8] The Sixteenth Amendment applies to income derived "from whatever source," and thus can be subject to a somewhat broad interpretation.[9] Nonetheless, the apportionment exception in the Sixteenth Amendment does not extend to taxes on *property*, as opposed to income derived from property.[10]

Amdt16.2 Historical Background on Sixteenth Amendment

Sixteenth Amendment:

> *The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.*

The Sixteenth Amendment was adopted to address the Court's 1895 decision in *Pollock v. Farmers' Loan & Trust Co.*[1] holding unconstitutional Congress's attempt of the previous year

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[1] U.S. Const. art. I, § 8, cl. 1; *see also* ArtI.S8.C1.1.1 Overview of Taxing Clause.

[2] U.S. Const. art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 4.

[3] U.S. Const. amend. XVI.

[4] Amdt16.2 Historical Background on Sixteenth Amendment; *see also* ArtI.S9.C4.4 Direct Taxes and the Sixteenth Amendment.

[5] *See, e.g.*, Eisner v. Macomber, 252 U.S. 189, 206 (1920) (saying the Sixteenth Amendment "did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the States of taxes laid on income").

[6] *See, e.g.*, *id.* (noting that the Amendment should not be extended beyond "income," in order to fully effectuate the Article I limitation).

[7] *See, e.g.*, Edwards v. Cuba R. Co., 268 U.S. 628, 633 (1925). *See also* Bowers v. Kerbaugh-Empire Co., 271 U.S. 170, 174 (1926) ("[I]ncome may be defined as gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital.").

[8] Burnet v. Sanford & Brooks Co., 282 U.S. 359, 364 (1931).

[9] U.S. Const. . amend. XVI. The definition of income in early federal tax laws has been interpreted as essentially being tied to the constitutional definition, as the Court said the text indicated "the purpose of Congress to use the full measure of its taxing power." Helvering v. Clifford, 309 U.S. 331, 334 (1940).

[10] *See Eisner*, 252 U.S. at 207–08.

[1] 157 U.S. 429 (1895) (Pollock I); 158 U.S. 601 (1895) (*Pollock II*) [hereinafter collectively referred to as *Pollock*]. *Pollock* came to the Court twice. In *Pollock I*, the Court invalidated the tax at issue insofar as it was a tax upon income derived from real property, but the Court was equally divided on whether income derived from personal property was

to tax incomes uniformly throughout the United States.[2] A tax on incomes derived from property,[3] the Court declared, was a "direct tax," which Congress, under the terms of Article I, Sections 2[4] and 9,[5] could impose only by the rule of apportionment according to population. Scarcely fifteen years earlier, in *Springer v. United States*,[6] the Justices had unanimously sustained a similar tax during the Civil War,[7] the only other occasion preceding the Sixteenth Amendment in which Congress had used this method of raising revenue.[8]

During the years between the *Pollock* decision in 1895 and the ratification of the Sixteenth Amendment in 1913, the Court appeared sensitive to *Pollock's* ramifications for the Government, which it partially addressed by redefining "direct tax" and emphasizing the Court's past favorable treatment of excise taxation. Thus, in a series of cases, notably *Nicol v. Ames*,[9] *Knowlton v. Moore*,[10] and *Patton v. Brady*,[11] the Court held the following taxes to have been levied upon "incidents of ownership" and hence to be excises: a tax that involved affixing revenue stamps to memoranda evidencing the sale of merchandise on commodity exchanges; an inheritance tax; and a war revenue tax upon tobacco, on which the hitherto imposed excise tax had already been paid and that the manufacturer held for resale. The Court also sustained a corporate income tax as an excise "measured by income" on the privilege of doing business in corporate form.[12]

The adoption of the Sixteenth Amendment, however, put an end to speculation whether the Court would eventually reverse *Pollock*. Indeed, in its initial appraisal[13] of the Amendment, the Court classified income taxes as being inherently "indirect," stating:

> [T]he command of the Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived, forbids the application to such taxes of the rule applied in the *Pollock Case* by which alone such taxes were removed from the great class of excises, duties and imports subject to the rule of uniformity and were placed under the other or direct class.[14]

The Court further observed: "[T]he Sixteenth Amendment conferred no new power of taxation but simply prohibited the previous complete and plenary power of income taxation

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a direct tax. *Pollock I*, 157 U.S. at 583. In *Pollock II*, on petitions for rehearing, the Court held that a tax on income derived from personal property was also a direct tax. *Pollock II*, 158 U.S. at 637.

[2] Act of Aug. 27, 18949, § 27, 28 Stat. 509, 553.

[3] In *Pollock II*, the Court conceded that taxes on incomes from "professions, trades, employments, or vocations" levied by this act were excise taxes and therefore valid. The Court voided the entire statute, however, on the ground that Congress never intended to permit the entire "burden of the tax to be borne by professions, trades, employments, or vocations" after exempting real estate and personal property. *Pollock II*, 158 U.S. at 635.

[4] U.S. CONST. art I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .").

[5] U.S. CONST. art I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.").

[6] 102 U.S. 586 (1881).

[7] Act of June 30, 1864, ch. 173, § 116, 13 Stat. 223, 281.

[8] For an account of the *Pollock* decision, *see* "From the Hylton to the Pollock Case," under Art. I, § 9, cl. 4, *supra* note 5.

[9] 173 U.S. 509 (1899).

[10] 178 U.S. 41 (1900).

[11] 184 U.S. 608 (1902).

[12] Flint v. Stone Tracy Co., 220 U.S. 107 (1911).

[13] Brushaber v. Union Pac. R.R., 240 U.S. 1 (1916); Stanton v. Baltic Mining Co., 240 U.S. 103 (1916); Tyee Realty Co. v. Anderson, 240 U.S. 115 (1916).

[14] *Brushaber*, 240 U.S. at 18–19.

possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged . . . .”[15]

Amdt16.3 Income and Corporate Dividends

Sixteenth Amendment:

> *The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.*

Building upon definitions formulated in cases construing the Corporation Tax Act of 1909,[1] the Court initially described income as “gain derived from capital, from labor, or from both combined,” inclusive of the “profit gained through a sale or conversion of capital assets.”[2] Consistent with the belief that all income “in the ordinary sense of the word” became taxable under the Sixteenth Amendment, the earliest decisions of the Court on the taxability of corporate dividends occasioned little comment.

Emphasizing that a stockholder should be viewed as “a different entity from the corporation,” the Court in *Lynch v. Hornby*,[3] held that a cash dividend equal to 24% of the par value of the outstanding stock and made possible largely by converting assets earned prior to the adoption of the Amendment into money, was taxable income to the stockholder for the year in which he received it, although such an extraordinary payment might appear “to be a mere realization in possession of an inchoate and contingent interest . . . [of] the stockholder . . . in a surplus of corporate assets previously existing.” [4] In *Peabody v. Eisner*,[5] decided the same day as *Lynch*, the Court ruled that a dividend paid in the stock of another corporation, although representing earnings that had accrued before ratification of the Amendment, was also taxable to the shareholder as income. The Court likened the dividend to a distribution in specie.[6]

Two years later, the Court decided *Eisner v. Macomber*.[7] Departing from its earlier interpretations of the Sixteenth Amendment—that the Amendment corrected *Pollock* to restore income taxation to “the category of indirect taxation to which it inherently belonged”[8]—Justice Mahlon Pitney, writing for the Court, stated that the Sixteenth Amendment “did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the States of taxes laid on income.”[9] Specifically, *Eisner* held that a stock dividend was capital when a stockholder of the

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[15] *Stanton*, 240 U.S. at 112.

[1] Stratton’s Independence, Ltd. v. Howbert, 231 U.S. 399 (1913); Doyle v. Mitchell Bros. Co., 247 U.S. 179 (1918).

[2] Eisner v. Macomber, 252 U.S. 189, 207 (1920); Bowers v. Kerbaugh-Empire Co., 271 U.S. 170 (1926).

[3] 247 U.S. 339 (1918).

[4] *Id.* at 344. In *Lynch v. Turrish,* 247 U.S. 221 (1918), the Court declared a single and final dividend distributed upon liquidation of a corporation’s entire assets, although equaling twice the par value of the capital stock, to represent only the corporation’s intrinsic value earned prior to the effective date of the Sixteenth Amendment. Consequently, the Court held the distribution was not taxable income to the shareholder in the year in which the shareholder actually received it. Similarly, *Southern Pacific Co. v. Lowe,* 247 U.S. 330 (1918), concerned a railway company whose entire capital stock was owned by and whose physical assets were leased to and used by another railway company. The Court held the dividends that the first railway company paid out of surplus accumulated before the Sixteenth Amendment’s effective date to be a nontaxable bookkeeping transaction between virtually identical corporations.

[5] 247 U.S. 347 (1918).

[6] *Id.*

[7] 252 U.S. 189 (1920).

[8] Stanton v. Baltic Mining Co., 240 U.S. 103, 112 (1916).

[9] 252 U.S. at 206.

issuing corporation received it and the dividend did not become taxable "income" until sold or converted, and then only to the extent that the stockholder realized a gain upon the proportion of the original investment that the stock represented. A stock dividend, Justice Mahlon Pitney maintained:

> Far from being a realization of profits of the stockholder . . . tends rather to postpone such realization, in that the fund represented by the new stock has been transferred from surplus to capital, and no longer is available for actual distribution. . . . We are clear that not only does a stock dividend really take nothing from the property of the corporation and add nothing to that of the shareholder, but that the antecedent accumulation of profits evidenced thereby, while indicating that the shareholder is richer because of an increase of his capital, at the same time shows [that] he has not realized or received any income in the transaction.[10]

Conceding that a stock dividend represented a gain, Justice Mahlon Pitney concluded that the only gain taxable as "income" under the Amendment was "a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in*, being '*derived*,' that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal;—*that* is income derived from property. Nothing else answers the description," including "a gain *accruing to* capital, not a *growth* or *increment* of value *in* the investment."[11]

Although the Court has not overturned the principle it asserted in *Eisner v. Macomber*,[12] it has narrowed its application. In *United States v. Phellis*, the Court treated as taxable income new stock issued in connection with a corporate reorganization designed to move the place of incorporation.[13] The Court rejected a test that compared the market value of the shares in the older corporation with the aggregate market value of those shares plus the dividend shares immediately after the reorganization, which showed that the stockholders experienced no increase in aggregate wealth.[14] Instead, the Court viewed the shareholders as having essentially exchanged stock in the old corporation for stock in the new corporation. The *Phellis* Court stated:

> It thus appears that in substance and fact, as well as in appearance, the dividend received by claimant was a gain, a profit, derived from his capital interest in the old company, not in liquidation of the capital but in distribution of accumulated profits of the company; something of exchangeable value produced by and proceeding from his

[10] *Id.* at 211, 212.

[11] *Id.* at 207. *See also* Merchants' L. & T. Co. v. Smietanka, 255 U.S. 509 (1921).

[12] The Court refused to reconsider *Eisner* in Helvering v. Griffiths, 318 U.S. 371 (1943).

[13] United States v. Phellis, 257 U.S. 156 (1921)

[14] *Id.*; *See also* Rockefeller v. United States, 257 U.S. 176 (1921); Cullinan v. Walker, 262 U.S. 134 (1923). In *Marr v. United States,* 268 U.S. 536 (1925), the Court held that the increased market value of stock issued by a new corporation in exchange for the stock of an older corporation—the assets of which the new corporation would absorb—was taxable income to the holder, even though the income represented the older corporation's profits and the capital remained invested in the same general enterprise. The Court likened *Weiss v. Stearn,* 265 U.S. 242 (1924), to *Eisner v. Macomber*, and distinguished it from the aforementioned cases on the ground of preservation of corporate identity. The Court observed that: "[Although the] new corporation had . . . been organized to take over the assets and business of the old . . . [,] the corporate identity was deemed to have been substantially maintained because the new corporation was organized under the laws of the same State with presumably the same powers as the old. There was also no change in the character of the securities issued. By reason of these facts, the proportional interest of the stockholder after the distribution of the new securities was deemed to be exactly the same . . . ." *Marr*, 268 U.S. at 541. Similarly, consistent with *Eisner v. Macomber*, the Court ruled that a dividend in common stock paid to holders of preferred stock, and a dividend in preferred stock paid to holders of common stock, constitute taxable income under the Sixteenth Amendment because they gave the stockholders an interest different from that represented by their prior holdings.

> investment therein, severed from it and drawn by him for his separate use. Hence it constituted individual income within the meaning of the income tax law . . . .[15]

By contrast, in *Miles v. Safe Deposit Company*, the Court held that no taxable income resulted when a stockholder received rights to subscribe for shares in a new issue of capital stock, the intrinsic value of which was assumed to exceed the issuing price.[16] The Court declared the right to subscribe to be analogous to a stock dividend, stating "the District Court rightly held defendant in error liable to income tax as to so much of the proceeds of sale of the subscription rights as represented a realized profit over and above the cost to it of what was sold."[17]

Amdt16.4 Corporate Earnings

Sixteenth Amendment:

> *The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.*

In *Helvering v. National Grocery Company*, the Court rejected the contention that a tax on undistributed corporate profits is essentially a penalty or a direct tax on capital subject to apportionment.[1] Because the exaction was permissible as a tax, its penal objective, which was "to force corporations to distribute earnings in order to create a basis for taxation against the stockholders," did not impair its validity.[2] The Court rejected the contention that the tax was a direct tax on a state of mind because liability was assessed upon a mere purpose to evade imposition of surtaxes against stockholders. The Court held that, while "the existence of the defined purpose was a condition precedent to the imposition of the tax liability," that "[did] not prevent it from being a true income tax within the meaning of the Sixteenth Amendment."[3] Subsequently, in *Helvering v. Northwest Steel Mills*,[4] the Court addressed the constitutionality of the undistributed profits tax, observing:

> It is true that the surtax is imposed upon annual income only if it is not distributed, but this does not serve to make it anything other than a true tax on income within the meaning of the Sixteenth Amendment. Nor is it true . . . that because there might be an impairment of the capital stock, the tax on the current annual profit would be the equivalent of a tax upon capital. Whether there was an impairment of the capital stock

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[15] *Phellis*, 257 U.S. at 175.

[16] Miles v. Safe Deposit Co., 259 U.S. 247 (1922). The Court stated: "The stockholder's right to take his part of the new shares therefore—assuming their intrinsic value to have exceeded the issuing price—was essentially analogous to a stock dividend. . . . [T]he subscription right of itself constituted no gain, profit, or income taxable without apportionment under the Sixteenth Amendment." *Id.* at 252.

[17] *Id.* at 253.

[1] Helvering v. National Grocery Co., 304 U.S. 282 (1938).

[2] *Id.* at 288.

[3] *Id*. at 288–89. In *Helvering v. Mitchell,* 303 U.S. 391 (1938), the defendant contended that the collection of 50% of any deficiency in addition to the deficiency alleged to have resulted from a fraudulent intent to evade the income tax amounted to the imposition of a criminal penalty. The Court, however, described the additional sum as a civil and not a criminal sanction, and one which could be constitutionally employed to safeguard the Government against loss of revenue. In contrast, the exaction upheld in *Helvering v. National Grocery Co.*, though conceded to possess the attributes of a civil sanction, was held to be sustainable as a tax.

[4] 311 U.S. 46 (1940). *See also* Crane-Johnson Co. v. Helvering, 311 U.S. 54 (1940).

> or not, the tax . . . was imposed on profits earned during a definite period—a tax year—and therefore on profits constituting income within the meaning of the Sixteenth Amendment.[5]

Similarly, the Court has held Congress's power to tax the income of an unincorporated joint stock association to be unaffected by the fact that, under state law, the association is not a legal entity and cannot hold title to property, or by the fact that the shareholders are liable for its debts as partners.[6]

Whether subsidies paid to corporations in money or in the form of grants of land or other physical property constitute taxable income has also concerned the Court. In *Edwards v. Cuba Railroad*,[7] the Court ruled that subsidies of lands, equipment, and money paid by Cuba to construct a railroad were not taxable income but should be viewed as having been received by the railroad as a reimbursement for capital expenditures in completing such project.

On the other hand, sums the Federal Government paid to fulfill its guarantee of minimum operating revenue to railroads during the six months following relinquishment of their control by that government were found to be taxable income. Such payments were distinguished from those excluded from computation of income in the preceding case in that the former were neither bonuses, nor gifts, nor subsidies, "that is, contributions to capital."[8] Other corporate receipts deemed to be taxable as income include: (1) "insiders profits" realized by a director and stockholder of a corporation from transaction in its stock, which, as required by the Securities and Exchange Act,[9] are paid over to the corporation;[10] (2) money received as exemplary damages for fraud or as the punitive two-thirds portion of a treble damage antitrust recovery;[11] and (3) compensation awarded for the fair rental value of trucking facilities operated by the taxpayer under control and possession of the government during World War II, for in the last instance the government never acquired title to the property and had not damaged it beyond ordinary wear.[12]

Amdt16.5 Gains

Sixteenth Amendment:

> *The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.*

The Supreme Court has stated that although "economic gain is not always taxable as income, it is settled that the realization of gain need not be in cash derived from the sale of an asset."[1] Thus, when through forfeiture of a lease, a landlord became possessed of a new building erected on his land by the outgoing tenant, the resulting gain to the former was taxable to him in that same year. The Court noted:

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[5] 311 U.S. at 53.

[6] Burk-Waggoner Ass'n v. Hopkins, 269 U.S. 110 (1925).

[7] 268 U.S. 628 (1925).

[8] Texas & Pacific Ry. v. United States, 286 U.S. 285, 289 (1932); Continental Tie & L. Co. v. United States, 286 U.S. 290 (1932).

[9] 15 U.S.C. § 78p.

[10] General American Investors Co. v. Commissioner, 348 U.S. 434 (1955).

[11] Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955).

[12] Commissioner v. Gillette Motor Co., 364 U.S. 130 (1960).

[1] Helvering v. Bruun, 309 U.S. 461, 469 (1940).

> The fact that the gain is a portion of the value of the property received by the taxpayer in the transaction does not negative its realization. . . . It is not necessary to recognition of taxable gain that he should be able to sever the improvement begetting the gain from his original capital. If that were necessary, no income could arise from the exchange of property; whereas such gain has always been recognized as realized taxable gain.[2]

Hence, the taxpayer was incorrect in contending "that the Amendment does not permit the taxation of such [a] gain without apportionment amongst the states."[3] Consistent with this holding, the Court has also ruled that, when an apartment house was acquired by bequest subject to an unassumed mortgage, and several years later was sold for a price slightly in excess of the mortgage, the basis for determining the gain from that sale was the difference between the selling price, undiminished by the amount of the mortgage, and the value of the property at the time of the acquisition, less deductions for depreciation during the years the building was held by the taxpayer. The latter's contention that the Revenue Act, as thus applied, taxed something that was not revenue, was declared to be unfounded.[4]

The Court also rejected the argument that a gift of stock became a capital asset of the donee and that, consequently, no part of the stock's value could be treated as taxable income of the donee when sold. The Court held that it was within the power of Congress to require a donee of stock, who sells it at a profit, to pay income tax on the difference between the selling price and the value when the donor acquired it.[5] In *Helvering v. Horst*, the Court explained:

> [N]ot all economic gain of the taxpayer is taxable income. From the beginning the revenue laws have been interpreted as defining 'realization' of income as the taxable event, rather than the acquisition of the right to receive it. And 'realization' is not deemed to occur until the income is paid. But the decisions and regulations have consistently recognized that receipt in cash or property is not the only characteristic of realization of income to a taxpayer on the cash receipts basis. Where the taxpayer does not receive payment of income in money or property realization may occur when the last step is taken by which he obtains the fruition of the economic gain which has already accrued to him.[6]

Consequently, an owner of bonds, reporting on the cash receipts basis, who clipped interest coupons therefrom before their due date and gave them to his son, was held to have realized taxable income in the amount of said coupons, notwithstanding that his son had collected them upon maturity later in the year.[7]

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[2] *Id.*

[3] *Id.* at 468.

[4] Crane v. Commissioner, 331 U.S. 1, 15–16 (1947). *See also* Diedrich v. Comm'r, 457 U.S. 191 (1982).

[5] In *Taft v. Bowers*, the Court observed that the donor could not, "by mere gift, enable another to hold this stock free from . . . [the] right . . . [of] the sovereign to take part of any increase in its value when separated through sale or conversion and reduced to possession." 278 U.S. 470, 482, 484 (1929). However, when a husband, as part of a divorce settlement, transfers his own corporate stock to his wife, he is deemed to have exchanged the stock for the release of his wife's inchoate, marital rights, the value of which are presumed to be equal to the current, market value of the stock, and, accordingly, he incurs a taxable gain measured by the difference between the initial purchase price of the stock and said market value upon transfer. United States v. Davis, 370 U.S. 65 (1962).

[6] Helvering v. Horst, 311 U.S. 112, 115 (1940). *See also* Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929); Corliss v. Bowers, 281 U.S. 376, 378 (1930); Burnet v. Wells, 289 U.S. 670 (1933).

[7] *Helvering* 311 U.S. at 115. The Court was also called upon to resolve questions as to whether gains, realized after 1913, on transactions consummated prior to ratification of the Sixteenth Amendment, were taxable and, if so, how such tax was to be determined. The Court's answer generally was that if the gain to the person whose income is under consideration became such subsequent to the date at which the amendment went into effect, namely, March 1, 1913, and was a real—not merely an apparent—gain, said gain is taxable. Thus, one who purchased stock in 1912 for $500

Amdt16.6 Income from Illicit Transactions

Sixteenth Amendment:

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In *United States v. Sullivan*,[1] the Court held that gains derived from illicit traffic were taxable income under the Act of 1921.[2] Justice Oliver Holmes wrote, for the unanimous Court: "We see no reason . . . why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay."[3] Consistent with that decision, although not without dissent, the Court ruled that Congress has the power to tax as income moneys received by an extortioner,[4] and, more recently, that embezzled money is taxable income of an embezzler in the year of embezzlement. In *James v. United States*, the Court reasoned

> When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, 'he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.'[5]

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could not limit his taxable gain to the difference between the value of the stock on March 1, 1913—$695—and the price obtained on the sale thereof, in 1916—$13,931. Instead, the seller was obliged to pay tax on the entire gain, that is, the difference between the original purchase price of $500 and the $13,931 in proceeds of the sale. Goodrich v. Edwards, 255 U.S. 527 (1921). Conversely, one who acquired stock in 1912 for $291,600 and who sold the same in 1916 for only $269,346, incurred a loss and could not be taxed at all, notwithstanding the fact that on March 1, 1913, his stock had depreciated to $148,635. Walsh v. Brewster, 255 U.S. 536 (1921). On the other hand, although the difference between the amount of life insurance premiums paid as of 1908, and the amount distributed in 1919, when the insured received the amount of his policy plus cash dividends apportioned thereto since 1908, constituted a gain, that portion of the latter that accrued between 1908 and 1913 was deemed to be an accretion of capital and hence not taxable. Lucas v. Alexander, 279 U.S. 473 (1929). However, a litigant who, in 1915, reduced to judgment a suit pending on February 26, 1913, for an accounting under a patent infringement, was unable to have treated as capital, and excluded from the taxable income produced by such settlement, that portion of his claim that had accrued prior to March 1, 1913. Income within the meaning of the Amendment was interpreted to be the fruit that is born of capital, not the potency of fruition. All that the taxpayer possessed in 1913 was a contingent chose in action that was inchoate, uncertain, and contested. United States v. Safety Car Heating Co., 297 U.S. 88 (1936).

Similarly, purchasers of coal lands subject to mining leases executed before adoption of the Amendment could not successfully contend that royalties received from 1920 to 1926 were payments for capital assets sold before March 1, 1913, and hence not taxable. Such an exemption, these purchasers argued, would have been in harmony with applicable local law, under which title to coal passes immediately to the lessee on execution of such leases. To the Court, however, such leases were not to be viewed "as a 'sale' of the mineral content of the soil," as minerals "may or may not be present in the leased premises, and may or may not be found [therein]. . . . If found, their abstraction . . . is a time-consuming operation and the payments made by the lessee to the lessor do not normally become payable as the result of a single transaction. . . . " The result for tax purposes would have been the same even had the lease provided that title to the minerals would pass only "on severance by the lessee." Burnet v. Harmel, 287 U.S. 103, 107, 106, 111 (1932).

[1] 274 U.S. 259 (1927).

[2] 42 Stat. 227, 250, 268.

[3] 274 U.S. at 263. Profits from illegal undertakings being taxable as income, expenses in the form of salaries and rentals incurred by bookmakers are deductible. Commissioner v. Sullivan, 356 U.S. 27 (1958).

[4] Rutkin v. United States, 343 U.S. 130 (1952). Four Justices—Hugo Black, Stanley Reed, Felix Frankfurter, and William Douglas—dissented.

[5] James v. United States, 366 U.S. 213, 219 (1961) (overruling Commissioner v. Wilcox, 327 U.S. 404 (1946)).

Amdt16.7 Deductions and Exemptions

Sixteenth Amendment:

> *The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.*

The Sixteenth Amendment authorization to tax income "from whatever source derived" does not preclude Congress from granting exemptions.[1] Thus, the fact that, "[u]nder the Revenue Acts of 1913, 1916, 1917 and 1918, stock fire insurance companies were taxed upon their income, including gains realized from the sale or other disposition of property accruing subsequent to March 1, 1913,"[2] but were not so taxed by the Revenue Acts of 1921, 1924, and 1926, did not prevent Congress, under the terms of the Revenue Act of 1928, from taxing all the gain attributable to increase in value after March 1, 1913, that such a company realized from a sale of property in 1928.[3] The constitutional power of Congress to tax a gain being well-established, the Court found Congress competent to choose "the moment of its realization and the amount realized"; and "[i]ts failure to impose a tax upon the increase in value in the earlier years . . . cannot preclude it from taxing the gain in the year when realized."[4] As the Court has observed, Congress is equally well-equipped with the "power to condition, limit, or deny deductions from gross incomes in order to arrive at the net that it chooses to tax."[5] Accordingly, even though the rental value of a building used by its owner does not constitute income within the meaning of the Amendment,[6] Congress was competent to provide that an insurance company shall not be entitled to deductions for depreciation, maintenance, and property taxes on real estate owned and occupied by it unless it includes in its computation of gross income the rental value of the space thus used.[7]

Also, a taxpayer who erected a $3,000,000 office building on land, the unimproved value of which was $660,000, and who subsequently purchased the lease on the latter for $2,100,000, is entitled to compute depreciation over the remaining useful life of the building on that portion of $1,440,000, representing the difference between the price and the unimproved value, as may be allocated to the building; but he cannot deduct the $1,440,000 as a business expense

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[1] Brushaber v. Union Pac. R.R., 240 U.S. 1 (1916).

[2] MacLaughlin v. Alliance Ins. Co., 286 U.S. 244, 247 (1932).

[3] *Id.*

[4] *Id.* at 250.

[5] Helvering v. Independent Life Ins. Co., 292 U.S. 371, 381 (1934); Helvering v. Winmill, 305 U.S. 79, 84 (1938).

[6] A tax on the rental value of property so occupied is a direct tax on the land and must be apportioned. Helvering v. Independent L. Ins. Co., 292 U.S. 371, 378–79 (1934).

[7] *Helvering*, 292 U.S. at 381. Expenditures incurred in the prosecution of work under a contract for the purpose of earning profits are not capital investments, the cost of which, if converted, must first be restored from the proceeds before there is a capital gain taxable as income. Accordingly, a dredging contractor, recovering a judgment for breach of warranty of the character of the material to be dredged, must include the amount thereof in the gross income of the year in which it was received, rather than of the years during which the contract was performed, even though it merely represents a return of expenditures made in performing the contract and resulting in a loss. The gain or profit subject to tax under the Sixteenth Amendment is the excess of receipts over allowable deductions during the accounting period, without regard to whether or not such excess represents a profit ascertained on the basis of particular transactions of the taxpayer when they are brought to a conclusion. Burnet v. Sanford & Brooks Co., 282 U.S. 359 (1931).

The grant on denial of deductions is not based on the taxpayers' engagement in constitutionally protected activities; accordingly, no deduction is granted for sums expended in combating legislation, enactment of which would destroy taxpayer's business. Cammarano v. United States, 358 U.S. 498 (1959).

Likewise, when tank truck owners, either intentionally for business reasons or unintentionally, violate state maximum weight laws, and incur fines, the latter are not deductible, for fines are penalties rather than tolls for the use of highways, and Congress is not to be viewed as having intended to encourage enterprises to violate state policy. Tank Truck Rentals v. Commissioner, 356 U.S. 30 (1958); Hoover Express Co. v. United States, 356 U.S. 38 (1958).

incurred in eliminating the cost of allegedly excessive rentals under the lease, nor can he treat that sum as a prepayment of rent to be amortized over the twenty-one-year period that the lease was to run.[8]

Amdt16.8 Diminution of Loss

Sixteenth Amendment:

> *The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.*

Mere diminution of loss is neither gain, profit, nor income. Accordingly, in *Bowers v. Kerbaugh-Empire*, the Court held that one who in 1913 borrowed a sum of money to be repaid in German marks and who subsequently lost the money in a business transaction cannot be taxed on the curtailment of debt effected by using depreciated marks in 1921 to settle a liability of $798,144 for $113,688, the "saving" having been exceeded by a loss on the entire operation.[1] The Court stated:

> The contention that the item in question is cash gain disregards the fact that the borrowed money was lost, and that the excess of such loss over income was more than the amount borrowed. When the loans were made and notes given, the assets and liabilities of defendant in error were increased alike. The loss of the money borrowed wiped out the increase of assets, but the liability remained. The assets were further diminished by payment of the debt. The loss was less than it would have been if marks had not declined in value; but the mere diminution of loss is not gain, profit or income.[2]

[8] Millinery Corp. v. Commissioner, 350 U.S. 456 (1956).

[1] 271 U.S. 170 (1926).

[2] *Id.* at 175.

SEVENTEENTH AMENDMENT
POPULAR ELECTION OF SENATORS

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SEVENTEENTH AMENDMENT—POPULAR ELECTION OF SENATORS

Amdt17.1 Overview of Seventeenth Amendment, Popular Election of Senators

The ratification of the Seventeenth Amendment was the outcome of increasing popular dissatisfaction with the original method of state legislatures selecting Senators set forth at Article I, Section 3, Clause 1.[1] As more people were able to exercise the franchise, the belief became widespread that Senators ought to be popularly elected in the same manner as Representatives.[2] Acceptance of this idea was fostered by the mounting accumulation of evidence of the practical disadvantages and malpractices attendant upon legislative selection, such as deadlocks within legislatures resulting in vacancies remaining unfilled for substantial intervals, the influencing of legislative selection by corrupt political organizations and special interest groups through purchase of legislative seats, and the neglect of other duties by legislators as a consequence of protracted electoral contests.

Amdt17.2 Historical Background on Popular Election of Senators

Seventeenth Amendment:

> *The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.*
>
> *When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.*
>
> *This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.*

Prior to ratification of the Seventeenth Amendment, many states had adopted arrangements calculated to afford voters more effective control over the selection of Senators. Some states amended their laws to enable voters participating in primary elections to designate their preference for one of several party candidates for a senatorial seat and state legislatures generally elected the winning candidate of the majority. In two states, candidates for legislative seats were required to promise to support, without regard to party ties, the senatorial candidate polling the most votes. As a result of such developments, the year before the Seventeenth Amendment was ratified, at least twenty-nine states were nominating Senators on a popular basis, and, as a consequence, the constitutional discretion of the state legislatures had been reduced to little more than that retained by presidential electors.[1]

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[1] *See* ArtI.S3.C1.3 Selection of Senators by State Legislatures.

[2] *See* ArtI.S2.C1.2 Voter Qualifications for House of Representatives Elections.

[1] 1 G. Haynes, The Senate of the United States 79–117 (1938).

Amdt17.3 Doctrine on Popular Election of Senators

Seventeenth Amendment:

> *The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.*
>
> *When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.*
>
> *This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.*

Shortly after ratification of the Seventeenth Amendment, some courts took the position that if a person possessed the qualifications required to vote for a Senator, the person's right to vote for the Senator was not derived merely from the constitution and laws of the state that chose the Senator, but had its foundation in the Constitution of the United States.[1] Consistent with this view, federal courts declared that, when local party authorities, acting pursuant to regulations prescribed by a party's state executive committee, refused to permit a Black citizen, on account of his race, to vote in a primary to select candidates for the office of U.S. Senator, they had deprived him of a right secured to him by the Constitution and laws, in violation of the Seventeenth Amendment.[2] By contrast, the Supreme Court held that an Illinois statute that required a petition signed by at least 25,000 voters from at least fifty counties to form and nominate candidates for a new political party did not violate the Seventeenth Amendment, notwithstanding that 52% of the state's voters were residents of one county, 87% were residents of forty counties, and only 13% resided in the fifty-three least populous counties.[3]

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[1] United States v. Aczel, 219 F. 917, 929–30 (D. Ind. 1915) (citing *Ex parte* Yarbrough, 110 U.S. 651 (1884)).

[2] Chapman v. King, 154 F.2d 460 (5th Cir. 1946), *cert. denied*, 327 U.S. 800 (1946).

[3] MacDougall v. Green, 335 U.S. 281 (1948), *overruled on equal protection grounds in* Moore v. Ogilvie, 394 U.S. 814 (1969). *See* Forssenius v. Harman, 235 F. Supp. 66 (E.D.Va. 1964), *aff'd on other grounds*, 380 U.S. 528 (1965), where a three-judge District Court held that the certificate of residence requirement established by the Virginia legislature as an alternative to payment of a poll tax in federal elections was an additional qualification to voting, in violation of the Seventeenth Amendment and Art. I, § 2.

EIGHTEENTH AMENDMENT
PROHIBITION OF LIQUOR

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PROHIBITION OF LIQUOR

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EIGHTEENTH AMENDMENT—PROHIBITION OF LIQUOR

Amdt18.1 Overview of Eighteenth Amendment, Prohibition of Alcohol

Eighteenth Amendment

Section 1:

> *After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.*

Section 2:

> *The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.*

Section 3:

> *This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.*

The Eighteenth Amendment was proposed by Congress on December 18, 1917, when it passed the Senate[1], having previously passed the House on December 17.[2] It appears officially in 40 Stat. 1059. Ratification was completed on January 16, 1919, when the thirty-sixth state approved the amendment, there being then forty-eight states in the Union. On January 29, 1919, Acting Secretary of State Polk certified that this amendment had been adopted by the requisite number of states.[3] By its terms this amendment did not become effective until one year after ratification.

The Eighteenth Amendment was repealed by the Twenty-First Amendment, and titles I and II of the National Prohibition Act[4] were subsequently specifically repealed by the Act of August 27, 1935.[5] Federal prohibition laws effective in various Districts and Territories were repealed as follows: District of Columbia–April 5, 1933, and January 24, 1934;[6] Puerto Rico and Virgin Islands–March 2, 1934;[7] Hawaii–March 26, 1934;[8] and Panama Canal Zone–June 19, 1934.[9]

Noting that ratification of the Twenty-First Amendment was completed on December 5, 1933, the Supreme Court held that the National Prohibition Act, insofar as it rested upon a grant of authority to Congress by the Eighteenth Amendment, thereupon become inoperative, with the result that prosecutions for violations of the National Prohibition Act, including proceedings on appeal, pending on, or begun after the date of repeal, had to be dismissed for want of jurisdiction. Only final judgments of conviction rendered while the National

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[1] Cong. Rec., 65th Cong., 2d Sess. 478 (1917).

[2] *Id.* at 470.

[3] 40 Stat. 1941.

[4] Ch. 85, 41 Stat. 305.

[5] Ch. 740, 49 Stat. 872.

[6] Ch. 19, 48 Stat. 25; ch. 4, 48 Stat. 319.

[7] Ch. 37, 48 Stat. 361.

[8] Ch. 88, 48 Stat. 467.

[9] Ch. 657, 48 Stat. 1116.

Prohibition Act was in force remained unaffected.[10] Likewise a heavy "special excise tax," insofar as it could be construed as part of the machinery for enforcing the Eighteenth Amendment, was deemed to have become inapplicable automatically upon the Amendment's repeal.[11] However, liability on a bond conditioned upon the return on the day of trial of a vessel seized for illegal transportation of liquor was held not to have been extinguished by repeal when the facts disclosed that the trial took place in 1931 and had resulted in conviction of the crew. The liability became complete upon occurrence of the breach of the express contractual condition, and a civil action for recovery was viewed as unaffected by the loss of penal sanctions.[12]

[10] United States v. Chambers, 291 U.S. 217, 222–26 (1934). *See also* Ellerbee v. Aderhold, 5 F. Supp. 1022 (N.D. Ga. 1934); United States *ex rel.* Randall v. United States Marshal, 143 F.2d 830 (2d Cir. 1944). Because the Twenty-First Amendment contains "no saving clause as to prosecutions for offenses therefore committed," these holdings were rendered unavoidable by virtue of the well-established principle that after "the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force. . . ." The General Pinkney, 9 U.S. (5 Cr.) 281, 283 (1809), *quoted in United States v. Chambers*, 291 U.S. at 223.

[11] United States v. Constantine, 296 U.S. 287 (1935). The Court also took the position that, even if the statute embodying this "tax" had not been "adopted to penalize violations of the Amendment," but merely to obtain a penalty for violations of state liquor laws, "it ceased to be enforceable at the date of repeal," for with the lapse of the unusual enforcement powers contained in the Eighteenth Amendment, Congress could not, without infringing upon powers reserved to the states by the Tenth Amendment, "impose cumulative penalties above and beyond those specified by State law for infractions of . . . [a] State's criminal code by its own citizens." Justice Benjamin Cardozo, joined by Justices Louis Brandeis and Harlan Stone, dissented on the ground that, on its face, the statute levying this "tax" was "an appropriate instrument of . . . fiscal policy. . . . Classification by Congress according to the nature of the calling affected by a tax . . . does not cease to be permissible because the line of division between callings to be favored and those to be reproved corresponds with a division between innocence and criminality under the statutes of a state." *Id.* at 294, 296, 297–98. In earlier cases, the Court nevertheless recognized that Congress also may tax what it forbids and that the basic tax on distilled spirits remained valid and enforceable during as well as after the life of the Amendment. *See* United States v. Yuginovich, 256 U.S. 450, 462 (1921); United States v. Stafoff, 260 U.S. 477 (1923); United States v. Rizzo, 297 U.S. 530 (1936).

[12] United States v. Mack, 295 U.S. 480 (1935).

NINETEENTH AMENDMENT
WOMEN'S SUFFRAGE

NINETEENTH AMENDMENT
WOMEN'S SUFFRAGE

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NINETEENTH AMENDMENT—WOMEN'S SUFFRAGE

Amdt19.1 Overview of Nineteenth Amendment, Women's Voting Rights

Nineteenth Amendment:

> *The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.*
>
> *Congress shall have power to enforce this article by appropriate legislation.*

The Nineteenth Amendment was adopted after a long campaign by its advocates, who had largely despaired of attaining their goal through modification of individual state laws. Agitation in behalf of women's suffrage was recorded as early as the Jackson Administration, but the initial results were meager. Beginning in 1838, Kentucky authorized women to vote in school elections and its action was later copied by a number of other states. Kansas in 1887 granted women unlimited rights to vote in municipal elections. Not until 1869, however, when the Wyoming Territory accorded women suffrage rights on an equal basis with men and continued the practice following admission to statehood, did these advocates register a notable victory. Progress continued to be discouraging, only ten additional states having joined Wyoming by 1914, and judicial efforts having failed.[1] A vigorous campaign brought congressional passage of a proposed Amendment in 1919 and the necessary state ratifications in 1920.[2]

In one case, the Supreme Court dealt with the Nineteenth Amendment's effect, holding that a Georgia poll tax statute that exempted from payment women who did not register to vote did not discriminate in any manner against the right of men to vote, although the Court noted that the Nineteenth Amendment "applies to men and women alike and by its own force supersedes inconsistent measures, whether federal or State."[3]

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[1] Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874), a challenge under the Privileges or Immunities Clause of the Fourteenth Amendment.

[2] E. Flexner, Century of Struggle: The Woman's Rights Movement in the United States (1959).

[3] Breedlove v. Suttles, 302 U.S. 277 (1937).

TWENTIETH AMENDMENT
PRESIDENTIAL TERM AND SUCCESSION

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PRESIDENTIAL TERM AND SUCCESSION

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TWENTIETH AMENDMENT—PRESIDENTIAL TERM AND SUCCESSION

SECTION 1—TERMS

Amdt20.S1.1 Presidential and Congressional Terms

Twentieth Amendment, Section 1:

> *The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.*

Article II, Section 1, Clause 1 of the Constitution[1] fixed the term of the President at four years. By a resolution of the Confederation, Congress commenced under the Constitution on March 4, 1789. Consequently, the February 6, 1933 ratification of Section 1 of the Twentieth Amendment in effect shortened the terms of the President and Vice President elected in 1932 by the interval between January 20 and March 4, 1937.

Similarly, ratification of the Twentieth Amendment shortened, by the intervals between January 3 and March 4, the terms of Senators elected for terms ending March 4, 1935, 1937, and 1939; and thus temporarily modified the Seventeenth Amendment, fixing the terms of Senators at six years. It also shortened the terms of Representatives elected to the 73rd Congress, by the interval between January 3 and March 4, 1935, and temporarily modified Article I, Section 2, Clause 1, fixing the terms of Representatives at two years.

SECTION 2—MEETINGS OF CONGRESS

Amdt20.S2.1 Date When Congress Shall Meet

Twentieth Amendment, Section 2:

> *The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.*

Section 2 of the Twentieth Amendment superseded Clause 2 of Section 4 of Article I.[1] Setting an exact hour for Congress to meet recognized Congress's long practice, which it enacted into permanent law for the first time in 1867[2] but repealed in 1871.[3] When January 3 fell on Sunday (in 1937), Congress appointed a different day by law to assemble.[4]

SECTION 3—SUCCESSION

Amdt20.S3.1 Presidential Succession

Twentieth Amendment, Section 3:

> *If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been*

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[1] *See* ArtII.S1.C1.9 Term of the President.

[1] *See* ArtI.S4.C2.1 When Congress Shall Assemble.

[2] Ch. 10, 14 Stat. 378.

[3] Ch. 21, § 30, 17 Stat. 12. *See* 1 ASHER C. HIND, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 11 (1907).

[4] Ch. 713, 49 Stat. 1826.

chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Pursuant to the authority conferred upon it by Section 3 of the Twentieth Amendment, Congress passed the Presidential Succession Act of 1948[1] to address the situation that would arise if both the President-elect and Vice President-elect failed to qualify on or before the time fixed for the beginning of the new Presidential term.

Section 4—Congress and Presidential Succession

Amdt20.S4.1 Congress's Power to Provide Further for Presidential Succession

Twentieth Amendment, Section 4:

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

In 1947, Congress adopted the Presidential Succession Act,[1] which provided for the Speaker of the House to "act as President"[2] followed by the President Pro Tempore of the Senate, and then by the department heads in the order in which each department had been established.

Section 5—Effective Date

Amdt20.S5.1 Effective Date of Sections 1 and 2 of Twentieth Amendment

Twentieth Amendment, Section 5:

Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Because the Twentieth Amendment was ratified on January 23, 1933, Sections 1 and 2 of the Twentieth Amendment[1] became effective on October 15, 1933.

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[1] Ch. 644, 62 Stat. 672, as amended, 3 U.S.C. § 19. For a discussion of the Twenty-Fifth Amendment, see Amdt25.1 Overview of Twenty-Fifth Amendment, Presidential Vacancy.

[1] Presidential Succession Act of 1947, Pub. L. No. 80-199, 61 Stat. 380 (codified as amended at 3 U.S.C. § 19).

[2] *Id.* § 19(1).

[1] *See* Amdt20.S1.1 Presidential and Congressional Terms; Amdt20.S2.1 Date When Congress Shall Meet.

SECTION 6—RATIFICATION

Amdt20.S6.1 Ratification of Twentieth Amendment

Twentieth Amendment, Section 6:

> *This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.*

The Twentieth Amendment was proposed by Congress on March 2, 1932, when it passed the Senate[1], having previously passed the House on March 1.[2] It appears officially in 47 Stat. 745. Ratification was completed on January 23, 1933, when the thirty-sixth state approved the amendment, there being then forty-eight states in the Union. On February 6, 1933, Secretary of State Stimson certified that it had become a part of the Constitution.[3]

[1] Cong. Rec. (72d Cong., 1st Sess.) 5086

[2] *Id.* at 5027

[3] 47 Stat. 2569

TWENTY-FIRST AMENDMENT
REPEAL OF PROHIBITION

TWENTY-FIRST AMENDMENT
REPEAL OF PROHIBITION

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TWENTY-FIRST AMENDMENT—REPEAL OF PROHIBITION

Section 1—Repeal of Eighteenth Amendment

Amdt21.S1.1 Repeal of Prohibition

Twenty-First Amendment, Section 1:

> *The eighteenth article of amendment to the Constitution of the United States is hereby repealed.*

Ratification of the Twenty-First Amendment on January 23, 1933 repealed the Eighteenth Amendment, which had prohibited "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes."[1]

Section 2—Importation, Transportation, and Sale of Liquor

Amdt21.S2.1 Discrimination Against Interstate Commerce

Twenty-First Amendment, Section 2:

> *The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.*

In a series of decisions rendered shortly after ratification of the Twenty-First Amendment, the Court established the proposition that states are competent to adopt legislation discriminating against imported intoxicating liquors in favor of those of domestic origin and that such discrimination offends neither the Commerce Clause of Article I nor the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Modern cases, however, have recognized that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause,"[1] also known as the Dormant Commerce Clause.[2]

Initially, the Court upheld a California statute that exacted a $500 annual license fee for the privilege of importing beer from other states and a $750 fee for the privilege of manufacturing beer,[3] and a Minnesota statute that prohibited a licensed manufacturer or wholesaler from importing any brand of intoxicating liquor containing more than 25% alcohol by volume and ready for sale without further processing, unless such brand was registered in the United States Patent Office.[4] Also validated were retaliation laws prohibiting sale of beer from states that discriminated against sale of beer from the enacting state.[5]

Conceding, in *State Board of Equalization v. Young's Market Co.*,[6] that, "[p]rior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for [the privilege of importation] . . . even if the State had exacted an equal fee for the

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[1] U.S. Const. amend. XVIII.

[1] Granholm v. Heald, 544 U.S. 460, 487 (2005).

[2] *See, e.g.*, Tenn. Wine and Spirits Retailers Ass'n. v. Thomas, No. 18-96, slip op. (June 26, 2019).

[3] State Board of Equalization v. Young's Market Co., 299 U.S. 59 (1936).

[4] Mahoney v. Triner Corp., 304 U.S. 401 (1938).

[5] Brewing Co. v. Liquor Comm'n, 305 U.S. 391 (1939) (Michigan law); Finch & Co. v. McKittrick, 305 U.S. 395 (1939) (Missouri law).

[6] 299 U.S. 59, 62 (1936).

privilege of transporting domestic beer from its place of manufacture to the [seller's] place of business," the Court proclaimed that this Amendment "abrogated the right to import free, so far as concerns intoxicating liquors." Because the Amendment was viewed as conferring on states an unconditioned authority to prohibit totally the importation of intoxicating beverages, it followed that any discriminatory restriction falling short of total exclusion was equally valid, notwithstanding the absence of any connection between such restriction and public health, safety, or morals. As to the contention that the unequal treatment of imported beer would contravene the Equal Protection Clause, the Court succinctly observed that "[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."[7]

In *Seagram & Sons v. Hostetter*[8] the Court upheld a state statute regulating the price of intoxicating liquors, asserting that the Twenty-First Amendment bestowed upon the states broad regulatory power over the liquor sales within their territories.[9] The Court also noted that states are not totally bound by traditional Commerce Clause limitations when they restrict the importation of intoxicants destined for use, distribution, or consumption within their borders.[10] In such a situation the Twenty-First Amendment demands wide latitude for regulation by the state.[11] The Court added that there was nothing in the Twenty-First Amendment or any other part of the Constitution that required state laws regulating the liquor business to be motivated exclusively by a desire to promote temperance.[12]

More recent cases undercut the expansive interpretation of state powers in *Young's Market* and the other early cases. The first step was to harmonize Twenty-First Amendment and Commerce Clause principles where possible by asking "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies."[13] Because "[t]he central purpose of the [Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition," the "central tenet" of the Commerce Clause will control to invalidate "mere economic protectionism," at least where the state cannot justify its tax or regulation as "designed to promote temperance or to carry out any other purpose of the . . . Amendment."[14] But the Court eventually came to view the Twenty-First Amendment as not creating an exception to the commerce power. "[S]tate regulation of alcohol is limited by the nondiscrimination principle of

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[7] 299 U.S. at 64. In the three decisions rendered subsequently, the Court merely restated these conclusions. The contention that discriminatory regulation of imported liquors violated the Due Process Clause was summarily rejected in *Brewing Co. v. Liquor Comm'n,* 305 U.S. 391, 394 (1939).

[8] 384 U.S. 35 (1966).

[9] 384 U.S. at 42. *See* United States v. Frankfort Distilleries, 324 U.S. 293, 299 (1945) and Nippert v. City of Richmond, 327 U.S. 416 (1946).

[10] 384 U.S. at 35. *See, e.g.*, Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964) and State Bd. of Equalization v. Young's Market Co., 299 U.S. 59 (1936).

[11] 384 U.S. at 35. The Court added that it was not deciding then whether the mode of liquor regulation chosen by a state in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause. *Id.* at 42–43.

[12] 384 U.S. at 47.

[13] Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984). "[T]he central power reserved by § 2 of the Twenty-first Amendment [is] that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.'" 467 U.S. at 715 (quoting California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97 (1980)).

[14] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984). *See also*, *e.g.*, Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 713 (1984) ("In rejecting the claim that the Twenty-first Amendment ousted the Federal Government of all jurisdiction over interstate traffic in liquor, we have held that when a State has not attempted directly to regulate the sale or use of liquor within its borders—the core § 2 power—a conflicting exercise of federal authority may prevail.").

the Commerce Clause," the Court stated in 2005.[15] Discrimination in favor of local products can be upheld only if the state "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[16] This interpretation stemmed from the Court's conclusion that the Twenty-First Amendment restored to states the powers that they had possessed prior to Prohibition "to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use" in a manner that did not discriminate against out-of-state goods.[17]

Consequently, in *Granholm v. Heald*, the Supreme Court struck down regulatory schemes employed by Michigan and New York that discriminated against out-of-state wineries.[18] Both states employed a "three-tier system," in which producers, wholesalers, and retailers had to be separately licensed by the state.[19] The Court first affirmed its prior cases holding that as a general matter, "States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment."[20] But within their three-tier systems, Michigan and New York gave certain advantages to in-state wineries by creating special licensing systems allowing them to directly ship wine to in-state consumers.[21] While recognizing that both states did have significant authority to regulate the importation and sale of liquor, the Court said that the challenged systems "involve[d] straightforward attempts to discriminate in favor of local producers . . . contrary to the Commerce Clause," and that these schemes could not be "saved by the Twenty-first Amendment."[22]

The states argued in *Granholm* that their restrictions on direct shipments by out-of-state wineries passed muster under Dormant Commerce Clause principles because they advanced two legitimate local purposes: "keeping alcohol out of the hands of minors and facilitating tax collection."[23] The Supreme Court rejected these claims, concluding that there was insufficient evidence to show that prohibiting direct shipments would solve either of these problems.[24] The

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[15] Granholm v. Heald, 544 U.S. 460, 487 (2005). *See also* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984) (invalidating tax that discriminated in favor of specific locally produced products); Healy v. The Beer Institute, 491 U.S. 324, 343 (1989) (invalidating "price affirmation" statute requiring out-of-state brewers and beer importers to affirm that their prices are not higher than prices charged in border states); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 585 (1986) (invalidating "price affirmation" statute requiring distillers or agents who sell to in-state wholesalers to affirm that their prices would not be higher than prices elsewhere in the United States).

[16] Granholm v. Heald, 544 U.S. 460, 487, 489 (2005) (invalidating Michigan and New York laws allowing in-state but not out-of-state wineries to make direct sales to consumers). This is the same test the Court applies outside the context of alcoholic beverages. *See* Maine v. Taylor, 477 U.S. 131, 138 (1986) (once discrimination against interstate commerce is established, "the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means") (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)).

[17] 460 U.S. at 484. According to Justice Anthony Kennedy's opinion for the Court, these pre-Prohibition state powers were framed by the Wilson and Webb-Kenyon Acts, and the Twenty-First Amendment evidenced a "clear intention of constitutionalizing the Commerce Clause framework established under those statutes." *Id.*, *accord* Tenn. Wine and Spirits Retailers Ass'n v. Thomas, No. 18-96, slip op. (June 26, 2019). However, in *Tennessee Wine*, the Court rejected the suggestion that a law should be deemed constitutional under the Twenty-First Amendment merely because it—or a similar law—predated Prohibition. *Id.* at 30. The Court clarified that pre-Prohibition laws that were "never tested" in the Supreme Court could have been held invalid then and, consequently, might remain invalid in modern times. *Id.*

[18] 544 U.S. 460, 493 (2005).

[19] *Id.* at 466–67.

[20] *Id.* at 466 (discussing North Dakota v. United States, 495 U.S. 423, 444 (1990) (plurality opinion); *id.* at 444 (Scalia, J., concurring)).

[21] *Id.* at 469–70.

[22] *Id.* at 489.

[23] *Id.*

[24] *Id.* at 490–91.

Court also suggested that the states could achieve "their regulatory objectives . . . without discriminating against interstate commerce."[25]

The Court struck down another discriminatory regulation in *Tennessee Wine and Spirits Retailers Association v. Thomas*.[26] In that case, the Court considered specific aspects of Tennessee's three-tier system.[27] In particular, Tennessee would only issue new retail licenses to individuals who had been residents of the state for the previous two years.[28] In defense of the law, a trade association representing Tennessee liquor stores argued that the case was not governed by *Granholm*.[29] In its view, *Granholm*'s analysis was limited to laws that discriminate against out-of-state products and producers, whereas Tennessee's provision concerned "the licensing of domestic retail alcohol stores."[30] The Court disagreed, explaining that instead, *Granholm* established that the Constitution "prohibits state discrimination against all 'out-of-state economic *interests*.'"[31]

Ultimately, the Court concluded in *Tennessee Wine* that the challenged law was unconstitutional because its predominant effect was protectionism, saying that the law had "at best a highly attenuated relationship to public health or safety."[32] The trade association argued that the provision was justified because it made retailers "amenable to the direct process of state courts," allowed the state "to determine an applicant's fitness to sell alcohol," and "promote[d] responsible alcohol consumption."[33] But in the Court's view, there was no "'concrete evidence' showing that the two-year residency requirement actually promotes public health or safety; nor [was] there evidence that nondiscriminatory alternatives would be insufficient to further those interests."[34]

When passing upon the constitutionality of legislation regulating the carriage of liquor interstate, a majority of the Justices seemed disposed to bypass the Twenty-First Amendment and to resolve the issue exclusively in terms of the Commerce Clause and state power. This trend toward devaluation of the Twenty-First Amendment was set in motion by *Ziffrin, Inc. v. Reeves*[35] in which a Kentucky statute that prohibited the transportation of intoxicating liquors by carriers other than licensed common carriers was enforced as to an Indiana corporation engaged in delivering liquor obtained from Kentucky distillers to consignees in Illinois but licensed only as a contract carrier under the Federal Motor Carriers Act. After acknowledging that "the Twenty-first Amendment sanctions the right of a State to legislate concerning

[25] *Id.* at 491.

[26] No. 18-96, slip op. (June 26, 2019).

[27] *Id.* at 2.

[28] *Id.* at 3. Some additional aspects of Tennessee's regulatory scheme had been invalidated by the lower courts, and the state did not defend those provisions on appeal to the Supreme Court. *Id.* at 1.

[29] *Id.* at 26.

[30] *Id.*

[31] *Id.* at 27 (quoting Granholm v. Heald, 544 U.S. 460, 472 (2005)). The Court also characterized the association's reading of the Twenty-First Amendment as "implausible." *Id.* While the association conceded that Section 2 of the Twenty-First Amendment could not shield discriminatory laws that address the importation of alcohol, it argued that Section 2 authorized its discriminatory law regarding licensing domestic stores. *Id.* The Court noted that the Twenty-First Amendment specifically prohibits the "importation" of alcohol into a state in violation of that state's laws, but does not literally address states' ability to license domestic retailers. *Id.* The majority argued that "if § 2 granted States the power to discriminate in the field of alcohol regulation, that power would be at its apex when it comes to regulating the activity to which the provision expressly refers." *Id.* at 26–27. But because Section 2 did *not* shield importation laws from analysis under the Dormant Commerce Clause, the Court reasoned that it would be odd for the provision to nonetheless protect other types of discriminatory regulations. *Id.*

[32] *Id.* at 33.

[33] *Id.* at 33–35.

[34] *Id.* at 33.

[35] 308 U.S. 132 (1939).

intoxicating liquors brought from without, unfettered by the Commerce Clause,"[36] the Court proceeded to found its ruling largely upon decisions antedating the Amendment that sustained similar state regulations as a legitimate exercise of the police power not unduly burdening interstate commerce. In light of the contemporaneous cases enumerated in the preceding topic construing the Twenty-First Amendment as according a plenary power to the states, such extended emphasis on the police power and the Commerce Clause would seem to have been unnecessary. Thereafter, a total eclipse of the Twenty-First Amendment was recorded in *Duckworth v. Arkansas*[37] and *Carter v. Virginia*,[38] in which, without even considering that Amendment, a majority of the Court upheld, as not contravening the Commerce Clause, statutes regulating the transport through the state of liquor cargoes originating and ending outside the regulating state's boundaries.[39]

Amdt21.S2.2 State Regulation of Imports Destined for a Federal Area

Twenty-First Amendment, Section 2:

> *The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.*

Importation of alcoholic beverages into a state for ultimate delivery at a National Park located in the state but over which the United States retained exclusive jurisdiction has been construed as not constituting "transportation . . . into [a] State for delivery and use therein" within the meaning of Section 2 of the Amendment. The importation having had as its objective delivery and use in a federal area over which the state retained no jurisdiction, the increased powers that the state acquired from the Twenty-First Amendment were declared to be inapplicable. California therefore could not extend the importation license and other regulatory requirements of its Alcoholic Beverage Control Act to a retail liquor dealer doing business in the Park.[1] On the other hand, a state may apply nondiscriminatory liquor regulations to sales at federal enclaves under concurrent federal and state jurisdiction, and may require that liquor sold at such federal enclaves be labeled as being restricted for use only within the enclave.[2]

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[36] 308 U.S. at 138.

[37] 314 U.S. 390 (1941).

[38] 321 U.S. 131 (1944). *See also* Cartlidge v. Raincey, 168 F.2d 841 (5th Cir. 1948), *cert. denied*, 335 U.S. 885 (1948).

[39] Arkansas required a permit for the transportation of liquor across its territory, but granted the same upon application and payment of a nominal fee. Virginia required carriers engaged in similar through-shipments to use the most direct route, carry a bill of lading describing that route, and post a $1,000 bond conditioned on lawful transportation; and also stipulated that the true consignee be named in the bill of lading and be one having the legal right to receive the shipment at destination.

[1] Collins v. Yosemite Park Co., 304 U.S. 518, 537–38 (1938). The principle was reaffirmed in *United States v. Mississippi Tax Comm'n,* 412 U.S. 363 (1973), holding that Mississippi could not apply its tax regulations to liquor sold to military officers' clubs and other nonappropriated fund activities located on bases within the State and over which the United States had obtained exclusive jurisdiction. "[A]bsent an appropriate express reservation . . . the Twenty-first Amendment confers no power on a State to regulate –whether by licensing, taxation, or otherwise—the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction." *Id.* at 375. Nor may states tax importation of liquor for sale at bases over which the United States exercises concurrent jurisdiction only. United States v. Mississippi Tax Comm'n, 421 U.S. 599 (1975).

[2] North Dakota v. United States, 495 U.S. 423 (1990) (also upholding application to federal enclaves of a uniform requirement that shipments into the state be reported to state officials).

Amdt21.S2.3 Imports, Exports, and Foreign Commerce

Twenty-First Amendment, Section 2:

> *The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.*

The Twenty-First Amendment did not repeal the Export-Import Clause, Article I, Section 10, Clause 2, nor obliterate the Commerce Clause, Article I, Section 8, Clause 3. Accordingly, a state cannot tax imported liquor while it remains "in unbroken packages in the hands of the original importer and prior to [his] resale or use" thereof.[1] Likewise, New York is precluded from terminating the business of an airport dealer who, under sanction of federal customs laws, acquired "tax-free liquors for export" from out-of-state sources for resale exclusively to airline passengers, with delivery deferred until the latter arrive at foreign destinations.[2] "The Commerce Clause operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in a foreign country . . . or another State."[3]

Amdt21.S2.4 Effect of Section 2 upon Other Constitutional Provisions

Twenty-First Amendment, Section 2:

> *The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.*

Notwithstanding the 1936 assertion that "[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth,"[1] the Court has now in a series of cases acknowledged that Section 2 of the Twenty-First Amendment did not repeal provisions of the Constitution adopted before ratification of the Twenty-First, save for the severe cabining of Commerce Clause application to the liquor traffic, but it has formulated no consistent rationale for a determination of the effect of the later provision upon earlier ones. In *Craig v. Boren*,[2] the Court invalidated a state law that prescribed different minimum drinking ages for men and women as violating the Equal Protection Clause. To the state's Twenty-First Amendment argument, the Court replied that the Amendment "primarily created an exception to the normal operation of the Commerce Clause" and that its "relevance . . . to other constitutional provisions" is doubtful. "'Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.'"[3] The holding on this point is "that the operation of the Twenty-First Amendment does not alter the application of

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[1] Department of Revenue v. Beam Distillers, 377 U.S. 341 (1964). The Court distinguished *Gordon v. Texas,* 355 U.S. 369 (1958) and *De Bary v. Louisiana,* 227 U.S. 108 (1913).

[2] Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964).

[3] Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 585 (1986) (citation omitted). *Accord*, Healy v. Beer Institute, 491 U.S. 324 (1989).

[1] State Bd. of Equalization v. Young's Market Co., 299 U.S. 59, 64 (1936). In *Craig v. Boren,* 429 U.S. 190, 206–07 (1976), this case and others like it are distinguished as involving the importation of intoxicants into a state, an area of increased state regulatory power, and as involving purely economic regulation traditionally meriting only restrained review. Neither distinguishing element, of course, addresses the precise language quoted. For consideration of equal protection analysis in an analogous situation, the statutory exemption of state insurance regulations from Commerce Clause purview, see Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 655–74 (1981).

[2] 429 U.S. 190 (1976).

[3] 429 U.S. at 206 (quoting P. Brest, Processes of Constitutional Decisionmaking–Cases and Materials 258 (1975).

the equal protection standards that would otherwise govern this case."[4] Other decisions reach the same result but without discussing the application of the Amendment.[5] Similarly, a state "may not exercise its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment."[6]

The Court departed from this line of reasoning in *California v. LaRue*,[7] in which it sustained the facial constitutionality of regulations barring a lengthy list of actual or simulated sexual activities and motion picture portrayals of these activities in establishments licensed to sell liquor by the drink. In an action attacking the validity of the regulations as applied to ban nude dancing in bars, the Court considered at some length the material adduced at the public hearings which resulted in the rules demonstrating the anti-social consequences of the activities in the bars. It conceded that the regulations reached expression that would not be deemed legally obscene under prevailing standards and reached expressive conduct that would not be prohibitable under prevailing standards,[8] but the Court thought that the constitutional protection of conduct that partakes "more of gross sexuality than of communication" was outweighed by the state's interest in maintaining order and decency. Moreover, the Court continued, the second section of the Twenty-First Amendment gave an "added presumption in favor of the validity" of the regulations as applied to prohibit questioned activities in places serving liquor by the drink.[9]

A much broader ruling resulted when the Court considered the constitutionality of a state regulation banning topless dancing in bars. "Pursuant to its power to regulate the sale of liquor within its boundaries, it has banned topless dancing in establishments granted a license to serve liquor. The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs."[10] This recurrence to the greater-includes-the-lesser-power argument, relatively rare in recent years,[11] would if it were broadly applied give the states in the area of regulation of alcoholic beverages a review-free discretion of unknown scope.

In *44 Liquormart, Inc. v. Rhode Island*,[12] the Court disavowed *LaRue* and *Bellanca*, and reaffirmed that, "although the Twenty-first Amendment limits the effect of the Dormant

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[4] 429 U.S. at 209–10.

[5] *E.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178–97 (1972) (invalidating a state liquor regulation as an equal protection denial in a racial context); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (invalidating a state law authorizing the posting of someone as an "excessive drinker" and thus barring him from buying liquor, as reconstrued in *Paul v. Davis,* 424 U.S. 693, 707–09 (1976)).

[6] Larkin v. Grendel's Den, 459 U.S. 116, 122 n.5 (1982).

[7] 409 U.S. 109 (1972).

[8] *Cf.* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (ban on live nude dancing in Borough); Doran v. Salem Inn, 422 U.S. 922 (1975) (ban on nude dancing in "any public place" applied to topless dancing in bars).

[9] 409 U.S. at 114–19. In *Doran v. Salem Inn,* 422 U.S. 922, 932–33 (1975), the Court described its holding in *LaRue* more broadly, saying that "we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as part of its liquor license control program."

[10] New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 717 (1981).

[11] For a rejection of the argument in another context, contemporaneously with *Bellanca*, see Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 657–68 (1981). For use of the argument in the commercial speech context, see Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345–46 (1986); this use of the argument in *Posadas* was disavowed in *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996). *See also* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984), not addressing the commercial speech issue but holding state regulation of liquor advertisements on cable TV to be preempted, in spite of the Twenty-First Amendment, by federal policies promoting access to cable TV).

[12] 517 U.S. 484 (1996) (statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages is not shielded from constitutional scrutiny by the Twenty-First Amendment).

Commerce Clause on a state's regulatory power over the delivery or use of intoxicating beverages within its borders, 'the Amendment does not license the States to ignore their obligations under other provisions of the Constitution,'"[13] and therefore does not afford a basis for state legislation infringing freedom of expression protected by the First Amendment. There is no reason, the Court asserted, for distinguishing between freedom of expression and the other constitutional guarantees (for example, those protected by the Establishment and Equal Protection Clauses) held to be insulated from state impairment pursuant to powers conferred by the Twenty-First Amendment. The Court hastened to add by way of dictum that states retain adequate police powers to regulate "grossly sexual exhibitions in premises licensed to serve alcoholic beverages." "Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations."[14]

Amdt21.S2.5 Effect on Federal Regulation

Twenty-First Amendment, Section 2:

> *The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.*

The Twenty-First Amendment does not oust all federal regulatory power affecting transportation or sale of alcoholic beverages. Thus, the Court held, the Amendment does not bar a prosecution under the Sherman Antitrust Act of producers, wholesalers, and retailers charged with conspiring to fix and maintain retail prices of alcoholic beverages in Colorado.[1] In a concurring opinion, supported by Justice Owen Roberts, Justice Felix Frankfurter took the position that if the State of Colorado had in fact "authorized the transactions here complained of, the Sherman Law could not override such exercise of state power. . . . [Because] the Sherman Law . . . can have no greater potency than the Commerce Clause itself, it must equally yield to state power drawn from the Twenty-first Amendment."[2]

Following a review of the cases in this area, the Court has observed "that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'"[3] Invalidating under the Sherman Act a state fair trade-scheme imposing a resale price maintenance policy for wine, the Court balanced the federal interest in free enterprise expressed through the antitrust laws against the asserted state interests in promoting temperance and orderly marketing conditions. Because the state courts had found that the policy under attack promoted neither interest significantly, the Supreme Court experienced no difficulty in concluding that the federal interest prevailed. Whether more substantial state interests or means more suited to promoting the state interests would survive attack under federal legislation must await further litigation.

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[13] 517 U.S. at 516 (quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712 (1984)).

[14] 517 U.S. at 515.

[1] United States v. Frankfort Distilleries, 324 U.S. 293, 297–99 (1945).

[2] 324 U.S. at 301–02. For application of federal laws, *see* William Jameson & Co. v. Morgenthau, 307 U.S. 171 (1939); Kiefer-Stewart Co. v. Jos. E. Seagram & Sons, 340 U.S. 211 (1951); Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951); Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35 (1966); Burke v. Ford, 389 U.S. 320 (1967).

[3] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 110 (1980).

Congress may condition receipt of federal highway funds on a state's agreeing to raise the minimum drinking age to twenty-one, the Twenty-First Amendment not constituting an "independent constitutional bar" to this sort of spending power exercise even though Congress may lack the power to achieve its purpose directly.[4]

Section 3—Ratification Deadline

Amdt21.S3.1 Ratification Deadline

Twenty-First Amendment, Section 2:

> *This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.*

The Twenty-First Amendment was proposed by Congress on February 20, 1933, when it passed the House[1], having previously passed the Senate on February 16.[2] It appears officially in 47 Stat. 1625. Ratification was completed on December 5, 1933, when the thirty-sixth state (Utah) approved the amendment, there being then forty-eight states in the Union. On December 5, 1933, Acting Secretary of State Phillips certified that it had been adopted by the requisite number of states.[3]

[4] South Dakota v. Dole, 483 U.S. 203, 210 (1987).

[1] Cong. Rec. (72d Cong., 2d Sess.) 4516.

[2] *Id.* at 4231.

[3] 48 Stat. 1749.

TWENTY-SECOND AMENDMENT
PRESIDENTIAL TERM LIMITS

TWENTY-SECOND AMENDMENT
PRESIDENTIAL TERM LIMITS

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Amdt22.1 Overview of Twenty-Second Amendment, Presidential Term Limits

Twenty-Second Amendment

Section 1:

> *No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.*

Section 2:

> *This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.*

Ratified in 1951, the Twenty-Second Amendment limits persons to being elected only twice to the presidency. As a House Report noted in 1947:

> By reason of the lack of a positive expression upon the subject of the tenure of the office of President, and by reason of a well-defined custom which has risen in the past that no President should have more than two terms in that office, much discussion has resulted upon this subject. Hence it is the purpose of this . . . [proposal] . . . to submit this question to the people so they, by and through the recognized processes, may express their views upon this question, and if they shall so elect, they may . . . thereby set at rest this problem.[1]

This characterization of the issue followed soon after the people had elected Franklin D. Roosevelt to unprecedented third and fourth terms of office, in 1940 and 1944, respectively.

The Twenty-Second Amendment has yet to be applied. Commentary suggests, however, that a number of issues could be raised as to the Twenty-Second Amendment's meaning and application, especially in relation to the Twelfth Amendment. By its terms, the Twenty-Second Amendment bars only the election of two-term Presidents, and this prohibition would not prevent someone who had twice been elected President from succeeding to the office after having been elected or appointed Vice President. Broader language providing that no such person "shall be chosen or serve as President . . . or be eligible to hold the office" was rejected in favor of the Twenty-Second Amendment's ban merely on election.[2] Whether a two-term President could be elected or appointed Vice President depends upon the meaning of the Twelfth Amendment, which provides that "no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President." Is someone prohibited by the Twenty-Second Amendment from being "elected" to the office of President thereby "constitutionally ineligible to the office?" Note also that neither Amendment addresses the

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[1] H.R. REP. NO. 17, 80th Cong., 1st Sess. at 2 (1947).

[2] H.J. Res. 27, 80th Cong., 1st Sess. (1947) (as introduced). As the House Judiciary Committee reported the measure, it would have made the covered category of former presidents "ineligible to hold the office of President." H.R. REP. NO. 17, 80th Cong., 1st Sess. at 1 (1947).

eligibility of a former two-term President to serve as Speaker of the House or as one of the other officers who could serve as President through operation of the Succession Act.[3]

[3] 3 U.S.C. § 19. For analysis of the Twenty-Second Amendment and its applicability to the various scenarios under which a person can succeed to the office, see Bruce G. Peabody and Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565 (1999).

TWENTY-THIRD AMENDMENT
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Amdt23.1 Overview of Twenty-Third Amendment, District of Columbia Electors

Twenty-Third Amendment

Section 1:

> *The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:*
>
> *A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.*

Section 2:

> *The Congress shall have power to enforce this article by appropriate legislation.*

House Report No. 1698 discussed the Twenty-Third Amendment, stating that it would:

> provide the citizens of the District of Columbia with appropriate rights of voting in national elections for President and Vice President of the United States. It would permit District citizens to elect Presidential electors who would be in addition to the electors from the States and who would participate in electing the President and Vice President.
>
> [This] . . . amendment would change the Constitution only to the minimum extent necessary to give the District appropriate participation in national elections. It would not make the District of Columbia a State. It would not give the District of Columbia any other attributes of a State or change the constitutional powers of the Congress to legislate with respect to the District of Columbia and to prescribe its form of government. . . . It would, however, perpetuate recognition of the unique status of the District as the seat of Federal Government under the exclusive legislative control of Congress.[1]

[1] H.R. REP. NO. 1698, 86th Cong., 2d Sess. 1, 2 (1960).

TWENTY-FOURTH AMENDMENT
ABOLITION OF POLL TAX

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TWENTY-FOURTH AMENDMENT—ABOLITION OF POLL TAX

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Ratification of the Twenty-Fourth Amendment in 1964 marked the culmination of an endeavor begun in Congress in 1939 to eliminate the poll tax as a qualification for voting in federal elections. Property qualifications extend back to colonial days, but the poll tax itself as a qualification was instituted in eleven states of the South following the end of Reconstruction, although at the time of the ratification of this Amendment only five states still retained it.[1] Congress viewed the qualification as "an obstacle to the proper exercise of a citizen's franchise" and expected its removal to "provide a more direct approach to participation by more of the people in their government." Congress similarly thought that a constitutional amendment was necessary,[2] because the qualifications had previously survived constitutional challenges on several grounds.[3]

Amdt24.2 Doctrine on Abolition of Poll Tax

Twenty-Fourth Amendment, Section 1:

> *The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.*

Twenty-Fourth Amendment, Section 2:

> *The Congress shall have power to enforce this article by appropriate legislation.*

Not long after ratification of the Amendment—applicable only to federal elections—Congress by statute authorized the Attorney General to seek injunctive relief against use of the poll tax as a means of racial discrimination in state elections,[1] and the Supreme Court held that the poll tax discriminated on the basis of wealth in violation of the Equal Protection Clause.[2]

In *Harman v. Forssenius*,[3] the Court struck down a Virginia statute that eliminated the poll tax as an absolute qualification for voting in federal elections and gave federal voters the choice either of paying the tax or of filing a certificate of residence six months before the election. Viewing the latter requirement as imposing upon voters in federal elections an onerous requirement that was not imposed on those who continued to pay the tax, the Court unanimously held the law to conflict with the new Amendment by penalizing those who chose to exercise a right guaranteed them by the Amendment.

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[1] Harman v. Forssenius, 380 U.S. 528, 538–40, 543–44 (1965); United States v. Texas, 252 F. Supp. 234, 238–45 (W.D. Tex. 1966) (three-judge court), *aff'd on other grounds*, 384 U.S. 155 (1966).

[2] H.R. REP. NO. 1821, 87th Cong., 2d Sess. 3, 5 (1962).

[3] Breedlove v. Suttles, 302 U.S. 277 (1937); Saunders v. Wilkins, 152 F.2d 235 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946); Butler v. Thompson, 97 F. Supp. 17 (E.D. Va), *aff'd*, 341 U.S. 937 (1951).

[1] Voting Rights Act of 1965, § 10, 79 Stat. 442, 42 U.S.C. § 1973h. For the results of actions instituted by the Attorney General under direction of this section, *see* United States v. Texas, 252 F. Supp. 234 (W.D. Tex. 1966) (three-judge court), *aff'd on other grounds*, 384 U.S. 155 (1966); United States v. Alabama, 252 F. Supp. 95 (M.D. Ala. 1966) (three-judge court).

[2] Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (invalid discrimination based on wealth).

[3] 380 U.S. 528 (1965).

TWENTY-FIFTH AMENDMENT
PRESIDENTIAL VACANCY

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TWENTY-FIFTH AMENDMENT—PRESIDENTIAL VACANCY

Amdt25.1 Overview of Twenty-Fifth Amendment, Presidential Vacancy

Twenty-Fifth Amendment

Section 1:

> *In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.*

Section 2:

> *Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.*

Section 3:

> *Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.*

Section 4:

> *Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.*
>
> *Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.*

The Twenty-Fifth Amendment was an effort to resolve some of the continuing issues revolving about the office of the President; that is, what happens upon the death, removal, or resignation of the President and what is the course to follow if for some reason the President becomes disabled to such a degree that he cannot fulfill his responsibilities. The practice had been well established that the Vice President became President upon the death of the President, as had happened eight times in our history. Presumably, the Vice President would

become President upon the removal of the President from office. Whether the Vice President would become acting President when the President became unable to carry on and whether the President could resume his office upon his recovering his ability were two questions that had divided scholars and experts. Also, seven Vice Presidents had died in office and one had resigned, so that for some 20% of United States history there had been no Vice President to step up. But the seemingly most insoluble problem was that of presidential inability—James Garfield's lying in a coma for eighty days before succumbing to the effects of an assassin's bullet, Woodrow Wilson an invalid for the last eighteen months of his term, the result of a stroke—with its unanswered questions: who was to determine the existence of an inability, how was the matter to be handled if the President sought to continue, in what manner should the Vice President act, would he be acting President or President, what was to happen if the President recovered. Congress finally proposed this Amendment to the states in the aftermath of President John F. Kennedy's assassination, with the Vice Presidency vacant and a President who had previously had a heart attack.

The Amendment was invoked during the 1970s and resulted for the first time in our history in the accession to the Presidency and Vice-Presidency of two men who had not faced the voters in a national election. First, Vice President Spiro Agnew resigned on October 10, 1973, and President Richard M. Nixon nominated Gerald R. Ford to succeed him, following the procedures of § 2 of the Amendment for the first time. Hearings were held upon the nomination by the Senate Rules Committee and the House Judiciary Committee, both Houses thereafter confirmed the nomination, and the new Vice President took the oath of office December 6, 1973. Second, President Nixon resigned his office August 9, 1974, and Vice President Ford immediately succeeded to the office and took the presidential oath of office at noon of the same day. Third, again following Section 2 of the Amendment, President Ford nominated Nelson A. Rockefeller to be Vice President; on August 20, 1974, hearings were held in both Houses, confirmation voted, and Rockefeller took the oath of office December 19, 1974.[1]

[1] For the legislative history, see S. Rep. No. 66, 89th Cong., 1st Sess. (1965); H.R. Rep. No. 203, 89th Cong., 1st Sess. (1965); H.R. Rep. No. 564, 89th Cong., 1st Sess. (1965). For an account of the history of the succession problem, see R. Silva, Presidential Succession (1951).

TWENTY-SIXTH AMENDMENT
REDUCTION OF VOTING AGE

TWENTY-SIXTH AMENDMENT
REDUCTION OF VOTING AGE

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TWENTY-SIXTH AMENDMENT—REDUCTION OF VOTING AGE

Amdt26.1 Overview of Twenty-Sixth Amendment, Reduction of Voting Age

Twenty-Sixth Amendment

Section 1:

> *The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.*

Section 2:

> *The Congress shall have power to enforce this article by appropriate legislation.*

In extending the Voting Rights Act of 1965 in 1970,[1] Congress included a provision lowering the age qualification to vote in all elections, federal, state, and local, to eighteen.[2] In a divided decision, the Supreme Court held that Congress was empowered to lower the age qualification in federal elections, but voided the application of the provision in all other elections as beyond congressional power.[3] Confronted thus with the possibility that they might have to maintain two sets of registration books and go to the expense of running separate election systems for federal elections and for all other elections, the states were receptive to the proposing of an Amendment by Congress to establish a minimum age qualification at eighteen for all elections, and ratified it promptly.[4]

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[1] 79 Stat. 437, *as extended and amended by* 84 Stat. 314, 42 U.S.C. §§ 1971 et seq.

[2] Title 3, 84 Stat. 318, 42 U.S.C. § 1973bb.

[3] Oregon v. Mitchell, 400 U.S. 112 (1970) .

[4] S. Rep. No. 26, 92d Cong., 1st Sess. (1971); H.R. Rep. No. 37, 92d Cong., 1st Sess. (1971).

TWENTY-SEVENTH AMENDMENT
CONGRESSIONAL COMPENSATION

TWENTY-SEVENTH AMENDMENT
CONGRESSIONAL COMPENSATION

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TWENTY-SEVENTH AMENDMENT—CONGRESSIONAL COMPENSATION

Amdt27.1 Overview of Twenty-Seventh Amendment, Congressional Compensation

Twenty-Seventh Amendment:

> *No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.*

Referred to the state legislatures at the same time as those proposals that eventually became the Bill of Rights, the Congressional Pay Amendment had long been assumed to be dead.[1] This provision had its genesis, as did several others of the first amendments, in the petitions of the states ratifying the Constitution.[2] It was ratified, however, by only six states (of the eleven needed), and it was rejected by five states. Aside from the idiosyncratic action of the Ohio legislature in 1873, which ratified the proposal in protest of a controversial pay increase adopted by Congress, the pay limitation provision lay dormant until the 1980s. Then, an aide to a Texas legislator discovered the proposal and began a crusade that culminated some ten years later in its ratification.[3]

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[1] Indeed, in *Dillon v. Gloss,* 256 U.S. 368, 375 (1921), the Court, albeit in dictum, observed that, unless the inference was drawn that ratification must occur within some reasonable time of proposal, "four amendments proposed long ago—two in 1789, one in 1810 and one in 1861——are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, *and in our opinion it is quite untenable*." (Emphasis supplied).

[2] A comprehensive, scholarly treatment of the background, development, failure, and subsequent success of this Amendment is Richard Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORD. L. REV. 497 (1992). A briefer account is *The Congressional Pay Amendment*, 16 Ops. of the Office of Legal Counsel, U.S. Dept. of Justice 102, App. at 127–136 (1992) (prelim. pr.).

[3] The ratification issues are considered in the discussion of Article V.

APPENDIX AND RESOURCES

APPENDIX AND RESOURCES

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APPENDIX AND RESOURCES

Appx.1 Methodologies for the Tables

Appx.1.1 Constitution Annotated Tables Generally

The following essays provide background on and explanations of the methodologies used to compile the tables in the Resources section of the *Constitution Annotated* website. These tables include the "Table of Supreme Court Decisions Overruled by Subsequent Decisions;"[1] the "Table of Laws Held Unconstitutional in Whole or in Part by the Supreme Court;"[2] the "Table of Supreme Court Justices;"[3] "Beyond the Constitutional Annotated: Table of Additional Resources;"[4] and the "Table of Cases."[5] The "Table of Supreme Court Decisions Overruled by Subsequent Decisions;" the "Table of Laws Held Unconstitutional in Whole or in Part by the Supreme Court;" the "Table of Supreme Court Justices;" and the "Table of Cases" are included in the 2022 edition of the Constitution Annotated. "Beyond the Constitution Annotated: Table of Additional Resources" is available online.

Appx.1.2 Methodology for the Table of Supreme Court Decisions Overruled by Subsequent Decisions

The Table of Supreme Court Decisions Overruled by Subsequent Decisions[1] lists Supreme Court decisions regarding an interpretation of constitutional law, which the Supreme Court subsequently overruled. In accordance with the underlying purposes of the Constitution Annotated, this list is intended to provide a consistent, objective assessment of changes in Court precedent. While Justices[2] and commentators[3] frequently assert in legal debates that a given decision has overruled a prior decision, such assertions may be speculative or reflect subjective interpretations, resulting in diverse opinions on whether a given case has, in fact,

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[1] This table is available online at https://constitution.congress.gov/resources/decisions-overruled/.

[2] This table is available online at https://constitution.congress.gov/resources/unconstitutional-laws/.

[3] This table is available online at https://constitution.congress.gov/resources/supreme-court-justices/.

[4] This table is available online at https://constitution.congress.gov/resources/additional-resources/.

[5] This table is available online at https://constitution.congress.gov/resources/cases-cited/.

[1] This table is available online at https://constitution.congress.gov/resources/decisions-overruled/.

[2] *See, e.g.*, Abdul-Kabir v. Quarterman, 127 S. Ct. 1654, 1685 (2007) (Scalia, J., dissenting) (arguing that the Court had implicitly overruled Johnson v. Texas, 509 U.S. 350 (1993)); Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 382 (2006) (Thomas, J., dissenting) (claiming that the Court overruled Hoffman v. Connecticut Department of Income Maintenance, 492 U.S. 96 (1989), in silence or "sub silentio"); Mitchell v. W.T. Grant Co., 416 U.S. 600, 634–35 (1974) (Stewart, J., dissenting) ("Yet the Court today has unmistakably overruled a considered decision of this Court that is barely two years old, without pointing to any change in either societal perceptions or basic constitutional understandings that might justify this total disregard of *stare decisis*."); Berger v. New York, 388 U.S. 41, 64 (1967) (Douglas, J., concurring) ("I join the opinion of the Court because at long last it overrules *sub silentio Olmstead v. United States* . . . and its offspring and brings wiretapping and other electronic eavesdropping fully within the purview of the Fourth Amendment.").

[3] *See* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 2–3 (2010) ("[M]any critics of [the Roberts Court's] decisions claimed that the overrulings had in fact occurred, but by 'stealth.' Underscoring that something well out of the ordinary was happening, challenges to the Justices' claims of fidelity to precedent came from both sides of the ideological divide."); Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 (1988) ("The truth, of course, is that *stare decisis* has always been a doctrine of convenience, to both conservatives and liberals. Its friends, for the most part, are determined by the needs of the moment.").

been overruled.[4] Oftentimes, knowledge of the Court's subsequent actions is necessary to determine whether and the extent to which a particular case can be said to have overturned precedent.[5]

In order to ensure that cases are identified as overruled in a consistent and objective manner, the *Constitution Annotated* adopted fixed criteria. Specifically, for a decision to be listed as overruled, a majority of the Court must have explicitly stated, in a subsequent decision, that the case has been overruled[6] or used language that is functionally equivalent.[7] While this approach may result in a list that is narrower than similar lists in other sources, it provides consistent and objective treatment, adhering to the Court's repeated statements that only the High Court has "the prerogative of overruling its own decisions."[8]

The table also includes decisions that the Court has only partially overruled or otherwise qualified. For example, in *United States v. Hatter*, the Court overruled *Evans v. Gore* "insofar as [*Evans*] holds that the Compensation Clause forbids Congress to apply a generally applicable, nondiscriminatory tax to the salaries of federal judges, whether or not they were appointed before enactment of the tax."[9] Similarly, in *Fulton Corp. v. Faulkner*, the Court distinguished an earlier decision's treatment of the Equal Protection and Commerce Clauses, stating: "To the extent that *Darnell* evaluated a discriminatory state tax under the Equal Protection Clause, time simply has passed it by . . . . [W]hile cases like *Kidd* and *Darnell* may still be authorities under the Equal Protection Clause, they are no longer good law under the Commerce Clause."[10]

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[4] *See* Matthew Berns, *Trigger Laws*, 97 GEO. L.J. 1639, 1672 (2009) ("Whether the Supreme Court has overruled itself is a difficult question that often lacks a clear 'yes' or 'no' answer, and an opinion might be consistent or inconsistent with an earlier decision on a number of different levels.").

[5] *Compare* Webster v. Reprod. Health Servs., 492 U.S. 490, 537 (1989) (Blackmun, J., dissenting) (arguing that a majority of the Court had functionally overruled *Roe v. Wade,* 410 U.S. 113 (1973)) *with* Planned Parenthood v. Casey, 505 U.S. 833, 923 (1992) (Blackmun, J., dissenting) (noting that a majority of the Court had concluded that the "essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").

[6] *See, e.g.*, United States v. Rabinowitz, 339 U.S. 56, 66 (1950) ("To the extent that *Trupiano v. United States* . . . requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled."); Brenham v. German Am. Bank, 144 U.S. 173, 187 (1892) ("We, therefore, must regard the cases of *Rogers v. Burlington* and *Mitchell v. Burlington*, as overruled in the particular referred to, by later cases in this court.").

[7] *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) ("For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in *Mutual Film Corp. v. Industrial Comm'n* . . . is out of harmony with the views here set forth, we no longer adhere to it."); Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 218 (1925) ("So far as the language of *Baltic Mining Co. v. Massachusetts* . . . tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved."). While the "functional equivalent" standard invites judgment calls about whether a case should be included, at a minimum, the majority opinion must discuss the case being overturned and have some clear language indicating the court is rejecting some principle announced in the earlier case to be included in the table.

[8] Agostini v. Felton, 521 U.S. 203, 237 (1997) . *See also* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

[9] 532 U.S. 557, 567 (2001). *See also* Lapides v. Bd. of Regents of Univ. System of Ga., 535 U.S. 613, 623 (2002) ("[F]or these same reasons, we conclude that *Clark*, *Gunter*, and *Gardner* represent the sounder line of authority. Finding Ford inconsistent with the basic rationale of that line of cases, we consequently overrule *Ford* insofar as it would otherwise apply.").

[10] 516 U.S. 325, 345 (1996). *See also* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996) ("Without questioning the holding in *LaRue*, we now disavow its reasoning insofar as it relied on the Twenty-First Amendment.").

This approach necessarily excludes certain cases that other sources may list as overruled. For example, the table does not include cases that the Court distinguished or limited[11] or cases identified by concurring or dissenting Justices or commentators as overruled,[12] unless such cases have also been expressly overruled by a majority of the Court. Similarly, cases that the Court treats as discredited, but has not expressly overruled, are not included in the table.[13] In addition, in order to avoid imputing findings to the Court with respect to particular cases, the table does not include cases that, arguably, rely on overruled precedent, unless the Court has also expressly identified such cases as overruled.

The table does not include cases where the Court issued a ruling on the merits after having split evenly on the issue previously,[14] or where the Court reversed an earlier procedural ruling (e.g., lifting a previously issued stay).[15] While some sources list such cases,[16] the *Constitution Annotated* does not. The table also does not address subsequent developments, such as the enactment of statutory or constitutional amendments, which may functionally "reverse" the Court's decisions.[17] In other words, the table focuses on the Supreme Court's actions and, in particular, the frequency and manner in which the Court has reversed itself. As such, the table does not necessarily reflect the current state of the law on a given issue.

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[11] *See, e.g.*, United States v. Class, 313 U.S. 299, 317 (1941) ("In *Newberry v. United States*, . . . four Justices of this Court were of opinion that the term 'elections' in §4 of Article I did not embrace a primary election, since that procedure was unknown to the framers. A fifth Justice, who with them pronounced the judgment of the Court, was of opinion that a primary, held under a law enacted before the adoption of the Seventeenth Amendment, for the nomination of candidates for Senator, was not an election within the meaning of §4 of Article I of the Constitution, presumably because the choice of the primary imposed no legal restrictions on the election of Senators by the state legislatures to which their election had been committed by Article I, § 3. The remaining four Justices were of the opinion that a primary election for the choice of candidates for Senator or Representative were elections subject to regulation by Congress within the meaning of §4 of Article I. The question then has not been prejudged by any decision of this Court."); *In re* Ayers, 123 U.S. 443 (1887) (distinguishing Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824)).

[12] *See, e.g.*, Mitchell v. W.T. Grant Co., 416 U.S. 600, 634–35 (1974) (Stewart, J., dissenting) ("Yet the Court today has unmistakably overruled a considered decision of this Court that is barely two years old, without pointing to any change in either societal perceptions or basic constitutional understandings that might justify this total disregard of *stare decisis*."); Berger v. New York, 388 U.S. 41, 64 (1967) (Douglas, J., concurring) ("I join the opinion of the Court because at long last it overrules *sub silentio Olmstead v. United States* . . . and its offspring and brings wiretapping and other electronic eavesdropping fully within the purview of the Fourth Amendment.").

[13] In a few instances, this approach may have counterintuitive results, such as the list's treatment of Plessy v. Ferguson. 163 U.S. 537 (1896). This 1896 decision, which held that the provision of "separate but equal" accommodations for African Americans does not run afoul of the constitutional guarantee of equal protection, is sometimes said to have been overruled by the Court's 1954 decision in *Brown v. Board of Education.* 347 U.S. 483 (1954). However, *Brown*'s language is more limited, stating only that "We conclude that, in the field of public education, the doctrine of 'separate but equal' has no place," (*Id.* at 495.) and distinguishing potentially conflicting case law as simply not addressing the ultimate holding in *Brown*, 347 U.S. at 491 (noting that "in Cumming v. County Board of Education, 175 U.S. 528 (1899), and Gong Lum v. Rice, 275 U.S. 78 (1927), the validity of the doctrine [of 'separate but equal' in public education] itself was not challenged."). Instead, the list provides that *Plessy* was firmly repudiated by the Court in a much later case, *Bob Jones University v. United States*, 461 U.S. 574 (1983).

[14] *Compare* Chesapeake & Ohio Ry. v. Leitch, 276 U.S. 429 (1928) (rehearing), *with* Chesapeake & Ohio Ry. v. Leitch, 275 U.S. 507 (1927) (per curiam) (affirming the decision of the lower court by a vote of four votes to four votes).

[15] *See, e.g.*, Paramount Publix Corp. v. Am. Tri-Ergon Corp., 293 U.S. 528 (1934) (reversing a prior order denying certiorari).

[16] Albert P. Blaustein & Andrew H. Field, *"Overruling" Opinions in the Supreme Court*, 57 Mich. L. Rev. 151, 184–89 (1958/1959).

[17] For example, the table lists the Court's 1944 decision in *United States v. South-Eastern Underwriters Association,* 322 U.S. 533 (1944) as reversing its 1869 decision in *Paul v. Virginia,* 75 U.S. (8 Wall.) 168 (1869), without noting that Congress subsequently enacted the McCarran-Ferguson Act to exempt the business of insurance from most federal regulation, a law that negates *Paul*. *See, e.g.*, Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Analysis of Courts' Ineffectual Attempts to Harmonize Federal Antitrust, Arbitration, and Insolvency Statutes with the McCarran-Ferguson Act, 1941–1993*, 43 Cath. U. L. Rev. 399, 401 (1994) ("*South-Eastern Underwriters* effectively overruled *Paul* and created major turbulence within the insurance industry. Congress responded to the crisis by enacting the McCarran-Ferguson Act (the Act).").

Appx.1.2
Methodology for the Table of Supreme Court Decisions Overruled by Subsequent Decisions

For purposes of this table, decisions are identified as *overruling* when the High Court characterizes them as such. While it is not uncommon for the Court to note that an earlier decision has been "eroded by . . . subsequent decisions,"[18] or "cannot be reconciled with later decisions of th[e] Court,"[19] cases that the Court may consider to have effectuated such "erosion" or legal change are not included in the table unless the Court expressly found such cases to overrule precedent.

Similarly, with *overruled* decisions, the table includes only decisions the Court has expressly identified as overruled. While the Court often refers to a decision by name when overruling it—stating, for example, "*Haddock v. Haddock* is overruled . . . ,"[20] or "We now expressly overrule *Spaziano* and *Hildwin* . . ."[21]—in some cases, the Court may identify several decisions related to a particular legal doctrine and then state that the doctrine is overruled.[22] In such circumstances, cases that the Court expressly identifies in the overruling decision are listed, insofar as the overruling decision evidences that the Court contemplated such cases when deeming the doctrine overruled. Decisions that may rely on an overruled doctrine, but are not identified by the Court as such, are not listed in order to avoid imputing findings to the Court that it did not intend.

The table was compiled by searching the LEXIS database for all Supreme Court decisions that use the word "overrule" in the headnotes, syllabus, or text of the Court's opinion.[23] The results were then reviewed to ascertain the Court's exact meaning with respect to its earlier decisions. Decisions supported by a majority of the Court that expressly overruled an earlier decision or used functionally equivalent language were listed in the table. These findings were also cross-checked with other sources to ensure that the search had captured any relevant results.[24]

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[18] Katz v. United States, 389 U.S. 347, 353 (1967) ("We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling.").

[19] California v. Thompson, 313 U.S. 109, 116 (1941) ("The decision in the *Di Santo* case was a departure from this principle which has been recognized since *Cooley v. Board of Port Wardens* . . . It cannot be reconciled with later decisions of this Court which have likewise recognized and applied the principle, and it can no longer be regarded as controlling authority.").

[20] Williams v. North Carolina, 317 U.S. 287, 304 (1942).

[21] Hurst v. Florida, 577 U.S. ___, No. 14-7505, slip op., at 9 (2016) .

[22] *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 114–15 (1984) ("The dissent in *Larson* made many of the arguments advanced by Justice Stevens['] dissent today, and asserted that many of the same cases were being overruled or ignored. Those arguments were rejected, and the cases supporting them are moribund. Since *Larson* was decided in 1949, no opinion by any Member of this Court has cited the cases on which the dissent primarily relies for a proposition as broad as the language the dissent quotes. Many if not most of these cases have not been relied upon in an Eleventh Amendment context at all."); Elkins v. United States, 364 U.S. 206, 208 (1960) ("In a word, we re-examine here the validity of what has come to be called the silver platter doctrine. For the reasons that follow we conclude that this doctrine can no longer be accepted.").

[23] This search strategy was selected because preliminary searches using other terms—including, but not limited to, "stare decisis"—suggest that the strategy previously noted would be effective in capturing decisions where the Court explicitly uses the word "overrule," as well as decisions where the Court uses other express language that can be seen to be tantamount to overruling. *See supra* note 3.

[24] *See, e.g.*, Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 Geo. Wash. L. Rev. 68 (1991/1992); Michael J. Gerhardt, The Power of Precedent (1990); Jon D. Noland, *Stare Decisis and the Overruling of Constitutional Decisions in the Warren Years*, 4 Val. U.L. Rev. 101 (1969/1970); S. Sidney Ulmer, *An Empirical Analysis of Selected Aspects of Lawmaking of the United States Supreme Court*, 8 J. Pub. L. 414 (1959); Blaustein & Field, *supra* note 16; Charlotte C. Bernhardt, *Supreme Court Reversals on Constitutional Issues*, 34 Cornell L.Q. 55 (1948/1949); William O. Douglas, We the Judges (1965); William O. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735 (1949); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–09 nn.1–4 (1932) (Brandeis, J., dissenting); Payne v. Tennessee, 301 U.S. 808, 830 (1991).

The table is arranged in chronological order by the date of the overruling decision. For each overruling decision listed, the table gives (1) the name of the overruling decision; (2) the date of the overruling decision; (3) the name of the overruled decision; and (4) the date of the overruled decision.

Appx.1.3 Methodology for the Table of Laws Held Unconstitutional in Whole or in Part by the Supreme Court

The Table of Laws Held Unconstitutional in Whole or in Part by the Supreme Court[1] is undergoing significant revisions and will be updated more fully as broader review of the *Constitution Annotated* continues. This table provides preliminary revisions to prior versions of the table, listing Supreme Court decisions that invalidated a law on constitutional grounds. It includes cases invalidating federal laws, state constitutional or statutory provisions, and local laws. The table does not include cases in which the Supreme Court held that a state or local law was preempted, as those cases tend to hinge on an interpretation of positive federal law as opposed to a substantive interpretation of a particular constitutional provision. Moreover, the table generally includes only cases in which the Court held that a statute was facially unconstitutional and does not include as-applied challenges. In addition to giving the case citations, the Table indicates the term in which the opinion was released, the opinion's author, and the general subject matter of the case. The table also briefly summarizes the law that was held unconstitutional and identifies what portion of the U.S. Constitution the law violated.

Appx.1.4 Methodology for the Table of Supreme Court Justices

The Table of Supreme Court Justices[1] lists all Supreme Court Justices along with brief biographical information (Supreme Court Term Start and End, Appointing President, and Noteworthy Opinions). The "Supreme Court Term Start" is the date on which the Justice was sworn in, including recess appointments.[2] The "Supreme Court Term End" is the date on which the Justice stopped serving on the Court.[3] "Notable Opinion(s)" lists landmark cases authored by the Justice addressing constitutional law issues.[4]

Appx.1.5 Methodology for Beyond the Constitution Annotated: Table of Additional Resources

Beyond the Constitution Annotated: Table of Additional Resources[1] lists and provides links to publicly available Congressional Research Service (CRS) written products, including reports and Legal Sidebars, pertaining to the Constitution. This table also archives the CRS products

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[1] This table is available online at https://constitution.congress.gov/resources/unconstitutional-laws/.

[1] This table is available online at https://constitution.congress.gov/resources/supreme-court-justices/.

[2] *History of the Federal Judiciary: Biographical Directory of Federal Judges, 1789–Present*, Fed. Judicial Ctr., http://www.fjc.gov/history/home.nsf/page/judges.html (last visited Apr. 15, 2022) (providing information about the Justices' position on the Court, their term of service, and the name of the appointing presidents); *Justices 1789 to Present*, SupremeCourt.gov, https://www.supremecourt.gov/about/members_text.aspx (last visited Apr. 15, 2022) (same).

[3] *Id.*

[4] *See* 3 William J. Rich, Modern Constitutional Law Appendix A (3d ed. 2011) (providing information about the Justices' noteworthy opinions); Clare Cushman, The Supreme Court Justices: Illustrated Biographies, 1789–2012 (3d ed. 2013) (same); Timothy L. Hall, Supreme Court Justices: A Biographical Dictionary (2011) (same); Melvin I. Urofsky, Biographical Encyclopedia of the Supreme Court: The Lives and Legal Philosophies of the Justices 135 (CQPress 2006) (same).

[1] This table is available online at https://constitution.congress.gov/resources/additional-resources/.

that have been featured on the *Constitution Annotated* homepage under "Featured Issues." The table identifies constitutional provisions and subjects addressed. Because of the volume of materials on this table, the table is not reproduced in the 2022 edition of the *Constitution Annotated* but is available online.

Appx.1.6 Methodology for the Table of Cases

The Table of Cases[1] is a comprehensive list of cases cited in the *Constitution Annotated* alongside the *Constitution Annotated* essays in which the citations are located. It is not a Table of Authorities, so it does not include citations to other types of authorities such as books, law journals, periodicals, reports, and others.

[1] This table is available online at https://constitution.congress.gov/resources/cases-cited/.

TABLE OF SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISION

Overruling Decision	Year of Overruling Decision	Overruled Decision(s)	Year(s) of Overruled Decision(s)
Dobbs v. Jackson Women's Health Organization, No. 19-1391 (U.S. June 24, 2022)	2022	Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992);	1992
		Roe v. Wade, 410 U.S. 113 (1973)	1973
Edwards v. Vannoy, No. 19-5807 (U.S. May 17, 2021)	2021	Teague v. Lane, 489 U.S. 288 (1989) (in part)	1989
Ramos v. Louisiana, No. 18-5924 (U.S. Apr. 20, 2020)	2020	Apodaca v. Oregon, 406 U.S. 404 (1972) (plurality opinion);	1972
		Johnson v. Louisiana, 406 U.S. 366 (1972) (Powell, J., concurring)	
Franchise Tax Board of California v. Hyatt, No. 17-1299 (U.S. May 13, 2019)	2019	Nevada v. Hall, 440 U.S. 410 (1979)	1979
Herrera v. Wyoming, No. 17-532 (U.S. May 20, 2019)	2019	Ward v. Race Horse, 163 U.S. 504 (1896)	1896
Knick v. Township of Scott, No. 17-647 (U.S. June 21, 2019)	2019	Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) (in part)	1985
Rucho v. Common Cause, No. 18-422 (U.S. June 27, 2019)	2019	Davis v. Bandemer, 478 U.S. 109 (1986)	1986
Janus v. American Federation of State, County, & Municipal Employees, Council 31, No. 16-1466 (U.S. June 27, 2018)	2018	Abood v. Detroit Board of Education, 431 U.S. 209 (1977)	1977
South Dakota v. Wayfair, No. 17-494 (U.S. June 21, 2018)	2018	Quill Corp. v. North Dakota, 504 U.S. 298 (1992);	1992
		National Bellas Hess v. Department of Revenue of Illinois, 386 U.S. 753 (1967)	1967
Trump v. Hawaii, No. 17-965 (U.S. June 26, 2018)	2018	Korematsu v. United States, 323 U.S. 214 (1944)	1944
Hurst v. Florida, No. 14-7505 (U.S. Jan. 12, 2016)	2016	Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam);	1989
		Spaziano v. Florida, 468 U.S. 447 (1984)	1984
Johnson v. United States, No. 13-7120 (U.S. June 26, 2015)	2015	Sykes v. United States, 564 U.S. 1 (2011);	2011
		James v. United States, 550 U.S. 192 (2007)	2007

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TABLE OF OVERRULED DECISIONS

Overruling Decision	Year of Overruling Decision	Overruled Decision(s)	Year(s) of Overruled Decision(s)
Obergefell v. Hodges, No. 14-556 (U.S. June 26, 2015)	2015	Baker v. Nelson, 409 U.S. 810 (1972)	1972
Alleyne v. United States, 570 U.S. 99 (2013)	2013	Harris v. United States, 536 U.S. 545 (2002)	2002
Citizens United v. Federal Election Commission, 558 U.S. 310 (2010)	2010	McConnell v. Federal Election Commission, 540 U.S. 93 (2003)	2003
Montejo v. Louisiana, 556 U.S. 778 (2009)	2009	Michigan v. Jackson, 475 U.S. 625 (1986)	1986
Pearson v. Callahan, 555 U.S. 223 (2009)	2009	Saucier v. Katz, 533 U.S. 194 (2001)	2001
Bowles v. Russell, 551 U.S. 205 (2007)	2007	Thompson v. Immigration & Naturalization Service, 375 U.S. 384 (1964);	1964
		Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962)	1962
Leegin Creative Leather Products Inc. v. PSKS, Inc., 551 U.S. 877 (2007)	2007	Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)	1911
Central Virginia Community College v. Katz, 546 U.S. 356 (2006)	2006	Hoffman v. Connecticut Department of Income Maintenance, 492 U.S. 96 (1989)	1989
Roper v. Simmons, 543 U.S. 551 (2005)	2005	Stanford v. Kentucky, 492 U.S. 361 (1989)	1989
Crawford v. Washington, 541 U.S. 36 (2004)	2004	Ohio v. Roberts, 448 U.S. 56 (1980)	1980
Lawrence v. Texas, 539 U.S. 558 (2003)	2003	Bowers v. Hardwick, 478 U.S. 186 (1986)	1986
Atkins v. Virginia, 536 U.S. 304 (2002)	2002	Penry v. Lynaugh, 492 U.S. 302 (1989)	1989
Lapides v. Board of Regents of University System of Georgia, 535 U.S. 613 (2002)	2002	Ford Motor Co. v. Department of Treasury of State of Indiana, 323 U.S. 459 (1945)	1945
Ring v. Arizona, 536 U.S. 584 (2002)	2002	Walton v. Arizona, 497 U.S. 639 (1990)	1990
United States v. Cotton, 535 U.S. 625 (2002)	2002	*Ex parte* Bain, 121 U.S. 1 (1887)	1887
United States v. Hatter, 532 U.S. 557 (2001)	2001	Evans v. Gore, 253 U.S. 245 (1920)	1920
Mitchell v. Helms, 530 U.S. 793 (2000)	2000	Wolman v. Walter, 433 U.S. 229 (1977);	1977
		Meek v. Pittenger, 421 U.S. 349 (1975)	1975
College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999)	1999	Parden v. Terminal Railway of Alabama State Docks Department, 377 U.S. 184 (1964) (in part)	1964
Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (in part)	1999	Ward v. Race Horse, 163 U.S. 504 (1896) (in part)	1896

Overruling Decision	Year of Overruling Decision	Overruled Decision(s)	Year(s) of Overruled Decision(s)
Hohn v. United States, 524 U.S. 236 (1998)	1998	House v. Mayo, 324 U.S. 42 (1945)	1945
Agostini v. Felton, 521 U.S. 203 (1997)	1997	Aguilar v. Felton, 473 U.S. 402 (1985);	1985
		School District of Grand Rapids v. Ball, 473 U.S. 373 (1985) (in part)	
Hudson v. United States, 522 U.S. 93 (1997)	1997	United States v. Halper, 490 U.S. 435 (1989)	1989
State Oil Co. v. Khan, 522 U.S. 3 (1997)	1997	Albrecht v. Herald Co., 390 U.S. 145 (1968)	1968
44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996)	1996	California v. LaRue, 409 U.S. 109 (1972)	1972
Fulton Corp. v. Faulkner, 516 U.S. 325 (1996)	1996	Darnell v. Indiana, 226 U.S. 390 (1912);	1912
		Kidd v. Alabama, 188 U.S. 730 (1903)	1903
Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)	1996	Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)	1989
Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)	1995	Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 547 (1990)	1990
Hubbard v. United States, 514 U.S. 695 (1995)	1995	United States v. Bramblett, 348 U.S. 503 (1955)	1955
United States v. Gaudin, 515 U.S. 506 (1995)	1995	Sinclair v. United States, 279 U.S. 263 (1929)	1929
Nichols v. United States, 511 U.S. 738 (1994)	1994	Baldasar v. Illinois, 446 U.S. 222 (1980)	1980
United States v. Dixon, 509 U.S. 688 (1993)	1993	Grady v. Corbin, 495 U.S. 508 (1990)	1990
Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992)	1992	Townsend v. Sain, 372 U.S. 293 (1963) (in part)	1963
Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)	1992	Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (in part);	1986
		City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) (in part)	1983
Quill Corp. v. North Dakota, 504 U.S. 298 (1992)	1992	National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967) (in part)	1967
California v. Acevedo, 500 U.S. 565 (1991)	1991	Arkansas v. Sanders, 442 U.S. 753 (1979)	1979
Coleman v. Thompson, 501 U.S. 722 (1991)	1991	Fay v. Noia, 372 U.S. 391 (1963) (in part)	1963
Exxon Corp. v. Central Gulf Lines, Inc., 500 U.S. 603 (1991)	1991	Minturn v. Maynard, 58 U.S. (17 How.) 477 (1855)	1855

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Overruling Decision	Year of Overruling Decision	Overruled Decision(s)	Year(s) of Overruled Decision(s)
Payne v. Tennessee, 501 U.S. 808 (1991)	1991	South Carolina v. Gathers, 490 U.S. 805 (1989);	1989
		Booth v. Maryland, 482 U.S. 496 (1987)	1987
Collins v. Youngblood, 497 U.S. 37 (1990)	1990	Thompson v. Utah, 170 U.S. 343 (1898);	1898
		Kring v. Missouri, 107 U.S. 221 (1883)	1883
W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400 (1990)	1990	American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909)	1909
Alabama v. Smith, 490 U.S. 794 (1989)	1989	North Carolina v. Pearce, 395 U.S. 711 (1969)	1969
Healy v. The Beer Institute, 491 U.S. 324 (1989)	1989	Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966)	1966
Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989)	1989	Wilko v. Swan, 346 U.S. 427 (1953)	1953
Thornburgh v. Abbott, 490 U.S. 401 (1989)	1989	Procunier v. Martinez, 416 U.S. 396 (1974) (in part)	1974
Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988)	1988	Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 (1942);	1942
		Enelow v. New York Life Insurance Co., 293 U.S. 379 (1935)	1935
South Carolina v. Baker, 485 U.S. 505 (1988)	1988	Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895)	1895
Puerto Rico v. Branstad, 483 U.S. 219 (1987)	1987	Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861)	1861
Solorio v. United States, 483 U.S. 435 (1987)	1987	O'Callahan v. Parker, 395 U.S. 258 (1969)	1969
Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987)	1987	General Motors Corp. v. Washington, 377 U.S. 436 (1964)	1964
Welch v. Texas Department of Highways & Public Transportation, 483 U.S. 468 (1987)	1987	Parden v. Terminal Railway of Alabama State Docks Department, 377 U.S. 184 (1964) (in part)	1964
Batson v. Kentucky, 476 U.S. 79 (1986)	1986	Swain v. Alabama, 380 U.S. 202 (1965) (in part)	1965
Daniels v. Williams, 474 U.S. 327 (1986)	1986	Parratt v. Taylor, 451 U.S. 527 (1981) (in part)	1981
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)	1985	National League of Cities v. Usery, 426 U.S. 833 (1976)	1976
United States v. Miller, 471 U.S. 130 (1985)	1985	*Ex parte* Bain, 121 U.S. 1 (1887) (in part)	1887

Overruling Decision	Year of Overruling Decision	Overruled Decision(s)	Year(s) of Overruled Decision(s)
Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)	1984	United States v. Yellow Cab Co., 332 U.S. 218 (1947)	1947
Limbach v. Hooven & Allison Co., 466 U.S. 353 (1984)	1984	Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945)	1945
Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984)	1984	Rolston v. Missouri Fund Commissioners, 120 U.S. 390 (1887) (in part)	1887
United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984)	1984	Coffey v. United States, 116 U.S. 436 (1886)	1886
Bob Jones University v. United States, 461 U.S. 574 (1983)	1983	Plessy v. Ferguson, 163 U.S. 537 (1896)	1896
Illinois v. Gates, 462 U.S. 213 (1983)	1983	Spinelli v. United States, 393 U.S. 410 (1969);	1969
		Aguilar v. Texas, 378 U.S. 108 (1964)	1964
Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982)	1982	Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908)	1908
United States v. Ross, 456 U.S. 798 (1982)	1982	Robbins v. California, 453 U.S. 420 (1981)	1981
Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981)	1981	Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922)	1922
Trammel v. United States, 445 U.S. 40 (1980)	1980	Hawkins v. United States, 358 U.S. 74 (1958)	1958
United States v. Salvucci, 448 U.S. 83 (1980)	1980	Jones v. United States, 362 U.S. 257 (1960)	1960
Hughes v. Oklahoma, 441 U.S. 322 (1979)	1979	Geer v. Connecticut, 161 U.S. 519 (1896)	1896
Burks v. United States, 437 U.S. 1 (1978)	1978	Forman v. United States, 361 U.S. 416 (1960) (in part);	1960
		Yates v. United States, 354 U.S. 298 (1957) (in part);	1957
		Bryan v. United States, 338 U.S. 552 (1950) (in part)	1950
Department of Revenue v. Ass'n of Washington Stevedoring Cos., 435 U.S. 734 (1978)	1978	Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947);	1947
		Puget Sound Stevedoring Co. v. State Tax Commission, 302 U.S. 90 (1937)	1937
Monell v. Department of Social Services, 436 U.S. 658 (1978)	1978	Monroe v. Pape, 365 U.S. 167 (1961) (in part)	1961
United States v. Scott, 437 U.S. 82 (1978)	1978	United States v. Jenkins, 420 U.S. 358 (1975)	1975
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)	1977	Spector Motor Service v. O'Connor, 340 U.S. 602 (1951)	1951

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Overruling Decision	Year of Overruling Decision	Overruled Decision(s)	Year(s) of Overruled Decision(s)
Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36 (1977)	1977	United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)	1967
Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977)	1977	Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973)	1973
Shaffer v. Heitner, 433 U.S. 186 (1977)	1977	Pennoyer v. Neff, 95 U.S. 714 (1877)	1877
City of New Orleans v. Dukes, 427 U.S. 297 (1976)	1976	Morey v. Doud, 354 U.S. 457 (1957)	1957
Craig v. Boren, 429 U.S. 190 (1976)	1976	Goesaert v. Cleary, 335 U.S. 464 (1948)	1948
Dove v. United States, 423 U.S. 325 (1976)	1976	Durham v. United States, 401 U.S. 481 (1971)	1971
Gregg v. Georgia, 428 U.S. 153 (1976)	1976	McGautha v. California, 402 U.S. 183 (1971)	1971
Hudgens v. National Labor Relations Board, 424 U.S. 507 (1976)	1976	Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968)	1968
Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976)	1976	International Union, U.A.W.A. v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949) (Briggs-Stratton)	1949
Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976)	1976	Low v. Austin, 80 U.S. (13 Wall.) 29 (1872)	1872
National League of Cities v. Usery, 426 U.S. 833 (1976)	1976	Maryland v. Wirtz, 392 U.S. 183 (1968)	1968
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)	1976	Valentine v. Chrestensen, 316 U.S. 52 (1942)	1942
Taylor v. Louisiana, 419 U.S. 522 (1975)	1975	Hoyt v. Florida, 368 U.S. 57 (1961) (in part)	1961
United States v. Reliable Transfer Co., 421 U.S. 397 (1975)	1975	The Schooner Catherine v. Dickinson, 58 U.S. (17 How.) 170 (1854)	1854
Edelman v. Jordan, 415 U.S. 651 (1974)	1974	Sterrett v. Mothers' & Children's Rights Organization, 409 U.S. 809 (1973);	1973
		State Department of Health & Rehabilitative Services v. Zarate, 407 U.S. 918 (1972);	1972
		Wyman v. Bowens, 397 U.S. 49 (1970);	1970
		Shapiro v. Thompson, 394 U.S. 618 (1969)	1969
Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973)	1973	Ahrens v. Clark, 335 U.S. 188 (1948)	1948

Overruling Decision	Year of Overruling Decision	Overruled Decision(s)	Year(s) of Overruled Decision(s)
Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973)	1973	Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928)	1928
Miller v. California, 413 U.S. 15 (1973)	1973	A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966)	1966
North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973)	1973	Louis K. Liggett Co. v. Baldridge, 278 U.S. 105 (1928)	1928
Andrews v. Louisville & Nashville Railroad, 406 U.S. 320 (1972)	1972	Moore v. Illinois Central Railroad, 312 U.S. 630 (1941)	1941
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971)	1971	Triplett v. Lowell, 297 U.S. 638 (1936)	1936
Griffin v. Breckenridge, 403 U.S. 88 (1971)	1971	Collins v. Hardyman, 341 U.S. 651 (1951) (in part)	1951
Perez v. Campbell, 402 U.S. 637 (1971)	1971	Kesler v. Department of Public Safety, 369 U.S. 153 (1962);	1962
		Reitz v. Mealey, 314 U.S. 33 (1941)	1941
Ashe v. Swenson, 397 U.S. 436 (1970)	1970	Hoag v. New Jersey, 356 U.S. 464 (1958)	1958
Boys Markets, Inc. v. Retail Clerk's Union, 398 U.S. 235 (1970)	1970	Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962)	1962
Moragne v. States Marine Lines, 398 U.S. 375 (1970)	1970	The Harrisburg, 119 U.S. 199 (1886)	1886
Price v. Georgia, 398 U.S. 323 (1970)	1970	Brantley v. Georgia, 217 U.S. 284 (1910)	1910
Williams v. Florida, 399 U.S. 78 (1970)	1970	Thompson v. Utah, 170 U.S. 343 (1898)	1898
Benton v. Maryland, 395 U.S. 784 (1969)	1969	Palko v. Connecticut, 302 U.S. 319 (1937)	1937
Brandenburg v. Ohio, 395 U.S. 444 (1969)	1969	Whitney v. California, 274 U.S. 357 (1927)	1927
Chimel v. California, 395 U.S. 752 (1969)	1969	United States v. Rabinowitz, 339 U.S. 56 (1950);	1950
		Harris v. United States, 331 U.S. 145 (1947)	1947
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1969)	1969	Hodges v. United States, 203 U.S. 1 (1906)	1906
Lear, Inc. v. Adkins, 395 U.S. 653 (1969)	1969	Automatic Radio Manufacturing Co. v. Hazeltine Research, Inc., 339 U.S. 827 (1950)	1950
Moore v. Ogilvie, 394 U.S. 814 (1969)	1969	MacDougall v. Green, 335 U.S. 281 (1948)	1948

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TABLE OF OVERRULED DECISIONS

Overruling Decision	Year of Overruling Decision	Overruled Decision(s)	Year(s) of Overruled Decision(s)
Bruton v. United States, 391 U.S. 123 (1968)	1968	Delli Paoli v. United States, 352 U.S. 232 (1957)	1957
Carafas v. LaVallee, 391 U.S. 234 (1968)	1968	Parker v. Ellis, 362 U.S. 574 (1960)	1960
Duncan v. Louisiana, 391 U.S. 145 (1968)	1968	Maxwell v. Dow, 176 U.S. 581 (1900)	1900
Lee v. Florida, 392 U.S. 378 (1968)	1968	Schwartz v. Texas, 344 U.S. 199 (1952)	1952
Marchetti v. United States, 390 U.S. 39 (1968)	1968	Lewis v. United States, 348 U.S. 419 (1955);	1955
		United States v. Kahriger, 345 U.S. 22 (1953)	1953
Peyton v. Rowe, 391 U.S. 54 (1968)	1968	McNally v. Hill, 293 U.S. 131 (1934)	1934
Afroyim v. Rusk, 387 U.S. 253 (1967)	1967	Perez v. Brownell, 356 U.S. 44 (1958)	1958
Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967)	1967	Frank v. Maryland, 359 U.S. 360 (1959)	1959
Katz v. United States, 389 U.S. 347 (1967)	1967	Goldman v. United States, 316 U.S. 129 (1942);	1942
		Olmstead v. United States, 277 U.S. 438 (1928)	1928
Keyishian v. Board of Regents, 385 U.S. 589 (1967)	1967	Adler v. Board of Education, 342 U.S. 485 (1952)	1952
Spevack v. Klein, 385 U.S. 511 (1967)	1967	Cohen v. Hurley, 366 U.S. 117 (1961)	1961
Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967)	1967	Gouled v. United States, 255 U.S. 298 1921 (1921)	1921
Harper v. Virgina Board of Elections, 383 U.S. 663 (1966)	1966	Breedlove v. Suttles, 302 U.S. 277 (1937)	1937
Miranda v. Arizona, 384 U.S. 436 (1966)	1966	Crooker v. California, 357 U.S. 433 (1958);	1958
		Cicenia v. La Gay, 357 U.S. 504 (1958)	
Harris v. United States, 382 U.S. 162 (1965)	1965	Brown v. United States, 359 U.S. 41 (1959)	1959
Pointer v. Texas, 380 U.S. 400 (1965)	1965	West v. Louisiana, 194 U.S. 258 (1904)	1904
Swift & Co. v. Wickham, 382 U.S. 111 (1965)	1965	Kesler v. Department of Public Safety, 369 U.S. 153 (1962) (in part)	1962
United States v. Brown, 381 U.S. 437 (1965)	1965	American Communications Ass'n v. Douds, 339 U.S. 382 (1950)	1950
Escobedo v. Illinois, 378 U.S. 478 (1964)	1964	Cicenia v. Lagay, 357 U.S. 504 (1958);	1958
		Crooker v. California, 357 U.S. 433 (1958)	

Overruling Decision	Year of Overruling Decision	Overruled Decision(s)	Year(s) of Overruled Decision(s)
Jackson v. Denno, 378 U.S. 368 (1964)	1964	Stein v. New York, 346 U.S. 156 (1953)	1953
Malloy v. Hogan, 378 U.S. 1, 6 (1964)	1964	Adamson v. California, 332 U.S. 46 (1947);	1947
		Twining v. New Jersey, 211 U.S. 78 (1908)	1908
McLaughlin v. Florida, 379 U.S. 184 (1964)	1964	Pace v. Alabama, 106 U.S. 583 (1883)	1883
Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964)	1964	Feldman v. United States, 322 U.S. 487 (1944);	1944
		United States v. Murdock, 284 U.S. 141 (1931)	1931
Wesberry v. Sanders, 376 U.S. 1 (1964)	1964	Colegrove v. Green, 328 U.S. 549 (1946) (in part)	1946
Fay v. Noia, 372 U.S. 391 (1963)	1963	Darr v. Burford, 339 U.S. 200 (1950) (in part);	1950
		Daniels v. Allen, 344 U.S. 443 (1953) (in part)	1953
Ferguson v. Skrupa, 372 U.S. 726 (1963)	1963	Adams v. Tanner, 244 U.S. 590 (1917)	1917
Gideon v. Wainwright, 372 U.S. 335 (1963)	1963	Betts v. Brady, 316 U.S. 455 (1942)	1942
Local No. 438 Construction & General Laborers' Union v. Curry, 371 U.S. 542 (1963)	1963	Montgomery Building & Construction Trades Council v. Ledbetter Erection Co., 344 U.S. 178 (1952) (in part)	1952
Townsend v. Sain, 372 U.S. 293 (1963)	1963	Brown v. Allen, 344 U.S. 443 (1953)	1953
Smith v. Evening News Ass'n, 371 U.S. 195 (1962)	1962	Ass'n of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437 (1955) (in part)	1955
James v. United States, 366 U.S. 213 (1961)	1961	Commissioner of Internal Revenue v. Wilcox, 327 U.S. 404 (1946)	1946
Mapp v. Ohio, 367 U.S. 643 (1961)	1961	Wolf v. Colorado, 338 U.S. 25 (1949) (in part)	1949
United States v. Raines, 362 U.S. 17 (1960)	1960	United States v. Reese, 92 U.S. 214 (1876)	1876
Reid v. Covert, 354 U.S. 1 (1957)	1957	Reid v. Covert, 351 U.S. 487 (1956);	1956
		Kinsella v. Krueger, 351 U.S. 470 (1956)	
Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957)	1957	Thompson v. Thompson, 226 U.S. 551 (1913)	1913
Carroll v. Lanza, 349 U.S. 408 (1955)	1955	Bradford Electric Light Co. v. Clapper, 286 U.S. 145 (1932)	1932
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)	1952	Mutual Film Corp. v. Industrial Commission of Ohio, 236 U.S. 230 (1915)	1915

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Overruling Decision	Year of Overruling Decision	Overruled Decision(s)	Year(s) of Overruled Decision(s)
Standard Oil Co. v. Peck, 342 U.S. 382 (1952)	1952	Ayer & Lord Tie Co. v. Kentucky, 202 U.S. 409 (1906);	1906
		Old Dominion Steamship Co. v. Virginia, 198 U.S. 299 (1905);	1905
		St. Louis v. The Ferry Co., 78 U.S. (11 Wall.) 423 (1870)	1870
United States v. Rabinowitz, 339 U.S. 56 (1950)	1950	Trupiano v. United States, 334 U.S. 699 (1948)	1948
Commissioner of Internal Revenue v. Estate of Church, 335 U.S. 632 (1949)	1949	May v. Heiner, 281 U.S. 238 (1930)	1930
Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783 (1949)	1949	Hust v. Moore-McCormack Lines, Inc., 328 U.S. 707 (1946)	1946
Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949)	1949	Coppage v. Kansas, 236 U.S. 1 (1915);	1915
		Adair v. United States, 208 U.S. 161 (1908)	1908
Oklahoma Tax Commission v. Texas Co., 336 U.S. 342 (1949)	1949	Oklahoma ex rel. Okla. Tax Comm'n v. Barnsdall Refineries, Inc., 296 U.S. 521 (1936);	1936
		Large Oil Co. v. Howard, 248 U.S. 549 (1919);	1919
		Howard v. Gipsy Oil Co., 247 U.S. 503 (1918);	1918
		Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U.S. 522 (1916);	1916
		Choctaw, Oklahoma & Gulf Railroad v. Harrison, 235 U.S. 292 (1914)	1914
Sherrer v. Sherrer, 334 U.S. 343 (1948)	1948	Andrews v. Andrews, 188 U.S. 14 (1903) (in part)	1903
Angel v. Bullington, 330 U.S. 183 (1947)	1947	David Lupton's Sons v. Automobile Club of America, 225 U.S. 489 (1912)	1912
Girouard v. United States, 328 U.S. 61 (1946)	1946	United States v. Bland, 283 U.S. 636 (1931);	1931
		United States v. Macintosh, 283 U.S. 605 (1931);	1931
		United States v. Schwimmer, 279 U.S. 644 (1929)	1929
Federal Power Commssion v. Hope Natural Gas Co., 320 U.S. 591 (1944)	1944	United Railways & Electric Co. v. West, 280 U.S. 234 (1930) (in part)	1930
Mahnich v. Southern Steamship Co., 321 U.S. 96 (1944)	1944	Plamals v. Steamship "Pinar Del Rio," 277 U.S. 151 (1928) (in part)	1928
Mercoid Corp. v. Mid-Continent Co., 320 U.S. 661 (1944)	1944	Leeds & Catlin Co. v. Victor Talking Machine Co., 213 U.S. 325 (1909)	1909
Smith v. Allwright, 321 U.S. 649 (1944)	1944	Grovey v. Townsend, 295 U.S. 45 (1935)	1935

Overruling Decision	Year of Overruling Decision	Overruled Decision(s)	Year(s) of Overruled Decision(s)
United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944)	1944	Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869)	1869
Brady v. Roosevelt Steamship, Co., 317 U.S. 575 (1943)	1943	Johnson v. U.S. Shipping Board Emergency Fleet Corp., 280 U.S. 320 (1930)	1930
Jones v. Opelika, 319 U.S. 103 (1943) (re-argument)	1943	Jones v. Opelika, 316 U.S. 584 (1942)	1942
Murdock v. Pennsylvania, 319 U.S. 105 (1943)	1943	Jones v. Opelika, 316 U.S. 584 (1942)	1942
Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943)	1943	Childers v. Beaver, 270 U.S. 555 (1926)	1926
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)	1943	Minersville School District v. Gobitis, 310 U.S. 586 (1940)	1940
Graves v. Schmidlapp, 315 U.S. 657 (1942)	1942	Wachovia Bank & Trust Co. v. Doughton, 272 U.S. 567 (1926)	1926
State Tax Commission v. Aldrich, 316 U.S. 174 (1942)	1942	First National Bank of Boston v. Maine, 284 U.S. 312 (1932)	1932
Williams v. North Carolina, 317 U.S. 287 (1942)	1942	Haddock v. Haddock, 201 U.S. 562 (1906)	1906
Alabama v. King & Boozer, 314 U.S. 1 (1941)	1941	Graves v. Texas Co., 298 U.S. 393 (1936);	1936
		Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218 (1928)	1928
California v. Thompson, 313 U.S. 109 (1941)	1941	Di Santo v. Pennsylvania, 273 U.S. 34 (1927)	1927
Edwards v. California, 314 U.S. 160 (1941)	1941	City of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837)	1837
Nye v. United States, 313 U.S. 33 (1941)	1941	Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918)	1918
Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n, 313 U.S. 236 (1941)	1941	Ribnik v. McBride, 277 U.S. 350 (1928)	1928
Toucey v. New York Life Insurance Co., 314 U.S. 118 (1941)	1941	Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921)	1921
United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad, 312 U.S. 592 (1941)	1941	United States v. Lynah, 188 U.S. 445 (1903)	1903
United States v. Darby, 312 U.S. 100 (1941)	1941	Hammer v. Dagenhart, 247 U.S. 251 (1918)	1918
Helvering v. Hallock, 309 U.S. 106 (1940)	1940	Becker v. St. Louis Union Trust Co., 296 U.S. 48 (1935);	1935
		Helvering v. St. Louis Union Trust Co., 296 U.S. 39 (1935)	

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Overruling Decision	Year of Overruling Decision	Overruled Decision(s)	Year(s) of Overruled Decision(s)
Madden v. Kentucky, 309 U.S. 83 (1940)	1940	Colgate v. Harvey, 296 U.S. 404 (1935)	1935
Tigner v. Texas, 310 U.S. 141 (1940)	1940	Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902)	1902
Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939)	1939	New York ex rel. Rogers v. Graves, 299 U.S. 401 (1937);	1937
		Collector v. Day, 78 U.S. (11 Wall.) 113 (1871)	1871
O'Malley v. Woodrough, 307 U.S. 277 (1939)	1939	Miles v. Graham, 268 U.S. 501 (1925);	1925
		Evans v. Gore, 253 U.S. 245 (1920)	1920
Rochester Telephone Corp. v. United States, 307 U.S. 125 (1939)	1939	Procter & Gamble Co. v. United States, 225 U.S. 282 (1912)	1912
Erie Railroad v. Tompkins, 304 U.S. 64 (1938)	1938	Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)	1842
Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938)	1938	Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932);	1932
		Gillespie v. Oklahoma, 257 U.S. 501 (1922)	1922
West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)	1937	Adkins v. Children's Hosp. of D.C., 261 U.S. 525 (1923)	1923
Funk v. United States, 290 U.S. 371 (1933)	1933	Jin Fuey Moy v. United States, 254 U.S. 189 (1920);	1920
		Hendrix v. United States, 219 U.S. 79 (1911)	1911
Chicago & Eastern Illinois Railroad v. Industrial Commission, 284 U.S. 296 (1932)	1932	Erie Railroad v. Szary, 253 U.S. 86 (1920);	1920
		Erie Railroad v. Collins, 253 U.S. 77 (1920)	
Fox Film Corp. v. Doyal, 286 U.S. 123 (1932)	1932	Long v. Rockwood, 277 U.S. 142 (1928)	1928
East Ohio Gas Co. v. Tax Commission of Ohio, 283 U.S. 465 (1931)	1931	Pennsylvania Gas Co. v. Public Service Commission, 252 U.S. 23 (1920)	1920
Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204 (1930)	1930	Blackstone v. Miller, 188 U.S. 189 (1903)	1903
Gleason v. Seaboard Air Line Railway, 278 U.S. 349 (1929)	1929	Friedlander v. Texas & Pacific Railway, 130 U.S. 416 (1889) (in part)	1889
Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925)	1925	Baltic Mining Co. v. Massachusetts, 231 U.S. 68 (1913)	1913
Lee v. Chesapeake & Ohio Railway, 260 U.S. 653 (1923)	1923	*In re* Moore, 209 U.S. 490 (1908);	1908
		Ex parte Wisner, 203 U.S. 449 (1906)	1906

Overruling Decision	Year of Overruling Decision	Overruled Decision(s)	Year(s) of Overruled Decision(s)
Terral v. Burke Construction Co., 257 U.S. 529 (1922)	1922	Security Mutual Life Insurance Co. v. Prewitt, 202 U.S. 246 (1906);	1906
		Doyle v. Cont'l Ins. Co., 94 U.S. 535 (1877)	1877
Boston Store of Chicago v. American Graphophone Co., 246 U.S. 8 (1918)	1918	Henry v. A.B. Dick Co., 224 U.S. 1 (1912)	1912
Rosen v. United States, 245 U.S. 467 (1918)	1918	United States v. Reid, 53 U.S. (12 How.) 361 (1851)	1851
Motion Picture Patents Co. v. Universal Film Manufacturing Co., 243 U.S. 502 (1917)	1917	Henry v. A.B. Dick Co., 224 U.S. 1 (1912)	1912
Pennsylvania Railroad v. Towers, 245 U.S. 6 (1917)	1917	Lake Shore & Michigan Southern Railway v. Smith, 173 U.S. 684 (1899) (in part)	1899
United States v. Nice, 241 U.S. 591 (1916)	1916	*In re* Heff, 197 U.S. 488 (1905)	1905
Garland v. Washington, 232 U.S. 642 (1914)	1914	Crain v. United States, 162 U.S. 625 (1896)	1896
Minnesota Rate Cases, 230 U.S. 352 (1913)	1913	Peik v. Chicago & Northwestern Railway, 94 U.S. 164 (1877)	1877
Roberts v. Lewis, 153 U.S. 367 (1894)	1894	Giles v. Little, 104 U.S. 291 (1881)	1881
Brenham v. German American Bank, 144 U.S. 173 (1892)	1892	Mitchell v. Burlington, 71 U.S. (4 Wall.) 270 (1867);	1867
		Rogers v. Burlington, 70 U.S. (3 Wall.) 654 (1866)	1866
Leisy v. Hardin, 135 U.S. 100 (1890)	1890	Peirce v. New Hampshire, 46 U.S. (5 How.) 504 (1847)	1847
Leloup v. Port of Mobile, 127 U.S. 640 (1888)	1888	Osborne v. Mobile, 83 U.S. (16 Wall.) 479 (1873)	1873
In re Ayers, 123 U.S. 443 (1887)	1887	Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824)	1824
Philadelphia & Southern Mail Steamship Co. v. Pennsylvania, 122 U.S. 326 (1887)	1887	State Tax on Railway Gross Receipts, 82 U.S. (15 Wall.) 284 (1873)	1873
Morgan v. United States, 113 U.S. 476 (1885)	1885	Texas v. White, 74 U.S. (7 Wall.) 700 (1869)	1869
Kountze v. Omaha Hotel Co., 107 U.S. 378 (1883)	1883	Stafford v. Union Bank of Louisiana, 57 U.S. (16 How.) 135 (1853)	1853
United States v. Phelps, 107 U.S. 320 (1883)	1883	Shelton v. Collector, 72 U.S. (5 Wall.) 113 (1867)	1867
Kilbourn v. Thompson, 103 U.S. 168 (1881)	1881	Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821)	1821
Tilghman v. Proctor, 102 U.S. 707 (1880)	1880	Mitchell v. Tilghman, 86 U.S. (19 Wall.) 287 (1873)	1873

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Overruling Decision	Year of Overruling Decision	Overruled Decision(s)	Year(s) of Overruled Decision(s)
Fairfield v. County of Gallatin, 100 U.S. 47 (1879)	1879	Town of Concord v. Portsmouth Savings Bank, 92 U.S. 625 (1875)	1875
County of Cass v. Johnston, 95 U.S. 360 (1877)	1877	Harshman v. Bates County, 92 U.S. 569 (1875)	1875
Hornbuckle v. Toombs, 85 U.S. (18 Wall.) 648 (1874)	1874	Dunphy v. Kleinsmith & Duer, 78 U.S. (11 Wall.) 610 (1870);	1870
		Orchard v. Hughes, 68 U.S. (1 Wall.) 73, 77 (1864);	1864
		Noonan v. Lee, 67 U.S. (2 Black) 499 (1863)	1863
Union Pacific Railway v. McShane, 89 U.S. (22 Wall.) 444 (1874)	1874	Railway v. Prescott, 83 U.S. (16 Wall.) 603 (1873) (in part)	1873
Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871) (Legal Tender Cases)	1871	Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870)	1870
Trebilcock v. Wilson, 79 U.S. (12 Wall.) 687 (1871)	1871	Roosevelt v. Meyer, 68 U.S. (1 Wall.) 512 (1863)	1863
The Belfast, 74 U.S. (7 Wall.) 624 (1869)	1869	Allen v. Newberry, 62 U.S. (21 How.) 244 (1858) (in part)	1858
Mason v. Eldred, 73 U.S. (6 Wall.) 231 (1868)	1868	Sheehy v. Mandeville & Jamesson, 10 U.S. (6 Cr.) 253 (1810)	1810
Suydam v. Williamson, 65 U.S. (24 How.) 427 (1861)	1861	Williamson v. Ball, 49 U.S. (8 How.) 566 (1850);	1850
		Williamson v. Irish Presbyterian Congregation, 49 U.S. (8 How.) 565 (1850);	
		Williamson v. Berry, 49 U.S. (8 How.) 495 (1850)	
Gazzam v. Lessee of Phillips, 61 U.S. (20 How.) 372 (1857)	1857	Brown's Lessee v. Clements, 44 U.S. (3 How.) 650 (1845)	1845
The Propeller Genesee Chief, 53 U.S. (12 How.) 443 (1851)	1851	The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825)	1825
Louisville, Cincinnati & Charleston Railway v. Letson, 43 U.S. (2 How.) 497 (1844)	1844	Commercial & Railroad Bank of Vicksburg v. Slocomb, 39 U.S. (14 Pet.) 60 (1840);	1840
		Bank of the United States v. Deveaux, 9 U.S. (5 Cr.) 61 (1809);	1809
		Strawbridge v. Curtiss, 7 U.S. (3 Cr.) 267 (1806)	1806
Green v. Lessee of Neal, 31 U.S. (6 Pet.) 291 (1832)	1832	Powell's Lessee v. Harman, 27 U.S. (2 Pet.) 241 (1829);	1829
		Patton's Lessee v. Easton, 14 U.S. (1 Wheat.) 476 (1816)	1816
Gordon v. Ogden, 28 U.S. (3 Pet.) 33 (1830)	1830	Wilson v. Daniel, 3 U.S. (3 Dall.) 401 (1798)	1798
Hudson v. Guestier, 10 U.S. (6 Cr.) 281 (1810)	1810	Rose v. Himely, 8 U.S. (4 Cr.) 241 (1808)	1808

TABLE OF LAWS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
2021	Carson v. Makin, No. 20-1088 (U.S. June 21, 2022)	Roberts, John G.	Civil Rights; Education	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Exercise Clause

Description of Unconstitutional Provision(s): Me. Stat. tit. 20-A, § 2951: Maine provision requiring schools participating in a tuition assistance program to be "nonsectarian."

2021	New York State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. June 23, 2022)	Thomas, Clarence	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Second Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): N.Y. Penal Law § 400.00(2)(f): a portion of New York's firearms licensing regime that restricts the carrying of certain licensed firearms outside the home to those who can establish "proper cause"

2021	Federal Election Commission v. Ted Cruz for Senate, No. 21-12 (U.S. May 16, 2022)	Roberts, John G.	Elections	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 52 U.S.C. § 30116(j): Portion of section 304(a) of Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155 establishing a $250,000 limit on amount of post-election campaign contributions that can be used to repay a candidate for personal campaign loans made pre-election.

2021	United States v. Washington, No. 21-404 (U.S. June 21, 2022)	Breyer, Stephen G.	Workers' Compensation & Social Security	State & Local

Constitutional Provision(s) Invoked: Article VI

Constitutional Clause(s) Invoked: Supremacy Clause

Description of Unconstitutional Provision(s): A provision in Washington's workers' compensation law that made it easier for federal contractors to establish their entitlement to workers' compensation, relative to the requirements for other workers.

2021	Siegel v. Fitzgerald, No. 21-441 (U.S. June 6, 2022)	Sotomayor, Sonia	Bankruptcy	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 4

Constitutional Clause(s) Invoked: Bankruptcy Clause

Description of Unconstitutional Provision(s): 28 U.S.C. § 1930(a)(6)(B): a statute that imposed temporary but significant increases in bankruptcy fees applicable to large Chapter 11 cases in districts that had adopted the U.S. Trustee program but not in districts that maintained the judicial appointment of bankruptcy administrators.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
2020	United States v. Arthrex, Inc., No. 19-1434 (U.S. June 21, 2021)	Roberts, John G.	Intellectual Property	Federal

Constitutional Provision(s) Invoked: Article II, Section 2, Clause 2

Constitutional Clause(s) Invoked: Appointments Clause

Description of Unconstitutional Provision(s): 35 U.S.C. § 6(c): A provision of the America Invents Act that insulated the inferior officers of the Patent Trial and Appeal Board from supervision by preventing the Patent and Trademark Office Director from reviewing certain final decisions of the Board's administrative patent judges.

2020	Americans for Prosperity Foundation v. Bonta, No. 19-251 (U.S. July 1, 2021)	Roberts, John G.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Freedom of Association

Description of Unconstitutional Provision(s): Cal. Code Regs. tit. 8, § 301: A California regulation requiring charities operating or soliciting funds in the state to file Schedule B to IRS Form 990, disclosing information about donors, with the state attorney general.

2020	Collins v. Yellen, No. 19-422 (U.S. June 23, 2021)	Roberts, John G.	Business & Corporate Law	Federal

Constitutional Provision(s) Invoked: Article II, Section 1, Clause 1

Constitutional Clause(s) Invoked: Separation of Powers Doctrine

Description of Unconstitutional Provision(s): 12 U.S.C. § 4512(b)(2): A provision of the Housing and Economic Recovery Act of 2008 stating that the President could only remove the Director of the Federal Housing Finance Agency "for cause."

2020	Cedar Point Nursery v. Hassid, No. 20-107 (U.S. June 23, 2021)	Alito, Samuel A.	Labor & Employment	State & Local

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Takings Clause

Description of Unconstitutional Provision(s): Cal. Code Regs. tit. 8, § 20900(e)(1)(C): A California regulation granting labor organizers a right to take access to agricultural facilities.

2019	June Medical Services LLC v. Russo, No. 18-1323 (U.S. June 29, 2020)	Breyer, Stephen G.	Healthcare	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): La. Rev. Stat. Ann. § 40:1061.10(A)(2)(a): A Louisiana law requiring abortion providers to have admitting privileges at hospitals within 30 miles of where an abortion is performed or induced.

2019	Ramos v. Louisiana, No. 18-5924 (U.S. Apr. 20, 2020)	Gorsuch, Neil M.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Sixth Amendment

Constitutional Clause(s) Invoked: Right to Trial by Jury

Description of Unconstitutional Provision(s): La. Const. art. I, § 17(A): A provision of the Louisiana constitution allowing criminal conviction by a nonunanimous jury.

2019	Allen v. Cooper, No. 18-877 (U.S. Mar. 23, 2020)	Kagan, Elena	Intellectual Property	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 8; Fourteenth Amendment, Section 5

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): 17 U.S.C. § 511(a): A provision of the Copyright Remedy Clarification Act that abrogated state sovereign immunity in copyright infringement cases.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
2019	Barr v. American Ass'n of Political Consultants, Inc., No. 19-631 (U.S. July 6, 2020)	KAVANAUGH, BRETT M.	Business & Corporate Law	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 47 U.S.C. § 227(b)(1)(A)(iii): The government debt collection exemption to the robocall restriction in the Telephone Consumer Protection Act.

2019	Seila Law LLC v. Consumer Financial Protection Bureau, No. 19-7 (U.S. June 29, 2020)	ROBERTS, JOHN G.	Banking	Federal

Constitutional Provision(s) Invoked: Article II, Section 1, Clause 1

Constitutional Clause(s) Invoked: Separation of Powers Doctrine

Description of Unconstitutional Provision(s): 12 U.S.C. § 5491(c)(3): A provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act stating that the President may only remove the Director of the Consumer Financial Protection Bureau "for inefficiency, neglect of duty, or malfeasance in office."

2018	Dawson v. Steager, No. 17-419 (U.S. Feb. 20, 2019)	GORSUCH, NEIL M.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article VI, Section 1, Clause 2

Constitutional Clause(s) Invoked: Supremacy Clause

Description of Unconstitutional Provision(s): W. Va. Code §11-21-12(c)(6): A West Virginia statute providing a tax exemption for the retirement benefits of certain state law enforcement employees but not for federal retirees who had comparable job duties.

2018	Iancu v. Brunetti, No. 18-302 (U.S. June 24, 2019)	KAGAN, ELENA	Intellectual Property	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 15 U.S.C. § 1052(a): A provision of the Lanham Act prohibiting the registration of trademarks that "consist[] of or comprise[] immoral . . . or scandalous matter."

2018	United States v. Davis, No. 18-431 (U.S. June 24, 2019)	GORSUCH, NEIL M.	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 18 U.S.C. § 924(c)(1)(A): A residual clause in the Firearms Owners' Protection Act that defines the term "crime of violence."

2018	Tennessee Wine & Spirits Retailers Ass'n v. Thomas, No. 18-96 (U.S. June 26, 2019)	ALITO, SAMUEL A.	Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Tenn. Code Ann. § 57-3-204(b)(2)(A): Tennessee law creating 2-year residency requirement for alcohol retailers to obtain a license.

2017	Sessions v. Dimaya, No. 15-1498 (U.S. Apr. 17, 2018)	KAGAN, ELENA	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 18 U.S.C. § 16: The residual clause of the provision of the federal criminal code that defines the term "crime of violence."

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
2017	National Institute of Family & Life Advocates v. Becerra, No. 16-1140 (U.S. June 26, 2018)	Thomas, Clarence	Healthcare	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Cal. Health & Safety Code § 123472: California law requiring certain (1) medically licensed pro-life centers that offer pregnancy-related services to notify clients that the state provides free or low-cost services, including abortion; and (2) unlicensed pro-life centers that offer-pregnancy-related services to disclose that the state has not licensed the clinics.

2017	Minnesota Voters Alliance v. Mansky, No. 16-1435 (U.S. June 14, 2018)	Roberts, John G.	Elections	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Minn. Stat. § 211B.11 (2017): Minnesota statute stating that political insignia may not be worn at polling places.

2017	Janus v. American Federation of State, County, & Municipal Employees, Council 31, No. 16-1466 (U.S. June 27, 2018)	Alito, Samuel A.	Labor & Employment	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 5 Ill. Comp. Stat. 315/6(e): Illinois statute that allows exclusive representatives of public employees to enter into collective bargaining agreements that require nonconsenting employees to pay certain fees to the representative.

2017	Murphy v. National Collegiate Athletic Ass'n, No. 16-476 (U.S. May 14, 2018)	Alito, Samuel A.	Government Operations	Federal

Constitutional Provision(s) Invoked: Tenth Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701 *et seq.*: Prohibiting states from authorizing sports gambling schemes.

2016	Sessions v. Morales-Santana, No. 15-1191 (U.S. June 12, 2017)	Ginsburg, Ruth Bader	Immigration	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): 8 U.S.C. § 1401(a)(7): Immigration provision imposing a gender-based differential concerning acquisition of U.S. citizenship by a child born abroad, when one parent is a U.S. citizen and the other a citizen of another nation.

2016	Packingham v. North Carolina, No. 15-1194 (U.S. June 19, 2017)	Kennedy, Anthony M.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): N.C. Gen. Stat. Ann. §§ 14-202.5(a), (e): North Carolina statute making it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages."

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
2016	Nelson v. Colorado, No. 15-1256 (U.S. Apr. 19, 2017)	Ginsburg, Ruth Bader	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Colo. Rev. Stat. §§ 13-65-101, 13-65-102, 13-65-103 (2016): Colorado statute requiring exonerated persons to prevail in separate civil proceeding to obtain refund of costs, fees, and restitution paid in connection with exonerated conviction.

2016	Cooper v. Harris, No. 15-1262 (U.S. May 22, 2017)	Kagan, Elena	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): North Carolina plan redrawing two congressional districts.

2016	Matal v. Tam, No. 15-1293 (U.S. June 19, 2017)	Alito, Samuel A.	Trade	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 15 U.S.C. § 1052(a): Disparagement Clause of the Lanham Act banning federal registration of trademarks that may be disparaging to persons or groups.

2016	Trinity Lutheran Church of Columbia, Inc. v. Comer, No. 15-577 (U.S. June 26, 2017)	Roberts, John G.	Civil Rights; Education	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Exercise Clause

Description of Unconstitutional Provision(s): Missouri Department of Natural Resources policy excluding churches and other religious organizations from grant program for resurfacing playgrounds.

2016	Pavan v. Smith, No. 16-92 (U.S. June 16, 2017)	Per Curiam	Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Ark. Code § 20-18-401 (2014): Arkansas statute requiring name of mother's "husband" to be entered on birth certificate as father of child, if mother is married.

2015	Hurst v. Florida, 577 U.S. 92 (2016)	Sotomayor, Sonia	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Sixth Amendment

Constitutional Clause(s) Invoked: Right to Trial by Jury

Description of Unconstitutional Provision(s): Fla. Stat. § 775.082(1) (2010): Florida statute requiring judge to hold separate hearing to determine whether aggravating circumstances justified death penalty, and allowing judge to impose sentence based on judicial fact-finding.

2015	Birchfield v. North Dakota, No. 14-1468 (U.S. June 23, 2016)	Alito, Samuel A.	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourth Amendment

Constitutional Clause(s) Invoked: Search & Seizure Clause

Description of Unconstitutional Provision(s): N.D. Cent. Code Ann. §§ 39-20-01(3)(a); 39-08-01(2): North Dakota statute imposing criminal penalties on a driver's refusal to consent to a blood test to determine driver's BAC.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
2015	Whole Woman's Health v. Hellerstedt, No. 15-274 (U.S. June 27, 2016)	Breyer, Stephen G.	Civil Rights; Healthcare	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Tex. Health & Safety Code Ann. §171.0031(a) (West Cum. Supp. 2015): Texas statute providing that physicians performing abortions must have admitting privileges at local hospital. Tex. Health & Safety Code Ann. §245.010(a): Texas statute providing that abortion facilities must meet minimum standards for surgical centers.

2014	Comptroller of the Treasury v. Wynne, 575 U.S. 542 (2015)	Alito, Samuel A.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Md. Tax-Gen. Code Ann. § §10-703 (2010): Maryland statute allowing residents to claim credit for income taxes paid to other states against payment of Maryland state taxes, but not against county taxes.

2014	Zivotofsky v. Kerry, 576 U.S. 1 (2015)	Kennedy, Anthony M.	Government Operations	Federal

Constitutional Provision(s) Invoked: Article II, Section 3; Article II, Section 2, Clause 2

Constitutional Clause(s) Invoked: Reception Clause

Description of Unconstitutional Provision(s): Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002): Section 214(d) of the Foreign Relations Authorization Act requiring that, "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."

2014	Reed v. Town of Gilbert, 576 U.S. 155 (2015)	Thomas, Clarence	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Gilbert, Ariz., Land Dev. Code, ch. 1, § 4.402 (2005): Arizona town's sign code prohibiting display of outdoor signs without a permit, but exempting certain categories of signs, including ideological, political and some temporary wayfinding signs.

2014	Horne v. Department of Agriculture, 576 U.S. 351 (2015)	Roberts, John G.	Food & Drug	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Takings Clause

Description of Unconstitutional Provision(s): 7 C.F.R. § 989.66: U.S. Department of Agriculture's California Raisin Marketing Order requiring a percentage of a grower's crop be physically set aside in certain years for the account of the Government, free of charge.

2014	City of Los Angeles v. Patel, 576 U.S. 409 (2015)	Sotomayor, Sonia	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourth Amendment

Constitutional Clause(s) Invoked: Search & Seizure Clause

Description of Unconstitutional Provision(s): Los Angeles Municipal Code § 41.49 (2015): Los Angeles ordinance requiring every hotel operator "to keep a record" containing specified information about guests and to make this record "available to any officer of the Los Angeles Police Department for inspection" on demand.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
2014	Johnson v. United States, 576 U.S. 591 (2015)	Scalia, Antonin	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 18 U.S.C. § 924(e)(2)(B): Statute imposing an increased sentence under the residual clause of the Armed Career Criminal Act.

2014	Obergefell v. Hodges, 576 U.S. 644 (2015)	Kennedy, Anthony M.	Civil Rights; Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Mich. Const. art. I, § 25; Ky. Const. § 233A; Ohio Rev. Code Ann. § 3101.01 (Lexis 2008); Tenn. Const. art. XI, §18: Statutory and constitutional provisions of Michigan, Kentucky, Ohio, and Tennessee defining marriage as a union between one man and one woman.

2013	McCutcheon v. Federal Election Commission, 572 U.S. 185 (2014)	Roberts, John G.	Elections	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 2 U.S.C. § 441a(a)(3): "Aggregate limits" provision of the Federal Election Campaign Act of 1971, as amended by the Bipartisan Campaign Reform Act of 2002, restricting how much money a donor may contribute in total to all candidates or committees

2013	Hall v. Florida, 572 U.S. 701 (2014)	Kennedy, Anthony M.	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Eighth Amendment

Constitutional Clause(s) Invoked: Cruel & Unusual Punishment Clause

Description of Unconstitutional Provision(s): Fla. Stat. § 921.137(1) (2013): Florida statute requiring threshold showing that defendant has an IQ test score of 70 or less before allowing him to present evidence of intellectual disability, for purposes of imposing death penalty.

2013	McCullen v. Coakley, 573 U.S. 464 (2014)	Roberts, John G.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Mass. Gen. Laws, ch. 266, § 120E1/2(a), (b) (West 2000): Massachusetts Reproductive Health Care Facilities Act making it a crime to knowingly stand on a "public way or sidewalk" within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed.

2013	Harris v. Quinn, 573 U.S. 616 (2014)	Alito, Samuel A.	Labor & Employment	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Ill. Comp. Stat., ch. 5, § 315/6(e): Illinois Public Labor Relations Act allowing collective bargaining agreements to require "employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective-bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment."

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
2012	Agency for International Development v. Alliance for Open Society International, Inc., 570 U.S. 205 (2013)	Roberts, John G.	Healthcare	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 22 U.S.C. § 7631(f): Funding condition of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 stating that no funds may be used by an organization "that does not have a policy explicitly opposing prostitution and sex trafficking."

2012	Shelby County v. Holder, 570 U.S. 529 (2013)	Roberts, John G.	Elections	Federal

Constitutional Provision(s) Invoked: Fifteenth Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): 42 U.S.C. § 1973b(b): Voting Rights Act of 1965 § 4(b) providing the formula for determining the states or electoral districts that are required to submit electoral changes to the U.S. Department of Justice or a federal court for preclearance.

2012	United States v. Windsor, 570 U.S. 744 (2013)	Kennedy, Anthony M.	Civil Rights	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 1 U.S.C. § 7: Defense of Marriage Act § 3 amending the Dictionary Act to provide a federal definition of "marriage" as between one man and one woman.

2011	Coleman v. Court of Appeals, 566 U.S. 30 (2012)	Kennedy, Anthony M.	Labor & Employment	Federal

Constitutional Provision(s) Invoked: Eleventh Amendment; Fourteenth Amendment, Section 5

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): 29 U.S.C. §2612(a)(1)(D): Provision requiring employers, including state employers, to grant unpaid leave for self care for a serious medical condition, provided other statutory requisites are met, and allowing for suits against the state to enforce this provision.

2011	Miller v. Alabama, 567 U.S. 460 (2012)	Kagan, Elena	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Eighth Amendment

Constitutional Clause(s) Invoked: Cruel & Unusual Punishment Clause

Description of Unconstitutional Provision(s): Ala. Code §§ 13A-5-40(9), 13A-6-2(c) (1982) and Ark. Code Ann. § 5-4-104(b) (1997): Alabama and Arkansas laws requiring juveniles in some circumstances to be sentenced to life-without-parole terms.

2011	American Tradition Partnership v. Bullock, 567 U.S. 516 (2012)	Per Curiam	Civil Rights; Elections	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Mont. Code Ann. §13-35-227(1) (2011): Montana statute prohibiting corporations from making "an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party."

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
2011	National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012)	Roberts, John G.	Healthcare	Federal

Constitutional Provision(s) Invoked: Tenth Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): 42 U.S.C. § 1396c: Patient Protection and Affordable Care Act provision mandating Medicaid coverage.

2011	United States v. Alvarez, 567 U.S. 709 (2012)	Kennedy, Anthony M.	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 18 U.S.C. § 704: Stolen Valor Act of 2005 penalizing any false claim of having been awarded a military decoration or medal.

2010	Pepper v. United States, 562 U.S. 476 (2011)	Sotomayor, Sonia	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Sixth Amendment

Constitutional Clause(s) Invoked: Right to Trial by Jury

Description of Unconstitutional Provision(s): 18 U.S.C. § 3742(g)(2): Statutory limitation on the use of post-conviction behavior during resentencing to depart from the Sentencing Guidelines is no longer valid after United States v. Booker.

2010	Sorrell v. IMS Health Inc., 564 U.S. 552 (2011)	Kennedy, Anthony M.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Vt. Stat. Ann., Tit. 18, § 4631 (Supp. 2010): "Vermont law restrict[ing] the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors." *Sorrell*, 564 U.S. at 557.

2010	Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011)	Roberts, John G.	Elections	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Ariz. Rev. Stat. Ann. § 16-952(A), (B), and (C)(4)–(5) (West 2006 and Supp. 2010): Arizona Citizens Clean Elections Act creating public financing system for elections that included matching funds provision.

2010	Brown v. Entertainment Merchants Ass'n, 564 U.S. 786 (2011)	Scalia, Antonin	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Cal. Civ. Code Ann. §§ 1746–1746.5 (West 2009): California statute prohibiting sale or rental of "violent video games" to minors.

2009	Citizens United v. Federal Election Commission, 558 U.S. 310 (2010)	Kennedy, Anthony M.	Elections	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 2 U.S.C. § 441b: Federal law prohibiting corporations and unions from using their general treasury funds to make independent expenditures for "electioneering communication" or for speech expressly advocating the election or defeat of a candidate.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
2009	United States v. Stevens, 559 U.S. 460 (2010)	Roberts, John G.	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 18 U.S.C. § 48: Statute criminalizing the commercial creation, sale, or possession of certain depictions of animal cruelty.

2009	Free Enterprise Fund v. Public Co. Accounting Oversight Board, 561 U.S. 477 (2010)	Roberts, John G.	Business & Corporate Law	Federal

Constitutional Provision(s) Invoked: Article II, Section 1, Clause 1

Constitutional Clause(s) Invoked: Separation of Powers Doctrine

Description of Unconstitutional Provision(s): 15 U.S.C. §§ 7211(e)(6), 7217(d)(3): Provisions of the Sarbanes-Oxley Act of 2002 under which members of the Public Company Accounting Oversight Board cannot be removed by the Securities & Exchange Commission at will, but only "for good cause shown," "in accordance with" certain procedures.

2009	McDonald v. City of Chicago, 561 U.S. 742 (2010)	Alito, Samuel A.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Second Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Chicago, Ill., Municipal Code § 8-20-040(a) (2009); Oak Park, Ill., Village Code §§ 27-2-1 (2007), 27-1-1 (2009): Chicago and Village of Oak Park prohibiting possession of most handguns.

2008	Haywood v. Drown, 556 U.S. 729 (2009)	Stevens, John Paul	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Article VI, Section 1, Clause 2

Constitutional Clause(s) Invoked: Supremacy Clause

Description of Unconstitutional Provision(s): New York statute divesting state trial courts of jurisdiction over § 1983 suits seeking damages from correction officers, and requiring such claims to be brought in the court of claims as claims against the state.

2008	Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1 (2009)	Breyer, Stephen G.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 3

Constitutional Clause(s) Invoked: Tonnage Clause

Description of Unconstitutional Provision(s): Valdez Ordinance No. 99-17 (1999): City of Valdez, Alaska, ordinance imposing a personal property tax upon the value of large ships that travelled to and from that city.

2007	Boumediene v. Bush, 553 U.S. 723 (2008)	Kennedy, Anthony M.	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Article I, Section 9, Clause 2

Constitutional Clause(s) Invoked: Suspension Clause

Description of Unconstitutional Provision(s): 28 U.S.C. § 2241(e): Provision of the Detainee Treatment Act amending the Military Commissions Act of 2006 to eliminate federal habeas jurisdiction over alien detainees held at Guantanamo Bay, Cuba.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
2007	Kennedy v. Louisiana, 554 U.S. 407 (2008)	KENNEDY, ANTHONY M.	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Eighth Amendment

Constitutional Clause(s) Invoked: Cruel & Unusual Punishment Clause

Description of Unconstitutional Provision(s): La. Stat. Ann. § 14:42 (West 1997 and Supp. 1998): Louisiana statute authorizing capital punishment for the rape of a child under twelve years of age.

2007	District of Columbia v. Heller, 554 U.S. 570 (2008)	SCALIA, ANTONIN	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Second Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): D.C. Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001): D.C. ordinance prohibiting possession of handguns D.C. Code §§ 22-4504(a), 22-4506 (2001): D.C. ordinance prohibiting carrying unlicensed handguns except with 1-year license issued by chief of police, D.C. Code § 7-2507.02 (2001): D.C. ordinance requiring that lawfully owned firearms be kept unloaded.

2007	Davis v. Federal Election Commission, 554 U.S. 724 (2008)	ALITO, SAMUEL A.	Elections	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 2 U.S.C. § 441a-1(a), (b): Sections 319(a) and (b) of the Bipartisan Campaign Reform Act of 2002 providing that if a "self-financing" candidate for the House of Representatives spends more than a specified amount, his opponent may accept more contributions than otherwise permitted, as well as a disclosure requirements designed to implement the asymmetrical contribution.

2006	Cunningham v. California, 549 U.S. 270 (2007)	GINSBURG, RUTH BADER	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Sixth Amendment

Constitutional Clause(s) Invoked: Right to Trial by Jury

Description of Unconstitutional Provision(s): Cal. Penal Code § 1170(b): California's Determinate Sentencing Law allowing judges to sentence defendants to higher terms based on judicial findings of aggravating facts.

2006	Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007)	ROBERTS, JOHN G.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Policy of Seattle public schools using students' race as one of a series of "tiebreakers" to determine which high school students would attend. Policy of Jefferson County public schools, in Kentucky, assigning some students to different schools if student's race would contribute to racial imbalance.

2005	Randall v. Sorrell, 548 U.S. 230 (2006)	BREYER, STEPHEN G.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Vt. Stat. Ann., Tit. 17, §§ 2801, 2805, 2809: Vermont statute limiting amounts that individuals, corporations, and political committees, as well as candidates themselves, could contribute to campaigns for candidates for state office.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
2004	United States v. Booker, 543 U.S. 220 (2005)	Breyer, Stephen G.	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Sixth Amendment

Constitutional Clause(s) Invoked: Right to Trial by Jury

Description of Unconstitutional Provision(s): 18 U.S.C. §§ 3553(b)(1), 3742(e): Two provisions of the Sentencing Reform Act of 1984, one making the Federal Sentencing Guidelines mandatory, and the other setting standards to govern appeals of departures from the mandatory Guidelines.

2004	Roper v. Simmons, 543 U.S. 551 (2005)	Kennedy, Anthony M.	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Eighth Amendment

Constitutional Clause(s) Invoked: Cruel & Unusual Punishment Clause

Description of Unconstitutional Provision(s): Mo. Rev. Stat. §§ 211.021 (2000) and 211.031 (Supp. 2003): Missouri statute providing that seventeen-year-olds were adults outside the jurisdiction of the juvenile court. Mo. Rev. Stat. § 565.020.2 (2000): Missouri statute allowing for the imposition of the death penalty.

2004	Granholm v. Heald, 544 U.S. 460 (2005)	Kennedy, Anthony M.	Business & Corporate Law; Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Mich. Comp. Laws § 436.1113(9) (2001); §§ 436.1537(2)-(3); Mich. Admin. Code r.436.1011(7)(b) (2003): Michigan statute allowing in-state wineries, but not out-of-state wineries, to apply for licenses to directly ship wine to Michigan consumers. N.Y. Alco. Bev. Cont. Law § 3(37) (McKinney 2005): New York statute requiring out-of-state wineries to become licensed New York wineries before they could directly ship wine to New York consumers.

2004	Halbert v. Michigan, 545 U.S. 605 (2005)	Ginsburg, Ruth Bader	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): Mich. Comp. Laws Ann. § 770.3a (West 2000): Michigan statute providing that most indigent defendants who pled guilty, guilty but mentally ill, or nolo contendere would not have appellate counsel appointed.

2003	McConnell v. Federal Election Commission, 540 U.S. 93 (2003)	Stevens, John Paul; O'Connor, Sandra Day	Elections	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 2 U.S.C. § 441b(b)(2): Section 203 of the Bipartisan Campaign Reform Act of 2002 amending the Federal Election Campaign Act of 1971 to require political parties to choose between coordinated and independent expenditures during the post-nomination, pre-election period and to prohibit persons "17 years old or younger" from contributing to candidates or political parties.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
2003	Blakely v. Washington, 542 U.S. 296 (2004)	Scalia, Antonin	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Sixth Amendment

Constitutional Clause(s) Invoked: Right to Trial by Jury

Description of Unconstitutional Provision(s): Wash. Rev. Code. Ann. § 9.94A.120(2) (2000): Washington statute allowing judges to impose higher sentences if they found substantial and compelling reasons justified upward departure.

2002	Virginia v. Black, 538 U.S. 343 (2003)	O'Connor, Sandra Day	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Va. Code Ann. § 18.2-423 (1996): Virginia statute banning cross burning with "an intent to intimidate a person or group of persons."

2002	Gratz v. Bollinger, 539 U.S. 244 (2003)	Rehnquist, William H.	Civil Rights; Education	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): University of Michigan's undergraduate admissions policy awarding points based on applicant's race.

2002	American Insurance Ass'n v. Garamendi, 539 U.S. 396 (2003)	Souter, David H.	Insurance	State & Local

Constitutional Provision(s) Invoked: Article II

Constitutional Clause(s) Invoked: Vesting Clause

Description of Unconstitutional Provision(s): Cal. Ins. Code Ann. §§ 13800-13807 (West Cum. Supp. 2003): California's Holocaust Victim Insurance Relief Act of 1999 requiring insurers doing business in the state to disclose insurance policies issued "to persons in Europe, which were in effect between 1920 and 1945."

2002	Lawrence v. Texas, 539 U.S. 558 (2003)	Kennedy, Anthony M.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Tex. Penal Code Ann. § 21.06(a) (2003): Texas statute criminalizing "deviate sexual intercourse with another individual of the same sex."

2002	Stogner v. California, 539 U.S. 607 (2003)	Breyer, Stephen G.	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Ex Post Facto Clause

Description of Unconstitutional Provision(s): Cal. Penal Code Ann. § 803(g)(3)(A) (West Supp. 2003): California statute allowing prosecution of certain crimes after the previously applicable period of limitations for those crimes had expired.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
2001	Ashcroft, v. Free Speech Coalition, 535 U.S. 234 (2002)	KENNEDY, ANTHONY M.	Advertising, Publishing, & Communications	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 18 U.S.C. § 2256(8)(B), (D): Two provisions of the Child Pornography Prevention Act of 1996 extending the federal prohibition against child pornography to sexually explicit images that appear to depict minors but are "virtual" pornography that do not involve a child in the production process.

2001	Thompson v. Western States Medical Center, 535 U.S. 357 (2002)	O'CONNOR, SANDRA DAY	Advertising, Publishing, & Communications; Food & Drug	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 21 U.S.C. § 353a: Section 503A of the Food and Drug Administration Modernization Act of 1997 exempting "compounded drugs" from the Food and Drug Administration's standard drug approval requirements if they refrain from advertising or promoting particular compounded drugs.

2001	Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2001)	STEVENS, JOHN PAUL	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Stratton, Ohio, Ordinance No. 1998-5: Village ordinance prohibiting people from entering private residential property to promote a cause without a permit.

2001	Atkins v. Virginia, 536 U.S. 304 (2002)	STEVENS, JOHN PAUL	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Eighth Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Virginia law failing to exempt mentally retarded defendants from imposition of death penalty.

2001	Ring v. Arizona, 536 U.S. 584 (2002)	GINSBURG, RUTH BADER	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Sixth Amendment

Constitutional Clause(s) Invoked: Right to Trial by Jury

Description of Unconstitutional Provision(s): Ariz. Rev. Stat. Ann. § 13-703, 13-1105(C): Arizona statute requiring judge to make certain factual findings before sentencing criminal defendant to death.

2001	Republican Party of Minnesota v. White, 536 U.S. 765 (2002)	SCALIA, ANTONIN	Civil Rights; Legal Ethics	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000): Minnesota's Code of Judicial Conduct prohibiting judicial candidates from announcing their "views on disputed legal or political issues."

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
2000	City of Indianapolis v. Edmond, 531 U.S. 32 (2000)	O'Connor, Sandra Day	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourth Amendment

Constitutional Clause(s) Invoked: Search & Seizure Clause

Description of Unconstitutional Provision(s): Indiana Police Department written directives implementing a highway checkpoint program that stopped vehicles to search for illegal narcotics.

2000	Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001)	Rehnquist, William H.	Labor & Employment	Federal

Constitutional Provision(s) Invoked: Eleventh Amendment; Fourteenth Amendment, Section 5

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): 42 U.S.C. §§ 12112–17: Provision of the Americans with Disabilities Act of 1990 subjecting states to suits in federal courts brought by state employees to collect money damages for the state's failure to make reasonable accommodations for qualified individuals with disabilities.

2000	Cook v. Gralike, 531 U.S. 510 (2001)	Stevens, John Paul	Elections	State & Local

Constitutional Provision(s) Invoked: Article I, Section 4, Clause 1

Constitutional Clause(s) Invoked: Elections Clause

Description of Unconstitutional Provision(s): Mo. Const., Art. VIII, § 17(1): Provision of Missouri Constitution instructing Members of Missouri's congressional delegation to use their powers to pass Congressional Term Limits Amendment, and requiring election ballots to indicate whether candidates supported that proposed amendment.

2000	Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001)	Kennedy, Anthony M.	Government Operations; Pensions & Benefits	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Omnibus Consolidated Rescissions and Appropriations Act of 1996 § 504, 110 Stat. 1321–53: Provisions of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 prohibiting funding of any organization "that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system."

2000	United States v. Hatter, 532 U.S. 557 (2001)	Breyer, Stephen G.	Government Operations; Taxes	Federal

Constitutional Provision(s) Invoked: Article III, Section 1

Constitutional Clause(s) Invoked: Compensation Clause

Description of Unconstitutional Provision(s): 42 U.S.C. § 410(a)(5)(E): Retroactively extending the Social Security law to require then-sitting judges to join the Social Security System and pay Social Security taxes.

2000	Ferguson v. City of Charleston, 532 U.S. 67 (2001)	Stevens, John Paul	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourth Amendment

Constitutional Clause(s) Invoked: Search & Seizure Clause

Description of Unconstitutional Provision(s): State hospital's policy of testing all pregnant patients' urine for drugs and referring women who tested positive for cocaine to local law enforcement.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
2000	United States v. United Foods, Inc., 533 U.S. 405 (2001)	KENNEDY, ANTHONY M.	Food & Drug	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 7 U.S.C. §§ 6101 *et seq.*: Provisions of the Mushroom Promotion, Research, and Consumer Information Act imposing mandatory assessments on mushroom handlers for the purpose of funding generic advertising to promote mushroom sales.

2000	Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)	O'CONNOR, SANDRA DAY	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 940 Code of Mass. Regs. §§ 21.04(5)(a)-(b), 22.06(5)(a)-(b) (2000): Massachusetts regulations banning outdoor adverting and restricting retail advertising of smokeless tobacco and cigars within a 1,000-foot radius of a school or playground.

2000	Good News Club, v. Milford Central School, 533 U.S. 98 (2001)	THOMAS, CLARENCE	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): School policy opening school to public use, but prohibiting use of school for religious purposes.

1999	Hunt-Wesson, Inc. v. Franchise Tax Board of California, 528 U.S. 458 (2000)	BREYER, STEPHEN G.	Taxes; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I; Fourteenth Amendment

Constitutional Clause(s) Invoked: Commerce Clause; Due Process Clause

Description of Unconstitutional Provision(s): Cal. Rev. & Tax Code Ann. § 24344 (West 1979): California interest-deduction-offset provision of California corporate income tax scheme, which allowed multistate corporations to deduct interest expenses when calculating California share of taxable income only to the extent that the interest expenses exceeded certain out-of-state income from unrelated business activity.

1999	Rice v. Cayetano, 528 U.S. 495 (2000)	KENNEDY, ANTHONY M.	Elections	State & Local

Constitutional Provision(s) Invoked: Fifteenth Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Haw. Const., Art. XII, § 5: Provision of Hawaii Constitution that limited the right to vote in statewide elections for Office of Hawaiian Affairs trustees to persons whose ancestry qualified them as "Hawaiian" or "native Hawaiian."

1999	Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)	O'CONNOR, SANDRA DAY	Labor & Employment	Federal

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 5

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): 29 U.S.C. §§ 216(b), 630(b): Fair Labor Standards Act Amendments of 1974 amending the Age Discrimination in Employment Act to subject states to damages actions in federal courts.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1999	Carmell v. Texas, 529 U.S. 513 (2000)	Stevens, John Paul	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10

Constitutional Clause(s) Invoked: Ex Post Facto Clause

Description of Unconstitutional Provision(s): Tex. Code Crim. Proc. Ann., Art. 38.07 (Vernon 1983): Texas statute that reduced minimum evidence required for conviction of certain sexual offenses from the victim's testimony plus other corroborating evidence to the victim's testimony alone.

1999	United States v. Morrison, 529 U.S. 598 (2000)	Rehnquist, William H.	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 5

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Provision of the Violence Against Women Act creating a federal civil remedy for victims of gender-motivated violence.

1999	United States v. Playboy Entertainment Group, 529 U.S. 803 (2000)	Kennedy, Anthony M.	Advertising, Publishing, & Communications	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Section 505 of the Telecommunications Act of 1996, 47 U.S.C. § 561: A federal statute requiring cable television operators that provide channels "primarily dedicated to sexually-oriented programming" either to "fully scramble or otherwise fully block" those channels or to limit their transmission to hours between 10 p.m. and 6 a.m.

1999	Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000)	Stevens, John Paul	Education; Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Establishment Clause

Description of Unconstitutional Provision(s): School district policy that allowed students to initiate and lead prayer before home football games.

1999	Dickerson v. United States, 530 U.S. 428 (2000)	Rehnquist, William H.	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Self-Incrimination Clause

Description of Unconstitutional Provision(s): 18 U.S.C. § 3501: Provision of the Omnibus Crime Control and Safe Streets Act of 1968 purporting to reinstate the voluntariness principle that had governed the constitutionality of custodial interrogations prior to the Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966).

1999	Apprendi v. New Jersey, 530 U.S. 466 (2000)	Stevens, John Paul	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 2000): New Jersey hate crime statute that provided for an enhanced sentence if a trial judge found by a preponderance of the evidence that the defendant acted with the purpose to intimidate a person or group because of their race, gender, handicap, religion, sexual orientation, or ethnicity.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1999	California Democratic Party v. Jones, 530 U.S. 567 (2000)	Scalia, Antonin	Elections	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Cal. Elec. Code § 2001 (Supp. 2000): California law that imposed a blanket format on political parties' primary elections, allowing voters to vote for any candidate regardless of party affiliation.

1999	Troxel v. Granville, 530 U.S. 57 (2000)	O'Connor, Sandra Day	Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Wash. Rev. Code § 26.10.160(3): Washington statute that authorized courts to grant visitation rights to any person who petitioned for them whenever the visitation would serve a child's best interests, notwithstanding parental objection and without requiring a showing that the visitation would prevent harm or potential harm to the child.

1999	Stenberg v. Carhart, 530 U.S. 914 (2000)	Breyer, Stephen G.	Healthcare; Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Neb. Rev. Stat. Ann. § 28-328(1) (Supp. 1999): A Nebraska statute that banned "partial birth abortion" unless necessary to save the life of the mother.

1998	Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182 (1999)	Ginsburg, Ruth Bader	Elections	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Colo. Rev. Stat. §§ 1-40-112(1), (2); 1-40-121: Colorado statute that limited participation in the state's initiative and referendum petition process by requiring (i) that petition circulators be registered voters; (ii) that petition circulators wear identification badges stating their names; and (iii) that initiative proponents report, upon filing a petition and on a monthly basis, the names and addresses of all paid circulators and the amount paid to each circulator.

1998	South Central Bell Telephone Co. v. Alabama, 526 U.S. 160 (1999)	Breyer, Stephen G.	Taxes; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Ala. Const., art. XII, § 229; Ala. Code § 40-14-40 (1993); Ala. Const., art. XII, § 232; Ala. Code § 40-14-41(a) (Supp. 1998); Ala. Code §§ 40-14-41(b)(1)–(5), (c): Alabama franchise tax statutory scheme that treated out-of-state firms unfavorably by requiring them to pay tax based on the amount of capital each firm employed in the state, whereas in-state firms paid tax based on the par value of their stock.

1998	City of Chicago v. Morales, 527 U.S. 41 (1999)	Stevens, John Paul	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Chicago Municipal Code § 8-4-015 (added June 17, 1992): Chicago Gang Congregation Ordinance that prohibited "criminal street gang members" from "loitering" with one another or with other persons in any public place.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1998	Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999)	Rehnquist, William H.	Intellectual Property	Federal

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 5

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): 35 U.S.C. §§ 271h, 296(a): Patent Remedy Act providing that the entities subject to a patent infringement suit under 35 U.S.C. § 271(a) include states, state instrumentalities, and state officers and employees.

1998	College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999)	Scalia, Antonin	Intellectual Property	Federal

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 5

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): 15 U.S.C. § 1125(a): Trademark Remedy Clarification Act subjecting States to suits brought under § 43(a) of the Lanham Act for false and misleading advertising.

1998	Alden v. Maine, 527 U.S. 706 (1999)	Kennedy, Anthony M.	Labor & Employment	Federal

Constitutional Provision(s) Invoked: Eleventh Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): 29 U.S.C. §§ 216(b), 203(x): Fair Labor Standards Amendments of 1974 subjecting non-consenting states to suits for damages brought by employees in state courts.

1997	Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287 (1998)	O'Connor, Sandra Day	Family Law; Taxes	State & Local

Constitutional Provision(s) Invoked: Article IV, Section 2

Constitutional Clause(s) Invoked: Privileges & Immunities Clause

Description of Unconstitutional Provision(s): N.Y. Tax Law § 631(b)(6): New York statute that denied nonresidents, but not residents, an income tax deduction for alimony payments.

1997	Clinton v. City of New York, 524 U.S. 417 (1998)	Stevens, John Paul	Government Operations	Federal

Constitutional Provision(s) Invoked: Article I, Section 7, Clause 2

Constitutional Clause(s) Invoked: Presentment Clause

Description of Unconstitutional Provision(s): 2 U.S.C. §§ 691 *et seq.*: Line Item Veto Act giving the President the authority to "cancel in whole" three types of provisions that have been signed into law.

1996	M. L. B. v. S. L. J., 519 U.S. 102 (1996)	Ginsburg, Ruth Bader	Family Law; Civil Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): Miss. Code Ann. § 11-51-29: Mississippi statute that conditioned the right to appeal a trial court decree terminating parental rights on the litigant's ability to prepay costs

1996	Babbitt v. Youpee, 519 U.S. 234 (1997)	Ginsburg, Ruth Bader	Federal Indian Law	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Takings Clause

Description of Unconstitutional Provision(s): 25 U.S.C. § 2206: Section 207 of the Indian Land Consolidation Act providing that certain small interests in Indian land escheat to the tribe upon death of the owner.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1996	Lynce v. Mathis, 519 U.S. 433 (1997)	Stevens, John Paul	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10

Constitutional Clause(s) Invoked: Ex Post Facto Clause

Description of Unconstitutional Provision(s): Fla. Stat. § 944.277: Florida statute that retroactively cancelled early release credits awarded to prisoners to alleviate prison overcrowding.

1996	Chandler v. Miller, 520 U.S. 305 (1997)	Ginsburg, Ruth Bader	Elections	State & Local

Constitutional Provision(s) Invoked: Fourth Amendment

Constitutional Clause(s) Invoked: Search & Seizure Clause

Description of Unconstitutional Provision(s): Ga. Code Ann. § 21-2—140 (1993): Georgia statute that required candidates for state office to certify that they had taken and passed a drug test.

1996	Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997)	Stevens, John Paul	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Me. Rev. Stat. tit. 36, § 652(1)(A): Maine property tax exemption statute for charitable institutions, which gave more favorable treatment to institutions operated principally for the benefit of state residents.

1996	City of Boerne v. Flores, 521 U.S. 507 (1997)	Kennedy, Anthony M.	Civil Rights	Federal

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 5

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): 42 U.S.C. §§ 2000bb *et seq.*: Provision of Religious Freedom Restoration Act directing the use of the compelling interest test to determine the validity of laws of general applicability that substantially burden the free exercise of religion.

1996	Reno v. American Civil Liberties Union, 521 U.S. 844 (1997)	Stevens, John Paul	Advertising, Publishing, & Communications	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 47 U.S.C. § 223(a), (d): Provisions of the Communications Decency Act of 1996 prohibiting knowing transmission on the Internet of obscene or indecent messages to any recipient under 18 years of age and the knowing sending or displaying of patently offensive messages in a manner that is available to anyone under 18 years of age.

1996	Printz v. United States, 521 U.S. 898 (1997)	Scalia, Antonin	Civil Rights	Federal

Constitutional Provision(s) Invoked: Tenth Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): 18 U.S.C. § 922(s): Provisions of the Brady Handgun Violence Prevention Act requiring state and local law enforcement officers to conduct background checks on prospective handgun purchasers.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1995	Fulton Corp. v. Faulkner, 516 U.S. 325 (1996)	Souter, David H.	Taxes; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): N.C. Gen. Stat. §§ 105-203, 105-130.4(i): North Carolina statute that levied an "intangibles tax" on the fair market value of corporate stock owned by state residents to an extent inversely proportional to the corporation's exposure to North Carolina income tax.

1995	Cooper v. Oklahoma, 517 U.S. 348 (1996)	Stevens, John Paul	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Okla. Stat. tit. 22, § 1175.4(B) (1991): Oklahoma statute that established a presumption of a criminal defendant's competence to stand trial unless the defendant proved his or her incompetence by clear and convincing evidence.

1995	Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)	Rehnquist, William H.	Federal Indian Law	Federal

Constitutional Provision(s) Invoked: Eleventh Amendment

Constitutional Clause(s) Invoked: Indian Commerce Clause

Description of Unconstitutional Provision(s): 25 U.S.C. § 2710(d)(7): Indian Gaming Regulatory Act authorizing an Indian tribe to sue a State in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact.

1995	44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996)	Stevens, John Paul	Trade; Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): R.I. Gen. Laws §§ 3-8-7, 3-8-8.1 (1987), Regulation 32 of the Rhode Island Liquor Control Administration: Rhode Island statutes and regulation that banned advertisement of retail liquor prices except at the place of sale.

1995	Romer v. Evans, 517 U.S. 620 (1996)	Kennedy, Anthony M.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Amendment 2, Colo. Const., Art. II, § 30b: Amendment to the Colorado Constitution that prohibited all legislative, executive, or judicial action, at any level of state or local government, designed to protect homosexual persons from discrimination.

1995	Shaw v. Hunt, 517 U.S. 899 (1996)	Rehnquist, William H.	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): North Carolina congressional redistricting plan that assigned voters to districts on the basis of race.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1995	Bush v. Vera, 517 U.S. 952 (1996)	O'Connor, Sandra Day	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Texas congressional redistricting plan, promulgated after the 1990 census showed a population increase that entitled the state to three additional seats in Congress, that used race as the predominant factor in drawing new district lines.

1995	United States v. Virginia, 518 U.S. 515 (1996)	Ginsburg, Ruth Bader	Education; Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Male-only admissions policy of the Virginia Military Institute, a state institution.

1995	Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission, 518 U.S. 727 (1996)	Breyer, Stephen G.	Advertising, Publishing, & Communications	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 47 U.S.C. §§ 532(j), (k): Provisions of the Cable Television Consumer Protection and Competition Act of 1992 requiring cable operators to segregate and block indecent programming on leased access channels and permitting a cable operator to prevent transmission of "sexually explicit" programming on public access channels.

1994	Ed Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995)	Scalia, Antonin	Securities	Federal

Constitutional Provision(s) Invoked: Article III, Section 1; Fifth Amendment

Constitutional Clause(s) Invoked: Separation of Powers Doctrine; Due Process

Description of Unconstitutional Provision(s): 15 U.S.C. § 78aa-1 (b): Section 27A(b) of the Securities Exchange Act of 1934 providing reinstatement of any action previously dismissed as time barred under certain circumstances.

1994	Mcintyre v. Ohio Elections Commission, 514 U.S. 334 (1995)	Stevens, John Paul	Elections; Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Ohio Rev. Code Ann. § 3599.09(A): Ohio statute prohibiting the distribution of anonymous campaign literature.

1994	Rubin v. Coors Brewing Company, 514 U.S. 476 (1995)	Thomas, Clarence	Food & Drug	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 27 U.S.C. § 205(e)(2): Section 5(e)(2) of the Federal Alcohol Administration Act prohibiting the display of alcohol content on beer labels.

1994	United States v. Lopez, 514 U.S. 549 (1995)	Rehnquist, William H.	Civil Rights	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): 18 U.S.C. § 922(q)(1)(A): Gun-Free School Zones Act of 1990 making it a criminal offense to knowingly possess a firearm within a school zone.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1994	United States Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)	Stevens, John Paul	Elections	State & Local

Constitutional Provision(s) Invoked: Article I, Section 2, Clause 2; Article I, Section 3, Clause 3

Constitutional Clause(s) Invoked: Qualifications for Membership in Congress Clauses

Description of Unconstitutional Provision(s): Ark. Const. Amendment 73, § 3: Amendment to the Arkansas Constitution that prohibited placement of the name of a candidate for U.S. Congress on the general election ballot if the candidate had already served three terms in the U.S. House of Representatives or two terms in the U.S. Senate.

1994	Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995)	Kennedy, Anthony M.	Civil Rights; Education	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): University of Virginia guideline that prohibited use of student activity funds to pay printing costs of student publications that primarily promoted a religious viewpoint.

1994	Miller v. Johnson, 515 U.S. 900 (1995)	Kennedy, Anthony M.	Civil Rights; Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Georgia congressional redistricting plan that assigned voters on the basis of race to create three majority-black districts.

1993	C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994)	Kennedy, Anthony M.	Environmental	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Clarkstown, N.Y., Local Laws No. 9 (1990): Town flow control ordinance that required all nonhazardous solid waste within the town to be processed at the town transfer station.

1993	Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994)	Stevens, John Paul	Criminal Law & Procedure; Taxes	State & Local

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Double Jeopardy Clause

Description of Unconstitutional Provision(s): Mont. Code Ann. § 15-25-111 (1987): Montana statute that imposed a tax, to be assessed after the imposition of criminal penalties, on the possession and storage of illegal drugs.

1993	Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon, 511 U.S. 93 (1994)	Thomas, Clarence	Environmental	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Ore. Rev. Stat. § 459.297(1): Oregon statute imposing a surcharge on the in-state disposal of waste generated out of state.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1993	West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994)	Stevens, John Paul	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Massachusetts milk pricing order that imposed an assessment on all milk sold to Massachusetts dealers and provided for the proceeds to be distributed amongst in-state milk producers.

1993	Honda Motor Co. v. Oberg, 512 U.S. 415 (1994)	Stevens, John Paul	Civil Procedure; Torts	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Or. Const. art. VII, § 3: Amendment of Oregon Constitution that prohibited judicial review of the size of a jury's punitive damages award unless there was no evidence to support the verdict.

1993	City of Ladue v. Gilleo, 512 U.S. 43 (1994)	Stevens, John Paul	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Ladue, Mo., Ordinance 35: City ordinance that banned all residential signs unless they fell within one of ten enumerated exemptions, which included exemptions for "for sale" signs and "municipal signs."

1993	Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994)	Souter, David H.	Education; Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Establishment Clause

Description of Unconstitutional Provision(s): 1989 N.Y. Laws, ch. 748: New York statute creating a separate school district along the village lines of a religious enclave.

1992	City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993)	Stevens, John Paul	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Cincinnati, Ohio, Municipal Code § 714-23: City ordinance that banned distribution of commercial handbills on public property.

1992	Edenfield v. Fane, 507 U.S. 761 (1993)	Kennedy, Anthony M.	Trade	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Fla. Admin. Code § 21A-24.002(2)(c) (1992): Florida regulation that prohibited certified public accountants from conducting direct, in-person, uninvited solicitation to obtain new clients.

1992	El Vocero De Puerto Rico (Caribbean International News Corp.) v. Puerto Rico, 508 U.S. 147 (1993)	Per Curiam	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): P.R. Laws Ann., Tit. 34, App. II, Rule 23(c): Puerto Rico rule of criminal procedure that entitled defendants to a private preliminary hearing.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1992	Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993)	White, Byron R.	Civil Rights; Education	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): New York Educ. Law § 414 (McKinney 1988 and Supp. 1993); Board of Center Moriches Union Free School District Rule 7: New York statute and school board regulation that prohibit the use of school grounds for religious purposes.

1992	Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)	Kennedy, Anthony M.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Exercise Clause

Description of Unconstitutional Provision(s): Hialeh, Fla. Ordinances 87-40, 87-52, 87-71, 87-72: City ordinances and resolutions that prohibited ritualistic animal sacrifices and also prohibited animal slaughter outside of zoned slaughterhouses, but provided an exemption for the slaughter of small numbers of hogs or cattle.

1991	Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105 (1991)	O'Connor, Sandra Day	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): N.Y. Exec. Law § 632-a: New York law requiring that an accused or convicted criminal's income from works describing his crime be made available, via deposit in an escrow account, to victims and creditors.

1991	Norman v. Reed, 502 U.S. 279 (1992)	Souter, David H.	Elections	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): Ill. Rev. Stat., ch. 46, §§ 10-2, 10-5 (1989): Illinois election laws that prohibited new political parties in a particular district from using the name of a party already established in another district, notwithstanding any authorization from the established party, and that disqualified all candidates of a new political party in all districts if the party failed to obtain 25,000 signatures in each district in which it offered candidates.

1991	Wyoming v. Oklahoma, 502 U.S. 437 (1992)	White, Byron R.	Energy & Utilities	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Okla. Stat., Tit. 45, §§ 939, 939.1 (Supp. 1988): Oklahoma statute requiring that at least ten percent of the coal burned by Oklahoma coal-powered electricity plants generating power for sale in that state to be Oklahoma-mined coal.

1991	Quill Corp. v. Heitkamp, 504 U.S. 298 (1992)	Stevens, John Paul	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): N.D. Cent. Code § 57-40.2-01(6) (Supp. 1991); N.D. Admin. Code § 81-04.1-01-03.1 (1988): North Dakota statute and regulation that impose sales tax collection requirement on out-of-state mail-order companies by extending the collection requirement to reach any retailer who placed three or more advertisements in the state within a 12-month period.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1991	Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992)	White, Byron R.	Environmental	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Ala. Code § 22-30B-2(b) (1990 and Supp. 1991): Alabama statute that imposed additional hazardous waste-disposal fee on all hazardous waste generated outside of Alabama.

1991	Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 504 U.S. 353 (1992)	Stevens, John Paul	Environmental	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Mich. Comp. Laws §§ 299.413a, 299.430(2) (1991): Michigan waste import restrictions that prohibited landfill operators from accepting solid waste generated in another county, state, or country unless the solid waste management plan of the county in which the landfill was located explicitly authorized the acceptance of such waste.

1991	Foucha v. Louisiana, 504 U.S. 71 (1992)	White, Byron R.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): La. Code Crim. Proc. Ann., Art. 657 (West 1991): Louisiana statute that permitted indefinite detention of criminal defendants found not guilty by reason of insanity who, although not mentally ill, failed to prove that they posed no danger to themselves or others.

1991	Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992)	Blackmun, Harry A.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Forsyth County (Atlanta, GA) Ordinance 34 (1987): County assembly and parade ordinance that establish a permit requirement and allow county administrator to adjust permit fee according to the estimated cost of maintaining public order.

1991	New York v. United States, 505 U.S. 144 (1992)	O'Connor, Sandra Day	Energy & Utilities	Federal

Constitutional Provision(s) Invoked: Tenth Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): 42 U.S.C. §§ 2021b *et seq.*: Take-title provision of the Low-Level Radioactive Waste Policy Act of 1985 providing various incentives to encourage the States to comply with their statutory obligation to provide for the disposal of radioactive waste generated within their borders.

1991	R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)	Scalia, Antonin	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): St. Paul, Minn., Legis. Code § 292.02 (1990): St. Paul Bias–Motivated Crime Ordinance that prohibited the placement on public or private property of a symbol that one knew or had reason to know would arouse anger, alarm, or resentment on the basis of race, color, creed, religion, or gender.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1991	Kraft General Foods, Inc. v. Iowa Department of Revenue & Finance, 505 U.S. 71 (1992)	Stevens, John Paul	Taxes; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8

Constitutional Clause(s) Invoked: Foreign Commerce Clause

Description of Unconstitutional Provision(s): Iowa Code § 422.35 (1981): Iowa business tax statute that taxed a corporation's dividends from foreign but not domestic subsidiaries.

1991	Lee v. International Society for Krishna Consciousness, Inc., 505 U.S. 830 (1992)	Per Curiam	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Port Authority of New York and New Jersey restriction that banned the distribution of literature in airport terminals.

1991	Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)	O'Connor, Sandra Day; Kennedy, Anthony M.; Souter, David H.	Healthcare	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 18 Pa. Cons. Stat. §§ 3209 (1990): Spousal notification provision of the Pennsylvania Abortion Control Act, prohibiting abortion for a married woman in most circumstances unless she signed a statement indicating that she had notified her husband of her intent to abort.

1990	Connecticut v. Doehr, 501 U.S. 1 (1991)	White, Byron R.	Real Property; Civil Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Conn. Gen. Stat. §52-278e(a)(1)(1991): Connecticut prejudgment remedy provision that authorized prejudgment attachment of real estate without notice or a hearing and without requiring a showing of exigent circumstances.

1990	Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991)	Stevens, John Paul	Transportation	Federal

Constitutional Provision(s) Invoked: Article I, Section 7; Article II

Constitutional Clause(s) Invoked: Bicameralism & Presentment Requirements; Vesting Clause

Description of Unconstitutional Provision(s): 49 U.S.C. §§ 2451–61: Metropolitan Washington Airports Act of 1986 authorizing the transfer of two major airports from the federal government to an airport authority, but conditioning the transfer on the creation of a board composed of nine members of Congress vested with veto power over the airport authority's decisions.

1989	Butterworth v. Smith, 494 U.S. 624 (1990)	Rehnquist, William H.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Fla. Stat. § 905.27: Florida statute that prohibited grand jury witnesses from ever disclosing testimony given to the grand jury, even after the end of the term of the grand jury.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1989	United States v. Eichman, 496 U.S. 310 (1990)	Brennan, William J.	Civil Rights	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 18 U.S.C. § 700: Flag Protection Act of 1989 criminalizing the burning and other acts of desecration of the flag of the United States.

1989	Peel v. Attorney Registration & Disciplinary Commission of Illinois, 496 U.S. 91 (1990)	Stevens, John Paul; Marshall, Thurgood	Civil Rights; Legal Ethics	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility: Provision of the Illinois Code of Professional Responsibility that prohibited lawyers from holding themselves out as being "certified" or being a "specialist" in a particular area of law.

1989	Hodgson v. Minnesota, 497 U.S. 417 (1990)	Stevens, John Paul	Healthcare; Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Minn. Stat. § 144.343(2): Minnesota parental notice statute, which in most circumstances prohibited abortions for women under 18 years of age unless both of her parents had been notified.

1988	City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989)	O'Connor, Sandra Day	Civil Rights; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Richmond, Va., City Code, § 12-156(a) (1985): Minority Business Utilization Plan of Richmond City, Virginia, requiring prime contractors awarded construction contracts by the city to subcontract at least 30% of the contract value to minority businesses.

1988	Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989)	Brennan, William J.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Establishment Clause

Description of Unconstitutional Provision(s): Tex. Tax Code Ann. § 151.312 (1982): Texas statute that exempted from sales and use taxes periodicals published or distributed by, and advancing the tenets of, a religious faith.

1988	Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989)	Marshall, Thurgood	Education; Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): California Elections Code Annotated §§ 11702, 29430 (West 1977): Sections of California Elections Code that banned official governing bodies of political parties from endorsing candidates in primaries and imposed restrictions on the bodies' internal governance procedures, organization, and composition.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1988	Barnard v. Thorstenn, 489 U.S. 546 (1989)	KENNEDY, ANTHONY M.	Trade	State & Local

Constitutional Provision(s) Invoked: Article IV, Section 2, Clause 1

Constitutional Clause(s) Invoked: Privileges & Immunities Clause

Description of Unconstitutional Provision(s): Local Rule 56(b)(4)-(5) of the District Court of the Virgin Islands: Provisions of Virgin Islands bar admission rules requiring at least one year of residence in the Virgin Islands and intention to continue to reside and practice in the Virgin Islands after admission.

1988	Board of Estimate of New York v. Morris, 489 U.S. 688 (1989)	WHITE, BYRON R.	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Section 61 of the New York City Charter (1986): Provision of New York City Charter establishing that the Board of Estimate would consist of three members elected citywide, along with the elected presidents of each of the five New York City boroughs.

1988	Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989)	KENNEDY, ANTHONY M.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article VI, Section 1, Clause 2

Constitutional Clause(s) Invoked: Supremacy Clause

Description of Unconstitutional Provision(s): Mich. Comp. Laws Ann. § 206.30(1)(f) (Supp. 1988): Michigan statute that levied income tax on retirement benefits paid by the Federal Government but not by the government of the state of Michigan or its political subdivisions.

1988	Healy v. Beer Institute, 491 U.S. 324 (1989)	BLACKMUN, HARRY A.	Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Conn. Gen. Stat. Ann. §§ 30-63 (1975 & Supp. 1982): Connecticut's beer-price-affirmation statute, requiring out-of-state beer shippers to affirm that prices, at the moment posted, of products sold to Connecticut wholesalers did not exceed prices for products sold in bordering states.

1988	Quinn v. Millsap, 491 U.S. 95 (1989)	BLACKMUN, HARRY A.	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Mo. Const., art. VI, § 30: Provision of the Missouri Constitution establishing a land-ownership requirement for membership on board charged with drafting plans to reorganize the governments of the city and county of St. Louis.

1988	Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115 (1989)	WHITE, BYRON R.	Advertising, Publishing, & Communications; Business & Corporate Law	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 47 U.S.C. § 223(b): Section 223(b) of the Communications Act of 1934 banning indecent and obscene interstate commercial telephone messages, commonly known as "dial-a-porn" services.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1987	Boos v. Barry, 485 U.S. 312 (1988)	O'Connor, Sandra Day	Real Property	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): District of Columbia Code § 22-1115: A District of Columbia ordinance making it unlawful, within 500 feet of a foreign embassy, either to display any sign that tends to bring the foreign government into "public odium" or "public disrepute."

1987	Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988)	O'Connor, Sandra Day	Estates, Gifts, & Trusts; Civil Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Okla. Stat., Tit. 58, § 333 (1981): A provision of Oklahoma's probate laws that require claims "arising upon a contract" generally to be presented to the executor or executrix of an estate within 2 months of the publication of a notice advising creditors of the commencement of probate proceedings.

1987	Hicks v. Feiock, 485 U.S. 624 (1988)	White, Byron R.	Criminal Law & Procedure; Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Cal. Civ. Proc. Code Ann. § 1209.5 (West 1982): A California law governing the payment of child support presumes that a parent is financially capable of paying support, shifting to the defendant the burden of proving inability to comply with a payment order in a criminal contempt proceeding.

1987	New Energy Company of Indiana v. Limbach, 486 U.S. 269 (1988)	Scalia, Antonin	Taxes; Energy & Utilities	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Ohio Rev. Code Ann. § 5735.145(B) (1986): An Ohio law that provides a tax credit against the Ohio motor vehicle fuel sales tax for each gallon of ethanol sold by fuel dealers, but only if the ethanol is produced in Ohio or, if produced in another State, to the extent that State grants similar tax advantages to ethanol produced in Ohio.

1987	Maynard v. Cartwright, 486 U.S. 356 (1988)	White, Byron R.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Eighth Amendment

Constitutional Clause(s) Invoked: Cruel & Unusual Punishment Clause

Description of Unconstitutional Provision(s): Okla. Stat., Tit. 21, §§ 701.12(2) & (4) (1981): Oklahoma's death penalty statute that allows for the imposition of the death penalty if the circumstances surrounding a murder were "especially heinous, atrocious, or cruel."

1987	Meyer v. Grant, 486 U.S. 414 (1988)	Stevens, John Paul	Elections	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Colo. Rev. Stat. § 1-40-110 (1980): A Colorado law that allows a proposed state constitutional amendment to be placed on a general election ballot if its proponents can obtain the signatures of at least five percent of the total number of qualified voters on an "initiative petition" within a 6-month period, but makes it a felony to pay petition circulators.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1987	Clark v. Jeter, 486 U.S. 456 (1988)	O'Connor, Sandra Day	Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): 42 Pa. Cons. Stat. § 6704(b) (1982) (repealed 1985): A Pennsylvania law requiring an illegitimate child prove paternity within six years of birth before seeking support from his or her father.

1987	Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988)	Brennan, William J.	Legal Ethics	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Ky. Supreme Court R. 3.135(5)(b)(i), *replaced by* ABA Model Rule of Professional Conduct 7.3 (1984): A Kentucky Supreme Court Rule that prohibits the targeted, direct-mail solicitation by lawyers for pecuniary gain, without a particularized finding that the solicitation is false or misleading.

1987	City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988)	Brennan, William J.	Real Property	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): § 901.181, Codified Ordinances, City of Lakewood, Ohio (1984): An ordinance of the city of Lakewood, Ohio that mayor unfettered discretion to deny permit for placing newspaper dispensing devices on public property.

1987	Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988)	Kennedy, Anthony M.	Civil Procedure; Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Ohio Rev. Code Ann. § 2305.15 (Supp. 1987): An Ohio law that imposes a 4-year statute of limitations in actions for breach of contract or fraud, but tolls the statute for any period that a person or corporation is not "present" in the state.

1987	Coy v. Iowa, 487 U.S. 1012 (1988)	Scalia, Antonin	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Sixth Amendment

Constitutional Clause(s) Invoked: Confrontation Clause

Description of Unconstitutional Provision(s): Act of May 23, 1985, § 6, 1985 Iowa Acts 338, now codified at Iowa Code § 910A.14 (1987): An Iowa law that allows a complaining witness to testify either via closed-circuit television or behind a screen.

1987	Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988)	Kennedy, Anthony M.	Legal Ethics	State & Local

Constitutional Provision(s) Invoked: Article IV, Section 2

Constitutional Clause(s) Invoked: Privileges & Immunities Clause

Description of Unconstitutional Provision(s): Virginia Supreme Court Rule 1A:1: A Virginia rule that conditions admission to the Virginia bar on a showing that the applicant is a permanent resident of Virginia.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1987	Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988)	Brennan, William J.	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): N.C. Gen. Stat. § 131C-17.2 (1986); N.C. Gen. Stat. § 131C-16.1(3) (1986); N.C. Gen. Stat. § 131C-6 (1986): North Carolina law that places various limitations on the solicitation of charitable contributions by professional fundraisers.

1986	Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986)	Marshall, Thurgood	Elections	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Freedom of Association

Description of Unconstitutional Provision(s): Portions of Conn. Gen. Stat. § 9-431 (1985): A Connecticut law that requires voters in any political party primary to be registered members of that party.

1986	324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987)	Powell, Lewis F.	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Twenty-First Amendment, Section 2

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): N.Y. Alco. Bev. Cont. Law, section 101-bb, (McKinney 1970 and Supp. 1986): A New York law requiring liquor retailers to charge at least 112 percent of the wholesaler's "posted" bottle price in effect at the time the retailer sells or offers to sell the item.

1986	Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987)	Marshall, Thurgood	Taxes	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Free Press Clause

Description of Unconstitutional Provision(s): Ark. Stat. Ann. §§ 84-1904(f),(j): An Arkansas law imposing a tax on receipts from sales of tangible personal property, but exempting newspapers and certain magazines.

1986	Hodel v. Irving, 481 U.S. 704 (1987)	O'Connor, Sandra Day	Federal Indian Law; Real Property	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Takings Clause

Description of Unconstitutional Provision(s): Pub. L. No. 97-459, 96 Stat. 2519: Section 207 of the Indian Land Consolidation Act of 1983 providing for escheat to tribes of fractionated interests in land representing less than 2% of a tract's total acreage.

1986	City of Houston v. Hill, 482 U.S. 451 (1987)	Brennan, William J.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Houston Code of Ordinances § 34-11(a): An ordinance of the city of Houston, Texas making it unlawful to "oppose, molest, abuse, or interrupt" police officer in performance of duty.

1986	Booth v. Maryland, 482 U.S. 496 (1987)	Powell, Lewis F.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Eighth Amendment

Constitutional Clause(s) Invoked: Cruel & Unusual Punishment Clause

Description of Unconstitutional Provision(s): Md. Ann. Code Art. 41, § 4-609(d) (1986): A Maryland statute that requires a presentence report in all felony cases (including capital murder) to include a victim impact statement (VIS), describing the effect of the crime on the victim and his family.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1986	Board of Airport Commissioners of Los Angeles v. Jews For Jesus, Inc., 482 U.S. 569 (1987)	O'Connor, Sandra Day	Transportation	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Board of Airport Commissioners Resolution No. 13787 (1983): A resolution of the Los Angeles, California Board of Airport Commissioners banning all "First Amendment activities" within the "Central Terminal Area" at Los Angeles International Airport.

1986	Edwards v. Aguillard, 482 U.S. 578 (1987)	Brennan, William J.	Education	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Establishment Clause

Description of Unconstitutional Provision(s): La. Rev. Stat. Ann. §§ 17:286.1–17:286.7 (West 1982): A Louisiana law forbidding the teaching of the theory of evolution in public elementary and secondary schools unless accompanied by instruction in the theory of "creation science."

1986	Turner v. Safley, 482 U.S. 78 (1987)	O'Connor, Sandra Day	Criminal Law & Procedure; Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): A regulation of the Missouri Department of Corrections that permits an inmate to marry only with the prison superintendent's permission, which can be given only when there are "compelling reasons" to do so.

1986	Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987)	Stevens, John Paul	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Washington's Business and Occupation Wash. Rev. Code § 82.04.440 (1985): A Washington State law imposing a business and occupation (B & O) tax on the privilege of engaging in business activities in the state, including manufacturing in the state and making wholesale sales in the state, but exempting products manufactured and sold in-state.

1986	American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987)	Stevens, John Paul	Transportation; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Pa. Cons. Stat. § 2102; 75 Pa. Cons. Stat. § 9902 (1984): A Pennsylvania law that imposes lump sum annual taxes on the operation of trucks on the state's roads.

1986	Sumner v. Shuman, 483 U.S. 66 (1987)	Blackmun, Harry A.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Eighth Amendment

Constitutional Clause(s) Invoked: Cruel & Unusual Punishment Clause

Description of Unconstitutional Provision(s): Nev. Rev. Stat. § 200.030 (1973); 1973 Nev. Stats., ch. 798, § 5: A Nevada law that mandates the death penalty for a prison inmate who is convicted of murder while serving a life sentence without possibility of parole.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1985	Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986)	Marshall, Thurgood	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): New York Alcoholic Beverage Control Law Section 101-b(3)(d) (McKinney 1970 and Supp. 1986): A New York law that requires every liquor distiller or producer that sells liquor to wholesalers within the state to sell at a price that is no higher than the lowest price the distiller charges wholesalers anywhere else in the United States.

1985	Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986)	Blackmun, Harry A.	Healthcare	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Pennsylvania's Abortion Control Act, 1982 Pa. Laws, Act No. 138, *codified as* 18 Pa. Cons. Stat. §§ 3201 *et seq.* (1982): A Pennsylvania statute prescribing a variety of requirements for the performance of an abortion, including providing oral and written information prior to the procedure, public reporting about the procedures that have been performed, and standard-of-care and second-physician requirements.

1985	Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986)	Brennan, William J.	Labor & Employment; Military & Veterans	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): N.Y. Const., art. V, § 6; N.Y. Civ. Serv. Law § 85 (McKinney 1983 & Supp. 1986): The State of New York's Constitution and civil service law that grants a civil service employment preference, in the form of points added to examination scores, to New York residents who are honorably discharged veterans of the Armed Forces, served during time of war, and were New York residents when they entered military service.

1985	Ford v. Wainwright, 477 U.S. 399 (1986)	Marshall, Thurgood	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Eighth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Cruel & Unusual Punishment Clause; Due Process Clause

Description of Unconstitutional Provision(s): Fla. Stat. § 922.07 (1985 & Supp. 1986): A Florida statute that provides the exclusive means for determining the sanity of a death row inmate that is wholly within the executive branch and does not allow for challenges by the defendant to the executive branches' findings.

1985	Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1 (1986)	Burger, Warren E.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Press Clause

Description of Unconstitutional Provision(s): Cal. Penal Code Ann. § 868 (West 1985): A California statute that requires that preliminary hearings in a criminal case be open to the public unless exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial, which California courts interpreted to require the defendant to establish a "reasonable likelihood of substantial prejudice" to seal the proceeding.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1985	Bowsher v. Synar, 478 U.S. 714 (1986)	Burger, Warren E.	Government Operations	Federal

Constitutional Provision(s) Invoked: Article I, Section 1

Constitutional Clause(s) Invoked: Separation of Powers Doctrine

Description of Unconstitutional Provision(s): 2 U.S.C. §§ 901 *et seq.*: Section 251 of the Balanced Budget and Emergency Deficit Control Act of 1985 making the Comptroller General responsible for preparing and submitting to the President a report specifying deficit reductions for a fiscal year, and requiring the President to order the reductions specified by the Comptroller General.

1984	Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985)	Powell, Lewis F.	Legal Ethics	State & Local

Constitutional Provision(s) Invoked: Article IV, Section 2

Constitutional Clause(s) Invoked: Privileges & Immunities Clause

Description of Unconstitutional Provision(s): N.H. Sup. Ct. Rule 42(3): A New Hampshire bar rule limits bar admission to state residents.

1984	Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480 (1985)	Rehnquist, William H.	Elections	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 26 U.S.C. § 9012(f): Section 9012(f) of the Presidential Election Campaign Fund Act making it a criminal offense for independent "political committees" to expend more than $1,000 to further a candidate's election if the candidate accepts public financing.

1984	Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985)	Powell, Lewis F.	Taxes; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Ala. Code §§ 27-4-4 and 27-4-5 (1975): Alabama's domestic preference tax statute, imposing a substantially lower gross premiums tax rate on domestic insurance companies than on out-of-state insurance companies.

1984	Tennessee v. Garner, 471 U.S. 1 (1985)	White, Byron R.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourth Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Tenn. Code Ann. § 40-7-108 (1982): A Tennessee law authorizing a police officer, after providing notice of his intention to arrest a criminal defendant and that defendant flees or forcibly resists arrest, to "use all the necessary means to effect the arrest."

1984	Hunter v. Underwood, 471 U.S. 222 (1985)	Rehnquist, William H.	Elections; Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Art. VIII, § 182, of the Alabama Constitution of 1901: A section of the Alabama Constitution provides for the disenfranchisement of persons convicted of certain enumerated felonies and misdemeanors, including "any . . . crime involving moral turpitude."

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1984	Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)	White, Byron R.	Legal Ethics	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Ohio Disciplinary Rules DR 2-103(A), 2-104(A), and 2-101(B): A provision within the Ohio Code of Professional Responsibility prohibiting (1) an attorney from soliciting or accepting legal employment through advertisements containing information or advice regarding a specific legal problem; (2) the use of illustrations in attorney advertisements.

1984	Williams v. Vermont, 472 U.S. 14 (1985)	White, Byron R.	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Vt. Stat. Ann., Tit. 32, § 8911(9) (1981): A Vermont law that distinguishes between residents and nonresidents in providing a credit for automobile sales taxes paid to another state.

1984	Wallace v. Jaffree, 472 U.S. 38 (1985)	Stevens, John Paul	Education	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Establishment Clause

Description of Unconstitutional Provision(s): Ala. Code 1975, § 16-1-20.1: An Alabama statute authorizing a one-minute period of silence in public schools "for meditation or voluntary prayer."

1984	Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985)	Burger, Warren E.	Taxes; Military & Veterans	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): N.M. Stat. Ann. § 7-37-5 (1983): A New Mexico law that grants a property tax exemption for Vietnam veterans that resided in the state before May 8, 1976.

1984	Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985)	Burger, Warren E.	Labor & Employment; Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Establishment Clause

Description of Unconstitutional Provision(s): Conn. Gen. Stat. § 53-303e(b): A Connecticut law that provides employees with the right not to work on the day that the employee chooses to observe as "his Sabbath."

1983	Westinghouse Electric Corp. v. Tully, 466 U.S. 388 (1984)	Blackmun, Harry A.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): N.Y. Tax Law § 210.13(a)(2): A New York law that allows corporations a tax credit for receipts from products shipped from an in-state place of business.

1983	Bernal v. Fainter, 467 U.S. 216 (1984)	Marshall, Thurgood	Business & Corporate Law; Immigration	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Tex. Rev. Civ. Stat. art. 5942(2): A Texas law that required a notary public to be a United States citizen.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1983	Armco, Inc. v. Hardesty, 467 U.S. 638 (1984)	Powell, Lewis F.	Taxes; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): W. Va. Code Section 11-13-2: A West Virginia law imposes a gross receipts tax on businesses selling tangible property at wholesale, but exempts local manufacturers from the tax.

1983	Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984)	Blackmun, Harry A.	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Md. Code Ann. Section 103D: A Maryland statute that generally prohibits a charitable organization, in connection with any fundraising activity, from paying expenses of more than 25% of the amount raised.

1983	Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984)	White, Byron R.	Taxes; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Haw. Rev. Stat. Sections 244-4(6), 244-4(7): A Hawaii law imposing a 20% excise tax on sales of liquor at wholesale, but exempting the sales of specified local products.

1983	Federal Communications Commission v. League of Women Voters of California, 468 U.S. 364 (1984)	Brennan, William J.	Advertising, Publishing, & Communications	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 47 U.S.C. § 399: Provision of Public Broadcasting Act of 1967 banning noncommercial educational stations receiving grants from the Corporation for Public Broadcasting from engaging in editorializing.

1983	Regan v. Time, Inc., 468 U.S. 641 (1984)	White, Byron R.	Advertising, Publishing, & Communications	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 18 U.S.C. § 504(1): Exception to statutory ban on the use of photographic reproductions of U.S. currency permitting the "printing, publishing, or importation . . . of illustrations of . . . any . . . obligation or other security of the United States . . . for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums."

1982	Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982)	Burger, Warren E.	Real Property; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Establishment Clause

Description of Unconstitutional Provision(s): Mass. Gen. Laws ch. 138, Sec. 16C: A Massachusetts law that provides that the governing bodies of schools and churches can prevent the issuance of liquor licenses to premises within 500 feet of a church or school by objecting to the license application.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1982	Memphis Bank & Trust Co. v. Garner, 459 U.S. 392 (1983)	Marshall, Thurgood	Banking; Taxes	State & Local

Constitutional Provision(s) Invoked: Article VI, Section 1, Clause 2

Constitutional Clause(s) Invoked: Supremacy Clause

Description of Unconstitutional Provision(s): Tenn. Code. Ann. Section 67-751: A Tennessee law imposes a tax on the net earnings of banks doing business within the state, defining net earnings to include income from obligations of the United States and its instrumentalities.

1982	Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983)	O'Connor, Sandra Day	Taxes	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Free Press Clause

Description of Unconstitutional Provision(s): Minn. Stat. Sec. 297A.14: A Minnesota law that imposes a use tax on the cost of paper and ink products consumed in the production of a periodic publication.

1982	Anderson v. Celebrezze, 460 U.S. 780 (1983)	Stevens, John Paul	Elections	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Ohio Revised Code Section 3513.25.7: An Ohio statute that requires independent candidates for President and Vice-President to file nominating petitions by March 20 in order to qualify for the November ballot.

1982	Kolender v. Lawson, 461 U.S. 352 (1983)	O'Connor, Sandra Day	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Cal. Penal Code Section 647(e): A California law requires that persons who loiter or wander on the streets identify themselves and to account for their presence when requested by a peace officer.

1982	Pickett v. Brown, 462 U.S. 1 (1983)	Brennan, William J.	Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Tenn. Code. Ann. Section 36-224(2): A Tennessee law generally requires a two-year period from date of birth to bring an action to establish paternity of illegitimate child for purposes of obtaining support of Tennessee's two-year statute of limitations for paternity and child support actions.

1982	City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983)	Powell, Lewis F.	Healthcare	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Ordinance No. 160-1978-Sections 1870.03, 1870.05(B), 1870.06(B), 1870.06(C), 1870.07, 1870.16: An ordinance of the city of Akron, Ohio regulating the practice of abortions, including requirements respecting (1) the location where abortions must be performed; (2) parental notification for certain minors seeking an abortion; (3) the information a physician must provide about the pregnancy and the abortion procedure to a patient; (4) a 24 hour waiting period for an abortion; (5) the disposal of fetal remains.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1982	Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476 (1983)	Powell, Lewis F.	Healthcare	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Mo. Rev. Stat. Sec. 188.025: A Missouri law that requires all abortions after 12 weeks of pregnancy to be performed in a hospital.

1982	Karcher v. Daggett, 462 U.S. 725 (1983)	Brennan, William J.	Elections	State & Local

Constitutional Provision(s) Invoked: Article I, Section 2

Constitutional Clause(s) Invoked: House of Representatives Clause

Description of Unconstitutional Provision(s): Pub. L. 1982, ch. 1: A New Jersey law reapportioning the state's congressional districts, resulting in population deviations of less than one percent amongst the various districts.

1982	Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983)	Burger, Warren E.	Immigration	Federal

Constitutional Provision(s) Invoked: Article I, Section 7, Clause 2; Article I, Section 7, Clause 3

Constitutional Clause(s) Invoked: Presentment Clause; Bicameral Clause

Description of Unconstitutional Provision(s): 8 U.S.C. § 244(c)(2): Immigration and Nationality Act § 244(c)(2) permitting either house of Congress to veto the decision of the Attorney General to suspend the deportation of certain aliens.

1982	Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983)	Marshall, Thurgood	Advertising, Publishing & Communications	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Act of March 3, 1873 (ch. 258, § 2, 17 Stat. 599, recodified in 39 U.S.C. § 3001(e)(2)): Comstock Act provision barring from the mails any unsolicited advertisement for contraceptives, as applied to circulars and flyers promoting prophylactics or containing information discussing the desirability and availability of prophylactics, violates the free speech clause of the First Amendment.

1981	Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290 (1981)	Burger, Warren E.	Elections	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Freedom of Association

Description of Unconstitutional Provision(s): Berkeley, Cal., Ordinance No. 4700-N.S., Section 602: A Berkeley, California ordinance that imposes a $250 limitation on contributions to committees formed to support or oppose ballot measures submitted to a popular vote.

1981	Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982)	Rehnquist, William H.	Bankruptcy	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 4

Constitutional Clause(s) Invoked: Bankruptcy Clause

Description of Unconstitutional Provision(s): 45 U.S.C. § 701: Statutes governing bankruptcy of a single named debtor.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1981	Santosky v. Kramer, 455 U.S. 745 (1982)	Blackmun, Harry A.	Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): N.Y. Family Court Act Section 622: A New York law that allows the state to terminate, over parental objection, the rights of parents upon a finding by a "fair preponderance of the evidence" that the child is "permanently neglected."

1981	Larson v. Valente, 456 U.S. 228 (1982)	Brennan, William J.	Taxes	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Establishment Clause

Description of Unconstitutional Provision(s): Minn. Stat. Section 309.515 Subdiv. 1(b): Minnesota law that exempts religious organizations that receive more than half of their total contributions from members or affiliated organizations from the registration and reporting requirements of the state's charitable solicitations statute.

1981	Mills v. Habluetzel, 456 U.S. 91 (1982)	Rehnquist, William H.	Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Tex. Fam. Code Section 13.01: A Texas law that imposes a one-year period from date of birth to bring an action to establish paternity of illegitimate child for purposes of obtaining support.

1981	Plyler v. Doe, 457 U.S. 202 (1982)	Brennan, William J.	Education; Immigration	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Tex. Educ. Code Ann. Section 21.031: A Texas statute that withholds state funds from local school districts for the education of any non-U.S. citizen children who were not legally admitted into United States and authorizes school boards to deny enrollment to such children.

1981	Zobel v. Williams, 457 U.S. 55 (1982)	Burger, Warren E.	Energy & Utilities; Workers' Compensation & Social Security	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Alaska Stat. Ann. Section 43.23.010: An Alaska law that apportions the state's mineral income fund to the state's adult residents based a citizen's length of residency.

1981	Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)	Brennan, William J.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Mass. Gen. Laws ch. 278, Section 16A: A Massachusetts statute requiring that, under all circumstances, the press and public must be excluded from trials regarding certain sexual offenses that involved a victim under the age of 18.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1981	Edgar v. MITE Corp., 457 U.S. 624 (1982)	White, Byron R.	Business & Corporate Law; Securities	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Ill. Rev. Stat., ch. 121 1/2, para. 137.54.A (Illinois Business Take-Over Act): An Illinois law that requires a offeror who wishes to takeover a company to notify the Secretary of State and the target company of its intent to make a offer and the terms of the offer 20 days before the offer becomes effective.

1981	Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)	Marshall, Thurgood	Real Property	State & Local

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Takings Clause

Description of Unconstitutional Provision(s): N.Y. Exec. Law Section 828: A New York statute that requires landlords to allow for the installation of cable television wiring on their property and prohibits landlords from demanding payment from a tenant in excess of what a state commission determines to be reasonable.

1981	Washington v. Seattle School District No. 1, 458 U.S. 457 (1982)	Blackmun, Harry A.	Education; Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Initiative 350; Wash. Rev. Code Section 28A.26.010: A Washington statute, enacted by an initiative responding to the use of mandatory busing for purposes of racial integration, that generally prohibits school boards from requiring any student to attend a school other than the one geographically nearest or next to nearest to his home.

1981	Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)	Brennan, William J.	Civil Procedure; Bankruptcy	Federal

Constitutional Provision(s) Invoked: Article I, Section 1; Article III

Constitutional Clause(s) Invoked: Vesting Clause

Description of Unconstitutional Provision(s): 28 U.S.C. § 1471(b): Statute granting bankruptcy courts jurisdiction over all "civil proceedings arising under title 11 [regarding bankruptcy] or arising in or related to cases under title 11."

1981	Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)	O'Connor, Sandra Day	Education; Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): 1884 Miss. Gen. Laws, Ch. 30, Section 6: A policy by the Mississippi University for Women, a state-supported university, that limited its enrollment to women.

1981	Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982)	Stevens, John Paul	Environmental	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Neb. Rev. Stat. § 46-613.01 (1978): A Nebraska law that requires that any person that intends to withdraw ground water from any well located in the state and transport it for use in another state first obtain a permit from the Nebraska Department of Water Resources.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1980	Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980)	Blackmun, Harry A.	Civil Rights; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Fifth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Takings Clause

Description of Unconstitutional Provision(s): Fla. Stat. § 28.33 (1977): Florida statute authorizing county to retain as its own the interest accruing on an interpleader fund that is deposited in the county court registry, when a fee is charged for the clerk's services in placing the fund into the registry.

1980	Stone v. Graham, 449 U.S. 39 (1980)	Per Curiam	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Establishment Clause

Description of Unconstitutional Provision(s): Ky. Rev. Stat. § 158.178: Kentucky statute requiring a copy of the Ten Commandments, purchased with private contributions, to be posted on the wall of each public classroom in the state.

1980	Kirchberg v. Feenstra, 450 U.S. 455 (1981)	Marshall, Thurgood	Real Property	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): La Civ. Code Ann. Art. 2404: Louisiana law permitting husbands, but not wives, to unilaterally dispose of jointly owned property without spousal consent.

1980	Kassel v. Consolidated Freightways Corp. of Delaware, 450 U.S. 662 (1981)	Powell, Lewis F.	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Iowa Code § 321.457: Iowa statute barring (in conflict with neighboring states) 65-foot double-trailer trucks on state's highways.

1980	Maryland v. Louisiana, 451 U.S. 725 (1981)	White, Byron R.	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I; Article VI, Section 1, Clause 2

Constitutional Clause(s) Invoked: Commerce Clause; Supremacy Clause

Description of Unconstitutional Provision(s): La. Rev. Stat. Ann. §§ 47:1301-47:1307 (1981): Louisiana statute imposing a tax on the first use of any natural gas brought in-state that has not been previously taxed.

1980	Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981)	White, Byron R.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Mount Ephraim Code 99-15B: Borough of Mount Ephraim, New Jersey ordinance prohibiting "live entertainment" within the Borough.

1980	Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)	White, Byron R.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): San Diego Ordinance No. 10795 (Mar. 14, 1972): San Diego, California ordinance prohibiting outdoor advertising displays except for certain onsite signs and 12 specific exceptions.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1979	Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980)	White, Byron R.	Civil Rights; Elections	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Due Process Clause

Description of Unconstitutional Provision(s): Schaumburg Village Code, ch. 22, art. III, § 22-20(g) (1975): Schaumburg, Illinois ordinance banning in-person solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for "charitable purposes."

1979	Vance v. Universal Amusement Co., 445 U.S. 308 (1980)	Per Curiam	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Due Process Clause

Description of Unconstitutional Provision(s): Tex. Rev. Civ. Stat. Ann. art. 4666 (1952); Tex. Rev. Civ. Stat. Ann. art. 4667(a) (1978): Texas public nuisance statute authorizing state judges, based on a showing that a theater previously exhibited obscene films, to enjoin the future exhibition of films not yet found to be obscene.

1979	Payton v. New York, 445 U.S. 573 (1980)	Stevens, John Paul	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Search & Seizure Clause; Due Process Clause

Description of Unconstitutional Provision(s): N.Y. Crim. Proc. Law § 140.15(4) (McKinney 1971): New York statutes authorizing police officers to enter a private residence without a warrant to effectuate a felony arrest.

1979	Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980)	White, Byron R.	Civil Rights; Workers' Compensation & Social Security	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Mo. Rev. Stat. § 287.240 (1979): Missouri workers' compensation law denying widowers death benefits unless they are either mentally or physically incapacitated or prove dependence on wife's earnings, but granting widows death benefits regardless of dependency.

1979	Lewis v. Bt Investment Managers, Inc., 447 U.S. 27 (1980)	Blackmun, Harry A.	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Fla. Stat. § 659.141(1): Florida statute barring out-of-state trust companies, banks, and bank holding companies from controlling or owning a business within the state that sells investment advisory services.

1979	Carey v. Brown, 447 U.S. 455 (1980)	Brennan, William J.	Civil Rights; Labor & Employment	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Ill. Rev. Stat. ch. 38, §§ 21.1-2 (1977): Illinois statute prohibiting the picketing of residences or dwellings, but exempting the peaceful picketing of places of employment in which there is a labor dispute.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1979	Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980)	Powell, Lewis F.	Civil Rights; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): New York Public Service Commission regulation banning an electric utility from advertising to promote electricity use.

1979	Beck v. Alabama, 447 U.S. 625 (1980)	Stevens, John Paul	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Ala. Code § 13-11-2(a) (1975): Alabama death penalty statute forbidding trial judges from giving a jury the option of convicting a defendant of a lesser included offense.

1978	Duren v. Missouri, 439 U.S. 357 (1979)	White, Byron R.	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Sixth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Fair Cross Section Requirement; Due Process Clause

Description of Unconstitutional Provision(s): Missouri Const., Art. 1, § 22(b); Mo. Rev. Stat. § 494.031(2) (Supp. 1978): Missouri statute, implementing a state constitutional provision, providing for the excusal of any women requesting exemption from jury service.

1978	Colautti v. Franklin, 439 U.S. 379 (1979)	Blackmun, Harry A.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Pennsylvania Abortion Control Act, § 5(a), Pa. Stat. Ann., Tit. 35, § 6605(a) (Purdon 1977): Pennsylvania abortion law requiring physicians to make a determination that a fetus is not viable, and if the fetus is viable or if there is sufficient reason to believe the fetus may be viable, to exercise the same care to preserve the fetus' life and health that would be required in the case of a fetus intended to be born alive.

1978	Orr v. Orr, 440 U.S. 268 (1979)	Brennan, William J.	Civil Rights; Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Ala. Code §§ 30-2-51, 30-2-52, 30-2-53 (1975): Alabama statute imposing alimony obligations on husbands but not on wives.

1978	Burch v. Louisiana, 441 U.S. 130 (1979)	Rehnquist, William H.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Sixth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Right to Trial by Jury; Due Process Clause

Description of Unconstitutional Provision(s): La. Const. art. I, § 17; La. Code Crim. Proc. Ann. art. 779(A) (1979): Louisiana statute, implementing a state constitutional provision, permitting criminal conviction for a non-petty offense by five out of six jurors.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1978	Hughes v. Oklahoma, 441 U.S. 322 (1979)	Brennan, William J.	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Okla. Stat. tit. 29, § 4-115(B) (1978): Oklahoma statute prohibiting the transport or shipment for sale outside the state of natural minnows seined or procured from waters within the state.

1978	Caban v. Mohammed, 441 U.S. 380 (1979)	Powell, Lewis F.	Civil Rights; Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): N.Y. Dom. Rel. Law § 111(c) (McKinney 1977): New York law permitting an unwed mother but not an unwed father to block the adoption of their child by withholding consent.

1978	Torres v. Puerto Rico, 442 U.S. 465 (1979)	Burger, Warren E.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourth Amendment

Constitutional Clause(s) Invoked: Unreasonable Searches & Seizure Clause

Description of Unconstitutional Provision(s): P.R. Laws Ann. Tit. 25, § 1051 (1977): Puerto Rico law authorizing the search of any person's luggage arriving from the United States.

1978	Bellotti v. Baird, 443 U.S. 622 (1979)	Powell, Lewis F.	Civil Rights; Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Mass. Gen. Laws Ann. ch. 112, § 12S (1979): Massachusetts law requiring parental consent for an abortion for an unmarried woman under age 18, and providing for a court order permitting abortion for good cause if parental consent is refused, which can nonetheless be withheld even if the court finds the minor to be mature and fully competent.

1978	Califano v. Westcott, 443 U.S. 76 (1979)	Blackmun, Harry A.	Pensions & Benefits; Civil Rights	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): 42 U.S.C. § 607: Provision of Social Security Act providing benefits to families if unemployment of father deprives dependent children of parental support, but not providing benefits based on unemployment of mother.

1978	Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979)	Burger, Warren E.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Due Process Clause

Description of Unconstitutional Provision(s): W. Va. Code § 49-7-3 (1976): West Virginia statute making it a crime for a newspaper to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1977	New York v. Cathedral Academy, 434 U.S. 125 (1977)	Stewart, Potter	Civil Rights; Education	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Establishment Clause; Due Process Clause

Description of Unconstitutional Provision(s): 1972 N.Y. Laws ch. 996: New York law authorizing reimbursement to sectarian schools for state-mandated testing and record-keeping services.

1977	Zablocki v. Redhail, 434 U.S. 374 (1978)	Marshall, Thurgood	Civil Rights; Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Wis. Stat. §§ 245.10(1), (4), (5) (1973): Wisconsin statute requiring court permission to marry for any resident that has minor children not in his custody for which he is under a court order to support, unless a court determines that the support obligation has been met and that the children are not and are not likely to become public charges.

1977	Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978)	Powell, Lewis F.	Transportation; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Wis. Stat. §§ 348.07(1) (1975): Wisconsin statutory and regulatory scheme generally prohibiting trucks longer than 55 feet to be operated on highways.

1977	Ballew v. Georgia, 435 U.S. 223 (1978)	Blackmun, Harry A.	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Sixth Amendment

Constitutional Clause(s) Invoked: Right to Trial by Jury

Description of Unconstitutional Provision(s): 1890-1891 Ga. Laws, No. 278, pp. 937-38: Georgia statute providing that certain trials in criminal cases be conducted before five-person juries.

1977	McDaniel v. Paty, 435 U.S. 618 (1978)	Burger, Warren E.	Civil Rights; Elections	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Exercise Clause; Due Process Clause

Description of Unconstitutional Provision(s): 1976 Tenn. Pub. Acts ch. 848, § 4 (incorporating Tenn. Const. Art. VIII, § 1: Tennessee statute barring ministers and priests from serving as delegates to state constitutional conventions (applying a state constitutional provision disqualifying ministers and priests from serving as members of the legislature).

1977	First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)	Powell, Lewis F.	Civil Rights; Elections	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Due Process Clause

Description of Unconstitutional Provision(s): Mass. Gen. Laws Ann. ch. 55, § 8 (1977): Massachusetts criminal statute banning certain business corporations from making expenditures for the purpose of influencing referendum votes on any questions not affecting the property, business, or assets of the corporation.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1977	Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)	Burger, Warren E.	Advertising, Publishing, & Communications	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Due Process Clause

Description of Unconstitutional Provision(s): Virginia Code §§ 2.1–37.13 (1973): Virginia statute making it a misdemeanor to divulge information regarding proceedings before a state judicial review commission.

1977	Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)	White, Byron R.	Labor & Employment; Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Fourth Amendment

Constitutional Clause(s) Invoked: Search & Seizure Clause

Description of Unconstitutional Provision(s): 29 U.S.C. § 657(a): Provision of Occupational Safety and Health Act of 1970 authorizing warrantless inspections of workplaces.

1977	Crist v. Bretz, 437 U.S. 28 (1978)	Stewart, Potter	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Double Jeopardy Clause

Description of Unconstitutional Provision(s): Mont. Code Ann. § 95-1711(3)(d) (1947): Montana law providing that jeopardy does not attach until the swearing-in of the first witness.

1977	Hicklin v. Orbeck, 437 U.S. 518 (1978)	Brennan, William J.	Civil Rights; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article IV, Section 2

Constitutional Clause(s) Invoked: Privileges & Immunities Clause

Description of Unconstitutional Provision(s): Alaska Hire Act, Alaska Stat. Ann. § 38.40.030(a) (1977): Alaska statute mandating that state residents be preferred to nonresidents in employment on oil and gas pipeline work.

1977	City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)	Stewart, Potter	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): N.J. Stat. Ann. § 13:1I-10 (1978): New Jersey law prohibiting importation of most solid or liquid waste that was collected or originated out of state.

1977	Lockett v. Ohio, 438 U.S. 586 (1978)	Burger, Warren E.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Eighth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Cruel & Unusual Punishment Clause; Due Process Clause

Description of Unconstitutional Provision(s): Ohio Rev. Code Ann. § 2929.04(B) (1975): Ohio statute requiring imposition of death penalty upon conviction of first-degree murder unless one of three mitigating factors established.

1976	Craig v. Boren, 429 U.S. 190 (1976)	Brennan, William J.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Okla. Stat. Tit., 37, §§ 241, 245 (1958 and Supp. 1976): Oklahoma law prohibiting the sale of 3.2% alcoholic beer to males under 21 and to females under 18.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1976	Connally v. Georgia, 429 U.S. 245 (1977)	Per Curiam	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Search & Seizure Clause; Due Process Clause

Description of Unconstitutional Provision(s): Ga. Code Ann. § 24-1601 (1971): Georgia law providing that a justice of the peace receive a fee for issuance of a search warrant, but no fee for a denial, where the justice received no salary.

1976	Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977)	White, Byron R.	Securities	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): N.Y. Tax Law § 270-a (McKinney 1976): New York law imposing a transfer tax on securities transactions structured so that transactions involving an out-of-state sale were taxed more heavily than most transactions involving a sale within the state.

1976	Califano v. Goldfarb, 430 U.S. 199 (1977)	Brennan, William J.	Pensions & Benefits	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): 42 U.S.C. § 402(f)(1)(D): Provision of Social Security Act awarding survivor's benefits based on earnings of a deceased wife to widower only if he was receiving at least half of his support from her at the time of her death, but awarding benefits to widow regardless of dependency.

1976	Wooley v. Maynard, 430 U.S. 705 (1977)	Burger, Warren E.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Due Process Clause

Description of Unconstitutional Provision(s): N.H. Rev. Stat. Ann. §§ 262:27-c, 263:1 (1975): New Hampshire law requiring that state license plates bear the motto "Live Free or Die" and making it a misdemeanor to obscure the motto.

1976	Trimble v. Gordon, 430 U.S. 762 (1977)	Powell, Lewis F.	Civil Rights; Real Property	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Illinois Probate Act, Ill. Rev. Stat. ch. 3, § 12 (1973): Illinois law requiring that illegitimate children could inherit by intestate succession only from their mothers while legitimate children could take from both parents.

1976	United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977)	Blackmun, Harry A.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): N.J. Laws, ch. 25 (1974): New Jersey law (together with a parallel New York statute) repealing a statutory covenant made by those states concerning the Port Authority of New York and New Jersey.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1976	Abood v. Detroit Board of Education, 431 U.S. 209 (1977)	Stewart, Potter	Civil Rights; Labor & Employment	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Due Process Clause

Description of Unconstitutional Provision(s): Mich. Comp. Laws § 432.210(1)(c): Michigan public sector collective bargining statute permitting a union and local government employer to enter an arrangement where every employee must contribute to the union as a condition of employment and the union could spend those funds for political purposes.

1976	Moore v. City of East Cleveland, 431 U.S. 494 (1977)	Powell, Lewis F.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Takings Clause

Description of Unconstitutional Provision(s): East Cleveland, Ohio, Housing Code § 1341.08: East Cleveland zoning ordinance limiting housing occupancy to members of a single family and restrictively defining family to a few categories of individuals.

1976	Roberts v. Louisiana, 431 U.S. 633 (1977)	Per Curiam	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Eighth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Cruel & Unusual Punishment Clause; Due Process Clause

Description of Unconstitutional Provision(s): La. Rev. Stat. Ann. § 14:30(2) (1974): Louisiana statute imposing a mandatory death sentence for convictions of first-degree murder.

1976	Carey v. Population Services International, 431 U.S. 678 (1977)	Brennan, William J.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Due Process Clause

Description of Unconstitutional Provision(s): N.Y. Educ. Law § 6811(8) (McKinney 1972): New York law making it a crime (1) for any person to sell or distribute contraceptives to minors under 16; (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over; and (3) for anyone to advertise or display contraceptives.

1976	Lefkowitz v. Cunningham, 431 U.S. 801 (1977)	Burger, Warren E.	Civil Rights; Elections	State & Local

Constitutional Provision(s) Invoked: Fifth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Self-Incrimination Clause; Due Process Clause

Description of Unconstitutional Provision(s): N.Y. Elec. Law § 22 (McKinney 1964): New York statute automatically removing from office and disqualifying from any office for the next five years any political party officer who refuses to testify or to waive immunity against subsequent criminal prosecution when subpoenaed before an authorized tribunal.

1976	Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977)	Marshall, Thurgood	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Due Process Clause

Description of Unconstitutional Provision(s): Willingboro, N.J., Ordinance 5-1974: Wilingboro, New Jersey ordinance prohibiting "For Sale" and "Sold" signs in order to prevent what the township perceived as flight of white homeowners.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1976	Nyquist v. Mauclet, 432 U.S. 1 (1977)	Blackmun, Harry A.	Civil Rights; Education	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): N.Y. Educ. Law § 661(3) (McKinney 1976): New York statute barring resident aliens who have not either applied for citizenship or affirmed the intent to apply from access to state financial assistance for higher education.

1976	Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977)	Burger, Warren E.	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): N.C. Gen. Stat. § 106-189.1 (1973): North Carolina statute requiring that all apples sold or shipped into the state in closed containers be identified by no grade on containers other than an applicable federal grade or a designation that apples are ungraded.

1976	Shaffer v. Heitner, 433 U.S. 186 (1977)	Marshall, Thurgood	Civil Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Delaware statute authorizing a court of the state to take jurisdiction of a lawsuit by sequestering property of a defendant that happens to be located in state.

1976	Wolman v. Walter, 433 U.S. 229 (1977)	Blackmun, Harry A.	Civil Rights; Education	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Establishment Clause; Due Process Clause

Description of Unconstitutional Provision(s): Ohio Rev. Code Ann. § 3317.06(B), (C), (L) (Supp. 1976): Ohio statute authorizing funding for the use of nonpublic schoolchildren for the purpose of (1) purchasing and loaning to pupils or their parents instructional material and equipment and (2) providing transportation and services for field trips.

1976	Coker v. Georgia, 433 U.S. 584 (1977)	White, Byron R.	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Eighth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Cruel & Unusual Punishment Clause; Due Process Clause

Description of Unconstitutional Provision(s): Ga. Code Ann. § 26-2001 (1972): Georgia statute authorizing the death penalty as punishment for rape.

1975	Turner v. Department of Employment Security of Utah, 423 U.S. 44 (1975)	Per Curiam	Labor & Employment; Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Utah Code Ann. § 35-4-5(h) (1) (1974): Utah law making pregnant women ineligible for unemployment compensation from twelve weeks before the expected date of childbirth until six weeks after childbirth.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1975	Buckley v. Valeo, 424 U.S. 1 (1976)	Per Curiam	Elections	Federal

Constitutional Provision(s) Invoked: Article II, Section 2, Clause 2; First Amendment

Constitutional Clause(s) Invoked: Appointments Clause; Free Speech Clause

Description of Unconstitutional Provision(s): 18 U.S.C. §§ 608(a), (c), and (e)(1): Provision of election statute limiting financial contributions to political candidates. 2 U.S.C. § 437(c): Statutes creating Federal Election Commission, vesting in it enforcement powers, and allowing legislative branch alone to appoint six members of Commission.

1975	Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976)	Brennan, William J.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Mississippi regulation prohibiting the sale of milk and milk products from another state unless the other State accepts milk and milk products from Mississippi.

1975	Mckinney v. Alabama, 424 U.S. 669 (1976)	Rehnquist, William H.	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Due Process Clause

Description of Unconstitutional Provision(s): Ala. Code, Tit. 14, § 374(4) (Supp. 1973); Ala. Code, Tit. 14, c. 64A: Alabama law authorizing officials to bring charges for selling material known to be obscene but precluding defendants from litigating the obscenity *vel non* of material found to be obscene in a separate equity proceeding.

1975	Hynes v. Mayor of Oradell, 425 U.S. 610 (1976)	Burger, Warren E.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Due Process Clause

Description of Unconstitutional Provision(s): Borough of Oradell, New Jersey Ordinance No. 598A: Ordinance requiring that advance written notice be given to local police by any person desiring to canvass, solicit, or call from house to house for a recognized charitable cause or political campaign or cause.

1975	Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)	Blackmun, Harry A.	Civil Rights; Healthcare	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Va. Code Ann. §§ 54-524.35: Virginia statute declaring it unprofessional conduct for a licensed pharmacist to advertise the price of prescription drugs.

1975	Examining Board of Engineers, Architects & Surveyors v. Flores De Otero, 426 U.S. 572 (1976)	Blackmun, Harry A.	Civil Rights; Labor & Employment	State & Local

Constitutional Provision(s) Invoked: Fifth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): P. R. Laws Ann., Tit. 20, 681-710 (Supp. 1973): Puerto Rico statute barring non-United States citizens from practicing as civil engineers in a private capacity.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1975	National League of Cities v. Usery, 426 U.S. 833 (1976)	Rehnquist, William H.	Labor & Employment	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3 & Clause 18

Constitutional Clause(s) Invoked: Commerce Clause; Necessary & Proper Clause

Description of Unconstitutional Provision(s): 29 U.S.C. §§ 203(s)(5), (x) (1970 ed., Supp. IV): Statutory provisions extending minimum wage and maximum hour standards to employees of state and local governments.

1975	Hampton v. Mow Sun Wong, 426 U.S. 88 (1976)	Stevens, John Paul	Labor & Employment; Civil Rights	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 5 C.F.R. § 338.101(a) (1976): Regulation of U.S. Civil Service Commission excluding from federal employment all persons except American citizens and natives of American Samoa.

1975	Woodson v. North Carolina, 428 U.S. 280 (1976)	Stewart, Potter; Powell, Lewis F.; Stevens, John Paul	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Eighth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): N.C. Gen. Stat. §§ 14-17 (Cum. Supp. 1975): North Carolina statute making the death penalty mandatory upon conviction of first-degree murder.

1975	Roberts v. Louisiana, 428 U.S. 325 (1976)	Stewart, Potter; Powell, Lewis F.; Stevens, John Paul	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Eighth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): La. Rev. Stat. Ann. §§ 14:30, 14:42, 14:44, 14:113 (1974): Louisiana statute making the death penalty mandatory upon conviction of first-degree murder.

1975	Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)	Blackmun, Harry A.	Civil Rights; Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): House Committee Substitute for House Bill No. 1211: Missouri law requiring spousal and parental consent for minors in certain circumstances before an abortion could be performed; proscribing the saline amniocentesis abortion procedure after the first 12 weeks of pregnancy; and requiring physicians to exercise professional care to preserve a fetus' life and health subject to criminal and civil penalties.

1974	Taylor v. Louisiana, 419 U.S. 522 (1975)	White, Byron R.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Sixth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Right to Trial by Jury

Description of Unconstitutional Provision(s): La. Const., Art. VII, § 41, and La. Code Crim. Proc., Art. 402: Constitutional and statutory provisions providing that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1974	Goss v. Lopez, 419 U.S. 565 (1975)	White, Byron R.	Education	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Ohio Rev. Code Ann. § 3313.66 (1972): Ohio statute authorizing suspension without a hearing of public school students for up to 10 days for misconduct.

1974	North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975)	White, Byron R.	Civil Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Ga. Code Ann. §§ 46-101 through 46-104, 46-401: Georgia statutes permitting a writ of garnishment to be issued in pending suits on the conclusory affidavit of plaintiff, and prescribing the filing of a bond as the only method of dissolving the writ, which deprived defendant of the use of the property pending the litigation, and making no provision for an early hearing.

1974	Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)	Brennan, William J.	Pensions & Benefits; Civil Rights	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 42 U.S.C. § 402(g): Provision of Social Security Act granting survivors' benefits based on the earnings of a deceased husband and father to his widow and to the couple's minor children in her care, but granting benefits based on the earnings of a deceased wife and mother only to the minor children and not to the widower.

1974	Austin v. New Hampshire, 420 U.S. 656 (1975)	Marshall, Thurgood	Transportation; Taxes	State & Local

Constitutional Provision(s) Invoked: Article IV

Constitutional Clause(s) Invoked: Privileges & Immunities Clause

Description of Unconstitutional Provision(s): N.H. Rev. Stat. Ann. § 77-B:2 II (1971): The New Hampshire Commuters Income Tax, which imposed a tax on nonresidents' New Hampshire-derived income.

1974	Hill v. Stone, 421 U.S. 289 (1975)	Marshall, Thurgood	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Tex. Const. Art. 6, § 3; Tex. Elec. Code §§ 5.03, 5.04, 5.07 (1967 and Supp. 1974-1975); Charter of the City of Fort Worth, c. 25, § 19: Texas constitution and statutes and city charter limiting the right to vote in city bond issue elections to persons who have listed property for taxation in the election district in the year of the election.

1974	Meek v. Pittenger, 421 U.S. 349 (1975)	Stewart, Potter	Education	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Establishment Clause

Description of Unconstitutional Provision(s): Pa. Stat. Ann., Tit. 24, § 9-972: Pennsylvania laws authorizing direct provision to nonpublic school children of "auxiliary services", i.e., counseling, testing, speech and hearing therapy, etc., and loans to the nonpublic schools for instructional material and equipment.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1974	United States v. Tax Commission of Mississippi, 421 U.S. 599 (1975)	Brennan, William J.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article VI, Section 1, Clause 2

Constitutional Clause(s) Invoked: Supremacy Clause

Description of Unconstitutional Provision(s): Regulation 25 of the Mississippi State Tax Commission, requiring out-of-state liquor distillers and suppliers to collect from military installations within Mississippi, and remit to the Commission, a liquor tax.

1974	Stanton v. Stanton, 421 U.S. 7 (1975)	Blackmun, Harry A.	Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Utah Code Ann. § 15-2-1 (1953): Utah's age of majority statute applied in the context of child support requirements obligating parental support of a son to age 21 but a daughter only to age 18.

1974	Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)	Powell, Lewis F.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Jacksonville, Fla., Ordinance 330.313 (1972): Jacksonville, Florida ordinance making it a public nuisance and a punishable offense for a drive-in movie theater to exhibit films containing nudity, when the screen is visible from a public street or place.

1974	Herring v. New York, 422 U.S. 853 (1975)	Stewart, Potter	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Sixth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Right to Counsel

Description of Unconstitutional Provision(s): N.Y. Crim. Proc. Law § 320.20 (3)(c) (1971): New York statute granting the trial judge in a nonjury criminal case the power to deny counsel the opportunity to make a summation of the evidence before the rendition of judgment.

1973	Plummer v. City of Columbus, 414 U.S. 2 (1973)	Per Curiam	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Columbus City Code § 2327.03: City ordinance of Columbus, Ohio prohibiting a person from abusing through the use of "menacing, insulting, slanderous, or profane language."

1973	Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974)	Brennan, William J.	Elections	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Free Press Clause

Description of Unconstitutional Provision(s): Ind. Ann. Stat. § 29-3812 (1969): Indiana statute prescribing a loyalty oath as a qualification for access to the ballot.

1973	Kusper v. Pontikes, 414 U.S. 51 (1973)	Stewart, Potter	Elections	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): § 7-43 (d) of the Illinois Election Code: Illinois statute prohibiting anyone who has voted in one party's primary election from voting in another party's primary election for at least 23 months.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1973	O'Brien v. Skinner, 414 U.S. 524 (1974)	Burger, Warren E.	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): N.Y. Election Law § 117 (1)(b) (1964): New York election law that permits persons incarcerated outside their county of residence while awaiting trial to register and vote absentee, but denying absentee privilege to persons incarcerated in their county of residence.

1973	Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)	Stewart, Potter	Civil Rights; Labor & Employment	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Rule of Board of Education of Cleveland, Ohio requiring "every pregnant school teacher to take maternity leave without pay, beginning five months before the expected birth of her child" and to not "return to work until the beginning of the next regular school semester which follows the date when her child attains the age of three months"; School Board of Chesterfield County, Virginia regulation requiring a "pregnant teacher leave work at least four months prior to the expected birth of her child."

1973	Lefkowitz v. Turley, 414 U.S. 70 (1973)	White, Byron R.	Criminal Law & Procedure; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Fifth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Self-Incrimination Clause

Description of Unconstitutional Provision(s): New York General Municipal Law §§ 103-a and 103-b and New York Public Authorities Law §§ 2601 and 2602: New York statute providing for cancellation of public contracts and disqualification of contractors from doing business with the state for five years for refusal to waive immunity from prosecution and testify concerning state contracts.

1973	Lewis v. City of New Orleans, 415 U.S. 130 (1974)	Brennan, William J.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): New Orleans Ordinance 828 M. C. S. § 49-7: New Orleans ordinance interpreted by state courts to punish the use of opprobrious words to a police officer without limitation of offense to uttering of fighting words.

1973	Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)	Marshall, Thurgood	Civil Rights; Healthcare	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Ariz. Rev. Stat. Ann. §§ 11-291, 11-297A (Supp. 1973-1974): Arizona statute imposing a one-year county residency requirement for indigents' eligibility for nonemergency medical care at state expense.

1973	Davis v. Alaska, 415 U.S. 308 (1974)	Burger, Warren E.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Sixth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Confrontation Clause

Description of Unconstitutional Provision(s): Alaska Rule of Children's Procedure 23 and Alaska Stat. § 47.10.080 (g) (1971): Alaska statute protecting the anonymity of juvenile offenders, as applied to prohibit cross-examination of a prosecution witness for possible bias.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1973	Smith v. Goguen, 415 U.S. 566 (1974)	Powell, Lewis F.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Mass. Gen. Laws Ann., c. 264, § 5: Massachusetts statute punishing anyone who treats the flag "contemptuously" without anchoring the proscription to specified conduct and modes.

1973	Lubin v. Panish, 415 U.S. 709 (1974)	Burger, Warren E.	Elections	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): Cal. Elections Code § 6551: California statute imposing a filing fee as the only means to get on the ballot.

1973	Procunier v. Martinez, 416 U.S. 396 (1974)	Powell, Lewis F.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Due Process Clause

Description of Unconstitutional Provision(s): Rule 2401 & 2402 of the California Department of Corrections; Administrative Rule MV-IV-02: Rules relating to the censorship of prisoner mail and a ban against attorney-client interviews conducted by law students or legal paraprofessionals.

1973	Jimenez v. Weinberger, 417 U.S. 628 (1974)	Burger, Warren E.	Pensions & Benefits	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): 42 U.S.C. § 416(h)(3)(B): Provision of Social Security Act qualifying certain illegitimate children for disability insurance benefits by presuming dependence but disqualifying other illegitimate children, regardless of dependency, if the disabled wage earner parent did not contribute to the child's support before the onset of the disability or if the child did not live with the parent before the onset of disability.

1973	Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)	Burger, Warren E.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Press Clause

Description of Unconstitutional Provision(s): Fla. Stat. Ann. § 104.38 (1973): Florida statute compelling newspapers to publish free replies by political candidates criticized by newspapers.

1973	Wolff v. McDonnell, 418 U.S. 539 (1974)	White, Byron R.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Certain Nebraska prison disciplinary procedures.

1972	Ward v. Village of Monroeville, 409 U.S. 57 (1972)	Brennan, William J.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Ohio Rev. Code Ann. §§ 1905.01 *et seq.* (1968): Ohio statute authorizing the mayor to sit as judge at trials for traffic offenses.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1972	Evco v. Jones, 409 U.S. 91 (1972)	Per Curiam	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): N.M. Stat. Ann. §§ 72-16A-1–72-16A-19 (1953 Compilation & Supp. 1971): New Mexico tax that a state appeals court characterized as an assessment on a business's proceeds from out-of-state sales of tangible personal property.

1972	Roe v. Wade, 410 U.S. 113 (1973)	Blackmun, Harry A.	Family Law; Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Vernon's Ann. Tex. P.C. arts. 1191–94, 1196: Texas statute making it a crime to procure or to attempt to procure an abortion except on medical advice to save the life of the mother.

1972	Doe v. Bolton, 410 U.S. 179 (1973)	Blackmun, Harry A.	Civil Rights; Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Portions of Ga. Code §§ 26-1201–26-1203: Portions of Georgia statutes criminalizing abortions but permitting them under prescribed circumstances.

1972	Papish v. Board of Curators of the University of Missouri, 410 U.S. 667 (1973)	Per Curiam	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): A bylaw of a university board of curators that prohibited distribution of materials containing "indecent speech."

1972	New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973)	Per Curiam	Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): N.J. Stat. Ann. §§ 44:13-1 *et seq.*: New Jersey statute denying assistance to families in which parents are not ceremonially married, among other qualifications.

1972	Frontiero v. Richardson, 411 U.S. 677 (1973)	Brennan, William J.	Civil Rights; Family Law	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 37 U.S.C. §§ 401, 403; 10 U.S.C. §§ 1072, 1076: Statutes providing that spouses of female members of the Armed Forces must be proved dependent to qualify for certain benefits, whereas spouses of male members are statutorily deemed dependent and automatically qualified for allowances.

1972	Vlandis v. Kline, 412 U.S. 441 (1973)	Stewart, Potter	Education	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Conn. Gen. Stat. Rev. s10—329(b) (Supp. 1969), as amended by Public Act No. 5, § 126 (June Sess. 1971): Connecticut statute creating an irrebuttable presumption that a student from out-of-state at the time he applied to a state college remained a nonresident for tuition purposes for his entire student career.

continues

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1972	Wardius v. Oregon, 412 U.S. 470 (1973)	MARSHALL, THURGOOD	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Ore. Rev. Stat. § 135.875: Oregon statute requiring a defendant to give pretrial notice of alibi defense and names of supporting witnesses but denying the defendant any reciprocal right of discovery of rebuttal evidence.

1972	White v. Regester, 412 U.S. 755 (1973)	WHITE, BYRON R.	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Provision of reapportionment plan for the Texas House of Representatives adopted in 1970 by the State Legislative Redistricting Board creating multimember districts in two Texas counties instead of single-member districts.

1972	White v. Weiser, 412 U.S. 783 (1973)	WHITE, BYRON R.	Elections	State & Local

Constitutional Provision(s) Invoked: Article I, Section 2

Constitutional Clause(s) Invoked: Composition & Election of Members

Description of Unconstitutional Provision(s): S.B. 1, Tex. Acts, 62d Leg., 1st Called Sess., c. 12, p. 38: Texas congressional districting law.

1972	Levitt v. Committee for Public Education & Religious Liberty, 413 U.S. 472 (1973)	BURGER, WARREN E.	Education	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Establishment Clause

Description of Unconstitutional Provision(s): New York Laws 1970, c. 138, § 2: New York statute to reimburse nonpublic schools for administrative expenses incurred in carrying out state-mandated examination and record-keeping requirements, but requiring no accounting and separating of religious and nonreligious uses.

1972	United States Department of Agriculture v. Murry, 413 U.S. 508 (1973)	DOUGLAS, WILLIAM O.	Pensions & Benefits	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 7 U.S.C. § 2014(b): Statute creating conclusive presumption of food stamp ineligibility for households containing persons 18 years or older who were claimed as "dependents" for income tax purposes by a taxpayer who was ineligible for food stamps.

1972	United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973)	BRENNAN, WILLIAM J.	Pensions & Benefits	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): 7 U.S.C. § 2012(e): Statute excluding household from receiving food stamps if household contains an individual unrelated by birth, marriage, or adoption to any other member of the household.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1972	Sugarman v. Dougall, 413 U.S. 634 (1973)	Blackmun, Harry A.	Civil Rights; Labor & Employment	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): N.Y. Civ. Serv. Law § 53 (Supp. 1972-1973): New York statute providing that only United States citizens may hold permanent positions in competitive civil service.

1972	In re Griffiths, 413 U.S. 717 (1973)	Powell, Lewis F.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Rule 8(1) of the Connecticut Practice Book (1963): Connecticut legal bar rule restricting bar admission to United States citizens. State Bar Requirements, see also 413 U.S. 717; 470 U.S. 274; 486 U.S. 466; 487 U.S. 59; 489 U.S. 546.

1972	Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973)	Powell, Lewis F.	Education; Taxes	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Establishment Clause

Description of Unconstitutional Provision(s): N.Y. Laws 1972, c. 414, §§ 1–5: New York education and tax laws providing grants to nonpublic schools for maintenance and repairs of facilities and providing tuition reimbursements and income tax benefits to parents of children attending nonpublic schools.

1972	Sloan v. Lemon, 413 U.S. 825 (1973)	Powell, Lewis F.	Education	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Establishment Clause

Description of Unconstitutional Provision(s): Pa. Laws 1971, Act 92, Pa. Stat. Ann., Tit. 24, §§ 5701–09 (Supp. 1973 & 1974): Pennsylvania statute providing for reimbursement of parents for portion of tuition expenses in sending children to nonpublic schools.

1971	Groppi v. Leslie, 404 U.S. 496 (1972)	Burger, Warren E.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Wis. Assembly Res. Of Oct. 1, 1969, Special Sess.: The Assembly of the Wisconsin Legislature passed a resolution citing petitioner for contempt and directing his confinement in the Dane County jail for a period of six months or for the duration of the 1969 Regular Session of the legislature, whichever was shorter.

1971	Reed v. Reed, 404 U.S. 71 (1971)	Burger, Warren E.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): I.C. § 15-314: Idaho statute giving preference to males over females for appointment as administrator of a decedent's estate.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1971	Bullock v. Carter, 405 U.S. 134 (1972)	BURGER, WARREN E.	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Arts. 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code Ann., V.A.T.S. (Supp. 1970—71): Texas' filing fee system, which imposes on candidates the costs of the primary election operation and affords no alternative opportunity for candidates unable to pay the fees to obtain access to the ballot.

1971	Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)	DOUGLAS, WILLIAM O.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Jacksonville Ordinance Code § 26-57: Jacksonville, Florida vagrancy ordinance covering various generalized offenses.

1971	Dunn v. Blumstein, 405 U.S. 330 (1972)	MARSHALL, THURGOOD	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Tenn. Const. art. IV, § 1; Tenn. Code Ann. § 2-201 (Supp. 1970): Tennessee's one-year residency requirement as a condition of registration to vote.

1971	Eisenstadt v. Baird, 405 U.S. 438 (1972)	BRENNAN, WILLIAM J.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Mass. Gen. Laws Ann., ch. 272, § 21: Massachusetts statute making it a crime to dispense any contraceptive article to an unmarried person, except to prevent disease.

1971	Gooding v. Wilson, 405 U.S. 518 (1972)	BRENNAN, WILLIAM J.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Ga. Code Ann. § 26-6303: Georgia statute making it a crime to use language "of or to another" tending to cause a breach of the peace, which was not limited to "fighting words."

1971	Lindsey v. Normet, 405 U.S. 56 (1972)	WHITE, BYRON R.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Ore. Rev. Stat. § 105.160: Oregon statute requiring tenants who wish to appeal housing eviction order to file bond in twice the amount of rent expected to accrue during pendency of appeal.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1971	Stanley v. Illinois, 405 U.S. 645 (1972)	White, Byron R.	Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): Ill. Rev. Stat., c. 37 §§ 701-14 (definition), 702-1, 702-4, 702-5, 705-8: Illinois statute that presumes without a hearing the unfitness of the father of illegitimate children to have custody upon death or disqualification of the mother. The case turned on the interplay between the definition of "parent" and the relevant procedures.

1971	Weber v. AETNA Casualty & Surety Co., 406 U.S. 164 (1972)	Powell, Lewis F.	Workers' Compensation & Social Security; Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Louisiana Civil Code Articles 203, 204, and 205: Louisiana workmen's compensation statute, which relegates unacknowledged illegitimate children to a status inferior to legitimate and acknowledged illegitimate children.

1971	Brooks v. Tennessee, 406 U.S. 605 (1972)	Brennan, William J.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fifth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Self-Incrimination Clause

Description of Unconstitutional Provision(s): Tenn. Code Ann. § 40-2403 (1955): Tennessee statute that requires a criminal defendant who chooses to testify to do so before any other witness for him.

1971	Jackson v. Indiana, 406 U.S. 715 (1972)	Blackmun, Harry A.	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Ind. Ann. Stat. § 9-1706a (Supp. 1971) (recodified at Ind. Code 35-5-3-2 (1971): Indiana's pretrial commitment procedure for allegedly incompetent defendants, which provides more lenient standards for commitment than the procedure for those persons not charged with any offense, and more stringent standards for release.

1971	James v. Strange, 407 U.S. 128 (1972)	Powell, Lewis F.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Kan. Stat. Ann. § 22-4513: Kansas statute enabling the state to recover in subsequent civil proceedings legal defense fees for indigent defendants.

1971	United States v. Scotland Neck City Board of Education, 407 U.S. 484 (1972)	Stewart, Potter	Civil Rights; Education	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): 1969 N.C. Sess. Laws ch. 31: North Carolina statute concerning the creation of a new school district that the district court had found would impede disestablishment of desegregation efforts.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1971	Fuentes v. Shevin, 407 U.S. 67 (1972)	Stewart, Potter	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): F.S.A. §§ 78.01, 78.07, 78.08, 78.10, 78.13; 12 P.S. Pa. § 1821; Pa. R.C.P. Nos. 1073(a, b), 1076, 1077,12 P.S. Appendix: Replevin statutes of Florida and Pennsylvania that permit installment sellers or other persons alleging entitlement to property to cause the seizure of the property without any notice or opportunity to be heard on the issues.

1971	Grayned v. City of Rockford, 408 U.S. 104 (1972)	Marshall, Thurgood	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Code of Ordinances, c. 28, s 18.1(i): Rockford ordinance referred to as an "antipicketing" ordinance.

1971	Furman v. Georgia, 408 U.S. 238 (1972)	Per Curiam	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Eighth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Cruel & Unusual Punishment Clause

Description of Unconstitutional Provision(s): Code Ga. §§ 26-1005, 26-1302; Vernon's Ann. Tex. P.C. art. 1189: Georgia and Texas statutes providing for the imposition of the death penalty.

1971	Moore v. Illinois, 408 U.S. 786 (1972)	Blackmun, Harry A.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Eighth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Cruel & Unusual Punishment Clause

Description of Unconstitutional Provision(s): Illinois statute providing for imposition of the death penalty.

1971	Police Department of Chicago v. Mosley, 408 U.S. 92 (1972)	Marshall, Thurgood	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Chicago Municipal Code, c. 193-1(i) (1971): Chicago ordinance prohibiting all picketing within a certain distance of any school except labor picketing while school was in session.

1970	Oregon v. Mitchell, 400 U.S. 112 (1970)	Blackmun, Harry A.	Elections	Federal

Constitutional Provision(s) Invoked: Article I, Section 4, Clause 1

Constitutional Clause(s) Invoked: Time, Places, & Manner of Elections Clause

Description of Unconstitutional Provision(s): Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314: Lowered the voting age to 18 for state and local elections.

1970	Blount v. Rizzi, 400 U.S. 410 (1971)	Brennan, William J.	Civil Rights	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 39 U.S.C. § 4006: Statute which allows the Postmaster General to designate certain packages unlawful, refuse to send obscene packages, and halt all mail coming from individual during this proceeding.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1970	Wisconsin v. Constantineau, 400 U.S. 433 (1971)	Douglas, William O.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Wis. Stat. § 176.26 (1967): Wisconsin statute provided that certain designated individuals could prevent the sale of alcohol to certain individual citizens without any notice or hearing process.

1970	Groppi v. Wisconsin, 400 U.S. 505 (1971)	Stewart, Potter	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Sixth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Wis. Stat. § 971.22 (effective July 1, 1970): Wisconsin statute provided in essence that only those defendants charged with felonies could move to change venue on grounds of impartiality at trial.

1970	Baird v. State Bar of Arizona, 401 U.S. 1 (1971)	Black, Hugo L.	Legal Ethics	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): State Bar of Arizona conditioned admission on answering questions as to whether applicants had ever belonged to organizations advocating for an overthrow of the government.

1970	Application of Stolar, 401 U.S. 23 (1971)	Black, Hugo L.	Legal Ethics	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): New York State Bar Association conditioned admission on answering questions regarding participation in organizations advocating overthrow of the U.S. government by force.

1970	United States v. United States Coin & Currency, 401 U.S. 715 (1971)	Harlan, John M. II	Taxes	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Self-Incrimination Clause

Description of Unconstitutional Provision(s): 26 U.S.C. § 7302: Asset forfeiture statute.

1970	North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971)	Burger, Warren E.	Civil Rights; Education	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): N.C. Gen. Stat. § 115-176.1 (Supp. 1969): An anti-busing law prohibited assignment based on race of any kind, which hindered the mandate of the Fourteenth Amendment.

1970	Bell v. Burson, 402 U.S. 535 (1971)	Douglas, William O.	Transportation; Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Motor Vehicle Safety Responsibility Act, Ga. Code Ann. §§ 92A-601 *et seq.* (1958): Georgia statute requiring suspension of driver's license and vehicle registration of uninsured motorists involved in accidents unless he or she could post security to cover the damages.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1970	Coates v. City of Cincinnati, 402 U.S. 611 (1971)	Stewart, Potter	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Due Process Clause

Description of Unconstitutional Provision(s): Code of Ordinances of the City of Cincinnati § 901-L6 (1956): Ordinance preventing individuals from assembling as groups in a manner that annoyed others, which was unconstitutionally vague and violative of the First Amendment.

1970	Cohen v. California, 403 U.S. 15 (1971)	Harlan, John M. II	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Cal. Penal Code § 415: California statute prohibited offensive conduct intended to disturb the peace.

1970	Connell v. Higginbotham, 403 U.S. 207 (1971)	Per Curiam	Civil Rights; Education	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Fla. Stat. §§ 876.05–10 (1965): Statute contained an oath to which state employees were required to swear or affirm that such individual did not belong to any organization advocating the overflow of the U.S. or Florida governments.

1970	Graham v. Richardson, 403 U.S. 365 (1971)	Blackmun, Harry A.	Pensions & Benefits	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 4; Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Ariz. Rev. Stat. Ann. § 46-233 (Supp. 1970–1971): An Arizona statute restricted federal assistance to U.S. citizens or aliens residing in the U.S. for a total of 15 years. Pa. Stat. Ann., Tit. 62, § 432(2) (1968) (public welfare code): A Pennsylvania code provision limiting commonwealth-funded assistance to U.S. citizens.

1970	Lemon v. Kurtzman, 403 U.S. 602 (1971)	Burger, Warren E.	Civil Rights; Education	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Establishment Clause; Free Exercise Clause

Description of Unconstitutional Provision(s): R.I. Gen. Laws Ann. §§ 16-51-1 *et seq.* (Supp. 1970): Act authorizing state officials to supplement salaries of teachers of secular subjects at non-public schools resulted in excessive entanglement of government with religion. Pa. Stat. Ann., Tit. 24, §§ 5601–09 (Supp. 1971): Pennsylvania statute authorized purchase of secular educational services from nonpublic schools, resulting in a similar entanglement.

1970	Tilton v. Richardson, 403 U.S. 672 (1971)	Burger, Warren E.	Education; Civil Rights	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Establishment Clause; Free Exercise Clause

Description of Unconstitutional Provision(s): 20 U.S.C. § 754(b)(2) (1964): Enforcement section of the Higher Education Facilities Act suggested that at the end of 20 years, institutions of higher education could use federal funds for religious purposes.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1969	Turner v. Fouche, 396 U.S. 346 (1970)	STEWART, POTTER	Elections; Government Operations	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Ga. Const., art. VIII, § V, para. I; Ga. Code Ann. § 2-6801 (1948): A Georgia statute that limited membership on the county board of education to freeholders, or persons that owned real estate.

1969	Goldberg v. Kelly, 397 U.S. 254 (1970)	BRENNAN, WILLIAM J.	Workers' Compensation & Social Security; Government Operations	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 18 CRR-NY 351.26(b): The New York City Department of Social Services promulgated Procedure No. 68-18, which halted aid immediately after the reviewing official affirmed the determination of ineligibility. The applicant was then notified of their ineligibility for welfare via a letter and not provided the opportunity to be heard prior to the termination of aid.

1969	In re Winship, 397 U.S. 358 (1970)	BRENNAN, WILLIAM J.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): N.Y. Family Court Act § 744(b): A New York statute that provided for a finding of guilt by preponderance of the evidence for an act that, if done by an adult, would have constituted the crime of larceny.

1969	Hadley v. Junior College District, 397 U.S. 50 (1970)	BLACK, HUGO L.	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Mo. Rev. Stat. § 178.20 (Cum. Supp. 1967): A Missouri statute setting out how trustees are to be apportioned among the separate school districts. Briefly, the statutes provides that: if no one or more of the component school districts has [33.33%] or more of the total enumeration of the junior college district, then all six trustees are elected at large. If, however, one or more districts has between [33.33%] and 50% of the total enumeration, each such district elects two trustees and the rest are elected at large from the remaining districts. Similarly, if one district has between 50% and [66.66%] of the enumeration it elects three trustees, and if one district has more than [66.66%] it elects four trustees." Therefore, the statute "necessarily results in a systematic discrimination against voters in more populous school districts because whenever a large district's percentage of the total enumeration falls within a certain percentage range it is always allocated the number of trustees corresponding to the bottom of that range." Moreover, "unless a particular large district has exactly [33.33%], 50%, or [66.66%] of the total enumeration it will always have proportionally fewer trustees than the small districts."

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1969	Schacht v. United States, 398 U.S. 58 (1970)	Black, Hugo L.	Military & Veterans	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 10 U.S.C. § 772(f): This provision of the U.S. Code states: "While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force." The Court limited their holding to the emphasized portion, striking it as unconstitutional. The Court reasoned that, when this portion of § 772(f) is read together with 18 U.S.C. § 702, which made it a crime for any person without authority to wear any uniform of the United States military, the effect is a violation of an actor's constitutional right "to say things that tend to bring the military into discredit or disrepute."

1969	Phoenix v. Kolodziejski, 399 U.S. 204 (1970)	White, Byron R.	Elections; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Ariz. Const., art. 7, § 13 & art. 9, § 8; Ariz. Rev. Stat. Ann. §§ 9-523, 35-452 (1956); § 35-455 (Supp. 1969): An Arizona constitutional and statutory provision that limits the right to vote on general obligation bonds to qualified voters who are also real property taxpayers.

1969	Williams v. Illinois, 399 U.S. 235 (1970)	Burger, Warren E.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Ill. Rev. Stat. ch. 38, § 1-7(k): An Illinois statute that required a defendant, in default of the payment of the fine and court costs at the expiration of the one year sentence in connection with a petty theft conviction, to remain in jail to "work off" the monetary obligations at a rate of $5 per day.

1969	Baldwin v. New York, 399 U.S. 66 (1970)	White, Byron R.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Sixth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Right to Trial by Jury

Description of Unconstitutional Provision(s): N.Y.C. Crim. Ct. Act § 40 (Supp. 1969): A New York statute declaring that all trial held in the New York City Criminal Court "shall be without a jury."

1968	WHYY, Inc. v. Borough of Glassboro, 393 U.S. 117 (1968)	Per Curiam	Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protections Clause

Description of Unconstitutional Provision(s): New Jersey statute denying tax exemption to foreign nonprofit corporations owning property in state on sole ground that such corporations had not been incorporated in New Jersey.

1968	Williams v. Rhodes, 393 U.S. 23 (1968)	Black, Hugo L.	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protections Clause

Description of Unconstitutional Provision(s): Ohio Rev. Code § 3517.01: Several provisions of the Ohio election laws that placed substantial burdens on any party that did not identify as Republican or Democrat to qualify for a place on the state ballot to choose electors pledged to particular candidates for President.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1968	Hunter v. Erickson, 393 U.S. 385 (1969)	White, Byron R.	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protections Clause

Description of Unconstitutional Provision(s): Akron, Ohio, Ordinance No. 873 (1964), amended by Akron, Ohio, Ordinance No. 926 (1964): "Any ordinance enacted by the Council of The City of Akron which regulates [housing] . . . on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors . . . before said ordinance shall be effective." However, most other ordinances "remained subject to the general rule: the ordinance would become effective 30 days after passage by the City Council, or immediately if passed as an emergency measure, and would be subject to referendum only if 10% of the electors so requested by filing a proper and timely petition."

1968	Epperson v. Arkansas, 393 U.S. 97 (1968)	Fortas, Abe	Criminal Law & Procedure; Education	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause, Freedom of Religion

Description of Unconstitutional Provision(s): Ark. Code Ann. §§ 80-1627, 80-1628 (Repl. Vol. 1960): Arkansas's "anti-evolution" statute prohibiting "teach[ing] the theory or doctrine that mankind ascended or descended from a lower order of animals," or using a textbook that propounds this theory, in any state-funded school or university.

1968	Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969)	Stewart, Potter	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Exercise Clause

Description of Unconstitutional Provision(s): General Code of Birmingham § 1159: An ordinance that required a permit be submitted to the commission to march in any parade or public demonstration. The commission could deny any permit if "in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused."

1968	Hadnott v. Amos, 394 U.S. 358 (1969)	Douglas, William O.	Elections	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fifteenth Amendment

Constitutional Clause(s) Invoked: Free Exercise Clause, Right to Vote

Description of Unconstitutional Provision(s): Ala. Code, Tit. 17, § 274 (1958): Read to allow white candidates to file needed committees before election, but not POC candidates and disqualified them from the election.

1968	Kirkpatrick v. Preisler, 394 U.S. 526 (1969)	Brennan, William J.	Elections	State & Local

Constitutional Provision(s) Invoked: Article I, Section 2

Constitutional Clause(s) Invoked: Equal Representation

Description of Unconstitutional Provision(s): Mo. Rev. Stat., c. 128 (Cum. Supp. 1967): Missouri 1967 congressional redistricting statute that had extreme differences in population district to district

1968	Wells v. Rockefeller, 394 U.S. 542 (1969)	Brennan, William J.	Elections	State & Local

Constitutional Provision(s) Invoked: Article I, Section 2; Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Representation

Description of Unconstitutional Provision(s): N.Y. Laws 1968, c. 8: New York law that sectioned off voting districts in disproportionate regions.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1968	Stanley v. Georgia, 394 U.S. 557 (1969)	MARSHALL, THURGOOD	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Ga. Code Ann. § 26-301 (Supp. 1968): Barring private possession of obscene matter.

1968	Shapiro v. Thompson, 394 U.S. 618 (1969)	BRENNAN, WILLIAM J.	Civil Rights; Pensions & Benefits	Federal; State & Local

Constitutional Provision(s) Invoked: Fifth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protections Clause, Due Process Clause

Description of Unconstitutional Provision(s): Conn. Gen. Stat. § 17-2d (Supp. 1965); D.C. Code § 3-203 (1967); 62 Pa. Const. Stat. § 432(6) (1968); 76 Stat. 914: Connecticut, Pennsylvania, and the District of Columbia statutory provisions that required, as a prerequisite for the receipt of social security benefits in their respective states, that applicants for aid through the Aid to Families with Dependent Children program have resided in their respective states for at least one year prior to date of filing their application for benefits.

1968	Moore v. Ogilvie, 394 U.S. 814 (1969)	DOUGLAS, WILLIAM O.	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause, Equal Protections Clause

Description of Unconstitutional Provision(s): Ill. Rev. Stat., c. 46, § 10-3: Illinois statute requiring at least 25,000 signatures (at least 200 signatures from each of the 50 counties) from qualified voters to get a candidate from a new political party on the ballot.

1968	Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969)	DOUGLAS, WILLIAM O.	Civil Procedure; Labor & Employment	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Wis. Stat. § 267.07(1): Wisconsin garnishment statute allowing the freezing of a defendant's wages until trial and final decision of suit on the merits.

1968	Jenkins v. McKeithen, 395 U.S. 411 (1969)	MARSHALL, THURGOOD	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause, Equal Protections Clause

Description of Unconstitutional Provision(s): Act No. 2 (1967); La. Rev. Stat. 22:880.1–23:880.18 (Supp. 1969): A Louisiana statute that created the Louisiana Labor-Management Commission of Inquiry to "the investigation and findings of facts relating to violations or possible violations of criminal laws of the state of Louisiana or of the United States arising out of or in connection with matters in the field of labor-management relations" and make those findings a matter of public record.

1968	Brandenburg v. Ohio, 395 U.S. 444 (1969)	PER CURIAM	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fifteenth Amendment

Constitutional Clause(s) Invoked: Free Exercise Clause

Description of Unconstitutional Provision(s): Ohio Criminal Syndicalism Act (Ohio Rev. Code Ann. § 2923.13): Ohio law that made it unlawful to advocate for criminal activity or methods of terrorism or to voluntarily assemble with any group to teach or advocate doctrines of syndicalism.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1968	Leary v. United States, 395 U.S. 6 (1969)	Harlan, John M. II	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551; 26 U.S.C. §§ 4741, 4744, 4751, 4753: Imposed a tax on the transfer of marijuana, rendered unlawful the possession of marijuana by a person who had failed to pay the tax imposed by § 4741, imposed a special occupational tax on persons engaging in transactions involving marijuana, and provided for the registration of persons subject to the special occupational tax imposed by § 475. Narcotic Control Act of 1956, ch. 629, § 106, 70 Stat. 567, 570, amending Narcotic Drugs Import and Export Act, ch. 100, § 2(h), 35 Stat. 614 (1909): Imposes a criminal punishment upon every person who "knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law . . . , or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . ." Section 176a also creates a presumption that, "whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

1968	Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969)	Warren, Earl	Education; Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protections Clause

Description of Unconstitutional Provision(s): N.Y. Educ. Laws §§ 2553(2), (4) (1953), as amended (Supp. 1968): Requiring those who vote in board of education elections to own or lease taxable property within the school district, or be the parent and/or guardian of a student who attends the school district.

1968	Cipriano v. City of Houma, 395 U.S. 701 (1969)	Per Curiam	Elections; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protections Clause

Description of Unconstitutional Provision(s): La. Rev. Stat. § 39:501 (1950): A Louisiana statute that limited the municipalities' power to issue revenue bonds so that bonds could only be issued if they were approved by a "majority in number and amount of the [Louisiana] property taxpayers qualified to vote" and who vote at the bond election.

1967	United States v. Robel, 389 U.S. 258 (1967)	Warren, Earl	Civil Rights	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Subversive Activities Control Act of 1950, § 5(a)(1)(D), 64 Stat. 992: Statute prohibited anyone who was a member of a registered Communist-action organization from working in any defense facility.

1967	Whitehill v. Elkins, 389 U.S. 54 (1967)	Douglas, William O.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Ober Act §§ 1, 13 (Art. 85A, Md. Ann. Code, 1957): Maryland law that requires teachers to take an oath certifying that he or she was not engaged in any attempt to overthrow, by force or violence, the U.S. or Maryland governments under penalty of perjury.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1967	Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968)	Per Curiam	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Chicago Motion Picture Censorship Ordinance: Ordinance required that those seeking to show films submit them to a Superintendent for a permit before exhibiting any film, a review and appeal process that lasted 50 to 57 days.

1967	Lee v. Washington, 390 U.S. 333 (1968)	Per Curiam	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Code of Ala., Title 45, §§ 4, 52, 121, 122, 123, 172 & 183 (1958): Statutes provided for racial segregation in state prisons and jails.

1967	Avery v. Midland County, 390 U.S. 474 (1968)	White, Byron R.	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Vernon's Ann. Tex. Civ. St. arts. 1269k, § 23a, 1677, 2351, 2766, 4492: Midland, County Texas districting statute apportioned general governmental powers over an entire geographic area among single-member districts of substantially unequal population.

1967	United States v. Jackson, 390 U.S. 570 (1968)	Stewart, Potter	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Fifth Amendment; Sixth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Impartial Jury Clause

Description of Unconstitutional Provision(s): Portion of the Federal Kidnaping Act, 18 U.S.C. § 1201(a): Authorized the death penalty as a punishment "if the verdict of the jury shall so recommend," and not in the case of a plea bargain.

1967	Interstate Circuit v. City of Dallas, 390 U.S. 676 (1968)	Marshall, Thurgood	Advertising, Publishing, & Communications; Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Revised Code of Civil and Criminal Ordinances of the City of Dallas, Chapter 46A (1960): Required that motion picture exhibitors file with and seek approval from a Motion Picture Classification Board which then classifies the film as suitable or not for children. The ordinance required a specific license for films not suitable for children, and imposed misdemeanor penalties for non-compliance.

1967	Rabeck v. New York, 391 U.S. 462 (1968)	Per Curiam	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): New York Penal Law, Consol. Laws, c. 40, § 484-i: Repealed statute prohibiting the sale of magazines "which would appeal to the lust of persons under the age of eighteen . . . ."

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1967	Witherspoon v. Illinois, 391 U.S. 510 (1968)	Stewart, Potter	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Sixth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Impartial Jury Clause

Description of Unconstitutional Provision(s): Ill. Rev. Stat., c. 38, § 743 (1959): Statute providing that a juror's "conscientious scruples against capital punishment" in trials for murder constitutes a for cause challenge.

1967	Pope v. United States, 392 U.S. 651 (1968)	Per Curiam	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Fifth Amendment; Sixth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Impartial Jury Clause

Description of Unconstitutional Provision(s): Federal Bank Robbery Act, 18 U.S.C. § 2113(e): Act imposed death penalty for bank robberies.

1966	Swann v. Adams, 385 U.S. 440 (1967)	White, Byron R.	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Fla. Stat. Ann. §§ 1(1)–(2): Florida reapportinment plan where "senate districts ranged from 15.09% overrepresented to 10.56% underrepresented with the ratio between the largest and smallest district being 1.30 to 1 and by which the house districts ranged from 18.28% overrepresented to 15.27% underrepresented with a radio of 1.41:1 between the largest and smallest districts, without adequate explanation as to reasons for the large deviations"

1966	Keyishian v. Board of Regents of University of New York, 385 U.S. 589 (1967)	Brennan, William J.	Education	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): N.Y. Educ. § 3021-02(2) & N.Y. Civ. Serv. §§ 105 (1)–(3): New York statutory scheme requiring the removal of professors at public universities for "treasonable or seditious udderances or acts."

1966	National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967)	Stewart, Potter	Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Commerce Clause; Due Process Clause

Description of Unconstitutional Provision(s): Ill. Rev. Stat. c. 120, §§ 439(2)–(3) (1965): Requires any business advertising in Illonois to pay taxes to Illonois, regardless of where they are incorporated or do business.

1966	Afroyim v. Rusk, 387 U.S. 253 (1967)	Black, Hugo L.	Civil Rights; Immigration	Federal

Constitutional Provision(s) Invoked: Fifth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Citizenship Clause; Due Process Clause

Description of Unconstitutional Provision(s): 8 U.S.C. § 1481: United States citizen shall lose their citizenship if they vote in a foreign political election

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1966	Reitman v. Mulkey, 387 U.S. 369 (1967)	White, Byron R.	Civil Rights; Real Property	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Cal. Const. art I, § 26: "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." Real Property is limited to residential property not owned by the state. Allowed for termination of lease based on racial considerations.

1966	Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967)	White, Byron R.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourth Amendment; Fourteenth Admenment

Constitutional Clause(s) Invoked: Due Process Clause; Warrant Clause

Description of Unconstitutional Provision(s): Ca. Housing Code § 503: Authorizes City employees to enter any building or structure provided they have the proper credentials and it is at a reasonable time.

1966	Loving v. Virginia, 388 U.S. 1 (1967)	Warren, Earl	Civil Rights; Family Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): Va. Code Ann. §20-58, 20-59 (1960): Virginia statutory code prohibiting interracial marraiges.

1966	Washington v. Texas, 388 U.S. 14 (1967)	Warren, Earl	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Sixth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Confrontation Clause; Due Process Clause

Description of Unconstitutional Provision(s): Vernon's Ann. Tex. Pen.Code, Art. 82: Prohibits principles, accessories, or accomplices from being introduced as witnesses for one another.

1966	Berger v. New York, 388 U.S. 41 (1967)	Clark, Tom C.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourth Amendment; Fourteenth Admenment

Constitutional Clause(s) Invoked: Due Process Clause; Right of Privacy

Description of Unconstitutional Provision(s): N.Y. Code Crim. Proc. § 813(a): Allows for "issuance of the order, or warrant for eavesdropping, upon the oath of the attorney general, the district attorney or any police officer above the rank of sergeant stating that 'there is reasonable ground to believe that evidence of crime may be thus obtained'." Berger v. New York, 388 U.S. 41, 54 (1967).

1965	United States v. Romano, 382 U.S. 136 (1965)	White, Byron R.	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 26 U.S.C. § 5601(b)(1): Particular section of a federal statute governing spirits provided that "[w]henever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1965	Giaccio v. Pennsylvania, 382 U.S. 399 (1966)	Black, Hugo L.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Act of March 31, 1860, Pub. L. No. 427, § 62; Pa. Stat. Ann., Tit. 19, § 1222: A Pennsylvania statute that allowed a jury to decide to impose the costs of the prosecution on the defendant and, upon that determination, permitted the court to sentence the defendant to that effect and order that the defendant be committed to jail until the costs are paid.

1965	Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965)	Brennan, William J.	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Subversive Activities Control Act of 1950, § 13(a), 64 Stat. 993–94, 50 U.S.C. § 786(d)(4) (1964): A provision of the Subversive Activities Control Act that allowed the Attorney General, after determining that a person was a member of the Communist Party, to order that the person register as such.

1965	Harper v. Virginia State Board of Elections, 383 U.S. 663 (1965)	Douglas, William O.	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Va. Const. §§ 18, 20, 21, 173: A Virginia poll tax scheme that imposed a tax upon on every resident of the State 21 years of age and over as a prerequisite for voting.

1965	Elfbrandt v. Russell, 384 U.S. 11 (1966)	Douglas, William O.	Government Operations	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Ariz. Rev. Stat. § 38-231 (1965 Supp.): An Arrizona statute that required state employees to take an oath and subjecting them to prosecution for perjury and discharge if they knowingly and willingly became a member of the communist party or of any other organizaiton where one of the organization's purposes was to promote the overthrow of the government of Arizona.

1965	Mills v. Alabama, 384 U.S. 214 (1966)	Black, Hugo L.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Alabama Corrupt Practices Act § 285; Ala. Code, 1940, Tit. 17, §§ 268–86: An Alabama law that makes it a crime "to do any electioneering or to solicit any votes . . . in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held."

1965	Rinaldi v. Yeager, 384 U.S. 305 (1966)	Stewart, Potter	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): N.J. Stat. Ann. § 2A: 152-18 (1964 Cum. Supp.): A New Jersey statute that imposed a duty to repay the costs associated with filing unsuccesssful appeals on incarcerated appellants, but did not impose a similar requirement on appellants who were not incarcerated.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1964	McLaughlin v. Florida, 379 U.S. 184 (1964)	White, Byron R.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Fla. Stat. § 798.05: A Florida statute making it illegal for a black man and white woman or white man and black woman to "habitually live in and occupy in the nighttime the same room" if they are not married.

1964	Cox v. Louisiana, 379 U.S. 536 (1965)	Goldberg, Arthur J.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Freedom of Association; Free Speech Clause

Description of Unconstitutional Provision(s): La. Stat. Ann. § 14:103.1: Louisiana disturbing the peace statute interpreted by the Louisiana Supreme Court in a way that criminalizes peacefully expressing unpopular views.

1964	Garrison v. Louisiana, 379 U.S. 64 (1964)	Brennan, William J.	Advertising, Publishing, & Communications; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): La. Stat. Ann. §§14:47-14:49: Louisiana statutes allowing criminal punishment for true statements made with ill-will and for false statements against public officials without regard to defendants knowledge of falsity or reckless disregard for falsity of statement.

1964	Louisiana v. United States, 380 U.S. 145 (1965)	Black, Hugo L.	Elections	State & Local

Constitutional Provision(s) Invoked: Fifteenth Amendment

Constitutional Clause(s) Invoked: Right to Vote Clause

Description of Unconstitutional Provision(s): La. Acts 1960, No. 613 (amending La. Const. Art. VIII, s 1(d) and previously implemented in La. Stat. Ann. § 18:36): Louisiana constitutional provision that required that applicant attempting to register to vote must be able to "give a reasonable interpretation" of any section of the State or Federal Constitution.

1964	Dombrowski v. Pfister, 380 U.S. 479 (1965)	Brennan, William J.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): La. Stat. Ann. §§ 14:359(5), 14:364(7): Louisiana statute defining subversive organization and making it a criminal offense to fail to register as a member of a subversive organization.

1964	Freedman v. Maryland, 380 U.S. 51 (1965)	Brennan, William J.	Advertising, Publishing, & Communications	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Md. Ann. Code, 1957, art. 66A: Maryland statute requiring submission of film to Maryland State Board of Censors prior to exhibition.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1964	Harman v. Forssenius, 380 U.S. 528 (1965)	Warren, Earl	Elections	State & Local

Constitutional Provision(s) Invoked: Twenty-Fourth Amendment

Constitutional Clause(s) Invoked: Poll Tax Clause

Description of Unconstitutional Provision(s): Va. Code. Ann. § 24-17.2 (1964 Supp.): Virginia statute requiring that one must pay a poll tax or file a witnessed or notarized certificate of residence in order to vote in federal elections.

1964	Carrington v. Rash, 380 U.S. 89 (1965)	Stewart, Potter	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Tex. Const., art. IV, § 2: Texas constitutional provision prohibiting any member of the Armed Forces who moves to Texas during military duty from voting in any election in Texas while he or she is a member of the Armed Forces.

1964	Lamont v. Postmaster General of United States, 381 U.S. 301 (1965)	Douglas, William O.	Government Operations	Federal

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): 39 U.S.C. § 4008(a): Federal law requiring mail that is printed or prepared in a foreign country and determined to be "communist political propaganda" to be detained by the Postmaster General and delivered only after the addressee requests that it be delivered.

1964	United States v. Brown, 381 U.S. 437 (1965)	Warren, Earl	Labor & Employment	Federal

Constitutional Provision(s) Invoked: Article I, Section 9, Clause 3

Constitutional Clause(s) Invoked: Bill of Attainder Clause

Description of Unconstitutional Provision(s): 29 U.S.C. § 504: Federal law making it illegal for a member of the Communist Party to serve as an officer or employee of a labor union.

1964	Griswold v. Connecticut, 381 U.S. 479 (1965)	Douglas, William O.	Criminal Law & Procedure; Healthcare	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Conn. Gen. Stat. §§ 53-32, 54-196: Connecticut statute prohibiting the use of contraceptives.

1963	Polar Ice Cream & Creamery Co. v. Andews, 375 U.S. 361 (1964)	White, Byron R.	Food & Drug	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Fla. Stat. § 501, Florida Milk Commission's Rule 220—1.05: Florida statute and related orders of the Milk Commission requiring that a substantial share of the local milk market be reserved for local producers.

1963	Anderson v. Martin, 375 U.S. 399 (1964)	Clark, Tom C.	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): La. Rev. Stat. § 18:1174.1: Louisiana statute requiring that the nomination papers and ballots designate the race of candidates for elective office in all primary, general, and special elections.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1963	Wesberry v. Sanders, 376 U.S. 1 (1964)	Black, Hugo L.	Elections	State & Local

Constitutional Provision(s) Invoked: Article I, Section 2, Clause 1

Constitutional Clause(s) Invoked: House of Representatives Clause

Description of Unconstitutional Provision(s): Ga. Code § 34-2301 (1931): Georgia statute creating congressional districts where one district had twice the population of the average congressional district in the state.

1963	Schneider v. Rusk, 377 U.S. 163 (1964)	Douglas, William O.	Immigration	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Immigration and Nationality Act of 1952, § 352(a)(1), 66 Stat. 163, 269 (codified at 8 U.S.C. §§ 1101, 1484): Federal statute providing for denationalization of naturalized citizens who reside continuously in the country of their birth or former nationality for three years.

1963	Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964)	Black, Hugo L.	Education	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Prince Edward County School Board decision to close public schools while contributing financial support to private segregated schools.

1963	Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964)	Stewart, Potter	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 2

Constitutional Clause(s) Invoked: Export Clause

Description of Unconstitutional Provision(s): Ky. Rev. Stat. Ann. § 243.680(2)(a): Kentucky statute that requires all persons who import whiskey to first obtain a permit and pay a tax on the amount of alcohol in each shipment.

1963	Baggett v. Bullitt, 377 U.S. 360 (1964)	White, Byron R.	Education; Labor & Employment	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Wash. Laws 1931, c. 103: Washington law requiring teachers to swear an oath to the federal and state constitution. Wash. Laws 1955, c. 377: Washington law requiring all state employees to take an oath declaring that they were not a "subversive person" as defined by the act.

1963	Chamberlin v. Dade County Board of Public Instruction, 377 U.S. 402 (1964)	Per Curiam	Education	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Establishment Clause

Description of Unconstitutional Provision(s): Fla. Stat. (1961) § 231.09: Florida statute authorizing school prayer and devotional bible reading in Dade County Public School

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1963	Reynolds v. Sims, 377 U.S. 533 (1964)	WARREN, EARL	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Alabama Reapportionment Act of 1962, Alabama House Bill No. 59, Act No. 91, Acts of Alabama, Special Session, 1962, p. 121 and Proposed Constitutional Amendment No. 1 of 1962, Alabama Senate Bill No. 29, Act No. 93, Acts of Alabama, Special Session, 1962, p. 124: Alabama statutes that failed to apportion legislative seats based on population.

1963	WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964)	WARREN, EARL	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): McKinney's N.Y.Laws, 1952 (Supp.1963), State Law, §§ 120—124: New York statute that failed to apportion legislative districts sufficiently on a population basis.

1963	Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656 (1964)	WARREN, EARL	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Md. Ann. Code (1962 Supp.), art. 40, § 42: Maryland statute that had "gross disparities from population-based representation in the apportionment of seats in the Maryland Senate."

1963	Davis v. Mann, 377 U.S. 678 (1964)	WARREN, EARL	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Va. Code § 24-14: Virginia statute apportioning districts for the Virginia Senate where 41.1% of the State's population lives in districts electing a majority of the Senators and Virginia House of Delegates where 40.5% of the State's population lives in districts electing a majority of the Delegates.

1963	Roman v. Sincock, 377 U.S. 695 (1964)	WARREN, EARL	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Del. Const. Art II, § 2 (1897), as amended in 1963: Delaware constitutional provisions that provided for two-thirds of the state Senate to be elected by 31% of the state's residents.

1963	Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964)	WARREN, EARL	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Colo. Const., art. 5, §§ 45–48 (as adopted in 1962, amend. No. 7, Laws 1963, p. 1045), Colo. Rev. Stat. §§ 63–1–1 to 63–1–6 (1953): Colorado statutes apportioning the state Senate that had extreme departures from population-based representation.

1963	Aptheker v. Secretary of State, 378 U.S. 500 (1964)	GOLDBERG, ARTHUR J.	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Subversive Activities Control Act of 1950, § 6, 64 Stat. 993 (codified at 50 U.S.C. § 785): Federal statute making it illegal for a member of a communist organization to apply for, renew, use, or attempt to use a passport.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1962	National Ass'n for Advancement of Colored People v. Button, 371 U.S. 415 (1963)	Brennan, William J.	Civil Rights; Legal Ethics	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Chapters 31, 32, 33, 35 and 36 of the Virginia Acts of Assembly, 1956 Extra Session; Chapter 33 prohibits "solicitation of legal business by a 'runner' or 'capper,'" which the chapter defines as "an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right to liability."

1962	Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)	Goldberg, Arthur J.	Civil Rights; Immigration	Federal

Constitutional Provision(s) Invoked: Fifth Amendment; Sixth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Right to Trial by Jury

Description of Unconstitutional Provision(s): Immigration and Nationality Act of 1952, §§ 401(j), 349(a)(10): Imposed "automatic[]" forfeiture of citizenship without court or administrative proceedings on those citizens who left the country and remained overseas to evade the draft.

1962	Gideon v. Wainwright, 372 U.S. 335 (1963)	Black, Hugo L.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Sixth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Right to Counsel

Description of Unconstitutional Provision(s): Florida state law authorizing the court to appoint council to a defendant only when they are charged with a capital offense.

1962	Gray v. Sanders, 372 U.S. 368 (1963)	Douglas, William O.	Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment; Seventeenth Amendment; Nineteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Ga. Code Ann., § 34-3212, 34-3213 (1962): Voting scheme that gave every voter one vote, but counted the votes in a bracket system that weighted some rural votes more than some urban votes.

1962	Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)	Brennan, William J.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): Rhode Island Legislature's Resolution 73: Created a Rhode Island Commission to Encourage Morality in Youth, and charged it with "the duty" to educate the public regarding obscene books, and to "investigate and recommend the prosecution of all violators . . . ."

1962	Peterson v. Greenville, 373 U.S. 244 (1963)	Warren, Earl	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Greenville City Ordinance provided, "[it] shall be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating house, boarding house or similar establishment to furnish meals to white persons and colored persons in the sat room . . . ."

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1962	Good v. Board of Education of Knoxville, 373 U.S. 683 (1963)	Clark, Tom C.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Transfer clauses for school desegregation plans in two Tennessee localities allowed students to request transfer for good cause. Good cause for purposes of the plans considered only racial factors.

1962	Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963)	Douglas, William O.	Labor & Employment; Legal Ethics	State & Local

Constitutional Provision(s) Invoked: Fifth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): N.Y. Jud. § 90: Admission to practice statutes not providing for a hearing in cases where the applicant was rejected.

1962	School District of Abington Township v. Schempp, 374 U.S. 203 (1963)	Clark, Tom C.	Civil Rights; Education	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Establishment Clause

Description of Unconstitutional Provision(s): 24 Pa. Stat. § 15-1516, as amended, Pub. Law No. 1928 (Supp. 1960): Demanded that: "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian." Board of School Commissioners of Baltimore City adopted a rule pursuant to Art. 77, § 202 of the Annotated Code of Maryland instituting "the holding of opening exercises in the schools of the city, consisting primarily of the 'reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer."

1961	Cramp v. Board of Public Instruction, 368 U.S. 278 (1961)	Stewart, Potter	Government Operations	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Fla. Stat. §§ 876.05, .06, .08: Provisions of a Florida statute requiring that all state government employees take an oath that they "have not and will not lend my aid, support, advice, counsel or influence to the Communist Party" by punishment of perjury and immediate discharge.

1961	Engel v. Vitale, 370 U.S. 421 (1962)	Black, Hugo L.	Civil Rights; Education	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Establishment Clause

Description of Unconstitutional Provision(s): 18 Misc. 2d, at 671-672, 191 N.Y.S. 2d, at 468-469: A New York law that required all public school students to recite a prayer in the presence of their teacher at the beginning of each school day.

1961	Robinson v. California, 370 U.S. 660 (1962)	Stewart, Potter	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Eighth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Cruel & Unusual Punishment Clause

Description of Unconstitutional Provision(s): Cal. Health & Safety Code § 11721: A California statute that made it a criminal offense for someone to "be addicted to the use of narcotics."

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1960	Gomillion v. Lightfoot, 364 U.S. 339 (1960)	Frankfurter, Felix	Elections	State & Local

Constitutional Provision(s) Invoked: Fifteenth Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Local Act No. 140 (1957): An Alabama statute redefining the boundaries of the City of Tuskegee so that the shape of Tuskegee was altered from a square to an twenty-eight-sided figure.

1960	Shelton v. Tucker, 364 U.S. 479 (1960)	Stewart, Potter	Education; Labor & Employment	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Freedom of Association

Description of Unconstitutional Provision(s): Act 10 of the Second Extraordinary Session of the Arkansas General Assembly of 1958: An Arkansas statute that prohibited the employment as a superintendent, principal or teacher in any public school in Arkansas, or as an instructor, professor or teacher in any public institution of higher learning in Arkansas, unless the person has first submitted an affidavit listing all organizations to which he at the time belongs and to which he has belonged during the past five years to the appropriate hiring authority.

1960	Bush v. Orleans Parish School Board, 364 U.S. 500 (1960)	Per Curiam	Education	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Act 2 of the First Extraordinary Session of 1960, LSA-R.S. 49:801 et seq.: A Louisiana so-called "interposition" statute by which Louisiana declares that it will not recognize the Supreme Court's decision in Brown v. Board of Education or the orders of this court issued pursuant to the mandate of that case. At issue in this case were 25 measures designed to halt, or at least forestall, the implementation of the Orleans Parish School Board's announced desegregation proposal.

1960	Ferguson v. Georgia, 365 U.S. 570 (1961)	Brennan, William J.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Ga. Code §§ 38-415, 38-416: Two Georgia statutes that retained the common law rule that persons "charged in any criminal proceeding" were incompetent to testify on their own behalf, but allowed the defendant to make an unsworn statement.

1960	Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744 (1961)	Whittaker, Charles E.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article VI, Section 1, Clause 2

Constitutional Clause(s) Invoked: Supremacy Clause

Description of Unconstitutional Provision(s): Wash. Rev. Code § 84.40.080: A Washington statute that provided for the taxation at the full value of all taxable leaseholds held by federal government but taxation of other property at 50 percent of fair market value.

1960	Torcaso v. Watkins, 367 U.S. 488 (1960)	Black, Hugo L.	Elections; Government Operations	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Establishment Clause

Description of Unconstitutional Provision(s): Article 37 of the Declaration of Rights of the Maryland Constitution: A Maryland statute that required a person seeking public office to declare their belief in the existence of God.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1959	Smith v. California, 361 U.S. 147 (1959)	Brennan, William J.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): L.A. Mun. Code § 41.01.1: A California ordinance that made it imposed strict criminal liability on any person who has "in his possession any obscene or indecent writing, [or] book . . . in any place of business where . . . books . . . are sold or kept for sale."

1959	Phillips Chemical Co. v. Dumas Independent School District, 361 U.S. 376 (1960)	Warren, Earl	Taxes	State & Local

Constitutional Provision(s) Invoked: Article VI, Section 1, Clause 2

Constitutional Clause(s) Invoked: Supremacy Clause

Description of Unconstitutional Provision(s): Vernon's Tex. Rev. Civ. Stat., 1948 (Supp. 1950), art. 5248 as amended Tex. Laws, 1st C. S. 1950, c. 37: A Texas statute that provided for taxation of leaseholds located on federal lands that was distinctly higher than the taxation of similarly situated lessees on exempt property owned by the state or its subdivisions under Art. 7173.

1959	Talley v. California, 362 U.S. 60 (1960)	Black, Hugo L.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): L.A. Mun. Code § 28.06: A city ordinance that bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them.

1958	Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959)	Douglas, William O.	Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Ill. Rev. Stats.1957, c. 95 1/2, § 218b: Illinois statute requiring that vehicles be "equipped with rear fender splash guards" in compliance with the statute while the vehicles are in operation on the highways of Illinois.

1958	Kingsley International Pictures Corp. v. Regents of University of New York, 360 U.S. 684 (1959)	Stewart, Potter	Education	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): McKinney's Consol. N.Y. Laws § 122-a (Cum. Supp. 1958): New York Law prohibiting showing of motion picture without a license and defining motion pictures that can be barred to include films that presents "acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior."

1957	Staub v. City of Baxley, 355 U.S. 313 (1958)	Whittaker, Charles E.	Advertising, Publishing, & Communications	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): City of Baxley Ordinance of September 17, 1949: Local ordinance making it an offense to "solicit" City of Baxley citizens to become members of any "organizaiton, union or society" that requires "fee [or] dues" without first receiving a "permit" from the Mayor and Council of the City.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1957	Trop v. Dulles, 356 U.S. 86 (1958)	Warren, Earl	Military & Veterans	Federal

Constitutional Provision(s) Invoked: Eighth Amendment

Constitutional Clause(s) Invoked: Cruel & Unusual Punishment Clause

Description of Unconstitutional Provision(s): Section 401(g) of the Nationality Act of 1940, 8 U.S.C. § 1481(a)(8): A federal statute giving military authorities discretion to impose denationalization if convicted by court martial of wartime desertion.

1957	Speiser v. Randall, 357 U.S. 513 (1958)	Brennan, William J.	Taxes	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Due Process Clause

Description of Unconstitutional Provision(s): California Revenue and Taxation Code § 32: California law requiring claimants, as a prerequisite to qualification for any property-tax exemption, to sign a statement on their tax return declaring that they do not advocates the overthrow of the federal or California government "by force or violence or other unlawful means" or support a hostile government against the United States

1957	First Unitarian Church of Los Angeles v. County of Los Angeles, 357 U.S. 545 (1958)	Brennan, William J.	Taxes	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Due Process Clause

Description of Unconstitutional Provision(s): California Revenue and Taxation Code § 32: California law requiring claimants, as a prerequisite to qualification for any property-tax exemption, to sign a statement on their tax return declaring that they do not advocates the overthrow of the federal or California government "by force or violence or other unlawful means" or support a hostile government against the United States

1956	Butler v. Michigan, 352 U.S. 380 (1957)	Frankfurter, Felix	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): § 343 of the Michigan Penal Code: A Michigan law that made it unlawful for a person to "import, print, publish, sell, possess with the intent to sell, design, prepare, loan, give away, distribute or offer for sale" any writing, picture, publication or other thing "containing obscene, immoral, lewd or lascivious language" or pictures "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth."

1955	United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955)	Black, Hugo L.	Military & Veterans	Federal

Constitutional Provision(s) Invoked: Article III

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Art. 3 (a), Uniform Code of Military Justice, 64 Stat. 109, 50 U.S.C. § 553: A federal law that subjected "any person" who violated a provision of the Uniform Code of Military Justice, while subject to the Code, to trial by court-martial where the violation was punishable by confinement of five years or more regardless of whether the person was still subject to the Code at the time of the trial.

1953	Brown v. Board of Education, 347 U.S. 483 (1954)	Warren, Earl	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Kan. Gen. Stat. § 72-1724 (1949); S.C. Const., Art. XI, § 7; S.C. Code § 5377 (1942); Va. Const., § 140; Va. Code § 22-221 (1950); Del. Const., Art. X, § 2; Del. Rev. Code § 2631 (1935): Kansas, South Carolina, Virginia, and Delaware laws that authorized segregation of white and black students in public schools.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1953	Bolling v. Sharpe, 347 U.S. 497 (1954)	Warren, Earl	Civil Rights	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Act of May 20, 1862 (§ 35, 12 Stat. 394); Act of May 21, 1862 (12 Stat. 407); Act of June 25, 1864 (13 Stat. 187); Act of July 23, 1866 (14 Stat. 216); Revised Statutes Relating to the District of Columbia, Act of June 22, 1874, (§§ 281, 282, 294, 304, 18 Stat. pt. 2). Washington, D.C. laws that that authorized segregation of white and black students in public schools.

1952	Wieman v. Updegraff, 344 U.S. 183 (1952)	Clark, Tom C.	Government Operations; Labor & Employment	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Okla. Stat. Ann., 1950, Tit. 51, §§ 37.1-37.8 (1952 Supp.): An Oklahoma statute that required all state officers and employees to make a "loyalty oath" swearing that they were not directly or indirectly affiliated with any agency, party, organization, association, or group which appears on a "list or lists" issued by the United States Attorney General prior enactment of the Act.

1952	Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94 (1952)	Reed, Stanley F.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment, Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Exercise Clause

Description of Unconstitutional Provision(s): Article 5-C of the Religious Corporations Law of New York, as amended in 1948: A state law that provided for both the incorporation and administration of Russian Orthodox churches; transferring the control of the New York churches of the Russian Orthodox religion from the central governing hierarchy of the Russian Orthodox Church, the Patriarch of Moscow and the Holy Synod, to the governing authorities of the Russian Church in America, a church organization limited to the diocese of North America and the Aleutian Islands.

1951	Standard Oil Co. v. Peck, 342 U.S. 382 (1952)	Douglas, William O.	Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): §§ 5325, 5328 of the Ohio General Code: levied an ad valorem personal property tax on all of the vessels registered in Cincinnati, Ohio, even when the vessels only stopped in Ohio for occasional fuel or repairs.

1951	Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952)	Vinson, Frederick M.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): "Privilege tax" levied on the corporation under Mississippi Laws 1944, c. 138 § 3 and Mississippi Laws 1944, c. 138, § 45. The tax is based upon soliciting business for laundries not licensed in the state.

1951	First National Bank v. United Air Lines, 342 U.S. 396 (1952)	Black, Hugo L.	Civil Procedure	State & Local

Constitutional Provision(s) Invoked: Article IV, Section 1

Constitutional Clause(s) Invoked: Full Faith & Credit Clause

Description of Unconstitutional Provision(s): Illinois Rev. Stat. Ch. 70, para. 2: This law provided that "no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists occurs under the laws of place where such death occurred and services of process in such suit may be had upon the defendant in such place."

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1951	Mullaney v. Anderson, 342 U.S. 415 (1952)	Frankfurter, Felix	Taxes	State & Local

Constitutional Provision(s) Invoked: Article IV, Section 2

Constitutional Clause(s) Invoked: Privileges & Immunities Clause

Description of Unconstitutional Provision(s): Territorial Legislature of Alaska, Laws 1949, c. 66: This statute provides for the licensing of commercial fisherman in territorial waters, and imposing a $5 license fee on resident fishermen and a $50 fee on nonresidents.

1951	Burstyn v. Wilson, 343 U.S. 495 (1952)	Clark, Tom C.	Constitutional Law	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Free Press Clause; Due Process Clause

Description of Unconstitutional Provision(s): §122 of the New York Education Law: This law provided that it is unlawful "to exhibit, or to sell, lease or lend for exhibition of any motion picture film or reel unless there is a valid license or permit therefor of the education department." A permit or license shall be denied if any pat of the film is "obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime."

1950	Kunz v. New York, 340 U.S. 290 (1951)	Clark, Tom C.	Constitutional Law	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Exercise Clause

Description of Unconstitutional Provision(s): New York, N.Y., Admin. Code. ch. 18, § 435-7.0: This law provides that it shall be unlawful for any person to disturb, molest or interrupt any clergyman, minister, missionary, lay-preacher or lay-reader, who sall be conducting religious services by authority of a permit, issued hereunder, or any minister or people who shall be performing the rite of baptism as permitted herein, nor shall any person commit any riot or disorder in any such assembly. Any person who violates this secion, shall be punished by a fine of not more than $25, or imprisonment for 30 days, or both.

1950	Dean Milk Co. v. Madison, 340 U.S. 349 (1951)	Clark, Tom C.	Constitutional Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Madision, Wis., Gen. Ordinaces §§ 7.11 and 7.21: This law forbids the sale of milk in the city as pasteurized unless it has been pasteurized and bottled at an approved pasteurization plant within five miles of the city.

1950	Hughes v. Fetter, 341 U.S. 609 (1951)	Black, Hugo L.	Civil Procedure	State & Local

Constitutional Provision(s) Invoked: Article IV, Section 1

Constitutional Clause(s) Invoked: Full Faith & Credit Clause

Description of Unconstitutional Provision(s): Wis. Stat. § 331.03, Wisoconsin Wrongful Death Act: This law provides a right of action only for deaths caused in the state of Wisconsin, regardless of the the decedent's domicile.

1949	Treichler v. Wisconsin, 338 U.S. 251 (1949)	Clark, Tom C.	Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Wis. Stat. 1947, § 72.74 (2). Wisconsin emergency tax on inheritances, the calculation of which can include property within states other than Wisconsin.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1949	Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	Jackson, Robert H.	Banking; Civil Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): New York Banking Law, s 100-c, c. 687, L.1937, as amended by c. 602, L.1943 and c. 158, L.1944. The only notice the law required for beneficiaries was a newspaper publication including the following information: (1) name and address of the trust company; (2) the name and the date of establishment of the common trust fund; (3) and a list of all participating estates, trusts or funds.

1949	Sweatt v. Painter, 339 U.S. 629 (1950)	Vinson, Frederick M.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Tex.Const. Art. VII, ss 7, 14; Tex.Rev.Civ.Stat. Arts. 2643b, 2719, 2900 (Vernon, 1925 and Supp.). *Id.* at 631 n.1. Restricted the University of Texas to white students.

1949	McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950)	Vinson, Frederick M.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): 70 Okl.Stat. (1941) ss 455, 456, 457. Requiring schools to exclude Black candidates as it makes it a misdemeanor to maintain or operate, teach or attend a school at which both whites and Negroes are enrolled or taught. Later Amended in 1950, 70 Okla.Stat.Ann. (1950) ss 455, 456, 457, which revised the law to state: "'Provided, that the provisions of this Section shall not apply to programs of instruction leading to a particular degree given at State owned or operated colleges or institutions of higher education of this State established for and/or used by the white race, where such programs of instruction leading to a particular degree are not given at colleges or institutions of higher education of this State established for and/or used by the colored race; provided further, that said programs of instruction leading to a particular degree shall be given at such colleges or institutions of higher education upon a segregated basis." Section 455 defines segregated basis as, "classroom instruction given in separate classrooms, or at separate times."

1948	Terminiello v. City of Chicago, 337 U.S. 1 (1949)	Douglas, William O.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause

Description of Unconstitutional Provision(s): §1, ch. 193, Rev. Code 1939, City of Chicago: Ordinance makes it illegal for "All persons who shall make, aid, countenance, or assistant in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city . . . shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense."

1948	Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949)	Jackson, Robert H.	Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Gen. Code Ohio, §§5328-1 and 5328-2: Ohio tax placed on intangible property owned by foreign corporations operating in the state.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1945	Nippert v. City of Richmond, 327 U.S. 416 (1946)	Rutledge, Wiley B.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Chapter 10, § 23, Richmond City Code (1939). Richmond, Virginia, City Code imposed upon persons "engaged in business as solicitors an annual license tax of $50.00 plus one-half of one per centum of their gross receipts or commissions for the preceding license year in excess of $1,000.00."

1945	United States v. Lovett, 328 U.S. 303 (1946)	Black, Hugo L.	Civil Rights; Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Article I, Section 9, Clause 3

Constitutional Clause(s) Invoked: Bill of Attainder Clause; Ex Post Facto Clause

Description of Unconstitutional Provision(s): Urgent Deficiency Appropriation Act of 1943, 57 Stat. 431, 450. Section 304 of the Urgent Deficiency Appropriation Act of 1943 provided that no salary should be paid to certain named federal employees out of moneys appropriated.

1945	Morgan v. Virginia, 328 U.S. 373 (1946)	Reed, Stanley F.	Criminal Law & Procedure; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Virginia Code of 1942, §§ 4097z to 4097dd inclusive. The sections are derived from an act of General Assembly of Virginia of 1930. Acts of Assembly, Va. 1930, p. 343; Morgan v. Virginia, 328 U.S. 373, 374 (1946) ("[A]n act of Virginia, which requires all passenger motor vehicle carriers, both interstate and intrastate, to separate without discrimination the white and colored passengers in their motor buses so that contiguous seats will not be occupied by persons of different races at the same time. A violation of the requirement of separation by the carrier is a misdemeanor. The driver or other person in charge is directed and required to increase or decrease the space allotted to the respective races as may be necessary or proper and may require passengers to change their seats to comply with the allocation. The operator's failure to enforce the provisions is made a misdemeanor.").

1944	Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945)	Stone, Harlan Fiske	Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): The Arizona Train Limit Law of 1912, Ariz. Rev. Stat. § 69-119 (1939): An Arizona law that makes it unlawful to operate a train of more than fourteeen passengeer or seventy freight cars.

1943	Pollock v. Williams, 322 U.S. 4 (1944)	Jackson, Robert H.	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Thirteenth Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Florida Statute of 1941, §§ 817.09 and 817.10: The statute made it a misdemeanor to induce advances with intent to defraud by a promise to perform labor, and further made failure to perform labor for which money had been obtained prima facie evidence of intent to defraud.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1942	Murdock v. Pennsylvania, 319 U.S. 105 (1943)	Douglas, William O.	Advertising, Publishing, & Communications	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Exercise Clause; Free Press Clause; Free Speech Clause

Description of Unconstitutional Provision(s): A city ordinance of Jeannette, Pennsylvania, requiring all persons soliciting merchandise to first obtain a license and pay the applicable fees.

1942	Martin v. Struthers, 319 U.S. 141 (1943)	Black, Hugo L.	Advertising, Publishing, & Communications	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Press Clause; Free Speech Clause

Description of Unconstitutional Provision(s): A city ordinance of Struthers, Ohio, making it unlawful for any person to summon the occupant of a residence for the purpose of distributing an advertisement.

1942	Tot v. United States, 319 U.S. 463 (1943)	Roberts, Owen J.	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Section 2(f) of the Federal Firearms Act, ch. 850, 52 Stat. 1250, 1251, 15 U.S.C. § 902(f): Made it unlawful for any fugitive or person convicted of a crime of violence to receive a firearm or ammunitition shipped in interstate or foreign commerce, and made possession of a firearm or ammunitition by any such person presumptive evidence that the firearm or ammunition was received in violation of this Act.

1942	West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)	Jackson, Robert H.	Education	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Free Exercise Clause

Description of Unconstitutional Provision(s): A January 9, 1942, resolution of the West Virginia State Board of Education that requred public school pupils to salute the U.S. flag and recite the pledge of allegiance or face expulsion.

1941	Edwards v. California, 314 U.S. 160 (1941)	Byrnes, James F.	Transportation; Immigration	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): § 2615 of the Welfare and Institutions Code of California, which made it unlawful for any person, corporation, officer, or agent to bring or assist a non-resident indigent person into the State, if they were to do so knowingly.

1941	Taylor v. Georgia, 315 U.S. 25 (1942)	Byrnes, James F.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Thirteenth Amendment

Constitutional Clause(s) Invoked: Prohibition Clause

Description of Unconstitutional Provision(s): §§ 7408 and 7409, of Title 26 of the Georgia Code, which allowed for peonage, or forced labor, to occur in some instances.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1941	Skinner v. Oklahoma, 316 U.S. 535 (1942)	Douglas, William O.	Criminal Law & Procedure; Civil Rights	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Habitual Criminal Sterilization Act (act), Okla. Stat. Ann. tit. 57, § 171 et seq., which forced sterilization of criminal offenders "convicted two or more times for crimes 'amounting to felonies involving moral turpitude.'" Skinner v. Oklahoma, 316 U.S. at 536.

1940	Best & Co. v. Maxwell, 311 U.S. 454 (1940)	Reed, Stanley F.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): 1937 N.C. Sess. Laws 127, § 121(e), which required individuals or companies that were not regular retail merchants in the State of North Carolina and wished to display products in a hotel room or temporarily occupied dwelling for sale to procure a state license beforehand and pay an annual privilege tax of $250.00.

1940	Ex parte Hull, 312 U.S. 546 (1941)	Murphy, Frank	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Article I, Section 9, Clause 2

Constitutional Clause(s) Invoked: Habeas Corpus

Description of Unconstitutional Provision(s): November 1940 prison regulation published by the warden that required all "legal documents, briefs, petitions, motions, habeas corpus proceedings and appeals" to be approved by the institutional welfare office and then referred to parole board's legal investigator. "Documents submitted to [the investigator], if in his opinion are properly drawn, will be directed to the court designated or will be referred back to the inmate."

1940	Wood v. Lovett, 313 U.S. 362 (1941)	Roberts, Owen J.	Real Property Law; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Ark. Act of March 17, 1937 (Ark. Act 264 of 1937): Act 264 of 1937 repealed Ark. Act of March 20, 1935 (Ark. Act 142 of 1935), which prohibited courts in law or equity to set aside the properly conducted sale of any real or personal property for the non-payment of taxes, because of any irregularity, informality, or omission by any officer in the assessment of the property, levying of the taxes, or recordation or related administrative acts.

1939	Schneider v. New Jersey, 308 U.S. 147 (1939)	Roberts, Owen J.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Free Press Clause

Description of Unconstitutional Provision(s): An ordinance of the Town of Irvington, New Jersey that prohibited persons from canvassing, soliciting, distributing circulars or other matter, and going door-to-door in the Town of Irvington without first having reported to and received a written permit from the "Chief of Police or the officer in charge of Police Headquarters." The law provided a number of detailed requirements for obtaining a permit and canvassing.

1939	Carlson v. California, 310 U.S. 106 (1940)	Murphy, Frank	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Free Press Clause

Description of Unconstitutional Provision(s): Section 2 of an ordinance of Shasta County, California that made it unlawful for any person to loiter or picket in front of a business in order to encourage others to boycott the business.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1939	Cantwell v. Connecticut, 310 U.S. 296 (1940)	Roberts, Owen J.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Due Process Clause

Description of Unconstitutional Provision(s): Conn. Gen. Stat. § 6294 (amended by § 860d in 1937 Supp.), which prohibited solicitation of money or any other valuable thing "for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council." The secretary had authority to determine "whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity."

1939	Thornhill v. Alabama, 310 U.S. 88 (1940)	Murphy, Frank	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Free Press Clause

Description of Unconstitutional Provision(s): Ala. Code § 3448 (1923), which forbid loitering or picketing "without a just cause or legal excuse" in front a business in order to encourage others to boycott the business.

1938	Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)	Hughes, Charles E.	Civil Rights; Education	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Mo. Rev. Stat. § 9622 (1929): A Missouri statute providing aid for African American residents to attend adjacent state institutions of higher education if Lincoln University, the Missouri state institution of higher education for African Americans, could not provide the same classes or other resources as the University of Missouri, which limited admission to white residents.

1938	Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939)	Stone, Harlan Fiske	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Wash. Laws 1935, ch. 180, p. 706: A Washington law imposing a tax on gross business income for any business activity conducted within the state.

1938	Hale v. Bimco Trading, Inc., 306 U.S. 375 (1939)	Frankfurter, Felix	Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Foreign Commerce Clause

Description of Unconstitutional Provision(s): Florida statute of 1937, § 4151(512-19): A Florida law providing for inspection of all imported cement and which required payment of such inspection at fifteen cents per hundred pounds.

1938	Lanzetta v. New Jersey, 306 U.S. 451 (1939)	Butler, Pierce	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): New Jersey statute of 1934, ch. 155, § 4: A New Jersey statute making it a crime to be a gangster, defined as any person not engaged in any lawful occupation, known to be a member of a gang that consists of two or more persons, who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in any state.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1938	Lane v. Wilson, 307 U.S. 268 (1939)	Frankfurter, Felix	Civil Rights; Elections	State & Local

Constitutional Provision(s) Invoked: Fifteenth Amendment, Section 1

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Okla. Stat. Ann. tit. 26, § 74: An Oklahoma law requiring qualified voters in 1916 to register between April 30 and May 11, with exceptions for those who voted in 1914, and permanently disenfranchising those who failed to register within that time frame.

1938	Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939)	Per Curiam	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Association Clause; Free Speech Clause; Due Process Clause

Description of Unconstitutional Provision(s): A city ordinance of Jersey City, New Jersey requiring a permit from the Director of Public Safety in order to hold a public parade or public assembly on public roadways, in public parks, or in public buildings.

1937	Lovell v. City of Griffin, 303 U.S. 444 (1938)	Hughes, Charles E.	Advertising, Publishing, & Communications	State & Local

Constitutional Provision(s) Invoked: First Amendment

Constitutional Clause(s) Invoked: Free Press Clause

Description of Unconstitutional Provision(s): City of Griffin, Ga. Code §§ 72-401, 72-9901 (1933): A city ordinance prohibiting the distribution of circulars, handbooks, advertising, or literature of any kind within city limits without a permit granted by the city manager.

1937	Connecticut General Life Insurance Co. v. Johnson, 303 U.S. 77 (1938)	Stone, Harlan Fiske	Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): California Statutes of 1921, Chapter 22, Sec. 2, Stat. 3664b: A California law permitting the state to levy an annual tax on gross insurance premiums received from business in California, including reinsurance premiums paid to the insurance company outside the state of California.

1937	United States v. Klein, 80 U.S. (13 Wall.) 128 (1872)	Stone, Harlan Fiske	Estates, Gifts, & Trusts	Federal

Constitutional Provision(s) Invoked: Article II, Section 2, Clause 1; Article III

Constitutional Clause(s) Invoked: Separation of Powers Doctrine

Description of Unconstitutional Provision(s): Act of July 12, 1870 (16 Stat. 235): Provision making Presidential pardons inadmissible in evidence in Court of Claims, prohibiting their use by that court in deciding claims or appeals, and requiring dismissal of appeals by the Supreme Court in cases where proof of loyalty had been made otherwise than as prescribed by law.

1936	Binney v. Long, 299 U.S. 280 (1936)	Roberts, Owen J.	Estates, Gifts, & Trusts; Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Mass. Gen. Laws c. 65 §2 (1907): Massachusetts law taxing interest in property at different rates when conveyed before or after September 1, 1907, the effective date of the act.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1936	Valentine v. Great Atlantic & Pacific Tea Co., 299 U.S. 32 (1936)	Per Curiam	Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Iowa Code c. 329 G-1 (1935) ("Chain Store Tax Act of 1935"): Iowa law "imposing a tax based on gross receipts from sales according to an accumulative graduated scale."

1936	Ingels v. Morf, 300 U.S. 290 (1937)	Stone, Harlan Fiske	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): 1935 Cal. Stat. 402 ("Caravan" Act): California law requiring a $15 permit for each vehicle being brought into the state for the purposes of selling it, either inside or outside California.

1936	Herndon v. Lowry, 301 U.S. 242 (1937)	Roberts, Owen J.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Ga. Penal Code §56: Georgia law defining attempt to incite insurrection.

1936	Hartford Steam Boiler Inspection & Insurance Co. v. Harrison, 301 U.S. 459 (1936)	McReynolds, James C.	Insurance	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): 1935 Ga. Laws 140: Georgia law requiring insurance policies to be issued through a "resident agent" licensed by the insurance commissioner. The definition of "resident agent" under the statute excluded salaried employees but "include[d] any agents of mutual insurance companies however compensated."

1935	United States v. Constantine, 296 U.S. 287 (1935)	Roberts, Owen J.	Taxes	Federal

Constitutional Provision(s) Invoked: Tenth Amendment; Eighteenth Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Revenue Act of 1924, 43 Stat. 328, amended by Revenue Act of 1926: levied a special excise tax of $1,000 on each person carrying on the business of a brewer, distiller, wholesale or retail liquor dealer, wholesale or retail dealer in malt liquor, or manufacturer of stills.

1935	Hopkins Federal Savings & Loan Ass'n v. Cleary, 296 U.S. 315 (1935)	Cardozo, Benjamin N.	Civil Procedure; Banking	Federal

Constitutional Provision(s) Invoked: Tenth Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Home Owners' Loan Act of 1933, § 5(i), 48 Stat. 132, amended by Act of Apr. 27, 1934, §6, 48 Stat. 646: permitted the conversion of state building and loan associations into federal associations.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1935	Colgate v. Harvey, 296 U.S. 404 (1935)	Sutherland, George A.	Business & Corporate Law; Tax Law	State & Local

Constitutional Provision(s) Invoked: Article IV, Section 2, Clause 1; Fourteenth Amendment

Constitutional Clause(s) Invoked: Privileges & Immunities

Description of Unconstitutional Provision(s): Vermont Income and Franchise Tax Act of 1931 (Vt. Pub. Laws 1933, § 872 et seq.): imposed a 4 percent tax on income derived from loans made outside the state but exempted income derived from loans made within the state below 5 percent interest per annum.

1935	United States v. Butler, 297 U.S. 1 (1936)	Roberts, Owen J.	Taxes; Transportation	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 1; Article I, Section 8, Clause 3; Tenth Amendment

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Agricultural Adjustment Act of 1933, 48 Stat. 31: provided for the regulation of agricultural production and imposed taxes on certain agricultural commodities.

1935	Rickert Rice Mills, Inc. v. Fontenot, 297 U.S. 110 (1936)	Roberts, Owen J.	Taxes	Federal

Constitutional Provision(s) Invoked: Article I, Section 8

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Agricultural Adjustment Act of 1933, 48 Stat. 31, amended by Act of Aug. 24, 1935, 49 Stat. 750: provided for the assessment and collection of rice processing taxes.

1935	Treigle v. Acme Homestead Ass'n, 297 U.S. 189 (1936)	Roberts, Owen J.	Banking	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10; Fourteenth Amendment

Constitutional Clause(s) Invoked: Contract Clause; Due Process Clause

Description of Unconstitutional Provision(s): 1932 La. Acts 140: abolished the required amount to be set aside by building and loan associations in reserve for withdrawing members and left the amount set aside to the sole discretion of the association's directors.

1935	Grosjean v. American Press Co., 297 U.S. 233 (1936)	Sutherland, George A.	Advertising, Publishing, & Communications; Business & Corporate Law; Criminal Law & Procedure; Taxes	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Press Clause; Due Process Clause

Description of Unconstitutional Provision(s): La. Act. No. 23 (1934): imposed a tax of 2 percent of the gross receipts of every person, firm, association, or corporation engaged in the business of selling advertising or for advertisements to be printed or published in any newspaper, magazine, periodical or publication having a circulation of more than 20,000 copies per week, or displayed and exhibited in the state of Louisiana.

1935	Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266 (1936)	Roberts, Owen J.	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Milk Control Act of Mar. 31, 1933, N.Y. Laws of 1933, c. 158, amended by N.Y. Laws of 1934, c. 126: granted the privilege of selling milk in New York City at a price one cent below the miniminim price to milk dealers without well-advertised trade names who were in the business before Apr. 10, 1933 and denied that privilege to milk dealers with well-advertised trade names.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1935	Bingaman v. Golden Eagle Western Lines, Inc., 297 U.S. 626 (1936)	Sutherland, George A.	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): N.M. Sess. Laws of 1933, c. 176, §§ 2-3: imposed an excise tax of five cents per gallon upon the sale and use of all gasoline and motor fuel and prohibited any distributor from importing, receiving, using, selling, or distributing any motor fuel unless the distributor held a valid annual license issued by the state Comptroller.

1935	Fisher's Blend Station, Inc. v. State Tax Commission, 297 U.S. 650 (1936)	Stone, Harlan Fiske	Advertising, Publishing, & Communications; Business & Corporate Law; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): 1933 Wash. Laws, c. 191, § 2: imposed a state occupation tax measured by the gross receipts from radio broadcasting from stations within the state.

1935	International Steel & Iron Co. v. National Surety Co., 297 U.S. 657 (1936)	Roberts, Owen J.	Business & Corporate Law; Civil Procedure	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): 1917 Tenn. Pub. Acts, c. 74, amended by 1929 Tenn. Pub. Acts, c. 80: 1929 amendment provided that the Commissioner of Highways might release retroactively the surety on a bond given by a contractor as required by the 1917 Act, without the contractor's consent.

1935	Carter v. Carter Coal Co., 298 U.S. 238 (1936)	Sutherland, George A.	Energy & Utilities; Labor & Employment; Taxes; Transportation	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Fifth Amendment

Constitutional Clause(s) Invoked: Commerce Clause; Due Process Clause

Description of Unconstitutional Provision(s): Bituminous Coal Conservation Act of 1935, 49 Stat. 991: imposed an excise tax on the sale or other disposal of all bituminous coal produced within the U.S. and authorized the setting of minimum coal prices.

1935	Ashton v. Cameron County Water Improvement District No. 1, 298 U.S. 513 (1936)	McReynolds, James C.	Bankruptcy	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 4

Constitutional Clause(s) Invoked: Bankruptcy Clause

Description of Unconstitutional Provision(s): Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 534, amended by Act of May 24, 1934, §§ 78, 79, and 80, 48 Stat. 798: provided provisions for readjustment of municipal indebtedness and granted original jurisdiction to bankruptcy courts in proceedings for the relief of municipal debtors.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1935	Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936)	Butler, Pierce	Labor & Employment	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): N.Y. Act, Laws of 1933, c. 584: declared it against public policy for any employer to employ any woman at an oppressive or unreasonable wage, defined as a wage that is both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health.

1934	Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)	Hughes, Charles E.	Trade	Federal

Constitutional Provision(s) Invoked: Article I, Section 1, Clause 1

Constitutional Clause(s) Invoked: Vesting Clause

Description of Unconstitutional Provision(s): 15 U.S.C. § 709(c) (1933): A provision of the National Industrial Recovery Act authorizing the President to prohibit the transportation of petroleum in interstate and foreign commerce and to issue related regulations, proscribing criminal penalties for any violation.

1934	Perry v. United States, 294 U.S. 330 (1935)	Hughes, Charles E.	Government Operations	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 2; Article I, Section 8, Clause 5

Constitutional Clause(s) Invoked: Borrowing Clause; Coinage Clause

Description of Unconstitutional Provision(s): 31 U.S.C. §§ 462-63 (1933): A Joint Resolution declaring that provisions requiring payment in gold or any particular kind of coin or currency are invalid and providing that any past or future obligation shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.

1934	Cooney v. Mountain States Telephone & Telegraph Co., 294 U.S. 384 (1935)	Hughes, Charles E.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): 1933 Mont. Laws ch. 174 & 1933-34 Mont. Laws ch. 54: Two statutes levying an annual tax for each telephone instrument used in the conduct of the business of operating or maintaining telephone lines and furnishing telephone service in the state of Montana, as well as proscribing the amount to be paid, date of payment, and other particulars.

1934	Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935)	Cardozo, Benjamin N.	Food & Drug	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3;

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): N.Y. Agric. & Mkts. Law § 258-m(4) (McKinney 1933): A provision of the New York Milk Control Act which extended the state's minimum purchase price for milk to purchases from out-of-state dealers, whether or not the milk was repackaged for resale by the distributors, and prohibited the sale of any milk purchased at a price lower than that of New York state.

1934	Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935)	Roberts, Owen J.	Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): 1930 Ky. Acts p. 475: A statute levying a graduated gross sales tax on retail merchants conducting business in the state.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1934	Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U.S. 613 (1935)	McReynolds, James C.	Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Kan. Stat. Ann. § 68-415 (1933): § 16 of the statute creating the Kansas Highway Commission, which authorized the Commission to require removal of abutments, wires, pipelines, and other fixtures upon state highways to other designated parts of the right of way.

1934	Broderick v. Rosner, 294 U.S. 629 (1935)	Brandeis, Louis D.	Banking; Civil Procedure	State & Local

Constitutional Provision(s) Invoked: Article IV, Section 1

Constitutional Clause(s) Invoked: Full Faith & Credit Clause

Description of Unconstitutional Provision(s): 1897 N.J. Laws p. 1656: § 94(b) of the Corporation Act of New Jersey which provided that no proceeding may be maintained in the courts of that State to enforce a stockholder's statutory personal liability arising under the laws of another State, with limited exceptions.

1934	Georgia Railway & Electric Co. v. Decatur, 295 U.S. 165 (1935)	Sutherland, George A.	Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 1919 Ga. Laws p. 934 & 1924 Ga. Laws p. 534: Two Georgia statutes conferring upon a city within the state power to improve its streets and make assessments for the cost of the improvements against adjacent real estate and against any street railway or other railroad company having tracks running along or across such streets.

1934	Railroad Retirement Board v. Alton Railroad, 295 U.S. 330 (1935)	Roberts, Owen J.	Pensions & Benefits	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Fifth Amendment

Constitutional Clause(s) Invoked: Commerce Clause; Due Process Clause

Description of Unconstitutional Provision(s): 45 U.S.C. §§ 201-214 (1934): The Railroad Retirement Act, which established a compulsory retirement and pension system for all carriers subject to the Interstate Commerce Act. The Act mandated contributions from employees and carriers, specified pension amounts based on length of service, and set a mandatory retirement age at 70.

1934	Senior v. Braden, 295 U.S. 422 (1935)	McReynolds, James C.	Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): 1931 Ohio Laws p. 714: A statute to amend various provisions of the Ohio General Code to levy a tax on intangible property.

1934	A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)	Hughes, Charles E.	Trade	Federal

Constitutional Provision(s) Invoked: Article I, Section 1, Clause 1; Article I, Section 8, Clause 3; Tenth Amendment

Constitutional Clause(s) Invoked: Vesting Clause; Commerce Clause; Separation of Powers Doctrine

Description of Unconstitutional Provision(s): 15 U.S.C. § 703 (1933): A provision of the National Industrial Recovery Act authorizing the President to approve codes of fair competition submitted by trade or industrial associations or groups, the violation of which constituted an unfair method of competition subject to to a $500 fine.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1934	Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)	Brandeis, Louis D.	Bankruptcy	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Takings Clause

Description of Unconstitutional Provision(s): 11 U.S.C. § 203(s) (1934): The Frazier-Lemke Act, which allowed certain mortgage holders, including farmers, upon being ajudged bankrupt, to purchase the property at an appraised value with deferred payments or to stay all foreclosure proceedings for a period of five years while retaining possession of the property through deferred rental payments. The Act applied only to debts existing prior to its date of enactment.

1934	W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935)	Cardozo, Benjamin N.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contracts Clause

Description of Unconstitutional Provision(s): 1933 Ark. Acts 868, 790, 375: Three statutes of the Arkansas General Assembly to amend the procedure for mortgage bond defaults including an extension for repayment, decreased penalties, lower interest rates, and heightened notice requirements.

1933	Southern Railway v. Commonwealth of Virginia ex rel. Shirley, 290 U.S. 190 (1933)	McReynolds, James C.	Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 1930 Va. Acts 74: Virginia law giving power to state highway commissioner to demand railroad companies build new crossings when he deemed it necessary for public safety, which provided no notice to a company or hearing and no means of review

1933	United States v. Chambers, 291 U.S. 217 (1934)	Hughes, Charles E.	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Twenty-First Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Provisions of the National Prohibition Act that prohibited the possession or transportation of intoxicating liquor and conspiracies to possess or transport liquor.

1933	Booth v. United States, 291 U.S. 339 (1934)	Roberts, Owen J.	Government Operations	Federal

Constitutional Provision(s) Invoked: Article III

Constitutional Clause(s) Invoked: Compensation Clause

Description of Unconstitutional Provision(s): Independent Offices Appropriation Act of June 16, 1933, Sec. 13. Federal act reducing a retired judge's salary by 15% for the fiscal year 1933.

1933	Morrison v. California, 291 U.S. 82 (1934)	Cardozo, Benjamin N.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Section 9a of the California Alien Land Law, as amended in 1927, and Section 1983 of the California Code of Civil Procedure, which placed the burden of disproving guilt on a defendant by requiring him to prove that he was a U.S. citizen.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1933	Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934)	Roberts, Owen J.	Insurance	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 1930 Mississippi Code, Sec. 5131 and 2294 Mississippi state law declaring "[a]ll contracts of insurance on property, lives, or interests in this state shall be deemed to be made therein."

1933	Lynch v. United States, 292 U.S. 571 (1934)	Brandeis, Louis D.	Insurance	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Takings Clause

Description of Unconstitutional Provision(s): 1933 Economy Act, Sec. 17 Repealed "[a]ll laws granting or pertaining to yearly renewable term insurance."

1932	Anglo-Chilean Nitrate Corp. v. Alabama, 288 U.S. 218 (1933)	Butler, Pierce	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 2; Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Import Clause; Commerce Clause

Description of Unconstitutional Provision(s): 1927 Ala. Laws 176, § 54, which required certain out-of-state companies to pay an annual franchise tax based on the amount of capital employed in this State.

1932	Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933)	Roberts, Owen J.	Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): 1931 Fla. Laws c. 15624, § 5, a state licensing statute that imposed an increased tax if the owner's stores were located in more than one county.

1931	First National Bank v. Maine, 284 U.S. 312 (1932)	Sutherland, George A.	Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Me. Rev. Stat. tit. 69, § 1, 25 (1916) & Me. Rev. Stat. tit. 51, § 37 (1916): A Maine tax levied on all property in Maine, and any interest therein, whether the owner of such property was domiciled in Maine or not, and whether the property was tangible or intangible. The statutes directed non-residents to pay the state's attorney general.

1931	State Tax Commission v. Interstate Natural Gas Co., 284 U.S. 41 (1931)	Holmes, Oliver Wendell	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): 1930 Miss. Gen. Laws, Ch. 88: A statute that assessed a state privilege tax.

1931	Smiley v. Holm, 285 U.S. 355 (1932)	Hughes, Charles E.	Elections; Government Operations	State & Local

Constitutional Provision(s) Invoked: Article I, Section 4, Clause 1

Constitutional Clause(s) Invoked: Time, Places, & Manner of Elections Clause

Description of Unconstitutional Provision(s): 1931 Minn. Laws p. 640: House File No. 1456, a bill to redraw the boundary lines of eight congressional districts following the 1930 Census.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1931	Coombes v. Getz, 285 U.S. 434 (1932)	Sutherland, George A.	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1; Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Contract Clause; Due Process Clause

Description of Unconstitutional Provision(s): N/A?

1930	Furst & Thomas v. Brewster, 282 U.S. 493 (1931)	Hughes, Charles E.	Business & Corporate Law; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): 1907 Ark. Acts 744: provided that all foreign companies and corporations file incorporation documents, a statement of assets and liabilities, and the name of an agent upon whom process could be served with the Ark. Sec. of State. Companies that failed to comply were prohibited from making any enforceable contracts within the state of Arkansas.

1930	Coolidge v. Long, 282 U.S. 582 (1931)	Butler, Pierce	Estates, Gifts, & Trusts; Real Property; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1; Fourteenth Amendment

Constitutional Clause(s) Invoked: Contract Clause; Due Process Clause

Description of Unconstitutional Provision(s): 1921 Mass. Gen. Laws, c. 65, § 1: provided that all property within the jurisdiction of the State that passed by deed, grant, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, or transferred to any person absolutely or in trust, shall be subject to a succession tax.

1930	Interstate Transit Co. v. Lindsey, 283 U.S. 183 (1931)	Brandeis, Louis D.	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Tenn. Act of 1927, c. 89, § 4: imposed a privilege tax on motor buses, graduated according to carrying capacity.

1930	Stromberg v. California, 283 U.S. 359 (1931)	Hughes, Charles E.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Speech Clause; Due Process Clause

Description of Unconstitutional Provision(s): Cal. Penal Code § 403a: provided that anyone displaying a red flag in a public place or in a meeting place (a) as a sign, symbol or emblem of opposition to organized government or (b) as an invitation or stimulus to anarchistic action or (c) as an aid to propaganda that is of a seditious character is guilty of a felony.

1930	Smith v. Cahoon, 283 U.S. 553 (1931)	Hughes, Charles E.	Civil Procedure; Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): 1929 Fla. Laws, c. 13700: required every auto transportation company to apply for a certificate of public convenience and necessity and pay a tax but exempted certain classes of private carriers while subjecting other private carriers to the same requirements as common carriers.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1930	Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931)	HUGHES, CHARLES E.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: First Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: Free Press Clause; Free Speech Clause; Due Process Clause

Description of Unconstitutional Provision(s): Minn. Stat. §§ 10123-1 to 10123-3: provided that one who engages in the business of regularly and customarily producing or publishing a malicious, scandalous, and defamatory newspaper, magazine, or other periodical is guillty of a nuisance and authorized suits in the name of the State to enjoin their publishers from future violations.

1928	Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928)	BUTLER, PIERCE	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): 1926 La. Acts 103, which regulated taking of shrimp in Louisiana waters. It granted "the right to take, can, pack and dry shrimp to residents and also to corporations, domiciled or organized in the State, operating a canning or packing factory or drying platform therein." The Act made it unlawful, among other things, "to export from the State any shrimp from which the heads and hulls have not been removed" and "to ship unshelled shrimp to any point within the State."

1928	Louis K. Liggett Co. v. Baldridge, 278 U.S. 105 (1928)	SUTHERLAND, GEORGE A.	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Pa. Cons. Stat. §§ 9377a-1, 9377a-2 (1927), which required new pharmacies and drug stores to be owned only by a licensed pharmacist, and, in the case of corporations, associations and copartnerships, required that all the partners or members thereof shall be licensed pharmacists.

1928	Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928)	BUTLER, PIERCE	Real Property	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Section 3(c) of a City of Seattle Zoning Ordinance (No. 45382, 1923) was amended by an ordinance adopted in 1925 (No. 49179) to state: "A philanthropic home for children or for old people shall be permitted in First Residence District when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building."

1928	Johnson v. Haydel, 278 U.S. 16 (1928)	BUTLER, PIERCE	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): 1926 La. Acts 258. "An Act [t]o declare all oysters and parts thereof in the waters of the State to be the property of the State of Louisiana, and to provide the manner and extent of their reduction to private ownership; to encourage, protect, conserve, regulate and develop the Oyster industry of the State of Louisiana . . .."

1928	Williams v. Standard Oil Co., 278 U.S. 235 (1929)	SUTHERLAND, GEORGE A.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 1927 Tenn. Pub. Acts 53, which fixed the prices at which gasoline could be sold within the state.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1928	Cudahy Packing Co. v. Hinkle, 278 U.S. 460 (1929)	McReynolds, James C.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Fourteenth Amendment

Constitutional Clause(s) Invoked: Commerce Clause; Due Process Clause

Description of Unconstitutional Provision(s): Wash. Rem. Comp. Stat. § 3836 (amended by ch. 149, Extraordinary Session, 1925). Mandates that every local and foreign corporation required by law to file its articles with the Secretary of State shall pay graduated filing fees, not above $ 3,000, reckoned upon its authorized capital stock. Wash. Rem. Comp. Stat. § 3841, (amended by ch. 149, Extraordinary Session, 1925). Requires foreign and domestic corporations to pay annual license fees, not above $ 3,000, reckoned upon authorized capital stock.

1928	Frost v. Corporation Commission, 278 U.S. 515 (1929)	Sutherland, George A.	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Okla. Comp. Stat. § 3714 (1915) (amended by 1925 Sess. Laws ch. 109). No gin can be operated without a license from the commission, and in order to secure such license there must be a satisfactory showing of public necessity; "[p]rovided, that on the presentation of a petition for the establishment of a gin to be run co-operatively signed by one hundred (100) citizens and tax payers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin."

1928	Manley v. Georgia, 279 U.S. 1 (1929)	Butler, Pierce	Banking; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Banking Act of 1919, art. XX, § 28, which deemed every bank insolvency to be fraudulent and made the president directors guilty of a crime unless they could show that the affairs of the bank had been fairly and legally administered, and "generally, with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe."

1928	Helson & Randolph v. Kentucky, 279 U.S. 245 (1929)	Sutherland, George A.	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): 1924 Ky. Acts ch. 120, § 1, which imposed a state tax of three cents on the wholesale sale of gasoline in the commonwealth. The tax was amended by 1926 Ky. Acts. ch. 169 to raise the tax from three cents to five cents a gallon.

1928	Macallen Co. v. Massachusetts, 279 U.S. 620 (1929)	Sutherland, George A.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8; Article I, Section 10

Constitutional Clause(s) Invoked: Borrowing Clause; Contract Clause

Description of Unconstitutional Provision(s): Mass. Gen. Laws ch. 63, § 32 (amended by Stat. 1923, ch. 424, § 1), which effectively imposed a tax on income from federal bonds and securities in addition to income from county and municipal bonds that were exempt from tax under a state law

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1928	Western & Atlantic Railroad v. Henderson, 279 U.S. 639 (1929)	Butler, Pierce	Torts	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Ga. Civ. Code § 2780. "A railroad company shall be liable for any damages done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

1927	Wuchter v. Pizzutti, 276 U.S. 13 (1928)	Taft, William Howard	Civil Procedure; Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 1924 N.J. Laws, c. 232: provided for service of process on non-residents of the state via the N.J Secretary of State in suits for injury by the negligent operation of automobiles on its highways.

1927	Delware, Lackawanna & Western Railroad v. Town of Morristown, 276 U.S. 182 (1928)	Butler, Pierce	Civil Procedure; Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Oct. 22, 1924 municipal ordinance of Morristown, NJ: declared the space set aside by a railroad for the exclusive use of a single taxicab company to be an "additional public hackstand" and prohibited the parking of vehicles in other parts of the railroad station driveway.

1927	Sprout v. City of South Bend, 277 U.S. 163 (1928)	Brandeis, Louis D.	Business & Corporate Law; Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Fourteenth Amendment

Constitutional Clause(s) Invoked: Commerce Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): 1921 South Bend, Indiana municipal ordinance: prohibited the operation on its streets of any motor bus not licensed by the city.

1927	Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32 (1928)	Sutherland, George A.	Estates, Gifts, & Trusts; Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): 1922 Ky. Stat. § 4019a-9: imposed a mortgage tax on deeds of trust except those instruments whose indebtedness matured within five years and all mortages executed to building and loan associations.

1926	Hanover Fire Insurance Co. v. Carr, 272 U.S. 494 (1926)	Taft, William Howard	Insurance; Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): 1925 Ill. Laws, p. 1405, c. 73, s. 159: Illinois state law imposing a tax on the net receipts of foreign insurance companies.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1926	Myers v. United States, 272 U.S. 52 (1926)	Taft, William Howard	Government Operations	Federal

Constitutional Provision(s) Invoked: Article II, Section 1; Article II, Section 2

Constitutional Clause(s) Invoked: Vesting Clause; Appointments Clause

Description of Unconstitutional Provision(s): Tenure of Office Act of 1867, § 6: Federal act prohibiting a president from removing certain appointed officials without the advice and consent of the Senate.

1926	Ottinger v. Brooklyn Union Gas Co., 272 U.S. 579 (1926); Ottinger v. Consolidated Gas Co. of New York, 272 U.S. 576 (1926)	McReynolds, James C.	Energy & Utilities	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Laws of New York 1923, Act of June 2, 1923, c. 899: New York state law limiting the rate gas companies can charge for gas.

1926	Farrington v. Tokushige, 273 U.S. 284 (1927)	McReynolds, James C.	Education	Federal; State & Local

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 1920 Special Session, Legislature of Hawaii, Act 30: Law governing operation of foreign language schools in the Territory of Hawaii.

1926	Di Santo v. Commonwealth of Pennsylvania, 273 U.S. 34 (1927)	Butler, Pierce	Transportation	State & Local

Constitutional Provision(s) Invoked: Article I

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): 1919 Pa. Laws 1003, §1: Pennsylvania state law requiring anyone selling steam ship tickets to obtain a license for an annual fee.

1926	Tyson & Brother - United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418 (1927)	Sutherland, George A.	Trade; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 1922 N. Y. Laws, s. 168, c. 590: New York state law fixing the maximum amount that could be charged for reselling tickets to public performances.

1926	Tumey v. State of Ohio, 273 U.S. 510 (1927)	Taft, William Howard	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Village of North College Hill Ordinance No. 125: Local ordinance providing that the mayor and other local officials shall be paid a portion of fees collected from defendants convicted of violating the state's Prohibition Act.

1926	Nixon v. Herndon, 273 U.S. 536 (1927)	Holmes, Oliver Wendell	Civil Rights; Elections	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Texas, 1923, Art. 3093-a: Texas state law declaring that African-Americans were ineligible to participate in a Democratic party primary election held in the State of Texas.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1926	Uihlein v. Wisconsin, 273 U.S. 642 (1926)	Per Curiam	Estates, Gifts, & Trusts; Tax Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 1919 Wis. Stat. §1087-1: Wisconsin state law treating any transfer of property within six years of a person's death as having been made in contemplation of death.

1926	Fairmont Creamery Co. v. State of Minnesota, 274 U.S. 1 (1927)	McReynolds, James C.	Food & Drug; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 1921 Minn. Laws, c. 305, s. 1: Minnesota state law prohibiting the purchase of dairy products at different rates in different localities after adjusting for transportation costs.

1926	Cline v. Frink Dairy Co., 274 U.S. 445 (1927)	Taft, William Howard	Trade	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 1913 Colorado Anti-Trust Act, c. 161: Colorado state law attempting to prevent monopolization of the dairy industry.

1926	Power Manufacturing Co. v. Saunders, 274 U.S. 490 (1927)	Van Devanter, Willis	Civil Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): 1921 Crawford & Moses' Digest, §§ 1152, 1171, 1176, 1829: Arkansas state law requiring actions against domestic corporations to be brought only in counties where they do business or where chief officers resides. Actions against foreign corporations can be brought in any county in the state regardless of where they do business or where their chief officers reside.

1926	Nichols v. Coolidge, 274 U.S. 531 (1927)	McReynolds, James C.	Taxes; Estates, Gifts, & Trusts	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Act of February 24, 1919 (40 Stat. 1097, § 402(c)): That part of the estate tax law providing that the "gross estate" of a decedent should include value of all property "to the extent of any interest therein of which the decedent has at any time made a transfer or with respect to which he had at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act), except in case of a bona fide sale," as applied to a transfer of property made prior to the act and intended to take effect in possession or enjoyment at death of grantor, but not in fact testamentary or designed to evade taxation.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1925	Connally v. General Construction Co., 269 U.S. 385 (1926)	Sutherland, George A.	Workers' Compensation & Social Security	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Okla. Comp. Stat. § §7255 and § 7257 (1921): Section 7255 created "an eight-hour day for all persons employed by or on behalf of the state" and provided "that not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, prison guards, janitors in public institutions, or other persons so employed by or on behalf of the State, . . . and laborers, workmen, mechanics, or other persons employed by contractors or subcontractors in the execution of any contract or contracts with the State, . . . shall be deemed to be employed by or on behalf of the State, . . ." Section 7257 imposed penalties for violations.

1925	Browning v. Hooper, 269 U.S. 396 (1926)	Butler, Pierce	Real Property; Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Complete Tex. St. 1920, or Vernon's Sayles' Ann. Civ. St. 1914, art. 627, which authorized any county, political subdivision or defined district of a county to issue bonds up to 25% of the total assessed value of real property in the district, for the "construction, maintenance and operation" of roads and to levy taxes to pay the bonds. The statute allowed a group of taxpayers to designate territory as a road district for purposes of the tax.

1925	Trusler v. Crooks, 269 U.S. 475 (1926)	McReynolds, James C.	Taxes	Federal

Constitutional Provision(s) Invoked: Article I, Section 8

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): § 3 of The Future Trading Act, 1921, c. 86, 42 Stat. 187: "purport[ed] to impose a tax of 20 cents per bushel upon all privileges or options for contracts of purchase or sale of grain, known to the trade as 'privileges,' 'bids,' 'offers,' 'puts and calls,' 'indemnities,' or 'ups and downs. . . .' " Id. at 475 (Lexis syllabus).

1925	Schlesinger v. Wisconsin, 270 U.S. 230 (1926)	McReynolds, James C.	Estates, Gifts, & Trusts; Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): Wis. Stat. § 72.01, which established a conclusive statutory presumption that a decedent's gifts made within six years of death were made "in contemplation of death," subjecting such gifts to inheritance taxes.

1925	Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926)	Butler, Pierce	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): An Act of the legislature of Pennsylvania, (Pa. Ls. 1923, c. 802), regulated the manufacture, sterilization and sale of bedding, and forbade the use of a material called "shoddy."

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1925	Fidelity & Deposit Co. v. Tafoya, 270 U.S. 426 (1926)	Holmes, Oliver Wendell	Insurance	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): N.M. Code of 1915 § 2820 (amended 1921), which prohibited "any insurance company authorized to do business in New Mexico" from paying "either directly or indirectly, any fee, brokerage or other emolument of any nature to any person, firm or corporation not a resident of the State of New Mexico, for the obtaining, placing or writing of any policy or policies of insurance covering risks in New Mexico."

1925	Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926)	Taft, William Howard	Civil Rights	Federal

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): Chinese Bookkeeping Act, Act No. 2972: this Act of the Philippine Legislature prohibited any Chinese merchant from keeping account books in any language other than English, Spanish, or a Philippine dialect.

1925	Frost & Frost Trucking Co. v. Railroad Commission of California, 271 U.S. 583 (1926)	Sutherland, George A.	Business & Corporate Law; Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Auto Stage and Truck Transportation Act of California, c. 213 (1917), which required private carriers by car for hire to become common carriers in order to operate on the state's highways.

1924	Air-Way Electric Appliance Corp. v. Day, 266 U.S. 71 (1924)	Butler, Pierce	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Commerce Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): 1921 Ohio Laws p. 277: An Ohio statute that imposed a franchise tax on the stock of foreign corporations conducting business in the state.

1924	Buck v. Kuykendall, 267 U.S. 307 (1925)	Brandeis, Louis D.	Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Wash. Laws 1921, c. 111, § 4: A Washington statute that prohibited common carriers for hire from using state highways without having first obtained from the Director of Public Works a certificate declaring that public convenience and necessity require such operation.

1924	George W. Bush & Sons Co. v. Maloy, 267 U.S. 317 (1925)	Brandeis, Louis D.	Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): 1922 Md. Laws c. 401, § 4: A Maryland statute that prohibited the use of state highways by common carriers without a permit, charging the Public Service Commission with the authority to inspect permit applications for the welfare and convenience of the public.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1924	Charles Wolff Packing Co. v. Court of Industrial Relations, 267 U.S. 552 (1925)	Van Devanter, Willis	Labor & Employment	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 1920 Kan. Sess. Laws c. 29: The Industrial Relations Act which prescribed minimum wages, maxmimum hours, overtime pay, as well as other working conditions and authorized the Court of Industrial Relations to settle labor disputes covered by the law.

1924	Shafer v. Farmers' Grain Co., 268 U.S. 189 (1925)	Van Devanter, Willis	Food & Drug; Government Operations	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): 1923 N.D. Laws p. 549: The North Dakota Grain Grading Act, a statute that established a uniform system of grades, weights, and measures for certain farm products, created a state official charged with the authority to oversee that system and enforce the provisions of the law, and forbid discriminatory and fradulent business practices.

1924	Real Silk Hosiery Mills v. Portland, 268 U.S. 325 (1925)	McReynolds, James C.	Business & Corporate Law; Government Operations	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A May 16, 1923 ordinance of Portland, Oregon which required every person who went from place to place taking orders for goods for future delivery and received payment or any deposit of money in advance to secure a license and file a bond.

1924	Frick v. Pennsylvania, 268 U.S. 473 (1925)	Van Devanter, Willis	Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 1919 Pa. Laws p. 521: Act No. 258, a Pennsylvania statute levying an estate tax on the transfer of all real and personal property in cases where the property is not located in or otherwise within the jurisdiction of the state.

1924	Miles v. Graham, 268 U.S. 501 (1925)	McReynolds, James C.	Taxes	Federal

Constitutional Provision(s) Invoked: Article III, Section 1

Constitutional Clause(s) Invoked: Compensation Clause

Description of Unconstitutional Provision(s): Act of February 24, 1919 (40 Stat. 1065, § 213, in part): Provision of the Revenue Act of 1918 which provided that "for the purposes of the title . . . the term 'gross income' . . . includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of . . . judges of the Supreme and inferior courts of the United States . . . the compensation received as such)."

1924	Pierce v. Society of Sisters, 268 U.S. 510 (1925)	McReynolds, James C.	Education	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 1923 Or. Laws p. 9: The Compulsory Education Act, an Oregon law that mandated public education for children between the ages of 8-16 with limited exceptions.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1923	Washington v. W. C. Dawson & Co., 264 U.S. 219 (1924)	McReynolds, James C.	Maritime Law; Workers' Compensation & Social Security	Federal

Constitutional Provision(s) Invoked: Article III, Section 2

Constitutional Clause(s) Invoked: Admiralty & Maritime Jurisdiction

Description of Unconstitutional Provision(s): Act of Congress June 10, 1922, ch. 216, 42 Stat. 634: The Act permitted state workers' compensation laws to apply to cases in maritime and admiralty jurisdiction.

1923	Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924)	Butler, Pierce	Food & Drug	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 1921 Neb. Laws, ch. 2, p. 56: Nebraska state law required bread to be sold only in certain weight increments and fixed the tolerance for underweight and overweight loaves.

1922	Chicago & Northwest Railway v. Nye Schneider Fowler Co., 260 U.S. 35 (1922)	Taft, William Howard	Civil Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Portions of 1919 Neb. Laws 134, amending Neb. Reb. Stat. § 6063 (1913), which imposed liability for attorney's fees, as determined by the court, on a common carrier railroad when the claimant prevailed against it.

1922	Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)	Holmes, Oliver Wendell	Energy & Utilities	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 1921 Pa. Laws 1198 (Kohler Act), which prohibited mining of coal if it would cause subsidence of a residential property above the mine.

1922	Columbia Railway Gas & Electric Co. v. South Carolina, 261 U.S. 236 (1923)	Sutherland, George A.	Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): 1917 S.C. Acts, p. 348, which converted a covenant in a prior legislative contract requring the appellant to complete a canal to the Congaree river "as soon as is practicable" into a "condition subsequent and [imposed] as a penalty for its violation the forfeiture of an extensive and valuable property."

1922	Keller v. Potomac Electric Power Co., 261 U.S. 428 (1923)	Taft, William Howard	Civil Procedure	Federal

Constitutional Provision(s) Invoked: Article III, Section 2, Clause 1

Constitutional Clause(s) Invoked: Supreme Court Jurisdiction

Description of Unconstitutional Provision(s): Act of March 4, 1913 (37 Stat. 988, part of par. 64):Provision of the District of Columbia Public Utility Commission Act authorizing appeal to the United States Supreme Court from decrees of the District of Columbia Court Appeals modifying valuation decisions of the Utilities Commission would extend the appellate jurisdiction of the Supreme Court to cases not strictly judicial within the meaning of Article III, § 2.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1922	Phipps & Phipps v. Cleveland Referee Co., 261 U.S. 449 (1923)	McKenna, Joseph	Energy & Utilities	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): 1915 Ohio Laws, vol. 105, p. 309, which required oil intended for sale in Ohio for illumination purposes to be inspected and imposed fees to pay for inspection.

1922	Adkins v. Children's Hospital, 261 U.S. 525 (1923)	Sutherland, George A.	Contracts; Labor & Employment	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Act of September 19, 1918 (40 Stat. 960): That part of the Minimum Wage Law of the District of Columbia which authorized the Wage Board "to ascertain and declare . . . (a) Standards of minimum wages for women in any occupation within the District of Columbia, and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals . . . " would interfere with the Fifth Amendment substantive due process interest in freedom of contract.

1922	Davis v. Farmers Cooperative Equity Co., 262 U.S. 312 (1923)	Brandeis, Louis D.	Civil Procedure	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): 1913 Minn. Laws, ch. 218, p. 274, which provided that "any foreign corporation having an agent in this state for the solicitation of freight and passenger traffic or either thereof over its lines outside of this state, may be served with summons by delivering a copy thereof to such agent."

1922	Meyer v. Nebraska, 262 U.S. 390 (1923)	McReynolds, James C.	Education	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 1919 Neb. Laws, ch. 249, which prohibited anyone from teaching any subject in any school in any language other than English unless the student had successfully passed eighth grade.

1922	Bartels v. Iowa, 262 U.S. 404 (1923)	McReynolds, James C.	Education	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 1919 Iowa Acts, ch. 198, which required all secular subjects in all schools to be taught in English except for foreign language instruction in courses above the eighth grade. 1919 Ohio Laws, 614, which required certain classes to be taught in English and prohibited teaching German to any student under the eighth grade. 1921 Neb. Laws, ch. 61, which declared English the official language of the state and required all official proceedings and classes in any school to be taught in English except for foreign language instruction in courses above the eighth grade.

1922	Charles Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1923)	Taft, William Howard	Labor & Employment	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): 1920 Kan. Spec. Sess. ch. 29 (Industrial Relations Act), which declared certain industries as clothed with public interest and created an industrial court to establish wages on its own initiative or after consideration of a conflict between employers and employees.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1922	Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U.S. 544 (1923)	Van Devanter, Willis	Civil Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): Wis. Stat., sec. 4096, subdiv. 7; sec. 4097, subdiv. 2 (1917), which provided that officers of a foreign corporation could be ordered for examination in any county while other subsections provided individuals could be examined only in the county where they resided or where they were served.

1922	Pennsylvania v. West Virginia, 262 U.S. 553 (1923)	Van Devanter, Willis	Energy & Utilities	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): 1919 W. Va. Acts, ch. 71, which gave preferential treatment to natural gas customers inside the state and decreased the amount of gas available for sale to neighboring states.

1921	Truax v. Corrigan, 257 U.S. 312 (1921)	Taft, William Howard	Civil Rights; Labor & Employment	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): Ariz. Rev. Stat. § 1464 (1913), which prohibited state courts from issuing injunctions in cases between employers and employees that involved a dispute concerning terms or conditions of employment, subject to certain exceptions.

1921	Terral v. Burke Construction Co., 257 U.S. 529 (1922)	Taft, William Howard	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article III, Section 2; Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Ark. Act of May 13, 1907, § 1, which authorized the Secretary of State to revoke a corporation's license to do business in the state if the company removed a suit to federal court or brought a lawsuit in federal court against an Arkansas citizen.

1921	Newton v. Consolidated Gas Co., 258 U.S. 165 (1922)	McReynolds, James C.	Energy & Utilities	State & Local

Constitutional Provision(s) Invoked: Fifth Amendment; Fourteeenth Amendment

Constitutional Clause(s) Invoked: Takings Clause; Due Process Clause

Description of Unconstitutional Provision(s): 1906 N.Y. Laws, c. 125, which fixed the natural gas rate at eighty cents per thousand cubic feet.

1921	Forbes Pioneer Boat Line v. Board of Commissioners, 258 U.S. 338 (1922)	Holmes, Oliver Wendell	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10; Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Fl. Acts of 1919, c. 7865, which purported to validate retroactively the collection of tolls for passage through a canal lock.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1921	United States v. Moreland, 258 U.S. 433 (1922)	McKenna, Joseph	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Grand Jury Clause

Description of Unconstitutional Provision(s): Act of June 18, 1912 (37 Stat. 136, § 8): Part of § 8 giving Juvenile Court of the District of Columbia (proceeding upon information) concurrent jurisdiction of desertion cases (which were, by law, punishable by fine or imprisonment in the workhouse at hard labor for 1 year), held invalid under the Fifth Amendment, which gives right to presentment by a grand jury in case of infamous crimes.

1921	Lemke v. Farmers Grain Co., 258 U.S. 50 (1922)	Day, William R.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): North Dakota Grain Grading and Inspection Act, 1919 N.D. Laws ch. 138, which required purchasers of grain to obtain a license and pay a license fee and act under a defined system of grading, inspection, and weighing, and provided that grain could only be purchased subject to the power of the state grain inspector to determine the profit margin realized by the buyer.

1921	Lemke v. Homer Farmers Elevator Co., 258 U.S. 65 (1922)	Day, William R.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): North Dakota Grain Grading and Inspection Act, 1919 N.D. Laws ch. 138, which required purchasers of grain to obtain a license and pay a license fee and act under a defined system of grading, inspection, and weighing, and provided that gain could only be purchased subject to the power of the state grain inspector to determine the profit margin realized by the buyer.

1921	Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20 (1922)	Taft, William Howard	Taxes	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 1; Tenth Amendment

Constitutional Clause(s) Invoked: Taxing Power; Federalism

Description of Unconstitutional Provision(s): Act of February 24, 1919, title XII (40 Stat. 1138, entire title): The Child Labor Tax Act, providing that "every person . . . operating . . . any . . . factory . . . in which children under the age of 14 years have been employed or permitted to work . . . shall pay . . . in addition to all other taxes imposed by law, an excise tax equivalent to 10 percent of the entire net profits received . . . for such year from the sale . . . of the product of such . . . factory . . . ," held beyond the taxing power under Article I, § 8, clause 1, and an infringement of state authority.

1921	Houston v. Southwestern Bell Telephone Co., 259 U.S. 318 (1922)	Clarke, John H.	Energy & Utilities	State & Local

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Takings Clause

Description of Unconstitutional Provision(s): 1909 Houston ordinance, which prescribed rates for telephone service.

1921	Hill v. Wallace, 259 U.S. 44 (1922)	Taft, William Howard	Taxes	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Tenth Amendment

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Future Trading Act § 4, c. 86, 42 Stat. 187 (Aug. 24, 1921), which imposed a tax of 20 cents a bushel on all contracts for the sale of grain for future delivery but excepted from its application sales on boards of trade designated as contract markets by the Secretary of Agriculture, on fulfillment by such boards of certain conditions and requirements.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1920	Weeds, Inc. v. United States, 255 U.S. 109 (1921)	White, Edward D.	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Act of October 22, 1919 (41 Stat. 298, § 2), amending Act of August 10, 1917 (40 Stat. 277, § 4): Section 4 of the Lever Act, making it unlawful "to conspire, combine, agree, or arrange with any other person to . . . exact excessive prices for any necessaries" was vague.

1920	United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921)	White, Edward D.	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Fifth Amendment; Sixth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Act of October 22, 1919 (41 Stat. 298, § 2), amending Act of August 10, 1917 (40 Stat. 277, § 4): Section 4 of the Lever Act, making it "unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" was vague.

1920	Bank of Minden v. Clement, 256 U.S. 126 (1921)	McReynolds, James C.	Insurance	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): La. Act No. 189 of 1914, which exempted life insurance proceeds from the debts of the insured when the policies were made payable to the decedent's estate

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1920	Newberry v. United States, 256 U.S. 232 (1921)	McReynolds, James C.	Elections	Federal

Constitutional Provision(s) Invoked: Article I, Section 4, Clause 1; Seventeenth Amendment

Constitutional Clause(s) Invoked: Elections Clause

Description of Unconstitutional Provision(s): Act of August 19, 1911 (37 Stat. 28): A provision in § 8 of the Federal Corrupt Practices Act fixing a maximum authorized expenditure by a candidate for Senator "in any campaign for his nomination and election" in a primary election, held not supported by Article I, § 4, giving Congress power to regulate the manner of holding elections for Senators and Representatives.

1920	Bethlehem Motors Corp. v. Flynt, 256 U.S. 421 (1921)	McKenna, Joseph	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Fourteenth Amendment

Constitutional Clause(s) Invoked: Commerce Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): 1917 N.C. Sess. Laws § 72, ch. 231, which provided that every manufacturer of automobiles engaged in the business of selling the same in the state shall pay to the State Treasurer a tax of $500 and obtain a license for conducting such business. If the manufacturer did not pay the license tax before selling or offering for sale any automobile, any person or corporation engaged in selling automobiles in the state had to pay the tax. The section further provided that upon filing with the State Treasurer a sworn statement showing that at least three-fourths of the entire assets of the manufacturer were invested in bonds of the state or any of its municipalities or properties, the tax required under this section would be reduced to one-fifth, or $100.

1919	City of Los Angeles v. Los Angeles Gas Corp., 251 U.S. 32 (1919)	McKenna, Joseph	Business	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): A Los Angeles ordinance authorizing city to establish lighting system of its own could not effect removal of fixtures of a lighting company occupying streets pursuant to rights granted by a prior franchise without paying compensation required by Due Process Clause.

continues

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1919	Eisner v. Macomber, 252 U.S. 189 (1920)	Pitney, Mahlon R.	Federalism	Federal

Constitutional Provision(s) Invoked: Article I, Section 2, Clause 3; Article I, Section 9, Clause 4; Sixteenth Amendment

Constitutional Clause(s) Invoked: Enumeration Clause

Description of Unconstitutional Provision(s): Act of September 8, 1916 (39 Stat. 757, § 2(a), in part): Provision of the income tax law of 1916, that a "stock dividend shall be considered income, to the amount of its cash value," held invalid (in spite of the Sixteenth Amendment) as an attempt to tax something not actually income, without regard to apportionment under Article I, § 2, clause 3.

1919	Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920)	McReynolds, James C.	Maritime Law; Workers' Compensation & Social Security	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 10; Article III, Section 2

Constitutional Clause(s) Invoked: Admiralty & Maritime Jurisdiction; Necessary & Proper Clause

Description of Unconstitutional Provision(s): Act of October 6, 1917 (40 Stat. 395): The amendment of §§ 24 and 256 of the Judicial Code (which prescribe jurisdiction of district courts) "saving . . . to claimants the rights and remedies under the workmen's compensation law of any State," held an attempt to transfer federal legislative powers to the states—the Constitution, by Article III, § 2, and Article I, § 8, having adopted rules of general maritime law.

1919	Evans v. Gore, 253 U.S. 245 (1920)	Van Devanter, Willis	Taxes	Federal

Constitutional Provision(s) Invoked: Article III, Section 1

Constitutional Clause(s) Invoked: Compensation Clause

Description of Unconstitutional Provision(s): Act of February 24, 1919 (40 Stat. 1065, § 213, in part): Provision of the Revenue Act of 1919 which provided that "for the purposes of the title . . . the term 'gross income' . . . includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of . . . judges of the Supreme and inferior courts of the United States . . . the compensation received as such)" as applied to a judge in office when the act was passed.

1918	Detroit United Railway v. City of Detroit, 248 U.S. 429 (1919)	Day, William R.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1; Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Contracts Clause; Due Process Clause

Description of Unconstitutional Provision(s): A Detroit ordinance that compelled street railway company to carry passengers on continuous trips over franchise lines to and over nonfranchise lines, and vice versa, for a fare no greater than its franchises entitled it to charge upon the former alone impaired the obligation of the franchise contracts; and insofar as its enforcement would result in a deficit, also deprived the company of its property without due process.

1918	Central of Georgia Railway v. Wright, 248 U.S. 525 (1919)	Holmes, Oliver Wendell	Taxes; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Tax exemptions in charters granted to certain railroads inured to their lessee, and, accordingly, a Georgia tax authorized by a constitutional provision postdating such charters and imposed on railroad company impaired the obligation of contract

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1918	Union Pacific Railroad v. Public Service Commission, 248 U.S. 67 (1918)	Holmes, Oliver Wendell	Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Missouri act, insofar as it authorized the Missouri Public Service Commission to exact a fee of $10,000 for a certificate of authority for issuance by an interstate railroad, doing no intrastate business in Missouri, of a $30,000,000 mortgage bond issue to meet expenditures incurred but in small part in that State, imposed an invalid burden on interstate commerce

1918	Union Tank Line Co. v. Wright, 249 U.S. 275 (1919)	McReynolds, James C.	Taxes; Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Fourteenth Amendment

Constitutional Clause(s) Invoked: Commerce Clause; Due Process Clause

Description of Unconstitutional Provision(s): Georgia tax under which a New Jersey company's tank cars operating in and out of that state were assessed upon a track-mileage basis, the ratio of the miles of railroad over which the cars were run in Georgia to the total miles over which they were run in all states, was invalid because the arbitrary rule bore no necessary relation to the real value in Georgia and hence conflicted with due process and unduly burdened interstate commerce

1918	Standard Oil Co. v. Graves, 249 U.S. 389 (1919)	Day, William R.	Taxes; Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Washington law under imposing inspection fees collected on oil products brought into the state for use or consumption was deemed to impose an excessive charge and accordingly an invalid burden on interstate commerce

1918	Chalker v. Birmingham & Northwestern Railway, 249 U.S. 522 (1919)	McReynolds, James C.	Taxes; Trade	State & Local

Constitutional Provision(s) Invoked: Article IV, Section 2, Clause 1

Constitutional Clause(s) Invoked: Privileges & Immunities Clause

Description of Unconstitutional Provision(s): Tennessee act that made the annual tax for the privilege of doing railway construction work in state vary based on whether the person taxed had his chief office in Tennessee

1917	Hendrickson v. Apperson, 245 U.S. 105 (1917)	McReynolds, James C.	Taxes; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Kentucky act of 1906, amending act of 1894 and construed in such manner as to enable a county to avoid collection of taxes to repay judgment on unpaid bonds impaired the obligation of contract.

1917	Looney v. Crane Co., 245 U.S. 178 (1917)	White, Edward D.	Taxes; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Commerce Clause; Due Process Clause

Description of Unconstitutional Provision(s): A Texas law that, under the guise of taxing the privilege of doing an intrastate business, imposed on an Illinois corporation a license tax based on its authorized capital stock, was void not only as imposing a burden on interstate commerce, but also as contravening the Due Process Clause by affecting property outside the jurisdiction of Texas.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1917	Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917)	Pitney, Mahlon R.	Taxes; Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Article I, Section 10, Clause 2

Constitutional Clause(s) Invoked: Commerce Clause; Export Clause

Description of Unconstitutional Provision(s): Pennsylvania gross receipts tax on wholesalers, as applied to a merchant who sold part of his merchandise to customers in foreign countries either as the result of orders received directly from them or as the result of orders solicited by agents abroad was void as a regulation of foreign commerce and as a duty on exports

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1917	Northern Ohio Traction & Light Co. v. Ohio ex rel. Pontius, 245 U.S. 574 (1918)	McReynolds, James C.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contracts Clause

Description of Unconstitutional Provision(s): Resolution of Stark County commissioners in 1912 purporting to revoke an electric railway franchise previously granted in perpetuity by appropriate county authorities in 1892 amounted to state action impairing the obligation of contract.

1917	Buchanan v. Warley, 245 U.S. 60 (1917)	Day, William R.	Discrimination	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): A Louisville, Kentucky, ordinance which forbade "colored" persons to occupy houses in blocks where the majority of the houses were occupied by whites was deemed to prevent sales of lots in such blocks to African Americans and to deprive the latter of property without due process of law.

1917	International Paper Co. v. Massachusetts, 246 U.S. 135 (1918)	Van Devanter, Willis	Taxes; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Fourteenth Amendment

Constitutional Clause(s) Invoked: Commerce Clause; Due Process Clause

Description of Unconstitutional Provision(s): License fee or excise of a given per cent of the par value of the entire authorized capital stock of a foreign corporation doing both a local and interstate business and owning property in several States was a tax on the entire business and property of the corporation and was void both as an illegal burden on interstate commerce and as a violation of due process by reason of affecting property beyond the borders of the taxing State

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1917	Cheney Brothers Co. v. Massachusetts, 246 U.S. 147 (1918)	Van Devanter, Willis	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): When a Connecticut corporation maintains and employs a Massachusetts office with a stock of samples and an office force and traveling salesmen merely to obtain local orders subject to confirmation at the Connecticut office and with deliveries to be made directly from the latter, its business was interstate commerce and a Massachusetts annual excise could not be validly applied thereto

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1917	City of Denver v. Denver Union Water Co., 246 U.S. 178 (1918)	Pitney, Mahlon R.	Business	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Rates fixed by a Denver ordinance pertaining to the charges to be collected for services by a water company deprived the latter of its property without due process of law by reason of yielding a return of 4.3% compared with prevailing rates in the city of 6% and higher obtained on secured and unsecured loans.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1917	New York Life Insurance Co. v. Dodge, 246 U.S. 357 (1918)	McReynolds, James C.	Contracts	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Liberty of contract, as protected by the due process clause of the Fourteenth Amendment, precluded enforcement of the Missouri nonforfeiture statute, prescribing how net value of a life insurance policy is to be applied to avert a forfeiture in the event the annual premium is not paid, so as to prevent a Missouri resident from executing in the New York office of the insurer a different agreement sanctioned by New York law whereby the policy was pledged as security for a loan and later canceled in satisfaction of the indebtedness

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1917	City of Covington v. South Covington Street Railway, 246 U.S. 413 (1918)	Holmes, Oliver Wendell	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contracts Clause

Description of Unconstitutional Provision(s): A Kentucky city ordinance of 1913 purporting to grant a 25-year franchise for a street railway over certain streets to the best bidder impaired the obligation of contract of an older street railway accorded a perpetual franchise over the same street.

1917	Hammer v. Dagenhart, 247 U.S. 251 (1918)	Day, William R.	Labor & Employment;	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3 Tenth Amendment

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Act of September 1, 1916 (39 Stat. 675): The original Child Labor Law, providing "that no producer . . . shall ship . . . in interstate commerce . . . any article or commodity the product of any mill . . . in which within 30 days prior to the removal of such product therefrom children under the age of 14 years have been employed or permitted to work more than 8 hours in any day or more than 6 days in any week."

1916	Detroit United Railway v. Michigan, 242 U.S. 238 (1916)	Pitney, Mahlon R.	Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Construction of acts of 1905 and 1907 as compelling a Detroit City Railway to extend its lines to suburban areas annexed by Detroit only on the same terms as were contained in its initial franchise as authorized by the Detroit ordinance of 1889, wherein its fare was fixed, operated to impair the obligation of contract.

1916	Rowland v. Boyle, 244 U.S. 106 (1917)	Holmes, Oliver Wendell	Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): The two-cent passenger rate fixed by act of the Arkansas legislature was confiscatory and accordingly deprived the railroad of its property without due process.

1916	Seaboard Air Line Railway v. Blackwell, 244 U.S. 310 (1917)	McKenna, Joseph	Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Georgia "Blow-Post" law imposed an unconstitutional burden on interstate commerce insofar as compliance with it would have required an interstate train to come practically to a stop at each of 124 ordinary grade crossings within a distance of 123 miles in Georgia and would have added more than six hours to the running time of the train.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1916	Western Oil Referee Co. v. Lipscomb, 244 U.S. 346 (1917)	Van Devanter, Willis	Taxes; Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Tennessee privilege tax could not validly be imposed on interstate sales consummated at either destination in Tennessee by an Indiana corporation that, for the purpose of filling orders taken by its salesmen in Tennessee, shipped thereto a tank car of oil and a carload of barrels and filled the orders through an agent who drew the oil from the tank car into the barrels, or into barrels furnished by customers, and then made delivery and collected the agreed price, and thereafter moved the two cars to another point in Tennessee for effecting like deliveries.

1916	Adams v. Tanner, 244 U.S. 590 (1917)	McReynolds, James C.	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): A Washington law that proscribed private employment agencies by prohibiting them from collecting fees for their services deprived individuals of the liberty to pursue a lawful calling contrary to due process of law.

1915	United States v. Hvoslef, 237 U.S. 1 (1915)	Hughes, Charles E.	Taxes	Federal

Constitutional Provision(s) Invoked: Article I, Section 9, Clause 5

Constitutional Clause(s) Invoked: Export Clause

Description of Unconstitutional Provision(s): Act of June 13, 1898 (30 Stat. 448, 460): Tax on charter parties, as applied to shipments exclusively from ports in United States to foreign ports.

1915	Truax v. Raich, 239 U.S. 33 (1915)	Hughes, Charles E.	Labor	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): An Arizona statute that compelled establishments hiring five or more workers to reserve 80 percent of the employment opportunities to U.S. citizens denied aliens equal protection of the laws.

1915	Indian Oil Co. v. Oklahoma, 240 U.S. 522 (1916)	McKenna, Joseph	Taxes	State & Local

Constitutional Provision(s) Invoked: Article VI, Section 2

Constitutional Clause(s) Invoked: Supremacy Clause

Description of Unconstitutional Provision(s): Oklahoma tax on lessee's interest in Indian lands, acquired pursuant to federal statutory authorization, was void as a tax on a federal instrumentality.

1915	Gast Realty Co. v. Schneider Granite Co., 240 U.S. 55 (1916)	Holmes, Oliver Wendell	Taxing	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): St. Louis ordinance which levied one-fourth of the cost of pavingon property fronting on the street and the remaining three-fourths uponall property in the taxing district according to area and without equalityas to depth denied equal protection of the laws.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1915	Wisconsin v. Philadelphia & Reading Coal Co., 241 U.S. 329 (1916)	McReynolds, James C.	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article III

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): A Wisconsin law that revoked the license of any foreign corporation that removed to a federal court a suit instituted against it by a Wisconsin citizen imposed an unconstitutional condition.

1915	Rosenberger v. Pacific Express Co., 241 U.S. 48 (1916)	White, Edward D.	Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Texas statute imposing special licenses on express companies maintaining offices for C.O.D. delivery of interstate shipments of alcoholic beverages imposed an invalid burden on interstate commerce under the terms of the Wilson Act of 1890 (26 Stat. 313).

1915	McFarland v. American Sugar Co., 241 U.S. 79 (1916)	Holmes, Oliver Wendell	Trade; Antitrust	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): A Louisiana law that established a rebuttable presumption that any person systematically purchasing sugar in Louisiana at a price below that which he paid in any other state was a party to a monopoly or conspiracy in restraint of trade violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it declared an individual presumptively guilty of a crime and exempted countless others paying the same price.

1914	Russell v. Sebastian, 233 U.S. 195 (1914)	Hughes, Charles E.	Energy & Utilities	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Amendment in 1911 of California constitution of 1879 granting certain companies the privilege of using public streets to lay gas pipes, and municipal ordinances of Los Angeles adopted in pursuance of the amendment.

1914	Sioux Remedy Co. v. Cope, 235 U.S. 197 (1914)	Van Devanter, Willis	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A South Dakota law that required a foreign corporation to appoint a local agent to accept service of process as a condition precedent to suing in state courts to collect a claim arising out of interstate commerce imposed an invalid burden on said commerce.

1914	Choctaw & Gulf Railroad v. Harrison, 235 U.S. 292 (1914)	McReynolds, James C.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article IV, Clause 2

Constitutional Clause(s) Invoked: Supremacy Clause

Description of Unconstitutional Provision(s): The Oklahoma Separate Coach Law permitting carriers to provide sleeping, dining, and chair cars for White passengers but not Black passengers.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1914	South Covington Railway v. City of Covington, 235 U.S. 537 (1915)	Day, William R.	Business	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Commerce Clause; Due Process Clause

Description of Unconstitutional Provision(s): Kentucky municipal ordinance, insofar as it sought to regulate the number of street cars to be run, and the number of passengers allowed in each car, between interstate points imposed an unreasonable burden on interstate commerce. Also, the requirement that temperature in the cars never be permitted to be below 50° was unreasonable and violated due process.

1914	Coppage v. Kansas, 236 U.S. 1 (1915)	Pitney, Mahlon R.	Labor & Employment	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Kansas law proscribing "yellow dog" contracts whereby the employer exacted of employees an agreement not to join or remain a member of a union as a condition of acquiring and retaining employment deprived employees of liberty of contract contrary to due process.

1914	Heyman v. Hays, 236 U.S. 178 (1915)	White, Edward D.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Tennessee county privilege tax law, insofar as it was enforced as to a liquor dealer doing a strictly mail-order business confined to shipments to out-of-state destinations was void as a burden on interstate commerce.

1914	Northern Pacific Railway v. North Dakota ex rel. McCue, 236 U.S. 585 (1915)	Hughes, Charles E.	Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): North Dakota law compelling carriers to haul certain commodities at less than compensatory rates deprived them of property without due process.

1914	Norfolk & Western Railway v. Conley, 236 U.S. 605 (1915)	Hughes, Charles E.	Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): A West Virginia law that compelled carriers to haul passengers at noncompensatory rates deprived them of property without due process.

1914	American Seeding Machine Co. v. Kentucky, 236 U.S. 660 (1915)	McKenna, Joseph	Trade	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Kentucky laws prohibiting combinations to establish prices greater or lower than an article's "real value."

1914	Wright v. Central of Georgia Railway, 236 U.S. 674 (1915)	Holmes, Oliver Wendell	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Since the lessee of two railroads, built under special charters containing irreparable contracts exempting the railway property from taxation in excess of a given rate was to be viewed as in the same position as the owners, Georgia's levy of an ad valorem tax on the lessee in excess of the charter rate impaired the obligation of contract (Art. I, § 10).

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1914	Davis v. Virginia, 236 U.S. 697 (1915)	Holmes, Oliver Wendell	Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Solicitation by a peddler in Virginia of orders for portraits made in another State, with an option to the purchaser to select frames upon delivery of the portrait by the peddler, amounted to a single transaction in interstate commerce, and Virginia therefore could not validly impose a peddler's license tax on the solicitor of such orders.

1914	Thames & Mersey Marine Insurance Co. v. United States, 237 U.S. 19 (1915)	Hughes, Charles E.	Taxes	Federal

Constitutional Provision(s) Invoked: Article I, Section 9, Clause 5

Constitutional Clause(s) Invoked: Export Clause

Description of Unconstitutional Provision(s): Act of June 13, 1898 (30 Stat. 448, 461): Stamp tax on policies of marine insurance on exports.

1914	Chicago, Burlington, & Quincy Railway v. Wisconsin Railroad Commission, 237 U.S. 220 (1915)	McKenna, Joseph	Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Wisconsin statute requiring interstate trains to stop at villages of a specified number of inhabitants, without regard to the volume of business done there, was void as imposing an unreasonable burden on interstate commerce.

1914	Guinn v. United States, 238 U.S. 347 (1915)	White, Edward D.	Voting	State & Local

Constitutional Provision(s) Invoked: Fifteenth Amendment

Constitutional Clause(s) Invoked: Right to Vote Clause

Description of Unconstitutional Provision(s): An Oklahoma grandfather clause, in its 1910 constitution, exempting from a literacy requirement and automatically enfranchising all entitled to vote as of January 1, 1866, or who were descendants of those entitled to vote on the latter date, violated the Fifteenth Amendment's protection of Negroes from discriminatory denial of the right to vote based on race.

1914	Myers v. Anderson, 238 U.S. 368 (1915)	White, Edward D.	Voting	State & Local

Constitutional Provision(s) Invoked: Fifteenth Amendment

Constitutional Clause(s) Invoked: Right to Vote Clause

Description of Unconstitutional Provision(s): Maryland grandfather clause providing voting rights based on persons or their ancestors having such rights before the Fifteenth Amendment's adoption violated the Fifteenth Amendment.

1914	Chicago, Milwaukee, & St. Paul Railroad v. Wisconsin, 238 U.S. 491 (1915)	Lamar, Joseph R.	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): A Wisconsin statute that compelled sleeping car companies, if an upper berth was not sold, to accord use of the space to the purchaser of a lower berth, took salable property from the owner without compensation and therefore deprived the owner of property without due process of law.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1914	Atchison, Topeka, & Santa Fe Railway v. Vosburg, 238 U.S. 56 (1915)	PITNEY, MAHLON R.	Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): The Kansas Reciprocal Demurrage Law of 1905, which allowed recovery of an attorney's fee by the shipper in case of delinquency by the carrier, but accorded the carrier no like privilege in case of delinquency on the part of the shipper, denied the carrier equal protection of the law.

1913	Chicago, Milwaukee, & St. Paul Railway v. Polt, 232 U.S. 165 (1914)	HOLMES, OLIVER WENDELL	Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): A South Dakota law that made railroads liable for double damages in case of failure to pay a claim, within 60 days after notice, or to offer to pay a sum equal to what a jury found the claimant entitled.

1913	Harrison v. St. Louis & San Francisco Railroad, 232 U.S. 318 (1914)	WHITE, EDWARD D.	Transportation	State & Local

Constitutional Provision(s) Invoked: Article III

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): An Oklahoma law that prohibited foreign corporations, upon penalty of forfeiting their license to do business in that state, from invoking the diversity of citizenship jurisdiction of federal courts.

1913	Foote v. Maryland, 232 U.S. 494 (1914)	LAMAR, LUCIUS Q.C.	Taxes; Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Article I, Section 10, Clause 2

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): The Maryland oyster inspection tax of 1910, levied on oysters coming from other states, the proceeds from which were used partly for inspection and partly for other purposes, such as the policing of state waters.

1913	Farmers Bank v. Minnesota, 232 U.S. 516 (1914)	PITNEY, MAHLON R.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article VI, Clause 2

Constitutional Clause(s) Invoked: Supremacy Clause

Description of Unconstitutional Provision(s): Minnesota tax on bonds issued by a municipality of the Territory of Oklahoma and held by Minnesota corporations.

1913	Stewart v. Michigan, 232 U.S. 665 (1914)	WHITE, EDWARD D.	Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Michigan statute requiring traveling salesmen to obtain licenses, applied to shipments of out-of-state goods.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1913	Carondelet Canal Co. v. Louisiana, 233 U.S. 362 (1914)	McKenna, Joseph	Government Contracts; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Louisiana act of 1906 repealing prior act of 1858 and sequestering with compensation certain property acquired by a canal company under the repealed enactment impaired an obligation of contact.

1913	Smith v. Texas, 233 U.S. 630 (1914)	Lamar, Joseph R.	Labor & Employment	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Texas act of 1914 stipulating that only those who have previously served two years as freight train conductors or brakemen shall be eligible to serve as railroad train conductors was arbitrary and effected a denial of the equal protection of the laws.

1913	International Harvester Co. v. Kentucky, 234 U.S. 216 (1914)	Holmes, Oliver Wendell	Trade	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Kentucky criminal and antitrust provisions, both constitutional and statutory, were void for vagueness and hence violated due process because a prohibition of combinations that establish prices that are greater or lower than the "real market value" of an article as established by "fair competition" and "under normal market conditions" afforded no standard that was possible to know in advance and to obey.

1913	Missouri Pacific Railway v. Larabee, 234 U.S. 459 (1914)	White, Edward D.	Civil Procedure	State & Local

Constitutional Provision(s) Invoked: Article VI, Section 1, Clause 2

Constitutional Clause(s) Invoked: Supremacy Clause

Description of Unconstitutional Provision(s): A Kansas statute empowering a Kansas court to award attorney's fees attributable to the presentation before the United States Supreme Court of an appeal in a mandamus proceeding.

1913	Western Union Telephone Co. v. Brown, 234 U.S. 542 (1914)	Holmes, Oliver Wendell	Torts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A South Carolina law making mental anguish resulting from negligent non-delivery of a telegram a cause of action, including telegrams sent to other jurisdictions.

1913	Collins v. Kentucky, 234 U.S. 634 (1914)	Hughes, Charles E.	Trade	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Kentucky laws prohibiting combinations to establish prices greater or lower than an article's "real value."

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1912	Eubank v. City of Richmond, 226 U.S. 137 (1912)	Holmes, Oliver Wendell	Zoning	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Municipal ordinance requiring authorities to establish building lines on separate blocks back of the public streets and across private property upon the request of less than all the owners of the property affected invalidly authorized the taking of property, not for public welfare but for the convenience of other property owners; and therefore violated due process.

1912	Bucks Stove Co. v. Vickers, 226 U.S. 205 (1912)	Van Devanter, Willis	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Kansas law that imposed certain requirements, such as obtaining permission of the State Charter Board, paying filing and license fees, and submitting annual statements listing all stockholders, as a condition prerequisite to doing business in Kansas and suing in its courts.

1912	Williams v. City of Talladega, 226 U.S. 404 (1912)	Day, William R.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article VI

Constitutional Clause(s) Invoked: Supremacy Clause

Description of Unconstitutional Provision(s): A $100 license fee imposed by ordinance of an Alabama city on a foreign telegraph company, part of whose business income was derived from the transmission of messages for the Federal Government was void as a tax on a federal instrumentality (Art. VI).

1912	Crenshaw v. Arkansas, 227 U.S. 389 (1913)	Day, William R.	Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): An Arkansas statute, exacting a license and fee from peddlers of lightning rods and other articles, as applied to representatives of a Missouri corporation soliciting orders for the sale and subsequent delivery of stoves.

1912	Grand Trunk Western Railway v. City of South Bend, 227 U.S. 544 (1913)	Lamar, Joseph R.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): South Bend, Indiana, ordinance of 1901 repealing portion of anordinance of 1866 authorizing a railroad to lay double tracks on oneof its streets impaired the obligation of contract contrary to Art. I, § 10.

1912	Ettor v. City of Tacoma, 228 U.S. 148 (1913)	Lurton, Horace H.	Real Property	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): A Washington statute of 1907 repealing a prior act of 1893, with the result that rights to consequential damages for a change of street grade that had already accrued under the earlier act were destroyed.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1912	Old Colony Trust Co. v. City of Omaha, 230 U.S. 100 (1913)	Van Devanter, Willis	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): An ordinance of a Nebraska municipality adopted in 1908 requiring, without any showing of the necessity therefore, a utility to remove its poles and wires from the city streets invalidly impaired an obligation of contract arising from an ordinance of 1884 granting in perpetuity the privilege of erecting and maintaining poles and wires for the transmission of power.

1912	Missouri Pacific Railway v. Tucker, 230 U.S. 340 (1913)	Van Devanter, Willis	Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): A Kansas statute that did not permit a carrier to have the sufficiency of rates established under it determined by judicial review and that exposed the carrier, when sued for charging rates in excess thereof, to a liability for liquidated damages in the sum of $500, which was unrelated to actual damages.

1912	City of Owensboro v. Cumberland Telephone Co., 230 U.S. 58 (1913)	Lurton, Horace H.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): An ordinance of a Kentucky municipality which required a telephone company to remove from the streets poles and wires installed under a prior ordinance granting permission to do so, without restrictionas to the duration of such privilege, or, in the alternative, pay a rental not prescribed in the original ordinance impaired an obligation of contract contrary to Art. I, § 10.

1912	Boise Water Co. v. Boise City, 230 U.S. 84 (1913)	Lurton, Horace H.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): An ordinance of an Idaho municipality, adopted in 1906, that subjected a water company to monthly rental fees for the use of its streets invalidly impaired the obligation of contract arising under an ordinance of 1889 which granted a predecessor company the privilege of laying water pipes under the city streets without payment of any charge for the exercise of such right.

1911	Berryman v. Whitman College, 222 U.S. 334 (1912)	White, Edward D.	Taxes; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Washington statute of 1905, as interpreted to authorize taxation of Whitman College, which was exempt from taxation under its charter.

1911	Atchison, Topeka, & Santa Fe Railway v. O'Connor, 223 U.S. 280 (1912)	Holmes, Oliver Wendell	Taxes; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Colorado law levying tax of 2 cents on each $1,000 of a corporation's capital stock, applied to a Kansas corporation engaged in interstate commerce.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1911	Oklahoma v. Wells, Fargo & Co., 223 U.S. 298 (1912)	Holmes, Oliver Wendell	Taxes; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): An Oklahoma law levying a three-percent gross receipts tax on corporations, and computed, in the case of express companies doing an interstate business, as a percentage of gross receipts from all sources, interstate as well as intrastate, which is equal to the proportion that its business in Oklahoma bears to its total business.

1911	Louisville & Nashville Railroad v. F.W. Cook Brewing Co., 223 U.S. 70 (1912)	Lurton, Horace H.	Transportation; Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Kentucky statute prohibiting common carriers from transporting intoxicating liquors to "dry" points in Kentucky.

1911	Haskell v. Kansas Natural Gas Co., 224 U.S. 217 (1912)	Day, William R.	Energy & Utilities	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): An Oklahoma conservation law, insofar as it withheld from foreign corporations the right to lay pipe lines across highways for purposes of transporting natural gas in interstate commerce.

1911	St. Louis, Iron Mountain, & Southern Railway v. Wynne, 224 U.S. 354 (1912)	Van Devanter, Willis	Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): An Arkansas law compelling railroads to pay claimants within 30 days after notice of injury to livestock caused by their trains, and, upon default thereof, authorizing claimants to recover double the damages awarded by a jury plus an attorney's fee.

1911	Choate v. Trapp, 224 U.S. 665 (1912)	Lamar, Joseph R.	Federal Indian Law; Taxes	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Act of May 27, 1908 (35 Stat. 313, § 4): Provision making land owned by the Choctaw and Chickasaw Tribes "from which restrictions have been or shall be removed" locally taxable.

1910	Bailey v. Alabama, 219 U.S. 219 (1911)	Hughes, Charles E.	Labor & Employment; Contract	State & Local

Constitutional Provision(s) Invoked: Thirteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Prohibition Clause

Description of Unconstitutional Provision(s): An Alabama law that made a refusal to perform labor contracted for, without return of money or property advanced under the contract, prima facie evidence of fraud and that was enforced under local rules of evidence that precluded one accused of such fraud from testifying as to uncommunicated motives.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1910	Muskrat v. United States, 219 U.S. 346 (1911)	Day, William R.	Federal Indian Law	Federal

Constitutional Provision(s) Invoked: Article III, Section 2

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Act of March 1, 1907 (34 Stat. 1028): Provisions authorizing certain Native Americans "to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since . . . 1902, insofar as said acts . . . attempt to increase or extend the restrictions upon alienation . . . of allotments of lands of Cherokee citizens," and giving a right of appeal to the Supreme Court.

1910	Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229 (1911)	McKenna, Joseph	Energy & Utilities	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Commerce Clause; Due Process Clause

Description of Unconstitutional Provision(s): An Oklahoma law that withheld from foreign corporations engaged in interstate commerce a privilege afforded domestic corporations engaged in local commerce, namely, of building pipe lines across its highways and transporting to points outside its boundaries natural gas extracted and reduced to possession therein.

1910	Coyle v. Smith, 221 U.S. 559 (1911)	Lurton, Horace H.	Government Operations; Federalism	Federal

Constitutional Provision(s) Invoked: Article IV, Section 3, Clause 1

Constitutional Clause(s) Invoked: New States Clause

Description of Unconstitutional Provision(s): Act of June 16, 1906 (34 Stat. 269, § 2): Provision of Oklahoma Enabling Act restricting relocation of the state capital prior to 1913.

1909	Louisiana ex rel. Hubert v. Mayor of New Orleans, 215 U.S. 170 (1909)	Day, William R.	Taxes; Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Louisiana act of 1870 providing for registration and collection of judgments against New Orleans, so far as it delayed payment, or collection of taxes for payment, of contract claims existing before its passage.

1909	City of Minneapolis v. Street Railway, 215 U.S. 417 (1910)	Day, William R.	Contract	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Minneapolis ordinance of 1907, directing the sale of six train tickets for 25¢, was void as impairing the contract which arose from passage of the ordinance of 1875 granting to a railway a franchise expiring in 1923 and establishing a fare of not less than 5¢.

1909	North Dakota ex rel. Flaherty v. Hanson, 215 U.S. 515 (1910)	White, Edward D.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 1

Constitutional Clause(s) Invoked: Taxing Power

Description of Unconstitutional Provision(s): A North Dakota statute that required the recipient of a federal retail liquor license solely because of payment therefor to publish official notices of the terms of such license and of the place where it is posted, to display on his premises an affidavit confirming such publication, and to file an authenticated copy of such federal license together with a $10 fee.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1909	Western Union Telephone Co. v. Kansas, 216 U.S. 1 (1910)	Harlan, John M.	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Commerce Clause; Due Process Clause

Description of Unconstitutional Provision(s): A Kansas statute imposing a charter fee, computed as a percentage of authorized capital stock, on corporations for the privilege of doing business in Kansas.

1909	Ludwig v. Western Union Telephone Co., 216 U.S. 146 (1910)	Harlan, John M.	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Commerce Clause; Due Process Clause

Description of Unconstitutional Provision(s): An Arkansas law that required a foreign corporation engaged in interstate commerce to pay, as a license fee for doing an intrastate business, a given amount of its entire capital stock, whether employed in Arkansas or elsewhere.

1909	Southern Railway v. Greene, 216 U.S. 400 (1910)	Day, William R.	Taxes; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): An Alabama law that imposed on foreign corporations already admitted to do business an additional franchise or privilege tax not levied on domestic corporations.

1909	St. Louis Southwestern Railway v. Arkansas, 217 U.S. 136 (1910)	White, Edward D.	Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): An Arkansas law and administrative order that required an interstate carrier, upon application of a local shipper, to deliver promptly the number of freight cars requested for loading purposes and that, without regard to the effect of such demand on its interstate traffic, exposed it to severe penalties for noncompliance.

1909	Missouri Pacific Railway v. Nebraska, 217 U.S. 196 (1910)	Holmes, Oliver Wendell	Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): A Nebraska law compelling railroad, at its own expense and upon request of grain elevator operators, to install switches connecting such elevators with its right of way.

1909	International Textbook Co. v. Pigg, 217 U.S. 91 (1910)	Harlan, John M.	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Kansas law that imposed upon foreign corporations engaged in interstate commerce, as a condition for admission and retention of the right to do business in that state, procurement of a license and submission of an annual financial statement, and that prohibited such foreign corporations from filing actions in Kansas courts unless such conditions were met.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1909	Dozier v. Alabama, 218 U.S. 124 (1910)	Holmes, Oliver Wendell	Taxes; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): An Alabama law that imposed a license tax on agents not having a permanent place of business in that state and soliciting orders for the purchase and delivery of pictures and frames manufactured in, and delivered from, another state.

1909	Herndon v. Chicago, Rock Island, & Pacific Railway, 218 U.S. 135 (1910)	Day, William R.	Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Missouri law requiring railroads to stop trains at junction points and forfeiting the right of an admitted foreign carrier to do a local business upon its instituting a right of action in a federal court.

1908	Louisville & Nashville Railroad v. Stock Yards Co., 212 U.S. 132 (1909)	Holmes, Oliver Wendell	Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): A Kentucky constitutional provision that required a carrier to deliver its cars to connecting carriers without providing adequate protection for their return or compensation for their use.

1908	Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909)	Peckham, Rufus W.	Energy & Utilities	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): A New York law that required a public utility to perform its service in such a manner that its entire plant would have to be rebuilt at a cost on which no return could be obtained under the rates fixed.

1908	Keller v. United States, 213 U.S. 138 (1909)	Brewer, David J.	Immigration; Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Article I, Section 8, Clause 4; Tenth Amendment

Constitutional Clause(s) Invoked: Foreign Commerce Clause; Naturalization Clause

Description of Unconstitutional Provision(s): Act of February 20, 1907 (34 Stat. 889, § 3): Provision in the Immigration Act of 1907 penalizing "whoever . . . shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution . . . any alien woman or girl, within 3 years after she shall have entered the United States."

1908	United States v. Evans, 213 U.S. 297 (1909)	Fuller, Melville W.	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Article III, Section 2

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Act of March 3, 1901 (31 Stat. 1341, § 935): Section of the District of Columbia Code granting the same right of appeal, in criminal cases, to the United States or the District of Columbia as to the defendant, but providing that a verdict was not to be set aside for error found in rulings during trial.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1908	Adams Express Co. v. Kentucky, 214 U.S. 218 (1909)	Brewer, David J.	Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Kentucky law proscribing the sale of liquor to an inebriate, as applied to a carrier delivering liquor to such person from another state.

1907	Central of Georgia Railway v. Wright, 207 U.S. 127 (1907)	Day, William R.	Taxes; Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): A Georgia statutory assessment procedure that afforded taxpayer no opportunity to be heard as to valuation of property not returned by him under honest belief that it was not taxable, and that permitted him to challenge the assessment only for fraud and corruption.

1907	The Employers' Liability Cases, 207 U.S. 463 (1908)	White, Edward D.	Labor & Employment; Torts; Transportation	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Act of June 11, 1906 (34 Stat. 232): Act providing that "every common carrier engaged in trade or commerce in the District of Columbia . . . or between the several States . . . shall be liable to any of its employees . . . for all damages which may result from the negligence of any of its officers . . . or by reason of any defect . . . due to its negligence in its cars, engines . . . roadbed," etc..

1907	Darnell & Son Co. v. City of Memphis, 208 U.S. 113 (1908)	White, Edward D.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Tennessee tax law that exempted domestic crops and manufactured products, but applied the levy to like products of out-of-state origin.

1907	Adair v. United States, 208 U.S. 161 (1908)	Harlan, John M.	Labor & Employment	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Fifth Amendment

Constitutional Clause(s) Invoked: Commerce Clause; Due Process Clause

Description of Unconstitutional Provision(s): Act of June 1, 1898, § 10 (30 Stat. 428): Provision penalizing "any employer subject to the provisions of this act," generally referring to common carriers, who should "threaten any employee with loss of employment . . . because of his membership in . . . a labor corporation, association, or organization."

1907	Ex parte Young, 209 U.S. 123 (1908)	Peckham, Rufus W.	Federalism; Trasnportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): A Minnesota railroad rate statute that imposed such excessive penalties that parties affected were deterred from testing its validity in the courts.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1907	Galveston, Harrisburg, & San Antonio Railway v. Texas, 210 U.S. 217 (1908)	Holmes, Oliver Wendell	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Texas gross receipts tax insofar as it was levied on railroad receipts that included income derived from interstate commerce.

1907	Londoner v. City of Denver, 210 U.S. 373 (1908)	Moody, William H.	Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): The due process requirements of notice and hearing in connection with the assessment of taxes were violated by a municipal assessment ordinance which afforded the taxpayer the privilege of filing objections but no opportunity to support his objections by argument and proof in open hearing.

1906	American Smelting Co. v. Colorado, 204 U.S. 103 (1907)	Peckham, Rufus W.	Taxes; Business & Corporate Law; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Colorado statute imposing higher annual license fees on foreign corporations admitted under the terms of a prior statute than were levied on domestic corporations.

1906	Adams Express Co. v. Kentucky, 206 U.S. 129 (1907)	Brewer, David J.	Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Kentucky law proscribing C.O.D. shipments of liquor, providing that the place where the money is paid or the goods delivered shall be deemed to be the place of sale, and making the carrier jointly liable with the vendor, as applied to interstate shipments.

1906	Mayor of Vicksburg v. Vicksburg Waterworks Co., 206 U.S. 496 (1907)	Day, William R.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contracts Clause

Description of Unconstitutional Provision(s): Municipal contract with utility fixing the maximum rate to be charged for supplying water to inhabitants was invalidly impaired by subsequent ordinances altering said rates.

1905	Union Transit Co. v. Kentucky, 199 U.S. 194 (1905)	Brown, Henry B.	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): A Kentucky tax on railway cars located in Indiana.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1905	Houston & Texas Central Railroad v. Mayes, 201 U.S. 321 (1906)	Brown, Henry B.	Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Texas statute exacting of an interstate railroad an absolute requirement that it furnish a certain number of cars on a given day to transport merchandise to another state.

1905	City of Cleveland v. Cleveland Electric Railway, 201 U.S. 529 (1906)	McKenna, Joseph	Business	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Contracts Clause

Description of Unconstitutional Provision(s): Ordinance according to a consolidated municipal railway an extension of the duration date of franchises issued to its predecessors, in consideration of which substantial sums were expended on improvements, gave rise to a new contract, which was impaired by later attempton the part of the city to reduce the rate stipulated in the franchises thus extended.

1905	Powers v. Detroit & Grand Haven Railway, 201 U.S. 543 (1906)	Brewer, David J.	Taxes; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Michigan law altering the rate of a tax originally imposed on a railroad in connection with a reorganization under a special act.

1905	Mayor of Vicksburg v. Vicksburg Waterworks Co., 202 U.S. 453 (1906)	Day, William R.	Government Contracts; Energy & Utilities	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Mississippi statute authorizing a city to erect its own water system, when water company owned an exclusive franchise to supply a city with water.

1905	Hodges v. United States, 203 U.S. 1 (1906)	Brewer, David J.	Contracts	Federal

Constitutional Provision(s) Invoked: Thirteenth Amendment, Section 2

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Act of May 31, 1870, § 16 (16 Stat. 144): Provision that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens."

1904	Postal Telegraph-Cable Co. v. Borough of Taylor, 192 U.S. 64 (1904)	Peckham, Rufus W.	Business	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Ordinance of Taylor, Pennsylvania authorizing an inspection fee on telegraph companies doing an interstate business held to be an unreasonable and invalid regulation of commerce.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1904	Central of Georgia Railway v. Murphey, 196 U.S. 194 (1905)	Peckham, Rufus W.	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Georgia statutes that imposed the duty on common carriers of reporting on the shipment of freight to the shipper, applied to interstate shipments.

1904	Matter of Heff, 197 U.S. 488 (1905)	Brewer, David J.	Federal Indian Law; Trade	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Indian Commerce Clause

Description of Unconstitutional Provision(s): Act of January 30, 1897 (29 Stat. 506): Prohibition on sale of liquor "to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government . . . ," held a police regulation infringing state powers, and not warranted by the Commerce Clause, Article I, § 8, clause 3.

1904	Rassmussen v. United States, 197 U.S. 516 (1905)	White, Edward D.	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Sixth Amendment

Constitutional Clause(s) Invoked: Right to Trial by Jury

Description of Unconstitutional Provision(s): Act of June 6, 1900 (31 Stat. 359, § 171): Section of the Alaska Code providing for a six-person jury in trials for misdemeanors.

1904	Lochner v. New York, 198 U.S. 45 (1905)	Peckham, Rufus W.	Labor & Employment	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): A New York statute establishing a 10-hour day in bakeries.

1903	The Robert W. Parsons, 191 U.S. 17 (1903)	Brown, Henry B.	Admiralty & Maritime Law	State & Local

Constitutional Provision(s) Invoked: Article III, Section 2, Clause 1:

Constitutional Clause(s) Invoked: Admiralty & Maritime Jurisdiction

Description of Unconstitutional Provision(s): New York statutes giving a lien for repairs upon vessels, and providing for the enforcement of such liens by proceedings in rem.

1903	Allen v. Pullman Company, 191 U.S. 171 (1903)	Day, William R.	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Tennessee tax of $500 per year per Pullman car, applied to cars moving in interstate as well as intrastate commerce.

1903	City of Cleveland v. Cleveland City Railway, 194 U.S. 517 (1904)	White, Edward D.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Contracts Clause

Description of Unconstitutional Provision(s): Ordinance reducing the rate of fares to be charged by railway companies lower than cited in previous ordinances held to impair the obligation of contract.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1903	Bradley v. Lightcap, 195 U.S. 1 (1904)	Fuller, Melville W.	Real Property; Banking; Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): An Illinois law, passed after a mortgage was executed, that provided that, if a mortgagee did not obtain a deed within five years after the period of redemption had lapsed, he lost the estate.

1902	Louisville & J. Ferry Co. v. Kentucky, 188 U.S. 385 (1903)	Harlan, John M.	Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Kentruck law authorizing a levy on an Indiana franchise granted to a Kentucky corporation for operating a ferry from the Indiana to the Kentucky shore.

1902	The Roanoke, 189 U.S. 185 (1903)	Brown, Henry B.	Admiralty & Maritime Law	State & Local

Constitutional Provision(s) Invoked: Article III, Section 2, Clause 1:

Constitutional Clause(s) Invoked: Admiralty & Maritime Jurisdiction

Description of Unconstitutional Provision(s): A Washington law that accorded a contractor or subcontractor a lien on a foreign vessel for work done and that made no provision for protection of owner in event contractor was fully paid before notice of subcontractor's lien was received.

1902	James v. Bowman, 190 U.S. 127 (1903)	Brewer, David J.	Elections	Federal

Constitutional Provision(s) Invoked: Article I, Section 4, Clause 1; Fifteenth Amendment, Section 2

Constitutional Clause(s) Invoked: Elections Clause

Description of Unconstitutional Provision(s): Act of May 31, 1870, § 5 (16 Stat. 141): Provision penalizing "[e]very person who prevents, hinders, controls, or intimidates another from exercising, or in exercising the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery or threats."

1901	Cotting v. Kansas City Stock Yards Co., 183 U.S. 79 (1901)	Brewer, David J.	Agriculture	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): A Kansas statute that regulated public stock yards, but applied to only one stockyard company in the state.

1901	Louisville & Nashville Railroad v. Eubank, 184 U.S. 27 (1902)	Peckham, Rufus W.	Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Kentucky constitutional provision on long and short haul railroad rates.

1901	City of Detroit v. Detroit Citizens' Street Railway, 184 U.S. 368 (1902)	Peckham, Rufus W.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contracts Clause

Description of Unconstitutional Provision(s): City ordinances that adjusted the rate of fare stipulated in agreements made with a street railway company held to impair the obligation of contract.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1901	Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902)	Harlan, John M.	Antitrust; Agriculture	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): An Illinois statute that regulated monopolies, but exempted agricultural products and livestock in the hands of the producer from the operation of the law.

1901	Stockard v. Morgan, 185 U.S. 27 (1902)	Peckham, Rufus W.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Tennessee license tax on agents soliciting and selling by sample for a company in another state.

1900	Stearns v. Minnesota, 179 U.S. 223 (1900)	Brewer, David J.	Taxes; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Minnesota statute repealing all former tax exemption laws and providing for the taxation of lands granted to railroads.

1900	Fairbank v. United States, 181 U.S. 283 (1901)	Brewer, David J.	Taxes; Trade	Federal

Constitutional Provision(s) Invoked: Article I, Section 9, Clause 5

Constitutional Clause(s) Invoked: Export Clause

Description of Unconstitutional Provision(s): Act of June 13, 1898 (30 Stat. 448, 459): Stamp tax on foreign bills of lading.

1899	Jones v. Meehan, 175 U.S. 1 (1899)	Gray, Horace	Federal Indian Law	Federal

Constitutional Provision(s) Invoked: Article III

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Joint Resolution of August 4, 1894 (28 Stat. 1018, No. 41): Provision authorizing the Secretary of the Interior to approve a second lease of certain land by an Indian chief in Minnesota (granted to lessor's ancestor by art. 9 of a treaty with the Chippewa Indians).

1899	Cleveland, Cincinnati, Chicago, & St. Louis Railway v. Illinois ex rel. Jett, 177 U.S. 514 (1900)	Brown, Henry B.	Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): An Illinois law that required all regular passenger trains to stop at county seats for receipt and discharge of passengers, applied to an express train serving only through passengers between New York and St. Louis.

1899	City of Los Angeles v. Los Angeles City Water Co., 177 U.S. 558 (1900)	McKenna, Joseph	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contracts Clause

Description of Unconstitutional Provision(s): Ordinance expanding city limits beyond those to be served by autility leasing a municipality's water works and effecting diminution of the rates stipulated in the original agreement without any equivalent compensation impaired the obligation of contract between the utility and the city.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1899	Houston & Texas Central Railroad v. Texas, 177 U.S. 66 (1900)	Peckham, Rufus W.	Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Repeal of a Texas statute that permitted treasury warrants to be given to the state for payment of interest on bonds issued by a railroad and held by the state, with accompanying endeavor to hold the railroad liable for back interest paid on the warrants.

1898	Brimmer v. Rebman, 138 U.S. 78 (1891)	Harlan, John M.	Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Virginia statute prohibiting sale of meat killed 100 miles or more from place of sale, unless it was first inspected in Virginia, held void as interference with interstate commerce and imposing a discriminatory tax.

1898	City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1 (1898)	Brown, Henry B.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contracts Clause

Description of Unconstitutional Provision(s): A Washington city ordinance that authorized construction of a municipal water works impaired the obligation of a contract previously negotiated with a private utility providing the same service.

1898	Blake v. McClung, 172 U.S. 239 (1898)	Harlan, John M.	Bankruptcy	State & Local

Constitutional Provision(s) Invoked: Article IV, Section 2, Clause 1

Constitutional Clause(s) Invoked: Privileges & Immunities Clause

Description of Unconstitutional Provision(s): Tennessee acts that granted Tennessee creditors priority over nonresident creditors having claims against foreign corporations admitted to do local business.

1898	Norwood v. Baker, 172 U.S. 269 (1898)	Harlan, John M.	Taxes; Real Property	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): The exaction, as authorized by Ohio law, from the owner of property, via special assessment, of the cost of a public improvement in substantial excess of the benefits accruing to him.

1898	Dewey v. City of Des Moines, 173 U.S. 193 (1899)	Peckham, Rufus W.	Taxes; Real Property	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): An Iowa statute subjecting a nonresident owner of property in Iowa to personal liability to pay a special assessment.

1898	Lake Shore & Michigan Southern Railway v. Smith, 173 U.S. 684 (1899)	Peckham, Rufus W.	Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): A Michigan act that required railroads to sell 1,000-mile tickets at a fixed price in favor of the purchaser, his wife, and children, with provisions for forfeiture if presented by any other person in payment of fare, and for expiration within two years, subject to redemption of unused portion and collection of 3 cents per mile already traveled.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1898	Kirby v. United States, 174 U.S. 47 (1899)	Harlan, John M.	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Sixth Amendment

Constitutional Clause(s) Invoked: Confrontation Clause

Description of Unconstitutional Provision(s): Act of March 3, 1875 (18 Stat. 479, § 2): Provision that "if the party [i.e., a person stealing property from the United States] has been convicted, then the judgment against him shall be conclusive evidence in the prosecution against [the] receiver that the property of the United States therein described has been embezzled, stolen, or purloined."

1897	Smyth v. Ames, 169 U.S. 466 (1898)	Harlan, John M.	Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): A Nebraska statute setting intrastate freight rates.

1897	Houston & Texas Central Railway v. Texas, 170 U.S. 243 (1898)	Fuller, Melville W.	Real Property; Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Texas constitutional provision, as enforced to recover certain sections of land held by a railroad company under a previous legislative grant.

1897	Thompson v. Utah, 170 U.S. 343 (1898)	Harlan, John M.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Article I, Section 9, Clause 3

Constitutional Clause(s) Invoked: Ex Post Facto Clause

Description of Unconstitutional Provision(s): A provision in Utah's constitution, providing for the trial of noncapital criminal cases in courts of general jurisdiction by a jury of eight persons.

1897	Schollenberger v. Pennsylvania, 171 U.S. 1 (1898)	Peckham, Rufus W.	Food & Drug; Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Pennsylvania law that prohibited interstate importation and resale of oleomargarine in original packages.

1897	Collins v. New Hampshire, 171 U.S. 30 (1898)	Peckham, Rufus W.	Food & Drug; Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A New Hampshire law that prohibited the sale of oleomargarine unless it was pink in color.

1896	Missouri Pacific Railway v. Nebraska, 164 U.S. 403 (1896)	Gray, Horace	Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): A Nebraska statute that compelled a railroad to permit a third party to erect a grain elevator on its right of way.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1896	Gulf, Colorado, & Santa Fe Railway v. Ellis, 165 U.S. 150 (1897)	Brewer, David J.	Civil Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): A Texas law that required railroads to pay court costs and attorneys' fees to litigants successfully prosecuting claims against them.

1896	Allgeyer v. Louisiana, 165 U.S. 578 (1897)	Peckham, Rufus W.	Insurance; Advertising; Publishing; & Communications	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): A Louisiana law imposing a penalty for soliciting contracts of insurance on behalf of insurers who had not complied with Louisiana law, applied to an insurance contract negotiated in New York with a New York company and with premiums and losses to be paid in New York.

1896	Scott v. Donald, 165 U.S. 58 (1897)	Shiras, George	Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A South Carolina act regulating the sale of alcoholic beverages exclusively at state dispensaries, when enforced against a resident importing out-of-state liquor.

1895	Bank of Commerce v. Tennessee, 161 U.S. 134 (1896)	Peckham, Rufus W.	Taxes; Banking; Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Tennessee revenue laws that imposed a tax on stock beyond that stipulated under the provision of a state charter.

1895	Barnitz v. Beverly, 163 U.S. 118 (1896)	Shiras, George	Real Property; Banking	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Kansas law granting to mortgagor a right to redeem foreclosed property, which right did not exist when the mortgage was negotiated.

1895	Illinois Central Railroad v. Illinois, 163 U.S. 142 (1896)	Gray, Horace	Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): An Illinois statute that required a railroad to run its New Orleans train into Cairo and back to mail line.

1895	Wong Wing v. United States, 163 U.S. 228 (1896)	Shiras, George	Immigration	Federal

Constitutional Provision(s) Invoked: Fifth Amendment; Sixth Amendment

Constitutional Clause(s) Invoked: Separation of Powers Doctrine

Description of Unconstitutional Provision(s): Act of May 5, 1892 (27 Stat. 25, § 4): Provision of a Chinese exclusion act, that Chinese persons "convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period not exceeding 1 year and thereafter removed from the United States."

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1894	Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895)	Fuller, Melville W.	Taxes	Federal

Constitutional Provision(s) Invoked: Article I, Section 2, Clause 3

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Provisions imposing a federal tax on a person's entire income, including income derived from real estate and income derived from municipal bonds.

1894	Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895)	Fuller, Melville W.	Taxes	Federal

Constitutional Provision(s) Invoked: Article I, Section 2, Clause 3

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): A provision imposing a federal tax on income derived from real estate.

1893	Mobile & Ohio Railroad v. Tennessee, 153 U.S. 486 (1894)	Jackson, Howell E.	Taxes; Transportation; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Tennessee statutes that levied taxes on a railroad company enjoying tax exemption under an earlier charter impaired the obligation of contract.

1893	New York, Lake Erie & Western Railroad v. Pennsylvania, 153 U.S. 628 (1894)	Harlan, John M.	Securities; Taxes; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1; Fourteenth Amendment

Constitutional Clause(s) Invoked: Contract Clause; Due Process Clause

Description of Unconstitutional Provision(s): A Pennsylvania act of 1885 that required a New York corporation, when paying interest in New York City on its outstanding securities, to withhold a Pennsylvania tax levied on resident owners of such securities, violated due process because of its application to property beyond the jurisdiction of Pennsylvania. The act also impaired the obligation of contracts by increasing the conditions originally exacted of the railroad in return for permission to construct and operate over trackage in Pennsylvania.

1893	Covington & Cincinnati Bridge Co. v. Kentucky, 154 U.S. 204 (1894)	Brown, Henry B.	Taxes; Transportation; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Article I, Section 8, Clause 1

Constitutional Clause(s) Invoked: Commerce Clause; Contract Clause

Description of Unconstitutional Provision(s): A Kentucky act regulating toll rates on bridge across the Ohio River was an unconstitutional regulation of interstate commerce.

1892	Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893)	Brewer, David J.	Real Property	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Right to Trial by Jury

Description of Unconstitutional Provision(s): Act of August 11, 1888 (25 Stat. 411): Directive, in a provision for the purchase or condemnation of a certain lock and dam in the Monongahela River, that ". . . in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated."

continues

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1890	McGahey v. Virginia, 135 U.S. 662 (1890)	Bradley, Joseph P.	Contracts; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Virginia acts that stipulated that, if the genuineness of coupons tendered in payment of taxes was in issue, the bond from which the coupon was cut must be produced, that precluded use of expert testimony to establish the genuineness of the coupons, and that, in suits for payment of taxes, imposed on the defendant tendering coupons as payment the burden of establishing the validity of said coupons, were deemed to abridge the remedies available to the bondholders so materially as to impair the obligation of contract.

1890	Pennoyer v. McConnaughy, 140 U.S. 1 (1891)	Lamar, Lucius Q.C.	Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): An Oregon act of 1887 that voided all certificates for the sale of public land unless 20% of the purchase price had been paid prior to 1879, altered the terms of purchase provided under preexisting law and therefore impaired the obligations of the contract.

1890	Crutcher v. Kentucky, 141 U.S. 47 (1891)	Bradley, Joseph P.	Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Kentucky law that required a license from foreign express corporation agents before doing business in the state was held invalid under the Commerce Clause.

1890	Voight v. Wright, 141 U.S. 62 (1891)	Bradley, Joseph P.	Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Virginia statute that required state inspection of all but domestic flour held invalid under Commerce Clause.

1889	Western Union Telephone Co. v. Alabama, 132 U.S. 472 (1889)	Miller, Samuel F.	Advertising, Publishing, & Communications; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): An Alabama tax law, as applied to revenue of telegraph company made by sending messages outside the state, was held to be an invalid regulation of commerce.

1889	Medley, Petitioner, 134 U.S. 160 (1890)	Miller, Samuel F.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Ex Post Facto Clause

Description of Unconstitutional Provision(s): A Colorado law, when applied to a person convicted of a murder committed prior to the enactment and that increased the penalty to be imposed, was void as an ex post facto law.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1889	Chicago, Milwaukee, & St. Paul Railway v. Minnesota, 134 U.S. 418 (1890)	Blatchford, Samuel M.	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause; Equal Protection Clause

Description of Unconstitutional Provision(s): A state rate-regulatory law that empowered a commission to establish rate schedules that were final and not subject to judicial review as to their reasonableness violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

1889	Leisy v. Hardin, 135 U.S. 100 (1890)	Fuller, Melville W.	Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): An Iowa Prohibition law, enforced as to an interstate shipment of liquor in the original packages or kegs.

1889	Lyng v. Michigan, 135 U.S. 161 (1890)	Fuller, Melville W.	Taxes; Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Michigan statute that taxed the sale of imported liquor in original package was held an invalid regulation of interstate commerce.

1889	Norfolk & Western Railroad v. Pennsylvania, 136 U.S. 114 (1890)	Lamar, Lucius Q.C.	Taxes; Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Pennsylvania act that imposed a license tax on foreign corporation common carriers doing business in the state was held to be invalid as a tax on interstate commerce.

1889	Minnesota v. Barber, 136 U.S. 313 (1890)	Harlan, John M.	Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Minnesota statute that made it illegal to offer for sale any meat other than that taken from animals passed by state inspectors was held to discriminate against meat producers from other states and to place an undue burden upon interstate commerce.

1888	California v. Pacific Railroad, 127 U.S. 1 (1888)	Bradley, Joseph P.	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Article VI, Clause 2

Constitutional Clause(s) Invoked: Commerce Clause; Supremacy Clause

Description of Unconstitutional Provision(s): A California tax levied on the franchise of interstate railway corporations chartered by Congress pursuant to its commerce power is void, Congress not having consented to it.

1888	Asher v. Texas, 128 U.S. 129 (1888)	Bradley, Joseph P.	Taxes; Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Texas law that imposed a license tax on drummers violates the Commerce Clause as enforced against one who solicited orders for the purchase of merchandise from out-of-state sellers.

continues

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1888	Stoutenburgh v. Hennick, 129 U.S. 141 (1889)	Fuller, Melville W.	Taxes; Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A clause of a District of Columbia act that required commercial agents selling by sample to pay a license tax was held a regulation of interstate commerce when applied to agents soliciting purchases on behalf of principals outside the District of Columbia.

1887	Bowman v. Chicago & Northwestern Railway, 125 U.S. 465 (1888)	Matthews, T. Stanley	Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): An Iowa liquor statute that required interstate carriers to procure a certificate from the auditor of the county of destination before bringing liquor into the state violated of the Commerce Clause.

1887	Ratterman v. Western Union Telephone Co., 127 U.S. 411 (1888)	Miller, Samuel F.	Advertising, Publishing, & Communications; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): An Ohio law that levied a tax on the receipts of a telegraph company was invalid to the extent that part of such receipts levied on were derived from interstate commerce.

1887	Callan v. Wilson, 127 U.S. 540 (1888)	Harlan, John M.	Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Article III, Section 2, Clause 3; Sixth Amendment

Constitutional Clause(s) Invoked: Right to Trial by Jury

Description of Unconstitutional Provision(s): Revised Statutes of the District of Columbia, § 1064 (Act of June 17, 1870, 16 Stat. 154,§ 3): Provision that "prosecutions in the police court [of the District of Columbia] shall be by information under oath, without indictment by grand jury or trial by petit jury," as applied to punishment for conspiracy.

1887	Leloup v. Port of Mobile, 127 U.S. 640 (1888)	Bradley, Joseph P.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Mobile, Alabama, ordinance that levied an occupational license tax on a telegraph company doing an interstate business was void.

1886	City of Mobile v. Watson, 116 U.S. 289 (1886)	Woods, William B.	Government Contracts; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): An Alabama law that deprived Mobile and its successor of the power to levy taxes sufficient to amortize previously issued bonds.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1886	Walling v. Michigan, 116 U.S. 446 (1886)	Bradley, Joseph P.	Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Michigan law taxing nonresidents soliciting sale of foreign liquors to be shipped into the state.

1886	Royall v. Virginia, 116 U.S. 572 (1886)	Harlan, John M.	Government Contracts; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Virginia laws requiring attorneys to obtain licenses in order to practice and requiring payment of the license fee in legal tender, although Virginia law had previously allowed state fees to be paid by coupons on state bonds.

1886	Wabash, St. Louis, & Pacific Railway v. Illinois, 118 U.S. 557 (1886)	Miller, Samuel F.	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): An Illinois law that prohibited long-short haul rate discrimination, when applied to interstate transportation, encroached upon the federal commerce power.

1886	Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887)	Bradley, Joseph P.	Taxes; Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Tennessee law taxing drummers not operating from a domestic licensed place of business, insofar as it applied to drummers soliciting sales of goods on behalf of out-of-state business firms, was an invalid regulation of interstate commerce.

1886	Corson v. Maryland, 120 U.S. 502 (1887)	Bradley, Joseph P.	Taxes; Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Maryland law licensing salesmen, insofar as it was applied to a New York resident soliciting orders on behalf of a New York firm, was an invalid regulation of interstate commerce.

1886	Barron v. Burnside, 121 U.S. 186 (1887)	Blatchford, Samuel M.	Business & Corporate Law; Civil Procedure	State & Local

Constitutional Provision(s) Invoked: Article III, Section 2

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): An Iowa law that conditioned admission of a foreign corporation to do local business on the surrender of its right to invoke the diversity of citizenship jurisdiction of federal courts exacted an invalid forfeiture of a constitutional right.

continues

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1886	Fargo v. Michigan, 121 U.S. 230 (1887)	Miller, Samuel F.	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Michigan act, insofar as it taxed the gross receipts of companies and corporations engaged in interstate commerce, was held to be in conflict with the commerce powers of Congress.

1886	Seibert v. Lewis, 122 U.S. 284 (1887)	Matthews, T. Stanley	Contracts; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Missouri law requiring certain petitions, not exacted when county bonds were issued, before taxes could be levied to amortize said bonds, impaired the obligation of contracts.

1886	Philadelphia Steamship Co. v. Pennsylvania, 122 U.S. 326 (1887)	Bradley, Joseph P.	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause; Foreign Commerce Clause; Interstate Commerce Clause

Description of Unconstitutional Provision(s): A Pennsylvania gross receipts tax on public utilities, insofar as it was applied to the gross receipts of a domestic corporation derived from transportation of persons and property on the high seas, was in conflict with the exclusive federal power to regulate foreign and interstate commerce.

1886	Western Union Telephone Co. v. Pendleton, 122 U.S. 347 (1887)	Field, Stephen J.	Advertising, Publishing, & Communications	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): An Indiana statute concerning the delivery of telegrams, insofar as it applied to deliveries sent from Indiana to other states, was an invalid regulation of commerce.

1885	Effinger v. Kenney, 115 U.S. 566 (1885)	Field, Stephen J.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Virginia Act of 1867, which provided that in suits to enforce contracts for the sale of property negotiated during the Civil War and payable in Confederate notes, the measure of recovery was to be the value of the land at the time of sale rather than the value of such notes at that time.

1885	New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650 (1885)	Harlan, John M.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contracts Clause

Description of Unconstitutional Provision(s): A municipal ordinance granting to a public utility an exclusive right to supply the city with gas, and state constitutional provision abolishing outstanding monopolistic grants, impaired the obligation of contract when enforced against a previously chartered utility which, through consolidation, had inherited the monopolistic, exclusive privileges of two utility corporations chartered prior to the constitutional proviso and ordinance.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1885	New Orleans Water-Works Co. v. Rivers, 115 U.S. 674 (1885)	HARLAN, JOHN M.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contracts Clause

Description of Unconstitutional Provision(s): When a utility is chartered with an exclusive privilege of supplying a city with water, a subsequently enacted ordinance authorizing an individual to supply water to a hotel impaired the obligation of contract.

1885	Louisville Gas Co. v. Citizens' Gas Co., 115 U.S. 683 (1885)	HARLAN, JOHN M.	Energy & Utilities; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Kentucky act of 1872 that chartered a corporation and authorized it to supply gas in Louisville, Kentucky.

1885	Van Brocklin v. Tennessee, 117 U.S. 151 (1886)	GRAY, HORACE	Taxes	State & Local

Constitutional Provision(s) Invoked: Article IV, Section 3, Clause 2; Article VI, Clause 2

Constitutional Clause(s) Invoked: Property Clause; Supremacy Clause

Description of Unconstitutional Provision(s): A state cannot validly sell for taxes lands that the United States owned at the time the taxes were levied, but in which it ceased to have an interest at the time of sale.

1885	Pickard v. Pullman Southern Car Co., 117 U.S. 34 (1886)	BLATCHFORD, SAMUEL M.	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Tennessee privilege tax on railway sleeping cars was void insofar as it applied to cars moving in interstate commerce.

1884	Moran v. City of New Orleans, 112 U.S. 69 (1884)	MATTHEWS, T. STANLEY	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A New Orleans ordinance, so far as it imposed license tax upon persons owning and running towboats to and from the Gulf of Mexico, was an invalid regulation of commerce.

1884	Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196 (1885)	FIELD, STEPHEN J.	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Pennsylvania taxing laws, when applied to the capital stock of a New Jersey ferry corporation carrying on no business in the state except the landing and receiving of passengers and freight.

continues

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1884	Virginia Coupon Cases (Poindexter v. Greenhow), 114 U.S. 270 (1885)	MATTHEWS, T. STANLEY	Government Contracts; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Virginia act that terminated a privilege accorded bondholders under prior law of tendering coupons from said bonds in payment of taxes.

1883	Civil Rights Cases, 109 U.S. 3 (1883)	BRADLEY, JOSEPH P.	Civil Rights	Federal

Constitutional Provision(s) Invoked: Thirteenth Amendment; Fourteenth Amendment

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Act of March 1, 1875 (18 Stat. 336, §§ 1, 2): Provision "[t]hat all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations . . . of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."

1883	Louisiana ex rel. Nelson v. Police Jury, 111 U.S. 716 (1884)	FIELD, STEPHEN J.	Government Contracts; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Louisiana act that repealed the taxing authority of a municipality to pay judgments previously rendered against it.

1882	United States v. Harris, 106 U.S. 629 (1883)	WOODS, WILLIAM B.	Civil Rights	Federal

Constitutional Provision(s) Invoked: Article IV, Section 2; Thirteenth Amendment; Fourteenth Amendment; Fifteenth Amendment

Constitutional Clause(s) Invoked: Privileges & Immunities Clause

Description of Unconstitutional Provision(s): Act of April 20, 1871 (17 Stat. 13, § 2): Section providing punishment when "two or more persons in any State . . . conspire . . . for the purpose of depriving . . . any person . . . of the equal protection of the laws . . . or for the purpose of preventing or hindering the constituted authorities of any State . . . from giving or securing to all persons within such State . . . the equal protection of the laws."

1882	Kring v. Missouri, 107 U.S. 221 (1883)	MILLER, SAMUEL F.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Article 1, Section 9, Clause 3

Constitutional Clause(s) Invoked: Ex Post Facto Clause

Description of Unconstitutional Provision(s): A Missouri law that abolished a rule existing at the time the crime was committed, under which subsequent prosecution for first degree murder was precluded after a conviction for second degree murder has been set aside on appeal.

1882	New York v. Compagnie General Transatlantique, 107 U.S. 59 (1883)	MILLER, SAMUEL F.	Taxes; Trade	State & Local

Constitutional Provision(s) Invoked: Article 1, Section 8, Clause 3; Article 1, Section 9, Clause 1; Article 1, Section 10, Clause 2

Constitutional Clause(s) Invoked: Commerce Claused; Import-Export Clause

Description of Unconstitutional Provision(s): A New York law imposing a tax on every alien arriving from a foreign country, and holding the vessel liable for payment of the tax.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1881	Louisiana v. Pilsbury, 105 U.S. 278 (1882)	Field, Stephen J.	Government Contracts; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Louisiana act preventing New Orleans from levying taxes for the payment of bonds previously issued.

1881	Asylum v. City of New Orleans, 105 U.S. 362 (1881)	Bradley, Joseph P.	Government Contracts; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): The general taxing laws for New Orleans, when applied to the property of an asylum whose charter exempted it from taxation.

1881	Telephone Co. v. Texas, 105 U.S. 460 (1882)	Waite, Morrison R.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Texas tax collected on private telegraph messages sent out of the state, and on official messages sent by federal officers.

1881	Ralls County Court v. United States, 105 U.S. 733 (1881)	Waite, Morrison R.	Government Contracts; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 6

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): State laws that deprived local government of power to levy tax necessary to pay bond obligations

1880	Tiernan v. Rinker, 102 U.S. 123 (1880)	Field, Stephen J.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Texas statute, insofar as it levied an occupational tax only upon the sale of out-of-state beer and wine.

1880	Hartman v. Greenhow, 102 U.S. 672 (1880)	Field, Stephen J.	Government Contracts; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Virginia act, adopted subsequently to a law providing for the issuance of bonds and the acceptance of interest coupons thereon in full payment of taxes, that levied a new property tax collectible by way of deduction from such interest coupons.

1880	Webber v. Virginia, 103 U.S. 344 (1881)	Field, Stephen J.	Labor & Employment; Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Virginia acts requiring a license for sale of goods made outside the state but not within the state.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1880	United States ex rel. Wolff v. City of New Orleans, 103 U.S. 358 (1881)	Field, Stephen J.	Government Contracts; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Louisiana act withdrawing from New Orleans the power to levy taxes adequate to amortize previously issued bonds.

1879	Strauder v. West Virginia, 100 U.S. 303 (1880)	Strong, William	Civil Rights; Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment, Section 1

Constitutional Clause(s) Invoked: Equal Protection Clause

Description of Unconstitutional Provision(s): A West Virginia law allowing only White males to serve as jurors.

1879	Guy v. City of Baltimore, 100 U.S. 434 (1879)	Harlan, John M.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Maryland statute and a Baltimore ordinance, levying tax solely on products of other states.

1879	Trade-Mark Cases, 100 U.S. 82 (1879)	Miller, Samuel F.	Intellectual Property	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Article I, Section 8, Clause 8

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Act of July 8, 1870 (16 Stat. 210), and Act of August 14, 1876 (19 Stat. 141): Original trademark law, applying to marks "for exclusive use within the United States," and a penal act designed solely for the protection of rights defined in the earlier measure.

1878	Keith v. Clark, 97 U.S. 454 (1878)	Miller, Samuel F.	Government Contracts; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A provision of the Tennessee Constitution of 1865 that forbade the receipt for taxes of the bills of the Bank of Tennessee and declared the issues of the bank during the insurrectionary period void.

1878	Cook v. Pennsylvania, 97 U.S. 566 (1878)	Miller, Samuel F.	Taxes; Trade	State & Local

Constitutional Provision(s) Invoked: Article 1, Section 8, Clause 3; Article 1, Section 10, Clause 2

Constitutional Clause(s) Invoked: Commerce Claused; Import-Export Clause

Description of Unconstitutional Provision(s): A Pennsylvania act taxing auction sales, when applied to sales of imported goods in the original packages.

1878	University v. People, 99 U.S. 309 (1879)	Miller, Samuel F.	Government Contracts; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A revenue law of Illinois, insofar as it modified tax exemptions granted to Northwestern University by an earlier statute.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1877	Morrill v. Wisconsin, 154 U.S. 626 (1877)	Waite, Morrison R.	Taxes; Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Wisconsin statute requiring the licensing of hawkers and peddlers, with an exemption for in-state manufacturers selling work manufactured in the state.

1877	New Jersey v. Yard, 95 U.S. 104 (1877)	Miller, Samuel F.	Taxes; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A statute increasing a tax above the rate stipulated in the state's contract with railroad corporations impaired the obligation of contract.

1877	Railroad v. Husen, 95 U.S. 465 (1878)	Strong, William	Trade; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Missouri act prohibiting the bringing of cattle into the state between March and November.

1877	Hall v. DeCuir, 95 U.S. 485 (1878)	Waite, Morrison R.	Civil Rights; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Louisiana Reconstruction Act that prohibited interstate common carriers of passengers from discriminating on the basis of race or color.

1877	United States v. Fox, 95 U.S. 670 (1878)	Field, Stephen J.	Bankruptcy; Criminal Law & Procedure	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 4

Constitutional Clause(s) Invoked: Bankruptcy Clause

Description of Unconstitutional Provision(s): Act of March 2, 1867 (14 Stat. 539): Provision penalizing "any person respecting whom bankruptcy proceedings are commenced . . . who, within 3 months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud."

1877	Farrington v. Tennessee, 95 U.S. 679 (1878)	Swayne, Noah H.	Civil Rights; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Tennessee law increasing the tax on a bank above the rate specified in its charter.

1877	Murray v. City of Charleston, 96 U.S. 432 (1878)	Strong, William	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contracts Clause

Description of Unconstitutional Provision(s): A Charleston, South Carolina, tax ordinance which withheld from interest payments on municipal bonds a tax levied after issuance of such bonds at a fixed rate of interest impaired the obligation of contract (Art. I, § 10).

continues

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1877	Edwards v. Kearzey, 96 U.S. 595 (1878)	Swayne, Noah H.	Contracts; Real Property	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A North Carolina constitutional provision increasing amount of debtor's property exempt from sale under execution of a judgment.

1876	Inman Steamship Co. v. Tinker, 94 U.S. 238 (1877)	Swayne, Noah H.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 3

Constitutional Clause(s) Invoked: Tonnage Clause

Description of Unconstitutional Provision(s): A New York act of 1865, that provided for collection from docking vessels of a fee measured by tonnage, imposed a tonnage duty in violation of Art. I, § 10.

1876	Foster v. Masters of New Orleans, 94 U.S. 246 (1877)	Swayne, Noah H.	Trade; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause; Foreign Commerce Clause

Description of Unconstitutional Provision(s): A Louisiana statute, that required a survey of hatches of every sea-going vessel arriving at New Orleans, contravened the federal power to regulate foreign and interstate commerce.

1875	Welton v. Missouri, 91 U.S. 275 (1875)	Field, Stephen J.	Taxes; Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Missouri act that required payment of a license fee by peddlers of merchandise produced outside the state, but exempted peddlers of merchandise produced in the state, imposed an unconstitutional burden on interstate commerce.

1875	Wilmington & Weldon Railroad v. King, 91 U.S. 3 (1875)	Field, Stephen J.	Civil Procedure; Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A North Carolina statute, insofar as it authorized a jury, in suits on contracts negotiated during the Civil War, to place their own estimates upon the value of such contracts instead of taking the value stipulated by the parties, impaired the obligation of such contracts.

1875	United States v. Reese, 92 U.S. 214 (1876)	Waite, Morrison R.	Elections	Federal

Constitutional Provision(s) Invoked: Fifteenth Amendment, Section 2

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Act of May 31, 1870 (16 Stat. 140, §§ 3, 4): Provisions penalizing (1) refusal of local election official to permit voting by persons offering to qualify under State laws, applicable to any citizens; and (2) hindering of any person from qualifying or voting.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1875	Henderson v. Mayor of New York, 92 U.S. 259 (1876)	Miller, Samuel F.	Taxes; Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause; Foreign Commerce Clause

Description of Unconstitutional Provision(s): A New York act of 1849 that required the owner of an ocean-going passenger vessel to post a bond of $300 for each passenger as surety against their becoming public charges, or, in lieu thereof, to pay a tax of $1.50 for each, contravened Congress's exclusive power to regulate foreign commerce.

1875	Chy Lung v. Freeman, 92 U.S. 275 (1876)	Miller, Samuel F.	Taxes; Transportation; Immigration	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause; Foreign Commerce Clause

Description of Unconstitutional Provision(s): A California law that required the master of a vessel to post a $500 bond for each alien "lewd and debauched female" passenger arriving from a foreign country contravened the federal power to regulate foreign commerce.

1874	Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445 (1874)	Hunt, Ward	Business & Corporate Law; Civil Procedure; Contracts	State & Local

Constitutional Provision(s) Invoked: Article III

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): A Wisconsin act admitting foreign insurance companies to transact business within the state, upon their agreement not to remove suits to federal courts, exacted an unconstitutional condition.

1874	Cannon v. City of New Orleans, 87 U.S. (20 Wall.) 577 (1874)	Miller, Samuel F.	Business	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 3

Constitutional Clause(s) Invoked: Duties of Tonnage Clause

Description of Unconstitutional Provision(s): A New Orleans ordinance of 1852, imposing a charge for use of piers measured by tonnage of vessel, levied an invalid tonnage duty.

1874	Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1875)	Miller, Samuel F.	Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): A Kansas act of 1872, authorizing municipalities to issue bonds repayable out of tax revenues in support of private enterprise, amounted to collection of money in aid of a private, rather than public purpose, and violated due process.

1873	Barings v. Dabney, 86 U.S. (19 Wall.) 1 (1873)	Bradley, Joseph P.	Banking; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A South Carolina act appropriating for payment of state debts the assets of an insolvent bank, in which the state owned all the stock, disadvantaged private creditors of the bank and thereby impaired the obligation of contract.

continues

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1873	Peete v. Morgan, 86 U.S. (19 Wall.) 581 (1874)	Davis, David	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Article I, Section 10, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause; Tonnage Clause

Description of Unconstitutional Provision(s): A Texas act of 1870 imposing a tonnage tax on foreign vessels to defray quarantine expenses held to violate of Art I, § 10, prohibiting levy without consent of Congress.

1873	Pacific Railroad v. Maguire, 87 U.S. (20 Wall.) 36 (1874)	Hunt, Ward	Taxes; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Missouri law that levied a tax on a railroad prior to expiration of a grant of exemption impaired the obligation of contract.

1872	Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1873)	Strong, William	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Pennsylvania law that imposed a tax on freight transported interstate, into and out of Pennsylvania, was an invalid regulation of interstate commerce.

1872	State Tax on Foreign-Held Bonds, 82 U.S. (15 Wall.) 300 (1873)	Field, Stephen J.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1; Fourteenth Amendment

Constitutional Clause(s) Invoked: Contract Clause; Due Process Clause

Description of Unconstitutional Provision(s): A Pennsylvania law, insofar as it directed domestic corporations to withhold on behalf of the state a portion of interest due on bonds owned by nonresidents.

1872	Gunn v. Barry, 82 U.S. (15 Wall.) 610 (1873)	Swayne, Noah H.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Georgia constitutional provision that increased the amount of a homestead exemption impaired the obligation of contract, insofar as it applied to a judgment obtained under a less liberal exemption provision.

1872	Pierce v. Carskadon, 83 U.S. (16 Wall.) 234 (1873)	Field, Stephen J.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Bill of Attainder Clause; Ex Post Facto Clause

Description of Unconstitutional Provision(s): A West Virginia Act of 1865, depriving defendants of right to rehearing on a judgment obtained under an earlier law unless they made oath that they had not committed certain offenses, constituted an invalid bill of attainder and ex post facto law.

1872	Humphrey v. Pegues, 83 U.S. (16 Wall.) 244 (1873)	Hunt, Ward	Taxes; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): South Carolina taxing laws, as applied to a railroad whose charter exempted it from taxation, impaired the obligation of contract.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1872	Walker v. Whitehead, 83 U.S. (16 Wall.) 314 (1873)	Swayne, Noah H.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Georgia law restricting remedies for obtaining a judgment, so far as it affected prior contracts, impaired the obligation of contract.

1871	Wilmington Railroad v. Reid, 80 U.S. (13 Wall.) 264 (1872)	Davis, David	Taxes; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A North Carolina statute that levied a tax on the franchise and property of a railroad that had been accorded a tax exemption by the terms of its charter impaired the obligation of contract.

1871	White v. Hart, 80 U.S. (13 Wall.) 646 (1872)	Swayne, Noah H.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Georgia constitutional provision of 1868, prohibiting enforcement of any contract, the consideration for which was a slave, applied to defeat enforcement of a note based on such consideration and negotiated prior to adoption of said provision.

1871	Osborne v. Nicholson, 80 U.S. (13 Wall.) 654 (1872)	Swayne, Noah H.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): An Arkansas constitutional provision of 1868, prohibiting enforcement of any contract, the consideration for which was a slave.

1871	Gibson v. Chouteau, 80 U.S. (13 Wall.) 92 (1872)	Field, Stephen J.	Civil Procedure; Real Property	State & Local

Constitutional Provision(s) Invoked: Article IV, Section 3, Clause 2; Article VI, Clause 2

Constitutional Clause(s) Invoked: Property Clause; Supremacy Clause

Description of Unconstitutional Provision(s): State legislation cannot interfere with the disposition of the public domain by Congress, and therefore a Missouri statute of limitations, which was inapplicable to the United States, could not be applied so as to accord title to an adverse possessor as against a grantee from the United States, notwithstanding that the adverse possession preceded the federal conveyance.

1871	Delmas v. Insurance Company, 81 U.S. (14 Wall.) 661 (1872)	Miller, Samuel F.	Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Louisiana constitutional provision rendering unenforceable contracts, the consideration for which was Confederate money, was, because of the Contracts Clause (Art. I, § 10), inapplicable to contracts consummated before adoption of the former provision.

continues

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1870	State Tonnage Tax Cases, 79 U.S. (12 Wall.) 204 (1871)	Clifford, Nathan	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 3

Constitutional Clause(s) Invoked: Tonnage Clause

Description of Unconstitutional Provision(s): Alabama taxes levied on vessels owned by its citizens and employed in intrastate commerce "at so much per ton of the registered tonnage" violated the constitutional prohibition against the levy of tonnage duties by states.

1870	Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1871)	Clifford, Nathan	Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Artivle IV, Section 2, Clause 1

Constitutional Clause(s) Invoked: Commerce Clause; Privileges & Immunities Clause

Description of Unconstitutional Provision(s): A Maryland law that exacted a traders' license from nonresidents at a higher rate than was collected from residents violated the Privileges and Immunities Clause of Art. IV, § 2.

1869	Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430 (1869)	Davis, David	Taxes; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Missouri statute taxing corporations afforded tax exemption by their charter impaired the obligation of contract.

1869	The Washington University v. Rouse, 75 U.S. (8 Wall.) 439 (1869)	Davis, David	Taxes; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Missouri statute taxing a university afforded a tax exemption by its charter impaired the obligation of contract.

1869	Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870)	Chase, Salmon P.	Contracts; Government Operations	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 18; Fifth Amendment

Constitutional Clause(s) Invoked: Necessary & Proper Clause; Due Process Clause

Description of Unconstitutional Provision(s): Act of February 25, 1862 (12 Stat. 345, § 1); July 11, 1862 (12 Stat. 532, § 1); March 3, 1863 (12 Stat. 711, § 3), each in part only: "Legal tender clauses," making noninterest-bearing United States notes legal tender in payment of "all debts, public and private," so far as applied to debts contracted before passage of the act.

1869	The Justices v. Murray, 76 U.S. (9 Wall.) 274 (1870)	Nelson, Samuel	Civil Procedure	Federal

Constitutional Provision(s) Invoked: Seventh Amendment

Constitutional Clause(s) Invoked: Separation of Powers Doctrine

Description of Unconstitutional Provision(s): Act of March 3, 1863 (12 Stat. 756, § 5): Provision providing for the removal of a judgment in a State court, and in which the cause was tried by a jury to the circuit court of the United States for a retrial on the facts and law.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1869	United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1870)	Chase, Salmon P.	Energy & Utilities; Trade	Federal

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 1; Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): Act of March 2, 1867 (14 Stat. 484, § 29): General prohibition on sale of naphtha, etc., for illuminating purposes, if inflammable at less temperature than 110° F.

1868	Northern Central Railway v. Jackson, 74 U.S. (7 Wall.) 262 (1869)	Nelson, Samuel	Taxes	State & Local

Constitutional Provision(s) Invoked: Fourteenth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Pennsylvania was without jurisdiction to enforce its law taxing interest on railway bonds secured by a mortgage applicable to railway property part of which was located in another state.

1868	The Alicia, 74 U.S. (7 Wall.) 571 (1869)	Chase, Salmon P.	Civil Procedure	Federal

Constitutional Provision(s) Invoked: Article III, Section 2, Clause 2

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Act of June 30, 1864 (13 Stat. 311, § 13): Provision that "any prize cause now pending in any circuit court shall, on the application of all parties in interest . . . be transferred by that court to the Supreme Court . . . ," as applied in a case where no action had been taken in the Circuit Court on the appeal from the district court.

1868	Furman v. Nichol, 75 U.S. (8 Wall.) 44 (1869)	Davis, David	Taxes; Banking; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Tennessee statute repealing prior law making notes of the Banks of Tennessee receivable in payment of taxes impaired the obligation of contract as to the notes already in circulation (Art. I, § 10).

1867	Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868)	Miller, Samuel F.	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Nevada tax collected from every person leaving the state by rail or stage coach abridged the privileges of United States citizens to move freely across state lines in fulfillment of their relations with the National Government.

1867	Reichart v. Felps, 73 U.S. (6 Wall.) 160 (1868)	Grier, Robert C.	Real Property	Federal

Constitutional Provision(s) Invoked: Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Act of February 20, 1812 (2 Stat. 677): Provisions establishing board of revision to annul titles conferred many years previously by governors of the Northwest Territory.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1867	Steamship Co. v. Portwardens, 73 U.S. (6 Wall.) 31 (1867)	Chase, Salmon P.	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Article I, Section 10, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause; Tonnage Clause

Description of Unconstitutional Provision(s): A Louisiana statute that provided that port wardens might collect a tax of five dollars from every ship entering the port of New Orleans, whether any service was performed or not.

1867	Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868)	Miller, Samuel F.	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): A Nevada tax collected from every person leaving the state by rail or stage coach.

1866	McGee v. Mathis, 71 U.S. (4 Wall.) 143 (1867)	Chase, Salmon P.	Taxes; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): An 1855 Arkansas statute that repealed an 1851 grant of a tax exemption applicable to swamp lands, paid for either before or after repeal with scrip issued before the repeal.

1866	Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867)	Field, Stephen J.	Criminal Law & Procedure	State & Local

Constitutional Provision(s) Invoked: Article I, Section 9, Clause 3

Constitutional Clause(s) Invoked: Bill of Attainder Clause; Ex Post Facto Clause

Description of Unconstitutional Provision(s): Missouri constitutional provisions that required clergymen, as a prerequisite to the practice of their profession, to take an oath that they had never been guilty of hostility to the United States or of certain other acts that were lawful when committed.

1866	Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867)	Field, Stephen J.	Government Operations; Legal Ethics	Federal

Constitutional Provision(s) Invoked: Article I, Section 9, Clause 3; Article II, Section 2, Clause 1

Constitutional Clause(s) Invoked: Ex Post Facto Clause

Description of Unconstitutional Provision(s): Act of January 24, 1865 (13 Stat. 424): Requirement of a test oath disavowing past actions in hostility to the United States before admission to appear as attorney in a federal court by virtue of any previous admission.

1866	Von Hoffman v. Quincy, 71 U.S. (4 Wall.) 535 (1867)	Swayne, Noah H.	Taxes; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): An Illinois law limiting taxing powers granted to a municipality under a prior law authorizing it to issue bonds and amortize the same by levy of taxes.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1866	Christmas v. Russell, 72 U.S. (5 Wall.) 290 (1866)	Clifford, Nathan	Civil Procedure	State & Local

Constitutional Provision(s) Invoked: Article IV, Section 1

Constitutional Clause(s) Invoked: Full Faith & Credit Clause

Description of Unconstitutional Provision(s): A Mississippi statute that prohibited enforcement of a judgment of a sister state against a resident of Mississippi whenever barred by the Mississippi statute of limitations.

1865	The Binghamton Bridge, 70 U.S. (3 Wall.) 51 (1866)	Davis, David	Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): The New York legislature, after having issued a charter to a bridge company containing assurances that erection of other bridges within two miles of said bridge would not be authorized, subsequently chartered a second company to construct a bridge within a few rods of the first.

1864	Gordon v. United States, 117 U.S. 697 (1864)	Taney, Roger B.	Civil Procedure	Federal

Constitutional Provision(s) Invoked: Article III, Section 1

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Act of March 3, 1863 (12 Stat. 766, § 5): Provision for an appeal from the Court of Claims to the Supreme Court, given a further provision (§ 14) requiring an estimate by the Secretary of the Treasury before payment of final judgment.

1864	Hawthorne v. Calef, 69 U.S. (2 Wall.) 10 (1865)	Nelson, Samuel	Business & Corporate Law; Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Maine statute terminating the liability of corporate stock for the debts of the corporation, applicable to claims of creditors outstanding at the time of such termination.

1864	Bank Tax Case, 69 U.S. (2 Wall.) 200 (1865)	Nelson, Samuel	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 2

Constitutional Clause(s) Invoked: Borrowing Power

Description of Unconstitutional Provision(s): An 1863 New York law that effectively imposed a tax on the securities of the United States.

1862	Bank of Commerce v. New York City, 67 U.S. (2 Black) 620 (1863)	Nelson, Samuel	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 2

Constitutional Clause(s) Invoked: Borrowing Power

Description of Unconstitutional Provision(s): Inclusion of the value of United States secuties in the capital of a bank subjected to taxation by the terms of a New York law.

1860	Almy v. California, 65 U.S. (24 How.) 169 (1861)	Taney, Roger B.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 2

Constitutional Clause(s) Invoked: Import-Export Clause

Description of Unconstitutional Provision(s): A California stamp tax imposed on bills of lading for gold or silver transported from California to any place outside the state.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1860	Howard v. Bugbee, 65 U.S. (24 How.) 461 (1861)	Nelson, Samuel	Real Property; Banking; Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): An Alabama statute authorizing redemption of mortgaged property in two years after sale under a foreclosure decree, by bona fide creditors of the mortgagor, applied to sales under mortgages executed prior to the enactment.

1856	Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)	Taney, Roger B.	Civil Rights	Federal

Constitutional Provision(s) Invoked: Article IV, Section 3, Clause 2; Fifth Amendment

Constitutional Clause(s) Invoked: Due Process Clause

Description of Unconstitutional Provision(s): Act of March 6, 1820 (3 Stat. 548, § 8, proviso): The Missouri Compromise, prohibiting slavery within the Louisiana Territory north of 36°30' except Missouri.

1855	Boyd v. United States, 116 U.S. 616 (1886)	Bradley, Joseph P.	Criminal Law & Procedure; Trade	Federal

Constitutional Provision(s) Invoked: Fourth Amendment; Fifth Amendment

Constitutional Clause(s) Invoked: Unreasonable Searches & Seizure Clause; Self-Incrimination Clause

Description of Unconstitutional Provision(s): Act of June 22, 1874 (18 Stat. 1878, § 4): Provision authorizing federal courts, in suits for forfeitures under revenue and custom laws, to require production of documents, with allegations expected to be proved therein to be taken as proved on failure to produce such documents.

1855	Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1856)	Wayne, James M.	Taxes; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A levy under an 1851 Ohio law of a bank tax at a higher rate than that specified in the bank's charter in 1845.

1854	Hays v. The Pacific Mail Steamship Co., 58 U.S. (17 How.) 596 (1855)	Nelson, Samuel	Taxes; Transportation	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause

Description of Unconstitutional Provision(s): California imposition of property taxes on vessels that were owned by a New York company and registered in New York.

1853	Curran v. Arkansas, 56 U.S. (15 How.) 304 (1854)	Curtis, Benjamin R.	Banking; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Retroactive Arkansas laws that vested all property of the state bank in Arkansas and thereby prevented the bank from honoring its outstanding bills payable on demand to the holders.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1853	State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369 (1854)	McLean, John	Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): An Ohio law exposing state banks to higher taxes than a prior direction to pay six percent of annual dividends to the states in lieu of all taxes.

1852	Trustees for Vincennes University v. Indiana, 55 U.S. (14 How.) 268 (1853)	McLean, John	Education	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Indiana statute ordering the sale of lands previously reserved for educational purposes, and use of the sale proceeds for other purposes.

1851	Achison v. Huddleson, 53 U.S. (12 How.) 293 (1852)	Curtis, Benjamin R.	Transportation	State & Local

Constitutional Provision(s) Invoked: Article VI, Clause 2

Constitutional Clause(s) Invoked: Supremacy Clause

Description of Unconstitutional Provision(s): Maryland law imposing tolls on passengers in coaches carrying mails over the Cumberland Road.

1850	Woodruff v. Trapnall, 51 U.S. (10 How.) 190 (1851)	McLean, John	Banking; Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Arkansas repeal of the section of a bank's charter providing that banknotes in circulation should be received in discharge of public debts.

1849	Smith v. Turner (Passenger Cases), 48 U.S. (7 How.) 283 (1849)	McLean, John	Transportation; Taxes	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3

Constitutional Clause(s) Invoked: Commerce Clause; Foreign Commerce Clause

Description of Unconstitutional Provision(s): Collection by New York and Massachusetts of per capita taxes on alien and domestic passengers arriving in the ports of these states.

1848	Planters' Bank v. Sharp, 47 U.S. (6 How.) 301 (1848)	Woodbury, Levi	Banking; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Mississippi statute that nullified the power of a bank under a previously issued charter to discount bills of exchange and promissory notes and to institute actions for collection of the same.

1845	Gordon v. Appeal Tax Court, 44 U.S. (3 How.) 133 (1845)	Wayne, James M.	Banking; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Maryland statute of 1841 taxing stockholders of Maryland state banks afforded an exemption under prior act of 1821.

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Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1844	McCracken v. Hayward, 43 U.S. (2 How.) 608 (1844)	Baldwin, Henry	Real Property; Banking; Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): An Illinois mortgage moratorium statute that, when applied to a mortgage executed prior to its passage, diminished remedies of the mortgage lender by prohibiting consummation of a foreclosure unless the foreclosure price equaled two-thirds of the value of the mortgaged property.

1843	Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843)	Taney, Roger B.	Real Property; Banking; Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): An Illinois mortgage moratorium statute that, when applied to a mortgage negotiated prior to its passage, reduced the remedies of the mortgage lender by conferring a new right of redemption upon a defaulting borrower.

1842	Dobbins v. Commissioners of Erie County, 41 U.S. (16 Pet.) 435 (1842)	Wayne, James M.	Taxes	State & Local

Constitutional Provision(s) Invoked: Article VI, Clause 2

Constitutional Clause(s) Invoked: Supremacy Clause

Description of Unconstitutional Provision(s): A Pennsylvania law that diminished the compensation of a federal officer by subjecting him to county taxes.

1842	Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842)	Taney, Roger B.	Civil Rights	State & Local

Constitutional Provision(s) Invoked: Article VI, Clause 2

Constitutional Clause(s) Invoked: Supremacy Clause

Description of Unconstitutional Provision(s): A Pennsylvania statute (1826) that penalized an owner's recovery of a runaway slave.

1832	Boyle v. Zacharie, 31 U.S. (6 Pet.) 635 (1832)	Story, Joseph	Bankruptcy	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Maryland insolvency law effecting discharge of an obligation contracted in Louisiana subsequently to its passage.

1830	Craig v. Missouri, 29 U.S. (4 Pet.) 410 (1830)	Marshall, John	Banking	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Bills of Credit Clause

Description of Unconstitutional Provision(s): A Missouri act authorizing the issuance of certificates in denominations of 50 cents to $10, payable in discharge of taxes or debts owned to the state and of salaries due public officers.

1829	Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449 (1829)	Marshall, John	Taxes	State & Local

Constitutional Provision(s) Invoked: Article VI, Clause 2

Constitutional Clause(s) Invoked: Supremacy Clause

Description of Unconstitutional Provision(s): A city ordinance that levied a tax on stock issued by the United States impaired the federal borrowing power and was void (Art. VI).

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1827	Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827)	JOHNSON, WILLIAM	Bankruptcy	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A New York insolvency law with extraterritorial enforcement to discharge a claim sought to be collected by a citizen of another state either in a federal court or in the courts of other states.

1827	Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827)	MARSHALL, JOHN	Trade	State & Local

Constitutional Provision(s) Invoked: Article I, Section 8, Clause 3; Article I, Section 10, Clause 2

Constitutional Clause(s) Invoked: Foreign Commerce Clause; Import-Export Clause

Description of Unconstitutional Provision(s): A Maryland statute that required an importer to obtain a license before reselling in the original package articles imported from abroad.

1824	Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824)	MARSHALL, JOHN	Taxes; Banking	State & Local

Constitutional Provision(s) Invoked: Article VI, Clause 2

Constitutional Clause(s) Invoked: Supremacy Clause

Description of Unconstitutional Provision(s): An Ohio statute levying a tax on the Bank of the United States, a federal instrumentality.

1823	Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823)	STORY, JOSEPH	Real Property	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Kentucky law that diminished the rights of a lawful owner by reducing the scope of his remedies against an adverse possessor.

1821	Farmers' & Mechanics' Bank v. Smith, 19 U.S. (6 Wheat.) 131 (1821)	MARSHALL, JOHN	Bankruptcy	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Pennsylvania insolvency law, insofar as it purported to discharge a debtor from obligations contracted prior to its passage.

1819	Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819)	MARSHALL, JOHN	Bankruptcy; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Retroactive operation of a New York insolvency law to discharge the obligation of a debtor on a promissory note negotiated prior to its adoption.

1819	McMillan v. McNeil, 17 U.S. (4 Wheat.) 209 (1819)	MARSHALL, JOHN	Bankruptcy; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Louisiana insolvency law invoked to relieve a debtor of an obligation contracted by him while a resident of South Carolina.

continues

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1819	McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)	MARSHALL, JOHN	Government Operations; Taxes	State & Local

Constitutional Provision(s) Invoked: Article IV, Clause 2

Constitutional Clause(s) Invoked: Supremacy Clause

Description of Unconstitutional Provision(s): A Maryland law imposing a tax on notes issued by a branch of the Bank of United States.

1819	Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819)	MARSHALL, JOHN	Business & Corporate Law	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A New Hampshire law that altered a charter granted to a private eleemosynary corporation by the British Crown prior to the Revolution.

1815	Terrett v. Taylor, 13 U.S. (9 Cr.) 43 (1815)	STORY, JOSEPH	Real Property; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): Two Virginia acts that purported to divest the Episcopal Church of title to property "acquired under the faith of previous laws."

1813	New Jersey v. Wilson, 11 U.S. (7 Cr.) 164 (1812)	MARSHALL, JOHN	Real Property; Taxes; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A New Jersey law purporting to repeal an exemption from taxation contained in a prior enactment conveying certain lands.

1810	Fletcher v. Peck, 10 U.S. (6 Cr.) 87 (1810)	MARSHALL, JOHN	Real Property; Government Contracts	State & Local

Constitutional Provision(s) Invoked: Article I, Section 10, Clause 1

Constitutional Clause(s) Invoked: Contract Clause

Description of Unconstitutional Provision(s): A Georgia statute annulling conveyance of public lands authorized by a prior enactment.

1809	United States v. Peters, 9 U.S. (5 Cr.) 115 (1809)	MARSHALL, JOHN	Civil Procedure	State & Local

Constitutional Provision(s) Invoked: Article III, Section 1; Article IV, Clause 2

Constitutional Clause(s) Invoked: Vesting Clause; Supremacy Clause

Description of Unconstitutional Provision(s): A Pennsylvania statute prohibiting the execution of any process issued to enforce a certain sentence of a federal court, on the ground that the federal court lacked jurisdiction in the cause.

Supreme Court October Term	Case	Author(s) of Main Opinion	Subject Matter(s)	Federal or State Provision(s)
1803	Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803)	MARSHALL, JOHN	Civil Procedure; Government Operations	Federal

Constitutional Provision(s) Invoked: Article III, Section 2, Clause 2

Constitutional Clause(s) Invoked: --

Description of Unconstitutional Provision(s): Act of September 24, 1789 (1 Stat. 81, § 13, in part): Provision that "[the Supreme Court] shall have power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any . . . persons holding office, under authority of the United States" as applied to the issue of mandamus to the Secretary of State requiring him to deliver to plaintiff a commission (duly signed by the President) as justice of the peace in the District of Columbia.

TABLE OF SUPREME COURT JUSTICES

Justice Name	Term Start	Term End	Appointing President
Jackson, Ketanji Brown (Associate Justice)	June 30, 2022	--	Biden, Joseph R.
Notable Opinion(s): Chinn v. Shoop, No. 22-508 (U.S. Nov. 7, 2022) (dissenting)			
Coney Barrett, Amy (Associate Justice)	Oct. 27, 2020	--	Trump, Donald J.
Notable Opinion(s): Fulton v. City of Philadelphia, No. 19-123 (U.S. June 17, 2021) (concurring); Nance v. Ward, No. 21-439 (U.S. June 23, 2022) (dissenting)			
Kavanaugh, Brett M. (Associate Justice)	Oct. 6, 2017	--	Trump, Donald J.
Notable Opinion(s): Barr v. American Association of Political Consultants, No. 19-631 (U.S. July 6, 2020); Jones v. Mississippi, No. 18-1259 (U.S. Apr. 22, 2021); Edwards v. Vannoy, No. 19-5807 (U.S. May 17, 2021); TransUnion LLC v. Ramirez, No. 20-297 (U.S. June 25, 2021); Dobbs v. Jackson Women's Health Organization, No. 199-1392 (U.S. June 24, 2022) (concurring); Oklahoma v. Castro-Huerta, No. 21-429 (U.S. June 29, 2022)			
Gorsuch, Neil M. (Associate Justice)	Apr. 10, 2017	--	Trump, Donald J.
Notable Opinion(s): Oil States Energy Services, LLC v. Greene's Energy Group, LLC, No. 16-712 (U.S. Apr. 24, 2018) (dissenting); Ramos v. Louisiana, No. 18-5924 (U.S. Apr. 20, 2020); McGirt v. Oklahoma, No. 18-9526 (U.S. July 9, 2020); Texas v. New Mexico, No. 65, Orig. (U.S. Dec. 14, 2020); Kennedy v. Bremerton School District, No. 21-418 (U.S. June 27, 2022); Oklahoma v. Castro-Huerta, No. 21-429 (U.S. June 29, 2022) (dissenting); West Virginia v. EPA, No. 20-1530 (U.S. June 30, 2022) (concurring)			
Kagan, Elena (Associate Justice)	Aug. 7, 2010	--	Obama, Barack H.
Notable Opinion(s): Miller v. Alabama, 567 U.S. 460 (2012); Lucia v. SEC, No. 17-130 (U.S. June 21, 2018); Gundy v. United States, No. 17-6086 (U.S. June 20, 2019); Seila Law LLC v. CFBP, No. 19-7 (U.S. June 29, 2020) (concurring and dissenting in part); Chiafalo v. Washington, No. 19-465 (U.S. July 6, 2020); Dobbs v. Jackson Women's Health Organization, No. 199-1392 (U.S. June 24, 2022) (dissenting); West Virginia v. EPA, No. 20-1530 (U.S. June 30, 2022) (dissenting)			
Sotomayor, Sonia (Associate Justice)	Aug. 8, 2009	--	Obama, Barack H.
Notable Opinion(s): Jesner v. Arab Bank PLC, No. 16-499 (U.S. Apr. 24, 2018) (dissenting); Collins v. Virginia, No. 16-1027 (U.S. May 29, 2018); Herrera v. Wyoming, No. 17-532 (U.S. May 20, 2019); Nestlé USA v. Doe, Nos. 19-416, 19-453 (U.S. June 17, 2021) (concurring in part and concurring in the judgment); Whole Women's Health v. Jackson, No. 21A24 (U.S. Sept. 1, 2021) (dissenting); Hemphill v. New York, No. 20-637 (U.S. Jan. 20, 2022); Dobbs v. Jackson Women's Health Organization, No. 199-1392 (U.S. June 24, 2022) (dissenting); Kennedy v. Bremerton School District, No. 21-418 (U.S. June 27, 2022) (dissenting)			
Alito, Samuel A. (Associate Justice)	Jan. 31, 2006	--	Bush, George W.
Notable Opinion(s): McDonald v. City of Chicago, 561 U.S. 742 (2010); Spokeo, Incorporated v. Robins, 578 U.S. 330 (2016); Murphy v. NCAA, No. 16-476 (U.S. May 14, 2018); Janus v. American Federation of State, County, and Municipal Employees, No. 16-1466 (U.S. June 27, 2018); American Legion v. American Humanist Association, No. 17-1717 (U.S. June 20, 2019); Fulton v. City of Philadelphia, No. 19-123 (U.S. June 17, 2021) (concurring); Collins v. Yellen, Nos. 19-422, 19-563 (U.S. June 23, 2021); Dobbs v. Jackson Women's Health Organization, No. 199-1392 (U.S. June 24, 2022)			

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Justice Name	Term Start	Term End	Appointing President
Roberts, John G. (Chief Justice)	Sept. 29, 2005	--	Bush, George W.

Notable Opinion(s): Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007); National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012); Bond v. United States, 572 U.S. 844 (2014); Trinity Lutheran Church of Columbia, Incorporated v. Comer, No. 15-577 (U.S. June 26, 2017); Jesner v. Arab Bank PLC, No. 16-499 (U.S. Apr. 24, 2018); United States v. Arthrex, Incorporated, No. 19-1434 (U.S. June 21, 2021); Cedar Point Nursery v. Hassid, No. 20-107 (U.S. June 23, 2021); Americans for Prosperity Foundation v. Bonta, No. 19-251 (U.S. July 1, 2021); Carson v. Makin, No. 20-1088 (U.S. June 21, 2022); West Virginia v. EPA, No. 20-1530 (U.S. June 30, 2022)

Thomas, Clarence (Associate Justice)	Oct. 23, 1991	--	Bush, George H. W.

Notable Opinion(s): Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656 (1993); United States v. Lopez, 514 U.S. 549 (1995) (concurring); U.S. Term Limits, Incorporated v. Thornton, 514 U.S. 779 (1995) (dissenting); Missouri v. Jenkins, 515 U.S. 70 (1995) (concurring); Kansas v. Hendricks, 521 U.S. 346 (1997); Hunt v. Cromartie, 526 U.S. 541 (1999); Good News Club v. Milford Central School, 533 U.S. 98 (2001); McDonald v. City of Chicago, 561 U.S. 742 (2010) (concurring); Reed v. Town of Gilbert, 576 U.S. 155 (2015); Oil States Energy Services, LLC v. Greene's Energy Group, LLC, No. 16-712 (U.S. Apr. 24, 2018); National Institute of Family and Life Advocates v. Becerra, No. 16-1140 (U.S. June 26, 2018); Chiafalo v. Washington, No. 19-465 (U.S. July 6, 2020) (concurring); Uzuegbunam v. Preczewski, No. 19-968 (U.S. Mar. 8, 2021); Caniglia v. Strom, No. 20-157 (U.S. May 17, 2021); New York State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. June 23, 2022); Dobbs v. Jackson Women's Health Organization, No. 199-1392 (U.S. June 24, 2022) (concurring)

Breyer, Stephen G. (Associate Justice)	Aug. 3, 1994	June 30, 2022	Clinton, William J.

Notable Opinion(s): Stenberg v. Carhart, 530 U.S. 914 (2000); Easley v. Cromartie, 532 U.S. 234 (2001); Zadvydas v. Davis, 533 U.S. 678 (2001); McConnell v. FEC, 540 U.S. 93 (2003); Sell v. United States, 539 U.S. 166 (2003); Stogner v. California, 539 U.S. 607 (2003); United States v. Booker, 543 U.S. 220 (2005); Shurtleff v. Boston, No. 20-1800 (U.S. May 2, 2022); Dobbs v. Jackson Women's Health Organization, No. 199-1392 (U.S. June 24, 2022) (dissenting)

Ginsburg, Ruth Bader (Associate Justice)	Aug. 10, 1993	Sept. 18, 2020	Clinton, William J.

Notable Opinion(s): United States v. Virginia, 518 U.S. 515 (1996); M.L.B. v. S.L.J., 519 U.S. 102 (1996); Babbitt v. Youpee, 519 U.S. 234 (1997); Buckley v. American Constitutional Law Foundation, Incorporated, 525 U.S. 182 (1999); Ring v. Arizona, 536 U.S. 584 (2002); Eldred v. Ashcroft, 537 U.S. 186 (2003); Christian Legal Society Chapter of University of California, Hastings College of the Law v. Martinez, 561 U.S. 661 (2010); Moore v. Texas, No. 15-797 (U.S. Mar. 28, 2017)

Souter, David H. (Associate Justice)	Oct. 9, 1990	June 29, 2009	Bush, George H. W.

Notable Opinion(s): Farmer v. Brennan, 511 U.S. 825 (1994); Foster v. Love, 522 U.S. 67 (1997); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995); County of Sacramento v. Lewis, 523 U.S. 833 (1998); Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000); McCreary City. v. American Civil Liberties Union of Kentucky, 545 U.S. 844 (2005)

Kennedy, Anthony M. (Associate Justice)	Feb. 18, 1988	July 31, 2018	Reagan, Ronald W.

Notable Opinion(s): Ward v. Rock Against Racism, 491 U.S. 781 (1989); Lee v. Weisman, 505 U.S. 577 (1992); Romer v. Evans, 517 U.S. 620 (1996); City of Boerne v. Flores, 521 U.S. 507 (1997); Legal Services Corporation v. Velazquez, 531 U.S. 533 (2001); Tuan Anh Nguyen v. INS, 533 U.S. 53 (2001); Lawrence v. Texas, 539 U.S. 558 (2003); Garcetti v. Ceballos, 547 U.S. 410 (2006); Gonzales v. Carhart, 550 U.S. 124 (2007); Boumediene v. Bush, 553 U.S. 723 (2008); Citizens United v. FEC, 558 U.S. 310 (2010)

Scalia, Antonin (Associate Justice)	Sept. 26, 1986	Feb. 13, 2016	Reagan, Ronald W.

Notable Opinion(s): Employment Division v. Smith, 494 U.S. 872 (1990); Lujan v. National Wildlife Federation, 497 U.S. 871 (1990); Wilson v. Seiter, 501 U.S. 294 (1991); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993); Printz v. United States, 521 U.S. 898 (1997); Republican Party of Minnesota v. White, 536 U.S. 765 (2002); Crawford v. Washington, 541 U.S. 36 (2004); Blakely v. Washington, 542 U.S. 296 (2004); District of Columbia v. Heller, 554 U.S. 570 (2008)

Justice Name	Term Start	Term End	Appointing President
Rehnquist, William H. (Chief Justice)	Sept. 26, 1986	Sept. 3, 2005	Reagan, Ronald W.

Notable Opinion(s): Dames and Moore v. Regan, 453 U.S. 654 (1981); South Dakota v. Dole, 483 U.S. 203 (1987); Hustler Magazine, Incorporated v. Falwell, 485 U.S 46 (1988); Cruzan by Cruzan v. Director, Moissouri Department of Health, 497 U.S. 261 (1990); Rust v. Sullivan, 500 U.S. 173 (1991)

O'Connor, Sandra Day (Associate Justice)	Sept. 25, 1981	Jan. 31, 2006	Reagan, Ronald W.

Notable Opinion(s): Mississippi University for Women v. Hogan, 458 U.S. 718 (1982); Turner v. Safley, 482 U.S. 78 (1987); Frisby v. Schultz, 487 U.S. 474 (1988); New York v. United States, 505 U.S. 144 (1992); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (joint opinion); Shaw v. Reno, 509 U.S. 630 (1993); Adarand Constructors, Incorporated v. Pena, 515 U.S. 200 (1995); Virginia v. Black, 538 U.S. 343 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); Hamdi v. Rumsfeld, 542 U.S. 507 (2004)

Stevens, John Paul (Associate Justice)	Dec. 19, 1975	June 29, 2010	Ford, Gerald R.

Notable Opinion(s): Branti v. Finkel, 445 U.S. 507 (1980); Chevron, U.S.A., Incorporated v. Natural Resources Defense Council, Incorporated, 467 U.S. 837 (1984); Wallace v. Jaffree, 472 U.S. 38 (1985); Cotton Petroleum Corporation v. New Mexico, 490 U.S. 163 (1989); U.S. Term Limits, Incorporated v. Thornton, 514 U.S. 779 (1995); Clinton v. Jones, 520 U.S. 681 (1997); Clinton v. City of New York, 524 U.S. 417 (1998); Saenz v. Roe, 526 U.S. 489 (1999); Rasul v. Bush, 542 U.S. 466 (2004); Massachusetts v. EPA, 549 U.S. 497 (2007);

Powell, Lewis F. (Associate Justice)	Jan. 7, 1972	June 26, 1987	Nixon, Richard M.

Notable Opinion(s): Branzburg v. Hayes, 408 U.S. 665 (1972) (concurring); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Mathews v. Eldridge, 424 U.S. 319 (1976); Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Regents of University. of California v. Bakke, 438 U.S. 265 (1978) (separate opinion); Central Hudson Gas and Electric Corporation v. Public Services Commission, 447 U.S. 557 (1980); Rhodes v. Chapman, 452 U.S. 337 (1981); Youngberg v. Romeo, 457 U.S. 307 (1982); Batson v. Kentucky, 476 U.S. 79 (1986)

Rehnquist, William H. (Associate Justice)	Jan. 7, 1972	Sept. 26, 1986	Nixon, Richard M.

Notable Opinion(s): Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Bell v. Wolfish, 441 U.S. 520 (1979)

Blackmun, Harry A. (Associate Justice)	June 9, 1970	Aug. 3, 1994	Nixon, Richard M.

Notable Opinion(s): Wyman v. James, 400 U.S. 309 (1971); Roe v. Wade, 410 U.S. 113 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Incorporated, 425 U.S. 748 (1976); Bellotti v. Baird, 428 U.S. 132 (1976); Bates v. State Bar, 433 U.S. 350 (1977); Colautti v. Franklin, 439 U.S. 379 (1979); Ohio v. Roberts, 448 U.S. 56 (1980); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985); Mistretta v. United States, 488 U.S. 361 (1989);

Burger, Warren E. (Chief Justice)	June 23, 1969	Sept. 26, 1986	Nixon, Richard M.

Notable Opinion(s): Griggs v. Duke Power Co., 401 U.S. 424 (1971); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971); Reed v. Reed, 404 U.S. 71 (1971); Wisconsin v. Yoder, 406 U.S. 205 (1972); Miller v. California, 413 U.S. 15 (1973); United States v. Nixon, 418 U.S. 683 (1974); Milliken v. Bradley, 433 U.S. 267 (1977); Parham v. J. R., 442 U.S. 584 (1979); I.N.S. v. Chadha, 462 U.S. 919 (1983); Bowsher v. Synar, 478 U.S. 714 (1986)

Marshall, Thurgood (Associate Justice)	Oct. 2, 1967	Oct. 1, 1991	Johnson, Lyndon B.

Notable Opinion(s): Pickering v. Board of Education, 391 U.S. 563 (1968); Stanley v. Georgia, 394 U.S. 557 (1969); Furman v. Georgia, 408 U.S. 238 (1972) (separate opinion); San Antonio Independent School District v. Rodriguez, 411 U.S. 1(1973) (dissenting); Hill v. Stone, 421 U.S. 289 (1975); Estelle v. Gamble, 429 U.S. 97 (1976); Bounds v. Smith, 430 U.S. 817 (1977); Shaffer v. Heitner, 433 U.S. 186 (1977); Zablocki v. Redhail, 434 U.S. 374 (1978); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Kulko v. Superior Court of California In and For City and City of San Francisco, 436 U.S. 84 (1978)

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Justice Name	Term Start	Term End	Appointing President
Fortas, Abraham (Associate Justice)	Oct. 4, 1965	May 14, 1969	Johnson, Lyndon B.
Notable Opinion(s): In re Gault, 387 U.S. 1 (1967); Epperson v. Arkansas, 393 U.S. 97 (1968); Johnson v. Avery, 393 U.S. 483 (1969); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)			
Goldberg, Arthur J. (Associate Justice)	Oct. 1, 1962	July 26, 1965	Kennedy, John F.
Notable Opinion(s): Gibson v. Florida Legislative Investigation Commission, 372 U.S. 539 (1963); Escobedo v. Illinois, 378 U.S. 478 (1964); Griswold v. Connecticut, 381 U.S. 479 (1965) (concurring)			
White, Byron R. (Associate Justice)	Apr. 16, 1962	June 28, 1993	Kennedy, John F.
Notable Opinion(s): Duncan v. Louisiana, 391 U.S. 145 (1968); Stanley v. Illinois, 405 U.S. 645 (1972); Broadrick v. Oklahoma, 413 U.S. 601 (1973); Goss v. Lopez, 419 U.S. 565 (1975); Washington v. Davis, 426 U.S. 229 (1976); World-Wide Volkswagen Corporation v. Woodson, 444 U.S. 286 (1980); Connick v. Myers, 461 U.S. 138 (1983); City of Cleburne v. Cleburne Living Trust, 473 U.S. 432 (1985); Bowers v. Hardwick, 478 U.S. 186 (1986); Bowsher v. Synar, 478 U.S. 714 (1986) (dissenting)			
Stewart, Potter (Associate Justice)	Oct. 14, 1958	July 3, 1981	Eisenhower, Dwight D.
Notable Opinion(s): Bates v. City of Little Rock, 361 U.S. 516 (1960); Chimel v. California, 395 U.S. 752 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); Sierra Club v. Morton, 405 U.S. 727 (1972); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Faretta v. California, 422 U.S. 806 (1975); Gregg v. Georgia, 428 U.S. 153 (1976); Abood v. Detroit Board of Education, 431 U.S. 209 (1977)			
Whittaker, Charles E. (Associate Justice)	Mar. 25, 1957	Mar. 31, 1962	Eisenhower, Dwight D.
Notable Opinion(s): Staub v. City of Baxley, 355 U.S. 313 (1958); Draper v. United States, 358 U.S. 307 (1959)			
Brennan, William J. (Associate Justice)	Oct. 16, 1956	July 20, 1990	Eisenhower, Dwight D.
Notable Opinion(s): Baker v. Carr, 369 U.S. 186 (1962); NAACP v. Button, 371 U.S. 415 (1963); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Shapiro v. Thompson, 394 U.S. 618 (1969); Goldberg v. Kelly, 397 U.S. 254 (1970); Eisenstadt v. Baird, 405 U.S. 438 (1972); Craig v. Boren, 429 U.S. 190 (1976); Monell v. Department of Social Services, 436 U.S. 658 (1978); Penn Central Transporation Co. v. City of New York, 438 U.S. 104 (1978); Plyler v. Doe, 457 U.S. 202 (1982); Texas v. Johnson, 491 U.S. 397 (1989)			
Harlan, John M. II (Associate Justice)	Mar. 28, 1955	Sept. 23, 1971	Eisenhower, Dwight D.
Notable Opinion(s): Yates v. United States, 354 U.S. 298 (1957); Barenblatt v. United States, 360 U.S. 109 (1959); Flemming v. Nestor, 363 U.S. 603 (1960); Konigsberg v. State Bar, 366 U.S. 36 (1961); Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961); Maryland v. Wirtz, 392 U.S. 183 (1968); Rosado v. Wyman, 397 U.S. 397 (1970); Boddie v. Connecticut, 401 U.S. 371 (1971); Cohen v. California, 403 U.S. 15 (1971)			
Warren, Earl (Chief Justice)	Oct. 5, 1953	June 23, 1969	Eisenhower, Dwight D.
Notable Opinion(s): Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); Gregory v. City of Chicago, 394 U.S. 111 (1969); Hernandez v. Texas, 347 U.S. 475 (1954); Loving v. Virginia, 388 U.S. 1 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); Terry v. Ohio, 392 U.S. 1 (1968); United States v. O'Brien, 391 U.S. 367 (1968); Zemel v. Rusk, 381 U.S. 1 (1965)			
Minton, Sherman (Associate Justice)	Oct. 12, 1949	Oct. 15, 1956	Truman, Harry S.
Notable Opinion(s): Adler v. Board of Education, 342 U.S. 485 (1952); Dennis v. United States, 339 U.S. 162 (1950); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950)			
Clark, Tom C. (Associate Justice)	Aug. 24, 1949	June 12, 1967	Truman, Harry S.
Notable Opinion(s): Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Reid v. Covert, 351 U.S. 487 (1956), on reh'g, 354 U.S. 1 (1957); Uphaus v. Wyman, 360 U.S. 72 (1959); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Mapp v. Ohio, 367 U.S. 643 (1961); Goss v. Board of Education, 373 U.S. 683 (1963); School District v. Schempp, 374 U.S. 203 (1963); Katzenbach v. McClung, 379 U.S. 294 (1964); United States v. Seeger, 380 U.S. 163 (1965)			

Justice Name	Term Start	Term End	Appointing President
Vinson, Fred M. (Chief Justice)	June 24, 1946	Sept. 8, 1953	Truman, Harry S.

Notable Opinion(s): Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948); American Communications Association. v. Douds, 339 U.S. 382 (1950); McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950); Feiner v. New York, 340 U.S. 315 (1951)

Burton, Harold H. (Associate Justice)	Oct. 1, 1945	Oct. 13, 1958	Truman, Harry S.

Notable Opinion(s): Duncan v. Kahanamoku, 327 U.S. 304 (1946) (dissenting); State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (concurring); Roviaro v. United States, 353 U.S. 53 (1957)

Rutledge, Wiley B. (Associate Justice)	Feb. 15, 1943	Sept. 10, 1949	Roosevelt, Franklin Delano

Notable Opinion(s): Prince v. Massachusetts, 321 U.S. 158 (1944); Thomas v. Collins, 323 U.S. 516 (1945); Prudential Institute Co. v. Benjamin, 328 U.S. 408 (1946); Frazier v. United States, 335 U.S. 497 (1948)

Jackson, Robert H. (Associate Justice)	July 11, 1941	Oct. 9, 1954	Roosevelt, Franklin Delano

Notable Opinion(s): Wickard v. Filburn, 317 U.S. 111 (1942); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950); Johnson v. Eisentrager, 339 U.S. 763 (1950); Doremus v. Board of Education, 342 U.S. 429 (1952); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (concurring)

Byrnes, James F. (Associate Justice)	July 8, 1941	Oct. 3, 1942	Roosevelt, Franklin Delano

Notable Opinion(s): Edwards v. California, 314 U.S. 160 (1941); Taylor v. Georgia, 315 U.S. 25 (1942); Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942); Ward v. Texas, 316 U.S. 547 (1942)

Stone, Harlan Fiske (Chief Justice)	July 3, 1941	Apr. 22, 1946	Roosevelt, Franklin Delano

Notable Opinion(s): Ex parte Quirin, 317 U.S. 1 (1942); Hirabayashi v. United States, 320 U.S. 81 (1943); South Pacific Co. v. Arizona, 325 U.S. 761 (1945); International Shoe Co. v. Washington, 326 U.S. 310 (1945)

Murphy, Frank (Associate Justice)	Feb. 5, 1940	July 19, 1949	Roosevelt, Franklin Delano

Notable Opinion(s): Thornhill v. Alabama, 310 U.S. 88 (1940); Glasser v. United States, 315 U.S. 60 (1942); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); United States v. White, 322 U.S. 694 (1944); Korematsu v. United States, 323 U.S. 214 (1944) (dissenting)

Douglas, William O. (Associate Justice)	Apr. 17, 1939	Nov. 12, 1975	Roosevelt, Franklin Delano

Notable Opinion(s): Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); Railway Express Agency v. People of State of New York, 336 U.S. 106 (1949); Berman v. Parker, 348 U.S. 26 (1954); Bibb v. Navajo Freight Lines, Incorporated, 359 U.S. 520 (1959); Douglas v. California, 372 U.S. 353 (1963); Griswold v. Connecticut, 381 U.S. 479 (1965); Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966); Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); Sniadach v. Family Financial Corporation of Bay View, 395 U.S. 337 (1969); Argersinger v. Hamlin, 407 U.S. 25 (1972); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)

Frankfurter, Felix (Associate Justice)	Jan. 30, 1939	Aug. 28, 1962	Roosevelt, Franklin Delano

Notable Opinion(s): Minersville School District v. Gobitis, 310 U.S. 586 (1940); Wolf v. Colorado, 338 U.S. 25 (1949); Dennis v. United States, 339 U.S. 162 (1950) (dissenting); Rochin v. California, 342 U.S. 165 (1952); Adler v. Board of Education, 342 U.S. 485 (1952) (dissenting); Beauharnais v. Illinois, 343 U.S. 250 (1952); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (concurring); Kingsley Books, Incorporated v. Brown, 354 U.S. 436 (1957); Gomillion v. Lightfoot, 364 U.S. 339 (1960)

Reed, Stanley F. (Associate Justice)	Jan. 31, 1938	Feb. 25, 1957	Roosevelt, Franklin Delano

Notable Opinion(s): United States v. Rock Royal Co-operative, Incorporated, 307 U.S. 533 (1939); H.P. Hood and Sons v. United States, 307 U.S. 588 (1939); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948) (dissenting); Winters v. New York, 333 U.S. 507 (1948); Kovacs v. Cooper, 336 U.S. 77 (1949); Poulos v. New Hampshire, 345 U.S. 395 (1953)

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Justice Name	Term Start	Term End	Appointing President
Black, Hugo L. (Associate Justice)	Aug. 19, 1937	Sept. 17, 1971	Roosevelt, Franklin Delano

Notable Opinion(s): Hines v. Davidowitz, 312 U.S. 52 (1941); Bridges v. California, 314 U.S. 252 (1941); Korematsu v. United States, 323 U.S. 214 (1944); Everson v. Board of Education of the Township of Ewing, 330 U.S. 1 (1947); Dennis v. United States, 341 U.S. 494 (1951) (dissenting); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Engel v. Vitale, 370 U.S. 421 (1962); Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. County School Board, 377 U.S. 218 (1964); Pointer v. Texas, 380 U.S. 400 (1965); Griswold v. Connecticut, 381 U.S. 479 (1965) (dissenting)

Cardozo, Benjamin N. (Associate Justice)	Mar. 14, 1932	July 9, 1938	Hoover, Herbert C.

Notable Opinion(s): Carter v. Carter Coal Co., 298 U.S. 238, 324 (1936) (dissenting); Henneford v. Silas Mason Co., 300 U.S. 577 (1937); Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619, 301 U.S. 672 (1937); Palko v. Connecticut, 302 U.S. 319 (1937)

Roberts, Owen J. (Associate Justice)	June 2, 1930	July 31, 1945	Hoover, Herbert C.

Notable Opinion(s): Nebbia v. New York, 291 U.S. 502 (1934); Herndon v. Lowry, 301 U.S. 242 (1937); Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939); Cantwell v. Connecticut, 310 U.S. 296 (1940); Betts v. Brady, 316 U.S. 455 (1942); Korematsu v. United States, 323 U.S. 214 (1944) (dissenting)

Hughes, Charles E. (Chief Justice)	Feb. 24, 1930	June 30, 1941	Hoover, Herbert C.

Notable Opinion(s): Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931); Home Building and Loan Association v. Blaisdell, 290 U.S. 398 (1934); Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); NLRB v. Jones and Laughlin Steel Corporation, 301 U.S. 1 (1937); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)

Stone, Harlan Fiske (Associate Justice)	Mar. 2, 1925	July 2, 1941	Coolidge, Calvin

Notable Opinion(s): Olmstead v. United States, 277 U.S. 438 (1928) (dissenting); South Carolina State Highway Department v. Barnwell Bros., 303 U.S. 177 (1938); United States v. Carolene Products Co., 304 U.S. 144 (1938); Minersville School District v. Gobitis, 310 U.S. 586 (1940) (dissenting); Hansberry v. Lee, 311 U.S. 32 (1940); United States v. Darby, 312 U.S. 100 (1941); United States v. Classic, 313 U.S. 299 (1941)

Sanford, Edward T. (Associate Justice)	Feb. 19, 1923	Mar. 8, 1930	Harding, Warren G.

Notable Opinion(s): Gitlow v. New York, 268 U.S. 652 (1925); Wong Tai v. United States, 273 U.S. 77 (1927); Whitney v. California, 274 U.S. 357 (1927); Fiske v. Kansas, 274 U.S. 380 (1927); Pocket Veto Case, 279 U.S. 655 (1929)

Butler, Pierce (Associate Justice)	Jan. 2, 1923	Nov. 16, 1939	Harding, Warren G.

Notable Opinion(s): International Shoe Co. v. Pinkus, 278 U.S. 261 (1929); United States v. Schwimmer, 279 U.S. 644 (1929); Near v. Minnesota, 283 U.S. 697 (1931) (dissenting); Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936); Breedlove v. Suttles, 302 U.S. 277 (1937)

Sutherland, George A. (Associate Justice)	Oct. 2, 1922	Jan. 17, 1938	Harding, Warren G.

Notable Opinion(s): Adkins v. Children's Hospital of District of Columbia, 261 U.S. 525 (1923); Massachusetts v. Mellon, 262 U.S. 447 (1923); Radice v. New York, 264 U.S. 292 (1924); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Nectow v. City of Cambridge, 277 U.S. 183 (1928); Blockburger v. United States, 284 U.S. 299 (1932); Humphrey's Executor v. United States, 295 U.S. 602 (1935); United States v. Curtiss-Wright Export Corporation, 299 U.S. 304 (1936); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (dissenting)

Taft, William Howard (Chief Justice)	July 11, 1921	Feb. 3, 1930	Harding, Warren G.

Notable Opinion(s): Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20 (1922); Adkins v. Children's Hospital of District of Columbia, 261 U.S. 525 (1923) (dissenting); Myers v. United States, 272 U.S. 52 (1926); Olmstead v. United States, 277 U.S. 438 (1928)

Clarke, John H. (Associate Justice)	Oct. 9, 1916	Sept. 18, 1922	Wilson, Woodrow

Notable Opinion(s): Abrams v. United States, 250 U.S. 616 (1919); Kwock Jan Fat v. White, 253 U.S. 454 (1920); Amos v. United States, 255 U.S. 313 (1921)

Justice Name	Term Start	Term End	Appointing President
Brandeis, Louis D. (Associate Justice)	June 5, 1916	Feb. 13, 1939	Wilson, Woodrow
Notable Opinion(s): Schaefer v. United States, 251 U.S. 466 (1920); Whitney v. California, 274 U.S. 357, 372 (1927) (concurring); Olmstead v. United States, 277 U.S. 438 (1928) (dissenting); Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) (concurring); Erie Railroad v. Tompkins, 304 U.S. 64 (1938)			
McReynolds, James C. (Associate Justice)	Oct. 12, 1914	Jan. 31, 1941	Wilson, Woodrow
Notable Opinion(s): Meyer v. Nebraska, 262 U.S. 390 (1923); Myers v. United States, 264 U.S. 95 (1924); Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925); NLRB v. Friedman-Harry Marks Clothing, 301 U.S. 58 (1937) (dissenting); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) (dissenting)			
Pitney, Mahlon R. (Associate Justice)	Mar. 18, 1912	Dec. 31, 1922	Taft, William Howard
Notable Opinion(s): Coppage v. Kansas, 236 U.S. 1 (1915); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920)			
Van Devanter, Willis (Associate Justice)	Jan. 3, 1911	June 2, 1937	Taft, William Howard
Notable Opinion(s): Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Southern Railway v. United States, 222 U.S. 20 (1911); Grand Trunk Western Railway v. Railroad Commission of Indiana, 221 U.S. 400 (1911)			
Lamar, Joseph R. (Associate Justice)	Jan. 3, 1911	Jan. 2, 1916	Taft, William Howard
Notable Opinion(s): Gompers v. Bucks Stove and Range Co., 221 U.S. 418 (1911); Wadley Southern Railway v. Georgia, 235 U.S. 651 (1915)			
White, Edward D. (Chief Justice)	Dec. 19, 1910	May 19, 1921	Taft, William Howard
Notable Opinion(s): Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911)			
Hughes, Charles E. (Associate Justice)	Oct. 10, 1910	June 10, 1916	Taft, William Howard
Notable Opinion(s): Truax v. Raich, 239 U.S. 33 (1915)			
Lurton, Horace H. (Associate Justice)	Jan. 3, 1910	July 12, 1914	Taft, William Howard
Notable Opinion(s): Coyle v. Smith, 221 U.S. 559 (1911)			
Moody, William H. (Associate Justice)	Dec. 17, 1906	Nov. 19, 1910	Roosevelt, Theodore
Notable Opinion(s): Twining v. New Jersey, 211 U.S. 78 (1908)			
Day, William R. (Associate Justice)	Mar. 2, 1903	Nov. 13, 1922	Roosevelt, Theodore
Notable Opinion(s): Muskrat v. United States, 219 U.S. 346 (1911); Caminetti v. United States, 242 U.S. 470 (1917); Hammer v. Dagenhart, 247 U.S. 251 (1918)			
Holmes, Oliver Wendell (Associate Justice)	Dec. 8, 1902	Jan. 12, 1932	Roosevelt, Theodore
Notable Opinion(s): Lochner v. New York, 198 U.S. 45 (1905); Schenck v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616 (1919) (dissenting); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Adkins v. Children's Hospital of District of Columbia, 261 U.S. 525 (1923) (dissenting); Gitlow v. New York, 268 U.S. 652 (1925); Buck v. Bell, 274 U.S. 200 (1927); Olmstead v. United States, 277 U.S. 438 (1928)			
McKenna, Joseph (Associate Justice)	Jan. 26, 1898	Jan. 5, 1925	McKinley, William
Notable Opinion(s): Hipolite Egg Co. v. United States, 220 U.S. 45 (1911)			
Peckham, Rufus W. (Associate Justice)	Jan. 6, 1896	Oct. 24, 1909	Cleveland, Grover
Notable Opinion(s): Allgeyer v. Louisiana, 165 U.S. 578 (1897); Lochner v. New York, 198 U.S. 45 (1905); Ex parte young, 209 U.S. 123 (1908)			

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Justice Name	Term Start	Term End	Appointing President
White, Edward D. (Associate Justice)	Mar. 12, 1894	Dec. 18, 1910	Cleveland, Grover
Notable Opinion(s): Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)			
Jackson, Howell E. (Associate Justice)	Mar. 4, 1893	Aug. 8, 1895	Harrison, Benjamin
Notable Opinion(s): Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895) (dissenting)			
Shiras, George (Associate Justice)	Oct. 10, 1892	Feb. 23, 1903	Harrison, Benjamin
Notable Opinion(s): Brass v. North Dakota ex rel. Stoeser, 153 U.S. 391 (1894); Wong Wing v. United States, 163 U.S. 228 (1896); Knoxville Iron Co. v. Harbison, 183 U.S. 13 (1901)			
Brown, Henry B. (Associate Justice)	Jan. 5, 1891	May 28, 1906	Harrison, Benjamin
Notable Opinion(s): Plessy v. Ferguson, 163 U.S. 537 (1896)			
Brewer, David J. (Associate Justice)	Jan. 6, 1890	Mar. 28, 1910	Harrison, Benjamin
Notable Opinion(s): In re Debs, 158 U.S. 564 (1895); Berea College v. Kentucky, 211 U.S. 45 (1908)			
Fuller, Melville W. (Chief Justice)	Oct. 8, 1888	July 4, 1910	Cleveland, Grover
Notable Opinion(s): Leisy v. Hardin, 135 U.S. 100 (1890); United States v. E. C. Knight Co., 156 U.S. 1 (1895); Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601 (1895)			
Lamar, Lucius Q.C. (Associate Justice)	Jan. 18, 1888	Jan. 23, 1893	Cleveland, Grover
Notable Opinion(s): In re Neagle, 135 U.S. 1 (1890) (dissenting)			
Blatchford, Samuel M. (Associate Justice)	Mar. 3, 1882	July 7, 1893	Arthur, Chester A.
Notable Opinion(s): Chicago, Milwaukee and St. Paul Railway v. Minnesota, 134 U.S. 418 (1890); Counselman v. Hitchcock, 142 U.S. 547 (1892); Budd v. New York, 143 U.S. 517 (1892)			
Gray, Horace (Associate Justice)	Jan. 9, 1882	Sept. 15, 1902	Arthur, Chester A.
Notable Opinion(s): Juilliard v. Greenman, 110 U.S. 421 (1884); Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891); Logan v. United States, 144 U.S. 263 (1892); Fong Yue Ting v. United States, 149 U.S. 698 (1893); United States v. Wong Kim Ark, 169 U.S. 649 (1898)			
Matthews, T. Stanley (Associate Justice)	May 17, 1881	Mar. 22, 1889	Garfield, James A.
Notable Opinion(s): Yick Wo v. Hopkins, 118 U.S. 356 (1886)			
Woods, William B. (Associate Justice)	Jan. 5, 1881	May 14, 1887	Hayes, Rutherford B.
Notable Opinion(s): Presser v. Illinois, 116 U.S. 252 (1886)			
Harlan, John M. (Associate Justice)	Dec. 10, 1877	Oct. 14, 1911	Hayes, Rutherford B.
Notable Opinion(s): Mugler v. Kansas, 123 U.S. 623 (1887); Hans v. Louisiana, 134 U.S. 1 (1890) (concurrence); United States v. E. C. Knight Co., 156 U.S. 1 (1895) (dissenting); Plessy v. Ferguson, 163 U.S. 537 (1896) (dissenting); Champion v. Ames, 188 U.S. 321 (1903); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Lochner v. New York, 198 U.S. 45 (1905) (dissenting); Adair v. United States, 208 U.S. 161 (1908)			
Waite, Morrison R. (Chief Justice)	Mar. 4, 1874	Mar. 23, 1888	Grant, Ulysses S.
Notable Opinion(s): Minor v. Happersett, 88 U.S. 162 (1874); United States v. Cruikshank, 92 U.S. 542 (1875); Ames v. Kansas, 111 U.S. 449 (1884)			
Hunt, Ward (Associate Justice)	Jan. 9, 1873	Jan. 27, 1882	Grant, Ulysses S.
Notable Opinion(s): United States v. Railroad, 84 U.S. 322 (1873); United States v. Reese, 92 U.S. 214 (1875) (dissenting)			

Justice Name	Term Start	Term End	Appointing President
Bradley, Joseph P. (Associate Justice)	Mar. 23, 1870	Jan. 22, 1892	Grant, Ulysses S.
Notable Opinion(s): Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) (dissenting)			
Strong, William (Associate Justice)	Mar. 14, 1870	Dec. 14, 1880	Grant, Ulysses S.
Notable Opinion(s): Strauder v. West Virginia, 100 U.S. 303 (1880)			
Chase, Salmon P. (Chief Justice)	Dec. 15, 1864	May 7, 1873	Lincoln, Abraham
Notable Opinion(s): Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869)			
Field, Stephen J. (Associate Justice)	May 20, 1863	Dec. 1, 1897	Lincoln, Abraham
Notable Opinion(s): Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869); The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) (dissenting); Totten v. United States, 92 U.S. 105 (1876); Pennoyer v. Neff, 95 U.S. 714 (1878); Strauder v. West Virginia, 100 U.S. 303 (1879) (separate opinion); Mugler v. Kansas, 123 U.S. 623 (1887) (separate opinion); The Chinese Exclusion Case, 130 U.S. 581 (1889)			
Davis, David (Associate Justice)	Dec. 10, 1862	Mar. 4, 1877	Lincoln, Abraham
Notable Opinion(s): Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866)			
Miller, Samuel F. (Associate Justice)	July 21, 1862	Oct. 13, 1890	Lincoln, Abraham
Notable Opinion(s): Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873); Loan Association v. Topeka, 87 U.S. (20 Wall.) 655 (1875)			
Swayne, Noah H. (Associate Justice)	Jan. 27, 1862	Jan. 24, 1881	Lincoln, Abraham
Notable Opinion(s): Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) (dissenting)			
Clifford, Nathan (Associate Justice)	Jan. 21, 1858	July 25, 1881	Buchanan, James
Notable Opinion(s): Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870); United States v. Cruikshank, 92 U.S. 542 (1875) (dissenting)			
Campbell, John A. (Associate Justice)	Apr. 11, 1853	Apr. 30, 1861	Pierce, Franklin
Notable Opinion(s): Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (separate opinion)			
Curtis, Benjamin R. (Associate Justice)	Oct. 10, 1851	Sept. 30, 1857	Fillmore, Millard
Notable Opinion(s): Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851); Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (dissenting)			
Grier, Robert C. (Associate Justice)	Aug. 10, 1846	Jan. 31, 1870	Polk, James K.
Notable Opinion(s): Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (separate opinion); The Amy Warwick, 67 U.S. 635 (1862)			
Woodbury, Levi (Associate Justice)	Sept. 23, 1845	Sept. 4, 1851	Polk, James K.
Notable Opinion(s): Jones v. Van Zandt, 46 U.S. 215 (1847); Cook v. Moffat and Curtis, 46 U.S. 295 (1847); Waring v. Clarke, 46 U.S. 441 (1847) (dissenting); Smith v. Turner (Passenger Cases), 48 U.S. (7 How.) 283 (1849) (dissenting)			
Nelson, Samuel (Associate Justice)	Feb. 27, 1845	Nov. 28, 1872	Tyler, John
Notable Opinion(s): Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (separate opinion); Prize Cases, 67 U.S. 635 (1862) (dissenting)			
Daniel, Peter V. (Associate Justice)	Jan. 10, 1842	May 31, 1860	Van Buren, Martin
Notable Opinion(s): Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (separate opinion)			

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Justice Name	Term Start	Term End	Appointing President
McKinley, John (Associate Justice)	Jan. 9, 1838	July 19, 1852	Van Buren, Martin
Notable Opinion(s): United States v. Fitzgerald, 40 U.S. 407 (1841); Pollard's Lessee v. Hagan, 44 U.S. 212 (1845)			
Catron, John (Associate Justice)	May 1, 1837	May 30, 1865	Jackson, Andrew
Notable Opinion(s): Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (separate opinion)			
Barbour, Philip P. (Associate Justice)	May 12, 1836	Feb. 25, 1841	Jackson, Andrew
Notable Opinion(s): New York v. Miln, 36 U.S. (11 Pet.) 102 (1837); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838) (concurring in part and dissenting in part); Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840) (concurring)			
Taney, Roger B. (Chief Justice)	Mar. 28, 1836	Oct. 12, 1864	Jackson, Andrew
Notable Opinion(s): Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (separate opinion); Luther v. Borden, 48 U.S. (7 How.) 1 (1849); Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)			
Wayne, James M. (Associate Justice)	Jan. 14, 1835	July 5, 1867	Jackson, Andrew
Notable Opinion(s): Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (separate opinion)			
Baldwin, Henry (Associate Justice)	Jan. 18, 1830	Apr. 21, 1844	Jackson, Andrew
Notable Opinion(s): Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (concurring); Ex Parte Crane, 30 U.S. (5 Pet.) 190 (1831) (dissenting); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838); Groves v. Slaughter, 40 U.S. (15 Pet.) 449 (1841) (dissenting)			
McLean, John (Associate Justice)	Mar. 12, 1829	Apr. 4, 1861	Jackson, Andrew
Notable Opinion(s): Briscoe v. Bank of Commonwealth of Kentucky, 36 U.S. 257 (1837); Pennsylvania v. Wheeling and Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856) (dissenting); Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (dissenting)			
Trimble, Robert (Associate Justice)	June 16, 1826	Aug. 25, 1828	Adams, John Quincy
Notable Opinion(s): Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827) (concurring)			
Thompson, Smith (Associate Justice)	Sept. 1, 1823	Dec. 18, 1843	Monroe, James
Notable Opinion(s): Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (dissenting)			
Story, Joseph (Associate Justice)	Feb. 3, 1812	Sept. 10, 1845	Madison, James
Notable Opinion(s): Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827); The Amistad, 40 U.S. 518 (1841); Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)			
Duvall, Gabriel (Associate Justice)	Nov. 23, 1811	Jan. 12, 1835	Madison, James
Notable Opinion(s): --			
Todd, Thomas (Associate Justice)	May 4, 1807	Feb. 7, 1826	Jefferson, Thomas
Notable Opinion(s): --			
Livingston, Henry Brockholst (Associate Justice)	Jan. 20, 1807	Mar. 18, 1823	Jefferson, Thomas
Notable Opinion(s): --			
Johnson, William (Associate Justice)	May 7, 1804	Aug. 4, 1834	Jefferson, Thomas
Notable Opinion(s): Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)			

Justice Name	Term Start	Term End	Appointing President
Marshall, John (Chief Justice)	Feb. 4, 1801	July 6, 1835	Adams, John
Notable Opinion(s): Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803); Fletcher v. Peck, 10 U.S. (6 Cr.) 87 (1810); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819); M'Culloch v. Maryland, 17 U.S. 316 (1819); Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Willson v. Black-Bird Creek Marsh Co., 27 U.S. 245 (1829); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833)			
Moore, Alfred (Associate Justice)	Apr. 21, 1800	Jan. 26, 1804	Adams, John
Notable Opinion(s): --			
Washington, Bushrod (Associate Justice)	Nov. 9, 1798	Nov. 26, 1829	Adams, John
Notable Opinion(s): Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827)			
Ellsworth, Oliver (Chief Justice)	Mar. 8, 1796	Dec. 15, 1800	Washington, George
Notable Opinion(s): --			
Chase, Samuel (Associate Justice)	Feb. 4, 1796	June 19, 1811	Washington, George
Notable Opinion(s): Ware v. Hylton, 3 U.S. 199 (1796); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)			
Rutledge, John (Interim Chief Justice)	Aug. 12, 1795	Dec. 15, 1795	Washington, George
Notable Opinion(s): --			
Paterson, William (Associate Justice)	Mar. 11, 1793	Sept. 9, 1806	Washington, George
Notable Opinion(s): Ware v. Hylton, 3 U.S. 199 (1796); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)			
Johnson, Thomas (Associate Justice)	Sept. 19, 1791	Jan. 16, 1793	Washington, George
Notable Opinion(s): --			
Iredell, James (Associate Justice)	May 12, 1790	Oct. 20, 1799	Washington, George
Notable Opinion(s): Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)			
Rutledge, John (Associate Justice)	Feb. 15, 1790	Mar. 5, 1791	Washington, George
Notable Opinion(s): --			
Cushing, William (Associate Justice)	Feb. 2, 1790	Sept. 13, 1810	Washington, George
Notable Opinion(s): Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)			
Blair, John (Associate Justice)	Feb. 2, 1790	Oct. 25, 1795	Washington, George
Notable Opinion(s): Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)			
Jay, John (Chief Justice)	Oct. 19, 1789	June 29, 1795	Washington, George
Notable Opinion(s): Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)			
Wilson, James (Associate Justice)	Oct. 5, 1789	Aug. 21, 1798	Washington, George
Notable Opinion(s): Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)			

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